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Author/s:

Descheemaeker, E

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The Standardisation of Tort Damages

Eric Descheemaeker*

This article explores the nature, scope, rationale and merits of the standardisation of compensatory damages in tort law, ie the fact of giving the claimant not the value (subject to ordinary limiting principles) of his own loss, but that of the loss which *an ordinary claimant placed in the same circumstances* would have suffered. Standardisation happens in respect of pecuniary and non-pecuniary losses, direct and consequential losses, and also normative losses. Its two main spurs are either that the orthodox award would not give the desired result – typically ‘too little’ damages – or that it runs into evidentiary difficulties, which the award of a typical sum overrides. While epistemic standardisation (which is not strictly standardisation) might be acceptable, the avowed granting of compensatory damages which do not aim to correspond to the claimant’s own loss should be resisted, and is in any event impossible because consequential losses can never be meaningfully standardised.

Does the award of compensatory damages in tort seek, at least prima facie, to undo – by monetary equivalent – the consequences of the wrong on the claimant? The question seems to admit of only one answer: of course it does. The principle, often known as *restitutio in integrum*, is possibly the most foundational principle governing the area, as universally accepted as its judicial interpretation in *The Liesbosch*: ‘[the claimants] should recover such a sum as will replace them, as far as can be

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done by compensation in money, in the same position as if the loss had not been inflicted on them'.¹ Yet, a closer look at the authorities brings out many difficulties: situations where what the claimant receives by way of compensatory damages would seem to be either more or less than the loss he has suffered. (Any attempt to unpack them immediately runs into the central difficulty that 'loss' is a concept which does not have a stable meaning, but this compounds the difficulties rather than resolves them.)

This calls for examination. Observing these 'irritants', the working hypothesis which presents itself is that what the claimant receives might be better explained as compensation, not for what he has in fact suffered on the facts of the case, but for what *an ordinary claimant would have suffered in those circumstances* – or, to put the same point slightly more provocatively, for what he *should* have lost rather than what he did in fact lose. This is what this article calls the 'standardisation' of compensatory damages and aims to subject to critical scrutiny. The topic is not only of great practical and theoretical significance in its own right; it also yields important insights into broader questions, such as the way in which we construe compensable detriments or the relationship between right, damage (or wrong or injury) and loss.

The aim of this work is twofold: first, to examine the extent to which such 'standardisation' of damages occurs in tort law and why; second, to assess its merits. In the end it will be argued that standardisation, while acceptable when it is no more than *epistemic* – ie a bona fide attempt to approximate the claimant's own loss in a situation of evidential uncertainty – ought to be resisted when it becomes *ontological*, ie when the award is made as a matter of principle even when it is observably at odds with the claimant's particular loss (standardisation in a narrower, and strict, sense of the term). Standardised damages, of which the most extreme form is that known as 'abstract' or 'normative' damages, signal the intrusion into the orthodox understanding of compensatory damages of a logic which is not only undesirable and impossible to achieve, but irreconcilable with the traditional – and still dominant – logic of the law. Accordingly this article can be seen as an effort to understand the orthodoxy in a deeper and finer-tuned way, so as to protect it from these profoundly disruptive (and indeed unnecessary) developments.

¹ *Liesbosch Dredger v Edison Steamship* [1933] AC 449, 459 (the sentence continues: 'subject to the rules of law as to remoteness of damage': see below, 'Defining Standardisation').

It consists of three main parts, the first two of which examine, respectively, the extent to which, and the reasons why, the law standardises awards; and the last of which defends the anti-(strong) standardisation argument. The conclusion then links this argument back to broader theoretical considerations concerning tort law damages. Briefly, however, standardisation must first be defined.

DEFINING STANDARDISATION

Like many others, the concept of standardisation has a straightforward core but ill-defined boundaries. At its simplest, the law standardises an award (of compensatory damages in tort) when its quantum does not reflect the claimant's own – 'personalised' – loss, but rather the loss that he would ordinarily have suffered. To take a couple of examples, when two claimants receive the same sum to compensate their bereavement after they had their spouses wrongfully killed by the defendant, even though one was demonstrably very close to his while the other couple was known to be estranged, their – non-pecuniary – damages are standardised. Again, when two claimants whose (identical) car was (identically) bumped both receive the (identical) market value of the repairs, even though one was swindled by an unscrupulous dealer and paid twice as much, while the other had a mechanic who was a friend do it for him at a fraction of the cost, their damages – pecuniary this time – are standardised. This is simple and intuitive enough. There are, however, at least five difficulties with the idea.

The first is that there has long existed a set of rules relating to (at least aspects of) causation, remoteness, mitigation and contributory negligence, which have the effect of giving the claimant observably less than his loss: together, they are sometimes known as 'limiting principles of liability'. On one reading, these could themselves be regarded as a form of standardisation: if the claimant cannot recover for a highly unusual loss (remoteness) or for one which he has unreasonably failed to avoid (mitigation), it is because an ordinary claimant would not have suffered them – in a sense, because they should not have been suffered.

However, in order to limit the scope of an already very broad enquiry, the choice was made to accept these as a separate and self-contained set of doctrines, the existence (or merit) of which will not be reopened in what follows. The presence of these second-order rules limiting the defendant's scope of liability are reflected in the qualifier 'prima facie' which was inserted in the opening sentence of the article and, for the sake of clarity, will not be systematically repeated. What

this work is interested in is standardisation apart from these principles: for the most part, as will be seen, the *first-order* rules which identify and measure the claimant's loss before such 'rolling back' principles are brought in.

The second difficulty follows on from the first: when we speak of standardised *damages*, do we mean that the law has first standardised the claimant's loss before compensating that – now deemed – loss according to orthodox principles, or do we mean that the law is under- or over-compensating the claimant's loss *as it has been identified*? Because the choice is inconsequential, the question is rarely addressed with the requisite clarity, and a level of ambiguity is thus allowed to linger. Nonetheless, as will be explored, most of the examples described as standardisation of damages are best understood as entailing a prior standardisation of the claimant's loss, identified with that of an 'ordinary' claimant.²

The third difficulty, dovetailing with the second, relates to the meaning of loss, which is still remarkably unclear. On a view developed elsewhere, losses have traditionally been understood – and should properly be understood – as the concrete detrimental consequences of the wrong on the claimant: what makes him, to use a common phrase, 'factually worse off'.³ This includes both pecuniary and non-pecuniary consequences, but it does not reach to abstract or normative losses, which are construed not as the consequences of the wrong but as the wrong itself: the setback to the claimant's interest. These 'legal' losses represent, it was argued, an extreme form of standardisation: when the law grants damages for a right-deprivation in and by itself ('loss of autonomy', 'loss of privacy', 'loss of use', etc), what it really does is grant damages for the typical consequences of the injury. This is why, having neutralised the claimant's idiosyncratic situation, they are able to present themselves as damages for the injury itself rather for its consequences, making it appear as though these awards do not follow a consequentialist logic (even though they demonstrably do).

² It is possible, in this respect, that the bits which do not fit that loss-standardisation model, such as caps on liability, would be best understood as also going to these second-order principles concerning the scope of the defendant's liability (see below, 'When the personalised approach would give "too much"'). They are, however, included in this study because it is not the way they are currently thought of.

³ E. Descheemaeker, 'Unravelling Harms in Tort Law' (2016) 132 LQR 595, 606, 613-614.

While references must by necessity be made to normative losses in this article, the focus will be on concrete, 'orthodox' losses, precisely because they are not meant to be (or thought of as being) standardised – yet, as will be explored, also are to a significant extent.

A fourth difficulty is that a fine, but nonetheless very real, line can be drawn between what was called 'ontological' (or substantial) and 'epistemic' (or evidential) standardisation. The law evidently operates in a context of limited knowledge and faces what can be very significant cognitive limitations, in particular when it comes to future – ie post-trial – losses. Faced with such limitations, the law still has to assign a quantum to the damages it grants, and it is unavoidable that these will rely on statistical averages and other generalisations. As such, they too entail a form of standardisation: they are based on what tends to happen. But such 'soft' standardisation can still be said to be an attempt to approximate the claimant's own loss. In that sense it remains clearly distinct, at least in theory, from what might be described as the 'hard' form of standardisation which, as was said, is ontological in that it has made a principled decision to grant a specific award regardless of any contrary evidence pertaining to the claimant's own loss.

The last difficulty relates to the fact that the very idea of standardisation involves the construction of a counterfactual: what would an ordinary claimant have suffered in the same circumstances? The problem is that there is no demonstrably right or wrong place to draw the line between considerations specific to the claimant – sometimes called his 'idiosyncrasies' – which must be neutralised, and his (objective or external) 'circumstances', which should be taken into account in the construction of the counterfactual. In the above example, 'being estranged' from the deceased has been neutralised: it is not part of the definition of the injury itself. But of course, 'the injury itself' could be described in more or less general terms. The Fatal Accidents Act made the very conscious choice not to draw further lines beyond the event 'death of a person covered by the Act',⁴ but in principle it could have distinguished between different forms of it (potentially attracting different levels of damages), for example 'death of a child aged 0-4' vs 'death of a child aged 5-17'; 'death of a male partner' vs 'death of a female partner', etc: the number of variations which could be introduced is unlimited – until indeed every death covered by the Act has become a class of its own. Even the estrangement could, in principle, be turned into an objective circumstance: so much

⁴ Text to n 26 below.

for ‘the death of a partner with whom no contact had been had for x years’. While such an extreme would probably be regarded as highly unattractive, it is nonetheless impossible to argue that the line-drawing exercise admits of a single right answer.

