A NEW APPROACH TO COMPENSATION FOR NON-PECUNIARY LOSS IN AUSTRALIA

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[*This article critically examines the present procedure adopted by the Australian courts in assessing damages for non-pecuniary loss in personal injury claims and suggests that a comprehensive legislative scheme combining two related but different srategies should be enacted in order to better promote consistency, uniformity and fairness between cases as well as encouraging rehabilitation and settlement negotiations. The author argues that justice would be best served by the introduction of a statutory upper limit on awards for non-pecuniary loss coupled with a guideline of average figures for specified injuries and the loss of specified faculties. It is argued that reference to a legislative tariff (with an overriding ceiling) would enable the courts to openly strive to treat like cases in a like manner rather than persisting with futile attempts to reconcile the modern resort to judge-made tariffs with the preserved non-comparability rule and would thus provide a preferable aid to the fair and reasonable assessment of damages.*]

The courts of most Commonwealth jurisdictions have long calculated compensation for personal injury by reference to a conventional range of dollar values for various types of loss.[1] Whilst it is inappropriate if applied to the total sum awarded,[2] this scale or tariff has been viewed as essential in the assessment of the non-economic component in order to promote consistency. It is one of the peculiarities of the law relating to personal injuries in Australia that despite the High Court's repeated opposition to the utilization of a tariff scheme to aid the courts in this task, one has unquestionably developed in this country. Judicial pronouncements over the last twenty years indicate that the divergence between the Australian courts and those of England,[3] Scotland,[4] Ireland[5] and New

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1 This can be largely attributed to the demise of jury trials in personal injury cases. This approach is in contrast to the American experience where the predominance of jury assessments has prevented the development of guides of this nature. Similarly, they have proved to be of limited value in Victoria where trial by jury is still common.

2 See *Thatcher v. Charles* (1961) 104 C.L.R. 57, 71-72 and *Lim Poh Choo v. Camden & Islington Area Health Authority* [1980] A.C. 174, 187.

3 See, for example, *Bird v. Cocking & Sons Ltd* [1951] 2 T.L.R. 1260; *Rushton v. National Coal Board* [1953] 1 Q.B. 495; *Waldon v. The War Office* [1956] 1 All E.R. 108; *Bastow v. Bagley & Co. Ltd* [1961] 3 All E.R. 1101; *Morey v, Woodfield* [1963] 3 All E.R. 533; *Hennell v. Ranaboldo* [1963] 3 All E.R. 684; *H. West & Son Ltd v. Shephard* [1964] A.C. 326; *Jag Singh (An Infant) v. Toong Fong Omnibus Co. Ltd* [1964] 3 All E.R. 925; *Hodges v. Harland & Wolff Ltd* [1965] 1 All E.R. 1086; *Naylor v. Yorkshire Electricity Board* [1968] A.C. 529; *Jones v. Griffith* [1969] 2 All E.R. 1015; *Thomas v. British Railways Board* [1978] Q.B. 912; *Walker v. John McLean & Sons Ltd* [1979] 2 All E.R. 965; *Pickett v. British Rail Engineering Ltd* [1980] A.C. 136; *Lim Poh Choo v. Camden & Islington Area Health Authority* [1980] A.C. 174; *Croke (an infant) v. Wiseman* [1981] 3 All E.R. 852; *Wright v. British Railways Board* [1983] 2 A.C. 773 and *Chan Wai Tong v. Li Ping Sum* [1985] A.C. 446. Note also Cane, P., *Atiyah's Accidents, Compensation and the Law* (4th ed, 1987), 187-192.

4 See *Allan v. Scott* [1972] S.C. 59; *McGregor v. Websters Executors* [1972] S.L.T. 29. Note also *MacShannon v. Rockware Glass Ltd* [1978] A.C. 795 and *Chan Wai Tong v. Li Ping Sum* [1985] A.C. 446.

5 See *Doherty v. Bowaters Irish Wallboard Mills Ltd* [1968] I.R. 277.

Zealand[6] which recognize the justification of some form of comparison of prior awards when deciding questions of quantum, is narrowing. Indeed, the comparative tables and details of sums awarded in personal injury claims set out in the C.C.H. Torts Reporter, Australian Legal Monthly Digest and similar publications[7] are premised on the basis that a comparable approach has prevailed in Australia.

The view that no two personal injury cases are truly comparable and the consequent rejection of the relevance of a tariff approach was advanced for the first time by Windeyer, Menzies and Kitto JJ. three decades ago.[8] The High Court has consistently favoured this reasoning and in 1968 emphatically rejected the suggestion that it adopt the contrary approach in *Planet Fisheries Pty Ltd v. La Rosa*.[9] In the course of dealing with a claim arising out of a motor vehicle accident Barwick C.J., Kitto and Menzies JJ. in a joint judgment stated that:

> It is the relationship of the award to the injury and its consequences as established in the evidence in the case in question which is to be proportionate. It is only if, there being no other error, the award is grossly disproportionate to those injuries and consequences that it can be set aside. Whether it is so or not is a matter of judgment in the sound exercise of a sense of proportion. It is not a matter to be resolved by reference to some norm or standard supposedly to be derived from a consideration of amounts awarded in a number of other specific cases . . . The principle to be followed in assessing damages is . . . not in doubt. It is that the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused. It is to be proportionate to the situation of the claimant party and not to the situation of other parties in other actions, even if some similarity between their situations may be supposed to be seen. What was sought to be done in this case by the appellant's counsel, namely, to derive a norm or standard from a group of judgments of this Court reviewing awards of damages on appeal is erroneous . . . The judgment of a Court awarding damages is not to be overborne by what other minds have judged right and proper for other situations. It may be granted that a judge who is making such an assessment will be aware of and give weight to current general ideas of fairness and moderation. But this general awareness is quite a different thing from what we were invited by Planet's counsel to act upon in this case. The awareness must be a product of general experience and not formed *ad hoc* by a process of considering particular cases and endeavouring, necessarily unsuccessfully, to allow for differences between the circumstances of those cases and the circumstances of the case in hand.[10]

With respect, this statement is inherently inconsistent and burdens the courts with a practically impossible task. Judges cannot be expected to keep up to date with the prevailing 'ideas of fairness and moderation' if they are prohibited from having recourse to comparable decisions of their court or other courts.[11] Indeed,

6 See *Gray v. Deakin*]1965] N.Z.L.R. 234. Note also that the Hong Kong Court of Appeal in *Lee Ting-lam v. Leung Kam-ming* [1980] H.K.L.R. 657 laid down general guidelines as to the amount of damages which should be awarded for various categories of injuries. These guidelines have been followed in a number of cases including the first instance decisions in *Leung Yiu Kim v. Lai Ping Sun* (unreported, High Court of Hong Kong, 27 Oct, 1978) and *Lee Yuk Ying v. Chim Kwok Chuen* (unreported, High Court of Hong Kong, 6 Nov, 1980) and by the Hong Kong Court of Appeal in *Law Sai-leung v. Ho Chai-man* (unreported, 6 Feb, 1985). See the Privy Council's discussion of these guidelines in *Chan Wai Tong v. Li Ping Sum* [1985] A.C. 446. The Malaysian courts adopt a similar practice; see *Liong Thoo v. Sawiyah* [1982] 1 M.L.J. 286. Note also Rhodes, P. F., 'Accident Compensation Reforms: England, Hong Kong and Malaysia' (1986) 16 H.K.L.J. 8, 9-11.

7 See, for example, Britts, M. G., *Comparable Verdicts in Personal Injury Claims* (1973).

8 See *Braunack v. Kuchel* (unreported, High Court of Australia, 23 Nov 1960; noted in (1964) 35 A.L.J. 296).

9 (1968) 119 C.L.R. 118 (hereafter referred to as *Planet Fisheries*).

10 *Ibid.* 124-125.

11 Hutley J. A. in *Vaughan v. Calvert* (unreported, N.S.W.C.A. 28 July, 1977) stated that it was 'beyond [his] understanding' how a judge could perform his function in the manner laid down by the High Court. Cox J. in *Packer v. Cameron* (1990) Aust. Torts Rep 81-007 at 67, 622 went so far as to state that the High Court's reference to 'current general ideas of fairness and moderation' 'must be an allusion to a general knowledge of other cases'.

