

Loss Of Chance Damages: Speculation As To The Criteria

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ABSTRACT

Loss of chance damages in contract and tort. Are the categories in the leading case, Allied Maples Group Ltd v Simmons & Simmons [1995] 4 All ER 407 sound? Difficulties with causation, quantification and identifiable criteria.

INTRODUCTION

Loss of chance is well recognized as a basis for assessing damages in contract and tort. In these cases, the law is concerned with hypothetical acts. If a defendant breaches the contract with the plaintiff and as a result a plaintiff loses the opportunity to gain a benefit or avoid a loss, the lost opportunity may be compensatable. The principle is illustrated by the early English contract case, *Chaplin v. Hicks*¹, where a beauty contestant who had successfully passed the initial stage of the contest, was, in breach of contract, not allowed to compete in the final stage. She was awarded damages for the loss of chance of being successful in winning a prize.

*Allied Maples Group Ltd v Simmons & Simmons*² has been regarded as the leading authority and the categories of Stuart –Smith L have been followed without criticism. On appeal, the House of Lords in the recent case *Gregg v Scott*³, had the opportunity to reformulate the rules in *Allied Maples* but discussion of that authority was limited.

In the New Zealand Court of Appeal in *Benton v Miller & Poulgrain (a firm)*⁴ William Young J stated “The law as to when Judges should take all or nothing or a loss of a chance approaches to causation and damages is, to say the least, difficult.”

Loss of chance law has developed in a number of areas. This paper will discuss some recent authorities with a view to outlining the issues and whether there are clear criteria which are applicable to both contract and tort.

CONTRACT AND TORT

The basic principles illustrate differences between contract and tort and also explain why the *Allied Maples* decision has been welcomed.

The advantage of a loss of chance formulation is that it provides a basis for substituting probabilistic causation for the traditional all or nothing approach. In the latter case the usual civil standard of proof is proof on the balance of probabilities and a plaintiff who satisfies the standard is awarded full damages. If it is not satisfied then the plaintiff fails. The plaintiff is concerned with past facts as opposed to hypothetical facts or future events. In the latter two situations, the damages are for loss of chance and proof on the balance of probability does not always apply. Loss of chance has no application if the damage arises from a past or present fact.⁵ If the hypothetical action

¹ [1911] 2 K.B. 786.

² [1955] 4 All ER 407.

³ [2005] 4 All ER 812.

⁴ [2005] 1 NZLR 66, 79.

⁵ Civil Remedies in New Zealand, ed Rt Hon Justice Peter Blanchard, Brookers Ltd, New Zealand, 2003, para 1.9.3.

is that of the plaintiff, balance of probability still applies. If the hypothetical action is that of a third party, then damages can be awarded in proportion to the chance of that loss. The plaintiff must show that a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages.

The general rule was stated by Lord Diplock in *Mallett v McMonagle*⁶:

“The role of the court in making an assessment of damages which depends on its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past the court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.”

Regardless whether an action is in tort or contract a statement that has stood the test of time as to the measure of damages is that of Lord Blackburn in *Livingstone v Raywards Coal Co*⁷:

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

However, there is a difference between tort and contract as was discussed by the New Zealand Court of Appeal in *Cox and Coxon Ltd v Leipst*⁸. Gault J approved the explanation provided in *McGregor on Damages*⁹:

“Turning to the case of compensatory damages, which is much more important because it represents the norm, there is at the very start a basic, though somewhat latent, distinction between contract and tort. This distinction is in the general rule which is the starting point for resolving all problems as to measure of damages. The distinction is latent because the leading formulation of the general rule is sufficiently wide to cover contract and tort equally: this formulation is that the plaintiff is entitled to be put into the same position, as far as money can do it, as he would have been in had the wrong not been committed. In contract, however, the wrong consists not in the making but in the breaking of the contract and therefore the plaintiff is entitled to be put into the position he would have been in if the contract had never been broken, or in other words, if the contract had been performed. The plaintiff is entitled to recover damages for the loss of his bargain. In tort, on the other hand, no question of loss of bargain can arise: the plaintiff is not complaining of failure to implement a promise but of failure to leave him alone. The measure of damages in tort is therefore to be assessed on the basis of restoring as far as possible the *status quo ante*.”

