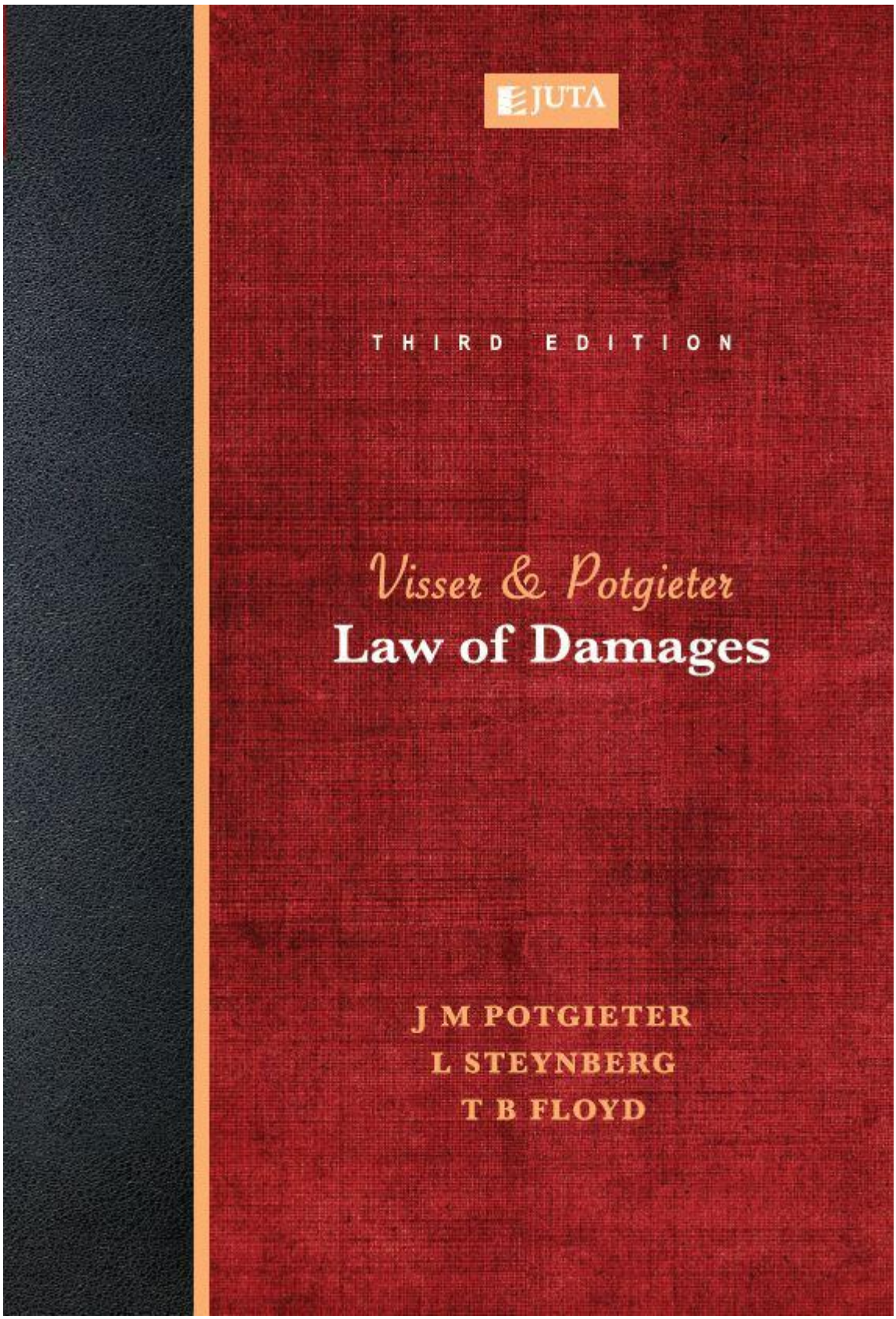
JUTA
THIRD EDITION
Visser & Potgieter
Law of Damages
J M POTGIETER
L STEYNBERG
T B FLOYD

Preface

The law of damages is that part of the law which indicates how the existence and extent of damage as well as the proper amount of damages or satisfaction are to be determined in the case of delict, breach of contract or other areas of law providing for the payment of damages.

This book provides a general and comprehensive introduction to the theory and practice of the law of damages (and certain related areas of law) and was written with a view to the needs of practitioners, lecturers and students. Our main object is to offer a systematic and analytical discussion of the practical principles of the law of damages. We have tried to maintain a healthy balance between practical rules and theoretical principles.

The material is divided into four parts: first, the general principles and terminology regarding damage and compensation; secondly, the assessment of damages in cases of breach of contract; thirdly, the determination of the quantum of damages and satisfaction in certain cases of delictual and other forms of liability; and, fourthly, certain procedural and other general matters.

The third edition updates the second edition in the light of new authority and literature. The extent of the revision is evidenced by the fact that the book has grown by more than 100 pages. This edition deals with new legislation affecting the law of damages, including the Road Accident Fund Amendment Act 19 of 2005, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. It examines a large number of important Constitutional Court, Supreme Court of Appeal and High Court judgments, as well as academic contributions relating to most fields of the law of damages in both delict and contract. Generally, cases and materials available to us up to September 2011 have been considered.

The third edition of the book is the first to appear without the collaboration of Professor PJ (Hans) Visser, who co-authored the first two editions. Professor Visser passed away in 2007. While Hans Visser's significant contribution to South African law has been fittingly honoured in the memorial volume *Vita Perit, Labor Non Moritur-Liber Memorialis: PJ Visser* (edited by Trynie Boezaart and Piet de Kock, and published by LexisNexis in 2008), we pay tribute here to his pioneering work as principal author of the first two editions of *Law of Damages* and *Skadevergoedingsreg*. His ongoing contribution to the law of damages is reflected in this third edition by the incorporation of his views as published in law journals since the previous

edition. Hans Visser's exceptional intellect, insight, analytical thought and industriousness—but even more his collegiality and friendship—are sorely missed.

We express our appreciation to Linda van de Vijver and the rest of the editorial team at Juta & Co for their invaluable assistance.

Pretoria
January 2012

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Chapter 1 DEFINITION, NATURE AND SCOPE, OBJECT, SYSTEMATICS, SOURCES, HISTORY AND TERMINOLOGY OF LAW OF DAMAGES

1.1 DEFINITION

It is difficult to formulate a generally acceptable definition of the law of damages because there are different opinions on which legal principles should be considered to be a part of this branch of law. [1] The law of damages deals with the content of obligations for the payment of damages (including satisfaction) [2] and can therefore generally be classified as part of the law of obligations. [3] But it consists of more than the law of obligations and even extends beyond private law. [4]

It is possible to define the law of damages in general terms so as to include the creation, content and termination of obligations for the payment of damages and satisfaction. [5] It would, however, appear that the following definition is the most appropriate:

The law of damages is that part of the law which indicates how the existence and extent of damage [6] as well as the proper amount of damages [7] or satisfaction [8]are to be determined in the case of delict, breach of contract and other legal principles [9] providing for the payment of damages. [10]

1.2 NATURE AND SCOPE

There are different opinions as to what principles and rules form part of the law of damages. [11] Although the law of damages consists mostly of private law principles, [12] it includes principles of different branches of law which are grouped together for the sake of convenience because they all deal with the compensation of damage. [13] In other words, the law of damages should be defined as consisting of principles regarding the compensation of all forms of damage [14] from all sources [15]of claims for damages (and satisfaction). [16]

In a sense the law of damages determines the content of an obligation to pay damages or satisfaction. It is nevertheless not always easy to draw a line of demarcation between the law of damages and the law of obligations in general. There would probably be consensus that principles on the following form part of the law of damages: the general formula for determining damage; [17] the operation of the

'once and for all' rule; [18] collateral benefits; [19] and the measure or quantum of damages and satisfaction in particular situations. [20] However, on the following there may be a divergence of opinion on whether the principles in question could properly be classified under the law of damages: remoteness of damage; [21] the non-recoverability of compensation for loss of income from illegal activities; [22] the effect of contributory negligence on the recovery of damages; [23] the onus of proof in regard to damage; [24] prescription of a claim for damages; [25] who is entitled to bring a claim for compensation; [26] and statutory requirements for the enforcement of claims in certain situations. [27]

Irrespective of one's views on the precise nature of the law of damages, [28] one should exclude from its scope certain principles which deal only with the creation (or termination) of an obligation to pay damages or satisfaction. [29] At the same time, the discussion of the law of damages should not be restricted only to those principles which deal with the measure or quantum of compensation.

In the present work, rules and principles from different branches [30] and sources [31] of the law regarding the identified claims for compensation [32] are discussed as part of the law of damages. [33]

1.3 OBJECT

The view is sometimes advanced that the law of damages has a particular object or ideal, namely the fullest possible compensation of damage. [34] It would, however, appear to be more accurate to see this as the object of a particular award of damages or satisfaction and not as the general purpose of the law of damages. [35]

The object of the law of damages should rather be seen as the provision of just, logical and practical rules and principles for solving problems regarding the determination of damage, damages and satisfaction.

1.4 SYSTEMATICS

The view is sometimes advanced that the law of damages has a particular object or ideal, namely the fullest possible compensation of damage. [34] It would, however, appear to be more accurate to see this as the object of a particular award of damages or satisfaction and not as the general purpose of the law of damages. [35]

The object of the law of damages should rather be seen as the provision of just, logical and practical rules and principles for solving problems regarding the determination of damage, damages and satisfaction.

1.4 SYSTEMATICS

No generally recognized system has been developed for the law of damages. [36]Different approaches are discernible in the available textbooks on this subject. [37]The system followed in the present work reflects an attempt to arrange and discuss, in an analytical manner, the nature and practical operation of the rules and principles of the law of damages. The material is divided into four parts: *First*, the

general principles regarding damage and compensation; *secondly* the measure or quantum of damages for breach of contract; *thirdly*, the quantum of damages and satisfaction in certain cases of delictual liability; and *fourthly*, certain procedural and other general matters. [38]

1.5 SOURCES OF CLAIMS FOR DAMAGES AND SATISFACTION

1.5.1 Introduction

Damage and damages are usually associated with contractual and delictual [39] liability. It should be noted, however, that despite the fact that liability for unjust enrichment is also concerned with the compensation of patrimonial loss if certain requirements are met, [40] in this work unjust enrichment will not be discussed as a source of liability for damages.

Damage or prejudice also plays an important role in the remedy of estoppel [41] and the function of estoppel, just as that of an interdict, [42] is to prevent damage or restrict its further development. [43] But, because it is clear that estoppel is no action for damages, it will not be discussed in this work. [44] Likewise, it is evident that a claim for specific performance (which may in a sense be compared with an interdict) [45] as a result of breach of contract is not a claim for damages. [46] A claim based on the principles of quantum meruit should also not be seen as one for damages. [47]

For the purposes of this work a claim for compensation for the expropriation of property is not viewed as one for damages. [48]

1.5.2 Delictual remedies

Claims for damages and satisfaction are possible in terms of delictual actions [49] such as the (extended) actio legis Aquiliae, [50] which provides for damages on account of the unlawful and culpable [51] causing [52] of any [53] patrimonial loss; [54] the actio iniuriarum [55] with which satisfaction [56] may be recovered for an unlawful and intentional [57] personality infringement; [58] the action for pain and suffering [59]which provides for damages [60] for non-patrimonial loss (injury to personality) [61] on account

of the unlawful and culpable infringement of the physical-mental integrity; [62]as well as in terms of certain other actions. [63]

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1.5.3 Liability without fault and liability based on risk

Actions which are based on so-called liability without fault [64] are the actio de pauperie with which damages are recoverable for patrimonial [65] as well as non-patrimonial loss [66] caused by animals in certain circumstances; [67] the actio de pastu with which compensation for patrimonial loss may be recovered where an animal has caused damage through eating and damaging plants; [68] as well as certain other actions. [69] In cases of vicarious liability a duty to pay damages or satisfaction is placed on the defendant because of the delict (and sometimes breach of contract) of another person. [70]

1.5.4 Legislation

A claim for damages may be created by legislation [71] or may function in terms of legislative provisions. [72]

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1.5.5 Breach of contract

Breach of contract is a source of an action for damages for patrimonial loss. [73]

1.5.6 Contract and realization of risk (insurance contract)

The conclusion of a contract and subsequent realization of risk are the source of a claim for damages (also referred to as indemnification or reparation) where an insurer has given a contractual undertaking to indemnify the insured in terms of a policy if the realization of risk causes damage. [74]

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1.5.7 Claims based on a right of recourse or adjustment

One may also view certain statutory and common-law claims for recourse or adjustment as claims for damages. [75]

1.6 ASPECTS OF HISTORY AND DEVELOPMENT OF SOUTH AFRICAN LAW OF DAMAGES [76]

1.6.1 Importance of historical development

Erasmus and Gauntlett hold the view that a proper understanding of the hybrid nature of our law of damages is essential for the correct approach to problems encountered in this field. [77] They demonstrate that our law is composed of elements of both Roman-Dutch law (which includes continental civil law in general) and English common law [78] but that the relative importance of these two elements has fluctuated at different times.

One's views on the history of the law of damages are of course determined by what one actually accepts to be the content of the law of damages. [79] The historical development of the three pillars of our law of delict in terms of which damages or satisfaction may be recovered, inter alia the actio legis Aquiliae, the actio iniuriarum and the action for pain and suffering, is fully discussed elsewhere and there is thus no need to deal with it here. [80] In the discussion which follows reference will be made only to

those facts of historical importance which are directly relevant to the modern law of damages.

1.6.2 Roman law and Roman-Dutch law [81]

Although certain terms of the law of damages (such as id quod interest, damnum emergens, lucrum cessans etc) are derived from Roman law, this system of law [82]has

made no special contribution to the development of our modern law of damages. [83]In classical Roman law id quod interest does not denote the result of a comparison between the plaintiff's present patrimony and what it would have been but for the damage-causing event, [84] but indicated the freedom of the judge to assess the amount of liability without regard to the value of the object concerned; it merely refers to what the defendant owes the plaintiff. [85] There is authority which indicates that the id quod interest of a plaintiff also includes lucrum (loss of profit or income). [86] Classical Roman law did not really know the difference between positive and negative interesse [87] and apparently did not find it necessary to develop general principles to address the problems of the limitation of liability to pay damages. [88] In post-classical Roman law the concept id quod interest disappeared but Justinian caused its revival within a new procedural framework. [89] As far as the limitation of the extent of liability for damages is concerned, Justinian enacted the well-known *Codex* 7.47. [90] In terms of this obscure and unnecessary enactment the amount of damages could in certain instances not be more than twice the value of an object or performance. [91]

In medieval law the concept of interesse was developed indicating the full amount of damages to be paid. [92] One of the most famous definitions of interesse is

that by Accursius: 'Interesse est damnum emergens et lucrum cessans ex quo aliquid fieri cesset.' [93] In terms of medieval legal theory interesse was divided in different ways of which the three-way division (interesse commune, singulare, and conventum) and the two-way division (interesse circa (intra) rem and extra rem) were the most important. [94] To the Glossators and their immediate successors interesse intra rem indicates damages for direct or immediate loss while interesse extra rem refers to compensation for consequential loss. [95]

In Roman-Dutch law jurists were not particularly interested in the law of damages and the principles which they state are based on views from medieval lawyers. [96] The terms 'id quod interest' and 'interesse' were translated as 'schaden' and 'interesse' and this usage gave rise to confusion. [97] Voet [98] (following Accursius) [99] defines interesse as follows (in translation): 'The deprivation of a benefit and the suffering of a loss [damnum] through such fraud or negligence on the part of an opponent as he is liable to make good, and as is assessed in fairness by the duty of the judge.'

Some noteworthy general principles of the law of damages accepted in Roman-Dutch law are the following: [100]

(a)

Interesse is defined in terms of the actual loss suffered. [101]

(b)

Liability for damage includes liability for loss of profits. The expectation of profit must, however, be certain in order to render the defendant liable. [102]

(c)

In the assessment of damages no account is taken of affective or sentimental loss. The assessment is based on a general objective standard of value. [103]

(d)

Adequate proof of loss should be adduced. Although Voet [104] accepts the award of a small sum of damages, this should not be confused with nominal damages from English law. [105] The actio legis Aquiliae is only available when there is proof of actual damage.