'there is no rational basis for saying whether a particular award represents over-compensation or under-compensation, except by comparison with other awards'.[12] Attempts to reconcile the attitude of the High Court with the modern judicial approach adopted by most other Australian courts are unconvincing. A gallant attempt was made by Travers and Walters JJ. in *Hirsch v. Bennett*.[13] Their Honours observed that due to the availability of full official reports in South Australia the substance and circumstances of every case are ascertainable by judges in that state who are thus able to appreciate whether the case in hand bears features which are easily or closely comparable with other cases in which damages have been awarded for similar injuries.[14] Their Honours continued:

> To this extent, the members of this Court are brought towards a consensus of judicial opinion on prevailing levels of damages in this State, and become 'aware of and give weight to current general ideas of fairness and moderation' in determining the limits of fair and reasonable compensation.
>
> It goes without saying that in assessing damages a judge must draw upon his own experience and rely upon his own analysis of the evidence in the particular case and upon his own opinion of the correct assessment of compensation for the injury sustained in that case. He must recognize that no two cases are wholly alike and that apparent similarities are often superficial. Because the elements which constitute the basis of an assessment of damages for personal injury vary so infinitely, there can be no fixed or unalterable standard for assessing the amounts for those particular elements. Nevertheless, it seems to us that so long as a judge heeds the warning against the formulation of any norm or standard of compensation by reference to other cases, it is not out of place for him, in his essay to gather the general consensus of judicial opinion on present levels of damages, to search for any trend of awards in reasonably comparable cases and to use any current pattern as a guide in making his assessment in the case under consideration. By looking at comparable cases in this way, we think that a judge does not strive towards an inflexible pattern which confines his award within fixed limits, but that he merely endeavours to obtain help in deciding what is a just award for the injuries and disabilities for which the particular claimant is to be compensated. In this context we think it proper for a judge to take notice of recent assessments made by other judges of this Court in cases which bear a reasonably close resemblance to the case under consideration. It seems to us that the view which we express does not offend against the pronouncement recently made by the High Court in relation to the citation of awards made in other cases.[15]

South Australia's former Chief Justice, Bray C.J., has also expressed the view in a number of cases that the comments in *Planet Fisheries* do not prevent a judge from using his or her knowledge of the general range of awards in his or her own jurisdiction.[16] Similarly, the New South Wales Court of Appeal has asserted that the High Court's decision is binding but that 'the general experience of current ideas of fairness and moderation' is itself established by knowledge of the range of awards made in cases of 'overall comparability'.[17]

In advancing statements of this nature the courts have, with respect, been

12 *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978) Cmnd 7054, 132.

13 [1969] S.A.S.R. 493.

14 *Ibid.* 498.

15 *Ibid.* 498-499.

16 See *Joyce v. Pioneer Tourist Coaches Pty Ltd* [1969] S.A.S.R. 501, 502; *Hirsch v. Bennett* [1969] S.A.S.R. 493, 494; *Paroczy v. Cook* [1971] 2 S.A.S.R. 14, 19. See also *Donelan v. I.N.D.* [1973] V.R. 490, 507; *Hall v. Tarlinton* (1978) 19 A.L.R. 501, 508 *per* Blackburn, Nimmo and St John JJ. where the court referred to the 'tentative guide' provided by the award of non-pecuniary loss in *Sharman v. Evans* (1977) 138 C.L.R. 563.

17 *Matijevic v. Khoury* (unreported, N.S.W.C.A. 26 April, 1978). See also *Gibb v. Shaw* (1984) Aust. Torts Rep. 80-536; *Moran v. McMahon* [1985] 3 N.S.W.L.R. 700; and *St Margaret's Hospital for Women (Sydney) v. McKibbin* (1987) Aust. Torts Rep. 80-130.

engaged in nothing more than an elaborate word game. The resulting uncertainty surrounding the authoritativeness of the 'rule' in *Planet Fisheries* is illustrated by *Moran v. McMahon* where three justices took diverging views of the High Court's decision.[18] Clarification of the matter is unlikely to be forthcoming from the High Court as special leave to appeal will probably not be granted because the issue in dispute will almost invariably be viewed as one of fact and not principle. Rather than continuing to pay lip service to a decision which preserves the possibility of inconsistency of awards, the courts should openly strive to ensure that plaintiffs who have been similarly injured and defendants who have been similarly accused are treated equally.[19] Justice would be served, and more importantly, would be seen to be served, by the introduction of a comprehensive legislative scheme designed to promote fairness between parties by ensuring that like cases are treated alike. It is suggested that legislative intervention in this context should incorporate two related but different strategies which, although mooted separately in the past as potential aids in the assessment of non-pecuniary loss, have not been considered in combination. There should be uniform Acts which contain an upper limit on the amount of damages awarded in personal injury cases under this head, coupled with a guideline of average figures awarded for specified injuries and the loss of specified faculties.

An Upper Limit On Damages Awarded For Non-Pecuniary Loss

A plaintiff cannot be 'compensated' for non-pecuniary loss in the sense of achieving *restitutio in integrum* because the damage suffered is not quantifiable in monetary terms. As Lord Morris observed in *H West & Son Ltd v. Shephard*:

> A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered.[20]

To this extent, any award made for this kind of loss will always be arbitrary. If compensation is not technically possible, setting damages at some 'comfort' level designed to provide the injured person with a 'reasonable solace for his misfortune'[21] makes sense. To do so could not, it is suggested, be said to operate to undercompensate individuals by depriving them of something to which they were entitled. The primary benefit of the introduction of limits on awards is the advancement of the objectives of uniformity, consistency and fairness as between parties and certainty in the measure of damages. Such limitations avoid the possibility of extravagant awards and the consequent burden imposed on

[18] [1985] 3 N.S.W.L.R. 700. Whereas McHugh J.A. viewed the High Court decision as binding, Kirby P. voiced opposition to it. Priestley J.A. expressed a hope that the High Court might reconsider the matter.

[19] Ironically, there are dicta of the High Court itself which acknowledge that justice 'in the abstract' demands 'some sort of consistency in awards'; see, for example, *Faulkner v. Keffalinos* (1970) 45 A.L.J.R. 80, 82 *per* Windeyer J.

[20] [1964] A.C. 326, 346.

[21] *Andrews v. Grand & Toy Alberta Ltd* (1978) 83 D.L.R. (3d) 452, 476 *per* Dickson J. See also Ogus, A., 'Damages for Lost Amenities: For a Foot, a Feeling or a Function?' (1972) 35 *Modern Law Review* 1, 15.

society through increased insurance premiums,[22] and ensure that barriers to rehabilitation are lifted by removing the incentive for victims to 'dwell on their misfortune' in the hope of securing a large award. It is natural for victims to believe that if they appear to be adjusting to their loss this will minimize its severity in the eyes of the court with the result of a reduced payout. An upper limit would encourage a plaintiff to 'get his life back in order and to look to the future'.[23] Moreover, the reduction of the potential windfall previously available is likely to discourage litigation and encourage settlement negotiations.[24]

The advantages flowing from the imposition of some ceiling on the amount of damages awarded for non-pecuniary loss were recognised in 1978 by the Supreme Court of Canada in a series of cases known collectively as the 'trilogy'.[25] Damages for this kind of loss, it was said, should be moderate and in order to achieve uniformity between cases a 'rough upper limit' was imposed at $100,000[26] adjusted for inflation[27] in cases involving two quadriplegic plaintiffs

22 See Waddams, S. M., 'Compensation for Non-Pecuniary Loss: Is There a Case for Legislative Intervention?' (1985) 63 *Canadian Bar Review* 734, 736, and the conclusions of the Ontario Task Force on Insurance, *Final Report of the Ontario Task Force on Insurance* (1986) which support a limitation on non-pecuniary awards. It stated at 38 that:

> There is no doubt that the current insurance crunch is dominated by a crisis in liability insurance. As noted above, the causes of this crisis are difficult to discern but relate primarily to the extreme uncertainty associated with 'long-tail' risks. The insurer's exposure may extend for many years beyond the time when the insured occurrence took place, and systemic socio-legal and economic changes are constantly shifting the parameters of liability and quantum of damage. This uncertainty has made it impossible for insurers to price the various types of risks and has led directly to the severe problems in availability, adequacy and affordability of liability insurance coverage.

