HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 10
on appeal from: [2004] EWCA Civ 1035

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

O'Brien and others (FC) (Appellants)
v.
Independent Assessor (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
Philip Engelman
(Instructed by Hodge Jones & Allen)

Respondents:
Ian Burnett QC
Robin Tam QC
(Instructed by Treasury Solicitor)

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ON
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LORD BINGHAM OF CORNHILL

My Lords,

1. This appeal by Mr Vincent Hickey and Mr Michael Hickey raises two questions of law relating to the assessment of compensation payable to them by the Secretary of State for the Home Department under section 133 of the Criminal Justice Act 1988 as amended. This section provides for payment of compensation to those who (like the appellants) have suffered punishment following a conviction which involved a miscarriage of justice. When, as here, the Secretary of State has determined that victims have a right to compensation under the section, an independent assessor (in the appellants' case, Lord Brennan QC) assesses the amount of the compensation payable, which must cover heads of loss not susceptible to precise arithmetical calculation (loss of liberty, loss of family and social life, injury to reputation, emotional suffering and anguish, mental illness caused by the experience of imprisonment and such like) and also heads of loss susceptible to such calculation (loss of past and future earnings, loss of pension rights, relatives' visiting expenses, expenses incurred in securing release, legal expenses and so on). The former heads are conveniently referred to as non-pecuniary loss, roughly equivalent to general damages recoverable on proof of an actionable civil wrong, the latter as pecuniary loss, roughly equivalent to special damages.

2. In calculating the pecuniary loss suffered by each of the appellants, the assessor considered what sums the appellants would have earned if they had been at liberty but which they had been unable to earn because they were in prison. No issue arises on that calculation. But the assessor further considered that to award the appellants the whole of that sum would over-compensate them because, had they been at liberty, they would inevitably have incurred personal living expenses to provide

the necessities of life which, because they were in prison (although wrongly and of course involuntarily), they had not incurred. So he deducted 25% from the appellants' lost earnings as calculated to achieve the figure of what, in his judgment, the appellants had actually lost, the balance which would have been left to them after feeding, clothing and accommodating themselves if in fact they had earned the sums which it was calculated they would have earned if at liberty. No issue arises on the percentage which the assessor used, but the appellants challenge the principle of making any deduction at all. The Queen's Bench Administrative Court (Maurice Kay J) found in their favour on this issue but the Court of Appeal (Auld and Longmore LJJ and Gage J) upheld the assessor's decision [2003] EWHC 855 (Admin); [2004] EWCA Civ 1035. The appellants contend that no deduction should have been made. This contention raises the first issue for decision by the House.

3. The second question pertains to the assessor's calculation of the appellants' non-pecuniary loss (other than that relating to psychiatric illness). In making percentage deductions to take account of the appellants' other convictions and any punishment resulting from them, the assessor applied percentages (25% in the case of Vincent Hickey, 20% in the case of Michael). This was a departure from the percentage (10%) previously applied by a different assessor (the late Sir David Calcutt QC) in assessing the compensation payable to Mr James Robinson, an alleged participant in the same crime and a victim of the same miscarriage of justice as the appellants but a man with a much worse criminal record. Counsel for the appellants does not criticise the making of a percentage deduction to take account of the appellants' other convictions and punishment resulting from them, nor does he contend that Lord Brennan was obliged to follow the precedent set by his predecessor by deducting the same or a similar percentage. His argument, founded on the principle that like cases ought ordinarily to be treated alike in the absence of good reasons for differentiation, is that if the assessor chose to depart significantly from the percentage applied by his predecessor, he should have given reasons to show that there was justification for doing so. This, it is said, he did not. The Divisional Court and the Court of Appeal did not accept the appellants' consistency argument, then somewhat differently put. Its correctness raises the second issue now before the House.

The facts

4. On 9 November 1979 the appellants and Mr Robinson, a co-defendant, were convicted at Stafford Crown Court of murdering Carl Bridgewater, a 13 year old newspaper-boy, during a burglary at Yew Tree Farm in the West Midlands.

5. Vincent Hickey was born in 1954 and was aged 25 on conviction. He had been convicted of some 17 offences, mostly minor, between 1970 and 1978. He had served one short custodial sentence as a juvenile and had been sentenced to 12 months' imprisonment suspended for 2 years. Michael (his cousin) was younger, born in 1961 and aged just under 18 on conviction. He had committed 15 offences, mostly minor, between 1976 and 1978. He had not served a custodial sentence. James Robinson was older than either of the appellants, aged 45 on conviction, and had a much worse criminal record than they did.

6. For the murder of Carl Bridgewater, Vincent Hickey was sentenced to life imprisonment. He was also sentenced to concurrent terms of 10 years' for aggravated burglary at Yew Tree Farm and 12 months' for an offence of deception. Michael, because of his age, was sentenced to detention during Her Majesty's Pleasure for the murder and 8 years' detention for the aggravated burglary at Yew Tree Farm. He was also sentenced to 12 years' detention concurrently for each of two armed robberies, at Chapel Hill Farm and a Tesco supermarket, to which he had earlier pleaded guilty. James Robinson was sentenced to life imprisonment and 10 years' imprisonment for the murder and aggravated burglary at Yew Tree Farm. He was also sentenced to 15 years' imprisonment concurrently for each of the Chapel Hill Farm and Tesco armed robberies, and a short suspended sentence was activated. The Chapel Hill Farm armed robbery was also charged against Vincent Hickey. He was never tried for or convicted of that crime, but it was later accepted that he had been complicit in it.

7. The appellants and Mr Robinson tried to challenge their convictions of the Yew Tree Farm offences, of which they always claimed to be innocent, but leave to appeal was refused in December 1981 and, on reference of their cases to the Court of Appeal by the Secretary of State under section 17(1)(a) of the Criminal Appeal Act 1968, their appeals were dismissed in March 1989. Following a further reference to the court by the Secretary of State, serious irregularities in the conduct of the investigation and trial came to light, and the

prosecution accepted that the trial of the appellants and Mr Robinson had been fundamentally flawed. They were released on unconditional bail in February 1997 and their appeals were allowed, and their convictions quashed, on 30 July 1997. The Secretary of State very promptly decided that the appellants had a right to compensation.

8. This was a grave miscarriage of justice. Making allowance for the term of imprisonment which Vincent Hickey would in any event have served for the Chapel Hill Farm armed robbery, the assessor calculated that he had been wrongfully detained for 13 years and just over 8 months for the Yew Tree Farm offences. Making similar allowance for the period Michael Hickey would in any event have been detained for the Chapel Hill Farm and Tesco armed robberies, and also of his standing as a young offender, the assessor treated 12 years, 10 months and 4 days as the period for which he had been wrongfully detained for the Yew Tree Farm offences.

Compensation for miscarriages of justice

9. The background to the current statutory scheme is described in *In re McFarland* [2004] UKHL 17, [2004] 1 WLR 1289, paras 8-9, 22, and *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, paras 5-6, 25-29, and it is unnecessary to repeat that summary. The right to compensation is contained in section 133 of the Criminal Justice Act 1988 which provides, so far as relevant:

> "133.—(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
>
> (2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

> (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
>
> (4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State."

The Criminal Appeal Act 1995, by section 28, inserted a new subsection to follow subsection (4):

> "(4A) In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to—
>
> (a) the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from the conviction;
>
> (b) the conduct of the investigation and prosecution of the offence; and
>
> (c) any other convictions of the person and any punishment resulting from them."

The Home Office routinely issues a "Note for Successful Applicants" which explains but does not of course purport to modify the terms of the statute. Paragraphs 5-7 are relevant for present purposes:

> "5. In reaching his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the wrongful charge or conviction and/or loss of liberty, and any or all of the following factors may be relevant according to the circumstances:
>
> 5.1 <u>Personal pecuniary loss</u>
>
> (a) loss of earnings as a result of the charge or conviction (to be supported by best available documentary evidence, together with details of any State benefits received during the same period);

(b) loss of future earning capacity;

(c) legal costs incurred;

(d) additional expenses incurred, eg for travelling, in consequence of detention, including such expenses incurred by the claimant's immediate family.

5.2 Non-pecuniary loss

Damage to character or reputation; hardship, including mental suffering; injury to feelings, and inconvenience.

6. When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in reversing his conviction, or pursuing the claim for compensation. In submitting their observations solicitors should state, as well as any other expenses incurred by the claimant, what their own itemised costs are, to enable them to be included in the assessment.

7. In considering the circumstances leading to the wrongful charge or conviction the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the claimant's own conduct. Although the amount awarded will take account of this factor, it will not include any element analogous to exemplary or punitive damages. The assessor will also have regard to any other convictions of the claimant and any punishment resulting from them."

10. Section 133 was enacted to give domestic effect to article 14(6) of the International Covenant on Civil and Political Rights, which the United Kingdom is bound in international law to observe. It provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

This paragraph bears a very close affinity to article 3 of the 7th Protocol to the European Convention on Human Rights, by which the United Kingdom is not bound. Counsel for the appellants made submissions on the meaning of "according to law" in article 14(6), but in my opinion these words are plainly directed to ensuring that the right to compensation is governed by law and not discretion: UN Human Rights Committee, General Comment No 13, 13 April 1984. This is achieved by section 133 since, although the question whether there is a right to compensation is to be determined by the Secretary of State, a determination adverse to an applicant will be challengeable on familiar public law grounds.

11. The award of compensation under section 133 does not prevent an applicant pursuing any civil claim which he may have as a result of his wrongful conviction and punishment (although double recovery will be prevented), but nor does the right to compensation in any way depend on the existence or proof of any delictual wrong recognised by the law. Wrongful conviction and punishment may and often are the result of delinquency on the part of public officials or others, but this is not necessarily so. The Secretary of State makes payment out of public funds to victims of miscarriages of justice not because he or his officials are or are treated as being wrongdoers, but because such victims are recognised as having suffered what may (as here) be a great injury at the hands of the state and it is accepted as just that the state, representing the public at large, should make fair recompense.

12. It is for the assessor to judge, in any given case, what recompense is fair. Those appointed by the Secretary of State to carry out this task have, at least in recent years, been senior and distinguished legal practitioners with particular expertise in the calculation of damages for personal injuries. Some heads of loss under section 133 will not ordinarily be found in a personal injuries action, although they may feature in other tortious claims, but a number of them will and a broadly similar approach must be appropriate providing proper account is taken of factors peculiarly attributable to wrongful imprisonment and punishment. It is noteworthy that section 133 gives the assessor a very broadly-defined remit. It makes no provision for the sort of scrutiny to which a court would subject a contested claim involving hundreds of thousands of pounds. Assessments are made relatively infrequently, and are not published. I do not think section 133 was intended to encourage undue legalism.

