Assessment of Damages for Personal Injury and Death, by HAROLD LUNTZ (Butterworths, Australia, 1974), pp. i-xxxii, 1-350. Australian price $20. ISBN 0 409 37885 1.

In his preface Mr Luntz relates that, when considering whether he should undertake the task of writing a book on damages for personal injury, he was troubled by three questions. First, was there any justification for dealing with the subject from a specifically Australian viewpoint? Secondly, was a scientific statement of the law relating to damages for personal injuries possible? Thirdly, was the present system of compensating victims obsolete, or at least obsolescent? In deciding to essay the task, the author was, as to the first question, comforted by the declaration of independence by the High Court in *Parker v. R.*[1] The High Court continues to regard itself as free to differ from the House of Lords, as its most recent decision on the assessment of damages under the Wrongs Act indicates.[2] As to the second deterrent, it may be doubted whether the 'scientific' statement of the law on any subject is possible. I am not sure what is meant by 'scientific' here—if a scientific statement of the law is one which attempts to systematize and classify, to seek the reasons behind rules and to test rules against principles, then it seems to me that Mr Luntz has done quite as well as one could have hoped with the hundreds of decisions, both at *nisi prius* and on appeal, which awaited orderly treatment. As for the third doubt, the winds of change have been blowing now for some years; but running down and industrial accident cases remain with us, and continue to account for the greater part of our litigation. Those who are concerned in any way with this litigation will be grateful that Mr Luntz was not deterred from his task by forebodings that the present system might be replaced by one of 'no fault' compensation.

The learned author has undertaken the task of dealing with the law relating to the assessment of damages for personal injury and death from an Australian viewpoint. Most of the leading English cases are referred to, along with decisions from a number of other jurisdictions, but the book is primarily concerned with the Australian law. I have not myself, by a random sampling procedure, tried to find out whether the author can fairly claim to have cited literally all the reported decisions in Australia on the subjects dealt with; but I should not be surprised to find that he has done so.

The author's aim must not be misunderstood. Unlike *Kemp and Kemp*[3] he is not concerned with the recording of particular awards. The reader will search in vain for the 'going rate' for the loss of an eye in Queensland in 1969, or the value of a Victorian leg in 1972. The author is concerned, not with particular awards, but with rules and principles. No branch of the law is more closely connected with the work of practising lawyers and Judges than that with which the book is concerned, and the book will well serve the needs of those in practice. No lawyer whose practice is to any substantial extent concerned with running down cases and industrial accidents should fail to possess himself of a copy.

It is perhaps not surprising that texts written by practising lawyers should at times bear indications of having been hastily written under pressure, and that they should often confine themselves to stating what the cases say, without criticism, at all events except in cases where conflict of authority makes a choice necessary. On the other hand, the text-books of academic lawyers, written (it may be) in a more leisurely way, are often more comprehensive and more scholarly, but are on occasions found not to be constructed in a way which the practising lawyer, seeking a quick answer to a question, finds to be helpful. In addition, academics do on occasions, in a way which vexes the practical lawyer, seem to be far more concerned with what the law might or ought to be than with what it is. With Mr Luntz, we have the best of both worlds.

The book is comprehensive and scholarly, and the author does not hesitate to criticize decisions which he regards as wrong. At the same time, the subject matter is

1 (1963) 111 C.L.R. 610.
2 *Philpott v. Glen* (1973) 47 A.L.J.R. 555.
3 D. Kemp and M. Kemp, *The Quantum of Damages* (3rd ed. London, 1973).

dealt with in such a way as to enable the reader quickly to ascertain the effect of the case law on a given point.