(e)

Since proof of damage may be difficult, the court should in doubtful cases where the plaintiff does not prove his or her damage with a high degree of certainty, favour the defendant by awarding low damages. [106]

(f)

The principle of *Codex* 7.47 in terms of which damages may not exceed double the value of the object in dispute, was accepted. [107]

(g)

Damages in terms of the actio legis Aquiliae have no (primary) penal function. [108] This means that a defendant who has in a culpable manner caused damage is not liable for more than the actual damage sustained.

(h)

In cases of the intentional infringement of a personality interest the actio iniuriarum was replaced by an amende profitable et honorable. [109] The amende profitable, like the actio iniuriarum, was aimed at the recovery of satisfaction. With the amende honorable the plaintiff could claim a palinodia or a recantatio (apology), in other words that the wrongdoer withdraw his or her words and deny the truth thereof, as well as a deprecatio, that is, an admission of guilt and a request for forgiveness. [110]

(i)

Damages may be awarded for the causing of pain and suffering as a result of bodily injuries. [111]

(j)

The compensatory nature of damages became very clear. [112]

1.6.3 Influence of English law [113]

Although Roman-Dutch law was in general retained as the common law after the British took over the Cape, changes occurred in regard to inter alia civil procedure, the law of evidence and rules of court. These changes had an important influence on the South African law of damages. The use of English legal terminology [114] in pleadings opened the door for the introduction of the substantive English law of

damages. [115] There are, for instance, early references to nominal and special damages. [116] In some cases South African courts quickly adopted English decisions on the assessment of damage. [117]

Erasmus [118] summarizes the effect of English law as follows:

> The establishment of judicial and procedural institutions along English lines, the adoption of the English law of evidence, the use of the English terminology of damages, the application of English rules of assessment: all these factors have created a strange dichotomy in South African law: whereas the existence of liability is determined in accordance with the substantive law which is

> Roman-Dutch in origin, the quantification of liability is largely governed by rules and concepts derived from English law.

A further influence of English law was that nominal damages [119] were awarded in many cases during the 19th century. [120] The idea of *exemplary damages* (damages with a type of penal function) also entered into our law [121] while in the case of defamation there was apparently an interesting development by which damages of a punitive nature were replaced by compensatory damages. [122] An undesirable result of the introduction of exemplary and nominal damages from English law was the subversion of the compensatory nature of the actio legis Aquiliae as well as the difference between the actio legis Aquiliae and the actio iniuriarum. The positive influence of English law in general was that it promoted the pragmatic development of our law of damages. [123]

The development of general principles of assessment of damage in English law also influenced South African law. Since Roman-Dutch jurists do not offer sufficient assistance especially in regard to contractual damages, our courts, as was to be expected, turned to English decisions which were under the strong influence of the French jurist Pothier. [124] By approximately 1880 the aim of an award of damages in cases of delict and breach of contract was stated in English law in terms comparable to that of the Differenztheorie [125] of (continental) civil law. [126] In cases of damages

for breach of contract, foreseeability was developed as a criterion for the limitation of liability [127] and this also left its mark on South African law. [128]

1.6.4 Development, problems and future of South African law of damages [129]

The principles and terminology of the English law of damages could not displace Roman-Dutch law completely and especially since 1910 the Appellate Division has placed more emphasis on Roman-Dutch law. [130] It is for obvious reasons neither possible nor desirable to ban all English influence from the South African law of damages. Erasmus and Gauntlett [131] give the following summary:

> The courts were in some instances faced with a long line of judicial authority which could not be overlooked. Moreover, the development of detailed rules of assessment is a modern phenomenon, [132] and to meet the demands of modern conditions the courts have continued to seek guidance in English decisions. [133]

It was especially in the area of delictual damages that English influence waned in that our courts stressed certain basic principles such as the compensatory nature of the actio legis Aquiliae and the requirement of actual patrimonial loss. [134] It would seem, however, that this development has not yet succeeded in finally banishing the

idea of nominal damages from modern law. [135] The clear distinction [136] between the actio legis Aquiliae and the actio iniuriarum had again been accepted [137] and it was appreciated that there is a difference between the actio iniuriarum and English torts for which punitive damages could be recovered. [138] Nevertheless, the actio iniuriarum could not shake off English influence as easily as the Aquilian action did. [139] In the case of breach of contract the principle remained (without any real common-law authority) [140] that the plaintiff must, as far as possible, be placed in the position he or she would have enjoyed had the contract been properly performed. [141]

After his informative discussion of aspects of the South African law of damages, Erasmus [142] comes to the following conclusion:

> The fusion of civil and common law elements in the South African law of damages was facilitated by the fact that during the nineteenth century the two systems had adopted a similar governing

rule for assessing the measure of damages: the plaintiff is to be placed in the position he would have been but for the commission of the wrong. It is interesting to note that when the South African courts adopted the rule during the early years of the twentieth century, they derived it in the case of delict from the civil law and in the case of contract from the common law.

It is probably correct to conclude that a distinctive South African law of damages has evolved which does in a sense have a hybrid nature but which consists of more than merely the sum of its historical components.

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In the current South African law of damages there is, according to Van der Walt, [143] a tendency to try to eliminate the shortcomings in the doctrine of damage through individualization, [144] objectification [145] or by replacing the object of damages by other objects. [146] According to this author, the search to solve problems in the field of the law of damages has always followed an ad hoc approach.

According to Reinecke [147] the South African doctrine of damage is still in its infancy. [148] Although there are cases and literature providing some guidance, there is uncertainty over a number of issues—varying from basic principles to questions of detail. [149]

The main principles and problems of the current South African law of damages will clearly emerge from the later discussion of this branch of the law. However, at this stage it may be pointed out that the most important problems of our law of damages are to be found in the following areas: the correct definition of concepts such as damage, patrimonial and non-patrimonial loss; [150] the formula or test for establishing patrimonial loss; [151] certain aspects of collateral benefits; [152] the operation of the 'once and for all' rule; [153] the definition and assessment of prospective loss; [154] compensation for the loss of income or support earned in an illegal way; [155] measuring damages for fraud which induced a contract; [156] and some problems of a more theoretical nature. [157]

It is obvious that the meaningful use of comparative law as well as the development of proper theories [158] may make a useful contribution to the further development of our law of damages. Currently, our courts do not merely pay attention to trends in English law and it is common to also find references to other legal systems. [159]

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1.6.5 Influence of Bill of Rights

The Constitution of the Republic of South Africa, 1996, containing the Bill of Rights, must be taken into account as far as the further development and application of the law of damages is concerned. [160] The so-called vertical as well as the horizontal application of the Bill of Rights should impact on the law of damages. [161] Section 38 of the Constitution empowers the courts to grant 'appropriate relief' in their enforcement of the entrenched fundamental rights and freedoms. [162] The courts are additionally authorized, when deciding a constitutional matter, to make any order that is 'just and equitable'. [163] Unfortunately, the Constitution does not give any clear indication as to what 'appropriate relief' [164] means or what a 'just and equitable' order entails, except that in both instances a declaration of rights [165] and a declaration of invalidity [166] are respectively recognized. Section 8 of the Promotion of Administrative Justice Act 3 of 2000 gives a list of orders that could be regarded as just and equitable. [167] In recent judgments appropriate relief has included awarding interest and granting cost orders in cases of negligent infringements of fundamental rights by government departments, [168] as well as granting out-of-pocket expenses as compensation in an exceptional case. [169]

The influence of the Bill of Rights will be referred to in regard to particular principles of the law of damages where fundamental rights are relevant. [170] As a general example, [171] reference may be made to the decision of the Constitutional Court in *Fose v Minister for Safety and Security* [172] where the plaintiff, inter alia, claimed 'constitutional damages' after an alleged assault and torture by the police. The court rejected this claim, finding no facts to award an additional sum of damages beyond ordinary delictual damages. [173] The court found that substantial delictual damages would be a powerful vindication of the plaintiff's rights, requiring no further vindication by way of an additional award of constitutional damages. [174] As far as possible punitive damages were concerned, [175] the court argued as follows: [176]

> This brings me to the final and most debated question, namely whether in the present case any additional amount of punitive constitutional damages can be awarded to the plaintiff over and above the amounts he would be entitled to recover for patrimonial loss, pain and

> suffering, loss of amenities, *contumelia* and other general damages. Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.
>
> All this notwithstanding, I have come to the conclusion that we ought not, in the present case, to hold that there is any place for punitive constitutional damages. I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution . . . .
>
> I agree with the criticisms of punitive constitutional damages referred to in para [65] above. Nothing has been produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the infringement in question is anything but an illusion. Nothing in our own recent history, where substantial awards for death and brutality in detention were awarded or agreed to, suggests that this had any preventative effect. To make nominal punitive awards will, if anything, trivialise the right involved. For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude. [177]

1.7 TERMINOLOGY: SOME BASIC CONCEPTS AND EXPRESSIONS IN LAW OF DAMAGES

1.7.1 Problems regarding terminology

It has been stated that the language of the English law of damages 'is more than usually confused'. [178] Erasmus and Gauntlett [179] are of the opinion that this statement also applies to some extent to Roman-Dutch law. In addition to the confusion that is unfortunately inherent in certain expressions in the law of damages, there is also the problem that in South African law terminology from English [180] as well as

(continental) civil law [181] has been translated into Afrikaans and English. The English expression 'damages' may be used to illustrate this point: damages ('skadevergoeding') for damage ('skade') merely indicates an amount of money which serves as some form of compensation and may be used to include satisfaction ('genoegdoening') [182] which differs from damages for patrimonial loss. [183]

Although Erasmus [184] is of the opinion that in Roman-Dutch law 'the terminology of damages was never applied to the actio iniuriarum [with which reparation for non-patrimonial loss is recovered]—the writers consistently speak of poena (pecuniaria)', our view is that the modern concept of damage should be understood in a wide sense as including patrimonial as well as non-patrimonial loss. [185] In fact, a general concept of damage provides the opportunity of employing some of the terminology and principles of patrimonial loss in a constructive way to the field of non-patrimonial loss. [186]

1.7.2 Definitions of some basic concepts and expressions

The principles of the law of damages operate in conjunction with certain concepts and terms which will be discussed in more detail later. It is useful at this stage, however, to provide a list as well as brief definitions of certain concepts. Most of these terms may, according to one's preference, be defined in different ways and although the authors are of the opinion that their definitions are acceptable, these do not exclude other correct descriptions.

Damage *(loss, harm, injury, detriment, prejudice)* [187]

Damage is the diminution, as a result of a damage-causing event, of the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved.

Patrimonial loss *(vermoënskade, pecuniary loss)* [188]

Patrimonial loss (as a subdivision of damage) is the diminution in the utility of a patrimonial interest in satisfying the legally recognized needs of the person entitled to such interest. It may also be defined as the loss or reduction in value of a positive

asset in someone's patrimony or the creation or increase of a negative element of his or her patrimony (a patrimonial debt).

Patrimony *(vermoë)* [189]

Some authorities prefer a legal concept of patrimony in terms of which the patrimony consists of all subjective rights having a monetary value as well as expectations of acquiring such rights. Included, too, are obligations (debts) with a monetary value. Others consider a patrimony in a factual and economic sense to be everything (material objects, rights or factual possibilities) of an individual which has a monetary value and which may be used by that person to satisfy his or her legally recognized needs.

Non-patrimonial loss *(nie-vermoënskade, persoonlikheidsnadeel, injury to personality, non-pecuniary loss)* [190]

This is the diminution in quality of the highly personal interests of an individual in satisfying his or her legally recognized needs but which does not affect that person's patrimony.

Damage-causing event *(skadestigtende gebeurtenis, uncertain event)* [191]

This is the factual situation of an uncertain nature which has [192] brought about damage. The factual situation consists of conduct which may in principle lead to delictual liability or liability for breach of contract, or any other fact [193] (eg the realization of a risk) which may bring about a duty to pay compensation.

Affective loss *(affektiewe skade, sentimental loss)* [194]

This is someone's emotional reaction (eg unhappiness or a feeling of having suffered an injustice) caused by having to suffer any kind of damage or invasion of rights.

Damages *(skadevergoeding)* [195]

Damages are a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage. [196]Damages also refer to the process through which an impaired interest may be restored through money. [197]

Compensation *(kompensasie)* [198]

In a *narrow sense* compensation denotes damages. In a *general sense* it means the process of reparation of any patrimonial or non-patrimonial loss.

Satisfaction *(genoegdoening)* [199]

Different meanings have been given to this term, such as penance, retribution, the reparation of a wrong or the giving of a solatium for someone's feelings of outrage or having to endure an injustice. In a wide sense satisfaction means that the law is upheld through penance or reconciliation and in a narrow sense it denotes the psychological gratification which the victim of an injustice receives. Satisfaction implies the reparation of damage in the form of injury to personality by inter alia effecting retribution for the wrong suffered by the plaintiff and by satisfying the plaintiff's and/or the community's sense of justice. Usually satisfaction operates through the fact that the defendant is ordered to pay a sum of money to the plaintiff.

Compensation (damages) for non-patrimonial loss (*vergoeding vir persoonlikheidsnadeel*) [200]

This means that an appropriate amount of money is awarded to a person who has suffered non-patrimonial loss (especially on account of bodily injuries) in an attempt to neutralize his or her loss through the fact that the money may bring happiness, contentment or comfort to that person or may in some other way assist him or her to overcome such loss.

Solatium [201]

This concept is sometimes used as a synonym for satisfaction. Literally, 'solatium' means 'consolation' (money) which is something less than satisfaction [202] and is also not precisely the same as 'compensation of non-patrimonial loss'.

Sum-formula *(sommeskadeleer, method of differentiation, comparative approach)* [203]

This describes a comparative method through which damage is determined by subtracting the plaintiff's present patrimonial position (after the occurrence of a damage-causing event) from the hypothetical patrimonial position which he or she would presently have been in had the damage-causing event not occurred. An actual sum of money is compared

with a hypothetical sum of money and this is why the method is referred to as the *sum*-formula.

Concrete concept of damage *(konkrete skadeteorie)* [204]

Damage is determined by comparing the utility of an element of the plaintiff's patrimony [205] before a damage-causing event occurred with its utility after the occurrence of such event. It may be stated that what was and what is are compared and no hypothetical position is taken into account. When this approach is adopted, damage is not expressed as an anonymous (global) sum of money but in terms of individual heads of damage.

'Once and for all' rule [206]

This rule has the effect that a plaintiff may in general only once claim damages or satisfaction for all damage based on a single cause of action. He or she therefore has to claim not only for all loss already suffered, but for all prospective loss too.

Cause of action *(eisoorsaak)* [207]

This means that all the elements or facts necessary to found a claim for damages or satisfaction are present. A cause of action accrues (if all the other facts are present) as soon as some damage is suffered. It is accordingly unnecessary that the full extent of the damage must have been reached. Where different claims are based on a single cause of action, their success depends on proof of essentially the same material facts (facta probanda).

Collateral benefits *(voordeeltoerekening, collateral source rule, compensating advantages)* [208]

This refers to the situation where a plaintiff also receives some benefit as a result of a damage-causing event. If such benefit is taken into account in reducing his or her recoverable damages, it is said that the collateral source rule does not apply (ie 'voordeeltoerekening' takes place). This means that the defendant's liability to pay damages is accordingly reduced or extinguished.

Res inter alios acta [209]

This expression is used to refer to a situation where the collateral source rule does apply. The benefit in question is said to be res inter alios acta and is irrelevant in regard to the liability of the defendant.

General and special damage *(algemene en besondere of spesiale skade)* [210]

In a *delictual* context general damage is usually that damage which is presumed to flow from an unlawful act, whereas special damage refers to damage which the law does not presume to be the necessary consequence of the act complained of and which must be specially pleaded and established by evidence. General damage is also used to refer to non-patrimonial loss. In the case of delictual liability for bodily injuries, all non-patrimonial loss (pain, suffering etc) as well as future loss are classified as general damage, while all pecuniary loss suffered before the trial qualifies as special damage.

