# ASSESSMENT OF DAMAGES

**By Justice Yaw Appau**
**Justice of the Court of Appeal**

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*at the Judicial Training Institute*

Assessment of Damages is a very wide area of the law. It is very 'technical' and covers an important area of civil litigation where there is an alleged civil wrong or an infraction of the law. It permeates almost all civil claims arising from tort and contract.

When a claim for damages is included in an action, the plaintiff or claimant is required under the law to provide evidence in support of the claim and to give facts upon which the damages could be assessed. Simply put, before assessment of damages could be made, the plaintiff or claimant must first **furnish evidence** to warrant the award of damages. He must also **provide facts** that would form the basis of assessment of the damages he would be entitled to. His failure to do so would be fatal to his claim for damages. That is why in all actions where damages is one of the reliefs claimed, the plaintiff or claimant is always called upon to give evidence in support of the claim for damages after interlocutory judgment is entered in his favour upon the failure of the defendant to either enter appearance or to defend the action.

But before I stray into the technical area of '**assessment of damages'**, which is our subject for this period, it is important that we know and appreciate what the word **'Damages'** in law means. When the word is used in its singular context; i.e. **'damage'**, what it simply connotes is either:

(i) **Harm or injury**, that is; **physical injury that makes something less useful, less valuable or unable to function properly**; e.g. (a) damage to a vehicle or any property and

(ii) **An adverse or harmful effect on somebody or something**; e.g. (a) did damage his reputation in the community in which he lives, (b) suffered psychological damage as a result of harassment, etc.

In another sense, damage is used to mean the cost or price of something.

However, '**Damages**', as used in law, is nothing but, **a sum of money claimed as compensation or awarded by a Court as compensation to the plaintiff/claimant for harm, loss or injury suffered by the plaintiff/claimant as a result of the tortuous act or breach of contract committed by the defendant or his agent.**

Elizabeth A. Martin's edition of the Oxford Dictionary of Law, 5th Edition, published by Oxford University Press, defines 'damages' as "**a sum of money awarded by a court as compensation for a tort or breach of contract".**

In 'McGregor on Damages', the word 'Damages' is defined as; **"the pecuniary compensation obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum, which is awarded unconditionally".** {See Chapter 1, page 3}.

**'Damages'** is one of the several remedies that are open to a plaintiff who suffers injury or harm as a result of the tortuous act or breach of contract of another.

In recent developments, however, our highest Court (i.e. the Supreme Court) made headway in the expansion of the areas that damages cover by awarding damages for the breach of a constitutional or a statutory right or duty, which is neither tort nor contract. The Court however did so with a caution. This was in the case of **AWUNI v. WAEC [2003-2004] Vol. 1 SCGLR 471**. The Court said by making that award, it was not laying down a general principle in regulating the exercise of the courts' discretion as that would open the floodgates for the award of all types of damages in public law proceedings.

Though Dr. Seth Twum disagreed with the award of damages in this particular case, based on the fact that the merits of the charges against the plaintiffs had not been gone into, he agreed that damages could be awarded to a person who complains that his liberty has been restricted without due process as provided under article 14; or that forced labour was exacted from him under article 16; or that his property was unlawfully appropriated under article 20 of the 1992 Constitution.

{Read the lead judgment of Kpegah, JSC, the judgment of Dr. Date-Bah, JSC and then the dissenting judgment of Dr. Seth Twum with regard to the award of damages}

As a result of this development, it would be appropriate to define 'damages' as**, the monetary compensation claimed or awarded to one who suffers a loss or detriment.**

Damages are usually **'lump sum'** awards. The general principle underlying the award of DAMAGES either in tort or in contract is that the plaintiff or claimant is entitled to full compensation for his losses; i.e. the principle of "**restitutio in integrum**".

However, in determining how much to award, the Court considers two matters; (i) **the measure of damages, (i.e. quantum or the amount of money or lump sum that must be awarded) and (ii) remoteness of damages; (i.e. the proximate cause of the breach).**

In 'tort', the purpose of damages is to put the plaintiff in the position he would have been in if the tort had not been committed. [**restitutio in integrum**]. Damages are not awarded to over-enrich a plaintiff far beyond his actual losses. The reverse is also the case. Plaintiff should not get far less than his actual loss.

