DAMAGES FOR PERSONAL INJURY: DELIMITING THE ECONOMIC LOSS

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INTRODUCTION

In the vast majority of personal-injury claims which come before the courts the plaintiff's economic loss will consist of a claim for the difference between what he would have earned had he not been injured and what, if anything, he can now earn in his injured state, and/or for the expenses which he has incurred or may yet incur as a result of the tort and which otherwise would not have fallen upon him. In Romanist terminology the plaintiff will claim *lucrum cessans*, his lost gain, and *damnum emergens*, the expenditure attributable to the injury.[1] It would seem natural to describe these losses, at least in these, the 'plain',[2] cases as, respectively, 'loss of earnings' or 'loss of wages', and 'expenditure incurred' or 'necessary expenses'. Yet, in Australia the plaintiff's economic losses in personal-injury cases are not so described. Rather, it is clearly and authoritatively established that the plaintiff is to be compensated for his lost earning *capacity* in so far as there is a reduction in his ability to exchange his labour for economic reward,[3] and for the *needs* which have been created by the tort in so far as he now has to incur expenditure which otherwise he would not have incurred.[4]

The description of the plaintiff's losses in these terms may in the vast majority of cases serve no purpose other than linguistic convenience or the dictates of the doctrine of precedent; yet these terms were originally employed,[5] and are sometimes still chosen by the courts,[6] as fundamental statements of doctrine. In such cases, the expressions are seen as representing the correct concepts from which the solutions to practical problems arising in the assessment of personal-injury damages can be

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1 See Lawson *Negligence in the Civil Law* (1955) 59-60.

2 Hart *The Concept of Law* (1961) 126.

3 E.g. Todorovic v. Waller (1981) 56 A.L.J.R. 59.

4 Griffiths v. Kerkemeyer (1977) 139 C.L.R. 161.

5 Id. and infra n. 42.

6 E.g. Atlas Tiles Ltd v.Briers (1978) 144 C.L.R. 202 at 210, per Barwick C.J.; Griffiths v Kerkemeyer, supra n. 4, esp. at 178, per Stephen J.

derived by a process of reasoning, and the purpose of conceptualising the plaintiff's losses in the terms chosen is two-fold. First, what has been lost is identified as an asset or a faculty which is one of the attributes of human personality. Such asset or faculty has an independent existence—independent, that is, of the loss of earnings to which it gives, or may give, rise in the case of lost earning capacity,[7] and of the expenditure which is, or may be, incurred to satisfy the need in the case of needs created.[8] Secondly, and as a corollary of the asset's independent existence, the measure of recovery is defined as the 'objective monetary value' of the loss.[9] The attempts which have been made to use a conceptual approach as a solution to problems which have arisen in the assessment of economic loss in personal-injury damages are, it is submitted, all ultimately referable to one or other, or both, of these purposes.

The following observations must be made at the outset concerning this conceptual approach to the economic heads of damage in personal-injury cases. First, it has never been disputed that 'the dominant rule of law' in assessing damages is the principle of compensation,[10] which, in tort, involves placing the plaintiff, so far as is possible, in the same position he would have been in but for the wrong.[11] In relation to economic losses in tort, this object is sometimes referred to as *restitutio in integrum*,[12] presumably to stress that the courts should try to award as compensation as exact an equivalent in money for the loss as is possible. Such an equivalent is surely to be determined by reference to the actual financial loss suffered in any case. It follows that an approach which overtly eschews an investigation of the actual financial loss, usually represented by a loss of earnings and/or by expenditure incurred, in favour of concentrating on 'lost capacities' or 'needs created' obviously requires justification in terms of the principle of compensation. Such justification may, no doubt, be found ultimately in extra-legal considerations,[13] for example, possibly in a theory of human personality which regards such personality as the total of various assessable components which the plaintiff owns.[14] When found the justification may demonstrate that the conceptual approach better gives effect to the principle of compensation. Indeed, that a conceptual approach

7 E.g. Atlas Tiles Ltd v. Briers, supra n. 6, at 209.
8 E.g. Griffiths v. Kerkemeyer, supra n. 4.
9 Id. at 178.
10 British Transport Commission v. Gourley [1956] A.C. 185 at 197-8.
11 Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25 at 39.
12 Liesbosch Dredger (Owners) v. S. S. Edison (Owners) [1933] A.C. 449 at 463; Todorovic v. Waller, supra n. 3, at 77.
13 See MacCormick *Legal Reasoning and Legal Theory* (1978) 25.
14 Consider, e.g., Scott *The Body as Property* (1981) ch. 10.

achieves such as a result was simply assumed by Barwick C.J. in *Atlas Tiles Ltd* v. *Briers*:[15]

> [The principle of compensation] may at once be accepted as fundamental. The real question, however, is the identification of that for which compensation is to be assessed . . . It is for that of which the plaintiff has been deprived by the defendant's act that the award of damages must compensate. To refer the ultimate consequence to the plaintiff of a verdict in terms of profit or loss is, in my opinion, to introduce an irrelevancy.

On the other hand, a frequently-quoted *dictum* of Dixon C.J. Kitto and Taylor JJ. in *Graham* v. *Baker*,[16] that 'an injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss', suggests that there is a tension between the conceptual approach and the principle of compensation, and that this tension has not been resolved by the courts.

Secondly, in the absence of any justification for the conceptual approach,[17] it results that where the courts are basing their arguments on conceptual reasoning, they are, apart from precedent,[18] using a premise whose truth has not been demonstrated, even though the argument may in all other respects be formally valid.

Thirdly the use of conceptual reasoning for either of the two purposes identified above is likely to prove unsatisfactory at the very level at which conceptual reasoning is traditionally employed, that is, at the level of classical logic with its all-important tool the Aristotelian syllogism. This is simply because the logical force of any syllogism is seriously impaired where its premises involve the use of indeterminate expressions, which clear the way for the intrusion of such logical fallacies as circular reasoning or the inconsequent argument.[19] Thus, the word 'capacity', which imports no more than the ability, latent and potential in the individual, to exercise rights and powers,[20] is, as Ormrod L.J. has pointed out, 'extraordinarily vague';[21] we should not, therefore, be sur-

15 Supra n. 6, at 709.

16 (1961) 106 C.L.R. 340 at 347.

17 The nearest justifications are those of Windeyer J. in Teubner v. Humble (1963) 108 C.L.R. 491 at 505, and of Kitto, Taylor Owen and Menzies JJ. in Skelton v. Collins (1966) 115 C.L.R. 94 (but cf. Windeyer J. at 129-32). But all these statements are, in the end, assertions not justifications.

18 MacCormick, supra n. 13, at 25-6.

19 See Stone, *Legal System and Lawyers' Reasonings* (1968) ch. 7; Thouless *Straight and Crooked Thinking* (1953) esp. chs. 3 and 4.

20 Allen, 'Status and Capacity' (1930) 46 *L Q.R.* 277 esp. at 290-3, reprinted in Allen *Legal Duties* (1931) 28, esp. at 45-8.

21 Daly v. General Steam Navigation Co. Ltd [1981] 1 W.L.R. 120 at 130.

prised to find that much can, and has, been built upon this word 'on rather insecure foundations'.[22] The same vagueness surrounds the expression 'needs created', for the word 'need' remains undefined.

The expression 'objective monetary value' requires special mention, for, at first blush, it seems meaningless, unnecessary and misleading. It seems meaningless because the phrase 'objective monetary value' does nothing but beg the question of 'value'. The point is simply that the word 'value' by itself 'offers no guidance as to how the "valuation" should be accomplished';[23] in reality there cannot, therefore, be any such thing as an 'objective monetary value'. It is true that there are *prima facie* rules for determining value, the best examples being in the sale of goods,[24] but if the phrase 'objective monetary value' is intended to do more than indicate the application of *prima facie* rules, then it is unnecessary, because the question of 'value' arises whatever concept (if any) is chosen. Further, it may prove misleading because the *prima facie* rules must yield, where appropriate, to measures which more accurately give effect to the principle of compensation; as Brandon L.J. has recently said: 'Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case.'[25]

Finally, and as a very general comment, it is enough to say that a conceptual approach in any area of the law is likely to prove ultimately unsatisfactory on no more than policy grounds. Indeed, the dangers of such an approach—namely, its failure to confront the real issues at stake in any particular case, especially as regards the consequences of the decision, and thereafter to choose between the competing interests and policies involved—have long been exposed.[26]

In the light of this, the purpose of the present paper is to investigate the reasons for, and the justifications of, the conceptual approach to economic loss in personal-injury cases. Our method of inquiry will involve a separate examination of the two heads of damage, 'lost earning capacity' and 'needs created,' into which economic loss is now invariably

[22] Id.

[23] See Ogus *The Law of Damages* (1973) 122, and Bonbright *The Valuation of Property* (1937) Part I.

[24] See Sutton *The Law of Sale of Goods in Australia and New Zealand* 2nd ed. (1974) 364-83.

[25] Brandeis Goldschmidt & Co. Ltd v. Western Transport Ltd [1981] Q.B. 864 at 870. See also Bacon v. Cooper (Metals) Ltd [1982] 1 All E.R. 1005 at 1010.