In *contract,* general damage is the damage that flows naturally from a breach of contract and which the law presumes that the parties contemplated would result from such a breach; special damage, on the other hand, refers to a loss which is normally too

remote and for which damages may be recovered only if the parties actually or presumably foresaw that it would result.

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General damage is sometimes referred to as intrinsic damage (damnum circa rem) while special damage is described as extrinsic damage (damnum extra rem). [211]

Nominal damages *(nominale skadevergoeding)* [212]

This describes the payment of a small amount of money to a plaintiff who has proved an invasion of his or her rights but no damage. This type of damages has no use in our law, except possibly to confirm in certain situations that an invasion of rights has taken place.

Id quod interest, interesse [213]

This is the (full) patrimonial damage or loss sustained by the plaintiff for which damages are recoverable. [214]

Damnum emergens, lucrum cessans [215]

Damnum means damage (patrimonial loss) which has been suffered and for which damages are claimed. Damnum emergens refers to a loss already sustained while lucrum cessans means loss of profits and some forms of prospective (future) loss. [216]

Prospective loss *(toekomstige skade, future loss)* [217]

This is damage in the form of patrimonial or non-patrimonial loss which will, with a sufficient degree of probability or possibility, materialize after the time of assessment of damage on account of an earlier damage-causing event. In terms of another view, [218] prospective loss concerns the frustration of an existing and legally recognized expectation that certain losses will not take place or that interests will increase in value.

Positive and negative interesse [219]

In a contractual context *positive* interesse usually refers to the total interest which a contractual party has in the other party fulfilling his or her contractual obligations, ie all damage which he or she has already suffered and will probably suffer in future as the result of a breach of contract. *Negative* interesse is usually determined with reference to the position in which a contracting party found himself or herself immediately before concluding a contract, or with reference to a person's position immediately before a delict was committed against that person (or his or her position if a delict had not been committed). [220]

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Discounting *(verdiskontering)* [221]

This indicates, inter alia, the reduction of an amount of damages awarded for future loss by using an appropriate rate of interest in order to ensure that the plaintiff does not receive an undue benefit through the advance receipt of such damages.

Annuity *(annuïteit)* [222]

This is relevant in the case of loss of future income or support. It refers to a capital sum, presently payable, which, with the addition of interest that may be earned on it will give the plaintiff a periodic yearly payment from capital and interest for a fixed number of years in order to replace the lost income or support, and the figure arrived at should be such that at the end of the period there would be no capital and interest left.

Contingencies *(gebeurlikhede)* [223]

This may be described as uncertain circumstances of a positive or negative nature which, independent of the defendant's conduct and if it should realize, would probably influence a person's health, income, earning capacity, quality of life, life expectancy or dependency on support in future or could have done so in the past, and which must consequently be taken into account in a fair and realistic manner by increasing or decreasing the plaintiff's damages during the quantification process. [224]

Limitation of liability *(aanspreeklikheidsbegrensing, remoteness of damage)* [225]

Someone who is liable to pay damages is not liable for all harmful consequences of his or her conduct and some normative measure is used to impose a limit on that person's liability.

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[1] Cf n 10 below; Reinecke *Diktaat* chap 1: 'Dit is daarom te wagte dat menings oor wat by die skadevergoedingsterrein ingesluit moet word, sal verskil.'

[2] See para 1.7 on problems regarding terminology. 'Satisfaction' is the equivalent of the Afrikaans 'genoegdoening'. The term 'damages', however, is wide enough to include compensation and satisfaction for both patrimonial loss and non-patrimonial loss. See also Erasmus & Gauntlett 7 *LAWSA*para 9.

[3] The law of obligations is that branch of private law which regulates the creation, content and termination of an obligation. An obligation is a legal relationship between two parties in terms of which the one (the creditor) is entitled to performance and the other (the debtor) is obliged to render such performance. Performance denotes a particular type of action or inaction on the part of the debtor. The most common sources of an obligation are delict, contract and unjustified enrichment. Other sources include negotiorum gestio, official commands, family relationships, statutes etc. Cf generally Van der Merwe & Olivier *Onregmatige Daad* 3–4.

[4] Cf n 10 below.

[5] Ibid.

[6] Para 2.1. Without damage there is no question about damages. However, see para 8.8 on nominal damages. See further *Parker v Reed* 1904 SC 496; *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at 101.

[7] Para 8.1.

[8] Para 9.4.

[9] See para 1.5 on the sources of claims for damages and satisfaction.

[10] There are other definitions of the law of damages: see Van der Walt 1980 *THRHR* 3 who states that the law of damages is that group of private law rules which deal with the origin, content, transfer and termination of obligations to compensate damage. This definition may be criticized on the following grounds: *(a)* The law of damages is not merely a part of private law; there are legal principles from mercantile law (eg the law of insurance) and public law (eg civil procedure, evidence and administrative law) which are directly relevant in determining damage and damages. Certain statutory provisions relevant in the compensation of damage (the National Credit Act 34 of 2005 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COID Act)), cannot be classified as private law. *(b)*All the requirements for the creation or termination of an obligation to pay damages should not be seen as part of the law of damages, as this would unnecessarily enlarge the law of damages at the expense of the law of delict and the law of contract. *(c)* It is not clear what is meant by the transfer ('oordrag') of an obligation to compensate damage. *(d)* The definition does not make it clear enough that the principles regarding satisfaction and compensation of non-pecuniary loss (injury to personality) also form part of the law of damages (para 5.2).

Reinecke *Diktaat* chap 1 is of the opinion that the law of damages deals with the content of rights to compensation. This definition contains too little detail. The same can be said of Munkman's (Exall *Munkman on Damages* 1) definition: 'Damages are simply a sum of money given as compensation for loss or harm of any kind.'

See further McGregor *Damages* 11: '[T]he assistance a textbook on damages properly gives is on how to decide the extent and the measurement of a liability once established.' See further Koch *Reduced Utility* 48; Bloembergen *Schadevergoeding* 1-3; Erasmus & Gauntlett 7 *LAWSA* para 1.

[11] See eg Reinecke *Diktaat*, who says that the law of damages is not a separate subject with a precise content.

[12] This fact should not influence one to classify the law of damages merely as private law—see n 10above.

[13] Some rules from civil procedure, eg on the pleading of damages (see rule 18(10) of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules—para 16.1.3 below) as well as the onus in proving damage (para 16.2), can hardly be separated from the substantive law of damages. See also Erasmus 1975 *THRHR* 279: 'There is a close relationship between evidence and damages. The operation of the law of evidence determines on what evidential material the assessment of the quantum will in any given case be based. No exact line of demarcation can be drawn between the field of operation of substantive law and that of adjective law.' However, the opinion of Spiro *Conflict of Laws* 82 that the calculation of damages is of a procedural nature cannot be supported.

[14] See para 2.3 on the extent of the concept of damage.

[15] Para 1.5.

[16] The definition of the law of damages by Van der Walt 1980 *THRHR* 3 (cf n 10 above) is, on the one hand, too wide (because it includes the requirements for the existence of a claim for damages), and too narrow on the other (because it apparently excludes compensation and satisfaction for non-patrimonial loss from the law of damages). The view that compensation in terms of the COID Act 130 of 1993 (para 14.9) does not constitute damages (eg *Grace v Workmen's Compensation Commissioner*1967 (4) SA 137 (T) at 140) is unrealistic. Obviously there are different forms of damage and ways of effecting compensation. Furthermore, certain principles apply only in some cases. Nevertheless, it is wrong to restrict the law of damages to patrimonial loss or to compensation in the field of delict and contract.

[17] See para 4.2 on the sum-formula.

[18] Para 7.1.

[19] Para 10.1.

[20] Para 12.1 et seq.

[21] Para 11.5.

[22] Para 2.4.12.

[23] Para 11.4.

[24] Para 16.2.

[25] Para 11.11.

[26] Para 11.1.

[27] Para 11.11.

[28] See also Van der Walt *Sommeskadeleer* 522, who accepts that the law of damages should take cognizance of reality. He apparently uses this observation to exclude prospective loss from compensation (para 6.1), which is expected only with a low degree of probability. However, it would possibly seem to be more useful to stress that the law should sometimes take into account the (non-legal) meaning that the community gives to the concept of 'damage'.

[29] On this see McGregor *Damages* 11: 'A textbook on the law of damages should not and cannot deal with the question of the existence of a liability. It must accept . . . that a liability exists.' Of course, one may argue that, eg, the 'once and for all' rule (para 7.1) actually relates to the question of the *existence* of a claim for damages and that in terms of McGregor's definition it may possibly not form part of the law of damages. Many similar examples may possibly be conceived (see also n 10 above). It is customary to consider certain principles as part of the law of damages irrespective of their precise nature. Cf in general further Van der Walt *Sommeskadeleer* 278: 'Vir die Suid-Afrikaanse skadevergoedingsreg kan daar met stelligheid beweer word dat skade 'n konstitutiewe vereiste is vir die ontstaan van 'n verbintenis tot skadevergoeding. By enige ondersoek van die skadevereiste moet hierdie verband waarin dit staan in gedagte gehou word. Dit hou in dat daar met die beantwoording van die skadevraag uiteraard nog nie uitspraak oor die vraag na die verweerder se uiteindelike aanspreeklikheid vir skadevergoeding gemaak word nie.'

[30] eg private law, mercantile law and public law.

[31] Common law, legislation, judicial decisions and academic opinion.

[32] Para 1.5.

[33] When damage is considered in practice, two questions arise: *(a)* Are the requirements for the existence of an obligation for the payment of damages satisfied? This issue is usually referred to as the 'merits' of the plaintiff's action. *(b)* If the plaintiff has an action on the merits, what is the amount of damages that he or she may recover? This is referred to as the issue of 'quantum'. The method with which the quantum of damages is assessed forms an important part of the law of damages (and is possibly all that legal practice considers to be the 'law of damages'). See further Kerr *Contract* 647: 'The normal rule is that the amount of damages to be awarded is determined at the end of the case. However ... a case may sometimes be tried in two parts, the amount of damages being determined after the issue of liability has been settled.' This division of an action may have important implications in regard to an appeal—see para 16.3. In practice it is common to find either that the parties agree on the quantum of damages but that the merits of the claim are disputed or that the dispute concerns only the quantum of damages. See also rule 33(4) of the Uniform Rules of Court, which has important implications in regard to the division of an action. In terms of this sub rule the issue of quantum can be decided separately from the rest of the action.

See further *Karpakis v Mutual & Federal Ins Co Ltd* 1991 (3) SA 489 (O) at 498; *Botha v AA Mutual Ins Ass Ltd* 1968 (4) SA 485 (A) at 489; *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (O) at 47; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 146-7; *Selero (Pty) Ltd v Chauvier* 1982 (2) SA 208 (T) at 217: 'There may be particular circumstances where the right to damages is part of the issues on the merits, as, for example, where a plaintiff alleges that she was married to a deceased breadwinner and that allegation is denied.' See also Koch *Lost Income* 2-3. Cf *Cape Town Municipality v Allianz Ins Co Ltd* 1990 (1) SA 311 (C) and para 7.3.1 on prescription where an action is divided. See, further, *Erasmus v Davis* 1969 (2) SA 1 (A) at 5 where it is stated that quantification of a compensatory award does not occur on the basis of formulas or stereotyped rules of practice, since quantification is merely a factual question. This dictum is unrealistic. The determination of compensation is decidedly not merely a question of fact. There are many legal principles which must be applied in order to establish whether damage has been sustained and what the extent thereof is, how the damage must be translated into money and how the amount of damages must be adjusted. Furthermore, in certain situations there are indeed stereotyped rules of practice (para 12.7.2 on market value; para 13.1 on the reasonable cost of repairs).

[34] See Van der Walt *Sommeskadeleer* 1, 227: 'Daar kan waarskynlik met oortuiging van die moderne skadevergoedingsreg gesê word dat dit nie op wraak- of strafgedagtes berus nie, maar primêr op die volledigs moontlike vergoeding van die eiser se skade ingestel is.' According to Van der Walt, further objects of the law of damages are prevention (op cit 234), loss-spreading (op cit 235); penalization and redress of wrongs (1980 *THRHR* 23-4). See also Van Aswegen *Sameloop* 166-7.

[35] Bloembergen *Schadevergoeding* 117, on whom Van der Walt *Sommeskadeleer* 301 relies, mentions the issue of the fullest compensation possible in connection with a particular *award* of damages and not in regard to the *law* of damages. See also Visser *Kompensasie en Genoegdoening* 3-4; Exall *Munkman on Damages* 1-4.

[36] See eg Van der Walt *Sommeskadeleer* 6, who refers to the casuistic approach in the South African law of damages. He discusses the development of the concept of damage in German law in order to provide a theoretical framework within which our law of damages may be systematized and expresses the hope that this will promote the practical functioning of the law of damages.

[37] See eg McGregor *Damages;* Street *Damages;* Bloembergen *Schadevergoeding*; Erasmus & Gauntlett 7 *LAWSA*; Corbett & Buchanan I; Kemp & Kemp *Quantum*; Koch *Lost Income*; Luntz *Damages*; Cooper-Stephenson *Personal Injury Damages*; White and Fletcher *Delictual Damages*; Exall *Munkman on Damages*; Barrie *Personal Injury Law*; Kemp *Damages*; Koch *Reduced Utility*; etc.

[38] Part I: chaps 1-11; part II: chap 12; part III: chaps 13-15; part IV: chap 16.

[39] Delictual liability may also be interpreted to include liability without fault or liability based on risk.

[40] 'Impoverishment', which is a requirement for a claim based on unjust enrichment, is determined in the same manner as patrimonial loss in the law of delict—cf De Vos *Verryking* 330-1 and para 4.1 on the comparative method of assessing damage. See also Reinecke 1976 *TSAR* 26-7; Van der Merwe & Olivier *Onregmatige Daad* 483-4 on the concurrence (para 11.9) of liability for unjust enrichment and delict in cases of metus and misrepresentation inducing contract; Van der Merwe & Olivier *Onregmatige Daad* 485 on enrichment and contractual liability. See further Van der Walt *Sommeskadeleer* 250-3; *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 436. See in general Eiselen & Pienaar *Unjustified Enrichment* 25-77; Sonnekus *Unjustified Enrichment* 27-96.

[41] See eg *Peri-Urban Areas Health Board v Breet* 1958 (3) SA 783 (T) at 790; *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 49; *Hayman and Napier v Rounthwaite* 1917 AD 456 at 459, 462; *Thompson v Voges* 1988 (1) SA 691 (A) at 709; Rabie 9 *LAWSA* 2nd ed para 663; Rabie *Estoppel* 99-119. See, further, Van der Walt 1973 *THRHR* 386.

[42] See eg Van der Merwe & Olivier *Onregmatige Daad* 257-8; Neethling & Potgieter *Delict* 254-5. See also *Trustees BKA Besigheidstrust v Enco Produkte en Dienste* 1990 (2) SA 102 (T) on damage in an application for an interdict and *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) on using an interdict to reinforce a claim for damages or to prevent the defendant from disposing of assets (*Atkin v Botes*unreported (566/2010) [2011] ZASCA 125 (9 September 2011)).

[43] eg *Thompson v Voges* 1988 (1) SA 691 (A) at 711.

[44] See Visser & Potgieter *Estoppel Cases and Materials* 27-35.

[45] See *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C) at 498.

[46] A party to a contract may of course claim damages in addition to specific performance (eg *Silverton Estate Co v Bellevue Syndicate* 1904 TS 462) or damages in the alternative to a claim for specific performance (eg *Woods v Walters* 1921 AD 303 at 310; *Custom Credit Corp (Pty) Ltd v Shembe*1972 (3) SA 462 (A) at 471). See also para 8.2 on restitution in kind in contrast to damages.

[47] See, in general, *Angath v Muckunlal's Estate* 1954 (4) SA 283 (N); *Ngobese v Slatter Bros* 1935 NPD 284. Contractual 'compensation' and damages are not the same thing—*Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 329-30; *Van Immerzeel & Pohl v Samancor Ltd*[2001] 2 All SA 235 (A) at 248.

