CHAPTER 1

INTRODUCTION

***Summary**: This thesis is concerned with damages for continuing loss, such as most commonly arise with personal injury, or with the death of a breadwinner. The approach is 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.*

[1.1] THE SCOPE OF THIS THESIS

This is a thesis about damages, the compensation that is awarded by a court for damage suffered in consequence of wrongful conduct. The emphasis is directed at damages for personal injury and death, events which give rise to a continuing loss over an extended period of time. Some would use the plural `losses'. The distinction goes to the heart of one of the major ambiguities of damages assessment and forms a central topic of this thesis. Continuing loss arises with breach of contract, damage to physical property, and with pure economic loss. It follows that the issues addressed in this thesis are not confined solely to loss flowing from personal injury and death.

As a general rule damage for continuing loss is compensated by a single once-and-for-all lump sum.[1] For purposes of this thesis the lump-sum once-and-for-all rule is accepted as axiomatic and desirable. There will be some discussion of compensation by instalments.

It will be argued in this thesis that damage is a reduction in the overall utility of a person's life plan and that damages by way of monetary payment provide a substitute for what has been lost. The single once-and-for-all payment made by way of damages has the nature of a price, in a manner of speaking. The nature of this price is most obvious when using the technique of value of a chance,[2] the present utility of an uncertain past or future loss or gain. The damages awarded for uncertain past or future loss have much in common with a market value, another manifestation of utility, and it is instructive to examine the assessment of damages against the background of such a paradigm. Market value is important to the assessment of damages because it is, in theory, the price at which a victim may purchase substitute goods and thereby convert a loss of goods into a loss of money. The right to a series of future payments of money may be purchased for a single here-and-now lump sum.[3]

---

[1]See 41.

[2]See 71.

[3]See 113.

[1.2] BACKGROUND TO RESEARCH

The assessment of damages is largely a question of fact with a sprinkling of legal rules governing the manner in which the facts are to be interpreted. These legal rules are supplemented by a large body of conventions drawn from various sciences, notably economics, sociology, statistics, and actuarial science. The major focus of this thesis is a critical overview of the conventional wisdom of the courts as regards these peripheral disciplines and an examination of the related logical and rational structures. Legal research traditionally has regard to foreign law. This has been done in this thesis, where appropriate, but, more importantly, the approach is multidisciplinary rather than multinational. In adopting this approach I have sought to move from the open arguments suggested by consideration of other disciplines towards structured reasoning suitable for legal analysis in the sense described by Honoré:[4]

> (There are two categories of presentation)`: open arguments and appeals to rules of law. But in many ways the most important feature of Roman and modern legal argumentation has been omitted from the catalogue so far discussed: it is this feature that constitutes the essence of the Roman gift to modern Western civilization. I am referring to the existence of a canon of unacceptable arguments. If we compare Greek and Roman civilization and ask wherein the inferiority of the Greeks lies from the point of view of legal culture we may be inclined to answer on the following lines: The Greeks had laws and constitutions and conducted arguments before juries and the like, but their mode of argument was determined by rhetorical and not specifically legal considerations. To them any argument was grist to the mill: in particular arguments *in hominem*, that one's opponent was a scoundrel or that one had oneself performed notable services to the city; and arguments which appeal directly to philosophical or religious principles or to political considerations. The Greeks had in fact a notion of rhetoric, of the art of persuasion, and a theory or catalogue of types of arguments, in other words a notion of `topic'. But what they lacked either in theory or in practice was the discipline to set up a canon of acceptable arguments proper to legal discourse. This involves a narrowing of the scope of the discussion with a view to strengthening within certain limits their persuasive power and so the stability of the conclusions reached. The appeal to rules of law is of course the first type of argument to be listed as acceptable....
>
> `Secondly, there are conventions concerning the range of acceptable open arguments. The creation of these conventions depends on a certain professionalization of the law....
>
> `Given, then, intellectual professionalism, it is possible for certain issues to be considered not in isolation from the moral, social, political and religious issues affecting society at large but in such a way that these are allowed to be taken into account only on certain terms and within certain limits. The terms are, I think, really twofold. The first is that open arguments resting on social values must ultimately give way to rules: in the last resort the argument that the decision proposed is inconsistent with a rule compelling the contrary decision must be accepted... The second is that the positive values which are the basis of open arguments are system-neutral and person-neutral, that is to say that they are indifferent to the idiosyncratic features of religious, moral, philosophical or political thought systems and are not conceived *ad hominem*... The open arguments are the windows through which the law looks at society and by which the values of society filter through to the law. By them the law absorbs the values of the people: utility, equity, nature and the like. But they enter in that very general form in which they would be likely to be endorsed by the mass of people, rather than as specific programmes, and they are filtered through a professional mesh which reduces them to technically manageable principles and maxims... This impartiality between as between persons and systems is

