COUNCIL OF LEGAL EDUCATION

HUGH WOODING LAW SCHOOL

ST. AUGUSTINE

LAW OF REMEDIES

AN INTRODUCTION TO CLIENT REMEDIES IN LEGAL PRACTICE AND
THE PRINCIPLES GOVERNING THE ASSESSMENT OF DAMAGES

YEAR ONE

2013/2014

Course Director: Michael Theodore
Research Assistant: Leon Kalicharan
VISION STATEMENT

To be a world leader in higher education through innovation, creativity and relevance in a system of practical legal education that is rooted in our history as a Caribbean people and is designed to enhance the practice of law and the jurisprudence of the Caribbean; to empower our people; and develop our societies throughout the 21st century.

MISSION STATEMENT

To facilitate the development of competent legal practitioners for the Region who, appreciating their responsibility as members of an honourable profession and recognising the needs of their socio-economic environment, are inspired in the pursuit of excellence, the maintenance of high ethical standards, the promotion of social justice and the strengthening of the rule of law.

QUALITY OBJECTIVES

- To achieve excellence in developing a teacher-student relationship which satisfies both parties and encourages a platform for on-going research and discussion of social and legal issues;
- To be a resource for providing support to regional governments and all arms of civil society in promoting social, legal, economic and political reform;
- To deepen understanding of other legal systems and foster a capacity to create international linkages in the legal education and research sphere to better enhance our legal systems and jurisprudential development;
- To be at the forefront of the development of legal education, the provision of impetus for continuing legal education and the extension of systems of legal aid and public education;
- To incorporate in all teaching programmes and activities at all times an awareness that the rule of law, equity and justice constitute a precondition for social and economic development in the Region.

OTHER IMPORTANT FOUNDATION BLOCKS FOR LEGAL TRAINING

Dear Colleagues,

I wish to welcome you to the Hugh Wooding Law School and the course Law of Remedies. I am very excited this year because for the first time we are introducing a blended learning methodology to the teaching of this course at the Law School. This combines the traditional face to face interaction (which is now being done for the first time by the seminar method) with a variety of technology applications including videotapes of lectures, social media and self-assessment exercises. This will allow the seminars to focus on active learning through exercises which will be made as close to a real world environment that we can create.

I have constructed what I believe will be an exciting and enjoyable programme for all of us and count on your active participation to ensure its success. I have also established an organisational framework where you will have an active and critical role in the programme which is designed to anticipate and deal with any issues which may arise from time to time.

I urge you to read this manual carefully – particularly the introduction as it sets the tone, objectives, philosophy and methodology which will guide the management of this programme.

You may have noticed that I deliberately addressed you as colleagues at the beginning of the welcome message. I do so because at this stage of your legal training I consider you to be “attorneys in waiting” and, therefore, I will accord to you the same assistance, guidance, respect and courtesy that I would give to any other member of the legal profession. I expect that these attributes will be reciprocated in the best traditions of the legal profession.

I look forward to serving you during the course of this year and to developing a relationship with each of you which will lead to our mutual development and which will forge a long-lasting professional relationship. Please enjoy your study period at the Law School and do not hesitate to let me know how I can assist in this regard!

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INTRODUCTION

COURSE OBJECTIVES AND STUDENT OUTCOMES

Course Objectives: This course aims to develop in you the:

1. characteristics, discipline and skills of an effective attorney at law;
2. ability to advise on appropriate litigious and non-litigious remedies available to your client to solve his problem;
3. ability to assess and quantify the measure of damages arising out of breaches of contract and tort;
4. ability to prepare and present arguments and opinions on the assessment of damages in litigious proceedings.

Student Outcomes: At the end of the course, students should be able to:

1. solve their clients’ problems using the widest array of tools available including litigation;
2. apply relevant issues of fact, law to provide an opinion on the appropriate remedies available to a client and to quantify any damages which may be appropriate;
3. draft an advice on quantification of damages;
4. present a claim on damages before any court or tribunal; and
5. negotiate a fair settlement for your client’s losses prior to or during the course of litigation.
PREREQUISITES FOR COURSE

To effectively participate in this course, students should have acquired knowledge basic principles of law and the specific areas outlined below. Students are therefore, advised to review their knowledge in these areas immediately on commencing the academic year.

**Basic Principles:** To be accepted to the Law School you would have acquired an LL.B. In my view this means that you will:

- have a basic knowledge of what I call conversational law i.e. basic areas of law which are encountered on a daily basis by most people in the society and areas you can expect the average lay person to approach you on as an attorney; and

- know where to find the law, analyse and apply it in those areas which are not conversational.

**Special Areas:**


2. Law of tor with special emphasis on trespass to the person (assault and battery, false imprisonment), malicious prosecution, negligence and nuisance.

3. Law of contract with special emphasis on breach of contract (employment and agreement for sale of land) and remedies.

4. Public Law: basic principles of constitutional, administrative law and public interest law, especially public law remedies of the declaration, injunction, the prerogative writs, remedies and procedures under the Judicial Review Act.

5. Equitable Remedies: injunctions, specific performance, restitution and damages.


**Information and Communications Technology (ICT)**

Because of the blended learning approach being adopted, students will be required to:

- have their own (or have access to a) computer; and

- be computer literate and a working knowledge of word processing and presentation software;

- have an email or Skype account.
COURSE CONTENT

The course is designed to enable students to have the skills of the modern attorney in his role as a problem solver. Clients now have more options when it comes to legal services as competition in this area grows. The successful attorney will be the one who can solve the client’s problem with minimum cost and in the most effective manner. It ushers in a new era of customer service to which lawyers need to get accustomed – with litigation being the last resort. However, regardless of the manner of settlement, an attorney must be able to quantify the damages to which his client is entitled in order to negotiate or to reasonably settle or advise him on any form of resolution to his matter.

The face to face interaction in the teaching of the course shall be conducted by seminars and is divided into four parts. These parts are fully described in the Content page of this Manual. What is provided here is an outline of the various parts of the programme.

Part One: Introduction to Client Remedies in the Arsenal of the Modern Attorney
This Part seeks to redefine the objectives of the course when it was originally envisaged in light of modern developments. With the advent of technology, the impact of globalisation and the widespread knowledge of information available to clients, it is now accepted internationally that the role of the attorney must be redefined in light of the:
• changing face of the legal profession and the skills and attributes of the modern attorney;
• role of the modern attorney as a problem solver first and litigator second; and
• arsenal of tools that the modern attorney has to solve clients’ problems.

Part 2: Basic Principles Governing the Assessment of Damages
This Part looks at the basic principles which underpin the exercise of quantifying damages or compensation generally but particularly so in tort and contract. It provides a framework and a process which should be adopted for any type of assessment. Because many of these principles are or ought to be familiar to you from your LL.B. programme, there will be no lectures or specific exercises on these principles. Rather the Manual provides a comprehensive review of all of the materials you need and you will be required to study and revise these principles on your own.
However, you will be tested on them and these principles will be incorporated into the various seminar exercises that you will be undertaking during the course of the year.
Part 3: Assessment of Damages in Specific Areas
This Part deals with the principles that are used in the assessment of damages for specific torts and breaches of contract. It would be impossible to actually teach the quantification of damages for all causes of action. However, these represent the most common types of claims that are made in practice. With a foundation in the principles of assessment and the actual application of such principles to actual areas of practice, you will be able to transfer these skills to any new area of assessment that you may encounter from time to time. By far, the most common area of damages is the assessment of loss for personal injuries and those arising from wrongful death. They vary from a broken finger to persons who are in a coma.

Part 4: Giving Good Advice: Choosing the Right Remedy
This Part recapitulates the intent of the entire course by placing the core of the course against the backdrop of skills needed by the modern attorney. It will focus, not only on the substance of the assessment of damages, but would explore situations where damages may be a viable remedy but there are also other remedies which an attorney should explore in giving practical advice to his client. Most of these situations would be based on the inquiry that was undertaken in Part 1 of the programme. It would also look at the other factors which affect the issue of quantum of which young lawyers should be aware such the civil litigation process and the law of evidence. It would examine other practical ways in which an attorney may render service to his client at the point he finds him and even if he cannot solve the problem, make the client – a client for life.
## RECOMMENDED TEXTS

<table>
<thead>
<tr>
<th>Author</th>
<th>Title</th>
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<tbody>
<tr>
<td>David Emmet</td>
<td>Remedies, 15th Ed, Oxford University Press. 2010</td>
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<tr>
<td>Mc Gregor</td>
<td>On Damages</td>
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<td>Munkman</td>
<td>Damages for Personal Injuries and Death</td>
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<td>Daly, Stephanie &amp; Martin</td>
<td>Daly’s Damages Digest</td>
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<td>Remedies of English Law:</td>
<td>F.H. Lawson, (2nd Ed.)</td>
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<tr>
<td>A.I. Ogus</td>
<td>The Law of Damages</td>
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### Other Materials

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<td>Rules of the Supreme Court</td>
<td>Of Your Jurisdiction</td>
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<tr>
<td>Civil Proceedings Rules</td>
<td>Trinidad and Tobago, Eastern Caribbean States</td>
</tr>
<tr>
<td>Review of Civil Procedure</td>
<td>Dick Greenslade, Supreme Court of Trinidad and Tobago</td>
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<td>Report on Civil Procedure</td>
<td>Dick Greenslade, Eastern Caribbean Supreme Court</td>
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### Reference Texts

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<tr>
<td>Snells</td>
<td>Principles of Equity</td>
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<td>Jones and Goodhart</td>
<td>Specific Performance</td>
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MANAGEMENT STRUCTURE – ROLES AND RESPONSIBILITIES

Underlying Philosophy: The philosophy at the heart of this structure seeks to:

- create an effective learning environment for continuing and reflective learning;
- develop effective collaboration and leadership skills;
- share the demands of the work (ever increasing in a modern context) equitably;
- ensure that students are provided with an exciting learning opportunity that will focus more on skills-based practice.

The Structure: As you can see, there will be 8 seminar groups consisting of 40 students each. Each of these is divided, in turn, into 5 student groups of 8 students. The course director will be responsible for three of these groups and associate tutors will be assigned to head the other five groups. This structure seeks to ensure efficient management of the course in line with the new methods of teaching/learning employed for this academic year – the seminar and blended learning methods. Its objectives are to:

- develop leadership skills among the student population;
- ensure that the learning needs of each student are accommodated;
- encourage self-learning and collaboration among student groups.

Team Approach: Because lawyers work more collaboratively than competitively, the management system is designed to encourage those skills. Consequently, each person in the system – from course director to individual student – is part of the learning team and is responsible in one way or another for attaining the learning objectives of this course. Consequently, each person has specific roles and responsibilities which are articulated below.

It is expected that this system of management will alleviate any problems or issue as they arise during the course of the year. Additionally, there will be team meetings of student leaders for each seminar group with the course director on a monthly basis to ensure that work in all seminar groups are on par with each other as far as possible and in line with the learning objectives of the course, readiness for assessment and the expectations of the course director.
RESPONSIBILITIES OF TEAM MEMBERS

COURSE DIRECTOR
The duties of the course director are to:

- develop and update the curriculum for the course and develop all course material;
- supervise the work of the teaching team for all students;
- set criteria for all assessment exercises and supervise the marking of scripts;
- ensure that all teaching/learning practices are effective;
- ensure that all examination scripts are properly marked;

ASSOCIATE TUTOR
The duties of the associate tutors are to:

- work with the course director to support the development of the curriculum in line with current practice;
- implement the teaching programme in relation to the seminar group to which he is assigned;
- first and second mark scripts for the number of students he supervises;

STUDENT LEADER
The duties of the student leader are to:

- work with the course director or associate tutor (whichever is in charge of the particular seminar group) to ensure that students learning needs are met through the execution of the various exercises assigned to the group;
- assist in the assignment of students to student groups in accordance with relevant guidelines;
- work with the student group leaders to ensure that all exercises assigned to the particular groups are done and ensure that individual student learning is attained;
- represent the concerns of members of his/her seminar group to the associate tutor or course director to ensure

STUDY GROUP
The duties of the members of each study group are to:

- work with each other regardless of personal preference to ensure that all tasks assigned to them are completed in a professional manner;
- ensure that they understand and can apply the principles and learning in the course;
• seek help from any member of the teaching team as soon as possible when an issue is unclear.

STUDY GROUP LEADER
The duties of the study group leader are to:
• work with members of his/her group to ensure that all exercises assigned to that group are efficiently done;
• represent the concerns of members of his/her group to the student leader, associate tutor or course director as appropriate.

RESEARCH ASSISTANT
The duties of the research assistant are to:
• assist the course director and associate tutors in any area of research, coordination and communications with students and management of the course as may be necessary or to which he/she may be assigned;
• work with the course director and other team members to ensure that the learning objectives of the course are met;
• coordinate the activities of the various student groups and assist students on an individual basis wherever possible according to their need;
• Undertake any task assigned to him/her by the course director.

COURSE SECRETARY
The duties of the course secretary are to assist the:
• teaching team with the administrative tasks necessary to ensure that the objectives of the course are met;
• course director as directed within the purview of his duties.
TEACHING STRATEGIES

BLENDED LEARNING
I have chosen to adopt the view taken from the practice of the University of Central Florida which sees blended learning as a

*pedagogical approach that combines the effectiveness and socialization opportunities of the classroom with the technologically enhanced active learning possibilities of the online environment .... In other words, blended learning should be approached not merely as a temporal construct, but rather as a fundamental redesign of the instructional model with the following characteristics:*

- A shift from lecture-to student-centered instruction in which students become active and interactive learners (this shift should apply to the entire course, including the face-to-face contact sessions);
- Increases in interaction between student-instructor, student-student, student-content, and student-outside resources; and
- Integrated formative and summative assessment, mechanisms for students and instructors.


In this context, blended learning will be delivered face to face in the seminar sessions which have been described above while ICT will be employed to provide students with background material, learning resources and the ability to communicate with each other and with the learning team online. While the technology aspects of this methodology may be challenging to some, it is designed to ensure that students apply some of the most common technologies which will make their learning easier and which also be relevant to their personal and professional lives.

SEMINAR SESSION: These are designed to engage the student in active learning through a variety of methods including:

**Discussion on areas of difficulty:** Students will be required to identify areas of difficulty or misunderstanding having reviewed the lectures and other learning materials on the topic. These issues will be discussed by the entire seminar group and only where there is gross misunderstanding would the tutor intervene to redirect the discussion towards a path of resolution.
**Problem-solving Exercises:** These are based on a specific fact situation where different groups will be assigned to represent the interests of different parties. They will be required to prepare their arguments on specific issues of law relating to the arguments they intend to advance on behalf of their clients and then present their arguments as they would before a court of law. There may be some general discussion about the approach they intend to use so as to determine whether the actual delivery matched the intention.

**Simulation Exercises and Moots:** These may be in the form of the actual presentation of the arguments to various problems as identified above or specific exercises designed to elucidate a particular learning objective. These can also be in the form of moots or mock trials where legal arguments are presented before a judicial panel.

**Case Study:** This is the documentation taken from an actual case that has been completed before the court. Groups will be assigned to familiarise themselves with specific aspects of the case and prepare it with a view to relitigate in the courts of the Hugh Wooding Law School. All aspects of the case will be relevant including the civil procedure aspect and the law of evidence. However, particular regard will be had to the assessment of damages.

By the end of the first term, students should have been able to prepare a quantification of damages based on the issues raised on behalf of their client. By the end of the second term, there will be a moot based on an appeal court hearing of the matter where parties will present their arguments to an independent coram for determination.

**Interviews with Field Experts:** On a periodic basis, live interaction via Skype will be held with a panel of experts drawn from relevant areas of the law and practice which affect the course content. While all students will not be able to participate in the live sessions, they will be recorded and made available to all. This panel may be with specialty experts in quantification of damages, judges who determine such matters, practitioners from various jurisdictions with whom students from such jurisdictions may be able to interact or other academics in the area. Such interaction must be prepared for and expected to be in the form of an interactive discussion.

**VIDEO INSTRUCTION**

All learning resources including lectures, problem-solving methods, and seminar exercises will be delivered to students prior to the seminars online. Students are expected to familiarise
themselves with the material and prepare themselves, through their respective groups, to deliver as requested in the seminar.

BLOG
This is an online community which facilitates the delivery of materials in the course through a course calendar, document archive. It also provides an online social media environment for the discussion of issues which may arise from a seminar session or as a communication media to access other members of your group or your tutor. This is a user-friendly interface to facilitate open discussion across the entire year group and to ensure direct access to the course director of this course. All materials in the course will be distributed primarily via this method unless otherwise indicated. One of the great advantages of the system is that it allows us to link you directly to cases and other online or digital materials which cannot be done in a hard copy manual.

MANUALS AND HANDOUTS
These are designed to:
- Give the student an outline of the principles applicable to the major areas of study/material with which he must be familiar;
- Give the student specific study material to assist him in his research;
- Make it possible for students to familiarise themselves with the basic law on topic to be discussed so you can follow and participate in seminar sessions.

CONSULTATIONS AND COMMUNICATION
In the legal profession you learn more from direct contact, interaction and networking than from almost any other conventional method. You will find that most of the practical issues are passed on by the collective experience of the profession and is not accessible in any legal text. In order to develop this culture which is a fundamental aspect of the legal profession, consultation is strongly encouraged as part of my policy.

While the huge increase in numbers will pose a problem and the course management structure has been designed to take a structural approach to resolving most of these issues, I will always try to make myself available to any student who needs my assistance to the best of my ability either individually or in groups.
Group consultations should be arranged in advance. I am also available on e-mail and I encourage students to submit any questions or comments on the course which they may have to me if this is a more convenient method of communication.

Any students should feel confident to approach me at any time to discuss problems with the course material or any other problem with which I may be able to assist you regardless of whether I am your tutorial leader or not.

Apart from my office hours, I will see students individually or in groups at any time that is mutually convenient. It has been my experience through interaction with students experiencing difficulties that they learn much more through direct contact with a tutor than trying to muddle through on their own. Sometimes it only takes a short explanation to avoid a world of grief through misunderstanding or not having your focus right. There are no prizes for futile effort and no one expects you to understand and master skills to which you have not been previously exposed.

DISTANCE EDUCATION PROGRAMME

According to Wikipedia, distance education is a mode of delivering education and instruction, often on an individual basis, to students who are not physically present in a traditional setting such as a classroom. Distance learning provides "access to learning when the source of information and the learners are separated by time and distance, or both." Distance education courses that require a physical on-site presence for any reason (including taking examinations) have been referred to as hybrid or blended courses of study. For more information, please see the original Wikipedia article at http://en.wikipedia.org/wiki/Distance_education.

How will it operate in the Law of Remedies?

In the context of the Law of Remedies, distance education will be a pilot project utilizing a group of no more than 40 students under my direction to test whether it can be applied effectively for the rest of the programme and in other courses at the law school. It will be done almost exclusively via the Internet and electronic communications. There will be one face to face meeting with students in this cohort at the beginning of each term to give us a chance to interact with each other. Otherwise, unless it is absolutely necessary, all communications will take place online.
Advantages:

- Reduces face to face interaction and allows learning to be at the pace of the student himself;
- Allows self-pace learning so it caters to the individual student;
- Greater contact/interaction with tutor;
- Student participation capable of being monitored more closely by tutor to pick up on students in need;

Disadvantages:

- Reduces face to face interaction – can produce a sense of isolation and lack of community which is present in the face to face experience;
- Allows self-pace learning – students have to be very disciplined in order to benefit otherwise there is a tendency to relax and fall backwards in meeting the demands of the programme;

Who will benefit most? Students who:

- may have family or other obligations and need to have more personal time will benefit This programme will reduce in-class time and attendance at the law school for participants.
- have access to a dedicated computer, tablet or smartphone;
- are technologically literate;
- are willing to adapt to a new way of learning and greater interaction with the tutor.
ASSESSMENT METHODOLOGY

Assessment in this course is both formative and summative. The objective of formative assessment is allow both student and tutor to determine whether students have learned what the tutor intended and have acquired the requisite skills without weight attached to a final or summative assessment. It is also designed to improve students’ performance on a continuing basis.

Summative assessment is utilized to determine whether students have met the course goals or student learning outcomes at the end of a course or program and the results of such assessment goes towards a grade or credit used to determine their degree or matriculation level.

FORMATIVE ASSESSMENT
This will be conducted through self-assessment of students by a series of multiple choice questions administrated through TWEN as well as peer assessment administered by the teaching staff but corrected by your peers.

SELF-ASSESSMENT THROUGH MULTIPLE CHOICE QUESTIONS
Students will be given multiple-choice self-assessment exercises during the course of the year depending on the stage at which we are in the course. This is designed to assist students to evaluate their understanding of the course and its contents as they progress through it. A period will be given for students to attempt these questions and then the answers together with explanations will be provided at a specified date. Again, students who may have realised that they are not doing as well as they had though, ought to seek help from their tutor or course director. The automated system allows students to get immediate response to their answers with explanations.

PEER ASSESSMENT THROUGH MOCK EXAMS
The mock exam is an exercise designed to prepare you to face the real examine and to hone your knowledge and skills to be able to deal with your final exam. Instead of 5 questions you will get 3 and instead of members of the teaching staff marking your scripts, your fellow students will mark them based on an anonymous marking system (as used in the final exam) and with marking criteria which will also be used in your final exam. There are several major benefits of participating in this exercise:

1. You get to a taste of what the examination will be like and to assess yourself;
2. You familiarise yourself with the marking criteria – both in answering the questions and marking the answers of others;
3. You can adjust your attitude and work ethic for the course to ensure your success;
4. You will benefit from becoming a reflective learner by reviewing your own work with a critical and dispassionate eye. You will then have another chance to develop this attitude by reviewing the scripts of your peers by applying the same criteria. This will develop your critical eye. Developing this reflective learning skill is an important skill of the attorney.

SUMMATIVE ASSESSMENT
Summative assessment in this course is done by a final examination at the end of the third term. The criteria used in the mock examination will be followed by examiners in the final examination to grade your scripts. Because of the volume of scripts to be marked, you will not see detailed assessment, feedback or comments on your final script.

There may be some significant changes to the structure of the examination this year to make them more practical in orientation and to ensure that students develop the requisite skill for practice. Students will be advised when this issue is settled and the mock exam will reflect any changes to the form and content of the final exam.

EXAMINATION AIDS
To assist students in preparing for these examinations, the follow aids should be utilised:

STUDENTS’ ANSWERS TO QUESTIONS
During the course of the year students submit answers to former exam questions to be for review. I often publish the question and answer together with my comments to all students for their benefit where I find that students can benefit from such an exercise. While not an exercise engaging each student, it is one from which all students can benefit.

PREVIOUS EXAMINER’S REPORTS WHERE AVAILABLE
I had started a practice of producing a report on final exams where I commented on issues dealt with by students in relation to each question. In many cases, there were very common misconceptions or problems which annually occur in an examination context even though students have been advised on these matters. The consideration of such a report may help to alleviate much heartache for several students if taken seriously.
EXAMINATION GUIDELINES

The within comments have been distilled from my experience of having to mark students’ scripts over the last 15 years in both this course and the course Civil Practice and Procedure I. They are meant as a guide for students based on common mistakes that have been made in the past. They are not exhaustive of the issues to which students ought to pay attention.

Examination Preparations

1. Go over the “Course Objectives” handout to get information on the approach needed for this course and particularly for your examinations;

2. Focus on understanding principles of law, analyse them to discern their meaning and extent of application, be able to apply them effectively to the factual situation presented;

Answering Examination Questions

3. Read instructions carefully and follow them. Make sure that you answer the question that is asked.

4. Do not assume knowledge on the part of the examiner. Outline the issues, state the law or applicable procedure and apply them to your situation. Adopt the same approach in practice. Remember that when you are presenting argument before a judge it is your duty to assist the court. The court expects that you would have researched the matter thoroughly. You are expected to assist the court with a comprehensive presentation of the facts, the issues and the law. A judge may not be experienced in the particular area of law which engages the court in a particular matter and it is up to you to clearly and succinctly guide the court.

5. Remember that your written document is the first opportunity that the court and the attorney on the other side may have to assess you. For examination purposes, your first paragraph very often tells the examiner where you are going. It lays out a ground map of the process you will use in answering the question. It also assists you in defining and sticking to your objective. It is my experience that the way students start answering their question is invariably the way they end up answering it. If you don’t understand the issues and the law in a problem so as to state it succinctly in the beginning then you will inevitably wander all over the place.
6. Be careful in the use of language. Language must be precise and clear in order to express what you intend to convey. The correct use of language, grammar and spelling is an important part of the attorney’s arsenal and expresses what you intend. The examiner is not a mind reader and unless you clearly and lucidly state your intention, opinion or thoughts, he will not be able to get into your mind and decipher them from what is on the script.

**Interpretation**

7. Do not over-read too many facts and issues into a question. I can assure you that I have included sufficient facts to engage your attention and time adequately. Indeed, I have never been accused of lacking in facts or issues and the contrary may be the more prevalent view.

8. Where an issue in an examination appears to be ambiguous, you are at liberty to interpret it in a manner most favourable to you and one that is consistent with the facts given. However, you must state the perceived ambiguity, articulate your interpretation and proceed to answer the question accordingly.

10. I do not need to have facts restated for me - I wrote them. This is an uneconomical waste of your word limit and an unwelcome waste of my time when correcting your paper.

11. Never try to tell me what you think I want to hear, rather tell me what you believe or understand to be the issues, law and procedure. The only “correct answer” in so far is there is one, is the one that analyses the issues that are raised on the facts, explores the law and procedure and applies them to the problem in a practical manner.

12. Follow the directions you are given and answer the question that is asked of you. Students have a tendency to write everything they know on a subject hoping that the answer lies somewhere inside there (the shotgun approach). There are others, on the other hand, who write too little and just give the skimpiest outline which is equally bad and which shows lack of research and knowledge.

13. Students may answer questions in point form if necessary. However, the points must be clearly made and in such a case it is even more important to have a clearly defined structure and organised answer as suggested above.

**Answering the Question**

14. A properly-structured answer is attractive to look at and follow. It also helps to organise your thoughts and expression.
• Use headings and sub-headings. The structure of this commentary should give you an idea of what is required.

• Make better use of paragraphs. Do not jumble everything you have to say about one topic in one paragraph. If you are quoting a rule, use a separate paragraph for it and then in your commentary on that rule start a new paragraph.

• Skip a line between paragraphs.

• Put your ID # at the top right-hand corner of each sheet of paper in case any gets dislodged at any time.

• It is also helpful to use page numbers.

15. Avoid stating your name or other information especially in your documents (if you are required to sign as an attorney) which may identify you in your assignment.

16. Students need to state jurisdiction on which their answers are based especially where you may choose to change jurisdictions depending on the question being answered.

Using Rules, Legislation and Cases

17. Reference to legislation without an outline of what it says is absolutely meaningless. Please indicate the principle, procedure, or practice to which the legislation speaks.

18. For the purposes of examinations avoid quoting literally from legislation where relevant - rather paraphrase and apply them. Formulating the legislation in this way will ensure that you understand it and give you a more intimate command of the principle. It will also be useful when you do not have access to the legislation but need to explain them especially in an examination situation. Finally, it will aid you in the correct application of the principle. However, in practice when you have to present an argument to the court, please note that you will have to quote directly from the legislation as the authority for your proposition and then you may advance your interpretation of the rule as it relates to your case.

19. **Cases and Judgments:** are to be used to illustrate the application of a rule of court (or any refinement of its meaning given by the courts) or a practice that has been developed by the courts, and should be used with discrimination. A preoccupation with cases that are quoted to impress and which do not illustrate their relevance is a waste of precious time and effort. **It is far better to demonstrate an understanding of the principle and the ability to apply it appropriately than to cite cases which simply demonstrate that you cannot analyse and apply what they expound. The amount of cases you cite or**
regurgitate has no correlation to any criteria of assessment. However, the judicious use of relevant authority does.
EXAMINATION MARKING CRITERIA

Knowledge of Relevant Substantive Law to Address Issues of Assessment 20
Knowledge of Principles of Assessment 20
Appropriate Application of Principles 20
Problem Solving Ability: 20
Presentation: 20

These points are to be used as a guide and are subject to varied from time to time by the course director.

GENERAL CRITERIA FOR MARKING SCRIPTS

KNOWLEDGE OF RELEVANT SUBSTANTIVE LAW TO ADDRESS ISSUES OF ASSESSMENT
Where applicable and appropriate, students should be able to identify:

- the range of possible causes of action arising from facts
- the possible available and relevant types of remedies available on the facts;
- the objective of an award of damages in tort (retrospective) vs breach of contract (prospective)
- principles which will determine whether any item of loss is recoverable or not (remoteness).