[48] See, however, authority listed in para 2.2 n 18 below.

[49] See in general Van der Walt & Midgley *Delict* 1-2, 211-16.

[50] See Neethling & Potgieter *Delict* 8-11; Van der Merwe & Olivier *Onregmatige Daad* 226-8; Boberg *Delict* 18-21.

[51] Neethling & Potgieter *Delict* 123 et seq.

[52] Neethling & Potgieter *Delict* 176-87 on factual causation.

[53] See Neethling & Potgieter *Delict* 10-11; see, further, *Perlman v Zoutendyk* 1934 CPD 151 at 155; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N); *Franschhoekse Wynkelder (Ko-op) Bpk v SAR&H* 1981 (3) SA 36 (C); *Barlow Rand Ltd v Lebos* 1985 (4) SA 341 (T); *Arthur E Abrahams and Gross v Cohen* 1991 (2) SA 301 (C); *Bayer (SA) (Pty) Ltd v Frost*1991 (4) SA 599 (A); see, however, also *Worcester Advice Office v First National Bank of Southern Africa Ltd* 1990 (4) SA 811 (C) at 819-20. See para 13.7 on liability for infringement of a patent and copyright; para 13.9.6 on trespass; para 13.11 on the interference with a contractual right; para 13.10on pure economic loss; para 13.6 on unlawful competition; para 13.4 on liability for misrepresentation.

[54] Para 3.1 et seq.

[55] See Neethling et al *Law of Personality* 49 et seq; *Jackson v NICRO* 1976 (3) SA 1 (A) at 11.

[56] Para 9.4. See Neethling et al *Law of Personality* 65-8 for criticism of the idea that the actio iniuriarum may be used to claim damages for patrimonial loss.

[57] See Neethling et al *Law of Personality* 63-5. In the case of wrongful deprivation of liberty and wrongful attachment of property liability is not based on fault; cf Neethling et al *Law of Personality* 119 et seq, 185 et seq. In the case of defamation by the mass media liability is based on negligence—see *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1210, 1214; Neethling & Potgieter *Delict* 342; Van der Walt & Midgley *Delict* 159-61.

[58] Neethling et al *Law of Personality* 51-3.

[59] Sometimes described by the meaningless phrase actio sui generis which applies to any action. See also Boberg *Delict* 18.

[60] Para 9.1 et seq; Visser *Kompensasie en Genoegdoening* 199-262.

[61] Para 5.1 et seq.

[62] Cf in general Olivier *Pyn en Lyding*.

[63] The actio doli (Van der Merwe & Olivier *Onregmatige Daad* 228-9; Van der Walt & Midgley *Delict*35; *Millward v Glaser* 1949 (4) SA 931 (A) at 942); the actio quod metus causa (Van der Merwe & Olivier *Onregmatige Daad* 229-30; *Union Government v Gowar* 1915 AD 426; *Broodryk v Smuts* 1942 TPD 47; Van der Walt & Midgley *Delict* 35); the condictio furtiva (an action for damages by the owner of stolen property against the thief—Van der Walt & Midgley *Delict* 42; *Minister van Verdediging v Van Wyk*1976 (1) SA 397 (T); *Crots v Pretorius* 2010 (6) SA 512 (SCA); Scott 2011 *TSAR* 383-93); the actio ad exhibendum (an action for damages by the owner of stolen property against a mala fide possessor who has intentionally consumed or alienated such property—cf Van der Walt & Midgley *Delict* 35; Silberberg & Schoeman *Law of Property* 263-5; Van der Merwe & Olivier *Onregmatige Daad* 231-3; Van der Merwe *Sakereg* 355; *Leal and Co v Williams* 1906 TS 554; *Phillip Robinson Motors (Pty) Ltd v N M Dada*

(Pty) Ltd 1975 (2) SA 420 (A); *Alderson & Flitton (Tzaneen) Ltd v EG Duffey's Spares (Pty) Ltd* 1975 (3) SA 41 (T) at 48-50; *Gore v Saficon Industrial (Pty) Ltd* 1994 (4) SA 536 (W) at 552; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) at 996; *Frankel Pollak Vinderine Inc v Stanton*2000 (1) SA 425 (W)); the actio Pauliana (see Thomas & Boraine 1994 *THRHR* 678; *Nedcor Bank Ltd v ABSA Bank* 1995 (4) SA 727 (W) at 729; *Commissioner, South African Revenue Service v ABSA Bank Ltd* 2003 (2) SA 96 (W)) and the doctrine of notice—aimed at restitution in kind but which may, according to Van der Merwe & Olivier *Onregmatige Daad* 279-80, also be used to claim damages. See also *Mlombo v Fourie* 1964 (3) SA 350 (T) on a claim for the value of something with the rei vindicatio; Van der Merwe *Sakereg* 352-3.

[64] See eg Neethling & Potgieter *Delict* 355 et seq. The description 'no fault' liability is inaccurate, because in these cases not only fault but all other requirements for delictual liability, with exception of damage, are absent: Visser 1991 *THRHR* 785.

[65] eg for damage to property, medical expenses etc (cf eg *SAR&H v Edwards* 1930 AD 3).

[66] Such as pain and suffering—see *Solomon v De Waal* 1972 (1) SA 575 (A).

[67] Neethling & Potgieter *Delict* 357-60; Van der Merwe & Olivier *Onrematige Daad* 486-94; Van der Walt & Midgley *Delict* 40-1.

[68] See Neethling & Potgieter *Delict* 360-1; Van der Merwe & Olivier *Onregmatige Daad* 494-7; Van der Walt & Midgley *Delict* 41.

[69] The actio de feris for damage caused by wild animals (Neethling & Potgieter *Delict* 361; Van der Merwe & Olivier *Onregmatige Daad* 497; Van der Walt & Midgley *Delict* 42); the actio de effusis vel deiectis for causing damage by throwing an object out of a building (Van der Merwe & Olivier *Onregmatige Daad* 499-500; Van der Walt & Midgley *Delict* 42; Neethling & Potgieter *Delict* 362; *Bowden v Rudman* 1964 (4) SA 686 (N) at 691-2); the action based on causing nuisance which deals with the unreasonable use of property (Van der Walt *Law of Neighbours* 237-323; Van der Merwe & Olivier *Onregmatige Daad* 500; Neethling & Potgieter *Delict* 363-4; *Bloemfontein Town Council v Richter* 1938 AD 195; *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C)); the action for the disturbance of lateral support of land (Van der Walt *Law of Neighbours* 88-131; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) at 253); the actio aquae pluviae arcendae and the interdictum quod vi aut clam for damage caused by the violation of the prohibition against the interference by a landowner with the natural flow of water (Van der Walt *Law of Neighbours* 204-36; *Redelinghuys v Bazzoni* 1976 (1) SA 110 (T); Van der Merwe & Olivier *Onregmatige Daad* 233-4; Van der Walt & Midgley *Delict* 42-3).

[70] See Neethling & Potgieter *Delict* 365-73 on the following situations: employer-employee, principal-agent, motor car owner-motor car driver, state-public school. See also Van der Walt & Midgley *Delict* 36-40; s 297A of the Criminal Procedure Act 51 of 1977 on the vicarious liability of the state for an accused who has caused patrimonial loss during community service; and *Lindsay v Stofberg* 1988 (2) SA 462 (C) at 467 on the vicarious liability of partners. See, further, *Eksteen v Van Schalkwyk* 1991 (2) SA 39 (T) on the possible liability of a client for defamation committed by his attorney. See in regard to contract, *Weinberg v Olivier* 1943 AD 181; *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd*1960 (3) SA 178 (W).

[71] It would obviously be incorrect to view such claims (based on statutory provisions) as falling outside the scope of the law of damages—see n 2 above and para 1.7. See also para 13.13.

[72] See the following examples: clause 9(3) sched 1 of the Legal Succession to the South African Transport Services Act 9 of 1989; s 8 of the Civil Aviation Act 13 of 2009; s 3 of the War Damage Insurance and Compensation Act 85 of 1976; ss 72 and 73 of the Nuclear Energy Act 131 of 1993; ss 30-5 of the National Nuclear Regulator Act 47 of 1999; s 36 of the COID Act 130 of 1993 (which provides for a statutory insurance claim by an employee against the Director-General—para 14.9; ss 78-103 of the Occupational Diseases in Mines and Works Act 78 of 1973. The Road Accident Fund (RAF) Act 56 of 1996, which provides for third-party compensation, creates certain new claims (eg s 17(5) concerning claims by the supplier against the RAF), but the important object of the Act is to cause the common-law delictual remedies (para 1.5.2) to be available against a new defendant who will be able to pay damages—see *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 841. See also the Prescribed Rate of Interest Act 55 of 1975 (paras 8.10.1-8.10.3), the Alienation of Land Act 68 of 1981 (para 12.19.4), the National Credit Act 34 of 2005 (paras 8.10 and 12.19.2) and the Consumer Protection Act 68 of 2008 (paras 8.10 and 12.19.3). See also ss 18 and 19 of the Share Blocks Control Act 59 of 1980; ss 24-5 of the Copyright Act 98 of 1978; ss 47 and 49 of the Plant Breeders' Rights Act 15 of 1976; s 5(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983; ss 65-71 of the Patents Act 57 of 1978; s 10 of the Performers' Protection Act 11 of 1967; s 21 of the Heraldry Act 18 of 1962; ss 4-6 of the Animals Protection Act 71 of 1962; s 59 of the National Forests Act 84 of 1998; ss 19, 26, 27 and 34 of the Animal Diseases Act 35 of 1984; s 20 of the National Research Foundation Act 23 of 1998; ss 19-21 of the Perishable Products Export Act 9 of 1983; ss 19, 129-31, 152, 153 and 157 of the National Water Act 36 of 1998; ss 9-13 of the Marine Pollution (Control and Civil

Liability) Act 6 of 1981; ss 193-5 of the Labour Relations Act 66 of 1995; s 15 of the Stock Theft Act 57 of 1959; s 60 of the South African Schools Act 84 of 1996; ss 2(4)*(p)*, 28, 36 and 49 of the National Environment Management Act 107 of 1998; s 65(6) of the Competition Act 89 of 1998; s 53 of the South African National Roads Agency Limited and National Roads Act 7 of 1998; s 21 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; s 8(1)*(c)* of the Promotion of Administrative Justice Act 3 of 2000; s 17(1) of the Counterfeit Goods Act 37 of 1997. See also s 17(6) of the RAF Act 56 of 1996; rule 34A of the Uniform Rules of Court and rule 18A of the Magistrates' Court Rules on interim payments of damages.

[73] See Van Aswegen *Sameloop* 310-13 and Van der Merwe et al *Contract* 333-6 on the difference of opinion as to whether a claim for damages originates from contract or breach of contract. Cf Van Aswegen *Sameloop* 313 who states that an action for damages on account of breach of contract does not arise ex contractu in the sense that it is primarily created by an agreement between the parties to a contract. She explains that it is a secondary obligation created by a breach of the (primary) contractual obligation causing damage. In view of this, there is no material difference between damages claims based on breach of contract and claims based on delict as far as their origin is concerned. See generally Olivier 'The tortification of contract' in *Developing Delict* 283.

See also Van der Merwe & Olivier *Onregmatige Daad* 479; Van der Merwe 1978 *SALJ* 317. One may also argue that, in the case of an undertaking to pay damages (cf the Conventional Penalties Act 15 of 1962—para 12.18), the origin of a claim to pay damages remains breach of contract and that the agreement determines only the quantum of damages. However, breach of contract cannot be considered in isolation because the existence and terms of a contract codetermine whether, in a given situation, breach of contract and thus a claim for damages exist. See further Reinecke 1990 *TSAR* 679. See paras 12.15.4 and 12.15.5 for a type of damages in terms of the actio quanti minoris and the actio redhibitoria for latent defects where there is probably no breach of contract. See also para 12.17 on damages for 'holding over' where there is not clarity on the precise nature of the cause of action.

[74] Para 12.22; see, generally, Reinecke et al 12 *LAWSA* (reissue).

[75] See eg para 11.1.8 on recourse between joint wrongdoers; para 10.4 on an insurer's right of subrogation; para 11.1.8 on a claim for adjustment between former spouses.

[76] See especially Lötz 2007 *Fundamina* 75-98; Erasmus 1975 *THRHR* 104, 268, 362; Erasmus & Gauntlett 7 *LAWSA* paras 2-6; Erasmus 1968 *THRHR* 213-41. See also Lawson *Negligence* 7-12, 59-65; Davel *Afhanklikes* 3-46; Millard *Earning Capacity* 10-27. See further Van der Walt *Sommeskadeleer* 9 et seq, who gives much attention to the German literature on the development of the concept of damage.

[77] Erasmus & Gauntlett 7 *LAWSA* para 2: 'A knowledge and appreciation of the historical perspective is therefore of considerable assistance in evaluating decided cases dating from different periods.'

[78] Erasmus 1975 *THRHR* 105: 'On the one hand, the courts and writers of textbooks have relied on civilians such as Voet, Domat and Pothier in their exposition of contractual damages. On the other hand it has been stated that, apart from three rules of general application derived from Voet, ''the law of damages in the modern Roman-Dutch law is substantially the same as in English law''. The duality of the origin of the South African law of damages is reflected in its terminology. Civil law terms such as *idquod interest, interesse,* positive and negative [interesse], *damnum emergens* and *lucrum cessans* rub shoulders with common-law terms such as special, general, nominal, punitive and exemplary damages.'

[79] See para 1.2.

[80] See eg Neethling & Potgieter *Delict* 7-16; Neethling et al *Law of Personality* 40-9; Olivier *Pyn en Lyding*; Visser *Kompensasie en Genoegdoening* 199-248; Van der Merwe & Olivier *Onregmatige Daad* 5-15; Van der Walt & Midgley *Delict* 7-14. See also Van Aswegen *Sameloop* 25-66.

[81] See Erasmus & Gauntlett 7 *LAWSA* paras 3-4. See Lötz 2007 *Fundamina* 76-90; Erasmus 1975 *THRHR* 104 et seq for a more detailed discussion.

[82] See Lötz 2007 *Fundamina* 76 et seq and Erasmus 1975 *THRHR* 104 et seq, who discuss Roman law in both the classical and the Justinian periods and then refer to authors from the Glossators to the Pandectists.

[83] The reason for this is summarized as follows by Erasmus & Gauntlett 7 *LAWSA* para 3 n 3: '[T]he Romans knew only individual situations from which liability for damages arose, and it was the task of the *iudex* to evaluate the extent of the liability in accordance with the formula of the particular *actio*. Roman law lacked the conceptual structure of the modern law of damages, and concepts such as consequential loss, remoteness of damage, foreseeability and mitigation of loss are foreign to Roman law.' See also Lötz 2007 *Fundamina* 77-8.

[84] See para 4.2 on the sum-formula or the comparative method.

[85] See Erasmus 1975 *THRHR* 107 n 17 for authority. See Erasmus idem on the gradual introduction of a subjective standard in measuring damage. When the value of a slave or animal was assessed in terms of the lex Aquilia, the real loss suffered by the plaintiff was also taken into account.

[86] See eg *D* 13.4.2.8; *D* 19.1.23.31; *D* 19.2.33. See, however, *D* 9.2.29.3 and *D* 18.6.20 where liability for lucrum is excluded. From these texts the distinction between damnum emergens and lucrum cessans is drawn (these terms are apparently of medieval origin)—see para 3.4.1 on these forms of damage. Erasmus 1975 *THRHR* 108 says that the fact that the Romans found it necessary to distinguish between damnum and lucrum indicate that the distinction had some significance. Liability for lucrum appears to have been construed on a narrow basis within certain typical situations and was judged by objective criteria. See further Lawson *Negligence* 59 et seq.

[87] Cf para 4.3 on this. See the discussion by Erasmus 1975 *THRHR* 109.

[88] Erasmus 1975 *THRHR* 110. Cf, however *D* 19.1.21.3, where Paul restricts liability to the utilitas circa rem. From this, medieval jurists developed the distinction between utilitas circa rem and extra rem. The real meaning of the text is, however, obscure.