A IDENTIFYING STANDARDISATION

Against the above background, it should not be controversial to say that the rhetoric, or self-understanding, of the law is that what it seeks to compensate is the claimant’s own loss. Looking for evidence of personalisation would be almost pointless, so transparent is it that this is the way the law thinks of itself.⁵ The suggestion that the claimant’s grievance is, even *prima facie*, what a counter-factual party would have lost, or that the law’s response to the individualised grievance is to award a standardised remedy, would probably strike commentators as fanciful. What we are looking for, instead, is evidence of instances where the law does not in fact accord with its self-understanding. While these deviations need not be explicit, or even conscious, they must nonetheless be observable (which will be more or less straightforward depending on how easy it is to construe the counterfactual of what the ‘ordinary claimant placed in the same circumstances’ would have suffered, and to put a value on it). As will be seen, these instances are in fact surprisingly numerous and far-reaching (albeit not all to the same extent), which is all the more remarkable because the topic has almost completely escaped the radar of scholarly attention.

The focus of this section will be on damages remedying concrete – ‘factual’ – losses, both pecuniary (ie loss of money) and non-pecuniary (ie, in the final analysis, loss of happiness), three examples of at least partial standardisation being provided on each side. These have no claim to be exhaustive of the law, but they represent a cross-section of relevant mechanisms and underlying concerns which should provide a sufficiently detailed picture of the phenomenon under investigation. Damages for abstract (‘normative’) losses, which are standardised by nature, are reintroduced at the end.⁶

⁵ To cite but two leading authorities, see J. Edelman, *McGregor on Damages* (London: Sweet & Maxwell, 20th ed, 2018) §2-001; A. Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford: OUP, 4th ed, 2019) 35.

⁶ For a justification of this threefold categorisation of losses, and the reduction of all non-pecuniary concrete (as opposed to abstract or normative) losses to emotional harm, see Descheemaeker, n 3 above, 597. *Prima*

The standardisation of pecuniary damages

Cost of Repair or Replacement that was Never Incurred

The first example concerns cost of repair or replacement for items of property, in particular chattels, which were damaged or destroyed. It is trite law that the claimant in such a situation is entitled to either the diminution in – market – value of the thing, ie what it would have fetched on the market had the wrong not occurred minus what it could now be exchanged for, *or* the cost of repair or replacement, which can be awarded if it is ‘reasonable’ (the underlying assumption being that it would always be at least as high as the diminution in value, and should only be compensated if the repair or replacement is not a wasteful use of resources).⁷ When exactly the claimant can obtain the higher amount – in other words, what the boundaries of ‘reasonableness’ are – is difficult to establish with precision; but what is certain is that there are circumstances where the claimant can in fact recover it even though we know that he did not, and will not, incur the expense. In other words, costs of repair or replacement can sometimes be compensated even though the claimant is in fact out of pocket for much less than that. Examples which cannot be attributed to any evidentiary uncertainties about the future (like the claimant changing his mind after the trial), which would be

facie at least, whereas normative losses are constructed by the law, factual losses are observed in the real world, the role of the law being to decide whether they will be redressed or not. But, as often, the dichotomy turns out to be rather less clear-cut on closer analysis. Normative losses might well be defined in terms of typical consequences, but these consequences are themselves concrete and not abstract: a legal loss is a concrete loss that would have been suffered by a counterfactual claimant. On the other hand, there are circumstances in which the law substitutes its own – normative – judgment as to what constitutes a factual detriment. The best known example concerns wrongful conception cases where, at least on one approach, the law denies recovery despite the existence of a recognised wrong, and despite a depletion of money and of happiness observably suffered by the claimant, because it *deems* the situation to be non-detrimental: no loss, says the law, can be said to flow from the birth of a healthy child (for example *McFarlane v Tayside Health Board* [2000] 2 AC 59, 113 *per* Lord Millett). This, however, seems peculiarly hard to sustain on any principled basis: it is one thing to deny recovery in such cases, for instance because the claimant has suffered no *damage*; but to deny that there was a factual loss, when that loss could be observed by all in the real world, can only be achieved by changing the meaning of ‘factual loss’ on a purely ad hoc basis.

⁷ *McGregor on Damages* n 5 above, §37-003; *Burrows*, n 5 above, 206.

an epistemological rather than ontological issue, include situations where the repairs have become impossible; where the cost was borne by insurance or by a third party; and the above example of the repairs being made 'at a mate's rate'.⁸ In all these cases, it is not doubted that the claimant having passed the 'reasonableness' hurdle – where intention to repair, albeit relevant, is not conclusive –⁹ can and will recover for the market's rate of the repairs or replacement, even if he is out of pocket for a lower sum, or not out of pocket at all. (Conversely, even though this is often regarded as going to principles limiting liability, no more than the market value will be recoverable if the claimant is out of pocket for a higher sum, for example if he was swindled by his local dealer).

This is a very clear example of – strong – standardisation: the claimant recovers as a matter of principle what an ordinary claimant placed in the same circumstances (understood as one who would in fact have had the thing repaired or replaced, at no more and no less than the market rate) would have suffered, regardless of any possible evidence to the contrary. The 'measure of the loss', as courts put it, is based on what an ideal-typical claimant would have lost: in the absence of any suggestion that the principle of *restitutio in integrum* is being departed from, this is best understood as the result of the law having standardised not just the damages awarded but the basis of the award as well, namely, the claimant's loss.

Average Loss of Earnings

The above example concerned 'direct' losses. Consequential losses also provide evidence of standardisation of damages, even though it is more difficult to tease out its ontological (strong) from its epistemic (weak) form because such losses often lie, at least in part, in the future. Nonetheless examples of strongly standardised awards can also be found. A striking example concerns loss of earnings in Australian law.¹⁰ In most Australian states and territories, the amount of lost income for

⁸ For example *Dimond v Lovell* [2000] UKHL 27, [2002] 1 AC 384, 406 (*Dimond*); *Burdis v Livsey* [2002] EWCA Civ 510, [2003] QB 36 at [85]; *Coles v Hetherton* [2013] EWCA Civ 1704, [2015] 1 WLR 160 at [27]; and see generally *McGregor on Damages* *ibid*, §§37-007–37-009; *Burrows*, *ibid*, 212-214.

⁹ For example *The Maersk Colombo* [2001] EWCA Civ 717, [2001] 2 Lloyd's Rep 275 at [56].

¹⁰ Even though this article focuses on English law, the example was chosen because it illustrates a different form of 'levelling' logic compared with the previous one. For examples of standardisation of consequential

which the claimant can recover in claims governed by the Civil Liability Acts is capped at three times the average earnings in the jurisdiction.¹¹ This is, again, a clear example of ontological standardisation: the high-earning claimant recovers *as if* he had been earning no more than a stated sum, even though we know that he has in fact lost more. Contrary to the previous example, there is no pretence here that the loss itself is being standardised: the very idea of a ‘cap’ on recovery assumes a discrepancy between what has been suffered and what is being compensated for. Yet damages are being awarded *as if* the claimant had been a typical, or at least more typical, person earning no more than three times the relevant average.

It is true that this is not complete standardisation – one could, in an extreme form of the same logic (which has been suggested by Harold Luntz),¹² imagine a system where everyone would be granted the same average sum, regardless of what they did in fact earn (if anything) – but it is nonetheless a clear form of it: the claimant is awarded what an idealised type, stripped of a particular idiosyncrasy, would have been compensated for.

Diminution in Value

The third example of standardised awards for pecuniary losses might be more difficult to perceive, but deserves to be identified nonetheless. It was said above that the owner of a damaged chattel can receive by way of compensation for his loss either the cost of repair (or indeed replacement) or, if that – presumably as high or higher – sum is not claimed or not awarded on the basis of its being ‘unreasonable’, then the diminution in market value of the thing. However the latter proposition turns out to be rather more problematic than its apparent triteness would suggest if, as orthodoxy will, we want to see in it an application of the principle of *restitutio in integrum*.

Let us unpack this point. My car is bumped. If I do go and have it repaired, then evidently I incur a pecuniary loss: I now have less money than I would have had I not been wronged; accordingly

economic loss in English law, see for example the recovery of cost of care rendered gratuitously: *Donnelly v Joyce* [1974] QB 454, 462; *Burrows*, n 5 above, 240-243; *McGregor on Damages* n 5 above, §§40-225–40-232.

¹¹ D. Ipp, *Review of the Law of Negligence. Final Report* (Canberra: Commonwealth of Australia, 2002) [13.60].

¹² H. Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (Chatswood, NSW: LexisNexis Butterworths Australia, 4th ed, 2006) §1.16.

the wrong has made me financially worse off. I will also almost certainly suffer an emotional harm, which will be short-term and probably (deemed to be) insignificant if the repairs are carried out rapidly and satisfactorily. But what if, for any reason, I do not in fact carry out any repairs? The emotional harm is then likely to be much greater: I now have to live with a bumped car every day until it gives up the ghost. But I have not suffered any concrete loss of a pecuniary nature: *I do not have any less money than I would have had without the wrong*; if I am factually worse off, it is in a non-pecuniary sense only.

