

---

THE ACTUARY IN IRISH LITIGATION WORK  
PIERS SEGRAVE-DALY (REPUBLIC OF IRELAND)

INTRODUCTION

Some papers are written because something new or something magnificent is offered to the actuarial fund of knowledge in a specialized area. This paper is intended just as an introduction to stimulate discussion.

HISTORY

Actuaries have been used extensively in injury and fatal cases in the Irish Court for almost 50 years. In an Appeal against the size of an award in a case before the Irish Supreme Court in 1968, one of the Supreme Court Judges in his written decision included the following:

"It has been decided by this Court in many cases that where there is a substantial element of future loss of earnings involved in any claim the evidence of an Actuary is not merely desirable but necessary. It is immaterial where the prospective loss is in respect of a long period or in respect of a short period and whether the period has already commenced or whether it will arise at some stage in the future. The appropriate Actuarial evidence is necessary in all these case to enable the Jury to arrive at a reasonably accurate mathematical computation of the present value of the actual loss which they find will be incurred".

Despite the removal of Juries from personal injury and fatal case trials in the meantime, there has been no material change in the above and actuaries continue to be used in every type of case involving the valuation of future losses.

PERSONAL

I first became involved in Litigation cased almost by mistake. In 1966 when working for a large Insurance Company in Dublin, I sat near to a girl who took a telephone call and passed the call to me saying "there is a Solicitor on the phone and he wants an Actuary to help him with an injury court case". It turned out to be a friend from school and that was my first case. Dublin is like a

---

village, word got around rapidly and four years later I was doing 100 cases in the year (with the permission of the Board of Directors of the Company for which I then worked!)

I continued to do Court work on a spare time basis until 1975 when I joined a friend in a Court Work and Pensions Consultancy. In 1980 I set up my own Consultancy doing "Court work only". This became a Company in 1988. There are now 13 employees including myself, four of whom are qualified as Actuaries. I wonder if we are unique in being the only Court work only Actuarial Consultancy.

Over the years I have personally been involved in writing reports for in excess of 5,000 cases and have appeared regularly at Court (a large number of cases have settled on the door of the Court) and in the Witness Box. The vast majority of the cases I do are on behalf of the plaintiff. My instructions come from Solicitors acting on behalf of a plaintiff or defendant.

#### INJURY CASE REPORTS

In injury cases, the Actuary is asked to put a value on the loss of each future £1 per week of lost earnings (called the Multiplier). The Actuary is frequently asked to also put a value on the future loss of earnings and is given data on (a) what the plaintiff would now be earning but for the accident and (b) what the plaintiff can now earn instead given his injuries. I call these the ceiling and the floor and the level of the floor in particular is frequently very uncertain. Often there are pension losses to be valued also.

The largest damages go to severely injured plaintiffs. The majority of those damages are in respect of future care costs. Data is provided regarding the annual amount of care costs, prosthesis costs, etc. and the actuarial report usually includes both multipliers and full valuations of each item of future cost, often on the basis of some reduction in the normal life expectation.

#### FATAL CASE REPORTS

In fatal cases the Actuary is usually the pivotal person who puts together the whole case for dependency losses. When I first started to practice, the Actuary simply valued each £1 per week lost. It did not fall to him to ascertain how many Pounds per week have been lost. Nowadays the vast majority of my time in fatal cases is spent on ascertaining the latter and the time ratio is frequently of the order of 10 to 1. Sometimes the instructing letter (indeed I received once

---

recently) is no more than "I act for Mrs. e.g. O'Brien whose husband was killed in a car accident a year ago. Please let me know what data you need to put a value on the dependency losses". I received one letter from a defending solicitor instructing me as follows: "I act for XYZ Insurance Company who are defending a fatal case involving the death of Mr. E.g. Murphy. You will get all the data you need from the plaintiffs' actuary. Please let me have your report".

The theory in fatal cases is simple enough. Give back in on lump sum all the dependants would have received if the fatality had not taken place. However very few fatal cases are easy to value. It cannot be otherwise when one is trying to take a still photograph of a moving picture. Typical of the complications might be a fatality where the husband before his death had a good job and was generous provider but was made redundant three weeks before he died: there are four young children: the wife was working part-time prior to her husband's death but had to give up work after he died for the children's sake; she is now known to have a live-in lover who contributes into the family kitty.