[89] Erasmus 1975 *THRHR* 109 et seq.

[90] See Erasmus 1968 *THRHR* 213-41 for a detailed discussion. Cf also Lötz 2007 *Fundamina* 79; Erasmus 1975 *THRHR* 111.

[91] Erasmus 1975 *THRHR* 111 and 117. In the case of a casus certus (something with a fixed value or nature) the amount of damages may not exceed double this value (simplum). In the case of incertus casus there is no simplum but merely the obligation to pay damages and there is no special limitation on the quantum of damages (except that it must be assessed in a reasonable manner). The *Tractatus de eo quod Interest* by Molinaeus is a commentary on *C* 7.47 and has had an important influence on the law of damages.

[92] See Erasmus 1975 *THRHR* 112 n 54 for the relevant references. Jurists subdivided the general concept of 'interesse' into various aspects. A certain Rebuffus even described 48 of them (Erasmus loc cit).

[93] See also *D* 46.8.13. Erasmus 1975 *THRHR* 112-13 describes its merits as follows: 'Firstly, by defining *interesse* in terms of loss suffered, the emphasis is put on the basic principle of compensation, punitive considerations being excluded and, secondly, the definition proceeds subjectively from the loss suffered by the individual plaintiff. The definition contains no objective or external limitations: as a matter of principle the full loss of the individual plaintiff is recoverable.' See Erasmus loc cit for a summary of how authors such as Baldus, Cujacius and Gothofredus tried to improve on the definition of Accursius and the approach by Hotomanus, who anticipated the Differenztheorie (see para 4.2 on the sum-formula) as it was eventually formulated by Mommsen in 1855.

[94] See Lötz 2007 *Fundamina* 80; Erasmus 1975 *THRHR* 114-15.

[95] Erasmus 1975 *THRHR* 116. See Erasmus loc cit on the development by Contius and Donellus, who sought to use causation in order to limit the liability to pay damages.

[96] Erasmus & Gauntlett 7 *LAWSA* para 3.

[97] See Erasmus 1975 *THRHR* 268 for references. See also *Sandilands v Tompkins* 1912 AD 171 at 177.

[98] *Commentarius* 45.1.9.

[99] See n 93 above.

[100] See Erasmus 1975 *THRHR* 269-70 and Erasmus & Gauntlett 7 *LAWSA* para 3 for the necessary references and further information.

[101] eg Voet *Commentarius* 45.1.9; Matthaeus *De Auctionibus* 1.21.2; Van Leeuwen *Censura Forensis* 1.4.15.6.

[102] Erasmus 1975 *THRHR* 269, with reference to Voet *Commentarius* 45.1.9 and 9.2.6.

[103] Voet *Commentarius* 45.1.9; Huber *Hedendaegse Rechtsgeleertheyt* 3.36.12.

[104] *Commentarius* 45.1.12.

[105] See para 8.8 on nominal damages.

[106] Voet *Commentarius* 45.1.12. See Erasmus 1975 *THRHR* 270 n 113 on a penalty stipulation (para 12.18).

[107] Voet *Commentarius* 45.1.10; Groenewegen *De Legibus Abrogatis ad C* 7.47; Van Bynkershoek *Quaestionum juris privati* 2.14. This principle no longer applies in modern South African law. Cf Erasmus 1968 *THRHR* 237-41; Joubert *Contract* 251. Such a rigid measure should, for obvious reasons, not be applied in quantifying damages. Only in strictly defined cases should an objective limitation be placed on the amount of recoverable damages (see para 11.8).

[108] Voet *Commentarius* 9.2.10.

[109] Van Leeuwen *Roomsch Hollandsch Recht* 4.37.1; Van der Linden *Koopmans Handboek* 1.16.4.

[110] See para 15.3.2.3*(b)* and the authorities referred to there. See also Neethling et al *Law of Personality* 171; Erasmus 1975 *THRHR* 272. Until recently, it was accepted that the amende profitable et honorable had fallen into desuetude in South African law. Now Willis J has held in *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at 525 that '[t]he *amende honorable* was not abrogated by disuse. Rather, it was forgotten: a little treasure lost in a nook of our legal attic. I accordingly come to the conclusion that the remedy of the *amende honorable* remains part of our law.' Cf *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 258-61, 274-6; Neethling & Potgieter *Delict* 254; Neethling & Potgieter 2003 *THRHR* 329 et seq; Mukheibir 2007 *Obiter* 583-9; Van der Walt & Midgley *Delict* 215.

[111] De Groot *Inleiding* 3.34.2. See also Visser *Kompensasie en Genoegdoening* 207 et seq; *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A) at 65 et seq.

[112] See Erasmus 1975 *THRHR* 271: 'It is submitted that as far as damages for breach of contract are concerned there was in Roman-Dutch law no exception to the general rule that damages are awarded as an indemnity for loss . . . . In the law of delict the principle of compensation was firmly entrenched in actions for patrimonial loss brought under the *lex Aquilia*.'

[113] See Erasmus 1975 *THRHR* 272-7; Lötz 2007 *Fundamina* 85-7.

[114] eg expressions such as nominal and special damages.

[115] See eg *Orphan Chamber v Truter* (1830) 1 Menz 452; *Smith v Skinner* (1847) 3 Menz 188.

[116] See eg *Breda v Muller* (1829) 1 Menz 425; *Hart & Constatt v Norden* (1845) 3 Menz 548; *Cawoods v Simpson* (1845) 3 Menz 542. See also *Keyter v Le Roux* (1841) 3 Menz 23 at 31 on vindictive damages.

[117] See eg *Phillips v London and South Western Rail Co* (1879) 5 QBD 78 and *Hume v Divisional Council of Cradock* 1880 EDC 104 at 134.

[118] 1975 *THRHR* 280.

[119] Para 8.8.

[120] See eg *Breda v Muller* (1829) 1 Menz 425 (trespass on land); *Cawoods v Simpson* 1845 3 Menz 542 (for breach of contract not causing damage). See also the well known dictum from *Jansen v Pienaar*1881 1 SC 276 at 277: '[T]he moment the plaintiff proved a wrong—as soon as he proved the enticing away, he was entitled to some damages though he did not prove one farthing actual damages.' This principle was based on English torts 'actionable per se' and was completely foreign to Roman-Dutch law. See further Erasmus 1975 *THRHR* 281 et seq; Van Aswegen *Southern Cross* 578-81; Erasmus & Gauntlett 7 *LAWSA* para 18 for more case references.

[121] See eg *De Villiers v Van Zyl* 1880 Foord 77; Erasmus 1975 *THRHR* 281 et seq for further examples. See also Erasmus & Gauntlett 7 *LAWSA* para 19; Neethling 2008 *Obiter* 238-42.

[122] See Erasmus 1975 *THRHR* 283 who refers inter alia to *Hare v White* 1865 Roscoe 246 at 250: '[T]he action of the *amende profitable* had been dropped, and instead of that was now taken what was called the English action for libel, which would merely lie in cases where temporal damages had been suffered.'

[123] See eg Van der Walt *Sommeskadeleer* 4.

[124] Erasmus 1975 *THRHR* 362 and especially n 227.

[125] See para 4.2 on the sum-formula (comparative method); Van der Walt *Sommeskadeleer* 9 et seq.

[126] See eg *Livingstone v Rawyards Coal Co* 1880 5 App Cas 25 at 39: '[W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.' Cf, further, *British Transport Commission v Gourley* [1956] AC 185 (HL) at 197; *Victoria Laundry v Newman* [1949] 2 KB 528 at 539; McGregor *Damages* 13 et seq.

[127] See the famous judgment in *Hadley v Baxendale* (1854) 9 Ex 341; Erasmus 1975 *THRHR* 277 on the influence of the French jurist Pothier on English law. See, further, McGregor *Damages* 212-15.

[128] See eg the following cases in which *Hadley v Baxendale* (1854) 9 Ex 341 was followed: *Du Plooi v Roodt* 1883 Greg 2; *Transvaal Silver Mines Ltd v Brayshaw* 1895 OR 95 at 102; *Emslie v African Merchants Ltd* 1908 EDC 82 at 91 and especially *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 15, where Innes CJ stated that English and Dutch law are essentially in agreement on the following: 'Such damages only are awarded as flow naturally from the breach, or as may reasonably supposed to have been in the contemplation of the contracting parties as likely to result therefrom.' Erasmus 1975 *THRHR* 364 rejects this dictum as inaccurate.

[129] See especially Erasmus 1975 *THRHR* 277-83, 362-9.

[130] Some theories from continental civil law after the codification of Roman-Dutch law also had an influence: The concept of damage developed by Mommsen (of 1855) was, on the authority of Windscheid and Grüber (cf the latter's work *The Lex Aquilia: The Roman Law of Damage to Property*(Oxford 1886)), taken over as the common-law concept of damage in South Africa: cf Van der Walt *Sommeskadeleer* 3; *Union Government v Warneke* 1911 AD 657 at 665; *Oslo Land Co v Union Government* 1938 AD 584 at 590. See Hahlo & Kahn *SA Legal System* 566 et seq; Erasmus & Gauntlett 7 *LAWSA* paras 5-6.

[131] 7 *LAWSA* para 6.

[132] See also Van der Walt *Sommeskadeleer* 3, who observes that the problems on which the law of damages must give answers do not really differ much in the various legal systems.

[133] See eg the extensive references to English law in *Dippenaar v Shield Ins* 1979 (2) SA 904 (A) (collateral benefits in the form of a pension—para 10.5). Cf also *Santam Versekeringsmpy Bpk v Beyleveldt* 1973 (2) SA 146 (A). The interest in English law has, however, become more selective. Erasmus 1975 *THRHR* 365 says, eg, that South African courts are more inclined to make use of actuarial evidence (see para 14.6.3) than English courts and also decline to adopt certain methods of quantification employed by English courts. See in this regard also *Green v Coetzer* 1958 (2) SA 697 (W) at 699, where the court expressly refused to follow the English case *Brunsden v Humphrey* (1884) 14 QBD 141 (which deals with causes of action—para 7.5.3).

[134] See eg *Union Government v Warneke* 1911 AD 657 at 665: '[I]t was essential to a claim under the *Lex Aquilia* that there should have been actual *damnum* in the sense of loss to the property of the injured person.' See also *Edwards v Hyde* 1903 TS 381.

[135] See Erasmus 1975 *THRHR* 366-7 for references. See also Erasmus & Gauntlett 7 *LAWSA* 6; para 8.8.

[136] See *Matthews v Young* 1922 AD 492 at 505 on satisfaction (sentimental damages) for the injustice (injury to personality) in a case of defamation and the Aquilian action for patrimonial loss. Erasmus 1975 *THRHR* 367 states: 'The influence of the English law lingers on in so far as the former is styled general damages, and the latter special damages which must be specially pleaded and proved.'

[137] eg *Salzmann v Holmes* 1914 AD 471 and De Villiers *The Roman and Roman-Dutch Law of Injuries*. See Erasmus & Gauntlett 7 *LAWSA* para 6 n 3 who point to the problems judges had to distinguish between the actio iniuriarum (essentially an action to obtain a private penalty) and English torts in which damages were 'at large' and penal awards could be made without proof of patrimonial loss. See, however, also *Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 560-1 in terms of which damages (for patrimonial loss) may apparently be recovered with the actio iniuriarum. See Neethling et al *Law of Personality* 65-8 for criticism.

[138] See, however, *Stuurman v Van Rooyen* 1893 SC 35, where Solomon J awarded a substantial amount of damages for contumelia without 'real' damage being proved.

[139] Erasmus 1975 *THRHR* 367 refers to the use of the English expression 'sentimental damages' while the old writers on the actio iniuriarum do not mention damages in this regard and consistently speak of a poena (pecuniaria). He also mentions the tendency to put too strong an emphasis on contumelia as an element of iniuria which probably reflects the influence of exemplary damages (see also *Foulds v Smith* 1950 (1) SA 1 (A) at 11).

[140] Erasmus 1975 *THRHR* 368 comments as follows on references to, eg, *D* 10.4.9.8; 13 4.2.8; 19.1.1*pr* etc as authority for the view that the principle of id quod interest supports 'positive interesse': 'Such direct recourse to Roman texts is, it is submitted, an anachronistic projection of the modern concept of *interesse,* and in this case more particularly the concept of positive interest, on the Roman texts. The same applies in the case of texts from Matthaeus, Voet and Van Leeuwen cited in support of the rule.'

[141] See *Robinson v Harman* 1848 1 Ex 850 at 855. This principle is also found in the doctrine of positive interesse of continental civil law—see Erasmus 1975 *THRHR* 368. See also *Dennill v Atkins & Co*1905 TS 288-9; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22, 46.

[142] 1975 *THRHR* 369.

[143] *Sommeskadeleer* 3-5.

[144] eg the drawing of a distinction between general and special damage—para 3.4.4.

[145] An idea which can be seen in the use of the rule concerning market value—para 12.7.2.

[146] His examples of this are the distinction between 'compensatory damages' and 'exemplary damages', and also the 'once and for all' rule—para 7.1 et seq.

[147] 1988 *De Jure* 221.

[148] This seems to be an underestimation of the state of development of the doctrine of damage and the law of damages generally—cf Erasmus & Gauntlett 7 *LAWSA* para 7.

[149] See also Reinecke 1988 *De Jure* 238, who indicates that clarification is needed on the question whether South African law accepts a subjective or objective doctrine of damage. Cf also para 3.5.

[150] Para 1.7.2.

[151] Chap 4.

[152] Chap 10.

[153] Chap 7.

[154] Chap 6.

[155] Para 11.6.

[156] Para 13.4.

[157] eg hypothetical causes (para 4.6.3.4); damages for the loss of use of an object (para 13.3).

[158] Cf eg Van der Walt *Sommeskadeleer* on patrimonial loss; Visser *Kompensasie en Genoegdoening* on non-patrimonial loss; Davel *Afhanklikes* on loss of support; Botha *Verdeling van Skadedragingslas* on apportionment of damages; Steynberg *Gebeurlikhede* on contingency adjustments; Millard *Earning Capacity* on loss of earning capacity; Van den Heever *Loss of a Chance* on recovery in medical law; Kuschke *Damage Caused by Pollution* on pollution liability insurance; and Meier *Voordeeltoerekening* on compensating advantages. See further the general theoretical analysis of Reinecke 1976 *TSAR* 26; 1988 *De Jure* 221.

[159] See eg *General Accident Ins Co Ltd v Summers etc* 1987 (3) SA 577 (A) (a reference to the Dutch author Bloembergen concerning future or 'continuing' loss); *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) (references to the American, English, Dutch and German law on the significance of inflation—para 11.7). See also *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) for references to English, Canadian and Australian authorities on the effect of unconsciousness on non-patrimonial loss—para 5.6.3. See further *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); *Minister of Police, Transkei v Xatula* 1994 (2) SA 680 (TkA); *Fose v Minister for Safety and Security* 1997 (3) SA 786 (CC) at 801-18.

[160] See generally on the role of the Bill of Rights in the field of delict and contract Neethling & Potgieter *Delict* 16-21; Okpaluba & Osode *Government Liability* 51 et seq, 415 et seq; Van der Walt & Midgley *Delict* 15-30; Loubser & Midgley (eds) *Delict* 31-40, 386-8; Erasmus & Gauntlett 7 *LAWSA* para 7; *Bill of Rights Compendium* 1A, 3H; Visser 1996 *THRHR* 695; 1997 *THRHR* 297; 1997 *THRHR* 495; 1997 *Obiter* 99; 1998 *THRHR* 150; 1998 *TSAR* 529; 1998 *De Jure* 143; Henderson 1999 *De Rebus* 24-8.

[161] See Neethling & Potgieter *Delict* 16 n 126 for references to case law and literature. See also Van der Walt & Midgley *Delict* 16; Neethling et al *Law of Personality* 73 et seq; Burchell *Personality Rights* 65 et seq.

[162] See Okpaluba & Osode *Government Liability* 51.