Yet I am entitled as a matter of right to damages for the diminution in the car's value. What are these for? The best interpretation is that they are damages for an *abstract* loss: the setback to the property right in itself, measured by reference to how much money it could be turned into in the counterfactual world where I have not been wronged (say, £2,000) minus what it can now be exchanged for in the post-wrong state of affairs (say, £1,500). Accordingly £500 is the *factual* loss of an *idealised* claimant; but it is not my own (concrete) loss as the actual claimant: assuming the life expectancy of the car has not been diminished by the wrong, if I do not repair it I have, again, suffered no pecuniary loss whatsoever. My only loss is normative: my right is worth less than it would otherwise be; but as long as the loss has not been crystallised – which, on the above assumptions, it will never be – it is not experienced in the real world.

This abstract loss, suffered by all claimants, is the flipside of the concrete loss that would be suffered by an ordinary claimant, ie the value of the consequences to *him*. When it grants diminution in value damages, the law gives claimants the standardised value of their – concrete – loss, based on what a party having behaved in a way regarded as normatively 'reasonable' would have suffered in the same circumstances. This is a very clear form of loss-standardisation, as indeed abstract or normative losses invariably are: the loss which is compensated (in the usual way) is not the claimant's own but what an ordinary claimant – who would be reputed to have sold off the bumped car and bought an otherwise identical, but unbumped, one – would have lost.

The standardisation of non-pecuniary damages

Like pecuniary damages, non-pecuniary damages could in principle be awarded on a personalised or standardised – in part or in whole – basis: analytically, the process of standardisation is not tied to a particular segment of the law of damages. Yet it stands to reason that the temptation to standardise awards is going to be much stronger in respect of losses which do not already come with a price-tag

affixed to them, as a result of the decentralised decision-making of a multitude of actors external to the law, by ‘the market’: if the law has to operate itself the cumbersome process of turning into money detriments which do not have a pre-established value, it can just as well do it once and for all for any given injury. To put the same point differently, so under-informative is the injunction of the legal order to award to the claimant as compensation a sum which is ‘fair, reasonable and just’,¹³ that a natural tendency is going to hold that what is sauce for the goose is also sauce for the gander (and indeed for any other claimant): the ‘fair, reasonable and just’ award thus becomes the price of the injury itself, its *market-substitute* value awarded – at least prima facie – regardless of any idiosyncratic situation. Accordingly it is easy to suspect that standardisation of awards is going to be much rife on the side of non-pecuniary damages; at the same time, it is going to be much harder to prove or disprove, precisely because there is no ready-made way to compare what the particular claimant has lost (factually, idiosyncratically) with how much he receives by way of compensatory damages.

Award-stabilisation mechanisms known as ‘tariffs’, which at least on their face suggest a strong standardisation of damages (one injury, one ‘price tag’ which applies to all claimants), are going to be the main focus of this section, precisely because their attempt to translate what is ‘fair, reasonable and just’ into recurring figures makes it possible for us to interrogate, in a way that is analogical to pecuniary losses, the logic underpinning this translation. As will be seen, such systems as exist in English law can in fact be shown to amount to a clear form of standardisation, of damages and indeed of loss; but this is neither as complete nor, especially, as straightforward, as the commonly used label ‘tariff’ might have suggested. Before we turn to them, however, two other important aspects of standardisation must be examined: first, the question of unconscious claimants (which has caused much ink to spill, indeed hijacking the discussion); second, more broadly, the relevance – apart from any ‘tariffs’ – of the claimant’s idiosyncratic reaction to the injury: to what extent does it matter to quantum that, given the same injury suffered, one claimant would be more distressed than another?

Unconscious Claimants

¹³ *Heil v Rankin* [2000] EWCA Civ 187, [2001] QB 272 at [27] *per* Lord Woolf.

The most obvious situation where the discrepancy between the ordinary consequences of the wrong and the claimant's particular situation is going to stand out, and the law is therefore going to have to take a stance as to the relevance of the latter, is that of unconscious – in particular permanently unconscious – claimants. Need the claimant, to use the words of the High Court of Australia, only 'have sustained the loss itself' or should he 'also have to bear a sense of his loss', ie suffer as a result of the injury, or wrong, which forms the basis of the action?¹⁴ As is well known, and despite powerful dissents, the Court of Appeal in *Wise v Kaye* and the House of Lords in *West v Shephard* came to the view that a plaintiff with no 'sense of his loss' could nonetheless recover damages for – part of – his non-pecuniary loss *as if* he had been 'bearing it'.¹⁵ This has remained the stance of English law and, even though the doctrinal basis for doing so is hardly ever examined, the mechanism used to bring this result about has been to draw a line, within non-pecuniary losses, between a part called 'pain and suffering', which will be valued at zero for the claimant who does not 'bear his loss'; and a part called 'loss of amenities', for which the ordinary amount will be recoverable.

The explanation sometimes given is that courts treat loss of amenity, unlike pain and suffering or mental distress, as 'analogous to proprietary losses'.¹⁶ This might be true, but it simply pushes the difficulty one step back: why do they; indeed where is the line drawn in the first place? Given that the word 'amenity' means 'pleasure', and that no-one seems to be able to explain the difference between the two parts of the award, this seems no more than a faux-sophisticated attempt to split the difference – giving the claimant something but not everything. Analytically, though, the position is clear: that part of the award described as 'loss of amenities' is being (strongly) standardised through the same process of abstraction as encountered previously; whereas the segment referred to as 'pain and suffering' remains personalised, the distress of the claimant idiosyncratically unable to experience the injury being – logically – valued at nil.

The Claimant's Response to the Injury

¹⁴ *Skelton v Collins* (1966) 115 CLR 94 at [2].

¹⁵ *Wise v Kaye* [1962] 1 QB 638, 652-653, 660-661 (*Wise*); *H West & Son Ltd v Shephard* [1964] AC 326, 349, 368-369 (*West*). All the discussion has been in the context of personal injuries, making it unclear what the position is in respect of other wrongs (where the concept of 'loss of amenities' is not pressed into service).

¹⁶ *Burrows*, n 5 above, 36.

When my car is bumped and it is reasonable to have it repaired, I can get the market price of the repair as the quantum of my damages. This amount corresponds to what it would ‘typically’ or ‘ordinarily’ cost to have the repairs done in the marketplace; and as explained this is what I am entitled to, even if on the facts I am out of pocket for more (I was swindled) or for less (my mate did them; my insurance paid). The market ascribes a single monetary tag to the damages and this is what I can recover; my own loss – how much I am in fact out of pocket for – is irrelevant.

An intriguing question is whether a similar reasoning applies, or should apply, in respect of non-pecuniary losses. If photographs of me are wrongfully taken in a public place and published to the world at large I might, at one extreme, shrug it off and be completely unaffected, or I might, at the other, be so affected as to become unable to live a normal life. Possible economic consequences apart, the level of harm I will suffer is, by construction, the product of two factors: the (external) injury inflicted on me, and my internal – idiosyncratic – response to it. To what extent does the latter matter? A personalised approach to the loss would ask what ‘quantum of distress’ I have suffered; a standardised one, what the consequences would have been for someone of ordinary fortitude placed in my circumstances – someone standing, as it were, at the top of the Gaussian distribution of responses to the externally defined injury.¹⁷ Do I, then, get damages for the *market-substitute* value of the loss in the same way as I can get the market value of the repairs, or do I get damages, at least prima facie, for what I have in fact suffered, even if that is more (the equivalent of the swindle) or less (the equivalent of the mate’s rate)?

The law on this is peculiarly unclear. There is little discussion of the topic in cases or academic literature; and whatever there is pulls in different directions. On the one hand, references can repeatedly be found to the effect that, in principle, a claimant who ‘pulls a long face to the court’ should not recover more than a stoic one, which suggests that both will receive the same,

¹⁷ This assumes that such responses follow a normal distribution curve, with most people concentrated around a particular point, which will be at the same time the *mean*, the *median* and the *mode* value of the loss (ie the average one, the one dividing top from bottom half, and the most common one). While this cannot be demonstrated, without this assumption the very notion of an ‘ordinary’, ‘typical’ or ‘standard’ claimant becomes meaningless.

standardised, sum (their idiosyncratic reactions, above or below 'normal', being discounted).¹⁸ On the other hand, a detailed examination of case law in one specific area – namely, damages for the non-pecuniary consequences of false imprisonment – reveals that claimants do in fact recover varying amounts, based on the impact it has on them, for what at least *appears to be* the same injury; however, the strong tendency of courts is to use the objective language of – external – circumstances, thereby effectively creating narrower bands within the broader injury, rather than the subjective language of – internal – responses to these circumstances. Instead of seeking to establish, to use Diplock LJ's language, how much 'pleasure or happiness' the claimant has lost,¹⁹ what courts do is endeavour to determine how 'bad' the circumstances were objectively – in other words, how serious the wrong was – even when these circumstances clearly relate to the claimant's own person.²⁰ Reasoning which takes as its direct point of reference the level of emotional distress suffered by the claimant can be found, but it is comparatively rare.

