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***WAVES OF CHANGE IN PAIN AND SUFFERING***

# PAIN IN DAMAGES AWARD: CHANGES IN THE LAW

**By Hugh Fraser QC[1]**

## "Pain, Suffering and Loss of Amenities" at Common Law

We've all heard the phrase "pain, suffering and loss of amenities" in the context of damages for personal injuries.

It is interesting to speculate on how this phrase came into being, how one might distinguish "pain" from "suffering", and both of them from "loss of amenities", and why this description has remained in use.

The phrase is an old one.

***McGregor on Damages*** tells us:

> *"The term 'pain and suffering' has been used so constantly by the Courts without any clear distinction between the two words that it is now a term of art. It has been suggested that 'pain' is the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while 'suffering' is distress which is not felt as being directly connected with any bodily condition".*[2]

Luntz ***"Assessment of Damages"*** 3rd ed. observes that by the 1870s the practice of awarding damages for "pain, suffering and loss of amenities" was entrenched. In ***Phillips v. London & South-West Railway Company*** (1879) 4 QBD 406, Field J listed as foremost amongst the heads of damage to be taken into account "the pain and suffering to the Plaintiff". On the appeal to the Court of Appeal, Cockburn CJ started his list of the heads of damage with "the bodily injury sustained; the pain undergone;

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1 I acknowledge the invaluable assistance provided in the preparation of this paper by Mr Richard Morgan of the Queensland Bar, but any errors and omissions are mine.

2 *McGregor on Damages* 14th ed., para 1213, citing "McCormick, *Damages (Minnesota, 1935).*

the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent".

It can be seen then that damages for "pain and suffering" ie general damages or non-pecuniary damages were considered by the Courts in the late 19th Century. Many Australian practitioners nowadays might be unaware, however, that it is a comparatively recent practice for an award of damages in a personal injuries case to be expressed by a judge other than in global terms. It was not until ***Jefford v. Gee*** [1970] 2 QB 130 that it became generally regarded as necessary in England for Courts to make separate assessments of general damages for pecuniary losses, damages for non-pecuniary losses and interest. As late as 1972 Lord Denning MR indicated in ***Smith v. Central Asbestos Company*** [1972] 1 QB 244 (see 262.A.) that it was still necessary to bear in mind the danger of overlapping amongst heads of damages, as a caution against the new procedure.

But whether the ultimate award of damages was simply expressed as a global amount, or was subject to itemisation, the practice of awarding non-pecuniary damages for pain and suffering was by then long entrenched. In ***Shearman v. Folland*** [1950] 2 KB 43 at 50 Asquith LJ characterised as an appropriate case for damages for pain, suffering and loss of amenities one where someone might spend life in a hospital rather than life in a hotel.

If pain was understood as requiring little by way of extrapolation, suffering was a more nebulous concept and might include a range of things such as:

- fright at the time of injury
- fright reaction
- fear of future incapacity
- mental troubles
- anxiety
- humiliation
- sadness
- embarrassment
- disfigurement

Damages for pain and suffering were intended by the Courts to compensate for both past and prospective loss.

As to loss of "amenities of life" as distinguished from "pain and suffering" this head of damages sought to concentrate on an injured person's inability to follow the activities enjoyed by them prior to the injury. In ***Manley v. Rugby Portland Cement Company*** the court said:[3]

> *"There is a head of damage which is sometimes called loss of amenities; the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed and who will never again go upon his walking excursions – things of that kind – loss of amenities".*

Loss of amenities came to be regarded as the appropriate analysis when a claimant had one of their five senses diminished or removed, or suffered from interference with their sexual life. Eventually, even the loss of enjoyment of a holiday or other leisure activities, came to be validly considered under this description.

