

A COMPARATIVE STUDY OF NONPECUNIARY DAMAGES IN COMMON LAW COUNTRIES

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I. INTRODUCTION

Nonpecuniary damages are difficult to calculate in any legal system. Regardless of the specific rules or precedents applicable, there remains a basic problem of deciding on a sum of money which will compensate a plaintiff who suffers debilitating and permanent injuries. By comparison, calculating money losses is easy—it is just a matter of presenting the bills or plugging the numbers into a formula. Nonpecuniary losses create a dilemma making courts uncomfortable. The damage award cannot restore lost bodily functions in the same way a damage award can replace lost money. However, it would not be fair to compensate the tort victim for only his pecuniary losses while ignoring physical and emotional pain that is the result of another's negligence.¹

The fact that nonpecuniary damages are defensible as fair compensation does not make them less difficult to ascertain. Deciding the amount of compensation owed to an individual whose injuries have no direct money value presents special difficulties.² Courts in every country wrestle with this problem, and they may benefit from knowledge of each other's experiences. This paper reviews the law of nonpecuniary damages compensation in five common law countries that have a common

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1. See, e.g., Special Comm. on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law* (Report to the A.B.A.), A.B.A., 5-176 (1984); Komesar, *Toward a General Theory of Personal Injury Loss*, 3 J. LEGAL STUD. 457, 459 (1974). For the distinction between damages as "restitution" in the case of money loss, and "compensation" in the case of nonpecuniary loss see *British Transp. Comm'n v. Gourley*, 1956 App. Cas. 185, 208-12 (H.L.). In *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 1 W.W.R. 577 (Can.), Dickson, J., commented: "Andrews used to be a healthy young man, athletically active and socially congenial. Now he is a cripple, deprived of many of life's pleasures and subjected to pain and disability. For this he is entitled to compensation, [but] there is no medium of exchange for happiness. There is no market for expectation of life." *Id.* at 602. This is the essence of the dilemma facing courts in this area.

2. For a discussion of pain and suffering damages as an economic valuation problem, see Lipnowski, *An Economist's Approach to Compensation for Accident Victims*, 9 MANITOBA L.J. 319 (1979).

cultural, historical and legal heritage. To isolate the issue of nonpecuniary damages from other legal issues, such as wrongful death compensation, this paper focuses on nonpecuniary damages for negligence to living plaintiffs. The countries surveyed are the United States, England, Canada, Australia and New Zealand.

II. THE COMMON HISTORICAL POSITION

All five countries were once part of the English common law system which allowed juries to decide nonpecuniary damage awards.³ The principle of not allowing the judiciary to interfere in nonpecuniary damage issues is explained in the 1763 case of *Huckle v. Money* in which Lord Mansfield explained: "The law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a variety of causes, facts and circumstances."⁴ On the basis that the nonpecuniary damage award must depend upon the unique causes, facts, and circumstances of each case, Lord Mansfield further noted:

[It] is very dangerous for the judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.⁵

One of the earliest challenges to a jury award of nonpecuniary damages in negligence occurred in the case of *Catlin v. Diamond Steam Packet Co.*⁶ In that case the defendant appealed a jury award of £900 for a lost leg on the grounds of excessiveness. The judges refused to address the issue of excessiveness, and they allowed an appeal by finding the trial judge's instruction to the jury was improper.

III. TWO THEORIES OF NONPECUNIARY DAMAGE AWARDS

One basis to compare the various approaches by common law countries to nonpecuniary damages is to note the extent they have moved from the original common law position represented by *Huckle v. Money* and *Catlin v. Diamond Steam Packet Co.* For example, the U.S. courts

3. "The early English cases give scant indication of the basis of the award, and in light of the tradition of global awards, there is little hint of the evaluation of the intangible component." Veitch, *The Implications of Lindal*, 28 MCGILL L.J. 116, 119 (1982).

4. *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763) (a case of assault and false imprisonment).

5. *Id.* at 769.

6. *Catlin v. Diamond Steam Packet Co.*, [1849] 7 L.T.R. 534 (Q.B.); cf. O'Connell & Carpenter, *Payment for Pain and Suffering Through History*, 50 INS. COUNS. J. 411 (1983).

remained close to the original common law position. Nonpecuniary damages are completely within the jury's discretion unless the jury award is clearly "outrageous."⁷ Other common law countries have moved away from this position. These countries have uniform standards so that judges can award nonpecuniary damages. New Zealand has moved the farthest from the common law approach of jury discretion by abolishing tort recovery in trials, and establishing a statutory system for awarding nonpecuniary damages.⁸

Under the different approaches used by the United States and the other common law countries, two distinct theories have emerged for defining and awarding nonpecuniary damages. The theory expressed by Lord Mansfield and the 18th and 19th century English courts is the "question of fact" approach. This approach is still followed to a large extent by the United States. The second theory is the "question of law" approach, the most extreme form of which is followed by New Zealand. There is authority for both approaches in all five common law countries, but each of them tends to express one approach more than the other.

A. *The "Question of Fact" Approach*

The "question of fact" approach is based on the assumption that each plaintiff's injury is unique. Another assumption is that the adequacy of compensation is a matter of public morality, which must be decided by community standards. The process of determining nonpecuniary damages under the "question of fact" approach is, therefore, subjective and nontechnical. The use of a jury to decide nonpecuniary damages is appropriate because the jury can tailor the award to the unique circumstances of the plaintiff's injuries, as well as represent community standards. Under this approach, there should be no general principles for calculating nonpecuniary damages because they inhibit the jury's discretion. General principles may not conform to community standards, and there are no uniform truths about human injuries that give rise to such rules.

B. *The "Question of Law" Approach*

The "question of law" approach is based on the assumption that personal injuries are basically the same among plaintiffs. The injuries will differ in each case, but the "question of law" approach assumes that all individuals having the same injuries should be equally compensated. In

7. See *infra* note 93 and accompanying text.

8. Accident Compensation Act, No. 181 (N.Z. 1982).

the "question of law" approach, the adequacy of compensation is measured by whether all persons who have the same injuries receive roughly the same compensation. If all injuries are roughly the same, then anything but similar compensation would be unfair. Therefore, calculating nonpecuniary damage awards under the "question of law" approach is objective and somewhat technical. In determining the award, the extent of the injury is considered rather than community notions of fairness. To assure objectivity and similar awards for the same injuries, this approach relies on general rules of law to decide the nonpecuniary damage award for each case. The general rules are in the form of predetermined compensation for various types of injuries. Broad discretion to the trier of fact is considered anarchic, and may lead to injustice, because two persons with the same injuries may receive significantly different awards.

The "question of fact" and "question of law" approaches offer two alternatives for calculating nonpecuniary damages.⁹ The most obvious legal implication is that in the "question of fact" approach calculating nonpecuniary damages is treated as a question of fact; while under the "question of law" approach, calculating nonpecuniary damages is treated as a question of law. The choice of one approach or the other is reflected in the range of decisions concerning nonpecuniary damages which courts or legislators must make. These include rules for calculating the award; the type and extent of proof required; whether the plaintiff needs to be conscious to recover; whether there should be a monetary ceiling on the awards; the standard of appellate review; and the general level of awards. The choice between "question of law" and "question of fact" reflects a basic conflict in law between the justice of treating everyone equally and the justice of having a fair result in the circumstances of each case.

IV. CALCULATING THE AWARD

A nonpecuniary damage award is made up of a variety of components that have different names in several of the common law countries. In all of the countries, a plaintiff¹⁰ may recover for nonpecuniary damage to his physical and emotional integrity resulting from another's negligence.¹¹ In the United States, this kind of recovery is generically referred

9. Compare the "objective," "subjective" and "functional" approaches described by Ogus, *Damages for Lost Amenities: For a Foot, a Feeling or a Function*, 55 MOD. L. REV. 1 (1972).

10. In many of the general comments about the five countries, words such as "plaintiff" and "recover" will be used. Technically, in New Zealand, the injured party is a "claimant" and does not "recover," but rather receives compensation from the Accident Insurance Corporation as provided by statute. Accident Compensation Act, No. 181 (N.Z. 1982).

11. This article does not discuss the tort of mental distress without physical impact which is present in most of the common law countries because it raises other complex legal issues that

to as "pain and suffering."¹² In Canada, courts speak in terms of "nonpecuniary loss" of which "pain and suffering" is merely one aspect.¹³ In England, nonpecuniary damages are classified as "pain and suffering and loss of amenity."¹⁴ Australian courts have traditionally called nonpecuniary damages "general damages,"¹⁵ a term which has a broader meaning in many jurisdictions of the United States. In New Zealand, nonpecuniary loss compensation is awarded under the Accident Compensation Act, for "permanent loss or impairment of bodily functions" (including the loss of a body part),¹⁶ "loss . . . of amenities or capacity for enjoying life," and "pain and mental suffering."¹⁷

A. United States

In the United States, the jury is given broad discretion to calculate pain and suffering awards. To assist jurors in their calculations, various factors are considered, such as: the severity of the injury; the effects of the injury on the plaintiff's life; the duration of the injuries; and the pain and humiliation associated with disfigurement.¹⁸ These are not separate categories of damages. They are factors to be considered in deciding the amount of a single award for a plaintiff's pain and suffering. However, there have been various attempts to create additional awards or break the pain and suffering awards into separate categories. The most successful attempt to create a new category of nonpecuniary compensation is the separate award for "loss of the ability to enjoy life."¹⁹ Some U.S. jurisdictions also recognize other damage awards including, "the visible nature

would detract from the focus on compensation. See, e.g., Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

12. See, e.g., Wagner, *Pretium Doloris - Pain and Suffering*, 30 AM. J. COMP. L. 117 (Supp. 1982); F. HARPER, F. JAMES, & O. GRAY, *THE LAW OF TORTS* § 25.10 (2d ed. 1986) [hereinafter HARPER, JAMES & GRAY].