[26] See generally Pound, 'Mechanical Jurisprudence' 8 *Colum. L. Rev* 605 (1908); Stone, supra n. 19, at 292-8; Lloyd *The Idea of Law* (1964) ch. 12 esp. at 293-5. See also, in relation to the subject-matter of this article, Atiyah, 'Loss of Earnings or Earning Capacity?' (1971) 45 *A.L.J.* 228.

itemized in personal-injury cases.[27] It must never be forgotten, however, that the approach to these two heads of damage is similar, as is shown at the simplest level by the concern of some authorities with the maintenance of a logical consistency between the two heads of damage,[28] and by Mason J.'s reformultion of 'needs created' in terms of 'loss of the capacity which occasions the need'.[29] Having reviewed the application of conceptual reasoning to the two standard heads of economic damage, we shall then consider its application to possible economic losses which fall outside these heads, before attempting an overall evaluation of conceptualism.

LOST EARNING CAPACITY

Plain Cases

In a plain case where a personal-injury plaintiff in receipt of some earnings, wages or salary[30] at the time of the tort claims damages for the economic loss flowing from the impairment of his ability to earn such money, if damages are to be based on the plaintiff's lost earning capacity, then regard must be had to the 'objective monetary value' of that capacity *qua* capacity. What, then, is the value of a capacity which is being exercised? Having regard to the principle of compensation, it must surely be its market value,[31] measured by reference to the income which it can be supposed to produce. It follows that, applying a capacity theory, the plaintiff will receive as compensation his actual economic loss; in short, in a plain case, the capacity theory achieves the right result. A typical statement to this effect is that of Reynolds J.A. in *Yammine* v. *Kalwy*:[32]

> The principle is simple enough that loss of earning capacity involves a comparison between what the injured man was capable of earning in his uninjured state and what he will probably be able to earn in employment suitable to his injured state . . . .

In the plain case, therefore, it would not appear to matter whether the loss in question is classified as a 'loss of earnings' or a 'lost earning

[27] See Tilbury, 'Damages for Personal Injuries: A Statement of the Modern Australian Law' (1980) 14 *U W.A.L. Rev.* 260 at 261-2 and 266-7.

[28] See Beck v. Farrelly (1975) 13 S.A.S.R. 17 at 23; Griffiths v. Kerkemeyer, supra n. 4, at 167. Contra: Dal Zotto v. Bonnani (1980) 47 F.L.R. 239 at 241, per Toohey J.

[29] Griffiths v. Kerkemeyer, supra n. 4, at 193.

[30] No distinction between these terms is intended.

[31] Consider Griffiths v. Kerkemeyer, supra n. 4, at 164, 180-1, 193.

[32] [1979] 2 N.S.W.L.R. 151 at 154. See also Todorovic v. Waller, supra n. 3, esp. at 82; Caltex Oil (Australia) Pty Ltd v. The Dredge 'Willemstad' (1976) 136 C.L.R. 529 at 598; Faulkner v. Keffalinos (1970) 45 A.L.J.R. 80 at 84.

capacity'. Indeed, the courts' continued insistence on the distinction between loss of earnings and lost earning capacity in the plain case can, it is submitted, now only be explained historically, that is, by reference to that general approach[33] towards the assessment of personal-injury damages which stresses the intuitive nature of the process of assessment and hence the importance of the discretion of the trier of fact, and which deprecates resort to precise calculations, such as those based on earnings, since such calculations merely give a pseudo-scientific appearance to the process of assessment[34] and run the risk of turning it into a 'computer programme'.[35] This approach also finds expression in its insistence on the importance of the 'global award' rather than on the component parts of the award.[36]

Translated into the field of economic loss resulting from the destruction of the capacity to earn money, this general approach yields the result that actual wages or earnings lost are merely evidence of, or a guide to, lost earning capacity. Probably the best statement of this is to be found in the words of Barwick C.J. in *Ruby* v. *Marsh*:[37]

> Damages to compensate for [the economic loss resulting from the loss of earning capacity] are not for what is lost but simply a financial evaluation of the worth of what is then lost. I have already expressed myself as to the [impropriety] of taking a weekly sum and using some multiplier in order to get a total, which will be discounted to cover contingencies, and be reduced to represent the present value of the discounted total sum which the calculation provides . . . . Of course, it cannot be gainsaid that anyone attempting to estimate what total sum should be awarded by way of damages when loss of earning capacity is one of the elements of loss, will make some *conspectus* of what the future might reasonably have brought to the injured person by way of financial gain by the exercise of the lost earning capacity. But I am unable to agree that *in any sense at all* the award is to include a calculation of the wages as such which might in fact have been earned by the injured plaintiff during the remainder of his working life, or that the court by its award is replacing, as such, the wages which might have earned but for the receipt of injury.

Broken down to its simplest form the reasoning in this passage is that as

33 See Tilbury, supra n. 27, at 266-7.

34 See esp. Arthur Robinson (Grafton) Pty Ltd v. Carter, (1968) 122 C.L.R. 649 at 657, 659.

35 Petroleum and Chemical Corporation (Australia) Ltd v. Morris (1973) 47 A.L.J.R. 484 at 485.

36 E.g. Arthur Robinson (Grafton) Pty Ltd v. Carter, supra n. 34, at 655.

37 (1975) 132 C.L.R. 642 at 650, emphasis supplied.

damages are given for lost earning capacity, and not for loss of wages, a broad 'conspectus' approach towards the assessment of such capacity is required, in preference to the usual method which uses actual wages and, where necessary, discounts a lump sum to present value and allows for contingencies.[38] There are at least two arguments why reasoning such as this should be rejected on purely analytical grounds. First, it involves a naked *petitio principii* because the statement assumes the nature of lost earning capacity—admittedly *ex facie* only negatively (that is, that it is *not* loss of wages), but in reality also positively, since it is inevitably made against the background of a general approach towards the assessment of personal-injury damages—and this general nature reveals without further argument the conclusion which is sought, namely, that a 'conspectus', not a 'loss-of-wages', approach must be adopted towards the assessment of such capacity. Secondly, if there is no assumption as to the nature of capacity in the statement 'damages are for lost earning capacity', but the phrase is chosen because precedent demands it, then the argument involves a *non sequitur* because the determination of the 'correct' concept *cannot* determine the correct *method* of valuation. This is simply because the concept serves only to identify the asset which has been lost, and, without more, *cannot* lead to any conclusion as to the *method* by which damages are to be valued, since the question of 'value' has yet to be determined, and, even when determined, is unlikely to throw light on the correct method of assessment.

This approach towards the assessment of personal-injury damages in general, and to the economic loss flowing from impaired earning capacity in particular, is associated with the High Court of the 1960s and the early 1970s, and especially with Sir Garfield Barwick, who has been described extra-judicially by Mr Justice Hutley as 'a determined critic of rational calculation of damages in accident cases.'[39] The approach is no longer in vogue[40]—if ever it was in practice[41]—but its legacy has been, and in some cases continues to be, felt, principally in relation to the valuation of future economic loss resulting from impaired earning capacity; to the effect of inflation and taxation on the valuation of the plaintiff's earning capacity; and, to the determination of the plaintiff's lifespan. We shall consider each of these in turn.

38 See Todorovic v. Waller, supra n. 3, at 62.

39 'Appeals Within the Judicial Hierarchy and the Effect of Judicial Doctrine on Such Appeals in Australia and England' (1976) 7 *Syd L R* 317 at 332.

40 See esp. Griffiths v. Kerkemeyer, supra n. 4, at 188-9, and consider Traecey v. Churchill [1980] 1 N.S.W.L.R. 442. Cf. Paul v. Rendell (1981) 55 A.L.J.R. 371, esp. at 376-7.

41 Hutley, supra n. 39, at 333.

(1) *The valuation of future economic loss resulting from impaired earning capacity*

The correctness of the lost-earning-capacity concept was first argued *inter alia* in relation to future economic losses, on the basis that it was only by the use of such a concept that the courts could adopt a broad approach which made allowance for the multitude of contingencies necessarily involved in the valuation of future losses.[42] Of course, such reasoning smacks of the logical fallacies we have discussed above, since the choice of the capacity concept *cannot* answer the question whether or not contingencies ought to be taken into account unless the nature of earning capacity is assumed, or unless a conclusion which does not follow from the premise is reached. An assumption was indeed made about capacity, namely, that it was not represented by loss of wages,[43] and that therefore an allowance could be made for contingencies.[44] Of course, even if the loss is described as 'loss of wages', it does not follow that an allowance cannot be made for contingencies in the assessment of such wages. Yet this could be assumed to be the result by reference to the method of valuation of that component of special damages which represented the plaintiff's loss of wages between the date of injury and the date of trial. Here the practice of the courts is simply to replace the wages which it is assumed the plaintiff would have lost, and *generally* to make no allowance for contingencies.[45] The practice is, however, dictated by the sheer convenience of using a figure which can be easily calculated and which is as likely, or more likely, to be right than one arrived at by guesswork. As Aickin J. said of this practice in *Todorovic* v. *Waller*:[46]

> It is no doubt realistic and sensible to take an actual figure, where one is known, especially when it represents a highly probable loss to the plaintiff capable of calculation with reasonable certainty, and to confine guesses to the uncertain, unknown and unknowable.