Historically, damages for personal injuries were awarded by juries. Damages awards would be reduced on appeal. Then damages awards generally came to be the province of judges. In Australia different States had a different informal "tariff" for different types of damages for pain, suffering and loss of amenities. This was a product of history, with unwritten deference to past awards, community standards and, perhaps, the levels of insurance premiums. At the annual conference of the Australian Plaintiff Lawyers Association in 1997, Dr Andrew Morrison SC of the New South Wales Bar, in a paper entitled "Damages – Recent Developments in the Law" made this comment:

> *"The range of damages available varies considerably from jurisdiction to jurisdiction. It would seem that the Courts of Queensland and Tasmania, for example, regard their citizens as either more stoic or as less deserving of compensation than the Courts in New South Wales and Victoria".*

Dr Morrison SC observed in that paper that the maximum sum to be awarded for a catastrophic injury was likely to be in the order of about $350,000.00 (ie for pain, suffering and loss of amenities). In ***Amato v. Onorato*** (Victorian Court of Appeal,

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3 (1951) C.A. No. 286 (*McGregor on Damages* 14th ed para 1219).

unreported 12 December 1996) $300,000.00 for general damages was regarded as being high, but not so high as to warrant interference on appeal.

**Subjectivity and Expert Evidence**

Compensation for pain and suffering is concerned with the subjective feelings of the Plaintiff. If the Plaintiff is permanently unconscious, then although the injury is particularly severe, he or she does not have any feelings of pain or discomfort and may receive little or no award of damages under this head[4].

Younger people with similar injuries will receive larger awards than older people, on the basis that the former will experience the pain and suffering over a longer period of time. However, one sees another line of reasoning from some judges, who point out that, with the experience of life and greater perceptiveness of an older persons, they can value more keenly their remaining years; accordingly little reduction may be warranted.

Damages awards for pain and suffering have also long recognised the effect of the need for further surgery and rehabilitation which may itself inflict further pain and suffering.

For a long time mental illness consequent upon physical injury has been a type of suffering which has attracted compensation variously being characterised as "suffering" or "loss of amenities".

Pain is a very subjective thing. Everyone knows what it is, but only the Plaintiff is feeling it. The Plaintiff's evidence will either be accepted, accepted in part or rejected about the level of pain he or she suffers. Moreover, it is a very unscientific process to attribute a monetary figure to whatever level of pain the Plaintiff might be thought to be experiencing. For these reasons one can speculate, that in practice, Courts are likely to look a good deal closer at "loss of amenities" when considering awards for general damages, then they do at pain per se.

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4 *Skelton v. Collins* (1966) 115 CLR 94.

By focussing on "loss of amenities" there is a greater opportunity to deal with objectively observable tangibles, rather than subjective intangibles. For example a Court can consider:

- subjective and objective feelings of mental distress
- loss or diminution of sexual function
- loss of recreational activities
- loss of social life
- loss of sporting opportunity
- loss of an ability to travel
- loss of the various senses
- loss of interaction with family

The Courts have tended to deal with loss of "expectation of life" and "cosmetic disfigurement" under other headings.

But even "loss of amenities" can be difficult to measure objectively. Evidence can be very hazy about how frequently a person enjoyed particular recreational activities, what subjective enjoyment they derived from them, and what subjective distress or loss they feel for the deprivation of them; and opinions differ about how much the loss of some amenity of life might mean as between different people.

For these reasons assessment of damages for "pain suffering and loss of amenities" is often closely related to the assessment of levels of "permanent partial impairment", as guided by expert medical opinion.

A feature of every personal injuries case is expert medical opinion. This nearly always involves the expert opinion of medical specialists. Only the most minor of personal injuries claims, settled without recourse to the issue of proceedings or even a compulsory conference or mediation, might be settled on the basis of a general practitioner's letter. Thus, where the judge decides what damages are awarded for "pain, suffering and loss of amenities" he or she is invariably not only dealing with the evidence of the Plaintiff about pain, suffering and loss of amenities, but is also dealing with expert medical opinion about what level, if any, of permanent partial impairment the Plaintiff has sustained.

It is difficult to resist the conclusion that in many cases the deference customarily paid to expert medical opinion and the assessment made by it of permanent partial impairment, assumes a larger role in the judge's thinking, than the subjective evidence of the Plaintiff.

