alternatively, by the acquisition by either party of an English domicile.[9] The latter alternative may be a little risky as it may not be long before "domicile", in the English sense, becomes as obsolete as the writs of Aiel, Besaiel and Cosinage.

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9. *Sottomayor* v. *De Barros* (No. 2) (1879) 5 P.D. 94.

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AUTOMOBILE INJURIES—CAN THE COMMON LAW COPE?

In *Travaglia* v. *Club Motor Insurance Agency Pty. Ltd.*[1] the Full Court of Queensland considered an appeal by an insurer to reduce damages awarded to a respondent for injuries received in an automobile accident. The court affirmed the findings of the trial judge in relation to the injuries suffered by the respondent and disabilities flowing therefrom both present and future. However, the court took the view that the specific injuries[2] suffered were insufficient to support the award of the trial judge and reduced the amount of general damages from $14,000 to $10,000.

As an automobile accident case *per se, Travaglia* provides little cause for comment. On a wider view the case is illustrative of some of the complaints put forward by advocates of a system to replace the traditional common law assessment of damages in such cases.[3] Lord Wilberforce has suggested[4] that the day is approaching when compensation for injuries received in automobile accidents will no longer be based on fault, nor will the quantum of such compensation be assessed by the courts. Accordingly, it behoves us to examine a case such as *Travaglia* to determine whether fundamental inadequacies in the application of the common law system or in the system itself are at the root of the current complaints, or, whether the system is adequate in terms of utility to meet the considerable challenge presented by the automobile to our present environment.

One of the grounds of appeal in *Travaglia* was that the trial judge had, contrary to principle, proceeded by assessing a sum for each injury and disability and then totalled the sums. While it was conceded that the judge did state certain figures during addresses, counsel for the respondent contended that the judge was not stating final figures but was merely "thinking aloud" concerning an approximate figure not intended to be a final figure.[5] The court's discussion of this matter, it is submitted, must have been set forth as guidance for the decision of future cases since it reached no conclusion as to the trial judge's conduct on this point. Thus the court said:[6]

1. [1968] Qd. R. 352.
2. The respondent's injuries consisted of a ten per cent permanent disability of her left leg; a complete and permanent loss of smell; frequent and severe headaches which according to medical testimony would affect her permanently; facial scarring and a constant painful sensation along the upper right teeth and right cheek. In addition there were various nervous complaints, fifty per cent attributable to the accident.
3. (1969) 119 *The New Law Journal* 653-654.
4. In an address delivered at the University of Queensland, July 1969.
5. [1968] Qd. R. 352 at 356.
6. *Ibid.*

> But *if* a judge did do what appellant's counsel said the trial judge did in the present case it would be an approach out of accord with authority . . . . .

And again:[7]

> . . . it would be strange and unhelpful . . . .

While it is conceded that the total sum awarded for general damages is stated as a single amount, and not as the sum of rigidly separate and independent items, it is submitted that the authorities relied on by the court[8] do not proscribe separate analysis of claimed items of damage in an appropriate case in reaching the finally stated single amount (for example pain and suffering occasioned by separate injuries to two distinct parts of the body but arising out of the same accident). The authorities cited by the court recognise that there is a possibility of an improper award based upon fallacious reasoning where a judge *automatically* adds together all the separate items falling within a single head of damage. Such *automatic* totalling may indeed result in the sum of the parts being greater than the whole. However, it is submitted that the individual analysis method may be of real value where the judge, using discretion, recedes from the forest a sufficient distance to see *its* proper size and shape as well as that of the individual trees gained from the closer view.

What does emerge from the court's discussion of this point is that apparently the court views "thinking aloud" in purely legal terms as different from "expressing a final figure".[9] A legal philosopher of the realist school might be forgiven for thinking that the process of judicial differentiation between the two individual "extremes" is illusory.

A further ground for appeal was that the amount of damages assessed was manifestly excessive. To determine the function of an appellate court in considering such a ground of appeal, the court referred to a number of decisions which it cited with approval.[10] The principles to be derived from the authorities cited by the court require that the assessment of damages by the judge, being an exercise of discretionary judgment concerning questions of fact, ought not to be interfered with by an appellate court merely because it would have awarded a different figure, but only where it is satisfied that the trial judge has applied a wrong principle of law, made a wholly erroneous estimate of the damage, or mistaken the facts or the evidence. Put in another way, it is suggested by the authorities that the scale must go down heavily against the figure attacked if the appellate court is to interfere.[11] Further, once the appellate court has determined to interfere with the figure awarded by the trial judge, "it cannot in forming its own estimate of a proper sum proceed on its own view of the evidence without regard to the view which the appellate court thinks the trial judge took."[12]

The court, while stating that it bore in mind these considerations, expressed no view as to the particular reasons upon which it proceeded in varying the award of the trial judge, being content to echo the statement of Denning L.J. in

7. *Id.* at 357.
8. *Id.* at 356-357.
9. *Id.* at 356.
10. *Id.* at 359.
11. *Miller* v. *Jennings* (1954) 92 C.L.R. 190 per Dixon C.J. and Kitto J. at 196.
12. *Russell* v. *Hargreaves & Sons Pty. Ltd.* [1957] St. R. Qd. 440 per Dixon C.J. and McTiernan J. at 444.

