

The Law Commission
Law Com No 257

**DAMAGES FOR PERSONAL
INJURY:
NON-PECUNIARY LOSS**

**Item 2 of the Sixth Programme of Law Reform:
Damages**

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Carnwath CVO, *Chairman* ⁺
Professor Andrew Burrows
Miss Diana Faber
Mr Charles Harpum
Mr Stephen Silber, QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

This terms of this report were agreed on 15 December 1998.

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⁺ At the date of signing, the Chairman was the Honourable Mrs Justice Arden DBE, who was succeeded on 2 February 1999 by the Honourable Mr Justice Carnwath CVO.

THE LAW COMMISSION

DAMAGES FOR PERSONAL INJURY: NON-PECUNIARY LOSS

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THE LAW COMMISSION

Item 2 of the Sixth Programme of Law Reform: Damages

DAMAGES FOR PERSONAL INJURY: NON-PECUNIARY LOSS

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I INTRODUCTION

- 1.1 In June 1995 the then Lord Chancellor announced the Law Commission's Sixth Programme of Law Reform which included, as the Fifth Programme had done, an item concerning damages. The Programme states:

that an examination be made of the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation. Certain matters to which specific consideration is to be given include:

...(e) the award of damages for pain and suffering and other forms of non-pecuniary loss...¹

- 1.2 In 1996 we published a consultation paper² on damages for non-pecuniary loss. The central issues considered in the paper were, first, whether current awards of damages for non-pecuniary loss in personal injury cases are at satisfactory levels, and secondly, whether changes should be made to the assessment of those damages. The latter question required consideration of the role of juries. The paper went on to address the role of juries in assessing quantum in non personal injury cases.
- 1.3 We received 164 responses to the consultation paper from individuals and organisations representing a broad spectrum of the community. A list of those who responded to the consultation paper is set out at Appendix C. We are very grateful for the time and effort spent by consultees. The arguments and insights put to us have been of invaluable assistance in the formulation of our final recommendations, as the detailed reference which we make to individual responses will demonstrate.
- 1.4 The extent of the current debate on the adequacy of damages for non-pecuniary loss in personal injury cases was commented on by Henry LJ, in his Foreword to

¹ Item 2 of the Sixth Programme of Law Reform (1995) Law Com No 234.

² Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140. The paper is 1995 copyright, although it was published early in January 1996.

the latest edition of the Judicial Studies Board *Guidelines for the Assessment of General Damages in Personal Injury Cases*.³ He said:

There is currently a lively debate initiated by the Law Commission as to what the level of ...[general damages for pain, suffering and loss of the amenities of life] ought to be.

- 1.5 We have sought to do justice to the range of points of view expressed in this debate. In particular, we accept the contention repeatedly made by consultees that the fairness of awards is partly reliant on their being perceived to be fair. Accordingly we have commissioned research from the Office for National Statistics into public perceptions of what the levels of damages for non-pecuniary loss in personal injury cases ought to be.⁴
- 1.6 Our conclusion is that awards of damages for non-pecuniary loss in cases of serious personal injury are too low and should generally be increased by a factor of at least 1.5, but by not more than a factor of 2 (or, in other words, that they should be increased by not less than 50 per cent, but by not more than 100 per cent). We make provision, however, for a tapered increase of between 1 and 50 per cent for injuries which fall just within our proposed definition of serious injury. We define a serious personal injury as one for which damages for pain and suffering and loss of amenity for that injury alone would be more than £2,000 (under the present law).⁵
- 1.7 We have reached the view that this increase would best be effected by the Court of Appeal and/or the House of Lords, using their existing powers to lay down guidelines as to quantum in the course of personal injury litigation. If change is not

³ (4th ed 1998). Henceforward we shall refer to these as the “JSB *Guidelines*”. The first edition was published in 1992, the second in 1994 and the third in 1996. At the time of the publication of *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140 the second edition was current. The status of the JSB *Guidelines* has recently been considered by the Court of Appeal in *Reed v Sunderland Health Authority*, *The Times* 16 October 1998. Beldam LJ, with whom Potter LJ agreed, referred to the JSB *Guidelines* as well as to three cases cited to him, when concluding that the award below for damages for pain and suffering and loss of amenity should be reduced. Staughton LJ agreed with Beldam LJ’s proposed order, but went on to comment on the status of the JSB *Guidelines*. He confirmed his view, expressed in *Arafa v Potter* [1994] PIQR Q73, Q79, that the JSB *Guidelines* are not in themselves law, since the Judicial Studies Board has no legislative power. The *Guidelines* should therefore be regarded with the respect accorded to the writings of any specialist legal author. He noted that Lord Woolf MR would go further, since he wrote in his Foreword to the third edition of the JSB *Guidelines* that they are “the most reliable tool, which up to now has been made available to courts up and down the land as to what is the correct range of damages for common classes of injuries”. Staughton LJ considered that he had undervalued the Guidelines when he described them in *Arafa* as “a slim and handy volume which anyone can slip into their briefcase on the way to the county court or travelling on circuit.” Nevertheless the law is to be found elsewhere in rather greater detail and so the Court of Appeal should not refer *only* to the JSB *Guidelines*. Hence his comment in the *Arafa* case that “In this Court we ought to look to the sources rather than the summary produced by the Judicial Studies Board...”, should be amended to say “In this Court we ought to look to the sources *as well as* the summary produced by the Judicial Studies Board.”

⁴ See Appendix B below for the full text of the research and paras 3.42-3.64 below for discussion of it.

⁵ See paras 3.40 & 3.110 below.

effected in this way within a reasonable period, we recommend that damages should be increased by the enactment of a short legislative provision.⁶

- 1.8 It will be plain from the above that we do not recommend the extension of jury trial in personal injury cases. Rather, we have concluded that the assessment of damages for personal injury should always be for a judge and should never be left to a jury.⁷ We also recommend that compensatory damages, other than in defamation cases, should be assessed by judges.⁸ Finally, we take this opportunity to “sweep up” and marginally extend our recommendations on juries in our report on Aggravated, Exemplary and Restitutionary Damages.⁹ We therefore here recommend that judges should in all cases decide whether to award, and, if so, the amount of, punitive or restitutionary damages.
- 1.9 The only immediate legislative change which we recommend is therefore in respect of juries. A draft Bill to give effect to our recommendations is to be found at Appendix A. We should make clear that we have considered whether that draft Bill complies with the European Convention of Human Rights, and we confirm that in our view it plainly does.
- 1.10 The rest of this paper sets out in detail the reasoning behind our recommendations. Part II addresses the issues raised in the consultation paper in respect of which we do not recommend change. Parts III and IV set out our proposals for change. Part V contains a summary of our recommendations. As we have said above, a draft Bill to give effect to our recommendations about juries is to be found at Appendix A. Appendix B contains the results of the empirical research carried out on our behalf. Appendix C contains a list of those who responded to the consultation paper. We have not included a separate section on the present law, since this is generally well-known and is set out in some detail in our consultation paper.¹⁰ We have, however, set out any important recent developments in the law at the relevant point in the discussion.
- 1.11 We gratefully acknowledge the great assistance provided to us in the preparation of this report by: Lord Woolf MR, Lord Bingham CJ, and the Judges’ Council, who particularly helped us with our analysis of the pros and cons of different possible methods for increasing the tariff of awards for non-pecuniary loss in personal injury cases; Lord Justice Brooke and Lord Justice May, who advised us on the practicalities of the Court of Appeal issuing guidelines on damages for non-pecuniary loss in personal injury cases; the Office for National Statistics and, in particular, Ms Olwen Rowlands, the Omnibus Project Manager and Ms Lynne Henderson;¹¹ Dr Mavis McLean of Wolfson College, Oxford and of the Lord

⁶ See paras 3.165 & 3.188 below.

⁷ See para 4.4 below.

⁸ See para 4.12 below.

⁹ (1997) Law Com 247, paras 5.44, 5.81-5.98, 3.54-3.57; Draft Bill, clauses 2, 12(4).

¹⁰ Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 2.4-2.52.

¹¹ But please note that those who carried out the original analysis and collection of the data bear no responsibility for the further analysis and interpretation of them.

Chancellor's Department, who advised us on the design and interpretation of the empirical research; the Association of British Insurers ("ABI") and the Association of Personal Injury Lawyers ("APIL"), who provided financial assistance, without which it would not have been possible for us to commission the empirical research; both also commented on the design of the research and the ABI assisted us to assess the impact on insurance premiums of our proposals for damages for non-pecuniary loss in personal injury cases; Mrs Ann Smart of St Hugh's College, Oxford, who carried out the analysis of responses to consultation. We are also grateful to the following for their help: Mr Richard Clayton, Mr Martin Eaton of the Foreign and Commonwealth Office; Lord Gill of the Scottish Law Commission, Mr Justice Girvan, Jeremy Gompertz QC, Ms Tamara Goriely, Mr Justice Morland, the Police Federation, Mr Justice Popplewell, Dr David Thomas of the Institute of Criminology, University of Cambridge, Hugh Tomlinson and Professor Martin Wasik of the University of Manchester.

PART II

WHERE CHANGE IS NOT REQUIRED

1. SHOULD DAMAGES FOR NON-PECUNIARY LOSS BE AVAILABLE AT ALL?

- 2.1 In the consultation paper we reached the strong provisional conclusion that damages for non-pecuniary loss owing to personal injury should be retained.¹ Such damages recognise the personal as well as the financial consequences of injury. Abolition of them may be thought to discriminate unfairly against those, such as the unemployed, who do not suffer any, or any substantial, pecuniary loss as a result of personal injury. Furthermore, almost all of the accident victims who took part in our empirical survey thought that damages should be available for non-pecuniary loss.²
- 2.2 There was widespread support from our consultees for this view. Of those who responded on this issue, 97.5 per cent agreed with us. Many consultees endorsed the reasons we had given for our conclusion. Consultees tended to express their support for the existence of damages for non-pecuniary loss in forthright terms, appealing to concepts of justice and to the views of victims.³ Support by the public in general for the existence of such damages was also seen as significant.
- 2.3 **We therefore recommend that damages for non-pecuniary loss should be retained.**

2. SHOULD ENGLISH LAW ADOPT THE CANADIAN “FUNCTIONAL” APPROACH TO THE ASSESSMENT OF DAMAGES FOR NON-PECUNIARY LOSS?

- 2.4 In the consultation paper we provisionally recommended that English law should not move from a “diminution of value” to a “functional” approach to the assessment of damages for non-pecuniary loss.⁴ According to the former view, damages are meant to put a value on what the claimant has lost, irrespective of how the sum awarded will be spent. On the “functional” approach damages for non-pecuniary loss are meant to provide comfort and solace to the claimant, by enabling him or her to obtain other means of satisfaction to replace what has been lost.

¹ Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.5-4.8.

² Personal Injury Compensation: How Much is Enough? (1994) Law Com No 225, p 210. See para 3.30 below.

³ Mrs A B MacFarlane, who retired as Master of the Court of Protection on 30 November 1995, responding in her personal capacity, said “The findings in Law Com No 225 fit very well with the experience of the Court of Protection, who remain involved with the affairs of patients with personal injuries for many years, usually for the rest of their lives, and who have constant reminders from their receivers and carers of the continuing problems they are experiencing.”

⁴ Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.9-4.10.

- 2.5 We rejected adoption of the “functional” view of damages for several reasons. First, this approach converts damages for non-pecuniary loss into damages for pecuniary loss, because the sum awarded is the financial cost of substitute pleasures. This places an unacceptable burden on claimants to produce evidence of pecuniary loss in order to recover damages for non-pecuniary loss. Secondly, substitute pleasures do not make up for all the non-pecuniary effects of personal injury. Thirdly, this way of assessing damages tends to be inimical to the development of a tariff of damages for different injuries, as the level of awards depends on what substitute pleasures are appropriate for particular claimants. Fourthly, damages for past non-pecuniary loss seem to be precluded. Finally, the Canadian experience of the “functional” approach has not been an entirely happy one.
- 2.6 There was extensive support for our provisional conclusion. Of those who responded to this question, 93 per cent agreed with us. Many endorsed our specific reasons for rejecting the functional approach. Practical objections were also raised. Defendants would have difficulty in making realistic offers of settlement or payments into court. Non-legal skills would be required to assess damages for non-pecuniary loss, possibly requiring a new brand of consultant in personal injury claims. Immediate public support would be necessary for a change of this nature to work and this may not be forthcoming.
- 2.7 **In the light of consultees’ views supporting our provisional conclusion, we do not recommend altering the traditional “diminution of value” approach to the assessment of damages for non-pecuniary loss.**

3. SHOULD A CLAIMANT WHO IS UNAWARE OF HIS OR HER INJURY BE ENTITLED TO DAMAGES FOR NON-PECUNIARY LOSS?

- 2.8 We made no provisional recommendations on this issue, but asked consultees to give their views on the correct approach to assessing damages for non-pecuniary loss for claimants rendered permanently conscious, and for conscious but severely brain-damaged claimants with little appreciation of their condition.⁵
- 2.9 In our analysis we questioned the correctness of the rule laid down by the majority of the House of Lords in *West v Shephard*,⁶ confirming the majority decision of the Court of Appeal in *Wise v Kaye*,⁷ that a permanently unconscious claimant should receive damages for loss of amenity at the top end of the scale of compensation for non-pecuniary loss. We suggested that non-pecuniary loss should be rationalised in terms of the mental suffering and loss of happiness caused to the claimant. That is, all non-pecuniary loss should be assessed subjectively (through the claimant’s awareness of it) and not objectively (irrespective of the claimant’s unawareness of it). On this view a person with no awareness of his or her condition should not receive damages for non-pecuniary loss.

⁵ Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.11-4.22.

⁶ [1964] AC 326.

⁷ [1962] 1 QB 638.

- 2.10 We rejected the counter-argument that it is impossible to know what those diagnosed as permanently unconscious experience. Damages should be awarded on the basis of the claimant's condition as proved on the civil burden of proof: that is, on a balance of probabilities. On this test, the possibility that if scientific knowledge were more advanced, it might be shown that a permanently unconscious claimant has some consciousness, is not sufficient to displace a conclusion based on current medical knowledge that a person has no awareness. We also rejected the argument that damages should be awarded, lest it be cheaper to injure someone more seriously than less seriously. If a subjective approach is taken to the assessment of damages, this outcome in this context is an inescapable consequence of a compensatory measure of tort damages. Furthermore we did not consider that an award should be rationalised as a means of compensating the dependants of the victim for their non-pecuniary loss.
- 2.11 Of the consultees who thought that a nil award should be made, some added to the arguments considered in the paper for this course of action. For example, the point was made that national resources to fund compensation are finite, and that some of an increase in most awards of damages for non-pecuniary loss could be found by abolishing awards which do not compensate in any real sense.⁸
- 2.12 In the consultation paper we acknowledged the alternative view, that loss of amenity should be largely, but not entirely, subjectively assessed. This would lead to the award of some damages for non-pecuniary loss for the unconscious claimant. Also, we recognised that a vast majority of the respondents to our empirical survey thought that damages for non-pecuniary loss should be payable to unconscious claimants.⁹
- 2.13 Contrary to the thrust of our analysis, 69 per cent of consultees who addressed this issue, were in favour of an award of damages for non-pecuniary loss to permanently unconscious victims of personal injury. On a theoretical level, consultees supported the argument that it would be unjust to award lower compensation for catastrophic injuries than for less serious ones. They also thought that this would have an anti-deterrent effect. It was considered that although permanently unconscious victims do not go through pain and suffering, substantial damages for non-pecuniary loss are justified by the unconscious victim's complete loss of amenity. Failure to recognise this would be to undervalue victims and to trivialise their experiences. Moreover consultees thought that following through a subjective approach to the assessment of damages would lead to inconsistencies and unpredictability. For example, it would require fine

⁸ A number of respondents (David Grimley of St Paul International Insurance Company Limited; UK Claims Managers' Association Working Party; London International Insurance and Reinsurance Market Association ("LIRMA"); Judge Anthony Thompson QC) also raised the dilemma in which families may be placed where a close relation is in a persistent vegetative state. Reference was made to *Airedale NHS Trust v Bland* [1993] AC 789 and the Official Solicitor's Practice Note of March 1994 at [1994] 2 All ER 413. Application for the termination of life will often be originated by close family members, who may benefit financially from such termination, but who also may be seen, if preferring to sustain the claimant's life, as doing so in order to attract an award of damages which the claimant cannot enjoy. A nil award would resolve at least part of this difficulty.

⁹ Damages for Personal Injury: How Much is Enough? (1994) Law Com No 225, pp 212-214.

distinctions to be made on the basis of a particular claimant's awareness of deprivation.

- 2.14 Many consultees expressed concern that the allegedly unconscious claimant may have some awareness or may recover a degree of consciousness. The point was also made that permanent unconsciousness may be difficult to define or diagnose,¹⁰ and that since medical knowledge is developing, now is not the moment to change the law.
- 2.15 Despite our contention that damages should not be justified as compensation for dependants, there was concern that if no damages for non-pecuniary loss were awarded, the families of permanently unconscious victims would not be compensated, when if the person had died they might have a claim under the Fatal Accidents Act 1976. Some consultees thought that those closest to the victim should be separately entitled to compensation. A number of suggestions were made of ways to achieve this, for example through a "not quite Fatal Accidents Act" or some form of claim for loss of society.
- 2.16 There was a range of views on the appropriate level of damages. Aside from the 31 per cent who favoured a nil award, 42 per cent thought that assessment should be as at present: that is, within a bracket at the top end of the judicial tariff of values. Twenty-four and a half per cent were in favour of a low award, although views varied as to where precisely to set the level. Those who favoured this option tended to do so in recognition of the strength of the arguments both ways. Two and a half per cent put forward other suggestions.

¹⁰ See for example the article submitted by APIL: Keith Andrews, Lesley Murphy, Ros Munday, Clare Littlewood "Misdiagnosis of the vegetative state: retrospective study in a rehabilitation unit" (1996) 313 BMJ 13, which stated: "Of 97 patients with profound brain damage admitted to the unit between 1992 and 1995, 40 (41%) had been diagnosed by the referring clinician as being in a vegetative state....Of the 40 patients diagnosed as being in the vegetative state, 10 (25%) remained vegetative, 13 (33%) slowly emerged from the vegetative state during the rehabilitation programme, and 17 (43%) were considered to have been misdiagnosed as vegetative....It is disturbing to think that some patients who were aware had for several years been considered to be, and treated as being, vegetative. It must be extremely distressing to be aware but unable to make contact with family or clinical carers. It is possible that we have been referred an unrepresentative sample of patients. This is possible since the unit is the only one in Britain specialising in the management of this group of people. However, similar figures for misdiagnosis have been described for patients at an earlier stage after brain damage, (Childs NI, Mercer WN, Childs HW. "Accuracy of diagnosis of persistent vegetative state." *Neurology* 1993 43 1465-1467) and figures of about half our level have been reported for patients in long term care. (Tresch DD, Farrol HS, Duthie EH, Goldstein MD, Lane PS "Clinical characteristics of patients in the persistent vegetative state" *Arch Intern Med* 1991 151 930-932) These findings are not a criticism of the referring clinician but emphasise both the complex nature of profound brain damage and the difficulties of caring for patients experienced by staff who see very few patients in this condition. We also emphasise that a quarter of those diagnosed as vegetative by the referring team remained vegetative and were almost certainly, from our experience, likely to remain so. These findings are therefore not an argument against the withdrawal of artificial nutrition and hydration but do emphasise the importance of accurate diagnosis of the vegetative state being made after expert assessment and provision of a rehabilitation programme by a very experienced team." See also Grubb, Walsh and Lambe, "Reporting on the Persistent Vegetative State in Europe" [1998] *Medical Law Review* 161, 176-177.

- 2.17 Although we still have doubts about the arguments in favour of an award of damages for non-pecuniary loss for claimants who are permanently unconscious, we are persuaded by the views of the majority that damages should continue to be awarded. In addition we accept that it is likely that this attitude is widely held amongst the public at large.¹¹ We are also bolstered in this conclusion by the fact that it is endorsed by the case law.¹²
- 2.18 A further consideration is what the level of such damages should be. We see two main difficulties with setting damages at a lower level than at present. First, there was no consensus amongst consultees about what this lower level should be. Secondly, no clear justification for any particular lower amount emerged. The best justification for the award of any damages seems to us to be that loss of amenity should be objectively assessed. If this is the case, the total loss of amenity suffered by a permanently unconscious claimant justifies an award at the upper end of the bracket for damages for non-pecuniary loss, subject to diminution, for example where the victim has a short life expectancy.¹³
- 2.19 **Accordingly we do not recommend changing the rules for damages for non-pecuniary loss in respect of permanently unconscious claimants.** We note that the present law can be said to meet the concerns of consultees who were anxious that the victim's family should not go uncompensated. Although damages are awarded to the permanently unconscious person, in practice it seems likely that the relatives closest to the victim also benefit from the award.
- 2.20 The separate issue raised by us in respect of claimants who are conscious, but severely brain-damaged, is to some degree overtaken by our conclusion that damages for permanently unconscious victims should be unchanged. If it is accepted that damages should be awarded to that category of victim, it seems inevitable that they should also be awarded to those who are conscious, but lack insight. In the consultation paper we accepted that, even applying a subjective approach to the assessment of non-pecuniary loss, it would be invidious to distinguish significantly between conscious claimants on the basis of their levels of awareness.¹⁴
- 2.21 Fifty-nine per cent of consultees who examined this issue were in favour of continuing to award damages to such victims within, or near, the highest bracket of awards. Thirty per cent were in favour of a mid-range bracket or an even lower sum, and 11 per cent made other suggestions for the level of the award to be made.

¹¹ We can also see that provision for a nil award for a person who is permanently unconscious may cause injustice, if the diagnosis were erroneous, although we would hope that the forensic process involved in a personal injury action would be sufficient to avoid this outcome. See para 2.14 above.

¹² See para 2.9 above.

¹³ The point was made by Peter Andrews QC and Wyn Williams QC that in practice damages for non-pecuniary loss to unconscious claimants are rarely actually in the top bracket, because injuries leading to permanent unconsciousness will often have a significant impact on life expectancy.

¹⁴ See also para 2.13 above.

- 2.22 There was support for higher awards on similar grounds as for permanently unconscious claimants. This would avoid making it cheaper to injure someone more rather than less seriously; a large award is justified despite the absence of pain and suffering, because of the significant loss of amenity; finally, it would be unpopular to reduce awards where a person has little insight into their situation.
- 2.23 Many consultees again expressed concern at how, in any event, a workable line could be drawn between different categories of sentient victims, particularly as medical knowledge is not settled. It was observed that some account is already taken of the level of awareness of loss shown by the claimant.
- 2.24 **In accordance with the provisional view expressed by us in the consultation paper, consultees' responses and our conclusion above regarding permanently unconscious victims of personal injury, we make no recommendations for change in relation to the assessment of damages for conscious, but severely brain-damaged, victims.**

4. SHOULD THERE BE A THRESHOLD FOR THE RECOVERY OF DAMAGES FOR NON-PECUNIARY LOSS?

- 2.25 In the consultation paper¹⁵ we reviewed the reasons which are usually put forward for introducing a threshold, namely that this would reduce the cost of tort compensation, both in terms of damages and legal costs, and the savings made could be better employed elsewhere; that cases would be excluded from the tort system where the potential for fabrication and exaggeration is the greatest; and that there is less of a case for compensating minor losses than more serious ones. In our view the arguments for a threshold tended to be pragmatic rather than principled.
- 2.26 We identified the counter-arguments to be that:
- (1) Even if the tort system is too expensive, costs should be reduced by other methods than interfering with basic common law principles;
 - (2) A threshold might itself lead to exaggeration;
 - (3) As minor injuries typically do not cause pecuniary loss, to refuse non-pecuniary damages would mean some wrongs went uncompensated;
 - (4) The Pearson Commission's recommendation that a threshold be introduced¹⁶ should be seen in the context of its wide terms of reference, and its view that tort damages should be seen as a supplement to no-fault compensation from the state;
 - (5) There are already disincentives to small claims, for example in costs rules;

¹⁵ See discussion of this issue in *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 4.23-4.26.

¹⁶ The Pearson Commission, *Report on Civil Liability and Compensation for Personal Injury* (1978) Cmnd 7054, Volume I, paras 382-389.

- (6) An exclusion, on the Pearson model, of damages for non-pecuniary loss in the first three months after the accident would in many cases exclude compensation when a victim's pain is at its worst.¹⁷

We were convinced by these arguments and therefore provisionally proposed that no threshold be introduced, particularly given that we could not recommend, within our terms of reference, a trade-off with a new no-fault compensation scheme.¹⁸

2.27 A large majority of those who responded on this issue, 93 per cent, agreed with our provisional recommendation. There was support for the reasons given by us for our conclusion. In addition, it was thought that a threshold would be seen by the public as unfair and would lead to injustice and inconsistency (because it would be impossible to draw a clear line between those cases which attracted compensation and those which did not). Mention was made of practical issues. Many saw the risk of exaggeration as a decisive factor weighing against a threshold, citing experience with the Criminal Injuries Compensation Board in support of this contention.¹⁹

2.28 **In accordance with our provisional conclusion and the views of consultees, we do not recommend the introduction of a threshold for the recovery of damages for non-pecuniary loss.**

5. SHOULD INTEREST BE AWARDED ON DAMAGES FOR NON-PECUNIARY LOSS AND, IF SO, HOW MUCH INTEREST?²⁰

2.29 We noted in the consultation paper that the award of interest on damages for personal injury is compulsory, unless there are special reasons to the contrary. The court is, however, given a discretion as to what part of the total award should carry interest, in respect of what period and at what rate. Subject to developments following *Wells v Wells*²¹ discussed below,²² the present guideline for non-pecuniary loss, as laid down by the Court of Appeal in *Birkett v Hayes*²³ and confirmed by the House of Lords in *Wright v British Railways Board*,²⁴ is that interest should be awarded on the whole sum at a rate of 2 per cent from the date of service of the writ until the date of trial.

¹⁷ See para 2.41 below.

¹⁸ See particularly the description of item 11 in the Fifth Programme of Law Reform (1991) Law Co No 200. Also see paras 1.1 above and 3.60 below.

¹⁹ This point was made by the Judges of the Queen's Bench and Family Divisions and by Peter Weitzman QC.

²⁰ See for discussion of this issue Damages for Personal Injury: Non-Pecuniary Loss, Consultation Paper No (1995) paras 4.105-4.125.

²¹ [1998] 3 WLR 329.

²² See para 2.57 below.

²³ [1982] 1 WLR 816.

²⁴ [1983] 2 AC 773.

- 2.30 The recovery of interest on the non-pecuniary aspect of personal injury damages has been the subject of some controversy. In 1973 the Law Commission recommended that there be no interest on this element of an award.²⁵ It was contended that since damages for non-pecuniary loss were already adjusted for inflation, awarding interest led to double recovery. The Pearson Commission exposed the flaw in this argument: claimants are, in theory, protected from the effects of past inflation because damages are awarded in the money of the day of the trial or settlement. This does not, however, compensate for loss consequent on being kept out of the damages.²⁶ The Pearson Commission nevertheless concluded that interest should not be payable on non-pecuniary loss.²⁷ It did so for two reasons: first, in times of high inflation an investor cannot generally expect to do much more than maintain the real value of his or her investment, once inflation and tax are taken into account. It is therefore sufficient merely to award damages according to values at the time of trial. Secondly, it was seen as inappropriate to apply detailed financial calculations to figures which are essentially arbitrary. Moreover, in principle a distinction should be made between past and future non-pecuniary loss, but in practice this would be difficult and highly artificial.
- 2.31 In our consultation paper we considered that the Pearson Commission's first argument could be met by provision for a low rate of interest. Indeed this was the basis of the decisions in *Birkett v Hayes*²⁸ and *Wright v British Railways Board*.²⁹ In relation to the second point, we observed that, although the sum of damages for non-pecuniary loss is conventional, the claimant is entitled to have it paid promptly. There is as much justification for interest to be paid on damages for past non-pecuniary loss as for past pecuniary loss. We also noted the pragmatic argument that the accrual of interest may encourage defendants to settle or to bring cases to trial quickly. We reached the provisional conclusion that interest should continue to be awarded on damages for non-pecuniary loss, and asked consultees if they agreed. Of consultees who responded to this question, 82 per cent agreed with our conclusion.
- 2.32 **We therefore recommend that interest should continue to be awarded on damages for non-pecuniary loss in personal injury cases.**
- 2.33 We went on to consider whether interest should be awarded only on pre-trial non-pecuniary loss. We noted that the present practice is for interest to be awarded on the whole sum of damages for non-pecuniary loss, on the basis that non-pecuniary loss is by its nature indivisible and so cannot be split between past and future loss.³⁰ We put the argument that principle and fairness required a different

²⁵ (1973) Law Com No 56, paras 273-277 & 286.

²⁶ The Pearson Commission, Report on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054, Volume I, para 746.

²⁷ *Ibid*, paras 747-748.

²⁸ [1982] 1 WLR 816.

²⁹ [1983] 2 AC 773.

³⁰ It is noteworthy that in arguing that no interest should be paid on damages for non-pecuniary loss, the Law Commission in 1973 and the Pearson Commission, both concluded that no attempt should be made to provide for separation of damages for past and future non-pecuniary loss. See (1973) Law Com No 56, para 273 & The Pearson

approach, and that it would not be impossible to make a broad division between past and future non-pecuniary loss. We asked consultees whether interest should be awarded only on damages for past non-pecuniary loss, and, if so, should this be coupled with a higher rate of interest, and/or should interest run from an earlier date.

- 2.34 The majority, 71 per cent, were not in favour of change. They put forward arguments on grounds of principle and of practicality. For example, Peter Cane pointed out that damages are not in any direct way calculated with respect to the period of the claimant's suffering and so cannot be divided temporally. Separation of non-pecuniary loss into past and future components was seen as arbitrary, artificial and inappropriate, and implied that such damages can be assessed scientifically, when this is far from the case. Even consultees who opposed the payment of any interest tended to take the view that, if it were payable, it should be payable in respect of both pre- and post- trial loss.
- 2.35 Practical points were decisive for many. A distinction would be difficult to draw and would therefore increase costs. An advantage would be given to dilatory claimants. The courts' task would be more complicated and an additional unnecessary ground of appeal would be created.
- 2.36 The minority favoured a change in practice, essentially on the grounds put forward in the consultation paper. No consensus emerged, however, on whether this change should be accompanied by an increase in the interest rate, or a change in the date from which interest should run.
- 2.37 **In the light of the majority view, and in the absence of a consensus by the minority on the associated issues concerning interest, we have concluded, with some reluctance, that the law should not be changed to provide for interest to be payable only on damages for past non-pecuniary loss.** We attach weight to the views expressed concerning the impracticality of change. We remain convinced, however, that the more principled approach would be to effect a split.³¹ Accordingly, we consider that this concession to claimants should be reflected in the measures recommended in respect of the date from, and the rate at which, interest is payable.
- 2.38 We next considered the date from which interest should be payable. We noted in the consultation paper that in *Jefford v Gee*³² the Court of Appeal chose the date of service of the writ as the date from which interest should usually be awarded. This was justified by three considerations, restated with approval by Lord Diplock in *Wright v British Railways Board*.³³ First, non-pecuniary loss does not occur all at once, and is not easily quantified at the date of the accident; secondly, the claimant is only kept out of his or her money from the time when the defendant ought to have paid it, which is when the action was brought; thirdly, if the starting point for

Commission, Report on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054, Volume I, para 747.

³¹ See on this point *McGregor on Damages* (16th ed 1997), para 652.

³² [1970] 2 QB 130.

³³ [1983] 2 AC 773.

interest is the date of service of the writ, this encourages the claimant to proceed without delay.

- 2.39 Given that the claimant's loss commences from the date of the accident, the choice of a later date for entitlement to interest on damages for non-pecuniary loss has been questioned. In 1973 the Law Commission doubted that this rule produced a significant increase in the expedition with which claimants started proceedings.³⁴ We noted in the consultation paper that more recent experience supports this view.³⁵ We questioned if, in any event, claimants should be penalised in order to encourage speedy issue of a writ. In *Jefford v Gee*³⁶ it was decided that interest on damages for non-pecuniary loss should be at the full short term investment account rate. It may be more difficult to justify interest running only from a date later than the accident when the rate is lower. We did not reach a provisional view on this issue, and asked consultees whether interest should be payable from the date of the accident or the date of service of the writ.
- 2.40 Of those who responded, 66 per cent favoured the payment of interest from the date of the accident. Thirty two per cent were in favour of payment from the date of service of the writ.³⁷ It should be noted that some of the consultees who expressed a view did so against the background that they had already given their opinion that interest should not be awarded at all.
- 2.41 Consultees put forward the argument of principle in favour of paying interest from the earlier date that the defendant has wrongfully withheld compensation for the claimant's losses since the date the cause of action arose. The point was also made that, arguably, most pain, suffering and loss of amenity occurs just after the accident.³⁸
- 2.42 It was also contended that the claimant should not be penalised for failing to serve a writ early. The date of service of a writ depends on many factors, which are often outside the claimant's control. The premature issue of proceedings should not be encouraged, as this may interfere with achievement of a negotiated settlement and cause costs to be incurred unnecessarily. Encouraging early issue of proceedings sits unhappily with Lord Woolf's proposals for pre-proceedings protocols.³⁹ It is also arguably in conflict with procedural rules to ensure expeditious progress of a

³⁴ (1973) Law Com No 56, para 271.

³⁵ See, eg, *Damages for Personal Injury: How Much is Enough?* (1994) Law Com 225, para 4.2 which found that a substantial proportion of the cases surveyed remained unresolved four years after the date of the accident; and The Right Honourable the Lord Woolf, *Access to Justice, Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (1995) pp 12-15, paras 29-41 & p 184, paras 12-14.

³⁶ [1970] 2 QB 130.

³⁷ Two per cent held no firm view.

³⁸ See para 2.26 above.

³⁹ The Right Honourable the Lord Woolf, *Access to Justice, Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (1995) pp 150-152, paras 3-12 & *Access to Justice, Final Report to the Lord Chancellor on the civil justice system in England and Wales* (1996), pp 107-111, paras 1-17.

case following issue, which may be difficult where a person has started proceedings prematurely to ensure entitlement to interest from an early date.

- 2.43 In any event, it was thought that making interest payable from the date of the writ does not affect the date on which claimants issue proceedings. If there is a concern to reduce delay there are many more effective ways in which courts can penalise dilatory claimants. Some consultees suggested that the courts retain a discretion to reduce the period for which interest is payable in cases of delay. The point was made, however, that delay is rarely deliberate, but more likely to be the result of inexperience or incompetence.
- 2.44 Amongst those who agreed with the present rule, there was support for the grounds of the decisions in *Jefford v Gee*⁴⁰ and *Wright v British Railways Board*.⁴¹ Also, dating interest from service of the writ acted as a balance to the failure to divide pre and post trial damages for non-pecuniary loss. Practical arguments were stressed. Aside from the point that payment of interest from the date of the accident would lead to delay on the part of claimants, it would not always be easy to ascertain the date from which interest should be payable, for example in disease cases. There might also be unfairness to defendants, where proceedings were delayed because an accident victim was subject to a legal disability, for example if he or she were a minor when the accident occurred.
- 2.45 While we can see the force of some of the arguments put forward by consultees in favour of awarding interest from the date of the accident, we consider these to be balanced by the benefit to claimants of interest being awarded not only on damages for past non-pecuniary loss, but also on damages for future non-pecuniary loss. **Hence, we recommend that payment of interest on damages for non-pecuniary loss should continue to run from the date of service of the writ.**
- 2.46 Turning to the rate of interest, which has been laid down to be 2 per cent,⁴² we noted that in our Report on Structured Settlements and Interim and Provisional Damages we recommended that to determine the expected return on damages for future pecuniary loss and thus the appropriate rate of discount to be applied when assessing those damages, legislation should be introduced requiring the courts to take account of the net rate of return on an index-linked government security (“ILGS”).⁴³ We considered that ILGS constituted the best evidence of the real

⁴⁰ [1970] 2 QB 130.