One only has to look to the United States, particularly in the area of medical malpractice to see the ramifications of comparatively huge awards for non-economic loss. The number of American insurance companies prepared to underwrite professional indemnity insurance is rapidly decreasing and judging by the dramatic increase in claims and awards the plight of professionals will probably worsen in coming years. The potential enormity of U.S. awards is illustrated by the Arizona Court of Appeal's decision in *Wry v. Dial* (1973) 503 P.2d 979 to uphold a jury award of $2,500,000 for pain and suffering in the case of a motor vehicle accident victim who had suffered brain damage that had changed his personality and scarring amounting to deformity but who had a normal life expectancy. The Court indicated that interference with awards would only be justified where they were 'so outrageously excessive as to suggest, at first blush, passion or prejudice'. Obviously, this case was not considered to be within this category. On the issue of the effect of tortious liability on insurance see generally *Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (1986) and Priest, G. L. 'The Current Insurance Crisis and Modern Tort Law' (1987) 96 *Yale Law Journal* 1521.

23 See Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss:* L.R.C. 76 (1984) 18.

24 See Hutley F. C, 'Appeals within the Judicial Hierarchy and the Effect of Judicial Doctrine on Such Appeals in Australia and England (1976) 7 *Sydney Law Review* 317, 333; Feldthusen B, McNair K, 'General Damages in Personal Injury Suits: The Supreme Court's Trilogy' (1978) 28 U.T.L.J. 381, 416; Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss:* L.R.C. 76 (1984) 19, and Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) 100-101.

25 *Andrews v. Grand & Toy Alberta Ltd* (1978) 83 D.L.R. (3d) 452; *Arnold v. Teno* (1978) 83 D.L.R. (3d) 609; *Thornton v. Board of School Trustees of School District No. 57 (Prince George)* (1978) 83 D.L.R. (3d) 480. These decisions were all handed down on January 19, 1978. All three were elaborated upon and explained by the Supreme Court in *Lindal v. Lindal* (1982) 129 D.L.R. (3d) 263; see below. See Feldthusen, McNair, *op. cit.* n. 24; McLachlin, *op. cit.* n. 20, 46-50; Cooper-Stephenson, K. D., Saunders, I. B., *Personal Injury Damages in Canada* (1981) 361-375 and Brodsky, G., 'A Ceiling on Damages' (1982) 40 *Adv.* 235.

26 The trial courts in British Columbia, Alberta, Manitoba and Prince Edward Island have accepted the $100,000 guideline whereas those in Saskatchewan, Ontario, Newfoundland and New Brunswick have refused to be bound by it. The courts of Nova Scotia have handed down conflicting decisions on the matter. However, following the Supreme Court decision in *Lindal v. Lindal* (1982) 129 D.L.R. (3d) 263 it is clear that a trial court judgment awarding damages for non-pecuniary loss in excess of $100,000 will almost invariably be reduced if appealed to the Supreme Court.

27 See, for example, *Fenn v. City of Peterborough* (1979) 104 D.L.R. (3d) 174 where the Ontario Court of Appeal allowed an award of $125,000 on the basis that there had been an erosion in the value of money since 1978. The Supreme Court upheld the award on appeal without commenting on

and one brain-damaged plaintiff.[28] The Court did countenance some flexibility stating that, because the individual situation of victims will vary from case to case, this limit may be extended in exceptional cases. Subsequent decisions, however, make it difficult to envisage circumstances justifying an award in excess of this sum.[29] The adoption of an upper limit in England has also been urged in several cases.[30] Although the House of Lords has indicated that this is a matter which should be addressed through legislation,[31] the Court of Appeal has recently set down as a guideline a figure of £75,000 for non-pecuniary loss for the average case of tetraplegia.[32] It is interesting to note that even those bodies which have opposed the utilization of upper limits have, at the same time, recognized the force of the argument that similar cases should be treated in the same manner. The Law Reform Commission of British Columbia, for example, although recommending that the $100,000 limit in Canada be abolished by statute, advocated the introduction of a 'fair upper reference point'.[33] The possibility of a maximum limit set at five times the average annual industrial earnings (about £20,000 in 1977) was discussed by the members of the 1978 United Kingdom Royal Commission on Civil Liability and Compensation for Personal Injury. Whilst they were equally divided upon the appropriateness of

the Court of Appeal's reasoning: *Sub nom. Consumers Gas Co. v. City of Peterborough* (1981) 129 D.L.R. (3d) 507. See also *Hatton v. Henderson* (1981) 126 D.L.R. (3d) 50 ($120,000); *Tomlinson v. Wurtz* (1982) 16 Man. R. (2d) 145 ($130,000); *Knutson v. Farr* (1984) 12 D.L.R. (4th) 658 ($154,000) and *Smithson v. Saskem Chem. Ltd* (1986) 34 C.C.L.T. 195 ($150,000 – on the basis of $168,000 as a late 1984 upper limit). By 1986 this figure had increased to just under $200,000. See, for example, *Scarff v. Wilson* (1986) 10 B.C.L.R. (2d) 273 ($188,842); *Watkins v. Olafson* (1986) 40 Man. R. (2d) 286 ($180,000); *Joubert v. Rosetown (Town)* (1986) 50 Sask. R. 41 ($115,000 – on the basis of $184,000 as an upper limit) and *Ciarlariello v. Schachter* (unreported, Ont. H.C.J. 3 Nov, 1987) ($196,800). Based on inquiries made of the Ontario Law Reform Commission and practising solicitors in Ontario the 1990 figure is likely to be approximately $224,000.

[28] Their Honours were mindful of the warning sounded by Moir J.A. in *Hamel v. Prather* (1976) 66 D.L.R. (3d) 109, 127 that 'damages under the head of loss of amenities will go up and up until they are stabilised by the Supreme Court of Canada'.

[29] See, for example, *Lindal v. Lindal* (1982) 129 D.L.R. (3d) 263 where although the plaintiff was comatose for approximately three months, suffered extensive brain damage, physical disability and severe emotional problems the Supreme court felt this was not so exceptional as to justify an award of $135,000 by the British Columbia Supreme Court and reduced it to the $100,000 upper limit. For an analysis of this decision see Veitch, E. 'The Implications of Lindal' (1982) 28 *McGill Law Journal* 116. There has been at least one attempt to confine the scope of the Supreme Court's restriction on recovery. The trial judge in *Reynard v. Carr* (1983) 30 C.C.L.T. 42 viewed the ceiling set as applicable only in relation to completely disabled plaintiffs and on this basis awarded a partially disabled plaintiff $425,000 for non-pecuniary loss. On appeal (1986) 38 C.C.L.T. 217 the British Columbia Court of Appeal ruled that this award was inconsistent with the trilogy cases and reduced it to $135,000. Note that it has been tentatively suggested that an injury involving chronic and severe physical pain would justify an award in excess of the rough upper limit because quadriplegia, whatever mental distress it may cause, by its nature excludes physical pain; see Law Reform Commission of British Columbia, Report on Compensation for Non-Pecuniary Loss: L.R.C. 76 (1984), 5.

[30] *Lim Poh Choo v. Camden & Islington Area Health Authority* [1979] Q.B. 196 and *Croke (a minor) v. Wiseman* [1981] 3 All E.R. 852.

[31] *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 183 *per* Lord Scarman.

[32] *Housecroft v. Burnett* [1986] 1 All E.R. 332. *Dorland's Illustrated Medical Dictionary*, (26th ed., 1981) 1352 defines 'tetraplegia' as the 'paralysis of all four extremities'. Note also Widgery L.J.'s comments in *Jones v. Griffith* [1969] 2 All E.R. 1015, 1019-1020 in relation to awards for epilepsy.