[163] Section 172(1) of the Constitution. See *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C); Modipane *Compensation for Expropriation* and Yanou *Dispossession and Access to Land*on 'just and equitable' compensation; Mbazira 2008 *SALJ* 71-94.

[164] In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 267 Moseneke DCJ held that common-law remedies that vindicate constitutionally entrenched rights should be regarded as appropriate relief under s 38 of the Constitution. See also Neethling & Potgieter *Delict* 20 n 161; Van der Walt & Midgley *Delict* 6, 27; Neethling et al *Law of Personality* 110 n 317; Neethling 2008 *Obiter* 238-46. In this respect it appears that an award of constitutional damages will only be regarded as appropriate relief if no other effective compensatory remedy is available—see *Dendy v University of Witwatersrand* 2007 (5) SA 382 (SCA); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd*; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) at 62; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); Van der Walt *Law of Neighbours* 58-9; Van der Walt 2005 *SAJHR* 144-61; Von Bonde 2009 *Obiter* 211-23.

[165] Section 38 of the Constitution; *Rail Commuters Action Group v Transnet Limited t/a Metro Rail*2005 (2) SA 359 (CC).

[166] Section 172 of the Constitution. See *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) on s 18*(b)* of the Matrimonial Property Act 88 of 1984.

[167] eg, setting aside administrative actions, granting interdicts, declaratory orders and cost orders.

[168] In *MEC Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) at paras 493-4 the Supreme Court of Appeal awarded constitutional damages for the breach of a fundamental right. The provincial government delayed the payment of a social grant to Kate. The court held that she did not suffer

direct financial loss, for the grant was destined to be consumed and not invested, but the loss was just as real. Apart from the physical discomfort of deprivation it also affected her dignity. Because no empirical monetary standard exists in our law to measure a loss of this kind, the court 'awarded an amount equivalent to the interest that is recognised in law to be payable when money is unlawfully withheld', which 'damages ought not to accumulate such as to exceed the capital amount'. See Devenish 2005 *THRHR* 515-20. Also in *Mahambehlala v MEC for Welfare, Eastern Cape Provincial Government*2002 (1) SA 342 (SE) the provincial government infringed the appellant's fundamental right by unfairly delaying the award of a social grant. The court held that appropriate (just and equitable) relief would be to place the appellant in the same position she would have been in had her rights not been denied. The applicant was awarded interest on the award for denial of her fundamental right at the prescribed rate from the date that her claim should have been paid, and not from only the date of the judgment. Leach J described the order granted as 'constitutional relief'. See also *Bacela v Member of the Executive Council for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E); Okpaluba & Osode *Government Liability* 73-6.

[169] See *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C). Cf *Steenkamp v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC), 2006 (3) SA 151 (SCA); *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA). A similar claim for compensation was rejected on appeal in *Minister of Defence v Dunn* 2007 (6) SA 52 (SCA).

[170] See Okpaluba & Osode *Government Liability* 482-503 for a discussion of the influence of the Bill of Rights on public law of damages.

[171] See also *Afrika v Metzler* 1997 (4) SA 531 (Nm); *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA); *Gore v Minister of Finance* unreported (11190/1999) [2008] ZAGPHC (30 October 2008) 338; *Fosi v Road Accident Fund* 2008 (3) SA 560 (C); McKenzie 2010 *Without Prejudice* 54-5; Neethling 2008 *Obiter* 238-46.

[172] 1997 (3) SA 786 (CC). See for a discussion of the decision of the court a quo Visser 1996 *THRHR* 695; Henderson 1996 *De Rebus* 175. See also Okpaluba & Osode *Government Liability* 67-9, 400-2; Van der Walt & Midgley *Delict* 61.

[173] Ackermann J held at 820: 'In many cases the common law will be broad enough to provide all the relief that would be ''appropriate'' for a breach of constitutional rights.'

[174] At 826. According to Okpaluba & Osode *Government Liability* 69 the Constitutional Court demonstrated in *Fose* its obvious preference for the use of the common law as the veritable route to claim damages for breach of fundamental rights. Cf *Jayiya v MEC for Welfare, Eastern Cape* 2004 (2) SA 611 (SCA); *Dendy v University of Witwatersrand* 2007 (5) SA 382 (SCA). See, however, Froneman J's opinion in *Kate v MEC, Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) at 154-5: 'Section 8(1) and (2) of PAJA [Promotion of Administrative Justice Act] provides that the court may grant any order that is just and equitable including, in the case of judicial review under s 6(1), directing the administrator or any other party to the proceedings to ''pay compensation'' ''in exceptional circumstances''. On the face of it, the wording of PAJA does not preclude judicial review under the general rule of law principle of legality, nor does it preclude appropriate constitutional relief under such a claim. The remedies available under PAJA too are couched in wide, open-ended and permissive terms.'

[175] See further *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E); *Fourie v Coetzee*[2001] 1 All SA 37 (SEC); Neethling 2008 *Obiter* 238-46.

[176] At 826-7.

[177] See for a discussion Varney 1998 *SAJHR* 336 and 243 on 'preventative damages'. See further *Wagener and Cuttings v Pharmcall Ltd* 2003 (4) SA 285 (SCA).

[178] *Casell v Broome* [1972] 1 All ER 801 (HL) 825. See also McGregor *Damages* 19 in regard to general and special damage: 'Yet the terms are used in a variety of different meanings, and if these meanings are not kept separate the indiscriminate use of the terms only spells confusion.'

[179] 7 *LAWSA* para 9. They give the example of id quod interest and interesse which were translated as 'schaden en interesse', and the misunderstanding that it also indicates interest—see eg *Sandilands v Tompkins* 1912 AD 171 at 177. There are many different views in continental civil law on the concept of interesse—see Erasmus 1975 *THRHR* 112-17 for a survey of various divisions of interesse (eg the 28 divisions of Scaccia and the 48 divisions of Rebuffus!) and Erasmus op cit 368 on the dangers of proceeding directly to Roman texts in order to establish the meaning of interesse.

[180] eg special, general, nominal and exemplary damages. Boberg *Delict* 476 says that these terms are irrelevant in Aquilian liability and only cause confusion. This may be true for delictual liability, but in contractual damages (para 11.5.5) the expressions special and general damages have been used for a long

time to describe the way in which limitation of liability operates and it is extremely doubtful whether our law will be able to rid itself of them.

[181] eg id quod interest, interesse, damnum emergens, lucrum cessans, positive and negative interesse.

[182] Para 9.4.

[183] See Boberg *Delict* 475: 'But in Afrikaans patrimonial loss (vermoënskade) gives rise to skadevergoeding, while the solatium for non-patrimonial harm (persoonlikheidsnadeel) is called genoegdoening. This more precise terminology emphasizes the fundamental differences of philosophy, purpose and availability between the two kinds of compensation-differences which the ambiguity of the English usage tends to obscure.' See also Van der Walt *Sommeskadeleer* 370, 437; Visser *Kompensasie en Genoegdoening* 41; Erasmus & Gauntlett 7 *LAWSA* para 9; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T).

[184] 1975 *THRHR* 367.

[185] See para 2.3.2 for a more detailed discussion and arguments in support of this view.

[186] Para 9.5.

[187] Chap 2.

[188] Para 3.1.

[189] Para 3.2.

[190] Para 5.1.

[191] See Van der Walt *Sommeskadeleer* 7, 9; para 2.1.

[192] See Van der Walt *Sommeskadeleer* 9 n 2, who warns that in a claim for damages the difference between the damage-causing event and a cause of action (para 7.4) should not be overlooked.

[193] Para 1.5.3.

[194] Para 5.5.

[195] Para 8.1.

[196] Cf *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253.

[197] Ibid.

[198] Paras 2.3.1, 8.1.

[199] Para 9.4.

[200] Para 9.5.

[201] Para 9.4.

[202] Contra Erasmus & Gauntlett 7 *LAWSA* para 9.

[203] Para 4.2. See Van der Walt *Sommeskadeleer* 7 for other equivalents in Afrikaans. Koch *Lost Income* 20 refers to the principle of balancing gains and losses.

[204] Para 4.2.5.

[205] This method may also be applied mutatis mutandis to non-patrimonial loss; para 5.6.4.

[206] Chap 7.

[207] Para 7.4.

[208] Chap 10.

[209] Para 10.2.2.

[210] Para 3.4.4.

[211] *Lavery & Co v Jungheinrich* 1931 AD 156 at 174-5; *Whitfield v Phillips* 1957 (3) SA 318 (A) at 329; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550.

[212] Para 8.8.

[213] Para 1.6.2; Erasmus & Gauntlett 7 *LAWSA* para 9.

[214] *See Jockie v Meyer* 1945 AD 354 at 367; *Smit v Saipem* 1973 (4) SA 335 (T) at 339.

[215] Para 1.6.2; Erasmus & Gauntlett 7 *LAWSA* para 9; Boberg *Delict* 476; Van der Walt *Sommeskadeleer* 271-7.

[216] Boberg *Delict* 476 refers to damnum emergens as 'actual losses or expenses' and to lucrum cessans as 'the deprivation of a financial benefit that would otherwise have accrued . . . [eg] a loss of earnings or profits'. See chap 6.

[217] Chap 6.

[218] See Reinecke 1976 *TSAR* 29 et seq; 1988 *De Jure* 236.

[219] Para 4.3.

[220] As will be demonstrated below (para 4.3) there is no real difference between positive interesse in contract and delictual negative interesse. Contractual positive interesse is, of course, different from contractual negative interesse.

[221] Para 6.7.5.

[222] Para 6.7.5.

[223] Para 6.7.3.

[224] Steynberg *Gebeurlikhede* 24; *Joubert v Bezuidenhout* unreported case no 23333/2000 (T), 22 August 2007 para 65. See para 4.6.3.5 on contingencies (possible events) in regard to past losses of income or profit. See also Steynberg 2007 *THRHR* 36.

[225] Para 11.5.

Chapter 2
CONCEPT OF DAMAGE

The concept of damage is clearly of fundamental importance in the law of damages. [1]Unfortunately, however, there is considerable conflict of opinion as to the precise legal nature and meaning of the term 'damage'. [2]

2.1 DEFINITION

Damage is the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved.

This definition reveals five elements of the concept of damage, described below.

2.1.1 Element of diminution or reduction

'Diminution' indicates a *reduction* which takes place and is an obvious part of any correct definition of damage. The definition does not reveal *how* the reduction is established, because this is performed through the test or measure of damage. [3] In the case of patrimonial interests [4] the reduction in utility is generally measured by a

monetary standard (a *quantitative* reduction), while in the case of personality interests there is mainly a reduction in *quality*, which is expressed in real or natural terms. [5]

2.1.2 Causal element [6]

Damage must obviously have been caused by something. Only harm or loss which has been *caused* in a certain manner qualifies as damage. [7] The law requires the operation of a so-called *damage-causing event*. This refers to a factual situation of an uncertain nature which, according to law, may in principle cause [8] damage and has in fact caused damage. [9]

2.1.3 Interest element

From the definition it appears that it is either a *patrimonial* or a *personality interest*which is the subject of the diminution or reduction. [10] The definition assumes a wide concept of damage, since damage includes more than an impairment of patrimonial interests. [11]

2.1.4 Normative element

Legal norms (and not only factual circumstances) co-determine the existence and nature of damage. The nature of the diminution or reduction is a reduction in the utility [12] or quality of an interest in satisfying someone's *legally recognized*needs. [13]

2.1.5 Time element

The definition gives no indication of *when* the reduction takes place. However, according to general principles, a reduction which has already occurred at the time

of the trial, as well as one which is expected with a sufficient degree of probability to materialize in future, is taken into account. [14]

There are many other definitions of damage which should be noted. [15]

2.2 BRIEF NOTE ON ORIGIN [16] AND NATURE OF MODERN CONCEPT OF DAMAGE

Damage is an ancient legal term and the word 'damnum' entered into legal terminology with the lex Aquilia in 287 BC. Since then it has developed into a complex concept involving numerous principles. [17] The concept of damage plays a role in many branches of law (some of which are also sources of the law of damages) such as the law of delict, contract, insurance, enrichment, expropriation, [18] hire-purchase, estoppel, criminal law (eg in regard to fraud) and the law of procedure. [19]

The origin of the modern concept of patrimonial damage can be traced back to the treatise of the German jurist Mommsen in 1855. [20] According to this author, damage (interesse) is the difference between the present patrimony of the plaintiff and the patrimonial position which would presently have existed if the damage-causing event had not taken place. This approach (the sum-formula) was taken over [21] as the concept of damage in our law on the authority of Windscheid and

Gruber. [22] However, this is not really a satisfactory definition of damage but rather a comparative method or standard by which the extent of patrimonial loss may be assessed. [23] The sum-formula will later be examined in greater detail. [24]

The concept of damage in our law has developed in the context of delictual and contractual liability and it should also be noted that our law accepts a wide concept of damage which includes both patrimonial and non-patrimonial loss. [25] In the law of insurance the concept of damage has developed in conjunction with the notion of 'insurable interest' [26] which has been described as the shadow of the concept of damage. [27]

2.3 EXTENT OF CONCEPT OF DAMAGE

2.3.1 General

The scope of the concept of damage may be ascertained with reference to the various types of loss which are recognized as damage in practice. [28] The various kinds of losses which are possibly excluded from the concept of damage may be established by applying the requirements for damage referred to earlier to a factual situation. [29]

The concept of damage includes more than harm for which *compensation* is recoverable, for *satisfaction* may be awarded in respect of some forms of damage. [30]

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The definition of damage implies that only harm in regard to legally recognized patrimonial [31] and personality interests qualifies as damage. [32] The reference to 'legally recognized needs' also emphasizes the recognized *object of* interests. The principles pertaining to recognized interests and needs may probably be the reason why, for example, loss such as inconvenience, disappointment or fear as a result of damage to property does not attract compensation with the Aquilian action, [33] or why a husband may not claim for the loss of the comfort and society of his wife who has been killed, [34] or why a child cannot claim damages for being allowed to be born with an abnormality or disability [35] and why pain and suffering [36] and inconvenience

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resulting from breach of contract may not be compensated. [37] One may, of course, possibly argue that these losses do constitute damage but that they go uncompensated for reasons of policy. [38]

Although Reinecke's submission [39] that the frustration of an expectation to earn money through illegal activities does not amount to damage in the legal sense has been criticized, [40] his view appears to be correct. [41]

Damage is restricted to the diminution in the utility or quality of interests which has been brought about by a damage-causing event. [42] Generally, this refers to

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events of an *uncertain* nature. [43] Any reduction of the utility or quality of interests which is sure to take place, on account of, for instance, wear and tear, age, illness due to natural causes, death, [44] the consumption of food etc cannot generally be defined as damage. [45] Where a person voluntarily incurs a debt as a reasonable reaction to an event which was outside that person's control (eg medical expenses on account of bodily injuries sustained in an accident), [46] such a debt qualifies as damage, because it has actually been caused by an uncertain event. Intentional conduct by someone in causing harm also constitutes an uncertain event and may thus cause damage. [47] In some instances the legislature has provided a restrictive definition of a damage-causing event. [48]

Prospective loss (ie loss which at the time of adjudication is manifested by an expectation that the utility or quality of the patrimony or personality, according to the case, will deteriorate or will not increase) is accepted as part of the concept of damage. [49]

Legislation may define damage in such a way that some forms of harm are excluded. [50]

2.3.2 Damage consists of patrimonial as well as non-patrimonial loss

According to the definition of damage provided earlier, damage is a wide concept which includes patrimonial [51] as well as non-patrimonial loss. [52] This implies that

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damage is a comprehensive concept with pecuniary and non-pecuniary loss as its two mutually exclusive components. [53]

Since in a primary sense damage means patrimonial loss, authors such as Van der Walt, [54] Reinecke, [55] Boberg [56] and Van der Merwe and Olivier [57] define damage only in terms of a reduction of someone's patrimony. In justifying this approach, it is argued that there is no meaningful common denominator between patrimonial and non-patrimonial loss. However, other authors such as McKerron, [58] Pauw [59] and Pont [60] regard damage as a wide concept which comprises both pecuniary and non-pecuniary loss.