When the damage depends, wholly or in part on the actions of a third party, there are differences in its application in tort and contract. In some cases the hypothetical event goes to liability but in others to quantification. In the case of breach of contract, there is no question of liability as the breach is actionable per se. Damage is not an element of the cause of action for breach of contract. In *Gregg v Scott*¹⁰ Lord Hope discussed the basic rules in a claim for personal injury in tort and listed in historical order the questions which must be asked at the outset:

“(a) whether the defendant owed a duty of care to the claimant, to prevent him sustaining the type of harm that was a foreseeable consequence of his careless acts or omissions; (b) whether there was an act or omission by the defendant which was in breach of that duty of care; and (c) for what loss, injury and damage, if any, the defendant is liable.”

⁶ [1969] 2 All ER 170, 190-1; [1970] AC 166,176.

⁷ (1880) 5 App Cas 25, 39.

⁸ [1999] 2 NZLR 15 at 19-20.

⁹ (16th ed, 1997) at para 810.

¹⁰ [2005] 4 All ER 812, 835.

If the event gives rise to a tort, in some cases damage is an element of the tort. The tort of negligence requires that damage must be established for liability to arise. Damage in this context has a different meaning from damages. ““Damage” refers to the injury suffered by the plaintiff. “[T]he recoverability for damage is a liability question, and the amount of damages to be awarded is a question of remedy.”¹¹

The Leading Authority - *Allied Maples Group Ltd V Simmons & Simmons* [1995] 4 All ER 40

*Allied Maples Group Ltd v Simmons & Simmons*¹² was a claim against a solicitor in contract and tort. In that case, a solicitor’s negligence deprived the plaintiff of an opportunity to negotiate a better bargain. The questions that the court had to resolve were what the plaintiffs would have done in the hypothetical situation, if the defendants had given the appropriate advice to the plaintiffs and whether the other party to the contract, the independent third party would have reached the suggested agreement. The Court of Appeal drew a distinction between the tests to be applied to the hypothetical acts of the plaintiff and the hypothetical acts of third parties. It was held that once the plaintiff proved on the balance of probability as a matter of causation that he would have taken action to obtain a benefit or avoid a risk, he did not have to go on to prove on the balance of probability that the vendor, the third party, would have acted so as to confer the benefit or avoid the risk to the plaintiff. Instead, the plaintiff was entitled to succeed provided he showed that there was a substantial, and not merely a speculative, chance that the vendor, would have agreed to more favourable terms

Stuart –Smith LJ outlined the problem as follows:¹³

“In these circumstances, where the plaintiffs' loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.

- (1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists in some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant's act, for example the careless driving, caused the plaintiff's loss consisting of his broken leg. Once established on the balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.
- (2) If the defendant's negligence consists of an omission, for example to provide proper equipment, or to give proper instructions or advice, causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if the equipment had been provided or the instruction or advice given. This can only be a matter of inference to be determined from all the circumstances. ...Although the question is a hypothetical one, it is well established that the plaintiff must prove on the balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour.
- (3) In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case does the plaintiff have to prove on the balance of probability, as Mr Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages? Although there is not a great deal of authority, and none in the Court of Appeal,

¹¹ Civil Remedies in New Zealand, ed Rt Hon Justice Peter Blanchard, Brookers Ltd, New Zealand, 2003, para 2.2.2.

¹² [1955] 4 All ER 907.

¹³ [1955] 4 All ER 907, 914-917.

relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr Jackson's submission is wrong and the second alternative is correct.”