The first question: the deduction from notional earnings

13. Mr Engelman's argument for the appellants, strongly put and with much citation of authority, was in essence very simple. The appellants were victims of a serious miscarriage of justice which led to their wrongful imprisonment for long years by the state. They are entitled to be compensated. Such compensation should, in accordance with familiar principles, be on a basis which is fair, just, reasonable and in accordance with public policy. It is unfair, unjust, unreasonable and contrary to public policy to reduce earnings lost as a result of wrongful imprisonment to reflect the free board, clothing and accommodation afforded to the prisoner. That is not a benefit, it is the very detriment on which the victim's claim to compensation depends. He should not be in effect charged for being wrongfully imprisoned, a procedure revolting to ordinary notions of fairness.

14. The assessor's response was also in essence simple. The trauma and suffering inherent in wrongful conviction and punishment are compensated by the award of compensation for non-pecuniary loss. The loss of which loss of earnings is an ingredient has a different object: to calculate as exactly as possible what in money terms the victim has actually lost. This calculation depends on a hypothetical assumption, that the victim had not been in prison at the relevant time, because if he had been he could not have earned wages in the market. So it must be assumed for purposes of this calculation that he was not in prison at the relevant time. On that assumption he would have had earnings, net of tax, of (let us say) x. But he would not have enjoyed x as a fund available for spending because if he had not been in prison he would have had to provide the necessities of life, which must be deducted to establish what he has actually lost. This is not to charge him for being in prison, nor is it to treat his wrongful imprisonment as a benefit. It is to recognise the reality (which authority enjoins decision-makers to do) that the sums could not have been earned had the earner not paid to procure the basic necessities of life. It is fair, just and reasonable to award the victim what he has notionally lost but no more, a course supported by legal authority and public policy expressed in statute.

15. I am not aware of any decided case in which the present issue has been contested. It might have been in the unusual case of *Meah v McCreamer* [1985] 1 All ER 367, but it appears to have been accepted in that case (see p 383) that the plaintiff had suffered no financial loss as a result of going to prison, since the money he had been saved as a result of being boarded in prison was regarded as exceeding any sum he might

have earned. So, in choosing between these conflicting submissions, the House must be guided by principle and analogy. Both parties referred to authority on the calculation of claims for special damages made by plaintiffs suing for damages for personal injuries. In *Shearman v Folland* [1950] 2 KB 43 the injured plaintiff had lived before the accident in hotels to which she paid seven guineas a week for board and lodging. After the accident she spent just over a year in nursing homes at a cost of twelve guineas a week exclusive of medical expenses. The judge, in awarding damages, deducted the smaller figure from the larger, treating the difference as her loss. The Court of Appeal held this deduction to be excessive, but accepted the principle that a deduction should be made for the cost of food and lodging which would have had to be incurred even if the plaintiff had not been injured.

16. The important case of *British Transport Commission v Gourlay* [1956] AC 185, established the principle that a plaintiff cannot recover more than he has lost, that the law must have regard to realities rather than technicalities and that where a claim lay for the loss of income which, if earned, would have been taxed, what the plaintiff really lost was what would have remained to him after payment of tax: see *Parry v Cleaver* [1970] AC 1, 13. It was this latter case which identified justice, reasonableness and public policy as the guiding principle of the common law in this area.

17. In *Daish v Wauton* [1972] 2 QB 262 a young child was very seriously injured and the trial judge, in calculating his loss of future earnings, made a substantial reduction to reflect the cost of maintaining himself which the child would have incurred if uninjured but which, in the event, he would not incur because he would be supported in a state institution free of cost. The Court of Appeal disapproved of that approach, holding that benefits received under the National Health Service should be ignored. But the effect of the Court of Appeal's decision was reversed by section 5 of the Administration of Justice Act 1982, which provided:

> "In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries (including any such action arising out of a contract) any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in a hospital, nursing home or other institution shall be set off against any income lost by him as a result of his injuries."

This is the only explicit, non-judicial, expression of public policy in this field. Its meaning is clear. In assessing the compensation due to an injured person for loss of earnings caused by his injuries allowance must be made for savings attributable to his maintenance at public expense. Such allowance was plainly seen as necessary if the injured person was not to be over-compensated.

18. After the Court of Appeal decision in *Daish v Wauton*, but before the enactment of section 5, the House made two important decisions. The first of these was *Pickett v British Rail Engineering Ltd* [1980] AC 136, in which the problem was to assess the earnings of a plaintiff during years lost to him (and his estate) as a result of the injury of which he complained. Should allowance be made for the living costs he would have incurred had he lived? The House held that it should. *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 concerned a catastrophically injured plaintiff whose expectation of life was not significantly reduced. She had large claims for loss of earnings and the cost of future care. The House held that deductions must be made from the damages awarded to reflect the cost of earning the lost future income and also the basic living expenses which the injured party would have incurred in any event.

19. Brief mention may be made of two decisions of the House since the enactment of section 5, neither of which concerned the permissibility of deducting living expenses from claims for loss of earnings. *Dews v National Coal Board* [1988] AC 1 concerned a claim by an injured miner to recover pension contributions which he would have made if uninjured but had not made because of his injury. The non-payment did not affect his pension rights. The House acknowledged (p 12) the "fundamental principle of English law that damages for personal injury are compensatory, and intended so far as money can to put the plaintiff in the same financial position as if the accident had never happened". The object (p 14) is to determine "what the plaintiff has *really* lost" and so,

> "When a plaintiff is injured and as a result is paid no wages his immediate real loss is that part of his net earnings that were available for current expenditure."

In *Hussain v New Taplow Paper Mills Ltd* [1988] 1 AC 514 the issue was whether, in calculating the injured plaintiff's claim for loss of earnings, credit should be given for sums he had received under his employers' insurance scheme. The rule was held to be (p 527)

> "that prima facie the only recoverable loss is the net loss. Financial gains accruing to the plaintiff which he would not have received but for the event which constitutes the plaintiff's cause of action are prima facie to be taken into account in mitigation of losses which that event occasions to him. In many, perhaps most cases, both losses and gains will come into the calculation."

20. In *Toneguzzo-Norvell v Burnaby Hospital* [1994] 1 SCR 114 the Supreme Court of Canada considered the case of a catastrophically injured plaintiff who claimed for loss of earnings both during the period she would live (as in *Lim Poh Choo*) and during the period in which, as result of the injury complained of, she would not live. The court held it to be "established that a deduction for personal living expenses must be made from the award for lost earning capacity for the years she will actually live" and continued:

> "A number of considerations suggest that a deduction for personal living expenses should be made from the award for lost earning capacity during the 'lost years'. The first is the fact that the projected earnings could not have been earned except on the supposition that the plaintiff would have been alive to earn them. There can be no capacity to earn without a life. The maintenance of that life requires expenditure for personal living expenses. Hence the earnings which the award represents are conditional on personal living expenses having been incurred. It follows that such expenses may appropriately be deducted from the award. Against this, it is argued that if Jessica had been born a millionaire, her personal living expenses during the 'lost years' would have been met from other sources. But this does not negate the fact that in order to earn income one must live and incur the attendant expenses.
>
> It can be argued that not to make a deduction for personal living expenses is to introduce into the award for lost earning capacity for the 'lost years' a measure of

> overcompensation akin to the duplication which the law avoids in the case of an award for lost earnings during the plaintiff's actual lifespan. This deduction has been justified for the years before the plaintiff's actual projected death, on the ground that it avoids duplication between the award for cost of care and the award for lost earning capacity. But in fact, the 'lived years' and the 'lost years' cannot be so easily distinguished. The same reasoning applies to both: had the plaintiff been in a position to earn the monies represented by the award for lost earning capacity, she would have had to spend a portion of them for living expenses. Not to recognize this is to introduce an element of duplication and to put the plaintiff in a better position than she would have been in had she actually earned the monies in question."

21. The assessor held, at para 13 of both assessments, that saved living expenses should be taken into account in computing the appellants' loss of earnings claims for a number of reasons, of which the first was:

> "Common law principles require that there should be no double compensation. Past and future loss of earnings compensation embraces living expenses that will be paid for out of such earnings. In fact, because he was imprisoned, the applicant did not incur such living expenses. That provides a financial benefit for which credit must be given. The principle accords with the common law approach. See for example *Hodgson v Trapp* [1989] AC 807 in which, before the later statutory change, the court felt that past and future benefits must be deducted so as to avoid double compensation."

The assessor went on to refer to *Meah v McCreamer* [1985] 1 All ER 367, and section 5 of the 1982 Act. When his assessment was challenged the assessor in para 25(c) of the addendum to his assessment, adhered to his earlier approach:

> "The true analysis is that by reason of a miscarriage of justice, he has suffered a loss of earnings. Had he not been the victim of a miscarriage of justice, part of those earnings would have been spent on his own living

> expenses. 25%, as deducted here, probably represents a modest sum for such living expenses. Having dealt with the question of what he has lost by reason of his imprisonment, there is a requirement to consider any set-off against that loss for any expense which has not been occasioned by reason of his being in prison. It is in that context that the deduction from loss of earnings arises in relation to saved living expenses."

22. In quashing the assessor's decision on this issue the judge held that he had misunderstood the relevant common law principle and misunderstood or placed undue weight on certain authorities he had relied on. The judge mentioned section 5 of the 1982 Act, to which he said he would return, but he does not appear to have done so. In the Court of Appeal, Auld LJ reviewed this issue in paras 87-104 of his comprehensive judgment, substantially endorsing the assessor's approach. Longmore LJ agreed (paras 126-135), basing his judgment primarily on the "lost years" approach upheld in *Pickett v. British Rail Engineering Ltd* [1980] AC 136. Gage J agreed.

23. It is in my opinion inapt and understandably offensive to the appellants to regard or treat their imprisonment as a benefit conferred on them by the state. A Prison Service Instruction (09/1999) on which they relied forbids deductions for board and lodging from the wages of prisoners working on enhanced wages schemes in prison or on pre-release schemes outside prison, accepting that prisoners cannot be required to pay for their own imprisonment and cannot consent to do so. I have no doubt that this is a salutary principle. But recognition of that principle does not in my opinion resolve the issue in this appeal. The assessor's task, in relation to the appellants' loss of earnings claim, was to assess what they had really lost. That, and that only, was the loss for which they were to be compensated. The assessment has necessarily to be hypothetical, but must be as realistic as possible. If the appellants were awarded the full sum of their notional lost earnings with no deduction save tax, they would in reality be better off than if they had earned the money as free men since as free men they would have had to spend the minimum necessary to keep themselves alive. The deduction puts the appellants in the position in which they would in reality have been had they earned the money as free men and so compensates them for their actual loss. In my opinion, the assessor and the Court of Appeal reached the correct conclusion, and I would reject this ground of appeal.

