ARE MODERN AWARDS FOR DAMAGES FOR PHYSICAL INJURIES BECOMING EXCESSIVE?

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IN a recent case in New South Wales, the Chief Justice of that State in giving judgment in the Full Court on an application for a new trial said, "For some little time, circumstances have limited the press in the matter of publishing reports of cases decided by juries, and generally speaking, only those have been reported, usually with arresting headlines, in which the verdict has been of a spectacular nature. It may be that jurors reading only in recent months of these particular types of case have confused the sensational instance with the normal standard, and have set for themselves a new and extravagant standard not warranted by that which prevailed in the past, even after making due allowance for the change in the purchasing power of money."[1]

In that instance, the Chief Justice was speaking of verdicts given by two juries in awarding damages for personal injury.

The immediate reaction to the dictum was the reiteration in a current law journal of an oft-repeated recommendation that a jury should determine liability and a judge the quantum of damage.[2]

This recommendation, however, should be contrasted with certain decisions of the Court of Appeal where that court recently has altered awards made by judges.[3] In the course of giving judgment on one of these cases in 1951 Lord Justice Birkett said, "The assessment of damages in case of personal injuries is perhaps one of the most difficult tasks which a judge has to perform. . . . The task is so difficult because the elements which must be considered in forming the assessment in any given

1. *Commissioner of Road Transport & Tramways v. Vickery and the same v. Cullinan* (1952) 69 W.N. (N.S.W.) 154.
2. 26 A.L.J. p. 194.
3. *Bird v. Cocking & Sons Ltd.* (1951) 2 T.L.R. 1260. *Rushton v. National Coal Board* (1953) 1 All.E.R. 314. *Stewart v. War Office* (1951) C.L.Y. 888.

case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements."[4]

It should also be contrasted with a decision of a Court of Appeal[5] which in 1951 ruled that in a case of serious damage by personal injury where liability was admitted, the question of the quantum of damages should be tried by a judge and jury rather than be assessed by a master. It should be remembered that in England since 1933 the right to a jury in an action for personal injuries has been abolished. A party has the right to a jury in a restricted number of cases, but in negligence and similar claims for personal injury, a jury is only given at the discretion of the Court.[6] It also is interesting to note that in the same case, Singleton L.J. was of opinion that in cases of grave damage, the damages should be assessed by three judges, not one, in the King's Bench Division.

Having made these preliminary observations as a justification, or at least an apology, for what is to follow, it is submitted that the question of awarding damages for personal injuries is an important problem which should engage the critical attention of lawyers, medical practitioners, and generally those who are interested in current social problems. The subject therefore will be examined from these three aspects—the legal, the medical and the social.

At the outset it should be borne in mind that before a plaintiff goes on to obtain damages in an action, he must first show that the defendant is a wrongdoer in the relevant legal sense, and that in consequence of his wrongdoing he suffered personal injury. The most common action at these times, is one for damages for personal injuries caused by negligence on the highway. But it should be remembered that the rules in law governing awards of damages in such actions apply equally to other actions, e.g. an action for injuries suffered by a plaintiff who after dark should come to a householder's residence to woo the householder's domestic servant and should fall over an unlighted lawnmower carelessly left by the householder in his sideway,[7] or by a surgeon's patient who alleges and proves

4. *Bird v. Cocking & Sons Ltd.* (Supra) at p. 1263.
5. *Milliken v. Smith* (1951) W.N. 422. Cf. Wragge v. Downard (1938) V.L.R. 353.
6. Hope v. G.W. Ry. Co. (1937) 2 K.B. 130.
7. Cf. Lipmann v. Clendinnen (1931) 46 C.L.R. 550.

to a jury's satisfaction that the surgeon carelessly left a piece of rubber tubing in the patient's throat during a thyroidectomy.[8]

There is, however, one common characteristic of all these defendants—namely, that a tribunal of fact has found in the circumstances that each of them owed a duty to the plaintiff, that the defendant committed a breach of that duty, and that as a result of such breach the defendant was a wrongdoer. There is a maxim of the law that everything is presumed against the wrongdoer.[9] One would suppose, therefore, that the plaintiff having established the wrongdoing of the defendant his task would be lightened by having the benefit of this presumption in assessing his damages. In various American States, the presumption has apparently been applied in actions for negligence.[10] In England and this jurisdiction, there is still an insistence upon proof of damage suffered by the plaintiff. Possibilities and probabilities as such of the future condition of a plaintiff may be given in evidence by the expert witnesses but the final onus is still on the plaintiff to prove his damage.[11] He cannot shift or lighten that burden of proof by any presumption in his favour.