Benton v Miller & Poulgrain (a firm) [2005]1NZLR 66

The above dicta of Stuart–Smith LJ was adopted by the New Zealand Court of Appeal in *Benton v Miller & Poulgrain (a firm)*¹⁴. In that case Miller & Poulgrain, a firm of barristers and solicitors acted for Mr Benton and his then wife in relation to property transactions. Miller & Poulgrain were negligent vis-à-vis Mr Benton. His claim failed against Miller & Poulgrain in the District Court as the Judge was not satisfied that Mr Benton had suffered any loss. In the High Court Mr Benton was awarded damages in the sum of \$37,000. Mr Benton appealed and Miller & Poulgrain cross-appealed. The appeal was allowed and Mr Benton was awarded \$90,000 and the cross-appeal was dismissed. William Young J delivering the judgment of Glazebrook J and himself referred to the two key areas of uncertainty. The first was the actual entitlements of Mr & Mrs Benton and the second was the result of appropriate advice. His Honour stated¹⁵ “Uncertainty can be addressed in two ways; either on what is often described as an ‘all or nothing’ basis by reference to the balance of probabilities standard of proof, or, alternatively, on a proportionate (or loss of a chance) basis according to the Judge’s assessment of the probabilities. The law as to when Judges should take all or nothing or a loss of a chance approaches to causation and damages is, to say the least, difficult.”

Mr Benton claimed that if appropriate advice had been given it would have resulted in a s 21 agreement whereby the matrimonial home property would have been declared his separate property. The true status of the 1985 properties was a matter of historical fact and loss of chance has no role to play in such situations. Entitlements were to be determined in accordance with the balance of probabilities standard of proof which is an all or nothing basis. Whereas, what would have happened if Mr & Mrs Benton had received appropriate advice involved asking and answering a hypothetical question.

Uncertainties as to how Mr Benton would have acted had proper advice been given were dealt with on an all or nothing basis by reference to the balance of probabilities standard of proof. Uncertainties as to Mrs Benton’s conduct involved a proportionate or loss of a chance basis, which called for broad judgments.

The Courts below had not made definitive findings as to the 1985 matrimonial property status of the key items, the Mt Albert house and the Pauanui house. Their Honours found that the Mt Albert house was Mr Benton’s separate property and the Pauanui house was the matrimonial home. It was highly likely, although far from certain, that proper advice would have resulted in a s 21 agreement declaring the matrimonial home property B’s separate property. If the case fell to be determined solely on loss of chance principles, one quarter was allowed for the contingencies that the wife might not have signed or the agreement might have been set aside. This would mean damages of \$67,500 as at 1998. If damages were assessed on a detriment basis the amount was \$49,700 as at 1985. Their Honours used the \$90,000 paid by Mr Benton to his wife as a cap on the award.

Hammond J arrived at the same conclusion but via a different route. His Honour outlined the importance of the relationship between pleadings and damages.¹⁶ “Before a plaintiff is entitled to damages, it follows ...that there must have been a breach of whatever duty was established; that the loss flowed there from; and that the loss was foreseeable.” and the need to put the plaintiff in the same position he would have been in had the duty been discharged. Hammond J noted that there was an important distinction between cases where there was a duty to provide information, and a duty to give advice. This was an “advice” case. There was no need to resort to loss of chance principles. It was more in accord with fundamental principle to simply say that there was a direct form of loss which flowed from the failure of the solicitor to give the relevant advice and that was Mrs Benton’s inchoate claim. The cost to remove the blot from the clean title was the measure of damages, \$90,000.

¹⁴ [2005] 1 NZLR 66, 80 -81.

¹⁵ Ibid at p 79.

¹⁶ Ibid at p 89.

Berryman¹⁷ suggests that Hammond J's judgment is to be preferred. "Only the first certainty posited by William Young J is relevant to damage quantification. The plaintiff has proved on the balance of probabilities, that if properly advised, he would not have proceeded without a s21 agreement. ...In either case, Mr Benton would have acted to safeguard his interest." The writer agrees that Hammond J's approach is preferable. What Mrs Benton would have done was irrelevant. It would have been Mr Benton's choice as to what he would have done, not the choice of fate. It was possible to determine what he would have done. On that basis the damages approach should have been all or nothing only.

