

Models to assess personal injury: lessons from Norwegian law?^{*}

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1 *Introduction*

One of the most interesting facets of the law pertaining to human damage is the way in which disability is measured. Whatever its cause or origin, the most devastating effect of human damage is probably a permanent impairment of an individual's earning capacity. In personal injury law this is often the most problematic aspect of a plaintiff's claim. In determining the degree of disability, a medical expert needs to furnish evidence on the degree of impairment and a lawyer needs to quantify that loss. There are various disability models and various tests that may be employed to establish loss of earning capacity. The purpose of this article is two-fold. First, it analyses a recent study into disability models in South Africa and in Norway and, second, it explores whether the different testing models and their implementation demonstrate a core value in the approach to disability.

2 *Testing the extent of disability in South Africa*

2.1 *General*

Before a court, tribunal or an administrative body is able to compensate a plaintiff for disability, the extent of the plaintiff's incapacity must first be determined. This is a matter for medical experts, as a thorough medical examination is necessary to substantiate any litigation or settlement. As few lawyers have a sufficient understanding of medical testing models, they are not in a position to give proper instructions to these medical experts.

A number of additional problems exist. Firstly, there is no uniform testing model for disability. Secondly, even in countries and industries where testing models are employed, these models fail to predict an impaired individual's residual capabilities.

The next step in the process of establishing disability is to use the opinions of medical experts to quantify the claim. Here, further difficulties present themselves as one does not work with defined benefits as is the case with road accident claims. This intricate process of calculating a claimant's loss is therefore fraught with pitfalls. In social security law, each institution has its own rules in terms of which disability is established and quantified. In private law, the plaintiff is compensated once and for all and there is a real danger that a

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victim's compensation is inadequate in proportion to the harm suffered. Even in cases where compensation is adequate, the *lex Aquilia* does not offer a solution to those who need to take care of a disabled relative or spouse. Collateral damage is an aspect of disability for which there is no formal remedy in the law of damages. Collateral damage is a sadly neglected aspect of disability that is probably better addressed in social security law. The following paragraphs will highlight all these practical problems.

2.2 Percentage disability

2.2.1 General

It has become common practice to attach a percentage to a claimant's permanent impairment or incapacity. In South Africa, little data is available on the ways in which incapacity and permanent disability are measured. The road accident fund commission¹ recently called for a report on the nature of disability among road accident victims.

In the report De Beer examined 252 cases of serious injuries for the commission.² De Beer assigns a disability coding to each individual claimant, ranging from 4% to 100%.³ According to the report, out of the 252 cases, 72,5% were disabled because of brain injuries, 56,4% because of spinal injuries, 39,4% because of injuries to the upper extremities,⁴ and 33,3% because of injuries to the lower extremities.⁵ The percentages signify the loss to be compensated.

The real question relates to the way in which these experts arrive at a disability percentage. In other words, what thought process do they follow when deciding the consequences of a specific injury? In South Africa, foreign testing models are used and unfortunately the local experts have not yet designed a unique, truly South African testing model.⁶ Furthermore, information on testing models and the models that are used in South Africa is virtually non-existent. At present, the most significant study on testing models is the report referred to above. The road accident fund commission states: "In many jurisdictions and areas of dispute, the legislature has turned from common law adversarial litigation, where a judicial officer is reliant on sifting out an assessment of injury, impairment and disability from divergent expert opinions."⁷

The commission warns that, although there is motivation for the establishment of a consistent system that would "cut through debate between doctors", some doctors also warn that a uniform testing system will reduce road accident victims to mere numbers needing to be processed.⁸ The following paragraphs highlight the most important testing models used worldwide and also classify these models.

¹ *Report of the Road Accident Fund Commission (2002)*. Hereafter in the footnotes, *RAF Report*.

² *RAF Report* (n 1) 951.

³ *ibid.*

⁴ Upper extremities include arms, hands and fingers.

⁵ *RAF Report* (n 1) 951. Lower extremities include legs, feet and toes.

⁶ In Belgium, for instance, experts use the *Official Belgian Scale for the Assessment of the Level of Invalidity*. In Norway, a variety of models are used. These are discussed below.

⁷ *RAF Report* (n 1) 677.

⁸ *ibid.*

2.2.2 Basic division of assessment models into medical and social models

According to the commission, experts use two models to assess disability.⁹ Hence the commission comments: “A variety of conceptual models have been proposed as aids to understanding and explaining disability and functioning. These may be expressed in a dialectic of ‘medical model’ versus ‘social model’.”¹⁰

According to the medical model, disability is a personal problem, caused directly by disease, trauma or other health conditions, requiring medical care in the form of treatment by professionals.¹¹ The commission comments on these models: “Management of the disability is aimed at cure or the individual’s adjustment and behavioural change. Medical care is viewed as the main issue and at a political level the principal response is to modify or reform healthcare policy.”¹² The medical model is different from the social model. The commission¹³ reiterates this difference:

“The social model of disability, on the other hand, sees the issue mainly as a socially created problem and principally as a matter of the full integration of individuals into society. Disability is not an attribute of an individual but rather a complex collection of conditions, many of which are created by the social environment.”