The plaintiff's task in order to succeed is to show that the personal injury suffered by him was caused by the wrongdoing of the defendant and to call evidence of the nature of his injury and the consequences of it, certain, probable or possible. He is entitled to recover his actual expenses and pecuniary loss to date of trial. These are easily ascertainable, and generally cause litigants in personal injury cases very little difficulty. From the mathematical precision of assessing such expenses, however, the law as it functions at present then plunges the litigants into a morass of uncertainty in the assessment as to what are called general damages.[12]

What guidance does the law give a tribunal of fact to assist in making the correct assessment of general damages?

8. Hocking v. Bell (1948) 75 C.L.R. 125.

9. Armory v. Delamirie (1722) 1 Strange 504, Wilson v. Northampton Ry. Co. (1874) L.R.9 Ch. App. 279 at p. 286.

10. "While damages must be reasonably certain and the burden of proving damages rests in a general sense upon the plaintiff, yet if through no fault of his the precise damage cannot be accurately determined, the wrongdoer must bear the burden of that difficulty." Shearman and Redfield on Negligence, p. 1885.

11. Bonham-Carter v. Hyde Park Hotel (1948) 64 T.L.R. 177 at p. 178. Carslogie S.S. Co. v. Royal Norwegian Govt. (1951) 2 T.L.R. 1099 H.L.

12. Pamment v. Palewski (1949) 79 C.L.R. 406 at p. 408.

In my submission, any guidance is of no practical value and a reference to the summing up of Mr. Justice Field set out in the report of the well-known case of *Phillips v. London & S.W.R. Co.*[13] shows the bankruptcy of legal rules to assist. Based traditionally upon the direction in that case a jury is generally told with respect to general damages—

(*a*) that it can compensate for pain and suffering past, present and future;
(*b*) that it can compensate for loss of amenities and general disability, past, present and future;
(*c*) that it can compensate for probable loss of earnings brought about by the permanence or otherwise of the disability;
(*d*) that the plaintiff can only come once;

any award therefore must take into account all contingencies. If the plaintiff is given too much because of alleged probability which, although proved in evidence, never eventuates, the defendant cannot come back to court to recover the surplus. On the other hand, if the plaintiff is given too little because the jury does reject a probability which does eventuate, he cannot come again and ask for more damages.

In addition to a reference to these rules, the judge may also these days possibly refer to the reduced purchasing power of money as a proper matter for consideration.[14]

Finally, he might inform the jury that it must not be overgenerous with the defendant's money or too niggardly to the plaintiff, but the jury should award the plaintiff full compensation for his injuries. It cannot be perfect compensation, he would probably add, as it is an impossibility to commute the nature of the physical damage into pounds, shillings and pence, or to "measure the immeasurable".

If the judge were the tribunal of fact to make an award he would direct himself along the same lines, probably not with the same detail. Nevertheless, the rules he would apply are those set out above.

Let us examine then these directions a little more closely and consider the task of the tribunal called upon to apply the rules. The first head for an award of damages is pain and suffering, past, present and future. In 1900 Lord Halsbury, no

13. (1879) 5 Q.B.D. 78.
14. Glasgow Corporation v. Kelly (1951) 1 T.L.R. 345. H.L.

doubt affected by well-known theological and philosophical doctrine,[15] said, "Take the most familiar and ordinary case: how is anybody to measure pain and suffering in moneys awarded? Nobody can suggest that you can by arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident. In truth, I think it would be very arguable to say that a person would be entitled to no damages for such things. What manly mind cares about pain and suffering that is past? But nevertheless the law recognizes that as a topic upon which damages may be given."[16] Animal pain may pass, but human anguish from the emotional or psychological upsets associated with injury may linger. Whether it be physical pain or human suffering, the law must admit of a subjective approach only. Pain and anguish must vary with individuals according to their characteristics, and to postulate that £x given by one tribunal is either too high or too low is a direct appeal to the intellectual arrogance of the superior critic. Unfortunately, as we shall see that is the very task that Courts of Appeal are called upon to perform.

The next head for an award of damages is for the loss of amenities and general disability due to the injury. Here again, the tribunal which is charged with assessing damages is called upon by the law to carry out an impossible task. If a plaintiff is a youthful footballer who loses a leg, it can be urged with some justification that he loses something in his recreational field. On the other hand, by his losing a leg and being fitted with an artificial leg, he might turn his attention to other fields of sport, bringing with it a success which no one at the time of the trial could have prophesied. Again, he might die prematurely either as a result of the accident or otherwise, and his disabilities will be for a very limited period.[17] Such contingencies would be pointed out to a jury and it is charged to bear these in mind in making its award. But how perplexed the members of the jury must be after such direction. Similarly, a judge who directs himself as a tribunal of fact on such matters must be no less disturbed by the conflicting hypotheses that

15. See for example, *The Problem of Pain,* by C. S. Lewis; *The Way of Suffering,* by Leslie Kingsbury.

16. The Mediana (1900) A.C. 113 at p. 116.

17. See Harris v. Brights' Asphalt Contractors (1953) 1 All.E.R. 395.

could be put forward. He could never be certain which were the decisive factors in the plaintiff's future condition, however eminent the opinion being pressed on him.