**The Civil Liability Act (Qld) 2003**

There is now legislative formalisation of this approach. The ***Civil Liability Act*** 2003 (Qld) does not "cover the field" so far as the assessment of damages in Queensland for personal injuries is concerned, because it does not apply to employment based accidents; but it is a modern and widely applicable statutory approach to the issue of damages for personal injuries.

What does this legislation have to say about pain? Section 51 says:

> *"In this chapter –*
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> *General damages means damages for:*
>
> *(a) pain and suffering; or*
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> *(b) loss of amenities of life; or*
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> *(c) loss of expectation of life; or*
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> *(d) disfigurement".*

Sections 61 and 62 of the Act require a calculation of general damages to occur by reference to an injury scale value found in the ***Civil Liability Regulations***. Schedule 3 s. 1 of the Regulations says that:

> *"The objectives of Schedule 4 include promoting –*
>
> *(a) consistency between assessments of general damages awarded by Courts for similar injuries;*
>
> *(b) similar assessments of general damages awarded by Courts for different types of injury that have a similar level of adverse impact on an injured person".*

The phrase "adverse impact" could perhaps be construed as embracing all of the components of the phrase "pain, suffering and loss of amenities".

Schedule 3 s. 3 takes account of "multiple injuries" and effectively requires the Court to look at the Injury Scale Value ("ISV") (found in the Regulations) for the "dominant injury" and then to give an uplift because of the effect of multiple injuries overlapping and the dominant ISV being inadequate to reflect the level of impact of them all.

Section 4 of Schedule 3(3)(b) says that the uplift should rarely be more than 25% higher than the maximum dominant ISV. If the increase is more than 25% the Court must give detailed reasons for the increase.

Schedule 3, s. 8 is headed "Other Matters". It sets out other provisions to which a Court may have regard. It refers to Schedule 4 which has the schedule of all of the different injuries. Section 8(3) of this Schedule says "the fact that schedule 4 provides examples of fact as affecting an ISV assessment is not intended to discourage a Court from having regard to other factors it considers are relevant in a particular case". Examples of other matters are given in s. 9, viz:

"• *The injured person's age, degree of insight, life expectancy, pain, suffering and loss of amenities of life*

• *The effects of a pre-existing condition on the injured person*

• *Difficulties in life likely to have emerged for the injured person whether or not the injury happened*

• *In assessing an ISV for multiple injuries, the range for and other provisions of schedule 4 in relation to, an injury other than the dominant injury of the multiple injuries".*

Sections 11 and 12 of Schedule 3 of the Regulations give primacy to the American Medical Association "Guides to the Evaluation of Permanent Impairment", saying that an assessment under it is to be given greater weight than one not under it.

There are 162 injuries referred to in Schedule 4 of the ***Civil Liability Regulation*** 2003. However, references to "pain" are comparatively few and scattered. If assessing Quadriplegia under item 1, one of the eight factors to be considered is the "presence and extent of pain." The others, importantly are:

- extent of any residual movement
- degree of insight
- adverse psychological reaction

- level of function and pre-existing function
- degree of independence
- ability to participate in daily activities, including employment
- presence and extent of secondary medical complications.

The same set of factors is to be considered if looking at item 2 ***Paraplegia***. Item 50 ***Loss of Both Testicles*** refers to "level of any pain or residual scarring". Item 62 ***Minor Injury to the Digestive System*** not caused by trauma refers to "disabling pain" amongst a number of other factors. Item 76 ***Serious Bladder, Prostate or Urethra Injury*** refers to "serious ongoing pain" whereas Item 77 ***Moderate Bladder, Prostate or Urethra Injury*** refers to one where there is "minimal incontinence and minimal pain". The preamble of division 2 – thoracic spine or lumbar spine injury- refers to "clinical findings of pain". Item 100 ***Loss of One Upper Limb*** refers to "severity of any phantom pains" as one of five considerations. I should add that these are described as "examples". Apart from these few instances and several others, references to pain do not feature in that legislative guidance to damages awards.

**Changes to the Quantum of Awards Effected by the Act**

It is unquestionably the case that damages under the ***Civil Liability Act and Regulation*** 2003 for minor and moderate injuries are less than under a generally assessed common law award.