KNOWLEDGE OF PRINCIPLES OF ASSESSMENT
Students must be able to demonstrate their understanding the principles of assessment including:

- terms used and various heads of damage under which assessment will be made;
- headings used in assessment of damages such as general/special damages, pecuniary and non-pecuniary loss and basic vs consequential loss which such principles are applicable to the facts in analyzing loss;
- the appropriate principles governing the specific aspects of loss

APPROPRIATE APPLICATION OF PRINCIPLES
1. Students will be expected to apply relevant principles to the facts of the problem;
2. Where the facts are ambiguous, to make an assumption about those facts on which they intend to proceed (preferable) or to explore both options. In the final analysis, students must give advice based on the facts;
3. Where the law or its application is uncertain, they should state possible variations and decide on which option they prefer and why.

PROBLEM SOLVING ABILITY:
Students are expected to:
- review the range of feasible solutions (non/litigious);
- relate solution to client’s circumstances in terms of cost, time and instructions;
- demonstrate their ability to make an informed decision in relation to how they will proceed on the available facts;

PRESENTATION:
Credit will be awarded for:
- structure and organization of answer (use of headings and sub-headings);
- Logical development of ideas;
- Consistency and fluency;
- Ease of understanding (physically and mentally) including tidiness, use of language and clarity of expression.

GRADE SYSTEM
A = 85 - 100
B = 65 - 84
C = 50 – 64
D = 0 - 49

STANDARD OF WORK EXPECTED
- That of a competent attorney using all skill and judgment. (See “The Skills and Characteristics of a Good Attorney” infra). Therefore, sloppiness, lack of research, carelessness or not using information that is available or has been made available to you, will not be tolerated. This is expected in your tutorial presentations and will be used to judge your assignment scripts and, as far as practicable, your examination scripts;
- To prepare for, attend and participate in class;
- To read, understand and prepare work. Understanding is the key to knowledge;
- To question and be critical - development of your critical faculty is essential for practice in law and it starts from your first moment of study;
To strive to attain the standard of work defined above;
“Good enough” is never good enough. Always strive for excellence and you may actually be good;
Honesty and integrity in all things.

KNOW YOUR COURSE DIRECTOR

BIOGRAPHY
I am an attorney at law of 29 years standing at the Bar of Trinidad and Tobago. After graduating from the Hugh Wooding Law School in 1983 I worked with the Attorney General Department for 6 years. I then started a tour company in the tourism sector and was a founding member and past president of the TT Incoming Tour Operators Association.

Since 1994, I followed my passion for public legal education through the publication of his book “Law: The Air We Breathe” and organised a series of public lectures on the law. In 2004 I started work on the establishing the Caribbean Electronic Law Network which seeks to educate the public on their legal rights via the Internet. I also manage a legal aid service for the region of Toco collaborating with SAD of Toco (a community NGO) private enterprise and several attorneys who provide pro bono services. This service creatively applies technology to provide a professional legal service to this community.

In 1997 I was employed by the Council of Legal Education (CLE) at the Hugh Wooding Law School as a course director/tutor. As a course director, I introduced a skills-based approach to teaching utilizing simulation of the real world experience to civil litigation and has written and experimented with the application of ICT to legal education. I wrote and published the legal textbook: “A Manual of Pre-Trial Litigation in the Caribbean” and lectures on the subject ‘Law and Technology’. Additionally, I wrote, published and presented papers on teaching-learning methods, assessment methods, quality assurance, governance and administration as well as the application of ICT to law and legal education. I have also written and presented papers at international conferences on legal education, governance of tertiary education institutions.

From 2006 - 2009 he was seconded to the post of Researcher/Analyst for the CLE where he advised it on issues affecting developments in globalisation, legal practice, legal education, curriculum reform, institutional governance, quality assurance and ICT. He also authored the quality assurance manual for the Council. He has served as a consultant to the Environmental Commission of Trinidad and Tobago for which he updated and redrafted their rules of procedure. In 2010 he was appointed to the Curriculum Sub-Committee of the Academic Committee of the CLE which he chairs.

From 2002 to 2010 I served as a Commissioner of the Law Reform Commission of Trinidad and Tobago and researched, wrote and presented papers on law reform to the Commission.
I am also a team leader for evaluations of tertiary education institutions for the Accreditation Council of Trinidad and Tobago and served as the only Caribbean member of the panel to evaluate the Cave Hill campus of the UWI for the Barbados Accreditation Council. I am a member and former chairman of the Professional Development Committee of the Association of Caribbean Higher Education Administrators (ACHEA) and a member of the constitution committee of the Caribbean Area Network for Quality Assurance in Tertiary Education (CANQATE).

I continue to serve on the board and as an officer for several NGOs and CBOs including the Constitution Reform Forum (Vice-Chair) and the Civil Society Coalition of Trinidad and Tobago (Interim Chairman). I am currently pursuing a doctoral programme in education at the University of Sheffield and am a reviewer for the Caribbean Law Journal Online.

TEACHING PHILOSOPHY

My teaching philosophy is critical to the effectiveness as a course director and tutor in this course. It is informed by my own experience as a student at this Law School, my practice in the courts, by the training and experiences I have had as a course director and by the nature of the relationship which I believe should be developed in a professional law school.

These experiences have resulted in my belief that my teaching must be:

**Empowering:** giving you the confidence in your ability to understand, analyse, synthesise and reconstruct information that gives you mastery over it so that it becomes knowledge;

**Transformative:** giving you the ability to use knowledge to transform yourself and your environment.

**Facilitative:** As fellow students of the law (a lifelong activity) and having travelled the road before, my role will be as a facilitator in helping you on your journey to understand and apply legal knowledge in a manner that will be relevant even when the substantive principles have changed. Our relationship will therefore be based on mutual inquiry and not one of authority;

**Relevant:** teaching and course curricula must be relevant to the needs of the society and not be tabulated principles divorced from social reality and the needs of your client;

**Modelled Behaviour:** As a professional, I must not simply teach but teach by modeling the behavior and values I expect you to adopt. My relationship with you will therefore be based on the same values and principles I relate with the most senior attorney at law. You must, therefore, see yourselves, not as students, but as ‘attorneys in waiting’.
TEACHING TEAM

ASSOCIATE TUTORS

Beverley John:
A Hugh Wooding alumna, Ms. Beverley A. John is a legal practitioner of some thirty three years blended experience in private as well as corporate practice.

Ms. John was called to the Bar of Trinidad and Tobago in 1979 and was also awarded the degree Masters of Laws in Commercial and Business Law from the University of the West Indies in 2006.

Ms. John has been quite active in the State Enterprise Sector holding the positions of Legal Adviser and Deputy Executive Director at the Water and Sewerage Authority, Manager Legal and Company Secretariat at both The Point Lisas Industrial Port Development Corporation Limited and The National Gas Company of Trinidad of Trinidad and Tobago and most recently as Senior Vice President of Corporate Administration and Acting President of the Evolving TecKnologies and Enterprise Development Company Limited. She now runs a solo Practice where she specializes in the areas of Land Acquisition and Management, Corporate Business Services, Corporate Governance, Procurement and Children’s Advocacy. She has also held the post of Deputy Chairman of the Airports Authority of Trinidad and Tobago, Chairman Finance and Tenders Committee and member of the Planning and Development, Human Resources and Audit Committees of the Airports Authority of Trinidad.

Ms. John has for the past fifteen been actively involved in community work, in particular as Executive Chairman of the Couva Children’s Home and Crisis Nursery, an NGO established to provide a safe home for disadvantaged children.

Mervyn Campbell

After reading for his LLB at the University of London where he graduated in 1968, Mr. Campbell was called to the Bar of England and Wales (Middle Temple) in 1968 and to the Bar of Trinidad and Tobago. He is currently the head of Chambers at Campbell and Co. Over his over 45 years of practice he has held numerous directorships including – Former Deputy Chairman of the Port of Spain Community Hospital Foundation Board, Former Chairman of the Trinidad and Tobago Urea Company, Former Deputy Chairman of Queens Hall and Former Vice President and Chairman of the Appeals Committee of Trinidad and Tobago Arts Society. He was also a member of the Bar Council of Trinidad and Tobago from 1980- 1982. Mr. Campbell has been lecturing at the Hugh Wooding Law School for.. years. His practice areas include: Civil Litigation, Corporate and Business Law, Insurance Law, Land Law, Industrial Law, Intellectual Property Law, Telecommunications Law, Information Technology Law, Wills Trust & Estate Administration and Dispute Resolution.

Ravindra Nanga

Mr. Nanga was admitted to the Trinidad and Tobago Bar in 1996. After spending eleven years with Pollonais, Blanc, de La Bastide & Jacelon, he is now in private practice where he specializes in Civil Advocacy, Insurance Law, Admiralty Law, Commercial Law, Contract Law, Land Law, Labour Law and Intellectual Property Law. He has extensive experience in Court, having appeared at all levels, including
the Court of Appeal and the Judicial Committee of the Privy Council. He has been a tutor at the Hugh Wooding Law School since 2005 where he tutors the Law of Remedies. Mr. Nanga also holds membership with several professional associations including the Law Association of Trinidad and Tobago, the Convocation Society of the University of London, The Hillview College Old Boys Association.

Amerelle Francis

A past student of the Hugh Wooding Law School, Ms. Francis was called to the Bar of Trinidad and Tobago in 2004. She is currently an associate with Elidore Chambers, formerly Peterson Lambert Peterson & Co where her practice areas span Civil, Criminal, Family and Succession. Ms. Francis is currently completing her Master of Laws in Corporate and Commercial Law at the University of the West Indies. She has also been Steward at the Caribbean Conference of Churches Assembly held in Cuba and the World Conference of Churches held in Zimbabwe and has held numerous leadership positions on the Law Society and Student Representative Council.

Christopher Sieuchand

Called to the Bar in 2005, Mr. Sieuchand also holds a M.Sc. in Government from the University of the West Indies. He has held positions with the Environmental Management Authority, The Solicitor General’s Department of the Ministry of the Attorney General, and most recently as an Associate Attorney with the Firm of M.G. Daly & Partners. He also tutored Administrative Law at the University of the West Indies. Mr. Sieuchand’s practice areas include civil litigation, corporate and commercial law, public and administrative law, alternative dispute resolution and risk management. He is a member of the Law Association of Trinidad and Tobago and is a member of the Council of Management of Lifeline.

STUDENT LEADERS

Group 1A: Christopher Foderingham-Garraway
Group 2A: Vadeesha John
Group 3A: Nathan Edwards
Group 4A: Omadatt Chandan
Group 5A: Olivia dos Santos
Group 6A: Delrene Liverpool
Group 7A: Vasco Perry
Group 8A: Andrew Gordon
INTRODUCTION

This is a new section that has been introduced into this course based on the flexibility provided by the blended learning methodology adopted. It is also introduced to realign the course with the core objectives that were envisaged when the course was first conceptualised 40 years ago and rebranded 16 years ago i.e. to provide law students with a skill set of providing legal remedies to their future clients. At that time, the lawyer was a totally different professional from what he is called to be today and since that time, there have been tremendous changes in the legal profession around the world:

1. There is increased competition as globally, more and more professionals are created in a limited marketplace.

2. Clients are more concerned about viable solutions to their problems as opposed to the traditional adversarial attitudes adopted in the past which were time-consuming, expensive and inefficient. This has led to the infusion of mediation as a form of alternative dispute resolution within the framework of civil litigation.

3. The shrinking world brought about by globalisation has seen the cross-border need for efficiency in legal services to support business activity in a more complex environment with increased specialisation.

4. The complexity of life and the demands for justice, equity and fairness have reconfigured the legal landscape away from simply redress in the Supreme Court, to alternative and parallel remedies in specialised tribunals created by statute, regional and international legal obligations to facilitate trade (such as under the CSME), and the emergence of new social environments which have propelled the courts to respond through the development of new mechanisms.

5. Technology has had the effect of:
   - providing clients with virtually free legal advice in many areas and dedicated legal services on the Internet;
   - Reconfiguring the way law is practiced with the advent of virtual and semi-virtual law firms with the ability to practice globally from a single, fixed, remote location;
• Making knowledge is more accessible so clients have a range of providers to choose from;
• Increasing communications that continue to make time and distance irrelevant so that English firms can now outsource their legal research and services to lawyers in India and Pakistan.

This section of the course will therefore explore these issues so as to contextualise the need for a broader appreciation of the new configuration of the course content. A variety of approaches will be taken to facilitate this discussion. For the Part 1A, all relevant material will be posted on TWEN (based on the references herein or as may be given from time to time) for students to download and review for discussion. However, students will be required to build on their own knowledge regarding Part 1B and to do additional research.

As far as technology is concerned, students can visit the Year 2 blog on Law and Technology located at www.hwlslawtech.wordpress.com to follow the discussion and access the materials there. You are only required to have a general idea of the consequences of technology on changing the way that practice is conducted especially as it relates to the lawyer as a problem-solver. However, you are free to browse the site and participate in discussions as you wish.

PART 1A: THE TRADITIONAL AND THE MODERN ATTORNEY

TRADITIONAL SKILLS
The skills of the traditional attorney are still very relevant to modern practice. The skill sets can be found in the Quality Management Policy of the Council of Legal Education 2008. (located at Course Materials Page on TWEN or on the Remedies blog). Some of these skills include:

A. The ability to:
   1. take instructions from one’s client, another lawyer or the court;
   2. follow those instructions;
   3. identify the fact(s) in issue;
   4. identify legal issues arising from the facts in issue;
   5. research all relevant law, procedure and practice governing issues;
   6. apply relevant law to the appropriate facts;
   7. recognize when he/she does not know and seek advice from a competent source;
8. argue effectively, meaning that he must present his work:
   - in a structured and logical manner;
   - clearly;
   - concisely; and
   - with consistency.

B. Further, a lawyer must ensure:
   - effective and thorough preparation of his matter;
   - effective presentation of his matter;
   - that he utilizes the art of persuasion to convince his audience; and
   - that the interest of his client is always at the forefront of his mind and that all advice
     and action taken on behalf of the client is geared to meet the specific needs of that
     client bearing in mind the client’s practical circumstances.

C. Finally, a lawyer must dispassionately review all his work. Where necessary he may need to
   have someone else review such work where he is inexperienced or too close to the work to
   competently do so himself.

MODERN SKILLS

However, because of the changes in the legal landscape which have occurred over the last 30
years, there are additional skills which an attorney must consider and develop if they are to
navigate the challenges and opportunities that are ahead of us. These changes have been driven
by globalisation, ICT and the increased complexity of modern life which is leading to an
unprecedented growth in specialisation of practice into various fields. See also the web paper
“Lawyers and their Skills” located at http://www.lsac.org/jd/think/lawyers-skills.asp

READINGS

In this Part, you will be provided with the within reading materials to start your consideration of
this topic and you will be required to do your own research to further your knowledge for
discussion. The papers written by me provide a Caribbean perspective. Other papers provide an
international perspective. You are not required to read all these papers but should select one or
two to consider in preparation for discussion.

1. Of Relevance, Revolution and the Power of One – The Challenges of the Young
   Attorney – Michael Theodore

2. The Role of Information Technology in the Legal Profession and its Implications for
   Legal Education in the Caribbean – Paper prepared by Michael Theodore for the
   Strategic Planning Committee of the Council of Legal Education 2003.
3. **Top Ten Legal Skills:** By Sally Kane, About.com Guide. See [http://legalcareers.about.com/od/legalcareerbasics/tp/Legal-Skills.htm](http://legalcareers.about.com/od/legalcareerbasics/tp/Legal-Skills.htm)

4. **The Modern Eclectic Lawyer:** This is an extremely good short paper written by a South African law student on his blog at [http://tshepomothulwe.blogspot.com/2012/02/modern-eclectic-lawyer-during-times-of.html](http://tshepomothulwe.blogspot.com/2012/02/modern-eclectic-lawyer-during-times-of.html)


6. **What Skills are required to Become a Lawyer:** [http://www.ultimatelawguide.com/careers/articles/what-skills-are-required-to-become-a-lawyer.html](http://www.ultimatelawguide.com/careers/articles/what-skills-are-required-to-become-a-lawyer.html)


8. **Report of the Task Force on the Future of the Legal Profession (New York State Bar Association), April 2, 2011.** This is an excellent (but long) paper which should really be mandatory reading to prepare you for the realities of the future.

There are many resources on the Internet, from articles, journals, blogs which discuss these issues. Very good resources can be found at the American Bar Association’s website on law and technology.

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**SEMINAR EXERCISE 1**

Assign each study group the task of researching one of the following issues as it has changed or is threatening to change the traditional role and function of attorneys:

1. WTO/GATS. What roles would international competition play in the transforming the profession through the export of legal services from developed to developing countries;

2. The Internet and public legal education;

3. Technology – Hardware and software developments which change the dynamics of legal practice and the relationship of attorney/client;

4. Communications Technology which change the dynamics of legal practice and the relationship of attorney/client. Look at the role of online legal services;
5. CSME and the original jurisdiction of the CCJ.

EXERCISE 2
Rate the following characteristics, skills and attitudes in order of priority and discuss:
1. a high degree of integrity (honesty, keeping faith);
2. the ability to endure long hours;
3. the commitment to put work first before self when necessary;
4. a sensitivity to clients’ needs (empathy);
5. a commitment to foster the law as a tool for development of society through critical analysis, commentary and constructive criticism;
6. a commitment to contributing to and developing the legal profession;
7. strong social skills developed by interaction and cooperation with other members of the profession;
8. an insatiable curiosity about developments in the law and especially in his area of the law;
9. the ability to cooperate and work as a team with anyone regardless of one’s personal preferences;
10. the ability to separate himself from his work and the result of his work. We only have control over the process and not the result of our efforts regardless of whether we give advice or pursue litigation. Very often the result rests in the hands of others, either the client or a judge;
11. a wide and varied experience of life reflecting the nature of the law;
12. highly-developed problem solving abilities focused on the needs and circumstances of each client and bringing administrative and ‘common world’ (as opposed to litigious) solutions where necessary;
13. a love for reading and research;
14. an ability to multi-task: to operate on several levels at the same time. In a trial, it can include the ability:
   - To take notes of evidence;
   - Prepare arguments in reply;
   - Object when appropriate;
   - Instruct counsel;
   - Research points raised by judge or other side;
   - Think about other matters to which you are committed.
PART 1B: STRATEGIES FOR CLIENT SATISFACTION/SOLVING CLIENTS’ PROBLEMS

Modern live has created many complexities which have mandated governments, the court and the society, generally to update tried and tested prescriptions and at the same time, come up with new and innovate solutions.

The modern attorney cannot be seen through TV lenses as the supreme litigator struggling to solve his client’s case in a court of law. Instead, his role is to find the most efficient, cost-effective and timely solution to his client’s problems. In many cases, being right is economically foolhardy and many business persons would rather retain a client and compromise a claim, than standing on ‘right’ and alienating a client’s business and his reputation for good. An astute lawyer must also take into account the financial means of his client to pursue expensive litigation on a claim where the ‘candle might be more expensive than the funeral’.

There are a range of non-traditional systems that can afford a relief to clients including:

1. ADMINISTRATIVE RELIEF

There are several quasi-judicial tribunals and regulatory agencies which are underutilised to achieve justice for individuals. These often have investigatory powers and while they may not be able to enforce their recommendations, the mere fact that a wrongdoer understands that he/she is now under scrutiny may make them more amenable to good behaviour. The advantages of these services to a client are that they are free. It is beneficial for an attorney to recommend and support a client before these tribunals especially for clients who cannot afford litigation. Such action would demonstrate to the client that they attorney is seeking a solution to their problem that is relevant to their means. It would also encourage the tribunal to do their best as they would appreciate that an attorney, knowing the law and the powers of the tribunal would not be as distracted by excuses as a layperson who may not have similar knowledge. Some of these tribunals in Trinidad and Tobago are:

- The Ombudsman;
- The Financial Ombudsman;
- Equal Opportunities Commission;
- Environmental Management Agency;
- Occupational Health and Safety Authority.
2. ALTERNATIVE DISPUTE RESOLUTION

In pursuing the resolution of their clients’ problems, attorneys are more frequently required to find new ways to attaining such resolution in circumstances where the traditional courts can only provide a limited decision but very often does not solve the problem and is often not restorative in its treatment of the parties before it. In these circumstances, there have been a range of alternative dispute resolution techniques which have been developed in recent years including arbitration, mediation, negotiation, collaborative law and conciliation.

3. PARALLEL SUPERIOR COURTS OF RECORD

There are also remedies which have been created by statute and, in many cases, are administered by superior courts of record in areas where special interests and knowledge are required. In some cases, they have been created to administer justice where common law principles were felt to be inadequate. In most cases they have a strong arsenal of weapons which rival, and in some cases, surpass the jurisdiction of the Supreme Court. Some of these agencies in Trinidad and Tobago are the:

- Industrial Court;
- Environmental Commission.

4. STATUTORY REMEDIES

Statutory remedies have been introduced in various jurisdictions to supplement remedies available at common law and equity due to increasing and oppressive social, political and economic factors for which special intervention is required. The following are just a sample of such remedies. Consider what other remedies are available through Parliamentary intervention.

a. Unfair Dismissal: The right to claim unfair dismissal was introduced because the common law did not provide adequate protection against arbitrary terminations of employment and also in an attempt to reduce the number of strikes over dismissals.

b. Workmens Compensation: This legislation provides a right to compensation for personal injury suffered by a workman by accident arising out of and in the course of his employment. Consider its relevance today in relation to compensation under negligence.

c. Equal Opportunities Legislation

- Equal Opportunities Bill/Act?
Note that depending on the nature of the wrong, while it may be expensive for a client to pursue litigation, the actions of the wrongdoer may be amenable to criminal sanction e.g. public nuisance or criminal actions sanctioned by special legislation such as offences committed under the Environmental Management Act of Trinidad and Tobago.

5. PUBLIC LAW REMEDIES

Public law has evolved in its own right over the last 50 years to become a critical avenue for citizens to advance their rights in circumstances where they may not have otherwise had a remedy. This is so especially in relation to the state and its agencies and is most often seen in the realm of employment where on similar facts of dismissal, a claimant may well be able to sustain a claim against the state for breach of a constitutional right, make an application for judicial review, or bring a claim for unequal treatment or discrimination under the Equal Opportunities Act of Trinidad and Tobago.

Staying with T&T, there have been many instances where the state has sometimes become involved in commerce, owning and managing businesses. There has also been the development of public companies which are really set up as private companies under the direction of the state to perform public functions which were previously done by government departments.

A modern lawyer must be able to keep up with all of these developments and ask himself the question – which is the most appropriate avenue of redress for my client? What is the objective and what are the restrictions of each of these processes?

a. Constitutional Redress:
   - Does the constitution create new rights?
   - What are they and are they in essence different from rights previously available at common law?
   - Are damages in constitutional law matters different than in private law?
   - Are there special remedies which apply to constitutional redress which are unavailable to litigants in private law claims?
   - Are their prohibitions for a litigant to pursue a public law claim on facts which can also sustain a private law claim?

b. Application for Judicial Review:
   - Under what circumstances do they apply?
• Do they apply to private bodies as well as public bodies?
• Are there any special remedies or processes which make them advantageous for litigants to pursue?
• Does the emergence of public interest litigation through an application for judicial review provide new remedies for litigants? See the Judicial Review Act of Trinidad and Tobago.

c. Law of Treaties – the CSME

The CSME has created a regime within the Caribbean region to promote trade and investment among its members by freeing trade restrictions and creating a system and a court to settle disputes between the parties. That court is the Caribbean Court of Justice in its original jurisdiction and the rules of trade are governed by the CSME itself. There are circumstances in which members of one state could not have had recourse for the infractions of members of another state unless they involved the limitations of private international law for redress. However, the Treaty provisions now allow private individuals in some cases, to bring matters before the court where their own governments have refused to do so. The court is entitled to award damages and other remedies in an evolving jurisprudence which has implications for each and every attorney interested in fully representing their clients.

See Hummingbird Rice Mills Ltd. v Suriname and the Caribbean Community, CCJ Application No. OA 1 of 2011.

6. COMMON LAW REMEDIES

The law on remedies has to be traced to the origins of the common law in England. It is therefore, important to remember the following points:

• English common law is based on the law of property, both real and personal and, is, therefore, said to act in rem.

• To initiate a suit meant applying to the court by a particular writ of action which dictated the manner in which the court would address the matter, the degree of liability, the defences and the remedy available for that particular form of action. e.g. different remedies being available in tort vs contract. An action to recover possession of land aims at a quite different solution from an action for damages for breach of contract
• The primary remedy available at common law was damages or compensation and it was only in very limited cases in certain actions relating to land that the courts would order the reinstatement of someone wrongfully dispossessed.
• Common law remedies because of the above are available ‘as of right’.

Other remedies which reflect the nature of common law relief as acting in rem are:
• forfeiture of goods
• the exercise of a lien on goods which are in the possession of a wronged party

What other remedies can be traced to a strictly common law origin?

7. REMEDIES IN EQUITY
It was in above context that equity developed as a system of rules enforced by the Chancellor to alleviate on moral grounds, technical injustices of the common law. In modern law, equitable remedies can still be granted or refused as the court in its discretion sees fit, having regard to the requirements of the case. These discretionary grounds are rooted directly in this historical context and they all bear striking similarities regardless of the remedy.

Some equitable remedies that have been developed over the years are:
• Specific performance;
• Injunctions; - note various types including the Anton Pilar, Mareva
• Accounts;
• Declaratory Relief;
• Reccision;
• Rectification;
• Restitution;
• Constitutive remedies: the development on the voidable transactions vs void ones.
• Equitable damages: Damages awarded by a court in its equitable jurisdiction when damages not available at common law.

NOTE
• Equity is said to act in personam while common law acted in rem.
• It exercised its jurisdiction over the person and could command the person to act in a particular way or to refrain from acting in such a way.
• Further, it had wider coercive powers on the person than common law because where common law could impound or forfeit the property of the individual, equity could imprison the individual for failure to observe its orders.
• What are some of the other principles or aspects of equity and equitable remedies that are important to know?

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SEMINAR EXERCISES

1. Prepare a 5 minute oral presentation on one of the following remedies:
   • Self-help
   • Forfeiture of goods
   • Exercise of a lien on goods which are in the possession of a wronged party;
   • Declaratory Relief;
   • Specific Performance;
   • Restitution;
   • Constitutive remedies: the development on the voidable transactions as opposed to void ones;
   • Constitutional and Public Law Remedies;
   • Equitable Damages.

2. (i) What legislation in your jurisdiction creates new remedies not known at common law or equity?
   (ii) Outline the extent of the remedy and the procedure that it involves?

3. Jane is a Guyanese designer who migrated to Trinidad and Tobago (T&T) with her husband ten years ago. She established a manufacturing facility where she produced clothes of very high quality and has been doing very well for herself.

   Last year, the Government of T&T published a policy paper on the development of the fashion industry in T&T which articulated that only graduates of the (government owned and operated) University of Technology would be given specific government incentives to establish and run manufacturing plants for the design and manufacture of clothes. In
January of this year, the government published Clothes Designer Regulations which implements a special regime of incentives for which she does not qualify because she is not a graduate of the University of Technology. The University of Technology's admissions policy specifies that only nationals of Trinidad and Tobago can attend and qualify for free tuition costs from the government.

Since then, graduates from the institution have established manufacturing plants and have started exporting their products competing unfairly with Jane who does not benefit from the incentives given.

Jane has suffered severe financial losses and comes to you for advice. Advise her.

4. Harrylal was employed as a carpenter by the National Housing Demolition Company (NHDC) for over 15 years. Two years ago he was injured on the job and could no longer perform any physical work. The CEO at the time reassigned him to the job of checker where he is required to sit on any building site and check the amount of materials stored, used and brought on site for the particular job.

Last year, a new CEO was hired and saw Harrylal sitting on the job site. He immediately flew into a rage and fired Harrylal shouting at him that the government cannot afford to have any cripple in its employ just sitting down and twiddling his thumbs. Harrylal was humiliated in front of his fellow workers. He is now out of a job with a wife and 5 children to feed.

Harrylal comes to you for advice as to what steps he can take to get back his job or get compensation for the loss he has suffered. Advise him.

5. Dennis is a prison’s officer of 25 years service. Recently he applied to be promoted but his application was declined. Over the years of service, Dennis had sat and passed every service examination and had been awarded several honours for his bravery in the line of duty and acting “above and beyond the call of duty” by the Fire Service. Further Dennis had acted in the post to which he was assigned for the last 10 years.