The second question: the deduction under section 133(4A)(c)

24. The thrust of the appellants' argument is summarised in para 3 above, from which its restricted focus is apparent. The appellants were younger men and had much less serious criminal records than Mr Robinson, and therefore one would have expected any deduction made under section 133(4A)(c) in their cases to have been smaller, or at any rate not greater, than that made in the case of Mr Robinson. But, as already noted, the deductions of 25% and 20% made by the assessor in their cases substantially exceeded the 10% deduction made by Sir David Calcutt QC in the case of Mr Robinson. That (it is argued) was a departure from the principle that like cases should be treated alike and unlike cases differently, a departure which called for justification, which has not been given. Mr Engelman relies by analogy on authorities relating to disparity in sentencing and contends that the appellants have a justified sense of grievance such that the House should interfere.

25. Mr Burnett QC, for the assessor, replies that his decision on this point can be disturbed only if it is shown to be unlawful on one of the recognised public law grounds. In this case it must be shown to be irrational or, perhaps, vitiated by lack of reasoning. It is neither. The authorities on disparity in sentencing do not assist.

26. It is convenient to touch first on this disparity argument. In some cases (of which *R v Fawcett* (1983) 5 Cr App R(S) 158 is an example) an appeal against sentence has succeeded because right-thinking members of the public, learning of a lenient sentence imposed on a co-defendant, would think something had gone wrong with the administration of justice on also learning of a disproportionately severe sentence passed on the appellant. In some of the cases such an appellant is said to have a justified sense of grievance. If the matter is viewed through his eyes alone, that may sometimes be so. But the appellate courts of all three United Kingdom jurisdictions have shown themselves to be, in varying degrees, resistant to disparity arguments of this kind, and the reason is not hard to discern. For while the perception of the sentenced defendant is important, a criminal sentence is imposed in the interests of the public and for its protection. The "right" sentence in a given case is that shown by statute, authority and other guidance to be best fitted to serve those ends. Thus a court will, and generally should, be very slow to impose what it regards as anything other than the right sentence simply because it or another court has imposed a "wrong" sentence on a co-defendant. The more usual approach is that very

recently articulated by the Court of Appeal (Criminal Division) in *R v Tate* [2006] EWCA Crim 2373, para 20:

> "The fact that the co-defendant Sheppard appears to have been extremely fortunate is not in our judgment a good reason for imposing a sentence on the appellant that would in our judgment be less than the facts of the case merit."

27. In the case of Vincent Hickey the assessor, in his assessment, reviewed his criminal activities and said (para 5):

> "Having regard to the seriousness of these matters and in particular the robbery at Chapel Hill Farm, I firmly conclude that the non-pecuniary loss award should be subject to a deduction of 25%. This I regard as the very least deduction that can reasonably be made, having regard to his criminal behaviour."

In Michael Hickey's case also the assessor summarised his criminal activity and said, at para 6:

> "There is no responsible basis upon which such serious convictions can be ignored in the assessment of non-pecuniary loss. In the circumstances, I make a reduction of 20% in respect of such matters from the total award of non-pecuniary compensation. This is slightly less than Vincent Hickey because of age and different record."

When his assessment was challenged, the assessor did not agree that the 10% reduction in Mr Robinson's case could not be exceeded because of a supposed need for or expectation of consistency, and declined to alter his assessment.

28. On the appellants' application for judicial review the judge accepted (para 44) that if the same assessor had determined all three cases he would not have made such different deductions in the appellants' cases and Mr Robinson's. But he also held that when considered individually and by reference to each other, but without reference to Mr Robinson, the deductions made in the appellants' cases

could not be said to be irrational or otherwise susceptible to challenge. This conclusion is not challenged. The judge said (para 48):

> "[The assessor] simply disagreed with the 10% reduction which Sir David Calcutt had made in *Robinson*. Was he to make what he believed (and, in my judgment, permissibly believed) to be the correct deduction or was he bound to allow himself to be influenced by an award with which he disagreed? In my judgment it was neither irrational nor otherwise unlawful for Lord Brennan to apply deductions of 20-25% which were in all other respects unobjectionable."

Any sense of grievance which the appellants had would not in the judge's opinion be justified, and accordingly the decision could not be quashed as *Wednesbury* unreasonable *(Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223).

29. Auld LJ addressed this issue in paras 114-124 of his judgment, with which the other members of the court agreed. He held that the assessor's reasons for departing from his predecessor's percentage were reasonable and adequately explained.

30. It is generally desirable that decision-makers, whether administrative or judicial, should act in a broadly consistent manner. If they do, reasonable hopes will not be disappointed. But the assessor's task in this case was to assess fair compensation for each of the appellants. He was not entitled to award more or less than, in his considered judgment, they deserved. He was not bound, and in my opinion was not entitled, to follow a previous decision which he considered erroneous and which would yield what he judged to be an excessive award. While he did not, in his initial assessments, refer to Sir David's 10% deduction, he made plain that he regarded the deductions he did make as the permissible minimum. In his addendum his disagreement with Sir David was express. Since the appropriate deduction is a highly judgmental matter and the assessor's deductions are not in themselves impugned, I would reject the appeal on this ground also.

31. I have, and may perhaps express, some reservations about the operation of section 133(4A)(c), although these do not bear on the disposal of either issue in this appeal. Auld LJ, in para 113 of his judgment, well described the purpose of the provision:

> "The mischief at which the provision is directed – the reason for enabling a deduction to be made for criminality from the entirety of the non-pecuniary suffering (save for personal injury) caused by the miscarriage of justice – is, in my view, two-fold. First, it enables account to be taken of the concurrent effect of any punishment for criminal offences of which the claimant has been rightly convicted and sentenced. Second, it allows an Independent Assessor to reflect the fact that an undoubted or hardened criminal may not suffer so greatly as a person of previous good character from many of the incidents of wrongful conviction and loss of liberty, in particular as to harm to reputation, injury to feelings, inconvenience, separation from family and other unpleasant aspects of incarceration …"

The factors referred to are all, in my opinion, likely to be very relevant. But they are, as it seems to me, factors which can and should be inherent in any assessment of the non-pecuniary loss suffered by any wrongly-imprisoned claimant: it is of the highest relevance that a claimant would have been in prison in any event or had a very bad criminal reputation independently of the offence of which he was unjustly convicted. Thus I would expect account to be taken of these matters at the first stage of the assessment rather than to base that assessment on assumed and fictional facts. But if account is taken of such matters at the first stage of the assessment, I am unclear what justification there can be for making a percentage deduction at a later stage. This matter, not raised by counsel in argument, perhaps merits consideration.

32. For the reasons I have given I would dismiss this appeal and invite written submissions on costs within 14 days.

LORD SCOTT OF FOSCOTE

My Lords,

33. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and gratefully adopt his description of the facts that have given rise to this appeal and the issues for your Lordships' decision.

34. The appellants, Mr Vincent Hickey and Mr Michael Hickey, have raised in this appeal two issues regarding the compensation awards in their favour made by the Independent Assessor. First, each of them contends that, in assessing the compensation that should be paid to him on account of his wrongful imprisonment in 1979 for the murder of Carl Bridgewater, the Independent Assessor, having arrived at the sum calculated to represent what he would have earned had he not suffered the wrongful imprisonment, erred in deducting a sum estimated to represent the cost of the bare necessities of life that the appellant would have had to incur had he remained at liberty. Secondly, each appellant challenges the deduction, made on account of his past criminality, from the compensation for non-pecuniary loss that he would otherwise have been awarded.

35. I am in complete agreement with the reasons given by Lord Bingham for his conclusion that on the "living expenses" issue the appeal should be dismissed. I wish to emphasise, in particular, my agreement that the deduction from a claimant's notional earnings for the period he has suffered wrongful imprisonment of a sum calculated to represent the cost of the bare necessities of life that he would, if at liberty, have had to incur cannot be justified, and has not been sought to be justified, as representing the value of a so-called benefit to the claimant of having been maintained at public expense during that period. I agree with my noble and learned friend Lord Brown of Eaton-under-Heywood that wrongful imprisonment cannot sensibly be characterised in any way as conferring a benefit (para 92 of his opinion). The justification for the deduction is, to my mind, that compensation is intended, so far as lost earnings are concerned, to provide the claimant with the sum that, had he been at liberty he would have had at his disposal to expend or save as he chose. Expenditure on the bare necessities of life is an essential, not a choice. So the deduction is necessary to achieve the object of the lost earnings element of a compensation award.

36. On the second issue, the deduction for past criminality, the only point argued before your Lordships has been based on the comparison between the 10% deduction for past criminality made by Sir David Calcutt QC in assessing the non-pecuniary loss element of the compensation awarded to Mr Robinson, a victim of the same miscarriage of justice as the Hickeys, and the 25% and 20% deductions made by Lord Brennan QC in assessing the non-pecuniary loss element of the compensation awarded to Mr Vincent Hickey and Mr Michael Hickey. It is accepted that Mr Robinson's criminal record was significantly worse than that of either of the Hickeys and the comparison undermines, it is submitted, the fairness, the propriety and, consequently, the legality of the greater deductions made in their respective cases. They seek an order remitting to Lord Brennan for reconsideration the amount of the criminality deductions proper to be made.

37. I must return to the comparative unfairness point, which, as I have said, was the only point regarding the criminality deductions argued before the House. In my opinion, however, that is not the only point regarding these deductions that arises in this appeal. There has throughout been another point taken on behalf of the Hickeys that, in my opinion, deserves your Lordships' attention. The point relates to the manner in which Lord Brennan and, before him, Sir David Calcutt have applied the requirement spelled out in subsection (4A) of section 133 of the 1988 Act (added by amendment by section 28 of the 1995 Act: see para 9 of Lord Bingham's opinion) that in assessing compensation "attributable to suffering, harm to reputation or similar damage" the assessor must have regard to, among other things "any other convictions of the person and any punishment resulting from them" (para (c) of subsection (4A)). It appears that the practice of Sir David Calcutt was and of Lord Brennan is to calculate a non-pecuniary loss figure attributable to "suffering, harm to reputation or similar damage", taking into account "the seriousness of the offence of which the person was convicted and the severity of the punishment resulting from that conviction" (para (a) of subsection (4A) and "the conduct of the investigation and prosecution of the offence" (para (b) of the subsection"), and then to deduct from that figure a percentage attributable to the person's previous criminal record. The deduction is said to be justified, or perhaps to be required, by para (c) of the subsection.

38. Thus, in para 5 of his Assessment of the compensation to be paid to Mr Vincent Hickey Lord Brennan set out the three paragraphs of

subsection (4A), expatiated on the seriousness of the claimant's previous convictions and concluded by saying -

> "Having regard to the seriousness of these matters … I firmly conclude that the non-pecuniary loss award should be subject to a deduction of 25%. This I regard as the very least deduction that can reasonably be made, having regard to his criminal behaviour."