Finally, the third head of damage is compensation for loss of earning capacity caused by the injuries. Once more, this must vary with different plaintiffs. Talents, physique, training and all the various factors that affect employability differ with individuals, and the effect of injury upon an individual is conditioned considerably by the presence or absence otherwise of these factors. Thus the loss of a limb to an unskilled labourer of mature age and working as a wood-chopper would be much more serious a thing than to a barrister. The earning capacity of the latter may be quite unaffected; on the contrary, his earnings may very well increase by his enforced physical inactivity leading to a more intensive study of his books.[18] The wood-chopper, on the other hand, may be compelled to rearrange his life to eke out his livelihood.

It is true that the determination of an amount under this head is much closer to reality than under either of the other heads, but even here there is great room for difference of opinion.[18] The plaintiff's earning capacity in the past has been valued in terms of money by his salary or wages, or by earnings in his vocation.

Unfortunately, however, no hint is given of what amounts are given by the jury under each head. Judges sitting as the tribunal of fact sometimes give particulars of how they arrive at their awards. Frequently, however, they also do not descend to particulars, and give a global award.[19]

From the foregoing examination of the rules thus far, the following propositions may be stated:

(*a*) "The courts have been compelled by the logic of circumstances to decide that their only possible course in cases of personal injury is to award damages in money."[20]

(*b*) Because of this necessity of doing so, a tribunal of fact is left practically at large to transmute the imponderable factors referred to into terms of money;

18. See Billingham v. Hughes (1949) 1 K.B. 643. C.A.

19. e.g. Haygarth v. Grayson Rolls & Clover Dicks (1951) 2 Lloyd's R. 185 C.A.

20. per Birkett L. J. in Rushton v. National Coal Board (1953) 1 All.E.R. 314 at p. 317.

(*c*) The loss is essentially subjective to the individual plaintiff and subject to what will be said hereafter no criterion or standard has been or can be laid down for the use of the tribunal of fact;

(*d*) Unscientific though it must be admitted to be, the litigants and the community at large must rely solely on the good sense and inate qualities of justice possessed by the tribunal of fact to hold the scales of justice evenly between the plaintiff and the defendant.

Passing on from these propositions, it should be observed that despite the note of despair expressed above, the law has in other forms of action called on judges and juries to assess damages with no more real assistance as to quantum than in cases of personal injury. Indeed, in cases of the invasion of incorporeal property rights and of attacks upon reputation or dignity, the rules of law for assessment of damages afford no greater mathematical certainty.

From the seventeenth century it has been recognized that despite the rule that juries have a large measure of discretion in awarding damages in actions for tort, their actions can be and are controlled by the Court. In 1697[21] Lord Holt C.J. remarked that the jury thought "they had an absolute despotic power" but he rectified that mistake by ordering a new trial. In 1763[22] another Chief Justice said, "The few cases to be found in the books of new trials for tort shew that Courts of Justice have most commonly set their faces against them and the Courts interfering in these cases would be laying aside juries".

In 1774[23] the rule for granting a new trial in an action of tort was stated: "The damages must be excessive and outrageous to require or warrant a new trial".

The modern rule of control by Courts of Appeal has evolved from the earlier cases and can be enunciated in the words of Viscount Simon speaking in 1951 for the Privy Council as follows:[24] "Whether the assessment of damages be by judge or a jury the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have

21. Ann Ash and Lady Ash (1697) Comber. 357.
22. Strakle v. Money (1763) 2 Wils. 205.
23. Sharpe v. Brice (1774) 2 Wm. Blackstone 942.
24. Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601 at p. 613.

awarded a different figure if it had tried the case at FIRST INSTANCE. Even if the tribunal of first instance was a judge sitting alone then before an appellate court can properly intervene it must be satisfied either that the judge in assessing the damages applied a wrong principle of law (as by taking into account some irrelevant factors or leaving out of account some relevant one), or short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. Flint v. Lovell 1935 K.B. 354 approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries (1942) A.C. 601. The last-named case further shows that when on a proper direction the quantum is ascertained by a jury, the disparity between the figure at which they have arrived and any figure at which they could properly have arrived must to justify correction by a Court of Appeal be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly out of all proportion."