[33] This was tentatively proposed to be represented in 1983 dollars by a figure of $400,000 in the Commission's *Compensation for Non-Pecuniary Loss, Working Paper No. 43* (1983) 40, and confirmed in the *Report on Compensation for Non-Pecuniary Loss L.R.C. 76* (1984) at 27. The difference between these points is unclear and the Report has been criticized by Waddams, *op. cit.* n. 22 as being inherently inconsistent.

restrictions of this nature, all were in agreement that some form of control on awards should exist.[34]

If one accepts the arguments for the justification for some form of ceiling on awards under this head of damages, it remains to be considered whether the judiciary or Parliament is in the best position to formulate the extent of changes of this nature. Divergent views have been expressed on the issue.[35] It is suggested that whilst it probably cannot be asserted that judicial intervention in this matter usurps the role of the legislature, the courtroom is not as conducive as the parliamentary forum to undertake thorough research into all the ramifications of such a policy-orientated reform. As Stephen J. observed in *Barrell Insurance Pty Ltd v. Pennant Hills Restaurants Pty Ltd*, 'it is not part of the judicial function to depress the level of awards on policy grounds. The Courts have no mandate to entertain any such policy'.[36] Public input including submissions from various interest groups such as the quadriplegic, paraplegic and head injuries societies would serve to clarify the question of what constitutes adequate compensation for this kind of loss.[37]

Legislative rather than judicial reform has been preferred in New Zealand and the United States. The no-fault compensation scheme introduced into New Zealand by the Accident Compensation Act 1972 (N.Z.) as consolidated and revised by the Accident Compensation Act 1982 (N.Z.), places a very modest limit of $17,000 on non-pecuniary losses involving 'the permanent loss or impairment of any bodily function' assessed on the basis of a schedule that attributes a percentage loss to each body part.[38] With respect to injuries which do not appear in the schedule, s. 79 empowers the Accident Compensation Corporation to pay any sum it considers appropriate up to a maximum of $10,000 for loss of amenities or the capacity to enjoy life if it is of the opinion that 'having regard to its nature, intensity, duration, and any other relevant circumstances' the loss or pain is sufficient to warrant payment.[39] The New Zealand Law Commission has observed that the maximum amounts have not increased in line with inflation or the cost of living and that no New Zealand government has been inclined to maintain the original relativities on a regular basis.[40] It has been suggested that

[34] Cmnd 7054, 90-91 (hereafter referred to as the *Pearson Report*). See generally, Allen, D. K., Bourn, C. J., Holyoak, J., *Accident Compensation After Pearson* (1979); Fleming, J. G., 'The Pearson Report: Its "Strategy" ' (1979) 42 *Modern Law Review* 249 and Hasson, R. A., 'The Pearson Report – Something for Everyone?' (1979) 6 *British Journal of Law and Society* 119.

[35] *Eg.* Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss: L.R.C. 76* (1984), 16-17; Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987), 104-105. Note also the English Law Commission, Report on Personal Injury Litigation – Assessment of Damages: No. 56 (1973), 11.

[36] (1981) 34 A.L.R. 162, 185. Note also *Morgans v. Launchbury* [1972] 2 All E.R. 606 and *D & F Estates Ltd v. Church Commissioners for England* [1988] 2 All E.R. 992.

[37] See Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss: L.R.C. 76* (1984), 16-17.

[38] See s. 78. The maximum was originally $5,000 and was increased to $7,000 on 1 October 1974 and to its current figure in the 1982 Act. For a more detailed analysis of the New Zealand no-fault programme see Harris, D. R. 'Accident Compensation in New Zealand: A Comprehensive Insurance System' (1974) 37 *Modern Law Review* 361; Palmer, G., *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979).

[39] This provision has given rise to considerable debate; see Palmer, G., 'Lump Sum Payments Under Accident Compensation' [1976] N.Z.L.J. 368.

[40] *Report No. 4: Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (1988), 58. There are no express indexing provisions in the present scheme.

the ceilings have resulted in a tendency for inappropriately high awards to be made in less serious cases and that they are moving up in a disproportionate way towards justified awards in cases where the injury has had a much more serious impact.[41] For this, and other reasons,[42] the Commission recently recommended the abolition of lump sum compensation under the two existing categories, proposing instead that there be an enlargement of existing periodic payment provisions to enable an assessment to be made on a schedule basis of the extent to which there has been a loss of physical or mental capacity.[43] The majority of American states have enacted legislation incorporating, to varying degrees, the 1986 recommendation made by the American Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability that there be a ceiling on non-pecuniary damages (including punitive damages) of $100,000.[44]

The ceiling strategy was first adopted in this country in South Australia in 1940 in relation to the *solatium* payable on death claims to spouses or to the parents of young children. In recent years various Australian states have enacted legislation placing upper limits on specified heads of damages in relation to specified types of claims. They are characterized by their narrow scope and particularity of operation which is usually restricted to the motor vehicle and industrial sphere.[45] With one exception,[46] these more recent Acts had not, at the time of writing, been judicially considered. This type of statute was first introduced in the Northern Territory by the enactment of the Motor Accidents (Compensation) Act 1979 (N.T.) which, in establishing a no-fault compensation scheme in relation to motor vehicle accidents, abolished all common law rights of action, save for those for non-pecuniary loss. Claims for this type of loss were, pursuant to s. 39, subject to a maximum of $100,000. The right to sue under this head was subsequently abolished and the section repealed as a result.[47]

Section 79 of the Motor Vehicles Accident Act 1988 (N.S.W.) introduces both a lower deductible limit of $15,000 and an upper limit of $180,000 on awards for non-economic loss. Subsection 2 stipulates that the amount of damages awarded

41 See New Zealand Law Commission, *Preliminary Paper No. 2: The Accident Compensation Scheme: A Discussion Paper* (1987), 12.

42 For example, lump sums place a barrier in the way of extending the principles of the accident scheme for sickness.

43 *Report No. 4: Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (1988), 58. Awards were proposed to be evaluated by reference to the American Medical Association (1984, 2nd ed.), *Guides to the Evaluation of Permanent Impairment*.

44 *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (1986), 69. The *Medical Injury Compensation Reform Act* Cal. Civ. Code 3333.2, for example, provides that non-economic damages, to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other intangible damages, should be limited to $250,000 in personal injury claims against providers of health care.

45 But note that ss. 38A(3) and (5) of the Limitation Act 1935 (W.A.) prohibit altogether recovery for non-economic loss in asbestos-related claims and place a ceiling of $120,000 on total awards of compensation for those types of injury. Similar restrictions are embodied in ss. 7(4) and (5) of the Fatal Accidents Act 1959 (W.A.) which deal with claims by dependants of asbestos victims.

46 See the examination of the recent judicial analyses of the relevant provisions of the Wrongs Act 1936 (S.A.) below.

47 Note that the High Court had prevented attempts to avoid this upper limit by commencing proceedings in other jurisdictions on two occasions; see *Breavington v. Godleman* (1988) 62 A.L.J.R. 447 and *Perrett v. Robinson* (1988) 62 A.L.J.R. 495.

under this head shall be a proportion, determined according to the severity of the loss, of the maximum permitted. The Act thus necessitates the judicial application of a notional scale. It is expressly provided in s. 79(3) that the upper limit, which is to be increased twice a year by reference to average weekly total earnings of full-time adults in New South Wales, must only be awarded in the 'most extreme' case.[48] If the amount of damages awarded is more than $15,000 but less than $55,000 s. 79(5) comes into operation. Under this subsection the lower limit of $15,000 is deducted in full from all amounts up to $40,000 and by $1,000 less than $15,000 for every $1,000 by which the award exceeds $40,000. As was the case with the redundant Northern Territory limit, the restrictions apply only, pursuant to s. 69, to an award of damages which relates to the injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle or arising out of a transport accident under the preceding legislation. The Act comes into operation in relation to motor accidents on or after 1 July 1989 and to transport accidents on or after 1 July 1987 and before 1 July 1989.

Common law rights in relation to workers' compensation have been reintroduced in New South Wales subject to similar restrictions.[49] These vest once again in employees as of 1 February 1990 pursuant to a new Part 5 inserted into the Workers Compensation Act 1987 (N.S.W.).[50] As is the case under the Motor Vehicle Accident Act 1988 (N.S.W.), compensation for non-pecuniary damage is to be calculated by reference to a notional scale of severity.[51] In addition to imposing a maximum limit of $180,000 on awards, s. 151G stipulates that if this type of loss is assessed at $45,000 or less no award will be made and that damages under $60,000 are subject to a reduction.[52]

Significant limitations on claims in relation to 'transport accidents'[53] occurring on or after 1 January 1987 have been introduced into the Transport Accident Act 1986 (Vic.). In addition to the injury having to be of a 'serious'[54] nature, s. 93(7) not only imposes a threshold limit of $20,000 coupled with an upper limit of $200,000 in respect of awards for 'pain and suffering',[55] but also restricts

48 There are other restrictions placed on the award of damages which are not appropriate for discussion in this context.

49 These were abolished by s. 149 of the Workers Compensation Act 1987 (N.S.W.) as from 30 June 1987.

50 Section 149 is repealed by s. 151U.

51 S. 151G(2).

52 S. 151G(3), (4) and (5). Section 151G(7) provides that these figures are to be indexed. Interestingly, under s. 151G(6) these dollar amounts differ in relation to injuries sustained before June 1989. For losses of this nature the relevant figures are $75,000 and $100,000.