By and large, what courts seem to want to do is give a standardised award – ie one that is not dependent on the claimant's idiosyncratic response – but for an injury (an abstract loss) which is itself defined very narrowly, based on the case's particular circumstances. As explained, the more

¹⁸ For example *Wise* n 15 above, 651, 659; *West* n 15 above, 365, 368-369 ('It would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and if a long face was the only safe passport to a large award'); Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* Law Com CP No 14 (1995) [2.12], [4.15]; *Burrows*, n 5 above, 36.

¹⁹ *Wise* n 15 above, 665.

²⁰ Leaving aggravated damages to one side, nine factors were identified in the cases as relevant to quantum of damages, some of which look strikingly like idiosyncrasies: (i) whether the loss of liberty consisted in detention or house arrest; (ii) whether it was wrongful *ab initio* – hence with the attending 'shock of arrest' – or only became so when the claimant failed to be freed on time; (iii) whether the claimant was placed at risk of deportation; (iv) whether religious observances were interfered with; (v) whether separation with family members ensued; (vi) age; (vii) health condition; (viii) dependence on alcohol; and (ix) existence of a prior criminal record – the idea being that a claimant who has been arrested before will likely not be distressed to the same extent as a 'first-timer'. (The above is based on an examination of all the cases where *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 (*Thompson*), which first sought to explain how awards for false imprisonment should be computed, was relevantly cited.)

this process of fine-tuning is carried out, the more standardisation becomes formal only: the claimant will indeed recover damages for the non-pecuniary loss typically associated with the injury; but the more that (generic) injury is itself defined with reference to the claimant's situation, the more the typical consequences of the injury and its idiosyncratic ones will, by construction, be the same. (Such practical blending of both models is in fact one principal reason why it is often immaterial which one is being adhered to, and also why they can be so difficult to tease out analytically.)

'Tariffs'

The above discussion leads straight to the most significant, but perhaps also most complicated, aspect of our topic: so-called 'tariff systems'. At its most basic, a tariff is a mechanism which lists specific injuries and ascribes a monetary value to them: anyone who suffers injury *x* receives £*y*. This would be standardisation at its purest: everyone receives the same – calculated on the basis of what an 'ordinary' or 'typical' claimant would have suffered – regardless of what they have in fact lost or not lost. Indeed, when perfected, this standardisation makes it possible to move from the idea of 'damages for the [non-pecuniary]²¹ consequences of injury *x*' (for instance, pain and suffering and loss of amenities (PSLA) flowing from a physical injury) to 'damages for injury *x*' itself. In that sense, a tariff is inextricably intertwined with the *abstraction of losses*: a price-tag is affixed to the diminution of the right (for example to physical integrity), which in turn is determined by the value of consequences typically associated with the injury. The claimant recovers for it because, on the logic underpinning such tariffs, the law holds this to be his loss (once the injury has been defined there is only one set of typical consequences, hence one abstract loss, associated with it; the extent of the claimant's own factual detriments becomes irrelevant).

Does, then, English law recognise such tariff systems, standardising losses and (by way of consequence) damages? This is not an easy question to answer because, whereas there clearly exist

²¹ There is no logical reason why a tariff should be limited to non-pecuniary consequences. We could give a fixed award for the – deemed – pecuniary consequences of injuries too. But, given the existence of the market, the practical need has never been felt: market values are themselves a form of tariff. (Note also, in this respect, that we have always been content to compensate pecuniary loss even when the claimant has no awareness of it.)

a number of mechanisms which *approximate* this model – and in respect of which lawyers frequently use the word – none can be said to follow the above logic straightforwardly. The question then becomes the extent to which they can be shown to adhere (if only implicitly) to it. Of these tariff-like award-stabilisation systems, the best-known example is undoubtedly the *Guidelines for the Assessment of General Damages in Personal Injury Cases*²² (*Guidelines*); but one could also cite (i) damages for false imprisonment and malicious prosecution after *Thompson*;²³ (ii) damages for wrongful discrimination after *Vento v Chief Constable of West Yorkshire Police*²⁴ (*Vento*); (iii) the award of £15,000 under *Rees v Darlington Memorial Hospital NHS Trust*²⁵ for the unwanted birth of a child; and (iv) damages for bereavement under the Fatal Accidents Act 1976 (FAA 1976), whereby the wrongful death of specific persons – primarily spouses or minor children – gives rise to an (almost) fixed award, currently £12,980, for the claimant’s emotional loss of bereavement.²⁶ (Calls for similar mechanisms have also been made in respect of other wrongs, for instance psychiatric injuries.²⁷)

The FAA 1976 is arguably the closest English law comes to a tariff in the above sense. It is an (almost) perfect example of standardisation: everyone whose situation comes under the scope of the Act will receive the same amount by way of damages for their bereavement, the estranged

²² Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford: OUP, 15th ed, 2019), first published in 1992. In this context, ‘general damages’ – a phrase best avoided because it has no stable meaning – means emotional harm flowing from the wrong (‘pain and suffering and loss of amenities’).

²³ *Thompson* n 20 above, 514-517.

²⁴ *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318, 335.

²⁵ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] AC 309, 318, 319, 350, 355. Burrows, n 5 above, 251 refers to it as ‘an award to compensate for non-pecuniary loss, namely a mother’s mental distress consequent on having her lifestyle plans disrupted’ but, this not being a matter of common agreement, the award will not be explored further.

²⁶ Fatal Accidents Act 1976, s 1A.

²⁷ P. Handford, *Tort Liability for Mental Harm* (Pyrmont, NSW: Law Book Co, 3rd ed, 2017) 592.

husband who felt relief when hearing the news of his wife's death no less than the mother whose adored toddler was crushed to death before her eyes. Everyone is *deemed* to suffer to the same extent (although, even here, there is a slight discrepancy: when both parents are entitled to damages for bereavement, the standard sum is to be divided between them: their – deemed – grief is now worth half of what it would otherwise be).

The other types of award stabilisation are, however, much less clear in their logic. Focusing on the *Guidelines*, by far the most developed example, they always follow one of two approaches, either:

Epilepsy

- grand mal [ie convulsive seizures]: £96,000 to £141,000
- petit mal [ie absence seizures]: £51,000 to £123,000
- other conditions: £10,000 to £25,000;

or:

Total blindness: in the region of £252,000.²⁸

Three points must be kept in mind when trying to analyse the significance of these figures in terms of standardisation as opposed to personalisation of awards. The first is that, unlike the FAA 1976, they are not binding on anyone. Not only is their descriptive rather than prescriptive nature emphatically underlined in successive editions; they could not in any event be binding given that they do not have the force of law (in the same way, the stabilisation of awards operated in *Thompson* or *Vento* is bound to have been *obiter dictum*). The second point is that, according to their own self-understanding, and despite the obvious tension between this and the very idea of a 'price tag' (or even of a range of values), these numbers are not meant to be the invariable quantum of damages for the relevant injury: in the words of the latest edition, they are 'guidelines, not tramlines',²⁹ describing what courts have in fact held, in the past, to be 'fair, reasonable and just'

²⁸ *Guidelines* n 22 above, 9-10, 16. Actual figures have been rounded for ease of reading.

²⁹ *Guidelines* *ibid*, xi.

compensation for similarly defined injuries. The third remark is that, although some injuries have a specific figure attached to them (if invariably coming with the qualifier 'in the region of'), most come with a *bracket*.

These considerations make it much harder than one might have thought to argue that the *Guidelines* are a tariff system. The Judicial College and courts alike have carefully eschewed such language and, despite how it might seem on a cursory glance, they certainly do not mechanically convert injuries into sums of money. Yet, imperfect though it may be, a strong form of standardisation can in fact be reconstructed behind their operation. This, however, takes a little unpacking to establish.

In order to understand the work done by these Guidelines, we first need to distinguish two functions within mechanisms stabilising damages for non-pecuniary losses, which are all too easy to conflate: one being the determination of the market-substitute value of the loss; the other, its being awarded by way of compensatory damages. Unlike the repairs to my car, my distress when I am blinded does not have a market value: it is for the law itself to place a figure – necessarily arbitrary – on its worth. This is what we might call its 'market-substitute' value, corresponding to the valuation by the law itself (as opposed to the market) of the ordinary detrimental consequences of the injury on the claimant's emotional wellbeing. The fact that the law would do it once and for all – ie that there should be one (arbitrary) figure rather than as many (all equally arbitrary) figures as award-makers – has great merits in itself, in terms of simplicity, coherence, predictability – most useful, in particular, for the insurance industry – and indeed the rule of law (as opposed to that of individual award-makers).

Yet, fixing the market-substitute value of grief is not the same as awarding it. Just as the law could decide not to give me the market value of the repairs to my car if I am out of pocket for more or less than that, so too it does not have to give me the market-substitute value of the non-pecuniary loss typically flowing from a specific injury, without having regard to my particular situation. What amounts to standardisation is not the determination of a reference point – the market or market-substitute value of the ordinary consequences of an injury – it is the normative decision to grant neither more nor less than that to the claimant, regardless of his own circumstances. In principle, saying that c. £252,000 is the market-substitute value of blindness (ie the value of the PSLA typically associated with that injury) is entirely compatible with a personalised award, whereby individual claimants would receive damages based on the consequences of their

own injury relative to this reference point: 50 per cent if they are held to suffer half as much, 200 per cent if twice as much, etc.