In Ireland it is usual to take into account the following in death of husband cases:

1. Losses to his wife during their joint lifetimes (had the deceased lived) but with some reduction from his retirement age onwards.
2. Losses to the children usually up to age 22.
3. Additional losses arising from pay increases which the deceased would have received had he lived between the date of death and the date of the Actuarial Report.
4. An indirect allowance for the future inflation.
5. A further loss to the deceased's wife when each of the children become independent.
6. An interest addition to the past losses.
7. An allowance for tax payable by the deceased's wife on the dividends and interest she expects to receive on the investment of her award.
8. The question of deciding how much of the deceased's contribution to the family kitty has been lost by each of the deceased's dependants is nearly always left to the Actuary.
9. Losses of an indirect nature such as family use of a deceased's company car.
10. The assets left by the deceased.

I make a clear distinction between advising as to what data is needed and actually gathering the data. We have strict office practice of never becoming data gatherers with one exception.

---

Frequently in the larger plaintiff fatal cases I suggest meeting with the widow with her solicitor as I find I get much better "feel" for the case after so doing.

#### GIVING EVIDENCE

My colleagues and I frequently give evidence in High Court cases most of which are held in Dublin but also in the other major cities of Ireland. Injury cases greatly outnumber fatal cases and therefore I most usually give evidence in an injury case. Judges' requirements vary enormously. Some Judges only want the value of each £1 per week but other Judges want all the calculations done for them and a figure or figures provided for the value of all future losses. Sometimes I am asked to give figures on a number of different (not actuarial) bases.

There is another reason why it is less usual to give evidence in fatal cases. There is a marked reluctance to putting widows through the ordeal of having to give evidence and be cross-examined in Court. As a result strenuous efforts are made to settle cases beforehand. This is made easier by the fact that on the purely actuarial aspects of the case actuaries tend not to disagree much. Where actuaries are called in evidence the Judge invariably harangues both sets of Barristers to get the two actuaries together to try to come to an agreement in respect of as much as they possibly can. The Court only wants to be presented with figures and arguments where agreement cannot be reached. This system most frequently results in an out of Court settlement. In one recent case where I acted on behalf of the defendants the plaintiffs' actuary's valuation figure was more than four times my figure – but even that case was resolved out of Court. It helps greatly that most of us who give evidence in the Irish Courts are well known to the Judges who before they became Judges were Barristers and were involved in previous cases with us.

#### THE DISCOUNT RATE

The main key to the multiplier is the discount rate. Currently (and for more than 10 years) the rate used has been 4%.

When I first started to practice the rate used was 8 ½% and no allowance was made for inflation. There had been a marked reluctance by Judges for some time previously to making any allowance for inflation. Then there was a long period when some allowance was made for inflation and a 5% rate was used. In 1982 however the figure of 5% was called into question.

---

Immediately prior to that there had been severe inflation in Ireland for a period and negative real rates of return had been the norm for some years. Various economists gave evidence in a case in which I acted for the plaintiff. They said that, based on past trends, there was no evidence over many previous years that a prudent investor could make 5% over and above the rate of inflation. In that particular case the Judge opted for a rate of 2½%. (Soon afterwards, substantial positive rates of return became the norm again!). For a 20 year old with a loss of earnings to age 65, a 2½ % discount rate give a multiplier 48% higher than the equivalent figure at 5%. The decision to use 2½% caused consternation among the insurers and was appealed. The Appeal was unsuccessful.

However around that time the Irish Government introduced Index Linked Stocks which are linked directly to the Consumer Price Index (the only Index of Irish price inflation). Almost since the beginning, the yields on these Stocks has hovered either side of 4% and this was a major factor in the initial adoption and continued use since 1983 of a 4% discount rate by actuaries in court cases.

#### THE TREATMENT OF TAX IN THE IRISH COURTS

Three principles underlie how tax affects the figures in Irish injury and fatal cases. Firstly the award itself is not subject to any form of tax. Secondly in calculating the loss of future earnings only the net loss (the loss of what the plaintiff would actually have received into his hands) is allowed to be valued. Thirdly in valuing the Actuary may make allowance for the tax payable on the dividends and interest received on the investment of any award.

