BOOK REVIEWS

The Quantum of Damages in Personal Injury Claims, by David A. Mc.I. Kemp, B.A., of the Inner Temple and the Wales and Chester Circuit, Barrister-at-Law, and Margaret Sylvia Kemp, M.A., a Solicitor of the Supreme Court. London, Sweet and Maxwell Ltd.; Sydney, The Law Book Co. of Australasia Pty. Ltd., 1954. xviii and 462 pp. (£2/9/6 in Australia.)

The life of the law is logic *and experience*, but rather more experience than logic. This, at all events, appears to be the opinion of the authors of this book. One-third of its length is devoted to a conventional analysis of legal principles. But the other two-thirds comprises a series of abbreviated reports of cases. And these reports are designed not to illustrate legal principles, but simply to serve as "examples" of what damages a particular person received in respect of a particular injury.

In this second part the objects of the authors, stated at length in the introduction,[1] may be seen to fall into two interrelated categories. Firstly, they hope that practitioners will be helped in various ways by being able to predict awards with greater certainty. Secondly, they hope that by the use of the book in court greater stability and uniformity will be induced in the practice of the judges. Their temerity in stating this second object is rewarded in that it is particularly this one which Birkett, L.J. applauds in the introduction. His Lordship, supporting his own views with references to dicta of Sir Raymond Evershed, M.R.[2] and Singleton, L.J.[3], says:

> Damages can never be standardised and the decision in any one particular case may not be of much help. But a book that gathers together into one volume the reported decisions and classifies them most carefully can at least be a guide of the most valuable kind.[4]

There can be no question but that the authors are right when they attribute to the actual figures awarded in a case an importance in future cases quite independent of the legal principles on which the figures purport to be based. *Benham* v. *Gambling*[5] seems to the reviewer such an outstanding illustration of this that some examination of it may help to suggest what such a method as the Kemps have followed may hope to achieve.

This action, it will be recalled, was brought by the representatives of a two-year-old child, killed by the defendant's negligence, in respect of the child's loss of expectation of life. In the result the House of Lords reduced the damages awarded by the trial judge from £1,200 to £200. The principles applied were that under this head of damages the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life,[6] that the ups and downs of life have to be considered before the excess of happiness over unhappiness is valued,[7] that in this respect all the circumstances and character

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[1] At 2-3.
[2] *Crawford* v. *Erection and Engineering Services Ltd.*, reported only in the work under review, at 381.
[3] *Brady* v. *Yorkshire Traction Co., Ltd.*, reported only in the work under review, at 194.
[4] At vi.
[5] (1941) A.C. 157.
[6] *Id.* at 166.
[7] *Ibid.*

of the individual before the court have to be considered,[8] and that "lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status."[9] The main judgment in the House of Lords concludes that, owing to the uncertainties of life, very moderate figures should be chosen, particularly in the case of a young child, and that £200 was awarded here only because the child's circumstances were exceptionally favourable.[10]

It is difficult to believe that there is any very close connection between the principles set forth above, based as they are on a somewhat outdated hedonism, and the figure at which the court arrived. But the figure itself has acquired something like the force of law. Hence in 1948 Streatfield, J., in awarding £200 in the case of a young child,[11] based his award on reasoning which offset the depreciation in the value of the pound since *Benham* v. *Gambling* was decided against the less happy circumstances of the child in the instant case as compared with those of the child which was the subject of the decision in *Benham* v. *Gambling*.

This, no doubt, is an extreme example of standardisation, the reasons for which are perhaps not far to seek. In the first place there is the fact already mentioned that the principles of law requiring the judge to measure happiness are themselves not very helpful. In these circumstances indeed it might be expected that the judge's own conception of what was just in the individual case would supply the deficiency of principle, but in cases like *Benham* v. *Gambling* the proper moral determinants of what is a just figure are obscure. The plaintiff is an estate, and what is most often in fact being demanded is that the defendant's insurance company should compensate the deceased's relatives for the deceased's loss of enjoyment of the life he would have had but for the defendant's act. Faced with this odd situation, it is not surprising that a judge should have no feelings as to what justice demands and should be only to ready to seize on a concrete figure offered to him with a show of authority.