There is, therefore, no difference in principle between special and general damages in this respect; indeed, there cannot be, since the losses in question are of the same nature, namely, contingent economic losses, and differ only in the point of time at which their impact on the plain-

42 Parsons, 'Excursus' (1955) 28 *A.L.J.* 571-2. The argument is also made in American law: see McCormick *Handbook of the Law of Damages* (1935) 299-301; Dobbs *Handbook on the Law of Remedies* (1973) 540-3.

43 See esp. Tzouvelis v. Victorian Railways Commissioners [1968] V.R. 112 at 145.

44 See e.g. Atlas Tiles Ltd v. Briers, supra n. 6, at 210.

45 Luntz *Assessment of Damages for Personal Injury and Death* (1974) 142-3.

46 Supra n. 3, at 79.

tiff is felt.[47] The assessment of loss of wages in special damages cannot, therefore, be used to justify an assertion that it is lost earning capacity which must be assessed for the future, for the practice in relation to special damages simply assumes nothing in relation to the nature of either special or general damages.[48]

Nevertheless once the earning-capacity theory is regarded as the basis for making an allowance in respect of contingencies, it can be used to justify the valuation of very speculative future economic losses—in fact 'guesstimates'.[49] In practice such losses are usually one of two kinds:

(a) Prospective economic loss which may be incapable of direct evidence. An example is the prospect of a plaintiff's losing his job in the future and being thrown on the open market.

(b) The prospective loss of wages of a person who is not presently exercising his capacity to earn money but who may, or is likely to, do so in the future. Examples are children, students, housewives; in fact, anyone who is *temporarily* unemployed and who is claiming damages for lost earning capacity on the basis of earnings which he may receive in the future.

The fallacious reasoning which has connected the allowance for future contingencies with the choice of the capacity concept has sometimes led to an incorrect, or at least a confusing, analysis of the losses in (a) and (b). In truth both situations are no more than plain cases which raise, admittedly in an acute form, the problem of certainty of damage or of damages, that is the problem of establishing and valuing the plaintiff's loss(es).[50] The danger of incorrect analysis is that the rules of certainty can be subverted. For example, in (a) the danger is that the contingency of the plaintiff's losing his job in the future will come to be seen as a distinct head of damage which will always require at least consideration with a view to valuation.[51] Yet this contingency is no different in kind from the many other contingencies which may operate upon a plaintiff's future employment pattern. Subject to the rules of certainty, it should therefore be merely one of the contingencies which the courts

47 See Griffiths v. Kerkemeyer, supra n. 4, at 180.

48 On this basis the further argument that because damages are for lost earning capacity an allowance should be made for contingencies in relation to special damages, their nature having been misunderstood, must also be rejected: cf. Atlas Tiles Ltd v. Briers, supra n. 6, at 211; Ruby v. Marsh, supra n. 37, at 648-53. But see Freudhofer v. Poledano [1972] V.R. 287; Todorovic v. Waller, supra, n, 46.

49 McGregor *McGregor on Damages* 14th ed. (1980) 800.

50 See id. ch. 8.

51 E.g. Clarke v. Rotax Aircraft Equipment Ltd [1975] 1 W.L.R. 1570.

take into account in establishing and valuing the plaintiff's loss.[52] This is recognized in Australia,[53] but in England this particular contingency has mistakenly become a separate head of damage[54]—a somewhat surprising development for English law since the capacity concept has generally played no part in its law of damages for personal injury.[55] Again, in relation to (b) the danger of failing to recognize that the problem raised is one of certainty is that the court may not insist on hearing the evidence which is available in respect of future economic loss and which it would normally expect to receive, with the result that there is a more than usual risk of under- or over-compensation.[56] It is true that in a case where a loss of either type (a)[57] or type (b)[58] is in issue the contingencies involved may dictate a departure from the usual *method* of assessment, but this is obviously a separate issue.

(2) *The effect of inflation on the valuation of the plaintiff's damages for lost earning capacity*

In so far as it is argued that the court need not take into account *for the future* the effect of inflation on the award, and such argument is based on the alleged distinction between awarding damages for lost earning capacity and loss of earnings,[59] the argument is open to the same objections as those we have noted (1) above, and these objections do not disappear simply by adding the rider that lost earning capacity must needs be discounted to *present* value, for the same can be said of loss of earnings.[60] It is not surprising, therefore, that when, in *Todorovic* v. *Waller*,[61] the High Court was required to pronounce authoritatively upon the question of the effect of inflation on the assessment of the plaintiff's damages for future economic loss, its decision was in no

52 See *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978), vol. 1, Cmnd. 7054-I para. 338 (hereinafter referred to as *Pearson Commission Report*).

53 E.g. Ikovic v. Australian Iron & Steel Ltd (1963) 63 S.R. (N.S.W.) 598. Cf. the difficulties in Lord Campbell's Act claims with the widow's revived 'capacity to remarry': Dominish v. Astill [1979] 2 N.S.W.L.R. 368.

54 Since Smith v. Manchester Corporation (1974) 17 K.I.R. 1 (C.A.). See esp. Moeliker v. A. Reyrolle & Co. Ltd [1977] 1 W.L.R. 132; Fairley v. John Thompson (Design & Contracting Division) Ltd. [1973] 2 Lloyd's Rep 40 at 42. And see Rogers *Winfield & Jolowicz on Tort* 11th ed. (1979) 614-5.

55 See Ogus, supra n. 23 at 185.

56 An example may be National Instruments Pty Ltd v. Gilles (1975) 49 A.L.J.R. 349. See also Sager v. Morten and Morrison (1973) 5 S.A.S.R. 143 at 156.

57 Yammine v. Kalwy, supra n. 32, at 156-8.

58 Joyce v. Yeomans [1981] 1 W.L.R. 549. Cf. Croke v. Wiseman [1982] 1 W.L.R. 71; Connolly v. Camden and Islington Area Health Authority [1981] 3 All E.R. 250.

59 E.g. O'Brien v. McKean (1968) 118 C.L.R. 540 at 546-7.

60 Luntz, supra n. 45, at 140.

61 Supra n. 3.

way founded upon reasoning which was concerned with the selection of the correct concept. The legacy of such reasoning may, however, be seen in one effect of that decision, namely, that inflation in the future operates only upon the discount rate, whilst inflation between the date of accident and the date of trial is effectively taken directly into account.[62] This distinction can, however, be justified on the same grounds as generally support the separate assessment of general and special damages.[63]

(3) *The effect of the incidence of taxation on the valuation of the plaintiff's damages for lost earning capacity*

The problem of taxation arises initially in a personal-injury case in deciding whether the plaintiff is to be compensated for his earnings before taxation (hereafter, his 'gross earnings'), or his earnings after taxation (hereafter, his 'net earnings'), or, in the language of the capacity concept, for his gross or net earning capacity. To state the problem in this way is to demonstrate that the question arises whichever concept is adopted. So the protagonists of the capacity concept framed a seemingly more sophisticated argument than those which were used in relation to future loss in general and to inflation.[64] The argument starts from the premise that lost earning capacity is 'undoubtedly' a capital asset,[65] and then reasons that it must be assessed by reference to its gross value.[66] Even apart from its question-begging nature, the premise is suspicious: it involves using from the law of income tax the notion of capital as a description of an aspect of human personality, and this is either wrong or, at least, inappropriate.[67] Further, even if the premise were unassailable, the conclusion that the faculty is to be assessed by reference to its gross value is not inescapable, since it can still, simply but plausibly, be argued that the real value of that capacity is the net earnings which it produces, since taxation is 'an essential condition of the exercise of the [plaintiff's] earning capacity'.[68] In short, the earning-

62 Id.

63 Supra text to notes 45-8.

64 The genesis of such argument is to be found in a consideration of the taxability of the award: see Groves v. United Pacific Transport Pty Ltd and Thompson [1965] Qd. R. 62. and Gerber's letter in (1971) 45 *A L.J* 447; cf. Atiyah's reply in (1971) 45 *A.L.J.* 700. And consider s. 10 of the Motor Accidents (Amendment) Act, 1979 (Vic.), which was passed pursuant to the decision in Tinkler v. Federal Commissioner of Taxation (1979) 29 *A.L.R* 663.

65 Atlas Tiles Ltd v. Briers, supra n. 6, at 209.

66 Id. at 210-2, 218-9, semble.

67 See Commissioner of Taxation of the Commonwealth v. Hatchett (1971) 45 A.L.J.R. 565 at 566.

68 Fitch v. Hyde-Cates (1982) 56 A.L.J.R. 270 at 277. And consider Commissioner of Taxation (Cth) v. Smith (1981) 55 A.L.J.R. 229.

capacity theory *cannot*, once again, provide an answer to the question of value. The solution, as the High Court acknowledged in *Cullen* v. *Trappell*[69] and in *Todorovic* v. *Waller*,[70] has to be sought elsewhere, in particular in the principle of compensation.

As regards the effect of taxation upon the income component of the assumed exhausting-fund which the court awards as damages, such notional taxation is taken into account, again in the discount rate,[71] because of the principle of compensation[72] and because of the logical requirements of the method of assessment adopted.[73] This has, and can have, nothing to do with the earning-capacity theory.