Medical and social models are both used in order to determine the extent of the loss that should be made good.

Part of any assessment procedure is the central role played by medical practitioners. As court officers and legal practitioners are not experts in medical matters, the testimony of medical experts must necessarily guide the presiding officer in deciding on an appropriate award for loss of earning capacity. However, not only is it costly to employ experts to assess loss of earning capacity, but it may also lead to greater confusion, as every expert uses a different method to measure disability. A uniform assessment model in South Africa may alleviate this problem.

In order to understand the way these guidelines function, one should first of all try to establish whether the guidelines are in fact objective and what the relative merits of each of the guidelines are. As stated above, the road accident fund commission undertook the first investigation into the viability of a uniform guideline for the assessment of disability. Although the findings of the commission primarily relate to road accidents, it is submitted that these findings may equally apply to all other instances where a victim has suffered human damage. Consequently, there is no difference between the way in which one assesses the disability of an assault victim and the way in which one assesses the disability of a road accident victim.

2.2.3 Assessment guidelines or framework

According to the road accident fund commission, schemes for road accident compensation in Australia and the United States as well as the Criminal In-

⁹ *RAF Report* (n 1) 674.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

juries Compensation Scheme in the United Kingdom and workers' compensation throughout the world have started to employ various objective tests in order to establish the eligibility of claimants for compensation or benefits.¹⁴ In this regard, the road accident fund commission remarks: "These criteria include waiting periods, duration of medical treatment, medical costs incurred, period of inability to work, and use of guides to evaluate injury, impairment or disability." These criteria have advantages as well as disadvantages. The following advantages come to mind:¹⁵ a consistent system for which a methodology is established; the debate between opposing medical experts is ended; objectivity; consistency; greater certainty and efficiency;¹⁶ less uncertainty about the expected outcome of a claim based on disability; greater precision and an integrated framework for the medical practitioners performing the assessments;¹⁷ a common language in describing the conclusions of the assessments; a common set of assessments or areas to be assessed for all professionals assessing the same person; a broader set of factors is considered to describe and understand a person's experience of disability and the needs of a disabled person; professionals from different sectors are able to use one common framework.¹⁸ Most importantly, a standard method of classification paves the way for a systematic collection and organisation of information on an individual's disability.

Although these arguments seem almost conclusive, in its report the road accident commission voiced a number of arguments against a standardised method of assessment.¹⁹ The main concern is that a standardised set of criteria will totally de-individuate the victim and the unique process of accident injury outcomes. Another concern is that a classification that is applied across a population or across population groups may easily assume a norm and that that norm will stigmatise claimants. Yet another concern is that a standardised system will follow the same route as other systems, placing the focus on yardsticks rather than on individual victims. According to the commission, this ultimately leads to distrust.²⁰

2.2.4 Existing testing models

a General

As was stated earlier, not much information on testing models, disability and

¹⁴ *RAF Report* (n 1) 677.

¹⁵ *RAF Report* (n 1) 677, 678, 680.

¹⁶ *RAF Report* (n 1) 678.

¹⁷ This is also one of the objectives of the International Classification of Functioning, Disability and Health (ICF).

¹⁸ The commission states: "The advantage of 'a common language for all users' is that professionals from very different sectors (eg, rehabilitation therapists, doctors, architects, designers, policy analysts, etc) as well as different government departments can all 'slot' their particular pieces of information into one common framework. Similarly, disabled people or their advocates can have the same frame of reference as professionals when talking about disability" (680).

¹⁹ *RAF Report* (n 1) 678.

²⁰ In South Africa, the only official testing model is the model employed by the compensation commissioner in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. This model is inappropriate to determine the degree of disability, because it is specifically designed to determine disability specifically for the purposes of this act. It does not fulfil any function outside the act.

the success of one guideline over another is available in South Africa. Currently, the best source is the extensive research done by the road accident fund commission. The commission investigated a number of guidelines. Although not all these guidelines have been employed in South Africa in the past, they have been used abroad for some time and they illustrate the relative merits of the use of guidelines. Also, from time to time experts refer to international testing models in their medico-legal reports. The following paragraphs outline the Abbreviated Injury Scale, the Vernova-Arcon Functional Assessment Process, the American Medical Association Guides (AMA Guides) and the International Classification of Functioning, Disability and Health (ICF).

b Abbreviated Injury Scale²¹

This scale was first introduced in 1971 and is mostly used in New South Wales, Australia.²² The current version was updated in 1998.²³ This assessment model assigns a six-digit numerical code to each injury.²⁴ The first digit identifies the region of the body, for example, the abdomen. The second digit identifies the type of anatomical structure that was injured – for example, organs. The third and fourth digits identify the specific anatomical structure, or in the case of external injuries, indicate the specific nature of the injury – for example, kidney. Finally, the fifth and sixth digits identify the level of injury within a specific region of the body and anatomical structure, such as a laceration extending through the renal cortex.