In the case of **BORKETEY v. ACHINIVU & Others (1966) GLR, 92,** where a taxicab collided with a bus leading to a complete damage of the taxicab beyond repairs, the Supreme Court, in an appeal held that, **"the appellant was entitled not only to the market value of the taxicab at the date of the accident but also to the profits he would have made had the car remained on the road".** {Total or actual loss}

The same principle applies to 'damages' in 'contract'. It was applied by the Supreme Court in the case **of ROYAL DUTCH AIRLINES & Another v. FARMEX LTD. [1989-90] 2 GLR, 623 @ 625** in the following words;

**"On the measure of damages for breach of contract, the principle adopted by the courts was restitutio in integrum, i.e. if plaintiff has suffered damage not too remote – he must, as far as money could do it, be restored to the position he would have been in had that particular damage not occurred. What was required to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost…"**

The Supreme Court echoed the same principle in the case of **JUXON-SMITH v. KLM DUTCH AIRLINES [2005-2006] SCGLR, 438 @ 442** in its holding (5) as follows: **"Where a party has sustained a loss by reason of a breach of contract, he was, so far as money could do it, to be placed in the same situation with respect to damages, as if the contract had been performed. In carriage of persons contract, as in the instant case, the normal measure of damages for failure to carry, was the cost of obtaining substitute transport less the contract price and consequential losses such as hotel expenses and the like and non-pecuniary loss such as physical inconvenience and discomfort".**

So in both cases; either in tort or in contract, the principle is; **'restitutio in integrum'.**

It is pertinent to note, however, that recovery of damages is limited by the rules of **"Remoteness of damages**", as indicated above. By '**remoteness'** is meant that the damages to be awarded must not be too remote from, but must be proximate to the tortuous act or the breach.

In a claim for damages for breach of contract, the locus classicus on this principle of remoteness is the case of **HADLEY v. BAXENDALE [1854] 9 Ex. 341.** This case supplies two tests for determining which damages are proximate and recoverable and which are too remote and therefore unrecoverable. These tests are:

1. **Do the damages arise naturally from the breach? Or**
2. **Were the damages reasonably contemplated by both parties when they made the contract as being a probable result of the breach?**

If the answer to any of these two questions is **yes,** then damages are proximate; i.e. not too remote and therefore recoverable.

As Alderson, B. stated in his judgment; **"where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract**

**should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it".**

These same principles were applied in the case of **VICTORIA LAUNDRY (WINDSOR) LIMITED v. NEWMAN INDUSTRIES LIMITED [1949] 2KB, 528.** Asquith L.J. said that the test of remoteness was whether the loss was **'reasonably foreseeable as liable to result from the breach'**. This, according to him, depends on the state of defendant's knowledge.

Suggested readings on the foreseeability test: - (1) **QUARCOO v. APPIAH [1972] 2 GLR, 30 – HC,** per Abban, J. (2) **BRADFORD v. ROBINSON RENTALS LTD. [1967] 1 W.L.R. 337; [1967] 1 All ER 267.**

In the Bradford case cited above it was held that it is not necessary that the precise nature of the injury be foreseeable, provided that 'the accident which occurred is a type which should have been foreseeable by a reasonable careful person, the defendant would be liable.

As stated in Salmon on Torts (14th edition at page 719), **"It is sufficient if the type, kind, degree or order of harm could have been foreseen in a general way. The question is, was the accident a variant of the perils originally brought about by the defendants' negligence**?"

**TYPES OF DAMAGES: -** Damages are of two main types, namely; **General Damages** and **Special Damages.** Apart from these two categorization, damages may also be classified as **Liquidated** and **Unliquidated.** This second classification pertains or is limited to only contracts or agreements.

**Liquidated Damages**

A contract may provide for the payment of a fixed sum on breach. Such a provision may serve the perfectly proper purpose of enabling a party to know in advance what his liability will be and of avoiding possibly difficult questions of quantification and remoteness. Such fixed-sum payments are called '**liquidated damages'.**

On the other hand the courts are reluctant to allow a party, under such provision, to recover a sum which is obviously and considerably greater than his loss. The courts have therefore drawn a distinction between '**penalty clauses'**, which are invalid, and '**liquidated damages clauses'**, which will generally be upheld.