What makes it possible to argue that the *Guidelines* do in fact operate a strong form of standardisation of damages for the non-pecuniary consequences of the injuries listed therein is the combination of two facts. First, that actual awards are only in rare circumstances made outside the 'suggested' range.³⁰ Hence, what Lord Woolf once described as a 'starting off point'³¹ has effectively become, through voluntary acceptance by courts and other legal actors, an 'end point'³² as well – except perhaps in situations where there are good, non-claimant-specific, reasons to revisit the guidance (for example when medical advances affect the level of PSLA typically associated with a particular injury). So widespread has the acceptance of the *Guidelines* become that litigation has in fact very largely dried out:³³ cases are settled on their basis, with only rare disagreement being observed. The second consideration is that the range proposed tends to be remarkably narrow, when indeed it is not reduced to nil: the example of epilepsy above lies at the wide end of the spectrum; by contrast, the figures associated with 'complete loss of sight in one eye' vary between £46,000 and £51,000 (and, as was said, total blindness is associated with a fixed figure, £252,000.)³⁴

The first point allows us to all but bridge the gap between the descriptive and the normative: if indeed claimants do in fact, save in exceptional circumstances (such as unconsciousness, which remains relevant), get an award within that range, then it is – in substance if not in form – what they

³⁰ Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford: OUP, 8th ed, 2006) vii; Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford: OUP, 11th ed, 2012) xi; *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford: OUP, 13th ed, 2015) xi; W. Latimer-Sayer (ed), *Personal Injury Schedules: Calculating Damages* (London: Bloomsbury Professional, 4th ed, 2018) 190-191.

³¹ Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Oxford: OUP, 3rd ed, 1996) vii.

³² *Guidelines* n 22 above, xiii.

³³ *ibid*, xiii.

³⁴ *ibid*, 16-17.

are *entitled* to get: an exercise of discretion which is invariably used in a given way becomes a rule. As to the second point, it makes it virtually impossible to believe that the award is made on a personalised basis. If what courts were seeking to do was, even *prima facie*, to approximate the 'quantum of distress' experienced by the claimant then, for any injury listed in the guidelines, we would expect to see a very broad range of figures reflecting the real-life responses of individual claimants, which common experience suggests can vary enormously (especially for injuries such as, precisely, blindness). Or indeed we would not, on such an approach, expect to see a range of figures at all: if it is self-evident that the award must be adjusted to the particular circumstances of the claimant, then the only relevant information becomes the amount in respect of the one standing at the top of the Gaussian curve of responses (the 'ordinary' claimant). A narrow range thus proves either too little or too much for the personalised model. Besides, the fact that most injuries do come with a bracket evidences that, for those which do not, the (quasi-) fixed amount is not meant to value the loss of an ordinary claimant, but the claimant's loss *tout court*: a quarter of a million pounds is what most claimants do in fact get when they are wrongfully blinded. Despite the often personalised rhetoric of the law, this is effectively the price-tag it has affixed on their injury.

Why, then, do most injuries in fact come with a bracket? If it is not evidence of personalisation to reflect the claimant's idiosyncratic response, the only alternative explanation – suggested by the *Guidelines* themselves – is that they represent a form of fine-tuning of the 'master injury'. Just as epilepsy comes with a 'grand mal' and a 'petit mal', the former being more serious than the latter, so it is normally possible to distinguish between different forms of a given injury, based on their intrinsic seriousness (ie the extent of the *usual* consequences for the injured person). The way such fine-tuning operates was already explored in the context of false imprisonment:³⁵ as explained, even though its practical effects overlap to a significant extent with those of personalisation – ie the grant of differential levels of damages for what at least *appears* to be the same injury – the underlying principle differs, seeking as it does to assess the (externally-defined) gravity of the injury, on which a higher or lower 'price' can then be put, rather than concern itself with the claimant's internal response to it. The existence of such fine-tuning – which, as was said, is in tension with the very idea of standardisation – makes sense both of the existence of a bracket (for not all forms of the injury are equally serious) but also of its much more limited scope than

³⁵ Text to nn 19-20 above.

personalisation would necessitate (for we are only concerned with the range of values associated with the *ordinary* claimant suffering the corresponding range of injuries, which is necessarily narrower because they are averaged).

Despite much of the rhetoric of the law remaining personalised, it seems clear from the above that strong standardisation of losses associated with given injuries, coupled with their fine-tuning based on intrinsic seriousness, is in fact the best explanation for the existence and the scope of brackets observed in the *Guidelines* (and indeed in awards made in, or out of, court). The standardised loss, in turn, becomes the basis for a standardised quantum of damages, reflecting how much a typical claimant would have suffered by way of PSLA.

The standardisation of normative damages

Normative damages, defined as compensation for abstract right-violations rather than their (concrete) consequences, need not detain us long but they are still of great relevance to our topic. It was explained in another forum why they represent a form of extreme standardisation.³⁶ Abstractly defined losses are not, as some might think, non-consequentialist: if they were, they would logically grant the same award to all claimants having suffered a violation of the relevant right. What they do is look ahead to consequences – but typical rather than actual: a wrong, on that reading, is more or less serious (and deserves a larger or smaller award of damages) depending on what it would ordinarily lead to, regardless of what happened in the claimant's own case. In that sense, normative damages cannot *be* standardised: they *are* standardised by nature, because the loss they redress is itself defined by reference to a de-particularised claimant.

This is true on the side of non-pecuniary losses. The Weller twins received substantial damages for the 'misuse of their private information',³⁷ despite their having suffered no detrimental

³⁶ Descheemaeker, n 3 above, 606-607.

³⁷ *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB), [2014] EMLR 24 at [192].

consequences.³⁸ Mr Yentob received a high quantum of damages for the loss of his ‘right to control the dissemination of information about [his] private life’ after his phone had been hacked for years, despite having experienced comparatively little distress because – unlike the other claimants in *Gulati v MGN Ltd*³⁹ (*Gulati*) – he was not aware at the time that he was being wronged. What courts did is grant them damages for an abstract loss construed as the wrong itself: *the very fact that they have been deprived of (some of) their privacy*. The quantum is then based on the perceived seriousness of the injury, which in turn depends on what its ordinary consequences would have been: in other words its consequences for a typical claimant, who in this case does not share the claimant’s idiosyncratic lack of awareness of the wrong.

The same process of standardisation through abstraction can be observed on the side of pecuniary losses, a case in point being damages assessed on the basis of a hypothetical bargain between the claimant and the defendant (so-called ‘user’ or ‘negotiating’ damages). If we accept, after *Morris-Garner v One Step (Support) Ltd*⁴⁰ (*One Step*), that these are compensatory, for what loss are they compensating? Lord Reed’s judgment might not be explicit about the abstraction of the relevant loss, but it is nonetheless clear. Having described the wrong or injury suffered by the claimant in such cases as the violation of the ‘right to control [the] use’ of a given piece of property,⁴¹ he went on to describe the relevant loss as ‘the economic value of the right which has been breached’,⁴² which exists ‘even in the absence of any pecuniary losses which are measurable in the ordinary way’: in other words, the loss lies not in the consequences of the right-injury but in the injury to the right itself, which is now worth less.⁴³ The reasoning is exactly the same as that which, as was seen, leads to diminution of value awards for damage to property even in the absence of any

³⁸ In the opinion of the court: see below for the argument that there was a future loss. (The same point applies to Mr Yentob.)

³⁹ *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch), [2016] FSR 12 at [111].

⁴⁰ *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2019] AC 649.

⁴¹ *ibid* at [30], [95].

⁴² *ibid* at [91].

⁴³ *ibid* at [93].

factual 'worse-offness'. In the hypothetical bargain cases, the relevant loss is the right to control the use of the thing: an aspect of the property right itself. Having been interfered with, it is now worth less than it would otherwise be (ie it can no longer be bargained away). This is an abstract loss. As with the bumped car, there may or may not be a factual loss to the claimant: it all depends on what he will do or would have done. An ordinary claimant, understood in this case as one who would have bargained the right away (for neither more nor less than its market value) would indeed have suffered a concrete loss of money equal to the value of the hypothetical bargain. Again, the concrete loss of a typical claimant is construed as the flipside of an abstract loss suffered by all claimants, as a result of which they can all receive the same standard award as if they had suffered the ordinary (factual) consequences, whether or not in fact they did. The normative loss redressed – on ordinary compensatory principles – by user damages represents the standardised factual loss of an idealised claimant.

EXPLAINING STANDARDISATION

Standardisation, as can be seen, is at work in all areas of the law of damages – albeit not to the same extent: for losses direct and consequential, pecuniary and non-pecuniary, factual and legal. Why, then, does the law standardise awards in such a large number of circumstances, despite this contradicting a basic tenet of its own self-understanding? Even though no general explanation is forthcoming in the sources, the reasons do not in fact appear to be difficult to fathom: the law switches over to a standardised measure when its default – ie personalised – approach either does not yield the 'right' result or runs into evidentiary difficulties. In other words, either the application of ordinary principles would give the claimant 'too much' or 'too little' according to our intuitions of justice, or it would make it exceedingly difficult (or, in some circumstances, inappropriate) to find out how much he should get. While the accuracy of these explanations cannot be demonstrated, their simplicity combined with their explanatory power makes it difficult to doubt them. This section expounds on them, without taking a stance at this stage as to whether they are justified.