13. Klar, *The Assessment of Damages for Non-Pecuniary Losses*, 5 CAN. CASES L. TORTS 262 (1978); McLachlin, *What Price Disability? A Perspective on the Law of Damages for Personal Injury*, 5 CAN. B. REV. 1, 48-51 (1981); *Andrews v. Grand & Toy Ltd.*, [1978] 1 W.W.R. 577, 602 (Can.).

14. A. OGUS, *THE LAW OF DAMAGES* 198 (1973); KEMP & KEMP, *THE QUANTUM OF DAMAGES IN PERSONAL INJURY* 1008 (4th ed. 1975); cf. Law Comm'n, *Report on Personal Injury Litigation - Assessment of Damages*, No. 56 ¶¶ 193-98 (1973) (recommending that damages be awarded under two broad categories of "pecuniary" or "nonpecuniary" in personal injury cases).

15. See, e.g., Luntz, *Damages in a Nutshell*, 53 LAW INST. Q. 639, 641 (1979); Tilbury, *Damage for Personal Injuries: A Statement of the Modern Australian Law*, 14 U.W. AUSTL. L. REV. 260, 262 (1980).

16. Accident Compensation Act, No. 181, § 78(1) (N.Z. 1982).

17. *Id.* § 79.

18. E.g., *Burke v. United States*, 605 F. Supp. 981, 988 (D. Md. 1985); *Dogan v. Hardy*, 587 F. Supp. 967, 970 (N.D. Miss. 1984).

19. See, e.g., Cramer, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 PAC. L.J. 965 (1981). According to HARPER, JAMES & GRAY, *supra* note 12 § 25.10A, the United States now allows a separate award for loss of ability to enjoy life in addition to the pain and suffering award.

of the injury"²⁰ and "permanency of the injury."²¹

None of the other countries surveyed recognize visibility of the injury as a separate category of damage award. As mentioned above, New Zealand has an award for loss of body parts or loss of bodily functions.²² Unlike Australia, the English,²³ Canadian,²⁴ New Zealand²⁵ and American courts do not recognize "lost years"²⁶ or "reduced life expectancy" as separate categories of damages.²⁷ In addition, many U.S. jurisdictions allow lawyers to make *per diem* arguments to the juries that award non-pecuniary damages.²⁸ A *per diem* argument is a method of calculating damages in which the plaintiff receives a fixed amount of damages for each unit of time the pain and suffering is expected to continue (e.g., ten cents per minute²⁹ or \$1,000 per year³⁰). However, a *per diem* argument is not a rule of law. Many American jurisdictions require a cautionary instruction to the jury that the *per diem* argument is advisory, and that it does not hamper the jury's discretion in deciding the amount of the pain and suffering award.³¹ The author has found no evidence of *per diem* arguments being used by other common law countries.

20. Jackson v. United States, 526 F. Supp. 1149, 1154 (E.D. Ark. 1981).

21. Thompson v. National R.R. Passenger Corp., 621 F.2d 814, 824 (6th Cir. 1980).

22. See *supra* note 16 and accompanying text.

23. Britain's Parliament abolished the award for "lost years" in 1982. Administration of Justice Act, 1982, ch. 53, § 1.

24. The Supreme Court of Canada, in its 1978 "trilogy" judgment, included "lost years" in its single award for "nonpecuniary loss." Andrews v. Grand & Toy Alta. Ltd., [1978] 1 W.W.R. 557, 592 (Can). Several Canadian provinces have abolished this category of damages by statute. See, e.g., Rose v. Belanger, [1985] 3 W.W.R. 612, 621-22 (Man. C.A.).

25. The Accident Compensation Act, No. 181, §§ 78-79 (N.Z. 1982), provides only a statutory tariff for body parts and functions lost by the injury and a discretionary award for pain and suffering, loss of amenities and loss of the capacity for enjoying life. "Lost years" is arguably included in the discretionary award, but there is no separate award for it.

26. According to HARPER, JAMES & GRAY, *supra* note 12, at 578-79, "questions have arisen" about a separate award, but this has not been generally accepted. The District Court for Maryland rejected such an award in Burke v. United States, 605 F. Supp. 981, 988 (D. Md. 1985).

27. Cf. Hodgin, *Damages for the "Lost Years,"* 32 N. IR. L.Q. 106 (1981); see also Fleming, *Lost Years: A Problem in the Computation and Distributing of Damages*, 50 CALIF. L. REV. 598 (1962).

28. See, e.g., Annotation, *Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering*, 3 A.L.R. 4TH 940 (1981).

29. Weeks v. Holsclaw, 195 S.E.2d 596 (N.C. 1982); see also Comment, *Damages - Per Diem Damages in North Carolina*, 19 WAKE FOREST L. REV. 645 (1983).

30. Watson v. City of Chicago, 124 Ill. App. 3d 348, 464 N.E.2d 1100 (Ill. App. Ct. 1984).

31. M. MINZER, J. NATES, C. KIMBALL, D. AXELROD & R. GOLDSTEIN, *DAMAGES IN TORT ACTIONS* § 4.71 (1986) [hereinafter MINZER].

B. Canada

In Canada, there is authority that calculating nonpecuniary damages is within the discretion of the jury.³² However, in a trilogy of cases decided on the same day in 1978,³³ the Canadian Supreme Court attempted to write a "handbook" for the award of personal injury damages,³⁴ including nonpecuniary damages. The basic principle of the trilogy cases is that pecuniary losses, including the cost of future care, were to be fully, and even generously, compensated.³⁵ However, they also said that "it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities."³⁶ Nonpecuniary damages were not to be viewed as compensation for the plaintiff's injuries, but as a small discretionary fund to buy "solace," or extra pleasures to replace those lost through the injury.³⁷ The Supreme Court called this concept the "functional" approach to nonpecuniary damages.³⁸

In principle, all Canadian courts are bound to follow the Supreme Court's decisions as binding precedent.³⁹ In practice, the "functional" approach has very little impact on calculating nonpecuniary damage awards in Canada.⁴⁰ The Canadian Supreme Court did not use the "functional" approach in the trilogy cases which advocated it. The Court never explained how it arrived at the figures it awarded on appeal, nor did it inquire into how much was necessary to buy "extra pleasures" given the plaintiffs' conditions.⁴¹ Generally, trial courts have either ignored the trilogy cases; paid lip service to them by noting that they had considered the comments of the Supreme Court in setting an award;⁴²

32. *Nance v. British Columbia Elec. Co.*, 1951 App. Cas. 601 (P.C.); *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 435 (Can.).

33. *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 1 W.W.R. 577 (Can.); *Thornton v. Board of School Trustees of School Dist. No. 57*, [1978] 2 S.C.R. 267 (Can.); *Arnold v. Teno*, [1978] 2 S.C.R. 287 (Can.).

34. Charles, *A New Handbook on the Assessment of Damages in Personal Injury Cases from the Supreme Court of Canada*, 3 CAN. CASES L. TORTS 344 (1977-78).

35. In the "trilogy," the Court rejected arguments that the defendant should only have to pay the cost of nursing home care for the paralyzed plaintiff, and decided instead to award the cost of more expensive care in the plaintiff's own home. *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 1 W.W.R. 577, 583 (Can.).

36. *Id.* at 602.

37. *Id.*

38. *Id.* at 603.

39. See P. HOGG, CONSTITUTIONAL LAW OF CANADA 171 (2d ed. 1985).

40. Klar, *Developments in Tort Law: The 1981-82 Term*, 5 SUP. CT. REV. 273, 276 (1983).

41. Cf. McLachlin, *supra* note 13, at 48; see also Charles, *supra* note 34 (comments on how to apply the functional approach in assessing damages).

42. *E.g.*, *Maltais v. A-G(Que)*, 1980 C.A. 236, 243 (Que. C.A.); *Ohlheiser v. Cummings*, [1979] 6 W.W.R. 282, 287 (Sask. Q.B.); *Tucker v. Stanbury*, 91 A.P.R. 64, 81 (Newf. C.A. 1981).

distinguished them;⁴³ or followed the Supreme Court's actions in claiming to use the "functional" approach when doing nothing of the kind.⁴⁴ Reading Canadian judgments on nonpecuniary damages at the trial and appellate levels suggests that nonpecuniary damages are calculated much like pain and suffering damages in the United States. The court picks a sum that it feels fairly represents the gravity, duration and effect of the injuries on the plaintiff.⁴⁵

C. England

In England, the law of nonpecuniary damages has changed significantly in recent years. Since 1970, courts award all personal injury damages in three categories: (1) "special damages," which are present and past money losses; (2) loss of future earnings; and (3) a general award for "pain and suffering and loss of amenities," which is equivalent to "pain and suffering" in the United States, and "nonpecuniary loss" in Canada.⁴⁶ In setting the "pain and suffering and loss of amenities" award, an English court may properly reduce the award for nonpecuniary loss where the award for "special damages" or pecuniary loss is high.⁴⁷

England has a more systematic approach for calculating nonpecuniary loss than the United States or Canada. Beginning in 1940, an informal pattern of damages evolved for various types of injuries which was adjusted for the individual circumstances of the plaintiffs,⁴⁸ and sometimes for inflation.⁴⁹ Until 1966, the pattern of nonpecuniary damage

43. *Decorby v. Wascana Winter Club*, [1980] 3 Sask. R. 96, 109 (Sask. C.A.).