I recently encountered a rare exception to the rule that the award itself is not taxable when I acted on behalf on an Austrian plaintiff, a Dental Surgeon in Vienna, who was seriously injured in a car accident while on holiday in Ireland. A key element to the case was the fact that as soon as he took that part of his award for future loss of earnings back to Austria he would be taxed on the whole capital sum. It was argued on his behalf therefore that when the calculation of what the Judge would award him for future loss of earnings had been completed, that figure needed to be "grossed up" to a higher sum, such that when Austrian tax was paid on the sum he would be left with what the Judge had awarded him in the first place for his future loss of earnings. The case was settled while at hearing.

Normally in arriving at the net loss of earnings, allowance is made for the tax that would have been payable on the plaintiff's earnings had the accident not occurred and allowing also for tax on

---

what the plaintiff is earning (or can earn) given his injuries. Other deductions are made in respect of Social Security contributions and employees pension scheme contributions.

Frequently only the gross wage figures are available to the Court and the actuary is asked to net them down while giving other evidence.

The actuarial multipliers on a 4% basis are increased to take account of the tax payable on the dividend or interest received on the investment of the award for loss of earnings.

In the United Kingdom, Tables known as "The Ogden Tables" have been published by the Government Actuaries Department and adopted together with the use of Index Linked Gilt Yields by a joint actuarial/legal working party chaired by Q.C. Although they were welcomed by many practitioners and by the Law Commission they have struggled to gain acceptance in the U.K. Courts. In a recent Judgement, Lord Justice Hirst rejected them on the argument that a prudent investment strategy implied a normal spread of investments with substantial equity content, which in the long-term would outperform Index Linked Gilts.

It is submitted that in Ireland, to some extent at least, a balance is reached by on the one hand only taking into account price inflation and not wage inflation and on the other hand ignoring the excess potential yield of equities over Index Linked Gilts.

Irish Judges are so used to a 4% rate that unless economic conditions and they yield on Index Linked Gilts were to vary substantially it seems like that the 4% discount rate will continue.

#### THE DISCOUNT RATE FOR FOREIGN NATIONALS

Now and again the plaintiff is a foreign national injured on holiday in Ireland. In such cases all the calculations are carried out in the home currency of the plaintiff. The question frequently arises as to whether an Irish or a foreign actuarial basis should be used and indeed whether an Irish or a foreign actuary should give evidence. The problem is highlighted where the actuarial basis which would normally be used in the plaintiff's home country is stronger than the normal basis in Ireland. The writer knows of no Irish decisions in this area as virtually all such cases so far have resulted in out of court settlements. The tendency has been to use Irish actuaries.

---

### MORTALITY

Generally multipliers are based on Population Mortality. While there is an argument for using lighter mortality (most plaintiffs are not deathbed cases) in practice Population Mortality is used. Most multipliers are requested only for a limited period (typically to age 60 or 65) and the effect of using lighter mortality would be very small indeed. Heavier mortality is used in some cases particularly for quadriplegics, the appropriate evidence on life expectancy being given by a medical expert.

I was once in Court where a Judge ticked off a Barrister for not giving evidence of a very elderly plaintiff's life expectation. The Barrister stood his ground arguing that he should not have to spend good money getting an Actuary to tell the Judge that the plaintiff should have been dead years previously!

### DEDUCTIBILITY OF ASSETS

In fatal cases the Irish Courts work on the basis of balancing off gains against losses. The main gain to the financial dependants of a deceased person is in respect of the assets, which passed to those dependants on a death. Certain assets are not deductible by law and these include the proceeds of life assurance or pension policies. The practice in Ireland is not to deduct either the value of the family home, its content or the family car on the argument that the dependants had the full use of these prior to the death of the deceased. Assets such as savings are deductible. Controversy surrounds two other types of assets.