When the personalised approach would give 'too much'

The first situation is when applying orthodox principles would yield a quantum of damages regarded as excessive. This situation is going to be less common than the reverse because there already exist rules operating to cut down the defendant's scope of liability so as to give him less than his full loss (which, as was said, could themselves be regarded as a form of standardisation, albeit not of the loss

itself). Indeed, the example of the cap placed on recovery for lost earnings by the Australian Civil Liability Acts might be best explained as another example of such a second-order rule containing the defendant's liability on the basis that it would not be equitable to lay the full extent of the claimant's loss at his feet (in particular, in this case, because compensation is typically paid from liability insurance premiums, with the result that compensating lost high earnings effectively amounts to 'redistribut[ing] income from the less wealthy to the more wealthy',⁴⁴ and should accordingly be left to first-party insurance).⁴⁵ On the other hand, the reluctance of courts fully to compensate claimants whose emotional response to the wrong is considered to be out of step with the norm – distress that is deemed 'over the top' by comparison with the abstract type of the ordinary claimant will not be compensated – has to be regarded as going to the standardisation of the loss itself: by deeming the claimant's loss to be no more than that of an ordinary claimant, the law can resist full compensation of his personal loss without having to appeal to these second-order rules (which would have no application here).

When the personalised approach would give 'too little'

More interesting perhaps, and certainly much less explored, is the reverse scenario: where the application of principle would yield a quantum of damages regarded, on our instincts of justice, as insufficient. By standardising, at least in part, the award, the law creates a set of rules which mirrors the 'limiting principles' of recovery.

The intuitive sense that the application of principle would give the claimant 'too little' and, correspondingly, allow the defendant to get away with his wrong is transparent in cases which established that an unconscious claimant could recover, at least in part, damages for non-pecuniary loss *as if* he had been conscious;⁴⁶ and the same concern applies to the stoic claimant who has 'made the most' of his injury⁴⁷ –the defendant should not stand to benefit from such states of

⁴⁴ Luntz, n 12 above, §1.16.

⁴⁵ *ibid*, §1.16; lpp, n 11 above, §13.66.

⁴⁶ *Wise* n 15 above, 661, *West* n 15 above, 341-342; cf Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* Law Com No 257 (1998), [2.13].

⁴⁷ *West ibid*, 340-341, 365, 368-369.

affairs, even though it would seem to make him liable for less. It is also evident in a case like *Gulati*: the defendant who has committed an egregious breach of privacy should ‘pay for it’; and if ordinary principles suggest otherwise, then these principles must be changed.⁴⁸ In all these cases, even though it might not be explicit, the concern is transparent and can be seen as driving the standardisation of the claimant’s loss, identified – in whole or in part – with that of someone who would have suffered more, because suffering more is the *norm*. Compensation can then be awarded on that basis.

The same principle holds on the side of damages for pecuniary losses. A claimant who had his car wrongfully damaged by the defendant but was ‘lucky’ enough, to use Lord Hoffmann’s word,⁴⁹ that a third party bore the cost, should, it seems, recover nothing on the application of ordinary principles: he is not factually worse off. Yet, the same – implicit but extremely clear – sense that this would allow the defendant to get away with it (in other words, ascribe the benefit of the fortunate happenstance to him, the wrongdoer, rather than the claimant) surfaces in the dicta of courts, justifying the award of ‘double recovery’ for a loss which is compensated despite having been avoided: ‘Why’, asked Lord Bridge in *Hussain v New Taplow Paper Mills Ltd*, ‘should the tortfeasor derive any benefit ... from the premiums which the plaintiff has paid to insure himself against some contingency, however caused [or] from the money provided by the third party with the sole intention of benefiting the injured plaintiff?’⁵⁰ Again, *One Step* provides a similar illustration: absent ‘any pecuniary losses ... measurable in the ordinary way’⁵¹ (and discounting non-pecuniary losses), the claimant should on the usual compensatory basis receive nominal damages only. Yet this seems unacceptable to our instincts of justice: ‘[t]he defendant has taken something for nothing’,⁵² and the prohibition of the wrong would become meaningless if all the defendant was liable to was a

⁴⁸ *Gulati* n 39 above at [113], [136], [143].

⁴⁹ *Dimond* n 8 above, 392.

⁵⁰ *Hussain v New Taplow Paper Mills Ltd* [1988] AC 514, 528. It is arguable that there was in fact a loss and therefore no ‘double recovery’ (text to n 60 below), but this is not the way the court approached it.

⁵¹ *One Step* n 41 above at [93].

⁵² *ibid* at [92]. This, of course, would seem to justify the very gain-based redress which the court rejected.

symbolic rap on the knuckles. Whether or not we believe that the concern is justified, it is hard not to see it at work behind many standardised awards giving the claimant more than he would have been entitled to, at least on the face of it, on the application of an orthodox – hence personalised – approach. Again, by identifying the loss suffered with that of a different, typical, claimant, the law can award a larger sum without departing from its rhetoric of *restitutio in integrum*.

When we do not know what the personalised approach would give

The third and fourth concerns are of a different nature: they are not that orthodox principles give too much or too little, but rather that we do not know – or sometimes indeed that we do not *want* to know – how much they would give.

The first reason why we might be facing evidentiary difficulties leading to standardisation seems the most obvious: because the loss is not pecuniary we do not know how much it is worth, hence the need for a conversion system (a ‘market substitute’) and therefore a price-tag attached to the underlying injury. But, as was explained, this is more complicated than it seems. Award-stabilisation mechanisms described as ‘tariffs’ can in principle be reconciled with a personalised approach. Thus, putting a monetary value on the distress typically associated with a particular injury is compatible with the view that a claimant who suffers, say, half as much should receive 50 per cent of the ordinary damages: on such a view, the market-substitute ascribes a value to the ordinary claimant’s loss but does not deny the existence of the idiosyncratic claimant, whose loss will be either more or less than that.

However, at this point the evidentiary difficulty is going to metastasise: *how* do we know where the claimant fits on the Gaussian curve of reactions? In theory, the stoic claimant might stand, in relation to non-pecuniary losses, in the same position as the mechanic’s mate with respect to pecuniary ones; in practice, however, he has no receipt or quote to show, and no bank statement documenting a transfer of value. The court is faced with an inscrutable inner reality, about which the claimant may be more or less truthful, which it is required to evaluate. It is not hard to understand how these evidentiary difficulties are naturally going to lead to awards of damages for non-pecuniary losses which are not simply *stabilised* but also *equalised*: if we do not know, or struggle to know, how much a claimant suffers, either in the abstract or comparatively to the expected norm, the obvious temptation is to give everyone the same: a ‘fair, reasonable and just’ sum. As was seen, this

is to a large extent what English law does, at least in the context of physical injuries (the pressure to follow suit in other areas of the law being strongly felt).⁵³

The second evidentiary issue is of a completely different nature; it concerns situations where the claimant may suffer a concrete detriment at some point in the future, but we do not know at the time the action is brought. Even though this is hardly ever identified, let alone discussed, the award of a standardised sum *ex ante* might be read as a mechanism to compensate *pre-emptively* a factual loss before it has arisen, without having to wait until it has occurred before the claimant can take action (which, for all manner of reasons starting with limitation periods, would be highly undesirable).

This, again, applies to both sides of the law of damages. In the discussion above, it was assumed that the owner of the unrepaired bumped car or the claimant deprived of his 'hypothetical bargain' had suffered no economic loss; and the same in respect of non-pecuniary losses for the unconscious claimant or the unaware victim of a breach of privacy. While this might well be true at the date of trial, it is of course entirely possible that they will suffer such losses at a later stage. The car owner might change his mind and decide that he would, after all, like his machine to look presentable again; the beneficiary of the covenant might have wanted one day to relax it in return for consideration; the Weller twins might *become* distressed when they grow up to realise how younger versions of themselves were objectified for the satisfaction of public curiosity – and, for all that we know, the person in a coma might wake up from it, at least in part, and start experiencing PSLA in the future. Certainly, this last prospect has been used as a reason to justify standardised awards for loss of amenity.⁵⁴ While the discussion has been more limited in respect of pecuniary losses, exactly the same arguments could be used to justify that the hypothetical occurrence of a concrete loss at a future point constitutes, for the claimant, a present (compensable) loss, as have been used to support damages for loss of a chance⁵⁵ – the difference being that the crystallisation of the loss depends, here, on the claimant's own decision rather than on events beyond his control.

⁵³ See, for instance, in respect of psychiatric injuries, Handford, n 27 above, 592.

⁵⁴ Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss*, n 18 above, [4.16].

⁵⁵ S. Steel, *Proof of Causation in Tort Law* (Cambridge: CUP, 2015) 340-351.

However, it not yet having occurred, the quantification of such a loss will necessarily have to be standardised.⁵⁶

When we do not want to know how much the personalised approach would give

A variation on the previous theme is the situation where we simply do not want to know how much the claimant has lost personally. There is at least one very clear example of this concern: the standardisation of damages for bereavement under the Fatal Accidents Act 1976.⁵⁷ No-one believes that everyone suffers the same grief when confronted with the death of a spouse or child (and evidentiary hurdles would be no more difficult to overcome than in respect of any other non-pecuniary harm); however, no-one is prepared to have the matter discussed openly either: this would be too unseemly.⁵⁸ In the language of cultural anthropology, the question is taboo.