Earlier this year, when the results of the promotions were published, Dennis realised that officers whom he knew were much more junior to him, who did not pass as many examinations as he had or had had as many commendations as him, were promoted over him and one, in particular was appointed to the substantive post in which Dennis had been acting.
Dennis comes to you seeking advice as to the various options he may have to get redress. He has done some research and believes that because the information to prove his assertions lie solely in the hands of the Public Service Commission, it would be difficult or impossible to get them to release such information as well as the basis on which they made their decisions. He is also afraid that if something is not done urgently, the appointments will take effect and it would be difficult or impossible to have them reversed.

Advise Dennis.
PART 2A: GENERAL PRINCIPLES GOVERNING THE ASSESSMENT OF DAMAGES

Contents
1. Definitions
2. Object and Scope of an Award of Damages
3. Compensatory Damages in Tort and Contract
4. Certainty
5. Form of Assessment: The Once and for All Rule
6. Date of Assessment

2A.1 TERMINOLOGY

**Damage:** “Loss, injury, or deterioration, caused by the negligence, design,, or accident of one person to another, in respect of the latter’s person or property.” Black’s Law Dictionary

**Damages**

“Damages are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum which is awarded unconditionally and is generally, but now not necessarily, expressed in English currency.” McGregor on Damages.

“A pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another”. Black’s Law Dictionary.

**Pecuniary damages** comprises all financial and material loss incurred which seeks to compensate victims for the actual loss suffered as far as possible. Such damages include loss of business profits or expenses of medical treatment and can be calculated in monetary value even where it is difficult to prove.

**Non-pecuniary damages** comprises all losses which do not represent an inroad upon a person's financial or material assets, such as physical pain or injury to feelings and cannot be compensated in monetary terms because it is either intangible or immeasurable by nature.
**Special Damages:** Financial compensation for all loss that has been incurred by the claimant or which arises from the cause of action from the time of the loss to the date of assessment and which can be quantified exactly (in dollars and cents). Such loss has to be specially pleaded and proved in legal proceedings.

**General Damages:** All loss which are not special damages and which by its nature has to be estimated by the court. Such loss may include (future) pecuniary loss, non-pecuniary loss which seeks to compensate the victim for an intangible loss, or certain types of which by nature are difficult to prove with certainty such as loss of income or loss of profit.

**See also:**
- Concerns damage arising naturally and/or damage due to special circumstances: expressed by Lord Wright in *Monarch S.S. Co. v. Karlshamns Oljefabriker* [1949] AC 196, 221
- Concerns proof relating to whether damage is capable of being quantified in money value or not: *Prehn v. Royal Bank of Liverpool* (1870) LR 5 Ex 92, 99-100LR where Martin B. This is closely associated related to the rules regarding pleadings where special damages have to be pleaded specifically. See also Haynes C. *Heerall v Hack Bros. (Construction) Co. Ltd.* (1799) 25 WIR 177, 124

**Normal and Consequential Losses:** The normal loss is that loss which every plaintiff in a like situation will suffer, the consequential loss is that loss which is special to the circumstances of the particular plaintiff.

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**SEMINAR EXERCISE**

Harry and his girlfriend, Sarah were shopping in LoCost Supermarket last week. Harry had parked his car in the car park.

Sarah had gone to the poultry isle to do some shopping when she slipped in a puddle of water on the floor and fell. At the time she was looking at her shopping list on her iPad which fell to the ground and the screen was shattered. Several customers came to assist her and she later suspected that one of them stole her purse which was later recovered in the adjoining isle. Upon recovery, she later realized that her expensive iPhone valued at $6000 and her purse which contained $5000 in cash which she had withdrawn from the bank to pay some workers were missing. Sarah has all her business contacts on that phone and she is completely lost without it.

As a result of the fall, Sarah dislocated her hip and had to be rushed to the hospital. She spent two weeks in hospital and another month at home recovering from her injury.
Sarah is self-employed and has been unable to work during this time. It is likely that her earnings in the future will be significantly reduced due to continuing problems with her hip.

Harry accompanied Sarah to the hospital but when he returned later that evening to collect his vehicle he realized that vandals had entered the car park while security personnel was there and had smashed his windscreen. Harry lost 3 days at work while looking for the replacement of his windscreen. He eventually had to import it from England because he wanted an original part and not the ‘cheap foreign’ parts available on the local market. The vandals also stole a diamond engagement ring valued at $75,000. Harry had intended to propose to Sarah that night.

Now, in light of her permanent disability he has decided not to marry her again.

You are required to:

a. list the various types of losses which Harry and Sarah have suffered;
b. advise them on the classification of such losses with a view to the assessment of the quantum of such losses for the purposes of compensation; and
c. advise them on whether such loss is recoverable or not.

*The following table is provided as a means of answering the above question. Please modify it as you see fit to answer the question. The number of empty rows in the following table are not exhaustive of the actual number of items of loss.*

<table>
<thead>
<tr>
<th>ITEM OF LOSS</th>
<th>TYPE OF LOSS</th>
<th>RECOVERABILITY</th>
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<tr>
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<td>SPECIAL DAMAGES</td>
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<td>GENERAL DAMAGES</td>
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<td>PECUNIARY LOSS</td>
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<td>NON-PECUNIARY LOSS</td>
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<td>BASIC LOSS</td>
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<td>CONSEQUENTIAL LOSS</td>
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2A.2 OBJECT AND SCOPE OF AWARD IN DAMAGES

A: PECUNIARY REMEDIES NOT A CLAIM FOR DAMAGES

1. Actions claiming money payable by the terms of a contract
2. Actions claiming money in quasi-contract, whether by the action for money had and received, by the action for money paid or under a quantum meruit, do not depend upon a wrong done to the plaintiff.
3. Actions claiming money in equity are not, apart from statutory authority, actions for damages.
4. Actions claiming money under statutes, where the claim is made independently of a wrong which is a tort or breach of contract, are not actions for damages.

B: BASIS OF AWARD IN DAMAGES

_Ubi jus ibi remedium_ - Before damages can be recovered in an action there must be a legal wrong committed, whether the wrong be a tort or a breach of contract for which a remedy exists in law. Before considering the appropriate remedy one must be able to identify a legal wrong (cause of action).

Civil Proceeding Rules 1998 of T&T and the ECS: These rules attempts to do away with identifying a remedy with a right allowing the court to give any relief it has power to give regardless of the cause of action. Part 8.5, pg 59 Review of Civil Procedure.

OBJECT OF AN AWARD OF DAMAGES: The object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he has suffered. General rule regarding the measure of damages was stated by Lord Blackburn in _Livingstone v. Rawyards Coal Co._ (1880) 5 App. Cas. 25, 39 as "that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

C: THE MEASURE OF DAMAGES


Contractual position stated by Parke B. in _Robinson v. Harman_ (1848) 1 Ex 850

Exceptions to the General Rule:

1. **Limitations:** The loss for which the plaintiff can recover will be cut down by the following factors:
   - part of the loss due to his contributory negligence
   - for such loss of which the defendant's conduct is not the cause
   - for such loss which is not within the scope of the protection of the particular tort or contract
   - for loss which he should have avoided
   - for loss which is too uncertain

2. **Circumstances when damages not based on compensation principle:**
   - awards of nominal damages for the infringement of a right;
   - awards of exemplary damages for wanton tortious conduct;
   - awards of liquidated damages as agreed between contracting parties;
   - where plaintiff receives a collateral benefit in addition to award of damages: *Parry v Cleaver* [1970] AC 1. See also “A Tortfeasor’s Lot is not a Happy One?” by Paul Matthews and Mark Lunney(1995) 58 MLR 305;
### BASIC TEMPLATE FOR ASSESSING DAMAGES

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<td>Cause of Action</td>
<td>Objectives of Award</td>
<td>Recoverability</td>
<td>Principles of Assessment</td>
<td>Basic Loss</td>
<td>Consequential Loss</td>
<td>Factors Increasing Compensation</td>
<td>Factors Limiting Compensation</td>
<td>Final Factors</td>
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<td>Tort</td>
<td>Retroactive or Reasonably Foreseeable Or</td>
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<td>- Personal Injuries or Fatal Accidents</td>
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2A.3 COMPENSATORY DAMAGES IN CONTRACT AND TORT

A: CONTRACT

1. BASIC PECUNIARY LOSSES


Recovery for expenses rendered futile by the breach: Bain v. Fothergill (1874) LR 7 HL 58

2. CONSEQUENTIAL PECUNIARY LOSSES

(1). Gains prevented by the breach.
   (c) Loss of services of relatives: Jackson v. Watson [1909] 2 KB 193

(2). Expenses caused by the breach: Many types of expenses may be incurred by the plaintiff as a result of the breach which will constitute a recoverable loss. Waithe v Caribbean International Airways Ltd (1988) 39 WIR 61

(3) Expenses rendered futile by the breach: an alternative to recovery for gains prevented by the breach: Such expenses form an alternative and not an additional head of damage, since they represent part of the price that the plaintiff was to incur in order to secure the gain.

3. NON-PECUNIARY LOSSES IN CONTRACT

- Physical inconvenience and discomfort: Substantial physical inconvenience and discomfort caused by a breach of contract will entitle a plaintiff to damages. Burton v. Pinkerton (1867) 36 LJ Ex. 137, Hobbs v. L. S.W. Ry (1875) LR 10 QB 111
- Pain and suffering, loss of amenities and of expectation of life
- Mental distress: in Hamlin v. G.N. Ry (1856) 1 H&N 408
- Social discredit
B. TORT

1. BASIC PECUNIARY LOSSES

The Normal Measure Of Damages: In tort, pecuniary damage is mostly associated with property damage or loss and the measure of damages is normally the diminution in the value of the property in question. *Darbishire v Warran* [1963] 1 WLR 1067, *Singh v Doobay* (1989) 44 WIR 196

2. CONSEQUENTIAL PECUNIARY LOSSES

(1) Gains prevented by the tort

(a) Loss of use, loss of profits, interest.

(b) Loss of services of relatives.

(2) Expenses caused by the tort: The plaintiff may incur many types of expenses as a result of the tort often made in order to keep the damage within reasonable bounds or to mitigate the damage. *Johnson v Browne* (1972) 19 WIR 382

3. NON-PECUNIARY LOSSES

*Cornilliac v St. Louis* (1964) 7 WIR 491 per Wooding CJ

See also Haynes C. in *Heeralall v Hack Bros. (Construction) Co Ltd* (1977) 25 WIR 117, 125

Depending on the nature of the tort, these other heads are also important:

- Social discredit: injury to reputation particularly in defamation cases
- Loss of society of relatives in the event of death (Fatal Accidents legislation).
2A.4 CERTAINTY OF DAMAGE

A. THE PROBLEM OF CERTAINTY

A plaintiff claiming damages must prove his case both as to the fact of damage and as to its amount. Dixon v. Deveridge (1825) 2C & P 109 and Twyman v. Knowles (1853) 13 CB 222. The fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. See Vaughan Williams L.J. in Chaplin v. Hicks [1911] 2 KB 786

Prospective and Contingent Losses: In such cases absolute certainty is not required as to the precise amount of loss that the plaintiff had suffered. See Devlin J. in Biggin v. Permanite [1951] 1 KB 422, 438: "Where precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can."


B. ABSOLUTE CERTAINTY OF PROOF CANNOT BE ASCERTAINED

1. Where Damage is Presumed: " such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man." Prehn v Royal Bank of Liverpool (1870) 5 Ex 92, 99-100. The damages are said to be at large.


2. Where the Loss is Non-Pecuniary: Money is awarded a substitute for that which is generally more important than money. Lord Halsbury L.C. The Mediana. [1900] AC 113, 116

3. Where it is Uncertain How a Pecuniary Loss is to be Measured: Biggin v. Permanite [1951] 1 KB 422.

4. Where it is Uncertain How Much of the Loss, Pecuniary or Non-Pecuniary, is Attributable to the Defendant: Thompson v. Smiths, Shiprepairers (North Shields) [1984] QB 405

5. Where it is Uncertain Whether a Particular Pecuniary Loss would have been Incurred: A pecuniary loss may also be difficult to assess because it relates to the future, and is therefore necessarily contingent upon other factors.
(A) **Prospective Expenses:** Prospective expenses may reach so far into the future that they are difficult to assess: *Roach v Yates* [1938] 1 KB 256.

If a legal expense has already incurred re third party but not yet paid by the plaintiff, amount to be included. *Mason v. Barker* (1843) 1 C&K 200, *Randall v. Raper* (1858) EB &E 84. Where the plaintiff only has moral duty, cannot be included in the damages. *Dixon v. Bell, Allen v. Waters* [1935] 1 KB 200. However, see *Donnelly v. Joyce* [1974] QB 454.

(B) **Prospective Earnings:** Important in personal injury cases where there is uncertainty as to the precise length of time that the plaintiff's disability will last, and the uncertainty as to the precise pattern that the plaintiff's future earnings would, but for the injury, have taken. *Moeliker v Reyrolle & Co* [1977] 1 WLR 132, 141.

(C) **Loss of General Business and Professional Profits:** *Ratcliffe v. Evans* [1892] 2 QB 524. Substantial damages might be awarded in those cases "where a general loss of custom is the natural and direct result of the slander and where it is not possible to specify particular instances of the loss." Also for loss of publicity. *Tolnay v Criterion Films* [1936] 2 All ER 1625, *Marcus v. Myers* (1895) 11 TLR 327.

(D) **Loss of Chance:** This deals with one particular chance for profit that the plaintiff loses, one particular contingency upon which a gain to him has depended.


(iii) Situations where the person upon whose will the contingency depends is the wrongdoer: *Re Thornett & Fehr* [1921] 1 KB 219, *Johnson Matthey Banking v. The State Trading Corporation of, Withers v. General Theatre Corporation* [1984] 1 Lloyd’s Rep 427 *Beach v. Reed Corrugated Cases*.


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**SEMINAR EXERCISE**

During the month of August 2013, Sandra and her boyfriend, Harry Innocent contracted with Slipshod Construction Enterprises to renovate their home and construction started at the end of the month. On the 15th September, they visited the site and were invited to have a tour of the premises by Mr. Shod the site foreman. On entering the kitchen, Clumpsie a workman who was working on the scaffold threw down a piece of wood without paying attention to what he was doing and it struck Sandra on the head and then hit Harry.

Sandra immediately became unconscious and was taken to the Better Care Private Hospital which was 5 miles away from her home even though the People’s Public Hospital was two blocks away from her home. She spent two weeks in ICU which cost ($75,000.00), another four weeks in the recuperation wing ($150,000.00) and three weeks at home before she was able to return to work ($50,000.00). Pauline, her mother who is the CEO of International Computer Services took time off from her job to take care of her.

Sandra now bears a two-inch scar on the right side of her face which doctors say will be permanent. Sandra is 25 years old and works as a model through a modelling agency. She was scheduled to conclude a very lucrative contract to model throughout the Caribbean for the months September to December. In industry circles, it is felt that had she been able to fulfil this contract she would have made it onto the international stage.

Harry on the other hand, though struck as well, did not feel anything immediately. However, two weeks after he began to develop severe headaches. His doctor referred him to a specialist who has found out that Harry had a latent condition which was exacerbated by the blow that he received. Harry had to receive medical attention abroad. Further diagnosis has revealed that Harry’s life expectancy has been reduced from 75 years to 50 years. Harry is a computer consultant in demand throughout the Caribbean. He can no longer take protracted air travel and his income will consequently suffer.

Sandra and Harry wishes to take legal action against Slipshod and seeks your advice as to the likely measure of damages to which they would be entitled.
2A.5 THE FORM OF DAMAGES

(a) **The once-and-for-on rule:** See Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1 All ER 332. Also *Filter v Veal* (1701) 12 Mod Rep 542 *Buckland v Palmer* [1984] 3 All ER 554. The rule does not prevent a different cause of action later being brought: *Brunsden v Humphrey* (1884) 14 QBD 141

(b) **Damages must be awarded unconditionally:** *Banbury v Bank of Montreal* [1918] AC 626.

2A.6 DATE FOR THE ASSESSMENT OF DAMAGES

(a) **Is there a time after which the court assessing damages is barred from taking into account events that have already occurred?** Lord Macnaghten in *Bwllfa and Merthyr Dare Steam Collieries Ltd v Ponymdd Waterworks Co* [1903] AC 426

**Admitting Fresh Evidence:** By RSC Ord 59, r 10 the Court of Appeal has the power to admit evidence of events occurring since the judgment at first instance. See Lord Wilberforce’s guidelines in *Mulholland v Mitchell* [1971] AC 666, *Lim Poh Chao v Camden and Islington Area Health Authority* [1979] 3 WLR 895. In the Caribbean, see *Hosein v Camacho* [1978] 30 WIR 333, 336B-E. Note that the provisions of the Civil Proceedings Rules 1998 Part 64.18 are substantially similar.

(b) **Which value of money, property or services do the courts apply in assessing damages?**

*Past recurring pecuniary loss:* the value of money at the date of the loss.

*Future pecuniary loss:* the value of money at the date of judgment.

*Other pecuniary loss:* the market value of the goods at the date of the breach of contract *General & Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314 and *Chubb Cash Ltd v John Crilley & Son* [1983] 2 All ER 294.

SEMINAR EXERCISE

On April 20, 2013, John contracted with Specialty Auto Imports (SAI) to purchase the latest model Lexus motor vehicle which was to be imported from Japan. The contract was for
US$100,000.00 and he paid a deposit of US$10,000.00. The car was to be delivered within three months.

One month after this contract there were elections in Japan and new policies brought in by the government resulted in a rise in the value of the yen on the international market. Further, while the vehicle was en route to your country, there was a fire on board the vessel and several vehicles were destroyed including John’s Lexus.

SAI was eventually able to land a replacement Lexus six months after the contract date. SAI has indicated that when they sought to replace the vehicle the cost of the vehicle had increased due to no fault of their own. Both events resulted in the vehicle costing twice the original contract price and they consequently sought to pass this increased costs to John.

John seeks your advice as to the appropriate price he should pay for the vehicle as he believes that he ought to pay the $TT price of the vehicle at the US$ value at the time of the contract.
TOPIC 2B: GENERAL PRINCIPLES LIMITING COMPENSATION

Contents:
1. Remoteness
2. Intervening Causes
3. Duty to Mitigate
4. Contributory Negligence
5. Impecuniosity
6. Special Circumstances re Contract

2B.1 REMOTENESS

A. TORTS

1. THE WAGON MOUND TEST

*Re Polemis and Fumiss Withy & Co* [1921] 3 KB 560. Overruled by *The Wagon Mound* [1961] AC 388. The following conclusions can be drawn from this case:

1. So long as the type of physical damage which has resulted was reasonably foreseeable at the time of the negligence, neither the *actual manner* in which it came about nor its *actual extent* needs to have been reasonably foreseeable. *Hughes v Lord Advocate* [1963] AC 837. *Vacwell Engineering Co Ltd v BDH Chemicals Ltd.* [1971] 1 QB 88.

2. Difficulties regarding the “type of physical damage”: *Bradford v Robinson Rentals Ltd* [1967] 1 All ER 267 vs *Tremain v Pike* [1969] 1 WLR 1556


4. the *Wagon Mound* has not affected the principle that it is no bar to recovery that the pecuniary value of property damage or the loss of earnings/dependency resulting from personal injury or death is far greater than could reasonably have been foreseen.

5. what degree of likelihood of the loss occurring is required under the *Wagon Mound* test? *The Wagon Mound (No 2)* the Privy Council considered that only a low degree of likelihood of the loss occurring need be reasonably foreseeable in order for the loss to be recoverable. H/L in *Koufos v Czarnikow Ltd, The Heron II* [1969] 1 AC. *H Parsom Lid v Uttley & Co Ltd* [1978] 1 All ER 525.
2. Is The Wagon Mound The Test For Remotness For All Torts? The Wagon Mound test was applied to the tort of nuisance in The Wagon Mound (No 2), Strict Liability Cases: Galashiels Gas Co Lid v O'Donnell [1949] AC 275
Deceit: Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158

B. BREACH OF CONTRACT

West Indian authority: Frederick v Lee (Bdos) No: CV 622 of 2006

2B.2 INTERVENING CAUSES

Even though the defendant's breach of duty is a cause of the plaintiffs loss, the plaintiff may not recover damages for it because an intervening cause, "combining with it to produce the loss," is regarded as breaking the chain of causation between the defendant's breach of duty and the loss.

(A) INTERVENING NATURAL EVENTS

(B) INTERVENING CONDUCT OF A THIRD PARTY
(ii) Third Party Intervention Other Than Where There Was A Duy To Guard Against It: Rouse v Squires [1973] QB 889

(C) INTERVENING CONDUCT OF THE PLAINTIFF
(i) **Unreasonable acts:** McKew v Holland and Hannen and Cubitts [1969] 3 All ER 1621, Quinn v Birch Bros (Builders) Ltd.[1966] 2 QB 370  Lambert v Lewis [1982] AC 225

(ii) **Reasonable acts:** Compania Vaviera Maropan v Bomaters [1981]1 WLR 274 the chain of causation will not be broken by reasonable intervening acts of the plaintiff. Wieland v Cyril Lord Carpets Lid [1969] 3 All ER 1006

(iii) **Contributory negligence?** The Calliope [1970] P 172

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**SEMINAR EXERCISES**

**EXERCISE 1**

Jo-Jo Billings owns a two-storey building in the city. Excavators Ltd. was employed by an adjoining landowner to do certain works involving blasting. Engineers for Excavators visited Jo-Jo's premises and compiled a schedule of cracks and defects in the building and a copy of the schedule was given to Jo-Jo. After the blasting operations the building was seen to be leaning towards the road.

Lao, the manager of Excavators Ltd. verbally accepted liability for damage to the building and sent in their engineer to examine the building. Jo-Jo also employed his own engineer. The engineers agreed that the building suffered an original design defect and it might have been weakened by the earthquake of 1995.

Jo-Jo who resided on the first floor and carried on his business on the ground floor, was forced to vacate the building. The cost of remedial work was estimated at $600,000. When the engineer's report on the damage was shown to Leo, he promptly denied liability on behalf of the company.

Jo-Jo now lives in an apartment at a monthly rent of $3,000. The cost of relocating his family and business amounted to $12,500. His children were quite upset at having to move and he has lost a substantial number of customers.

You are consulted by Jo-Jo who tells you that he sued Excavators Ltd. and the matter comes up for hearing next Wednesday. He tells you that because of financial difficulties, he was unable to do the remedial work, the cost of which has since doubled. The building has also been vandalised.

Advise Jo-Jo as to the measure of damages.

**EXERCISE 2**
Turnaround Transportation Enterprises owns a fleet of trucks and is in the transportation business. On January 1, 2011 they enter into a two-year contract with the Lohi Supermarket chain to transport mushrooms from the Specialty Farms and deliver them within 24 hours to its chain of 3 supermarkets in Port of Spain.

Business goes well for some time. However, early in February this year, several of Turnaround’s lorries began developing problems which they never fixed because they never invested in a maintenance service for their vehicles. Eventually exhaust fumes leaked into the tray of certain lorries and contaminated the mushrooms causing several persons to get ill. Lohi Supermarket had to pay $500,000.00 in compensation to these victims.

From the beginning of the year, there has been a fall in demand and price of mushrooms as a new scientific study has revealed that a harmful bacteria can infest this item under certain conditions.

Discuss the considerations that you will need to take into account in advising Lohi as to the most practical cause of action and consequent remedy in the circumstances paying particular regard to the measure of damages.
2B.3 THE DUTY TO MITIGATE

(a) The first principle - unreasonable inaction

A plaintiff must take all reasonable steps to minimise the loss to him British Westinghouse Electric v Underground Electric Railways Co of London Ltd [1912] AC 673

(i) Where the plaintiff has been wrongfully dismissed he need not accept an offer of re-employment from his employer. Yetton v Eastwoods Froy Ltd.[[1967] 1 WLR 104

(ii) If in a contract of sale the defendant makes an offer of alternative performance, it will generally be unreasonable for the plaintiff to turn it down if acceptatice would have reduced his loss. Payzu Ltd v Saunders [1919] 2 KB 581

(iii) The plaintiffs conduct is unreasonable if he refuses an operation contrary to firm medical advice. McAuley v London Transport Executive [1957] 2 Lloyds Rep 500 Selvanayagam v University of the West Indies [1983] 1 All ER 824

(v) The plaintiff need not take action which will put his commercial reputation or good public relations at risk. In James Finlay & Co Ltd u Kwik Hoo Tong [1929] 1 KB 400

(vi) The plaintiff need not take steps which would involve him in complicated litigation. Pilkington v Wood [1953] Ch 770


(c) When does the duty to mitigate arise in relation to the anticipatory repudiation of a contract? While & Carter (Councils) Ltd v McGregor [1962] AC 413 Russell v van Galen supra, Heeralall v Hack Bros supra per Haynes C at 139I - 141N

However, see Geest v Lansiquot [2002] UKPC 48. See also Andre Marchong v T&TEC and Anor CV 2008-04045 (TT).

*******************************
SEMINAR EXERCISES

EXERCISE 1
Examine the Geest Case and discuss whether it has eliminated the common law duty of the claimant/plaintiff to mitigate damage.

EXERCISE 2
David was the owner of a four-year old mechanical digger which he hired out at a daily rate of $1,000. He was in the habit of replacing the digger every five years. On June 20, 1998, while the digger was being transported to a building site it fell from the transporter over an embankment and into the sea. Marcus, the owner of the transporter, was completely to blame for the accident. The digger was damaged beyond repair.

David, who shortly before the accident had ordered a new digger from the local agents, decided to hire a substitute digger at the rate of $500 per day. He could have purchased a substitute digger on the local market but he preferred to await the delivery of the new digger, which was due in the country within 2 weeks of the accident. However because of the industrial action on the port the new digger was delivered 12 weeks late.

Advise David on the measure of damages in an action against Marcus.

EXERCISE 3
In May 2012, Ms. Classy went to C&T Furnishings and entered into a contract for them to furnish her home on a hire purchase basis. In December 2012 she applied her entire Christmas bonus and incentive awards to paying off all her debts in full. Unfortunately, C&T Furnishings, did not make their computer equipment Y2K compliance and on New Year’s Day all their records were rendered unintelligible. Their records still had Ms. Classy as owning another 18 months of payments and of her not having made any payments since December, 2012.

On April 15th, the bailiff for C&T Furnishings, together with four burly men broke into Ms. Classy’s home while she was entertaining the CEO and members of the board of her company. They pushed everyone roughly aside and proceeded to pack up and take away the dining table on which they were eating. In fact, they cleaned out the entire house of all the items which Ms. Classy had purchased. On May 6th, C&T held a public auction and sold all the goods.
Ms. Classy had just spent most of her savings on remodelling the house and could not afford to buy new furniture and appliances to replace the ones that she had lost. Most of her income, in fact, now goes to paying tuition fees for her daughter who is studying for the CXC examinations.

Further to this, Ms. Classy had recently sent her BMW motor car to Quickfix Auto Garage for a maintenance check but due to her financial problems bought on by C&T’s actions she could not pay the bill on time. Without any notice, Quickfix sold the car which was worth $350,000 at the time, for $75,000, deducted their fee and gave the rest to Ms. Classy.

Ms. Classy now comes to you seeking advice as to the measure of damages she is likely to recover in any legal action taken on the above facts.

Advise her as to which items of loss is recoverable and whether the manner in which C&T Furnishings had handled her matter would affect her measure of damages.
2B.4 IMPECUNIOSITY

Loss resulting from the plaintiff's weak financial position is irrecoverable. *Owners of Dredger Liesbosch v Owners of Steamship Edison, The Liesbosch* [1933] AC 449

The denial of recovery for loss flowing from impecuniosity seems unjustified in terms of policy. As Sir Patrick Bennett QC said at first instance in *Perry v Sidney Phillips & Son* [1982]1 All ER 1005. In *Muhammad Issa El Sheikh Ahmed v Ali* [1947] AC 414 and *Trans Trust SPRL v Danubian Trading Co Ltd* [1952]2 QB 297 loss flowing from impecuniosity was held to be recoverable so long as it satisfied the normal test for remoteness and *The Liesbosch* was ignored.


See also *Lagden v O'Connor* 1 All ER 277 in relation to the taking of a loan to mitigate damages and whether defendant responsible for the interest on the loan even if it was excessive.

2B.5 CONTRIBUTORY NEGLIGENCE

The provisions of the Law Reform (Contributory Negligence) Act 1945 of the UK has been reproduced in various territories e.g.in Trinidad and Tobago in s. 28 of the Supreme Court of Judicature Act.

A. TORTS

(i) In order for the defence to apply the defendant must establish three points.