53 These are defined in s. 3(1) as 'an incident directly caused by, or directly arising out of, the driving of a motor car or motor vehicle, a railway train or a tram'.

54 Subsection (17) deems an injury to be serious if it involves the:

(a) serious long-term impairment or loss of a body function; or
(b) permanent serious disfigurement;
(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or
(d) loss of a foetus.

See also ss. 93(1)-(6).

55 This term is defined in subsection 17 as meaning 'damages for pain and suffering, loss of amenities of life or loss of enjoyment of life'. Note that in relation to industrial accidents in Victoria s. 135(3A) of the Accident Compensation Act 1985 (Vic.) sets a ceiling for non-economic loss of $140,000 indexed annually, pursuant to s. 100, to average weekly earnings.

recovery for pecuniary damage by confining awards under that head to amounts within the range between $20,000 and $450,000. In contrast also to s. 79 of the New South Wales Act no mechanism for deduction was incorporated and the $200,000 maximum is not expressed to be at the top of a scale. It has been suggested, however, that because the limit is comparatively high and will, pursuant to s. 61(2), be indexed once a year by reference to the Consumer Price Index, that the courts will interpret the figure this way.[56] The ranking of various awards on a statutory scale will necessitate a comparison between similar cases, something that whilst desirable in relation to the non-economic portion of personal injury awards, is, as Lord Scarman has pointed out,[57] inappropriate and even 'misleading' in a wider context.

Arguably it is the 1986 amendments to the Wrongs Act 1936 (S.A.) which provide for the most radical redevelopment in the law of assessment of damages for non-pecuniary loss. Section 35(a) states that in relation to 'motor accidents',[58] provided that a certain threshold[59] is reached, a plaintiff's pain, suffering, loss of amenities and expectation of life and disfigurement must be assigned a numerical value on a scale of 0 to 60[60] and multiplied by a prescribed amount. In respect of 1987 accidents this amount is $1,000.[61] Thus, the maximum capable of being awarded for these accidents is $60,000. Both the minimum and maximum limits are indexed for subsequent years by reference to the Consumer Price Index.[62] The words in parentheses in s. 35(a)(1)(b)(i) ('the greater the severity of the non-economic loss the higher the number') indicate that the court is required to 'slot in' injuries on the scale by making some sort of comparative analysis.[63] The emphasis placed upon the relative degree of severity (rather than factors external to the scale) and the provision for statutory increases to combat the effects of inflation, should ensure that claims are not, as a matter of course, categorized at the top end and awarded the maximum amount.[64] The

56 See Luntz, H. *Assessment of Damages for Personal Injury and Death*, (3rd ed., 1990) 478-479. Note also Malkin I., 'Victoria's Transport Accident Reforms – In Perspective' (1987) 16 *M.U.L.R.* 254.

57 See *Lim Poh Choo v. Camden & Islington Area Health Authority* [1980] A.C. 174, 187. Note also *Thatcher v. Charles* (1961) 104 C.L.R. 57 and Luntz, *op. cit.* n. 56, 162-163.

58 This is defined in s. 35(6) as 'an incident in which injury is caused by or arises out of the use of a motor vehicle'. The statute applies to causes of action accruing on or after 8 February 1987.

59 Pursuant to s. 35(a)(1)(a) this is either seven days significant impairment or medical expenses of $1,000 or some other prescribed amount.

60 This numerical value can be expressed by the use of decimals; see *Parker v. Cameron* (1990) Aust. Torts Rep. 81-007, although it is only in the case of awards towards the bottom of the scale that a court would ever be disposed to adopt this strategy.

61 See ss. 36(a)(1)(b) and (6).

62 See s. 35(a)(6).

63 See *Packer v. Cameron* (1990) Aust. Torts Rep. 81-007, *Jenkins v. Maddeford* (unreported. S.A.S.C., 7 March 1990).

64 The 'bunching' of severe cases has in the past proved a cause for concern in relation to statutory maximums in other Acts; see Luntz, *op. cit.* n. 56, 476. This problem has arisen on at least one occasion in relation to the judicial limit on damages in Canada. The Court of Appeal of British Columbia in *Blackstock & Vincent v. Patterson* [1982] 4 W.W.R. 519, 526 interpreted the maximum set in the trilogy cases as being 'based on the premise that in the case of all severely injured plaintiffs, in order to avoid extravagant claims, an upper limit of $100,000 should be imposed'. It was expressly stated that the limit 'was not based on the view that the awards made by the lower courts in the trilogy cases were excessive or that there was no distinction between the cases'. On this view the maximum amount would be recovered for injuries which were not of the most serious degree.

need to preserve scope for a proper differentiation in the overall spectrum of injury claims was recognised by White J. in *Jenkins v. Maddeford*[65] who warned of the dangers of judicial over-generosity, particularly in the early stages of the implementation of s. 35(a), stating that:

> A sense of due proportion must be observed when assigning a number in the scale. There must be room in the middle of the scale and at the top for the non-economic impact in cases where the impact is moderately severe, very severe and very drastically severe cases. Assignment of too high a number . . . to a person . . . with only slightly severe impact tends to trespass upon the slots in the scale available to higher claims and to deny to the latter the distributive or comparative justice to which they are entitled.[66]

Despite the extensive changes to the assessment of damages introduced by s. 35(a), it is clear, as Cox J. recently indicated in *Packer v. Cameron*,[67] that the provision has to be read:

> against the background of a legal system in which awards in comparable cases within the same judicial system . . . create the broad standard by which any particular plaintiff's loss is to be measured in money terms, and in which a general consistency between awards for comparable losses remains a desirable goal.[68]

His Honour continued:

> It seems reasonable to assume that Parliament intended no greater disturbance of established principles and methods of assessment than is necessary to achieve [the objective of limiting general awards]. The general relevance of universal experience, of what other people have been awarded in more or less comparable circumstances, will thus remain.[69]

Similarly White J. in *Jenkins v. Maddeford*[70] viewed the application of s. 35(a) as 'an exercise in relativity'. His Honour stated:

> [T]he purpose of the exercise in s. 35(a) is to fix attention solely upon the relative severity of the non-economic impact of the injuries upon the particular plaintiff and to compare that impact with the non-economic impact of the most severe and least severe injuries on other hypothetical persons.[71]

Clearly, the enactment of s. 35(a) has placed a significant fetter on the judicial discretion to award damages for non-pecuniary loss in South Australia. The upper limit of between $150,000 and $200,000 for pre-s. 35(a) awards[72] has been pruned to $60,000 (indexed). It follows that whilst the new scheme operates on a comparative basis, there is, as White J. has observed,[73] a danger in cross-checking new awards with the old ones which were made under a far more liberal regime. Although it is not an error of law to proceed along these lines,[74] such comparisons should be confined to the transitional period until the courts gain more experience with the new system and are able, by comparing new awards, to fix appropriate numbers directly.

65 (Unreported, S.A.S.C., 7 March 1990).
66 See also Millhouse J.'s comments.
67 (1990) Aust. Torts Rep 81-007.
68 *Ibid.* 67,623. See also Duggan J., 67,627.
69 *Ibid.*
70 (Unreported, S.A.S.C. 7 March 1990).
71 *Ibid.* See also Olsson J. and *Eaton v. Hawthorne* (unreported, S.A.S.C. 9 Apr, 1990) *per* King C. J.
72 The figure of $200,000 was accepted by both the trial judge and Cox J. in *Packer v. Cameron* (1990) Aust. Torts Rep 81-007 and by the trial judge in *Jenkins v. Maddeford* (unreported, S.A.S.C. 7 Mar, 1990). However, the Supreme Court in the latter case considered a figure closer to $150,000 as more realistic.
73 See *Jenkins v. Maddeford* (unreported, S.A.S.C. 7 March 1990). Note *Packer v. Cameron* (1990) Aust. Torts Rep. 81-007.
74 *Jenkins v. Maddeford* (unreported, S.A.S.C. 7 March 1990).