(4) *The determination of the plaintiff's lifespan*

The problem here is to determine whether, where an accident has shortened the plaintiff's life expectancy, damages are to be awarded on the basis of the plaintiff's pre- or post-accident expectation of life. In deciding in favour of the plaintiff's pre-accident expectation of life, that is that the award should contain a component for economic loss during the 'lost years', the High Court may have been influenced by the capacity concept,[74] but it is clear that similar reasons to those in (1) and (2) above would, *mutatis mutandis*, prevent a logical answer to this problem flowing from the selection of the 'correct' concept. As Lord Wilberforce said in *Pickett* v. *British Rail Engineering Ltd*:[75]

> I do not think that the problem can be solved by describing what has been lost as an 'opportunity' or a 'prospect' or an 'expectation'. Indeed these words are invoked both ways—by the Lords Justices as denying a right to recover [for the lost years] (on grounds of remoteness, intangibility or speculation), by those supporting [recovery for the lost years] as demonstrating the loss of some real asset of true value. The fact is that the law sometimes allows damages to be given for the loss of things so described . . . sometimes it does not. It always has to answer a question which in the end can hardly be more accurately framed than as asking, 'Is the loss of this something for which the claimant should and reasonably can be compensated?'

The solution to this problem is thus, once again, to be found by reference to the principle of compensation, in particular to the function of

69 (1980) 54 A.L.J.R. 294.
70 Supra n. 3.
71 Id.
72 Cullen v. Trappell, supra n. 69.
73 Id. at 299.
74 Skelton v. Collins, supra n. 17, esp. at 129.
75 [1980] A.C. 136 at 149.

damages during the lost years,[76] and perhaps also to the ordinary man's sense of justice.[77]

Other Cases

From the above review of the attempted applications of the lost-earning-capacity theory it is clear that the concept cannot provide a solution to the practical problems presented by plain cases, and that this is now recognized by the courts.[78] We have, therefore, to turn to situations apart from plain cases if we are to find any justification for the continued use of the earning-capacity concept. There are, it is submitted, three situations which we need to consider: (1) where, before the injury the plaintiff was receiving no earnings, or reduced earnings, in exchange for his labour; (2) where, after the accident, the plaintiff's loss of earnings is effectively reduced as a result of receipts from sources other than his damages from the tortfeasor; and (3) where the plaintiff claims business losses. Each of these will now be considered.

(1) *Where, before the injury, the plaintiff was receiving no earnings, or reduced earnings, for his labour*

The meaning of the expression 'no earnings' is obvious: 'reduced earnings' means that the plaintiff was receiving less in earnings than he would or could normally have been expected to receive because he was underemployed for whatever reason.

Probably the most important groups of persons who fall into this category are: part-time workers; children, students and retired persons; women and men who devote themselves to housework; charity workers and persons in holy or religious orders; persons of independent means; the unemployed, in the sense of those who cannot obtain work because of prevailing economic conditions; and, the unemployable and handicapped. Obviously, the assessment of damages in personal-injury claims raises different issues in relation to individuals who fall into any one of these groups, but in so far as such a person presents a claim for the financial gains which he allegedly loses as a result of the tort, and which are based upon his being a housekeeper, student, charity worker or whatever, or upon the unexploited part of his underemployed capacity, that claim, since there are no earnings in respect of it, is likely to succeed only on an argument founded on the concept of capacity. The argument would, of course, be that one of the plaintiff's faculties, his

[76] Id. at 151.
[77] Id. at 150.
[78] See esp. Todorovic v. Waller, supra n. 3, at 82, per Brennan J.

earning capacity, has been impaired, and that, as a corollary, an objective monetary value should be placed upon it.[79]

But what is the 'objective monetary value' of an earning capacity which is unexercised, either permanently or temporarily? There is, of course, no market in such capacities, and so there is no measure of damages even *prima facie* applicable. Three possible answers have been suggested in the Australian authorities:

(a) That the value of such a capacity is what the plaintiff *could* have earned. This is illustrated by *Forsberg* v. *Maslin*:[80]

> At the time of the injury which seriously impaired his earning capacity P was underemployed in that although he worked as a plant operator, he took off from work substantial periods of time to pursue his interest in speedway racing, it being his lifelong ambition to be a speedway star. He made no profit from speedway racing, but his pursuit thereof reduced his earnings from $78 to $45 per week.

In arriving at a broad figure of $7,000 for economic loss, Bray C.J. ignored the fact that the plaintiff worked only sporadically and that he would probably continue to do so, and based his award on the plaintiff's having the capacity to earn more than he did. There are fairly obvious objections to a solution such as this. The solution is based on a fiction (that the plaintiff would earn) which makes it incompatible with the principle of compensating the plaintiff for estimated financial loss; which is against the evidence; and which, where the plaintiff is receiving no earnings at the time of the tort, involves making a guess at the sort of work he could have engaged in to determine what wages he might have received. Further, the solution is effectively at odds with the earning-capacity concept if and in so far as it assumes that earning capacity cannot have an assessable value outside its ability to produce earnings.

(b) That the value of such capacity is what the plaintiff *would* have earned. It is submitted that this is supported by the decision of Bright J. in *Mann* v. *Ellbourne*,[81] a case which effectively overrules for South Australia the decision in *Forsberg* v. *Maslin*.[80] In *Mann* v. *Ellbourne*,[81] the court was concerned with compensating a personal-injury plaintiff who was at the time of the accident working at only two-thirds of her total capacity and who would have continued to work at that level for the remainder of her working life. There was obviously no difficulty in

[79] Consider, e.g., Atlas Tiles Ltd v. Briers, supra n. 6, at 210.
[80] [1968] S.A.S.R. 432.
[81] (1974) 8 S.A.S.R. 298.

compensating the plaintiff for the loss of earnings which flowed from the utilisation of the two-thirds of her earning capacity. But, what of compensation for the unexercised one-third? Bright J. said:[82]

> She has lost 100% of her economic capacity to work, and must be awarded damages for the deprivation of the chance to exploit that capacity at some future time to the full extent. The damages awarded on this head will be calculated as *a measure of the financial loss* occasioned by the deprivation of the chance.

Earlier in the course of his judgment his Honour had said:[83]

> If [the plaintiff] loses an attribute that cannot be restored to him, such as capacity to work . . . then one has to look at what he was doing with that attribute before the accident, and what he was likely to have done with it but for the accident, and *what he might possibly have done with it* but for the accident, and one assesses the user, the probable user, and *the chance* as best one can. *One does not however assess as if possibilities were probabilities or probabilities certainties.*

The most plausible interpretation of these passages is that his Honour regards the problem of the plaintiff who has an unexercised or only partially exercised earning capacity as raising no more than an issue of certainty, so that the court's task, as in the plain case,[84] is no more than to value the chance of the *actual* exercise of the capacity in the future. Logically, if the conclusion is that there is no chance of the capacity's exercise in the future (as in the instant case), the plaintiff should get nothing.[85] If this is the correct interpretation of Bright J.'s judgment, then that judgment has no need of the capacity concept: the conclusion that the problem is simply one of establishing future loss of earnings means that the lost capacity itself has no value apart from those earnings.[86] It also means that the capacity concept is meaningless in this context, because the chance of the plaintiff's exercising her earning capacity in the future is surely the very matter which the court has considered in arriving at an estimation that the plaintiff will utilize two-thirds of her total capacity in the future. Logically once this estimation has been made, the value of the chance in issue must be zero. As with other speculative prospective losses,[87] there is no need for a separate head of damage.

82 Id. at 309, emphasis supplied.
83 Id. at 308-9, emphasis supplied.
84 Supra text to notes 49-58.
85 It is not clear whether effect was given to this in the assessment made by Zelling J. in Mann v. Ellbourn, supra n. 81, esp. at 311.
86 The *dictum* in Graham v. Baker, supra n. 16, is to this effect.
87 See supra text to notes 50-5.

(c) That the value of such capacity is what the trier of fact in his discretion thinks is fair and reasonable in all the circumstances. The starting-point of this approach is to recognize that there is no market in an unexploited earning capacity, but that the absence of a market does not prevent an assessment's being made;[88] rather, it is the function of the trier of fact simply to do the best he can.[89] Probably the nearest analogy is the valuation in personal-injury cases of destroyed capacities which give rise to non-economic losses and which leave the plaintiff non-sentient: here a 'moderate but not conventional' sum is placed upon the loss of the capacity itself.[90] It is submitted that this approach finds support in the judgment of Bray C.J. in *Mann* v. *Ellbourne*.[90a] Although his Honour agreed with the decision of Bright J., his interpretation of that decision is instructive:

> It compensates the plaintiff for the loss of the money she would probably have earned but for the accident, or, in other words, for the extent to which her earning capacity would probably have been used. In addition it gives her something for the loss of an earning capacity she would probably not have used even if there had been no accident, for the loss of a chance to exploit that earning capacity. *I would prefer to say that she is entitled to be compensated for the loss of the chance to exploit it rather than for the loss of the chance that she would have exploited it.*[91]

The meaning of this last sentence, particularly in the context of the judgment as a whole, is, it is submitted, that some value is always to be placed on the loss of the chance to exploit the capacity, even if the court is satisfied that the plaintiff will not exploit, or further exploit, his/her capacity. The approach does, therefore, give effect to the concept of capacity by requiring a value to be placed on the unexercised capacity *qua* capacity. Now, although Bray C.J. regarded this solution as combining 'justice to the plaintiff with moderation to the defendant',[92] and whatever be thought of the solution in the field of non-economic losses,[93] the solution must be rejected, simply because it cannot be reconciled with the principle of compensation, in that it allows recovery for a loss which the courts have estimated will not occur.