1. **the plaintiff must have been at fault or negligent towards himself:** *Jones v Livox Quarries Ltd* [1952]2 AB 608, *Owens v Brimmell* [1976] 3 All ER 765, *Gregory v Kelly* [1978]RTR 426

2. **the plaintiffs negligence must have been a factual cause of his loss:** *Froom v Butcher* [1976]QB 286, *Owens v Brimmell*

3. **the plaintiffs negligence must have exposed him to the particular risk of the type of damage suffered.** *Jones v Livox Quarries Ltd.*

(ii) How do the courts decide the extent to which the damages should be reduced? Denning LJ in *Davies v Swan Motor Co (Swansta) Ltd* [1949]2 KB 291, 326.
(iii) **Contributory negligence subsequent to the tort:** *The Calliope* [1970] P 172

(iv) **Is contributory negligence applicable to all torts?:** Refer to definition of “fault” as meaning ‘...negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort, or would, apart from this Act, give rise to the defence of contributory negligence.

**B. CONTRACT**

**Effect of Contributory Negligence in Contract for Damages**

a) where liability arises both in contract and tort coextensively, the provisions of the Act applies and damages will be reduced to take account of any contributory negligence on the part of the plaintiff - *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, *Fong Maun Yee v Yoong Weng Ho Robert* [1997] 3 LRC 138.

b) where the breach of contract does not amount to a tort as well, the Act does not apply and any contributory negligence on the part of the plaintiff can be disregarded - *Lambert v Lewis* [1982] 1 AC 225

c) where there is both strict liability in contract and coextensive liability in contract and tort, there can be no defence of contributory negligence - *Barclays Bank plc v Fairclough Building Ltd* [1995] 1 All ER 289

**Legislation Governing Contributory Negligence**

<table>
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<tr>
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2B.6 SPECIAL CIRCUMSTANCES CONCERNING BREACH OF CONTRACT

Apart from the five general principles limiting compensatory damages for both torts and breach of contract, there are three principles that limit compensatory damages solely for breach of contract.

(1) **The Rule in Bain v Folhergill** (1874) LR 7 HL 158: where a breach of contract for sale of land is occasioned by the vendor's inability without his own fault to show a good title, the purchaser can recover damages
   * only in respect of his deposit (with interest) and
   * his wasted expenses in investigating the title, in preparing the contract,
   * in respect of any other expense wasted because of the breach.

He cannot recover damage, for the difference between the value of the land and the contract price.


The Exception to this Principle: is in hire-purchase agreements where the debtor repudiates the contract: *Yeoman Credit v Waragowski* [1961] 3 All ER 145.

Qualifications on Principle:

a. Where the court considers that it was the parties’ intention that the defendant’s discretion should be exercised reasonably. *Abraham v Herbert Reiach Ltd* [1922] 1 KB 477, *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390

b. The courts judge the defendant’s least burdensome performance by taking all other potential losses into account. per Diplock LJ in *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, *Bold v Brough, Nicholson & Hall* [1963] 3 All ER 849

(3) **The Only Obligation Broken is to Pay Money:** Where the only obligation broken is to pay money, no damages can be awarded and the sole remedy is the award of the agreed sum.
London, Chatham and Dover Rly Co v South Eastern Rly [1893] AC 429. Rule does not affect the plaintiff's right to terminate the contract and sue for damages

Disadvantage the creditor: Firstly, he could recover no compensation for loss of the general use of the money during a delay before the agreed sum was paid (interest). Addressed by court’s statutory power to award interest. Secondly, he could recover no compensation for other losses caused by not receiving the agreed sum or receiving it late. However, see Wadsworth v Lydall [1981] 1 WLR 598.
PART 2C: FACTORS INCREASING THE ASSESSMENT OF DAMAGES

Contents
1. Inflation and Devaluation
2. Compensating Advantages
3. Taxation
4. Interest

2C.1 INFLATION AND DEVALUATION


DEVALUATION: Changes in the external value of money-foreign money liabilities: The traditional assessment date was made according to the rates applicable at the time of the loss. However, see Miliangos v George Frank (Textiles) Ltd [1976] AC 443 and Bibi Shamina v Sampat Dyal (1993) 50 WIR 239.


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2C.2 COMPENSATING ADVANTAGES

A compensating advantage occurs where the plaintiff’s actual position has been, or will be, improved by benefits acquired subsequent to and as a result of the tort or breach of contract.

WHEN ARE COMPENSATING ADVANTAGES IGNORED?

(a) Indirect compensating advantages are not deducted: See British Westinghouse v Underground Electric Rlys Co of London Ltd [1912] AC 673, Lavarack v Woods of Colchester Ltd. [1967] 1 QB 278.

(b) Many compensating advantages provided by third parties in response to the consequences of a tort or breach of contract are not deducted or are only partly deducted. Parry v Cleaver [1970] AC 1

TREATMENT OF VARIOUS BENEFITS


(ii) Non-state benefits: Such benefits are generally not deducted: Bradburn v Great Western Rly Co (1874) LR 10 Exch 1

2C.3 TAXATION

The question here is, in assessing damages for the gains that the plaintiff has been prevented from making by the defendant's tort or breach of contract, do the courts deduct income tax that the plaintiff would have paid on those gains?

(a) The Gourley principle
In *British Tramport Commission v Gourley* [1956] AC 185 the H/Ls held that, in assessing damages for loss of earnings, the tax which the plaintiff would have paid if he had been working for those earnings must be deducted. See also *Shove v Downs Surgical plc* [1984] 1 All ER 7.

When is tax applied? *Sarju v Walker* (No 1) [1973] 21 WIR 86, per Crane JA 102B.

2C.4 INTEREST

Trinidad & Tobago: s. 25 Supreme Court of Judicature Act Ch. 4:01
Barbados: s. 35 Supreme Court of Judicature Act Cap. 117A
Guyana: s. 12 Law Reform Miscellaneous Provisions Act 6:02
E.C.S.: Eastern Caribbean Supreme Court Statutes
St. Lucia: Art. 1009A Civil Code

The Award of Interest

**Purpose of award:** per Lord Denning MR in *Jefford v Gee* [1970] 1 All ER 1202, 1208. Also *Johnson v Browne* supra.
See also *BP Exploration Co (Libya) Ltd v Hunt* (No 2) [1982] 1 All ER 925, *De Souza v Trinidad Transport* (No. 2) (1971) 18 W.I.R. 150
The nature of the award is discretionary. *Johnson v Browne* at 391G-I.

Damages for breach of contract – is compound interest awardable in damages. *E. Elias & Co v AG*, HCA# 630/89

**Interest is not payable on:**

- damages for future pecuniary loss as plaintiff has not been deprived of the use of money due to him - *Jefford v Gee* (1970) 2 Q.B. 130, *Cookson v Knowles* [1977] 2 All E.R. 820, *Hosein v Camacho* 30 W.R 333 at 341D
- damages for non-pecuniary loss - *Saunders v Edwards* [1987] 1 WLR 1116


**What is the rate of interest?**

**Commercial cases:** for large companies the courts usually take the bank’s base interest rate plus 1% - *BP Exploration v Hunt* (No 2) [1982] 1 All ER 925, but for smaller companies this can be higher - *Catnic Components Ltd. v Hill & Smith Ltd* [1983] FSR 512.

**Personal Injury cases:** See *De Souza’s Case* and *Jefford v Gee, Mohammed v Thorne & Ors* [1972] 19 WIR 500. See method suggested in *Dexter v Courtaulds Ltd* [1984] 1 All ER 70. No evidence that this has been followed in Caribbean.

**At what date is it assessed?**
I. Cookson v Knowles. However, in Pickett v British Rail Engineering Ltd [1979] 1 All E.R. 774 the HL overruled this. See also Birkett v Hayes [1982] 2 All E.R. 710 where the rate of 2% was awarded in light of Pickett’s case and confirmed in Wright v British Railways Board [1983] 2 AC 773.

ii. Interest on Foreign Currency Accounts: Where Miliangos applies and judgment is expressed in foreign currency, interest should be awarded at the rate applicable to that currency. Shell Tankers (UK) Ltd v Astro Comino [1981] 2 Lloyds Rep 40.
PART 2D: DAMAGES NOT BASED STRICTLY ON COMPENSATION

Contents
1. Nominal Damages
2. Contemptuous Damages
3. Aggravated and Exemplary Damages Compared
4. Exemplary Damages
5. Aggravated Damages

2D.1 NOMINAL DAMAGES

Several torts are actionable per se, as well as breach of contract, ie without proof of damage. One consequence is that even though the court is satisfied that the plaintiff has not suffered any damage, he is still entitled to damages for the defendant's breach of contract or tort. Such damages are termed nominal and they comprise a trivial sum of money, usually about Ј2 (UK) and in Caribbean the sum is variable. *C and P Haulage v Middleton* [1983] 3 All ER 94. Note the application of the reliance interest in this case.

For a considered judgment on the application of nominal damages see Basdeo Persad Maharaj J in *Long v Collins* No S2114/87 (TT) at page 38 - 40. Note also award at 1st instance in *Grayson v Quinn* [1963] 6 WIR 109.

Further, failing proof of substantial damages, a judge can award nominal damages. The term nominal damages does not mean small damages - *State Vacuum Stores of Canada Ltd. v Phillips* [1954] CCS 243.

The function of nominal damages is merely to declare that the defendant has committed a wrong against the plaintiff and hence that the plaintiff's rights have been infringed. However, this of little importance after Devlin J's decision in *Anglo-Cyprian Trade Agencies v Paphos Wine Industries Ltd* [1951] 1 All ER 873 that a plaintiff awarded nominal damages should not necessarily be regarded as a successful plaintiff for the purposes of costs. WI position?!
2D.2 CONTEMPTUOUS DAMAGES

Rarely awarded other than by a jury in a defamation case, these are damages of a very small amount-usually of the lowest coin of the realm whose function is to indicate that, while the defendant has committed the alleged wrong (including a tort actionable only on proof of damage) the plaintiff deserves no more than a technical acknowledgment of the infringement of his rights, because of his own conduct in the matter.

A plaintiff awarded merely contemptuous damages is even less likely to recover his costs than one awarded nominal damages - Martin v Benson [1927] 1 KB 771.

In exceptional cases may even have to pay the costs of the defendant - Red Mans Syndicate v The Associated Newspapers Ltd [1910] 26 TLR 394.

The award is usually given in cases of defamation but is not confined to such cases: Gambles v Sates [1920] 36 TLR 427.

2D.3 AGGRAVATED AND EXEMPLARY DAMAGES COMPARED

THE CAUSE OF CONFUSION

Very often aggravated and exemplary damages are granted by the courts on the same facts and this has often led to a blurring of the line and the rationale of these two forms of damages. The actions of a defendant which tend to humiliate and aggravate the damage to the plaintiff for which he should be compensated often attracts the sanction of the court to punish him for his high-handedness as well as to set an example to others.

ROOKES V BARNARD

Here the House of Lords sought to set policy guidelines as to when each should be applied by distinguishing and limiting the situations when exemplary damages will apply. The relevance of this approach to the Caribbean should be studied in the context of dicta of the Jamaican Court of Appeal in Douglas v Bowen [1974] 22 WIR 333 with particular attention to the judgment of Graham-Perkins JA.
COMPARE AND CONTRAST

AGGRAVATED DAMAGES
This is based on the compensatory principle of tort and is used to describe the compensation payable to the plaintiff to satisfy his mental suffering and humiliation at the hands of the defendant. *Hill v Church of Scientology of Toronto* 114 DLR (4th) 1.

Its computation is part of the general award of damages where the humiliation and mental suffering of the plaintiff is accounted for.

EXEMPLARY DAMAGES
This is meant to punish the defendant for his oppressive and high-handed actions and is now only awardable under the categories defined in Rookes. *Marsahll v Semper* [1966] 10 WIR 129.

This is computed after an award of aggravated damages is granted and will only be awarded if it is considered that that award is insufficient to punish the defendant.

2D.4 EXEMPLARY DAMAGES

(1) ARE EXEMPLARY DAMAGES AWARDED FOR BREACH OF CONTRACT?

2. WHEN ARE EXEMPLARY DAMAGES AWARDED FOR TORTS?

(A) THE THREE CATEGORIES IN ROOKES V BARNARD
*Rookes v Barnard* [1964] AC 1129. See also *Cassell & Co Ltd v Broome* [1972] AC 1027

(i) 'Oppressive, arbitrary or unconstitutional actions by servants of the government'
In *Cassell v Broome* it was made clear that 'servants of the government' is to be widely construed. The defendant must be exercising governmental power. *AB v South West Water Services Ltd* [1993] 1 All ER 609, *Marshall v Semper* [1966] 10 WIR 129.


(ii) 'The defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff':

What is required is:

(a) knowledge that what is proposed to be done is against the law or a reckless disregard whether what is proposed to be done is illegal or legal and

(b) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss. *Cassell v Broome* supra.

Damages under this second category are not concerned merely to reverse the defendant's unjust enrichment but also to discourage the financial benefit of such action.

**Landlord and Tenant actions:** Apart from libel, the main use of this second category has been in actions by tenants against landlords for wrongful harassment or eviction founded on the torts of trespass or nuisance. *Drane v Evangelou* [1978] 2 All ER 437, *Guppys (Bridport) Ltd v Brookling and James* (1983) 269 Estates Gazette 846, *Douglas v Bowen*, supra, *Valentine v Rampersad* [1970] 17 WIR 12.

**Trespass:** *Beckles v Chandler* [1959] 2 WIR 1.

**Tortious interference with the plaintiff's business:** *Bell v Midland Rly* (1861) 10 CBNS 287, *Messenger Newspaper Group Ltd v National Graphical Association* [1984] IRLR 397

Can sexual harassment attract exemplary damages? *Norberg v Wynrib* [1993] 2 LRC 408

(iii) **Express authorisation by statute**

In *Rookes v Barnard* Lord Devlin mentioned the Reserve and Auxiliary Forces Act 1951, s 13(2), as a statutory provision expressly authorising exemplary damages. See section 97 (2) of the Copyright Designs and Patents Act 1988 (formerly s. 17 (3) of the Copyright Act 1954) which gives the court power in assessing damages for an infringement of copyright to award such additional damages as the court may consider appropriate for the flagrancy of the infringement. *William v Settle* [1960] 2 All ER 806

In *Redrow Home Ltd v Brett Bros. plc* The Times, Jan 26, 1998 the HL has held that that provision did not provide a remedy of additional damages independent of the remedy under s. 96 (2) of the Act so that additional damages under s. 97 could only be awarded
when normal compensatory damages being assessed there. Is this an attempt to limit this branch of the rule?!

(B) FURTHER RESTRICTION BEYOND THE THREE CATEGORIES

(i) **The tort is not one for which exemplary damages were awarded before Rookes v Barnard:** See Bradford City v Metropolitan Council v Arora [1983] FSR 512 However, held to be per incuriam by CA in AB v South West Water Services Ltd [1993] 1 All ER 609 which decided that Cassell v Broome required that the tort be one for which exemplary damages had been awarded prior to 1964.

Can exemplary damages be awarded for breach of a constitutional right?: Mountain Housing Development Ltd v AG HCA #1070/88, doubted by de la Bastide CJ AG v MM Brokers Ltd.[1996] 50 WIR 462. Isn’t this extending application beyond categories laid down by Rookes? Latest position is stated in R. Jorsingh v AG [997] 52 WIR 501

(ii) **Double punishment:** Archer v Brown [1984] AC 2 All ER 267, Loomis v Rohan (1974) 46 DLR (3d) 423, Norberg v Wynrib . No exemplary damages should be awarded since a person should not be punished twice for the same offence.

(iii) **The plaintiff’s conduct:** In Rookes v Bamard Lord Devlin said that the court should take into account all mitigating circumstances. Therefore, exemplary damages may be refused (or reduced) if the plaintiff has brought the defendant's conduct upon himself. O’Connor v Hewiton [1979] Crim LR 46.

(iv) **Compensatory damages sufficient:** As stressed in Rookes v Barnard and Cassell v Broome there should be no exemplary damages if it is considered that the compensatory damages awarded are adequate to punish the defendant. Carrington v Karamath supra.

(C) ASSESSING EXEMPLARY DAMAGES

**Discretionary:** Whatever sum is felt necessary to punish the defendant and to set an example to others is allowable. The parties' means and all mitigating circumstances should be taken into account such as the plaintiff’s own contributory blameworthy conduct, as well as what defendants can pay.

**Joint Defendants:** Where there are joint defendants exemplary damages must not exceed the lowest sum that any of the defendants ought to pay; so that if damages are not justified against any one of the defendants, they should not be awarded at all. Cassell v Broome, Marshall v Semper & Ors [1966] 10 WIR 129
Multiple Plaintiffs: where there are multiple plaintiffs the total amount of exemplary damages considered fair for the defendant to pay should first be decided on. Then that amount can be divided among the plaintiffs. Riches v News Group Newspapers [1986] QB 256.

Quantification: there is no need for trial judge to separately quantify damages under this head - AG v Reynolds supra.

2D.5 AGGRAVATED DAMAGES

5A: TORTS
The law has traditionally been more favourable to the distressed plaintiff in tort than in contract. So there has been compensation, often under the head of 'aggravated damages', for mental distress caused by torts such as:

Malicious prosecutions: Savile v Roberts (1698) 1 Ld Raym 374
Assault and battery: Marshall v Semper, W v Meah [1986] 1 All ER 935
Defamation: McCarey v Associated Newspapers Ltd [1965] 2 QB 86
Nuisance: Bone v Seale [1975] 1 WLR 797
Trespass to goods: Owen & Smith v Reo Motors Ltd (1934) 151 LT 274
Statutory Provisions: See the Copyright, Designs and Patents Act 1988, s 97(2) discussed above. Also s 66(4) of the Sex Discrimination Act 1975 and s 57(4) of the Race Relations Act 1976 the courts are empowered to award damages for 'injured feelings' where the plaintiff sues for breach of statutory duty.
Deceit: Archer v Brown [1984] 2 All ER 267

LIMITATIONS ON COMPENSATION FOR MENTAL SUFFERING
There is no tortious recovery for grief, anguish, upset, worry or strain suffered by a person as a result of the personal injuries tortiously inflicted on that person's spouse or child' except for statutory bereavement damages. Dicta in Bagley v North Herts Health Authority and Whitmore.
There can be no recovery (except under the tort of assault) for the mental distress of being frightened for one's own safety. *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1.

**(2) Assessing damages for mental distress**

As with all non-pecuniary losses the aim must be to award a fair and reasonable sum, which is in line with other mental distress awards. However, the courts do not regard mental distress as that serious for they have often stressed that awards should be kept at a moderate level. *Watts v Morrow* [1991] 1 WLR 1421.

**AGGRAVATED DAMAGES IN DEFAMATION ACTIONS**

Most awards of aggravated damages are found in defamation actions where the following factors are considered.

1. **The defendant's conduct:** The defendant's conduct is relevant in this way to show whether he has acted with or without malice.

2. **Importance of Evidence:** Tindal C.J. in *Pearson v. Lemaitre* "that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter."

   (a) Evidence to prove malice in aggravation of damages. Malice may be shown by the defendant's conduct generally, but there are two particular ways in which it has come to be shown: by other derogatory statements made of the plaintiff by the defendant and by the defendant's persistence in the accusation, such persistence being either by way of an unreasonable plea of justification or by lack of any, or any adequate, apology.

   (b) Evidence to disprove malice in mitigation of damages. Must be specially pleaded. R.S.C 1975 of Trinidad and Tobago, Ord. 80, r. 5.

   (i) Truth or partial truth of the statement

   (ii) Statement not originated by the defendant.

   (iii) Provocation of the defendant. If the plaintiff has provoked the defendant into the defamatory statement, this is evidence to disprove malice in mitigation of damages. *Watts v. Fraser* (1835) 1 M & Rob 449

   (iv) Apology by the defendant. By statute since 1843, and probably before then at common law, an apology has been admissible in mitigation of damages.

   (v) The plaintiffs character: bad reputation

For a detailed discussion on the law of evidence regarding this area, see McGregor on Damages.
3. **Other circumstances of the plaintiff and defendant:** On principle, the social and financial position should be relevant to damages only in so far as it shows the extent of the injury to the plaintiff. Also the extent of the publication of the defamatory statement as a factor operating in aggravation or mitigation of the damage.

4. **Action for damages against other persons:** Section 12 of the Defamation Act 1952 UK provides that a defendant can give in evidence in mitigation that the plaintiff has recovered from other parties damages for defamation on the same basis for which he is now suing the defendant. *Lewis v. Daily Telegraph* [1963] 2 All ER 234
Traditionally Addis v Gramophone Co Ltd [1909] AC 488 was regarded as barring any damages for mental distress in an action for breach of contract. However, since the Court of Appeal decision in Jarvis v Swan's Tours [1973]QB 233 mental distress damages have been awarded in many cases, primarily but not only for ruined holidays. See Alcala v TSTT HCA# (TT).

CASES COMPENSATING DAMAGES FOR MENTAL DISTRESS
Where the predominant object of the contract, from the plaintiff’s point of view, was to obtain mental satisfaction, whether enjoyment or relief from distress. See ruined holiday cases, such as Jarvis v Swan's Tours. Also Heywood v Wellers [1976] QB 446: failure of solicitor to secure injunction.


Beyond those two situations, mental distress damages are irrecoverable. Shove v Downs Surgical plc [1984] 1 All ER 7, Bliss v South East Thames Regional Health Authority [1987] 1 ICR 700, Hayes v James & Charles Dodd [1990] 2 All ER 815. All these cases limited and then overruled the attempt to extend the principle in Cox v Philips Industries Ltd.

Review the case of Aaron Torres v PLIPDECO Civil Appeal (TT) NO. 84 of 2005 where the Court of Appeal delivered a strong judgment deviating from the common law approach of not awarding exemplary damages for breach of contract.

Torres v AG dealing with breach of contract of employment. See Barbadian position in Ismael v Queen Elizabeth Hospital Board Civil Suit No: 0011 of 2011 and Sealey v First Caribbean International Civil Appeal No.10 of 2008.

See also
Seegobin v AG CV 2009-03089
S. Wallace v AG Claim No.: CV2008-04009
Persad v AG Claim No. CV2008-04811
Mohammed v AG Claim No CV2009-02792
Brown and Ors v AG CV 2009-00900
Baboolal v AG CV 2008-02487 (formerly 1053 of 2005)
EXERCISE 1
Discuss the effect of the case of Torres v PLIDECO on the assessment of aggravated and exemplary damages.

EXERCISE 2
On the afternoon of Sunday, April 24, 2013, Mr. John and his wife, Prudencia, his children and Simon, a friend, were at home viewing a documentary entitled "Wonders of the Undersea World" when four armed policemen in uniform, burst into the family room. One officer seized Mr. John who was then handcuffed by another officer. They marched him at gun-point and in full view of curious neighbours, to a Police vehicle which was parked some distance away from the house, In the meantime Prudencia became hysterical and subsequently fainted. Simon, who was an ex-convict and attended the same church as the Johns, took Prudencia to the hospital where she was treated for nervous shock.

At the Police station Mr. John was searched and put into a cell where he was interrogated non-stop during the night until he fainted from lack of sleep and beatings. During this time the Police told Mr. John that they had received a report from an ex employee of Mr. John that "drug barons" used the Johns' residence to plan "drug moves". This information turned out to be false and groundless.

Advise on the measure of damages.
The Complete Advocate

The following process of developing an Advice on Quantum is taken from the book “The Complete Advocate” by Justice Ronnie Boodoosingh. Students are advised to review the book so as to put this extract in the context of drafting legal opinions generally.

An Outline of an Opinion/Advice on Quantum

Heading

ADVICE ON QUANTUM

Claim of Mary Windsor against Adrian Gray & Speedy Claims Insurance Company

Set out what you have been asked to advise on.

1. I have been asked to advise Speedy Claims Insurance Company ("Speedy Claims") on the quantum of damages relative to Mary Windsor's claim for damages following the death of her son in a motor vehicle accident.

Set out the facts.

2. The claimant is the mother and administrator of the estate Charlie Windsor ("the deceased") who was twelve (12) years old at the date of his death.
3. Adrian Grey was insured with Speedy Claims, who accept they are liable to pay, under a valid contract of insurance between. Mr. Grey and themselves.
4. The deceased was injured on May 25 2003 and died on June 2003 at the St. Augustine General Hospital. The death certificate shows that he died from multiple internal injuries consistent with being struck by a motor car.
5. Speedy Claims accepts its insured was negligent and wholly to blame for the accident.
6. I am informed that Speedy Claims desires to bring this matter to an end quickly.

Set out the law that is being considered.

7. Two actions may be brought following the death of a person. These are a survivorship claim and a dependency claim. I am informed that there is no claim to be made by anyone as a dependent. I will, therefore, advise solely on the survivorship claim.

Set out the legal basis for the claim.

8. Under section 27(1) of the Supreme Court of Judicature Act, Chapter 4:01 all causes of action (except for specified causes not relevant to the instant case) vested in a deceased person at the date of death, survive for the benefit of his estate. In calculating the award of damages no loss or gain to the estate consequent on the death is taken into account, except that a sum in respect of funeral expenses may be included.
Set out what may be claimed in the survivorship claim.

While the approach of the court is to make one award for general damages the various heads of damages that make up such an award will be considered here. These are as follows.

- Pain and suffering
- Loss of amenities
- Loss of expectation of life
- Lost years
- Special damages

Set out what may be claimed under each head above outlining briefly the supporting law and discussing any relevant facts.

For example, if a claim has been maintained for pain and suffering, a relevant discussion on facts may be as follows.

In this case the deceased was injured on May 25 2003 and died 6 days later on June 01 2003. To date, no information has been produced to show that the deceased was conscious during the six-day interval. This information is necessary to determine whether damages should be awarded under this head.

In *Bishop v Cunard White Star* (1950) P240 it was held that no award should be made under this head, "in the absence of clear evidence reasonably prolonged suffering".

If the claimant fails to establish that the deceased was conscious and capable of experiencing pain during the six-day interval, then no award is payable under this head. On the other hand, if it is proved that there were periods of consciousness and pain was felt during these periods then as a conventional award, I advise that $10,000.00 is reasonable under this head.

Do an analysis for each of the headings of whether it would be applicable in your case, and if so, what would be a reasonable award.

Regarding special damages, a short discussion may be as follows.

**Special Damages**

A claimant is entitled to recover all expenses reasonably incurred, and which can be proved, as a result of the accident. Reasonable expenses include wake expenses, funeral expenses, cost of any clothing destroyed and the cost of travel to and from the hospital. Any claims that Special Claims consider to be reasonable and which are capable of proof should be paid. Bear in mind that the claimant may not be able to prove receipts for all of these expenses. In the interest of settling the claim the insurers may wish to be flexible on this issue.

After dealing with each item it may be useful to do a summary of what you advise would be a reasonable sum under each head.

I advise that the following payments are reasonable in the settlement of this claim:
(1) Pain and Suffering $10,000.00  
(2) Loss of Amenities $10,000.00  
(3) Loss of Expectation of Life $15,000.00  
(4) Lost Years $96,500.00  
(5) Special Damages $3,500.00  
TOTAL $135,000.00

*You should include ending words such as follows.*

Please let me know if you need me to clarify any of the matters raised above. I can be contacted at my Chambers at telephone number 123 4567.

Include your signature, address of your Chambers and the date. Each paragraph should be numbered to ensure ease of reference.
PART THREE – ASSESSMENT OF DAMAGES IN SPECIFIC AREAS

PART 3A: DAMAGES FOR PERSONAL INJURIES

Contents
3A.1 Introduction
3A.2 Quantifying Pass Pecuniary Loss
   Loss of Earnings
   Cost of Care
   Miscellaneous
3A.3 Quantifying (General) Future Pecuniary Loss
   Loss of Earning
   Loss of Earning Capacity
   Lost Years
   Miscellaneous Awards including Cost of Care
3A.4 General (Non-Pecuniary) Loss
   Pain and Suffering
   Loss of Amenities
   Loss of Expectation of Life
3A.5 Making the Necessary Deductions
3A.6 Adding Interest

3A.1 INTRODUCTION

WHAT IS PERSONAL INJURY?
Personal injury includes disease and illness, both physical and mental, as well as the more obvious cuts, bruises, broken bones and loss of limbs.

Claims for personal injury are nearly always founded on a tort (and usually the tort of negligence or breach of statutory duty) but they can also be founded on a breach of contract. Subject to differences in relation to some of the limiting principles, like remoteness and contributory negligence, the principles applied are and should be the same whether founded on tort or breach of contract.
THE ENGLISH POSITION

1. The English position re underlying principle informing compensation in tort especially in relation to *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 it is no ground for appeal that the global award is too high; rather rationality dictates that a particular item of damages should be challenged. See also *Pickett v British Rail Engineering Ltd* [1980] AC 136.

