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Book Review: Assessment of Damages for Personal Injury and Death, by Harold Luntz

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Assessment of Damages for Personal Injury and Death. By HAROLD LUNTZ. Sydney: Butterworth Pty Ltd. 1974. Pp. xxxii, 350. (No Price Given)

This is an outstanding book: it is certainly one of the best monograghs on any branch of the law of tort that has appeared in the common law world in the last thirty years. This must have been a particularly difficult book for the author to write for not only is the subject he has chosen to write about an intrinsically complicated one but the author feels that the whole system of common law damages should be jettisoned in favour of periodic benefits paid on a no-fault basis. Indeed, one gets the impression that Mr. Luntz would be very happy if there were no need for successive editions of his book.

If there is an aspect of the law of damages which has not been extensively and acutely discussed, I have not been able to find it. Whether he is dealing with the rule in *Brunsden* v. *Humphrey*,[1] the rule in *B.T.C.* v. *Gourley*,[2] the collateral source rule, actuarial methods of computing damages and many other topics, the author is always clear, exhaustive and forceful.

All this does not mean that I would agree with all of Mr. Luntz's recommendations. Thus, in a "no-fault world", Mr. Luntz would abolish the private action for damages for assault and battery but the reasons he gives for this recommendation are not convincing. He argues that punitive damages do not make sense in a world of liability insurance. This is true, but presumably, in a no-fault regime liability insurance will be a thing of the past. Alternatively, even with liability insurance, there is no reason why

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1 (1884), 14 Q.B.D. 141.

2 [1956] A.C. 185.

the insurance should be held to cover awards of exemplary or punitive damages. Finally, there is no need to fear that the wrongdoer will be punished twice. It should be possible within a single proceeding to make sure that the wrongdoer only pays one penalty and it should be possible to divide that penalty between the victim and the State.

Although the question is a very difficult one, I am unable to share Mr. Luntz's support of *B.T.C.* v. *Gourley*.[3] Insurers do not pay tax on the sums they retain under *Gourley*. This seems particularly difficult to justify when the law (certainly in Canada and the United Kingdom) already gives very generous tax treatment to insurers. It is hard to justify this amount of generosity, unless one can be fairly certain that premium rates would be significantly lowered. There is another aspect to the problem: at present awards for damages do not take inflation into account. If the plaintiff in *Gourley* had had £37,720 (instead of £6,695) to invest, this would have given greater protection against the ravages of inflation. Mr. Luntz would argue that the way to deal with the inflation problem is for the courts to expressly take this into account in assessing damages. This idea obviously has merit but until that change is accomplished, I would favour the pre-*Gourley* law.

I would also—given the present fault regime—not tamper with the collateral benefits principle which the author would like to have totally removed from the law, even to the extent of deducting (at least some) charitable gifts from the victim's damages. The author delivers a devastating broadside at *Bradburn* v. *G.W. Railway*.[4] Although it is true that the reason given by the court in *Bradburn* in support of the rule, namely, that the insured had paid his premiums, is weak, I would not make the parallel which the author makes between property and personal injury insurance. In the former case, even with the revenue-producing property, there is not usually present the problem of measuring *continuing*[5] loss which arises in all cases of serious personal injury. Again my fear is that with the refusal on the part of the courts to take into account inflation and given also their reluctance to use actuarial tables, that the level of damages will be inadequate to compensate victims even for their economic losses during the period of their disability. I should add that even in a "no-fault

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[3] *Ibid.*

[4] (1874), L.R. 10 Ex. 1.

[5] My emphasis.

world", I would see no objection to, for example, unions purchasing group accident insurance, the effect of which might put employees in a better position financially while injured than while working.

The law of damages relating to personal injury is, of necessity, in a thoroughly unsatisfactory state. All too often one is forced at the present time not to choose the "best solution" (because it is unavailable) but rather the "least bad" alternative.

Occasionally, I have differed from Mr. Luntz in my choice of the "least bad" solution but this is not to deny that he has written a book of the first-rank. I am certain that it will come to be so regarded, both by academics and by the legal profession throughout the Commonwealth.

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[1] D. A. Schmeiser, Criminal Law: Cases and Comments (2nd ed., 1973).