44. *E.g.*, *Ostapowich v. Benoit*, [1982] 14 Sask. R. 233 (Sask. Q.B.); *Hohol v. Pickering*, [1982] 35 A.R. 181 (Alta. Q.B.); *Penso v. Solowan and Public Trustee*, [1982] 4 W.W.R. 385, 395-96. Counsel tried to use the functional approach by insisting that evidence be called to justify the use of nonpecuniary damage award money by the plaintiff. *Id.* The Court rejected this demand for very persuasive reasons, for example, that it would "prove" nothing and would distract the court from the calculation of "conventional" awards in the normal manner. *Id.*

45. Most of the awards are simply a catalog of the plaintiff's injuries followed by a sum for nonpecuniary damages with no explanation of how that sum was chosen. A typical example follows:

The evidence establishes that there was substantial pain and suffering for some considerable time. The plaintiff suffered several operations and also had twenty-five physiotherapy treatments. His major loss was the sight of an eye He formerly played pool. His disabilities have hampered his game. He formerly golfed some. He has not resumed this activity . . . because of his arm. The loss of sight of one eye has restricted his ability to drive a motor vehicle. The plaintiff was a normal, healthy young man before the accident. He is now considerably restricted in many of his activities. I think a fair assessment on this score would be \$35,000.00.

Paterson v. Bearchief, [1978] 14 A.R. 48, 65-66 (Alta. Q.B.).

46. *Jefford v. Gee*, [1970] 1 All E.R. 1202, 1212 (C.A.).

47. *Smith v. Central Asbestos Co. Ltd.*, [1971] 3 All E.R. 204, 213 (C.A.).

48. The setting of a £200 fixed award was made for lost life expectancy or "lost years" in *Benham v. Gambling*, 1941 App. Cas. 157, [1941] 1 All E.R. 7 (H.L.).

49. 12 HALSBURY'S LAWS OF ENGLAND ¶ 1147 n.1 (4th ed. 1979).

awards was wholly informal. Thereafter, the English Court of Appeals began to reverse jury awards⁵⁰ and awards by judges⁵¹ that did not conform to the general pattern, or bracket, of awards for the type of injury presented. The loss of important bodily functions, or an unusual deprivation, or a resulting inability to work, tended to push an award toward the top of the bracket for the plaintiff's type of injury.⁵² Older plaintiffs tended to get awards at the lower end of the damage bracket for their injuries.⁵³

D. Australia

In Australia, calculating nonpecuniary damages is similar to England's approach. There is a damage range, or bracket system, for nonpecuniary damage awards which varies with circumstances, such as the intensity of the pain, the age of the plaintiff and the effect the injury has in depriving the plaintiff of particular activities.⁵⁴ There are awards for pain and suffering, loss of enjoyment of life and the loss of expectation of life.⁵⁵ Loss of expectation of life, or "lost years," is a fixed award,⁵⁶ which prevailed in Britain until it was abolished by statute in 1982.⁵⁷ No matter how many years the Australian plaintiff's life is shortened, he receives the same award in real terms that every other plaintiff whose life has been shortened receives. Beyond the fixed amount for "lost years," and the informal ranges of compensation for various injuries, there is little official guidance for Australian courts in awarding nonpecuniary damages.⁵⁸

Australian judges, like American juries, are required to follow community standards in awarding nonpecuniary damages.⁵⁹ Although the bracket system of damages is similar to England's, the Australian system is less formal since failure to adhere to a particular bracket is not reversible error.⁶⁰ However, as in both Canada and England, a very large award for pecuniary damages can reduce the nonpecuniary damage award.⁶¹ Since 1978, Australian courts have awarded nonpecuniary damages under three categories: (1) loss of earning capacity; (2) pain and

50. *Ward v. James*, [1966] 1 Q.B. 273 (C.A.).

51. *George v. Pinnock*, [1973] 1 All E.R. 926 (C.A.).

52. *Supra* note 49.

53. *Id.*

54. *Luntz, supra* note 15, at 642.

55. *Tilbury, supra* note 15.

56. *Id.* at 278; *see also*, *Sharman v. Evans*, 138 C.L.R. 563, 585 (Austl. 1977).

57. *See supra* note 23 and accompanying text.

58. *Sharman v. Evans*, 138 C.L.R., at 585.

59. *Luntz, supra* note 15.

60. *Arthur Robinson (Grafton) Pty. Ltd. v. Carter*, 122 C.L.R. 649, 656 (Austl. 1970).

61. *Sharman v. Evans*, 138 C.L.R. 563, 585 (Austl. 1977).

suffering; and (3) loss of amenities.⁶²

One unique aspect of Australian nonpecuniary damage law is the special provision for aboriginal plaintiffs which emerged recently. In several cases, Australian courts have awarded damages (as part of loss of amenities) for the social shame and exclusion from tribal activities that results when a traditional aborigine suffers physical injury involving deformity or loss of function.⁶³ The author could find no examples of American or Canadian courts awarding damages to Indians in an analogous way, or of the New Zealand Accident Compensation Act making special provisions for the native Maoris.

E. New Zealand

In New Zealand, compensation for nonpecuniary damages in a negligence case is part of a state accident compensation scheme.⁶⁴ The emphasis of the scheme is on replacing lost income and providing free rehabilitation so that the injured person can return to work.⁶⁵ Nonpecuniary loss has only a secondary role.⁶⁶ Nonpecuniary loss is compensated in two ways under New Zealand's Accident Compensation Act. First, there is a predetermined compensation scheme for the loss of body parts or functions based on the injured person's preinjury earnings and the percentage of total disability created by the injury. For example, the plaintiff is awarded a set amount for the loss of a foot or other body part or function.⁶⁷ The plaintiff's compensation is calculated using medical evidence to determine the percentage of disability, and then this figure is applied to the claimant's earnings according to the statute.⁶⁸ The second type of nonpecuniary loss compensation in New Zealand is a discretionary award for: loss of amenities; the loss of the capacity to enjoy life (including disfigurement); and pain and mental suffering (including shock and neurosis).⁶⁹ The only requirement for allowing the discretionary award is that the injury must be "of a sufficient degree to justify payment" when considering "its nature, intensity, duration and any

62. *Fire & All Risks Ins. Co. v. Callinan*, 52 A.L.R. 637 (Austl. 1978).

63. *Dixon v. Davies*, 17 N. Terr. Rep. 31 (1982); *Weston v. Woodruffe*, 36 N. Terr. Rep. 34 (1986).

64. See Accident Compensation Act, No. 181 (N.Z. 1982); Pedrik, *Palmar's Compensation For Incapacity*, UTAH L. REV. 115 (1981).

65. See *In re Garner*: Decision No. 234, 2 N.Z. Admin. R. 240, 243-44 (1979) (Acc. Comp. App. Auth.).

66. The original Accident Compensation Bill of 1972 would have abolished compensation for nonpecuniary loss altogether but lobbying by unions and lawyers forced an amendment of the legislation. Gaskins, *Tort Reform in the Welfare State: The New Zealand Accident Compensation Act*, 18 OSGOODE HALL L.J. 238, 258 (1980).

67. Accident Compensation Act, No. 181, § 1 (N.Z. 1982).

68. *Id.* § 78(3).

69. *Id.* § 79.

other relevant circumstances.”⁷⁰ The payment must be made within two years after the injury. The Accident Compensation Corporation must use the statutory guidelines when determining the discretionary award, and it cannot construct its own standardized compensation scheme of nonpecuniary damages to calculate such awards.⁷¹

F. Similarities in Jurisdictions

The broad discretion of courts in the United States and Canada in calculating nonpecuniary damage awards places them under the “question of fact” approach to nonpecuniary damages. Juries in the United States and judges in Canada are relatively free to tailor awards to specific circumstances of the plaintiff’s case, and to allow community standards of fairness to guide them. England’s standardized bracket system of awards is like the “question of law” approach in bringing more uniformity and objectivity to the calculation of nonpecuniary damages. However, since the awards are based on a bracket system, rather than specified amounts, courts do have some flexibility to adjust nonpecuniary awards to plaintiffs’ specific circumstances and reflect community standards.

Australia and New Zealand have interesting mixtures of “question of law” and “question of fact” approaches. In Australia, the law owes much to “question of fact” principles by requiring judges to follow community standards, and refusing to enforce a bracket system of damages. Australian practice, however, is more “question of law” by using an informal bracket system to assess damages. In New Zealand, the set statutory scheme for loss of body parts falls under the “question of law” approach. It calculates nonpecuniary losses in a totally objective manner with no discretion. On the other hand, New Zealand’s discretionary scheme for awarding pain and suffering and loss of amenities damages is within the “question of fact” approach. The Accident Compensation Corporation is allowed complete discretion in awarding nonpecuniary damages based on injured parties actual situations and what the corporation deems fair. The mixture of the two approaches in assessing nonpecuniary damages in each country shows the tension between the two theories and the difficulty of pursuing either the “question of law” or “question of fact” approach in a pure form.