The scale is far from ideal. A number of problems can be identified:²⁵

- i Certain outcomes are not coded: blindness, ache, pain, swelling, tenderness, deafness, obstruction, spontaneous abortion or induced premature delivery, haemorrhage, asphyxia, drowning and death.
- ii There is a serious lack of consistency among scale users when coding head injuries. The primary problem seems to be the incompleteness of brain injury descriptions.
- iii Brain injuries are problematic because the AIS was developed based upon trauma resulting from mechanical energy, not thermal energy.
- iv Practical experience has indicated a certain level of misunderstanding of the terms “major”, “superficial”, “deep” and “extensive” when describing an abrasion, contusion or laceration.
- v In the case of fractures, a distinction is made between the severity of a closed fracture and the severity of an open fracture. However, it is not always possible to distinguish between an open and a closed fracture.

The American Association for Automotive Medicine states that “[T]he AIS clearly distinguishes between an injury, which is coded, and the results of an injury, which is not coded, but which may be used to qualify an injury.” In other words, the fact that someone has injured a body part is not relevant *per se*, but the resultant impairment is important.

²¹ The Abbreviated Injury Scale (1980) American Association for Automotive Medicine 3 (1980) (hereafter in the footnotes, AIS).

²² *RAF Report* (n 1) 682, 702.

²³ *RAF Report* (n 1) 703, fn 4.

²⁴ *RAF Report* (n 1) 682.

²⁵ *AIS* 4.

Although this scale is used extensively in Australia, it is probably not suitable for South Africa, as it does not measure impairment or disability.²⁶ However, it does indicate the severity of a specific injury and this may be extremely helpful in assisting a presiding officer in arriving at an appropriate amount of compensation.²⁷ What is also clear is that this is a purely medical model, while in certain circumstances it may be necessary to refer to factors other than purely medical factors to assess disability.

c Vernova-Arcon Functional Assessment Process²⁸

This guide assesses the functional ability of a claimant comprehensively. A claimant is subjected to a functional ability screen and a diagnostic specific assessment of deficit areas. The test includes an assessment of range of movement, strength, stability, palpation, sensation, lifting capacity, static testing, dynamic lifting and heart rates. A very interesting feature of this system is the Methods-Time-Measurement of the Industrial Standard. The Industrial Standard measures the time it takes an average person with average skills to perform a task during an average eight-hour day.

Liberty Mutual's *Return to Work Rehabilitation Program* uses this process. Proponents of this system aver that the total time during which a claimant's file remained open was reduced by eighty days, and that claimant's return to pre-accident status was expedited.

It is submitted that although this particular test comprehensively assesses a claimant's capacity to perform certain tasks, it does not describe the injury in detail.

d American Medical Association's Guides to the Evaluation of Permanent Impairment (2001)

This testing model is the most commonly used tool in the United States to rate permanent impairment in disability systems.²⁹ "The AMA Guides attempt to provide a standard framework and method of analysis through which physicians can evaluate, report on and communicate information about the impairments of any human organ system. The framework is thought also to be an aid to diagnosing an impairment and following the course of therapy."³⁰

²⁶ *RAF Report* (n 1) 683.

²⁷ The commission states: "This consideration is of concern to disability rights activists, such as Mr Patrick Nkosi of Disabled People South Africa who stress that the emphasis should 'not be on the severity of injury but on living with disability'."

²⁸ *RAF Report* (n 1) 683.

²⁹ Spieler *et al* "Recommendations to guide revision of the guides to the evaluation of permanent impairment" 2000 *Journal of the American Medical Association* 299. See also Mulvany and Horner "The use and abuse of the American Medical Association Guides in Accident Compensation Schemes" 1998 *Journal of Law and Medicine* 136. The writers state: "[P]hrenology, a now discredited pseudo-science, involved the study of the conformation of the skull as indicative of mental faculties and traits of character. The originator of the idea held that areas of the brain were connected with certain emotions or character traits, and this meant that the degree of development of each of these qualities was reflected in the bony development of the skull immediately above it. Thus a skilled phrenologist could appraise the moral and intellectual qualities of an individual by running his or her hands over the subject's skull. This is really not very different from assessing a person's impairment due to a back injury solely by reference to his or her loss of range of movement."