**Liquidated Damages** are therefore, **a sum fixed in advance by the parties to a contract as the amount to be paid in the event of a breach**, or **an amount of money specified in a contract to compensate a party for injuries suffered because of a breach of contract by the other party to the agreement,** or **the amount agreed in advance of a breach of contract to serve as compensation for any injury or damage suffered thereby, precluding any liability in excess of the amount stipulated in the contract.**

These fixed amounts are recoverable provided that the sums fixed were a fair pre-estimate of the likely consequences of a breach, but not if they were imposed as a penalty. The question as to whether a clause is penal or a pre-estimate of damages depends on its construction and on the surrounding circumstances. The fact that the payment is described in the contract as a 'penalty' or as 'liquidated damages' is relevant, but not decisive.

Lord Dunedin formulated four rules of construction on what constitutes 'penalty clauses' as opposed to 'liquidated damages clauses' in the case of **DUNLOP PNEUMATIC TYRE CO. LTD v. NEW GARAGE & MOTOR CO. LTD. [1915] A.C. 6 @ 10** as follows**:**

(a) "It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach"; e.g., ( if a contract to do building work worth say GHC50.00 provided that the builder should pay GHC500.00 if he failed to do the work).

(b) It will be held to be a penalty if the breach consists only in paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid; e.g. ( a clause which says a debtor is liable to pay GHC200.00 if he failed to pay GHC50.00 on the due date).

(c) There is a presumption that a clause is penal when a single lump sum is made payable on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages.

(d) It is not penal just because the consequences of breach are such as to make precise pre-estimation an impossibility. On the contrary, that is just the situation when pre-estimated damages were the true bargain between the parties. But even in such situations the sum will be penal if it is extravagant.

**Unliquidated damages**, on the other hand, are damages, the amount of which is fixed by the courts. It is the court that determines how much is to be paid as damages. The court bases its decision on the testimony and facts before it.

## GENERAL DAMAGES and SPECIAL DAMAGES

What is the difference between **GENERAL Damages** as opposed to **SPECIAL Damages**?

**General Damages** are damages that the law presumes to have resulted from the defendant's tort or breach of contract. They are normally damages at large and can be **nominal** or **substantial** depending on the circumstances of each case.

**Special Damages** are such a loss as will not be presumed by law. They are special expenses incurred or monies actually lost. For example, the expenses which a plaintiff or a party has actually incurred up to

the date of the hearing are all styled special damages; for instance, in personal injury cases, expenses for medical treatment, transportation to and from hospital or treatment centre, etc.

Again substantial damage capable of pecuniary assessment, which flows directly and in the normal course of things from the act of the defendant for which he is responsible and which must be proved in the case of all torts not actionable per se is called '**Special damage'**.

Unlike General damages, a claim for Special damages should be specifically **pleaded, particularized and proved**. I call them the three **P's.**

According to Lord Macnaghten, **'General damages' are such as the law will presume to be the direct natural or probable consequence of the action complained of. 'Special damages' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary cause. They are exceptional in character and therefore they must be claimed specially and proved strictly.**

Other suggested readings on how to assess special damages:

1. **STROMS BRUKS AKTIE BOLAG v. HUTCHINSON [1905] AC 515 @525-526, per Lord Macnaghten.**
2. **BOHAM v. EVONNA [1992] 1 GLR 287 per Kpegah J.**
3. **CHAHIN & SONS v. EPOPE PRINTING PRESS [1963] 1 GLR 163 - SC**

Special Damages are liquidated, verifiable and provable sums; e.g. loss of income, loss of rent, loss of wages, replacement costs, loss of marriage, loss of material hospitality, loss of employment, loss of a business dealing (even if it might have turned out unprofitable), loss of particular customers, a general falling of profits and any other material loss. The recovery of such damages is however, subject to the principle of remoteness as already discussed above.

**General Damages**

Damages that fall under the broad headline of general damages are classified as follows: -

(i) Nominal Damages.

(ii) Substantial Damages.

(iii) Aggravated and Parasitic Damages.

(iv) Exemplary Damages

(v) Incidental/Consequential Damages.

**(i) Nominal Damages**

Nominal Damages will be awarded where the court decides in the light of all the facts that no actual damage has been sustained. See **NEVILLE v. LONDON EXPRESS NEWSPAPER LTD [1919] A.C. 368 @ p. 392,** per Viscount Haldane – H.L.

According to Street on Torts, the function of nominal damages is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that infringement of it is a tort actionable per se. [Street on Torts 5th Edition London Butterworth].

