

GUIDELINES FOR EXPERTS

(a summary of some basic principles of damages assessment)

The vast majority of medico-legal reports that I see are well prepared. Nonetheless I feel that there may be some advantage in detailing certain aspects that are often overlooked, even by experts experienced with litigation:

Summary of future expenses: Most experts list their opinion as regards future expenses in a clearly defined section near the end of the report. Expenses mentioned in passing in the body of the report are sometimes overlooked. An opinion as regards future expenses should specify:

- * The cost in terms of current rand values.
- * The period over which a recurrent expense will be incurred or the number of years until surgery will be needed.
- * The percentage chance that the expense will need to be incurred.

Percentage disability: It is of immense assistance to litigants to have an opinion as regards percentage disability. This could be expressed as varying percentages over the lifespan. Whatever a medical expert's reservations about the difficulties of making such an assessment he should endeavour to do so because he is eminently more competent in this regard than the legal persons who will be using the report to determine compensation. Such percentages are not intended to be of scientific precision, they are merely the best possible assessment having regard to the information available at the time of assessment. The AMA rating system is to be preferred to the Compensation Commissioner's ratings. Some experts give both percentages. The percentages will usually be used to assess a claim for loss of earnings and should thus have regard to the occupation of the victim. For children the occupation of a parent is often helpful in this regard.

Headings: Reports should specify on every page the date of the report, the name of the person examined, and, ideally, the name of the expert preparing the report. There are often several expert reports relating to one claim and the actuary is often provided with only the last few pages of each report.

Value of a chance: Many expected future expenses are uncertain. Thus a knee arthrodesis may be predicted for a victim in 20 years' time but only with 35% confidence level, that is to say chance of occurrence. The discounted present value of the anticipated cost of such a procedure may be R12000. A court will not refuse to award compensation for this possibility but will allow 35% of the value of the prospective cost, that is to say R4200.

Conversely if an expense may be predicted with a confidence level of 75% then the court will allow 75% of the expenses, that is to say give the defendant the benefit of the 25% possibility that the expense may not be incurred. It is essential when predicting an expense that the confidence level of that expense, the chance of its occurrence, be given together with the present cost of that expense. Experts

should refrain from capitalizing expenses unless they have the necessary training in calculations using life tables. For purposes of capitalization it is essential that some indication be given of when the expense will most likely be incurred. Expenses less than 3 years into the future will usually not be capitalized.

Mortality: If an expense of R10000 is expected in 20 years' time with 100% confidence there remains the chance that the victim may die before then. The chance of death is calculated from the life table. For a male presently aged 40 the chance according to life table 5 that he will be alive at age 60 is 68%. The value of the chance that he will still be alive to incur the expense is thus 68% of R10000. This is an important point because many experts fail to take account of the chance of early death and suggest that 100% of the cost should be awarded.

Probabilities and possibilities: The classical and correct usage of these words is that a 'possibility' is a chance of less than 50% whereas a 'probability' is a chance of greater than 50%. Modern statisticians have displayed a gross disregard for basic English usage with their use of the word 'probability' to designate a chance both greater or less than 50%. What moderns call 'probability theory' was at one time more correctly and accurately termed the 'theory of chances'. Most lawyers continue to use the words 'probability' and 'possibility' correctly and experts preparing medico-legal reports are well advised to follow the legal usage. It follows that if a medico-legal report states that an expense is a 'possibility', but does not give an explicit percentage chance, then this will be taken to mean that the expense will be incurred with a confidence level of below 50%. For computation purposes that would be taken to mean a chance of 25%. Conversely a 'probable' expense would be treated as having a confidence level of 75%.

Life expectancy: At pages 82 to 93 are listed a series of 6 different life tables suitable for the assessment of damages in South Africa. These tables are based on statistical averages. The choice of table will depend on sex, education and level of income. Death by violence is a major factor for persons living in crowded urban townships. Poor education, superstition, and remote medical facilities impact on many rural dwellers. In general one would accept the statistical average as the life expectancy except where there are clearly defined factors which justify deviation from the average. It is useful to think in terms of a personalised average. A victim whose family has displayed unusual longevity would be assessed as having a better-than-average life expectancy. A family with a history of coronary disease would suggest a below-average life expectancy. The ratings used by life offices are very helpful providing it is borne in mind that these include a safety margin in favour of the insurer and also that the loadings have regard to life insurance mortality and not population mortality. The fact that a victim has been accepted at standard rates by a life insurance company may indicate that something better than the population table may be appropriate, depending on what life insurance product is involved. Regard should also be had to the impact of AIDS. In suitable circumstances an opinion on life expectancy may be reserved pending an AIDS test.