Three arguments prove that damage is a general concept which consists of patrimonial as well as non-patrimonial loss. [61]

(a)

Patrimonial and non-patrimonial loss have a common denominator, viz the diminution in the utility or quality of any legally protected (patrimonial or non-patrimonial) interest. [62] If one considers the true nature of damage, it appears that damage is essentially something which has a real (and not an arithmetical) nature. Therefore, damage need not be measurable in money. [63] It is unjustified to insist on measurableness in money (which is a characteristic

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of patrimonial damage) as a general criterion for all damage. [64] However, the fact that patrimonial and non-patrimonial loss are accepted as subdivisions of a wide concept of damage does not imply that the important differences between these two concepts suddenly disappear, [65] or that compensation of patrimonial loss is identical to compensation for non-patrimonial damage; it merely advocates a realistic approach to damage as consisting of all forms of harm which may be relevant in the law of obligations. [66]

(b)

Legal practice employs a wide concept of damage. In applying legislation in which terms such as 'damage' or 'loss' are used but left undefined, practice (correctly) accepts that damage includes patrimonial as well as non- patrimonial loss. [67] If a narrow concept of damage were to be applied here, it may have absurd and unfair results. Our legal practice adopts a wide concept of damage in respect of compensation for loss caused by bodily injuries, [68] despite the use of the sum-formula with its comparison of two patrimonial positions in establishing damage. [69] This is apparent from the fact that non-pecuniary loss (injury to personality) is sometimes classified with prospective patrimonial loss [70] as general damage. [71]

(c)

The historical development of the action for pain and suffering is also relevant. This action, which provides compensation for the infringement of physical-mental integrity, has developed in conjunction with the Aquilian action as a remedy aimed at compensation (in contrast to satisfaction in terms of the actio iniuriarum). [72] The action for pain and suffering has made it possible to award

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a type of *imperfect compensation* for bodily injuries. [73] Thus, it is justified to conclude from the development of the action for pain and suffering that, since certain forms of non-pecuniary damage have become the subject of (imperfect) compensation ('skadevergoeding'), such loss should necessarily be accommodated within the concept of damage. [74] Once it is accepted that non-pecuniary loss may be compensable damage, there is apparently no reason why any injury to personality which is an actionable iniuria in terms of the actio iniuriarum cannot be classified as non-patrimonial loss falling within a comprehensive concept of damage. [75] Moreover, the way in which the action for pain and suffering functions clearly indicates that (direct) compensability or commensurability in money need not be a requirement for damage. The distinction between damage and compensable damage should be observed. Therefore, the correct approach is to accept a wide concept of damage as a starting point and then to judge which forms of damage are capable of compensation and in which forms satisfaction predominates. [76]

2.3.3 Relationship between patrimonial and non-patrimonial loss [77]

The concept of damage includes harm in regard to a person's patrimony as well as his or her personality. [78] The common factor between patrimonial and non- patrimonial loss is that in both the utility or quality of a legally protected interest is infringed (ie the plaintiff loses something for which he or she may receive money as compensation). [79]

There are also important differences between the two forms of damage. The

qualifications of these differences prove that there is no absolute distinction between patrimonial and non-patrimonial loss. Neethling and Potgieter refer to the following (qualified) differences: [80]

(a)

Patrimonial loss can be directly or naturally measured in money, while non-patrimonial loss is only indirectly measurable in this way. [81]

(b)

The extent of patrimonial loss can be determined with greater precision than the extent of non-patrimonial loss. [82] The amount of damages for patrimonial loss may be calculated by employing objective criteria such as market value, reasonable cost of repairs etc. Compensation for non-patrimonial damage is based on a subjective injury to feelings and can be assessed only by means of an equitable estimate. [83]

(c)

Damages for patrimonial loss are of the same nature as the impaired patrimonial interest and can thus be a true equivalent for such damage. [84] In non-patrimonial loss there is no real relationship between money and the injury to personality. [85]

(d)

In patrimonial loss the utility of a patrimonial interest is impaired, while a personality interest is the subject of diminution in non-patrimonial loss. [86]

2.3.4 Relevance of distinction between patrimonial and non-patrimonial loss

The distinction between patrimonial and non-patrimonial damage is of practical significance in, for example, determining the limits of Aquilian liability, [87] in an action for breach of contract, [88] the application of certain legislation [89] and in the

transmissibility and cession of claims. [90] However, in respect of other matters the distinction is of no importance. [91]

2.4 DAMAGE AND WRONGFULNESS (UNLAWFULNESS) [92]

2.4.1 Introduction

Although wrongfulness [93] and damage are two separate requirements for delictual liability, they stand in a particular relationship to each other. The object is to define this relationship properly so that the systematization of delictual principles is not violated. According to one theory there is a very close relationship between wrongfulness and damage, resulting in damage being defined in terms of wrongfulness, since the latter concept is incorrectly elevated to the status of a prerequisite for damage. [94] The effect of this may be that inappropriate principles are given a role in the assessment of damage. On the other hand, the denial of any link between wrongfulness and damage [95] is unrealistic as it may present an obstacle to the development of a juridical concept of patrimony [96] which is necessary for a proper definition of patrimonial loss. In practice the problem of finding the correct relationship between wrongfulness and damage mainly arises in respect of liability for a loss of income earned through illegal activities or illegal income as the source for the provision of maintenance. [97] Jurists have experienced considerable difficulties in furnishing an explanation for the non-recoverability of damages in

such cases. [98] It is possible, of course, to exclude so-called 'illegal damage' from the concept of damage, [99] or, if it does qualify as damage, to deny compensation on policy grounds. [100]

2.4.2 Connection between wrongfulness and damage

From the nature of wrongfulness [101] and damage it appears that in both concepts the impairment of certain (patrimonial or non-patrimonial) interests is usually relevant. This common denominator is illustrated by the fact that conduct can be described as wrongful only if it has caused a harmful consequence. [102] Where, for example, X drives at 200 km/h in an urban area but causes no accident, she has not acted wrongfully for the purposes of private law, since there are no harmful consequences. This demonstrates that the absence of damage may coincide with the absence of wrongfulness.

2.4.3 Distinction between wrongfulness and damage

In determining wrongfulness the real question is whether the infringement of interests is in violation of a legal norm. When damage is assessed, the law is concerned with the diminution in utility or quality of interests. It must be obvious that the violation of a legal norm (illegality) cannot be a prerequisite for any diminution, because the former is based on a legal evaluation whereas the latter is a quantitative phenomenon. [103]

2.4.4 Wrongfulness without damage

X acts wrongfully when he steals a valueless object from Y or when he is on Y's land without a lawful reason but causes no harm (entitling Y to an eviction order or an interdict in the case of trespass). But, although wrongfulness is present (Y's rights are violated), damage is not present. [104]

2.4.5 Damage without wrongfulness

There may be damage without any wrongful act, for example where a bolt of lightning causes X's house to burn down or where vis maior renders contractual performance impossible. It would be incorrect to define a damage-causing event [105] in such narrow terms that only loss caused by a legally reprehensible (human) act may constitute damage. [106] A link between wrongfulness and damage can exist only when both are required for liability. [107] These principles prove that if wrongfulness is accepted as a requirement for damage, different concepts of damage would not only have to be developed, for example, delict, contract and insurance, but that even in the law of delict one will not be able to use a single concept of damage. It nevertheless appears from practice that our courts do not treat damage in the context of the actio de pauperie differently from damage in terms of the Aquilian action. The reason is simple: although there are important differences between these two actions, the element of damage is factually the same in both instances.

2.4.6 No wrongfulness and no damage

Where X's property is destroyed, a stranger Y does not suffer damage and there is also no unlawful act against Y. There can be no wrongfulness, since Y has no right to X's property; there is no damage, because the property does not form part of Y's patrimony.

2.4.7 Wrongfulness and damage both present

In instances where wrongfulness and damage are present, it is customary to speak of damage which 'flows' from wrongful and culpable conduct. [108] This is not intended to convey any idea that wrongfulness (or fault) qualifies damage. It merely indicates, among other things, damage for which compensation may be recovered

ex delicto, in contrast to damage for which delictual compensation is not recoverable (but in respect of which an insurer may still be liable). [109]

2.4.8 Close relationship between wrongfulness and damage

Van der Merwe and Olivier [110] are of the opinion that a close connection exists between wrongfulness and damage. To them, damage is only a diminution of patrimony which flows from the infringement of a right. [111]

These authors [112] furnish an example of A who breaks a window of B in a situation of necessity. B cannot claim damages from A because the situation of necessity means that B has suffered no patrimonial loss in a juridical sense. Van der Merwe and Olivier specifically deny that their theory implies the incorporation of wrongfulness into the concept of damage. They say they merely intend to demonstrate that just as there cannot be fault with wrongfulness, the law of delict makes a remedy available only where damage flows from an infringement of a right. They add that something can be an element of a delict only in so far as it may result in delictual liability. [113]

These views have attracted considerable criticism. [114] Although Van der Merwe and Olivier expressly deny this, in effect they include wrongfulness in their concept of damage. Furthermore, it is obvious that harm which 'results' from lawful conduct (eg in necessity) does indeed amount to damage, but that there can be no delictual liability in respect of it as the other requirements for such liability (ie wrongfulness and fault) are

not satisfied. It is pointless to define damage in terms of requirements which relate only to other delictual elements. [115] The essence of the criticism of this view is that these authors create an erroneous connection between wrongfulness and damage and that, consequently, their definition of damage is unsound.

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2.4.9 Loose relationship between wrongfulness and damage

Van der Walt [116] argues that the fact that the term 'damage' is used in connection with the operation of a system of norms known as the law of damages already implies that damage is a juridical and normative concept. [117] While the law naturally takes note of the extra-juridical or factual meaning of damage, it is not subject to it. The fact that damage is a normative concept does not imply that it should be defined in terms of an infringement of a right as this may cause confusion between wrongfulness and damage.

Although the rejection by Van der Walt of the unnecessarily close relationship between wrongfulness and damage [118] is correct, the question arises whether his views do not imply too loose a correlation between the two concepts. According to this author, a patrimony (which serves as the basis for the definition and determination of damage) must be seen in a factual and economic sense as comprising all a person's material property, rights and factual opportunities. [119] He expressly rejects the legal concept of patrimony. [120] However, the views of Van der Walt do not seem to take account of the fact that wrongfulness is usually determined with reference to a disturbance of the very same interests of which the diminution in utility constitutes damage. [121] Although an unlawful impairment of interests is definitely no requirement for damage, a person can suffer damage only in respect of interests which the law identifies and protects for his or her benefit. Why does X not suffer damage if Y's motor car is damaged? The answer is simply that the property in question does not form part of X's patrimony, [122] while it should further be noted that wrongfulness is also absent. [123] Van der Walt states that it is incorrect to conclude that X, whose injuries render him incapable of earning income in an illegal manner, [124] suffers no damage, as this would support the idea that damage flows from the infringement of a right. [125]

2.4.10 Wrongfulness and damage judged in terms of juridical concept of patrimony

The link which Reinecke identifies between wrongfulness and damage [126] exists in terms of the juridical concept of patrimony. [127] He says it goes without saying that a

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person has an interest in an asset only if that person can show that a valuable relationship exists between himself or herself and such an asset. If, for example, the property of A is destroyed, a stranger B suffers no damage because there is no legally recognized relationship between him and such property. Reinecke then identifies certain relationships (rights) which may thus exist in terms of the juridical concept of damage. An expectation that a new right will be acquired also forms part of someone's patrimony if, among other things, it is not an unlawful expectation. [128]This requirement implies that damages are not recoverable for the loss of illegal earnings, because the law does not accept an unlawful expectation as part of someone's patrimony. Thus, the frustration of such an expectation does not give rise to damage. [129]

An advantage of accepting the juridical concept of patrimony is that it provides some clarity regarding the relationship between wrongfulness and damage. This theory on patrimony identifies those individual interests which the law protects in principle. Only the diminution in the utility or quality of such interests can constitute patrimonial

damage. [130] On the other hand, these interests are also the object or part of the object of a subjective right or other legally recognized interest or expectancy. Wrongfulness implies the impairment of such interests contrary to a legal norm. When one applies the principles used to determine wrongfulness, [131] it may appear that the factual impairment of interests is not unlawful because the law does not, for example, protect interests which form part of the juridical patrimony when they are impaired in terms of a ground of justification. [132]

2.4.11 Personality infringement and damage

The general view [133] that the infringement of a personality right may result in patrimonial loss causes theoretical problems. [134] If a right of personality only has specified personality interests as its object, then logically only non-patrimonial loss (injury to personality) can be present if an unlawful impairment of such interests has occurred. Any loss of a patrimonial nature in such a case can be related only to the possible infringement of a patrimonial right in respect of the personality. Thus, for example, medical expenses on account of bodily injuries in fact relate to a yet to

be identified patrimonial right to the corpus. [135] If a right of personality also includes patrimonial interests [136] it may explain the existence of patrimonial loss in conjunction with a personality infringement; but then it is misleading still to speak of a right to personality, because such a right has a mixed nature. [137]

The argument by Reinecke [138] that in the case of an infringement of a right to personality there may be *patrimonial loss* without wrongfulness, is unconvincing as this implies too loose a relationship between unlawfulness and damage. Our law should adopt a proper system in terms of which a person's patrimony consists of patrimonial interests (which have a natural monetary value) and only the infringement of a patrimonial right may be relevant. In the sphere of someone's personality, only personality interests, non-patrimonial loss (injury to personality) and the possible infringement of a personality right should be relevant. The law does not, for example, give compensation in respect of non-patrimonial loss associated with damage to property, and neither should patrimonial loss be acknowledged in the case of an infringement of a personality right, since this loss relates to patrimonial interests which should be recognized as such.

2.4.12 Illegal earnings [139]

The law denies compensation where bodily injuries prevent someone from earning money illegally [140] and many opinions have been advanced on the correct reason for this. According to one view, wrongfulness is absent because a person can have no right to earn income unlawfully. [141] In terms of another explanation, there is no damage in such a case. [142]

The correct analysis of this problem leads to the conclusion that both damage

and wrongfulness are absent. A person who earns money through unlawful activities does not use his or her earning capacity as part of his or her juridical patrimony and consequently the frustration of such activities cannot constitute damage. [143]

However, Reinecke [144] argues that where X, who is injured, loses income from unlawful sources, wrongfulness exists because his right to bodily integrity has been infringed. This is unconvincing, since conduct may be wrongful with reference to one consequence and lawful with reference to another. [145] Thus the fact that X, who has

been wrongfully and negligently injured, may claim compensation for medical expenses and pain and suffering does not prove that his loss of illegal income has also been caused wrongfully. [146] The correctness of this view may be tested by asking whether X had a right to earn income illegally. The negative answer demonstrates that it is impossible to speak of the wrongful impairment of an illegal 'capacity' to earn money.

Where X, who earns income unlawfully, is injured, the fact that he can obviously not recover compensation for such loss does not exclude a claim for the possible impairment of his *lawful* earning capacity. [147] In other words, the same act may cause X not only to lose his illegal earnings but also his capacity to earn money lawfully. Irrespective of how one views the nature of earning capacity, [148] the plaintiff's impaired potential to have earned income lawfully in future should be considered. But usually illegal income cannot afford proof of someone's lawful earning capacity.

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2.4.13 Maintenance [149] earned illegally [150]

This issue is more complex than the question of illegal earnings, and here different approaches are possible. [151]

Reinecke [152] argues that other considerations apply to a dependant whose breadwinner has been killed than those mentioned in regard to unlawful earnings. [153]A dependant does not merely have an expectation of support; he or she has a continuous personal right ('vorderingsreg') to such support. Reinecke suggests the following test to establish the existence of damage: Would the dependant be able to institute a successful claim for maintenance against his or her breadwinner if the latter had nothing else but the proceeds of his or her illegal income? He answers this question in the affirmative, [154] because the source of income is res inter alios acta. [155]

These views may be criticized. A dependant's right to support from his or her breadwinner is closely related to the latter's capacity to provide such support. [156]The necessary correlation of this is that the dependant's right to maintenance goes only as far as the breadwinner's lawful ability to provide same. It should further be obvious that a dependant can have no *right* to be supported out of stolen money. [157] Even if a dependant is not to be blamed for his or her breadwinner's modus operandi in earning money, it is the dependant (and not outsiders) who bears the risk involved with such income.