This means that nominal damages are normally awarded in all torts that are actionable per se; e.g. damages for trespass to land; actions founded on defamation, i.e. damages for libel and slander; damages for assault; damages for nuisance; damages for false imprisonment; damages for seduction; etc. and again in actions for breach of contract. However, the damages that are awarded in these cases are said to be **'at large'**. What this means is that although the interest protected may not have a precise cash value, the court is free on proof of the commission of the tort, or the breach of contract, to award 'substantial' damages instead of 'nominal' damages. This brings me to the next head; **Substantial Damages**.

**(ii) Substantial Damages**

Substantial Damages are damages given when actual damage has been caused. They are sometimes called '**actual**' or '**compensatory**' damages.

**(iii) Aggravated/Parasitic Damages**

The general compensatory damages also known as actual or substantial damages as explained above may be increased to take account of defendant's motives in committing the tort complained of or his conduct before or during the action. This happens in exceptional cases in tort, particularly in libel actions but never in contract. Such increased damages are known as **aggravated damages**. They are meant to compensate the plaintiff for the additional injury caused. They are, however, different from exemplary damages which are awarded under special circumstances. Some of the factors that tend to increase or aggravate damages in libel are, but not limited to the following:

i, gravity of the libel, manner of publication and extent of circulation.

ii, defendant's actual malice, i.e. improper motives in publishing words complained of.

iii, defendant's subsequent conduct before and during the action.

iv, Defendant's failure to apologize after realizing the untruth in the publication.

v, where the defendant puts in a plea of justification but failed to prove it, and

vi, the conduct of defendant's case.

**iv, Exemplary/Punitive Damages**

These damages are awarded in excess of actual or substantial damages just to make an example of the defendant or to punish him. The Supreme Court in the case of **AYISI v. ASIBEY III & Others [1964] GLR 695 @ 696-7** held that even in damages for trespass, exemplary damages could be awarded in addition to the normal nominal and actual damages suffered. The Court held: **"In assessing damages for trespass consideration should be taken not only of the extent of the land on which the trespass had been committed by the individual defendants, but also the length of time that the plaintiff had been wrongfully kept off the land...."**

Also, in the case of **MAHAMA v. KOTIA & Others [1989-90] 2 GLR, 24** where the plaintiff sued the defendants for the demolition of her building, the Court of Appeal held that in addition to the replacement value of the building, the plaintiff was also entitled to damages for being deprived of the use of her building.

Exemplary damages may also be awarded in defamatory or slander/libel actions where the plaintiff proves that at the time of the publication, the defendant knew that the publication would be tortuous or was reckless as to whether or not it was, and nevertheless decided to publish the words complained of because the prospects of material advantage outweighed the prospects of material loss.

See the case of **RICHES v. NEWS GROUP NEWSPAPERS LIMITED [1986] QB 256 @ 269; [1985] 2 All ER, 845 @ 850.**

Also 'Exemplary damages' may be awarded for the oppressive, arbitrary or unconstitutional conduct by public servants. In the case of **NICOL v. CUSTOMS EXCISE & PREVENTIVE SERVICES [1992] 1 GLR 135,** the defendants (CEPS) seized and detained for over two (2) years plaintiff's multi-purpose vehicle. The seizure and detention was without justification. The conduct of the defendant was said to be oppressive, arbitrary and unconstitutional. Plaintiff was consequently awarded 'Exemplary' damages of c500,000.00. In her judgment Lutterodt, J. (as she then was) had this to say; **"exemplary damages were awarded when the tortfeasor's conduct was reprehensible and so outrageous that it deserved condemnation, as for example where he was actuated by malice, fraud, cruelty, insolence, brutal show of force or the like…"**

The rational behind such awards is to do something for the defendant to know that the tort he/she has committed does not pay.

***It is important to note that 'Exemplary' damages have the same character like 'Special' damages. They have to be expressly pleaded and proved.**

Other damages that may be awarded in tort or contract are '**incidental'** or '**consequential'** damages. These are peculiar to the party; e.g. profits lost, or expenses incurred through the tort committed or the breach of contract.

## GENERAL ASSESSMENT OF DAMAGES IN TORT

Some of the actions in tort in which damages are normally assessed are; damages for trespass, damages for personal injuries arising from the negligence of the defendant, replacement of damaged motor vehicles, damages for libel and slander, damages for nuisance, damages for assault, damages for false imprisonment, damages for seduction, damages for interference in marriage, damages for breach of promise to marry, damages for loss of use, loss of earnings, etc, etc.