³⁰ *RAF Report* (n 1) 684

According to the guides, impairments are not related only to work activities, but also to the so-called activities of daily living.³¹ Although quite comprehensive, the guides cannot provide answers about every type and degree of impairment, because “human functioning in everyday life is a highly dynamic process, there is an infinite variety of human disease, and there are constant changes in the field of medicine and medical practice in understanding disease and its manifestations, diagnosis and treatment”.³²

A very interesting feature of the guides is that they distinguish between impairment and disability. For example:

“Loss of the distal phalanx of the little finger of the right hand will impair the functioning of the digit and hand of both a concert pianist and a bank president. However, the bank president is less likely to be disabled than the pianist. A surgeon who loses a hand will be impaired and will be disabled in terms of the ability to operate; but the surgeon may be fully capable of being the chief of a hospital medical staff and may not be at all disabled with respect to that occupation.”³³

It seems as though the guides combine the best of the social and the medical model because they not only test physical impairment but also recognise the need to adapt the individual’s circumstances to a specific work situation.³⁴ However, the commission indicates that the guides may be inappropriate for disability assessment.³⁵ The commission levels the following criticism against the use of the guides:

- i The guides are not intended to rate disability, and disability and impairment are not the same thing.³⁶
- ii The numerical ratings for organ systems in the guides are based upon the opinions of authors. The argument is that the measurement of functional limitations should be done in accordance with an evidence-based impairment rating system.³⁷
- iii An impairment scale should indicate, in a percentage, the level of functional loss. Hence an impairment of 100% should reflect a level of functional loss resulting in an inability to perform specific tasks necessary for independent daily life. At the other end of the scale, a 0% should reflect an unimpaired ability to perform certain tasks. According to the commission, this is not the case with the guides, as the guides define 95-100% as “a state that is approaching death,” whereas a zero percentage is not defined at all.³⁸

³¹ *ibid.*

³² *ibid.*

³³ *RAF Report* (n 1) 685.

³⁴ The commission states: “As the AMA Guides point out ‘an individual who is able to meet life’s demands is not disabled, even if a medical examination discloses an impairment. An impaired individual may or may not have sufficient ability or capacity to meet the demands or requirements of a particular position or occupation’.”

³⁵ *RAF Report* (n 1) 687.

³⁶ *ibid.* See Spieler *et al* (n 29) 520 where the writers state: “The Guides explicitly states that it is not intended to rate disability and notes that impairment and disability are not synonymous.”

³⁷ *ibid.* Spieler *et al* (n 29) 520 state: “The Guides’ numerical ratings for organ system impairment and WPI [Whole Person Impairment] are based on consensus opinions of chapter authors about the severity of particular conditions and have changed little over the years.”

³⁸ *ibid.* See also Spieler *et al* (n 29) 521.

- iv The current publication is also not comprehensive, as it does not deal with all impairments.³⁹
- v The guides are internally inconsistent, as there are discrepancies within chapters as well as inconsistencies from one organ system to another.⁴⁰
- vi The guides should be more accessible, so that all interested parties are able to use it.⁴¹

Although a lot of criticism can be levelled against the guides, the fact remains that they are more comprehensive than any model currently used in South Africa.

e International Classification of Functioning, Disability and Health⁴²

The classification is part of the World Health Organisation's family of international classifications.⁴³ The objective of the classification is to measure a change in a person's health status with reference to three basic factors, namely, body functions and structures, activities at an individual level and participation in society.

The first part of the enquiry concentrates on an individual's health condition, for example his ability to see or walk. The second part of the enquiry is concerned with contextual factors, such as the physical, social and attitudinal environment in which the individual lives. Personal factors include race, gender, age, other health conditions, profession and character, to name but a few. The commission comments that the classification as a testing model has a number of strong points,⁴⁴ namely that it provides a common language for all users, it provides a classification that goes beyond injury and impairment by being systematic, it takes the impact of the environment into account and it targets interventions. An intervention, for instance, is the conversion of an inaccessible building to provide access to a person in a wheelchair.

On the adaptability of the classification, the commission states that "[t]he international Classification of Functioning is valuable as a unified and standard language and framework to describe human functioning and disability as a component of health".⁴⁵ Of all the testing models that were considered by the commission, this model was found to be the most favourable for South African conditions.

2.3 Calculation of loss

Whether a plaintiff will receive compensation, a defined benefit or a disability grant depends largely on the cause of the disability. In the case of a simple

³⁹ *Ibid.* See Spieler *et al* (n 29) 521 where the writers indicate: "A permanent impairment rating system should include all impairments, regardless of whether they may result in work disability. All conditions resulting in functional loss should receive a rating greater than 0% impairment."

⁴⁰ Spieler (n 29) 522.