It is now apparent that any solution to the problem of the personal-injury plaintiff who is receiving no earnings or reduced earnings must

88 Chaplin v. Hicks [1911] 2 K.B. 786 at 792.
89 Id.
90 Skelton v. Collins, supra n. 17.
90a See footnote 81.
91 Mann v. Ellbourn, supra n. 81, at 302, emphasis supplied.
92 Id.
93 See Skelton v. Collins, supra n. 17, at 133, per Windeyer J.

focus on the question whether or not the tort has given rise to financial loss. The basic mistake which has been made in these cases is the very selection of the earning-capacity concept itself, for the plaintiff is no more seeking to recover damages for a lost *earning* capacity than he is for loss of *earnings*. Rather, he is seeking to recover for the financial loss which results from his inability to engage in *non-earning* activity. It has been a failure of the courts generally to recognize this element of economic loss. It was, however, clearly appreciated by Murphy J. in *Sharman* v. *Evans*[94] that there is 'a discernible element of economic loss in loss of ability to do non-earning work of economic value'. His Honour called such a loss a loss of 'capacity to work',[95] but such a description is to be avoided not only to obviate any hint of conceptualism but also because the word 'work' may, as we shall see,[96] itself turn out to be as unnecessary a restriction on recovery as the word 'earning' has become. Otherwise, Murphy J.'s *dictum* points out the essential requirement of a successful claim for compensation by a plaintiff who receives no earnings or reduced earnings: the demonstration that what he does with his non-market time is of economic or financial value, even though there is no money exchanged for it.[97]

How are the courts to differentiate between situations where the impairment of the plaintiff's ability to engage in non-earning activity is or may be productive of financial loss and those where it is not and is unlikely to be? The response is, no doubt, likely to be intuitive. The easiest cases will be those where the plaintiff is providing services for which he is receiving no payment, but the loss of which can be said 'obviously' to give rise to financial loss. Thus, in the case of a nun who teaches gratuitously, or of a child who renders gratuitous services of economic value to its parents, or of a housewife, we can say that the impairment of the plaintiff's ability to perform such services obviously gives rise to economic loss, namely, the substitution cost of such services.[98] Indeed, we can point out that the law already recognizes the element of economic loss in the case of the impairment of a woman's ability to render household services or of a child's ability to render services to its parent, by giving a claim in respect of such loss to the husband or parent respectively.[99]

94 (1977) 138 C.L.R. 563 at 598.

95 Id.

96 Infra text to notes 104-10.

97 See also Luntz, supra n. 45, at 137.

98 The element of economic loss in these situations is clearly recognized in economics literature, especially that dealing with the value of time resources: see Komesar, 'Toward a General Theory of Personal Injury Loss' 3 *J. Legal Stud.* 457 at 460 n. 8 (1974).

99 See Luntz, supra n. 45, at 303-10.

At the other end of the spectrum will be cases of 'obvious' non-economic loss. Examples here are likely to be the 'gentleman millionaire' who has never done any work of economic value but lived off, say, inherited wealth, which he will continue to receive after the tort;[100] or the plaintiff who partially exercises his capacity to earn, but spends the rest of his time pursuing, for example, hobbies which are of no economic worth. On this basis, *Mann* v. *Ellbourn*[101] will have been correctly decided if the plaintiff did nothing of economic value with the unexercised one-third of her capacity, but not if, for example, she devoted that time to housework. On the other hand, *Forsberg* v. *Maslin*[102] will have been wrongly decided if we assume that there was no financial loss flowing from the plaintiff's inability to engage in speedway racing.[103]

There are two related reasons why we should be wary of an intuitive response to the identification of situations which do sound in financial loss and those which do not. First, the situations we have described as 'obviously' giving rise to financial loss are those in which the plaintiff is rendering services which require replacement, that is, they are akin to 'work' situations. But there may be situations which are not so readily identifiable. For example, do claims by a child, student or retired person for the impairment of the ability to engage in the non-earning activity of being a child, student or retired person—particularly in the context of family situations—sound in economic loss? There is economics literature to suggest that there is a discernible element of economic loss in such impairment of at least children[104] and students.[105] Secondly, the substitution-cost method of valuation may not always be the appropriate one. Thus, taking as an example the important case of a housewife who has lost her 'housekeeping capacity',[106] apart from the substitution-cost method of valuation, other possible measures are: (i) the value of *all* the services she performs: this may not be the same as the substitution cost, since it seeks to include those services for which there can be no substitute;[107] (ii) the opportunity cost of the housekeeping ser-

100 Tzouvelis v. Victorian Railways Commissioners, supra n. 43, at 136. And see Government Insurance Office v. Johnson [1981] 2 N.S.W.L.R. 617 at 627.

101 Supra n. 81.

102 Supra n. 80.

103 This was accepted on the facts, see *id.* at 433.

104 See Komesar, supra n. 98, at 471-4, 483-4.

105 Consider Schultz, 'Capital Formation by Education' 68 *J. Pol. Econ.* 571 (1960).

106 Daly v. General Steam Navigation Co., supra n. 21, at 122, 126.

107 Consider Regan v. Williamson [1976] 1 W.L.R. 305. See also the costing of a wife's time for insurance purposes: *The Times* (London) Nov. 11, 1981, 1 col. 4. As with the substitution-cost method, the lowest market price of those services which can be substituted is likely to be taken.

vices, that is, the assumed market wage which is foregone in order to be a housewife;[108] (iii) a combination of (i) and (ii);[109] (iv) the value of such services as a proportion of their contribution to the G.N.P.[110]

Of course, solutions posited by economists can never be decisive of the issue of compensation.[111] Indeed, whatever economists may say it is likely that the substitution-cost method will be at least the *prima facie* method of valuation in these cases.[112] This may be justifiable. As Clarke and Ogus say:[113]

> The substitution cost method might . . . realistically be attributable to a pragmatic objective in the law of damages. Rather than attempt to place a 'value' on the loss, the judiciary are concerned to implement the principle of *restitutio in integrum* . . . . This involves awarding a sum of money which, as far as is practicable, may be used to secure an equivalent to the service lost.

Yet there are already signs that the courts may depart from this method where appropriate. In *Daly* v. *General Steam Navigation Co. Ltd*[114] Ormrod L.J. said that 'in trying to assess what is a fair compensation in an internal family situation, it is not necessarily at all reliable to have regard to market values of housekeepers or other comparable people.' It is suggested that when the courts feel uneasy about applying the *prima facie* measure they may well find guidance in the relevant economics literature.

Whatever use be made of economics literature, it is necessary to point out the practical implications of the recognition of an element of economic loss in even the 'obvious' cases to which we have referred. First, such financial loss should always be claimed, even in cases of temporary or partial incapacity. Thus, where a personal-injury plaintiff is a housewife at the time of the tort but the evidence is that she will join the workforce in, say, ten years' time, her claim for future loss of earnings should not be allowed to overshadow her claim for the economic loss *qua* housewife. The danger is, as Komesar points out, that '(w)here substan-

108 See Bresatz v. Przibilla (1962) 108 C.L.R. 541 at 545. Consider also Mehmet v. Perry [1977] 2 All E.R. 529. For criticism see Komesar, supra n. 98, at 480-1, and supra text to n. 80.

109 See Komesar, supra n. 98, at 482 n. 53.

110 Consider Franco v. Wolfe (1974) 52 D.L.R. (3d) 355. See also Galbraith *Economics and the Public Purpose* (Penguin ed. 1975) 49.

111 Pennant Hills Restaurants Pty Ltd v. Barrell Insurances Pty Ltd (1981) 55 A.L.J.R. 258; Todorovic v Waller, supra n. 3.

112 Consider Griffiths v. Kerkemeyer, supra n. 4.

113 'What is a Wife Worth?' (1978) 5 *B.J.L.S.* 1 at 22.

114 Supra n. 21, at 130. See also *Pearson Commission Report*, supra n. 52, at para. 357.

tial market earnings are in evidence, it is possible to ignore other aspects of loss under cover of the seemingly sizable recoveries'.[115]

Secondly, the plaintiff's claim in these situations succeeds even though the financial *impact* of that loss is not felt exclusively by him (as in the case of a housewife where there is also loss to the family unit), or indeed at all by him (as perhaps in the case of a child). That the plaintiff effectively recovers for losses suffered by others is in essence the creative aspect of the important decision in *Griffiths* v. *Kerkemeyer*,[116] where the High Court allowed a personal-injury plaintiff to recover as his 'needs created' the cost of services gratuitously provided by relatives, who obviously shouldered the financial burden of providing such services. The proposition is also supported, at least *sub silentio*, by the High Court's pervasive *dictum*, in *Graham* v. *Baker*,[117] which allows the plaintiff to recover to the extent that the impairment of his capacity 'is, or may be, productive of financial loss'—not necessarily, it is to be noted, to the plaintiff.

