ABSTRACT

This thesis is concerned with damages for continuing loss, such as most commonly arise with personal injury, or the death of a breadwinner. The approach has been multidisciplinary rather than multinational. The thesis comprises 4 sections: General theory; Technical issues; Technique and law governing personal injury claims; Technique and law governing claims for loss of support. The thesis does not seek to be a compilation of all relevant legal sources.

The initial inquiry focuses upon utility theory and the related concept of value. In its most general form utility is merely descriptive of a vital life force. Its application to the assessment of damages requires objectivization. Money and risk are both subject to utilitarian considerations. Techniques can be developed for the measurement of personal utilities. The statistical concept of an expectation describes the utility of uncertain, usually future events. In suitable circumstances market value provides an objective guide to utility. Abstraction promotes forensic efficiency. Concretization, attention to personal details, ensures for each claimant and defendant a proper hearing. Justice involves a blend of these conflicting goals.

Perfect restitution is only possible in extremely rare instances. In general the damages awarded by a court are compensation, a fair equivalent for what has been lost. When differencing utility regard must be had for the effect of the award for damages on the overall utility after the wrongful act. The assessment of lump-sum damages is assisted by the concept of a patrimonium which includes as assets the present values of future uncertain incomes and outlays. The assessment of damages requires a comparison between the hypothetical state had there been no wrongful act and the actual state having regard to that act.

Fundamental to the assessment of damages for uncertain loss is the technique, known as `valuation of a chance', whereby the present value of an uncertain hypothetical event is calculated by taking the value of that event as a certainty and then reducing it by a percentage to allow for the contingency of non-occurrence. The technique is applicable equally to past and future losses. The technique is distinguished from proof in a civil court on the balance of probabilities. The determination of the percentage chance may have regard to historical statistics but will more often be based on subjective value judgments. The analysis of chances according to subjective considerations has been a major field of study for analysts of utility.

The average expectation of life is a point estimate obtained by summing the survival chances for all possible years of life to age 99 and beyond. The chance of inheritance is similarly calculated but with the chance of death in each year substituted for one of the survival ratios. The standard actuarial calculation for ascertaining present value proceeds by taking the value of the chance in each year of the relevant income or expenditure and then summing the resulting series of separate values. It is generally unsound to suggest that by consuming interest and capital a claimant may reproduce the income that has been lost.

Despite the inadequacies of a compensation model based upon consuming interest and capital it is a useful concept provided its limitations are borne in mind. Conditions of high inflation dictate that there is a `ballooning' of the original capital for many years before inroads into accumulated funds begin to be made. To test the consumable income from investing an award a court should ignore high nominal rates of return and look to rates closer to the real rate of return. The prudent investor will save for a retirement that extends well beyond the expiry of the expectation of life. The impact of tax on interest receipts is aggravated by high rates of inflation and renders such investments unattractive compared to growth investments such as mutual funds and immovable property.

Life annuities provide a medium for contractually transferring the risk of early and late death to a life insurer. The use of actuaries by the courts has its origin in the need for evidence as to the price at which to purchase a life annuity. This evidence has with time become corrupted into a fiction about consuming interest and capital over the expectation of life. In recent years there has been a resurgence of interest in life annuities in the form of `settlement annuities'. There are a variety of different annuity contracts of which the `annuity certain' and the `life annuity' deserve special note. It was the practice in the classical Roman-Dutch law to ignore the price at which `life annuities' were commercially available. That practice, with few exceptions, continues today.

The `discount rate of interest' is better described as the `discount rate of return'. A nominal rate (I) comprises a real rate of return (R) and an offset to inflation (F). For compensation calculations R is the most important measure. Historical analysis suggests that R has a value of about 2,5% per year compound. The net capitalization rate will be different from R if the cash flow to be valued does not escalate in line with inflation. The allowance for the risk aspect of general contingencies is best achieved by an increase to the discount rate of return.

The deduction for general contingencies reflects the court's subjective impression as to the adequacy, or otherwise, the comparative utility, of the primary actuarial calculations. Although collateral benefits are sometimes viewed as part of the general contingencies the risks attaching to what has been, or will be lost, are the major component of the deduction. Allowance for such risks can equally be achieved through an increase to the discount rate of return.

Interest is the measure of loss for deprivation from the use of money. The loss of use of goods can generally be quantified by interest on the value of the goods subject to an adjustment for the rate at which the goods increase or decrease in value with the passage of time. A court is competent to award damages expressed in terms of a foreign currency. The rate of mora interest must then be adjusted to that appropriate to the relevant foreign economy.

Before dealing with the explicit actions for loss of earning capacity and support one needs to examine the impact of collateral benefit rules upon the distribution of the costs of damage within the community at large. A comprehensive approach to damages requires the deduction of insurance and employment benefits. A court making an award of damages should specify that a claimant should reimburse certain welldoers including an employer. Benefits provided by the State are not gratuitous and are generally deducted.

The expression `loss of earning capacity' embraces both earnings and living expenses. `Loss of earnings' and `loss of earning capacity' should not be distinguished. Just as increased living expenses, *damnum emergens*, increase the compensation payable so too saved living expenses reduce damage suffered and thus the defendant's liability. General damages has a patrimonial aspect and awards must have some regard to the cost of goods and services in the community at large. Likely earnings and likely expenses are the criteria by which to measure earning capacity and spending needs. The earning capacity of business capital should be distinguished from the earning capacity of the victim. Compensation for `loss of earning capacity' includes loss of support for the victim's family. Illegal earnings are best dealt with by basing compensation on what would have been earned had the victim acted legally.

The loss of a **right** to support determines who may bring an action for loss of support. The financial loss suffered is, however, not the right to support but the value of the financial benefits expected from the breadwinner in consequence of this right. This financial value will be assessed according the value of the chance of receiving the support. The working wife who earns sufficient to support herself has no right, at that point in time, to claim support from her husband. The loss by the dependants will be assessed without regard for compensating advantages other than inheritance and remarriage. The focus is on the support which would have been provided had there been no death. The widow who takes up employment after the death will be compensated as though she were unemployed. Conversely a widow who ceases employment in consequence of the death has no claim under the dependants' action for this loss of earnings. Loss of inheritance prospects will be compensated to the extent that these would have provided ongoing support. Although dependants have in theory a claim for loss of support during the `lost years' such claims will usually fail due to difficulties with evidence.