The first of these is the value of a farm (excluding the farmhouse itself). Let us say that a farmer who had a farm valued at £400,000 and who made an income therefrom of £16,000 per annum is killed. If his wife was his only dependant and if he left the farm to his wife then the Irish Courts have in the past compensated her on the basis of the loss of the support she was receiving from the farm income but a substantial deduction is made therefrom in respect of what is known as the "accelerated value" of the farm itself. The argument in respect of "acceleration" is that had the accident not occurred the widow would have inherited the farm in the fullness of time in any event had she survived her husband but now because of the untimely death of her husband she gets it earlier. The formula is  $\frac{1}{i} \times \frac{1}{1+i} \times \text{value}$ . The farm is normally taken at market value and the argument is that the widow could sell the farm and get that much money in the open market. Under this system (when the farm is not sold as invariably it is not) the profit that the widow makes on the farm

---

subsequent to her husband's death is not taken into account at all. This avoids the conundrum whereby the worse the job she makes of farming the higher the damages and vice versa. Nevertheless the deductibility of such assets is highly unpopular with plaintiffs who argue that it is not true that they did not have to any extent the "use and benefit" of the lands prior to the death of the deceased.

The second category of asset subject to much controversy is holiday homes. I acted some years ago for the two grown-up sons of an Austrian couple who were killed in a train crash in Ireland. The family lived in a rented flat in Vienna but they had a substantial and valuable holiday home in the Austrian mountains. I suggested that the value of the holiday home should not be taken into account at all on the argument that the two sons had the full use thereof prior to their parents' death. The actuary on behalf of the defendants contended that the house was fully deductible. The matter has never been tested in the Irish Courts and in that particular case a compromise was reached. A similar situation arose recently where a family had a residential home in Dublin and a holiday home which was in the wife's name and she was the one who was killed. It transpired that her husband had provided most of the money for the holiday home but it was nevertheless argued on behalf of the defendants that part at least of the value of the holiday home was a deductible item from the dependency losses. Again the case was settled on compromised terms. It is to be hoped that this matter will be decided once and for all by a Judge in the Irish Courts in the near future.

### STRUCTURED SETTLEMENTS

Some cases in the United Kingdom have been settled in recent years by means of Structured Settlements (Annuity Payments). A special tax concession is available in the United Kingdom whereby no part of the Annuity Payment is subject to tax. The Irish Law Reform Commission has recently produced a report favoring Structured Settlements. The commission recommends structured settlements where both the plaintiff and defendant agree to the same. They envisage a structured settlement which "guarantees an inflation proofed tax free income to the plaintiff for the rest of his or her lifetime". The report was made available recently to the public to enable informed comments or suggestions to be made to the Irish Government.

---

## ACTUARIAL REPORT – FOR WHOSE EYES?

Sometimes my instructions particularly in plaintiff fatal cases include a requested to carry out the valuation on two different bases on being a near maximum and the other a near minimum. The instruction clearly indicates that the report can be written for the eyes only of the plaintiff and his advisors. When acting for the defendants the actuary may be asked to point out any weak areas in the Pleadings and to give his views as to whether a claim is being exaggerated. Again clearly the report is for eyes of the defendants' advisors only. However in recent times there have been moves in Ireland towards exchanging reports and it has just become mandatory in most situations for reports to be exchanged.

A report prepared on behalf of the defendants setting out the weaknesses in the plaintiffs' case as the defendants' actuary sees them, if shown to the plaintiffs' side may help them to research and perhaps shore up some of the weaknesses. It is submitted that there is a risk that actuarial reports on behalf of the plaintiff will increasingly show the high point only and on behalf of the defendant the low point only.

## CONCLUSION

It is not possible to convey in a short paper like this the rewarding nature of the work of the writer in the Irish Courts over the last 30 years. In that time I have become acquainted with all the main players (Judges, Solicitors, Barristers both Senior and Junior, Doctors, Engineers and Senior Claims Officials on behalf of the Insurance Companies). Many of the Judges are personal friends where the friendship developed either in Court or on the golf course during the years when the Judge was a Barrister (all the Irish High Court Judges must be Barristers of long standing). Neither is it possible to communicate fully the satisfaction in taking time and great of care to see as far as possible that e.g. a widow gets a good sum to make up for the loss of all the finance she would have received from her husband had he not been killed.

The paper by Peter Milburn-Pyle entitled "The Actuary as an Expert Witness – The Lighter Moments", read to the International Association of Consulting Actuaries' meeting in Scotland in 1996 prompted the writer to attempt this paper. It has little actuarial content but hopefully it will stimulate discussion on what Actuaries do in injury and fatal litigation work in other Countries. The writer looks forward to sharing some of the Irish lighter moments with fellow consulting Actuaries in Cape Town.