From this dictum it can be seen that an appellant has a very heavy onus cast on him in the Court of Appeal to upset the finding of the tribunal of fact on the quantum. Despite such discouraging burden, the reports of courts in various parts of the Common Law countries show that appeals are still being brought to upset awards either by judges or juries on the ground that the assessment is erroneous. This applies equally to awards for damages for personal injury, and hence one is justified in asking the question: Are such awards becoming too high?

What standard does one adopt to say they are too high? If an award is "inordinately high" or "inordinately low" it must have regard to some hypothetical figure £x. Again, one must remember that an award of damages is a global award, and the components frequently are not indicated. Unless indicated, each part can be only a matter of speculation. The Court of Appeal when it is faced with the task of determining whether an award is too high is compelled to compute what the inferior tribunal assessed for—

(a) pain and suffering;
(b) loss of amenities; and
(c) loss of earning capacity.

In two recent cases it has been suggested by the Court of Appeal that the court is entitled to look at other awards in

similar cases of injury as a guide. "It is useful to look at comparable cases," says Lord Justice Birkett in the later of these cases, "to see what other minds have done and so gather the general consensus of opinion as to the award which an injured person in the present state of society ought to be awarded."[25]

If one might say so, there is very little in the report of the case[26] to show precisely why the Court of Appeal reduced the judge's award of £10,000 damages for an injury which was described by a member of the court as "a dreadful one. It is the worst case of the loss of an arm that anyone has ever encountered,"[27] In this case the plaintiff, a healthy, strong man, had been a loader at a colliery, and whilst carrying on his work tripped, fell, and his right arm coming into contact with a moving conveyor belt, was torn away from his body. The primary judge regarded the injury of such a serious nature that he awarded £10,000 damages, of which only £83 was special damages.

In reducing the damages to £7,000, one must assume that the Court of Appeal regarded the award as out of line with awards being made in England in 1953.

Lord Justice Romer points out that in effect the Court was being asked "to measure the immeasurable because . . . damages cannot constitute actual compensation whether £50,000 or £100 is awarded, but the principle has been adopted . . . of trying to compensate a person in the plight of the plaintiff by awarding what might fairly be described as notional or theoretical compensation to take the place of that which is not possible, viz. actual compensation. The Court should apply that principle with some degree of uniformity so far as possible. I say 'so far as possible' because nothing in the nature of any rigid classification can be achieved when one is dealing not with fact, but with theory. The only way to achieve anything approaching a uniform standard is by considering cases that have come before courts in the past and seeing what amounts were awarded in circumstances so far as may be comparable with the case the Court has to decide."[28]

One should not be unmindful that the approach of the Courts of Admiralty in salvage awards is similar to that suggested

25. Bird v. Cocking & Sons Ltd. and Rushton v. National Coal Board (ubi supra).
26. Rushton's Case at p. 317.
27. per Singleton L. J. in Rushton's Case at p. 316.
28. *Ibid* at pp. 317-8.

by the Court of Appeal in those two personal injury cases. So uniform have the salvage awards become that a member of the Statistical Society in London after a study of awards given over a period of twenty years was able to discover a mathematical quantification of each of the non-arithmetical factors which in law was a relevant consideration in such awards.[29] Whether one could ever hope to arrive at such uniformity with respect to damages for personal injuries seems to be highly problematical and the criticisms of such an approach are obvious.

First, in a recent case, Dixon J. as he then was, pointed out, "The diminishing purchasing power of money has robbed the traditional standards of past experience of much of their value as a test."[30] Secondly, the subjective nature of the plaintiff's case makes no two cases really comparable. What is to be compared? The loss of the limb or other injury, the age, training, talents, the adaptability and characteristics of each plaintiff? The circumstances of each accident with its obvious emotional background? The employability of each plaintiff? And so on! From one's reading, the tendency seems to be to compare only the injury suffered, but this leaves out of account many factors that would determine the award. Thirdly, while we have juries, are we going to have in the future the spectacle of a barrister addressing a jury and drawing comparisons between this and some other case where no one in court but he was present and the jury awarded £*y*? Fourthly, is a Court of Appeal going to draw its code of suggested amounts and if the verdict is either above or below the amount in the code will it order a new trial? The only practical manner in which such method can be applied is by a hearing before a judge alone.