ASSESSING STANDARDISATION

Should the law, then, seek to standardise awards of compensatory damages in tort, in whole or in part? The answer this article seeks to defend is that standardisation, at least in the strict sense expounded above ('ontological'), is not defensible: it is neither desirable nor possible. In order to understand this, it helps to start by addressing the concerns, developed in the previous part, which explain why the law does it, before examining why the process goes against elementary principles of tort law damages, and runs into the – probably insuperable – difficulty of the standardisation of consequential losses.

Addressing concerns

⁵⁶ The question then becomes whether the method to compute quantum is satisfactory: see below, 000.

⁵⁷ Text to n 26 above.

⁵⁸ That this is the issue could hardly have been made clearer when the Law Commission came up with the suggestion: 'We make this recommendation for a fixed tariff figure because we are anxious that there should be no judicial enquiry at all into the consequences of bereavement ... We recognise that the effects of bereavement will be greater in some cases than others but to avoid any judicial enquiry into degrees of grief we are prepared to accept this disparity' (Law Commission, *Report on Personal Injury Litigation – Assessment of Damages* Law Com No 56 (1973), [175].

Looking at the above arguments, and bearing in mind that ‘too much’ or ‘too little’ are bound to be matters on which reasonable people might reasonably disagree, the following remarks can be offered:

In some cases it seems that the intuitively ‘wrong’ result is in fact right once placed in a broader perspective. In particular, the desire to ‘not let the defendant get away with it’ misunderstands the purpose of compensatory damages, which are definitionally concerned with loss and hence, on the orthodox understanding, the consequences of the wrong for the claimant. There is nothing indefensible about the fact that it can, in some instances at least, be ‘cheaper to kill than to maim’: it is the logic of tort, a logic that can easily be defended on first principles of corrective justice. Of course, this says nothing about the availability of non-compensatory damages (punitive, gain-based, etc), or indeed of non-tortious responses to the same facts (for example through the criminal law). Compensatory damages should not become the vehicle for alien concerns in search of a place to express themselves.

In other cases the real issue appears to be that the ‘orthodox’ result is not properly appreciated; ordinary principles are believed to have been tried and found wanting when in fact they have been misunderstood. To put the same point differently (and even without bringing non-compensatory damages into the discussion), the law is often more generous *already* than those who might want to find another basis on which to award damages to the claimant appear to believe. This is especially true of two types of factual losses with which the law has always been uncomfortable: emotional harms and future losses – the difficulty naturally being compounded when detriments are both future and non-pecuniary.

Leaving aside the situations of uncertainty mentioned above, in some cases a concrete loss will clearly be present, which should be compensated on ordinary principles. For instance the owner of the bumped car who does not repair it has suffered, if nothing else, an emotional harm;⁵⁹ and Mr Yentob should have been entitled to a high quantum of damages, *on orthodox principles*, for his

⁵⁹ This is typically believed to be unrecoverable but the evidence points the other way: see E. Descheemaeker, ‘Rationalising Recovery for Emotional Harm in Tort Law’ (2018) 134 LQR 602, 614-615. If the emotional harm becomes too high, it might however fall foul of the principle of mitigation: the owner should have repaired the car instead of ongoingly suffering grief at the sight of the damage.

factual loss: until his death he will have to live with the knowledge that, for years, his innermost privacy was trampled upon by strangers utilising him as a means to gratify their curiosity or pursue lucre. In fact, it is only if we – unwarrantedly – focus on the harm that has already occurred by the time of trial that his situation will appear markedly different from that of the other claimants; using a broader lens, it is only marginally dissimilar. Consequently there is no need to alter basic tenets of tort law to give him the damages we might – rightly – believe he is entitled to: he is entitled to them precisely because the basic tenets of our law have chosen to award them to him.

Pecuniary losses too can be in need of better identification. On closer examination it is not in fact hard to justify on ordinary principles why the claimant whose repairs have been paid for by his insurer or through the benevolence of a third party should nonetheless be able to recover damages for the cost of these repairs: it is because, contrary to the assumption implicitly accepted up to that point, these have not been truly ‘avoided’ – accordingly there is in reality no ‘double recovery’. As Lord Bridge himself points out, albeit without making anything of it, insurance premiums have been paid for;⁶⁰ similarly the argument could be made that the benevolence of one’s mate creates a duty, at least moral, to reciprocate. If the specific loss of cost of repair has been avoided, it is only because another loss has been suffered: the cost of the premiums (past or future) paid in respect of this particular risk, and the cost of returning a similar favour. It is true that, on ordinary principles, it is these – ie the cost of the premiums or the favour – which should be compensated but, in the face of evidentiary difficulties, it is hard to see what more satisfactory value could be placed on the specific premiums than, precisely, the value of the loss insured against when it materialises, or on the moral duty to return the favour than what it would cost to fulfil it. This sort of ‘epistemological’ (or practical) standardisation does not contradict the pro-personalisation argument this piece defends.

The previous point raises the question of evidentiary issues more generally. As was explained, sometimes the law can be seen to standardise the quantum of damages simply because it does not know what the claimant’s own loss is. This might look strikingly similar to the strong standardisation cases from the outside, but the difference is in fact considerable: in one case, the law is seeking to approximate the claimant’s own loss in the face of cognitive limitations; in the

⁶⁰ Text to n 50 above.

other, it gives a specified sum to the claimant as a matter of principle, regardless of what might be known or knowable about his own loss.

The second approach, it will be argued, is indefensible. But what about the first? The short answer is that such epistemic standardisation is not wrong in itself; the question in respect of it is rather whether the approximation is carried out in a satisfactory way. This is a topic for a separate paper, standardisation in this weaker sense being part of the much broader question of how the law of damages responds to epistemic uncertainties, an issue which would need to be addressed in its globality if the conclusions reached are to be meaningful. Suffice it to say, in respect of the above examples, that it is not clear why the cases which were described as concerned with possible future losses should be dealt with through standardised awards rather than ordinary principles pertaining to future hypotheticals (ie, to simplify, that the quantum of damages reflects the value of the loss if it did materialise, discounted by the estimated probability that it will not). As to the issue of deciding where a claimant sits on the 'curve' of reactions to an injury, despite the undeniable difficulties it would not seem to necessitate any epistemological step which the law is not already prepared to take: if we know – or assume we know – what a typical claimant would feel in the circumstances (which we need in order to give a market-substitute value to the ordinary consequences of the injury), we can just as well decide how much, or how little, the particular claimant is suffering. We might not enjoy asking ourselves the question, but that is an entirely separate consideration.

Related to this is the last issue, that of not wanting to know the truth. This would seem to be indefensible. It is true that all societies have taboos, which are not wrong in themselves. But if we truly believe that we are breaking a higher norm by wondering if mother A grieves more than mother B, should the answer not be to disallow bereavement as a head of loss altogether? On the other hand, if all that is involved is the unpleasantness of dealing with real life, then the answer is that this is what the law exists for. Courts have shown in other areas that they are not squeamish about these realities; nor should they be.

Undesirability

Having addressed the reasons why the law switches to a standardised measure of loss, it can now be sketched out why strong standardisation is wrong-headed. It is, in effect, and for the most part, both undesirable and impossible.

The reason why it is undesirable need not detain us long. It is in a sense self-evident, stemming as it does from the most basic principle of the law of compensatory damages: *restitutio in integrum* can only be claimant-specific. The claimant's loss is definitionally his own. Complaining of the loss that a typical person would have suffered in similar circumstances is a nonsensical grievance; accordingly, so is seeking to compensate it by way of redress. The fact that this would be passed off as compensation for the claimant's own loss by deeming this loss to be something else than what it really is changes nothing to the fact. Naturally, this is not to deny that there might be good reasons why the quantum of compensatory damages would reflect other concerns than the principle of *restitutio in integrum*: thus, limiting principles of liability (including, in our survey, caps on recovery of lost earnings) might be perfectly justified.⁶¹ But if they are – a question which lies beyond the scope of this article – it is because we can adduce good substantive and independent reasons for their existence, not by using the absurd fiction that what the claimant did lose is, regardless of evidence to the contrary, what he should have lost. There does not appear to be any basis on which the latter would be defensible. (As mentioned, this says nothing about the grant of non-compensatory damages, or the use of statistical averages to guesstimate the claimant's loss – own and factual – in a situation of uncertainty.)

Impossibility

In any event, full standardisation of awards quickly turns out to be an impossibility, certainly in practice and probably even in theory. Therefore, unless one can explain why standardisation should be carried out in part but not in whole, or in respect of a particular segment of the award but not the rest, the project would need to be abandoned in its totality.

Key to this impossibility is the fact that, according to an orthodoxy which has never been challenged, once a wrong has been established then – subject to the standard limiting principles – all losses which can be shown to flow from it are recoverable. This extends not simply to direct (or basic) losses but also to what we call 'consequential losses'. What a consequential loss is, and where the line is drawn between the two types of loss, is not altogether clear; but the underlying idea is.