Lord Brennan then considered the amount of the award for non-pecuniary loss that would be appropriate, arrived at the figure of £190,000 and reduced that sum by applying the 25% deduction (para 10 of the Assessment). The £190,000 included £50,000 for psychiatric injury to Mr Hickey attributable to his wrongful imprisonment and also included whatever sum Lord Brennan had decided was appropriate in respect of "the conduct of the investigation and prosecution of the offence" (para (b) of section 4(A)).

39. The Assessment of the compensation to be awarded to Mr Michael Hickey followed much the same lines save that a sum in respect of aggravated damages was added to the non-pecuniary award. £140,000 was awarded for "all factors other than psychiatric illness", £35,000 for the "aggravating features of the case" and £75,000 for psychiatric illness, giving a total of £250,000. The £250,000 was then subjected to the 20% deduction for past criminality (see para 10 of the Assessment).

40. Lord Brennan later published an Addendum to his two Assessments. One section of this dealt with "Reduction for previous offending". It is plain from the Addendum that Lord Brennan regarded the "aggravating factors" to which he had referred as falling within the section 4(A)(b) matters to which the assessor was directed to pay particular regard. As to the application of the deduction to the whole of the award for non-pecuniary loss, Lord Brennan explained his thinking in para 20 of the Addendum.

> "Any reduction because of previous convictions, and imprisonment if it has been served, must apply to all the non-pecuniary loss award save for one exception. Sir David [Calcutt] treated that part of an award for personal injury (physical or mental) as not subject to any reduction.

> I agree. It is fair to treat this as arising independently of any previous offending."

Lord Brennan's agreement that the part of an award relating to a physical or mental injury should not be reduced on account of any past criminality led, since he had subjected both the £50,000 he awarded to Mr Vincent Hickey and the £75,000 he awarded to Mr Michael Hickey for psychiatric injury to the past criminality deduction, to an amendment of his original assessment. The deduction was not applied to the £50,000 or to the £75,000.

41. In their respective judicial review applications both appellants referred to the application of the past criminality deduction to "the entire sum referable to non-pecuniary loss" as a misdirection (see para 55 of Mr Vincent Hickey's Grounds and para 57 of Mr Michael Hickey's and both sought, inter alia, an order quashing the decision "to make the … deduction for previous offending from the sum total for non-pecuniary loss" (see para 72(a)(iii) of Mr Vincent Hickey's application and para 74(a)(iii) of Mr Michael Hickey's).

42. The Summary Grounds of Defence filed on behalf of Lord Brennan (and on behalf of the Home Secretary) adverted to this issue and contended that

> "The Assessor's approach is a lawful one which he was entitled to adopt" (para 4.3)

43. Maurice Kay J, as he then was, dealt with this issue in para 42 of his judgment. He said he had "… no doubt that sub-section (4A) permits deduction from the whole of the non-pecuniary award".

44. The Hickeys (and Mr O'Brien) appealed to the Court of Appeal. One of the specified grounds of appeal was that Maurice Kay J was in error in permitting a deduction from the non-pecuniary damages attributable to "the misconduct by the authorities, the fact of loss and liberty and aggravated damages" (see paras 4, 5 and 6 of their respective Section 7 Grounds of Appeal).

45. Auld LJ dealt with the issue in paras 105 to 113 of his judgment. He concluded in para 112 of his judgment that:

> "… it is plain that sub-section (4A) permits deduction from the whole of the non-pecuniary award, save any sum included for personal injury"

and, in para 113, said this:

> "The mischief at which the provision [i.e. ss (4A)(c)] is directed – the reason for enabling a deduction to be made for criminality from the entirety of the non-pecuniary suffering (save for personal injury) caused by the miscarriage of justice – is, in my view, two-fold. First, it enables account to be taken of the concurrent effect of any punishment for criminal offences of which the claimant has been rightly convicted and sentenced. Second, it allows an Independent Assessor to reflect the fact that an undoubted or hardened criminal may not suffer so greatly as a person of previous good character from many of the incidents of wrongful conviction and loss of liberty, in particular as to harm to reputation, injury to feelings, inconvenience, separation from family and other unpleasant aspects of incarceration."

Longmore LJ and Gage J both agreed with what Auld LJ had said on this point and added nothing of their own.

46. My Lords the history in this litigation of the issue whether section 133 (4A)(c) justifies a past criminality deduction from the whole of a non-pecuniary award (save such part as relates to physical or mental injury – see para 20 of Lord Brennan's Addendum and para 112 of Auld LJ's judgment) demonstrates, I respectfully suggest, that the issue has been alive in these proceedings since their inception and, since the leave to the appellants to appeal to this House was in no way limited, can be addressed by your Lordships, whether or not it has been specifically addressed by counsel.

47. In my opinion the reasoning of Auld LJ in para 113 of his judgment, and of Maurice Kay J in para 42 of his, fail to justify the

application of a past criminality deduction to compensation awarded to reflect any improprieties in the conduct of the investigation and prosecution of the offence (i.e. the subsection (4A)(b) matters). In para 113 Auld LJ noted that a hardened criminal might not suffer so greatly as a person of previous good character from many of the incidents of wrongful conviction and loss of liberty. That may well be true, but what has it to do with improprieties committed by the police or by prosecuting authorities when investigating and prosecuting an offence? If a sum is to be awarded by way of compensation for the commission of those improprieties, why is it to be supposed that a hardened criminal is not as much aggrieved by them as a person with no criminal record? I suppose that a hardened criminal might accept prosecution and imprisonment as a risk inherent in his lifestyle. But would he accept, as part of that risk, the risk of his conviction for an offence he had not committed being procured by a false confession extracted from him or others by violence or other improper persuasion, or by deliberate non-disclosure of exonerating evidence held by the police or prosecuting authorities, or by perjured evidence in the giving of which the police were complicit? I hope he would not, for although a hardened criminal may live a life of disrespect for the rule of law, he is as entitled as everyone else to expect justice when he finds himself in a court of law. To pretend or to assume that a hardened criminal's feelings and sense of outrage, when the victim of a miscarriage of justice for which the conduct of the authorities in the investigation and prosecution of the offence may be in part responsible, are different in kind from those of a person with no criminal record who finds himself in a similar position is to my mind unacceptable. In my opinion, there is no justification whatever for applying the past criminality deduction to the part of a non-pecuniary loss award that reflects the subsection (4A)(b) matters. Nor can I see any logic at all in applying a past criminality deduction to the incidents of loss of liberty experienced by a person who has never before been in prison. Why should a record of petty offending that has not led to a sentence of imprisonment justify any deduction at all? The misery of imprisonment as a result of a miscarriage of justice might be less for a person who had had previous experience of justified imprisonment, but why should it be less for a person who had not?

48. Indeed the whole concept of an indiscriminate deduction on account of past criminality seems to me to be wrong in principle and not justified by section 133(4A). The subsection requires the assessor to assess the compensation attributable to "suffering, harm to reputation or similar damage" and directs the assessor, in doing so, to have regard in particular to the para (a), (b) and (c) matters. It says nothing about a deduction across the board on account of past criminality. Past convictions may be very relevant to the sum to be awarded for loss of

reputation. Past imprisonment may be relevant to the degree of suffering occasioned by being in prison. The sum to be awarded in respect of individual types of suffering or harm that go to make up the total sum to be awarded for non-pecuniary loss may be less because, by reason of past convictions or past imprisonment, the suffering or harm can be adjudged to be less.

49. However, in my opinion an approach that treats paragraph (c) as justifying an indiscriminate deduction across the board not only fails to reflect what subsection (4A), properly construed, directs but runs the risk of past criminality being taken into account twice; first when assessing the value to be placed on the suffering or harm and, secondly, in the making of the deduction. Thus, an inveterate fraudster who has a record of convictions for fraud may have a fairly minimal loss of reputation when he comes to be wrongly convicted for fraud. Why should the value of his minimal loss of reputation be further reduced on account of his previous convictions for fraud. These convictions should be taken into account once and for all when assessing the harm caused to his reputation by the wrongful conviction. Further, if a person has been convicted of an offence and punished for it, why should he be punished again when, as a victim of a miscarriage of justice, he becomes entitled to section 133 compensation? If his earlier malfeasance is relevant to the compensation to be given him for the degree of damage caused by the wrongful conviction to his reputation, or if the period of his past imprisonment can be taken to have reduced the degree of his suffering when finding himself, having been wrongly convicted, again in prison, so be it. But to reduce the amount of compensation simply because the claimant has previously been convicted and punished is not required by subsection (4A), is not supported by any logic, and is inflicting a further punishment for an offence already dealt with by the criminal justice system. I do not accept that this could possibly have been Parliament's intention.

50. For the reasons I have tried to explain I regard the practice of applying an indiscriminate deduction to non-pecuniary damages as wrong in principle. However, the appellants' counsel, Mr Engelmann, has concentrated his attack on the lack of consistency between the 25% and 20% deductions made in respect of the appellants and the 10% deduction made by Sir David Calcutt in respect of Mr Robinson. My noble and learned friend Lord Bingham has rejected this attack. He has done so first by analogy with the situation which arises where an appeal against sentence is based on more lenient sentencing of some other person or persons who have been convicted of a similar offence committed in similar circumstances. Lord Bingham has pointed out that

disparity in sentencing is not usually, without more, a basis for a successful appeal. Second, my noble and learned friend has posed the *Wednesbury* test *(Associated Provincial Picture Houses Ltd v. Wednesbury Corpn* [1948] 1 KB 223); were the percentage deductions within the bracket of judgmental discretion available to the assessor? He has concluded that they were and a majority of your Lordships are in agreement with him on both points.

51. My Lords I do not find this issue at all easy but I do not believe, first, that the analogy with disparity in sentencing is an apt one or, secondly, that sufficient weight was attributed by Lord Brennan to the degree of disparity when his 25% and 20% deductions are compared with the 10% Robinson deduction. As to the disparity in sentencing analogy, the role of a judge in sentencing is to take account of the nature of the offence, the nature of the accused's criminal conduct and what the public interest requires, as well, no doubt, of other relevant considerations. In sentencing the judge owes a duty to the public, who deserve to be protected from criminal conduct, to deal with the accused in accordance with law and having regard to the circumstances of the case. If a previous sentence was too lenient, the judge's duty to the public may preclude him from allowing that leniency to deflect him from imposing the proper sentence for comparable criminal conduct in the case before him.