The maximum liability of South Australian employers for non-economic loss arising from employment (save in relation to motor accidents) has also been reduced by statute. Pursuant to the Workers Rehabilitation and Compensation Act 1986 (S.A.) it is now limited to 1.4 times the maximum amount prescribed in s. 43(11) for the purposes of the 'table of maims'[75] indexed by reference to the Consumer Price Index. This amount was $65,300 in 1987. Similarly, Commonwealth employees are limited under s. 45(4) of the Commonwealth Employees Rehabilitation and Compensation Act 1988 (Cth) to recovery of a maximum of $110,000 for non-economic loss.

The Law Reform Commission of Tasmania, whilst rejecting the introduction of thresholds, has also recommended that in relation to motor accidents limits should be placed on both non-pecuniary recovery ($60,000 indexed) and pecuniary recovery ($500,000).[76]

What strikes the reader immediately upon a perusal of the various State Acts is the disparity between the ceilings placed on awards. The permissible maximum for non-pecuniary awards ranges from $60,000 in South Australia to $200,000 in Victoria.[77] It is submitted that there is a strong need for national uniform legislation governing the assessment of damages in personal injury cases, at least in relation to recovery for non-pecuniary loss. The need for uniformity was recognised by the Supreme Court of Canada in the 'trilogy' cases. Dickson J. in *Andrews v. Grand & Toy Alberta Ltd* stated that:

> The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss. Variation should be made for what a particular individual has lost in the way of amenities and enjoyment of life, and for what will function to make up for this loss, but variation should not be made merely for the province in which he happens to live.[78]

When comparing the three 1978 cases, the Law Reform Commission of British Columbia pointed out that:

> In three different cases, plaintiffs who had suffered similarly massive and permanent injuries were awarded $150,000, (*Andrews* reduced to $100,000 on appeal) and $200,000 (*Thornton* and *Teno*). There was, in these cases, no reason why Thornton and Teno should have been entitled to twice the damages for non-pecuniary loss as were awarded to Andrews. The result was injustice in that like injuries did not result in like awards.[79]

Clearly, when determining the amount which would adequately compensate a particular plaintiff, a court should have regard only to awards in the same jurisdiction or in a neighbouring locality where the relevant conditions are

[75] See s. 54(4).

[76] See Law Reform Commission of Tasmania, *Report No 52: Compensation for Victims of Motor Vehicle Accidents* (1987), 35-41.

[77] Unfortunately disparities of this nature are not new in Australia. Significant differences in awards payable under the various 'Tables of Maims' in workers compensation statutes have existed for almost a century. See *Workers Compensation Legislation in Australia 1987* (1987), Table 9.

[78] (1978) 83 D.L.R. (3d) 452, 477.

[79] See Law Reform Commission of British Columbia, *Report on Compensation for Non-Pecuniary Loss: L.R.C. 76* (1984), 18-19. But note the seemingly contradictory remarks at 17. See also Waddam, *op. cit.* n. 22, 741-742. The fact that the plaintiffs in the Canadian trilogy each came from different provinces, namely, British Columbia, Alberta and Ontario can hardly be said to justify this difference.

similar.[80] However, the social, economic and industrial conditions of the Australian states and territories do not vary to such an extent that substantial differences in non-pecuniary awards can be said to be warranted. Whilst one can see some justification for variations in awards for pecuniary loss given the fluctuation of medical expenses between the states and territories,[81] it cannot be asserted that a person who is burnt or loses a leg in Western Australia does not suffer, in non-pecuniary terms, to the extent of a similar victim in New South Wales or Victoria. He or she sustains the same injury or loses the same faculty, experiences the same pain and suffering, the same humiliation and embarrassment due to disfigurement, and the same reduction in life expectancy irrespective of his or her domicile. Although theoretically justifying slight disparities between sums awarded, any marginal differences in the costs between the states of purchasing alternative sources of pleasure to replace those lost can, for all practical purposes be ignored.[82] The adoption of a uniform approach could still accommodate variations in awards where a particular individual's circumstances (for example age, or sporting or musical attributes) differ from plaintiffs similarly injured in other states or territories. What it would prevent is discrepancies in awards for non-pecuniary damage granted to plaintiffs who are in the same situation for like injuries suffered in a like manner but which occurred in different places. It should not be possible for a plaintiff to obtain $X for non-pecuniary loss sustained in state A and know that had he or she been injured in exactly the same way in state B he or she would have received $X + Y. Whilst it is true that the actual receipt of compensation may vary according to circumstances beyond the control of the plaintiff such as the presence or absence of fault or insurance, the existing state of affairs is undesirable. The increased volume of interstate traffic and the fact that road users are in a high risk category makes the need for consistency in awards throughout the country even more pressing. Unfortunately, the situation has developed in Australia where, with the exception of Victoria,[83] eastern states awards are often markedly higher than those handed

80 See *Jag Singh (An Infant) v. Toong Fong Omnibus Co. Ltd* [1964] 3 All E.R. 925; *Fu Yuk-ming v. Lee Fook-choi* [1975] H.K.L.R. 250; *Lee Koon-keung v. Ng Chi-yat* [1975] H.K.L.R. 153; *Ratnasingam v. Kow Ah Dek* [1983] 1 W.L.R. 1235; *Selvanayagam v. University of the West Indies* [1983] 1 All E.R. 824 and *Chan Wai Tong v. Li Ping Sum* [1985] A.C. 446. As noted previously, for example, the Scottish courts view the conditions in England as sufficiently analogous to justify them referring to English awards. By way of contrast, the courts of Papua New Guinea have been inconsistent in their use of Australian decisions; see Luntz, *op. cit.* n. 56, 160, 166.

81 But note that it has even been recognized that the discrepancies in awards between countries where standards of living vary more dramatically are not readily attributable to this fact but are merely the result of the differences in perceptions of what is fair and reasonable; see McGregor, H. 'The International Accident Problem' (1970) 33 *Modern Law Review* 1, 25-26 and Fleming, J. G., 'Damages for Non-Material Loss', *Law Society of Upper Canada, Special Lectures* (1973), 5.

82 Significant differences in the price of pleasure between jurisdictions have been taken into account by some foreign courts. For example, the Papua New Guinean courts have, on occasion, recognized that expatriate Australians will spend damages awarded to them in Australia and not in Papua New Guinea where prices are considerably lower, thus entitling them to higher sums for non-pecuniary loss than indigenous persons; see *The Administration of Papua New Guinea v. Carrol* [1974] P.N.G.L.R. 265. Note also *Iapidik v. Green* [1964] P.N.G.L.R. 178, *McLean v. Carmichael* [1969-70] P.N.G.L.R. 333 and Luntz, *op. cit.* n. 56, 160. This approach was, however, subsequently disapproved of in *Dillingham Corporation of New Guinea Pty Ltd v. Diaz* [1975] P.N.G.L.R. 262 and *Kerr v. Motor Vehicle Insurance (P.N.G.) Trust* [1979] P.N.G.L.R. 251.

83 The retention of the jury system in that state has led to lower awards than those handed down in Western Australia and South Australia.

down in the west.[84] Cynical assertions that one is better off getting run over in New South Wales are not without some foundation. Regrettably, this discrepancy has been preserved by the differences in the statutory ceilings.

The ambit of the legislation is, in the opinion of the present writer, too narrow. Whilst it is true that the vast majority of personal injury disputes arise in relation to losses sustained in traffic and work-related accidents, there is no reason why claims of this nature should be subject to restrictions not imposed in other contexts. Why should it be possible, for example, for a customer who slips on a wet shopping centre floor or for a person who is bitten by a neighbour's dog to recover higher awards for non-pecuniary damage than those available to victims of more common mishaps?[85] Assertions that the state of the motor vehicle and industrial insurance industries necessitated this distinction are unconvincing. The fact remains that there is no legal justificiation for the difference in approach. In order to promote a fair, consistent, comprehensive and cohesive scheme to aid the courts in the assessment of damages all personal injuries claims must be considered according to the same set of rules. At the very least, the separate motor vehicle and industrial schemes existing in South Australia and Victoria should be amended and amalgamated for simplicity and uniformity.