V. PROVING NONPECUNIARY LOSS

The proof necessary to obtain an award for nonpecuniary damages is different among the common law countries. Sufficient proof in one

70. *Id.* § 79(1).

71. *Jones v. Accident Compensation Comm’n*, [1980] 2 N.Z.L.R. 379 (H.C.).

country may not entitle a similar plaintiff to an award in another country.

In the United States, nonpecuniary loss must be proved with "reasonable certainty;"⁷² yet the meaning of "reasonable certainty" differs from jurisdiction to jurisdiction. Some jurisdictions do not mandate testimony by medical experts to recover nonpecuniary damages. Under the "reasonable probability" rule for future personal injury damage in Texas, a jury may make its award based upon the nature of the injuries, the medical care rendered before trial, and the condition of the injured party at the time of trial.⁷³ The rule does not require the plaintiff to offer medical evidence of future pain and suffering.⁷⁴ In West Virginia, lay testimony is sufficient except "where . . . the effects [of the injury] . . . are not readily . . . demonstrable or subject of common knowledge."⁷⁵ In Georgia, no direct evidence of future pain is needed. The jury is free "to draw all inferences from the evidence as are justified by the common experience and observations of mankind."⁷⁶ In Louisiana, medical testimony is not needed to prove pain and suffering (present or future), "[l]ay testimony is always admissible to prove that which the witness knows about."⁷⁷ Thus, it is sufficient for the jury to believe the plaintiff's own testimony. In Ohio, medical testimony is not necessary to prove pain and suffering that is "not so great" as to require such testimony.⁷⁸ In Montana, the victim's own testimony is enough to prove the existence of an injury, although it is not sufficient to prove permanency of the injury where permanency is in dispute and not "apparent from the injury itself."⁷⁹

Not all American states are so liberal about the proof required to establish nonpecuniary damages. South Dakota, for example, requires proof not only of tissue scarring, but of the effects of scarring on the plaintiff in order to recover for such an injury.⁸⁰ In New York, "the

72. MINZER, *supra* note 31, § 4.42; *see also* *Wages v. Snell*, 360 So. 2d 807, 809 (Fla. Dist. Ct. App. 1978).

73. *Hughett v. Dwyre*, 624 S.W.2d 401, 405 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).

74. *See Dartez v. Fibreboard Corp.*, 765 F.2d 456, 466 (5th Cir. 1985) (medical evidence is necessary to recover for future medical conditions).

75. *Jordan v. Bero*, 210 S.E.2d 618, 635 (W. Va. 1974).

76. *Georgia Power Co. v. Bramwell*, 48 Ga. App. 654, 660, 173 S.E. 763, 767 (Ga. Ct. App. 1934) (cited with approval in *Valdosta Housing Auth. v. Finessee*, 160 Ga. App. 552, —, 287 S.E.2d 569, 570 (Ga. Ct. App. 1981)).

77. *Campbell v. Moulton*, 412 So. 2d 191, 196 (La. Ct. App. 1982).

78. *Turner v. Barrett*, 68 Ohio App. 2d 80, 426 N.E.2d 1193 (Ohio Ct. App. 1980).

79. *Cain v. Stevenson*, 706 P.2d 128, 131 (Mont. 1985).

80. *Bethel v. Janis*, 597 F. Supp. 56, 63 (D.S.D. 1984) (the plaintiff was in an automobile accident and his injuries included a scar over his left eye).

strongest inferences" may be drawn against defendants who fail to produce medical testimony on injuries they contest.⁸¹ Missouri's Court of Appeals considers the future physical condition of the victim as a "matter of medical opinion."⁸²

In general, other countries require more evidence of nonpecuniary injury than the United States. The evidence of the plaintiff or other laymen is usually not enough. In Canada, a plaintiff is expected to call all doctors who attended him in all important aspects of the injury claimed or explain why he did not do so.⁸³ In England, it has been questioned whether the plaintiff's own testimony on the extent of his nonpecuniary loss is admissible.⁸⁴ In New Zealand, the Accident Compensation Act specifically directs the Accident Compensation Corporation to decide the percentage disability of a claimant "in the light of the medical and other evidence available."⁸⁵

On the other hand, Australia, like the United States, has a lower standard for proving nonpecuniary damages than the above countries. "[M]ore exact proof will be required of most economic loss . . . than will be required of alleged noneconomic losses."⁸⁶

VI. THE ROLE OF PRECEDENT

The use of prior nonpecuniary damage awards as binding precedents for calculating nonpecuniary damage is a contentious issue in Canada, the United States, and possibly Australia. In England, the open acceptance and enforcement of an informal nonpecuniary bracket system for awarding damages requires courts to regard prior decisions on similar facts as binding.⁸⁷ By contrast, rulings by the New Zealand courts that the Accident Compensation Corporation cannot construct its own bracket system, because it will inhibit its own statutory discretion,⁸⁸ may preclude it from treating its own prior decisions as binding. In Canada, the Supreme Court has stated that comparing the facts of one case against another's is contrary to the "functional approach" for awarding nonpecuniary loss compensation,⁸⁹ but trial courts continue in practice to review damages in cases when deciding nonpecuniary damage

81. *Oswicki v. Engert*, 85 A.D.2d 778, 780, 445 N.Y.S.2d 320, 322 (N.Y. App. Div. 1981).

82. *Smith v. Sayles*, 637 S.W.2d 714, 718 (Mo. Ct. App. 1982).

83. *Barker v. McQuah*, 49 W.W.R. 685, 689 (B.C.C.A. 1964).

84. *Gall v. Manchester Slate Co. Ltd.*, [1974] 2 Lloyd's Rep. 525 (C.A.).

85. Accident Compensation Act, No. 181, § 78(3) (N.Z. 1982).

86. *Tilbury*, *supra* note 15, at 263.

87. See *supra* notes 50-51, and accompanying text.

88. *Jones v. Accident Compensation Comm'n*, [1980] 2 N.Z.L.R. 379 (H.C.).

89. *Lindal v. Lindal*, [1982] 1 W.W.R. 433, 444 (Can.).

awards.⁹⁰ In Australia, as noted, courts use a bracket approach in assessing nonpecuniary loss, although it is not reversible error to fail to do so. In *Arthur Robinson (Grafton) Pty. Ltd. v. Carter*, the court held:

[T]here is [no] . . . conventional range upon which or within which the award of damages for particular classes of injuries should be confined. Comparisons with amounts awarded in other cases in near comparable or even in comparable circumstances ought not, in my opinion, to be used to achieve so called uniformity but merely used as an assistance in judging what in the community at or about the time . . . has been regarded as fair.⁹¹

Therefore, precedents in Australia are quite relevant in calculating nonpecuniary loss compensation, but they are not binding. In Australia and Canada, there appears to be a sharp dichotomy between the practice of courts, and the principles of the review courts on the issue of precedent.

In the United States, there is no consistent approach to precedent. Some jurisdictions forbid any role for precedent. In jurisdictions where precedent is allowed, precedents are relevant, but not binding. This is similar to the practice in Canada and the principle in Australia. Most awards in the United States are made by juries rather than judges,⁹² and the issue of precedent arises only on appeal. Since American appellate courts will overturn a jury award of nonpecuniary damages only where it is "shocking" or "outrageous," precedents are admissible on appeal to help the defendant prove that the jury award was shocking or outrageous.⁹³ However, the opposing argument, which has found acceptance in Illinois,⁹⁴ Minnesota,⁹⁵ Kansas⁹⁶ and Mississippi,⁹⁷ was expressed by the New Mexico Court of Appeals in the following terms: "[T]he comparison of awards is improper because the question of prejudice (on the part of the jury) must be determined from the evidence in each case."⁹⁸ In Michigan precedents may not be cited to the jury; but on appeal, the

90. See, e.g., *Malat v. Bjornson*, [1979] 4 W.W.R. 673, 696 (B.C.S.C.); *Bond v. Loutit*, [1979] 2 W.W.R. 154, 168 (Man. Q.B.); *Michols v. McWilliams*, 24 Alta. Rep. 102, 121-122 (Alta. Q.B. 1980).

91. *Arthur Robinson (Grafton) Pty. v. Carter*, 122 C.L.R. 649, 656 (Austl. 1970).

92. P. HAY, AN INTRODUCTION TO UNITED STATES LAW 45 (1976).

93. See, e.g., *Texas Constr. Serv. Co. of Austin, Inc. v. Allen*, 635 S.W.2d 810, 812 (Tex. App.—Corpus Christi 1982, no writ); *Dahole v. Mathieu*, 478 So. 2d 1294 (La. Ct. App. 1985) (applying *Reck v. Stephens*, 373 So. 2d 498, 500 (La. 1979) to nonpecuniary damages in negligence); *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir. 1980).

94. *Nicholson v. St. Anne Lanes, Inc.*, 136 Ill. App. 3d 664, —, 483 N.E.2d 291, 296 (Ill. App. Ct. 1985).

95. *DeRenner v. Pacific Intermountain Express Co.*, 353 N.W.2d 694, 699 (Minn. Ct. App. 1984).