Reduced life expectancy: A reduction in life expectancy means that the chance of early death has been increased in each and every future year. For paraplegics, for instance, the chance of early death is very high during the 3 to 5 years following the injury. Once the victim, and those around him, have learned to cope with his condition the risk of early death tends closer to average, but still remains above-average, that is to say life expectancy is reduced. Walsh & Yeo 1985 *FESPIC* 142 (Australia) have reported very low rates of mortality for paraplegics (-5% from life expectancy) and quadriplegics (-15%). Geisler (1983) 21 *Paraplegia* 364 reports very much higher rates of mortality despite having regard to much the same period of time and medical knowledge. One suspects that Geisler included in his sample many persons of lower income and education who were less able to follow medical advice and adapt their life styles. Brain injury generally gives rise to higher mortality (-4 years from life expectancy per survey reported by Roberts 'Severe accidental head injury' 1979 148-51) probably due to a reduced ability to recognise and report life-threatening conditions and thus a tendency to do foolish things. Hrubec & Ryder 33 (1980) *J Chron Dis* 239-50 report +40% extra mortality for amputees probably due to increased risk of accidents, inadequate exercise, and poor self-images leading to abuse of alcohol and even suicide. The mortality of epileptics is a complicated subject depending on the severity of the affliction and the victim's education and income level (Brackenridge 'Life risks' 2ed 604-8; Laidlaw & Rickens 'Epilepsy' 28). It is important to bear in mind that if there is a risk of epilepsy then there is an immediately reduction to life expectancy in the sense that there is a chance of early death due to the possible onset of epilepsy. It is highly desirable when giving an opinion on reduced life expectancy (or extra mortality) that the life table for normal pre-injury mortality is stated. This is particularly important when the victim was in poor health prior to the injury. The medico-legal report needs to state what was the mortality of the victim had there been no injury and separately the effect of the injury on that mortality. If the victim had pre-existing angina and diabetes the effect of these on normal pre-injury life expectancy needs to be stated. A medico-legal report for such a person which states curtly that the injury has had no effect on life expectancy has failed to address an important issue.

Actuarial calculations: It is also important to bear in mind that the standard actuarial calculation does not have regard to the expectation of life. Actuaries use the percentage chances of survival to each year. When costing an expense over a lifetime the actuaries will do a separate calculation for each year with a special percentage deduction in each year for the chance of early death. This means, for instance, that even if a life expectancy has been reduced below age 65 the actuary will still calculate loss of earnings to age 65. The fact of reduced life expectancy will merely lead to larger-than-average deductions for the chance of early death. A number of experts make the mistake of ignoring expenses expected to occur after expiry of the expectation of life. This is false reasoning because every victim has a chance of close to 50% of outliving his expectation of life. To ignore expenses after that time is to deny the victim the value of the chance of such expenses.

Capitalization: One commonly encounters the view that medical inflation exceeds the general consumer price index. In those instances where it does this usually reflects improved technologies rather than increased cost for the same goods and services, and the claimant's award for general damages should then be reduced due to the prospect of enhanced relief. Periods of cost increases in excess of inflation will usually be followed by periods of lesser increases, such as seem presently imminent with the general slowdown of world economies. In the long term the consumer price index will include the effect of medical cost increases and thus narrow, if not eliminate differences, even technological improvements. It follows that medical costs projected over long future periods should be capitalized at a real rate of about 2½% per year, this being the rate generally used by actuaries in South Africa.

Likely earnings: Earning capacity in the legal sense means likely earnings having regard to how the victim would have used his work capacity, or will now use his work capacity. This point is particularly relevant for industrial psychologists who, incorrectly, tend to focus on "potential" earnings rather than "likely" earnings. A properly prepared opinion as to earning capacity will also include an opinion as to the value of fringe benefits. There is a tendency to analyse earning capacity in terms of statistics relating to the formal sector. These are substantially higher than those found in the informal sector (see 107 and 104 below) and often include costs to the employer which are not passed on as benefits to the employee.

