

ASSESSMENT OF DAMAGES

FOR
PERSONAL INJURY AND DEATH

by

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PREFACE

The first edition of this book was intended as an academic study of all the reported cases in Australia dealing with the principles or rules for the assessment of damages for personal injury and death. Despite its stated emphasis on the law rather than practice, and its denial of any attempt to afford a dollars-and-cents answer to the question of how much a particular injury is worth, it has apparently proved useful to practitioners. I have been gratified to find passages in it referred to or quoted in appellate courts in all Australian jurisdictions.

Although, for the reasons given below, I had hoped that no second edition would be necessary, I have continued to read every relevant reported Australian case on the topic (and many unreported ones, which are far too numerous for exhaustive coverage). I have also continued to read most of the reported appellate decisions of the English courts, as well as occasional reports emanating from Canada, the United States, New Zealand, Scotland, Ireland and South Africa. The present work is the product of such reading. Once again, however, I must disclaim any comprehensive treatment of the law in any jurisdiction other than the Australian ones.

In view of the reception achieved by the first edition, I have sought to make the book even more useful to practitioners, referring here and there to practical points that I have become aware of and adding a chapter on Appeals and the various tables set out in the Appendix. Yet I hope that I have retained scholarship as the first priority.

The book has been extensively rewritten, not much of the original text having survived intact. There are a number of reasons for this. First, my preparation of the Australian Commentary on the title “Damages” in *Halsbury’s Laws of England* (4th ed) and my subsequent teaching of an LLM course on the Law of Damages, encompassing damages in contract and tort generally, have made me more aware of the general principles into which damages for personal injury and death fit. Secondly, my work resulting from the *Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia* (the Woodhouse Report, 1974) — which led first to the publication of my review of that report in *Compensation and Rehabilitation* (1975), then to my appointment as a consultant to the Senate Committee on Constitutional and Legal Affairs in its inquiry into the Clauses of the National Compensation Bill 1974, and then to numerous speaking engagements on the subject of comprehensive compensation for all to audiences with diverse professional interests — has opened my eyes more fully to the role played by damages awards in the total scheme of accident compensation. Thirdly, United Kingdom developments — particularly the publication of the Law Commission’s *Report on Personal Injury Litigation: Assessment of Damages* (Law Com No 56, 1973) and of the *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (the Pearson Report, Cmnd 7054, 1978) — gave further support to my criticism of much of the existing law. Finally,

of course, it has been necessary to take account of the increased activity of the courts in reshaping the law, to my gratification, often in the direction that I had proposed in the first edition.

In the Preface to that edition I drew attention to the views of Barry J in *Tzouvelis v Victorian Railways Commissioners* [1968] VR 112 (FC), 114-23, and asked whether the present system for compensating accident victims was not obsolete, or at least obsolescent. I referred to the *Report of the Royal Commission on Compensation for Personal Injury in New Zealand* (the first Woodhouse Report, 1967) and said that I had been, and had remained, convinced by the arguments there presented against the continuation of the present methods, particularly in regard to their large dependence on "fault". I said that I foresaw difficulties, arising from the Australian federal system, in implementing in this country the scheme recommended — and then about to come into operation — in New Zealand. I mentioned that I had predicted that it would be many years before problems concerning the assessment of damages would no longer arise in any of the Australian States and Territories. I saw a ray of light in the then recent appointment of the Australian Woodhouse Committee, but thought that "for a few years at least the need for a book which brings order to the current chaos" would continue. I expressed the hope that the first edition of this book would partly satisfy that need. It was my implicit wish that no second edition would be required.

That wish was not to be fulfilled. The chaotic internal illogicality of the law of damages for personal injury has perhaps been diminished a little as a result of the close attention the subject has now received from the ultimate appellate courts of Australia, the United Kingdom and Canada. On the other hand, those decisions have made more apparent — even to the judges — the inadequacy of the mechanism available to the courts for doing justice in those cases that come before them. Furthermore, it has become apparent to virtually all but the official representatives of the legal profession that retention of the common law in this area is a wastefully expensive method of meeting the needs of only a small proportion of accident victims. Yet the day when this book will no longer be of any use other than as a historical study seems as far away now as it did in 1973. This time I shall pin my faith that logic and compassion will ultimately prevail on the reference on Accident Compensation which has recently been given to the New South Wales Law Reform Commission. However, I shall be less sanguine, first because experience has increased my cynicism and, secondly, because it will take time for any solution arrived at in New South Wales to be implemented elsewhere. Thus it seems likely that this book will have to go into a third edition.

In relation to the present edition my thanks are due to Sir Richard Eggleston, who found time in the course of his extensive duties to read and comment on some sections; to Richard Greenfield, for his readiness to give me prompt advice on actuarial matters, for having read and commented on the relevant sections of the book and for having organized the preparation of the tables in the Appendix with Peter Szabo and John Crocker, whose contribution I gratefully acknowledge; and to Will Foster, Ted Sieper and Paul Kenny for reading and commenting on sections dealing with economics. I was pleased to find that all these persons dealt kindly with my

amateur ventures into fields outside my own expertise; for the errors that remain I alone am, of course, responsible.

This book will be typeset directly from word-processor disks, the first occasion on which Butterworths will have attempted such a task. Pioneering efforts of this nature carry with them inherent risks. One reason why I can face those risks with some confidence is the superb skill of my secretary, Sue Horsman, who was responsible for putting the whole of the manuscript on to the disks. I am grateful to her, too, for the devotion with which she completed the processing of the original manuscript to meet the last of many deadlines set for me by the publishers. To Butterworths' staff I extend my thanks for their encouragement and willingness to experiment.

As always, my greatest debt is owed to my wife, to whom this book is again dedicated, and to my children.

The law is stated as at 31 May 1982.

14 September 1982

HAROLD LUNTZ

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