From the foregoing examination of the legal concepts applicable to such actions can it be said as a matter of legal principle that verdicts are becoming excessive? My submission is that having regard to human experience and the relevant legal principles, no one can generalise from a few startling cases which are given publicity in the newspapers that in law verdicts are becoming excessive. The want of some commencing point is always a great disadvantage to the critic, and the human mind with all its ingenuity has been unable to devise or formulate a rule by which exact measurement can be postulated. The critic therefore on unsubstantial foundations must induce his audience

29. "The Assessment of Salvage Awards" by Charles T. Sutton.
30. Pamment v. Palewski (ubi supra) at p. 411.

to commence with a hypothetical figure which can brook of no criticism as being too high or too low. In that hypothetical figure he must include several items which mathematically are immeasurable. Assuming he reaches such a figure, then the disparity between the figure and the amount awarded should be so great as to raise the inference that no reasonable man could possibly have arrived at the figure of the award. If the critic reaches such a conclusion with valid reasoning, then of course the law helps him by granting him a ground for a new trial. On the other hand, if he fails to show manifestly the correctness of his submission, and the guilty defendant is left to satisfy a very large award of damages, then I venture to repeat what was said by Sir Lancelot Shadwell over a century ago: "The general wisdom of mankind has acquiesced in this: that the author of a mischief is not the party which is to complain of the result of it, but that he who has done it must submit to have the effects of it recoil upon himself."[31]

It must now be apparent that since the approach to the question of compensation for personal injury is essentially subjective, awards of tribunals must, of necessity, be conditioned upon the evidence called before them. In this regard the medical profession must and does play an important part in the administration of justice. The medical expert cannot assist the court to overcome the difficult task of measuring the immeasurable. He can, however, take the various elements upon which computation is based, and by his opinion give the court the most accurate picture of the plaintiff's condition. Emphasis has been made over the course of the years of the importance of medical evidence in law courts and it is not intended to traverse again the subjects which more eminent persons have already discussed in this Society. It is only in relation to its effect upon the quantum of the verdict or the judge's award that I desire to speak.

A plaintiff is entitled to call evidence of his future condition, either as a matter of certainty, or as a matter of probability, or as a matter of possibility. From a position of comparative certainty, the admission of evidence of probabilities and possibilities can plunge the litigants once more into a phase of uncertainty. It is in respect of the prognosis that the medical expert has a real and live responsibility to the court, because in the end it is the opinion he expresses about the plaintiff's

31. Leeds v. Amherst (1850) 20 B.239 at 342.

future which will generally determine the verdict. In this regard, laymen, and incidentally many lawyers, are ignorant of the technical language used, are ignorant of the advances by medical science with respect to such subjects as manipulation, mechanical aids, etc., and it is therefore necessary for the medical witness to be both informative and understandable.

Patent permanent disabilities, such as loss of a limb, can be readily perceived and the court can conjure up for itself the effect of the injury on the plaintiff's future enjoyment of life. But unless assisted by being informed fully as to what remedial action can be given to the plaintiff, it may come to an erroneous conclusion as to the disability. Unfortunately, such subjects as osteo-arthritis and post-traumatic epilepsy cause a good deal of uncertainty and difference of opinion between medical witnesses called in the same case. In consequence, it is not an uncommon thing to hear Counsel, in cases where these sequelae are alleged, in their final addresses to juries assert that once again we have doctors disagreeing. It may be at this stage of medical learning that there can be no agreement on such subjects. While there can be a disagreement between medical witnesses as to the possible onset of the physical disabilities set out above can a tribunal of fact be condemned for giving the plaintiff an award which it thinks just, having regard to the most pessimistic prognosis given in evidence? Incidentally, medical men should not condemn verdicts which are given publicity in newspapers, e.g. this week an award of £6,000 was made for what was described as removal of a patella. Inquiries from Counsel engaged in the case showed how wrong was the description.

Even if the prognosis given in evidence is the most accurate that human experience and the present state of medical knowledge can achieve and the award therefore is based upon as solid foundation of fact as it is possible to get, yet there are many kinds of injury which because of their nature must add an important element of uncertainty into a jury's verdict. The examples which readily spring to mind are disfigurement of the plaintiff or any kind of injury that has a concurrent history of psychological or emotional upset.

Under each head of general damage set out above, the medical witness can undoubtedly lend his aid, even if he cannot remove the element of uncertainty. The allaying of pain and suffering and the provision of substitutes to overcome the physical disabilities, thereby affecting the plaintiff's employ-

ability and his enjoyment of life, are the constant care of the medical profession. It is needless to give examples of how the advances in medical knowledge can and do affect the tribunal's opinion of the plaintiff's future. It is sufficient to say that the medical witness in an action can greatly affect the result by giving the court full information on the advances made in medical knowledge. Incidentally, he should make no assumption as to the knowledge either of Counsel who is calling him as a witness or of the court before whom he appears. He should if possible make certain they are properly informed.