96. *West v. Martin*, 11 Kan. App. 2d 55, —, 713 P.2d 957, 959 (Kan. Ct. App. 1986).

97. *Jesco, Inc. v. Shannon*, 451 So. 2d 694, 705 (Miss. 1984).

98. *Martinez v. Teague*, 96 N.M. 446, —, 631 P.2d 1314, 1320 (N.M. Ct. App. 1981).

Michigan courts are the most active in applying precedent to review nonpecuniary damage awards.⁹⁹ Furthermore, federal courts use precedents in awarding nonpecuniary damages as evidence of the state's tort law¹⁰⁰ they are bound to apply.¹⁰¹

With the exception of England, precedents have a limited role in calculating nonpecuniary damages in common law countries. English courts take the "question of law" approach in using precedents to standardize damage awards. Other countries, using the "question of fact" approach, treat precedents merely as evidence of community standards and continue to tailor the award to the facts of each case.

VII. THE UNCONSCIOUS PLAINTIFF

Many courts feel that the unconscious plaintiff raises a dilemma in awarding nonpecuniary damages. The unconscious plaintiff does not feel any loss or pain. However, the defendant should not incur a windfall in his liability by not allowing unconscious plaintiffs to recover nonpecuniary damages. With the exception of the United States,¹⁰² all common law jurisdictions have ruled on this issue.

Each common law country surveyed limits nonpecuniary damages to the unconscious plaintiff. In Australia, an unconscious plaintiff will not receive nonpecuniary damages for pain and suffering, although he can be compensated for "lost years" if the accident has reduced his life expectancy.¹⁰³ This is based on the theory that the plaintiff does not feel the loss of the ability to enjoy life, and therefore, has not been damaged in this respect.¹⁰⁴ Also, nonpecuniary damages are only for "solace," so they are not necessary when the plaintiff is unconscious.¹⁰⁵ In England, an unconscious plaintiff cannot receive damages for pain and suffering, but he can claim damages for loss of faculty¹⁰⁶ on the theory that he has lost something as valuable to him as an arm or a leg.¹⁰⁷ In Canada, an unconscious plaintiff can receive damages for pain and suffering, but the

99. *Precopio v. City of Detroit Dept. of Transp.*, 415 Mich. 457, —, 330 N.W.2d 802, 808-09 (Mich. 1982); *see also* *Scott v. Allen Bradley Co.*, 139 Mich. App. 665, —, 362 N.W.2d 734, 738 (Mich. Ct. App. 1984).

100. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

101. *See, e.g., Martell v. Boardwalk Enter. Inc.*, 748 F.2d 740, 750 (2d Cir. 1984); *Shaw v. United States*, 741 F.2d 1202, 1209 (9th Cir. 1984). For a general criticism of the American approach to precedent, *see Newman, Damages: A Call For Meaningful Precedents*, 3 PACE L. REV. 605 (1983).

102. There seems to be little interest in this issue among American journals. The only article written on the subject in the past 15 years is Note, *Nonpecuniary Damages for Comatose Tort Victims*, 61 GEO. L.J. 1547 (1973).

103. *Skelton v. Collins*, 115 C.L.R. 94 (Austl. 1966).

104. *See id.* at 96, 113.

105. *See id.* at 130-31.

106. *H. West & Sons Ltd. v. Shepard*, 1964 App. Cas. 326 (H.L.).

107. *See Wise v. Kaye and Another*, [1962] 1 All E.R. 257, 268 (C.A.); *id.* at 271-78 (the

award must be less than the amount that it would be if he were conscious, on the theory that the plaintiff has lost something, but not as much as if he were conscious.¹⁰⁸ In New Zealand, the Accident Compensation Act's discretionary pain and suffering award directs the corporation "to have regard to the injured person's knowledge and awareness of his injury and loss" when awarding nonpecuniary damages.¹⁰⁹ The effect of the statute is probably intended to reduce, but not eliminate nonpecuniary compensation to the unconscious plaintiff, although the answer to this issue is still uncertain.

VIII. MONETARY LIMITATIONS

Several of the countries surveyed operate some form of limitation on the amount of nonpecuniary damage awards. Cash limits can take one of two forms: (1) ceilings above which no person can receive more money in nonpecuniary damage compensation; and (2) floors below which nonpecuniary damages may not be awarded. The purpose of ceilings on nonpecuniary damages is to limit expenditure on nonpecuniary damage awards by the tortfeasors, insurance companies, or states which pay the compensation. The purpose of floors, or thresholds, on nonpecuniary damages is to protect those who pay for compensation from trivial complaints.

In the United States, several states have legislative limits on nonpecuniary damage compensation. In 1981, the California Supreme Court approved such a limitation.¹¹⁰ However, in the late 1970s, the supreme courts of North Dakota¹¹¹ and New Hampshire¹¹² declared the statutory limitation of nonpecuniary damage awards to be a violation of the U.S. Constitution. The California court found its legislative limitation a justifiable response to the "malpractice insurance crisis," and ruled that plaintiffs had no constitutional right to nonpecuniary damages.¹¹³ The North Dakota¹¹⁴ and New Hampshire¹¹⁵ courts found that a cap on malpractice claims denied equal protection to the most seriously injured plaintiffs. The most severely injured plaintiffs would have received higher awards without the cap, while the less seriously injured plaintiffs

award was for the loss of the "happiness" of consciousness); *id.* at 262-64 (award is for lost faculty).

108. *Knutson v. Farr*, [1984] 5 W.W.R. 315 (B.C.C.A.), *appeal denied*, 58 Nat. Rep. 78 (Can. 1984).

109. Accident Compensation Act, No. 181, § 79(5) (N.Z. 1982).

110. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665 (Cal. 1982).

111. *Arneson v. Olson*, 270 N.W.2d. 125 (N.D. 1978).

112. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (N.H. 1980).

113. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, —, 695 P.2d at 679-80.

114. *Arneson v. Olson*, 270 N.W.2d at 135-36.

115. *Carson v. Mauer*, 120 N.H. 924, 926, 424 A.2d at 826.

received the same award with or without the ceiling. In view of the continued legislative interest in limiting nonpecuniary damages in the United States,¹¹⁶ this seems a fertile ground for a determinative interpretation of equal protection rights by the U.S. Supreme Court.¹¹⁷

Several states have also set thresholds, or minimum levels of compensable nonpecuniary damages, under their "no-fault" accident compensation schemes for motor vehicle accidents.¹¹⁸ These thresholds for nonpecuniary damages have prevailed in court challenges.¹¹⁹

England¹²⁰ and Australia¹²¹ rejected the idea of court imposed limitations on nonpecuniary damage awards. Lord Denning purported to fix a limit of £25,000 on damages for "pain and suffering and loss of amenity" in *Croke v. Wiseman*,¹²² but other judges¹²³ decided the case on other grounds. In 1978, the Pearson Commission recommended either a limitation or a threshold on pain and suffering and loss of amenity damages,¹²⁴ but Parliament has taken no action on this proposal. In Australia, several states have enacted motor vehicle accident compensation schemes,¹²⁵ as in the United States; but these do not follow the American schemes in setting thresholds.

In contrast, Canada and New Zealand have tried to set rigid limitations on nonpecuniary damage compensation. New Zealand's comprehensive Accident Compensation Act prohibits payments of more than

116. As this paper is being written, for example, the Ohio Legislature is completing action on a bill (S.B. 330) which includes limits on nonpecuniary damage recovery.

117. U.S. CONST. amend. XIV.

118. United States legislation on nonpecuniary damages has taken two forms: (1) Limitation of tort awards, often inspired by insurance and/or medical pressure groups; see, e.g., Note, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Countersuits*, 34 WASH. & LEE L. REV. 1179 (1977); Note, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417 (1975); (2) "No-fault" motor vehicle accident plans including a statutory framework for the compensation of nonpecuniary loss; see, e.g., A. WIDISS, NO-FAULT AUTOMOBILE INSURANCE IN ACTION (1977); M. WOODRUFF, J. FONSECA & A. SQUILLANTE, AUTOMOBILE INSURANCE AND NO-FAULT LAW ch. 15, 17-18 (1974 & Supp. 1986).

119. *Montgomery v. Daniels*, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (N.Y. 1975); *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (Mass. 1971); *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974); *Manzanares v. Bell*, 214 Kan. 589, 522 P.2d 1291 (Kan. 1974); *In re Requests of the Governor and Senate*, 389 Mich. 441, 208 N.W.2d 469 (Mich. 1973).

120. In *Lim Poh Choo v. Camden Area Health Auth.*, 1980 App. Cas. 174 (H.L.), the House of Lords held that courts had no authority to limit nonpecuniary damage recovery without statutory authority. In *Walker v. John McLean & Sons*, [1979] 2 All E.R. 965 (C.A.), the Court of Appeals rejected the argument that nonpecuniary loss compensation ought to be scaled down to keep with the public policy of reducing incomes to fight inflation.

121. *Baber v. Meadwell*, 32 A.L.R. 57 (F.C.A./N.T. 1979).

122. *Croke v. Wiseman*, [1982] 1 W.L.R. 71, 78 (C.A.).

123. *Id.* at 79.

124. Report to Parliament reprinted in 1 ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, cmnd. 7054-I, 90-91 (March 1978).