⁴¹ [1983] 2 AC 773.

⁴² See para 2.29 above.

⁴³ (1994) Law Com No 224, paras 1.12, 2.24-2.36 and 6.2-6.4. This recommendation was not implemented in full in the Damages Act 1996. Instead s 1 of the Damages Act 1996 provides:

“(1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.

return on any investment where the risk element was minimal.⁴⁴ We thought it arguable that the question raised in this context was analogous and that therefore the ILGS should be used to calculate interest on damages for non-pecuniary loss.

- 2.47 We noted that some argued for a higher rate of interest on the basis that awards of damages for non-pecuniary loss are not properly adjusted to take account of inflation. Others considered that a higher rate would encourage the expeditious conduct of claims. We recognised the force of the latter argument, but also noted counter-arguments, similar to those raised by consultees in relation to the date from which interest should be paid.⁴⁵
- 2.48 We asked consultees to indicate whether they thought the current rate of interest satisfactory, or if they instead favoured the net rate of return on ILGS over the relevant period, or the application of a higher net real rate of return on a low-risk investment, in order, for example, to discourage delay by defendants.
- 2.49 Views were very much divided: 27 per cent were in favour of retaining the current interest rate, 30 per cent supported the net rate of return on index-linked government securities and 24 per cent thought a higher rate of interest should be adopted. The remaining 19 per cent argued for a diverse range of options. Again there was some overlap between answers here and elsewhere, so that consultees did not necessarily express consistent views on all of the questions regarding interest.

(2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

(3) An order under subsection (1) above may prescribe different rates of return for different classes of case.

(4) Before making an order under subsection (1) above the Lord Chancellor shall consult the Government Actuary and the Treasury; and any order under that subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(5) In the application of this section to Scotland for references to the Lord Chancellor there shall be substituted references to the Secretary of State.”

In the debates during the passage of the Bill through the House of Lords, the then Lord Chancellor stated that he would await the outcome of the appeal in *Wells v Wells* before exercising his powers under section 1 (See [1997] 1 All ER 673, 676, CA & [1998] 3WLR 329, 343, HL). More recently the Minister of State at the Lord Chancellor’s Department said that the Lord Chancellor and the Secretary of State for Scotland were consulting the Government Actuary and the Treasury as required by the above section prior to the exercise of the power contained therein (*Hansard* (HC) 19 October 1998, vol 317, cols 940-941).

⁴⁴ Report on Structured Settlements and Interim and Provisional Damages (1994) Law Com No 224, para 2.28.

⁴⁵ It could be argued that the function of interest on damages is to compensate the claimant, not to encourage speedy litigation. In any event, Lord Woolf made recommendations for the award of interest at an enhanced rate where the defendant refused an offer by the claimant to settle and the claimant recovered damages which matched, or were in excess of, the offer made. See The Right Honourable the Lord Woolf *Access to Justice; Interim Report to the Lord Chancellor on the civil justice system in England and Wales* (1995), pp 194-198, paras 1-20 and *Access to Justice; Final Report to the Lord Chancellor on the civil justice system in England and Wales* (1996), pp 112-115, paras 1-10. See further Part 36: Offers to Settle and Payments into Court, of the Civil Procedure Rules which are to be introduced on 26 April 1999.

- 2.50 Support for the current practice generally rested on the view that the reasoning underlying it is sound, and that it represents a workable compromise. A higher rate to discourage delay by defendants would be unfair. It is often claimants who delay. They would be encouraged to do so by a punitive rate of interest. In any event it is a myth that the 2 per cent rate of interest is an incentive to defendants to delay.
- 2.51 Those in favour of the net rate of return on ILGS gave a range of reasons for their view. Positive support for the ILGS rate tended to be on the basis of the arguments put forward in the consultation paper. The 2 per cent rate was seen as out of touch and arbitrary. Consultees who supported the award of interest at a higher rate than ILGS essentially did so on the basis that this would encourage defendants to settle cases.
- 2.52 Particularly in view of the lack of consensus amongst consultees on this issue, and certainly the lack of enthusiasm or persuasive argument for a much higher rate of interest, it seems to us that the main question in relation to the rate of interest on damages for non-pecuniary loss is whether it should be based on ILGS rates. In *Wells v Wells*⁴⁶ the House of Lords supported the recommendation in our Report on Structured Settlements and Interim and Provisional Damages⁴⁷ that ILGS rates be used in the calculation of future pecuniary loss. Their Lordships held that 3 per cent should be the guideline rate upon which discounts are based, subject, of course, to a different rate being specified by the Lord Chancellor under section 1 of the Damages Act 1996.⁴⁸ It would seem to follow that if the rate of interest on damages for non-pecuniary loss should be based on ILGS rates, the actual rate adopted should be 3, rather than 2, per cent.
- 2.53 As we have said above,⁴⁹ the argument of principle for increasing the rate of interest on damages for non-pecuniary loss to 3 per cent is that ILGS provides the best evidence of the loss to the claimant through being kept out of his or her damages for non-pecuniary loss.
- 2.54 There is a counter-argument of principle. As we have also said above,⁵⁰ in theory interest should only be awarded on damages for past non-pecuniary loss. Since interest is awarded on the whole sum of damages for non-pecuniary loss (and we do not recommend that this be changed), it may be argued that, even if ILGS is the right starting point, the ILGS rate should be discounted. This would be a source of injustice where the claimant was awarded damages for past non-pecuniary loss only. However, the magnitude of that injustice would most probably be slight, given that in such circumstances the sum of interest involved is very

⁴⁶ [1998] 3 WLR 329.

⁴⁷ (1994) Law Com No 224.

⁴⁸ Or, in the absence of action by the Lord Chancellor, to there being a significant change in economic circumstances justifying a new guideline by the courts. See [1998] 3 WLR 329, 355 (Lord Steyn) & 370 (Lord Hutton). Lord Hope at 360 stated that adjustments and the timing of them should now be left to the Lord Chancellor and the Secretary of State for Scotland, in the exercise of the power conferred on them by section 1 of the Damages Act 1996.

⁴⁹ See para 2.46 above.

⁵⁰ See paras 2.33, 2.37 & 2.45 above.

likely to be small. On the other hand, not to discount the rate of interest would cause injustice of a greater magnitude to defendants, since it is only in respect of large awards where damages for future non-pecuniary loss are made that the interest element is significant.

2.55 We also note that in *Wright v British Railways Board*,⁵¹ while Lord Diplock considered that the two relevant indicators of the appropriate interest rate suggested a 2 per cent rate, he went on to say:

In *Birkett v Hayes*⁵² Eveleigh LJ drew particular attention to the artificiality to which I initially referred, of treating the sum ultimately assessed at the trial as damages for non-economic loss, both that which the plaintiff had sustained by that date and also that which he was likely to sustain thereafter (although no discount for its deferment was made in the lump sum awarded), as if it were a debt for a sum certain of the same “real” value, payable on the date of service of the writ. Even assuming, as he was prepared to do, that after elimination of the risk element due to inflation the market rate of interest obtainable by investors as a reward for foregoing the use of their money remained at 4 per cent gross before deduction of tax, notwithstanding that the currency was rapidly depreciating, Eveleigh LJ would have regarded it as fair to apply a rate lower than the net rate of 2.8 per cent which represented the gross rate of 4 per cent less tax. The 2 per cent fairly represented an appropriate lower rate.⁵³

2.56 It seems to us that the issue of principle is finely balanced. In particular it might be said that the advantage to claimants of awarding interest on the whole sum of damages for non-pecuniary loss is sufficiently offset by our conclusion above that there should be no alteration to the date from which interest should be paid. In any event, we are convinced that legislation would be inappropriate. First, there was no consensus among consultees as to the appropriate rate of interest. Secondly, while the effect of *Wells v Wells*⁵⁴ is not entirely clear, it seems to us that a 3 per cent interest rate is at the very least consistent with the reasoning in that case, and may be required by it.⁵⁵ That being so, it would seem to us inappropriate

⁵¹ [1983] 2 AC 773.

⁵² [1982] 1 WLR 816, 824.

⁵³ [1983] 2 AC 773, 784.

⁵⁴ [1998] 3 WLR 329.

⁵⁵ In *Wells v Wells* [1998] 3 WLR 329 at 348, Lord Lloyd, in considering the correct rate of interest to employ in the calculation of damages for additional accommodation costs caused by an injury, said: “...the lost income is not to be calculated by reference to a normal commercial rate of interest. For interest, as Lord Diplock explained in *Wright v British Railways Board* [1983] 2 AC 773, 781, normally included two elements, ‘a reward for taking a risk of loss or reduction of capital,’ and ‘a reward for forgoing the use of the capital sum for the time being.’ Since the capital input in the new accommodation is free of risk, or virtually free of risk, it is only the second of the two elements of interest that the plaintiff has lost, namely, the ‘going rate’ for forgoing the use of the money. The Court of Appeal in *Roberts v Johnstone* took 2 per cent as the ‘going rate.’ This was the figure originally chosen by Lord Denning MR in *Birkett v Hayes* [1982] 1 WLR 816, and accepted by Lord Diplock in *Wright v British Railways Board*. *Birkett v Hayes* and *Wright v British Railways Board* were both cases of non-pecuniary loss, but the point is the same. Both sides accept that the correct approach is that adopted by the Court of Appeal in *Roberts v*

to suggest legislative interference with a solution so recently settled on by the courts, and this is especially the case where the arguments of principle for and against change are finely balanced.

- 2.57 Our reading of *Wells v Wells*⁵⁶ is borne out by the decision in *Burns v Davies*.⁵⁷ While appreciating that the rate of interest on damages for non-pecuniary loss had not been considered in *Wells v Wells*,⁵⁸ Connell J referred to the reasoning of Lord Diplock in *Wright v British Railways Board*⁵⁹ and Lord Lloyd's reasoning in *Wells v Wells*.⁶⁰ He then followed Lord Diplock's reasoning, which he noted had been cited with approval by Lord Lloyd, to find that interest on damages for non-pecuniary loss should be awarded at a rate of 3 per cent.
- 2.58 Our conclusion is therefore that there is no need for legislation in this area to achieve an uplift based on current ILGS rates, and that it would be wrong to recommend legislation to ensure a reduced rate. **We therefore do not recommend legislative change to the rate of interest on damages for non-pecuniary loss in personal injury cases.**

6. SHOULD DAMAGES FOR NON-PECUNIARY LOSS SURVIVE THE DEATH OF THE VICTIM?

- 2.59 The present position is that, where a victim of personal injury dies before his or her claim for damages is resolved, English law allows the deceased's estate to recover the full value of any pre-death pain, suffering and loss of amenity, whether

Johnstone. The only question is how that approach should be applied. Collins J arrived at the 'going rate' by taking the average return on ILGS as the best possible indicator of the real return on a risk-free investment over the period of the award. In other words, he took the same discount of 3 per cent net of tax as he had taken for the calculation of future loss. The Court of Appeal disagreed. They took the 'conventional rate' of 2 per cent, pointing out that Stocker LJ had not tied his 2 per cent to the return on any particular form of investment. It is true that there is no reference to ILGS in *Roberts v Johnstone*. But in *Wright v British Railways Board* Lord Diplock chose the return on ILGS as the first (and in my view simpler) of the two routes by which courts can arrive at the appropriate or 'conventional' rate of interest for forgoing the use of capital. At that time the net return on 15-year and 25-year index-linked stocks was 2 per cent. I can see no reason for regarding 2 per cent as sacrosanct now that the average net return on ILGS has changed. The current rate is 3 per cent. This therefore is the rate which should now be taken for calculating the cost of additional accommodation. It has two advantages. In the first place it is the same as the rate for calculating future loss. Secondly it will be kept up to date by the Lord Chancellor when exercising his powers under section 1 of the Act of 1996." The other Law Lords all concurred with Lord Lloyd's judgment on this point. (Lord Lloyd also referred to Lord Diplock's reliance on ILGS in *Wright* when considering the correct rate of interest to apply to the calculation of future pecuniary loss. See [1998] 3 WLR 329, 340.) See also A Buchan "Is it Time to Review Interest on General Damages at two per cent? Shouldn't it be three per cent?" [1998] JPIL 296; P Kitson "What will be the impact of the House of Lords ruling on personal injury awards?" *Quantum*, Double Issue 4 & 5, 4 September 1998, 14 & D Kemp "Damages for Personal Injuries: A Sea Change" (1998) 114 LQR 570.

⁵⁶ [1998] 3 WLR 329.

⁵⁷ Transcript, 7 August 1998.

⁵⁸ [1998] 3 WLR 329.

⁵⁹ [1983] 2 AC 773, 782-783.

⁶⁰ [1998] 3 WLR 329.

or not death was caused by the injury itself and whether or not the deceased commenced an action for damages while alive.⁶¹

- 2.60 We provisionally recommended that the law should not be changed. We considered practical considerations to be decisive. For example, if survival of the claim for damages were precluded, where it was known that a tort victim was fatally ill defendants might be encouraged to delay settlement, and victims would be placed under unacceptable pressure as they were dying.
- 2.61 We did not consider the survival of damages for non-pecuniary loss to be unfair to defendants, as it did not involve the grant of new rights, but the preservation of existing ones. Also, damages for pre-death non-pecuniary loss are distinct from damages available under the Fatal Accidents Act 1976. Our conclusion was reinforced by experience in Scotland, where damages for non-pecuniary loss were excluded from survival actions between 1976 and 1992. This led to public disquiet and the law was changed back in 1993.⁶²
- 2.62 Of those consultees who responded on this point, 89 per cent agreed with our provisional recommendation that the survival of damages for non-pecuniary loss should not be excluded altogether. Only 6 per cent disagreed outright, while 4.5 per cent made other suggestions. There was support for the arguments in favour of survival which were accepted in the consultation paper. The argument that it should not be cheaper to kill than to injure was also made in this context.
- 2.63 In addition we rejected the imposition of conditions on the survival of damages for non-pecuniary loss. We therefore made the provisional recommendations that there should be no rule limiting the survival of damages for non-pecuniary loss in personal injury actions to cases where the supervening death is due to extraneous causes or to where the deceased had commenced an action while alive. There was considerable support for both of these conclusions (a 97 per cent majority rejecting the first possible condition, and 96 per cent rejecting the second).
- 2.64 **We therefore do not recommend any change to the law on the survival of damages for non-pecuniary loss following the victim's death.**

7. DOES THE QUESTION OF OVERLAP (BETWEEN DAMAGES FOR LOSS OF EARNINGS AND DAMAGES FOR LOSS OF AMENITY) RAISED IN *FLETCHER V AUTOCAR AND TRANSPORTERS LTD*⁶³ GIVE RISE TO DIFFICULTY?

- 2.65 We noted that in *Fletcher v Autocar and Transporters Ltd*⁶⁴ Lord Denning MR and Lord Diplock, in the majority, and Salmon LJ, dissenting, all thought that where a

⁶¹ Law Reform (Miscellaneous Provisions) Act 1934, s 1 and see generally for discussion on this issue Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.126-4.137.

⁶² See the Damages (Scotland) Act 1993, amending the Damages (Scotland) Act 1976, and Report on The Effect of Death on Damages (1992) Scot Law Com No 134. See also S Forsyth, "Transmissible Solatium After Death" 1999 SLT 45 for a discussion of the law in Scotland.

⁶³ [1968] 2 QB 322.

⁶⁴ *Ibid.*

claimant could no longer pursue a hobby which had involved expenditure, his or her damages should be reduced to reflect the savings resulting from having to give up the pursuit. They each differed, however, on how the savings should be taken into account. In its 1973 Report, the Law Commission rejected such a deduction. In our consultation paper we thought it strongly arguable that the case for a deduction falsely treated the assessment of damages for non-pecuniary loss as a precise calculation as if one were assessing a pecuniary loss.⁶⁵

2.66 We were (and remain) unaware of subsequent cases in which the deduction suggested in *Fletcher*⁶⁶ has been made, and so we did not regard this as a major consultation issue. Nevertheless we asked consultees if it caused difficulty, and, if so, what the solution to that difficulty should be.

2.67 Consultees who responded to this question were overwhelmingly of the view that there is no difficulty with this issue in practice. *Fletcher v Autocar and Transporters Ltd*⁶⁷ is rarely cited and generally ignored. This was thought to be right in principle. Consultees made various arguments to this effect. For example, it is irrelevant to the question of what the claimant has lost to ask how he or she proposes to spend his or her money, which the argument for a deduction effectively does. Moreover, if any set-off is to be made, it should not, in principle, be against damages for loss of amenity or loss of earnings, but against the cost of substitute hobbies. It would also be impractical to require deductions in respect of money saved from lost hobbies, as this would involve complicated enquiries and calculations, for very little tangible benefit.

2.68 **In the light of consultees' responses, we make no recommendation for changing the law on the question of the overlap (between damages for loss of earnings and for loss of amenity) raised in *Fletcher v Autocar and Transporters Ltd*.**⁶⁸

⁶⁵ See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 2.38.

⁶⁶ [1968] 2 QB 322.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

PART III

WHERE CHANGE IS REQUIRED I: INCREASING THE LEVELS OF DAMAGES

1. DAMAGES FOR NON-PECUNIARY LOSS FOR SERIOUS PERSONAL INJURY SHOULD BE INCREASED¹

(1) Our questions for consultees

- 3.1 We noted in the consultation paper that the most vociferous recent criticism of the current level of awards had tended to come from those claiming that levels of compensation are too low, and we reviewed some of this criticism. While one cannot say that any particular level of damages for non-pecuniary loss is right or wrong,² in the same way as one can for pecuniary loss, we thought it useful to ask consultees:

...whether they believe that the level of damages for non-pecuniary loss is too high or too low; and, if so, whether that belief rests on anything other than intuition. If consultees do think that the damages are too low we ask: (a) what would be the uplift required to render awards acceptable (for example, double or one and a half times the present levels)?; and (b) should the uplift be across the whole range of awards or confined, for example, to the most serious injuries? If, in contrast, consultees consider that the level of awards is too high, would they favour a legislative ceiling on awards for non-pecuniary loss in personal injury cases?³

- 3.2 We also examined whether awards of damages for non-pecuniary loss have kept pace with inflation, noting that if not this would provide rational grounds for saying that damages for non-pecuniary loss are too low. We compared, in respect of a few injuries of varying severity, the real value of the conventional sums which a claimant can expect with those which he or she could have expected to receive in the past, particularly in the late 1960s and early 1970s. In respect of less serious injuries the results were inconsistent. However, the awards for very serious injuries, namely paraplegia, quadriplegia and very severe brain injury, appeared consistently to have fallen significantly below the rate of inflation over the last 25 to 30 years.
- 3.3 We emphasised, however, that our comparative exercise was a very rough one. First, it was difficult to find decisions in which general damages had been isolated, and so the samples used were small and not necessarily representative. Secondly, sums which are now awarded separately for future pecuniary expense were previously included, if at all, in the award for damages for loss of amenity.⁴

¹ See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.27-4.52.

² See paras 3.12 & 3.23 below. See also the quotation from Lord Diplock's speech in *Wright v British Railways Board* [1983] 2 AC 773, 785 set out at para 3.146 below.

³ Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 4.33.

⁴ See paras 3.8-3.11 below.

Nevertheless, we felt it possible to draw support for the view that since the late 1960s and early 1970s, at least in respect of very serious injuries, awards have failed to keep up with inflation. We asked consultees if they agreed with this view and whether they had other evidence to support it.

(2) Consultees' responses

- 3.4 Four central messages came through from consultees' responses: (a) damages for non-pecuniary loss for serious personal injury are too low; (b) there is no clear consensus on what the level of damages for non-pecuniary loss in personal injury cases should be; (c) the views of society as a whole should influence the level of damages for non-pecuniary loss in personal injury cases; and (d) one must be clear as to the relevance, if any, of other components of a damages award. We shall now examine each of these propositions in turn.

(a) Damages for non-pecuniary loss for serious personal injury are too low

- 3.5 Of consultees who gave views on levels some did not differentiate between categories of injury. Others did. When the opinions of these two groups are added together, the following conclusions can be drawn: -

- (1) The significant majority (at least 75 per cent) thought that damages for non-pecuniary loss for very serious injuries are too low.⁵
- (2) At least 50 per cent considered that damages for non-pecuniary loss are too low across the board.
- (3) On the other hand, around 50 per cent thought that damages for "minor" or "trivial" injuries are not too low. Indeed, about 12 per cent took the view that damages for "trivial" injuries are too high.

- 3.6 Consultees who differentiated between categories of injury tended not to define their terms. This makes it difficult to analyse the responses of this group, particularly in respect of mid-range injuries.⁶ Still, we have concluded that if the highest awards are thought to be too low, this must have a knock-on effect lower down the scale. Our reading of consultees' responses therefore suggests a significant measure of support for increasing damages for non-pecuniary loss not only in respect of very serious injuries but also in respect of injuries which fall between the very serious and the "minor" or "trivial", although there may be

⁵ David Kemp QC's response is published in Kemp & Kemp, *The Quantum of Damages* Volume I, 1-040-1-040/7. He states at 1-040/7 that "I believe that the current "tariff" for damages for non-pecuniary loss is much too low. Broadly speaking, I think it should be doubled." See also *McGregor on Damages* (16th ed 1997), para 1696: "It is thought that the general level of awards is not in need of change upwards...However, there does seem to be a case for increasing awards for the most serious injuries because it has been shown...that these awards have fallen seriously behind inflation."

⁶ It is also difficult to analyse what respondents meant by the expressions "minor" or "trivial." See paras 3.34-3.40 below for our analysis of how non-serious injury should be defined.

variation between some consultees as to the detail of where and how the increase should be made for mid-range injuries.⁷

- 3.7 Of those who responded to the question concerning inflation, 74.5 per cent agreed with our provisional conclusion that damages have failed to keep pace with the decrease in the value of money. A few consultees referred to other evidence supporting this contention.⁸ In addition, consultees put forward a range of explanations for this, for example that inflation indexes were not readily available in the past and that there has been a tendency among judges to be concerned to keep the level of damages low.⁹
- 3.8 Piers Ashworth QC, however, put the argument that old awards are not comparable:

Even in the rare cases in the 1960s where a judge has broken down his award into its component elements, or where these can be ascertained from his findings of fact (or the evidence adduced), the damages for non-pecuniary loss (the general damages) invariably covered many items which now would be the subject of claims for pecuniary loss. For example, it was not really until the 1970s that the cost of domestic care for injured plaintiffs came to be advanced on a logical financial basis, and claims for matters such as the cost of visiting the plaintiff in hospital, for holidays, for medical and social equipment, for transport, were virtually unknown. These were all encompassed within the general damages. What is striking about those awards is that the general damages formed a much greater proportion of the total award than now. I have heard it argued that this shows that general damages have failed to keep pace with other elements of the awards. But a true analysis shows that what has happened is that more and more elements have been stripped out of the general damages and compensated separately. I have been involved in many cases over the years in which the comparison with the 1960s and 1970s (and earlier) has been argued, and it has always been possible for the plaintiff to point to some case supporting his argument. But equally the defendant has always been able to point to other cases supporting his argument. By 1986 Lord Justice O'Connor (who was in practice or on the Bench

⁷ This is supported by the view put by some consultees that the inadequacy of awards for the most serious injuries had depressed, and even distorted, levels of damages for non-pecuniary loss for less serious injuries. We have also noted from our informal soundings amongst part-time judges, that an overwhelming majority answered positively to the question, "Do you agree that the level of damages for pain, suffering and loss of amenity is too low, at least for serious injuries?"

⁸ For example, Alastair MacDuff QC said that comparison of earlier and later awards in *Kemp & Kemp* was sufficient evidence. Irwin Mitchell referred to the articles by Christopher Carling in 1992 BPILS Bulletin 9 P1 and 1994 JPIL 108. Carling took the sums awarded in earlier cases and showed that if converted into today's prices they produced sums that are higher than current awards.

⁹ Bill Braithwaite QC said "I agree that damages have failed to keep pace with inflation, and in my opinion this is because Judges at all levels are very often keen to keep damages low." See also para 3.162 below.

throughout the period) was pointing to the futility of the argument - see *Housecroft v Burnett*.¹⁰

- 3.9 RM Stewart QC rejected this view. He argued that the early cases were poorly presented, and hence that the awards for non-pecuniary loss were comparable while the awards for pecuniary loss were not. He said:

I have no doubt that the Court of Appeal in *Housecroft v Burnett*¹¹ deliberately cut the level of award for tetraplegia - I was Leading Counsel for the Appellant. In paragraph 4.31 of the Consultation Paper, the passage appears:

“In the past, however, some elements of what are now pleaded as specific items of pecuniary expense would have been regarded as covered by the damages for pain, suffering and loss of amenity.”¹²

This rather spurious contention was raised, arguendo, by the Court of Appeal; and in the event was used in part to justify the “fresh start” for the “average case of tetraplegia” as at April 1985, of £75,000....The reality was that the Court of Appeal was unable to come to terms with the critique that earlier total awards were inadequate, because the detailed analysis of losses and needs (presented in *Housecroft* and the norm nowadays) was not done at those earlier dates. The logic is inescapable, that personal injury cases, by the standards of presentation common from the early 1980s, used not to be conducted properly in the 1960s and 1970s.

- 3.10 Catherine Leech (participating in a seminar on our consultation paper organised by Pannone & Partners) also argued that the increase in damages for pecuniary loss should not detract from damages for non-pecuniary loss. She said:

The Commission argues that one reason that the awards have been lagging behind inflation might be that plaintiff lawyers have become more creative¹³ ...in the heads of pecuniary loss that they claim for

¹⁰ [1986] 1 All ER 332. See paras 3.148-3.153 below for an account of this case. LIRMA said that: “...the 1969 awards do not offer a true comparison. The sums awarded for pain, suffering and loss of amenity in this period include items such as motoring expenses, holidays etc., which would now be pleaded separately. The pleading of aids and equipment type claims as a separate head has significantly increased in recent years.” In addition David Grimley of St Paul International Insurance Company Limited and the UK Claims Managers’ Association Working Party said: “...in dealing with the most severe categories of injuries much of the compensation that would have been included in an award in the late 1960s and early 1970s incorporated amounts which are now separately pleaded as part of future pecuniary loss.”

¹¹ [1986] 1 All ER 332.

¹² See *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, para 4.31.

¹³ We found Laura C H Hoyano’s comment on the Canadian experience interesting in this context: “The judicially imposed cap on non-pecuniary damages in Canada has simply induced counsel to seek financial justifications for particular heads of damage, so as to move those claims into the non-capped pecuniary losses. For a recent example, see *Mulholland v Riley Estate* (1995) 12 BCLR 248 (CA), awarding to a brain injured victim aged 15 years substantial pecuniary damages for loss of the opportunity to obtain financial benefits from a “permanent interdependent relationship”. In many instances, of course, this

special damages. For example, more emphasis on travel, services, occupational therapy equipment etc. Indeed, the Court of Appeal Judges considering the matter in *Housecroft v Burnett*¹⁴ commented on this....I think that this is wrong. We should not confuse the costs involved in the items I mentioned properly calculable and supported...[with] pain, suffering and loss of amenity....

I spoke to some of the doctors at Southport Spinal Injury Unit before considering this area. These experts have unparalleled experience in dealing with large numbers of victims of the most catastrophic injuries. As Mr Krishnan said, including the cost of a car or a driver or transport equipment in a claim for pecuniary loss does not compensate the driver for the inconvenience of spending 15 minutes transferring into his car in rain or shine, the wheelchair running away from the door of the car during the course of the transfer, the need...[to] call for help if anything goes mildly wrong. The effort, time and indignity and lack of independence involved are nothing to do with items of pecuniary loss and therefore should still properly be compensatable in the head of general damages. The same argument applies to every single item of special damage claimed. Because a plaintiff has two nurses provided round the clock does not provide any compensation for the indignity of being unable to go to the lavatory by himself, the acute fear of getting an infection or medical complication or the frustration at not being able even to make and drink a cup of tea on his own. In my opinion, it is a fallacy to say that special damages have taken over the role of...part of general damages....

- 3.11 We consider that there is truth in both analyses of the relevance of past awards. Ultimately we think it unlikely that this debate will ever be settled.¹⁵ For our

has resulted in a rationalisation of the segregation of pecuniary from non-pecuniary claims.” See para 3.155
n 193 below. Andrew Buchan made an analogous point about experience here when he said: “I believe that practitioners and the judiciary have acknowledged the low level of damages by trying to develop other heads of damage such as for example loss of congenial employment. This head would historically have formed part of the award of general damages. By separating it from the general award it allows the Court to make a larger award in appropriate cases.” See paras 3.18-3.20 for discussion of whether damages for non-pecuniary loss should be sub-divided.

¹⁴ [1986] 1 All ER 332.

¹⁵ We were, however, interested by conclusions reached on this issue in the *UK Bodily Injury Awards Study*, published by LIRMA in 1997 (“the LIRMA Study”). The introduction states at p 7: “The LIRMA Bodily Injury Claims Study was commissioned in November 1995 because of growing concern among insurers and reinsurers at the apparent increase in the level of bodily injury claims. Three working parties, supported by relevant specialists, have investigated the medical, legal and actuarial factors that have contributed to this.” The legal report included an exercise whereby two cases based on actual claims were valued as at 1986 using only the heads of damages put forward by the Claimants’ representatives at the time; as at 1996 using the same heads of damages and as at 1996 including the heads of claim that the authors would have expected to have seen put forward in 1996. The actual settlement figures were also included. (See pp 62-63 & 112-122.) A similar exercise was gone through in respect of two constructed claims. They were valued as if at 1986 and at 1996. (See pp 62-63 & 123-130.) In summarising this exercise the authors stated: “Perhaps the most striking feature can be seen from the two case histories based on actual claims. It is clear that there are very many heads of damages that were not put forward in 1986 that would be routinely advanced today. In these two examples the Claimants’ representatives

purposes it does not need to be resolved. We have reached the conclusion below that damages for non-pecuniary loss for serious personal injury are too low. However, our reasons for this view suggest that the solution is not to increase awards in line with inflation since a chosen point in the past. We should not assume that historic levels of awards are fair for modern society, but rather assess what fairness requires in the context of today.¹⁶

(b) There is no clear consensus on what the level of damages for non-pecuniary loss in personal injury cases should be

- 3.12 The point was consistently made by consultees that there is no demonstrably right level for damages for non-pecuniary loss.¹⁷ This led some consultees to desist from giving any view on levels of damages. Even amongst consultees who committed themselves to the view that damages are too low, there was a reluctance to specify the factor by which damages should be increased and hence no consensus on this issue emerged.¹⁸

approach was far less sophisticated than could be expected today....With the exception of the ventilated quadriplegia case history it is surprising how small an effect medical developments have had....Legal changes have had a relatively small impact with the main area of increased expense being the result of changes in multipliers.” (See p 63.) In the overall summary to the legal report the authors said: “We believe that the value of individual claims has risen at a greater rate than inflation over the previous decade. In our opinion the single most important factor behind this development is the increased expertise of Claimants’ representatives.” (See p 67.) See for a general discussion of this study, David Watson “Damages and rehabilitation: a way forward?” [1998] JPIL 107.

¹⁶ A comment made by Mrs A B MacFarlane, retired Master of the Court of Protection responding in her personal capacity, is interesting in this regard: “The cases of *Wise* [v *Kay* [1962] 1 QB 638] and *West* [v *Shepherd* [1964] AC 326] cited need to be considered against the background of a number of significant changes since the 1960s. These include a diminution in state aid by way of hospital provision for long-term patients, a disproportionate rise in the cost of housing, a greater expectation of wives of their own ability to work outside the home in the normal way, the wider availability of technological aids at a price, more detailed pleading of heads of damage, greater availability of statutory wills to meet patients’ presumed wishes and the use of video recordings to demonstrate to trial judges the minutiae of a plaintiff’s daily life and to demonstrate the pain, suffering and loss of amenities he is undergoing.”

¹⁷ See *Personal Injury Compensation: How Much Is Enough?* (1994) Law Com 225, p 202, where Professor Genn recorded similar sentiments expressed by individual personal injury victims. See also p 208 where Professor Genn stated: “With the exception of those respondents who had made a full recovery from their injuries, there was a general view amongst those who were given in-depth interviews that the damages received could not compensate them for their experiences of the accident or the losses they had sustained, both physically and emotionally. Indeed, a number of people said that no amount of money would be adequate compensation in this respect.” See paras 3.1 above and 3.23 below, and also the quotation from Lord Diplock’s speech in *Wright v British Railways Board* [1983] 2 AC 773, 785 set out at para 3.146 below.

¹⁸ The question of whether there should be a legislative ceiling on damages for non-pecuniary loss was effectively a non-issue, emphatically rejected by the few consultees who considered it. In any event, an informal ceiling was thought already to exist in practice, through the tariff set by past decisions and the JSB *Guidelines*.

- 3.13 Of those who favoured one overall increase, a cluster thought that damages across the board should be increased by a factor of 1.5 to 2.¹⁹ This amounted to roughly 13 per cent of those who gave their view that levels were either too high or too low. Once account is taken of the views of those who favoured differentiating between categories of injuries, about 27 per cent favoured an increase by a factor of 1.5 to 2 in respect of more serious injuries.²⁰ This was the largest measure of consensus between consultees for any particular increase.

(c) The views of society as a whole should influence the level of damages for non-pecuniary loss in personal injury cases

- 3.14 A constantly recurring theme which emerged across the range of responses was that the views of society as a whole should be taken into account in determining the level of damages for non-pecuniary loss in personal injury cases.²¹ It was felt by a great many that this would require an increase in awards.²² Practitioners

¹⁹ For example, District Judge Anthony Armon-Jones, Bill Braithwaite QC, Michael Brent QC, Buxton LJ, Judge Anthony Diamond QC and Jean H Ritchie QC. Peter Andrews QC and RM Stewart QC both favoured an increase by a factor of 2.5. Brian Langstaff QC favoured an increase by a factor of 3.

²⁰ For example, Lord Bingham CJ (an increase by a factor of 1.5 to 2 would be roughly appropriate for medium and serious injuries, while awards for trivial injuries are about right), A Collender QC (awards for the most serious injuries should be roughly double), Nicola Solomon (most awards should be doubled, although the lower end are possibly about right), Wyn Williams QC (awards should be doubled in the most serious cases and where there is permanent disability, but awards are reasonably acceptable where there is a full recovery within a comparatively short time), Raymond Walker QC (awards in general are appropriate but those for serious injuries should be increased by a factor of 1.5), the Judges of the Queen's Bench and Family Divisions (awards for more serious injuries should be increased by a factor of 1.5 to 2, but the level of smaller awards may in some cases be too high), Judge S P Grenfell (where there is continuing disability awards should be doubled; where there is a good recovery but a number of years of pain and suffering, the increase should be by a factor of 1.5; where there is a good recovery in a short period awards should be left unchanged), George Pulman QC (all awards but those at the lowest end should be doubled), The Association of District Judges (awards in cases of serious injuries should be doubled, but in trivial cases are too high).

²¹ For example, the Association of Community Health Councils for England and Wales, the Association of Law Teachers, the Civil Sub-Committee of the Council of Circuit Judges, the General Council of the Bar of Northern Ireland, the Law Society Civil Litigation Committee, Sir Michael Ogden QC, the Police Federation of England and Wales, One Pump Court, Nicola Solomon, Thompsons, Leigh, Day & Co, Martin S Bruffell.