At first blush, it may seem impossible to reconcile this result with the principle of compensation if it is assumed that that principle allows the plaintiff to recover for *his* loss, no more no less.[118] In *Griffiths* v. *Kerkemeyer*,[116] the necessary reconciliation was, as we shall see,[119] found in conceptual reasoning, that is, by identifying the loss as the plaintiff's need for the services. In the case of financial loss flowing from the inability to engage in non-earning work, the concept of lost capacity, no doubt revised in some such manner as suggested by Murphy J.,[120] can be pressed into service to show that the loss is really the plaintiff's loss. To do this is, however, to invite the dangers of incorrect valuation[121] and subversion of the rules relating to extraneous benefits.[122] The capacity concept should, therefore, be avoided. If the loss must be justified as the plaintiff's loss, it may be preferable to appeal to the Lockean notion of property and assert that the plaintiff owns his labour and its fruits.[123] Such justification is, however, also to be rejected, for it invites the appli-

115 Supra n. 98, at 469.
116 Supra n. 4.
117 Supra n. 16.
118 This is assumed in Griffiths v. Kerkemeyer, supra n. 4, esp. at 175 and 193. And see Dal Zotto v. Bonnani, supra n. 28.
119 Infra text to notes 164-7.
120 Supra text to notes 94 and 95.
121 Supra text to notes 80-93.
122 Infra text to notes 143-5.
123 See Riseley, 'Sex, Housework and the Law' (1981) 7 *Adel. L.R.* 421 at 452.

cation to the plaintiff's losses of a proprietary analysis, which would clearly be unhelpful, inappropriate and dangerous.[124]

It is submitted that, in the cases under consideration, it is not essential that the loss be seen as the plaintiff's loss before the plaintiff can recover in respect of such loss. It is further submitted that this proposition does not conflict with the principle of compensation since the plaintiff recovers no more than the financial loss which flows from the injury. It is true that he recovers more than *his* loss, but that the principle of compensation requires that the plaintiff be restricted to *his* loss seems more the result of assumption than of direct authority. And even if the principle of compensation were to be so interpreted, then, it must be remembered that the principle is, in the law of damages, only the 'dominant rule of law'[125] to which competing principles and policies may dictate exceptions allowing the plaintiff to recover more or less than the loss suffered.[126] The case of the personal-injury plaintiff who suffers financial loss as a result of his inability now to engage in non-earning activity can be seen as such an exceptional case, for the difficulties of allowing a claim in respect of the financial loss to anyone but the plaintiff,[127] as well as the desirability of avoiding multiplicity of actions,[128] dictate that the plaintiff should recover the full financial loss flowing from the tort. In truth, once the element of economic loss resulting from the impairment of the plaintiff's ability to engage in non-earning activity is recognized, there is no reason why the plaintiff should not be allowed to recover for the loss. The situation becomes identical to the plain case, where it has never been suggested that the fact that third parties (for example, the plaintiff's family) share or bear the impact of the financial loss is in any way relevant to the plaintiff's recovery. Indeed, in the present state of the law, where the plaintiff is free both before the tort to dispose of his time in a particular way, and after the tort to dispost of the damages which represent the value of that time in whatever way he chooses,[129] there can be no justification for distinguishing between market and non-market time.[130]

For the sake of completeness, it needs to be mentioned that there are two factors which may be peculiarly relevant to persons who are receiv-

124 Consider Sackville, 'Property, Rights and Social Security' (1978) 2 *U.N.S.W.L.J.* 246, esp. at 251-2.

125 Supra n. 10.

126 See McGregor, supra n. 49, at 9-13.

127 Infra text to notes 173-5. Cf. the position in the *per quod* actions: infra, text to notes 132-6.

128 Infra text to notes 176-7.

129 Todorovic v. Waller, supra n. 3, at 61.

130 Cf. Atiyah, supra n. 26, at 231.

ing reduced earnings or no earnings at the time of the tort, and which may operate to deny or reduce a claim for the financial loss suffered. These are:

(a) The financial loss in question must in fact be caused by the tort. This means that the plaintiff must have had the ability, or at least some ability, to engage in earning or non-earning activity at the time of the accident. Practically, this will exclude claims by persons who, at the time of the tort, are, for whatever reason, handicapped or unemployable to the extent that such handicap or unemployability has already impaired their ability.[131]

(b) No other person must have recovered damages for the financial loss(es) in question. This requirement is necessary to prevent double recovery by children and wives where their parents and husbands respectively have claimed damages for loss of *servitium* or of *consortium et servitium*, and such claims encompass the financial loss flowing from their destroyed ability to engage in non-earning activity of economic value.[132] There is authority for the wider proposition that the existence of these actions *per quod* precludes a claim by children and wives for the financial loss which can be claimed in such actions,[133] but it is submitted that the formulation of requirement (b) above is to be preferred since it recognizes the continued existence of *per quod* actions,[134] whilst accommodating those authorities which seem to allow as an alternative an action at least by wives in respect of the financial losses which could be encompassed in a *per quod* claim.[135] In any event, it may be that the action *per quod* 'is not long for this world'.[136]

(2) *Where, after the accident, the plaintiff's loss of earnings is effectively reduced as a result of receipts from sources other than his damages from the tortfeasor*

Where as a result of the tort the plaintiff receives some extraneous benefit which alleviates the financial consequences of the tort, a whole host of issues of principle and policy arise in any attempt to determine

131 Performance Cars Ltd v. Abraham [1962] 1 Q.B. 33; Faulkner v. Keffalinos, supra n. 32, at 85 ('(t)he capacity has no value unless it be exercisable').

132 See Luntz, supra n. 45, at 303-10.

133 Id. at 111-12.

134 Luntz's suggestion that the *primary* claim should be the wife's is the most sensible way of allowing *per quod* actions to survive, i.e., as alternative *and supplementary* remedies: id. at 112.

135 Bresatz v. Przibilla, supra n. 108, at 545; Sharman v. Evans, supra n. 94, at 598; Daly v. General Steam Navigation Co., supra n. 21.

136 McGregor, supra n. 49, at 845. See *Pearson Commission Report*, supra n. 52, paras. 445-7.

whether such benefit should go in reduction of the defendant's liability. The issues relate to the principle of compensation, the policy of loss-distribution, the nature and purpose of the benefit in question, and, sometimes, the ordinary man's concept of justice.[137] It is not too superficial to say that the trend has been towards ignoring such benefits in assessing damages.[138] It may be conjectured that, to a large extent, the trend was a response to—and, no doubt, offset to some extent—what Murphy J. has called 'the judicial practice of depressing damages, especially in catastrophic personal injury cases'.[139] Now that the courts do openly strive for full compensation for financial loss,[140] and given the confusion which presently exists in the law relating to collateral benefits,[141] it may be that this whole area of the law requires re-examination, and that this will result in a reversal of the trend. There is certainly evidence of this in England, at least in relation to social security benefits.[142]

Reasoning based on the concept of earning capacity may, however, be pressed into service to provide the solution to any claim for the reduction of the plaintiff's damages by reason of the plaintiff's receipt of extraneous benefits, such as unemployment benefits. The application of such reasoning strengthens any trend towards ignoring collateral benefits, for the argument is that as damages are given for lost earning capacity, a capital asset, the plaintiff is entitled to the objective monetary value of that asset, and that just as the market value or earnings in the plain case are only a guide to such value, so anything which is completely extraneous to that value, such as the source from which it is met, is irrelevant, since that value itself represents the 'thing' for which the plaintiff is getting his compensation.[143] At the analytical level, such reasoning obviously smacks of more than one of the logical fallacies we have exposed above,[144] and demonstrates the unacceptability of concep-

137 See Fleming, 'The Collateral Source Rule and Loss Allocation in Tort Law' 54 *Calif. L Rev.* 1478 (1966); Fleming, 'Collateral Benefits' 11 *International Encyclopedia of Comparative Law* ch. 11.

138 Sher, 'Damages for Personal Injuries: Current Developments, Future Trends and Suggested Reforms' (1981) 55 *A.L.J* 458 at 466.

139 Sharman v. Evans, supra n. 94, at 599. See also Cullen v. Trappell, supra n. 69, at 305.

140 Sharman v. Evans, supra n. 94, at 585; Pickett v. British Rail Engineering Ltd., supra n. 75, at 168.

141 Especially in relation to unemployment benefits: e.g. Lee v. Redding (1981) 28 S.A.S.R. 372, and authorities there cited; cf. Muller v. Evans (No. 2)[1982] Qd. R. 209.

142 E.g. Plummer v. P. W. Wilkins & Sons [1981] 1 W.L.R. 831; Lincoln v. Hayman [1982] 1 W.L.R. 488. And see *Pearson Commission Report*, supra n. 52, ch. 13.

143 Canny v. John Pfeiffer Pty Ltd (1979) 28 A.C.T.R. 11 at 30; Morley v. Murray (1980) 42 F.L.R. 271 at 272. See also Muller v. Evans (No. 2), supra n. 141.