52. These considerations have, in my opinion, no counterpart in section 133 compensation assessments. These are cases where the claimants for compensation are not wrongdoers from whose activities the public deserve protection or who must be taught that crime does not pay. They are victims of miscarriages of justice. They have been subjected to sentences of imprisonment after convictions procured by miscarriages of justice. The public, on whose behalf judges impose sentences on those convicted in cases tried before them, owe a debt to those who, victims of miscarriages of justice, have been wrongly convicted, sentenced and imprisoned. Section 133 recognises that debt and provides a legally enforceable scheme for compensation to be assessed and paid. The compensation may be regarded as recognising and intended to settle that debt. If the assessment of the compensation gives rise to an understandable, and, in that sense, legitimate feeling of unfairness, it is difficult to see how the payment of the compensation so assessed can be regarded as ameliorating the claimant's sense of grievance arising from the miscarriage of justice. In these circumstances one of the purposes of section 133 will not be met. In disparity of sentencing cases the public interest may require that correct sentences be pronounced. In section 133 compensation cases, by

contrast, the public interest, in my opinion, requires at least that the assessment of the compensation should appear to be fair. Where there is the disparity that here exists between the 10% deduction made in respect of Mr Robinson's compensation for non-pecuniary loss and the 20% and 25% deductions made in respect of the Hickeys' compensation for non-pecuniary loss, and bearing in mind the accepted greater seriousness of Mr Robinson's previous criminality when compared with that of either of the Hickeys, the assessment of the compensation awarded to them does not appear to be fair.

53. In my respectful opinion Lord Brennan ought to have attributed much more weight to the 10% deduction fixed by Sir David Calcutt for Mr Robinson than he evidently did. The analogy with disparity of sentencing cases is, in my opinion, an unsound one.

54. For all these reasons I would remit the compensation payable to the appellants for non-pecuniary loss back to Lord Brennan for reconsideration. I would allow the appeals on the deduction for past criminality issue.

LORD RODGER OF EARLSFERRY

My Lords,

55. I agree with my noble and learned friends, Lord Bingham of Cornhill and Lord Brown of Eaton-under-Heywood, that, for the reasons which they give, the appeals relating to the second question should be dismissed. I have, however, formed the view that there is merit in the appellants' first ground of appeal.

56. When the Home Secretary accepts that compensation should be paid for a wrongful charge, conviction or imprisonment, the applicant receives a "Note for Successful Applicants". Para 5 tells him that:

> "In reaching his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising

> from the wrongful charge or conviction and/or loss of liberty...."

57. Where a defendant has to pay damages for personal injuries suffered by a claimant, the basic way that a judge assesses his pecuniary loss is by comparing the claimant's actual position with his hypothetical position if the wrong in question had not happened. By analogy, the assessor has to compare the applicant's actual position with his hypothetical position if he had not been wrongly charged, convicted or imprisoned – whether or not that was due to anyone's fault.

58. In many cases of damages for personal injuries the claimant will argue that his financial position has been affected in either or both of two ways. First, he will say that, as a result of being injured, he has suffered and will continue to suffer loss by reason of incurring additional non-profitable expenditure, eg, on making his home more accessible or on care in a private nursing home. Secondly, he will say that, because of his injuries, he has been prevented from earning money which he would otherwise have made, usually by working for a wage or salary.

59. If a claimant has been so badly injured that he has to receive full-time care or treatment in a private nursing home or similar facility and gives up his house, the defendant may point out that, while in the nursing home, he is being accommodated and fed. If he had not been injured, he would still have had to accommodate and feed himself. Should his claim for damages for the cost of the nursing home be reduced to take account of the fact that this expenditure saves him the cost of providing accommodation and food for himself elsewhere?

60. Going further, if, as a result of his injuries, the claimant is housed and fed in a hospital at public expense, should his claim for damages be reduced on the basis that he has received a positive benefit in the shape of free board and lodging? Similarly, here, on one view it could be argued that, by providing the appellants with free accommodation, food and clothing, Her Majesty's Government actually conferred a benefit on them – albeit one that they did not want and which ought never to have been inflicted upon them. In assessing their compensation should an allowance be made for that benefit? The argument that it should is inherently very unattractive. But a version is found in the assessor's determination of the appellants' "saved living expenses" in his Assessments for both appellants.

61. Before going any further, it is right to recall that, in the words of Lord Bridge of Harwich in *Hussain v New Taplow Paper Mills Ltd* [1988] 1 AC 514, 527, prima facie the only loss which a claimant can recover is his net loss. But, as Lord Reid observed in *Parry v Cleaver* [1970] AC 1, 13, there is no universal rule and the common law treats the matter as one depending on justice, reasonableness and public policy.

62. In his Assessments the assessor dealt, at para 13, with "saved living expenses" in this way:

> "Common law principles require that there should be no double compensation. Past and future loss of earnings compensation embraces living expenses that will be paid for out of such earnings. In fact, because he was imprisoned, the applicant did not incur such living expenses. That provides a financial benefit for which credit must be given."

Under reference to the concession apparently made by Mr David Kemp QC in *Meah v McCreamer* [1985] 1 All ER 367, 383e-f, the assessor commented that "this leading expert clearly considered that the financial benefit of board in prison was to be regarded as a credit or deduction against other financial loss of earnings." He also noticed that "the experienced judge" (Woolf J) had accepted this approach. Consistently with that line of argument, in one section of his written case counsel for the assessor also contended that the gratuitous provision of these necessities was a collateral benefit that must be deducted from the gross loss in order to ensure that the appellants were not compensated for something which had already been provided to them.

63. Not only is that approach inherently unattractive: it also infringes a major constitutional principle.

64. During the period when the appellants were in prison the relevant "domestic" duties of the authorities were to be found in the Prison Rules 1964 (SI 1964/388) made under the Prisons Act 1952. By rule 20(2), as convicted prisoners, the appellants had to be provided with clothing adequate for warmth and health in accordance with a scale approved by the Secretary of State. By rule 21(2), as convicted prisoners, they were not allowed to have any food other than that ordinarily provided and, by

sub-paragraph (4), the food had to be wholesome, nutritious, well prepared and served, reasonably varied and sufficient in quantity. By rule 22(1) they were not allowed to have alcohol. Finally, by rule 24 they had to be provided with a separate bed and with separate bedding adequate for warmth and health.

65. Doubtless, it would be possible to calculate the notional cost to the Exchequer of keeping the appellants in gaol for 13 years 8 months. But, any such figure would include the cost of having secure buildings and the necessary number of staff to maintain discipline, prevent escapes, provide training and look after the prisoners' welfare etc. So it would not be an accurate reflection of any "benefit" which – however unwillingly – the appellants received in the form of clothing, food and accommodation. The market value of those elements to a consumer would clearly be very much less than the cost of providing them in a prison.

66. Nothing in the Prisons Act or in the 1964 Rules would have authorised the Home Secretary to charge the appellants for their clothing or board and lodging. That being so, as a matter of high constitutional policy, the Home Secretary and those acting on his behalf would have had no power to levy a charge on the appellants for those items. In *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884 the Food Controller had imposed a charge of 2d per gallon as a condition of the grant of a licence to purchase milk. The case proceeded on the basis that the sums were to be paid into the National Exchequer. Referring to the Bill of Rights, Atkin LJ said, at p 886:

> "Though the attention of our ancestors was directed especially to abuses of the prerogative, there can be no doubt that this statute declares the law that no money shall be levied for or to the use of the Crown except by grant of Parliament. We know how strictly Parliament has maintained this right – and, in particular, how jealously the House of Commons has asserted its predominance in the power of raising money.... In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorized the particular charge."

He added, at p 887:

> "It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contracting party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use."

The corresponding passages in the judgment of Scrutton LJ are equally familiar. The decision of the Court of Appeal was affirmed by this House ((1922) 38 TLR 781) and has been regarded ever since as embodying a fundamental principle. See, for instance, *R v Richmond-upon-Thames London Borough Council*, *Ex p McCarthy & Stone Developments Ltd* [1992] 2 AC 48.

67. Although no mention was made of these authorities in argument, Mr Engelman cited a Prison Service Instruction 09/99 which referred to a previous practice of making deductions in respect of board and lodging from the wages of prisoners on enhanced earnings schemes. Four prisoners had brought proceedings for judicial review of the deductions. The Instruction explained that the Home Office had conceded the cases in the light of legal advice that the deductions were unlawful "because prisoners cannot be required to pay for their own imprisonment, and cannot consent to pay for their own imprisonment". The form of the advice (echoing the judgment of Atkin LJ) shows that it was based on the *Wilts United Dairies* line of authority. The advice was plainly correct. Equally correctly, in his oral submissions on behalf of the assessor Mr Burnett QC accepted that the Home Secretary could not have charged for the clothing, food and accommodation provided to the appellants while in prison. Departing to this extent from the approach in his written case, counsel also accepted the corollary that, in assessing the appellants' loss, the assessor would not have been entitled to make any allowance for the cost of these items as a benefit conferred on the appellants. In my view that is also plainly correct.

68. In para 25(c) of the Addendum to his Assessments, however, the assessor gave a somewhat different justification for his deduction for saved living expenses:

> "There is no question here of requiring the applicant to pay for his board and lodging in prison, nor any question of treating Mr O'Brien in a way that puts him at a disadvantage compared to such a convicted prisoner. The true analysis is that by reason of a miscarriage of justice, he has suffered a loss of earnings. Had he not been the victim of a miscarriage of justice, part of those earnings would have been spent on his own living expenses. 25%, as deducted here, probably represents a modest sum for such living expenses. Having dealt with the question of what he has lost by reason of his imprisonment, there is a requirement to consider any set-off against that loss for any expense which has not been occasioned by reason of his being in prison. It is in that context that the deduction from loss of earnings arises in relation to saved living expenses."

Although at first blush there may seem to be force in this argument, the authorities show that the policy of the law is considerably more subtle.

69. In *Shearman v Folland* [1950] 2 KB 43 the plaintiff had been in the habit of living in hotels at an average cost of 7 guineas a week. As a result of being injured by the negligence of the defendant's servant, she was confined for 55 weeks to a nursing home where the fees amounted to 12 guineas a week. The defendant argued that, on this aspect of the plaintiff's claim, he should only have to pay an amount based on a loss of 5 guineas per week, being the difference between the cost of the nursing home and the cost of the hotels in which she would have stayed but for the accident. Giving the judgment of the Court of Appeal, Asquith LJ rejected that argument on the basis that "The precise style in which she would probably or might well have lived is, in our view, a collateral matter, and the two payments are not in pari materia": [1950] 2 KB 43, 50. He illustrated the hazards of any other approach by various examples, including this one, at p 47:

> "A millionaire, accustomed to live at a palatial hotel, where his weekly expenses far exceed the charges of the nursing-home to which, after being injured by the defendant's negligence, he is transplanted, would recover nothing by way of special damage. Could it really lie in the mouth of the wrongdoer in such a case to say: 'I am entitled to go scot-free; I have, by my negligent act, not merely inflicted no loss but conferred a net financial

> benefit on the plaintiff by saving him from the consequences of his habitual extravagance'?"