²² APIL said: "As part of its response to the Law Commission Paper, APIL commissioned a qualitative research study into public perceptions of levels of damages, and the clear conclusion from that research is that the public is dissatisfied with the level of awards....The study considered a series of real cases, ranging from injuries of maximum severity to less serious injuries such as whiplash and loss of a finger. Throughout, those participating in the exercise were astonished at the low level of current awards, and the general view was that compensation levels should be increased, particularly for the most serious and middle ranges of injury...[T]aking into account...the results of our study, APIL believes the uplift for the more serious injuries should be three times present levels;...this uplift should be applied at the top end of the scale, with a slightly lower factor reflecting middle range injuries, declining for less severe cases." We should say that we have not relied on the research submitted by APIL, particularly since it was not clear on the face of the research that the relationship between damages for pecuniary and non-pecuniary loss was made clear to respondents. But see paras 3.42-3.64 below for our consideration of the empirical research which we commissioned ourselves.

particularly commented on how difficult and embarrassing it is to explain to clients what are perceived to be very low levels of damages.²³

(d) One must be clear as to the relevance, if any, of other components of a damages award

- 3.15 Several consultees, particularly those who opposed an increase in damages for non-pecuniary loss, made the point that damages for non-pecuniary loss do not exist in a vacuum. They are one part of a total award of damages for the victim's personal injury.²⁴ Professor P S Atiyah compared maximum awards over the years, rather than individual heads and stated that there has been a considerable overall increase in the total sums of damages available.²⁵
- 3.16 It was argued that it is right that the courts should have some over-arching idea of the maximum award of damages, including both pecuniary and non-pecuniary loss, and hence that damages for non-pecuniary loss should be kept down if the available damages for pecuniary loss increase. Judge S P Grenfell usefully set out the effect of this approach in practice:

²³ We found Judge G O Edwards QC's response to Damages for Personal Injury: Collateral Benefits (1997) Consultation Paper No 147 particularly persuasive on this point. He said: "Like most judges dealing with civil cases I feel it necessary to explain in the course of a judgment dealing with a successful claim for serious injury, that the levels of compensation for injuries themselves can no longer be regarded as just compensation but are calculated partly on compensatory principles and partly on what it is felt insurers can afford."

²⁴ This seems to be the approach of Stuart-Smith LJ, who said: "One of the reasons why I think that present levels of awards [are] acceptable is because in very heavy cases there is always a very substantial claim for nursing expenses and loss of earnings as well as other items of expenditure, such as transport, heating, accommodation etc. Loss of earnings are customarily calculated in full, with only a deduction for tax, but not other costs usually incurred in earning salary, such as travelling, tools etc. The overall level of awards are consequently very high." See also the statement by O'Connor LJ in *Housecroft v Burnett* [1986] 1 All ER 332, 339-340 cited at para 3.153 below.

²⁵ He said: "In 1968 the Court of Appeal fixed the maximum in a case of maximum severity and high earnings at about £50,000 in *Fletcher v Autocar*. [[1968] 2 QB 322] Today maximum awards are probably around £2 to £3 million, though there have been some even higher awards. This suggests that maximum awards have increased over 28 years by some 40 to 60 times. I think the general level of prices has increased over this period by about 12 times.... This suggests that there has been a very substantial increase in the level of awards in these cases of maximum severity. (Of course I appreciate that, because earnings losses vary and other pecuniary losses also vary, there is a sense in which there is never any real maximum to damages for pecuniary loss; nevertheless I do not think it is unreal to believe that the Court of Appeal generally has some idea - and certainly did in *Fletcher v Autocar* [[1968] 2 QB 322]- of some broad overall maximum figures which should be kept in mind.)" Charles Gray QC made an analogous point when comparing damages for non-pecuniary loss owing to defamation with damages for non-pecuniary loss owing to personal injury. He said: "Speaking admittedly as one who practises mainly in the field of defamation, the awards of damages for non-pecuniary loss do appear, when looked at in isolation, extraordinarily low. My understanding is that part of the explanation may be that in many personal injury cases the awards for non-pecuniary loss tend to be low because they are dwarfed by the pecuniary loss suffered (eg nursing care over many years) with the result that the non-pecuniary element becomes comparatively unimportant. It has to be borne in mind that this feature rarely occurs in defamation actions, where awards of special damages are unusual."

Plaintiffs with substantial claims for continuing pecuniary loss, in my experience, were usually less concerned at the level of their damages for pain, suffering and loss of amenity than those with equivalent disabilities who, for example, were unemployed and had to make do with a *Smith* claim. This highlights what happens in practice, that a judge will not give such a large award for non-pecuniary loss where there is some possible element of duplication: the loss of amenity is partially addressed by the award for loss of earning capacity. Because the majority of serious injury awards include large sums for loss of earnings and cost of material needs, the plaintiff without the loss of earnings has tended to lose out on the non-pecuniary award. Further, it has to be recognised that just because, for example, a working man, is impressed by his overall award of damages...it should not be assumed that the level of non-pecuniary damages is correct....

I agree with the provisional conclusion that at least in respect of very serious injuries, damages for non-pecuniary loss have failed to keep pace with inflation. To a certain extent this stems from the totality of awards approach: where inflated figures for losses of earnings or the cost of remedial equipment have substantially increased awards in respect of pecuniary loss, there has been a tendency to draw in the reins somewhat in respect of non-pecuniary loss. As I have observed earlier, this has an adverse effect on the seriously injured plaintiff with a lesser pecuniary loss established.

- 3.17 We firmly reject the argument that damages for non-pecuniary loss should be set on the basis of what is potentially available as damages for pecuniary loss.²⁶ This amounts to limiting damages for those who have sustained no pecuniary loss on the basis of what others are entitled to receive for their pecuniary loss.²⁷ Damages for pecuniary and non-pecuniary loss are, in principle, to meet separate losses. Provided there is no duplication in practice between them, to reduce damages for non-pecuniary loss because of the level of damages for pecuniary loss must cause undercompensation.²⁸
- 3.18 On the other hand, the comments of consultees have highlighted for us the need to be clear about what we mean by damages for non-pecuniary loss. In particular, some consultees mentioned to us heads of damages for non-pecuniary loss which are sometimes assessed separately from damages for pain and suffering and loss of amenity. For example, Brian Langstaff QC drew our attention to the separate assessment of awards for loss of congenial employment. Benjamin Browne QC

²⁶ See para 3.68 below, for the analogous view that the general levels of damages for non-pecuniary loss in personal injury cases should not be set on the basis of what might be available to individuals from alternative sources.

²⁷ Andrew Buchan criticised the current scale of awards on the basis that it does just this: "I do not agree with the current judicial approach that one should start at £120,000 for quadriplegia and discount downwards for the Plaintiff's injury. This approach ignores the relatively huge level of the pecuniary/special damages award. This inevitably depreciates the award for general damages in those types of cases. The less severely injured Plaintiff who just has a claim for general damages does not receive a proportional uplift to take account of the lack of other damages...."

²⁸ This view may be regarded as deriving support from the House of Lords in *Wells v Wells* [1998] 3 WLR 329, 333 & 361.

criticised this practice.²⁹ The Civil Litigation Committee of the Law Society suggested that damages for loss of congenial employment should be re-classified as damages for pecuniary loss, along with damages for handicap on the open labour market. They said:

As the Commission's report correctly states (paragraph 2.4), the two main heads of non-pecuniary loss are pain and suffering - and loss of amenity. Sometimes included in the latter is "loss of congenial employment"...although this might be regarded as a separate head of damage (see *Champion v LFCDA*³⁰...). Also *Smith v Manchester*³¹ awards, for handicap on the labour market, are often referred to as a subhead of damages for non-pecuniary loss. The Law Society suggests that it would be preferable, and less confusing, if both these heads of damage clearly formed part of claims for special damage/future loss of earnings, and that this might be an issue that the Commission could comment upon in its final report.

3.19 Martin S Bruffell put what seems to us quite a radical proposition, as follows:

The head of Loss of Amenity is...falling into disrepute and is rarely considered now as part of the General Damages claim for pain and suffering: it is now covered by specific claims for loss of earnings, loss of enjoyment of employment, etc.³²

3.20 In our view damages for "handicap on the open labour market" are compensation for pecuniary loss;³³ while "loss of congenial employment" is merely an aspect of pain and suffering and loss of amenity. Despite the practice in some cases, we do not believe that there is any need for, nor advantage in, separating out new heads of "non-pecuniary loss" beyond pain and suffering and loss of amenity.³⁴

(3) The Law Commission's view on levels

3.21 In the light of the responses of consultees, we must now go on to formulate, and justify, our recommendations on the levels of damages.

²⁹ He said: "Awards are occasionally made of damages for "loss of congenial employment". It seems to me that there is an illogicality in making such an award as a discrete item when no award is made for "loss of much enjoyed hobby". It seems to me that the loss of the congenial employment should merely be reflected in the general figure for general damages, pain, suffering and loss of amenity and it is undesirable that it should be reflected in a discrete item."

³⁰ *The Times* 5 July 1990.

³¹ (1974) 118 SJ 597.

³² See also the LIRMA Study at p 42 which mentions an increase in claims for damages for loss of congenial employment, for loss of enjoyment of holiday and for loss of leisure.

³³ See, eg, *Foster v Tyne and Wear CC* [1986] 1 All ER 567; *Clerk & Lindsell on Torts* (17th ed 1995) para 17-15.

³⁴ See para 3.10 note 13 above for the suggestion that the development of other heads of damages, including new heads of damages for non-pecuniary loss, has been a reaction to the inadequacy of damages for pain and suffering and loss of amenity. If there is merit in this view, it may be anticipated that this tendency will cease if damages for pain and suffering and loss of amenity are increased.

(a) Damages for non-pecuniary loss for serious personal injury are too low

3.22 We have reached the conclusion that damages for non-pecuniary loss for serious personal injury³⁵ are too low. On a theoretical level tort law is fundamentally a system of corrective justice. Dewees, Duff and Trebilcock give a broad summary of this theoretical perspective as follows:

...the purpose of tort law...[is to oblige] a person whose morally culpable behaviour has violated another's autonomy to restore the latter as nearly as possible to his or her pre-injury status....the purpose of tort law is to correct past injustices, not to deter future behaviour of other potential wrongdoers [n]or to compensate victims of misfortune whose misfortune is not directly caused by the morally culpable conduct of another.³⁶

3.23 It is relatively easy to apply this theoretical conception to pecuniary losses, because the sum required to provide corrective justice by restoring an injured person's pecuniary losses can be worked out. In respect of non-pecuniary loss the position is more complicated. As so many consultees pointed out, no sum is demonstrably equivalent to what has been lost.³⁷ A value judgment is therefore required.

3.24 It is plain that responsibility for making that value judgment must be given to someone. In our view whoever bears the responsibility for setting levels of damages for non-pecuniary loss in personal injury cases, should fix conventional levels which to some extent conform with general perceptions of the sums of money that are commensurate with the different non-pecuniary losses suffered. Otherwise the tort system will not, in practice, be a system of corrective justice, since damages

³⁵ See paras 3.34-3.40 below for discussion of how serious injury should be defined.

³⁶ Dewees, Duff and Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996), p 8. See also *Damages for Personal Injury: Collateral Benefits* (1997) Consultation Paper No 147, paras 4.5-4.20. In particular we said at paras 4.5 & 4.7 of that paper: "Underlying the tort system is the belief that those who have sustained harm due to a wrong should be restored to their pre-injury position and that the responsibility for that compensation should lie with the wrongdoer. It is a good in itself that tortious wrongdoers should be legally responsible for putting right the harm they have caused to others. It follows that compensation, but no more than compensation, for injury caused by a wrong, is the primary function of tort law. We accept this conception of and justification for tort law and the primacy of the compensation aim which flows from it....For some this corrective justice conception of tort law is incoherent: tort liability rules do not adopt a consistent or a defensible normative position. In any event in the personal injury field it is argued that the tort system succeeds in compensating so few of its potential beneficiaries, that if restoration of those who have been wronged is its central aim, it has signally failed. These criticisms do not, however, suggest that tort law is not about corrective justice, but question whether it successfully achieves that aim." We were interested by Dewees, Duff and Trebilcock's conclusion at pp 436-437 that: "Our review of the empirical evidence leads us to a bleak judgment about the tort system as a compensatory mechanism.....By placing the primary burden of accident reduction on the regulatory system, particularly in the motor vehicle, environmental, and product areas, and on the premium and benefit structures of insurance and compensation systems, and by shifting many compensatory functions from the tort system to other compensatory regimes, the tort system in the reduced domains that we would leave to it would serve principally to vindicate traditional corrective justice values, unencumbered by other values that it cannot simultaneously or effectively advance."

³⁷ See paras 3.1 & 3.12 above.

awarded will not generally be accepted as restoring a victim's losses. This approach is reflected in the case-law, which requires that the fairness and reasonableness of damages for non-pecuniary loss be assessed in the context of the social, economic and industrial conditions prevailing at the time.³⁸

3.25 Hence we believe that the widely-held view amongst consultees that damages for non-pecuniary loss in cases of serious personal injury are too low, particularly so far as it reflects difficulty in explaining the tort system to victims, in itself demonstrates that those damages *are* too low. On the other hand, that half of consultees did not consider awards in respect of "minor" injuries to be too low, suggests that those awards *are not* too low.

3.26 Moreover, in respect of "minor" injuries, we were interested by the following statement by the authors of the legal report of the LIRMA Study:

By comparing the 1992 and 1996 editions[*of the JSB Guidelines*]³⁹ it is possible to assess some recent trends in awards for pain, suffering and loss of amenity. In particular, whilst damages in respect of minor injuries are increasing markedly, damages for more serious injuries are not increasing at anywhere near the same rate. For example, the increase between the three editions in respect of minor whiplash injuries and minor wrist injuries (Colles' fracture) is 30 per cent. The increase between the three editions for quadriplegia is 11 per cent and for very severe brain damage 9 per cent.⁴⁰

This suggests that there may be an empirical explanation for consultees' view that awards at the lower end are not too low.

3.27 We have also been influenced by Professor Hazel Genn's 1994 study, *Personal Injury Compensation: How Much Is Enough?*⁴¹ Respondents were divided into

³⁸ See *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Law Commission Consultation Paper No 140, para 2.21 for further discussion and authorities, as well as paras 3.146-3.147 below. In addition, see Kemp & Kemp, *The Quantum of Damages* Volume I, 1-003/2. We also found the comment by Sir Thomas Bingham MR (as he then was) in *John v MGN Ltd* [1997] QB 586, at 611, of interest: "Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury. No other result can be accepted as just. But there is continuing evidence of libel awards in sums which appear so large as to bear no relation to the ordinary values of life. This is most obviously unjust to defendants. But it serves no public purpose to encourage plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike, as is regrettably true of the assessment of damages by libel juries." See also Smith J's comment in *Prison Service and Others v Johnson* [1997] ICR 275 at 282, regarding awards for injury to feelings in cases of racial discrimination: "We think that a tribunal ought to keep an eye on the value of money in ordinary life and on the view which right-thinking members of the public would have of the amount of the award.... We summarise the principles which we draw from these authorities:... Finally, tribunals should bear in mind Sir Thomas Bingham's reference [at 611 in *John v MGN Ltd* [1997] QB 586] to the need for public respect for the level of awards made."

³⁹ See para 1.4 note 3 above.

⁴⁰ The LIRMA study, p 33.

⁴¹ (1994) Law Com 225.

four bands, made up of those who received damages within the following ranges: Band 1 - £5,000 to £19,999; Band 2 - £20,000 to £49,999; Band 3 - £50,000 to £99,999; Band 4 - £100,000 and over.⁴²

- 3.28 In relation to respondents' attitudes to their compensation, at the time of the research Professor Genn found that 60 per cent of respondents in band 1 and 66 per cent in bands 2-4 were dissatisfied with the compensation they had received. She said:

Three main reasons were given by respondents for being dissatisfied with their damages....*The most frequent reason mentioned was that the settlement represented inadequate compensation because their whole way of life had changed or their life was now ruined as a result of their accident* (31 per cent in band 1 and 33 per cent in bands 2-4). A similar number said that the damages had not sufficiently made up their losses in earnings...(23 per cent in band 1 and 31 per cent in bands 2-4). *The third reason was that their health condition had not improved as they had expected* (25 per cent in band 1 and 27 per cent in bands 2-4).⁴³ (Emphasis added.)

It is noteworthy that the first and third of these reasons emphasise the non-pecuniary consequences of injury.

- 3.29 The study also demonstrated the very significant adverse effects of personal injury on the lives of victims.⁴⁴ In particular Professor Genn noted the recurring phenomenon of even apparently minor injuries having profound effects on the lives of victims, and of victims who suffered injuries with serious effects who did not receive substantial damages, for example because of age or pre-accident activity status.⁴⁵

- 3.30 In noting that the vast majority of respondents thought that damages should be awarded for pain and suffering, Professor Genn related her findings about the extent of ongoing pain to views on damages for pain and suffering, as follows:

This widespread experience of continuing pain, even many years after the date of the injury must surely have had a significant influence on respondents' feelings about the practical and symbolic value of compensation for pain and suffering, and responses to questions about the reasons why such payments should be made reflected this depth of feeling.⁴⁶

⁴² The survey did not cover those who received damages of £4,999 or less.

⁴³ Personal Injury Compensation: How Much Is Enough? (1994) Law Com 225, p 202.

⁴⁴ See Personal Injury Compensation: How Much Is Enough? (1994) Law Com 225, pp 53 & 57.

⁴⁵ *Ibid*, at p 263.

⁴⁶ *Ibid*, at p 211. 94% in band 1 and 96% in bands 2-4 thought that some money in respect of pain and suffering should be included in damages payments (see *ibid*, at p 210). See our discussion at paras 2.1-2.3 above about whether or not damages for non-pecuniary loss should continue to be available.

- 3.31 We consider that these findings also indicate that damages for non-pecuniary loss in respect of serious personal injury are too low for two reasons: first they provide further evidence that those damages are not generally perceived to be commensurate with the claimant's losses; secondly, they suggest that the ongoing non-pecuniary effects of many injuries are far greater than anticipated by victims at the time that they receive their compensation. If victims tend to under-estimate the future effects of their injuries on their lives, it seems very likely that judges, entirely understandably, do so too, which would inevitably lead to lower awards than a fuller appreciation of the future would have elicited.
- 3.32 Finally, it seems to us that there is a good independent argument for the top levels of damages to be increased. This is that the life expectancy of those who suffer some of the most dramatic injuries is now very considerably longer than it used to be.⁴⁷ Although this argument primarily affects the injuries at the top of the scale, it may be regarded as having implications for the whole scale.
- 3.33 On the other hand, it follows from what we have so far said that we do not accept the argument that the whole scale should be reduced because advances in medical science mean that it is possible more effectively to treat many injuries, so that the consequences of them today are less severe than in the past.⁴⁸ Our feeling is that the main relevance of medical advances is to the correctness of the order in which injuries are placed on the scale of damages, and any changes to the order should be left to case-by-case development.⁴⁹ We particularly note that consultees generally did not seem to consider that there was much wrong with the ranking of

⁴⁷ See the LIRMA Study at p 15, where it is stated: "Life-expectancy 50 years ago for paraplegics was in the order of two years. Nowadays it is frequently equated as being normal or close to normal." Catherine Leech (participating in a seminar on our consultation paper organised by Pannone & Partners) said: "The third and probably strongest argument that the awards for non-pecuniary loss for pain, suffering and loss should be dramatically higher is in my opinion because not only have they not kept pace with inflation they have taken no account of the fact that medical science has advanced to a degree that many people survive accidents [when] they would have died in the 1970's and many of these people live longer. For spinal cord injuries, there is a 42% greater prospect of surviving a severe accident now than there was in 1976, only 19 years ago. Thus, some people survive with much more serious disability than they did then. Awards should reflect this. More importantly, life expectancy is up to 25% longer now for a spinally-injured patient than it was in [the] 1970's. There is therefore a strong argument to say that not only should the award from 1970 have kept pace with inflation but it should be 25% higher in appropriate cases too."

⁴⁸ LIRMA, Bernard Livesey QC and Ronald Walker QC all made the point that medical advances have improved the lot of some injured people. For example, Ronald Walker QC said: "It should be borne in mind that, with the passage of time, improvements in treatment facilities, pain relief, control of symptoms, availability of specialised equipment, etc. are likely to ameliorate the position of individuals who have sustained injury of a particular kind. For example, advances in medication have immeasurably improved the quality of life of persons suffering from epilepsy, while developing technology offers much improved bladder, bowel and sexual function for many paraplegics." See also the LIRMA Study at p 34, although the point is also here made that many previously fatal injuries are now survivable.

⁴⁹ It is plainly within the power of the judges to alter the scale of awards to take account of medical changes. See Lord Diplock in *Wright v British Railways Board* [1983] 2 AC 773, 785, cited in full at para 3.146 below.

injuries in the present scale of awards.⁵⁰ Brian Langstaff QC said “I have heard very little criticism of the scaling of awards, one against the other, within our present system.” David Kemp QC said: “...criticism of the present position essentially concerns the general level of awards and not the relationship inter se of awards for various types of injury. Given the requisite direction as to the general level of awards, judges are well able to assess the gravity of a particular injury in relation to other more or less serious injuries.”

(b) The definition of “serious injury”

3.34 Having concluded that damages for non-pecuniary loss in cases of serious personal injury are too low, it is necessary to define specifically what is meant by “serious injury”. Our deliberations suggest that what divides current awards for non-pecuniary loss in personal injury cases which are adequate from those which are inadequate is, broadly speaking, whether or not there has been full recovery. Hence our definition of serious injury should be directed at capturing cases in which there has not been full recovery.

3.35 We have found findings of the Legal Aid Board Research Unit (“LABRU”) of great assistance in this regard.⁵¹ The Unit analysed a sample of 762 legally aided personal injury cases, excluding cases in which profit costs exceeded £5,000. It was hoped that the sample would be representative of ordinary personal injury cases. The cases were categorised on the following injury severity scale:

Scale 1 = Minor; full recovery within 1 year

Scale 2 = Minor; full recovery within 1 to 2 years

Scale 3 = Moderate; full recovery within 3 years

Scale 4 = Moderate; persistent problems

Scale 5 = Severe; moderate permanent disability

Scale 6 = Severe; severe permanent disability

3.36 Damages were recovered in over three-quarters of cases. The average total award was £4,545. Using rough calculations, about 42 per cent of successful claims were in Scale 1, and received an average award of £2,266 (median award of £1,800); about 22 per cent were in Scale 2 and received an average award of £3,734 (median award of £2,846); about 12 per cent were in Scale 3 and received an average award of £5,132 (median award of £3,563); about 21 per cent were in Scale 4 and received an average award of £5,511 (median award of £3,678); about

⁵⁰ Although see the comment made in the Introduction to the second edition of the JSB *Guidelines* of 1994: “The working party recognise that any approach which is based on an analysis of the cases is likely to, and does, throw up anomalies. It is not easy to explain why a particular injury has in the past been found to merit higher compensation than another which to many may appear at least as serious. The fact is that at some time in the past a value judgment has been made and if new values are to be applied that must be for an appellate tribunal to rule upon.”

⁵¹ Pascoe Pleasence, Legal Aid Board Research Unit, *Report of the Case Profiling Study, Personal Injury Litigation in Practice, Research Paper 3*, (1998) pp 47-51, 59-62.

3 per cent were in Scale 5 and received an average award of £26,917 (median award of £16,536).

3.37 In summary, therefore, about 64 per cent of successful claimants were fully recovered after 2 years, and 76 per cent after 3 years. Total damages within those categories were generally substantially less than £5,000. On the other hand, 21 per cent of successful cases involved injuries from which full recovery had not been made after 3 years, and within this category there were awards of less than £5,000. Three per cent of cases concerned victims with moderate permanent disability. These findings indicate that while very many cases attracting total awards of £5,000 or less involve a full recovery within three years, there will be some cases at this level where the victim has problems which persist after three years.

3.38 It should be noted that damages for non-pecuniary tend to represent more than half of total damages awards at the lower end of the scale.⁵² Bearing this in mind, on the basis of the LABRU findings it seems to us that injuries in respect of which an award for non-pecuniary loss of £2,000 would presently be made, assuming full liability, are almost certainly injuries from which there is full recovery. Hence, they are injuries for which it can be said that current awards are adequate.⁵³ *We therefore propose to define a serious injury as being an injury in respect of which the award for pain and suffering and loss of amenity in a case on any facts involving that injury alone, and ignoring contributory negligence, would be more than £2,000.*⁵⁴

3.39 Moreover, it seems to us that just above the £2,000 level there will be very many cases in respect of which there is full recovery, or where the ongoing effects are genuinely minor. Accordingly it seems to us that the overall suggested increase should be tapered for injuries attracting awards of between £2,000 and £3,000. This will have the beneficial side effect of avoiding a crude distinction between cases falling just on either side of the definition.

3.40 **We therefore recommend that:**

- (1) damages for non-pecuniary loss (that is, for pain and suffering and loss of amenity) for serious personal injury should be increased;**
- (2) for these purposes a serious personal injury is one for which damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) for the injury alone would be more than £2,000**

⁵² See P Cane, *Atiyah's Accidents, Compensation and the Law* (5th ed 1993), p 236, where he says: "...it is clear from the Pearson findings that the proportion of a settlement which is attributable to non-pecuniary loss is much higher in small claims. Indeed, for claims of up to £5,000 (in 1973) over two-thirds, and in many minor cases over 70% was for non-pecuniary loss. For larger claims, the proportion attributable to non-pecuniary loss drops to around 50%." See Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054 Volume II, para 521 & Table 108 on p 157.

⁵³ This is particularly so when the effects of inflation since the studies we have quoted are taken into account. In other words, awards generally will have increased in line with inflation, so that it is even less likely that awards at the lower end will be attributable to injuries in respect of which there are ongoing effects.

⁵⁴ Examples of such injuries are rib fractures, minor soft tissue and whiplash injuries, fractures of one finger and the loss of one front tooth.

(under the present law), but there should be tapered increases where the present award would be between £2,000 and £3,000.

(c) The amount by which damages for non-pecuniary loss for serious personal injury should be increased

3.41 The next question is the amount by which damages for non-pecuniary loss for serious personal injury should be increased.⁵⁵ We believe that four factors (each of which was mentioned by several or more consultees) should, to a greater or lesser extent, be borne in mind in reaching a view. These are: (i) the views of society as a whole; (ii) how tort damages are paid for; (iii) the level of “damages” in other UK compensation systems; (iv) the levels of damages for non-pecuniary loss in personal injury cases in other jurisdictions.

(i) THE VIEWS OF SOCIETY AS A WHOLE

3.42 It follows from the discussion above⁵⁶ that we believe that public opinion on the level of damages for non-pecuniary loss in personal injury cases should be influential.⁵⁷ In the absence of any other detailed research, we commissioned the

⁵⁵ Bill Braithwaite QC suggested to us that greater use should be made of the concept of *per diem* damages, to enable judges better to distinguish between different levels of injury, and different life expectancies. He said: “By way of example...if the range for standard paraplegia was between £3,000 and £5,000 a year, that would produce, using a multiplier system, a figure of about £140,000 for a young female, which I would regard as entirely acceptable.” See also Mr Braithwaite’s comments on this subject in “What of the Future?”, The Personal and Medical Injuries Law Letter, October 1998, p 59. It is interesting to note that a temporal approach was found useful by Lord Woolf MR in *Thompson v Commissioner of Police for the Metropolis* [1997] 3 WLR 403, 416. But compare Lord Woolf MR’s comments in *Evans v The Governor of HM Prison Brockhill* [1999] 2 WLR 103 about awards based on daily, weekly or monthly figures: see para 4.10 n 19 below. We would have concerns about formalising this approach, particularly when we did not consult on it, because it would reduce judicial discretion as to how to take account of life expectancy when consultees were concerned to preserve judicial discretion in individual cases. (See in particular para 3.112 below and the discussion which follows on how best to increase an uplift in damages awards.) Still, we can see that it may be a useful check for judges when deciding individual cases to reflect on, say, the yearly compensation which an award will provide for.

⁵⁶ See paras 3.24-3.25 above.

⁵⁷ See, however, paras 3.114-3.117 and 4.1-4.32 below for our views on jury assessment of damages. It might be argued that our contention that the views of the public should be reflected in damages for non-pecuniary loss suggests that if juries cease trying non-personal injury actions for which damages for non-pecuniary loss are available, some other means must be found directly to reflect public opinion in those awards. Indeed, it might be said to follow that where judges assess damages for non-pecuniary loss in non-personal injury cases some means must be found to ensure that their awards are consonant with public expectations. We do not consider either of these propositions necessarily to follow. First, the relationship which ought to exist between damages for non-pecuniary loss and public opinion is a loose one. Judges should hence generally be able, from their own knowledge and experience, to assess damages for non-pecuniary loss at levels which are perceived to be just. Secondly, we set out at paras 4.9-4.10 and 4.16-4.18 the recent case law linking awards of non-pecuniary loss for defamation, false imprisonment, malicious prosecution and discrimination to the tariff of personal injury awards. It seems to us unsurprising and wholly right that the proper relationship between different types of non-pecuniary loss should be ensured by comparison with the tariff of awards for non-pecuniary loss in personal injury cases, given that this is the most extensive and highly developed set of conventional awards. A corollary of this development is that if the tariff of awards for

Office for National Statistics to carry out a survey.⁵⁸ The results, which are reproduced at Appendix B, have provided us with invaluable guidance. We shall now set out how the research was conducted and explain how it has influenced us. As we have said earlier,⁵⁹ Dr Mavis McLean of Wolfson College, Oxford and of the Lord Chancellor's Department has greatly assisted us, both with the design and the interpretation of the research.

- 3.43 The Office for National Statistics carries out a monthly survey, the ONS Omnibus Survey, the methodology for which is explained in detail in Appendix B. In brief, every month "face to face" interviews are conducted with approximately 1,900 adults. The interviewees are selected from a list of private household addresses in such a way that those interviewed form a random and representative sample of the population of Great Britain.
- 3.44 A series of questions on damages for non-pecuniary loss in personal injury cases was included in the September and November 1998 surveys.⁶⁰ The full text of the questions asked is included in Appendix B, but for ease of reference we shall here set out the content of the first question asked.⁶¹ Each interviewee was first told the following:

The next set of questions is being asked on behalf of the Law Commission. When a person or an organisation is considered by the courts to be legally responsible for causing someone an injury, they have to pay compensation to the injured person. The compensation is in two parts. The first part compensates for any financial loss due to injury; for example, loss of earnings, medical expenses or the cost of long-term care. The second part compensates for those effects of the injury that cannot be measured precisely, for example pain, worry and no longer being able to enjoy life as much as before the injury. I am now going to ask you to read brief descriptions of four cases in which people became eligible for compensation. When you have read the descriptions, I would like you to tell me how much money you think each of the injured people should have been awarded for the second type of compensation. The first case describes injuries to a young

damages for non-pecuniary loss in personal injury cases is properly reflective of public opinion, its influence should ensure that the same is true of awards of damages for non-pecuniary loss in other types of cases.

⁵⁸ In considering our suggestion for a Compensation Advisory Board, several consultees made suggestions about how to ensure that the tariff arrived at reflected the views of society as a whole. Leigh, Day & Co proposed that the Compensation Advisory Board be subject to a duty to consult widely with the general public and to take into account the effects of consultation. APIL thought public input might be secured by market research techniques, or "citizens' juries" (and see also 3.14 note 22 above regarding research submitted by APIL with its response). The Association of Law Teachers thought that the deliberations of the Compensation Advisory Board should be supplemented and reinforced by larger scale investigations of societal attitudes to quantum carried out periodically under the aegis of the Board.

⁵⁹ See para 1.11 above.

⁶⁰ And some further interviews were carried out in the October 1998 survey.

⁶¹ A second question was asked which particularly raised with interviewees the question of how awards of damages in personal injury cases are funded. See paras 3.63-3.64 below.

woman which are among the worst that there can be, so it is likely that the amount you suggest for her will be towards the top of your range. Please remember that this second type of compensation is in addition to the compensation each of these injured people will receive for their financial losses.

- 3.45 Interviewees were then asked to read the following case descriptions,⁶² which were printed on individual cards:

Case A

A 16 year old girl suffered permanent paralysis of all four limbs in a road traffic accident. She is now 19. She is expected to live until she is about 46. She needs constant care. She cannot feed herself, nor attend to her bodily functions. She is relatively free from pain and discomfort. She can use her arms to a very limited extent. For example, she can, with great difficulty propel a wheelchair, but only very slowly and for short distances. She will never be able to work, nor to have a family. She is not expected to marry.

Case B

A man, who is now 30, was injured when he was 21 in an accident at work. He suffered brain damage. Five years after the accident he developed epilepsy, but this is controlled by medication. He needs constant supervision. He has been able to work as a manual labourer, but only with help. He will probably lose this job in the next few years, and is unlikely to get another one. Before the accident he got on well with people, but his personality has changed and he now does not have a social life.

Case C

A 26 year old man lost the sight in his right eye as a result of a medical accident. He is now 29, and is developing a squint, which may need an operation. He has occasional headaches. He has kept his job, which is reasonably secure. He has had to give up his hobbies of motorcycle riding, pool, tennis, darts and football.

Case D

A 34 year old woman suffered an injury to her neck in a road traffic accident. She could not drive or work for 2 weeks because of pain and stiffness in her neck. She had regular severe headaches for about 3 weeks, after which they occurred less often. Her symptoms had disappeared 18 months after her accident, but she has given up keep-fit and is a less confident driver.

⁶² If an interviewee said that they were unable to read all four cases and/or asked for help in reading them, the interview was not proceeded with, but was counted in the results as an instance in which no response was given.

Finally, once the interviewee had read all four cases, he or she was asked in respect of each description how much money the injured person should receive to compensate for things other than financial loss.

- 3.46 In order to categorise suggestions made by interviewees it is necessary to estimate the approximate amounts which the four victims would be likely to receive for their non-pecuniary losses. Our estimates are based on 2 sources: first, the case descriptions were derived from actual decisions; secondly, we have considered the guidance provided by the 1998 JSB *Guidelines* (which are stated to be based on awards up to August 1998).⁶³
- 3.47 *Housecroft v Burnett*⁶⁴ was the model for Case A. In July 1983 the trial judge awarded damages for pain and suffering and loss of amenity of £80,000. The Court of Appeal did not reduce this award, but stated that an award of £70,000 would have been more appropriate. Using the monthly inflation table in Current Law,⁶⁵ and updating these awards from the date of the Court of Appeal hearing in May 1985 to August 1998, £80,000 becomes £137,549, while £70,000 becomes £120,355.
- 3.48 Turning to the JSB *Guidelines*, Case A would fall within Guideline 1(a) for Quadriplegia,⁶⁶ for which the range is £120,000-£150,000. The commentary to the Guideline states:

The level of the award within the bracket will be affected by the following considerations:

- (i) the extent of any residual movement;
- (ii) the presence and extent of pain;
- (iii) depression;
- (iv) age and life expectancy.

The top of the bracket will be appropriate only where there is significant effect on the senses.

This guidance suggests that the award in Case A would be likely to be around the £130,000-£140,000 mark. In the light of the actual award and the JSB Guidelines, it seems to us that the maximum which would be likely to be awarded for Case A would be £140,000.

- 3.49 Case B was based on *McConnell v Welch*,⁶⁷ decided by the then Brooke J on 16 December 1991. The award made for damages for pain and suffering and loss of

⁶³ JSB *Guidelines*, (4th ed 1998) p 2.

⁶⁴ [1986] 1 All ER 332 & see paras 3.148-3.153 below for a full discussion of the case.

⁶⁵ [1999] 1 CL 200.

⁶⁶ JSB *Guidelines*, (4th ed 1998) p 3.