McCarthy v. *Coldair Ltd.*,[13] "Good gracious me—as high as that?" In the absence of reasons for the reduction of damages it is idle to speculate upon what the court actually relied as a basis for the reduction. Moreover, such absence leads to some reasonable doubt as to the existence of any such reasons. It is submitted that failure to state the principle upon which the court proceeded not only amounts to a failure of the proper functioning of the judicial process if one, some or all of the above-mentioned principles may have been relevant, but also provides a beach-head for assault upon the common law system in this context. In practical terms it is difficult, when faced with the arguments of social reformers, to justify a judicial decision which does not disclose the principle relied on to declare an award of damages excessive.

Critics of the common law method of personal injury compensation are quick to point to the artificial and restricted nature of the assessment of damages therein. For example, in *Travaglia* the amounts of damages awarded by the trial judge and the appellate court, calculated on an actuarial basis, and broken down to daily amounts, would be $2.43 per day and $1.73 per day respectively.[14] It is submitted that these figures in the context of respondent's injuries and the appellate court's action in *Travaglia* bear sober reflection.

Is it logically or legally consistent for appellate courts, as authority for propositions of law to justify their value judgments on questions of fact in a case before them, to rely upon decided cases which are themselves subjective decisions on questions of fact? It is the apparent unreality of such an approach along a tortuous path of legal reasoning which leads critics of the common law system to an accusation of sophistry.

One of the criticisms which goes to the basis of the common law system of compensation is that in the field of automobile accidents in jurisdictions with compulsory third party insurance, there is already in effect a method of social insurance. As a result, partially at least, the rationale for the formal legal approach has been swept aside.

The social reformers argue that as there is now no direct connection between fault and the compensation for damages caused thereby, in the sense that an insurance company now stands behind the person at fault, there is little point in basing a system of compensation on liability through fault. It is submitted, however, that there is no reason for assuming that because payment now comes from a different pocket the courts are no longer equipped to deal with the problems which arise. The criticism is valid however where courts fail to meet the challenge presented by improper or tardy handling or analysis of the ever increasing automobile accident claims, whether such impropriety or tardiness is caused by the sheer weight of numbers or otherwise.

It is suggested that the reluctance of the courts in automobile cases to award large sums in damages to gravely injured plaintiffs may be traced to the prevalence of compulsory third party liability insurance. Since the wrongdoer is no

13. [1951] 2 T.L.R. 1226 at 1229. In this case the plaintiff's only injury was a seriously fractured wrist. He was awarded £2750 damages by the trial judge. Denning L.J. stated that the highest reasonable figure would be £1250 while Vaisey J. concluded that the trial judge's award was "extravagant, excessive or wholly disproportionate to the injuries suffered."

14. *The Australian Life Tables of 1962,* Commonwealth Statistician. The calculation has been made by assessing the life expectancy of the respondent at the date of the accident as 30.5 years and determining the daily amounts recoverable by her for that period from an annuity utilizing the entire award of damages plus interest at 5 per cent over that period. The tables are those used by the Supreme Court of Queensland.

longer liable in money terms for the consequences of his act, there may be an unconscious balancing by the court of the amount of insurance premiums extracted from all motorists and the individual compensation to be awarded to the plaintiff. In fields where the factor of insurance is not present, however, for example, intentional torts, the courts have not displayed the same reluctance to award substantial damages in a relative sense.[15]

While it is not the purpose of this note to examine schemes to supplant the formal legal system of compensation for injuries received in automobile accidents, it is suggested that merely ignoring the arguments of the advocates of change and the problems involved may hasten the social acceptance and implementation of those arguments.

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15. Compare *Hazell* v. *Parramatta City Council and Others* [1968] N.S.W.R. 166 wherein the plaintiff, a solicitor, was subjected to approximately 1¼ hours of inconvenience and possible embarrassment at the hands of a City Council employee and a constable. He was charged with several minor offences which were later dismissed at the conclusion of the prosecution's case in the trial thereof. Plaintiff sued for damages for assault, wrongful arrest, false imprisonment and malicious prosecution and was awarded $10,350.

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THE PROBLEM OF VALUING DUTIABLE SUCCESSIONS

The Statute books contain sections which are unfortunately drafted, the reports abound with cases based on unusual facts, but in the case under review, *White* v. *Commissioner of Stamp Duties*,[1] these two features are combined.

The section is s. 10C of *The Succession and Probate Duties Acts,* 1892 to 1963,[2] (called "the Act" in this note), which reads as follows:[3]

10C. Notwithstanding anything contained in this Act or in any other Act or law, practice, or usage to the contrary, the moneys payable under any policy of insurance on the life of any person (whether such insurance was effected by the person himself or by any other person, and irrespective of any question as to who paid the premiums in respect of any such policy of insurance) shall on the death of the person on whose life such insurance was effected be deemed to be derived by the person beneficially entitled to such moneys by way of succession from the person on whose death such moneys become payable who shall be deemed to be the predecessor.
And it is hereby declared that the provisions of this section also apply to the moneys payable under any policy of life insurance which by instrument inter vivos has been assigned unless it be proved to the satisfaction of the Commissioner by the person in whose favour any such assignment may have been made that such assignment was for a bona fide adequate

1. [1968] Qd. R. 140.
2. The Act is currently under review and it is anticipated that a totally different scheme, based on true estate duty concepts, will be adopted in future legislation.
3. Only the first two paragraphs are set out. The last two are not relevant to this note.