### a. Damages in Personal Injuries & Fatal Accidents cases

The most important group of torts in practice is that dealing with personal injuries, especially the tort of 'Negligence'. In the case of **MENSAH v. AMAKOM SAWMILL [1962] 1 GLR, 373,** Apaloo, J. (as he then was), did express how difficult the subject of assessment of damages was and turned to the judgment of Lord Wright in **DAVIES v. POWELL DUFFRYN ASSOCIATED COLLIERIES LIMITED [1942] 1 All ER, 657,** for support**.** This case is regarded as the pointer to the practical way in which assessment of damages should be ascertained. Lord Wright said:

**"There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a 'datum' or 'basic' figure which will generally be turned into a lump sum by taking a certain 'number of years purchase'. That sum, however, has to be tasked down by having due regard to the uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."**

Some of the questions asked are**;**

**1. "How long would the deceased have continued to live if he had not met this particular accident?**

**2. How much working life did he have?**

This second question brings into focus the deceased's state of health and age. It is said that twelve (12) to fifteen (15) years is quite a common multiple in the case of a healthy man.

Some of the uncertainties taken into account in rolling down the amount are:

(i) Deceased may not have been successful in business in the future as he had been in the past.

(ii) He might have been taken ill and become bedridden and thus incapable of earning income.

(iii) He may have contracted more customary marriages thus increasing his responsibilities and must have felt constraints to reduce contributions to plaintiffs.

(iv) Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time - **de Graft Johnson v. Ghana Commercial Bank**... (Cited infra).

Lord Wrights rule, which was applied by other decided cases, was admirably summarized in **Charlesworth on Negligence (3rd Edition), pp 560 & 561, para. 909** as follows:

"Method of calculating damages**: When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.' The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependants and the probable duration of the continuance of the deceased's assistance to the dependants during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependants in consequence of the death."**

In **de GRAFT JOHNSON v. GHANA COMMERCIAL BANK (ROYAL EXCHANGE ASSURANCE LTD 3RD PARTY) [1977] 1 GLR 179,** Edusel, J held that in assessing damages in actions on loss of dependency, the possibility of the deceased's widow re-marrying, must be taken into consideration.

Holroyd Pearce, L.J. said; **since the question is one of actual material loss, some arithmetical calculations are necessarily involved in the assessment of the injury. He was however, of the view that arithmetical calculations do not provide a substitute for common sense.** See the case of **DANIELS v. JONES [1961] 1 WLR 1103 @ 1110 – C.A.**

In **AKUFFO v. ISSAKA [1966] GLR, 476**, the Supreme Court held that in fixing damages for personal injuries it was open to the court to apportion the amount among the various heads or damage and it was equally open to it to fix a lump sum to cover the various heads. Whether a lump sum was fixed and later apportioned or it fixed damages for each head and finally added the several figures up, is immaterial.

The heads under which damages are normally assessed are; **pain and suffering, financial (i.e. loss of earning capacity), loss of amenities of life, loss of expectation of life, loss of impairment of bodily faculty, etc.**

Further reading on the measure and mode of assessment of damages in personal injury cases:

**(i) OPOKU-DARKWA v. AKYEA [1974] 1 GLR 272, per Edward Wiredu,J. (as he then was)**

**(ii) QUARCOO v. APPIAH [1972] 2 GLR, 30, per Abban, J (as he then was).**

**(iii) DAMALIE v. KWADZI [1974] 1 GLR 161, per Abban, J.**

**(iv) ATAA v. ASHANTI GOLDFIELDS CORP. [1971] 2 GLR 421, per Mensa Boison, J.**

**(v) SHELL COMPANY OF GHANA LIMITED v. AYIMAVOR [1971] 1 GLR 51, C.A.**

**(vi) BENHAM v. GAMBLING [1941] AC 157.**

Also falling under this is the measure of damages with regard to damage to, replacement of and loss of use of vehicles, collision of vehicles, total loss/destruction of goods, etc. For further reading on this, see

i. **NORGBEY v. ASANTE [1992] 1 GLR 506,** per Acquah J. (as he then was)

ii. **AHENKORAH v. MOUBARAK [1972] 2 GLR 429,** per Edusei, J.**;**

iii. **WEST AFRICAN BAKERY v. MIEZAH [1972] 1 GLR 78, C.A.;**

iv. **BORKETEY v. ACHINIVU [1966] GLR 92, SC;**

v. **ZACCA v. CFAO [1969] CC 156;**

vi. **ZAKARIA v. BILLA [1992] 1 GLR 42;** per Benin, J.