⁶⁷ Kemp & Kemp, *The Quantum of Damages* Volume II, C2-O13.

amenity was £50,000. This becomes £60,317 when updated from December 1991 to August 1998.

- 3.50 According to the JSB *Guidelines*, Case B would fall within Guideline 2(A)(c)(ii) for Moderate Brain Damage,⁶⁸ for which the range is £40,000-£65,000. The commentary states that this includes:

Cases in which there is a moderate to modest intellectual deficit, the ability to work is greatly reduced, and there is some risk of epilepsy.

It seems to us that the award for Case B would be likely to be in the upper half or quarter of that range, given the onset of epilepsy, the victim's poor employment prospects and the dramatic effect of the injury on his inter-personal relationships. On this basis, and in the light of the actual award, we consider the maximum likely award to be £65,000.

- 3.51 Case C was based on *Burdiss v Redbridge London Borough Council*,⁶⁹ decided by Judge Hardy on 30 June 1994 at the Central London County Court. The award made for damages for pain, suffering and loss of amenity was £19,500. Updated from June 1994 to August 1998, this translates to £22,060.

- 3.52 According to the JSB *Guidelines*, Case C would fall within Guideline 4(A)(e) for Complete Loss of Sight in One Eye,⁷⁰ for which the range is £22,500 to £25,000. The commentary states:

This award takes account of the risk of sympathetic ophthalmia. The upper end of the bracket is appropriate where there is scarring in the region of the eye which is not sufficiently serious to merit a separate award.

While the actual award indicates that the injury would be likely to fall at the bottom end of the range, the range is so small that there seems to us little point in narrowing it on this basis. Hence we have taken the view that the maximum likely award for Case C is £25,000.

- 3.53 Case D was based on *Bird v Rixon*⁷¹ decided on 15 December 1995 by Judge Lam at Ipswich County Court. The award for pain and suffering and loss of amenity was £3,250. Updated to August 1998, this becomes £3,530.

- 3.54 Case D would fall within Guideline 6(A)(c) for Minor Neck Injuries, for which the range is "Up to £3,500" as at August 1998.⁷² The commentary states:

Minor soft tissue and whiplash injuries and the like where symptoms are moderate and a full recovery takes place within at the most two years.

⁶⁸ JSB *Guidelines* (4th ed 1998), pp 5-6.

⁶⁹ Kemp & Kemp, *The Quantum of Damages*, Volume II, D2-O35.

⁷⁰ JSB *Guidelines* (4th ed 1998), pp 12-13.

⁷¹ Kemp & Kemp, *The Quantum of Damages*, Volume III, K2-O20.

⁷² JSB *Guidelines* (4th ed 1998), p 25.

Given that the victim recovered within 18 months, the award would most probably fall within the upper half of the range, but below the maximum. Taking this into account, as well as the actual award, we consider the maximum likely award for Case D to be £3,500.

3.55 We have particularly examined interviewees' views so far as they relate to the maximum likely current award, one and a half times that award, and double that award. This has required us notionally to define those levels of award for each case description. In so doing, we have chosen numbers which fit conveniently with interviewees' responses, bearing in mind that interviewees naturally tended to suggest round numbers. The following are the definitions which we have adopted:

TABLE 1

	Notional maximum current award	Notional award at one and a half times the current award	Notional award at double the current award
Case A	£140,000	£210,000	£280,000
Case B	£65,000	£95,000	£130,000
Case C	£25,000	£35,000	£50,000
Case D	£3,500	£5,000	£7,000

3.56 Table 2 shows the percentages of those interviewed who suggested awards up to the current maxima (as defined in Table 1), over the current maxima, and, for completeness, those who did not answer the question. Table 3 breaks up the responses slightly differently, to show the percentage of interviewees who suggested figures which are at least one and a half times the current maxima (as defined in Table 1). Finally, Table 4 illustrates the percentage which suggested figures which are double or more of the current maxima (as defined in Table 1).

TABLE 2

	Up to the current maximum	Over the current maximum	“Don’t Know”
Case A	29%	61%	9%
Case B	29%	61%	8%
Case C	39%	54%	8%
Case D	38%	55%	7%
Average across the 4 cases	34%	58%	8%

TABLE 3

	Up to the current maximum	Over the current maximum, but by less than one and a half times	One and a half times the current maximum, or more	“Don’t Know”
Case A	29%	6%	55%	9%
Case B	29%	5%	56%	8%
Case C	39%	5%	49%	8%
Case D	38%	1%	54%	7%
Average across the 4 cases	34%	4%	54%	8%

TABLE 4

	Up to the current maximum	Over the current maximum, but by less than double	Double the current maximum, or more	“Don’t Know”
Case A	29%	12%	49%	9%
Case B	29%	15%	46%	8%
Case C	39%	8%	46%	8%
Case D	38%	16%	39%	7%
Average across the 4 cases	34%	13%	45%	8%

- 3.57 One should note that a large proportion of those interviewed responded to the questions asked. The Tables also show that there was consistency in interviewees’ reactions across the four cases. Both of these phenomenon render the results of the research particularly powerful, especially when it is recalled that no figures whatever were put to interviewees, so that the ranges chosen by them were entirely of their own devising.
- 3.58 Tables 2, 3 and 4 demonstrate that a third of those interviewed put forward awards which suggest that current awards are either at the right levels, or are too high. However, Table 2 shows that the largest group, and an overall majority, suggested awards at levels which indicate that current awards are too low. Indeed, when averaged across the four case descriptions, an overall majority suggested awards at least one and a half times higher than would currently be available, and a very substantial minority (and the largest single group) suggested awards which were at least double (and were often very much more than double) current awards. These figures tend to suggest that the majority of the population would consider the current levels of damages for non-pecuniary loss in personal injury cases to be too low, at the very least by 50 per cent, and often by a much larger percentage.
- 3.59 The research provides support for the message communicated to us by our consultees,⁷³ namely that damages for non-pecuniary loss in personal injury cases are considerably too low. We remain conscious, nevertheless, that a substantial minority surveyed did not support higher levels of damages. This should temper the conclusion which we draw from the research as to the precise amount of an appropriate increase. Accordingly the results of the research indicate to us that damages for non-pecuniary loss in cases of serious personal injury should be increased by a minimum of 50 per cent, and a maximum of 100 per cent. In our

⁷³ See paras 3.5-3.6 and 3.12-3.13 above.

view the research findings indicate that this is the increase necessary to restore awards to levels which will generally be perceived to be sufficient to achieve corrective justice.

(II) HOW TORT DAMAGES ARE PAID FOR

- 3.60 Several consultees who considered present levels of damages to be adequate made the point that how increases in damages are funded is relevant.⁷⁴ Funding questions have tended to be raised in support of an argument that the tort system, at least in respect of personal injury, should be abolished. It is argued that the tort system is inequitable in providing for relatively large amounts of compensation for a small proportion of the ill and injured at the cost of large sections of the public. Moreover the tort system is wasteful in that compensation is paid at very high administrative cost. It is argued that the tort system does not have sufficient ancillary benefits to justify its retention despite these criticisms: it cannot be justified on corrective justice grounds, because liability rules do not form a coherent fault-based code, nor on deterrence grounds, because it can be shown empirically that tort liability is not an effective deterrent. Consideration of such arguments is beyond our terms of reference,⁷⁵ because this review is intended to

⁷⁴ Iain Goldrein QC & Margaret de Haas made an interesting suggestion which directly linked the costs of the tort system, and how it is funded, with the level of damages. They said: "We are now in the Woolf era - when we can expect: a) The "fixed costs" regime of fast-track, and b) The attenuation of "delay" through court management. Both these factors will have the necessary effect of releasing vast sums which once were paid to litigators. The net effect will be an enhancement of monies in the hands of insurers, with the opportunity for a greater apportionment of this money to those Plaintiffs who in law truly deserve it....If insurers paid up generously on the good claims, and resisted strongly the nuisance/bad claims, there would be more money to pay enhanced compensation. In the past the insurer was in a lose/lose situation: If he won, he did not get his costs from the Plaintiff.... This resulted in a wishy washy approach by the insurance industry to claims management: All Plaintiffs got something - even if the claim was very weak. And strong claims did not get as much as they should - the fine tuning of the case being lost with files which ran on for years and years. But with conditional fee agreements, all this could be about to change. If an insurer wins, he will get his costs from the Plaintiff's legal expense insurer. We perceive therefore an increasing drive from the insurance industry to pay up quickly on good cases and fight vigorously the weak cases. If this happens, there will be a shaking out of "duff" litigation, with the result that there will be more money available for compensation and reduced insurance premiums....The Lord Chancellor's Department could liaise with the Association of British Insurers and the Association of Personal Injury Lawyers, and hammer out an agreement that if legal costs falling upon insurers fall by 1/3 by the year 1999, then the Lord Chancellor will ordain an increase of 1/3 in the brackets recommended in the JSB guidelines." With respect, we find this suggestion problematic. First, it does not suggest the mechanism by which damages should be increased. Secondly, it relies on difficult predictions, both as to how the Government will change the law and how those involved in personal injury litigation will react. We have heard the argument, on the one hand, that the combined effect of the Woolf reforms and the introduction of conditional fees will be to exert downward pressure on damages. On the other hand, at paragraph 2.44 of the Lord Chancellor's Department's December 1998 White Paper, *Modernising Justice*, it is proposed that defendants pay any success fee, which might have the opposite effect by increasing the pressure on defendants to settle good claims early.

⁷⁵ Item 2 of the Sixth Programme of Law Reform (1995) Law Com 234 (which was formerly Item 11 Fifth programme of Law Reform (1991) Law Com No 200). See para 1.1 above.

recommend improvements to the law of damages, assuming the continued existence of the tort system.⁷⁶

- 3.61 A subsidiary argument might be made, however, that the weaknesses of the tort system mean that damages rules should be developed so as to minimise tort compensation, and thereby to minimise the inequity which it creates. We reject this argument because we accept a corrective justice conception and justification for tort law.⁷⁷ As such we believe the tort system's damages rules should be developed in accordance with that theoretical perspective.
- 3.62 However, consultees made a further argument that if account should be taken of what people believe the level of tortious damages should be, account should also be taken of the reality that large sections of the public pay those damages. Piers Ashworth QC eloquently made this connection when he said:

It is the rare bird who, if asked whether he would like more money, says "no". Equally, most people if asked whether the levels of social security benefits or state pensions were adequate would say that they should be greatly increased. But if the same people were asked whether they would be prepared to pay twice as much tax in order to fund greatly increased benefit, many would have second thoughts. Someone has to pay for damages. In the days before widespread liability insurance, this was the tortfeasor (the railway company or the factory owner). Now the vast majority of awards are paid by insurance companies or public bodies. Despite some fond beliefs - and the apparent view of juries in America - there is no such thing as an insurance company with a bottomless well of private cash. The majority of the money to pay awards of damages comes from the public. The connection may be not so direct or obvious as between taxation and state benefits; but it is no less.... One cannot ask "should awards be higher?" without at the same time asking "how are they to be funded?" - any more than one can ask the same question about social security benefits. As in so many matters, in the end it is a matter of balance, and if the balance is wrong everyone loses...

⁷⁶ See para 2.26 above.

⁷⁷ See para 3.22 above. Also see *Damages for Personal Injury: Collateral Benefits*, Consultation Paper 147, paras 4.5-4.20 where this issue is discussed further. This question received some attention in *Wells v Wells* [1998] 3 WLR 329. Lord Steyn noted at p 350 that the tort principle of full compensation had been criticised by commentators, notably in P Cane *Atiyah's Accidents, Compensation and the Law* (5th ed 1993). He quoted from page 131 of that book to the effect that most other compensation systems reject the "100 per cent principle." He went on to say: "Rhetorically, Professor Atiyah asks, at pp 127-129: "why should different accident victims be compensated for the same injury on a scale which varies according to their previous level of earnings? (p 127) and "if...two people are killed in similar accidents, what justification is there for compensating their dependants at different rates?" (p 128) The author gives two main reasons for rejecting the 100 per cent principle. The first is the cost involved. The second is that it reduces the victims' incentive to return to work....Not only do these arguments contemplate a radical departure from established principle, but controversial issues regarding resources and social policy would be at stake. Such policy arguments are a matter for Parliament and not the judiciary." See also Lord Lloyd at 341 & Lord Hutton at 371.

3.63 We accept that there is truth in this contention. In particular public perceptions of the justice of a situation may be affected by knowledge of how tort compensation is paid for. Accordingly the second question asked in the ONS Omnibus survey was as follows:

Generally, negligent people who cause an injury to someone else do not themselves pay the compensation. Instead it is paid by their insurance company. If the amounts of compensation awarded by the courts change significantly, this is likely to lead to a change in the premiums charged by insurance companies. For example, if awards go up, motor insurance may become more expensive. In other words, in most cases the cost of compensation is met by a wide cross-section of the public rather than by the negligent person who caused the injury.

Does knowing this alter your views about what would be an appropriate amount of compensation for the non-financial consequences of injury?

3.64 Eighty per cent of interviewees answered no to this question.⁷⁸ This emphatically refutes the contention that a person's view of what is adequate compensation for non-pecuniary loss will generally be contingent on what he or she is prepared to pay in order for that compensation to be available. This finding has convinced us that we should not be dissuaded by costs considerations from recommending an increase to damages for non-pecuniary loss which we consider to be justified on other grounds.

3.65 Nevertheless, we have obtained from the ABI some preliminary evidence about how much insurance premiums would go up if damages for non-pecuniary loss in personal injury cases were increased. This demonstrates that the cost of increasing damages is significantly reduced if the increase is limited to awards for serious injuries. In particular, if damages for non-pecuniary loss in personal injury cases were increased "across the board" by a factor of 1.5 to 2, around 40 per cent of the resultant increase in motor insurance premiums, and around 50 per cent of the resultant increase in employers' liability insurance, would be attributable to the cost of increasing awards in cases for which the total damages were £5,000 or less.⁷⁹ This conclusion is supported by the recent research by the Legal Aid Board. Of 81,142 legal aid certificated personal injury cases closed in the 1996-7 financial

⁷⁸ If interviewees answered yes, they were asked: "By how much would you reduce or increase the suggested awards you have given?" They were then given a card from which to choose amongst the following answers: reduce by a 1/4; reduce by a 1/2; reduce to nothing; increase by a 1/4; increase by a 1/2; double; other (please specify); don't know/can't say. However, since only 11 per cent of interviewees said yes, their attitudes to how compensation should be altered are not particularly instructive.

⁷⁹ The ABI figures suggest that an *overall* increase of 50% would lead to an increase in motor insurance premiums of 1.9 to 2.3% and an increase in employer's liability insurance premiums of 6.9 to 9%. A 100% *overall* increase would lead to an increase in motor insurance premiums of 3.8 to 4.7% and in employer's liability insurance premiums of 13.8 to 18%. Note that the disparity in the increase between motor insurance and employer's liability insurance results from the proportion of motor claims attributable to property damage rather than personal injury.

year, the overall success rate was 63 per cent. Of successful cases, 70 per cent led to damages of less than £5,000.⁸⁰

(III) THE LEVEL OF “DAMAGES” IN OTHER UK COMPENSATION SYSTEMS⁸¹

- 3.66 The point was forcefully made by some consultees that in assessing levels of damages for non-pecuniary loss in personal injury cases, account should be taken of other domestic systems of compensation for personal injury.
- 3.67 First, it was argued that it should be ensured that overlapping compensation is not available from different sources. As Donald Harris put it in respect of social security:

Paper No 140 pays little attention to the parallel provision made by parliament for social security benefits designed for sick, injured and disabled people. The Paper reads as if the tort system of damages for personal injury should be developed or reformed without reference to the social security system. In my opinion, the two systems should not be developed separately, as if the other did not exist. Even though Parliament has said that common law damages are to be assessed without reference to the plaintiff’s entitlement to social security benefits, the reformer who proposes changes to the tort system must consider the inter-relationship of the two systems....

During the last 40 or so years many improvements have been made in social security benefits for sick and disabled people. In making a comparison between current awards and those made “in the late 1960s and early 1970s”...we should bear in mind the improved social security benefits to which plaintiffs are now entitled....Parliament, if asked to consider an improvement in the level of awards for non-pecuniary loss, should consider the aggregate of benefits and damages available to successful tort claimants, not damages on their own.

- 3.68 While we can see the importance of avoiding double compensation - and we have considered this in detail in our consultation paper on collateral benefits⁸² - it would

⁸⁰ Pascoe Pleasence, Legal Aid Board Research Unit, *Report of the Case Profiling Study, Personal Injury Litigation in Practice, Research Paper 3* (1998) p 10.

⁸¹ We later discuss the view that there should be a reasonable relationship between levels of damages for different types of non-pecuniary loss, for example injury to reputation. We note case law developments which reflect this concern. See para 4.9-4.10 and paras 4.16-4.18 below. It might be said to follow that we should take account of awards for other types of non-pecuniary loss in our analysis of the factor by which damages for non-pecuniary loss in personal injury cases should be increased. This is not, however, possible, because there is no other tariff of awards which would enable a rational comparative exercise to be undertaken. See for example the comment of Smith J in *Prison Service and Others v Johnson* [1997] ICR 275, 281 regarding awards for injury to feelings in cases of race discrimination: “[It was submitted that] [t]he award was not simply a sum which was “just and equitable,” but should be and should be seen to be consistent with the range of awards in cases of a similar kind. The difficulty about consistency is that there is not yet a range of reported cases of this kind. Remarkably few cases have been reported.”

⁸² See our paper on this subject, *Damages for Personal Injury: Collateral Benefits*, Consultation Paper 147. The consideration of social security benefits was excluded from our terms of reference, as Parliament has in recent years given detailed consideration to the relationship which ought to exist between tort damages and social security benefits. Hence

seem to us quite wrong for the general levels of damages for non-pecuniary loss in personal injury cases to be set on the basis of what might be available to individuals from alternative sources.

- 3.69 Secondly, it was argued that the levels of payments under other systems of compensation should be influential. This emerged from Professor Atiyah's submission:

Most of the disabled and injured people in our society do not obtain damages at all. They receive public help through the social security system, the criminal injuries compensation system, the local authority social services, and a variety of other sources. I find it strange that the Law Commission Paper devotes so much attention to discussing the law of damages in other countries, but make no reference to other laws in our own country under which these disabled and injured people receive their state support. The levels of state support received by these groups of the disabled and injured are, of course, far below those offered by the system of common law damages.

- 3.70 We agree with Professor Atiyah that the amounts provided under other UK personal injury compensation systems should be taken into account in setting levels of tort compensation, but only so far as the two systems are genuinely comparable. Equally, even if an alternative source of compensation is comparable to tort damages, the levels adopted by it should only be influential to the extent that they were chosen for good reasons.

- 3.71 On this basis, we do not believe that the amount of social security benefits should be influential. There is no sense in which the social security system is designed to achieve corrective justice and therefore to be fully reparative. The theory which underlies the endeavour to arrive at fair levels of damages for non-pecuniary loss in personal injury cases does not figure in considerations of how much social security benefits should be, and so no useful guidance may be drawn from the levels of those benefits.

- 3.72 On the other hand, the tort system and the Criminal Injuries Compensation Scheme are more superficially comparable. Under the present scheme there are three possible elements to an award in respect of non-fatal injury. First, a standard amount is payable, according to a tariff. Secondly, where there has been a loss of earnings or earning capacity which has continued for longer than 28 weeks, compensation is available for (a) loss of earnings and for (b) special expenses, subject to an overall limit on any one award of £500,000.⁸³

the Social Security Act 1989 (replaced by the Social Security Administration Act of 1992) introduced recoupment by the state of social security benefits, the system for which was reformed in the Social Security (Recovery of Benefits) Act 1997. See para 3.17 above, for our analogous view that the general level of awards for non-pecuniary loss should not be based on the availability of damages for pecuniary losses.

⁸³ Any applications for criminal injuries compensation on or after 1 April 1996 are to be assessed under the new scheme, issued by the Secretary of State under the Criminal Injuries Compensation Act 1995 on 12 December 1995.

- 3.73 A number of consultees felt that a comparison should be made between tort damages for non-pecuniary loss and criminal injuries compensation. Professor David Miers said:

The CICS tariff for quadriplegia is K£250....The maximum award that can be made under the CICS is K£500....I am surprised that in ...[the comparative section] you do not include a comparison with the CICS given its obvious parallels with common law damages.

It was suggested by another consultee that there would be criticism if a new legislative tariff did not correspond with the CICS tariff either in terms of amount or of detail.

- 3.74 Peter Weitzman QC thought that the levels provided for under the CICS were relevant, but also referred to the basis on which they were reached:

It is interesting that the tariff scheme of the new Criminal Injuries Compensation Authority specifies an award of £250,000 for general damages in cases of tetraplegia. This provision has a curious history. The first tariff scheme excluded any compensation for loss of earnings or cost of care. But its figures were based on a survey of awards which had, in appropriate cases, included sums for these elements. The current tariff scheme allows for awards to cover pecuniary loss. But this was apparently overlooked. The result is that the present tariff for general damages is about twice the common law figure.⁸⁴ When this was pointed out the Home Office declined to change the figure. I am not sure why: but it does seem to show that an award of £250,000 for pain, suffering and loss of amenity in tetraplegic cases did not seem out of the way.⁸⁵

- 3.75 Other consultees considered that the CICS was not comparable to common law damages. One Pump Court said:

I believe that the government's new tariff scheme for compensating victims of crime is arbitrary and unfair....The primary purpose of such compensation was seen as recognition by society of the ordeal to which the victim of violent crime had been subjected. It is no precedent for reform of the common law assessment of damages.

- 3.76 APIL said:

It is important to note that the new CICS tariff is not claimed by the Government to be a common law method of assessing damages, nor is it intended to compensate for the injuries and losses suffered by a victim. Throughout, the Government have made clear that the purpose of the tariff is to represent society's "expression of sympathy for the

⁸⁴ At the time that the first tariff scheme was introduced on 1 April 1994 (see further at para 3.79 below) the 1st edition of the *JSB* Guidelines was current. These provided that the range for quadriplegia was £100,000-£115,000. It is therefore quite right to say that the top CICS tariff award was approximately double the top of the common law range.

⁸⁵ See para 3.81 below.

victim”, rather than to produce an accurate assessment of a victim’s losses, compensatable by way of damages.⁸⁶

3.77 In order to evaluate consultees’ conflicting views it is necessary to look back in some detail at the history of criminal injuries compensation in this country.⁸⁷ The first scheme was introduced in 1964. It was made clear that the state did not accept any legal liability to the victims of crime, but rather that publicly-funded criminal injuries compensation should be seen as an expression of public sympathy. Hence compensation was to be paid on an “ex gratia” basis. The expression of public sympathy is plainly a different rationale for compensation than the corrective justice theory which underlies tort law.⁸⁸ Yet it was provided that criminal injuries compensation should be based on common law damages.

3.78 Peter Duff has argued that this decision was taken primarily for pragmatic reasons, but that it was partly influenced by principle:

...there was simply a feeling that it was ‘right’ to prefer the model of common law damages. It was generally thought that since criminal victimisation is so different from the other types of misfortune which result in support from the state, compensation at the same level as other payments from the state was not appropriate....Moreover, it was generally felt that crime victims should not receive any less than the recipients of common law damages, because they were obviously at least as deserving of public sympathy as the victims of mere negligence. At base, these feelings derived from the symbolic function of compensation: it was felt, in an unarticulated way, that society ought to be seen to state, through an award of criminal injuries compensation, that crime is more damaging to the social fabric than industrial and other types of accident, illness, unemployment and the like.⁸⁹

This analysis suggests that society accepted some measure of responsibility for harm criminally inflicted, whatever the Government said, since it was felt that society should ensure that the victim received reparation, rather than a token financial award. At this stage, therefore, the rationale for criminal injuries compensation appears not to have been far from that for tort damages.

3.79 In 1994 there was a fundamental shift of approach when a tariff system of criminal injuries compensation was introduced (and payments were for the first time not be

⁸⁶ See in particular paras 3.80-3.82 below.

⁸⁷ See Peter Duff “The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog’s Dinner” [1998] 18 OJLS 105 for a full account.

⁸⁸ Peter Duff said *ibid* at p 107, “To state that the public sympathises with the victims of violence implies little - if anything - about the level of compensation which they deserve. If, for instance, it had been generally accepted that the state was legally liable to the victims of violence as a result of its failure to prevent crime and protect its citizens, the appropriate starting point would clearly have been the model of civil damages. Discussion might then have centred around the extent to which a state funded criminal injuries compensation scheme should attempt to provide full restitution.”

⁸⁹ *Ibid*, at p 117.

made “ex gratia”). Following a successful judicial review,⁹⁰ the present hybrid scheme was enacted in 1995. As we have seen, under the current scheme the vast majority of those eligible for criminal injuries compensation receive a standard sum according to a tariff, but those most seriously injured also receive compensation for some of their pecuniary losses.⁹¹

3.80 The present Criminal Injuries Compensation Scheme is barely comparable to the tort system for two reasons. First, as Peter Duff said of the change to a tariff scheme:

the tacit assumption that similar injuries should attract similar awards implies a shift in the nature of criminal injuries compensation....the victim should be compensated not for his actual losses but rather for the relative severity of his injury regardless of its particular impact upon him.⁹²

This marks a fundamental departure from the reparative tort measure of damages. Indeed, Peter Duff predicts that the theoretical rift between the two systems is now bound to deepen:

...the symbolic function of [criminal injuries] compensation, freed from the anchor of restitution, could well drift away from its traditional victim-centred berth towards, most likely, offence-centred waters....there is some evidence that awards will increasingly be interpreted as making a statement about the seriousness of the offence...⁹³

3.81 Secondly, the computation of criminal injury awards is theoretically muddled. The tariff sums prescribed are based on awards of criminal injuries compensation under the old common law inspired scheme. Peter Duff explained this as follows:

...around 20,000 recent cases were analysed in order to arrive at the appropriate tariff levels....cases were categorised by injury, producing a list of around 200 different types of injury; the median award for each type of injury was calculated; and the injury was thereby assigned to the closest figure on a tariff...The reliance on actual cases meant that the Tariff Scheme included an element of lost earnings and expenses....In terms of principle the [first] Tariff Scheme represented something of an unhappy compromise. The authors of the White Paper appeared to think that compensation should be paid only in respect of general damages and, consequently there seems little logic in putting forward a structure which meant paying compensation for lost

⁹⁰ The first tariff scheme was introduced to apply to all applications on or after 1 April 1994, but was found in Spring 1995 by the House of Lords to be unlawful in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

⁹¹ See para 3.72 above.

⁹² Peter Duff “The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog’s Dinner” [1998] 18 OJLS 105, 126.

⁹³ *Ibid.*, at p 141.

earnings and expenses at a purely notional level...irrespective of whether the individual victim actually suffered any such loss.⁹⁴

3.82 To add to the confusion, the new tariff scheme retained the old tariff awards, when also providing that seriously injured victims should receive compensation for pecuniary losses on top of the tariff sum. Provision has therefore been made for some crime victims to be doubly compensated for certain losses.⁹⁵ There is also a rule that no award shall exceed £500,000.

3.83 These inroads into the idea of matching compensation to loss mean that it is now extremely difficult to compare tort damages to criminal injuries compensation.⁹⁶ In Peter Duff's view this difficulty is likely to increase:

While...the tariff's roots lie in common law damages, the method of calculation used to produce it greatly distorted the original restitutionary template. Moreover, as time goes on, further distance

⁹⁴ *Ibid*, at p 127. See also David Miers, *State Compensation for Criminal Injuries* (1997), p 19 and para 3.74 above.

⁹⁵ Peter Duff "The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner" [1998] 18 OJLS 105 said at p 135 of this anomaly that: "While the Government's position was undoubtedly pragmatic, this element of double compensation does illustrate once more the lack of attention paid to finding basic principles which might establish a theoretically logical approach to the assessment of awards. As Miers points out [David Miers, *State Compensation for Criminal Injuries* (1997), 201 n 5], it means that some tariff payments for particularly serious injuries - paraplegia and quadriplegia - are almost double the general damages that would be assessed at common law. On the one hand, the abandonment of the common law model means that this does not necessarily matter but, on the other, the tariff was designed to produce similar sums to general damages at common law. Thus, it is surely unsatisfactory that in the case of some injuries the figures diverge to such an extent without any justification in terms of principle."

⁹⁶ Interestingly, Peter Duff records the response to a Lords amendment regarding the current scheme: "...the Home Office Minister argued that the new Scheme was no longer based on common law damages; thus it was designed to cover 'core' losses and not 'each and every potential loss which a victim might conceivably suffer' at the expense of the taxpayer." (Peter Duff "The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner" [1998] 18 OJLS 105, 137.) Judge Anthony Thompson QC also made some interesting observations: "In April 1995 I tried *Griffiths v Williams* with a jury....the plaintiff alleged that she had been raped by the defendant....[T]he jury...awarded the plaintiff £50,000 by way of damages. The Court of Appeal found no fault with the summing up, and declined to interfere with the award, although expressing the view that it was somewhat on the high side. Civil actions for rape are rare, but applications by victims of rape to the Criminal Injuries Compensation Board are not. I am informed that the conventional award by the Criminal Injuries Compensation Board in an ordinary rape case (if there is such a thing) is £7,500. When I asked a senior member of the Board...what the award would be in the case of a victim who had been dragged off by several assailants and battered, beaten, buggered and generally sexually abused as well as being gang-raped...the response was about £25,000. That sits very uneasily with the jury award of twice that amount for what, by any standards, must be regarded as a rape at the lowest end of the scale." It is not entirely clear if the sums mentioned were in respect of non-pecuniary loss only. Still, it is noteworthy that Judge Thompson was referring to the old criminal injuries scheme, pursuant to which damages were assessed on common law principles. The tariff sum payable in respect of non-consensual vaginal and/or anal intercourse with other serious bodily injuries is £17,500. The sum payable in respect of non-consensual vaginal and/or anal intercourse by two or more attackers is £10,000. These figures are in respect of a single incident, and cover victims of any age (although there are also specific provisions in respect of sexual abuse of children).

will probably develop between tariff payments and common law damages because, at risk of being cynical, it is unlikely, given the pressures on public expenditure, that tariff levels will be increased in line with inflation. Thus, as tariff levels fall, in relative terms, they may increasingly come to resemble other benefits paid by the welfare state without the relatively solid intellectual base provided by, for example, the notion of need or the concept of loss of faculty.⁹⁷

3.84 Our conclusion is that it would be wrong, in evaluating what damages for non-pecuniary loss in personal injury cases should be, to attach very much weight to the current level of criminal injuries awards. Still, we accept Peter Weitzman QC's point that the provision for a top criminal injuries tariff award of £250,000 indicates that this sum was not seen, even in 1994, as completely "out of the way" as an award of damages for non-pecuniary loss for the most serious injuries. This must follow from the fact that the tariff sums were seen by the Government as analogous to damages for non-pecuniary loss.⁹⁸ Hence, so far as the levels of "damages" available under other UK compensation systems are of assistance, they suggest that an increase of up to 100 per cent of current awards, at least at the top of the scale, would be appropriate.

(IV) THE LEVEL OF DAMAGES FOR NON-PECUNIARY LOSS IN PERSONAL INJURY CASES IN OTHER JURISDICTIONS

3.85 Many consultees thought that damages for non-pecuniary loss in personal injury cases should take account of levels of awards in other countries. On the other hand, some did not consider comparison with other jurisdictions to be appropriate. For example, Bill Braithwaite QC rejected the argument that to increase the amount of damages in England would put us high in comparison to other jurisdictions,⁹⁹ on the basis that it is for each country to make its own value judgment¹⁰⁰ and that comparison is difficult because different countries offer different services.¹⁰¹

3.86 We have found the analysis of Mrs A B MacFarlane, retired Master of the Court of Protection responding in her personal capacity, particularly helpful. She said:

⁹⁷ Peter Duff "The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner" [1998] 18 OJLS 105, 140.

⁹⁸ See para 3.81 above.

⁹⁹ Harvey McGregor QC particularly raised this concern.

¹⁰⁰ Dr Pfennigstorf gave no view on levels, but said: "...awards can only be determined case by case. Any resulting disparities and apparent inequalities among different jurisdictions or classes of cases...should be accepted as a just price to be paid for individual equity."

¹⁰¹ Sir Michael Ogden QC said: "Obviously, the only correct figures are those of which the public do not disapprove. This must be viewed having regard to the level of earnings. Put in another way, an award is too low if the man on the bus says "it is absurd that that award for that injury is less than a year's earnings." This is why, leaving the effects of injuries aside, awards in North America have been higher than in Europe which in turn have been higher than awards in the Far East." Also Professor Horton Rogers: "This is an area where comparisons with other systems are rather dangerous - the US and Australian positions have been affected by insurance crises (or perceived crises) which seem to be less acute here. European comparisons tend to be falsified by other factors which affect the "total bill" - eg the more generous treatment of *dommage morale* of "indirect victims" in France."

The experience of other jurisdictions has been noted with interest... However, I think we must work out our own solutions, against the background of our traditions, while being open to persuasion from other jurisdictions with traditions comparable to our own.

- 3.87 It seems to us that, as in the case of other UK compensation systems, account should be taken of the level of damages awarded in other jurisdictions, but only if a close analogy may be drawn between the approach of the two legal systems,¹⁰² and if the arguments put for adopting a particular level are cogent.
- 3.88 Our feeling is that the most help may be gained from comparison with the jurisdictions which are closest to home, namely Scotland and Northern Ireland. Otherwise, we have concluded that study of the practice in other jurisdictions is not particularly helpful. Even in respect of the European Union, while we found the research by McIntosh & Holmes¹⁰³ into levels of damages in EU and EFTA countries of great interest, we were convinced by it that the very considerable divergence between the EU and EFTA jurisdictions rendered comparison problematic. This conclusion is reflected in the tendency of consultees to rely on the same material to support opposing conclusions.
- 3.89 For example the Civil Litigation Committee of the Law Society cited McIntosh & Holmes' work to show that the level of awards in the UK are lower than in other jurisdictions within Europe, namely Belgium, the Netherlands, Germany, Ireland and Luxembourg. St Paul International Insurance Company Limited cited the same work to the opposite effect:

Not enough weight, we would suggest, has been given to comparative awards in the United Kingdom and Europe. David McIntosh and Marjorie Holmes have now produced the second edition of their excellent work comparing personal injury awards in EU and EFTA countries which was published in 1994. At page 3 in their explanatory note they point out:

Although for our purposes no limits have been assumed it is appropriate to note that for injuries at sea and in the air, limits usually apply, and in most countries (not England and Wales, Scotland or Ireland) limits would apply for road traffic accidents. In some countries, including Spain and Germany, awards for injury caused by drugs are also limited.¹⁰⁴

On the following page under the heading of England and Wales they note:

¹⁰² This is similar to the approach to awards in foreign jurisdictions adopted in the case law. See, for example *McGregor on Damages* (16th ed 1997) para 1695 n 15 & Kemp & Kemp, *The Quantum of Damages*, Volume I, paras 1-003/3 - 1/004/1/2.

¹⁰³ McIntosh & Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994).

¹⁰⁴ *Ibid*, at p 3.

There are three distinctive features under the English system:

1. Pain and suffering awards are comparatively high.¹⁰⁵

Indeed, a detailed consideration of the awards anticipated for pain suffering and loss of amenity in the various EU countries...show awards in Ireland consistently and substantially higher than any other jurisdiction with English awards tending towards the upper quartile for most types of injury.

Again, there is truth in both analyses. While McIntosh & Holmes' work seems to suggest that levels of tort compensation in England and Wales are somewhere in the middle of the EU "league", higher awards are likely to move England and Wales up the "table". Yet, if it is believed, as a matter of principle and experience, that damages for non-pecuniary loss here are too low, it would seem to us entirely arbitrary not to increase them on the basis of practice elsewhere which is not necessarily genuinely comparable.