Professor Coote succinctly summarised the difficulty:¹⁸ "[i]t is submitted, with respect, that the real problems arising from the burden of proof in this context lie not with the question whether the loss of a chance should be assessed on an all-or-nothing basis but with difficulties arising, on the one hand from proof of causation and, on the other, of bringing the loss of a chance within an established cause of action."

DIFFICULT ISSUES

A major difficulty in loss of chance cases is whether causation or quantification is at issue. This was acknowledged in *Allied Maples* by Stuart-Smith LJ. His often quoted passage which sets out the three rules begins by reference to the necessity to establish causation and where causation ends and quantification begins. The problem areas are when hypothetical acts of a third party or a future event are at issue as these questions are not decided on the balance of probability but, on the court's assessment of the risk eventuating or the loss of chances approach.

In the case of hypothetical facts why the distinction? In the Court of Appeal in *Gregg v Scott*¹⁹ Mance LJ noted that the well-known rules in *Allied Maples* may require further elaboration and listed three problem areas.²⁰

First, he referred to the suggestions in McGregor on Damages (18th ed.) paragraph 381 that "the first category in *Allied Maples* should embrace omissions, while the second category should embrace all circumstances in which the alleged loss depends on a claimant's own conduct." Secondly, Mance LJ asked how the categories and rules identified in *Allied Maples* fit with the reasoning in *Davies v Taylor*²¹, where the claimant's own hypothetical conduct was assessed in terms of prospects, not probabilities. "The readiest explanation of the approach taken in *Davies v Taylor* is, however, that the particular statutory test under the Fatal Accidents Acts ("reasonable expectation") required it."²² Thirdly, he noted that, Lord Reid in *Davies v Taylor* spoke of the general impossibility of proof of hypothetical events and he was of the view that it was difficult to explain the rationale of the distinction between Stuart-Smith's categories two and three. "Rather it must, I would think, be the pragmatic consideration that a claimant may be expected to adduce persuasive evidence about his own conduct (even though hypothetical), whereas proof of a third party's hypothetical conduct may often be more difficult to adduce."

The first two problem areas are self explanatory. The third is the basis of loss of chance and hypothetical events. This is Stuart-Smith LJ's second category. Many questions can be raised as to the rationale of the distinction. Can it be guaranteed that an independent third party is likely to adduce more reliable evidence than the plaintiff who would be under considerable stress because of his/ her need to adduce evidence to achieve the desired outcome? Mance LJ considered that was the case. Clearly the plaintiff knows what must be stated. Whereas, it could be argued that a third party if independent is more reliable. Browne-Wilkinson QC²³ takes the opposite view to Mance LJ and states that in his experience "despite every attempt on the part of the witness to be honest his evidence as to what he *would* have done is often extremely unreliable." Or can it be said that the court is more likely to spot

¹⁷ J Berryman, Contractual Remedies NZLS July – August 2005, p51.

¹⁸ B Coote, Recovery for loss of a chance: could it be all or nothing at all? (2006) 12 NZBLQ 127, 129.

¹⁹ [2002] EWCA Civ 1471.

²⁰ Ibid para 71.

²¹ [1974] AC 207.

²² In *Davies v Taylor* a widow had separated from her husband failed to satisfy the test of reasonable expectation of pecuniary benefit under the Fatal Accidents Act because there was only a speculative possibility of a reconciliation.

²³ S. Browne-Wilkinson QC Recent developments in the law of damages Professional Negligence, Vol 20 No 3 2004 152, 158

lies in the one case than the other? Why should the tests differ depending whether the hypothetical conduct is that of the plaintiff or that of a third party? *Allied Maples* does not provide any answers for the reason why there is a distinction.

Many judgments have followed *Allied Maples* but are the categories sound? On appeal, the House of Lords in *Gregg v Scott*²⁴, did not discuss the categories in *Allied Maples*. Lord Nicholls²⁵ stated: “It is clear that Stuart-Smith LJ did not intend this to be a precise or exhaustive statement of the circumstances where loss of a chance may constitute actionable damage and his observation should not be so understood.”