2. In the context of personal injury, special damages now appear to refer to damages awarded for all pecuniary loss, including future pecuniary loss. General damages refer to damages for non-pecuniary loss.

By RSC Ord 18, r 12(lA-C), the amount of the special damages claimed, and the details, must be pleaded: ie the plaintiff must serve with his statement of claim a statement giving full particulars of the expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings and of pension rights).

Does our new rules contemplate such a change? See p. 59 of Civil Justice Review which seems point in this direction.

3. Section 32A of the Supreme Court Act 1981, as inserted by s 6 of the Administration of Justice Act 1982, empowers courts to award provisional damages where there is a chance that at some time in the future the injured person will develop some serious disease or suffer some serious mental or physical deterioration. While damages are awarded without reference to this chance, provision is made for damages to be awarded in the future is this situation materialises.

THE CARIBBEAN POSITION

The accepted heads of damages for personal injury cases was authoritatively stated by Wooding CJ in *Cornilliac v St. Louis*. However, this is honoured more in the breach than in the observance. Do C’bean judgments really analyse personal injuries according to these heads?

**How do the courts actually make their assessment?** *Heerallal v Hack Bros* [1977] 25 WIR 117 per Haynes C. regarding:

- the restitutive vs the compensatory nature of an award in damages: pp 124 H - 125 D
- global vs itemised awards: pp 125 C - 128 B
- comparability of awards: pp 128 D - 129 E
- calculation of the multiplicand and multiplier: pp132 C, 139 B
- double deduction: p 134 B
- the overall figure: p 135 H
- future earning prospects: 141 C
3A.2 QUANTIFYING PAST PECUNIARY LOSS

SPECIAL DAMAGES: Past pecuniary mainly consist of special damages. This is because much of this loss has already been incurred and is easily quantifiable at the time of the trial. It includes expenses incurred up to the date of the assessment of damages. The plaintiff has to plead and prove the item of loss and its value *Grant v Motilal Moonan Ltd* [1988] 43 WIR 372. If the plaintiff fails to prove that an item of expenditure is reasonable, the court will either not award it or will award such sum as would have been reasonable.

**Items to exclude:** Unreasonable claims or claims where the amount claimed is unreasonable and claims that cannot be proved

3A.2.1 LOSS OF PAST EARNINGS

The plaintiff is entitled to the net earnings he would have made but as a result of his injury has not made. In principle the expenses involved in earning, which have been saved (eg the costs of travelling to work), should be deducted, although in general this appears not to be the practice.

In assessing lost earnings, pay attention to:

- what was the plaintiff earning at date of the injury
- what he would have earned or
- what he had a realistic chance of earning but for his injuries *from the accident to the trial*.

Regular vs Fluctuating Employment: Where the plaintiff was a regular wage earner the loss can be calculated by reference to payment for similar work. Where earnings fluctuate, an average will be taken over an appropriate period (varies from case to case depending on type of work, seasonality, etc.)

Taxation re Gourley Principle: Where plaintiff’s claim is for a partial loss of earnings, the earnings that he has lost are deemed to be the top slice of his income (so take off the higher rate tax until his earnings fall below the higher rate threshold). This applies equally to compulsory contributions to a pension scheme - *Dews v NCB* [1987] 2 All ER 545.

Expenses incurred in employment: Set off expenses he would have incurred in employment e.g. travel, special clothes, etc. unless he still incurs them.
3A.2.2 COST OF CARE

1. The plaintiff can recover all medical, nursing and hospital expenses where reasonably incurred. It follows that if the plaintiff does not incur these expenses because he makes use of the NHS, he cannot recover what he would have had to pay if he had had private treatment. *Rialas v Mitchell* (1984) 128 Sol Jo 704

2. There is still a valid claim for nursing expenses even though they may be rendered by a wife, or someone else who is performing the services voluntarily. *Cunningham v Harrison* or a mother as in *Donnelly v Joyce* [1974] QB 454 and *Housecraft v Bumett* [1986] 1 All ER 332. Most importantly see House of Lords decision in *Hunt v Severs* [1994] 2 AC 350 in the H/L.

3. Voluntary services rendered by the defendant (who is a family member?): In *Hunt v Severs* H/L reversing C/A.

4. Other gratuitous services of defendant: It was accepted that where a tortfeasor gratuitously supplies a wheelchair to the plaintiff he has injured, or gratuitously repairs the bodywork of a car that he has damaged, or gratuitously replaces and re-erects a fence that he has destroyed, the plaintiff cannot claim the value of those goods and services. *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514.

5. The cost of buying, fitting out and moving to special accommodation is allowable: but the capital cost of a new house (as opposed to the cost of the capital) is not awarded since the plaintiff still has that capital in the form of the house. In *Roberts v Johnstone* [1989] QB 878.


7. Out of Pocket Expenses incurred by Third Parties: *Schneider v Eisovitch* [1960] 2 QB 430

3A.2.3 OTHER PECUNIARY LOSSES

All other pre-trial pecuniary losses should be recoverable provided the usual limiting principles, such as remoteness and the duty to mitigate, are not infringed.

A plaintiff’s 'loss of housekeeping capacity': *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd’s Rep 257.

Loss directly consequent to a divorce: *Jones v Jones* [1985] QB 704. However, see *Pritchard v J H Cobden Ltd* [1988] Fam 22.
On January 1, 2013 Denise then aged 24 years, was involved in an accident for which Charles was totally to blame. Shortly after the accident she was admitted to a private hospital in an unconscious state and did not regain consciousness until six weeks later. Medical reports indicated that she suffered severe head injuries and it was unlikely that she could ever lead an independent life.

Denise was discharged from hospital on July 1, 2013 and her mother, Doreen who was then employed as a secretary at $3,000 per month, gave up her job to care for her daughter. Doreen also spent a total of $700 for visits to the hospital during her daughter’s period of hospitalization. Denise’s hospital and other related medical expenses amounting to $4,000 were paid for by her fiance, Frank.

At the time of the accident Denise was employed as a social worker earning $5,000 per month, which she was paid until June 30, 2013. After the accident, she was paid a lump sum of $500,000 under the terms of an accident insurance policy effected by her. She also now receives $1,000 per month under this policy.

Denise, who represented her country at hockey, is now in a state of chronic depression and is particularly worried about her prospect of marriage, as Frank, has since married someone else.

Denise has taken legal proceedings against Charles and the hearing of the assessment of damages is set for January 30, 2014. She seeks your advice on the likely measure of damages and her entitlement to interest.

Advise Denise.
3A.3 QUANTIFYING GENERAL DAMAGES: FUTURE EXPENSES

3A.3.1 FUTURE LOSS OR EARNINGS

This arises where there is at the date of trial an annual loss of earnings which is measurable at today's values, and evidence that it will continue into the future. If at the date of trial there is no measurable annual loss, but evidence that some loss is likely to accrue in the future, then an award for loss of earning capacity will be more appropriate.

The judicial approach to converting future loss of earnings into a present capital sum is to multiply a multiplicand by a multiplier.

The Multiplicand: The multiplicand is basically the plaintiff’s present annual loss of net earnings, ie the annual net sum the plaintiff would at present have been earning minus what he actually is earning. This figure is then adjusted to take account, for example, of lost promotion prospects. See Heeralall v Hack Bros

The Multiplier: The starting point for the multiplier is the estimated number of years of disability from the trial. Where the plaintiff is expected to be disabled for the rest of his life, the starting point is the remaining years of working life. This figure is then adjusted on the following:

- a reduction for the fact that the plaintiff receives a capital sum now, rather than periodical payments over the years.
- a reduction for the contingencies of life, for example the chance that the plaintiff might die earlier than expected or might have become unemployed irrespective of the injury.

The aim is to provide a lump sum which, when invested, will produce an income in terms of interest and withdrawals of capital equal to the lost income over the plaintiff's working life.


The Average: In practice, the maximum multiplier is about 18 and the norm for a 30-year-old is about 15-16.
Factors Which Affect The Multiplier

(a) **The plaintiff’s age:** The older the plaintiff the lower it is likely to be since he has lost fewer working years. The reverse is not quite true. Maximum multipliers tend to go to plaintiffs in their early twenties. Below that age special considerations apply.

(b) **The plaintiff’s life expectancy:** This is a relevant factor that operates in the same way as age. But there is a special rule where life expectancy has been reduced as a result of the injury.

(c) **Plaintiff's sex.** This can be an important factor re loss of marriage prospects/actual working life (“female plaintiffs” - infra)

(d) **Plaintiff’s pre-accident employment:**

<table>
<thead>
<tr>
<th>Employment Status</th>
<th>Multiplier</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jobs with low retirement age</td>
<td>low multiplier</td>
</tr>
<tr>
<td>Self-employed with no retirement age</td>
<td>higher multiplier</td>
</tr>
<tr>
<td>Risk of redundancy/no regular job</td>
<td>low multiplier unless alternate employment.</td>
</tr>
</tbody>
</table>

(e) **Plaintiff's earning capacity and career prospects:** If increased earnings. through promotion/development of career, etc., this will go to increase the multiplier.

(f) **Plaintiff's actual earning capacity:** Account must be taken of anything the plaintiff call reasonably be expected to do to mitigate his loss, by developing skills he has, retraining, etc.

(g) **Plaintiff’s Health:** If the plaintiff was in ill health before his injury, this may well go to reduce the multiplier.

(h) **General uncertainty:** The less certain the court is as to what the future would have held in store for the plaintiff, the greater the discount that is likely to be made from the multiplier.

Factors That Do Not Affect The Choice Of Multiplier

a. **Future inflation:** High inflation is usually accompanied by higher interest rates and so no adjustment needs to be made *Lim v Camden Health Authority* [1980] AC 174, *Hodgson v Trapp* [1988] 3 All ER 870.

b. **The period between injury and trial:** Not taken into account - *Pritchard v J H Cobden* [1987] 1 All ER 300. However, the court looks to the number of working years lost at the date of trial, not at the date of the injury. The rule is the opposite to what applies in claims under the Fatal Accidents Act (see 32.3.4.5) and operates slightly in favour of plaintiffs who are slow in bringing their cases to trial.
SPECIAL CIRCUMSTANCES

Female Plaintiffs and Future Loss of Earnings: A female plaintiff may have a lower multiplier applied to her annual loss than that which would be applied to a male in the same job as the court may take account of the possibility (on evidence) that she would have given up or interrupted her employment at some time in the future to have children and raise a family.

Loss of marriage prospects: This is both a loss of amenity and a financial loss, she has lost the financial support her husband would have provided had she given up work to raise a family. Although to make an award for lost marriage prospects and loss of future earnings may amount to double recovery, one can cancel the other out - Moriarty v McCarthy [1978] 1 WLR 155 and Hughes v McKeown [1985] 1 WLR 963.

Child Plaintiffs and Future Loss of Earnings: There can never be a measurable annual loss and so damages assessed on a multiplier/multiplicand basis are not prima facie appropriate. Where the plaintiff is very young, the court is likely to make an award for loss of earning capacity rather than loss of future earnings Joyce v Yeomans [1981] 1 WLR 549. But if the plaintiff has lost any chance of career or employment, the court will sometimes attempt to assess damages on a multiplier/multiplicand basis Coke v Wiseman [1981] 3 All ER 852, Mohammed v Theodore infra

The overall award is likely to be small and the multiplier will also be unusually low because of:
(a) The large number of uncertainties to be considered.
(b) The additional element of accelerated receipt - the plaintiff may be receiving a" award for lost earnings ten or more years before he would ever have earned anything anyway.

3A.3.2 LOSS OF EARNING CAPACITY

This head of damages arises where there is clear evidence that the plaintiff will not earn as much in the future as he would have done but for his injury, but there is nevertheless no measurable annual loss to found an award for loss of future earnings on a multiplier/multiplicand basis. Instead an award for loss of earning capacity may be made.

When is an award of this kind appropriate?
(a) Where the plaintiff is back in his pre-accident employment, or in work of equal value,
i. if, as it result of his injury, he will at some time in the future be forced into an early retirement or less well paid job, and this is a real, or substantial, risk, a lump sum award can be made \(\textit{Moeliker v A. Reyrolle & Co Ltd [1977] 1 All ER 9.}\)

ii. and is not likely to lose it, but nevertheless his injury has damaged his prospects of promotion, ability to advance his career.

(c) Where the plaintiff is handicapped on the labour market by his injury (was unemployed at the date of the accident, or is not yet back at work, and is now going to find work harder to come by, or will find that the range of jobs open to him is narrower than it was.

(d) Where the plaintiff is a child who has not yet entered the labour market.

\textbf{Quantification of an Award for Loss or Earning Capacity:} The award is quantified as a round lump sum which is chosen on a fairly arbitrary basis, with some reference to awards in previous cases.

\textbf{CO-RELATION BETWEEN L/EARNINGS AND L/EARNING CAPACITY}

The courts do now always draw a clear distinction between damages for loss of earnings and loss of earnings capacity, and occasional hybrid awards can be found where damages for loss of future earnings have been assessed as a lump sum, or where damages for lost earning capacity have been quantified by means of a speculative multiplicand and multiplier.

The two heads are normally alternative to each other, but there may be cases where an award under each head is appropriate, e.g. where the plaintiff has not yet gone back to work but is expected to do so in, say, a year's time; he will then resume his pre-accident employment but will still be handicapped on the labour market. In such a case the court would probably award one year's loss of earnings and a small lump sum.
Sally is 21 years old and is an excellent football player. She has recently left school with outstanding academic credentials but wishes to pursue her football career before she gets ‘over the hill’ in football years. She currently works for at a local fast food outlet.

Two months ago a professional football team from the US ‘scouted’ her and made certain proposals for her to play for their club in exchange for a lucrative contract and a fully-funded academic scholarship to pursue the career of her dreams in medicine. Last week, Tom who was driving his father’s BMW, broke the red light and ran over Sally while she was crossing the road. Sally’s prognosis is that she will never be able to play football again and her crushed fingers will also make her desired ambitions to be a doctor impossible.

Advise Sally as to the measure of damages to which she is entitled.
3A.3.3 LOSS OF INCOME DURING THE LOST YEARS

**Basis Or Assessment:** A plaintiff can claim loss of future earnings, not only for the period he will survive, but also for the years he has lost, unless that loss is too remote to be measurable *Pickett v British Rail Engineering* 119801 AC 136. It will be too remote to be measurable if, for example, the plaintiff is a very young child *Coke v Wiseman* or if the years that have been lost would make only a negligible difference to the choice of multiplier.

**Deduction for living expenses:** But in a lost years case a deduction will have to be made from the multiplicant to take account of the plaintiff’s living expenses over those lost years which he will no longer incur and so which cannot be recovered. *Jamaica Public Service Co Ltd v Morgan* [1966] 44 WIR 310.

'Living expenses' includes all that the plaintiff would have spent exclusively on himself - both needs (food, etc.) and pleasures (entertainments, etc.), *but not what he would have saved or spent in the support of his dependants, or others, such as girlfriends*. Expenditure which would have been both for his own and his dependents' benefit (e.g. rent, mortgage) has to be apportioned and a share taken from the multiplicant as the plaintiff's living expenses (*Harris v Empress Motors* [1983] 3 All ER 561)

**Two Awards:** In a lost years case there will usually be two awards for loss of future earnings, each with a different multiplicant and multiplier: one in respect of the period that the plaintiff is likely to survive, using a multiplicant from which living expenses have not been deducted; and one in respect of the lost years, using a reduced multiplicant. See *Woods v Francis* [1985]. CILR 510 (Cayman Is)
3A.3.4 MISCELLANEOUS AWARDS

LOSS OF PENSION RIGHTS: It is often the case that if a plaintiff has lost his employment as a result of his injury, or his employment has been interrupted, he has also lost his employers' contributions towards his retirement pension, which will accordingly be reduced. Damages can be awarded to compensate him for this loss. See *Auty v National Coal Board* [1985] 1 All ER 930.

FUTURE EXPENSES: These are expenses which will continue into the future for a number of years or indefinitely. The loss is future loss and forms part of the award for general damages. Anything that was reasonably recoverable as special damages is also recoverable for the future.

'ONE OFF' ITEMS: Items of expenditure that are 'one off', such as the cost of converting a home for wheelchair access, or will recur only a few times, such as new wheelchair every five years, are quantified on a lump sum basis. If the court takes present day values, the advantage of accelerated receipt is offset by inflation.

RECURRING ITEMS: Recurring items, such as the cost of nursing care, the cost of a housekeeper, and the value of voluntary services, are quantified on a multiplier/multiplicaid basis. The multiplicand is the annual cost of the service as at the date of trial. The multiplier is the number of years' purchase. If the items of expenditure will only last for a certain number of years, then the multiplier represents that number of years (discounted); if the item of expenditure will last indefinitely, then the multiplier represents the plaintiff's age and life expectancy. It does not follow that the multiplier will be the same as that applied to the annual loss of earnings; and each item may require a separate multiplier.

THE DOMESTIC ELEMENT IN COST OF CARE
Where there is a claim for the cost of future care of the plaintiff, as well as a claim for the plaintiff's lost earnings, care must be taken to avoid duplication in the area of living expenses - *Lim Poh Choo v Camden & Islington Health Authority* [1980] AC 174.
3A.4 NON-PECUNIARY LOSS

Damages for non-pecuniary loss are normally made as a single award. Pain and suffering and loss of amenity are by their nature wholly non-financial losses, and the compensation cannot possibly be calculated. The basis chosen for evaluation is basically convention, coupled with comparison with previous awards, experience, and intuition.

3A.4.1 PAIN AND SUFFERING

Elements of award: Damages for pain and suffering compensate the plaintiff for the physical pain and the emotional and intellectual suffering caused by the injury. It is not the injury itself but its actual effects for which the plaintiff is being compensated. Consequently, a plaintiff who suffers multiple injuries, and is thereby rendered immediately and permanently unconscious, recovers nothing. Under this head, the courts award damages for
- pain caused by the injury or its treatment,
- the awareness of physical disability and its consequences,
- the fear of future incapacity,
- embarrassment at disfigurement, and
- all the mental distress that the plaintiff has suffered and will suffer in the future as a result of the personal injury: for example, shock, anxiety, embarrassment and emotional injury. However, emotional distress, e.g., fear, horror, anguish and grief, which is not connected to physical or psychiatric injury, does not by itself give rise to a claim under this head.

Three less common examples of what can be included under suffering where the court certain special factors into account:
1. The plaintiff’s inability to help her husband, as much as she would have liked; Rourke v Barton (1982) 23 June LT.
2. Loss of enjoyment of holiday: Ichard v Frangoulis [1977] 2 All ER; and

Approach to assessment:
- It is the injury itself which will form the starting point for evaluating pain and suffering, so the exact nature and extent of the injury is important.
• Look at the particular plaintiff and his individual circumstances. A plaintiff who is distressed by a sear on his face suffers more than one who is not. Clearly this is a subjective loss and hence no damages were awarded for it in the total human vegetable case of *Wise v Kaye*.

• The plaintiff's age and life expectancy are relevant. The shorter his expected life, the shorter the period of pain and suffering and the less he will recover in damages, even where it is the injuries themselves that have reduced his life expectancy. The plaintiff’s suffering may be increased by knowledge that his life expectancy has been reduced, and this must be taken into account (AJA 1982, s. 1 (1) (b)). Note that in the UK legislation has abolished the heading “loss of expectation of life” hence this approach by courts.

Consider the debate arising from the above cases re applicability of awards for pain and suffering and loss of amenities to unconscious persons or those in a vegetative state.

**Evidence:** Medical evidence and evidence of the plaintiff himself. Possible in cases dealing with mental conditions for family members to give evidence of plaintiff’s change in attitude - *Heeralall v Hack*. The attorney must, therefore, ascertain as accurately as possible the nature and extent of the injuries, the degree of pain and suffering and loss of amenities involved.

**3A.4.2 LOSS OF AMENITIES**

Damages for loss of amenities compensate the plaintiff for his lost or reduced enjoyment of life. Most often one figure is awarded under these two heads - *Associated Industries Ltd v Ragnauth* [1982] 32 WIR 249(Guy). Loss of amenities most frequently arise in the following situations:

1. Generally, whenever the injuries have affected the plaintiff’s general sense of well-being or cheerful disposition;
2. Specifically, where the injury has deprived the plaintiff of an activity in which he was involved e.g. where the plaintiff is no longer able to enjoy a game of football or play the piano.
3. Loss of brain function, loss of any of the five senses, loss of sex-life, loss of mobility, loss of ability to do one's job, loss of job satisfaction, loss of ability to form friendships or relationships, loss of marriage prospects, breakdown of marriage, and loss of enjoyment of a holiday.
In this case it is the loss of amenity itself for which the plaintiff is being compensated, not the suffering caused by awareness of it, so a plaintiff who is in a coma or so severely brain-damaged as to have no realisation of his plight can recover damages under this head (*Wise v Kaye* [1962] 1 QB 638; *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174).

Child Plaintiff: *Mohammed v Theodore* [1961] 3 WIR 324

**ASPECTS OF PAIN AND SUFFERING AND LOSS OF AMENITIES COMPARED**

<table>
<thead>
<tr>
<th>SIMILARITIES</th>
<th>DIFFERENCES</th>
</tr>
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<tbody>
<tr>
<td>Both categories are highly subjective and specific to the plaintiff</td>
<td>Particularly so for loss of amenities as each person is to be assessed in relation to the specific effect of the loss on them e.g. loss of hearing on musician different than layperson.</td>
</tr>
<tr>
<td>The plaintiff’s age and life expectancy will make a difference, and the shorter the life expectancy the shorter the loss of amenity</td>
<td>It does not follow that the shorter the life expectancy the less the loss of amenity. The intrinsic value of the loss may be worth more than its length</td>
</tr>
<tr>
<td>Both are most frequently taken together because it is usually impossible to say where one ends and the other begins e.g. where pain arises after moderate use and causes loss of mobility which results in lack of enjoyment of walking/exercise</td>
<td></td>
</tr>
<tr>
<td>Awards in both are conventional sums and assessment exercise is similar (see below)</td>
<td></td>
</tr>
</tbody>
</table>

**Method of Assessment**

The courts use the tariff system (conventional sum) to produce uniformity - by this, awards given for similar injuries will represent the basic award, which may then be varied to take account, for example, of the plaintiff’s life expectancy or his unusually severe pain and suffering. You should, therefore, use the following guide as closely as possible:

1. Look at the evidence especially the medical evidence and that of the plaintiff himself, or where appropriate family members - *Heerallal v Hack Bros*.
2. Look up awards made in past cases of a similar nature or basis in your particular jurisdiction on the basis on which the court arrives at a figure in these cases. In T&T, Daly’s Damages and its supplements are the preferred guide.
4. Try to ascertain the correct range your case falls in, in relation to the type of injury you are dealing with then narrow that range by comparison between the facts of those cases and you own taking into account the particular characteristics of your plaintiff.

5. Make allowances for inflation and other factors which are important such as how differ are the injuries and their effects in your case from preceding ones.

**Inflation:** It is important to look at recent awards and take account of inflation because the sums awarded should increase with inflation. This need was recognised in *Housecroft v Burnett* [1986] 1 All ER 332.

**The Problem of Future Uncertainty as Regards Pain and Suffering and Loss of Amenity:** It is to the plaintiff's advantage usually to try and delay trial or settlement until the future is as certain as it is going to be, but this may not be possible. *In such circumstances the court has to assess the chance and value it.* The greater the likelihood of an unfavourable development, the greater the award of damages.

**Problems of Assessment**
In practice, there arise from the cases situations in which assessment can appear to be appropriate either under non-pecuniary and/or pecuniary loss. This mostly occurs in relation to the quantification of loss of amenities. See the following situations:

- **Loss of congenial employment:** i.e. loss of job satisfaction (avoid double compensation with loss of earnings)
- **Loss of housekeeping ability:** If this was a pleasure for plaintiff and valued at the cost of a housekeeper. *Daly v General Steam Navigation Co Ltd* [1981] 1 WLR 120.
- **Loss of marriage prospects:** Both loss of amenities if injury has destroyed this chance and financial loss (in all decided cases relating to female plaintiffs) which deprives plaintiff of financial support a spouse would have provided.
- **Breakdown of marriage:** Both for loss of amenities and as a financial loss where breakdown of marriage results in significant extra expenditure: see conflicting cases of *Jones v Jones* [1985] QB 704 and *Pritchard v JH Cobden Ltd* [1988] Fam. 22.
3A.4.3 LOSS OF EXPECTATION OF LIFE

GENERAL CONSIDERATIONS:
This head of loss was established in 1934 when the CA in *Flint v. Lovell* [1935] 1 KB 354 decided that where the injury to the plaintiff shortened his expectation of life he was entitled to damages in respect of this shortening, thus removing it as a separate consideration under pain and suffering and giving it an objective approach detached from the subjective considerations of pain and suffering.

This award originated in a desire to compensate for cases in which the victim was not injured but killed and the action was being brought for the benefit of the estate (*Rose v. Ford*) and was then extended to living persons.

This was abolished in the UK by s1 (1) (a) of the Administration of Justice Act 1982, although by s 1 (1) (b) the courts are ordered to take into account in assessing damages for the plaintiff’s pain and suffering, any suffering caused or likely to be caused to him by awareness that his expectation of life has been reduced.

PRINCIPLES UPON WHICH ASSESSMENT BASED:
In *Benham v. Gambling* [1941] AC 157 the HLs laid down the mode for assessing damages under this head the effect of which was to cut down very substantially the awards for loss of expectation of life in the case of deceased victims. The principles laid down by Viscount Simon L.C. in *Benham v. Gambling* are:

1. What has to be valued is “the prospect of a predominantly happy life"
2. What has to be fixed is a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness.
3. It is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence.

- If the character or habits of the individual were calculated to lead him to a future of unhappiness or despondency, that would be circumstance for justifying a smaller award - *Burns v Edman* [1970] 2 QB 541(court took judicial notice that a criminal life is an unhappy one).
- If the plaintiff is reduced to such a state of misery that he does not wish to go on living, and this is due to the accident itself, this is no ground for reducing the damages: what is to be valued is the prospect or happiness as it stood before the injury. *Roach v Yates* [1938] 1 KB 256
Note the following points:
1. no regard must be had to financial losses or gains during the period or which the victim has been deprived,
2. damages are not to be higher "because the social position or prospects of worldly possessions are greater,
3. the thing to be valued is not the prospect of length of days, and the "damages should not be calculated solely, or even mainly, on the basis of the length of life that is lost." (B v G).
4. it is characterised by an objective fixed sum (conventional) which does not alter regardless of the plaintiff’s circumstances except for one particular case. Ramsawak v Carnarvon [1960] 2 WIR 426

Amounts Awarded
- In Benham v. Gambling the HLs awarded the sum of J200 where the deceased was a child of two and a half years.
- In Naylor v. Yorkshire Electricity Board the House awarded the sum of J500 where the deceased was a young man who was killed shortly before his 21st birthday. Since Naylor v. Yorkshire Electricity Board, further increases in the conventional sum have slowly been made on account of inflation.
- In Cookson v Knowles [1977] QB 913, 923E J750 became accepted.

The conventional sum is likely to be awarded irrespective of whether the victim is an adult or a very young child as the principles laid down in Benhtun v. Gambling admit of little flexibility in the result. See Andrews v. Freeborough, [1967] 1 QB 1, Cain v. Wilcock [1968] 1WLR 1961. Probably any variation from the norm is equally uncalled for where the victim is very old.

However, for discussion on principles to be applied in WI for a child in relation to various aspects of non-pecuniary loss, see
Mohammed v Theodore supra.
Bhagwandin v Collins [1967] 11 WIR 335
Leonard v Forbes [1971] 16 WIR 244
3A.5 MAKING THE NECESSARY DEDUCTIONS

Introduction: On the compensatory principle, any gains made as a result of the injury would be deducted from any claim for losses suffered. However, the courts require a clear causative link between injury and benefit, and not all benefits received have to be deducted.

1. **Insurance:** Where the plaintiff was insured against accidental injury and receives the benefit of that insurance policy, no deduction is to be made - *Bradburn v Great Western Railway* (1974) LR 10 Ex 1, even where the insurance premium was paid on the plaintiff's behalf by another (such as an employer). But an employer’s sick-pay scheme may be treated differently - *Hussain v New Taplow Paper Mills Ltd* [1998] 1 All ER 541

2. **Pensions:** *(Parry v Cleaver [1970] AC 1.*

3. **Social Security Benefits/National Insurance:** The full amount the plaintiff has received by way of the following benefits is to be deducted from his special damages.