Asquith LJ went on to hold, however, that if the plaintiff in that case had led evidence to show what proportion of the twelve guineas a week was attributable to board or lodging in the nursing home, it would have been open to the judge to make a deduction in respect of that. In the absence of such evidence the court was not prepared to make its own assessment. On the other hand, Asquith LJ considered that, even in the absence of evidence, a jury would have been entitled to estimate the element in the fees referable to food at £1 per week. So the court made a deduction of £55 from the sum awarded for the fees which the plaintiff had incurred for her stay in the nursing home.

70. What is significant for present purposes is that the Court of Appeal preferred to deduct the elements for accommodation and food, "the domestic element", from the plaintiff's loss in the form of her outlays on nursing home fees. In this way the court treated the plaintiff's normal expenditure on accommodation and food as a collateral matter which was no concern of the defendant. Indeed, as a matter of policy – of the kind envisaged by Lord Reid in *Parry v Cleaver* [1970] AC 1, 13 - the law proceeds on the basis that the way the claimant spent his income or would spend his damages is not the defendant's business. That policy was reiterated by Lord Griffiths in *Dews v National Coal Board* [1988] 1 AC 1. The plaintiff sought damages for loss of earnings during a period of 31 weeks when he was off work due to injuries. The claim included a sum representing the value of contributions which would have been made to a pension scheme during that period. The plaintiff's ultimate pension entitlement was not affected, however, by the absence of these contributions. The House rejected this aspect of his claim. In the course of his reasoning Lord Griffiths said, at p 14E-G:

> "When a plaintiff is injured and as a result is paid no wages his immediate real loss is that part of his net earnings that were available for current expenditure. In respect of this part of his earnings the object of which is to provide income available for current expenditure the tortfeasor is, subject to sums necessarily spent to earn the income, entitled to no credit for expenditure saved as a result of the injury; the principle that it is no concern of the tortfeasor how the plaintiff chooses to spend his income applies."

Lord Mackay of Clashfern also observed, at p 17D-E, that it is "generally true that a tortfeasor is in no way concerned with how a plaintiff might have spent the remuneration to which he would have been entitled had he not been injured."

71. The policy was seen at work in *Shearman v Folland.* It also means that a claimant who is awarded damages for his pre-trial loss of earnings may be left with more capital than he would have had if he had been earning and spending his money in his usual way. Indeed, as Lord Brown points out, since the appellants are to be compensated under their non-pecuniary head of claim for the lost pleasures of a (hypothetical) fulfilled life outside prison, as a matter of pure logic it might seem appropriate to make virtually no award for loss of earnings on the view that they would have had to spend those earnings in order to achieve that pleasurable existence. But, because of the policy adopted by the law in personal injuries cases, that approach is not applied in calculating awards for loss of earnings during the claimant's lifetime. So it should not be applied to the appellants – and indeed counsel for the assessor did not suggest otherwise.

72. Taken at their broadest, the statements by Lord Griffiths and Lord Mackay suggest that, as a matter of policy, a defendant who has to pay damages for loss of earnings is entitled to no credit for the expenditure on board and lodging which a claimant has saved as a result of his injury. On that approach, the only proper basis for making an allowance for board and lodging would be as a deduction from any award for the cost of private nursing home or similar care for the claimant.

73. In *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 the plaintiff, Dr Lim, had claims for both loss of earnings and the cost of private care. By the time of the hearing before this House, as a result of the catastrophic injuries which she had suffered in the course of medical treatment, not only was the plaintiff unable to carry on her career as a psychiatrist, but she was having to be cared for in a private nursing home in England. In considering how to approach the question of the plaintiff's living expenses, Lord Scarman adopted the approach of the Court of Appeal in *Shearman.* He said, at p 191D-G:

> "This is necessarily a hypothetical figure in the case of a 'lost years' claim, since the plaintiff does not survive to earn the money: and, since there is no cost of care claim

> (the plaintiff being assumed to be dead), it falls to be deducted from the loss of earnings award. But where, as in the present case, the expectancy of life is not shortened but incapacity exists, there will be a cost of care claim as well as a loss of earnings claim. How should living expenses be assessed and deducted in such a case? One approach, analogous to the method necessarily adopted in 'lost years' cases, would be to attempt an assessment of how much the plaintiff would have spent and upon what – always a most speculative exercise. How, for instance, could anyone tell how Dr Lim would have ordered her standard of living, had she been able to pursue her career? Another approach is, however, available in the case of a living plaintiff. In *Shearman v Folland* [1950] 2 KB 43 the Court of Appeal deducted what it described as the 'domestic element' from the cost of care. Inevitably, a surviving plaintiff has to meet her living expenses. This approach, being on the basis of a future actuality (subject to the uncertainties of life), is far less hypothetical than the former (which, 'faute de mieux', has to be adopted in 'lost years' cases). It is a simpler, more realistic, calculation and accords more closely with the general principle of the law that the courts in assessing compensation for loss are not concerned either with how the plaintiff would have used the moneys lost or with how she (or he) will use the compensation received."

The trial judge had excluded the domestic element from his calculation of the cost of pre-trial care in Malaysia. Lord Scarman endorsed that approach at p 194H and went on, at p 195B and G, to make an appropriate deduction for the domestic element both in calculating the cost of pre-trial care in England and in settling the multiplicand to be used in calculating the cost of future care.

74. As a result of being wrongly convicted and imprisoned the appellants were provided with accommodation, food and clothing at Her Majesty's expense. They have accordingly no claim for sums spent by them on their care from which a domestic element can be deducted. So the approach favoured by the Court of Appeal in *Shearman* and by this House in *Lim Poh Choo* - deducting the domestic element from the award for the cost of care – cannot be applied. Despite this, Mr Burnett submitted that, in assessing the appellants' loss of earnings, the assessor had been right to take account of the sums which they would have had to pay for basic accommodation and food if they had been out in the world

earning a living. Given that the appellants had not paid for their keep in prison, as in "lost years" claims, faute de mieux the sum should be deducted from the appellants' compensation for loss of earnings during the period when they were imprisoned.

75. In *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229 the Supreme Court of Canada had to deal with a case where the plaintiff was claiming both future loss of earnings and the cost of future care. Dickson J said, at pp 250-251:

> "It is clear that a plaintiff cannot recover for the expense of providing for basic necessities as part of the cost of future care while still recovering fully for prospective loss of earnings. Without the accident, expenses for such items as food, clothing and accommodation would have been paid for out of earnings. They are not an additional type of expense occasioned by the accident.
>
> When calculating the damage award, however, there are two possible methods of proceeding. One method is to give the injured party an award for future care which makes no deduction in respect of the basic necessities for which he would have had to pay in any event. A deduction must then be made for the cost of such basic necessities when computing the award for loss of prospective earnings: ie the award is on the basis of net earnings and not gross earnings. The alternative method is the reverse: ie to deduct the cost of basic necessities when computing the award for future care and then to compute the earnings award on the basis of gross earnings.
>
> The trial judge took the first approach, reducing loss of future earnings by 53 per cent. The Appellate Division took the second. In my opinion, the approach of the trial judge is to be preferred. This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included.
>
> The costs of necessaries when in an infirm state may well be different from those when in a state of health. Thus, while the types of expenses would have been incurred in any event, the level of expenses for the victim may be seen as attributable to the accident. In my opinion, the

> projected cost of necessities should, therefore, be included in calculating the cost of future care, and a percentage attributable to the necessities of a person in a normal state should be reduced from the award for future earnings."

Unlike the House in *Lim Poh Choo*, the Supreme Court preferred to make the deduction from the award for loss of earnings rather than from the award for the cost of care. It should also be noted that the reason which the court gave for deducting the cost of basic necessaries applies only where the plaintiff is awarded damages for both loss of earnings and nursing home or similar care: the aim is to avoid duplication in the two awards.

76. In *Watkins v Olafson* [1989] 2 SCR 750 the plaintiff had been cared for by the state between the accident and the trial and so had no claim for the cost of care during that period. The Court of Appeal of British Columbia held that, in calculating the plaintiff's pre-trial loss of income, allowance should be made for the plaintiff's basic living expenses. Consistently with the reasoning in *Andrews*, the Supreme Court held that this was wrong. McLachlin J said, at p 773:

> "In calculating loss of future earning capacity in cases where an award for future care is made, a deduction is made from the award for lost earning capacity for living expenses to avoid duplication between the two heads of damage. The Court of Appeal in this case applied similar reasoning to the plaintiff's pre-trial lost income. However, the basis for making a deduction on this account – duplication between two heads of damage – was lacking, there being no award for pre-trial cost of care. No case was cited to us in which a deduction for living expenses has been made from damages for pre-trial loss of earning capacity and I see no need to introduce such a practice."

By analogy, it could be argued that, since the appellants have no claim for the cost of care, no deduction for the cost of necessities need be made from the compensation for their loss of earnings.

77. In arguing in favour of such a deduction, counsel for the assessor referred to the passage from Lord Griffiths' speech in *Dews v National Coal Board* which I have already quoted in para 70. There Lord

Griffiths acknowledged that, when paying damages for the loss of income, a defendant could take credit for sums which the plaintiff would necessarily have spent in order to earn the income. There was no reason, counsel argued, to confine such sums to, for example, the substantial travel expenses which a self-employed businessman would have had to incur in order to earn his income. It would have been equally necessary for the businessman to keep body and soul together in order to earn the income in question. So the cost of minimum living expenses should be deducted as a necessary expense from any award for loss of earnings.

78. In support of this argument Mr Burnett cited the decision of the Supreme Court of Canada in *Toneguzzo-Norvell v Burnaby Hospital* [1994] 1 SCR 114. The plaintiff had suffered horrendous injuries as a result of which her life expectancy had been reduced. She claimed damages for loss of earning capacity during her lifetime and during the "lost years". The Supreme Court held that a deduction for necessary living expenses should be made in respect of both elements of her claim – even though, during the "lost years", she would ex hypothesi be dead and so not incurring any care costs. McLachlin J said this:

> "There can be no capacity to earn without a life. The maintenance of that life requires expenditure for personal living expenses. Hence the earnings which the award represents are conditional on personal living expenses having been incurred. It follows that such expenses may appropriately be deducted from the award…. It can be argued that not to make a deduction for personal living expenses is to introduce into the award for lost earning capacity for the 'lost years' a measure of overcompensation akin to the duplication which the law avoids in the case of an award for lost earnings during the plaintiff's actual lifespan. This deduction has been justified for the years before the plaintiff's actual projected death, on the ground that it avoids duplication between the award for cost of care and the award for lost earning capacity. But in fact, the 'lived years' and the 'lost years' cannot be so easily distinguished. The same reasoning applies to both: had the plaintiff been in a position to earn the monies represented by the award for lost earning capacity, she would have had to spend a portion of them for living expenses. Not to recognize this is to introduce an element of duplication and to put the plaintiff in a better

position than she would have been in had she actually earned the monies in question."