Gregg v Scott [2005] UKHL 2

Mr Gregg went to see Dr Scott, who negligently diagnosed as innocuous a lump under his left arm when in fact it was cancerous. This led to nine months' delay in Mr Gregg receiving treatment. The cancer spread, which meant that the deterioration in Mr Gregg's condition reduced his prospects of disease-free survival for ten years from 42%, when he first consulted Dr Scott, to 25% at the date of the trial. The trial judge, Judge Inglis found that, although Mr Gregg's condition deteriorated and in consequence his prospects were reduced in this way, a better outcome was never a probability. It could not be concluded on the balance of probability that, in the absence of the negligence, Mr Gregg's medical condition would have been better or that he would have avoided any particular treatment.

The trial judge, Judge Inglis, dismissed the claim. The Court of Appeal by a majority (Simon Brown and Mance LJJ, Latham LJ dissenting) dismissed Mr Gregg's appeal. In the Court of Appeal and the House of Lords, Mr Gregg's counsel advanced two arguments. Lord Hoffmann outlined the arguments:²⁶ “The first was that Mr Gregg had proved that the delay had caused him injury because the judge found that if he had been treated earlier, the cancer would probably not have spread as quickly as it did. He was entitled to compensation for this injury and that should include the reduction in his chances of survival. The second argument was that quite apart from any other injury, the reduction in his chances of survival was itself a compensatable head of damage.”

The majority of the Court of Appeal (Simon Brown and Mance LJJ) rejected both arguments and dismissed the appeal. Latham LJ accepted the first argument. The House of Lords also by a majority (Lord Hoffmann, Lord Phillips and Baroness Hale) dismissed the claim.

Lord Nicholls delivered a powerful dissent and noted²⁷ that the “sharp distinction between past events and future possibilities is open to criticism. Whether an event occurred in the past can be every bit as uncertain as whether an event is likely to occur in the future. But by and large this established distinction works well enough.”

His Lordship declared²⁸ “The present state of the law is crude to an extent bordering on arbitrariness. It means that a patient with a 60% chance of recovery reduced to a 40% prospect by medical negligence can obtain compensation. But he can obtain nothing if his prospects were reduced from 40% to nil. This is rough justice indeed.”

Lord Phillips asked the question²⁹ “Should this House introduce into the law of clinical negligence the right of a patient who has suffered an adverse event to recover damages for the loss of a chance of a more favourable outcome?” The complications of the case persuaded his Lordship that it was not a suitable vehicle “for introducing into the law of clinical negligence the right to recover damages for the loss of a chance of a cure.”³⁰

²⁴ [2005] 4 All ER 812.

²⁵ Ibid at 819.

²⁶ Ibid at 828.

²⁷ Ibid at 817-8.

²⁸ Ibid at 825.

²⁹ Ibid at 843.

³⁰ Ibid at 858.

ARE THERE IDENTIFIABLE CRITERIA?

What is the difference between a *Gregg v Scott* type case and *Allied Maples* where damages were awarded for loss of chance? Lord Hoffmann's possible explanation was that they are cases involving indeterminacy where the lost chance depends on the actions of human beings as opposed to Mr Gregg's condition which the law regarded as determined. His Lordship referred³¹ to Helen Reece's illuminating article³² where she points out that "the law regards the world as in principle bound by laws of causality. Everything has a determinate cause, even if we do not know what it is."

Lord Hoffmann observed³³ that "[e]verything is determined by causality. What we lack is knowledge and the law deals with lack of knowledge by the concept of the burden of proof." In Mr Gregg's case the disease had a determinate cause. "[T]he outcome was not random; it was governed by laws of causality and,..... cannot be remedied by treating the outcome as having been somehow indeterminate."³⁴

The striking exception to the assumption that everything is determined by impersonal laws of causality is where the actions of human beings provide part of the explanation for "why in some cases damages are awarded for the loss of a chance of gaining an advantage or avoiding a disadvantage which depends upon the independent action of another person: see *Allied Maples Group Ltd* and the cases there cited. But the true basis of these cases is a good deal more complex."³⁵