4. **Contractual Sick Pay**

5. **Redundancy Payments:** This will not normally be deducted since the payment has nothing to do with his injury or incapacity to work *(Mills v Hassell* [1983] ICR 330). However, where the plaintiff has been made redundant, the redundancy payment is deductible *(Colledge v Bass Mitchells and Butley Ltd* [1988] 1 All ER 536).


7. **Maintenance at Public Expense:** In UK, statute (AJA 1982, s. 5) provides that if the plaintiff is being maintained wholly or partly at public expense in a hospital, any saving made must be deducted from any damages for lost earnings or earning capacity. This deduction is roughly equivalent to the deduction of the domestic element. No WI decision on point - what are your views?

8. **Contributory Negligence**

3A.6 ADDING INTEREST

*Jefford v Gee* [1970] 2 QB 130

**Interest on General Damages:** Interest is awarded on damages for pain and suffering and loss of amenity from the date of service of the writ to the date of trial *(Pickett v British Rail Engineering* [1980] AC 136).
No interest is awarded on any damages for future loss.
Advice on Quantum Does Not Usually Cover Interest

ADDITIONAL WEST INDIAN AUTHORITY ON ASSESSMENT

Marchong v T&TEC  Claim No. CV2008-04045
Reds v Rattan and Salim  Claim No. CV2007-00903
Culley v Gajadar  Claim No CV2007-00363
St. Kitts/Nevis: Carole-Cragun v Sun Alliance  Claim No. SKBHCV2004/0155
Barbados: Alleyne v AG of Bdos  Suit No: CV358 of 2000,

SPECIAL PRACTICE NOTE

There is a new development in both the UK and North America called a “structured settlement” that is used in practice where the injured plaintiff is likely to require medical attention and financial support for a long and indeterminate period in the future. It is negotiated between attorneys and approved by the court. It is meant to provide a realistic method of payment for such situations. Though this topic is not part of this course, students are advised (when able) that additional reading should be done on this area to examine its applicability to our social and economic context and possibility of applying it to practice.

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SEMINAR EXERCISES

EXERCISE 1
Of all potential alternative remedies under this head of loss:

- list which are the most relevant;
- review the various remedies which may be used under each type of approach taken;
- illustrate under what circumstances they may apply; and
- explain why an alternative remedy may be more appropriate than the traditional common law remedy.
EXERCISE 2

In October 2012 Bumptuous negligently ran over Ms. Daisy while she was crossing the road. Ms. Daisy was 21 years old at the time. She suffered a dislocated hip joint, broken leg and dislocated right collar bone. Her other leg had to be amputated under the knee. She spent 3 months in Best Care Private Nursing Home after which she spent a further month at home. For two of these weeks her sister, who was unemployed at the time took care of her and her mother took care of her for the other two week although she had to take time off from work to do so and she was working for $20,000.00 per month at her job as marketing manager at More Money Corporation.

While she was convalescing, her father who lives in England spent $10,000.00 to visit her to cheer her up from a depression into which she had sunk. Her medical report indicates that she will have a good recover although she will suffer from some pain in the leg that was broken and the shoulder that was dislocated. These injuries will result in arthritic pain and perhaps complications in the years to come. She will further have to be fitted with a prosthesis. The ones available locally are rather clumsy, painful to wear and are not very versatile. Ms. Daisy learns of a prosthesis centre in New York that fits prosthesis which allows the patient to have almost full use of the limb again. The cost for this fitting is amounts to 15 times the cost of the local fitting and it has to be checked and replaced by a trained technician every 5 years (there is no one trained locally).

At the time of the accident, Ms. Daisy was working for $5,000.00 per month as a computer programmer in Incoco Ltd. She had a good track record and was on the verge of a promotion at the end of that month to a salary of $7,500.00 per month. Her prospects with the company were excellent the directors of the company have indicated that she was heading for a senior management position in the company. In fact, they were so pleased with her that they were firm in their view that she would do as well or better in any business to which she directed her mind. She finds out that she will no longer get that promotion and she further has no chance for managerial advance.

In her private life, Ms. Daisy was a very active person involved in the sports of table tennis, hockey, hiking and parachuting. She was very healthy although was some history of diabetes on her father’s side of the family and cancer on her mother’s. Medical evidence indicates that she would have had a life expectancy of 75 years but for the accident which has perhaps reduced this to 60 years.
Ms. Daisy was also engaged to Flighty Dick who, on seeing her condition after the accident broke off the engagement on the grounds that he could not stand any “one-legged woman” walking at his side for the rest of his life. Ms. Daisy is now very disturbed about her prospects of being married at all as a result of this accident.

At the trial, the judge finds Bumptuous fully liable in negligence and has asked you as Ms. Daisy’s attorney to address on the measure of damages. In your research, you have found that there are no cases in the jurisdiction relating to these types of injuries since 1990 and the cases that are there have the following awards. Central Bank reports indicate that since 1990 inflation has been at a steady 0.3% per annum.

<table>
<thead>
<tr>
<th>CASE</th>
<th>INJURY</th>
<th>PARTICULARS</th>
<th>P&amp;S</th>
<th>L/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v B</td>
<td>Dislocated collar bone</td>
<td>Single woman of 25 with active lifestyle in responsible management position</td>
<td>$50,000</td>
<td>$40,000</td>
</tr>
<tr>
<td>A v Z</td>
<td>Leg amputated below knee</td>
<td>Married woman of 35 with sedentary lifestyle working as typist. 3 children.</td>
<td>$20,000</td>
<td>$15,000</td>
</tr>
<tr>
<td>D v E</td>
<td>Broken leg</td>
<td>Single woman of 35 with active lifestyle. Home-maker.</td>
<td>$10,000</td>
<td>$8,000</td>
</tr>
</tbody>
</table>

P&S: Pain and Suffering
L/A: Loss of amenities

Using the above awards and any other decided case to which you may have access, prepare an ADVICE ON QUANTUM on behalf of Ms. Daisy for the prospective litigation in this matter.
PART 3B: DAMAGES ARISING FROM WRONGFUL DEATH –

SURVIVORSHIP OF ACTIONS; AND
FATAL ACCIDENT LEGISLATION

Contents
3B.1 Survivorship Action
3B.2 Fatal Accident Action

On the death of a person resulting from personal injury two causes of action arise:
1. An action for the benefit of the estate of the deceased which is called a survivorship action,
and
2. An action for the dependants of the deceased which is called a dependant’s action.

At common law, an action for personal injuries died with the victim and no benefit was passed on to the estate. The Fatal Accidents legislation between 1846 and 1949 was in England to give dependents of persons who died wrongfully at the hands of another, a claim for the income they had lost by that wrongful death. Further the Law Reform (Miscellaneous Provisions) Act of 1934 in England to reverse in part the common law position by allowing the personal representatives of a deceased person to carry on an action to which he was entitled.
3B.1 SURVIVORSHIP ACTION (ESTATE)

This is an action brought by the personal representatives of the deceased for any claim (with specified exceptions) that he could have brought had he survived. In most cases it excludes the application of exemplary damages. See following legislation:

- **Guyana**  
  Law Reform (Miscellaneous Provisions) Act Cap. 6:02 as amended.  
- **Grenada**  
- **Trinidad & Tobago**  
  Supreme Court of Judicature Act Ch. 4:01, s. 27  
- **B.V.I.**  
  Causes of Action (Survival) Act Cap. 11  
- **Barbados**  
  Law Reform (Miscellaneous Provisions) Act Cap. 205  
- **St. Kitts & Nevis**  
  Causes of Action (Survival) Act Cap. 11  
- **Antigua**  
  Causes of Action (Survival) Act Cap. 78  
- **Anguilla**  
  Causes of Action (Survival) Act Cap. 11  
- **Dominica**  
  Law Reform (Miscellaneous Provisions) Act Chap. 79  
- **St. Vincent**  
  Compensation for Injuries Act Cap. 83 ss. 3, 13

In *Singh v Persaud* [1985] 39 WIR 198 the Guyanese court did an extensive overview of this area of law. Note however that this case was decided before the English reforms which prohibit recovery for the lost years. Apart from Guyana, Dominica and St. Lucia have abandoned lost years earnings.

This action preserves an existing cause of action: *Deonarine v Narine* [1969] 14 WIR 33.

**LOSS OR GAIN TO THE ESTATE**

Legislation provides that damages for the benefit of the estate shall be calculated without reference to any loss or gain to the victim’s estate: *Gammell v Wilson* [1982] AC 27

Also excludes losses incurred by mere fact that it is an estate e.g. death duties, costs of letters of administration, costs of administration of the estate itself. *Gammell v Wilson* pp 47 - 69, *Deonarine v Narine* [1968] 33.
Gains to be ignored: insurance payments, benefits from friendly societies or collateral benefits - *Gammell v Wilson* p 74.

**DAMAGES RECOVERABLE**

**Special Damages:** may be small unless there is property damage. Loss of earnings is applicable if where there is a long interval between the injury and death of the deceased. Medical expenses are recoverable even if they are not paid before the death.  

**Funeral Expenses** recoverable by legislation. See *Hart v Griffith-Jones* [1948] 2 All ER 729.

**General Damages**

Non-Pecuniary Loss
- c. Loss of expectation of life: A conventional sum is recoverable under this head.

Pecuniary Loss

**Loss of Future Earnings (The Lost Years):** Prior to *Pickett v British Rail Engineering* [1980] AC - damages were not awardable for the lost years. However, H/L reversed this position.136. See also *Gammell v Wilson* [1982] A.C. 27.

Court should not be bound by fixed formula: *Jamaica Public Service Co Ltd v Morgan & Anor* [1986] 44.

Deductions for what deceased would have spent on himself: *Harris v Empress Motors Ltd* [1983] 3 All ER 561. No deductions are made from what the deceased would have spent on dependants: *Clay v Pooler* [1982] 3 All ER 570.
3B.2 FATAL ACCIDENT LEGISLATION (THE DEPENDANT’S ACTION)

INTRODUCTION
In England prior to the Fatal Accidents Legislation between 1846 to 1949 dependants of a person who died as the result of the wrongful action, neglect or fault of another could not be compensated. This legislation is an attempt to make financial provision for such dependants in light of the loss of such provision by the death of the deceased.

Guyana Accidental Deaths and Workman’s Injuries (Compensation) Act Cap: 99:05 now the Accidental Deaths and Personal Injuries (Damages) Act No 13/1983
Grenada Compensation for Injuries Act Cap. 59
T’dad & T’go Compensation for Injuries Act Cap. 8:05
B.V.I. Fatal Accidents Act Cap. 26
Barbados Accident Compensation (Reform) Act Cap. 193A
St. Kitts & Nevis Fatal Accidents Act Cap. 27
Antigua Fatal Accidents Act Cap. 166
Anguilla Fatal Accidents Act Cap. 27
Dominica Fatal Accidents Act Cap. 27
St. Vincent Compensation for Injuries Act Chap. 7:59
St. Lucia Art. 988 Civil Code

Who are the Dependants: This is defined by the legislation of each jurisdiction and varies. Persaud v Lewis [1970] 15 WIR 455 (Guy)

Who brings the Action: The personal representative of the deceased. Where there is no personal representative or the action is not brought within the time period (usually 6 months from death) any dependant can sue in their own name on behalf of all the other dependants - Austin v Hart [1983] 2 All ER 341.

This time period is not a limitation on the personal representative’s right to bring the action.

Conditions Precedent: Action can only succeed if the act/omission would have entitled the injured party to an action for damages. The Stella (1900) P 161, Read v Great Eastern Rly (1868) LR 3 QB 555, Nunan v SRC [1924] 1 KB 223.

Loss To Be Compensated: Dependants are not automatically entitled to compensation because in dependency they must prove some financial loss. Generally there is no claim for bereavement or other non-pecuniary loss except for Dominica (s 4 of the Fatal Accidents Act).
Head of Damage: Dependency.

Barbados s 8 of the Accident Compensation Reform Act: compensation for loss of guidance, care and companionship. Gittens v Interage Ltd (supra). Also e.g. transport to visit deceased, etc. This Act allows dependants to bring claim against tortfeasor even where the injured party is still alive - Toppin v Jordan [1991] 51 WIR 16.

See also:

- M. Pilgrim v Transport Board HCA# 1110/83
- R. Lee v E. Phillips #1171/85
- M. Lorde v Transport Board CA# 8/97
- J. McCarthy v BL&P #127/88
- H. Gorgichuk v T. Clarke CA# 4/83
- M. Gibson v K. Roach #1072/86
- C. Daniel v R. Marshall #1023/84
- E. Sisnett v S. Gittens # 365/83
- P. Rose v Taurel Industries Ltd 731/83
- W. Gittens v E. Cumberbatch #1018/81
- Lloyd Bank plc v M. Stock #886/83
- V. Greaves v N. Corbin #972/82

Dependency consists of:

a) the amount the deceased would have applied to the benefit of his dependants
b) any additional expenses dependants have been put to as a result of the death
c) any additional losses the dependant suffered as a result of the death over the period that they would have remained dependant. Maraj v Samlal HCA# 1058/73 (TT)

Factors to be considered to sustain a claim:

1. It is not a condition precedent that deceased should be actually earning or contributing at the date of his death
2. The fact that the dependant had a reasonable expectation of pecuniary benefit from continuing life of deceased is enough to maintain the claim - Taff Vale Rly Co v Jenkins [1913] AC 1.
3. If the loss is not sustained as a dependant but in some other relationship on which family relationship is superimposed e.g. a business partnership, there can be no claim. - Malyon v Plumber [1964] 1 QB 330, Burgess v Florence Nightingale Hospital [1955] 1 All ER 511
4. In considering the dependency, the court looks at the actual financial loss of the claimant. Thus if money is given to others together with that given to the claimant, the court will only award the sum that represents the claimant’s share of that money - *Persaud v Lewis*.

**THE ASSESSMENT OF THE DEPENDANCY**

In assessing damages under the Fatal Accident legislation, damages ought to be split in two: pre-trial loss and future loss - *Cookson v Knowles* (this is primarily in order to award interest). However, where considerable time elapses before matter comes to trial variation permissible: *Maraj v Samlal* HCA# 1058/73 (TT), *Gittens v Interage Ltd* HCA# 414/92 (B’dos).

**PRE-TRIAL LOSS**

**Value:** Pre-trial Loss consists of the value of the dependency from the date of death to the date of trial.

**Methods of Assessment**

**Approach A: Item by Item Approach:** Possible where specific amounts can be attributed to what deceased contributed to various dependants. Where the dependants are the wife and children, the dependency may consists of expenditure such as housekeeping, rent, mortgage, clothing, school fees, holidays etc. minus expenses deceased would have spent on himself.

To this expenditure must be added other losses e.g. free perks (from employment), loss of benefits in kind, additional expenditure (do it yourself jobs the deceased would have done).

**Approach B: Earnings Minus Living Expenses** - used where it is impossible to ascertain the expenditure on each dependant. Here the court finds the net earnings of the deceased then it deducts the living expenses. What is left is presumed to be the dependency. To this can be added any additional losses or benefits in kind.

**Approach C: The Percentage Approach** - As evidence of the dependant’s living expenses or value of the dependency, the court may be forced to use a percentage approach. The court may assess the dependency as 75% of the deceased’s
net earnings in the case of a widow and children or 67% where the widow is the only dependant - *Harris v Empress Motors* [1983] 3 All ER 561.

Court reserves right to vary method to suit the needs of each case: *Jamaica Public Service Co Ltd v Morgan & Anor* [1986] 44 WIR 310, *Maraj v Samlal* HCA# 1058/73

*McKenzie and Davis v Tyrell* [1971] 17 WIR 318: Deceased’s widow’s dependency – emphasis to be placed on possibility of remarriage – the appropriate multiplier in circumstances

NB: The percentage approach has been rejected in the Jamaican case of *Jamaica Public Service Co v Morgan* [1986] 44 WIR 310 and in the Cayman Island case of *Carter v D. A. Dawson* [1998] CILR 204. The feeling of the courts are that economic conditions are not as sophisticated as in England to ensure that such a mathematical calculations would be reflective of current social realities.

### PARTICULAR CASES

**Claims for the Death of a Wife:** Assessed in same way as husband’s (Item by Item). It is in the court’s discretion as to what value it places on the wife’s service but each service should be looked at and valued. *Regan v Williamson* [1976] 2 All ER 241.

**Death of Husband:** Likelihood of continued dependency important especially where there is a troubled marriage: Must show reasonable likelihood of dependency. *Davies v Taylor* [1972] 3 All ER 836.

**Death of a Father:** *Meade v Clarke Chapman* [1952] 1 WLR 70

**Death of a Parent:** Where the claim is for a father/breadwinner, see above. Where the claim is for the loss of a mother, the need for someone to care for them will arise in cases of young children. *Hay v Hughes* [1975] QB 790.

Value of dependency based on notional cost of hiring a nanny: *Corbett v Barking Health Authority* [1991] 1 All ER 498, *Cresswell & Ors v Eaton & Ors* [1991] 1 All ER 484, even if mother would not have provided proper: *Stanley v Saddique* [1991] 1 All ER 529

**FUTURE LOSS**

The assessment here is done a multiplier/multiplicand basis.

**The MultiPLICAND** is the annual value of the dependency at the date of the trial. Items used in the assessment of the pre-trial dependency will apply to future – *Hubah v Ramjass* [1961] 3 WIR 330, *Ratray v Muir, Davis v Powell Duffryn Associated Collieries Ltd* [1942] AC 601.
The Multiplier:  This is calculated from the date of death = number of years purchase: *Graham v Dodds* [1981] 2 All ER 953. Although there may by be several dependants, a single multiplier may be applied as in *Ratray v Muir* - i.e. taking the average of various years of dependency of all the dependants. The more usual approach is to select a different multiplier and multiplicand for each dependant.

Factors Affecting the Choice of the Multiplier
a  Age/life expectancy at death and the estimated working life of the deceased.
b  The dependant’s ages, life expectancies, estimated length of the dependency, e.g. mother’s dependency will prima facie lasts for her and the deceased’s joint lives. Children’s dependency will go up to the age of majority and beyond depending on the prospects of higher education.
c  Deceased’s job security and career prospects. Note that this runs from the date of death.

*Maraj v Samlal* HCA# 1058/73 (TT)

Dependency for pre-trial loss would have been calculated separately. The multiplier for future loss is found by deducting the pre-trial period from the selected multiplier - *Graham v Dodds* [1983] 2 All ER 953.

Future Loss is calculated by multiplying the multiplicand times the multiplier. Here the court has a discretion to round the sum up to do justice over all. *Spittle v Bunney* [1988] 3 All ER 1031.

DEDUCTIONS FOR COLLATERAL BENEFITS
In assessing damages the court must consider the pecuniary benefits arising on death to which the claimant had a reasonable expectation whether as of right or otherwise (as any likely award under survival action) - *Davis v Powell Duffy* pp 617. Legislation has cut down the number of benefits that may be deducted. See legislation re benefits that are not deducted.

Benefits from Remarriage:  In some jurisdictions the prospect of remarriage of the wife must be taken into account - *Ratray v Muir* [1969] 15 WIR 87. The onus of showing the benefit to be derived from a second marriage rests with the defendant - *Mead v Chapman* [1956] 1 WLR 70. Legislation in some jurisdictions provide that no account is to be taken of remarriage of the wife or actual remarriage (Dominica).

Voluntary Services:  In *Hay v Hughes* [1975] 1 All ER 257 - voluntary services rendered after death were not such gains as to be deducted. But where the tortfeasor renders voluntary services
or makes voluntary payments, these are to be taken into account - *Jenner v West* [1959] 2 All ER 115. See also cases above on death of a parent.

**Damages under Survival Actions:** Where the deceased’s claim for damages survive for the benefit of the estate the transmission of the claim to the dependants will amount to a benefit which is deductible from damages for loss of dependency - *Davis v PD*. Damages awarded to the estate for loss of earnings before death should not be set - *Murray v Shutter* [1975] 3 All ER 375

In **Dominica** statute prohibits deductions of benefits received under survival action. Here there is no compensation for loss of years so there is no significant difference in the end result.

**CONTRIBUTORY NEGLIGENCE:** The award may be reduced for contributory negligence.

**INTEREST:** Awarded on pre-trial loss only. *Maraj v Samlal* HCA# 1058/73 (TT)

**APPORTIONMENT:** Legislation provides for the apportionment of damages so when a lump sum is awarded, the court must indicate how the money is to be divided between the dependants. This will correspond with the value of the dependency of each dependant. If the court uses a multiplicand/multiplier approach for each dependant then this will be the actual value of the dependency.

See also: *Dolly Rock v Cardinal Stow* HCA# 2951/73 (TT)

**ADDITIONAL WEST INDIAN AUTHORITY**

**TT:** *Sarah Young v Pegus & GGIL*. Claim No. CV 2008-00876, *Pragg v Gomez* HCA 4314 of 1983, *Chung Shah v Leo Raymond* CLAIM NO CV 2009-02469

**Barbados:** *Strickland v BRC* No. 660 of 2000, *Kelman v Augustine* No. 1119 of 2003,

**Antigua & Barbuda:** *Frederick v Lam* - AG 2010 HC 41

**St. Lucia:** *Compton v Nathaniel* - LC 2010 HC 20

**ARTICLES**


The Assessment of Damages in Wrongful Death Claims in Jamaica  C. Dennis Morrison, WLJ Vol 35 (1), 2010, 45

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- explain why an alternative remedy may be more appropriate than the traditional common law remedy.

EXERCISE 2
James is a mechanical engineer, aged 42. He is killed on January, 10, 1995, in a major vehicular accident for which Haynes is totally to blame. He is survived by his wife Jane (aged 40) and two children, aged 15 and 13 respectively. At the time of his death James was employed with Caltec Ltd. and earned a monthly salary of $5,000. In addition he received a car allowance of $200 per month. His widowed mother, Gladys (aged 66) lived at his home and was virtually supported by him. Gladys assisted in looking after the children. Out of his net salary, James contributed the sum of $2,000 per month to defray the grocery and other household expenses for himself and his family. At the time of his death the relationship between James and Jane was strained. Although they lived together, Jane had threatened to leave and had on more than one occasion, stated that she wanted a divorce.

James was very much a family man. He took care of the lawn himself and did all the minor odd jobs around the house. He regularly assisted his eldest child with her physics and maths. Shortly after James’ death, his company Caltec Ltd made an ex gratia payment of $10,000 to his widow.

Jane has just obtained letters of administration to James’ estate and is desirous of instituting proceedings against Haynes. She seeks your advice as to the measure of damages recoverable in these proposed proceedings. Advise her.
Would your advice be any different if:

a. James was partially responsible for the accident, and  
b. James and Jane were not lawfully married but lived together in a common law union?

**EXERCISE 3**

Frank, aged 40, was an accountant employed with Castle and Co at a salary of $6,000 per month. In addition he received a travelling allowance of $500 per month. In March 1998 he was killed in a motor car accident for which Speedboy was totally to blame. At the time of his death, he was living with Joyce in a common law union and they had two children, Phillip and Stan, now aged eight and six respectively. Frank was very attached to Joyce and the children. He was the sole breadwinner of the family and out of his net salary he gave Joyce the sum of $2,000 per month to defray the grocery and other household expenses for himself and his family.

Frank also had another child, Claire, now aged 16, by a previous association with Linda, but apart from the odd Christmas or birthday gift, he did not contribute to her maintenance or support.

Frank left a will under which he appointed Lawrence as his executor and left all his real and personal property to Joyce. Frank also left two insurance policies valued $100,000 in which his estate was named as beneficiary. Shortly after Frank’s death, his employers made a payment of $10,000 ex gratia to Joyce for the benefit of Phillip and Stan.

Lawrence has just obtained probate of Frank’s will and seeks your advice as to the causes of action available to him and the measure of damages likely to be recovered in each action.

**Advise him.**

Should Lawrence fail to institute legal proceedings within a reasonable time after obtaining probate, what would be your advice to Joyce?

How would it affect the measure of damages if Frank was partially to blame for the accident in which he lost his life?
3C  DAMAGES IN SPECIFIC AREAS: TORT

3C.1  DESTRUCTION AND DAMAGE TO CHATTELS

3C.1.1  INTRODUCTION TO DAMAGES AWARDED RE CHATTEL

Property may be damaged in three different ways: destruction, damage and misappropriation. Prior to the *Liesbosch Dredger v SS Edison* [1933] AC 449 damages in this area were assessed applying the following methods:

- selling price
- costs of adaptation
- special value to the owner
- buying price
- cost of manufacture
- capitalisation potential

However, in the *Liesbosch* introduced a more flexible approach to assessment. Lord Wright there made the following observations:

1. since many types of chattels were owned and employed in many varied ways it was impossible to lay down any universal formula for the measure of damages.
2. the basic value was indeed the value of the chattel at the time and place of loss, but in calculating the ‘value’, the arithmetical approach was discredited.
3. the ‘value’ of the chattel was not the market value but the value to its owner as a going concern. Thus the court should not simply take the market value and add to it the future profits which had been lost, but should arrive at “a capitalised value of the chattel as a profit-earning machine”.


3C.1.2 GENERAL PRINCIPLES REGARDING DESTRUCTION

Following the Liesboch a more flexible approach was propounded. using the following methods:

Cost Of Replacement Method: When the chattel is destroyed the most usual method of assessing the value are those based on the costs of finding a reasonable replacement. Moore v DER Ltd [1971] 3 All ER 517.

To this would be added the cost of adaptation (where necessary), as well as for the loss of profits during any delay for the replacement. If nothing but the specific replacement is adequate, the plaintiff may recover the cost of manufacturing an equivalent which must be reasonable - Unctos v Mazzetta [1956] 1 LL R 209.

Market Value: This is the value meaning the selling price value. The choice between this value and replacement value turns on the nature of the plaintiff’s holding of the chattel i.e. whether held it for sale (this method) or personal use (former method).

Special Value: Where a chattel has a value peculiar to itself or to its owner, or where the owner employs it for a special purpose in general, the first method will be applied. If the purchase of a replacement is inadvisable, unreasonable or impossible, the court may determine a sum which in no way reflects objective commercial criteria, but which seeks to express the real subjective value of the chattel to the owner. The Harmonides [1903] P 1.
3C.1.3 DAMAGE TO CHATTEL

Where a chattel is damaged there are two possible modes of assessment:

a. if the chattel is in such a condition that it is reasonable to repair it, the basic measure is the cost of such repairs.

b. if the injury is so severe that it is not reasonable to repair it the loss will be treated as one of constructive total loss in which case the rules relating to destruction apply.

**BASIC MEASURE:** The measure of damages is restitutio by whichever method (repair/replacement) it would be reasonable for the owner of the chattel to adopt to the circumstances - *Darbishire v Warren* [1963] 1 WLR 1067. The principles regarding repairs are as follows:


1. Repairs must be necessary for the plaintiff to recover the full cost of repairs: he must show that the need for repairs arose from the accident for which the defendant was liable. *The Pactolus* (1856) Sw 173:

2. Cost of repairs must be reasonable: *The Pactolus*, *Bacon v Cooper* [1982] 1 All ER 397.

3. Cost of repairs may include overhead charges: This arises where the plaintiff is undertaking the repairs but again such an amount must be reasonable and proper one and recovery for overhead expenses will not be entertained where the expenses would have existed in any event - *London Transport Executive v Foy Morgan* (1955) CLY 743 vs *London Transport Executive v Court* (1954)CLY 888.

4. Cost of complete repair of all the damage is recoverable: notwithstanding that the result of the complete repair may be to render the article more valuable than it was before the accident - *The Gazelle* (1844) 2 W Rob 279, *Harbut’s Plasticine Ltd v Wayne Tank* [1970] 1 All ER 225.

5. Where the chattel is only partially repaired: the plaintiff may recover for the difference - *The Georgiana v The Anglican* (1873) 21 WR 280.

6. Even if the repairs are not yet executed: the plaintiff may still recover an amount representing those repairs - *The Kingsway* [1918] P 344.
7. Where pre-existing damage present: Cost of repair is not recoverable if the work which will repair the defendant’s damage is required to repair other damage to the chattel already existing before the defendant’s tort - *Performance Cars v Abraham* [1961] 3 All ER 413.

8. Where repairs not to be executed: Since cost of repairs is adopted as being the equivalent to the diminution in the ship’s value, it is immaterial that as the circumstances turn out, the repairs will never be executed - *The Genfinlas* (1918) P 363.