vii. **TWIM v. BARNES Part 1 [1992-93] GBR 417, C.A.**

In **Twim v. Barnes** cited above, the Court of Appeal held that where an income-yielding vehicle was damaged beyond economic repairs, the period for which loss of profit was recoverable was **a reasonable time depending on the circumstances of each case**. What was a reasonable time was an issue of fact determinable from the circumstances of the particular case.

In the **ZAKARIA v. BILLA** case where there was total loss as a result of the total destruction of goods, it was held that in determining the measure of damages, the court should take into consideration the **market value of the goods destroyed at the time and place of destruction**.

Other suggested readings are; **Fatal Injuries – Civil Liability Act [1963] Act 176;**

**b. Damages for Libel/Slander**

In both libel and slander, damages are awarded to compensate the plaintiff for the injury to his reputation and the hurt to his feelings. Such damages are compensatory and therefore 'at large'. Such damages are termed as a solatium rather than a monetary recompense for harm measurable in monetary terms. However, the general compensatory damages may be increased to take into accounts the defendant's motives in uttering the words complained of or his conduct during the action. These additional or increased damages are what we call '**aggravated'** or **'increased'** damages as discussed earlier. They are meant to compensate the plaintiff for the additional injury caused as already explained above.

For factors to be considered in assessing damages recoverable in libel, see the case of **ANTHONY v. UNIVERSITY COLLEGE OF CAPE COAST [1973] 1 GLR 299,** per Edward Wiredu, J. (as he then was).

For principles of assessment of damages in a customary law action for slander, see **NKRUMAH v. ATAA [1972] 2 GLR 13,** per Osei-Hwere, J.

**c. Damages for False Imprisonment**

It has been held that in assessing damages for the tort of False Imprisonment, the court must consider in addition to the restraint of the person's liberty and serious damage to his credit and reputation, the question whether or not the defendant acted bona fide, although wrongly. See **MANSOUR v. EL NASR EXPORT & IMPORT Co. [1963] 2 GLR 316**

Also, in **MANGOTEY v. ASARE [1989-90] 2 GLR 77**, Lutterodt, J (as she then was), held that, **"in assessing general damages for false arrest and imprisonment, substantial damages might be awarded for the injury to the plaintiff's dignity, discomfort or inconvenience even where there has been neither physical injury nor loss of pecuniary damages. The time, place and manner of the trespass and the conduct of the defendant might be taken into account."**

**d. Damages for Seduction**

In the case of **ASANTE v. SARPONG [1963] 2 GLR 359**, the High Court, per Apaloo, J (as he then was), held that in awarding damages, **the Court is entitled to take into account the plaintiff's injured feelings and the defendant's provocative conduct in denying responsibility for the pregnancy and the imputation of unchastity of plaintiff's daughter.**

For further reading on damages for seduction, see the case of **KOMBAT v. LAMBIM [1989-90]1 GLR 324**, per Benin, J (as he then was). This was a case based on Bimoba custom.

**e. Damages for Breach of Duty** (Legal Practitioner) – Mode of assessment; **FODWOO v. LAW CHAMBERS Co. [1965] GLR 363, SC –** holding (3): -

**"In the assessment of damages in cases such as this, there are three relevant principles. First, if the client's case would have succeeded, but for the negligence of the legal practitioner, then the injured plaintiff would be entitled to the full amount of damages lost. Secondly, if although negligence was established against the legal practitioner, the action was nonetheless certain to fail the plaintiff would be entitled to no more than nominal damages. Thirdly, where although negligence was established against the legal practitioner, it was uncertain whether the action would have succeeded or failed, but the plaintiff lost some right of substance, the damages should not be nominal, but has to be estimated by the court as best as it could."**

**f. Trespass to person; e.g. (Damages for assault):**

In the English case of **LANE v. HALLOWAY [1967] 3 W.L.R. 1003; [1967] 3 All ER 129**, it was held that, although provocation might wipe out an element of exemplary or aggravated damages, it could not be used to reduce the actual figure of pecuniary compensation.