⁶¹ On the other hand, it is difficult to see how damages could ever be *more* than the claimant's own factual loss and still be properly compensatory. In other words, it is hard to see what 'expanding principles of liability' there might exist which would justify the discrepancy.

When a wrong occurs, certain consequences are liable to follow in an immediate (albeit not necessarily instantaneous) way: these are direct (or ‘basic’, or ‘normal’) losses. In the words of *McGregor on Damages*, ‘[t]he normal loss is that loss which every claimant in a like situation will be expected to suffer’.⁶² If my knee is negligently broken, I will ordinarily suffer out-of-pocket expenses as a consequence, and I will ordinarily experience distress. Of course, it is possible that this would not be the case in my particular circumstances, but it is the norm – ie the normal result of the wrong itself.

Because my knee is broken, I might also have to take time off work, as a result of which I will also – again, typically – suffer additional economic loss (and possibly additional distress); or my partner might leave me due to the strain of the situation, in turn causing – in the ordinary course of events – more financial and emotional detriments. These are *further* losses which, subject to scope of liability considerations, are also recoverable. But they may or may not occur; in *McGregor’s* words, such “‘particular’ or ‘actual’ ... loss’ is ‘that loss which is related to the circumstances of the particular claimant’”.⁶³ Because these ‘consequential’ losses are mediated rather than unmediated, their occurrence cannot in any way be regarded as the *normal* consequence of the wrong: even if they are not rare or statistically unlikely, they remain atypical or un-expected. (Arguably such further losses are best understood, in doctrinal terms, as the detrimental consequences – financial and emotional – of *further injuries* or damages brought about by the initial wrong: the inability to work, the breakdown in the relationship, etc; but this is a separate issue.)

Because they are atypical, any attempt to standardise these further losses in a principled way would founder from the start.⁶⁴ Even if it were meaningful to speak of an expected value – in

⁶² *McGregor on Damages* n 5 above, §3-008.

⁶³ *ibid*, §3-008.

⁶⁴ Besides this, there are at least two further obstacles facing the standardising enterprise. One is to construct the ideal-type of the ‘ordinary claimant’: it is one thing to neutralise on an *ad hoc* basis certain features of the case as being idiosyncratic (which could also be done for consequential losses, for example insurance arrangements could be discounted); it is another to identify in a systematic and coherent way what being a ‘typical’ claimant entails. The other obstacle is to justify why, if the law’s response to the wrong is determined independently of the specific claimant, the wrong itself should not also be. But it would strike everyone as

the mathematical sense of the term – of the *overall* loss flowing from the broken knee, ie a weighted average of outcomes in all the possible worlds where the wrong has occurred, it would in any event be effectively impossible to calculate. A standardised quantum of consequential losses would need to look for all the possible further damages that might be brought about by the initial wrong and, for each of them, assign a probability to its occurrence and an expected value to its detrimental consequences. No one has ever suggested anything like this; indeed it is unlikely that anyone would accept that there is such a thing as ‘typical’ further damages or losses; there only are consequential damages or losses that have in fact occurred, or will likely occur, in the instant case. Standardisation of consequential damages, in the sense of compensating the claimant for ‘ordinary consequential loss’ is a practical, and probably also principled, impossibility.

To this, it might be replied that we could still aim to identify the damages or injuries suffered by the claimant personally, but then standardise the loss associated with each of them. In the above example, this would mean identifying the broken knee as the initial damage and the impairment of earning capacity or relationship breakdown as further damages. A standardised value would then be given to each (to the amount of the loss typically flowing from them), the overall award being the sum total of these. On paper there is an attraction to this approach. However, even if it were theoretically feasible, what can safely be said is that this would take us so far from the way everyone currently thinks about damages as to enter the realm of law-fiction. Indeed, analytically, it would mean getting rid of the concept of consequential loss altogether: on this alternative view, the claimant has suffered several damages or injuries, each coming with its own *direct* losses, the only difference between the further injuries and the original one being that their wrongfulness does not have to be established anew: it is assumed from the fact that they flow from damage which has already been recognised as wrongful.⁶⁵

absurd to say that a wrong has been committed when an ordinary claimant would have had his right violated in the same circumstances, even though the particular claimant did not.

⁶⁵ Going one step further, if one defines a wrong in terms of the violation of a right (rather than the historical causes of action through which these have been protected), the logical conclusion is that the claimant has suffered several wrongs: the interference with his physical integrity, with his capacity to earn, with a protected relationship, etc. The consequences of this analysis for our understanding of rights and wrongs are far-reaching.

Standardisation of consequential loss, being impossible in any meaningful sense, must be abandoned and, given that there does not appear to be any reason why direct and consequential losses should be treated differently in this respect, so must the standardising enterprise in its entirety. Accordingly, the historical orthodoxy of English law should be reasserted: what the claimant gets compensated for is, *prima facie*, his *own* (ie personal) *factual* (ie concrete) loss. While there might be all manner of difficulties in working out the principle – some of which might indeed entail a form of guesstimation (a ‘soft’, and unobjectionable, form of standardisation) – the principle itself can, and should, be re-established.

CONCLUSION

As we conclude, the above developments must be integrated into a larger narrative. This article is the third in a series on damages. The first one identified two models of tort – described as respectively ‘bipolar’ and ‘unipolar’ – correlating with two understandings of loss: concrete vs abstract, ie the consequences of the wrong vs the wrong itself. Three things were argued concerning the unipolar, wrong-as-loss, model: first, it is for the most part novel, driven by the now ubiquitous language of rights; second, it typically raises its head when the orthodox model does not give the expected answer – read ‘not enough’ damages – even though it could in principle apply to all (at least basic) losses; and third, contrary to appearances it is not deontic; it is consequentialist in the sense that it looks ahead to consequences. But these consequences are potential rather than actual; they correspond to what would typically happen, which itself is the reverse of what we understand by the seriousness of the wrong. A ‘serious’ injury, on that reading, is one which which leads to grave consequences in the ordinary course of events.⁶⁶

What this article has illustrated is that, to make things more complicated, the ordinary – ‘bipolar’ – model is already, to a significant extent, standardised, in the sense that it often construes the claimant’s compensable detriments not as his own but as those of an ordinary person in the same circumstances: this is true (albeit not equally true) of direct and consequential, and of pecuniary and non-pecuniary, losses. In other words, the same logic which led to the emergence of the unipolar model has also led to the standardisation of tort losses, and therefore of tort awards, *even when* these are meant to be concerned with the factual consequences (financial or emotional)

⁶⁶ Descheemaeker, n 3 above.

of the wrong. As surveyed above, the standardisation of damages through the abstraction of the corresponding loss goes far beyond the awards lawyers would conceive of as 'normative damages'. Obviously, the more standardisation is carried out on the orthodox model, the smaller the distance becomes from the wrong-as-loss model which, as was said, really is a standardised-consequences model.

Such standardisation of losses has some undeniable attractions in terms of simplicity, consistency, predictability and accountability, which must be taken seriously. But ultimately the enterprise is both wrong-headed and unachievable, at least without going back on some foundational commitments made by the law a long time ago. To the extent that the concerns which spurred it are valid – and they often are – they can (and should) be addressed differently. Loss is irretrievably, indeed it is *definitionally*, personal. Not giving the claimant everything he lost because there are other concerns which the law must give effect to; giving him non-compensatory damages when he has lost nothing in any real (ie factual) sense; and approximating his loss in a way that involves averages are all defensible. But defining the claimant's loss as what an ordinary claimant placed in the same circumstances would – ie what the claimant 'should' – have lost is not. It is a mere sleight of hand which only serves to obscure the underlying issues.

In turn, this reasoning forces us to abandon the unipolar model of tort law and, hand in hand with it, the abstract or normative understanding of loss to which it is wedded. Again, there is no such thing, on closer examination, as a normative loss. Someone who is only worse off because the law says so is not worse off in any meaningful sense. He has no grievance: as Edelman puts it, 'normative loss ... is not a loss experienced in the real world'.⁶⁷ But the consequences of this abandonment would not be far-reaching. Often, in situations where the law switches to that alternative construction of loss, the claimant should indeed recover substantial – not nominal – damages: but these are either compensatory on the orthodox model (in particular for emotional or future losses, both of which are insufficiently appreciated), or rooted in the idea of punishment of the defendant, or based on his gain. We do not need to pull losses out of thin air to give the claimant an 'effective remedy'.⁶⁸

⁶⁷ *McGregor on Damages* n 5 above, §17-020.

⁶⁸ Descheemaeker, n 59 above.

What this and the previous pieces have sought to do is simply to recapture the orthodoxy of the law: a loss is definitionally the claimant's own (even though he might not recover all of it); losses are properly factual (but then 'factual' is broader than 'financial'); compensation is for such losses only (but their full scope must be taken into account, including future losses); finally, difficulties in measuring the loss based on these principles – hence the prima facie measure of compensation – must be firmly distinguished from the principles themselves. The English law of damages, the product of a long growth over centuries, is certainly in accelerated need of rationalisation in the post-jury age, but it is not broken and need not be fixed; least of all does it need more concepts or ideas to be thrown into an already overcrowded toolbox. What it needs is to understand better, and work out, its own logic while warding off alien and incompatible ones.

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