From this very cursory examination of the influence that the medical profession can exert in the assessment of damages, one cannot but be impressed by the view that, as in all litigation, so in cases of personal injury there must be a great element of uncertainty in the proof of facts which must finally reflect itself in the varying awards given in such cases. Furthermore, with the very best medical evidence in the world, one cannot remove the inherent weakness in our system of attempting to measure in terms of money something which is incapable of being so translated.

This brings one to the social aspect of the problem. Are there any factors in society generally which may affect an award? It cannot be denied that the present economic state of the community may very well do so. In the first place, it is now well established by authority that the changing purchasing power of money is a proper matter for consideration. An award of £3,000 to-day may very well be said to be equivalent to an award of £1,000 in 1939. Secondly, if one were to adopt the approach of comparable assessments and one were to take the awards in England and compare them, for Victorian purposes, then in fairness, and as a matter of logic consistent with the last preceding rule, the tribunal should increase such awards by twenty-five per cent to allow for the difference between £Sterling and £A. To show the limits to which for the purpose of argument these views may be pushed, let me cite to you the case of *Heaps v. Perrite*[32] where a Court of Appeal in 1937 upheld an award by a judge of £10,000 damages to a boy who at his work had lost two hands. Translating that award in 1937 into a 1953 award in England, with the difference in purchasing power of the £E, the award should be about £20,000–£25,000, that is, if mathematical precision is to be used in applying the rule on

32. 1937 2 All.E.R. 60.

the deflated value of the currency.[33]. Converting the English award into a local award, this figure could very well reach £A25,000 to £A30,000. The newspapers would immediately seize upon the verdict as a "record" and the successful barrister's name would be linked with such international record-breakers like Ben Hogan or Don Bradman. Above all, it would be a lively topic of conversation in the legal profession as to whether or not the plaintiff could hold his verdict in the Full Court.

There is one other interesting feature in Heaps' case if I may digress to mention it. It was urged in that case that the plaintiff had been awarded a sum which would exceed the sum he might ever earn. This view was rejected broadly on the ground that conceding that the plaintiff had more money than he was ever likely to earn, yet he had suffered a grievous injury with a consequential loss in the enjoyment of living for which he was entitled to full compensation.

Besides these economic factors there are, however, many social factors which otherwise must affect assessments of damages. In particular, the industrial development and the increased mobility and density of transport throughout Australia have made the risk of injury and in particular of very grave injury much greater for each individual in the community. To illustrate the incidence of risk let me remind you that in 1900, ten people lost their lives on roads throughout the Commonwealth. In 1925, this figure had increased to 517; and by 1950, to 1,783. In 1951 (the latest figures available to me) there were 63,566 reported accidents on the road in which 1,986 were killed and 37,649 were injured. Allowing for an increase in population since 1900, the figures are nevertheless indicative of the increased risk on roads.[34]. Similar statistics of industrial accidents would also show the same pattern.

The consequence of these changes in our social life have necessarily been reflected first, in a great increase in the number of cases brought as a result of these accidents, and secondly, a consciousness that something must be done on a community basis to alleviate the evils resulting from such accidents.

The State has by legislation attempted to remedy the evil by two methods, first to control the conduct of people in factories and on highways by statutory regulations, and secondly,

33. This is doubtful. See Bird v. Cocking & Son (ubi supra). See the use made of Heap's Case in Bird v. Cocking (ubi supra).

34. Statistics by courtesy of Australian Road Safety Council.

by enforcing a scheme of insurance of defendants, so that successful claimants will have their demands satisfied. The knowledge of such insurance has undoubtedly had profound effects, and if I might say so with respect, not only on juries but also judges.

It is common to hear the criticism that juries are or have been greatly affected by the knowledge that it is not the defendant but the insurance companies that have to pay. The real point of this criticism is that sympathy for the injured plaintiff will colour the jury's judgment to give a verdict for the plaintiff on the issue of liability despite strong evidence to the contrary. Further, it must be admitted that with such knowledge of insurance, the jury is not inhibited with any feeling of injustice they might do to the defendant if they make a large award against him. But for myself I do not believe that juries have become so irresponsible of their duty to do justice between the parties as to make the quantum of their assessments inordinately high. Members of juries, no less than judges, are well aware that if their verdicts are large, the premiums payable by them as members of the community must be increased.[35] Now and then there are startling verdicts, not so much in this State as in New South Wales, but from one's reading it would appear that these have been speedily dealt with by a new trial application. Generally speaking, however, and I speak only of experience in this State, attacks in Courts of Appeal on awards of juries on the ground of excessive damages are only with respect to a very small percentage of verdicts taken.