If there is truth in this speculation as to the reasons for the readiness of the judges to accept standardisation in this one case, a further speculation may be made as to the interest among English judges in a work of the kind under review. May it not be that this willingness to utilise figures offered as "averages" springs in general from the factors we have suggested may be at work in the particular example taken, firstly, a deficiency in legal principle, and, secondly, a lack of any apparent demand of justice to eke out, or supply the lack of, legal principle?

The vagueness of the principles upon which the assessment of damages depends has often been stressed and is stressed in the work under review. But there are different kinds of vagueness. Sometimes a legal principle almost openly invites a value judgment by referring to some standard such as reasonableness. Sometimes, and much more confusingly, the legal principles seem concrete enough but are reduced to meaninglessness by internal contradiction.[12] And it seems that this second kind of indeterminacy is more prominent in the principles of assessment of damages than is generally conceded. The authors of this book state the general rule to be that you should get as nearly as possible at that sum of money which will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[13] In calculating loss of past and prospective income, the authors proceed, full compensation is therefore obtained,[14] but in respect of such matters as pain and inconvenience perfect compensation cannot be given and only reasonable compensation is recover-

[8] At 166-167.
[9] At 167.
[10] At 167-168.
[11] *Hart* v. *Griffith-Jones* (1948) 2 All E.R. 729.
[12] See J. Stone, *The Province and Function of Law* (1946), c. 7.
[13] At 11-12.
[14] At 12.

able.[15] For this the authors give two different reasons, though without suggesting that they are different, one that such things as pain cannot be precisely calculated in money, and a second that no sum could be enough to compensate a man, for example, for the loss of his eyes.[16] The first of these reasons seems to be more in keeping with the general principle stated at the outset — it still requires that you attempt to be as near perfect compensation as possible in money terms, but the second reason given implies that it is quite useless to try to give full compensation in this field and the tribunal is to be satisfied to award a sum which it knows is not full compensation. The awkward frictions in the authors' statements on this point seem to be a fair representation of the state of the law.

It follows that any tribunal which seeks to apply its sense of justice to the measure of damages in an accident case begins in danger of confusion from conflicting principles. But let it be supposed that the judge has come down on one side of the dilemma and accepted the position that perfect compensation is not even to be aimed at, and the judge seeks only to give reasonable or fair compensation. So long as he has an individual injured person and a flesh and blood defendant before him there is a situation on which his feelings of what the one ought to pay the other can operate. But once introduce the spectre of the defendant's insurance company and the considerations which go to "reasonableness" dissolve into a haze of obscure considerations of economic policy affecting the price of insurance to motorists. Thus conditioned, the judge may be only too ready to accept the guidance of figures.

The exact manner in which the figures themselves can assist is not made the subject of any close examination by the authors of the book. The figures are to be a "guide" but "each case depends on its own facts".[17] It is rarely, of course, that one finds a situation so favourable to standardisation as that in *Benham* v. *Gambling*.[18] There the injury was death, and there are no degrees of mortality; the House asserted that her situation was the most favourable possible,[19] the child had no occupation, and the wealth or status of the parents was declared to be irrelevant.[20] And the tribunal was the House of Lords. But more usually the injury is of a kind which may vary indefinitely, and it may happen that in the decided case where the injury was most nearly the same, the plaintiff had a different age and occupation, and the decision was that of a single judge only, given in a year when the value of money was different.

Of course, with sufficient data, one can imagine the variations to be made in respect of these main factors being reduced to something like formulae. One can almost envisage some law student of the future being required arithmetically to solve the problem: "If Croom Johnson, J. awarded £200 general damages to a twenty-eight year old librarian for a broken finger in 1954, how much will Jones, J. award to a thirty-five year old tram conductress for an amputated toe in 1957?" Put explicitly, such a problem may sound ridiculous, but it must be something of this sort which a judge is expected to do more or less subconsciously with the materials provided in this book, as well as making corrections for a variety of unclassified factors.