⁴¹ Spieler (n 29) 522 - 523.

⁴² World Health Organisation *Use of the World Health Organisation's International Classification of Functioning, Disability and Health (ICF) for the Assessment of Compensation Claims – Submission requested by the Road Accident Fund Commission, South Africa* (2002).

⁴³ *RAF Report* (n 1) 692.

⁴⁴ *RAF Report* (n 1) 694.

⁴⁵ *ibid.*

delict, the *lex Aquilia* applies and the courts employ essentially two methods of calculation. The first approach is to establish a reasonable and fair amount based on the proven facts and the prevailing circumstances (hereafter, the “some-how-or-other approach”).⁴⁶ According to this approach, the court exercises its discretion in a way similar to the one used to award compensation for pain and suffering. The second approach is to establish an amount based upon mathematical calculations made on the proven facts of the case (hereafter, the “mathematical approach”).⁴⁷

In social security legislation, disability benefits are payable where a victim was injured in the course and/or scope of his employment or where there was a road accident. In South Africa, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 regulates employment accidents and diseases and the Road Accident Fund Act 56 of 1996 regulates road accidents.⁴⁸ Interestingly, a victim of an employment accident is entitled to a defined benefit that is directly linked to his percentage disability, according to a fixed scale. A victim of a road accident, on the other hand, is treated in accordance with the same principles as a plaintiff in an ordinary delictual action, in which case the *lex Aquilia* once again applies.

It is also possible for a disabled person to apply for a disability grant in terms of the Social Assistance Act 59 of 1992. This grant is paid out of tax money to those disabled members of society who qualify in terms of a means test.

The purpose of this article is not to furnish an in-depth exposition of the nature and extent of different benefits, but to show that each piece of legislation has a different take on disability and how the testing model that is being used has a direct influence on the individual’s ability to cope with his changed circumstances. For instance, those who have become disabled because of an employment accident are merely assessed with a view on continued employment in that specific job or the payment of benefits where a certain part of the body has been injured. Klinck argues as follows:

“The so-called ‘meat-chart approach’ (fixed levels of compensation) has been criticised as creating the impression that this is compensation for loss of a limb rather than for the achievement of adequate or reasonable income replacement (social security as a (temporary) bypass) until reintegration occurs.”⁴⁹

As I have indicated before, compensation payable to road accident victims is no different to common law compensation and here experts are not bound to any particular testing model. This gives rise to disputes and costly litigation.

The provisions of the Social Assistance Act are also criticised for a number of reasons. Klinck explains that this act “identifies disability type by category for eligibility and, in so doing, excludes large numbers of disabled people who do not meet the criteria, for example, sensory and intellectual disabilities, and non-evident disabilities such as epilepsy” and, most importantly, “[c]urrent

⁴⁶ Klopper *Law of Third Party Compensation* (2000) 177; Koch *Damages for Lost Income* (1984) 158. The phrase “some-how-or-other” was actually coined by Koch to denote the non-mathematical way of calculating loss of earning capacity.

⁴⁷ *ibid.*

⁴⁸ 56 of 1996.

⁴⁹ Klinck “People with disabilities” in Olivier *et al Social Security Law: A Legal Analysis* (2003) 325.

assessments do not consider social factors and attitudes (positive and negative) or the specific person's abilities and needs".⁵⁰ This is precisely where a social model is useful and where a mere assessment of a person's medical condition alone leads to unfair results. The next paragraph looks at a number of suggestions to improve the current state of affairs.

2.4 Recommendations

From the in-depth investigation by the road accident fund commission reported on above, it is clear that there are various disability models or guides to assess loss of earning capacity. In South Africa, medical models seem to prevail. The fact remains that testing for disability is an intricate procedure that involves, to a great extent, the cooperation of experts from various disciplines outside the law. This is precisely why there should be a core value in disability provisioning. Allowing each expert or group of experts to assess a plaintiff in terms of a medical model ignores the fact that disability is a multi-faceted problem.

2.5 Conclusion

According to the professional groups who formed part of the community agency for social enquiry study, one possible solution to this problem is to establish an assessment panel in each district. This assessment panel ideally will comprise a senior social security official, a rehabilitation therapist, a representative from the disability sector or a reputable member of the community and any other person who may be deemed necessary.⁵¹ Any person who needs assistance with disability benefits in terms of either the Road Accident Fund Act, the Compensation for Occupational Diseases and Injuries Act or the Social Assistance Act will thus be assisted and assessed by this panel.⁵²

3 *Testing models in Norway*

3.1 General

Norway is a typical welfare state. Kjønstad reflects on the needs of the disabled and states:

"The primary goal of any society ought to be to offer handicapped people treatment and rehabilitation in order to improve their capacity to function as normally as possible. Places of work and social conditions should be adapted so as to enable them to make optimal use of their resources."⁵³

Because human damage is universal, one expects that industrialised countries have more or less the same testing models for disability. This is not the case. In Norway, experts recognise five different concepts of disability, namely tabular, medical, occupational, economic and social disablement. Kjønstad explains

⁵⁰ Klinck (n 49) 328.