In Australia in the only two recently reported cases in the High Court this session the awards of judges have been attacked on the ground, not of over-generosity to the plaintiff, but of inadequacy of the amount.[36] By contrast in the United Kingdom over the last four years there are some five cases reported of attacks made on the awards by judges on the ground that the amount awarded was excessive. The Courts of Appeal have reduced these determinations on the ground that the awards have been inordinately high.[37]

35. See Heaps v. Perrite Ltd. (ubi supra) at p. 61.

36. See Transport Co. v. Watson. Pamment v. Polewski (ubi supra). Cf. McBride v. A. Shipping Ltd. (1939) 82 Ll.L.R. 715. Stewart v. War Office (1951) C.L.Y. 5888.

37. Gresham v. Teccalamit (1948) W.N. 452. Billingham v. Hughes (ubi supra). Purdec v. William Allen & Sons (1949) S.C. 477. Bird v. Hocking (ubi supra). Rushden v. Nat. Coal Board (ubi supra).

To complete the picture, it should also be pointed out that there has been quite recently, in 1951, a decision of the High Court which ordered a new trial on the ground that the verdict of a jury was inadequate for injuries suffered in a road accident.[38] In this case, the jury awarded £475 damages, including £165 special damages. The plaintiff was a motor cyclist aged 21 years who collided with a motor car whereby he suffered three fractures and a comminuted fracture of the jaw thereby allegedly affecting his mastication and speech. There was some evidence of a congenital condition of deformity of the jaw prior to the accident. The Full Court in New South Wales refused an application for a new trial by the plaintiff on the ground of inadequacy, but the High Court, consisting of five judges, was unanimously of opinion that a new trial should be had on the ground that the sum awarded bore no reasonable proportion to the serious personal injuries suffered by the plaintiff. As plaintiff's Counsel suggested that the verdict may have been a compromise, he asked for and was granted a new trial at large.

In the course of a joint judgment, Dixon J., Williams J., Webb J. and Kitto J. said[39]: "The assessment of damages is peculiarly within the province of the jury. There is no definite standard by which they may be estimated and the considerations which govern the assessment are little else than guides for the reasonable exercise of a discretionary judgment founded upon experiences of daily life and ordinary affairs."

This dictum is earnestly recommended for the consideration of all critics of awards for personal injury. For those who in particular criticize the verdicts of juries, my submission is that the best mouthpiece to express what judgment should be founded "upon experience of daily life and ordinary affairs" are members of the community chosen indiscriminately therefrom. Lawyers may desire to obtain uniformity of awards, but such uniformity because of the very nature of the action will lead in my submission to graver injustice. If some rule of thumb is to be worked out for categories of physical injury, then such method will overlook many elements of compensation.

On the other hand, laymen fully responsible of their duty, untrammelled by any such notions of uniformity or tabulating injuries are more likely to translate the anguish and suffering of a plaintiff into a money value. It will certainly be one that

38. Coates v. Canter (1951) A.L.R. 543.
39. *ibid* at p. 545.

most plaintiffs can appreciate at any rate. Remember, the successful plaintiff is the innocent party[40] who, in many cases, has suffered a dire injury. When he retires from the court he should receive as full compensation as human ingenuity can grant. A perfect compensation he cannot obtain by force of circumstances, but at least, the community requires that he should be compensated for his misfortune so far as money can do so. It is submitted that the voice of the community will be more coherently expressed through members of a jury.

To those who assert that the discretion of assessing the quantum should be given solely to judges, one might very well ask—why? It is dangerous to argue to the general from the particular, but let me cite the case of *Wragge v. Downard*,[41] where a justice of our Supreme Court heard an action by a plaintiff, a passenger in a motor van, against two defendants, one being the driver of the van, the other the driver of another vehicle coming in an opposite direction. The vehicles collided on a main highway on a bend, about the centre of the road. Each defendant alleged the other was on his wrong side. The plaintiff could not assist one or the other very much, and after hearing the two defendants the learned judge was unable to say which story he believed. He therefore referred the following issue to the jury: "Was the injury suffered by the plaintiff caused by the negligence of both or either of the defendants?" One of the defendants then appealed to the Full Court and applied to the High Court for leave to appeal to have this order set aside. Both applications were refused, and a jury then heard the issue. The jury disagreed, and an unofficial check afterwards suggested it was evenly divided—three to three. This example serves to justify the judge's original opinion, but also it points to the fact that the corporate mind of a jury often moves along similar lines as that of a judge. The reason for this is obvious. After addresses from Counsel and a direction of a judge, six reasonably intelligent men should be able to grasp the nature of the task they are called upon to perform.