**g. Damages for Interference in Marriage**: **BENTIL v. PRATT;** In re Pratt's Caveat **[1989-90] 2 GLR 476**, holding (3).

**h. Damages for trespass to land**: **AYISI v. ASIBEY III & Others [1964] GLR 695** – per APALOO, JSC (sitting as additional High Court Judge).

## GENERAL ASSESSMENT OF DAMAGES IN CONTRACT and ACTIONS FOR WRONGFUL DISMISSAL

One of the remedies that flow from a breach of contract is **DAMAGES.** Other remedies are; quantum meruit, money had and received, specific performance, reinstatement, injunction, rescission and rectification.

Damages are the normal remedy for a contracting party who suffers as a result of a breach of contract by the other party. In a claim for damages, the court considers two main factors or matters; (a) **remoteness of damages** (i.e. the proximate cause of the breach) and (b) **the measure of damages** (i.e. the quantum or amount to be awarded).

Remoteness has already been discussed above. The locus classicus is HADLEY v. BAXENDALE, cited supra.

**Measure of Damages** – The arithmetic calculation or computation of how much money must be paid by the party in breach to the party suffering from the breach of the contract. This is backed by commonsense.

**Purpose of Damages –** To put the party who has suffered as a result of the breach in nearly the same position that he would have been had the other party not broken the contract; (**restitutio in integrum**)

Some of the cases considered under Breach of Contract: -

(1) **PRAH & Ors. V. ANANE [1964] GLR, 458 @465** {to claim for full value of contract}. 'damages follow the event'.

(2**) AHEY LIMITED v. ARTHUR [1987-88] 1GLR 19** – Loss of rent if contractor fails to complete house intended to be rented out on time.

If money is due, award of damages can take the rates of interest and inflation into account:

(1) **BOASIAKO v. GHANA TIMBER MARKETING BOARD [1982-83] 2 GLR, 824, HC.**

(2**)** In **SOWAH v. BANK FOR HOUSING & CONSTRUCTION [1982-83] 2 GLR, 1324.** Taylor, JSC stated at page 1359 as follows: "**I propose to be guided by my initial inclination, for I am persuaded by the apparent modern approach of the English courts to the view that since the money was due at a point in time and it is now being paid at a subsequent point in time, the interest which the money attracts during the period assuming that it is a loan is, inter alia, a fair yardstick by which to measure to some extent the damages so suffered by the appellant."**

**<u>DAMAGES FOR WRONGFUL DISMISSAL</u>**

Cases to consider:

**(1) NARTEY TOKOLI & Others v. VOLTA ALUMINIUM COMPANY LIMITED (No. 2) [1989-90] 2 GLR 341 @ 344- SC. holding (2).** The Court held as follows: **"The measure of damages for wrongful dismissal from employment was not to be confined to only loss of wages or salary but in addition the employee was to receive his entitlements under the contract of employment…"**

However, in **ARKORFUL v. S.F.C. [1991] 2 GLR, 348,** the Court per Osei Hwere J.A. sitting as additional High Court Judge, refused to award additional damages to cover 'estimated current value of salaries lost' as requested by plaintiff's counsel. This was what the learned judge said:

**"In spite of the damages to his pocket which the plaintiff is claiming, his counsel, with much industry, argues that he is entitled, in addition, to the 'estimated current value' of the salaries lost. His argument, as far as I could understand him, proceeded on the premises that if say in 1976 the plaintiff's salary of c10 per month could buy say ten bottles of whisky then if there should be a refund to him today of the said salary then that lost salary must be reckoned by the value of ten bottles of whisky today. To advance this claim, he tried to call a government statistician whose evidence, unfortunately, threw no light on this novel proposition. I do not think that this court can admit such a**

**claim which, if entertained, will open the floodgates to embrace such an economic loss as a new head in assessing damages in breach of contract. I think that the invitation is dangerous and I reject it".**

Damages which the court awarded in this case covered the following:

a. all his lost salary calculated from the date of his interdiction to date of judgment;

b. payment of three months salary in lieu of proper notice;

c. all his end of service awards calculated from date of judgment;

d. c400,000.00 damages for prospective loss of promotion or loss of employment; and

e. interest on (a) and (b) calculated at the prevailing bank rate from the date of his interdiction to the date of judgment.