⁵¹ Schneider and Marshall *Social Security for People with Disabilities* researched for the department of welfare: Community Agency for Social Enquiry (CASE) (June 1998) Part F. See also Klinck (n 49) 325.

⁵² Klinck (n 49) 328.

⁵³ Kjønstad *Norwegian Social Law* (1987) 198.

that: “Across these dividing lines there goes a distinction between temporary and permanent disablement, and also a distinction between the individual’s capacity and will to carry out certain tasks (capacity to function/ will to function).”⁵⁴ Interestingly, Norwegian legislation uses all these concepts and combinations of them.⁵⁵ The next paragraphs look at the ways in which different institutions employ these concepts or testing models.

3.2 Tabular assessment

Kjønstad explains that tabular disablement assessment measures the individual’s physical resources needed for undertaking an unspecified register of tasks.⁵⁶ He states that the degree of disability connected with various physical or mental conditions is defined in general provisions. This method is abstract in the sense that the person’s individual faculties or the areas where his functioning capacity is reduced are not considered. In other words, if a soccer player and a university professor’s left legs are amputated, tabular assessment will grade their disability in exactly the same way.

Tabular assessment is used in accident compensation as well as in industrial injury compensation. Accident insurance in Norway refers to road accidents. Every individual needs to insure against this risk. This is a different model from that of the road accident fund in South Africa. What does work well is that the table with its corresponding values, eg loss of an eye equals a disability of 20%, is included in the insurance policy.⁵⁷ Because of this, there is little room for disputes if a disability event should occur. Also, accident insurance is a private arrangement that is additional to a whole system of social insurance which includes extensive health care. On the fairness of the tabular grading of disability, Kjønstad comments as follows:

“It may seem unreasonable not to take into account the specific nature of each case. But accident insurance is a mass product which companies are out to market. The insured person buys certain benefits in case he should be injured in an accident. If the disablement were to be assessed on the basis of a grading in which a number of individual circumstances were to be taken into account, this might easily end in conflicts as regards the degree of disablement and the companies’ product would become more expensive.”⁵⁸

In industrial injury compensation, a tabular grading is also used as a primary test for disability. Kjønstad points out that the Norwegian industrial injury table consists of 200 injuries.⁵⁹ The more comprehensive the table, the slimmer the chance that a specific individual will fall outside the table. He argues further: “The system presupposes that the tabular disablement is an appropriate general gauge of the reduction in the capacity to exploit life’s possibilities/ ‘enjoy life’.”

Tabular grading is not the only testing model that is provided for. It is possible to adjust the degree of disability by looking at instances where “age, sex, weight or other individual circumstances are likely to make the injury

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ (n 53) 222.

⁵⁷ (n 53) 202.

⁵⁸ (n 53) 202.

⁵⁹ (n 53) 204.

result in particular inconvenience to the person concerned”.⁶⁰ Thus, industrial injury compensation employs two methods, namely tabular and medical models. In South Africa, the “meat-chart” approach is used where an occupational injury occurred. This approach corresponds closely with the tabular assessment method used in Norway. Unfortunately, the South African testing model does not provide for any other form of testing, with the result that it remains one-dimensional and of little value as far as possible re-integration and rehabilitation are concerned.

3.3 Medical assessment

Medical disablement is a measure of the individual’s aggregate resources needed to undertake an unspecified register of tasks. These aggregate resources include physical, mental and social resources.⁶¹ So, in addition to objectively recorded clinical symptoms, subjective factors such as sex, age, mental health, social position and adjustment ability are also taken into account.⁶² Kjønstad explains that the tabular and medical concepts of disablement are used in determining non-pecuniary loss in Norway.⁶³ Also, insurance companies and administrative bodies emphasise tabular disablement.⁶⁴ This type of assessment is used in accident insurance and industrial injury compensation. Kjønstad states that the system followed by insurance companies and administrative bodies is quite easy, whereas the system of the courts leave room for considerable discretion.⁶⁵ Medical grading is used in the industrial injury compensation system (as described in par 3.2 above), as well as in determining compensation for non-pecuniary loss. The courts award non-pecuniary loss in terms of section 3(2) of the Act on Torts to a person who “has sustained lasting and substantial injury of a medical nature”.⁶⁶ Apparently, one can claim non-pecuniary loss in cases of neglect or strict liability and this will include motor vehicle accidents. Although the courts in such instances are obliged to use the medical testing model, they assess each case individually. Kjønstad remarks:

“In the light of this it is probably correct to say that the courts, when assessing compensation for non-pecuniary loss, have a far greater latitude to take into account a person’s individual capacities and total life situation than the National Insurance Administration and Social Security Tribunal have when determining industrial injury compensation.”⁶⁷

One can safely say that the Norwegian Act on Torts corresponds closely with the principles of the action for pain and suffering in South African law. South African courts similarly have a discretion in awarding an amount of compensation and they mostly base this award on the medical testing model. Clearly, the difference between South Africa and Norway lies in the fact that the Norwegian Act on Torts has limited application. An individual is not dependent on this type of compensation for his livelihood, as other systems in the

⁶⁰ Kjønstad (n 53) 207. See § 3.4 below.

⁶¹ Kjønstad (n 53) 222.

⁶² Kjønstad (n 53) 205.

⁶³ Kjønstad (n 53) 223.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Kjønstad (n 53) 208.

⁶⁷ Kjønstad (n 53) 209.

welfare state take care of income replacement and medical expenses.⁶⁸ However, in South Africa, road accident victims have a claim against a statutory fund that is based on common law principles and, because so many individuals are disabled following accidents, the action for pain and suffering serves to supplement an injured individual's future income.

3.4 Occupational assessment

Occupational disablement is a measure of the individual's aggregate resources needed to carry out his previous occupation.⁶⁹ Occupational disablement is different from tabular and medical disablement because the ongoing employability of an individual is assessed in his specific pre-morbid occupation. Kjønstad explains that consideration is given to the individual's resources and that the capacity to function should be related to definite tasks.⁷⁰ As far as these schemes are concerned, occupational testing is used in order to determine eligibility for sickness benefits in terms of the National Insurance Act, for a disability pension and for a housewives' disablement pension. Once again, there is a huge difference between Norway and South Africa as far as the systems and the testing models are concerned. Sickness benefits in South Africa are only awarded to those who fit the description of "employees" in terms of the Unemployment Insurance Act 63 of 2001 and these benefits are limited in their application. Also, pension funds are used primarily as retirement vehicles and do not provide for disability at any stage before retirement. Finally, no institution in the South African social security system makes provision for disabled housewives.

Consequently, even though there is also criticism against the use of an occupational disability test in Norway, one should once again consider the legal framework within which it operates.⁷¹ The idea behind sickness benefits in terms of the National Insurance Act, disability pensions and housewives' disablement pension is that they serve as income replacement and not, as in the case of accident and occupational injury insurance, as compensation for non-pecuniary loss.

3.5 Economic assessment

Economic disablement measures the individual's aggregate resources needed to carry out some kind of work for which he is fit.⁷² Here, the individual's work capacity is measured and attention is paid not only to whether an individual

⁶⁸ Kjønstad (n 53) 208.

⁶⁹ *ibid.*

⁷⁰ Kjønstad (n 53) 211.

⁷¹ Kjønstad (n 53) 210 remarks: "One Norwegian medical specialist believes that the concept of occupational disablement should be abandoned. His objection to the term is that it refers to actual income for work, and not the capacity to work. In his opinion, use of the term will imply that those who do not exploit their possibilities (for instance because they are lazy) receive too much compensation, while those who show initiative and want to make an effort to manage as well as they can will get a smaller compensation. I believe that the distinction between the capacity and the will to carry out work (or to function in other respects) should not be applied when one is defining the term occupational disablement. This is a general problem connected with all disablement concepts which are not of a purely tabular character."

⁷² Kjønstad (n 53) 223.

can re-enter his previous occupation, but also whether he will be able to do other kinds of work.⁷³ This test is used in conjunction with other tests in the following instances:

- i where someone applies for a disability pension in terms of the National Insurance Act (this act covers employees, the self-employed, housewives, children and young people);⁷⁴
- ii where someone is the plaintiff in terms of section 3-1 of the Act on Torts;⁷⁵
- iii where someone is entitled to a disability pension in terms of the Industrial Injury Insurance Act;⁷⁶ and
- iv where someone applies for a disability pension under the War Pensions Act.⁷⁷

It is interesting to note that combined tests are used. It is suggested that South Africa would benefit from such a practice. This would enable one to achieve the objective of a specific statute, for example the Compensation for Occupational Injuries and Diseases Act, but at the same time take cognisance of more than one aspect of an individual's capacities. Also, the Norwegian economic testing model provides for re-training and rehabilitation. In South Africa, rehabilitation and re-training are non-existent.