125. E.g., Victoria Motor Accidents Act 1973; Tasmania Motor Accidents (Liability and Compensation) Act 1973; Northern Territories Motor Accidents (Compensation) Act 1979.

\$17,000 for disability, or \$10,000 for pain and suffering and loss of amenities (in New Zealand dollars).¹²⁶ Canada tried to copy New Zealand's approach through its judiciary. Part of the 1978 trilogy decision by the Supreme Court of Canada¹²⁷ was a rough upper limit on nonpecuniary damage awards of \$100,000.¹²⁸ However, it is much more difficult to impose a damage limit as an unprecedented rule of common law than it is to do so by legislation as a part of a general scheme of damage compensation. The court was vague about how to implement the cash limit on nonpecuniary damages in Canada.

The court never explained or justified its choice of \$100,000 as the limit. The limit was said to apply except in exceptional circumstances,¹²⁹ but these circumstances were never defined. In the 1981 case of *Lindal v. Lindal*,¹³⁰ the issue of exceptional circumstances was put before the court. However, the court only repeated its 1978 arguments and noted that the injuries suffered by the plaintiff in *Lindal*, which were more severe than those suffered by the plaintiff in the trilogy cases, were not "exceptional circumstances."¹³¹ The court again refused to define exceptional circumstances.¹³²

Canada and New Zealand have encountered serious difficulty in trying to implement their limitations on nonpecuniary loss compensation. In Canada, the courts have ignored the limit¹³³ by distinguishing cases from the facts of the trilogy cases.¹³⁴ Another difficulty is adjusting monetary limitations for inflation. The Supreme Court of Canada faced the inflation issue in *Lindal*, but the Court refused to decide it claiming there was not enough evidence on the record of the case for such a decision. Since the Supreme Court of Canada sidestepped the issue in *Lindal*, appeals courts have been unable to agree on whether inflation should be measured from the trial date, or the date of the final appellate court's decision.¹³⁵ In 1982, three courts decided that the limit was \$130,000,¹³⁶

126. Accident Compensation Act, No. 181, §§ 78(1) & 79(1) (N.Z. 1982).

127. *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 1 W.W.R. 577 (Can.); *Thorton v. Board of School Trustees of School Dist. No. 57*, [1978] 2 S.C.R. 267 (Can.); *Arnold v. Teno*, [1978] 2 S.C.R. 287 (Can.).

128. *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 1 W.W.R. 577, 605 (Can.).

129. *Id.*

130. *Lindal v. Lindal*, [1982] 1 W.W.R. 433, 444 (Can.).

131. *Id.*

132. *Id.* at 445.

133. *See, e.g.*, *D'Andrade v. Mohamed*, [1983] 43 A.L.R. 334, 341 (Alta. Q.B.); *Weare & N.W. Constr. v. Anthony*, [1981] 90 A.P.R. 411, 428-29 (N.S. App.).

134. *See Fenn v. Peterborough*, 9 Can. Cases L. Torts 1, 72-74 (Ont. C.A. 1979) (plaintiff suffered more pain than plaintiffs in trilogy); *Decorby v. Wascana Winter Club*, [1980] 3 Sask. Rep. 100 (Sask. C.A.) (trilogy cases only apply to awards made by judges, not to awards made by juries).

135. Compare with the arguments in *Hatton v. Henderson*, 126 D.L.R.3d 50 (Can. 1981);

\$142,000¹³⁷ and \$154,000.¹³⁸ At least one writer has suggested that the cash limit has injected appeals courts into the trial court's province of calculating Canadian nonpecuniary damage awards so as to make the trials *pro forma*.¹³⁹ At least one Canadian appellate judge has suggested that the major effect of the Supreme Court's cash limit on nonpecuniary damages has been to force lawyers to spuriously move nonpecuniary losses into the pecuniary categories.¹⁴⁰

In New Zealand, setting limitations on nonpecuniary loss compensation has been the most difficult area of the accident compensation scheme. There were so many appeals of the discretionary award that the Accident Compensation Commission had to establish a special section of its compensation division.¹⁴¹ One scholar who studied the Accident Compensation Scheme in the late 1970's concluded that the discretionary award for pain and suffering and loss of amenities had become "impossibly muddled."¹⁴²

The "question of law" theory calculates damages by a uniform and consistent set of rules or principles. However, a cash limitation has a built-in inconsistency. Regardless of the rules which apply to nonpecuniary loss, damages are to be arbitrarily reduced if they exceed a certain amount. The "question of fact" theory calculates nonpecuniary damages based on the facts of the plaintiff's situation. With a limitation, a higher award will not be given in situations where the severity of the plaintiff's injuries or the circumstances of the case require it. The inconsistency of cash limits with either a rational or empirically fair system of nonpecuniary loss compensation explains much of the difficulty of applying limitations on the American constitutional system, the Canadian common law system, and the New Zealand administrative system. Inconsistency arises because cash limits primarily are based on political policy, rather than legal theories. They reflect the political power of the third-party payers of nonpecuniary damage awards, such as insurance companies and the state (*vis-à-vis* the political power of personal injury plaintiffs).

Fenn v. Peterborough, 9 Can. Cases L. Torts 1, 74 (Ont. C.A. 1979); Borbely v. Mryglod, [1981] 9 Sask. Rep. 61, 70 (Sask. C.A.).

136. Macdonald v. Alderson, 20 Can. Cases L. Torts 64, 74 (Man. C.A. 1982).

137. Borbely v. Mryglod, [1981] 9 Sask. Rep. at 70.

138. Knutson v. Farr, [1982] 5 W.W.R. 114 (B.C.S.C.).

139. Stanton, *The Trial Court's Loss of Discretion to Assess Damages for Personal Injuries*, 39 *ADVOC.* 121 (1981).

140. Macdonald v. Alderson, 20 Can. Cases L. Torts at 96.

141. Palmer, *Accident Compensation in New Zealand: The First Two Years*, 25 *AM. J. COMP. L.* 1, 24 (1977).

142. Gaskins, *supra* note 66, at 258.

IX. APPEALS

Most of the countries surveyed have two ways of overturning a trial court's nonpecuniary damage award. The dissatisfied party can attempt to overturn the award at the trial level or seek review of the award at a higher level of the process.

When a jury awards nonpecuniary damages, there is the possibility that a judge will reject the jury's verdict. In the United States, the trial judge may order a new trial or change the award by *additur* or *remittitur*. The purpose of rejecting the jury's award is "to prevent awards from exceeding the upper limits of fair and reasonable compensation."¹⁴³ Judicial intervention in the jury awards differs from state to state. In many states, the judge must have the plaintiff's consent to a *remittitur*, and presumably the defendant's consent to an *additur*, as an alternative to an order for a new trial.¹⁴⁴ In other states, the trial judge has broad discretion to add or subtract from the jury's award of pain and suffering damages.¹⁴⁵ In some states, such as Florida,¹⁴⁶ the trial judge can change the jury's award only if there are indications of impropriety in the jury award, or if the jury has considered matters not appearing in the record. There is authority in Alabama that a trial judge can modify a jury award of nonpecuniary damages only in "matters of form or clerical error,"¹⁴⁷ but there is evidence that Alabama courts are more active in practice.¹⁴⁸

Some states have fixed rules for the use of *additur* and *remittitur*. In Missouri, for example, it is automatically "excessive" for the jury to award more than the plaintiff demands, so the judge can correct the award by *remittitur*.¹⁴⁹ A few states use a maximum recovery rule that allows a trial judge, at his discretion, to use *remittitur* when a jury's verdict exceeds what a "reasonable jury" would award in the circumstances.¹⁵⁰

Additur and *remittitur* are rare in the other common law countries because juries seldom make nonpecuniary damage awards. In Canada, a

143. *Koehler v. Burlington N. Inc.*, 573 S.W.2d 938 (Mo. Ct. App. 1978).

144. *E.g.*, *Campbell v. Gould*, 194 Conn. 35, 478 A.2d 596 (Conn. 1984); *Foster v. Springfield Clinic*, 88 Ill. App. 3d 459, 410 N.E.2d 604 (Ill. App. Ct. 1980); *Weeks v. Holsclaw*, 306 N.C. 655, 295 S.E.2d 596 (N.C. 1982).

145. *Ehrnke v. Hicks*, 148 Ariz. 450, 451, 715 P.2d 306, 308 (Ariz. Ct. App. 1985); *Reid v. Spadone Mach. Co.*, 404 A.2d 1094, 1099 (N.H. 1979); *Worthington v. Bynum*, 305 N.C. 478, —, 290 S.E.2d 599, 604 (N.C. 1982) (discretion to order a new trial); *Fowler v. Park Corp.*, 673 S.W.2d 749, 758 (Mo. 1984). For a discussion of the discretionary use of *additur* by the trial judge see Roth, *Inadequate Damages as a Basis for a New Trial*, 44 TEX. B.J. 369 (1980).

146. *Lassitur v. McCabe*, 363 So. 2d 846, 848 (Fla. 1978).

147. *Great Atl. & Pac. Tea Co. v. Sealy*, 374 So. 2d 887, 883 (Ala. 1979).

148. Note, *Remittitur Practice in Alabama*, 34 ALA. L. REV. 275, 279 (1983).

149. *Sparks v. Consolidated Aluminum Co.*, 679 S.W.2d 348, 354 (Mo. Ct. App. 1984).