79. The desirability of avoiding duplication is, generally speaking, indisputable. But, so far as the "lost years" are concerned, there is no risk of duplication from the cumulation of an award for loss of earnings and an award for care. The reasoning in *Watkins v Olafson* might therefore have suggested that no deduction for basic necessities should be made from the loss of earnings figure for that period. But the court adopts a significantly different rationale and holds that a deduction for basic necessities should indeed be made for the "lost years" because the injured person could not have made the earnings which she claims without spending some of them on those basic necessities. When considering the passage, it should, however, be noted that the Supreme Court envisages the deduction of only basic necessities even in claims for "lost years". By contrast, in *Lim Poh Choo* [1980] AC 174, 191D-F, Lord Scarman considered that hypothetical discretionary expenditure by the plaintiff would also have to be deducted in calculating the loss of earnings during the "lost years". The thinking underlying the two approaches is actually very different and the Supreme Court's reasoning cannot be easily reconciled with the approach which the House adopted in *Lim Poh Choo.*

80. Despite this, Mr Burnett argued that the approach of the Supreme Court was really just a development of Lord Griffiths' indication in *Dews* that necessary expenses such as substantial travel costs should be deducted from an award for loss of earnings. There is, of course, nothing to show that the assessor had this particular rationale in mind. But, even leaving that aside and also leaving aside the difference in the measure of the deduction permitted by the two systems in "lost years" awards, the development appears to me to cross an important line. The travel costs to which Lord Griffiths was referring are costs which the self-employed businessman incurs only in order to work and earn his income. But people eat to live: they don't eat to work. So, like everyone else, even such businessmen incur basic living expenses simply in order to live. When they are not working, they still have to incur those expenses. For good reason, therefore, by contrast with the Canadian courts, even in care cases such as *Lim Poh Choo*, the courts in this country have respected the important policy that a defendant has no concern with how a claimant spends his earnings during his lifetime. At common law they have accordingly deducted basic living costs only as part of the larger deduction for prospective discretionary expenditure in the "lost years" when ex hypothesi the claimant is presumed to be dead

and so the award is regarded as being for the benefit of the claimant's estate.

81. Parliament has, however, stepped into the arena by enacting section 5 of the Administration of Justice Act 1982. The section provides that:

> "any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in a hospital, nursing home or other institution shall be set off against any income lost by him as a result of his injuries."

This provision – which may, of course, have forestalled a development in the common law - enshrines a public policy that savings in basic living expenses attributable to an injured person's maintenance in a hospital, nursing home or "other institution" at public expense should be offset against compensation for loss of income. Mr Burnett did not suggest that the words "other institution" would be apt, in themselves, to cover a prison. And indeed both the context and the eiusdem generis rule would exclude such a construction. His argument was, rather, that by analogy the savings in basic living costs to the appellants which were attributable to their maintenance in prison at public expense should be set off against their compensation for loss of income.

82. In respectful disagreement with your Lordships, I find myself unable to accept this, or indeed any other, argument in favour of the deduction. Section 5 is designed to deal with an injured person's maintenance while necessarily living in a caring institution for the purposes of treatment. I am by no means satisfied that Parliament would ever have envisaged that it would be extended by analogy to cover a prisoner's maintenance while unjustifiably detained in a prison for the purposes of punishment. Indeed, at this point the assessor's approach meets what I consider to be an insuperable objection. In the situation envisaged by Parliament, and indeed in all the situations where the courts have allowed a deduction for basic living costs, by the time the supposed saving occurs the defendant has already injured, but is no longer injuring, the claimant. The wrong is over and done with, even though its effects remain. Parliament provides that any savings which then accrue to the injured person, while he is being maintained at public expense in an institution providing treatment to remove or palliate those effects, are to be set off against any loss of earnings. By contrast, in the appellants' situation the wrong was not over and done with when they

were being maintained at public expense and the supposed savings accrued to them. On the contrary, their enforced but unjustified maintenance in prison at public expense for years on end is the very worst part of the injury which has been done to them and for which they are entitled to compensation. The actual infliction of the continuing wrong and the supposed saving are inextricably linked, just as they would be in the case of a prolonged kidnapping. That simple fact takes the appellants' case beyond the reach of the kinds of policy considerations which favour offsetting the injured person's savings against loss of earnings in the situations envisaged by Parliament and the courts. To put it no more strongly, justice, reasonableness and public policy surely dictate that no allowance should be made for so-called savings which the appellants were supposedly making while they were actually enduring the appalling wrong for which they are to be compensated.

83. One further point in conclusion. As I mentioned above at para 67, Mr Burnett accepted that the assessor would not have been entitled to make a deduction to represent the value of the benefit to the appellants of being fed, housed and clothed in prison. But he argued, of course, that this did not mean that the assessor could not set off the saving to the appellants in the basic living expenses which they would have had to pay if they had been at liberty and earning an income. Mr Burnett was right to say that the two approaches are different. In theory. In reality, they come to much the same thing. If one assumes – which does not seem unreasonable – that the standard of living of prisoners is not significantly higher than the minimum standard of living to which they might aspire if at liberty and working, then the practical effect of the two approaches is in substance the same. The value of the "benefit" provided to prisoners such as the appellants would be £y and the saving to them in not having to provide themselves with the basic necessities of life outside would also be £y. So it is irrelevant under which of the heads the assessor deducts £y from the compensation of £x for the appellants' loss of earnings. On either approach the appellants receive £(x-y). It is not hard to see why, either way, the appellants would feel that in the end they were, in effect, paying for their keep throughout all those long years when they were wrongly deprived of their liberty and shut up in prison.

84. For these reasons I would have allowed the appeals on the first ground.

LORD CARSWELL

My Lords,

85. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. I entirely agree with the reasons which he has given on both questions for dismissing the appeal and wish to add only a very few observations of my own.

86. The objective of compensation remains the same, whether it be by way of damages in tort for an injury sustained by a claimant or compensation for a loss or deprivation in a case such as the present. There is, as Lord Reid expressed it in *Parry v Cleaver* [1970] AC 1, 13 "a universal rule that the plaintiff cannot recover more then he has lost." He added the important observation that one must have regard to realities rather than technicalities. So viewed, the appellants' proposition in relation to the deduction made for living expenses is unsustainable and the Court of Appeal were right to affirm the assessor's conclusion on this issue. To approach the question as if the provision of board and lodging in prison should be regarded as a benefit is inapt and tends to distort consideration of the true issue, which is determination of the sum properly required to compensate the appellants for their true loss.

87. On the second question, that of inconsistency between the percentage deductions from the awards made to the appellants by Lord Brennan and that made in James Robinson's case by Sir David Calcutt, I again agree entirely with the reasons given by Lord Bingham for rejecting the appellants' complaint. I would, I think, go further in questioning the appropriateness of the method of deducting a percentage across the board to reflect the appellants' convictions and the punishment resulting from them. As my noble and learned friend Lord Scott of Foscote has pointed out, such a deduction is relevant to some only of the heads of compensation which are properly included in the sum to be paid. Section 133(4A)(c) of the Criminal Justice Act (inserted by section 28 of the Criminal Appeal Act 1995) requires the assessor to have regard to any other convictions of the person and any punishment resulting from them in assessing "so much of any compensation … as is attributable to suffering, harm to reputation or similar damage". I find it difficult to see how any deduction from non-pecuniary loss can correctly be made except in respect of those specified heads, to which the factors

in section 133(4A)(c) are obviously relevant. Indeed, I would expect, as Lord Bingham said in paragraph 31, that it would be taken into account at the first stage in assessing the amount to be attributed to those heads, rather than making a deduction across the board at a later stage. In supporting the assessor's decision, accordingly, I do not wish to be taken to giving my imprimatur to all of his method of calculation.

88. That said, I agree that the inconsistency in the level of deduction between Robinson's case and those of the appellants does not vitiate the assessor's conclusions. Consistency in the award of damages is a very desirable feature, just as it is in sentencing criminals – the recognition of which has produced such valuable works as *Kemp & Kemp*, *The Quantum of Damages.* That is because it is a facet of justice, to both payer and recipient, that like cases should attract like amounts. But it is only one facet, and the imperative of consistency may have to yield to the larger imperative of justice in the particular case, achieving a result which is proper and fair to the interests of both payer and recipient.

89. I do consider the analogy with disparity in sentences, to which Lord Bingham and Lord Scott have referred, to be apt and instructive. As Lord Bingham stated in paragraph 26, a court will, and generally should, be very slow to impose what it regards as anything other than the right sentence simply because it or another court has imposed a "wrong" sentence on a co-defendant. As Hutton LCJ expressed it in the Northern Ireland Court of Appeal in *R v Delaney* [1994] NIJB 31, 33-34:

> "The principle served by this approach is that where right thinking members of the public looking at the respective sentences would say that something had gone wrong the court should step in … It should not be supposed, however, that the court will be prepared to invoke the principle and make the reduction unless there is a really marked disparity, for unless that condition is satisfied it will not regard any sense of grievance felt by an appellant as having sufficient justification … It is only if a fair-minded and right-thinking person would feel that the disparity involved some unfairness to the appellant, as distinct from a possibly rueful feeling that his associate has been more fortunate in his treatment, that a court should intervene …"

Griffiths LJ expressed the principle pithily in *R v Large* (1981) 3 Cr App R(S) 80, 83:

> "If there be honour among thieves and armed robbers, let him who has been properly and severely sentenced rejoice in the good fortune of his companion who has received a lenient sentence. Let him not complain that he himself has received a proper sentence."

90. There was a marked disparity between the deduction made by Sir David Calcutt in Robinson's case and those made by Lord Brennan in respect of the appellants. It is apparent, however, that Lord Brennan was of the view that the deductions which he made were right and proper, notwithstanding the disparity, of which he was well aware. It is equally apparent that he was satisfied that the deductions which he made were justified and that that made by Sir David was insufficient. Although Lord Scott considers that that disparity constitutes such unfairness that the deductions made by Lord Brennan should not stand, I am unable to share this view. It has not been argued that those deductions are in themselves excessive, and the focus of the submission on behalf of the appellants was the disparity with Robinson's case. In my opinion it would be wrong for the appellants to be awarded more than what the assessor adjudged to be fair and proper amounts and I would reject this ground of appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

91. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and gratefully adopt his exposition of the facts, the legislative framework within which these disputed assessments were made, and the two issues arising for your Lordships' determination on the appeal.

92. Issue 1 concerns the 25% deduction from the appellants' loss of earnings claim for "saved living expenses" and it is not difficult to understand why it has aroused such strong feelings. Here are two men, incarcerated in prison for many years for crimes they never committed,

entitled by statute to compensation for that grave miscarriage of justice, now required, so it is suggested on their behalf, to give credit against their earning losses for the supposed benefits of being fed, clothed and housed in prison. If, indeed, this is a correct characterisation of the deduction—if, in other words, the state is exacting a credit for the cost of imprisoning them (although not, of course, the full cost, now running at upwards of £35,000 per annum for each inmate)—their case is unanswerable and their appeal must succeed. Clearly imprisonment was no benefit whatever.