- 3.90 As we have said, we consider it most helpful to look at those jurisdictions closely allied to our own. Turning first to Scotland, there continues to be provision for juries to assess damages in personal injury cases heard in the Court of Session, although not for cases heard in the Sheriff's court.¹⁰⁶ Cases are to be tried by a jury "unless there is special cause shown". In practice, however, the vast majority of personal injury cases are decided by judge alone.¹⁰⁷ Nevertheless, it appears that the number of jury trials of personal injury cases has been on the increase since around the late 80s,¹⁰⁸ although we understand that the absolute numbers are still very low.
- 3.91 McIntosh & Holmes state that Scottish awards are often noticeably lower than English ones, although since *Allan v Scott*¹⁰⁹ in 1972 account has been taken of English precedents in the assessment of non-pecuniary loss by judges.¹¹⁰ This conclusion seems to be borne out by their results in respect of total awards,

¹⁰⁵ *Ibid*, at p 4.

¹⁰⁶ Court of Session Act 1988, s 11. See Andrew M Hajducki QC, *Civil Jury Trials* (1998) for a full account of the history and present practice of civil jury trial in Scotland.

¹⁰⁷ See McIntosh & Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994), p 295 where it is stated that a ratio of about 20 to 1 cases are heard by a judge, although it is not clear if this relates to all personal injury cases, or only those in the Court of Session. See also Lord Hope of Craighead in *Girvan v Inverness Farmers Dairy (No 2)* 1998 SLT 21, 25 & 30 (but cf his comment at 33 that "While it is difficult to predict what will happen in the future, there are now signs of a small increase in the number of jury trials..."), and Moore, "Civil Jury Trials in Scotland; Where Do We Go After Girvan" [1998] 42 JLSS 61, 61.

¹⁰⁸ See Andrew M Hajducki QC, *Civil Jury Trials* (1998), p v (foreword by The Rt Hon The Lord Cameron of Lochbroom, PC) and pp 12-13 and 201-202 (the latter is part of an essay by Colin McEachran QC, included as Appendix VI to Mr Hajducki's book).

¹⁰⁹ 1972 SC 59.

¹¹⁰ McIntosh & Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994), p 4.

although the pattern is not entirely uniform.¹¹¹ In respect of awards for pain and suffering and loss of amenity, the disparity appears to be less.¹¹²

3.92 However, McIntosh & Holmes did not take account of jury awards.¹¹³ The recent House of Lords decision in *Girvan v Inverness Farmers Dairy (No 2)*¹¹⁴ is important to an assessment of what difference this might make. Mr Girvan was injured in a road traffic accident in 1989. He suffered a laceration to the head and to the knee, but his worst injury was a serious fracture of the right elbow. This had grave consequences on Mr Girvan's work and home life. In addition, the injury made it impossible for him to continue a successful international career as a clay pigeon shot. In a first jury trial in December 1993 Mr Girvan was awarded £120,000 for solatium (the Scottish equivalent of damages for pain and suffering and loss of amenity). This sum was found to be excessive on appeal, and a second jury awarded Mr Girvan £95,000 in May 1995.¹¹⁵ The appeal against this award was pursued to the House of Lords, but was unsuccessful. It is interesting to compare this award with the suggested bracket of £16,000 - £21,500 for a severely disabling injury to the elbow in the JSB *Guidelines* edition of June 1994.¹¹⁶

3.93 In his speech Lord Hope, with whom Lord Browne-Wilkinson, Lord Mackay and Lord Slynn agreed, while also providing general guidance on how an appeal from a jury award of damages should be approached, said of the particular award in this case:

The award which has been made in the present case is undoubtedly a high one in comparison with awards made by judges for similar injuries. I would be inclined to set the figure for the appropriate judicial award, taking the most pessimistic view of all the physical and emotional effects of the injury - but leaving out of account the effect on the pursuer's sporting activities - at about £25,000 to £30,000. But the factor which I have left out of account in this assessment is a factor of great importance, because a jury would be entitled to attach great weight to it in reaching their view as to how much money should be paid to the pursuer to compensate him for what, in this respect, he has lost. I do not think that it is helpful in this case to go further with the question what a judge could properly have awarded after taking this

¹¹¹ *Ibid*, pp 19-20.

¹¹² *Ibid*, at pp 23-24. See Kemp & Kemp, *The Quantum of Damages*, Volume I, 1-004, n 2, where it is stated: "Since [*Allan v Scott*]...awards in Scottish cases have come roughly in line with English awards..."

¹¹³ See McIntosh & Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed 1994), p 290.

¹¹⁴ 1998 SLT 21.

¹¹⁵ Colin McEachran QC said in his response to consultation: "...the Scottish practice is to sue for a fixed sum. A cautious pursuer's Counsel will always do a quick calculation of the likely value of a claim and sue for approximately double to be on the safe side. Thus for a Jury, a cap can always be put on the whole claim or any particular element of the claim. In particular in *Girvan No 2*...I, as Counsel, for the pursuer told the Jury that the pursuer did not wish an award in six figures because that was liable to be regarded as excessive but asked for a substantial five figure sum. The Jury awarded £95,000 and it may be that without the cap they would have awarded more."

¹¹⁶ *JSB Guidelines* (2nd ed 1994), p 29.

element into account. This element is so obviously one for a jury to assess.¹¹⁷

In effect this suggests that a judge should not be called upon to assess damages in a case where an element of the loss is peculiarly appropriate for a jury award, even though this may lead to a higher award than a judge could properly give.

- 3.94 Furthermore, Lord Hope seemed to suggest that judges should take account of jury awards in their own assessments of damages.¹¹⁸ He said of *Currie v Kilmarnock and Loudoun District Council*,¹¹⁹ a case in which the Inner House refused to overturn a jury award of damages:

...sitting in that case as Lord President, I said that...there was a risk that, by adhering to the relatively narrow band within which judges operate, judges would become increasingly out of touch with awards made by juries in the exercise of their proper function. I should add that we were informed that steps are now being taken to include all awards made in the Court of Session by juries in the information about past awards in Paton on *Damages*. This initiative is to be commended, as the making of this information available in this way will ensure that judges will be able to take account of awards made by juries when making their own assessment.¹²⁰

- 3.95 Lord Clyde, who gave the only other speech, said:

In a system in which damages may be assessed in different cases either by a jury or by a judge it is essential, not only for the profession, but also for the court both in the making of awards and in the consideration of awards which have been made, for there to be available a convenient record of awards by juries as well as by judges. In recent times the stock of jury awards has not been extensive and there may be some practical difficulties in the tracing and analysing of such awards. It appears however that such work has now been set in hand more systematically than it may have been in the past. The collection and classification of such materials is obviously to be encouraged.¹²¹

- 3.96 It is not yet clear if these statements will lead to account being taken by judges of awards made by juries. In *Swan v Hope-Dunbar*¹²² in the Outer House, Lord Dunbar said that he did not take the speeches in *Currie*¹²³ and *Girvan*¹²⁴ to suggest

¹¹⁷ *Girvan v Inverness Farmers Dairy (No 2)* 1998 SLT 21, 33.

¹¹⁸ Cf Moore, "Civil Jury Trials in Scotland; Where Do We Go After Girvan" [1998] 42 JLSS 61, 61-62, who considered that Lord Hope had left this point ambiguous, although he acknowledged that Lord Clyde made it clear that judges should have regard to jury awards when considering on appeal whether a particular jury award is excessive.

¹¹⁹ 1996 SLT 481.

¹²⁰ *Girvan v Inverness Farmers Dairy (No 2)* 1998 SLT 21, 28.

¹²¹ *Ibid*, at p 36.

¹²² 1997 SLT 760.

¹²³ 1996 SLT 481.

¹²⁴ 1998 SLT 21.

that a judge sitting on his own without a jury should in any way be bound by jury awards. He stated his award to be based, at the end of the day, on judgment and experience applied to the circumstances of the case. In *English v North Lanarkshire Council*,¹²⁵ a decision of the Outer House, Lord Reed observed that the assessment of damages should involve more than the application of an index to past awards, whether by judge or jury. However, while jury awards might be a valuable aid, in the absence of information as to the actual award in any comparable case, it was not possible to take into account the pursuer's suggestion that jury awards tended to be above judges' awards.¹²⁶

3.97 The continuing availability in Scotland of jury trial in personal injury actions means that that in some cases awards in Scotland are appreciably higher than in England and Wales.¹²⁷ In his response to our consultation paper Colin McEachran QC argued that recent Scottish jury awards show that judges' awards, which are comparable across the two jurisdictions, are about 100 per cent too low.¹²⁸ Moreover, if the judges in Scotland begin to take account of awards in jury trials in the assessment of damages, it is possible that all Scottish awards for non-pecuniary loss will increase.

3.98 Still it must be noted that Lord Hope also considered that the question whether the Inner House should be given a power to assess damages on a successful motion for a new trial raised a fundamental issue of principle, as follows:

This is whether it is still appropriate for damages in personal injury cases to be left to juries or whether the time has now come in Scotland, as in England, to alter the balance of the whole system in favour of judge made awards.... This is something which is best left for consideration by the Scottish Law Commission, so that a more complete study of the whole matter may be undertaken and a recommendation made for legislation, if thought appropriate, after all interested parties have been consulted.¹²⁹

Yet, even if juries were to be abolished in Scotland, Lord Hope and Lord Clyde's apparent conclusion in *Girvan*¹³⁰ that judges should take account of jury awards in the assessment of damages for non-pecuniary loss, is analogous to our conclusion that account should be taken of public opinion in setting general levels of awards for non-pecuniary loss in personal injury cases. It will be plain from our later discussion of jury assessment of damages that we do not consider the jury route to

¹²⁵ 1999 GWD 7-351.

¹²⁶ See Forsyth, "Transmissible Solatium After Death" 1999 SLT 45, 49 for a discussion of this issue.

¹²⁷ For further examples of Scottish jury awards in personal injury cases see S Forsyth, "Transmissible Solatium After Death" 1999 SLT 45 and Andrew M Hajducki QC, *Civil Jury Trials* (1998), Appendix V, pp 198-200.

¹²⁸ See also S Forsyth, "Transmissible Solatium After Death" 1999 SLT 45, 49-50 & Andrew M Hajducki QC, *Civil Jury Trials* (1998), pp 25 & 206 (the latter is part of an essay by Colin McEachran QC, included as Appendix VI to Mr Hajducki's book).

¹²⁹ *Girvan v Inverness Farmers Dairy (No 2)* 1998 SLT 21, 34.

¹³⁰ *Ibid.*

this end to be desirable,¹³¹ but we find it encouraging that the Scots, like us, consider public opinion to be of importance in fixing the appropriate levels of damages for non-pecuniary loss.

- 3.99 Our consultation paper did not deal separately with Northern Ireland and nor did the McIntosh & Holmes study. However consultees suggested that we consider the position there, and we have found this most illuminating. The General Council of the Bar of Northern Ireland said:

We consider the level of damages in England and Wales to be too low across the whole range of awards at present.

We base this view on a comparison of our level of damages in Northern Ireland which are on average almost twice the equivalent value in England and Wales. We have had the benefit of Juries assessing damages in personal injury actions more recently (until 19[87]) and accordingly we believe our damages have fallen less behind inflation....

We agree with the view that damages in England and Wales have failed to keep up with inflation. We suggest that the levels of damages in Northern Ireland and the Republic of Ireland reflect this clearly as both these jurisdictions have only comparatively recently lost the benefit of juries assessing damages in personal injury actions and damages across the whole range of awards are generally higher than England and Wales.¹³²

- 3.100 The case of *Simpson v Harland & Wolff PLC*⁴³³ contained an interesting discussion of the relationship between levels of awards in different jurisdictions and between jury awards and judge awards. This case was decided at first instance very soon after judges took over the assessment of damages in personal injury cases in Northern Ireland. An award of £75,000 for pain and suffering was made at first instance to a man suffering from mesothelioma. It was argued on appeal that the award was too high, not because it was higher than comparable awards in Northern Ireland, but because it was much higher than recent awards by judges in similar cases in England. It was submitted that there was no good reason for a difference to prevail between the level of awards in England and Wales on the one hand and Northern Ireland on the other, and hence that English decisions should be taken as establishing the standard.

- 3.101 Lord Lowry LCJ, with whom O'Donnell LJ and Kelly LJ concurred, observed that when personal injury cases began to be tried by judges in England and Wales, the standard must initially have been the general level of jury verdicts in the recent past. He went on to say:

But in England what started in 1934 as the general level of jury awards has gradually but inevitably been transformed into the general level of judges' awards and the level of awards of general damages in England

¹³¹ See paras 3.114-3.117 and 4.1-4.32 below.

¹³² Brian Langstaff QC also argued that higher awards of damages for non-pecuniary loss in Northern Ireland should be taken into account in setting levels here.

¹³³ [1988] NI 432.

and Wales has tended to fall behind the level of awards of general damages here. This tendency is inevitable, since the age of judges ranges from middle-aged to elderly and, as objective people, (including, I believe, most High Court judges) will readily concede, elderly people (particularly men), if they are not in business or constantly dealing with pecuniary transactions of some kind, become less adaptable and less receptive to changing values, even though at the same time they may remain intellectually able and alert....A judge's award of general damages is not intrinsically *better* than a jury's. The chief merit of the former is not in its amount but in its greater predictability and consistency, which ought to be readily achievable by a numerically small judiciary....¹³⁴

3.102 Lord Lowry concluded that the Northern Irish judges should take Northern Irish jury awards as their starting point. This reflected the principle that the standard for damages in Northern Ireland is that of the reasonable ordinary person, and that this standard is not wrong if it does not conform to the standard observed in a separate jurisdiction. Still, taking this approach, it was found that the award in the present case should be reduced to £50,000.

3.103 This decision is important to us for several reasons. First, it supports our analysis that differences between jurisdictions may be perfectly defensible. Indeed, this is argued to be the case even for such closely associated jurisdictions as Northern Ireland and England and Wales. Perhaps more importantly, however, Lord Lowry's observations support the view that awards in England and Wales have decreased, in relative terms, over the years, and he gives an explanation for why this might be so. Finally, one finds reiterated the notion that damages for non-pecuniary loss in personal injury cases should be influenced by the views of the reasonable ordinary person, although in this context it is recognised that jury assessment of awards may not be the best method by which to achieve this.

3.104 In the light of this decision it is not surprising to find that awards for damages for non-pecuniary loss in Northern Ireland have remained very much higher than in England and Wales.¹³⁵ In 1997 the Judicial Studies Board of Northern Ireland published its own *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*. These follow closely the format of the Guidelines for England and Wales. In the Introduction Lord Justice MacDermott stated that the Committee set up to produce these guidelines at first doubted the wisdom of doing so, but became convinced that they should be produced for the following reasons:

...the level of damages in Northern Ireland is significantly higher than in England and Wales. As was pointed out by Lord Lowry in *Simpson v Harland & Wolff* [1988] NI 432 this variation is in large measure due to the fact that in Northern Ireland the assessment of damages was in

¹³⁴ *Ibid*, at p 440.

¹³⁵ See McIntosh & Holmes, *Personal Injury Awards in EU and EFTA Countries* (2nd ed, 1994), p 5, where it was stated: "Hilary Wells of solicitors Messrs. Robert A. Mullan & Son, Co. Down, Northern Ireland, advises that juries in Northern Ireland were abolished at about the same time as juries were abolished for personal injury cases in the Republic of Ireland and their experience has been that this has not slowed the rate of increase of awards."

the hands of juries until 1987. Secondly, Practitioners when valuing cases and Judges when assessing damages have had regard to the 1987 level of damages adjusted to reflect inflation. Thirdly, if there are no local guidelines there is a danger that the existing English Guidelines will be accepted as relevant by default. This would be both irrational and unjust.¹³⁶

- 3.105 An examination of the Northern Irish *Guidelines* discloses how very much higher awards are there than in England and Wales. This is even more noticeable when it is borne in mind that the Northern Irish *Guidelines* state the position as at late 1996, whereas the new edition of the English and Welsh *Guidelines* takes account of settlements up to 1 August 1998. To give some examples, the range for quadriplegia is given as £250,000 to £400,000,¹³⁷ compared to £120,000 to £150,000 in England and Wales.¹³⁸ The Northern Irish awards at this level are therefore higher than English and Welsh awards by a factor of between 2 and 3. This pattern is reflected across the range of awards. For example, the Northern Irish guideline for an above knee amputation of one leg is £100,000 to £150,000¹³⁹ compared to £42,500 to £60,000¹⁴⁰ in England and Wales. The Northern Irish guideline for simple fractures to cheek-bones states that awards should be up to £7,500,¹⁴¹ compared with the guideline for England and Wales which provides for an award of up to £3,000.¹⁴²
- 3.106 In conclusion, it seems to us that awards for non-pecuniary loss in personal injury cases in Scotland and in England and Wales are reasonably on a par, except where jury trial is held. Equally, if judges take account of jury awards when assessing damages, this may lead to an increase in the awards made by judges. In respect of Northern Ireland, there is a very considerable disparity.¹⁴³ Taken together, the position in these two jurisdictions suggests that some increase to awards in England and Wales for non-pecuniary loss in personal injury cases would be appropriate. This is particularly the case in so far as an increase would reflect the views of the public as to what such damages should be, given that both Scotland and Northern Ireland seem to some extent to espouse the principle that damages for non-pecuniary loss in personal injury cases should be in line with public beliefs and expectations.

¹³⁶ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* (1997), p 1.

¹³⁷ *Ibid*, at p 3.

¹³⁸ *JSB Guidelines* (4th ed 1998), p 3.

¹³⁹ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* (1997), p 28.

¹⁴⁰ *JSB Guidelines* (4th ed 1998), p 39.

¹⁴¹ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* (1997), p 37.

¹⁴² *JSB Guidelines* (4th ed 1998), p 49.

¹⁴³ It is also noteworthy that in Northern Ireland criminal injuries compensation is assessed on common law principles.

(V) THE LAW COMMISSION'S RECOMMENDATION

3.107 In summary, we have drawn the following conclusions from the four relevant factors considered in paragraphs 3.41 to 3.106 above:

- (1) The views of the public suggest that damages for non-pecuniary loss in cases of serious personal injury should be increased by a factor of at least 1.5 but by not more than a factor of 2.¹⁴⁴ This is also in keeping with the largest measure of consensus among our consultees.¹⁴⁵
- (2) We should not be dissuaded from recommending an increase to damages for non-pecuniary loss by costs considerations. The research undertaken on our behalf by ONS suggests that beliefs about the fairness of awards are generally not altered by knowledge that increases in damages will entail costs for a large section of society. In any event, our recommendation that awards for non-serious injury should not be altered will significantly limit the cost of any increase.¹⁴⁶
- (3) So far as the levels of “damages” available under other UK compensation systems are of assistance, they suggest that an increase of up to twice the value of current awards, at least at the top of the scale, would be appropriate.¹⁴⁷
- (4) The position in other jurisdictions closely linked to our own (ie Scotland and Northern Ireland) suggests that some increase to awards in England and Wales for non-pecuniary loss in personal injury cases would be appropriate.¹⁴⁸

3.108 In the final analysis, we have reached the view that damages for non-pecuniary loss (ie damages for pain and suffering and loss of amenity) in cases of serious personal injury should in general be increased by not less than a factor of 1.5, but by not more than a factor of 2. In other words, such damages should be uplifted by at least 50 per cent, but by not more than 100 per cent. The caveat to this recommendation is that where the award would at present fall in the range from £2,001 to £3,000, a series of tapered increases of less than 50 per cent should be applied (so that, for example, an award now of £2,500 should be uplifted by around 25 per cent).¹⁴⁹

3.109 We have concluded that our recommendation should allow for a range of possible increases, since to recommend a single percentage uplift would fail to reflect the difficulty of the value judgment involved. In our view the range we have given is the farthest that we may helpfully go in interpreting the relevant considerations.

¹⁴⁴ See paras 3.42-3.59 above.

¹⁴⁵ See paras 3.12-3.13 above.

¹⁴⁶ See paras 3.60-3.65 above.

¹⁴⁷ See paras 3.66-3.84 above.

¹⁴⁸ See paras 3.85-3.106 above.

¹⁴⁹ See our discussion of the definition of serious injury at paras 3.34-3.40 above.

We shall discuss further below how we would envisage implementation of our recommendation working in practice.

3.110 Accordingly, we recommend that:

- (1) in respect of injuries for which the current award for non-pecuniary loss for the injury alone would be more than £3,000, damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) should be increased by a factor of at least 1.5, but by not more than a factor of 2;**
- (2) in respect of injuries for which the current award for non-pecuniary loss for the injury alone would be in the range £2,001 to £3,000, damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) should be increased by a series of tapered increases of less than a factor of 1.5 (so that, for example, an award now of £2,500 should be uplifted by around 25 per cent).**

Finally, if the increases recommended by us are not implemented until over a year after publication of this report, the recommended increases should be adjusted to take into account any change in the value of money since the publication of this report.

2. WHAT MECHANISM SHOULD BE EMPLOYED TO INCREASE DAMAGES FOR NON-PECUNIARY LOSS?

- 3.111 The possible mechanisms for increasing damages for non-pecuniary loss in personal injury cases put forward in our consultation paper¹⁵⁰ generally provide, not only for an increase to be effected, but also for a decision to be made as to how much the increase should be. Yet, as we have just explained, the work done by us has enabled us to recommend a particular increase.
- 3.112 What we are therefore here focusing on is what means should be used to increase damages (ie to implement the recommendation in paragraph 3.110). This is a deceptively difficult question. Two points have been at the forefront of our minds. First, consultees have highlighted practical pitfalls in the methods for effecting an increase put forward in the consultation paper. Secondly, and perhaps most importantly, consultees have repeatedly stressed the advantages of the current system and the importance of preserving its strengths, particularly its flexibility and adaptability to individual circumstances.
- 3.113 Bearing these general points in mind, we shall now set out our views on the appropriateness of different possible means of increasing damages.

¹⁵⁰ Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.53-4.79.

(1) Should juries play a greater role in assessing damages for personal injury?

- 3.114 One way in which damages for non-pecuniary loss would be likely to be increased would be by making greater use of juries. Indeed a central part of APIL's submission to us was that jury trial should be favoured.
- 3.115 This is an example of a method of increasing damages which would leave the factor increase to be devised elsewhere, despite our clearly stated view as to what the increase should be. In any event, as we discuss in greater detail below,¹⁵¹ we believe - along with the overwhelming majority of our consultees - that to give juries a greater role in the assessment of damages for personal injury would be a retrograde step. While we consider that lay opinion should influence levels of damages for non-pecuniary loss in personal injury cases, we do not believe jury trial to be a satisfactory method of achieving this.¹⁵² In particular, jury awards are unpredictable and can be inconsistent. Moreover, lay opinion should be an important but not the sole determinant of an appropriate sum.
- 3.116 In the consultation paper we also emphatically rejected the suggestion of "guinea-pig" jury trials: that is the idea that personal injury cases should sometimes be tried by a jury to provide guidance to the judiciary in the assessment of non-pecuniary loss.¹⁵³ Of the consultees who gave their view on this issue, 88 per cent agreed with our conclusion. Moreover, a large majority expressed their disapproval of guinea-pig jury trials in strong terms.
- 3.117 **We therefore reject the ideas of juries playing a greater role in assessing damages for personal injury than under the present law; or of trial by jury being used as a means of providing sample awards for the judicial assessment of non-pecuniary loss.**

(2) A Compensation Advisory Board?¹⁵⁴

- 3.118 We described in the consultation paper the proposal contained in the 1988 Citizens' Compensation Bill to establish a Compensation Advisory Board. CITCOM was the pressure group behind the bill. It believed that damages for non-pecuniary loss were too low and that the public should have more say on the level of them. It saw the proposals in its bill as a means to achieve this.
- 3.119 We considered that if a Compensation Advisory Board were established, it should have the following features:
- (1) It should be made up of those suggested by CITCOM¹⁵⁵ together with lay people and a representative of insurers, employers and trades union

¹⁵¹ See paras 4.1-4.4 below.

¹⁵² See paras 3.24, 3.42-3.59, 3.98, 3.100-3.103 and 3.106 above.

¹⁵³ See for discussion of this issue, Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.73-4.76.

¹⁵⁴ See for discussion of this issue, Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.68-4.72. See also at paras 3.160 and 3.167-3.168 below our discussion of the Sentencing Advisory Panel, created by the Crime and Disorder Act 1998.

organisations. It should be chaired by a High Court judge with experience of personal injury litigation.

- (2) The Board should be subject to a duty to recommend levels of damages for non-pecuniary loss which it considered to be fair compensation. The categories of injuries covered should include at least those in the *JSB Guidelines*, but the Board should be free to arrive at its own categorisation of injuries. Recommendations might be for fixed sums, or for brackets.
- (3) The recommendations of the Board should be advisory only. A judge should be entitled to refuse to apply them, for good reason, which he or she should be required to articulate. An appellate court might hold that the judge had failed to take proper account of the Board's recommended levels.
- (4) Although ultimately this depended on consultees' views as to the adequacy of present levels of damages, we envisaged that for most or all injuries, the Board would be under a duty to recommend levels of general damages not lower than current levels, and to take into account evidence that awards have failed to keep pace with inflation in the last 25 to 30 years.
- (5) The Board would be required initially to produce a report within one year of its creation, following which, subject to a power in the Lord Chancellor to provide otherwise, it should meet to review its recommendations, annually for two years, and thereafter once every three years.
- (6) The sums recommended should automatically be updated for inflation on an annual basis, by reference to the Retail Prices Index.

We asked consultees to indicate if they supported establishment of a Compensation Advisory Board, and for their views on the model suggested by us.

3.120 Of those who responded to this question, 60 per cent were in favour of a Compensation Advisory Board. However, this is another example of a method of increasing damages which would revisit the question of how much they should be increased when we have exhaustively addressed this issue. Moreover, consultees made powerful arguments against the creation of a Compensation Advisory Board. Even amongst consultees who favoured this option, there was considerable dissension about how a Compensation Advisory Board should work. Ultimately we have been persuaded to reject this option, not merely to avoid duplication of our work on the level of awards, but for the further substantial reasons which we shall now set out.

¹⁵⁵ That is, at least one medically qualified person specialising in the rehabilitation of injured people, one clinical psychologist specialising in the counselling of injured people, one solicitor and one barrister experienced in personal injury litigation, and four people appointed after consultation with voluntary organisations providing advice or services to injured or disabled people.

(a) Creation of a Compensation Advisory Board should be rejected because decision-making would be unworkable and/or the Board's recommendations may not command respect

- 3.121 These two concerns were pithily summed up by some members of the Council of Circuit Judges, Civil Sub-Committee, who feared that a Compensation Advisory Board would be either too partial to one interest, or it would be divided and hence indecisive.¹⁵⁶ Certainly there was considerable concern amongst consultees that a Board drawn from a variety of disparate and competing interest groups would not be able to reach a consensus. We share this apprehension.
- 3.122 Moreover, consultees expressed a very wide range of views on what the membership of a Compensation Advisory Board should be. These views were often inconsistent. For example:
- (a) The Association of Law Teachers thought that lawyers should advise the Board, and a standing panel, composed of insurers, trades unions and consumer organisations, should give evidence to it. The Board itself, however, should replicate a jury, albeit that its members should not be randomly chosen, but be from the “intelligent and informed public”, possibly chosen from amongst candidates for the magistracy.
 - (b) The National Consumer Council thought that the overriding purpose of the Board should be the technical task of considering all relevant physical, psychological and social factors in order to determine what would be adequate levels of compensation. The Board should not discuss wider policy issues, or resolve conflicts between competing interests. On this basis there should be no legal, employer, insurer or trades union representatives (although evidence might be sought from these groups), but only experts in various types of injury, in physiotherapy, and in physical, psychological and social rehabilitation. A panel of injured people and carers might act as advisers.
 - (c) Leigh, Day & Co argued that there should be no practitioners, pressure or interest groups, rather that the Board should consist of a judge or Law Commissioner as Chairman, and independent academics and lay representatives. Conversely, a number of consultees thought that the Board should have several legal members with relevant experience of all aspects of personal injury litigation.
 - (d) Irwin Mitchell commented that victims would not be directly represented under our provisional proposal. Other consultees similarly argued that there should be disabled people on the Board.

¹⁵⁶ See also Professor John Fleming's succinct criticism “The suggested Board solution would result in unprincipled compromises and horse-trading. It would not be an improvement.”

- (e) Some insurer consultees thought that if a Compensation Advisory Board were set up (which they opposed), it should be far more representative and balanced than we had provisionally proposed. In particular, they considered that voluntary organisations should not be included, on the basis that they do not have relevant skills.

The diversity of opinion as to the proper composition of a Compensation Advisory Board indicates to us that, however the Board was eventually composed, even if it could reach a consensus, its pronouncements would not generally be seen as authoritative.

(b) Creation of a Compensation Advisory Board should be rejected because its recommendations would not be binding

- 3.123 This is a more technical objection, which consideration of consultees' responses has highlighted for us. We said very little in the consultation paper about exactly how the recommendations of our suggested Compensation Advisory Board would be given effect. In stressing that the recommendations would be advisory only, we implicitly envisaged that they would be effective once made (that is, without subsequent Parliamentary approval), but that they would not bind the judiciary, who would be entitled to refuse to take account of them for good reason.
- 3.124 Consultees were generally in strong agreement with our provisional view that the Board's recommendations should be advisory only.¹⁵⁷ However, concern was expressed about exactly what this meant.¹⁵⁸

¹⁵⁷ Some consultees went further and opposed the establishment of a Compensation Advisory Board at all on the basis that the assessment of damages should not be taken out of the hands of Parliament and the courts, and given to an unelected and unaccountable quango.

¹⁵⁸ In our informal discussions with the judiciary the question was raised whether there is any precedent for a body such as a Compensation Advisory Board influencing decisions reached by judges. We discuss at paras 3.160 and 3.167-3.168 below the creation of a Sentencing Advisory Panel in the Crime and Disorder Act 1998. Aside from this, the closest analogy is from the United States where sentencing commissions were established both at the Federal and State level. Examination of how the sentencing commissions have fared in the US is interesting. The commissions were based on Judge Marvin Frankel's suggestion. He proposed creation of a specialised agency, authorised by statute to write detailed guidelines for sentencing. Its members would be judges, prosecutors, defence lawyers, academics, and lay-people, supported by a full-time professional staff. The enabling statute would provide either for the guidelines produced to become law automatically after the agency approved them (in the absence of a legislative resolution of disapproval), or the approval of the legislature would be required. Judges would be under a duty to follow the guidelines, except where they could give satisfactory reasons for not doing so. (See Marvin E Frankel *Criminal Sentences: Law Without Order* (1972); also see A Von Hirsch "The Functions of a Sentencing Commission" in A Von Hirsch & A Ashworth (eds) *Principled Sentencing* (1992), pp 274-275.) While the State commissions have been said to have achieved many of their goals (M Tonry *Sentencing Matters* (1996), pp 69-70), the US Federal Sentencing Guidelines, although endorsed by Congress, have been extremely unpopular. A notable effect of this has been that judges and lawyers have found means to manipulate and evade them. M Tonry *Sentencing Matters* (1996), pp 72-83. They are disliked both on policy grounds, for example that they are too severe and rigid, and for practical reasons, for example that sentencing hearings take longer than before the guidelines took effect.

3.125 Some consultees raised the difficulty that if the Board's recommendations were advisory only, this would mean that they would have little impact. Hence, for example, R M Stewart QC and Henry Witcomb proposed a requirement that the judiciary have regard to the Board's recommendations and Peter Andrews QC that the recommendations be advisory and presumptively mandatory. Piers Ashworth QC said:

...I have very serious reservations about the suggestion that [a Compensation Advisory Board's] recommendations would be advisory only. This would simply create more uncertainty. It should produce a tariff to replicate, and to be as binding as, the present judicial tariff.

3.126 We do not believe that the recommendations of a Compensation Advisory Board should be binding. This would give considerably too much power to an unelected, non-judicial body. Moreover, binding recommendations on levels of damages would be likely to lack flexibility to take account of individual circumstances.¹⁵⁹

3.127 Yet, if the judges were free to reject the Board's recommendations, the creation of a Compensation Advisory Board might prove futile. Even if the recommendations were accepted, there would be a period of considerable uncertainty, conceivably of years, until there had been enough first instance and appellate decisions for the position to be clarified.¹⁶⁰

(c) Creation of a Compensation Advisory Board should be rejected because it would be costly

3.128 The point was made by some consultees that the Compensation Advisory Board suggested by us would be expensive, particularly compared with the present system for the assessment of damages for non-pecuniary loss. While the question of cost may not be felt to be decisive on its own,¹⁶¹ the likely costliness of a Compensation Advisory Board adds weight to the case against creation of such a board.

(d) Conclusion

3.129 **In the light of these arguments we reject the idea of creating a Compensation Advisory Board.**

¹⁵⁹ See para 3.138 below for a similar conclusion in relation to a legislative tariff.

¹⁶⁰ It would be possible to avoid the problems discussed here by making the recommendations of the Board binding by legislative enactment. However, this would amount to enacting a legislative tariff, which we discuss at paras 3.130-3.139 below.

¹⁶¹ Other consultees pointed out that the Compensation Advisory Board need not be permanent, and suggested cost savings which creation of a Compensation Advisory Board might lead to. For example, APIL said: "The CAB proposed by the Law Commission is relatively streamlined, and need not be a permanent "quango". Whilst the Government may have been concerned about the cost of such a Board when it was previously proposed, and about possible hindrance to the speedy resolution of claims, APIL believes the contrary to be the case. It may well be that the CAB could play a role in reducing the cost of litigation, because guidelines to practitioners and the courts may lead to quicker settlement of claims. APIL believes that the cost of a CAB would easily be offset by savings in the cost of litigation."

(3) A legislative tariff?¹⁶²

3.130 A further method by which to increase damages would be the enactment of a legislative tariff. In the consultation paper, we looked at the arguments for and against this option. We noted that arguments in favour included that society's views can be reflected in levels of awards, that judicial discretion would be regulated and damages standardised, that levels of awards could be reset, and that there would be a ceiling on awards. Arguments against a tariff included that it is difficult to devise a system which would be of assistance to the judiciary without being overly rigid; that the judicial tariff has been rendered more accessible by the publication of the JSB's *Guidelines*; and that the imposition of a fixed sum tariff in the Criminal Injuries Compensation Scheme in 1994 attracted considerable public opposition, aimed both at the principle of a tariff scheme and the proposed levels of awards. We reached no provisional view on whether a legislative tariff should be introduced and sought consultees' views.

3.131 We considered that if a legislative tariff were introduced, it should take the form of a list of upper and lower limits of damages for different injuries, coupled with a non-exhaustive list of relevant factors which may legitimately affect the level of award within the range. We favoured this form of a legislative tariff on the basis that it was the more flexible of the two possibilities which most differed from the current system. We said:

We believe that, if a legislative tariff were to be introduced, the real choice as to the form of that tariff lies between a tariff of fixed sums and one of upper and lower limits. It is only these forms of tariff which control and regulate judicial discretion in a way which would justify abandoning the present system for assessing non-pecuniary damages. They each ensure that the legislative scale will itself remain intact, by providing limits beyond which the judge is not permitted to transgress. Consequently also, they promote more uniformity and consistency in awards. In contrast, there appears to be no significant difference between a tariff of either maximum sums, minimum sums or average sums and the informal judicial tariff which we currently have. Further, these carry a real danger because of the breadth of the ranges of award that they permit, that a new judicial tariff will emerge to undermine the statutory sums.¹⁶³

3.132 The model for a legislative tariff put forward in the consultation paper included a suggested means for prescribing new levels of damages. We envisaged advice being taken from a wide spectrum of the community.¹⁶⁴ This exercise would now be unnecessary in view of our recommendation on what the increase should be.