150. *E.g.*, *Exxon Corp. v. Alvey*, 690 P.2d 773, 742 (Alaska 1984); *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1306 (11th Cir. 1984).

judge can reject a jury award of nonpecuniary damages "only where he concludes that there is no evidence to support the findings of a jury, or where the jury gives an answer to a question which cannot in law provide a foundation for judgment."¹⁵¹ In New Zealand, there are no trials for nonpecuniary damages, but there is a provision for the Accident Compensation Corporation to review its own decision not to award funds for impairment of body parts or functions if the injured person's medical condition deteriorates.¹⁵² The Corporation is prohibited, however, from reviewing its discretionary award for pain and suffering, loss of amenities, or capacity for enjoying life except in the case of a head injury producing post-award epilepsy, or where permitted by government regulations.¹⁵³ In Britain and Australia, almost all nonpecuniary damage awards are made by judges without juries,¹⁵⁴ so that the issue of *additur* or *remittitur* does not arise.

The appellate courts of some common law countries are more likely to review nonpecuniary damage awards than the appellate courts of other common law countries. American appellate courts are the least intrusive, and will overturn a trial court's decision on nonpecuniary damages only if there is "prejudice, partiality or other improper motive," or if the award is "so outrageous as to impress the court at first blush with its enormity."¹⁵⁵ Since there is no concrete monetary value for nonpecuniary loss, the courts consider the jury's decision to be as reliable as the judge's: "Pain and suffering not having any marketable value, and money compensation therefore not being susceptible to mathematical determination . . . the recovery therefore being left to the enlightened consciences of impartial juries."¹⁵⁶

Unlike several of the other countries, the size of the award alone will not induce an American court to reduce damages.¹⁵⁷ Some federal courts, however, use a maximum recovery rule in assessing the size of awards on appeal when the court decides what a "properly functioning jury" would have awarded on the facts before the jury at trial, and adjusts the award accordingly.¹⁵⁸ Judicial awards of nonpecuniary damages must be "clearly erroneous" to be reversed on appeal.¹⁵⁹

151. *LeBlanc v. Penticton*, [1981] 5 W.W.R. 289, 294 (B.C.C.A.).

152. Accident Compensation Act, No. 181, § 78(7) (N.Z. 1982).

153. *Id.* § 79(4).

154. *Tilbury*, *supra* note 15, at 267.

155. *Posey County v. Chamness*, 438 N.E.2d 1041, 1049 (Ind. Ct. App. 1982).

156. *Southern Ry. v. Bottoms*, 35 Ga. App. 804, —, 134 S.E. 824, 825 (Ga. Ct. App. 1926).

157. *Valdosta Hous. Auth. v. Finnessee*, 160 Ga. App. 552, —, 287 S.E.2d 569, 571 (Ga. Ct. App.); *Sparks v. Consol. Aluminum Co.*, 679 S.W.2d 348, 352 (Mo. Ct. App. 1984).

158. *Calderera v. Eastern Airlines Inc.*, 529 F. Supp. 634 (W.D. La. 1982); *Glazer v. Glazer*, 278 F. Supp. 476 (E.D. La. 1968).

159. *Hough v. Mooningham*, 139 Ill. App. 3d 1018, —, 487 N.E.2d 1281, 1285 (Ill. App.

Canada also uses the "clearly erroneous" standard for reviewing awards of nonpecuniary damages.¹⁶⁰ The Canadian Supreme Court ruled that appellate courts are not to change trial awards of nonpecuniary damages on the basis that the appellate judges would have awarded a different amount.¹⁶¹ Again, practice and theory in Canadian nonpecuniary damages law differ, due to the Supreme Court's attempt to rewrite personal injury damages law in 1978. Ironically, in the trilogy cases, the Court noted the impropriety of changing trial awards according to the appellate judge's own preference,¹⁶² and then turned around and changed the jury awards in the trilogy cases themselves. Since 1978, Canadian courts have tended to follow what the Court did rather than what the Court urged. The cash limit and the "functional" approach give appellate courts excuses to recalculate nonpecuniary damage awards. The appellate courts may not apply the "functional" approach, but merely assert that in view of the monetary limitations the trial court's award is too high.¹⁶³

The Australian courts are similar to the American courts in principle when dealing with nonpecuniary damages on appeal, but less similar in practice. "In the case of a jury award an appellate court will only interfere with an award which it considers unreasonably large or small."¹⁶⁴ This is, in principle, equivalent to the "shocking" or "outrageous" test applied by American courts. However, in practice, Australian courts are more willing than American courts to change trial nonpecuniary loss compensation awards. Unlike the American courts, an Australian court may change a trial court award where "the assessment itself, by its disproportion to the injuries received, demonstrates error."¹⁶⁵ In applying this standard, the appellate judges may change awards if they consider the awards too high or too low, which is similar to the "maximum recovery rule" method in the United States.

New Zealand's system of appellate review for nonpecuniary damage awards is influenced by the fact that awards are made by an administrative tribunal rather than a court or jury. There is an Accident Compensation Appeal Authority which reviews appeals as a matter of

Ct. 1986) (although this was an assault and battery case, the court was referring to damage appeals in general).

160. *Woelk v. Halvorson*, [1980] 2 S.C.R. 430, 435 (Can.).

161. *Id.*

162. *Thorton v. Board of School Trustees of School Dist. No. 57*, [1978] 2 S.C.R. 267, 284 (Can.).

163. *See, e.g., Senft v. MacGregor* [1979] 15 B.C.L.R. 76, 77 (C.A.).

164. *Tilbury*, *supra* note 15, at 269.

165. *Sharman v. Evans*, [1977] 138 C.L.R. 563, 565 (Austl. 1977); *see also Planet Fisheries Pty. Ltd. v. La Rose*, [1968] 119 C.L.R. 118, 124-25 (Aust.); *Gregg & Allsop, Damages For Personal Injuries in the Case of a Plaintiff Fully Aware of his Plight*, 8 SYDNEY L. REV. 747 (1977).

administrative law. An appeal can be taken to the New Zealand Supreme Court on questions of law. There are few reported appeals. As in all administrative cases, review is limited to whether the Accident Compensation Corporation exceeded its statutory authority, which is potentially a more deferential standard of review than an appellate court's review of a trial decision. In practice, appeals are decided by very literal interpretations of the statute, whether the effect is to overturn the Corporation's award,¹⁶⁶ or to sustain it.¹⁶⁷

English courts are the most intrusive of the five jurisdictions in reviewing nonpecuniary damage awards. As noted above, English appeal courts will hold trial courts to the bracket system of nonpecuniary damages unless there are special reasons not to do so. In *Stevens v. William Nash Ltd.*,¹⁶⁸ the English Court of Appeals went so far as to conduct its own visual, tactile examination of the plaintiff's injuries.¹⁶⁹

The position of appellate courts is directly related to whether a legal system has chosen to follow a "question of law" or "question of fact" approach to nonpecuniary loss compensation. The abstinence of the American courts, except in "shocking" or "outrageous" cases, from judicial interference with trial jury awards reflects America's "question of fact" approach. By considering the facts of the case, the jury decides the plaintiff's compensation. Today, in England, the "question of law" approach dominates the judicial system, so it is crucial that appellate courts keep awards among plaintiffs consistent under the governing rules. The difference between appellate principle and practice in Canada and Australia illustrates the existing compromises between the "question of law" and "question of fact" approaches. The Canadian Supreme Court has tried to impose a "question of law" approach in a basically "question of fact" court system, requiring aggressive appellate intervention in an attempt to bring uniformity and consistency to nonpecuniary damage awards. In Australia, the pronouncements of the High Court on nonpecuniary damages is dominated by the "question of fact" approach, but the trial courts have chosen to operate a "question of law" style rating or bracket system of nonpecuniary damages. The High Court will not interfere unless the results are excessive. New Zealand's abolition of the tort system has carried the "question of law" approach of compensation for nonpecuniary loss to an extreme. The statutory tariff requires no appellate review, and the courts feel that they have no choice but to treat all

166. *Jones v. Accident Compensation Comm'n*, [1980] 2 N.Z.L.R. 379 (H.C.).

167. *In re Phillips*, Decision No. 935, [1983] 3 N. Z. Admin. R. 385 (Acc. Comp. App. Auth.).

168. *Stevens v. Williams Nash Ltds.*, [1966] 3 All E.R. 156 (C.A.).

169. *Id.* at 158-59.

questions arising under the Accident Compensation Act as questions of law through statutory interpretation.

X. LEVEL OF DAMAGE AWARDS

The choice of the "question of law" or "question of fact" approach in awarding nonpecuniary loss compensation affects not only the procedure of arriving at an award, but the award itself. The level of awards in the five common law countries surveyed differs significantly.

There is a major difficulty in making cross-country comparisons of awards in different currencies and societies with different standards of living. The problems are choosing which awards to compare, and putting them in a common unit of exchange which will allow them to be compared. Therefore, this section focuses on the average maximum nonpecuniary damage award allowed in each country for the most severe injuries. All awards are converted into U.S. dollars.