Likely expenses: Consideration of what is likely is equally relevant to prognostication of future medical and related expenses. It is unreasonable to prognosticate expenses based on private medical care if the victim will in all likelihood make use of the services of provincial hospitals. A victim who is to be compensated on the basis that he will never work again cannot complain if he now has to spend time waiting for attention at a provincial hospital and thereby saving himself the cost of private treatment. Conversely a victim who remains in employment will need speedy medical attention if he is to retain his job.

In general a victim who would never have owned a motor car will not after injury be provided with one. The same applies to ownership of a house. This is not to say that the victim will not use his compensation money to buy a microbus or a house, that is one of the big advantages of a lump sum over instalment compensation.

Reasonableness: The following dicta by the courts may be of interest to experts who are called upon to prepare medico-legal reports.

'Her recommendation concerning the services and appliances required by the plaintiff are, I think, to some extent in the nature of counsels of perfection and I must remind myself that the Court is bound by the test of reasonableness in determining whether a particular type of expenditure is required' (*Ndlovu v Swaziland Royal insurance* 1989 4 C&B E2-1 (Swazi) E2-6).

`Ek kon egter nie die gevoel afgeskud kry nie dat mev Thompson ietwat oor-entoesiasies in haar algemene benadering tot hulpmiddels vir eiser is en dat redelikheid by haar aanbevelings vir verskeie sodanige hulpmiddels nie 'n rol gespeel het nie... Dr du Toit is insgelyks 'n deskundige op sy terrein met jarelange ondervinding maar ook hy het by my die indruk gelaat dat hy nie altyd suiwer objektief was nie' (*Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) A3-22).

`...the experts and, in particular, the architect, have lost sight of the fact that what is required is reasonable compensation and not indulgence' (*Shaka v President Insurance* 1990 4 C&B A2-8 (W)).

General damages: Damages awards for personal injury involve two major overlapping components: General damages awarded for pain and suffering and loss of the amenities of life (see detailed lists in this publication) and damages for patrimonial, that is to say financial losses. A medico-legal report should address as three separate issues: pain and suffering; loss of amenities; and financial costs. An unconscious victim, for instance, will generally experience little or no pain and suffering but will experience a substantial loss of amenities. General damages will be awarded to unconscious victims (albeit at a fairly low level of about R250000) and also to the estate of a deceased victim provided the pleadings had been closed prior to his death. A reduction on life expectancy is the loss of an amenity and is compensated by way of an increase to the award for general damages (and not by way of damages for financial loss). Continued attendance at work despite the difficulties occasioned by the injuries justifies an increase to the award for general damages, even if there is no explicit loss of earnings. Conversely release from the need to work can justify a decrease to the award for general damages. There is an interaction between the benefits brought about by medical science/assistative devices and the award for general damages. If the victim is to be provided with meaningful assistative devices the award for general damages will be reduced. If a victim can live with his problem and thereby spare himself the medical expense then his damages will be limited to the lesser of the cost of the treatment and the general damages that would have been awarded in the absence of such treatment (this arises particularly with would-be-nice expenses such as plastic surgery, psychotherapy and arm prostheses).

Financial losses: These include expected medical expenses, assistative devices, the costs of an attendant and/or curator bonis and loss of earnings. An injured woman may claim for loss of the financial benefits of marriage. Conversely a male victim may become unmarriageable and thereby be spared the costs of supporting a wife and family. His claim for loss of earnings will be reduced by reason of this saving. For all victims there will be a reduction in compensation for the prospect of being spared normal living expenses (food, clothing, housing, etc) during the so-called 'lost years'.

Expenses had there been no injury: The reports of many occupational therapists pay no consideration whatsoever to the living expenses that the victim would have incurred had there been no injury. The normal family purchases beds, bath mats, TV sets, motor cars, can openers, microwave ovens, etc. If these expenses are to be listed in the report then there should be an explanation as why the expense would not have been incurred had there been no injury. Compensation is for the likely additional costs.