144 See supra esp. text to notes 37-8.

tual reasoning in this area, for it ignores the real issues to which extraneous benefits give rise. Such reasoning is therefore to be rejected, and attention focussed rather on the actual financial loss which is suffered in any situation, having regard to the policy objectives underlying the law in respect of extraneous benefits. This is generally recognized by the courts.[145]

(3) *Where the plaintiff claims business losses*

Where a personal-injury plaintiff is engaged in a business which yields profits, and those profits are substantially the result of his own efforts, rather than of the investment of capital, and/or of the labour of others,[146] it is accepted that the plaintiff can recover any diminution in those profits which is attributable to his injury.[147] No earning-capacity theory is necessary to achieve this result: it is simply a question of recognizing that this is the real measure of the plaintiff's loss, although it is not manifested by, or limited to, 'earnings' in the sense of wages received from an employer.

What is still doubtful is whether, where the personal-injury plaintiff is engaged in such a business but the profits are the product both of his efforts and of the efforts of partners,[148] his claim is restricted to *his* actual financial loss, or whether he can claim the loss which results to the business as a whole. In *Lee* v. *Sheard*[149] the opinion was expressed *obiter* by Denning L.J., as he then was, that the plaintiff could recover for his loss and no more. The Australian authorities are divided on this issue.[150] It is submitted that since *Griffiths* v. *Kerkemeyer*,[151] and in the light of our discussion above,[152] the answer is, in principle, clear, namely, that the financial loss should be recoverable by the plaintiff even though it includes loss effectively suffered by others. As has been suggested above,[152] this result has no need of an earning-capacity theory. Indeed, it is clear in this context that, unless it is assumed that the adoption of the concept itself answers the question whether the loss must be the plaintiff's loss, the theory does not lead us to any particular

145 E.g. National Insurance Co. of New Zealand Ltd v. Espagne (1961) 105 C.L.R. 569. Consider also Tuncel v. Renown Plate Co. Pty Ltd [1976] V.R. 501. Cf. the cases in n. 143, supra.

146 See Slagle, 'The Role of Profits in Personal Injury Actions' 19 *Ohio St. L.J.* 179 (1958).

147 E.g. Lee v. Sheard [1956] 1 Q.B. 192.

148 In principle the mere fact of incorporation ought not to make a difference except in so far as the company itself has been successful in a *per quod* claim: see Luntz, supra n. 45, at 152-4, and supra text to notes 132-6.

149 Supra n. 147, at 196.

150 See Luntz, supra n. 45, at 154-5.

151 Supra n. 4.

152 Supra text to notes 116-30.

result. The point is strikingly made in the decision of the Federal Court in *Dal Zotto* v. *Bonnani*,[153] where a personal-injury plaintiff who had a half-share in a partnership was restricted to damages on the basis of his loss, measured as half of the cost of the employment of substitute labour during the period of his injury. McGregor and Sheppard JJ., whilst accepting the earning-capacity concept, nevertheless held that the *dictum* in *Graham* v. *Baker*,[154] and its acceptance in *Griffiths* v. *Kerkemeyer*,[151] resulted in the plaintiff's recovering only his own loss. Toohey J., on the other hand, dissented and held that the total loss was recoverable because 'the [plaintiff's] loss of earning capacity is reflected by the entire cost of substitute labour since it is the true measure of his earning capacity . . . .'[155] His Honour perceived the same difficulty as the majority in reaching this conclusion, but he held that the authorities which persuaded them were inapplicable to the measurement of compensation for lost earning capacity[156]—in spite of the fact that the *dictum* in *Graham* v. *Baker*[154] refers *ex facie* to lost earning capacity!

With respect, if the conceptual approach is jettisoned, the real issues can be confronted, and it will be seen that the plaintiff should be able to recover the financial loss which results from the tort, and that it should be irrelevant that some of that loss falls upon others.[157] The abandonment of conceptualism also has the advantage of obviating any tendency[158] to tie the measurement of such loss to any particular formula, such as the cost of replacement labour. No doubt this may be seen as the *prima facie* measure, but other measures may be more appropriate in some cases.[159]

NEEDS CREATED

It is only since the decision of the High Court in *Griffiths* v. *Kerkemeyer*[160] in 1977 that the expenditure incurred by the plaintiff as a result of the tort has been conceptualized in terms of the plaintiff's needs created. The relatively late emergence of conceptual reasoning in relation to these losses is not difficult to understand, for ordinarily such losses cause no problem: if they result from the tort and are incurred by the plaintiff as reasonable and necessary expenses,[161] then the plaintiff

153 Supra n. 28.
154 Supra n. 16.
155 Dal Zotto v. Bonnani, supra n. 28, at 242.
156 Id. at 241. Cf. Tibbett v. Davidson [1976] W.A.R. 24 at 27.
157 Supra text to notes 116-30.
158 Supra text to notes 9 and 23-5.
159 E.g. Linke v. Howard [1967] S.A.S.R. 83.
160 Supra n. 4.
161 See Sharman v. Evans, supra n. 94, at 573.

will recover their value, however they are described, on the ordinary principle of compensation. The pressure for the definition of the loss in terms of the plaintiff's needs arises in those cases where the effects of the loss are either enhanced by the action of third parties, or reduced by the action of third parties or by the operation of extraneous benefits, and the plaintiff either claims for the enhanced loss or seeks to ignore the alleviating effect of extraneous actions or benefits. An example of the first situation is where the plaintiff claims for the expenses incurred by relatives in visiting him in hospital in circumstances where such visits are of benefit to his health.[162] An example of the second situation is where the plaintiff needs nursing services as a result of the tort and these services are provided gratuitously by a third party.[163] Both of these situations are, or may be, productive of financial loss, and the impact of that loss is borne by a third party. Yet, the plaintiff can recover beneficially[164] damages for such loss, namely, the loss of the ability to be free of the need in question,[165] the 'objective monetary value' thereof being the market value of whatever it is to which the need gives rise.[166] As the need will give rise to services or expenditures which have a market value, a *prima facie* measure, conceptual reasoning—as in the plain case of lost earning capacity[167]—works rather more successfully here than in most other instances of its application. Notwithstanding its linguistic appeal, the adoption of conceptual reasoning must be rejected here for reasons similar to those which necessitate its rejection in relation to lost earning capacity.

First, if the purpose of conceptualism is no more than to identify the plaintiff's need as his loss so as to give him a *prima facie* right of recovery—and this is, it is submitted the correct interpretation of *Griffiths* v. *Kerkemeyer*[168]—then it is unnecessary. Why cannot we simply say that any financial loss, causally connected with the tort, which has been or may be reasonably or necessarily incurred as a result of the plaintiff's injuries, grounds a right of recovery in the plaintiff, subject to the rules relating to extraneous benefits?[169] Two possible objections may be made to this. First, where neither the plaintiff nor anyone else has parted, or may part, with money, but there is clear evidence that the

162 See Wilson v. McLeay (1961) 106 C.L.R. 523.
163 See Griffiths v. Kerkemeyer, supra n. 4.
164 Id. at 177, 193-4.
165 Id. at 167-8, 174-5, 193.
166 Id. at 169, 181, 193.
167 Supra text to notes 31-2.
168 Supra n. 4, at 165-6, 174-5. And see Luntz, 'Damages in Respect of Voluntary Services' [1977] *A.C.L.* DT-303.
169 Consider Wilson v. McLeay, supra n. 162, at 527.

tort has created a need in the plaintiff, and that need sounds in financial terms, it may be argued that the plaintiff should recover nothing since there is no financial loss. The simple answer to this is that there is no reason why financial loss should be equated with monetary outlay: a loss is financial if it is capable of estimation in money even if no money is expended to alleviate it.[170] Secondly, it may be argued that, even where there is clear evidence of financial loss, but that loss is borne by another, the plaintiff cannot recover since it is not *his* loss,[171] and the only way of allowing recovery is by identifying the loss as the plaintiff's loss in terms of his needs created. But as has been argued above,[172] it is not necessary that the loss is the plaintiff's loss, and it is in this context that the practical reasons which require that the plaintiff be allowed to recover more than his loss are most clearly demonstrated. For, if the plaintiff cannot recover in respect of such loss, it is likely that the third parties who effectively bear the brunt of the financial loss will receive no compensation as, notwithstanding *Caltex Oil (Australia) Pty Ltd* v. *The Dredge 'Willemstad'*,[173] it is doubtful that such third parties have a claim against the tortfeasor,[174] and certain that, in the absence of legal obligation, they have no action against the victim of the tort, as our law has no generic doctrine of *negotiorum gestio*.[175] Of course, there is no guarantee that if the plaintiff recovers damages beneficially in respect of a loss which is effectively borne by a third party, that such third party will receive any recompense for his loss, and this may suggest that a trust should be imposed upon the damages in favour of such third party. But, although such a solution is possible,[176] it is undesirable, at least in cases involving future losses, because it will involve the courts' engaging in yet further detailed speculations as to the pattern of the plaintiff's future needs and as to how those needs will be met.[177] In short, potentially the least disastrous course is to allow the plaintiff to recover the damages beneficially in the hope that he will recompense those who have and will suffer financial loss as a result of his injuries.

170 Naum v. Nominal Defendant [1974] 2 N.S.W.L.R. 14 at 17. Consider, Griffiths v. Kerkemeyer, supra n. 4, at 178-9. Quaere: ought a distinction be drawn between general and special damages? See Wilson v. McLeay, supra n. 162.