From my own experience I have never been surprised by the quantum of damages assessed by a jury in any action in which I have appeared, as being either inordinately high or

40. In view of the Wrongs (Contributory Negligence) Act this is not now strictly accurate.

41. (1948) V.L.R. 353.

inordinately low. This is corroborated by discussion with other members of the Bar who are constantly practising before juries. It is not surprising therefore that I do not recommend any change in our tribunals to assess quantum. If any of the litigants desire a jury in a personal accident case, the litigant should be given such tribunal as one eminently fitted for the task. I venture to repeat what I said in another place. The jury is probably the most coherent medium for the expression of the community view on what is or is not reasonable compensation for bodily injuries. On the other hand, if the parties jointly desire a judge to make the assessment, then equally they should be entitled to that forum, not on the ground that it is superior to a jury, but rather because the parties themselves in that particularly action have greater confidence in it.

The only valid argument for judges assessing damages is that greater uniformity may be given in awards. It has never been conclusively shown that there is a lack of uniformity in jury verdicts. The criticism has been that they have been too large. That criticism comes generally from those whose business it is to indemnify guilty defendants, and therefore, must be suspect. As already stated, however, it is submitted that any attempt at uniformity may very well defeat the ends of justice which require a tribunal assessing damages to give full compensation to the plaintiff for his own personal injury and its consequences to him, not for an injury comparable to that suffered by *X* who was awarded £*y*.

What conclusions are to be drawn from this rather ponderous approach to the rhetorical question asked in the title to this paper. It is submitted—

(*a*) The relevant legal principle and the nature of the facts and the evidence thereof make the task of any tribunal to assess damages a difficult and uncertain one;

(*b*) Modern social conditions have made us reconsider our previous views on what is and what is not a large sum of money. The present prices of ordinary household necessities, of dwelling houses and of motor cars, the extraordinary increases in the basic wage, fares, rates and not least of all, income tax, have numbed our old ideas of money. At the first impact we were shocked by the amount of each of these items, but with the passage of time we are becoming inured to them;

(*c*) In the same way, courts consisting either of a judge alone or a judge and jury have reacted to these social changes with the result that there has been an undoubted increase in awards of damages for personal injury cases. But in relation to the general purchasing power of money, no one with a knowledge of the factors controlling awards can properly attack them as unreasonably excessive. Indeed, if as reasonable beings, the critics can show such an excess in an award, then there remains the corrective power of superior courts to control the matter. But it is significant that this power is invoked so rarely, and when invoked is more rarely acted on by the court.

What recommendations can be suggested to correct any of the evils that we have discovered this evening? Obviously, the first inquiry thereon is, do we retain the present principles of law and methods of proof in assessment?

If the answer is in the affirmative, then the only useful recommendation I would suggest is a reform in procedure whereby juries, like judges, should in making their assessment be compelled to give it at least under three heads, viz.—

(*a*) Special damages;
(*b*) Pain, suffering and loss of amenities; and
(*c*) Loss of future earnings.

By such method a greater control could be exerted by the superior court on the verdicts. There would be less speculation as to how the jury arrived at its verdict. Again it may afford some useful information to those who through empirical study may attempt in the future some code of uniformity in fixation of awards. On the other hand, my submission is that the results of such method would justify the views I have been making about the jury's work in this sphere.

If my submission, however, should be wrong, then there will undoubtedly be a spate of applications for new trial, and it will afford the best evidence to those who criticize the jury system to have the assessment of damages made by a judge. At least, it will either confirm the confidence in the present system of verdicts or give very good reasons for a change.

If the answer to the question be in the negative, I would suggest in a shorthand manner for consideration of this Society the abolition of some or all uncertainty for the injured party

by having him insured, instead of the guilty defendant. At the present time a lump sum is handed over by the guilty defendant's insurers to the plaintiff which may or may not be the present value of proper compensation and which he may quickly dissipate to become a charge on the community. Motor car owners and employers now pay a large premium fund to insurers to pay the awards to successful plaintiffs. The Commonwealth Government pays a large sum of money by way of sickness or unemployment allowances to injured persons, other than successful plaintiffs. It is not a very great task for human ingenuity that the one system be coalesced into the other, so that an innocent injured person will get a pension each week equivalent to his actual loss, in lieu of a lump sum therefor, together with a capital sum as solatium for his pain, suffering and loss of amenities and shortening of his life. The latter lump sum would tend to become more uniform if a man's future was rendered secure by an award of so much per week. The guilty injured party is anyhow a charge on the community. If one is to retain the distinction between innocent and guilty injured parties, such distinction can be reflected by a full as near as perfect weekly compensation for the innocent, and the standard weekly sickness-unemployment allowance for the guilty. The difficulties I anticipate in such a recommendation are first, the compensation for the permanently partially incapacitated, secondly, the unholy consequences of constitutional severance of powers, and thirdly, if one is to take any notice of the article in to-night's paper on this issue, then I am, God forbid, suggesting the creation of another government department.