3.133 In any event, we have been persuaded that a legislative tariff should not be enacted. We have been influenced by consultees' strong opposition: 74 per cent who addressed this issue were not in favour of, or doubtful about, a legislative

¹⁶² See for discussion of this issue *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 4.53-4.67.

¹⁶³ *Ibid*, para 4.64.

¹⁶⁴ We also suggested periodic review of the tariff, and automatic updating for inflation.

tariff. Persuasive arguments were made against a legislative tariff, the most important of which we shall now consider.

(a) A legislative tariff should be rejected because it would politicise the question of what damages for non-pecuniary loss should be

- 3.134 Consultees felt that enactment of a legislative tariff would unacceptably politicise the question of what damages for non-pecuniary loss in personal injury cases should be. Judge Anthony Thompson QC made this point as follows:

[a legislative tariff] would reflect the view of the Government with enormous input from the Treasury and after high powered lobbying by the insurance industry.¹⁶⁵

Some consultees saw a real danger that an overall reduction in the general level of awards for non-pecuniary loss would follow. We can see that there may be force in these contentions.

(b) A legislative tariff should be rejected because it would be too rigid

- 3.135 It was in this context that consultees repeatedly emphasised their concern that the flexibility of the current system for the assessment of damages for non-pecuniary loss in personal injury cases should be preserved. Enactment of a legislative tariff would render this difficult or impossible. Such a system would be unwieldy and unable to respond appropriately to variations in individual cases.

- 3.136 Consultees mentioned other technical problems which they anticipated, for example that there would inevitably be gaps in a legislative tariff. However, they continually returned to concerns about flexibility. For example:

- (1) A legislative tariff cannot adequately provide for combinations of injuries. Mention was especially made of combinations of physical and psychological injuries, and of situations where minor injuries lead to major complications, such as where there is a pre-existing vulnerability.
- (2) Variations in age and life expectancy cannot appropriately be adjusted for in a legislative tariff.
- (3) A legislative tariff would be less adaptable, for example to the emergence of new injuries, than the present system and would become set in stone.

- 3.137 Our feeling is that the main technical difficulties, and particularly the problem of flexibility, could to some extent be addressed in the design of the tariff.¹⁶⁶ Most importantly, it could be provided that the judges would have the same discretion to

¹⁶⁵ Ursula Cheer of the University of Canterbury, Christchurch, New Zealand encapsulated the objections of many to a legislative tariff when she said: "I do not favour this approach. It is inflexible, and subject to government tinkering once established, as we in New Zealand well know."

¹⁶⁶ In this regard we were surprised that 86% of consultees who addressed this issue agreed that, *if* a legislative tariff were introduced, its form should be as suggested by us in the consultation paper. This seems odd, when the model of legislative tariff which we put forward was designed specifically to be different from the current system, and less flexible.

go outside the legislative tariff in individual cases as they have to go outside the current judicial tariff. Where there were gaps in the tariff, it could be provided that the judicial tariff system would continue to apply, subject to the requirement that the awards made must be in keeping with the legislative tariff. The essential difference between such a system and the current arrangements would be that the tariff sum would generally derive from legislation, rather than from decided cases.

- 3.138 Still, there would remain problems. Consultees' strong views have convinced us that whatever the design of a legislative tariff there would at the very least be a perception of a loss of flexibility. This would render reform in this way unpopular, which might in itself cause the change not to work well. Moreover, if creation of a legislative tariff did not work out, it would be difficult to revert to the old system.

(c) Conclusion

- 3.139 **In the light of these arguments and consultees' views we reject the idea of creating a legislative tariff.**

(4) An increase in the tariff by the Court of Appeal and/or the House of Lords?

- 3.140 The recurrent view that the current system for the assessment of damages for non-pecuniary loss in personal injury cases has many advantages has led us to consider whether the judges, in normal decision-making, could themselves uplift the tariff of damages,¹⁶⁷ and, if so, whether this would be the best way to achieve change.

(a) Do the Court of Appeal and the House of Lords have the power to increase the tariff of damages for non-pecuniary loss in personal injury cases?

- 3.141 It is only since the demise of the jury in civil trials began about 150 years ago that the law about the assessment by judges of damages for non-pecuniary loss in personal injury cases has developed. It is perhaps unsurprising that it is not clear where the judge's discretion in an individual case ends, and the authority of precedent begins. In the Introduction to the 1996 edition of the *JSB Guidelines* the authors state that "The doctrine of *stare decisis* does not apply in this field...".¹⁶⁸ It may be technically correct that the rules of precedent do not apply in the normal way to rulings and 'guidelines' on the level of damages. However, for all practical purposes the options of trial judges in inferior courts are proscribed by decisions of superior courts, if only by the knowledge that an award out of keeping

¹⁶⁷ George Pulman QC said on this issue: "A good case could go to the Court of Appeal based on the inadequacies of present awards, thus encouraging the Court of Appeal to say "current awards are inadequate and the law has been wrong for 30 years". This would demonstrate the strength of the Common Law responding as it does to changes in society and the perceived necessity to keep the law up to date." On the other hand Piers Ashworth QC said: "There is no legitimate way in which the judiciary can make any change. Although the tariff is based upon arbitrary figures, these figures are by precedent now part of our law, just as much as if they had been enacted by Parliament. The courts are not entitled to substitute other arbitrary figures for these."

¹⁶⁸ *JSB Guidelines* (3rd ed 1996), p 1.

with the “tariff” will be overturned on appeal.¹⁶⁹ The Court of Appeal and the House of Lords therefore have the effective power to ensure that conventional awards of damages are broadly adhered to. Moreover, more unusually, the authorities establish that the Court of Appeal and the House of Lords may not only enforce adherence to conventional awards, but in certain circumstances alter the levels of such awards.¹⁷⁰

3.142 In *Benham v Gambling*¹⁷¹ a unanimous House of Lords reduced an award for loss of expectation of life in respect of the death of an infant, from £1,200 to £200. Viscount Simon LC, with whom all of the other Law Lords concurred, said:

In reaching this conclusion, we are in substance correcting the methods of estimating this head of loss, whether in the case of children or adults, which have grown up in a series of earlier cases, and which Asquith J naturally followed, and are approving a standard of measurement which, had it been applied in those cases, would have led, at any rate in many of them, to reduced awards. I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy.

This decision is an example of the House of Lords altering the conventional award for a particular head of damages. Subsequent courts may not have been bound by this case to award £200 for loss of expectation of life. Yet it seems to us clear, and subsequent history bears this out, that they were bound to apply this sum as a

¹⁶⁹ *Alsford v British Telecommunications PLC* (1986) CA, 30 October 1986 is an example of how the higher courts ensure that conventional awards are adhered to. The trial judge awarded £15,000 for pain and suffering and loss of amenity. This was out of line with awards in two comparable cases, which had been affirmed by the Court of Appeal. The trial judge stated that he thought the damages in those cases unacceptably low. The Court of Appeal substituted an award of £11,500. Lloyd LJ said: “Everybody accepts that awards of damages in this field are necessarily conventional, and that they are based on a scale of comparative seriousness which is also conventional. I do not suggest that the scale is immutable. It may change gradually over time, as indeed may the level of damages generally. If judges consistently award damages for a particular type of injury at the top of the range, then that type of injury may gradually move up the scale of relative seriousness. But in my judgment it should not be open to a judge to award damages outside the range because he regards the range as being too low.”

¹⁷⁰ See Kemp & Kemp, *The Quantum of Damages* Volume I, 1-004/3, where it is stated: “It is clear that the general level of awards must be increased to take account of the decline in the value of money. But what of the general level itself, ignoring inflation? How is that to be adjusted, whether up or down? In our submission that is a function of the Court of Appeal, as Lord Diplock stated in *Wright v British Railways Board* [[1983] 2 AC 773]... That Court certainly exercised such function in *Housecroft v Burnett* [[1986] 1 All ER 332].” See also *McGregor on Damages* (16th ed 1997) para 1696, commenting particularly on the relevance of the failure of awards to keep pace with inflation: “However, there does seem to be a case for increasing awards for the most serious injuries because it has been shown... that these awards have fallen seriously behind inflation. Nor does there seem to be any reason why increases here cannot be achieved by the judges themselves once the failure to advance with inflation has been revealed to them; in particular, a legislative tariff is to be avoided.”

¹⁷¹ [1941] AC 157, 168.

starting point, which could only be departed from on the basis of the principles enunciated by the House of Lords in reaching their decision.¹⁷²

3.143 Certain statements of Lord Scarman in the case of *Lim Poh Choo v Camden & Islington Area Health Authority*,¹⁷³ might be taken to question the legitimacy of judicial alteration of conventional awards. The case concerned a senior psychiatric registrar in her early 40s, who was the victim of medical negligence which left her seriously brain damaged. She was only intermittently, and then barely, sentient. She was totally dependant on others, although her expectation of life was substantially what it had been. The defendants appealed the trial judge's award of £243,309, and the claimant cross-appealed the sum of £20,000 given in respect of pain and suffering and loss of amenity. Neither appeal was successful in the Court of Appeal, Lord Denning dissenting.

3.144 In the House of Lords, Lord Scarman gave a speech, with which all of the other Law Lords agreed. He said:

...it falls to your Lordships House to do what it can to provide trial judges with guidance which will enable them to reach reasonable and consistent awards until such time as Parliament intervenes by legislation to reform the law. Perfect justice is not attainable: nor would it be wise in the search for the nearest approximation to justice to abandon principles already judicially determined, whatever one's "saucy doubts and fears". If your Lordships can lay down, by decision in this case, an intelligible and moderate way of assessing damages for catastrophic, but not fatal, personal injuries under the law as it now is, there will have been achieved all that the judicial process can offer towards the improvement of this area of the law.¹⁷⁴

3.145 Lord Scarman later rejected the defendant's submission that the award for pain and suffering should be greatly reduced because of the claimant's unawareness of her loss, on the basis that this issue had been settled by previous House of Lords authority.¹⁷⁵ He said:

We are in the area of "conventional" awards for non-pecuniary loss, where comparability matters. Justice requires that such awards continue to be consistent with the general level accepted by the judges. If the law is to be changed...it should be done not judicially but legislatively within the context of a comprehensive enactment dealing with all aspects of damages for personal injury.¹⁷⁶

¹⁷² See our discussion of this case and developments subsequent to it in *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 2.7-2.9.

¹⁷³ [1980] AC 174.

¹⁷⁴ *Ibid*, 184.

¹⁷⁵ *West v Shephard* [1964] AC 326. See also *Wise v Kaye* [1962] 1 QB 638 where the Court of Appeal addressed this question, and paras 2.8-2.24 above, where we discuss the law relating to damages awards for unconscious or severely brain-damaged claimants.

¹⁷⁶ [1980] AC 174, 189.

3.146 Yet in *Wright v British Railways Board*,¹⁷⁷ Lord Diplock, with whom all the other Law Lords concurred, seemed to take a different approach. He made clear that levels of awards should not be seen as governed by precedent, and hence that the Court of Appeal and the House of Lords are free, not only to give guideline judgments regarding conventional levels, but in so doing to alter conventional levels. He said:

The second characteristic [of actions for personal injuries that militates against predictability as to the sum recoverable] is that non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be “basically a conventional figure derived from experience and from awards in comparable cases.”¹⁷⁸

...The need for a judge in assessing damages for non-economic loss to have regard to awards in comparable cases has led to progressive general increases in the level of awards particularly for serious injuries. These have been intended to reflect, though admittedly imperfectly, the general increase in the level of salaries and wages,¹⁷⁹ and more particularly since inflation became rampant, the decrease in the real value of the money due to this cause....

[Where] judges carry out their duty of assessing damages for non-economic loss in the money of the day at the date of the trial...this is a rule of practice that judges are required to follow, not a guideline from which they have a discretion to depart if there are special circumstances that justify their doing so...

My Lords, given the inescapably artificial and conventional nature of the assessment of damages for non-economic loss in personal injury actions...it is an important function of the Court of Appeal to lay down guidelines...as to the quantum of damages appropriate to compensate for various types of commonly occurring injuries....The purpose of such guidelines is that they should be simple and easy to apply though broad enough to permit allowances to be made for special features of individual cases which make the deprivation caused to the particular plaintiff by the non-economic loss greater or less than in the general run of cases involving injuries of the same kind. Guidelines laid down by an appellate court are addressed directly to judges who try personal injury actions; but confidence that trial judges will apply them means

¹⁷⁷ [1983] 2 AC 773, 777, 782 & 784-785.

¹⁷⁸ Lord Denning MR in *Ward v James* [1966] 1 QB 273, 303.

¹⁷⁹ See also Lawton LJ in *Cunningham v Harrison* [1973] QB 942, 956. He said: “This case graphically illustrates the difficulties which arise in the assessment of damages in cases of grave personal injury engendering acute, and probably insoluble, human and social problems. The judge who takes on the task...has to fix a sum which is “to a considerable extent conventional.” Conventions, however, change; and if judges do not adjust their awards to changing conditions and rising standards of living, their assessments of damages will have even less contact with reality than they have had in the recent past or at the present time.”

that all those who are engaged in settling out of court the many thousands of claims that never reach the stage of litigation at all or, if they do, do not proceed as far as trial will know very broadly speaking what the claim is likely to be worth if 100 per cent liability is established.

The Court of Appeal, with its considerable case-loads of appeals in personal injury actions and the relatively recent experience of many of its members in trying such cases themselves is, generally speaking, the tribunal best qualified to set the guidelines for judges currently trying such actions, particularly as respects non-economic loss; and this House should hesitate before deciding to depart from them, particularly if the departure will make the guideline less general in its applicability or less simple to apply.

A guideline as to quantum of conventional damages...is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach...

As regards assessment of damages for non-economic loss in personal injury cases, the Court of Appeal creates the guidelines as to the appropriate conventional figure by increasing or reducing awards of damages made by judges in individual cases for various common kinds of injuries. Thus so-called "brackets" are established, broad enough to make allowance for circumstances which make the deprivation suffered by an individual plaintiff in consequence of the particular kind of injury greater or less than in the general run of cases, yet clear enough to reduce the unpredictability of what is likely to be the most important factor in arriving at settlement of claims. "Brackets" may call for alteration not only to take account of inflation, for which they ought automatically to be raised, but also it may be to take account of advances in medical science which may make particular kinds of injuries less disabling or advances in medical knowledge which may disclose hitherto unsuspected long term effects of some kinds of injuries or industrial diseases.

- 3.147 Lord Diplock here made plain that the Court of Appeal and the House of Lords have the power to alter a conventional award "as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach". It follows that the higher courts are free to alter the whole scale of awards in certain circumstances. Lord Diplock's speech suggests examples of such circumstances: first, where awards have fallen out of line with inflation; secondly, where awards no longer bear a proper relationship to improved standards of living¹⁸⁰ and thirdly, where advances in medical science have altered the effects of particular injuries.

¹⁸⁰ Experience in Hong Kong is interesting in this regard. In *Chan Pui Ki v Leung On & The Kowloon Motor Bus Co (1933) Ltd*, decided at first instance in October 1995, and on appeal in July 1996, it was accepted that damages for non-pecuniary loss should be very substantially increased to take account of improved social and economic conditions. See

3.148 *Housecroft v Burnett*¹⁸¹ is an important example of the exercise by the Court of Appeal of their power to alter conventional awards. Moreover, as the injury concerned was at the top of the scale of seriousness, the new guideline may be said to have capped damages for non-pecuniary loss in personal injury cases. Indeed, Kemp & Kemp says of this decision

[it] has effectively reduced all claims for loss of amenities and pain and suffering. Current awards now have to fall in line with that figure, always, of course, taking into account any subsequent decline in the value of money.¹⁸²

3.149 In this case the Court of Appeal set a new guideline award for tetraplegia, because awards in past cases were generally felt either not to be properly comparable, or to have taken insufficient account of inflation. Having quoted extensively from Lord Diplock's speech in *Wright*,¹⁸³ O'Connor LJ, with whom the other members of the Court of Appeal concurred, said on the subject of the tariff of conventional awards:

The bracket which emerges from decisions of this court must have a spread, because this court does not interfere with an award under this head unless it is manifestly too high or too low or it can be shown that the judge has erred in principle in relation to some element that goes to make up the award. The human condition is so infinitely variable that it is impossible to set a tariff, but some injuries are more susceptible to some uniformity in compensation than others. One such is an injury which results in tetraplegia for in the nature of things the variables are more or less limited to age, awareness, pain and expectation of life.¹⁸⁴

3.150 O'Connor LJ noted that for at least the ten years prior to that case, when a claim by a tetraplegic had come to trial, counsel for the claimant had presented the judge with a list of awards multiplied by the appropriate inflation factor, which appeared to show that the going rate in use by the judges was too low. Counsel for the claimant in this case made the same submission, and O'Connor LJ accepted that it established that it was time to make a fresh start in defining the conventional award of damages for pain and suffering and loss of amenity in respect of tetraplegia.

3.151 The judge had already pointed out the difficulties of relying on past decisions in assessing damages where there was some material difference in the way that

Kemp & Kemp, *The Quantum of Damages* Volume I, 1-004/1/2, 1-040/7 & 1-041-1-041/2; also Alan Linning "New guidelines for personal injury awards" *International Commercial Litigation*, April 1997, 31-32. See also paras 3.24 above and para 3.172 below.

¹⁸¹ [1986] 1 All ER 332.

¹⁸² Kemp & Kemp, *The Quantum of Damages* Volume 1, 1-004/3. In his response to the consultation paper, Henry Witcomb said (when discussing the failure of awards to keep up with inflation), "Unless there is firm evidence that the erosion in the level of damages in the most severe injury categories has not had a chilling effect on each of the less severe categories, the presumption must be, in my view, that that effect has occurred."

¹⁸³ [1983] 2 AC 773.

¹⁸⁴ [1986] 1 All ER 332, 337.

damages had been calculated in those cases. Hence he was unable to rely on seemingly comparable cases before 1970, because:

it is only occasionally that one can get a figure for pain, suffering and loss of amenity separated from the award of general damages. When the award is separated it will be found that it includes sometimes expressly, and certainly by implication, matters which are separately assessed today.¹⁸⁵

He also could not rely on cases between 1973 and 1978, because a prior decision of the Court of Appeal had found that awards during that period had fallen significantly below what they ought to have been in order to keep pace with the fall in the value of money.¹⁸⁶

3.152 The more recent awards were a better guide because they were net of sums assessed separately which in fact compensate for loss of amenity in part. He said of them:

The cases show that this case is a typical middle-of-the-road case of tetraplegia. These are cases where the injured person is not in physical pain, is fully aware of the disability, has an expectation of life of 25 years or more,¹⁸⁷ powers of speech, sight and hearing are present, and needs help with bodily functions. The factors which operate to make the case one for awarding more than average are physical pain and any diminution in the powers of speech, sight or hearing. The factors which operate to make the case one for awarding less than average are lack of awareness of the condition and a reduction in expectation of life.¹⁸⁸

3.153 Having considered the more recent cases, O'Connor LJ went on to say:

While understanding and sharing the judge's sympathy for the plaintiff, I do not think that the case is other than an average example of cases of tetraplegia. I think that the award under this head was too much. I think that £70,000 would have been an adequate assessment. It is important to remember that the award under this head in cases of catastrophic injury invariably forms part of a much larger total award.¹⁸⁹ I am conscious that we are considering this case some 20 months after judgment and, as I have said, I think the time has come for a fresh start. I have come to the conclusion that as a guideline in April 1985 a figure of £75,000 should be used for an average case of tetraplegia. When the factors to which I have referred earlier in this judgment are taken into consideration there will be cases where an

¹⁸⁵ *Ibid.*

¹⁸⁶ *Walker v John McLean & Sons Ltd* [1979] 1 WLR 760, 765. See also comment in *Wright v British Railways Board* [1983] 2 AC 773, 777-778.

¹⁸⁷ But see para 3.32 above. It is noteworthy that the life expectancy element of O'Connor LJ's account of the "average" tetraplegic may well no longer be borne out by medical evidence today.

¹⁸⁸ [1986] 1 All ER 332, 338.

¹⁸⁹ See paras 3.16-3.17 above.

award of very much less will be appropriate, but I would not expect there to be many cases calling for much increase on what has to be a conventional sum.¹⁹⁰

This case is therefore an example of the Court of Appeal issuing a guideline judgment which reset a conventional award. Moreover it inevitably influenced the whole scale of damages since it concerned an injury at the top of the tariff.

3.154 Finally, we gain powerful support for our view of the powers of the Court of Appeal and the House of Lords in this sphere from the decision of the House of Lords in *Wells v Wells*.¹⁹¹ Lord Clyde said:

In respect of pain and suffering money can only be a conventional medium of compensation and the assessment of it to cover the past and the future must necessarily be imprecise and open to differences of view. But the accumulation of precedent and experience and the careful analysis of the nature and effects of particular injuries can go a long way towards establishing levels of award which may be generally recognised and accepted as reasonable in particular circumstances. If necessary those levels may be open to adjustment or even correction from time to time by those courts which are best qualified to review what must in essence be a factual assessment of the kind sometimes referred to as a jury question.¹⁹²

3.155 To conclude, our view is that the Court of Appeal and the House of Lords are free to accept a submission that the tariff of damages should be altered because changed circumstances have rendered current levels inadequate. It seems to us that if, as a result, the Court of Appeal or the House of Lords declared, for example, that the tariff of conventional awards should be doubled, lower courts would in practice be bound by this pronouncement.¹⁹³

¹⁹⁰ [1986] 1 All ER 332, 339-340.

¹⁹¹ [1998] 3 WLR 329.

¹⁹² *Ibid*, at p 361. See also Lord Lloyd, who said at 340 (although of interest rates only): “*Wright v British Railways Board* is also important because of Lord Diplock’s observation, at p 784, that guidelines as to the rate of interest for economic and non-economic loss should be simple to apply, and broad enough to allow for the special feature of individual cases. Such guidelines are not to be regarded as rules of law or even rules of practice. They set no binding precedent, and can be altered as circumstances alter.”

¹⁹³ The case law in Canada suggests that the higher courts there plainly have the power to control the overall level of awards for damages for non-pecuniary loss in personal injury cases, since in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452; *Arnold v Teno* (1978) 83 DLR (3d) 609; and *Thornton v Board of School Trustees of School District No 57* (1978) 83 DLR (3d) 480 (“the trilogy”) the Supreme Court of Canada adopted the functional approach to the assessment of damages for non-pecuniary loss, and imposed a rough upper limit of \$100,000 on such awards. (See *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140 at paras 3.38-3.51). The Supreme Court made clear that it was influenced by the policy concern to avoid the escalation of damages. It is notable that the decisions in the trilogy itself and subsequently and the academic commentary on the issue barely question the basis on which the Supreme Court acted. (See for rare examples of consideration of this issue *Hatton v Henderson* (1981) 126 DLR (3d) 50, 54 & 61; the British Columbia Law Reform Commission *Report on Compensation for Non-Pecuniary Loss* (1984), pp 16-17 & the Ontario Law Reform Commission, *Report on Compensation for Personal Injury and Death* (1987), pp 104-5.)

(b) Should an increase in damages be effected in this way?

- 3.156 We have come to the conclusion that the increase in damages for non-pecuniary loss which we have recommended would best be implemented by the Court of Appeal and/or the House of Lords in the context of an appropriate case (or series of cases).¹⁹⁴ In other words we suggest that, at least in the first instance, legislation imposing our increase should be avoided. We have been encouraged in making this suggestion by advice given to us by Lord Woolf MR and Lord Bingham CJ.¹⁹⁵ In particular, we believe that it will be possible for a series of cases to be brought before the Court of Appeal which will enable that court to increase the level of damages for non-pecuniary loss across the range of serious personal injuries. Some analogy may here be drawn with Court of Appeal guideline cases on criminal sentencing.¹⁹⁶
- 3.157 Our main reason for reaching this conclusion is that it preserves the current system for the assessment of damages in individual cases, which, in common with many consultees, we believe is an extremely good one.¹⁹⁷ The present arrangements achieve the difficult task of being both flexible, in that account can be taken of the individual circumstances of claimants, and consistent, because decisions are made with regard to an overall tariff. Our deliberations about different possible methods of altering the assessment of damages have led us to conclude that it would be practically impossible to invent a new system which was equally well able to achieve these two aims.
- 3.158 We also note that the flexibility of judicial decision-making means that this is the mechanism for altering levels of damages which can most easily effect an increase only in cases of serious personal injury, and tapered at the lower end. Guideline

¹⁹⁴ Jean H Ritchie QC suggested another way of increasing the tariff with minimum change to existing arrangements: "I am...of the view that the current tariffs should be doubled but I do not know whether that would need legislation or whether it could be made a Practice Direction of the QBD (which I would strongly prefer). Thereafter the figures should be uplifted each year by the rate of inflation so that an annual table is published by the JSB, and then say every 5 or 10 years the JSB would decide whether the figures were still in line with reasonable public expectations or whether they needed a further uplift." We do not believe that the courts could properly make a practice direction to this effect, as this would seek to influence the substantive law, when practice directions deal only with procedural matters. They are issued pursuant to the courts' inherent jurisdiction to regulate and control their own process, which does not extend to a power to "regulate and control" the substantive law. See *Halsbury's Laws* (4th ed 1982), Volume 37, para 12, pp 21-22.

¹⁹⁵ Lord Woolf MR raised this matter on our behalf with the Judges' Council. In a letter to us Lord Bingham CJ wrote: "...I would myself think it possible to arrange for the Court of Appeal to hear a number of different appeals on quantum in personal injury cases, covering a range of different injuries and factual situations, and to invite the appointment of an amicus. I think it would be important to have independent representations, since the court would have to consider the effect on insurers of a sudden increase in levels of compensation if the court were to be invited to rule in favour of such a general increase. The situation might well be one in which the court would think it right to permit direct representations to be made on behalf of insurance interests."

¹⁹⁶ See para 3.160 below.

¹⁹⁷ For example, Nigel Cooksley said, "I think that a method needs to be devised for increasing awards without radically changing the present system of assessment. I do not consider that there is anything particularly wrong with Judges assessing damages on the basis of the loose tariff which arises from past authorities."

judgments by the Court of Appeal and/or the House of Lords can set out the broad parameters of the change and leave it to judges in individual cases to apply the guidelines in a sensible way.

- 3.159 We reject the argument that a fundamental reform of this nature should not be made without recourse to Parliament.¹⁹⁸ We have set out above¹⁹⁹ our view of the theory which underlies the award of damages for non-pecuniary loss. We believe that a value judgment is required, or in other words, a decision of legal policy. In our view this question of legal policy is appropriate for the judges,²⁰⁰ because it is inextricably intertwined with the rest of the law of tort in personal injury cases, which has to date largely been developed by the judges. For example the judges have in the main been responsible for “legal policy” decisions as to the scope of tortious liability for personal injuries. Moreover the judges have the responsibility for deciding the precise amount of damages in individual cases.
- 3.160 It is interesting to consider the analogy with the judges’ role in sentencing. In that sphere issues of legal policy have been very much more influenced by the legislature. Yet even there it is felt important that the judiciary should retain a significant role, not only in deciding the particular sentence (not exceeding a statutory maximum) for the offender in question, but also in establishing and revising guidelines for sentencing decisions. The Court of Appeal first began to issue sentencing guideline judgments in the 1970s, and particular guidelines have been revised since.²⁰¹ Provisions in the Crime and Disorder Act 1998, which we discuss further at paragraph 3.167 below, set out the Court of Appeal’s duties in this regard, while also providing for creation of a Sentencing Advisory Panel to advise the Court.
- 3.161 Still, the fact that a value judgment is involved suggests that a better answer will be achieved the more assistance the decision-maker receives.²⁰² Yet there will normally

¹⁹⁸ For example, David Kemp QC said: “In so far as the courts have endeavoured to state a principle, it appears to be that an award should be such as would be regarded by society as fair compensation for the particular injury, having regard to the current social, economic and industrial conditions existing in England and Wales. But how is society’s view on this topic to be ascertained? In my view the only body competent to express such a view is Parliament. Before expressing such view, Parliament as a whole would no doubt consult and seek reports from appropriate organisations such as trade unions, employers, medical experts and their professional bodies, political and social organisations. Individual MPs would consult their constituents. If Parliament could not reach a firm majority view, the status quo should not be disturbed.”

¹⁹⁹ See paras 3.22-3.23 above.

²⁰⁰ Jean H Ritchie QC said: “...the awards of general damages seem to me exactly the sort of area where Judges who put their collective experience together are likely to come up pretty quickly with the right result.”

²⁰¹ See for example *Brewster* [1998] 1 CR App R (S) 181; *Clark* [1998] 2 Cr App R (S) 95; *Warren* [1996] 1 CR App R (S) 233 and *Hurley* [1998] 1 Cr App R (S) 299. It is noteworthy that similarities can be seen between the development of the Court of Appeal’s practice of issuing and revising sentencing guidelines and its practice of issuing and revising guideline awards for damages for non-pecuniary loss in personal injury cases. See paras 3.141-3.155 above.

²⁰² The Civil Sub-Committee of the Council of Circuit Judges said “In view of the fact that it is impossible to produce a precise scale against which to turn pain, suffering and disability into a sum of money we feel that it may be more important to achieve a balance between

be constraints in an individual case which will prevent the courts from undertaking a wide-ranging enquiry. It is in this regard that we hope and expect that our report - and our recommended increase in the level of damages - will be of assistance to the courts.²⁰³

various competing policy considerations. For example, it is desirable that the widest possible range of risks should be covered by insurance. If the level of damages is set too high insurance cover will become too expensive and the range of risks covered will reduce, to the point where some Plaintiffs, with a good claim, will fail to recover. It is also desirable that the public in general should feel that awards of damages provide fair compensation. It must be accepted that such a perception of fairness can only be on a rough and ready basis. In other words the public are only likely to regard damages as being unfair if they are well below or above the norm. A further consideration is the use of public money. On the one hand many Plaintiffs are funded via Legal Aid, while on the other many of those injured will require Social Security payments if they do not receive adequate compensation.” Also John Munkman QC: “...I think it is for the Court of Appeal to formulate new Guidelines when the JSB Guide needs improvement. The Courts are as capable of striking a fair balance as anybody. It is important to remember that the value put on an injury is not what the injured person would say, but the value other people generally would give. Also the maximum must not exceed what society can reasonably afford, through insurance and public funds. Asbestosis claims in [the] USA have nearly destroyed Lloyds insurance; medical claims have made tremendous holes in National Health funds...”

²⁰³ Consultees made a variety of suggestions which were a variant of this approach. The Civil Sub-Committee of the Council of Circuit Judges said: “One respondent suggested that a better way forward would be to provide a means for evidence from experts and/or pressure groups to be put before the Judge or the Court of Appeal in certain cases. The object would be to allow a case by case approach after the evidence had been assessed by the normal judicial process.” Also Judge Diamond QC: “I consider that in a very few major personal injury cases, there is room for a third-party to appear at the trial, and at subsequent appeals, to represent the public interest. This would particularly be so where the result might affect the level of awards in other cases. A Compensation Advisory Board would in my view serve a useful purpose if it could appear at trials and appeals in this type of litigation and introduce evidence and arguments as to the proper level of damages or submit something in the nature of an “amicus” brief. A proposal of this type would need to be worked out in detail. In some cases “scores” for medical points might play a part. In others evidence might be given of medical aspects of a particular illness or injury and the appreciation of the particular disability by persons other than the plaintiff, thus widening the background against which the case has to be considered. In some cases the Board’s function might be limited to the appeal stage. It would be for consideration to what extent on such appeals the Court should be entitled to depart from the pattern established by previous awards. I would however leave the decision as to the proper level of damages in the hands of the Court of Appeal and House of Lords.” Professor JC Smith of the University of British Columbia said: “I am sceptical as to the value of a Compensation Advisory Board. I doubt that the results would justify the expense. If tariffs are appropriate, they ought to be in the form of non-binding guidelines prepared by committees of the judiciary itself.” Also R M Stewart QC: “The ideal way forward would be for the Queen’s Bench Judges to sit “in banc” as per the medieval pattern where there was a difficult problem to resolve.” (Our understanding is that this procedure involved groups of judges deciding difficult points of law which had arisen in a particular case. See ed J Burke, *Jowitt’s Dictionary of English Law* (2nd ed 1977), Volume I, p 179; JH Baker *An Introduction to English Legal History*, (3rd ed 1990) pp 99-101.) Michael Bolger also made an interesting suggestion when he said: “In excluding a jury and placing emphasis instead, on a judge, it is vital to establish the right balance between the undue generosity of an inexperienced jury and the undue subjective bias of a single judge. In the most serious cases of personal injury, therefore, would it be more balanced if the case was heard by a panel of at least two judges?” Some consultees’ suggestions involved some variant of the JSB Guidelines. John Henty QC said: “I would prefer the development of the Judicial Studies Board *Guidelines* by the introduction of a jury of say 50 men and women randomly picked nation-wide to assess a range of hypothetical cases selected and presented jointly by the JSB, CICB members, APIL and the British

3.162 We acknowledge that it is entirely a matter for the courts whether or not they take the course we have suggested, and, if they are minded to effect an increase, the precise level within the range that we have suggested. We are conscious that some consultees will be dismayed that we thus propose to leave the achievement of reform in the hands of the judiciary.²⁰⁴ It may be thought that the judiciary are responsible for current levels of awards, and hence are the group least likely to be prepared to alter them.²⁰⁵ We believe that such fears will prove unfounded. Rather

Insurers Federation.” The response submitted for the Judges of the Queens Bench and Family Divisions said: “Respondents are fairly evenly divided between leaving the matter in the hands of the Court of Appeal to produce corrective guideline decisions (although this must depend upon a suitable case going to appeal which...may not happen very often), a full-blown Compensation Advisory Board, and putting greater authority into the guidelines issued by the Judicial Studies Board. Marginally the most popular approach would seem to be making the maximum possible use of the JSB *Guidelines*, possible enlarging the sub-committee which produces those guidelines to include suitable lay representatives, as well as district judges to add their expertise in relation to smaller awards.” The Law Society of Northern Ireland said: “More worthy of consideration at the other end of the spectrum would be a guide such as produced by the Judicial Studies Review Board which Courts and Lawyers would not be obliged to follow and which would set general damages figures in respect of various types of injury on a “range of value” basis.” LIRMA, having set out its opposition to a Compensation Advisory Board, said: “We would prefer an enhanced and extended JSB as we consider the judiciary are better informed at assessing levels of damages.” Christopher Pitchford QC said: “The Court of Appeal should approve a re-cast Guide published by the Judicial Studies Board (or its successor) after consultation with the [Law] Commission. Whether enabling legislation is required (which I doubt) is a matter for political discussion.” See also Buxton LJ at para 3.177 below.