---

[4]Honoré *Legal reasoning in Rome and today* from *Select South African legal problems* edited by Kahn & Zeffert (Juta 1974) 84 91-3.

> crucial to Western legal culture; it is the specific legacy of Roman law to our civilization and it is alien to Greek culture....
>
> `The Romans therefore bequeathed to us a form of legal culture in which the closed and the open are combined. Law is a separate sphere of discourse: it is closed in the sense that all arguments adduced must be person- and system- neutral. On the other hand it is open in that open arguments, if they conform to the above criteria, are acceptable subject to the ultimate test of consistency with binding rules'.

There is a large divide between legal science and actuarial science. This gives rise to an intellectual no-man's land considered unduly actuarial by the lawyers and unduly legal by the actuaries. This thesis seeks to fill that gap. The actuarial issues discussed in this thesis are, with few exceptions, fairly trite by actuarial standards, but fairly advanced by legal standards. Suffice it to say that this thesis is not intended for actuaries but for lawyers who are concerned with the analysis of the relationship between damage and damages.

[1.3] STRUCTURE OF THE THESIS

[1.3.1] Part I - Theory of damages: Chapters 2 and 3 seek to define a theory of damage and damages. Chapter 2 deals primarily with general utility theory whereas chapter 3 goes on to deal with differencing and `pigeonholing'.

[1.3.2] Part II - Financial and technical matters: Chapters 4 to 11 discuss and define a number of concepts and issues, largely technical in nature: Chapter 4 defines the all-pervasive technique of value of a chance; Chapter 5 examines this technique further using the risks of life and death as the paradigm; Chapter 6 deals with diverse funding techniques, including the fiction of consuming interest and capital as the means by which to reproduce the lost cash flow; Chapter 7 defines and discusses various forms of annuity; Chapter 8 examines the discount for delayed payment, that is to say the discount for the prospect of investment returns; Chapter 9 deals with the deduction for general contingencies; Chapter 10 deals with compensation for loss of use of goods, but, more importantly, the loss of use of money; Chapter 11 deals with the vexed issue of collateral benefits and examines these from an economic and administrative, rather then legal, point of view.

[1.3.3] Part III - Damages for personal injury: Chapter 12 examines in detail the techniques and legal aspects governing the assessment of damages for personal injury.

[1.3.4] Part IV - Damages for loss of support: Chapter 13 examines in detail the techniques and legal aspects governing the assessment of damages for loss of support arising from the death of a breadwinner. The chapter concludes with a discussion of the problem of the `lost years' which involves an overlap between the claim for loss of support and the claim for personal injury.

[1.4] REFERENCES

I do not attempt to provide a compilation of all available judgments and articles on the various topics. My focus is on ideas and methodologies. For this reason I will often cite a single judgment to illustrate an approach which has been used in a number of judgments. As a rule the most recent judgment on a topic includes a comprehensive survey of the relevant authorities up to that point in time. When this is not so I have provided guidance to a wider range of authorities.

[1.5] STYLE

In order to render the text more readable I have made extensive use of the first person `I' rather than a more formal impersonal phraseology. For the same reason I use popular damages phraseology despite having pointed to the potential misconceptions that are contained therein. My approach to punctuation and capitals is a blend between Juta's house style and that preferred by the editors of *THRHR*.