The difference in standards of living, or purchasing power of the currencies is associated with the exchange rate problem.¹⁷⁰ To address the differences in purchasing power of nonpecuniary damages awards in different countries, this section compares the nonpecuniary damages awards to the "average personal consumption expenditure per person" (APCE). APCE measures how much (in U.S. dollars) the average person spends on his own consumption (*i.e.*, goods and services) in a year.¹⁷¹

A comparison of the general level of nonpecuniary damage compensation in the common law countries begins by looking at the average personal consumption expenditures in U.S. dollars of each country:

United States	\$8,584
Canada	\$6,931
Australia	\$6,150
Britain	\$4,781
New Zealand	\$4,531 ¹⁷²

Since most of the personal injury award data comes from 1982, this APCE data is from 1982 as well.

In the United States, a quantum study of pain and suffering awards

170. An award of \$5,000 (U.S.), for example, means something far different in a society where the average income is \$10,000 (U.S.) per year and prices are set accordingly, than the same award means in a society where prices are based on an average income of \$20,000 (U.S.).

171. An award of \$10,000 (U.S.) in a society where the APCE is \$10,000 (U.S.) would buy the average person one year of consumption. By calculating the number of years of personal consumption each country's highest nonpecuniary damage award will buy, there will be a basis to determine whether one country's award is "higher" or "lower" than that of another country.

172. International Labor Organization, *Personal Consumption Expenditures for 1982*, in 18 WORLD BOOK ENCYCLOPEDIA 654 (1983).

in Louisiana for 1982-83 was used.¹⁷³ The awards for pain and suffering ranged from \$314.50 (U.S.) to \$750,000 (U.S.). Dividing the highest award of \$750,000 (U.S.) by the 1982 APCE of \$8,584 (U.S.), there are eighty-seven years of personal consumption expenditure.

The \$100,000 (Can.) awarded in the Canadian Supreme Court trilogy cases, established the upper limit for nonpecuniary damages in 1978.¹⁷⁴ In 1982, Canadian courts were estimating the limit as \$130,000 to \$154,000 (Can.).¹⁷⁵ We can take the average of these three Canadian judgments at \$140,000 (Can.), and by using the 1982 exchange rate, the award is \$113,400 (U.S.).¹⁷⁶ Dividing this sum by the 1982 APCE for Canada of \$6,931 (U.S.), there are 16.5 years of personal consumption expenditure.

In England, the range of awards for quadriplegia in 1985 was £60,000 to £90,000.¹⁷⁷ Quadriplegia allows the highest awards for pain and suffering and loss of amenities in England. Using the 1985 exchange rate, the highest award of £90,000 becomes \$116,000 (U.S.).¹⁷⁸ Dividing this by the 1982 APCE for Britain of \$4,781, there are somewhat less than twenty-four years of consumption expenditure, assuming that APCE was higher for Britain in 1985 than it was in 1982.

In Australia, a review of personal injury awards for the state of South Australia in 1982 showed a range of pain and suffering awards of \$10,000 to \$70,000 (Aus.).¹⁷⁹ Using the 1982 exchange rate, it becomes \$67,200 (U.S.).¹⁸⁰ Dividing this by the 1982 APCE of \$6,150 (U.S.), there are about eleven years of personal consumption.

In New Zealand, the maximum statutory award for nonpecuniary losses under the Accident Compensation Act of 1982 is \$27,000 (N.Z.).¹⁸¹ Using the 1982 exchange rate, this converts to \$19,286

173. Evans, *A Quantum Study of Pain and Suffering Awards for Personal Injuries in the Louisiana Appellate Courts 1982-83*, 29 LOY. L. REV. 957 (1983); see also Rand, *What's a Leg Worth? To Juries, It Depends*, 3 NAT'L L.J. 3 (1984).

174. See *supra* note 33 and accompanying text.

175. See *supra* notes 136-38 and accompanying text.

176. 1983 WORLD BOOK ENCYCLOPEDIA Y.B. 231 (the December 31, 1982 exchange rate was \$1.00 (Can.) = \$0.81 (U.S.)).

177. KEMP & KEMP, *supra* note 14, vol. II, pt. 1, § A at 1011-91.

178. WORLD ALMANAC AND BOOK OF FACTS 612 (1986) (the 1985 exchange rate was £0.77 = \$1.00 (U.S.)).

179. Quick, *Personal Injuries Awards in South Australia 1982*, 8 ADELAIDE L. REV. 333 (1982).

180. 1983 WORLD BOOK ENCYCLOPEDIA Y.B. 197 (the December 31, 1982 exchange rate was \$1.04 (Aus.) = \$1.00 (U.S.)).

181. Accident Compensation Act, No. 181, § 78(1) (N.Z. 1982). This would be \$17,000 (N.Z.) for the maximum award for 100% disability for loss of body part or function, plus the maximum discretionary award of \$10,000 (N.Z.) for pain, suffering, loss of ability to enjoy life, etc. *Id.* § 79(1).

(U.S.).¹⁸² Dividing this by the 1982 APCE figure of \$4,531 (U.S.) there are four years of personal consumption expenditure.

To summarize the results in terms of years of personal consumption expenditure, below is a ranking of the general level of nonpecuniary damage compensation in the five countries:

1.	United States	87 years
2.	England	24 years
3.	Canada	16.5 years
4.	Australia	11 years
5.	New Zealand	4 years

XI. CONCLUSION

In the common law countries, there is a trend to treat nonpecuniary damages as more of a question of law than a question of fact. The net effect of this change is to reduce and standardize the awards. At the extremes, this is reflected in the general level of the awards. The United States, which adheres closely to the "question of fact" approach, has the highest level of awards. New Zealand, which carries the "question of law" approach to the extreme of imposing a statutory tariff, has the lowest awards.

On this basis one would expect that England, which uses a slightly less formal and all encompassing tariff than New Zealand, would have changed places with Australia or Canada. Part of the problem is that England's level is overstated, due to using a 1982 APCE and 1985 damages. Also, monetary limitations do not completely explain the results observed. Australia has no cash limits, and it awards less than Canada's cash limit. The general level figures are not at all rigorous, because they are based on only one study in each country.

One reason for the movement of nonpecuniary damages from the "question of fact" approach towards the "question of law" approach is the changing role of the jury. The right to trial by jury in civil cases is guaranteed by the U.S. Constitution.¹⁸³ However, allowing trial judges in many states to change jury awards through the processes of *additur* and *remittitur*, plus devices such as the maximum recovery rule, means that even the American jury is affected by the move towards the "question of law" approach in common law countries. The other countries, without

182. 1983 WORLD BOOK ENCYCLOPEDIA Y.B. 197 (the December 31, 1982 exchange rate was \$1.40 (N.Z.) = \$1.00 (U.S.)).

183. U.S. CONST. amend. VII.

constitutional requirements of a jury trial, have gone much further. England abolished the right to trial by jury in civil cases in 1933;¹⁸⁴ and today, a personal injury case in England is normally tried by a judge sitting alone.¹⁸⁵ In Canada, tort cases are usually tried by a judge without a jury,¹⁸⁶ but juries are used more often in Canada than in England. In Australia, personal injury cases are usually tried by judges alone. In New Zealand, the jury has been totally abolished in nonpecuniary compensation cases along with the judge, and replaced by civil servants.

There are other influences behind the change from complete jury discretion to the restriction or abolition of the jury's role in deciding nonpecuniary damage awards. Perhaps the most relevant social fact in the five countries surveyed is the change from defendant-paid to third-party-paid compensation for personal injuries.¹⁸⁷ It used to be the individual tortfeasor who paid the costs; but today, everyone pays injury compensation through the insurance industry or taxation. Thus, damage law must meet the needs of society rather than the individual defendant or plaintiff. The third-party payment system has created a direct conflict of interest between the small class of personal injury plaintiffs and the mass of people who pay insurance premiums or taxes.

The movement of nonpecuniary damage awards from a "question of fact" approach to a "question of law" approach is an example of how damage law is being restructured to protect society's interest in having uniform, predictable and low nonpecuniary damages awards. The "question of law" approach serves society's interest in holding down the cost of injury compensation by making nonpecuniary damages harder to prove; limiting awards to amounts justifiable by precedent; creating a greater possibility of appeal; and setting uniform standards to which the awards must conform. It is unclear who will represent the plaintiff's interests in obtaining fair and adequate compensation for serious injuries caused, at least in part, by someone else. The state is a good candidate to protect the plaintiff's interest, since it can use its power to restrain the potential influence of insurance companies.

Nonpecuniary damage awards are vulnerable to political tampering. Conceivably, third-party payments will turn a tort system of compensation into a welfare system that gives the injured person the least society

184. Administration of Justice Act (Miscellaneous Provisions), 1933, 23 & 24 Geo. 5, ch. 36, § 6(1).

185. See *supra* note 154 and accompanying text.

186. See, e.g., W. JENNINGS & T. ZUBER, *CANADIAN LAW* 31 (2d ed. 1972).

187. See, e.g., E. BERNZWEIG, *BY ACCIDENT NOT DESIGN* 104-11 (1980); P. ATIYAH, *ACCIDENTS, COMPENSATION AND THE LAW* 9-37 (1970). *But cf.* W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* 547-57 (4th ed. 1980) (minimizing the effect of this trend on tort law generally).

can get away with, according to what society thinks it can afford. The survey of the common law countries' experience indicates that the best protection for the injured person's interest in compensation, balanced against the rights of defendant or those who pay defendant's bills, is the enlightened conscience of impartial jurors' treating the award of compensation as a question of fact.