A Guideline of Average Figures For Specified Injuries And The Loss Of Specified Faculties

It is suggested that a legislative tariff designed to provide guidance as to the appropriate level of awards in respect of specified injuries or the loss of specified faculties be enacted to complement the introduction of a limit on the maximum total award allowable for non-pecuniary loss. The courts would thereby receive assistance in the assessment of damages under this head in two ways, both of which are directed to promote consistency in approach. In contrast to the proposed strict upper limit on the total compensation awardable, it is not suggested that the sums specified for injuries or faculty loss be determinative for every judgment in every case. Rather, the tariff should be structured to operate merely to provide the courts with a workable guide without imposing an undesirable rigidity upon judicial discretion. The possibility of exorbitant awards and the problems associated with them will have been averted by the imposition of the maximum total limit, thus justifying the courts operating more freely in the assessment of the individual sub-heads of non-pecuniary loss. The final calculation of damages for faculty loss would, in most cases, be left to the judges.

[84] See *Australian Iron & Steel Ltd v. Greenwood* (1962) 107 C.L.R. 308 *per* Windeyer J. Although his Honour was referring to the total sums awarded for personal injuries, Mayo J. in *Earl v. Haebich* (1961) 23 L.S.J.S. 4 observed that 'the tendency as one travels east in Australia seems to be for the amount allowed individuals for general damages to be greatly increased'. In *Henderson v. Oswald* [1965] W.A.R. 54 Negus J. acknowledged that the High Court had shown by its decision in previous fatal accident cases that it was of the view that Western Australian awards were too low.

[85] Limitations imposed upon recovery under other heads of damage and on the availability of certain defences are also objectionable if confined to certain species of claim. However, a discussion of restrictions of this nature included in the state Acts is beyond the scope of this article.

In order to ensure the maximum measure of uniformity the scheme would, however, also be structured to accommodate those jurisdictions which still provide for jury assessment of awards for personal injury.[86] This could be achieved by making it incumbent upon the courts to inform jurors of the statutory guide. Concerns raised by opponents of the use of guides to aid juries in their deliberations are not applicable to the writer's proposed scheme. Critics of this approach have focused on referrals by counsel and judges to comparable cases and conventional figures rather than considering the issue in the legislative context.[87] The proposed Act would provide for the conveyance of one set dollar amount only thus avoiding the inevitable confusion on the part of the jury that would result from an over-exposure to conflicting cases and figures and the consequent delay in proceedings. The communication would not, as some have suggested,[88] defeat the purpose of having a jury. On the contrary, it would promote the objective of securing a fair, reasonable and just result by ensuring that neither party is prejudiced by a verdict based on ignorance. This view receives support from recent calls by the English Court of Appeal for judicial guidance to assist jurors to appreciate the real value of large sums.[89] Their Lordships have indicated that they see no danger in inviting juries notionally to weigh any sum they have in mind by reference to the financial implications of such a sum. This practice would dramatically reduce the risk of awards being set aside on appeal thereby avoiding the inconvenience, expense, delay and anxiety of retrials.

As the Pearson Commission stressed, the emphasis in compensation for non-pecuniary damage should be on serious and continuing losses, especially loss of a faculty.[90] The legislative isolation of this form of non-pecuniary loss would not, it is submitted, operate to reduce the significance of, or effectively abolish, the more subjective elements of present awards. The difference between the total sum allowable and the highest amount on the tariff for the most severe type of injury would provide sufficient scope for the courts to adequately compensate victims for the other types of non-pecuniary damage.[91] The proposed scheme would, for this reason, also accommodate any overlap between the various sub-heads (for example, between pain and suffering and loss of faculty) without

86 That is, Victoria and New South Wales (in relation to non-motor accident cases). Note *Ellis v. Wallsend District Hospital* (1989) Aust. Torts. Rep. 80-289.

87 See, for example, Lord Denning M.R.'s comments in *Ward v. James* [1966] 1 Q.B. 273, 301-303.

88 *Ibid.*

89 See *Sutcliffe v. Pressdram Ltd* [1990] 1 All E.R. 269. The Court stated that it was not bound by the reasoning in *Ward v. James* [1966] 1 Q.B. 273. Although the case concerned a defamation action their Lordships' observations are equally applicable in the context of jury assessments for personal injury.

90 See the *Pearson Report*, 90.

91 There are those who would view this as an undesirable result. Although the *Pearson Report*, 89 ultimately recommended the retention of awards for pain and suffering it did so by majority only. Professors Schilling and Stevenson dissented and proposed that pain and suffering be eliminated as a basis for compensation. Although the proposed scheme would, in the Australian context, accommodate awards for loss of life expectancy, the variance between the maximum total amount awardable and the highest listed tariff for faculty loss would need to be slightly reduced in England, Wales and Northern Ireland to take account of the abolition of this kind of loss as a head of damage by s. 1(1) of the Administration of Justice Act 1982 (U.K.).

prejudicing claimants.[92] There are at least four possible bases upon which the tariff could be formulated:

(a) by permitting awards up to a maximum figure assessed by reference to a schedule which specifies a percentage disablement for each type of injury;
(b) by setting upper and lower limits for each type of injury;
(c) by setting a minimum figure for each type of injury;
(d) by specifying an average figure for each type of injury.

The first strategy has long been a feature of workers compensation and war pension schemes. As noted previously, the Accident Compensation Act 1982 (N.Z.) also operates by providing for lump sum compensation for permanent loss or impairment of bodily functions assessed on the basis of a schedule which assigns a percentage loss to specified disabilities.[93] The New Zealand Law Commission has recently recommended the introduction of permanent periodic payments for loss of physical capacity evaluated by reference to the American Medical Association Guides to the Evaluation of Permanent Impairment which operate along similar lines by stating in percentage terms the extent to which specified injuries permanently impair a 'whole man'.[94] Reliance on these Guides was also proposed 17 years ago by the National Committee of Inquiry into Compensation and Rehabilitation in Australia set up by the Whitlam Government and chaired by Sir Owen Woodhouse of the New Zealand Court of Appeal.[95] Although the introduction of this sort of approach would be an improvement upon the present state of affairs in Australia, compensation schemes which rely upon percentage based formulae are, in the opinion of the present writer, unnecessarily complex. Notwithstanding that certain injuries and diseases may present some problems of categorization, it is arguably simpler to provide for a specified figure of various types of injury and disease than to set a maximum figure and assess awards based on a percentage calculation of that maximum.

The English Law Commission has rejected tariffs with upper and lower limits for each injury.[96] It felt that upper limits may work injustice where an injury was aggravated by another injury or its impact on some amenity central to an individual's life. Similarly, the incorporation of a lower limit on awards may well prove to be unjustifiably generous where a plaintiff injures a part of her or his body that is already irreparable (for example, the loss of a blind eye or the severing of a paralysed limb). This reasoning is, with respect, compelling.

[92] On the question of overlap see the *Pearson Report*, 89.

[93] See p. 720.

[94] *Report No. 4: Personal Injury: Prevention and Recovery: Report on the Accident Compensation Scheme* (1988), 58.

[95] *Report of the National Committee of Inquiry* (1974), 188-191. A Draft Bill incorporating the Committee's recommendations was passed in the House of Representatives but was strongly opposed by various interest groups and some of the states; see Luntz, H., *Compensation and Rehabilitation* (1975). Note also Ison, T. G., 'The Politics of Reform in Personal Injury Compensation' (1977) 27 *University of Toronto Law Journal* 385. The Bill became one of the casualties of the Whitlam dismissal in 1975 and has never been implemented. Interestingly, however, the Department of Veterans' Affairs has, in practice, been referring to the U.S. Guides, as modified for Australian conditions, for the past 15 or so years in assessing disability pensions.

[96] English Law Commission, *Personal Injury Litigation – Assessment of Damages: Working Paper No. 41* (1971) 53. Note also *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 11 and the *Pearson Report* 88-91.

A minimum tariff could be set to indicate to the court the lowest appropriate amount payable to a victim for a specified loss, irrespective of the individual characteristics of the particular plaintiff. The adoption of this option would necessitate the retention of a judicial discretion to exceed this amount in certain, presumably exceptional, circumstances. The formulation of these circumstances would prove prohibitively difficult[97] resulting in possible uncertainty and the defeat of the objective behind legislative intervention in the law of assessment of damages, namely consistency between cases. For this reason, this option is not to be preferred.