²⁰⁴ See for example Peter Andrews QC: “...the levels of damages are essentially a matter for society as a whole rather than the exclusive and paternalistic preserve of the judiciary. The examples of the House of Lords in... [*West v Shepherd* [1964] AC 326]... and of the Court of Appeal in *Housecroft v Burnett* [1986] 1 All ER 332... give no confidence in the ability of the judiciary to give voice to the legitimate views of society as a whole.” Also Henry Witcomb: “Whilst the judiciary has failed to reflect adequately society’s values when assessing damages for pain, suffering and loss of amenity, it is unlikely to do so in the future, and cannot, in many respects be expected to do so....The judiciary, with one notable exception, have almost inevitably sought and will continue to seek the shelter of a precedent-based approach which avoids the political pitfalls of attempting to divine and act as a conduit for society’s views. Whilst avoidance of the issue is unacceptable, the one occasion on which the judiciary has ventured beyond precedent demonstrates the greater danger of allowing it a free hand. The Court of Appeal’s ‘fresh start’ decision in *Housecroft v Burnett* [1986] 1 All ER 332 not only failed to repair the damage done to the level of quadriplegia awards by inflation, but in setting a new guideline figure actually decreased the level. Further, in doing so the court appeared to have regard to a factor which must on any view be categorised as irrelevant “...It is important to remember that the award under this head in cases of catastrophic injury invariably forms part of a much larger total award...” (339j) and which gives credence to the suspicion that at least some judges view this head of damages merely as a makeweight.” (See paras 3.17 and 3.148-3.153 above.) Also Alastair MacDuff QC: “I think it is perhaps unfortunate that the Court of Appeal has really allowed the present position to be reached. There have been ample opportunities for the Court of Appeal, when considering serious cases, to make appropriate comments and give appropriate guidelines. It has not been done.” Colin McEachran QC said: “It seems to me that the matter is too important to be left to the Courts who have demonstrably failed accident victims in the UK. The Courts are caught in a judicial strait-jacket comprising previous decisions and the Judicial Guidelines. On what basis could they possibly proceed to increase their previous awards by 100% to take account of general public dissatisfaction?”

²⁰⁵ Some consultees blamed the inadequacy of awards on the judiciary’s lack of experience of personal injury litigation and their conservative approach. Judges were thought to rely too

we hope that our report will provide the judges with a sufficiently wide-ranging and detailed study of levels of damages for non-pecuniary loss in personal injury cases, that they will be enabled appropriately to make use of their power to alter the tariff of awards. Nevertheless we suggest below a “fall-back” position should the judiciary feel unable to proceed as we have suggested.²⁰⁶

- 3.163 We note that a recommendation that the tariff of awards for non-pecuniary loss in personal injury cases be increased in the course of litigation relies on litigants being prepared to incur costs in pursuing this issue before the courts. We do not consider that this factor should deter us, since it will always be a matter for individual litigants whether or not to institute or to proceed with litigation, and hence to incur costs.
- 3.164 We are, however, conscious of the drawback of this method for increasing awards, that it may cause uncertainty. In particular, if damages are increased in the context of litigation rather than by legislation, there will not be a period in which those affected will be able to plan in the knowledge of the detail of the proposed change. Still, while our report may make an increase in damages more likely, it only advocates what the courts already have the power to do. At least publication of this report will give some warning of what may be in store. Even if a measure of uncertainty is inevitable, provided every effort is made to keep this to a minimum, we consider it to be an acceptable price for retaining a system for the assessment of damages for non-pecuniary loss in personal injury cases which is fundamentally a good one.
- 3.165 **We therefore recommend that, at least initially, legislation imposing an increase in the level of damages for non-pecuniary loss in personal injury cases should be avoided. Instead we hope that the Court of Appeal and the House of Lords will use their existing powers to lay down guidelines, in a case or series of cases, which would raise damages in line with the increases recommended in paragraph 3.110 above.**

(c) Should the Court of Appeal and the House of Lords’ power to alter levels of damages be enshrined in statute?

- 3.166 It is plain from what we have said that we do not believe that there need be legislative intervention in order for the judiciary to have the power to alter the tariff of awards for non-pecuniary loss in personal injury cases. On the other hand, for the legislature to enact such a provision would put entirely beyond question the legitimacy of an alteration in levels of damages by the courts. Moreover, a legislative provision would secure for the future the courts’ power to alter the tariff, which may go some way to ensuring that damages never again fall so far below what they should be.

heavily on the JSB *Guidelines*. (Although we should also mention that RM Stewart QC gave the opposite view that the JSB *Guidelines* are rarely used or cited by experienced judges or practitioners. See also Kemp & Kemp, *The Quantum of Damages* Volume I, 1-004/1/3-1-004/2A for a discussion of judicial pronouncements on the JSB *Guidelines*, particularly to the effect that judges must still have regard to awards in previous cases and to the individual facts of any particular case. Also see para 1.4 note 3 above.)

²⁰⁶ See paras 3.177-3.188 below.

- 3.167 In this regard we have found the Crime and Disorder Act 1998 of interest.²⁰⁷ It creates a system whereby the Criminal Division of the Court of Appeal will be advised by a Sentencing Advisory Panel. Where the Court is seised of an appeal against sentence, it will be under a duty to consider whether to frame or revise sentencing guidelines for offences in that category. If the Court decides to do so, it will be required to notify the Panel. Once notified, the Panel must obtain the views of a range of persons and bodies, formulate its own view on what the guidelines should be, and inform the Court of this view. In addition the Panel will be under a duty to provide information on current sentencing practice, the cost of different sentences, and their relative effectiveness in preventing re-offending. Finally, in framing or revising the guidelines the Court will be required to have regard to a list of factors, including the views of the Panel and the matters about which the Panel is obliged to provide information. However, it will be entirely a matter for the Court how these considerations are balanced and which considerations are found to be of paramount importance. In other words, the Court of Appeal will be obliged to have regard to the advice from the panel, but will be free not to accept that advice. The Secretary of State and the Panel will also have the power to initiate this procedure.
- 3.168 To some extent this mirrors our suggestion in the consultation paper for a Compensation Advisory Board,²⁰⁸ and to that extent we do not consider it to be an appropriate model for reform in the present context.²⁰⁹ However, as we have said, the powers of the higher courts to set and revise sentencing guidelines are analogous to the powers of the higher courts to set and revise conventional awards of damages for non-pecuniary loss in personal injury cases.²¹⁰ That the former have been incorporated in legislation might suggest that it would be helpful also for the latter to be.²¹¹

²⁰⁷ See para 3.160 above. The relevant provisions of the Crime and Disorder Act 1998 are ss 80 and 81. The Sentencing Advisory Panel is expected to start its work in July 1999.

²⁰⁸ An important difference is that the Sentencing Advisory Panel will advise only the Court of Appeal, rather than issuing recommendations to the judiciary generally. See paras 3.123-3.127 above.

²⁰⁹ We can see, however, that a different conclusion may be justified in the sentencing context. For example, as we understand it, the main policy aim of ss 80 & 81 of the Crime and Disorder Act 1998 is the achievement of consistency and comparability in sentencing, rather than a particular change in levels or types of sentences.

²¹⁰ We also note that there is some consistency between our final recommendations and the model for arriving at sentencing levels set out in the Crime and Disorder Act 1998, in the sense that our report will hopefully provide assistance to the higher courts similar to that to be provided by the Sentencing Advisory Panel. However, we recommend only a one-off change rather than creation of a system of perpetual review. Our hope is that once damages for non-pecuniary loss in personal injury cases have been reset, the judiciary will themselves respond to change as it arises. Even if they do not, we think it will be such a long time before a fundamental reappraisal of levels is again necessary that a legislative system of perpetual extra-judicial review would be redundant. See para 3.187 below.

²¹¹ On the other hand, there is the consideration that legislation which referred only to guideline judgments in personal injury cases might limit the higher courts' powers to issue guidance in relation to other sorts of damages, for example damages for non-pecuniary loss in cases of defamation, false imprisonment and malicious prosecution. See our discussion of the assessment of such damages at paras 4.6-4.30 below.

3.169 We consider the arguments on this issue to be finely balanced. Ultimately we have come to the conclusion that we should not recommend legislation in this area. Not only would such legislation be merely declaratory; but there would be a risk that a recommendation would in itself delay “judicial reform”, since the courts might be reluctant to act until it had been implemented.

3.170 **We therefore do not recommend that the Court of Appeal and the House of Lords’ current power to make and to alter guidelines for the assessment of damages for non-pecuniary loss in personal injury cases should be enshrined in legislation.**

(5) How should awards be updated for the future?

3.171 APIL particularly argued that damages should automatically reflect improvements in standards of living. In their view the Average Earnings Index should be adopted as the benchmark for the automatic uprating of awards, rather than the Retail Prices Index, on the basis that the Average Earnings Index better reflects improved living standards.²¹²

3.172 It is plain from our discussion of the cases²¹³ that at present it is for the judges to determine the proper relationship between standards of living and damages for non-pecuniary loss in the light of social, economic and industrial conditions. However, the judges are obliged by precedent to update awards according to the fall in the value of money.²¹⁴ In our view this is the correct approach.

3.173 We believe that the relationship between the level of compensation and the standard of living goes to the initial question of what is a fair level of compensation. As we have set out above,²¹⁵ we consider the appropriate level of damages for non-pecuniary loss in personal injury cases to be a value judgment, which should be influenced by and reflect society’s views. That value judgment cannot properly be made for all time by making a straightforward arithmetical link between damages and standards of living (for example, that “the top of the non-pecuniary loss scale should be 20 times average earnings”). Rather, from time to time it will be right to reappraise the fairness of awards in the light of prevailing social conditions.²¹⁶

3.174 Hence automatic updating should continue to be in line with the changes in the value of money, rather than in line with changes in average earnings. This approach provides that if £x equals the fair measure in year 1 and the value of money has declined by 10 per cent by year 5, the same fair measure means that

²¹² Bill Braithwaite QC thought that some guidance may be provided to the courts from a consideration of earnings statistics. He said “...another approach to guide Courts would be to select some form of earning statistics, so that damages were always related to the public’s earning power.”

²¹³ See paras 3.141-3.155 above.

²¹⁴ *Mitchell v Mulholland (no 2)* [1972] 1 QB 65, 83; *Walker v John McLean & Sons Ltd* [1979] 1 WLR 760, 765; *Wright v British Railways Board* [1983] 2 AC 773, 782.

²¹⁵ See paras 3.24, 3.42-3.59, 3.100-3.103 and 3.106 above.

²¹⁶ See para 3.168 note 210 above and para 3.187 below.

the award in year 5 should be £x plus 10 per cent. In practice the index which is commonly used to identify changes in the value of money is the RPI, as the most highly developed and accessible consumption index, and we see no reason for this practice to be altered.

3.175 We have considered whether the common law obligation on judges to update in line with inflation should be laid down in statute. On the one hand, it may be felt that this would assist to prevent increases in awards being allowed again to lag behind inflation. On the other hand, a statutory provision would merely be declaratory of the existing law. In the final analysis we have concluded that the gains to be made from legislation are insufficiently certain to justify it.

3.176 **We therefore do not recommend laying down in statute the common law duty on judges to take account of changes in the value of money when assessing damages for non-pecuniary loss in personal injury cases.**

(6) A fallback position: legislative implementation of our suggested increase in the tariff of awards for non-pecuniary loss in personal injury cases

3.177 A number of consultees made suggestions for a legislative increase to damages for non-pecuniary loss in personal injury cases otherwise than by a legislative tariff. Buxton LJ said:

...could there not be a legislative provision that [judges] except in exceptional cases, which they must identify in any judgement relying on same, will follow the approach of the guidelines, as updated from time to time by the JSB or any other body that the Lord Chancellor by resolution laid before both Houses determines; with the important provision that the levels of compensation provided by the initial statutory booklet will be double the present figures, and updated by inflation figures published (say) every six months by the JSB?

3.178 David Kemp QC said:

I reject a detailed legislative tariff. It has the advantage of simplicity, but would be far too inflexible and would not be sensitive to the plaintiff's particular circumstances. I suggest a simple statutory provision to the effect that damages for non-pecuniary loss should from a specified date be assessed at, for example, roughly twice the level currently awarded, and should thereafter be increased or decreased to allow for a fall or increase in the purchasing power of the pound. The courts would have little difficulty in giving effect to such a provision, or to a similar provision requiring a different broad increase or decrease in the current tariff. For example, the courts had no problem in adapting the then level of damages to conform with the guideline figures laid down by the Court of Appeal in *Housecroft v Burnett*.²¹⁷

3.179 RM Stewart QC, opposing a legislative tariff and the form of it suggested in the consultation paper, said:

²¹⁷ [1986] 1 All ER 332.

It may be that the only sensible form of intervention, in the end, would be to lay down a tariff for the “average case of tetraplegia”, requiring judges to assess awards as they presently do, but within the ambit of this new guideline.

Professor Fleming, Norman S Marsh and PIBA, all also opposing a legislative tariff, made similar suggestions.

3.180 Ben Hytner QC made the following suggestion:

I see no reason why Parliament should not list a number of clearly identifiable “conventional” awards eg quadriplegia, paraplegia, loss of arm above/below the elbow, or leg above/below the knee, loss of one/both eyes together with a figure for the injury of maximum severity ie the ceiling figure. Judges should then be free to take into account in each case the age or other attributes of the plaintiff, and where the injury, if not a conventional one, relates to the scale. The Court of Appeal would then begin to give guideline awards in non-conventional cases. To avoid odd amounts being awarded, I think that subordinate legislation every two years (more often in periods of rampant inflation, less frequently in periods of stability) should take account of inflation, and that judges [should] be bound by current legislative levels.

3.181 George Pulman QC made a number of suggestions. He said:

(i) An Act [could be] passed providing that the current ceiling is doubled. This could be by reference to one case decided in the Court of Appeal. For example:

“(a) For injuries of the severity of those suffered by the Plaintiff in *Jones v Smith* 1996 1 XLR 1 the award of general damages is hereafter doubled.

(b) the awards of general damages in claims for personal injury hereafter shall be proportionately increased.

(c) The range of awards of general damages is to be by reference to the range hereby created. Awards of general damages for injuries of modest severity are to remain unchanged.”

After a while a whole new range of cases will exist and cases can be compared. A helpful scale of “increases” would be published in Kemp & Kemp....

(iii) An Act could be passed giving the JSB power to recommend changes in awards; and such change would be given effect every 5 years by Statutory Instrument.

(iv) An Act could be passed giving two scales. The old scale would have £1,000 at the bottom and £125,000 at the top. The new scale would be £1,000 at the bottom and £250,000 at the top.

Such a scheme has the advantage that it can accommodate cases which presently exceed the top end of the range. For example:

quadriplegia plus blindness plus deafness exceeds the award for quadriplegia at £125,000....

3.182 These suggestions caused us to reflect on whether or not it would be possible to devise a legislative provision which had the effect of increasing damages for non-pecuniary loss in personal cases, while otherwise leaving the current system for the assessment of damages the same. If this were possible, it would seem to us the best alternative to a judicial increase, because it would least interfere with current arrangements.

3.183 Although our initial view was that such legislation would at the very least be unusual and, at worst, impossible to draft, we have come to the conclusion, with the great assistance of Parliamentary Counsel, that such a legislative enactment is possible. The following is a draft statutory clause illustrating what we have in mind:

Increase in damages for non-pecuniary loss.

.-(1) This section applies to damages for pain and suffering and loss of amenity awarded for serious personal injury in cases where the cause of action arises after this section comes into force.

(2) At the time when this section comes into force the appropriate level of damages is [one and a half times] the level that would have applied in a comparable case on [date “y”], adjusted to take account of the change in the value of money between [date “y”] and the time when this section comes into force.

(3) Subsection (2) does not affect -

(a) any power of a court to adjust the level of damages to take account of changes in circumstances after this section comes into force, or

(b) the duty of a court to take account of changes in the value of money after that time.

(4) Subsection (2) is subject to any limit placed on the level of damages by any other enactment.²¹⁸

(5) For the purposes of subsection (1) -

(a) “personal injury” includes any disease or any impairment of a person’s physical or mental condition, and

(b) an injury is serious if the most that would have been awarded on [date y] for pain and suffering and loss of amenity in a case on any facts involving that injury alone was more than [£3,000].

²¹⁸ This is intended to accommodate legislation like the Carriage by Air Act 1961, the Carriage of Passengers by Road Act 1974 and s 17 of the Merchant Shipping Act 1979. See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 2.39, note 154.

3.184 We should point out the following:

- (1) It will be noticed that the provision is drafted without providing for the tapered increase which we have recommended at para 3.110 above for cases in which the current damages for non-pecuniary loss, assuming full liability, would be between £2,001 and £3,000. In the event that it is necessary to rely on this “fall-back” method of implementation, the question of how best to provide for our recommended increase for such cases will need to be considered.
- (2) As the provision is drafted to apply only to causes of actions arising after it comes into force, it would be some time until it applied to all personal injury cases. The provision has been framed in this way on the basis that legislation, unlike judicial reform, tends to be prospective. Its effect would be that two tariffs of awards for non-pecuniary loss in personal injury cases would co-exist for some time.
- (3) There would be the possibility of judicial developments between date “y” and the date the provision came into force. These would not be carried forward. It would be necessary to minimise the risk of this occurring by ensuring that date “y” was as near as possible to that on which the provision was brought into force.

3.185 These observations highlight that, while a legislative uplift of damages for non-pecuniary loss in personal injury cases which preserves the current system for the assessment of damages is possible, legislative interference will have some effects which case by case development would not. Moreover there would be an element of uncertainty as to exactly how the legislative enactment would work in practice. Hence our view that a judicial uplift is preferable is confirmed by consideration of this option.

3.186 Nevertheless we consider legislation in the form suggested to be a perfectly adequate means of achieving an uplift should our recommended increase not be effected in the course of litigation. Indeed we are conscious that some would prefer legislation because it necessarily involves Parliament. Moreover reform in this area of the law is of pressing importance and is felt by many to be well overdue already. Accordingly, if our recommendation that damages for non-pecuniary loss in personal injury cases be increased is not effected in the course of litigation within a reasonable period of time (say three years from the date of publication of our report), we consider that it should be implemented by legislative enactment broadly in the form we have suggested. In other words, this is our “fall-back” recommendation.

3.187 In the event that the fall-back position is to be relied on, it will be necessary to check that the factor increase recommended by us has the same value in real terms when the proposed legislation is to be enacted. In other words, if increases in damages fall significantly behind inflation, or if they significantly outstrip inflation, it may be necessary for an adjustment to be made to the factor increase. Those eventualities aside, we envisage that the recommendation made in this report will remain valid for at least three years from the date of publication. Indeed, barring a major and cataclysmic alteration to the social and economic environment in England and Wales, we believe that the level of damages for non-pecuniary loss in

personal injury cases recommended by us will be seen as fair for a long time to come.²¹⁹

- 3.188 **We therefore recommend that, if the minimum increase recommended by us in paragraph 3.110 above is not achieved by the judiciary within a reasonable period (say three years from the date of publication of this report), it should be implemented by legislative enactment broadly in the form we have suggested in paragraph 3.183 above.**

ADDENDUM: (OTHER) CHANGES TO ASSIST JUDGES IN ASSESSING DAMAGES FOR NON-PECUNIARY LOSS

- 3.189 In this addendum we look at possible changes that might be made to assist judges in assessing damages for non-pecuniary loss (other than through juries playing a more extensive role, a Compensation Advisory Board or a legislative tariff). We are focusing here not so much on altering the tariff of damages but rather on how, whatever the level of damages, one might help judges in assessing damages for non-pecuniary loss in an individual case. We have included this as an addendum because, as shall be seen, most of the suggestions are matters of practice and we are not recommending any legislative reforms (although some of the ideas may be of interest to, for example, the Judicial Studies Board).

(1) Greater reliance on medical “scores”

- 3.190 In the consultation paper we raised the possibility of using recognised medical scoring systems to assess the claimant’s injury, and then to assign tariff values to the various scores.²²⁰ We expressed no provisional view on the issue of medical scoring but asked consultees, particularly those with appropriate medical experience, whether they thought greater reliance should be placed on medical scoring in comparing awards for non-pecuniary loss, and if they thought it would be possible and sensible to devise a special scoring system to assess damages for non-pecuniary loss in personal injury cases.
- 3.191 Of those who responded to this question, only 20 per cent were in favour of greater reliance on medical scoring, while 17 per cent gave qualified support, or were doubtful, but not actually opposed to it. The majority, 63 per cent, did not think that there should be greater reliance on medical scoring. A small number of consultees considered whether a new system should be devised.
- 3.192 Among the majority of consultees who were not in favour of greater reliance on medical scoring, it was observed by many that such systems were unable to reflect all the factors which should be taken into account in the assessment of damages. It was noticeable that large numbers of practitioners were strongly opposed to medical scoring systems. APIL foresaw difficulties in practice, for example about which doctor should do the scoring and how this could be challenged.

²¹⁹ See also para 3.168, note 210 above.

²²⁰ See for discussion of this issue, *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 4.77-4.79.

3.193 Those in favour of medical scoring systems tended to base their view on the sorts of arguments put forward in the consultation paper, and to consider that existing scoring systems should be refined and adapted.²²¹ It was observed that scoring has already been adopted by practitioners in certain areas, such as deafness and asbestos-related claims.

3.194 **In view of the opposition of the majority of consultees to the increased use of medical scoring, and the reservations expressed by many who gave it some support, we reject reforming the law by greater reliance being placed on medical “scores”.**

(2) Computerised assistance

3.195 In the consultation paper we noted the possibility of developing a scheme, using computers, to enable judges to have easy access to information on past damages awards. This would tie in with increasing interest in the use of information technology as a tool serving the administration of justice. We asked consultees for their views as to whether, and how, greater use could be made of computers to aid the more consistent assessment by judges of damages for non-pecuniary loss.

3.196 Of those who responded on this issue, 79 per cent were in favour of greater use of computers, although views differed as to exactly how this should take place. Some made the radical suggestion that computer programmes should be developed to assist in the actual assessment of damages, one consultee going so far as to say that in time the function of the judge in this sphere would be usurped.

3.197 Attention was, however, drawn to the technical difficulties of devising a computer system able to work in this way. One of our consultees was the Canadian Professor who directed the FLAIR Project, Professor J C Smith. This project involved the construction of an extensive database of damages awards for soft tissue injury (whiplash). The database is now licensed to the Insurance Corporation of British Columbia and is available to the judiciary and the legal profession. However, the attempt made in the project to create an intelligent computer system to set awards on the basis of the database, using a rule-based expert system and neural net approach, failed to produce a system which was sufficiently accurate to be of value.²²² Professor Alan A Paterson, however, said that a computer package designed to assist in the more *consistent* assessment of damages already exists in Scotland.

3.198 Other consultees put forward less radical propositions. Attention was drawn to computer programmes to assist in calculating interest. Several consultees argued for creation of a database of awards to assist in the search for comparable

²²¹ For example, the British Medical Association considered there to be some merit in exploring the adaptation of existing medical scoring systems for use in assessing damages for non-pecuniary loss. The British Society of Rehabilitation Medicine and Mr Julian Shah saw it as entirely possible to devise an appropriate scoring system, and thought that this would produce greater fairness and clarity.

²²² A Terrett, “Neural Networks - Towards Predictive Law Machines”, International Journal of Law and Information Technology, Vol 3 No 1 p 94.

authorities. It was thought that this would be of use both to practitioners and the judiciary, for example in saving time and in promoting consistency.

- 3.199 The suggestion was also put forward that something like the JSB *Guidelines* be computerised, possibly including more detail and being automatically index-linked. The point was also made that if the *Guidelines* themselves were to be regularly updated, they could be distributed more easily by computer.
- 3.200 Consultees who were opposed to the use of computers in the assessment of damages tended to think that existing materials were sufficient to enable judges to fit a given case into the pattern of previous awards. The problem was not the availability of information, but the level of awards, and the basis on which damages should be given. Moreover, a centralised computer database would be impracticable, and there would be a danger that information provided would be of a lower quality than at present.
- 3.201 We do not propose ourselves to recommend legislation in this area. However, we have noted the creation of the Civil Justice IT Strategy Development Group, which has been set up by the Minister of State at the Lord Chancellor's Department. This group has been charged with making recommendations for the role of IT in civil justice over the next five to fifteen years. A consultation paper, *Civil Justice: Resolving and Avoiding Disputes in the Information Age*, was issued by the Lord Chancellor's Department in September 1998 as a first step in this work. In order that the points made by consultees should be considered in this context we have forwarded relevant extracts from consultees' responses to the Lord Chancellor's Department.
- 3.202 **At least at this stage, (when technology appears to be insufficiently developed) we do not recommend legislation in relation to the use of computers in assessing personal injury damages. Nevertheless we have forwarded the views of consultees to the Lord Chancellors' Department for consideration by those entrusted with developing information technology for the judiciary.**

(3) Other ways of assisting the judiciary

- 3.203 Aside from the specific questions asked, we enquired of consultees whether there were any other ways in which the judiciary might be assisted in fixing the amounts to be awarded for non-pecuniary loss.
- 3.204 Only 23 per cent of respondents answered this question. The main issue raised which we have not already canvassed above, was that of the desirability of additional judicial training or specialisation. A number of consultees argued that the training of the judiciary should be improved. Training should be mandatory and should take place more frequently. A variety of new topics were suggested for inclusion in judicial training, including updates in medical developments, training in recognition of social and cultural problems, disability awareness training and training in the psychological implications of different types of personal injury. Others consultees argued for establishment of a specialised bench to try personal injury actions.

3.205 **We have forwarded details of the views expressed to the Judicial Studies Board but make no specific recommendations ourselves.**

PART IV

WHERE CHANGE IS REQUIRED II: REDUCING THE ROLE OF JURIES IN ASSESSING DAMAGES

1. THE ASSESSMENT OF COMPENSATORY DAMAGES FOR PERSONAL INJURY SHOULD NOT BE LEFT TO A JURY

- 4.1 Under section 69 of the Supreme Court Act 1981 there is a right to jury trial in claims for libel, slander, malicious prosecution, false imprisonment or where there is a charge of fraud.¹ Otherwise trial is generally by judge alone, although the court has a discretion to order trial by jury. In *Ward v James*² the Court of Appeal held that personal injury cases should almost always be tried by a judge, because jury trial fails to achieve uniformity and predictability in damages awards. In *H v Ministry of Defence*³ this proposition was confirmed and strengthened. Lord Donaldson MR said:

...trial by jury is normally inappropriate for any personal injury action in so far as the jury is required to assess compensatory damages, because the assessment of such damages must be based upon or have regard to conventional scales of damages.⁴

- 4.2 In the consultation paper we provisionally proposed that juries should never be called upon to assess compensatory damages for personal injury.⁵ We considered this conclusion to be warranted by the difficulty of assessing damages for non-pecuniary loss in personal injury cases and the development of a judicial tariff to ensure consistency and uniformity. Of the consultees who responded on this point, 87 per cent agreed with our provisional proposal.⁶ In addition to the arguments

¹ But note that in respect of a charge of fraud, the application for jury trial must be by the party against whom the charge of fraud is made. Also s 69 provides that jury trial should not be ordered if “the Court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury”. See also s 66 of the County Courts Act 1984 for the equivalent provision for the County Courts.

² [1966] 1 QB 273.

³ [1991] 2 QB 103.

⁴ *Ibid*, at p 112. Lord Donaldson MR gave the judgment of the Court of Appeal, reversing a decision by Hutchison J who had ordered trial by jury in a case where a major part of the claimant’s penis had been amputated. *Ward v James* was decided under s 6 of the Administration of Justice (Miscellaneous Provisions) Act 1933, which provided simply for the court to have a discretion to order jury trial. *H v Ministry of Defence* was decided under s 69 of the Supreme Court Act 1981 pursuant to which there is a prima facie presumption against jury trial. In the Court of Appeal’s view, the change in statutory wording strengthened the presumption against jury trial. See also, generally, *Hendry v Chief Constable of Lancashire Constabulary*, 7 December 1993 (unreported) CA.

⁵ See for our complete discussion of this issue Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.82-4.85.

⁶ Our informal consultation with the judiciary disclosed similar levels of support for the view that assessment of compensatory damages should always be a matter for the judge.

put by us, it was pointed out that assessment of damages by juries makes settlement more difficult and increases the likelihood of appeal.

- 4.3 Thirteen per cent of those who responded on this issue were in favour of jury trial of personal injury cases. A recurrent argument was that jury assessment of damages for non-pecuniary loss would lead to a re-valuation of damages properly to reflect public opinion, and would be less subject to erosion over time.⁷ Consultees cited Scottish experience to show that juries are reliable and consistent. They also considered it significant that Scottish practitioners favour the system.⁸
- 4.4 **However, in keeping with the strong majority support for our provisional proposal, we recommend that the assessment of compensatory damages for personal injury should always be for a judge and should never be a matter for a jury.** (Draft Bill, clauses 1(1) and 1(2))
- 4.5 The effect of this recommendation is that where there is an existing right to trial by jury the assessment of damages for personal injury (that is, for a physical injury, disease or illness or for a recognised psychiatric illness) should be made by the judge and not the jury. So, for example, where the victim of a false imprisonment or malicious prosecution alleges battery or a (directly caused) illness, the judge and not the jury should assess the damages for the personal injury.⁹ In all other cases where there is at present a discretion to order trial by jury and a jury trial is (exceptionally) ordered, the assessment of damages for personal injury should again be made by the judge and not the jury.

2. THE ASSESSMENT OF COMPENSATORY DAMAGES (OTHER THAN FOR PERSONAL INJURY) IN NON-DEFAMATION CASES

- 4.6 The next closely-related question is whether in a jury trial for false imprisonment or malicious prosecution or, indeed, in any other non-defamation case,¹⁰

⁷ See our discussion at paras 3.114-3.117 above.

⁸ See our discussion of the position in Scotland at paras 3.90-3.98 above.

⁹ In principle, it seems that damages for personal injury (for example a psychiatric illness) could be awarded in an action for libel or slander. This possibility was expressly left open by the Court of Appeal in *Wheeler v Somerfield* [1966] 2 QB 94, 104. For Australian cases, allowing or tending to allow such damages, see *Rigby v Mirror Newspapers Ltd* (1963) 24 SR (NSW) 34; *McRae v South Australian Telecasters Ltd* (1976) 145 ASR 162; *Mirror Newspaper Ltd v Jools* (1985) 65 ALR 174; *Sattin v Nationwide News Property Ltd* (1996) 39 NSWLR 32. For commentators' views (tending to favour recovery), see *McGregor on Damages* (16th ed, 1997), para 1896, "No authorities appear on injury to health. It is submitted that recovery ought to be allowed ..."; D Price, *Defamation, Law, Procedure and Practice* (1998) p 163; "There is no reported authority of a plaintiff in a defamation action recovering for post traumatic stress syndrome. Nevertheless, there is no reason why not, provided causation and foreseeability can be proved." The position is more complicated for slander actionable only on proof of damage: see *Allsop v Allsop* (1860) 5 H & N 534, and the discussion in *McGregor on Damages*, paras 86, 194, 1873. In line with the principled approach, clause 1(2) of our Draft Bill has been drafted on the basis that damages for personal injury can be awarded in an action for libel and slander.

¹⁰ Theoretically there are two other areas (ie outside defamation, false imprisonment and malicious prosecution) where a jury can assess compensatory damages other than for personal injury, although these are very unlikely to arise in practice: (i) where there is a

compensatory (including aggravated) damages (other than damages for personal injury)¹¹ should be assessed by a jury.

- 4.7 In the consultation paper, we envisaged that in a jury trial the consequence of the recommendation in paragraph 4.4 above would be that, while the judge would assess damages for the non-pecuniary and pecuniary loss consequent on any personal injury, the jury would assess any other damages, including aggravated and/or exemplary damages (if available). But we pointed out that we would be addressing the role of aggravated and exemplary damages in our Report on Aggravated, Exemplary and Restitutionary Damages. We have since published that Report.¹² It made three recommendations which are of relevance here. First, we proposed a legislative provision to make clear that aggravated damages are concerned to compensate for mental distress and not to punish. Secondly, we recommended that the availability and quantum of exemplary or, as we prefer to call them, punitive damages, should always be determined by a judge. Thirdly, we recommended that where an issue on restitutionary damages overlapped with an issue on punitive damages, the availability of restitutionary damages should be for a judge, not a jury.¹³
- 4.8 In our view it would be workable for the judge to assess damages for a personal injury resulting from a false imprisonment or malicious prosecution and any punitive damages, while the jury assessed compensatory (including aggravated) damages for the false imprisonment or malicious prosecution itself. However, it would be simpler and more coherent (and in line with most of our consultees' general dislike of assessment of damages by juries) if judges in these cases were also charged with assessing compensatory damages (including aggravated damages) for the false imprisonment or malicious prosecution. Moreover, assessment by a judge rather than a jury is likely to enhance consistency and predictability.¹⁴
- 4.9 Developments in case law since the publication of our consultation paper have gone some way towards controlling the assessment of damages by juries in non-personal injury cases. We provisionally recommended that a judge in directing the

charge of fraud and an application for jury trial is granted; (ii) where a judge exercises his discretion to order trial by jury in a non-personal injury case.

¹¹ See the recommendation in para 4.4 above.

¹² (1997) Law Com 247.

¹³ *Ibid*, paras 2.39-2.43, 3.54-3.56, 5.81-5.98.

¹⁴ Moreover, we consider that this split of function would be feasible on the same analysis as that employed in our Report on Aggravated, Exemplary and Restitutionary Damages (1997) Law Com 247 at paras 5.87-5.89 in relation to the assessment by judges of punitive damages. See paras 4.20-4.21 below regarding defamation cases. *Darragh & ors v Chief Constable of Thames Valley Police* (unreported, transcript 16 October 1998) is an interesting case in this respect. The trial judge ordered trial by judge alone, on the basis that a decision on quantum would require prolonged examination of documents. See para 4.1 note 1 above. The Court of Appeal observed that while some of the issues in the case, for example allegations of police brutality and misconduct, would best be tried by a jury, the question of damages would best be decided by a judge alone. A split trial was not a possible solution, since the parties were against this. The Court of Appeal concluded that it should not interfere with the trial judge's exercise of his discretion in the circumstances.

jury in relation to the assessment of damages in defamation - and in any other non-defamation case where a jury is required to assess damages for non-pecuniary loss (for example, for malicious prosecution or false imprisonment) - should inform the jury of the range of awards for non-pecuniary loss in personal injury cases.¹⁵ As regards defamation, as we shall see below, this recommendation was “implemented” by the Court of Appeal in *John v Mirror Group Newspapers Ltd.*¹⁶ In respect of false imprisonment and malicious prosecution the Court of Appeal went further in *Thompson v Commissioner of Police for the Metropolis*¹⁷, when it laid down detailed guidelines for juries in assessing damages. This was in an attempt to combat startling variations in jury assessed awards of damages against the police for false imprisonment and malicious prosecution. Lord Woolf MR said:

We have...been referred to a number of cases in which juries have made awards, both cases which are under appeal and cases which are not and the variations in the range of figures which are covered is striking. The variations disclose no logical pattern. There are also examples in the appendix to *Clayton & Tomlinson on Civil Actions Against the Police* 2nd ed (1992), of which the same is true... .These examples confirm our impression that a more structured approach to the guidance given to juries in these actions is now overdue.¹⁸

4.10 Lord Woolf MR then went into considerable detail in setting out the guidance which should be given to juries. For example, he said:

The jury should be told that the basic damages will depend on the circumstances and the degree of harm suffered by the plaintiff. But they should be provided with an appropriate bracket to use as a starting point. The Judge will be responsible for determining the

¹⁵ See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 4.103.

¹⁶ [1997] QB 586.

¹⁷ [1997] 3 WLR 403.