For example, a moderate cervical spine injury – soft tissue injury at item 88 - has the reference "an ISV of not more than 10 will be appropriate if there is whole person impairment of 8% caused by a soft tissue injury for which there is no radiological evidence". The injury scale value range is 5 to 10. Assuming there might be a 5% whole person impairment assessment by an orthopaedic surgeon which is accepted by the Court, then one might have an ISV range of 5 to 7. Turning to section 61 of the ***Civil Liability Act*** 2003 this would mean a range for general damages (pain, suffering and loss of amenities) of between $5,000.00 and $7,200.00. At common law, depending upon the apparent effect of the injury taken into consideration with such an assessment by a medical specialist, one might have recovered anywhere between $15,000.00 and $25,000.00.

However, for the more serious injuries the ***Civil Liability Act*** 2003 and Regulation appear to allow compensation not terribly differently from what might have been recovered under common law.

The point may be illustrated with reference to traumatic brain injuries awards under the general law. In ***Goode v. Thompson and Suncorp Metway Insurance Limited*** [2002] QCA 138 the Queensland Court of Appeal was asked to interfere with an assessment of general damages of $150,000.00 in respect of a Plaintiff injured at 12½ years of age who suffered traumatic head injuries. He received intensive therapy in hospital for three months and there was a prolonged phase of post-traumatic amnesia and bilateral spasticity. He experienced visual impairment and behavioural problems. Although an average to above average student prior to the injury, at the time of trial he was attending a special school. His behaviour was consistent with frontal lobe injury. He needed to be the centre of attention of his carer for about 14 hours per day.

In ***Lambert v. Matilda Pet Foods*** (Cullinane J No. 300 of 1997) a man aged 28 at the time of injury and 34 at trial was working as a butcher trimming kangaroo carcasses when the knife he was using penetrated his eye and the frontal lobe of his brain. He suffered from brain damage (diplopia) and pain behind his eye and lost 70% of vision in that eye. He experienced epileptic fits, depression and nightmares and was admitted to a psychiatric hospital after using drugs and alcohol to excess. He was awarded $70,000.00 damages for pain, suffering and loss of amenities.

In ***Black v. RTA of New South Wales*** [2000] NSWSC 326 the Plaintiff was unconscious at the scene of the accident and had a Glasgow coma score of 5. He was in a coma for 19 days and had post-traumatic amnesia. He was described as having a severe traumatic brain injury. He was awarded general damages of $182,000.00.

In ***Droga v. Coluzzi*** [2000] NSWSC 1081 the Plaintiff also suffered traumatic brain injuries and was assessed by a neurosurgeon as having a 20% permanent impairment of brain function together with a 20% permanent impairment of his left arm function related to cord contusion. He had cognitive deficits and a grossly distorted speech pattern such that he would not be employable in a competitive workforce. He was awarded $140,000.00 for general damages.

In ***Noferi v. Smithers*** [2002] NSWSC 508 the Plaintiff was hit by a speedboat. He suffered traumatic brain injuries whose effects included right sided incoordination, memory deterioration, cognitive deficits, depression and reduced anger control. He was awarded general damages in the sum of $200,000.00.

In ***McChesney v. Singh & Ors*** [2002] QSC 311 the Plaintiff when not quite 18 years of age was severely injured in a traffic accident. She was 24 years and 8 months at the commencement of the trial. Brain damage had not rendered her wholly incapable of living independently but seriously affected her memory and her ability to recognise common objects and people who should be familiar to her. She was awarded $200,000.00. The Court of Appeal declined to interfere with this.

In ***Hedge v. Trenerry*** [1997] QCA 406 the Court of Appeal did not interfere with an award of general damages of $150,000.00 in respect of injuries to a young woman consisting of a depressed right fronto-parietal fracture of the skull, a fracture of the first sacral segment, post accident amnesia and ongoing short term and long term memory problems. Medical evidence referred to her as being in the severe disability category.