It is submitted, with respect, that the English Law Commission's provisional view that the introduction of average figures would be most appropriate in a tariff scheme[98] is correct. As with any ceiling introduced on total non-pecuniary awards, the figures should be geared to the cost of living and increased annually to offset inflationary pressures.[99] Each specified figure would represent the most appropriate sum to compensate the average plaintiff in an ordinary case for a particular injury and its effect upon him or her. It would not, as some have suggested,[1] detract from the principle that judges evaluate the individual case. On the contrary, it would allow the courts to analyse the circumstances of each plaintiff's claim and to determine whether the compensation awarded should be above or below the average and by how much. Judicial discretion in this context would thereby be maintained. The claimant would bear the burden of adducing evidence to demonstrate that her or his loss justified an award more than the specified norm and the defendant of proving that the claim merited less than that amount. Thus, the truly exceptional case would not be doomed to undercompensation.[2] Not only would the tariff provide guidelines for the courts in their calculations (something that members of the judiciary have recognised would be of great assistance in this difficult task[3]) but importantly, it would also be conducive to a speedy resolution of settlement proceedings. Given the small number of disputes argued before courts of law, a guide that aids advisers in reaching agreement on the appropriate amount of damages outside that forum is to be especially welcomed.[4]

97 *Ibid.*

98 *Ibid.*

99 There are numerous dicta recognising the need to take into account the fall in the value of money when comparing cases; for example, *Lee Transport Co. Ltd v. Watson* (1940) 64 C.L.R. 1; *Roulstone v. Ketley* [1966] 2 N.S.W.L.R. 389; *Taylor v. O'Connor* [1971] A.C. 115; *Petroleum & Chemical Corporation (Australia) Ltd v. Morris* (1973) 1 A.L.R. 269; *Sharman v. Evans* (1977) 138 C.L.R. 563; *Andrews v. Grand & Toy Alberta Ltd* (1978) 83 D.L.R. (3d) 452; *Arnold v. Teno* (1978) 83 D.L.R. (3d) 609; *Walker v. John McLean & Sons Ltd* [1979] 2 All E.R. 965; *Pennant Hills Restaurants Pty Ltd v. Barrell Insurance Pty Ltd* (1981) 145 C.L.R. 625; *Todorovic v. Waller* (1981) 150 C.L.R. 402 and *Lindal v. Lindal* (1982) 129 D.L.R. (3d) 263. Any legislative scheme introduced would need to have an inbuilt mechanism to compensate for annual reductions in the purchasing power of the amounts initially specified. Note also Fleming, J. G., 'The Impact of Inflation on Tort Compensation' (1978) 26 *American Journal of Comparative Law* 51.

1 See the English Law Commission's comments on the English Bar Council's opposition in its *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 11.

2 Note, *Hodges v. Harland & Wolff Ltd* [1965] 1 All E.R. 1086 and *Hinz v. Berry* [1970] 2 Q.B. 40.

3 For example, *Naylor v. Yorkshire Electricity Board* [1968] A.C. 529.

4 Note Mansfield C.J.'s comments in *Turton v. Wright* [1957] Q.W.N. 47. Note also *Johns v. Minister of Education* (1981) 28 S.A.S.R. 206 where Sangster J. approved a settlement having considered two earlier decisions dealing with injuries similar to the one before him, notwithstanding that he viewed the sum in question as 'plainly inadequate'.

Whilst it would be relatively easy to devise a helpful norm for 'simple' losses such as that of an arm or eye, this task would prove more difficult in relation to complex injuries such as industrial deafness, brain damage, head or back traumas or diseases such as cancer, asbestosis or mesothelioma.[5] However, as the English Law Commission has observed,[6] this problem is not insurmountable and, it is suggested, does not warrant the abandonment of the legislative tariff approach. Perhaps some assistance could be gleaned from the extensive coverage of the various impairments contained in the U.S. Medical Guides. Although it is proposed not to use the American percentage formula, a check list of this nature would provide a helpful starting point in the allocation of dollar guides. It would need to be made clear that in the case of multiple injuries the tariff does not operate cumulatively and that, with reference to the listed figures, the loss in question is to be analysed as a whole.[7] Any judgment made would be based upon the most appropriate tariff figure after consideration of the closeness of its relationship with the particular injuries sustained.

The question arises as to who or which body ought to determine the list of norms. The formation of a multifaceted body designed to attract input from a wide cross-section of persons interested in the issue may be more appropriate and prove more fruitful than simply relying upon parliamentarians to fix what they consider as the most desirable scale. One attractive option would be to convene conferences attended by judges, expert legal practitioners, leading academics and lay experts (including doctors, economists, representatives from the paraplegic, quadriplegic, head injuries and similar associations as well as other persons conversant with the problems faced by the disabled) to debate the question of the most appropriate figures.[8] Discussions would need to include considerations of not only the amount necessary to adequately compensate victims of specified injuries, but the wider ramifications of any decisions made. As evidenced by the American experience,[9] for example, the undesirable effects upon insurance premiums which flow from large court awards would have to be borne in mind to protect against the average figures being set at too high a level.[10]

5 Note ss. 38A(3) and (5) of the Limitation Act 1935 (W.A.).

6 *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 11.

7 English Law Commission, *Personal Injury Litigation – Assessment of Damages: Working Paper No. 41* (1971) 52.

8 There is precedent for this in the form of Judges Conferences on Sentencing in criminal cases. The English Law Commission favoured this type of informed discussion in its *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 79-80. The proposed forum is to be distinguished from damage tribunals, the setting up of which was disapproved of by both the Commission and the earlier Winn Committee, *Report of the Committee on Personal Injuries Litigation* (1968) Cmnd. 3691, 114-116. The Commission's rejection of this latter strategy was based largely upon the unsatisfactory operation of The Western Australian Third Party Claims Tribunal which was established by the Motor Vehicle (Third Party Insurance) Act 1967 (W.A.) and disbanded soon after.

9 See n. 22 above.

10 Note *Heaps v. Perrite Ltd* [1937] 2 All E.R. 60; *Hately v. Allport* (1953) 54 S.R. (N.S.W.) 17; *Fletcher v. Autocar & Transporters Ltd* [1968] 2 Q.B. 322; *Arnold v. Teno* (1978) 83 D.L.R. (3d) 609; *Andrews v. Grand & Toy Alberta Ltd* (1978) 83 D.L.R. (3d) 452; *Lim Poh Choo v. Camden & Islington Area Health Authority* [1979] Q.B. 196 and *Lindal v. Lindal* (1982) 129 D.L.R. (3d) 263. But see *Lim Poh Choo v. Camden & Islington Area Health Authority* [1980] A.C. 174, 187 *per* Lord Scarman.

Although it came to no final conclusion upon the desirability of a tariff system in its 1971 Working Paper,[11] the English Law Commission ultimately rejected its legislative adoption.[12] It appeared to do so, not on the basis of sound legal justifications, but rather because of an 'absence of any real enthusiasm for this innovation'.[13] With respect, this is a dubious basis for any recommendation relating to law reform. As noted previously, the benefits of legislative guidance in the context of the assessment of non-pecuniary damages have been recognized by members of the judiciary[14] and would go a long way to ensuring that all claimants and defendants are treated equally before the courts. Irrespective of public and legal sentiment on particular proposals, this is, and must always remain, the primary objective of every legal system. The rejection of the tariff system was justified, at least in part, by the High Court in *Planet Fisheries* on the ground that:

> the amount of damages must be fair and reasonable compensation for the injuries received and the disabilities caused.[15]

Their Honours' approach does not, however, lend itself to the fair and reasonable resolution of personal injury disputes. Their justification is better advanced as a reason for implementing a legislative scheme based upon a tariff system (with an overriding upper limit) which would avoid the onerous burden presently faced by trial judges and guarantee, so far as is possible, consistency between awards.

11 *Personal Injury Litigation – Assessment of Damages: Working Paper No. 41* (1971) 54.

12 *Report on Personal Injury Litigation – Assessment of Damages: No. 56* (1973) 11. The *Pearson Report* 88-89 also rejected a legislative tariff to control awards.

13 *Ibid.*

14 For example, *Naylor v. Yorkshire Electricity Board* [1968] A.C. 529 (HL).

15 (1968) C.L.R. 118, 125.