Looked at in this light, the material provided in the book under review is certainly meagre. There are eighty-seven awards of individual judges set out together with what the authors regard as the relevant facts in each case.[21] In addition there are a few pages of notices of judgments.[22] The system of classification made by the authors proceeds by reference to the nature of the injury suffered. There is also an attempt in an appendix to classify awards

[15] At 13-15.
[16] At 14.
[17] At 1-2, quoting Birkett, L.J. in *Bird* v. *Cocking* (1951) 2 T.L.R. 1260 at 1263.
[18] (1941) A.C. 157.
[19] *Id.* at 168.
[20] *Supra* n. 9.
[21] At 137-393.
[22] At 395-410.

by reference to the judge who gave them[23], but the authors concede that there is far too little material here to form a basis of useful inference as to the leanings of individual judges.[24] Nevertheless, as long as the demand for this kind of material persists, so long may we expect the material to be accumulated through successive editions, with progressively greater influence towards standardisation. But it is a process which, the reviewer feels, arises out of an unfortunate situation and leads to arbitrariness, however consistent with itself the arbitrariness may be.

A word of speculation may be added in conclusion as to the prospects of a similar compilation of New South Wales awards. Whatever use it might be to enable practitioners to predict awards there seem to be factors militating against the use of such a compilation to provide a stabilising influence. The chief of these lies in the fact that in New South Wales the usual tribunal for the assessment of damages for personal injury is the jury, whereas in England it is the judge. A list of jury awards in former cases could hardly be evidence for a later jury. It is difficult to imagine that even the view of an appeal court that a particular sum was too large in given circumstances would be regarded as proper material for a jury in a subsequent comparable case. Hence such a compilation could only exercise a stabilising influence as between decisions of appeal courts. And while appeal courts here, like those in England, show an interest in the removal of anomalies, there seems to be some difference of opinion as between the Full Court and the High Court as to what is the proper average to strike. The proposition advanced by Street, C.J. in the Full Court appears to be that the average of jury verdicts before the war with some correction for money values is the appropriate one as contrasted with the present-day run of jury verdicts.[25] On the other hand, Dixon, C.J. has indicated that verdicts before the war were perhaps unduly low because the jury was subject to the influence of sympathy for a defendant who had to pay the damages out of his own pocket.[26]

In these circumstances, prospects for standardisation in New South Wales do not seem too bright, even if standardisation on the basis of some kind of existing average figure were regarded as a desirable object. But the truth seems to be that in New South Wales as much as in England standardisation of awards on the basis of some existing average would be an escape from, and not a solution of, the problem of what is a just amount in a given case. A fundamental solution can only be found by reviewing the worth of the principles both of substantive law and assessment of damages in the light of the growth of the insurance principle. It is comforting to observe that in the current number of our brother law review, *The University of Western Australia Annual Law Review*, these fundamental problems receive extended, learned and incisive discussion.[27]

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Jurisprudence in Action: A Pleader's Anthology: Legal Essays Selected by the Association of the Bar of the City of New York, with a Foreword by the Hon. Robert H. Jackson. New York, Baker, Voorhis & Co., Inc., Australia, Law Book Co. of Australasia Ltd., 1953. ii and 494 pp. (£3/3/0 in Australia.)

Of a volume entitled as ambiguously as this one the Reviewer must hasten to say that its production is a tribute to the enterprise of the Association of the

[23] Appendix B, at 417-421.
[24] At 4.
[25] *Hately* v. *Allport* (1954) 54 S.R. (N.S.W.) 17 at 21-23, discussed (1955) 1 *Sydney L.R.* 384.
[26] *Pamment* v. *Pawelski* (1949) 79 C.L.R. 406 at 411.
[27] R. W. Parsons, "Death and Injury on the Roads" (1955) 3 *Univ. W.A. Annual L.R.* 201.

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