**CONSEQUENTIAL LOSS**

**a. Expenses Other Than The Costs Of Repair Such As:**

i. Expenses of docking, towing, of the vessel to a particular dock: *The Inflexible* (1857) Swab 200;

ii. Expenses as regards the hiring of a substitute article during the repair period: The situation has also arisen in relation to the hire of a substitute car - *Watson Norie v Shaw* (1967) 111 SJ 117. However, in *HL Motorworks v Alwahbi* [1977] RTR 276.


iii. Futile Expenses: Expenses rendered futile by the loss which may sometimes be included e.g. wages of ship’s officers and crew are recoverable if it were customary to retain them during stand-still periods - *The Inflexible* 166 ER 1094.

iv. Other Losses Incurred: No claims bonus lost and other expenses under insurance contract - *Ironfield v Eastern Gas Board* [1964] 1 WLR 1125.

**b. Loss of Profit:** With a profit-earning chattel the normal measure of profits may be awarded either as special or general damages. To plead special damages the plaintiff must offer proof of some current or future contractual engagement which he had to abandon as a result of the accident - *The Pacific Concord* [1961] 1 All ER 106.

Where there are no special damages, the court must still attempt to assess the profits which would have been earned if the chattel had not be detained - *The Soya* [1956] 2 All ER 393.

**3C.1.4 DEDUCTIONS**

**Mitigation:** The plaintiff is under a duty to mitigate his loss so from the award of profits will be deducted a sum representing those profits which he actually made or should have made during the period for which he claims compensation. - *The Star of India* (1876) 1 PD 466. See the ‘car’ cases above.

Other Deductions: These will also be made for the savings of expenses which would have been incurred if the chattel had been profitably employed e.g. saving of depreciation through wear and tear.

**Concurrent Repairs**: Expenses and loss of profits where other repairs have been affected concurrently - *The Carslogie SS v Royal Norwegian* [1952] 1 All ER 20 held that there should be no apportionment in such circumstances.

**3C.1.5 NON-PROFIT EARNING CHATTEL**

**LOSS OF USE ON NON-PROFIT EARNING CHATTELS**

It is deemed that a person in this position losses a small amount of the capital value of the item as he had invested money in its purchase and intended use. *The Greta Holme* [1899] AC 596, *Birmingham Corporation v Salisbury* [1969] 113 SJ 877

According to the cases, it is generally to be calculated on the basis of interest on the capital value of the damaged ship at the time of the collision. Ogus gives an alternative mode of assessment as the standing charge cost i.e. the cost of maintaining and operating the chattel. But it was said in Birmingham that that was putting a premium on inefficiency.

Where the plaintiff has kept a standby ship, the calculation is made upon the value of the standby itself. The interest on the value of the standby ship would form the correct calculation. However, in *The Hebridean Coast* [1961] AC 545, 562.
DAMAGE AND DESTRUCTION TO CHATTEL

**DAMAGE** <-> **LIESBOSCH** -> **DESTRUCTION**

**Reasonable to repair**
- Repair must be necessary
- Cost must be reasonable
- May include overhead charges
- Applicable regardless of betterment

**Not Reasonable to Repair**

**Cost of Replacement**

**Special Value?**

**Market Value**
- Purpose for which chattel being used
- Buying Price (personal)
- Selling Price (Commercial)

**Special Value?**

**What else can you add to this chart to assist in your understanding of the area?**
EXERCISE 1
Of all potential alternative remedies under this head of loss:
- list which are the most relevant;
- review the various remedies which may be used under each type of approach taken;
- illustrate under what circumstances they may apply; and
- explain why an alternative remedy may be more appropriate than the traditional common law remedy.

EXERCISE 2:
Kareem is the owner of a 1925 model car in which the Princess Royal travelled in 1936 during her visit to the Caribbean. He spent a considerable amount of money on maintaining the comfort and efficiency of the car. He checked the engine regularly and replaced worn parts personally.

On his way home from work one evening, a public transport company bus, being negligently driven away from the terminus, collided with Kareem's car. Substantial damage was done to the right rear and front fenders, the radiator and the grille. Kareem was badly cut on the face but refused an anti tetanus injection and spent an extra two weeks in hospital when the cut turned septic; he now has an unsightly scar.

The company accepted liability and their insurers informed Kareem that the repairs would be done at the company's garage at a cost of $3,000. Kareem did not accept this offer, but instead, by telephone calls to England, obtained second-hand parts which were delivered by air freight. The parts cost $2,000. He paid $1,000 for insurance and freight, and $1,500 for labour to the car to restore its original condition. The pre-accident value of the car was $4,000.

The company has refused to pay the bill submitted by Kareem for the total cost of restoration of the car and disputes the special damages claimed in respect of Kareem's two-week stay in hospital.

Kareem now consults you as to the measure of damages he is entitled to recover. Advise him.

EXERCISE 3:
Prak is a boating enthusiast and the owner of a power boat "The Paradigm I", valued at $300,000. In November 1995, while "The Paradigm I" was moored in the marina, another vessel
owned by Calvin ran into it, damaging it beyond repair. Calvin admitted liability for the accident.

Prak contacted P and B Boat Builders Inc. in the United States to order a replacement but was informed that that model of power boat was no longer manufactured. Prak was forced to order the new model which had many new and improved features. The new power boat was delivered to Prak at the end of January 1996.

Calvin has just received a letter from Prak's lawyers claiming-

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Landed Cost of new power boat</td>
<td>$365,000</td>
</tr>
<tr>
<td>(2) Loss of use - 8 weeks at $2,000 per week</td>
<td>$16,000</td>
</tr>
<tr>
<td>(3) Damages for inconvenience</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

The letter has been passed to you for your advice. Calvin has pointed out to you in his covering letter that he did not feel he was liable to pay for the full cost of the new boat since it was a new and improved model and also that Prak should get little or nothing for loss of use and inconvenience since he used the boat infrequently and only on weekends.

Advise Calvin.
3C.2 TORT: MISAPPROPRIATION OF CHATTELS

3C2.1 INTRODUCTION

Misappropriation of goods, like damage and destruction may result from a number of torts. However, certain differences in relation to assessment of damages have appeared between the various possible torts, namely, conversion, detinue and trespass.

3C2.2 BASIC LOSS

A - THE MARKET VALUE METHOD

Where the Plaintiff is Absolutely Entitled and the Chattel is not Redelivered: Where there is a market available for the chattel of which the plaintiff is permanently deprived, it is generally said that he is entitled to its market value (either selling or buying price). In France v Gaudet (1871) LR 6 QB 199 the selling price applied. But in Hall v Barclay [1937] 3 All ER 620 the buying price applied.

Rationale: This is based on purpose the plaintiff held in the property. If the chattel is held to sell in the future, then the appropriate value is the selling price. If the intention of the owner is to retain the chattel for his own benefit, then the appropriate value is the buying price.

B - Methods other than Market Value: Applied where there is no available market for the goods in question or where the market value would not adequately compensate the plaintiff. There is a lack of case law in this area, by analogy, use may be made of other value meanings – adaptation costs or reproduction costs used in Hall v Barclay or the special value – Caxton Publishing Co v Sutherland Publishing Co [1939] AC 178.

C - The Time at which the Value is to be taken: In conversion, the value should be assessed at the time of the wrongful dealing with the chattel. BBMB Ltd v Eda Holdings Ltd [1991] 2 All ER 129. The value of the chattel at the date of judgement is relevant to consequential loss if the fluctuation in market value gives a loss to the plaintiff. He can recover this as a consequential loss – Sachs v Michlos [1948] 2 KB 23, Rosenthal v Alderton [1946] KB 23.
Conversion: The basic loss should be assessed at the time of the wrongful dealing with the chattel. The ‘value’ of the chattel at the date of judgment is relevant only for the assessment of consequential loss. Sachs v Michelos (1948)

Detinue: In detinue the chattel must be valued at the date the defendant was bound to restore to the plaintiff either the chattel or its value. This is the date of judgment. Rosenthal v Alderton (1946), General and Finance v Cooks Cars (1963).

Is the measure different where the plaintiff in detinue rather than conversion? Wickham Holdings v Brook House Motors [1967] 1 WIR 295

NB: The tort of conversion has been abolished in Barbados.

D - The Defendant Improves The Chattel: Any increased value given to the goods by improvements by the defendant or third parties will not be included in the measure of damages - Munro v Wilmoth [1949] 1 KB 295. Compare this with cases for repairs. See also: Peruvian Guano v Dreyfuss, [1892] AC 166 Glenwood Lumber v Phillips [1904] AC 405

E - The Place At Which Value To Be Assessed
In estimating the damages for the conversion of the plaintiff’s goods, the value of the goods at the place where the principal market for them exists is the right basis of calculation, but there must be deducted from the price at which they could have been sold, the cost of conveying them there: Burmah Trading Corpn v Mirza Mohammed (1878) LR 5 Ind App 130: Ewbank v Nutting 137 ER 316. See English Digest for cases.

F - LIMITED INTEREST IN CHATTEL
1. Where The Plaintiff Has A Limited Interest And The Defendant Has No Interest At All:
   i. if at the time of the conversion the plaintiff had possession but not ownership e.g. as a bailee, it is well-settled that he is entitled to the full value of the thing unaffected by the interest of the owner. - The Winkfield [1902] P 42.
   ii. If at the time plaintiff had ownership but not possession, the extent of recovery as against the tortfeasor is disputed. If he has only a limited pecuniary interest as opposed to possession, the award of damages should be limited to the extent of his interest - Bloxam v Hubbard (1804) 5 East 407. MacGregor suggests that the absence of possession should make no difference and he should be entitled to the full value.

2. Where The Plaintiff And The Defendant Both Have An Interest: Here D will not be liable for the full value and plaintiff may recover only to the extent of his interest. Whiteley v Hilt [1918] 2 KB 808. Difficulties arise in determining the extent of the
defendant’s interest and answer must be found in law governing the transaction which is
the subject-matter of the action. aid.

**G: REDELIVERY OF CHATTEL**

Redelivery will not bar any action for misappropriation of the goods but can be a plea in
mitigation. Where the plaintiff accepts redelivery before action in conversion has proceed to
judgment, it does not bar action but goes to mitigation of damages. In detinue acceptance of the
goods before judgment went to bar further action for goods or their value - *Solloway v McLaughlin*
[1938] AC 247. It illustrates that delivery of an equivalent article goes to reduce
damages – *Underwood v Bank of Liverpool* [1924] 1 KB 775.

**What constitutes redelivery?** Offer by D to P to redeliver at some time before the judgment.
The return of an equivalent article will suffice - *Solloway v McLaughlin*
‘Notional redelivery” may be enough - *Hiort v London & NWR* (1879) 4 Ex D 188.

**3C.2.3 CONSEQUENTIAL LOSS**

a. **Loss of Profits:** Such loss will be based on evidence of contractual engagements to which P
was at the time of the tort, already committed. *The Arpard* [1934] P 189.
But where general loss of business is pleaded and where the plaintiff had intended to sell the
chattel or put it to some profitable use, he may recover a sum representing the loss of the
general profit he would have earned – *Strand Electric Co. v Bristol* [1952] 2 QB 246.
From any loss of general profit a deduction has to be made for saving of expense the plaintiff
would have incurred to earn his profit.

b. **Detention:** The plaintiff may as an alternative to compensation for the loss of profits claim a
sum for the detention of his property. It is important in cases of redelivery where it may
represent the plaintiff’s only substantial loss. *The Greta Holme*

c. **Other Consequential Loss:**

i. Ordinary depreciation of value during the defendant’s wrongful detention of the article
will be absorbed in damages for the wrongful detention. If the chattel had remained in
the plaintiff’s possession the same depreciation would have occurred. The plaintiff’s
substantive loss is his inability to benefit from possession of the thing during the
period of detention. But if through the defendant’s neglect depreciation is greater than
it would have been under proper care, the plaintiff is entitled to additional compensation for this loss – *Hall v Pearlberg* [1956].

ii. The plaintiff can recover any expenses necessarily incurred as result of the deprivation of the chattel e.g. cost of hiring replacement - *Strand Electric v Brisford Entertainment*

iii. The plaintiff can also recover any sum for loss of reputation or credit resulting from the misappropriation – *Caxton Publishing v Suterland* where the property was appropriated in some way enhanced the credit of the plaintiff or where a wrongful distress in satisfaction of an alleged debt lowers the reputation of the plaintiff in the estimation of his customers.

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**SEMINAR EXERCISES**

**EXERCISE 1**

Of all potential alternative remedies under this head of loss:

- list which are the most relevant;
- review the various remedies which may be used under each type of approach taken;
- illustrate under what circumstances they may apply; and
- explain why an alternative remedy may be more appropriate than the traditional common law remedy.

**EXERCISE 2**

John is the executor of the estate of William, a retired Senior Counsel who died in November 2012. Under the terms of the will, William left all his real and personal property for his nephew, Shawn. After William's death, Max, William's half-brother, went into his study and removed the following items:

(1) $300 US in notes;
(2) A copy of Chitty's "Queen's Bench Forms' which is now out of print;
(3) The title deed to William's estate in Toco;
(4) A share certificate for 10,000 shares in Syrico Ltd., the market value of which is $5.00 per share;
(5) Certain pages of the manuscript of a book entitled "Memoirs of a Senior Counsel" which William had written and for which arrangements for publications had already been made.

Max refuses to hand over these items to John. But he gives John a key for a safety deposit box saying "The Deed for the old miser's estate is in this safety deposit box, you find out where it is!" Max gave the share certificate to Natty to hold as "security" for a loan of $20,000 Natty made to Max.

John has recently received a letter from the book publishers indicating that they require the manuscript as they are ready 'to go to press'. The publishers also indicate that the estimated selling price of the book would be $125 per copy.

About 3 months prior to his death, William had delivered his video camera valued at $3,000 to Glen for repairs and was told to collect it in 2 weeks time. William never collected the camera. Glen repaired the camera at a cost of $300 and after 3 months sold it for $2,000.

In October 2012, William had bought a new Dash 500 motor car in the joint names of himself, and his mistress, Carla. The showroom price of the car was $36,000. Upon William's death, Carla took possession of the car and refuses to deliver it up to John, claiming that she considered herself entitled to it because of all she had done for William over the year and 2 months they were friendly.

Advise John as to what causes of action are open to him and the measure of damages he is likely to recover on behalf of William's estate.
3C3 TORT: DAMAGE TO AND WRONGFUL OCCUPATION OF LAND

3C.3.1 DAMAGE TO LAND

A. BASIC LOSS
This is assessed by the use of two methods. 1) the diminution of saleable value; and 2.) the cost of replacement method.

The basis principle is restitutio in integrum, but choice of above tests depends on the circumstances of the particular case - *Dominion Mosaics v Trafalgar Trucking* [1990] 2 All ER 246. See also Donaldson LJ in *Dodd Properties v Canterbury CC* [1980] 1 All ER 918, 938

If plaintiff holds the land primarily as an economic asset, then the doctrine of restitutio in integrum applies to award him a sum based on the diminution of the selling price or where he intends to hold the land for his own purposes, then he should be entitled to the cost of replacement - *Hollebone v Midhurst & Fernhurst* [1968] 1 Lloyd’s Rep. 38, *Dominion Mosaics v Trafalgar Trucking* [1990], *Harbutt’s Plasticine Ltd v Wayne Tank* [1970] 1 QB 447, *Ward v Cannock Chase DC* [1985] 3 All ER 537 -

However, for diminution in value test, see *Taylor v Hepworths Ltd* [1977] 1 WLR 659, *Jones v Gooday* (1841) 8 M&W 146, *Watts v Morrow* [1991] 4 All ER 937, *Bruce v Yorke* #173/79 (TT)

Other Factors Which Determine Method To Be Adopted:
1. if there is no market for the property the cost of replacement should be adopted: *Murphy v Wexford County Council* (1921) 2 IR 230, or
2. if replacement or restoration is impossible, unreasonable in an economic sense the award should be based on the diminution of the selling price - *Hole & Son v Harrisons* (1972) 116 Sol Jo 922, *Taylor v Auto Trade Supply*[1972] NZLR 102, *Spicer v Smee* [1946] 1 All ER 489;
3. Market rental value may also be used as measure of damages for wrongful occupation arising from trespass to land –. *A. Rahman v Z. Esack*, HCA# 1045/95

Replacement Value
- Where the cost of replacement is based on restitutio, it must be reasonable - *Dodd Properties v Canterbury CC* [1979] 2 All ER 118 per Cantley J, *Riley v Cooper* #1090/79 (TT)
• Where replacement increases the value of property, there should be no deduction from the plaintiff’s award for such increase - *Harbutt's Palstincine v Wayne Tank*

Cost of reinstatement: *J. Wheatley v S. Cader: HCA# 1498/92*

**Time:** This is normally at the date of the tort. However, see *Bunclark v Hertfordshire CC* infra and *London Congregational Union v Harris & Harriss* [1985] 1 All ER 335 (affirmed on appeal), *Duncan v T'idak Dredging CA 47/79* (TT)

**West Indian Authority:** *Bayne v Phillips No. 1497 of 2001*(Negice-Br of Contract)

**Plaintiffs with Limited Interest**

**Mere Occupiers:** An occupier with no proprietary interest may recover such a sum as will represent the loss to his use and enjoyment of the land during his term of possession - *Bedingtonfield v Onslow* (1685) 3 Lev 209.

**Reversioner:** The reversioner will be able to revert only to the extent that his permanent interest in the property has been injured. Permanent damage to property is a question of fact. See *Rust v Victoria Graving Dock Co* (1887) 36 Ch D. However, see *Mayfair Property v Johnston* (1894) 1 Ch 508.

**B. CONSEQUENTIAL LOSS**

The principle of consequential loss applicable to chattels also applies to land and include:

a) any reasonable expenses incurred: *Grosvenor Hotel v Hamilton* [1894] 2 QB 836, *Dodd Properties, Dominion Mosaic:*

b) any loss of profits he was prevented from earning through damage to land- *Rust v Victoria Graving Dock* (1887) 36 Ch D 113.

c) damages for loss of use of the property to the extent that his use and enjoyment of the property was impaired by the tort - *Spicer v Smee* [1946] 1 All ER 489.

**3C.3.2 WRONGFUL OCCUPATION OF LAND**

**A: BASIC LOSS**

Normal Measure for Wrongful Occupation: is the rental value of the property occupied or used for the period of wrongful occupation or user. Note that principal action here would be for recovery of possession. - *Clamer Ltd v Edwards #726/82* (TT). Damages would then be limited
to loss arising from the period of wrongful occupation by the defendant – *B. Persad v D. Lakhan & Royal Bank of T&T* HCA# S1685/84.

Mere Use without Deprivation: Where the defendant merely uses the plaintiff’s land without depriving plaintiff of possession, damages would necessarily be limited to the loss arising from the period of wrongful user. These are based on what is regarded as a reasonable rent or fee irrespective of whether the plaintiff would have otherwise acquired that sum by letting.- *Whitwham v Westminster Brymbo Coal* [1896] 2 Ch 538. The Whitwham principle was applied in recent times in: *Penarth Dock Engineering v Pound* [1963] 1 LL.R. 359, *Swordheath Properties v Tabet* [1979] 1 WLR 285

In almost each of these cases the wrongful user would either have ceased by the time of the action or if persisted in by the defendant would be put to a stay by the court granting an injunction. Any question of damages for loss arising for future periods of wrongful user will not arise.


**B: CONSEQUENTIAL LOSS**

a. Loss of Profit: The plaintiff is entitled to the sum representing profits he would have made if the land had not been occupied by the defendant. Deductions are to be made for expenses plaintiff would have incurred to secure profits - *B. Persad v D. Lakhan & Royal Bank of T&T*

b. Loss of Use: If the plaintiff himself would, but for the wrongful occupation have been in possession, then he is entitled for compensation for loss of use and enjoyment of land. The usual award is such a sum as would have been paid to him as rent if defendant was a lawful tenant - *Hall v Pearlberg* [1956] 1 All ER 297

c. Expenses: Expenses and other consequential losses are awarded provided they do not infringe the rules as to certainty, mitigation and remoteness.

d. Aggravated and Exemplary Damages: *Drane v Evangelou*

e. Mitigation: *H. Riley v S. Cooper* HCA #1090/79

**3C.3.3 OTHER TORTS TO LAND**
Unauthorised Mining: In the particular case of trespass by unauthorised mining, although the main head of loss in the value of severed minerals removed, there may also be recovery for damage to land e.g. injury to soil by digging, flooding, recovery for damage to houses on surface as in Livingstone v Rawyard Coal Co (1880) 5 App Cas 25.

Nuisance: In the case of nuisance there may only be physical damage to land and the normal measure of damage will be that diminution in the value of the land. If measured by the cost of replacement, this will generally be termed the costs of abating it. MacGregor summary of Bunclark v Hertfordshire CC (1977) 243 EG 381 illustrates both diminution in value and cost of reinstatement. Compare with Dodd Properties and The Liesboch.

Beyond physical damage to land a nuisance may cause annoyance, inconvenience, discomfort or even illness to the plaintiff/occupier. Recovery for non-pecuniary loss is permissible as the normal measure of damages - Halsey v Esso Petroleum [1961] 1 WLR 683 and Bone v Seale [1975] 1 WLR 797, Bahamas Developers Ltd v G B Airport Co Ltd [1965 – 70] 2 LRB 326.

Trespass to Lifestock: This arises where the defendant’s cattle strayed on the plaintiff’s land and destroyed his crops, his animals or his person whether by physical impact or by infection. Dicta suggest that the defendant’s liability does not extend beyond the damage resulting from the acts of the animal in accordance with its ordinary nature - Wormald v Cole [1954] 1 QB 614.

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SEMINAR EXERCISES

EXERCISE 1
Of all potential alternative remedies under this head of loss:

- list which are the most relevant;
- review the various remedies which may be used under each type of approach taken;
- illustrate under what circumstances they may apply; and
- explain why an alternative remedy may be more appropriate than the traditional common law remedy.

Exercise 2
In 2011 Celsus who operated a taxi business acquired a large lot in the city on which he built a garage to accommodate his five taxis. Business flourished initially but three years later mainly
due to his carelessness and mismanagement the business took a downward trend. Some of the taxis were destroyed and the parts were accumulated on the garage compound. Celsus sold the last one in July 1997 but still retained the garage premises since the site was a good one and capable of redevelopment.

In September 2012 owning to the negligence of the restaurant proprietors who carried on their business on the adjoining lot a fire spread onto Celsus’ premises and destroyed the garage together with the broken portions of the taxis which were on the site. Two months after the fire three young men of the rastafarian sect went onto the land and after clearing the debris, they fenced a portion of the land adjoining the highway and erected stalls from which they sold various kinds of merchandise to the public.

On being apprised of the situation, Celsus who had not paid much attention to the property since the September fire confronted the men in December 2012 and asked them to remove their stalls from his property immediately. An altercation ensured as a result of which Celsus received a severe beating from the three young men. After recovery Celsus consults you as to taking appropriate action for the injury to his property.

Advise Celsus as to the appropriate causes of action and the likely awards from the above-mentioned facts.

Exercise 2

In 2011, Electra, a widow, purchased a two-storey house in Ladbrook Heights by way of investment. Shortly after the purchase Electra contracted, RAN & Company, a firm of building contractors to carry out certain renovations to the house including replacing the entire roof.

Electra had the premises divided into 2 apartments and advertised the same for rent at $2,000.00 each monthly. In 1997 Willis rented the upstairs apartment and Jamal took the downstairs apartment.

Jamal proved to be an undesirable tenant and Electra duly terminated his tenancy with effect from the 15th December 2013. Jamal vacated the premises but before doing so he removed the air-condition unit which Electra had installed at a cost of $3,000.00 and took the same with him. Moreover, he did not deliver up the keys to Electra, but handed them over to his good friend Robday, who immediately moved into possession. Robday is still there.

Shortly after Willis moved in water marks appeared on the ceiling and the roof began to leak. Electra reported this to RAN & Company and they promised to have the roof fixed. However, they never fulfilled their promise and the leaks grew progressively worse. Willis complained to
Electra but due to financial difficulties she was unable to engage anyone else to repair the roof. Eventually, in September 2013, a portion of the building collapsed and Willis was forced to vacate the apartment. Again, Electra was unable due to financial difficulties to carry out the repairs even up to the present time. Further rainfall caused the carpet in the upstairs apartment to become water logged and some furniture has been damaged.

These are your instructions. Advise Electra as to her rights and remedies.
**3C.4 BREACH OF CONTRACT: SALE OF LAND**

**3C.4 1 INTRODUCTION**

In an action for the breach of contract for the sale of land a claim for such breach can be made by a party who has elected to rescind the contract following the breach by the other party and his remedy is in damages. Where the party affirms the contract, he may sue for specific performance and/or damages.

**3C.4 2 SELLER IN DEFAULT (REFUSAL/INABILITY TO COMPLETE)**

The Normal Measure Is Damages For Loss Of Bargain: This is consistent with the general principle of damages for breach of contract situation enunciated in *Robinson v Harman* (1848) 1 Exch 848, *Hadley v Baxendale* (1852) 9 Exch 341 and *Rose v Chung* (infra). This measure is the **market value of the property at the time fixed for completion minus the contract price**.

The purchaser must also be able to establish his own ability to perform the contract and should prove a tender of both the conveyance for execution and the balance of the purchase price. *Phillips v Lamdin* [1949] 2 KB 33.

The Price of Resale: This may be used by the court for estimating the market value in certain circumstances:

d) where there are difficulties in estimating the market value - *Engell v Fitch* LR 4 QB 659.

e. where there is a departure from the general rule, the court may take the value of the property at the date of judgment rather than the date of completion if this will do justice - *Roth v Tyler* [1974] Ch 30, *Johnson v Agnew* [1979] 1 All ER 883, *Rose & Ors v Chung & Ors* [1978] 27 WIR 211 vs *Rall-Morgan v Chung & Ors* [1978] 27 WIR 196.

f. in special circumstances e.g. effect of inflation since completion date, there is no comparable property, impecuniosity, or may be demanding specific performance - *Malhotra v Choudhury* [1980] 1 All ER 186, *Rose v Chung*

g. where the plaintiff makes a profit after resale, such gains may be disallowed in considerations of mitigation in appropriate circumstances – *Hussey v Eels* [1990] 1 All ER 449.
CONSEQUENTIAL LOSS

Loss of Profit on Resale: Considered too remote. However, if knowledge that the plaintiff intends to use property in a particular way at the time of the contract, this can be taken into account. *Diamond v Campbell-Jones* [1961] Ch 22, *Seven Seas Properties v Al-Essa No. 2* [1993] 3 All ER 577, *Cottrill v Steyning & Littlehampton BS* [1966] 1 WLR 753, *Malhotra v Choudhury, Lloyd v Stanbury* [1971] 2 All ER 267.

Expenses preliminary to contract can be claimed if they are likely to be such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken – *Anglia Television Ltd v Reed* [1972] 1 QB 60.

Increased Value of Property: Where plaintiff’s action increases value of property, defendant cannot claim benefit of such increased - *Hussey v Eels* (also useful on mitigation).

3C.4 3 SELLER IN DEFAULT - DEFECT IN TITLE

THE RULE IN BAIN V FOTERGILL

When the vendor who has not expressly contracted to deduce good title is in default due to a defect in title the rule in *Bain v Fothergill* (1874) LR 7 HL 158 applies and the normal measure does not apply except in the case of fraud.

What is recoverable?
* Costs or preparing and executing contract
* The return of the deposit paid with interest
* Expenses incurred in investigating title
* Pre-contract expenditure under *Lloyd v Stanbury* (supra)
  
  *E. Johnson v NSR Ltd* [1996] 49 WIR 27, *Keen v Mear* [1920] 2 Ch. 574

Rationale: Based on the difficulty of a vendor to demonstrate a good title under the system of unregistered conveyancing at the time of the contract. *Ray v Druce* [1985] 2 All ER 482.

Application: The rule applies to any disposition or sale of any interest in land whether the land is freehold or leasehold. Even though the rule is severely criticised it has been recently affirmed in *Day v Singleton* [1889] 2 Ch 320 and *Seven Seas Properties v Al Essa*.

Special Considerations:

f. Does rule apply to registered conveyancing? *Wroth v Tyler* per Megarry J.
7. The vendor simply needs to show bona fides even if the belief is not a reasonable one. Although the vendor is under a duty to take reasonable steps to secure a good title he was not obliged to engage in expensive litigation to secure title - *Sharneyford Supplies Ltd v Edge & Anor* [1985] 1 All ER 976.

**Specific Instances of Applications:**
*Where the vendor contracts in the mistaken belief that he has good title*  
*Where there is a mistake of expectation* - *Keen v Mear* [1920] 2 Ch 574.