93. But is this, on analysis, the true basis of the deduction? Is the deduction not rather to be explained, as the respondent submits, on a very different basis? The loss of earnings claims necessarily suppose that the appellants would have been at liberty to work. Had this been so they would inevitably have had to keep body and soul together, in short incur basic living expenses. To award them their loss of earnings without taking these expenses into account would not reflect that reality and would, therefore, be to over-compensate them. A claimant's expenditure on living expenses is no less a necessary pre-condition of his ability to earn than his travel expenses in getting to work. The appellants' real loss, therefore, can only be their loss of earnings less any such expenses. So runs the respondent's argument.

94. How then is this deduction properly to be characterised? Is it a credit impermissibly claimed by the state as representing the value of the supposed benefits of being fed, clothed and accommodated in prison or is it a deduction to reflect the basic expenses of living in freedom?

95. To my mind it is plainly the latter and really there has never been any question here of attempting to justify the deduction as a credit for benefits received. But that is not quite the end of the matter. It remains to decide whether indeed the appellants' saved living expenses can properly be deducted from their notional earnings in the calculation of their real loss—the object being, as Lord Griffiths put it in *Dews v National Coal Board* [1988] AC1, 14, to determine "what the plaintiff has *really* lost".

96. The central difficulty in addressing this question is the artificiality of the concept of a claimant's real loss. Realistically it could be argued that the appellants' loss of earnings claims should be assessed at nil. They are most unlikely ever to have saved any of their notional earnings and, in so far as they have been deprived of the benefit of

having spent them, this loss must be assumed to be reflected in the award of compensation for their non-pecuniary loss. The non-pecuniary award is presumably assessed on the basis of the contrast between the misery of their actual lives in prison and the probable pleasures of their notional lives at liberty. Life at liberty would not have been much fun had they not spent their (comparatively modest) putative earnings in full.

97. The contrary argument, at its most extreme, would be that the appellants' real loss is the entirety of their net earning loss. Once tax had been paid (*British Transport Commission v Gourlay* [1956] AC 185) and any other direct monetary deductions have been made from the gross earning figure—most notably any national insurance contributions (*Cooper v Firth Brown Ltd* [1963] 1 WLR 418) and any compulsory pension contributions (*Dews v National Coal Board* [1988] AC 1)—the earnings would have been available to spend as the appellants chose. Of course part of those earnings would have been expended on the basic necessities of life. But the appellants had no less right to determine how this part should be spent (what to eat, what to wear, where to be housed) than the rest.

98. The first of those arguments, that the earning loss should be assessed at nil, is not, let it be clear, one that the respondent advances in this case. An argument substantially like it, however, appears to have been advanced (unsuccessfully) in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174, 177. Logical though it may appear, it does not reflect the conventional approach taken to damages assessments. General damages, certainly in personal injury cases, are simply not designed to compensate for earning losses i.e. to reflect the benefits to have been expected from spending the lost earnings.

99. The second argument seems to me to present altogether greater difficulty. The general principle is that it is of no concern to the tortfeasor how the claimant might have spent his earnings. That was why the Court of Appeal in *Shearman v Folland* [1950] 2 KB 43, rejected the defendant's contention that the seven guineas a week paid by the plaintiff before her accident for board and lodging be set off against the twelve guineas a week which she spent on post-accident nursing home fees: "The precise style in which she would probably or might well have lived is, in our view, a collateral matter, and the two payments are not in pari materia." (p 50). The court gave the defendant credit for only £1 a week.

100. Adopting the same approach in *Lim Poh Choo,* and setting off the plaintiff's living expenses against the future care costs, Lord Scarman said, at p191:

> "It is a simpler, more realistic, calculation and accords more closely with the general principle of the law that the courts in assessing compensation for loss are not concerned either with how the plaintiff would have used the moneys lost or with how she (or he) will use the compensation received."

101. A further statement of the principle is to be found in Lord Griffiths' speech in *Dews v National Coal Board* at p14:

> "When a plaintiff is injured and as a result is paid no wages his immediate real loss is that part of his net earnings that were available for current expenditure. In respect of this part of his earnings the object of which is to provide income available for current expenditure the tortfeasor is, subject to sums necessarily spent to earn the income, entitled to no credit for expenditure saved as a result of the injury; the principle that it is no concern of the tortfeasor, how the plaintiff chooses to spend his income applies."

102. Is the respondent's contention on the present appeal consistent with that statement of principle? With some hesitation I have concluded that it is, provided always that the deduction sought to be made is confined to the cost of the bare necessities of life. If restricted in this way (as in *Shearman v Folland*) to the basic cost of food and shelter, it seems to me capable of falling within Lord Griffiths' formulation of "sums necessarily spent to earn the income". True, this formulation appears designed principally to allow for travelling expenses (as discussed by Lord Griffiths at p 13). To my mind, however, it is apt also to encompass basic living expenses, the claimant's ability to earn being dependent no less on his remaining alive from day to day than on arriving daily for work.

103. It must be acknowledged that in no other case (except pursuant to section 5 of the Administration of Justice Act 1982) do saved living expenses appear ever to have been set off directly against the actual loss

of earnings claim. In *Lim Poh Choo,* for example, only the "expenses of earning the income which has been lost" were set off against the lost income, the living expenses ("the domestic element") being set off against the claim for future cost of care.

104. *Lim Poh Choo* nevertheless seems to me broadly to support the approach taken by the assessor in the present case. So too, still more clearly, does the decision of the Supreme Court of Canada in *Toneguzzo-Norvell v Burnaby Hospital* [1994] 1 SCR 114—see particularly the passages cited from McLachlin J's judgment under the heading "The Deduction of 50% for Personal Living Expenses from the award for Lost Earning Capacity during the 'lost years'"—at para 20 of Lord Bingham's opinion.

105. This approach is consistent too with the public policy which plainly underlies Parliament's reversal of the Court of Appeal's decision in *Daish v Wauton* [1972] 2 QB 262 by the enactment of section 5 of the Administration of Justice Act 1982—the provision that any saving attributable to an injured person's maintenance at public expense in a hospital or similar institution must be set off against his loss of earning claim. True it is that, to avoid any suggestion here that credit is being claimed for the appellants' maintenance at public expense in prison, the focus of the respondent's argument is rather upon the appellants' saving than their maintenance at public expense. As, however, Lord Bridge of Harwich observed in *Hussain v New Taplow Paper Mills Ltd* [1988] 1 AC 514, 527:

> "This dichotomy [between the two questions identified by Lord Reid in *Parry v Cleaver* [1970] AC 1, 13, namely, first, what did the plaintiff lose as a result of the accident i.e. what sums will he no longer receive and, secondly, what has he in fact received which he would otherwise not have received], however, must not be allowed to obscure the rule that prima facie the only recoverable loss is the net loss."

106. By the same token that as the result of an accident the claimant may have received sums for which he must give credit against his earnings losses, so too he may have been relieved of liabilities for which likewise he should give credit. Of course, were an injured claimant in fact to be maintained not at public expense but through the benevolence of a sympathetic third party, no credit would fall to be given for any

consequent saving to him. But that is because of the public policy underlying this particular exception to the basic rule. It cannot avail the appellants here.

107. In short, I reject both the appellants' characterisation of this 25% deduction from their earning losses as the taking of credit for the supposed benefits of their being fed and housed in prison and I reject too their contention that it transgresses the principle that it is of no concern to tortfeasors or to courts assessing damages claims (and by analogy assessors determining compensation for miscarriages of justice) how the claimant would have used the moneys lost.

108. Issue 2 concerns the reductions of the (bulk of the) non-pecuniary loss awards (of 25% in Vincent Hickey's case, 20% in Michael's), to take account of their respective "other convictions . . . and any punishment resulting from them" as provided for by section 133 (4A)(c) of the Criminal Appeal Act 1995 as amended.

109. The appellants' complaint here is again at first blush readily understandable. These reductions are very substantially greater than the 10% reduction made by the respondent's predecessor as assessor, Sir David Calcutt QC, in the case of Mr Robinson, another claimant in the same miscarriage of justice case, whose record, moreover, was significantly worse than either of theirs. This looks on the face of it most unfair and certainly I for my part would have had little hesitation in striking down the assessment were it not clear, as I believe it is, why Lord Brennan QC departed from his predecessor's approach, or, indeed, if there appeared no good reason for his having done so.

110. The following paragraph (para 5) from the respondent's determination in Vincent Hickey's case is to my mind critical to the proper understanding of his approach:

> "Having regard to the seriousness of these matters and in particular the robbery at Chapel Hill Farm, I firmly conclude that the non-pecuniary loss award should be subject to a deduction of 25%. This I regard as the very least deduction that can reasonably be made, having regard to his criminal behaviour."

111. There is no question but that the respondent knew full well that he was applying a far larger percentage deduction than Sir David had done in Mr Robinson's case. He was doing so, however, because he did not think that he could reasonably make any lesser deduction consistently with his duty under section 133(4A)(c). It necessarily followed either that he regarded Sir David's 10% reduction in Mr Robinson's case to have been irrationally low or that he was adopting a different approach from Sir David also with regard to the initial non-pecuniary loss assessments i.e. the assessments which then fell to be reduced to take account of the claimants' criminal records.

112. As Lord Bingham has explained, how precisely the assessor should approach his task generally under section 133(4A), and more particularly how he should give effect to para (c), is problematic and plainly worthy of further consideration. Most sensibly perhaps he should have regard to the para (c) considerations once and for all when making the assessment in the first place. But if he chooses to regard para (c) as a discrete provision requiring a separate, second stage determination, then logically he should be making his first stage assessment on the assumption that the claimant had no other convictions whatever and so was suffering much more both from his wrongful imprisonment and from loss of reputation. Were such an artificial first stage assessment to be made in the case of those like these appellants (let alone Mr Robinson) with significant criminal records, it is hardly surprising that Lord Brennan brought deductions of at least 20% (in Michael's case) and 25% (in Vincent's) necessary. This seems, I repeat, a curious and intrinsically unsatisfactory approach to the non-pecuniary loss assessment. Better far, one might think, that a single overall assessment be made to take account of all the relevant factors. That, however, is not presently an issue before the House and the decision is not impugned on that basis.

113. The fact is that, without knowing precisely how each assessor approached the first stage of their respective non-pecuniary loss assessments, it is impossible to say whether or not there is any real inconsistency between their final awards. The respondent's deductions are not in themselves impugned. No basis is accordingly established for interfering with them.

114. For these reasons together with those given by Lord Bingham I too would dismiss this appeal.