¹⁸ *Thompson v Commissioner of Police for the Metropolis* [1997] 3 WLR 403, 415. See the description of *George Glen Lewis v The Chief Constable West Midlands Police* in “Substantial Quantum for Wrongful Imprisonment” Personal and Medical Injuries Law Letter, April 1998, p 28. It is recorded that a settlement for £200,000 (plus discharge of any liability to the CRU) was agreed. The apportionment of the damages suggested by the defendant was: special damages - £70,000; general damages including aggravated damages for false imprisonment - £100,000; injuries - £10,000; damages for malicious prosecution - £10,000; exemplary damages - £10,000. The case involved a malicious prosecution for armed robbery and burglary, following which the claimant was in custody for 5 and a half years. Also see reports in *The Times* and *The Daily Telegraph* on 10 April 1998 of a jury award of £443,500 at the Liverpool County Court to a taxi driver, Mr Randles, who brought a claim against the police. The award was in respect of a finding of assault only, since we understand that Mr Randles’ claims of false imprisonment and malicious prosecution were not allowed to go the jury. We understand that the award was made up of £40,000 for post-traumatic stress disorder, £3,500 for the victim’s physical injuries, £100,000 aggravated damages and £300,000 exemplary damages, and that it is subject to an appeal. See also *Hussain (Walayat) v Chief Constable of West Midlands Police* (1997) 22 September 1997, Birmingham County Court, Legal Action, January 1998, p 15, in which HHJ Corrie awarded damages of £2,000 for wrongful arrest, false imprisonment and trespass to land. The judge declined to apply the guidance contained in *Thompson* mechanistically and awarded a larger sum to reflect particular features of the case.

bracket, and we envisage that in the ordinary way the Judge will have heard submissions on the matter from counsel in the absence of the jury... Though this is not what was proposed in the case of a defamation action in *John v MGN Ltd.*...submissions by counsel in the absence of the jury are likely to have advantages because of the resemblance between the sum to be awarded in false imprisonment cases and ordinary personal injury cases, and because a greater number of precedents may be cited in this class of case than in a defamation action. We therefore think it would be better for the debate to take place in the absence of the jury... .

In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale¹⁹... . In the case of malicious prosecution the figure should start at about £2,000 and for prosecution continuing for as long as two years, the case being taken to the Crown Court, an award of about £10,000 could be appropriate.²⁰

4.11 We have considered whether, in the light of *Thompson*,²¹ it would be preferable to leave juries to assess damages for the false imprisonment and malicious prosecution itself. But for the same reasons (for example, avoiding the need for

¹⁹ See *Evans v The Governor of HM Prison Brockhill* [1999] 2 WLR 103. The claimant was falsely imprisoned for 59 days, as a result of erroneous case law. Lord Woolf MR, with whose comments on quantum Judge LJ and Roch LJ agreed, distinguished *Thompson*, and increased the award made from £2,000 to £5,000. He also recommended that a global approach be taken to quantum, rather than applying a daily, weekly or monthly figure, since no two cases are the same.

²⁰ *Thompson v Commissioner of Police for the Metropolis* *Ibid* [1997] 3 WLR 403, 415-416. It is also interesting to see other specific comments made by Lord Woolf MR about the relevance of levels of compensation for personal injury to damages in police cases. At 413 he said: "Apart from the freedom of speech aspect of defamation, it can be said that there is in fact more reason to assist juries in actions for false imprisonment. Part of the claim can have, as in both of these appeals, a personal injury element which makes the experience in ordinary personal injury cases directly relevant. A difference in the awards for compensation for the same injury, ignoring any question of aggravation, cannot be justified because the award is by a jury in a small minority of cases (the false imprisonment cases) while in the majority of cases (the other personal injury cases) the award is by a judge. If this court would intervene in one situation it should do so in the other. There is no justification for two tariffs. Furthermore even where what is being calculated is the proper compensation for loss of liberty or the damaging effect of a malicious prosecution the analogy with personal injuries is closer than it is in the case of defamation. The compensation is for something which is akin to pain and suffering" At 418 he said "We appreciate that the guideline figures depart from the figures frequently awarded by juries at the present time. However they are designed to establish some relationship between the figures awarded in this area and those awarded for personal injuries."

²¹ [1997] 3 WLR 403.

appellate controls of jury awards, and ensuring consistency, predictability and reasoned decision-making) that we decided in relation to punitive damages that *Thompson*²² (and *John*)²³ did not undermine a recommendation for the removal of jury assessment, so here we believe that the restrictions laid down in *Thompson* have already so limited the role of juries that removal of jury assessment is the obvious next step. We therefore take the view that in a false imprisonment or malicious prosecution (or any other non-defamation) case the assessment of compensatory damages should always be for a judge and never for a jury.

4.12 We recommend that in a false imprisonment or malicious prosecution, or any other non-defamation case, the assessment of compensatory damages (other than damages for personal injury, which are already covered by the recommendation in paragraph 4.4 above) should always be for a judge and should never be a matter for a jury. (Draft Bill clause 1(1))

4.13 In respect of compensatory damages the draft Bill, set out at Appendix A, makes clear how courts, in a jury trial, should differentiate between issues regarding liability and issues regarding quantum. Clause 1(1) and (2) provide that decisions about “the amount of damages to be awarded as compensation for any recoverable loss” are to be taken by the judge. This leaves to the jury (factual) decisions about whether or not a loss has been suffered and is recoverable, including issues of causation and remoteness. It will also be for the jury to decide as a matter of fact the extent to which, if at all, a claimant has failed in the duty to mitigate. Equally, it will be for the jury to decide the factual question whether there is a loss for which aggravated damages (which are damages compensating for mental distress)²⁴ are recoverable, and for the judge to decide the amount of those damages. Clause 1(4) and (5) provide that it will be for the jury to decide the extent of the reduction for contributory negligence²⁵ (that is, the percentage reduction), and for the judge to apply this finding to the assessment of damages.²⁶

²² *Ibid.*

²³ [1997] QB 586.

²⁴ See Aggravated, Exemplary and Restitutionary Damages (1997) Law Com No 247, Part II and Draft Bill, Clause 13.

²⁵ Out of an abundance of caution, clause 1(4) cross-refers to 1(2) (personal injury damages being claimed in an action for libel or slander) rather than merely 1(1). We are not aware of any case in which the question of contributory negligence has been raised in an action for libel or slander. For a general discussion of the scope of the defence of contributory negligence, see A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed, 1994), pp 79-80; G Williams, *Joint Torts and Contributory Negligence* (1951), pp 318-9, 326-8. Also out of an abundance of caution, the consequential amendment to the Law Reform (Contributory Negligence) Act 1945 in clause 1(6) takes account not merely of a reduction of compensatory damages but also of a reduction of punitive damages (although it is unclear whether the 1945 Act can apply to punitive damages). In relation to punitive damages the jury would have no role (see clause 1(3)) and hence should not determine the extent of the reduction for contributory negligence.

²⁶ There is no need to make separate provision for contribution proceedings, which are governed by the Civil Liability (Contribution) Act 1978, because an award of contribution is not an award of damages. Hence, the effect of Clause 1(1) & (2) of the Draft Bill in contribution proceedings before a jury, would be that the judge would determine the separate and prior question of the amount of damages that the claimant should recover

3. THE ASSESSMENT OF COMPENSATORY DAMAGES (OTHER THAN FOR PERSONAL INJURY) IN DEFAMATION CASES

- 4.14 We thought it crucial for the consultation paper to consider the assessment of compensatory damages by juries in defamation cases,²⁷ because the comparatively large awards made in those cases are often cited as evidence that damages for non-pecuniary loss owing to personal injury are too low. Our view was that the disparity between the sums of compensation awarded in the two types of cases offended the proper relationship which ought to exist between pain and suffering and loss of amenity on the one hand, and loss of reputation and injury to feelings on the other.²⁸
- 4.15 We considered the radical solution of removing the right to jury trial in defamation cases to be beyond the scope of our enquiry. However, we consulted on two main issues, as follows:
- (1) We reluctantly reached the provisional view that it would be unworkable to split the determination of liability and damages between jury and judge in defamation cases;
 - (2) We provisionally recommended that a judge, in directing the jury in relation to the assessment of damages in a defamation case, should inform the jury of the range of awards for non-pecuniary loss in personal injury cases as is conveniently set out in the JSB *Guidelines*.
- 4.16 After the consultation paper went to the printers but before its publication, the provisional recommendation above was “implemented” by the Court of Appeal in *John v Mirror Group Newspapers Ltd*.²⁹ In that case the singer, Elton John, sued Mirror Group Newspapers for libel and was awarded £75,000 compensatory damages and £275,000 exemplary damages by a jury. The defendants appealed

from the original defendant(s). However, it would be for the jury to determine the percentage contribution that was just and equitable as between the defendants.

²⁷ See Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, paras 4.86-4.104.

²⁸ See Personal Injury Compensation: How Much Is Enough? (1994) Law Com 225 section 11.4, p 207 where Professor Genn records the expression of this view by individual personal injury victims.

²⁹ [1997] QB 586. See also *HM Prison Service and ors v Johnson* [1997] ICR 275, in which the Employment Appeal Tribunal upheld an award of £21,000 for injury to feelings caused by racial discrimination. The award was upheld on the basis that it was not grossly or obviously out of line with the general range of personal injury awards, nor with the injury to reputation award in *John v Mirror Group Newspapers Ltd*. Smith J said at 282-283: “Lord Meston accepted that it is not possible or desirable that there should be any attempt to draw a direct comparison between personal injury damages and compensation for injury to feelings. But he submitted, and we accept, that tribunals should have regard to the general order of magnitude of personal injury awards. It would, we agree with Lord Meston, be undesirable if there were to be a gross and obvious disparity between awards in these two fields. In this regard Lord Meston referred us to the bracket of awards recommended by the Judicial Studies Board for cases of post traumatic stress disorder....We summarise the principles which we draw from these authorities:...Awards should bear some broad general similarity to the range of awards in personal injury cases. We do not think this should be done by reference to any particular type of personal injury award, rather to the whole range of such awards.”

the award of damages. In *Rantzen v Mirror Group Newspapers (1986) Ltd*,³⁰ the Court of Appeal had rejected the suggestion that juries should be referred to levels of awards in personal injury actions, but in *John*³¹ the Court of Appeal accepted that this decision should be reconsidered, in particular because of continuing evidence of excessive libel awards. Sir Thomas Bingham MR (as he then was), giving judgment for the court, examined four possible changes in practice. He rejected the possibility of judges referring juries to previous jury awards in libel cases, but agreed with *Rantzen*³² that reference might be made to awards approved or made by the Court of Appeal.

- 4.17 He also considered that referring juries to conventional levels of awards for personal injuries was acceptable as a check on the reasonableness of the juries' proposed award for defamation, even if it would not be right to treat the two types of award as equivalent. In his words:

...it is one thing to say (and we agree) that there can be no precise equiparation between a serious libel and (say) serious brain damage; but it is another to point out to a jury considering the award of damages for a serious libel that the maximum conventional award for pain and suffering and loss of amenity to a plaintiff suffering from very severe brain damage is about £125,000 and that this is something of which the jury may take account... It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons.³³

- 4.18 The Court of Appeal also rejected the reasons given in previous cases for not allowing counsel and the judge to make any suggestion to the jury as to what would be an appropriate award. It was thought that introduction of this practice would introduce a mood of realism on both sides.
- 4.19 We welcome this development. It is noteworthy that 76 per cent of consultees who responded on this issue agreed with our provisional recommendation.³⁴ Consultees recognised and commented on the lack of proportionality between damages for non-pecuniary loss in personal injury and in defamation cases. They regarded this as unjustified and unreflective of public opinion.
- 4.20 As regards our other provisional view, (that a split of function between judge, deciding quantum, and jury, deciding liability, was unworkable) we have been

³⁰ [1993] 4 All ER 975.

³¹ [1997] QB 586.

³² [1993] 4 All ER 975.

³³ [1997] QB 586, 614.

³⁴ Only a handful of consultees addressed the question whether the same approach should be applied in non-defamation cases. Of the very few who did, most agreed with our provisional recommendation (see para 4.9 above) that it should, essentially because there would be no logical ground on which to make a distinction.

persuaded, in the light of consultees' responses, that such a split of function between judge and jury is workable. In particular, some consultees drew a persuasive analogy with criminal trials in which juries decide on guilt or innocence and the judge decides the appropriate sentence.³⁵ Experience in New South Wales was also cited.³⁶

- 4.21 Nevertheless we do not think that it would here be appropriate for us to recommend that juries no longer assess (compensatory) damages in defamation cases. While we believe that a split in function between judge and jury would be workable, we note that in New South Wales, the split is not as envisaged in our consultation paper. Instead the issues for decision in a defamation case are split between judge and jury to ensure that there is no overlap in the questions for each to decide.³⁷ This suggests that it may be appropriate for the question whether juries should continue to assess compensatory damages in defamation actions to be considered in the context of how defamation actions as a whole should be tried.
- 4.22 Moreover we accept that before being altered further defamation law should be allowed to settle, particularly given that there has been so much change in recent years.³⁸ Indeed further change is anticipated in the near future. First, important provisions of the Defamation Act 1996 are to be brought into force.³⁹ Secondly, Article 10 of the European Convention on Human Rights guarantees freedom of expression. The Human Rights Act 1998 may therefore have an effect on the law of defamation.⁴⁰

³⁵ We set out full reasoning on this in our Report on Aggravated, Exemplary and Restitutionary Damages (1997) Law Com No 247, para 5.89.

³⁶ The Defamation Amendment Act 1994 (NSW), which came into force on 1 January 1995, provided that the trial judge and not the jury should determine whether any defence was established and the amount of the damages.

³⁷ See *Defamation* (1995) Report 75 of the New South Wales Law Reform Commission, pp 50-51, approving this alteration in the law, where it was said: "...most importantly, the assignment of defences to the judge alone follows directly from our decision...that damages are to be assessed by the judge. The quantum of damages depends on a number of findings of fact necessarily involved in the defences...The judge would have to know what the jury findings were on such issues in order to assess the damages. This may require the jury to make special findings on the issues. It would mean that the judge would have to explain the whole exercise to the jury. Not only would this be a difficult task which would consume a good deal of the court's time, it would also run the risk of generating inconsistent findings which would destroy the validity of the whole trial."

³⁸ See s 8 of the Courts and Legal Services Act 1990 (which gave the Court of Appeal the power on allowing an appeal to substitute its assessment of damages for that of the jury), *John v Mirror Group Newspapers Ltd* [1997] QB 586 and the Defamation Act 1996.

³⁹ See Lord Chancellor's Department *Press Notice*, 1 June 1998, which affirmed the Government's intention to bring the outstanding provisions of the Defamation Act 1996 into force as soon as reasonably practicable. Also now see the Lord Chancellor's Department *Press Notice*, 12 March 1999, which announced that sections 14 and 15 of the Defamation Act 1996 relating to statutory privilege would be brought into force from 1 April 1999, but made no further announcement about the other outstanding sections.

⁴⁰ For example in *Tolstoy v UK* (1995) 20 EHRR 442 the European Court of Human Rights quashed an award of damages of £1,500,000 on the ground that it was an unacceptable limitation on Count Tolstoy's right to freedom of speech.

- 4.23 **In jury trials of defamation cases we do not at this stage recommend assessment of compensatory damages (other than for personal injury)⁴¹ by the judge rather than the jury.**
- 4.24 Before leaving compensatory damages in defamation cases it should be noted that we asked consultees for their views as to whether there should be a statutory ceiling on damages for non-pecuniary loss in defamation cases.
- 4.25 Of the consultees who addressed this issue, 49 per cent were not in favour of a statutory ceiling, or were doubtful, while 38 per cent thought there should be a statutory ceiling. There was, however, considerable dissension on the level at which the limit should be set. Suggestions ranged from £10,000 to £500,000.
- 4.26 The group which opposed a statutory ceiling put forward many arguments. The view was expressed that it would be unjust to fetter the jury's (or judge's) freedom to express its displeasure at the defendant's conduct and to take account of profits made or of damage deliberately inflicted. The theoretical basis for a statutory ceiling was thought to be unclear; as was the answer to the question of why defamation should be singled out as requiring a statutory ceiling. Many thought that a cap would encourage the more outrageous libels, since the maximum price would be known in advance. The deterrent effect of the threat of unlimited damages would be lost. The point was also made that proposals for reform should not be unduly coloured by reaction to the few libel cases which receive considerable media coverage, often involving large awards to celebrities.
- 4.27 Practical objections were raised. For a ceiling to be high enough to provide compensation in the worst case, it would be of no use in the ordinary run of defamation cases and might, indeed, have an inflationary effect. If the limit were set too low, the victims of serious libels would be undercompensated. Also the whole range of awards might be depressed. Moreover experience shows that maxima are difficult to raise and do not keep pace with inflation. It would be difficult for the jury (or judge) to know where to place a particular case on the scale. In the absence of complex anti-avoidance provisions, a statutory maximum could be evaded if a claimant sued several publications.
- 4.28 The point was also made that a statutory ceiling is unnecessary. Practitioners are able to make fairly accurate assessments of the level at which the Court of Appeal will intervene, and recent developments in the case law will lead to an informal limit being set, most probably in line with the top award for non-pecuniary loss in personal injury cases.
- 4.29 A significant minority of consultees, however, favoured a statutory ceiling, some as a second choice to assessment of damages by a judge. A limit on damages for non-pecuniary loss would provide a useful yardstick, enabling a sliding scale to be established. Ludicrously high awards would be prevented, and guidance given in the most serious cases as to the maximum that should be awarded.
- 4.30 We have been impressed by the range of arguments against a statutory ceiling. Furthermore, it is a significant stumbling block that even consultees in favour did

⁴¹ See para 4.5 note 9 above.

not agree on the level at which a statutory ceiling should be set. **Accordingly, we have come to the conclusion that the option of imposing a statutory ceiling on damages for non-pecuniary loss owing to defamation should be rejected.**

4. PUNITIVE AND RESTITUTIONARY DAMAGES

- 4.31 We are very conscious that, in addition to the recommendations in paras 4.4 and 4.12 above, we have made recommendations on the role of juries in relation to punitive and restitutionary damages in our Report No 247 on Aggravated, Exemplary and Restitutionary Damages.⁴² To ensure coherence between all these recommendations - and to make sure that there are no unwarranted “gaps” left - it is now important first, to “sweep up” here the recommendations on the role of juries in relation to punitive⁴³ and restitutionary damages⁴⁴ from Report No 247; and, secondly, to take a small step further than we recommended on restitutionary damages in that Report so that a jury never decides whether restitutionary damages should be awarded or their amount.⁴⁵
- 4.32 **We therefore recommend that it should never be left to a jury to decide whether punitive and restitutionary damages should be awarded or their amount. (This “sweeps up” and goes slightly further than our recommendations on juries in Report No 247.)** (Draft Bill, clause 1(3))

⁴² See Report No 247, recommendations 9 and 17 and Draft Bill, clauses 2 and 12(4).

⁴³ We explained in Report No 247, at para 5.39, that we preferred the terminology of “punitive damages” to “exemplary damages”. Clause 1(2) of the Draft Bill appended to that Report reads, “Punitive damages are damages which were commonly called exemplary before the passing of this Act.”

⁴⁴ In Report No 247, Draft Bill, clause 15(6), restitutionary damages are defined as “damages designed to remove a benefit derived by a person from his tort or other wrong.”

⁴⁵ In Report No 247, recommendation 9, and Draft Bill, clause 12(4), we were purely concerned with the role of juries in relation to restitutionary damages where an issue on these damages overlapped with an issue arising in a claim for punitive damages. But it is within the spirit of that recommendation - and is supported by the general tenor of consultees’ responses to the questions on juries in our consultation papers on Aggravated, Exemplary and Restitutionary Damages, and on Damages for Non-Pecuniary Loss - to extend the recommendation to the availability - and quantum - of restitutionary damages generally.

PART V

SUMMARY OF RECOMMENDATIONS

1. WHERE CHANGE IS NOT REQUIRED

(1) Should damages for non-pecuniary loss be available at all?

- 5.1 We recommend that damages for non-pecuniary loss should be retained. (Paragraph 2.3)

(2) Should English law adopt the Canadian “functional” approach to the assessment of damages for non-pecuniary loss?

- 5.2 We do not recommend altering the traditional “diminution of value” approach to the assessment of damages for non-pecuniary loss. (Paragraph 2.7)

(3) Should a claimant who is unaware of his or her injury be entitled to damages for non-pecuniary loss?

- 5.3 We do not recommend changing the rules for damages for non-pecuniary loss in respect of permanently unconscious claimants, nor for those who are conscious but severely brain-damaged. (Paragraphs 2.19 & 2.24)

(4) Should there be a threshold for the recovery of damages for non-pecuniary loss?

- 5.4 We do not recommend the introduction of a threshold for the recovery of damages for non-pecuniary loss. (Paragraph 2.28)

(5) Should interest be awarded on damages for non-pecuniary loss and, if so, how much interest?

- 5.5 We recommend that interest should continue to be awarded on damages for non-pecuniary loss in personal injury cases. However, we recommend that the law should not be changed:

- (1) to provide for interest to be payable on damages for past non-pecuniary loss only;
- (2) to prescribe a new date from which interest on damages for non-pecuniary loss should be payable;
- (3) to change the rate of interest on damages for non-pecuniary loss in personal injury cases. (Paragraphs 2.32, 2.37, 2.45, and 2.58)

(6) Should damages for non-pecuniary loss survive the death of the victim?

- 5.6 We do not recommend any change to the law on the survival of damages for non-pecuniary loss following the victim’s death. (Paragraph 2.64)

(7) Does the question of overlap (between damages for loss of earnings and damages for loss of amenity) raised in *Fletcher v Autocar and Transporters Ltd* give rise to difficulty?

- 5.7 We make no recommendation for changing the law on the question of the overlap (between damages for loss of earnings and for loss of amenity) raised in *Fletcher v Autocar and Transporters Ltd*. (Paragraph 2.68)

2. WHERE CHANGE IS REQUIRED: INCREASING THE LEVELS OF DAMAGES

(1) Damages for non-pecuniary loss for serious personal injury should be increased

- 5.8 We recommend that:
- (1) in respect of injuries for which the current award for non-pecuniary loss for the injury alone would be more than £3,000, damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) should be increased by a factor of at least 1.5, but by not more than a factor of 2;
 - (2) in respect of injuries for which the current award for non-pecuniary loss for the injury alone would be in the range £2,001 to £3,000, damages for non-pecuniary loss (that is for pain and suffering and loss of amenity) should be increased by a series of tapered increases of less than a factor of 1.5 (so that, for example, an award now of £2,500 should be uplifted by around 25 per cent).
 - (3) Finally, if the increases recommended by us are not implemented until over a year after publication of this report, the recommended increases should be adjusted to take into account any change in the value of money since the publication of this report. (Paragraphs 3.40 and 3.110)

2. What mechanism should be employed to increase damages for non-pecuniary loss?

- 5.9 We reject the ideas of juries playing a greater role in assessing damages for personal injury than under the present law or of trial by jury being used as a means of providing sample awards for the judicial assessment of non-pecuniary loss; of creating a Compensation Advisory Board; or of creating a legislative tariff. (Paragraphs 3.117, 3.129 and 3.139)
- 5.10 We recommend that, at least initially, legislation imposing an increase in the level of damages for non-pecuniary loss in personal injury cases should be avoided. Instead we hope that the Court of Appeal and the House of Lords will use their existing powers to lay down guidelines, in a case or series of cases, which would raise damages in line with the increases recommended in paragraph 5.8 above. (Paragraph 3.165)
- 5.11 We do not recommend that the Court of Appeal and the House of Lords' current power to make and to alter guidelines for the assessment of damages for non-

¹ [1968] 2 QB 322.

pecuniary loss in personal injury cases should be enshrined in legislation. (Paragraph 3.170)

- 5.12 We do not recommend laying down in statute the common law duty on judges to take account of changes in the value of money when assessing damages for non-pecuniary loss in personal injury cases. (Paragraph 3.176)
- 5.13 We recommend that, if the minimum increase recommended by us in paragraph 5.8 above is not achieved by the judiciary within a reasonable period (say three years from the date of publication of this report), it should be implemented by legislative enactment broadly in the form we have suggested in paragraph 3.183 above. (Paragraph 3.188)

Addendum: (other) changes to assist judges in assessing damages for non-pecuniary loss

- 5.14 We reject reforming the law by greater reliance being placed on medical “scores,” by legislation in relation to the use of computers in assessing personal injury damages or by changes to judicial training. (Paragraphs 3.194, 3.202 & 3.205)

3. WHERE CHANGE IS REQUIRED: REDUCING THE ROLE OF JURIES IN ASSESSING DAMAGES

(1) The assessment of compensatory damages for personal injury should not be left to a jury

- 5.15 We recommend that the assessment of compensatory damages for personal injury should always be for a judge and should never be a matter for a jury. (Paragraph 4.4 & Draft Bill, clauses 1(1) and 1(2))

(2) The assessment of compensatory damages (other than for personal injury) in non-defamation cases

- 5.16 We recommend that in a false imprisonment or malicious prosecution, or any other non-defamation case, the assessment of compensatory damages (other than damages for personal injury which are already covered by the recommendation in paragraph 5.15 above) should always be for a judge and should never be a matter for a jury. (Paragraph 4.12 & Draft Bill Clause 1(1))

(3) The assessment of compensatory damages (other than for personal injury) in defamation cases

- 5.17 In jury trials of defamation cases we do not recommend assessment of compensatory damages (other than for personal injury) by the judge rather than the jury. In addition we reject the option of imposing a statutory ceiling on damages for non-pecuniary loss owing to defamation. (Paragraph 4.23 and 4.30)

(4) Punitive and restitutionary damages

- 5.18 We recommend that it should never be left to a jury to decide whether punitive and restitutionary damages should be awarded or their amount. (This “sweeps up” and goes slightly further than our recommendations on juries in Report No 247.) (Paragraph 4.32 & Draft Bill, clause 1(3))

(Signed)

MARY ARDEN, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
15 December 1998

APPENDIX A

Draft Damages (Role of Jury) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Damages: role of jury.
2. Short title, commencement and extent.

[NOTE: The Draft Bill and Explanatory Notes in Appendix A appear on pages 111-114 in the hard copy published version of this Report]

DRAFT
OF A
B I L L
TO

Make provision about the role of the jury in relation to damages. A.D. 1999.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 **1.**—(1) In any action, other than an action for libel or slander, a decision about the amount of damages to be awarded as compensation for any recoverable loss must not be left to a jury. Damages: role of jury.

(2) To the extent that an action for libel or slander is an action for personal injury, a decision about the amount of damages to be awarded as compensation for any recoverable loss must not be left to a jury. 10

(3) In any action, a decision whether to award punitive or restitutionary damages, or about the amount of such damages, must not be left to a jury.

(4) In subsections (1) and (2), the reference to a decision about the amount of damages to be awarded as compensation does not include a decision under section 1 of the Law Reform (Contributory Negligence) Act 1945 (apportionment of liability in case of contributory negligence) about the extent to which damages are to be reduced. 15 1945 c. 28.

(5) In section 1(6) of that Act (under which, if a case is tried with a jury, the jury must determine the total damages recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced) for the words from “determine” to the end there is substituted— 20

“(a) in relation to any damages whose amount is left to them for decision, determine—

25 (i) the amount which would have been recoverable if the claimant had not been at fault, and
(ii) the extent to which the damages are to be reduced;

(b) in relation to any damages to be awarded as compensation whose amount is not left to them for decision, determine the extent to which the damages which would have been recoverable if the claimant had not been at fault are to be reduced.”

5

(6) In this section—

“personal injury” includes any disease and any impairment of a person’s physical or mental condition;

“restitutionary damages” means damages designed to remove a benefit derived by a person from his tort or other wrong.

10

Short title,
commencement
and extent.

2.—(1) This Act may be cited as the Damages (Role of Jury) Act 1999.

(2) This Act comes into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.

(3) Nothing in this Act affects a cause of action accruing before the day on which this Act comes into force.

15

(4) This Act extends to England and Wales only.

EXPLANATORY NOTES

This draft Bill implements the recommendations in Part IV of this Report and is concerned to reduce the role of juries in assessing damages. It says nothing on the role of juries in criminal cases. Most civil cases are heard by a judge only but, under section 69 of the Supreme Court Act 1981 and section 66 of the County Courts Act 1984, a claimant has the right to jury trial in claims for libel, slander, malicious prosecution, false imprisonment or where there is a charge of fraud. The court otherwise has a discretion to order trial by jury but this is very rarely exercised.

Clause 1(1) lays down that, other than in an action for libel or slander, the assessment or quantum of compensatory damages (that is, damages compensating for a pecuniary or non-pecuniary loss) should be for the judge and never for a jury. Clause 1(2) lays down the same approach for the admittedly remote possibility (discussed at para 4.5 note 9 of this Report) of personal injury damages being claimed in an action for libel or slander. "Personal injury" is defined in the usual statutory manner in clause 1(6); mere mental distress, as opposed to a recognisable psychiatric illness, consequent on a libel or slander, should not be regarded as a personal injury. Clauses 1(1) and (2) implement the recommendations in paras 4.4 and 4.12 of this Report. The distinction between quantum (for the judge) and liability (for the jury) is explained further in para 4.13 of this Report. It should also be noted that, as made clear in *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, Part II and Draft Bill clause 13, so-called 'aggravated damages' are damages compensating for mental distress.

Clause 1(4) clarifies how the split between quantum and liability for compensatory damages works in relation to contributory negligence. The extent of the reduction for contributory negligence (that is, the percentage reduction) is a liability question for the jury to decide; and it is then for the judge to apply that finding to the assessment of damages. Out of an abundance of caution (there appears to be no case in which the question of contributory negligence has been raised in an action for libel or slander: see para 4.13 note 25 of this Report) clause 1(4) cross-refers to 1(2) as well as to 1(1). Clause 1(5) (which, out of an abundance of caution, takes account of the possibility of a reduction for contributory negligence of punitive, as well as compensatory damages: see para 4.13 note 25 of this Report) makes a consequential amendment to section 1(6) of the Law Reform (Contributory Negligence) Act 1945 which deals with the role of a jury where a case involving contributory negligence is tried with a jury.

Clause 1(3) implements the recommendation in para 4.32 of this Report. It repeats and (as regards restitutionary damages: see para 4.31 note 45 of this Report) goes slightly further than *Aggravated, Exemplary and Restitutionary Damages* (1997) Law Com No 247, recommendations 9 and 17 and Draft Bill clause 2 and 12(4). The definition of restitutionary damages in clause 1(6) repeats the definition in that Draft Bill, clause 15(6). Punitive damages are what have hitherto commonly been called exemplary damages: see Report No 247, para 5.39 and Draft Bill clause 1(2).

APPENDIX B

RESEARCH CARRIED OUT BY THE OFFICE FOR NATIONAL STATISTICS INTO PUBLIC PERCEPTIONS OF WHAT DAMAGES FOR NON-PECUNIARY LOSS IN PERSONAL INJURY CASES SHOULD BE

The full results of the research, which are set out in the hard copy published Report on pages 116-193, will be included in the Internet version of the Report as soon as possible.

Please note that those who carried out the original analysis and collection of the data bear no responsibility for the further analysis and interpretation of them.

Our interpretation and explanation of the research is at paras 3.42-3.59 and 3.63-3.64 above.

APPENDIX C

LIST OF PERSONS AND ORGANISATIONS WHO COMMENTED ON CONSULTATION PAPER NO 140

(This list does not include those consultees who requested that their responses remain anonymous)

Judiciary

District Judge Anthony Armon-Jones

Association of District Judges

The Lord Chief Justice Lord Bingham of Cornhill

Lord Justice Buxton

Civil Sub-Committee of the Council of Circuit Judges

Judge Anthony Diamond QC

Mr Justice Garland

Judge S P Grenfell

Judges of the Queen's Bench and Family Divisions

Mrs A B Macfarlane

Judge Michael Mander

Lord Justice Sedley

Lord Justice Stuart-Smith

Judge Robert Taylor

Judge Anthony Thompson QC

Barristers

Peter Andrews QC

Dr Michael Arnheim

Piers Ashworth QC

Bill Braithwaite QC

Michael Brent QC

Benjamin Browne QC

Andrew Buchan

Andrew Caldecott QC

Alex Carlile QC

Richard Clayton

A Collender QC

Nigel Cooksley
Jonathan Crystal
Iain S Goldrein and Margaret R De Haas
Charles Gray QC
John Hendy QC
B A Hytner QC
David Kemp QC
Brian Langstaff QC
Charles J Lewis
Bernard Livesey QC
Colin McEachran QC
Harvey McGregor QC
Alistair G MacDuff QC
Patrick Milmo QC
John Munkman
Sir Michael Ogden QC
Christopher Pitchford QC
James Price QC
George Pulman QC
One Pump Court
Jean H Ritchie QC
Thomas Saunt
Geoffrey Shaw QC
Jonathan Sofer
R M Stewart QC
David Stockdale QC
Raymond Walker QC
Ronald Walker QC
Peter Weitzman QC
Wyn Williams QC
Henry Witcomb

Solicitors

Trevor M Aldridge QC
Martin S Bruffell, Berrymans
Peter Carter-Ruck and Andrew Stephenson, Peter Carter-Ruck and Partners
Robert Clinton, Farrer & Co

Irwin Mitchell

Martin Kramer, Katherine Rimell, Rupert Earle and David Engel, Theodore Goddard

Terry Lee, Evill and Coleman

Leigh, Day & Co

M A M S Leigh, Hempsons

Leo Abse & Cohen

Anne Luttmann-Johnson

C P Mather, Penningtons

Oswald Hickson Collier

Alasdair Pepper, Peter Carter-Ruck and Partners

David Price, David Price & Co

Schilling & Lom

Nicola Solomon, Stephens Innocent

C W Sprague, Ince & Co

Patrick Swaffer, Goodman Derrick

Nigel Tait, Peter Carter-Ruck and Partners

Margaret A M Thomas, Davies Arnold Cooper

Neil Thomas, Hextall Erskine

Thompsons

Academics

Professor P S Atiyah

Professor Eric Barendt

Professor R A Buckley

Professor Peter Cane

Ursula Cheer

B A Childs

Professor Tony Dugdale

Professor John G Fleming

Professor G H L Fridman

Dr Andrew Halpin

Donald Harris

Laura C H Hoyano

Professor J A Jolowicz

Mark Lunney

Professor Harold Luntz

Professor David Miers
Maureen Mulholland
John Murphy
Professor Jeffrey O'Connell
Professor Anthony I Ogus
Professor Alan A Paterson
Dr Werner Pfennigstorf
Professor W V H Rogers
Dr Gary Slapper
Professor J C Smith
Professor Andrew Tettenborn
Rosemary Tobin
Prue Vines
Professor S M Waddams
Kay Wheat

Organisations

Action for Victims of Medical Accidents
Association of Chief Police Officers in Scotland
Association of Community Health Councils for England and Wales
Association of Disabled Professionals
Association of Law Teachers
Association of Personal Injury Lawyers
Association of Police Lawyers
Association of Professional Ambulance Personnel
Association for Spinal Injury Research Rehabilitation and Reintegration
Association of Women Solicitors
The Automobile Association
British Medical Association
British Society of Rehabilitation Medicine
Compassionate Friends
General Council of the Bar of Northern Ireland
Institute of Actuaries and the Faculty of Actuaries
Institute of Legal Executives
The Law Society, Civil Litigation Committee
The Law Society of Northern Ireland
Limbless Association

The Medical Defence Union Ltd

National Association of Bereavement Services

National Consumer Council

The Newspaper Society

Participants in a Seminar on Consultation Paper No 140 organised by Pannone & Partners, 21 March 1996, Manchester.

Personal Injuries Bar Association, Law Reform Sub-Committee

Police Federation of England and Wales

RAC Legal Department

Royal Association for Disability & Rehabilitation

Royal College of Nursing, Work Injured Nurses Group

SPTL Tort Group

TPR Social & Legal Research

Welsh Council of the British Medical Association

Victim Support

Medical Practitioners

Andrew J Carr

Dr Richard Mayou

Mr Julian Shah

Professor Jonathan Shepherd

Dr Derick T Wade

Individuals

Susan Anthony

Michael Bolger

Norman S Marsh

Mark Proctor

Insurers

Association of British Insurers

AXA Insurance Company Limited

Rob Butcher, United Friendly General Insurance Limited

David Grimley, St Paul International Insurance Company Limited

London International Insurance and Reinsurance Market Association

Royal Insurance

UK Claims Managers' Association Working Party

Government Bodies

Home Office

Lord Chancellor's Department

The Treasury Solicitor