Reece³⁶ takes the view that chance has value only if it arises from indeterministic forces. There is a distinction between deterministic events in the natural world and indeterministic events which depend on the actions of human beings. "Phenomena are deterministic when their past uniquely determines their future and that phenomena are indeterministic when they have a random component." However, Reece's explication of the distinction is not without criticism. Fischer³⁷ does not agree that the distinction assists in providing a basis for a useful limiting principle. This is because as Reece states "it is difficult, if not impossible, to know that an event is indeterministic, since our inability to predict its occurrence could be either because the event is inherently unpredictable or because we have not found the complete set of necessary or sufficient causes. It is not humanly possible to predict the event."³⁸ Fischer gives the example of stage two breast cancer in which the processes may be deterministic if we knew enough about the disease and the individual. However, the processes could be indeterministic – science does not provide the answer. The only aid is intuition and it can be no better than science.

Baroness Hale also referred³⁹ to this difference and the real difference between personal injury and financial loss.

POLICY FACTORS

Policy was not mentioned in *Allied Maples*. In *Gregg v Scott* Mance LJ observed⁴⁰ that the distinction between "causation" and "evaluation or quantification" is not always either clear-cut or self-evident. His Lordship agreed with Simon Brown J's view at first instance in *Hotson* [1985] 1 WLR 1036, 1048C-D where he observed that how the distinction is drawn in any particular case may well depend on policy considerations. Later in *Gregg* Mance

³¹ Ibid at 830.

³² H Reece, *Losses of Chances in the Law* 59 Mod L Rev 188.

³³ [2005] 4 All ER 812, 830.

³⁴ Ibid.

³⁵ [2005] 4 All ER 812, 831.

³⁶ Reece, above n 30.

³⁷ D A Fischer, *Tort recovery for loss of chance* 36 Wake Forest L Rev 605.

³⁸ Reece, above n 30, p 194.

³⁹ [2005] 4 All ER 821, 866.

⁴⁰ [2002] EWCA Civ 147, para 66.

LJ emphasised⁴¹ the policy aspect of any judgment. Recent House of Lords cases have emphasised policy and in particular, Lord Hoffmann in *Gregg v Scott*.⁴² His Lordship referred to the distinction between proof on a balance of probability and “loss of the chance that the third party would have so acted.” “***This apparently arbitrary distinction obviously rests on grounds of policy.*** In addition, most of the cases in which there has been recovery for loss of a chance have involved financial loss, where the chance can itself plausibly be characterised as an item of property, like a lottery ticket.”⁴³ [emphasis added]

Lord Hoffmann considered⁴⁴ that a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act. It would have enormous consequences for insurance companies and the National Health Service. Such a radical change should be left to Parliament.

Baroness Hale outlined⁴⁵ the policy choice, which was between retaining the present definition of personal injury in outcome terms and redefining it in loss of opportunity terms. However, in her Lordship’s view, “introducing the latter would cause far more problems in the general run of personal injury claims than the policy benefits are worth.”

In *Gregg* the outcome had not materialised and there was no recovery for loss of chance. If the outcome had materialised then the proof required was on the balance of probabilities that the defendant’s negligence caused the outcome.

In *Allied Maples Group Ltd v Simmons & Simmons*⁴⁶ a chance of success in court did result in compensation but in the case of clinical negligence, *Gregg v Scott* that was not the case. What is required is a critical examination of this arbitrary distinction and the rules in *Allied Maples*. Is loss of a chance in itself actionable damage, that is, damage which the law regards as founding a claim for compensation?

⁴¹ [2005] 4 All ER 812, 831- 832.

⁴² [2005] 4 All ER 812, 831. See also, Lord Phillips p 854., *Rothwell v Chemical & Insulating Co Ltd & Anor* [2006] EWCA Civ 27 para 24; Lord Phillips, *Barker v Corus (UK) plc* [2006] UKHL para 20, 124; Baroness Hale.

⁴³ [2005] 4 All ER 812, 831.

⁴⁴ *Ibid* at 832.

⁴⁵ [2005] 4 All ER 812, 867.

⁴⁶ [1955] 4 All ER 407.