3.6 Social assessment

Social disablement is a measure of the aggregate resources an individual needs to maintain contact with other people.⁷⁸ Kjønstad explains that the content of the term social disablement is not clear. It may possibly refer to an individual's incapacity to participate in leisure activities,⁷⁹ but as far as legislation is concerned, section 5(8) of the National Insurance Act provides that where a person's capacity to function has been substantially reduced on account of sickness, injury or defect, that person may receive an allowance to buy a car.

3.7 Comment

Kjønstad comments that the different disability concepts vary substantially. He quotes figures from a recent survey that show that those who have a tabular disability of 15% do not, for instance, have any economic disability. Also, one third of those who received disability pensions did not have a tabular disability of more than 15 %. In short, even in Norway where every type of risk is managed, either by social insurance or in some other way, the type of testing model employed will to a large extent determine the percentage disability. Nevertheless, Norwegian testing models are quite sophisticated and an insured potential beneficiary or litigant has a fair idea of the way in which he will be assessed.

⁷³ Kjønstad (n 53) 213.

⁷⁴ Kjønstad (n 53) 214-217.

⁷⁵ Kjønstad (n 53) 217.

⁷⁶ Kjønstad (n 53) 219. Here, a combined medical/tabular grading and grading of economic disablement are done.

⁷⁷ Kjønstad (n 53) 219.

⁷⁸ *ibid.*

⁷⁹ Kjønstad (n 53) 220.

4 Conclusion

This article illustrates the difficulties inherent in grading disability. The whole process, from the time of the first medical assessment up to the issuing of a cheque, is fraught with pitfalls. It is evident from the road accident fund commission's research that each expert in South Africa has his own view on testing models, and that nobody knows in advance which test will be applied to assess disability. This shows that in South Africa there is no core value when it comes to disability.

In Norway, there are various testing models and the medical model is used in conjunction with other models. The type of model used in Norway depends largely on the objective of the legislation within which a beneficiary or litigant finds his risk or entitlement. Although these various tests also yield different results, they are at least aimed at a certain result. For instance, one knows that occupational assessment is done with a view to claiming short-term disability benefits, whereas economic disablement assesses residual earning capacity. From all these testing models a core value emerges: the disabled should be properly assessed, as far as possible rehabilitated and re-integrated into society.

In the final instance it is submitted that a compact, integrated social security scheme, such as Norway's, takes care of all sorts of disabilities and no-one is left by the wayside. South Africa has a long way to go in integrating its disability schemes and in establishing a core value approach to disability.

SAMEVATTING

PERSOONLIKE BESERINGS: LESSE UIT DIE NOORWEEGSE REG

Een van die interessante fasette van die reg ten opsigte van menslike skade is die wyse waarop daar vir ongeskiktheid getoets word. Wat ookal die oorsaak of oorsprong daarvan, die mees vernietigende effek van menslike skade is waarskynlik die permanente beperking van 'n persoon se verdienvermoë. Hierdie aspek van menslike skade is ook een van die mees problematiese aspekte van die skadevergoedingsreg. Ten einde die graad van 'n individu se ongeskiktheid te kan bepaal, moet 'n mediese deskundige getuienis aanvoer oor die graad van ongeskiktheid en 'n regsgeleerde moet die verlies dan kwantifiseer. Verskeie ongeskiktheidsmodelle kan gebruik word om verlies aan verdienvermoë vas te stel. Die doel met hierdie artikel is tweeledig. Eerstens ontleed dit onlangse studies oor ongeskiktheidsmodelle in Suid-Afrika sowel as in Noorweë en tweedens ondersoek die artikel die vraag of die verskillende toetsmodelle in die twee lande 'n onderliggende kernwaarde demonstreer. Die outeur kom tot die gevolgtrekking dat die proses vir die vaststelling van ongeskiktheid uiters problematies is en dat elke deskundige in Suid-Afrika sy eie opinie het oor toetsmodelle. Gevolglik is dit nie moontlik om 'n kernwaarde te identifiseer nie. Die Noorweegse stelsel gebruik ook 'n verskeidenheid van toetsmodelle. Ten spyte van die feit dat hierdie toetsmodelle verskillende resultate lewer afhangend van die tipe model wat gebruik word, is dit uit die staanspoor baie duidelik wat die doel is met die gebruik van 'n spesifieke toetsmodel, soos om korttermynvoordele te eis. 'n Ontleding van die verskillende erkende Noorweegse toetsmodelle dui daarop dat sekere basiese waardes onderliggend is aan die Noorweegse stelsel. Hierdie kernwaardes sluit onder andere in dat diegene met ongeskikthede behoorlik getoets moet word, dat hulle so ver moontlik gerehabiliteer moet word en dat hulle herintegreer moet word in die samelewing. Suid-Afrika kan derhalwe baat by 'n kompakte, geïntegreerde sosiale sekerheidstelsel waarbinne duidelike kernwaardes aangeneem word ten opsigte van persone met ongeskikthede.