**Exceptions to the Rule:**

1. **Fraud:** Where the plaintiff/purchaser is induced by the fraudulent misrepresentation of the vendor that he had good title when he knows the contrary it true the rule does not apply - Lord Chelmsford in *Bain v Fothergill, Watts v Spence* [1975] 2 ALL ER 528, *Watts v Spence* [1976] Ch 165.

2. **Lack of Bona fides:** If subsequent to the contract the vendor acts with ill will or spite so as not to complete the transaction. This includes situations:
   * where the consent of a third party is required and the vendor takes no steps to secure that consent - *Braybrooks v Whaley* [1919] 1 KB 435.
   * where between the dates of contract and completion the vendor deliberately puts it out of his power to convey the property by selling it to a third party - *Goffin v Houlder* [1921] 90 LJ Ch 488, *AVG Management Science v Barnwell Developments* [1979] DLR (3d) 289.

   Here the normal measure would apply where there is no defect in titled and the vendor refused to convey. Note curious situation in *Rose v Chung*.

   Impecuniosity or expense does not let in the rule in *Bain v Fothergill* as this is a matter of conveyancing rather than title. Issues of title are outside the power of the vendor to remove. *Engell v Fitch, Re Daniel* [1919] 2 Ch 405[191]

**Inter-relationship Between Normal Measure and B v F:**

1. Where he recovers the normal measure or loss of bargain, the purchaser cannot recover expenses for investigating title - *Re Daniel*. If expenses are not incurred, an estimate would be made and deducted.

2. Where he proves loss of bargain  

   *Lloyd v Stanbury* [1971] 1 WLR 535.
3C.4 3 SELLER’S DELAY IN COMPLETION

A plaintiff is entitled to damages for being kept out of the conveyance and this is equal to the value of user of land (rental) from the contractual date of completion to the actual date. This operates whether the delay brought to an end by the vendor or by coercion by order of the court. Gloucester House Ltd v Peskin [1962] 4 WIR 182, Phillips v Lamdin, Raineri v Miles [1980] 2 All ER 145.

3C.4 4 PURCHASER IN DEFAULT

Specific Performance: A vendor may affirm the contract and sue for specific performance. Where a vendor brings an action for specific performance of the contract, but places such performance out of his hands by the time of trial (by subsequent sale of property), he cannot claim damages as an alternative unless he amends his pleadings. Hipgrave v Case (1885) 28 Ch D 356.

If specific performance is not carried out, the successful party can put an end to the contract and have damages assessed instead. Johnson v NSR Ltd.

Damages: This is the difference between the contract price (the amount of the purchase price which the vendor would have received) and the value in money of the estate at the time of the breach. Keck v Faber, Jellett v Keeble (1915) 60 Sol Jo 253, Watkins v Watkins (1849) 12 LTOS 353. If no time is fixed for completion, market value is taken at the time when the purchaser refuses to accept the conveyance. Johnson v Agnew.

Consequential Loss: is recoverable as well e.g. auctioneer and solicitors fees, costs of conveyance and even costs incurred in reselling the property to a 3rd party.
BREACH OF CONTRACT – SALE OF LAND

Damages for Breach of Contract for Sale of Land

To succeed:

Vendor's Obligation: to produce good title, and remove all impediments, charges on the property

Normal Breach (Breach of Warranty)

Consequential Loss = 2nd limb of HuB or Diamond v Campbell-Jones

Loss of Bargain = Value of land at time of completion - contract price

Fundamental Breach = Genuine defect in title (B v F)

return of deposit, legal fees; search fees; costs rendered nugatory by breach

Purchaser's Obligations: to show they are able to complete (have balance of purchase price) at time of completion

Consider alternate remedies of specific performance or injunctions

Market value varies based on value at completion based on circumstances e.g., where no value can be ascertained - possible resale price; cost at time of judgment can also be used. Look at other factors

Fraud and Mala fides voids application of BvF
SEMINAR EXERCISE 1

Of all potential alternative remedies:
- list which are the most relevant;
- review the various remedies which may be used under each type of approach taken;
- illustrate under what circumstances they may apply; and
- explain why an alternative remedy may be more appropriate than the traditional common law remedy.

SEMINAR EXERCISE 2

Romulus was the owner of a property known as "Greenacres." He also owned a property called "Hillview", jointly with his brother Remus.

By an agreement in writing dated November 1, 1998, Romulus agreed to sell "Greenacres" to Cosmos for the price of $100,000. The time fixed for completion was March 1, 1993. Pursuant to the agreement Cosmos paid a deposit of $10,000. He also paid the sum of $2,000 to his lawyer for preparation of the agreement and the cost of investigating title. He intended to use "Greenacres" for horticulture in order to take advantage of the lucrative export market for cut flowers. He estimated that he would make a net profit of $100,000 in the first year of operation.

Romulus and Remus decided to sell "Hillview". By a contract in writing dated December 1, 1998 made between Romulus and Cosmos, Romulus agreed to sell 'Hillview' to Cosmos for the price of $500,000. The contract fixed the date for completion at April 1, 1999. In accordance with the contract Cosmos paid a deposit of $50,000. In addition he paid $20,000 to his lawyer for preparation of the contract, the cost of investigating title and preparation of the conveyance. At the time of entering into this contract Cosmos informed Romulus that he intended to convert "Hillview" into a hotel and entertainment complex.

On February 12, 1999, Romulus sold and conveyed "Greenacres" to Ophelia for the price of $200,000. On April 1, 1999 he informed Cosmos that he would no longer be able to sell "Hillview" because Remus had changed his mind about selling.

Advise Romulus as to his liability in damages to Cosmos.
3C.5 BREACH OF THE CONTRACT: EMPLOYMENT

3C.5.1 INTRODUCTION

In considering remedies against the dismissal of an employee from his employment, two distinct remedies are available to him. The first is under the common law for wrongful dismissal and is usually comprised solely of damages, and the other is “unfair dismissal” created by legislation in order to ameliorate the harshness of the common law.

The weaknesses of protection against dismissal under the common law are:
1. The failure of the common law action to question the fairness of the employer’s decision to terminate the contract, provided the correct period of notice was given.
2. The low level of damages awarded.
3. The inability of the employee to regain job because of traditional reluctance of the courts to order reinstatement.
4. The archaic nature of some of the principles of summary dismissal.
5. The lack of procedural protections for most employees, with only an ill-defined group of so-called office-holders being entitled to natural justice.

Revived Interest in Wrongful Dismissal: Wrongful dismissal claim is worth considering where:

• the employee is a high earner whose losses in terms of salary and fringe benefits far exceed the relatively low maximum compensation limits set for unfair dismissal
• the employee is prevented from claiming unfair dismissal because he or she lacks sufficient continuity of service, is over retirement age or has failed to lodge a complaint within the statutory period
• the dismissal is in breach of contract and the employee wishes to seek a declaration or an injunction to keep the contract alive
• The dismissal is fair but in breach of contract.

Termination of Contract and Wrongful Dismissal: by notice, breach of contract and by dismissal.

There are several ways in which the contract of employment may be terminated at common law:
POTENTIAL ALTERNATIVE REMEDIES

Statutory Remedies for Unfair Dismissal

Damages

Reinstatement

3C.5.2 TERMINATION

TERMINATION BY NOTICE AT COMMON LAW
Save in the case of a fixed-term contract, an employee is employed for an indefinite period subject to termination by a reasonable period. The length of notice is usually expressly agreed, otherwise the common law will imply a period of reasonable notice depending on the circumstances of the particular employment. In many cases this is taken to be the same length as the period of payment - Grundy v Sun Printing and Publishing Association (1916) 33 TLR 77, Adams v Union Cinemas Ltd [1939] 3 All ER 136. See also Boyce v Brewster [1996] 52 WIR 73, 78f-j.


TERMINATION BY BREACH
A party to a contract of employment is discharged by a fundamental breach, that is, a breach which:
(a) the parties regard as vital (The Mihalis Angelos [1971] I QB 164);
(b) is so serious in its consequences as effectively to deprive the other party of what he had contracted for (Hong Kong Fir S/zipping v Kawasaki Kisen Kaisha [1962] 2 QB 26); or
(c) shows that the other party no longer intends to be bound by one or more of the essential terms of the contract (Western Excavating (EEC) Ltd v Sharp [1978] QB 761).

Must a breach be accepted by the innocent party? This issue is of practical importance in deciding:

(a) the date when termination took place;
(b) whether strikers by the very act of striking, i.e. in fundamental breach of contract, put an end to their contract;
(c) whether a termination/repudiation comes within the definition of direct or constructive dismissal for unfair dismissal and redundancy; and
(d) to what date the employee must be paid.


See CA discussion (in Barbados) of statutory provision relating to vacation leave which influenced court in decision that employer repudiated contract of employment in Boyce v Brewster [1996] 52 WIR 73.


TERMINATION BY DISMISSAL

Ordinary employees: A dismissal with proper notice is lawful, except where procedural provisions for termination form part of the contract (e.g. Tomlinson v LM & S Railway [1944] 1 All ER 537. These provisions are not normally implied, Mc Clory v Post Office[1992] ICR 758.
Office holders: the courts have implied the need for natural justice Stevenson v URTU [1977] ICR 893, (1977) 2 All ER 941, Ridge v Baldwin [1964] AC 40, Malloch v Aberdeen Corporation [1971] 1 WLR 1578. The rules of natural justice 'must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth' Russell v Duke of Norfolk [1949] 1 All ER 109.

“Office Holder” has a wide meaning: Hanis v Teevan et al 169 DLR 414.

In employment cases, the essentials are, as in the concept of fair procedure in unfair dismissal, the rights to be heard by an unbiased tribunal, to have proper notice of charges of misconduct, to be heard in answer to the charges, and to appeal from the initial decision. Public Interest: will exclude principle. Council of Civil Service Unions v Minister for the Civil Service [1985] ICR 14, R v Director of GCHQ ex parte Hodges, The Times, 26 July 1988.

SUMMARY DISMISSAL

Here dismissal is without notice, the general test being: ‘whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service’ Laws v London Chronicle (Indicator Newspapers) Ltd [1959] I WLR 698, Blyth v The Scottish Liberal Club [1983] IRLR 245, Hilton International (B’dos) Ltd v Boyce [1996] 52 WIR 49, Arawak Cement v London [1996] 52 WIR 54. The lawfulness of the dismissal depends inter alia on:

(i) the position of the employee;
(ii) his past record;
(iii) the social conditions of the time.

West Indian authority: Torres v AG dealing with breach of contract of employment. See Barbadian position in Ismael v Queen Elizabeth Hospital Board Civil Suit No: 0011 of 2011 and Sealey v First Caribbean International Civil Appeal No.10 of 2008.

See also St. Christopher case of Hensley v Federal Express Corporation Civil Suit No 0114 of 2003

3C.5.3 REMEDIES FOR WRONGFUL DISMISSAL

The potential remedies for wrongful dismissal are: damages, specific performance, injunction, declaration, and prerogative orders.

A. DAMAGES

Damages are the normal remedy for breach of contract and the usual measure is the wages and benefits the employee would have earned if due notice had been given. Radford v De
Treatment of benefits Contractual fringe benefits are taken into account and an important element for consideration in *Shove v Downs Surgical plc* (supra) was the provision of a Daimler motor car. Sheen J rejected the employer’s submissions that:

(a) the correct method of assessment was by reference to the tax charge imposed by the Finance Acts;

(b) the employee was entitled to compensation only in respect of such vehicle as he could expect to be provided with in his position; and

(c) the absence of contractual entitlement to petrol meant that it could not be claimed even though it had been provided to him free by the company for many years.

**Damages for distress etc.** Damages is limited in that no damages are recoverable for:

- the humiliating way in which the employee was dismissed; *Cox v Philips Industries Ltd* [1975] IRLR 344. This was, however, overruled by the CA in *Bliss v South East Thames Health Authority* [1985] IRLR 308.


**Where the parties envisage a greater return from the contract of employment than wages:** *Marbe v George Edwardes (Daly’s Theatres) Ltd* [1928] 1 KB 269, *H C &J Waller Ltd v Oliver* [1930] AC 209, *Dunk v George Walter & Sons Ltd* [1970] 2 QB 163.

Bonuses under contract: *Lake v Campbell* (1862) 5 LT 582

There will be no award for:

- *bonuses* which are solely within the discretion of the employer (*Lavarack v Woods of Chester Ltd* [1967] 1 QB 278);


**Loss of a chance:** In *Robert Con & Son Ltd v Charman* [1981] IRLR 437, Browne-Wilkinson J suggested *obiter* that damages might include a sum for the loss of the right to compensation for unfair dismissal which the employee would have successfully claimed had the correct notice been given (see also *Stapp v The Shaftesbury-v Society* [1982] IRLR 326, *Collins v I-fall Blinds Ltd*, unreported: Clerkenwell County Court, JO October 1994, *FOCSA Services (UK) Ltd v Birkett* [1996] IRLR 325).
Where a dismissal was wrongful on procedural grounds: the proper amount of damages is what would have been earned from the date of the unlawful dismissal to the date when the contract could lawfully be terminated according to Hodgson J in Dietman v London Borough of Brent [1987] IRLR 259.

Fixed Term Contracts Not Terminated by Notice: Very large measures of damages here. This is most usually the case in high status occupations like company directors, football club managers and accountants. The measure of damages is then similarly the amount which would have been earned in the unexpired part of the fixed term, but here there might be four or five years to run. Leonetti v Hussmann Canada Inc. 159 DLR (4th) 655.

Deductions from Damages

Mitigation: This duty applies. Employee must take reasonable steps to obtain another job, and if he succeeds any wages earned in the new position will be deducted from wages due over the period of notice. If, on the other hand, he does not try to find another post, a sum is taken away to represent his lack of effort West-wood v Secretary of State for Employment [1984] IRLR 209. Edwards V SOGAT [1970] 3 WLR 743, 3 All ER 689, (Yetton v Eastwoods Froy [1967] 1 WLR 104).

The employee must also give credit for any opportunities gained as a result of his dismissal, but not where these arise indirectly. Lavarack v Woods of Colchester Ltd [1967] I QB 278.

There is no duty to mitigate, however, in a case where the contract of employment provides for a specific period of payment on termination which may be thus recovered as a debt (Abrahams v Performing Rights Society Ltd [1995] ICR 1028j. Belize Airways Ltd v Tatum Belize Law Reports 104


Other benefits: There may be other sources of assistance during unemployment besides recourse to the courts for damages. These must be balanced against damages so that the dismissed employee does not recover twice. The following rules apply to such other benefits:

(a) Unemployment benefit (now the jobseekers allowance) and supplementary benefit received during the period of notice for which damages can be gained are deducted (Parsons v BNM Laboratories Ltd [1964] I QB 95, Cheeseman v Bowater Paper Ltd [1971] 3 All ER 513. Nabi v British Leyland (UK) Ltd [1980] I All ER 667, Lincoln v Hayman [1982] 1 WLR 488).

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(b) **Redundancy payment** is not deducted since it is not a substitute for wages but a lump sum recognition of past employment *(Yorkshire Engineering & Welding Ltd v Burnham 11974) ICR 77, Basnett v J & A. Jackson Ltd [1976] ICR 63, Stocks v Magna Merchants Ltd [1973J ICR 530, Wilson v National Coal Board (1980) 130 NU 1146.

(c) The sum of social security contributions which the employee has not had to pay while unemployed are deducted *Cooper v Firth Brown Ltd* [1963] 1 WLR 418.

(d) Unfair dismissal compensation is deducted, at least the amount awarded for loss of earnings *(Berry v Aynsley Trust Ltd* (1976) 127 NLJ 1052). but the court will not he able to do this if the unfair dismissal award is for the maximum figure then available and the tribunal has not apportioned that amount to any particular period when the employee was out of work *O’Laiore v Jackel International Ltd* 1199111CR 718.

(e) Occupational pension benefits are not deductible *Hopkins v Norcross plc* 11994] IRLR 18.

**B. SPECIFIC PERFORMANCE AND INJUNCTION**

The courts have in general refused to countenance his regaining his old position by injunction preventing the dismissal taking effect - *Warner Bros Pictures Inc. v Nelson* [1937] 1 KB 209. The following reasons have been advanced for this conclusion:

(a) It would amount to *forced labour* Thus Fry LJ in *De Francesco v Barnum* (1890) 43 Ch D 165

(b) It would be inconsistent with the *trust and confidence* which must exist between employer and employee.

(c) If the effect of dismissal is to terminate the employment, equity will not act on the basis that it is still alive.

(d) It offends against the doctrine of *mutuality* since to force an employer to reinstate cannot be balanced by forcing an employee to work.

(e) The court cannot *supervise* performance of the contract.

(f) *Damages* are usually an adequate remedy.

The court will not enforce a provision not to take any employment at all for a period after termination of the contract of service. For this would constitute a thinly disguised form of compelling service - *Page One Records Ltd v Britton* [1967] 3 All ER 822, *Lumley v Wagner* (1852) 1 De GM & O 604, *Evening Standard Co. v Henderson* [1987] IRLR 64, *Warren v Mendy* [1989] IRLR 210. See also *F. Des Vignes v Caroni* (1975) Ltd HCA# 1719/94 (TT) whether injunctive relief can be granted

An injunction may normally be granted only where there is the necessary trust and confidence remaining between employer and employee as was the case in *Irani v Southampton and South West Hampshire Health Authority* (here court took a broader view of granting injunction than usual traditional approach) and *Powell v London Borough of Brent* [1987] IRLR 466. This must be judged by reference to all the circumstances of the case including the:

- nature of the work,
- people with whom the work must be done, and
- the likely effect on the employer and employer’s operations if he is required by the injunction to suffer the plaintiff employee to remain in his position (cf. *Ali v Southwark LBC* [1990] ICR 567; *Powell v Brent London Borough Council* [1988] ICR 176 Court of Appeal)

**Note:** In exceptional circumstances, equitable remedies may be granted even where mutual trust and confidence has been lost, so long as the court is satisfied that ‘a workable situation’ can prevail.. *Wadcock v London Borough of Brent* [1990] IRLR 223 Queen’s Bench Division

**C. DECLARATION**

The declaration is of increasing importance in the area of dismissals. This has been for some time used as a remedy in cases involving statutory status and offices, (*Vine v National Dock Labour Board* [1956] 1 QB 658, *Stevenson v United Road Transport Union* [1977] ICR 893. In the past they have been refused in the case of ordinary employees *Francis v Municipal Council/on of Kuala Lutnpur* [1962] 1 WLR 1411.

The Court of Appeal in *Gunton v Richmond-upon-Thames LBC* [1980] ICR 755, countenanced an extension in the use of the declaration *to declare* that the employees contract remained in being. They indicated that it was not issued because of any special statutory status of the applicant; it may be particularly appropriate for declaring that a contract still exists and a repudiation has not been accepted by the other party.

**JUDICIAL REVIEW**

Where the employer is a statutory authority, the prerogative orders of *certiorari* and mandamus may be sought in the Divisional Court (*University Council of the Vidyodaya University v Silva* [1965] 1 WLR 77), but this does not extend to post office employees (*R v Post Office ex parte Byrne* [1975] ICR 221) since this is a public corporation.
In *R v East Berkshire Health Authority ex parte Walsh* [1984] IRLR 278, the Court of Appeal stressed that judicial review was only available where an issue of public law was involved. A breach of the contract of employment by a public authority was not a matter of public law. The Master of the Rolls explained that it was the existence of special statutory provisions bearing directly upon the right to dismiss which distinguished this case from the cases of *Vine* (supra), *Ridge v Baldwin* [1964] AC 40 and *Malloch v Aberdeen Corporation* [1971] ICR 893 where judicial review was granted.

The following have not been held issues of public law so that judicial review is an inappropriate remedy:

(a) the termination of the contract for services between a deputy police surgeon and a county council (*R v Derbyshire CC ex parte Noble* [1990] ICR 808);

(b) a decision of a Probation Committee to phase out a mileage allowance on financial grounds (*Doyle v Northumbria Probation Committee* [1992] ICR 121).

In *R v Hertfordshire CC ex parte National Union of Public Employees* [1985] IRLR 258.
BREACH OF CONTRACT – CONTRACT OF EMPLOYMENT

Damages for Breach of Contract of Employment (Wrongful Dismissal) at common law

Other Remedies
- Unfair Dismissal (Legislation)
- Judicial Review in case of public officers (common law)
- Remedies for breach of constitutional right (consider alternative remedies – Jaron v AG)
- Equal Opportunities Act (legislation) – T&T and Guyana
- Complaint to Ombudsman (administrative remedy) – T&T and Guyana
- Whistleblower Legislation or ‘ole talk???

Other Remedies
- Specific Performance
- Injunction?
- Declaration?

Type of Contracts
- Fixed Term Contracts
- Open-ended contract of employment

Terms of the Contract
- Specific terms regarding termination of employment
- Contract does not have specific terms regarding termination:
  - Court to construe what is reasonable notice based on circumstances of employment – length of service, position hold in company, importance of position, level of expertise, contribution to company, etc.

- Basic Loss: Lost wages, emoluments and benefits to end of term of contract subject to duty to mitigate.
  - Distinguish between
    - Benefits that are compulsory
    - Benefits that are discretionary
      - Aggravated and Exemplary Damages?

- Consequential Loss: Loss of Chance
  - Distinguish between

Consider what are the various types of emoluments which are potential subjects of compensation.

Attach cases next to relevant principles;

Any additional principles which are relevant to understanding of area?
SEMINAR EXERCISE 1

Of all potential alternative remedies as an alternative to damages for wrongful dismissal:

- list which are the most relevant;
- review the various remedies which may be used under each type of approach taken;
- illustrate under what circumstances they may apply; and
- explain why an alternative remedy may be more appropriate than the traditional common law remedy.

SEMINAR EXERCISE 2

Fred is the Chairman of the Board of Directors of Trintak Limited, proprietors and publishers of the "First Edition", a well-known daily newspaper. While on holiday in Canada in 1998, Fred met Malcolm, a highly respected West Indian journalist, who was then living and working in Canada. Fred, acting on behalf of the Board, offered Malcolm the position of Managing Editor of the 'First Edition". After some persuasion by Fred, Malcolm agreed to return home and take up the post on February 1, 1999. There was not formal written contract between the parties. However, under the terms of his employment, Malcolm was to receive a salary of $9,000 per month together with rent-free accommodation and a company car. The contract was for an initial period of three years with an option on the part of Trintak Limited to extend it for a further period of three years.

Malcolm duly took up his post on February 1, 1999. Shortly thereafter he sent to Canada for his wife, Melda, and he had his household effects shipped home at a total cost of $7,000.

The relationship between Malcolm and the Board became very strained by October 1999. The Board disliked and disapproved of Malcolm's frank and open editorials on politically sensitive issues and his plans for the re-organisation of the editorial staff. Gradually, the Board relieved him of his major responsibilities and by the end of February 2000, Gobin, a Director of the company, was performing all the functions of Managing Editor. Malcolm became frustrated and depressed and suffered a great deal of mental anguish and as a result was forced to seek medical attention.

Finally in March 2000, the Board called upon Malcolm to resign. He was given a cheque for 3 months' salary. Fred offered Malcolm the job of Manager of Advertec Limited, a small advertising subsidiary of Trintak Limited, at a salary of $6,000 per month. Malcolm refused this
offer. Malcolm's efforts to obtain another job in the newspaper industry at home have been fruitless. Having heard of the possibility of an opening with a newspaper in a neighbouring country, he travelled there for an interview. The cost of this trip, including hotel accommodation was $1,100.

Had Malcolm continued in the post of Managing Editor, it was very likely that he would have been elected President of the West Indian Journalists Association for the 2000/2001 term, a non-remunerative but highly prestigious post.

Malcolm has now consulted you and he wants to take legal action against Trintak Ltd. He tells you that he feels humiliated and embarrassed by the whole episode as the word is now out in newspaper circles that he had been fired.

Advise Malcolm as to his likely measure of damages in an action for wrongful dismissal.
This part will consist of a series of exercises based on factual situations which may come up in practice and which will involve you having to utilise all the knowledge and skill you have accumulated during the course of this programme. It will especially focus on how you use the advice on quantum of damages as a means to solve your client’s problem – whether it is through
1. a mediated or negotiated settlement without recourse to litigation; or
2. actual litigation in the courts where you will have to prove damages and subscribe to the various processes of the court (this will examining the impact of civil procedure and practice and the role of evidence in the actual award of damages).

These exercises will be delivered during the course of the academic year. However, as alternative remedies are assessable, the follow fact situation will provide a good guide to discussing the various remedies and which may be appropriate in the circumstances. This fact pattern comes out of the 2013 May examination.

INSTRUCTIONS

The Context

Poshville is a highly residential and exclusive suburban community in your country. The Rio Tranquil River runs through this community. Because of the country’s economic growth, there has been a high demand for aggregate in the construction sector which has led to much unscrupulous dealings. In fact, the regulatory agencies have effectively turned a blind eye to many unlawful practices in order to fill the demands. Relevant public safeguards in your country include quarrying regulations and licensing requirements, environmental legislation and land use laws which should be obtained prior to commencing any such activity.

In January 2012, Jeb, a quarry owner started mining the river to extract certain types of stone and gravel for sale without securing the necessary licence to do so. He used dynamite to blast the river bed and brought in heavy trucks right through the community in order to cart away the aggregate to his quarry.

Rachael’s Complaint
The blasting of the river bed has destabilised the foundations of many homes in the community as the land has started to shift. In particular, Rachael’s home suffered a severe crack in the foundation and wall and a civil engineer has advised her that it is no longer safe for her to continue living there. He estimates that it will cost over $1.5m to restore the house to its original condition. Similar houses in the community which have been unaffected by this problem are valued at $900,000.

She has moved her family to the Hilton Hotel while she determines what steps she can take regarding her living accommodation. While she was away, vandals broke into the home and stole many valuable items which she had not had an opportunity to remove. She further had to take a loan at a much higher rate of interest than normal because she did not have the money to finance these repairs herself;

**George’s Situation**

Dust and debris from the blasts have blown into the homes of many residents and form an almost permanent layer on paintwork, damaging household appliances and plants. George is particularly affected in all these areas. Most hurtful, is that he has spent over 20 years creating and cultivating a very rare specie of anthurium lily in his backyard. He has now lost 50 percent of his plants. Further, the flowers that he cuts from these plants for sale on a weekly basis are unmarketable due to the dust infestation.

George also has a fine collection of old vinyl LPs and CDs with an exquisite music system. His entire music system has been destroyed by the dust and it will cost over $50,000 to repair his LPs and CDs. These are irreplaceable.

**Tom and Family**

In November last year, Tom, aged 39, was struck by one of Jeb’s trucks on the pavement in front of his home while he was cutting his front hedge. He was taken to the community hospital where he was in severe pain for 3 weeks before he eventually succumbed to his injuries and died. He left his wife, Theresa (35) and 2 children: Jane, aged 15 who has a promising academic future and wishes to be a doctor, and Ben, age 5. Tom was a civil engineer working for $80,000 per month.

Jane, who was assisting her dad at the time of the collision, was also injured. She spent 2 months in hospital and a further month at home. Theresa decided to take time off from work to take care of her daughter at home. While Jane’s academic career is still bright, she now walks with a
permanent limp. Her right hand was also injured and it is now clear that she will never be the neurosurgeon that she expected to be. This has left her depressed.

The death of Tom and injury to Jane was devastating to the community. It galvanized them into action and Theresa was at the forefront of much of the vocal protests, appearing on television and demanding accountability from public officials - even calling for the resignation of key political officials. Last month, Theresa, who has been employed by the National Arts Council for the last 15 years with an exemplary record, was called into a Board meeting and was told that the Board had been directed by its line minister to terminate her services with immediate effect because of her public statements which were an embarrassment to the government. They then called in security and had all her belongings packed into two boxes. She was marched through the building and was thrown out on the street. Theresa was entitled to three (3) months vacation leave, was entitled to several productivity bonuses and was due for an increase in salary at the end of the month.

Because of the depreciation of land prices in the community because of Jeb’s activities, many residents have been approached by Cunling, a land developer to buy their homes. Cunling has an inside track on the political scene and knows that he can buy way below the true value of the homes, do necessary remedial work and resell at a huge profit. He has also been informed that the government will soon be stopping Jeb’s activities because of the amount of negative public attention it has received from its handling of the situation and therefore land prices in the community will increase dramatically.

Cunling had approached Theresa and she had agreed to sell her house to him for $600,000 on April 28. However, after considering the loving times that her family had spent in the house and the children’s insistence that they did not want to live anywhere else, she decides not to sell and accordingly informs Cunling.