171 Wilson v. McLeay, supra n. 162, at 527.

172 Supra text to notes 116-30.

173 Supra n. 32.

174 See Griffiths v. Kerkemeyer, supra n. 4, at 177.

175 Goff and Jones *The Law of Restitution* 2nd ed. (1978) ch. 15, esp. 272-3.

176 E.g. Schneider v. Eisovitch [1960] 2 Q.B. 430 at 440; Cunningham v. Harrison [1973] Q.B. 942 at 952; Cf. Banbury v. Bank of Montreal [1918] A.C. 626 at 668, 700 and 716-7; Wilson v. McLeay, supra n. 162, at 527.

177 Griffiths v. Kerkemeyer, supra n. 4, at 177, 193. See also *Pearson Commission Report*, supra n. 52, para. 349.

The second reason for the rejection of the application of conceptual reasoning in this area is that, as it involves the logical fallacies exposed above,[178] it may well lead to incorrect valuation of the loss. It may be objected that, in the case of 'needs created', the danger of incorrect valuation is more theoretical than real, since the market value of the loss will always be the correct measure.[179] However, the English courts have not restricted themselves to applying the market value of necessary services,[180] and there may well be situations where the market value is too restrictive a measure. Take, as an example, the case of a married woman who is injured in an accident and suppose that it is essential to her recovery that she be attended by her husband, who consequently gives up a highly remunerative salary, out of which he, as breadwinner, supported his wife and family. Is it reasonable, bearing in mind the principle of *restitutio in integrum*, to restrict the wife's recovery to the market value of her husband's services, when such value may be well below his expected salary? In short, is not the value supposedly dictated by conceptual reasoning too inflexible to be an *invariable* barometer of loss?[181]

Thirdly, the conceptual approach is potentially dangerous in that it may, as with lost earning capacity,[182] subvert the rules as to extraneous benefits by stressing that the source from which the plaintiff's needs are met is irrelevant. It is true that in *Griffiths* v. *Kerkemeyer*[183] Gibbs and Stephen JJ. were at pains to point out that the rules relating to extraneous benefits survived, Gibbs J. by holding that it was only where there was 'financial loss' that the plaintiff could recover,[184] and Stephen J. by stating that in cases other than the one at hand the rules relating to third-party subventions still applied.[185] Indeed, Gibbs and Mason JJ. inclined to the view that if the services *in casu* had been provided gratuitously by the State such services would have reduced the defendant's damages.[186] Logically, unless *Griffiths* v. *Kerkemeyer*[186a] is interpreted as giving no more than a *prima facie* right of recovery in the case of needs created,[187] it is difficult to see how such a distinction can be

178 Supra esp. text to notes 23-5.
179 Griffiths v. Kerkemeyer, supra n. 4, at 169, 181, 193.
180 E.g. Donnelly v. Joyce [1974] Q.B. 454 at 460.
181 See *Pearson Commission Report*, supra n. 52, para. 350.
182 Supra text to notes 137-45.
183 Supra n. 4.
184 Id. at 165.
185 Id. at 175-6.
186 Id. at 165-6, 194.
186a See footnote 183.
187 Supra n. 168.

drawn once the loss has been conceptualized in terms of needs created, for the need exists regardless of the source which bears its financial consequences. As Bray C.J. said in *Beck* v. *Farrelly*.[188]

> [Q]uestions arise with regard to free medical or hospital assistance supplied by the State. Subject to any statutory provision, it is said that the wrongdoer does not have to pay for them . . . Why? The plaintiff's loss includes a need for medical and hospital services. If the source from which the cost of those services is met is really irrelevant to the wrongdoer's liability, why, subject again to any statutory provision, should he not have to pay for them?

OTHER ECONOMIC LOSSES

The fact that financial loss in personal-injury cases is invariably claimed and awarded under the heads 'lost earning capacity' and 'needs created' should not obscure the fact that in principle the plaintiff is entitled to recover all the financial losses which are caused by the tort and are not too remote a consequence of it,[189] and the fact is that 'lost earning capacity' is not an exhaustive description of possible lost economic gains. Examples suggested by recent cases are: the loss of the opportunity of making a capital gain;[190] the loss of a life interest in property during the period of lost years;[191] and, the loss of income tax paid on worker's compensation payments which are repayable to an employer as to their gross amount without any deduction for the tax which they have attracted.[192] Another example is the loss of the economic benefits of marriage.[193]

Where a court in a personal-injury case is faced with a claim for one of these exceptional losses, the recoverability of that loss should not depend on whether it can be accommodated under the head of 'lost earning capacity' or otherwise conceptualized. Indeed, we have already seen how, by attempting to place under the rubric 'lost earning capacity' a claim for financial loss flowing from inability to engage in non-earning activity, it is possible to ignore the real basis of recovery.[194] The real basis of recovery in all these cases is simply that the plaintiff is entitled to be compensated, on the basis of *restitutio in integrum*, for such

188 Supra n. 28, at 23. See also Griffiths v. Kerkemeyer, supra n. 4, at 194.
189 Overseas Tankship (U.K.) v. Morts Dock and Engineering Co. (The Wagon Mound) [1961] A.C. 388.
190 Cullen v. Trappel, supra n. 69, at 303.
191 Pickett v. British Rail Engineering Ltd, supra n. 75, at 165.
192 Fox v. Wood (1981) 55 A.L.J.R. 562.
193 See McGregor, supra n. 49, at 796-7.
194 Supra text to notes 80-97.

financial loss as is not too remote.[195] It is just as unnecessary and misleading to go beyond this and to speak of, for example, 'loss of capacity to make a capital gain', as it is of, for example, 'lost housekeeping capacity'.[196]

CONCLUSION

More than ten years have elapsed since Professor Atiyah[197] appealed for an end to what Murphy J. has called the 'sterile controversy'[198] as to whether 'lost earning capacity' or 'loss of earnings' is the correct description of the plaintiff's lost gains. Professor Atiyah urged that, instead of seeking the 'right' concepts, the courts should attempt to find solutions to the problems surrounding this head of damage in an analysis of the policy issues presented by each problem. That appeal has been spectacularly unsuccessful. Indeed, in 1977 the conceptual approach was given a new lease of life by the High Court in its extension to that head of damage now called 'needs created'.[199] One possible reason for the persistence of conceptualism may be the obscurity of the literature on the subject. For, whilst all jurists who have considered the Australian law of damages for personal injury have drawn attention to the fact that 'lost earning capacity' is the correct concept to delimit the plaintiff's lost gains, they have always added a rider to the effect that the concept is not 'in all respects pushed to extreme',[200] to 'unacceptable conclusions'[201] or to 'logical conclusions'.[202] However, with the exception of Professor Luntz,[203] these writers have not explained the nature of such cryptic statements, nor considered their implications.

It is hoped that the present paper has indicated the meaning and implications of the conceptual approach, and demonstrated that it cannot be supported. The approach is of no use in the plain case; on the contrary, its use has in some situations tended to obfuscate the real issues involved. In all cases, the danger of its use is that it can lead to incorrect valuation and/or subversion of the rules relating to extraneous benefits. All this is not really surprising since the attempts which have been made to use the approach are all deficient on purely analytical grounds. The

195 See Fox v. Wood, supra n. 192.
196 Daly v. General Steam Navigation Co., supra n. 106.
197 Supra n. 26.
198 Commissioner of Taxation (Cth) v. Smith, supra n. 68, at 232.
199 Griffiths v. Kerkemeyer, supra n. 4.
200 Fleming *The Law of Torts* 5th ed. (1977) 218.
201 Luntz, supra n. 45, at 171.
202 Ogus, supra n. 23, at 184.
203 Supra n. 45, at 131-40.

appeal of the approach as providing linguistic tools is conceded, but this alone cannot justify its continuing use.

The conclusion that the courts should avoid the conceptual approach towards the economic heads of damage in personal-injury cases is thus inescapable. Indeed, the problems which we have discussed in this paper would then be susceptible of solution by focussing attention on the actual economic loss flowing from the tort in an attempt to give effect to the primary principle of compensation. If this were done, the law could be stated in some such simple form as the following:

(1) The plaintiff in a personal-injury claim is, *prima facie*, to be compensated for all the economic losses which are caused by the tort, which are not too remote therefrom, and which satisfy the requirements of certainty of damage(s).

(2) The plaintiff is not entitled to be compensated to the extent to which extraneous benefits have lessened his economic losses *and* the law requires that such benefits be taken into account in reduction of the defendant's damages.

(3) Subject to (1) and (2), where the plaintiff claims as part of his financial loss his loss of earnings, he is entitled to recover such earnings subject only to an allowance for contingencies.

(4) Subject to (1) and (2), where the plaintiff makes a claim for financial loss and at the time of the tort he was not in receipt of any earnings at all, or in receipt of reduced earnings, he is entitled, in addition to any loss of earnings, to damages to the extent to which his inability now to engage in non-earning activity of economic value results in financial loss, provided that no other person has recovered damages for such loss.

(5) Subject to (1) and (2), where expenditure has been or may be reasonably or necessarily incurred as a result of the plaintiff's injuries, it is recoverable.