If one looks at how people with these sorts of severe brain damage injuries (taking this as a working example) might be assessed under the **Civil Liability Act** then one of course immediately has regard to s. 3 of schedule 3, "multiple injuries", which has been referred to above. "Serious brain injury" carries an injury scale value of 56 to 70. Item 6 of the schedule 4 of the Regulations gives the example of serious brain injury causing physical impairment such as limb paralysis or cognitive impairment with marked impairment of intellect and personality. Factors affecting the ISV (Injury Scale Value) assessment are said to include the degree of insight, life expectancy, extent of physical limitations, extent of cognitive limitations and other things including behavioural or psychological changes and a risk of epilepsy. It is said that an ISV (Injury Scale Value) at or near the top of the range will be appropriate only if the injured person substantially depends on others and needs substantial professional and other care.

It is to be stressed that this particular injury "serious brain injury" which carries an ISV scale of between 56 to 70, will invariably be accompanied by associated items of physical injury suffered by a person in a serious accident. For example there might be facial injuries, scarring and other orthopaedic injuries. The PIRS (Psychiatric Impairment Rating Scale) found in schedule 6 of the Regulation will invariably also be relevant in such a case. Allowing for an uplift, a person with injuries like those discussed in the common law cases referred to above, might be found to have an Injury Scale Value within the meaning of the ***Civil Liability Regulations*** of between 70 and 80. When one applies the criteria in s. 62 of the ***Civil Liability Act*** 2003 this would give a range for general damages of between $121,400.00 and $150,800.00.

This range is broadly in keeping with the level of general damages which might have been awarded under a common law assessment.

**Changes to Assessment Methodology Effected by the Act**

In decisions based on the ***Civil Liability Act*** 2003, judges awarding damages for "pain, suffering and loss of amenities" proceed to assess those damages firstly by reference to the "pain, suffering and loss of amenities" affecting a Plaintiff both subjectively and objectively, and then secondly by reference to the levels of impairment they have been found to experience based on expert medical opinion.

An impressive application of this process may be seen in the judgment of McGill DCJ in ***Carroll v. Coomber*** [2006] QDC 146 His Honour went through the Plaintiff's various problems in a detailed fashion. He then went through the Plaintiff's subjectively and objectively observed pain, suffering and loss of amenities. There was then an evaluation of those aspects in the light of the various expert medical opinions. The levels of impairment were examined. Then the different injuries and the ISV with respect to each of them were evaluated.

After this exercise had been performed and the ISV for the dominant injury had been determined, the next exercise was to assess whether pursuant to s. 3 of schedule 3 of the Regulations an uplift in the Injury Scale Value from the Injury Scale Value for the dominant injury could be performed. In that case his Honour found that there were three separate injuries which were of about the same significance and of lasting

significance. In addition, there was one other injury which was less significant but lasting and more than minor, and two other injuries which although quite painful and disabling for a time, did in time subside. There was no one injury which was particularly dominant. His Honour said at paragraph 47:

> *"In these circumstances, in my opinion neither an ISV within the range of whatever injury is chosen as the 'dominant injury', nor that with a 25% loading, is adequate properly to deal with the spread of injuries suffered by the Plaintiff, particularly in circumstances where most of the injuries are going to be permanent and where the Plaintiff is relatively young. In addition, a comparison with other decisions, and in particular with the more relevant earlier decision, under the Act and Regulation, suggests and ISV in excess of 16, in all the circumstances therefore in my opinion it is appropriate in this case, in a situation which is no doubt unusual, to allow an ISV with a greater than 25% loading at the top of the range of the 'dominant injury."*

His Honour went on to say that doing so reflected the 'adverse impacts' of all of the injuries.

### *Conclusion*

Both at common law and under the ***Civil Liability Act 2003*** the plaintiff's evidence of subjective feeling of pain does have its place in assessing general damages for "pain and suffering". It is, of course, logically the first point of consideration in that respect; but under both the common law and the Act, the evidence (especially the expert evidence) as to the many and varied "adverse impacts" of an injury, beyond the pain itself, probably plays a greater part in the exercise of quantifying the award of damages for "pain, suffering and loss of amenities", at least in most cases.

**Hugh Fraser QC**

**12 October 2007**