There are only two critical observations that I have to make. The first concerns the failure of the book to deal with the topic of appeals against awards of damages. It seems to me that, even if one regards as outside the scope of the work any sort of general consideration of the principles and rules applied by appellate Courts, it was at least appropriate to refer to some of the authorities showing the well settled principles on which a court of appeal acts in deciding whether to interfere with an award of damages on the ground that the damages are excessive or inadequate This topic does, I think, fairly fall within the subject matter, Assessment of Damages. Whether it is appropriate to go further and deal more generally with the principles applied by courts of appeal in considering awards of damages is a question on which opinions will differ; my own view, having regard to the extent to which appeals against assessments of damages occupy the time of appellate courts, is that some wider treatment is desirable. Without adding unduly to the bulk of the book, it would be possible to deal with such matters as the following—the general approach of appellate courts to jury verdicts and findings of fact of judges, including the rule that, when considering a verdict, it is necessary to take the most favourable view possible of the evidence from the point of view of the party supporting the verdict; the circumstances in which an appellate court will interfere with an award of damages on the ground that the damages are excessive or inadequate; the effect of the improper admission or rejection of evidence and the effect of misdirection and non-direction, including the principles laid down in *Balenzuela v. De Gail*;[4] the effect of the failure by counsel at the trial to take exception to the charge where an attempt is later made to persuade the appellate court to set aside the verdict on the ground of misdirection or non-direction;[5] the circumstances in which a third trial will be ordered; the question of the appellate court's proper course where it is of opinion that the primary judge was right for the wrong reason.[6]

Having regard to the number of Australian authorities dealing with questions such as these and to the fact that the authorities cited and acted upon in Australian appellate courts on these questions are usually decisions of our own appellate courts, at all events some limited treatment of the topic of appeals is consistent with the author's stated aim of dealing with the subject of damages for personal injury from a specifically Australian viewpoint. I should have thought that it would be possible to provide a useful treatment of the subject of appeals against awards of damages for personal injury within the confines of a relatively short chapter. Other matters which might merit attention in any such chapter concern the appellate jurisdiction and the practice of the High Court, for example, the distinction between an order for a new trial and an order refusing a new trial; the former is interlocutory and the latter is final; accordingly an appeal may be taken to the High Court from an order for a new trial only by leave.[7] No doubt the learned author's failure to deal with appeals as a separate topic is the result of a deliberate decision as to the proper scope of the book. I hope that in the next edition he will take a different view, having regard to the great practical importance of the determination of appeals against assessments of damages for personal injury in the work of the appellate courts.

I have said that Mr Luntz has not hesitated to criticise decisions which he regards as wrong. His criticisms are often cogent. There are certain conventions, however, which on the whole are still observed. As it seems to me, by a paradox, the older (and so it might be said the more respectable) a decision, the greater the freedom with which text-writers and counsel criticise it. In the course of argument or in a learned writing, one may bluntly and fearlessly assert that the court went hope-

4 (1959) 101 C.L.R. 226.
5 *General Motors-Holden Pty Ltd v. Moularas* (1964) 111 C.L.R. 234.
6 See *Robinson v. Riley* [1971] 1 N.S.W.L.R. 403, a case of compensating errors, and compare *Philpott v. Glen* (1973) 47 A.L.J.R. 555.
7 Judiciary Act (Cth) s. 35 (1)(a); *Ex parte Bucknell* (1936) 56 C.L.R. 221; *Hall v. Nominal Defendant* (1966) 117 C.L.R. 423, 443; *Fredericks v. May* (1973) 47 A.L.J.R. 362.

lessly astray in *The Case of Thorns*,[8] or that the approach taken in the *Six Carpenters Case*[9] was utterly misconceived. Indeed it is not necessary to go back to the Year Books; even after 50 years a judge, albeit a Lord Chancellor, may be criticised quite roundly and directly. There does seem to be a convention, however, that if a judge is still extant, more circumspect language should be used. Whether even in dealing with the present incumbents of the Bench it is necessary or desirable, to interlard an argument or besprinkle a manuscript with expressions of respectful deference is a matter of opinion. I confess that I found some of the criticisms in the book now under review expressed in terms a trifle too blunt for my taste. In one place criticism of a judge's opinion is coupled with an unnecessary reference to the career of the judge concerned before his appointment. This I do regard as unfortunate. By the paradox which I have mentioned, a reference in similar terms to the antecedents of Lord Mansfield would no doubt be allowed to pass without comment.

The long title is *Assessment of Damages for Personal Injury and Death*. Unfortunately, in consequence of spinal compression, when the book is viewed on the shelves it appears to be concerned with the assessment of damages generally. If Mr Luntz were ever able to find the time to deal with the whole topic of damages in Australian law as helpfully as he has dealt with the matter of damages for personal injury and death, the profession would be even further in his debt.

ROBERT BROOKING*

[8] (1466) Y.B. 6 Edw. IV, 7 pl. 18.
[9] (1610) 8 Rep. 146a.
* B.A. (Hons), LL.B. (Hons); Q.C. of the Victorian Bar.