Other suggested readings:

1. **ADDIS v. GRAMOPHONE CO. LTD. [1909] AC 488**
2. **HEMANS v. GNTC [1978] GLR 4, C.A.**
3. **OWUSU AFRIYIE v. STATE HOTELS CORPORATION [1976] 1 GLR 247**
4. **GHANA COCOA MARKETING BOARD v. AGBETTOH [1984-86] 1 GLR 122**, **C.A.**
5. **LABOUR ACT, 2003 (ACT 651)**

## Mitigation or Reduction of Damages

There is what is referred to as 'mitigable loss that is not recoverable. The plaintiff is required to take reasonable steps to mitigate his losses. Damages awarded are therefore subject to the rule that the innocent party must take reasonable steps to mitigate his losses. The onus is on the defendant to prove that the plaintiff or innocent party ought reasonably to have taken steps to mitigate his losses. If he fails to do this normal damages would apply.

1. **BOHAM v. EVONNA [1992] 1GLR 287 @ 288**, PER Kpegah , J. (as he then was) held in holding (2) as follows: **"where an income earning vehicle damaged in a motor accident was capable of being repaired, the plaintiff had a duty to minimize his loss and should not wait until the date of judgment, which might be long in coming…"**
2. In **SOCIETE GENERAL de COMPENSATION v. ACKERMAN [1972] 1 GLR 413 @ 432, C.A.** per Anin JA, it was held that: **"what steps a plaintiff in an action for breach of contract should take towards mitigating the damage is a question of fact and not of law and the burden of proof is on the defendant".**

In employment cases, a dismissed employee is required to look for alternative employment after termination to mitigate his losses. Burden of proof on the employer that plaintiff employee has failed to take any steps to secure another job. Earnings from suitable employment can be deducted from the loss.

In libel suits, some of the factors that are taken into consideration to reduce damages are, but not limited to the following:

1. Plaintiff's bad reputation. If claim is for damages for injury to reputation, the defendant is entitled to give evidence in mitigation of damages as to plaintiff's general bad reputation.

   (Reason: - a person is not to recover damages for a reputation, which is not his), i.e. the character that he in fact bears in public estimation is in issue not his general disposition. Evidence should not be what rumours have circulated.

2. Plaintiff's criminal convictions.

3. Plaintiff's conduct before and after action is brought in court. (Defendant may prove that plaintiff provoked the words).

4. Repetition and disclosure of source – though not a defence.

5. Absence of express malice.

6. Apology – prompt and public apology.

7. Previous award of damages.

In case of **AFAGYARE & KOBI v. GASSOUB [1962] 1 GLR 190 @ P. 194**, Djabanor, J. held that the duty to mitigate damages applies to general damages and not to special damages.

## INTERFERENCE BY THE COURT OF APPEAL IN THE AWARD OF DAMAGES

The assessment of damages is peculiarly the province of the trial court and the Court of Appeal will only interfere only if the finding is out of proportion to the facts. In **AKUFFO v. ISSAKA [1966] GLR 476 – SC**., it was held that the appellate court would only set aside an award if it is shown that the trial court/judge left some relevant matters out of account or that the trial court took some irrelevant matters into consideration in assessing damages.

The Supreme Court had earlier on in **BRESSAH v. ASANTE & Another [1965] 1 GLR 117 – SC,** held the same position in the following words: **"An appellate court would only interfere with the quantum of damages on the ground that the trial judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it an erroneous estimate".**

In the Bressah case, the action was for declaration of title, injunction and damages for trespass.

In **KARAM v. ASHKAR [1963] 1 GLR 38 – SC**., which was a case involving damages for breach of covenant for quiet enjoyment, the Supreme Court held as follows: "**An appeal Court will only interfere with the trial court's assessment of damages if satisfied that the judge acted on a wrong principle of law or has misapprehended the facts, or has for those or other reasons, made a wholly erroneous estimate of the damages suffered."**

Also in **DOLPHYNE (No.3) v. SPEED LINE STEVEDOORING CO. LTD [1996-97] SCGLR 514 @ 515**; where the action was for damages for fraud – the Supreme Court held that; "**Where the claim of the plaintiff for damages for fraud was supported by evidence accepted by the trial court, appellate court not to interfere in award as colossal.**

Other suggested readings:

(1) **JUXTON SMITH v. KLM**, cited supra;

(2) **STANDARD CHARTERED BANK (GH) LTD v. NELSON [1998-99] SCGLR 810 @812 holding (2) –** Appellate Court can reverse or vary award of damages.

Thank You