In the normal situation where a breadwinner (despite illegal earnings) may have had the capacity to employ lawful methods of earning money in future, the death of that breadwinner may indeed be seen as an infringement of the dependant's right to support. In this situation a dependant's damage must be assessed by considering all the permissible evidence regarding the value of the right he or she has lost. The

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value of the dependant's right may usually be proved only by evidence of how the breadwinner could have earned income lawfully. [158]

2.5 DAMAGE AND FAULT [159]

Although in delict [160] it is customary to speak of damage caused by unlawful and *culpable* conduct, [161] it is clear that fault, as blameworthiness or a reprehensible state of mind [162] cannot qualify or cause damage. [163] Thus damage may originate or exist independently of intention or negligence. On the other hand, damages may be

recovered ex delicto for damage which has been caused by unlawful and negligent conduct.

Although damage may exist independently of fault, damage may co-determine whether someone has acted intentionally or negligently. For intention, the actor must direct his or her will to the causing of a harmful consequence, and negligence is present if the reasonable person in the position of the actor would have foreseen and prevented harm. [164] Where contributory negligence is present, the extent of the defendant's liability to pay damages is reduced to an amount which the court may deem just and equitable having regard to the degree to which the plaintiff was at fault. [165] Furthermore, the extent of a right of recourse between joint wrongdoers who are liable to pay damages is determined by considering their respective degrees of fault in relation to the damage. [166]

2.6 DAMAGE AND FACTUAL [167] CAUSATION

Factual causation is always relevant in respect of damage. A causal nexus is often expressed in terms of the conditio sine qua non formula. [168] In fact, conditio sine

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qua non is only a way of expressing a factual nexus which has already been determined—it is no real test of causation. [169] If a factual nexus is to be determined between damage and an alleged damage-causing event, [170] it must be decided on the available evidence as well as on the basis of human knowledge and experience whether the harmful consequence resulted from the event in question. [171]

Factual causation and damage are two separate elements in determining the possible existence of a duty to pay damages or satisfaction. Superficially considered, one may be tempted to conclude that causation and damage can be clearly distinguished and that confusion between the two concepts is unlikely. However, the matter is not that simple, since factual causation can exist only in relation to a particular consequence, that is, damage. [172] Furthermore, causation and damage may be determined through different tests or methods and in this regard overlapping and confusion are possible. [173] It is also necessary to distinguish between (factual) causation and the quantification of damages with regard to the proof of damages. [174] Considering that this problem relates to the assessment of damage (especially patrimonial loss), it will be dealt with below. [175]

2.7 PROSPECTIVE (FUTURE) LOSS

Damage has a particular relationship with time. This makes it possible to categorize damage according to the time at which it manifests itself. One may thus distinguish

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between the following: damage before the requirements of liability are met; damage from the moment of liability to the commencement of legal proceedings; damage from such commencement to judgment; damage up to the stage of an appeal; and damage which is expected after judgment on appeal.

The principles and problems regarding prospective patrimonial and non- patrimonial loss are discussed in a separate chapter. [176]

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[1] See Van der Walt *Sommeskadeleer* 278: 'Die funksie wat die skadevereiste vervul in die komplekse regsfeit wat tot die ontstaan van 'n verbintenis tot skadevergoeding sal lei, is om aan die verpligting tot

skadevergoeding inhoud te gee, en om (in beginsel) die omvang van daardie skadevergoedingsplig te bepaal.'

[2] Van der Walt *Sommeskadeleer* gives an account inter alia of the debate during the past 120 years on the theoretical basis and practical nature of the concept of 'damage' in German law. From this the theoretical depth attained in the German literature becomes evident. Van der Walt op cit 5 also suggests that a study of this literature is indispensable if one wants to make a useful contribution to the South African law of damages. However, despite the theoretical value of the German literature, the authors are of the opinion that its significance for South African law should not be overestimated: *(a)* The hybrid nature of the South African law of damages (para 1.6.1) requires that there should in comparative law also be a balance between the influence of continental (civil) law and Anglo-American law. *(b)* The German approach also has its flaws. In regard to, eg, damages for the loss of use of an object (para 13.3) there exists an impressive literature reflecting a whole range of theories (see 1986 *NJW* 2037; Lange *Schadensersatz* 184–91). Nevertheless, the highest German court has criticized academics because they have not been able to make a more useful contribution in solving certain problems! (see 1986 *NJW* 2038). Here the German method of working from basic legal principles has met with unexpected difficulties (see Stoll & Visser 1990 *De Jure* 349). See further on the concept of damage in general Bloembergen *Schadevergoeding* 11 et seq; McGregor *Damages* 19 et seq; Koch *Reduced Utility*48 et seq; Roberto *Schadensrecht* 9 et seq.

[3] Para 4.1. It would also be premature to define the test of damage (eg a comparative method) before one knows the nature of that which has to be established.

[4] Para 3.2.

[5] Para 5.5.

[6] See para 4.6 for more detail.

[7] See also Reinecke 1976 *TSAR* 34.

[8] See also para 1.7.2. Damage cannot merely be defined as some static condition as only harm or loss caused by events of an uncertain nature (eg conduct which *may* in principle constitute a delict or breach of contract or the realization of risk, etc—para 12.22) is accepted as damage by law. The emphasis is placed on uncertain events and not on a 'completed' delict, breach of contract etc, because a delict or breach of contract cannot be prerequisites for damage (para 2.4.1). Reinecke 1976 *TSAR* 34 (see also Bloembergen *Schadevergoeding* 14–15) refers to this as the causal element of damage. Cf further Van der Walt *Sommeskadeleer* 7.

[9] Benefits may, of course, also arise from a damage-causing event—see chap 10 in regard to collateral benefits (the collateral source rule).

[10] Cf para 3.2 on the patrimony and para 5.4 on personality interests.

[11] See para 2.3.2 for a discussion.

[12] See Koch *Reduced Utility* 5 et seq on an examination of the utility theory and the related concept 'value'.

[13] With reference to this view, Loubser 2003 *Stell LR* 441 states: 'In other words, damage is not only a factual matter, but also a norm-based social construct.' 'Legally recognized needs' does not imply the unlawful causing of damage (see para 2.4) but indicates that, in a sense, the law evaluates damage objectively (cf para 3.5 on the subjective approach to patrimonial loss). The correct evaluation of damage requires that a balance be struck between objective and subjective factors and that the one group of factors not be allowed to displace the other. See para 2.3.1 for examples of certain types of loss which are not compensable, probably because they do not pertain to legally recognized interests.

[14] This is a reference to loss already sustained as well as prospective loss—para 6.1.

[15] Van der Walt 1980 *THRHR* 3 defines damage as "n afname in die nuttigheid van 'n getroffe vermoënsbestanddeel of vermoënstruktuur vir die planmatige bevrediging van die betrokke vermoënshebbende se erkende behoeftes' (the reduction in the utility of an affected patrimonial element in the planned satisfaction of the relevant person's recognized needs). This is a correct definition of patrimonial loss. However, the restriction of the concept of damage to *patrimonial* loss is unacceptable—para 2.3.2. In addition, the word 'vermoënstruktuur' does not really contribute much while 'erkende behoeftes' should be replaced by 'legally recognized needs' in order to render it less vague. See further Reinecke 1976 *TSAR* 56 who states that damage is the causing of defined results by defined events in regard to a person's patrimony. Defined events are events of an uncertain nature and defined results are results which in some or other manner reduce or minimize someone's patrimony. The exclusion of non-patrimonial loss from the concept of damage is unjustified. Boberg *Delict* 475 sees damage as 'a calculable pecuniary loss or diminution in his patrimony (estate) resulting from the defendant's unlawful and culpable conduct'. Criticism may be levelled at the absence of any reference to non-patrimonial loss and the definition seems incorrectly to require unlawfulness and fault. See further *Oslo Land Co v Union*

Government 1938 AD 584 at 590: 'By ... damage is ... meant ... the loss suffered by the plaintiff by reason of the negligent act.' Cf also *Union Government v Warneke* 1911 AD 657 at 665; Grüber *Lex Aquilia* 269: 'It is the whole loss which the plaintiff has sustained in his property ... .'; Van der Merwe & Olivier *Onregmatige Daad* 179 who argue that in the first place damage means patrimonial loss.

[16] See para 1.6.

[17] See Reinecke 1976 *TSAR* 26 for the necessary references. See also para 1.6.4.

[18] See *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA), 2005 (5) SA 3 (CC); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA); Modipane *Compensation for Expropriation*; Van der Walt *Law of Neighbours* 58–9; Van der Walt 2005 *SAJHR* 144–61; Van der Walt 2005 *SALJ* 765–8; Van der Walt 2006 *SALJ* 23–40; Okpaluba & Osode *Government Liability* 71–2; Du Plessis 2011 *Stell LR* 352–75. See also *Haffayee v Ethekwini Municipality* unreported (110/2010) [2011] ZACC 28 (25 August 2011)—expropriation before settling compensation is not unconstitutional.

[19] See Reinecke 1976 *TSAR* 26–7.

[20] See in general Van der Walt *Sommeskadeleer* 9–19.

[21] See *Union Government v Warneke* 1911 AD 657 at 665; *Oslo Land Co v Union Government* 1938 AD 584 at 590; Van der Walt *Sommeskadeleer* 3. Cf also Corbett & Buchanan I 5.

[22] See *Lex Aquilia* 269: 'Accordingly, it is the whole loss which the plaintiff has sustained in his property (the word "property" being taken in the sense of a universitas or complex of legal relations, rights as well as duties), or, in other words, the difference of the plaintiff's property, as it was after the act of damage and as it would have been if the act had not been committed, this so-called *interesse* ... which has become the object of the Aquilian action in course of time.' See also *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W).

[23] Cf also Visser *Kompensasie en Genoegdoening* 25 for the necessary references; Van der Walt *Sommeskadeleer* 183: the sum-formula requires a comparison of two patrimonial positions without defining what a patrimonial position is.

[24] Para 4.2.

[25] Para 2.3.2.

[26] Para 12.22 on insurance.

[27] See Reinecke 2001 *TSAR* 225. See also Reinecke et al 12 *LAWSA* (reissue) paras 56–63 for a comprehensive discussion. The generic concept of 'insurable interest' is informed by the concept loss of damage in the sense that an insurable interest exists whenever loss or damage exists. However, there is a strong trend in recent decisions to view loss or damage in the law of insurance as having a wider meaning than its meaning in the law of damages.

[28] See eg chaps 12, 13, 14 and 15, where principles concerning the various types of damage in delictual and contractual liability are discussed.

[29] Para 2.1.

[30] Para 9.4. In most instances of iniuria, or where a person does not realize his or her loss of amenities of life because he or she is unconscious, (true) compensation is impossible and satisfaction remains the only way of reparation (para 5.6.3). See also Van der Merwe & Olivier *Onregmatige Daad*192, who allege that 'loss' which is 'incapable' of compensation is conceptually irrelevant in delictual liability. However, the differentiation between 'relevant' and 'irrelevant' damage seems artificial. The problem with damage incapable of compensation (eg in the case of an unconscious plaintiff—para 5.6.3) is not the nature of the loss but the inapplicability of the compensatory function. However, compensability in money cannot be a requirement for either a delict or breach of contract, or the existence of damage.

[31] See para 3.2.4.2*(b)* below on legally recognized expectations of patrimonial benefits.

[32] See para 2.3.2 for reasons why non-patrimonial loss (injury to personality) is part of the concept of damage and para 2.3.3 on the relationship between these two forms of damage. See para 3.2 on the patrimony and para 5.4 on personality interests. See generally Neethling & Potgieter *Delict* 212–13 et seq.

Eg, where someone's expectation to inherit or to inherit a certain amount of money is frustrated, there is no damage, since the law does not regard that specific interest as part of his or her patrimony.

See also *De Vos v SA Eagle Versekeringsmpy Bpk* 1985 (3) SA 447 (A) at 451, where the court refused to award damages where the deceased's application for life insurance had been approved but he was negligently killed before he could pay the first premium. The ratio was that no damage was proved, because the policy did not provide for any benefit as long as the person involved was still alive (see also para 11.1.3 on this case). However, there could have been some kind of loss, because the premature death of

the deceased prevented the policy from ever coming into effect (though this possibility was not raised on the pleadings). Even if this type of loss is recognized as damage, the law of delict may, for policy reasons, still refuse damages. See further *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C), where the court refused to award damages for loss of pension benefits from a dead spouse.

Environmental damage can also be seen as part of the concept of damage. Environmental damage is a broad concept which may also include pollution of the environment. According to Havenga (1995 *SA Merc LJ* 188) it seems that until recently the probability of incurring liability for environmental damage in South Africa was remote. He submits (at 189) that the most important aspects to be considered in determining liability for environmental damage are the influence of the Constitution, the requirements of the common law to establish delictual liability, and the effect of legislation. The most important legislation applicable here are, inter alia, the National Environment Management Act 107 of 1998, the Marine Pollution (Control and Civil Liability) Act 6 of 1981, the National Nuclear Regulator Act 47 of 1999, the National Water Act 36 of 1998 and s 69 of the National Ports Act 12 of 2005. See Verwey *Liability for Oil Pollution Damage* on the inadequacy of South African legislation to effectively regulate oil pollution in South African waters; Kuschke *Damage Caused by Pollution* on pollution liability insurance; and Kidd *Environmental Law* on inter alia the various statutory provisions applicable to the environmental law landscape. See further in general Havenga 1995 *SA Merc LJ* 189; Oosthuizen 1998 *SAJELP* 355; Soltan 1999 *SAJELP* 34; Prozesky-Kuschke 2000 *TSAR* 494; Stander 2004 *SA Merc LJ* 327–52; Van der Poll & Booley 2011 *Law, Democracy and Development* 1–43; *Richtersveld Community v Alexkor Ltd* [2004] 3 All SA 244 (LCC); *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Metropolitan Municipality* [2010] 1 All SA 12 (SCA); Fogleman et al *Environmental Law* 72–91.

[33] See *Edwards v Hyde* 1903 TS 381 at 385–6; *Union Government v Warneke* 1911 AD 657 at 665; *Monumental Art Co v Kenston Pharmacy* 1976 (2) SA 111 (C); *Wynberg Municipality v Dreyer* 1920 AD 439 at 448. These losses do not exist in connection with the satisfaction of someone's legally recognized needs through his or her patrimonial interests. Where such losses are associated with the infringement of personality interests, damages may be recoverable if the requirements of the action for pain and suffering or the actio iniuriarum are met (para 5.6).

[34] *Union Government v Warneke* 1911 AD 657 at 665.

[35] Also referred to as a 'wrongful life' claim which is not allowed in our law (*Friedman v Glicksman*1996 (1) SA 1134 (W); *Stewart v Botha* 2008 (6) SA 310 (SCA)). In *Stewart* it was averred that if the doctor had not failed to inform the parents of the risk of birth defects to the potential child, the child would not have been born at all to experience the pain and suffering attributable to his disability because the mother would have elected to terminate the pregnancy. The SCA agreed with the trial court that the claim on behalf of the child did not disclose a cause of action, the main reason being that there was no duty on the respondents to ensure that the child was not born, and that to recognize such a claim would be contra bonos mores. According to Snyders AJA (at 316) at the core of cases of this kind is the 'deeply existential question whether it was preferable—from the perspective of the child—''not to have been born at all''?' She continued: 'If the claim of the child is to succeed it will require a court to evaluate the existence of the child against his or her non-existence and find that the latter was preferable.' The judge (at 319) expressed the opinion that this question 'goes so deeply to the heart of what it is to be human that it should not even be asked by the law'. The claim was accordingly dismissed. Neethling & Potgieter *Delict* 69 n 208 (also 2008 *Annual Survey* 832) criticize the judgment as follows: 'In our opinion the conduct of a doctor who (negligently) causes a child to be born with serious disabilities should be regarded as wrongful. Although the doctor did not cause the defects by positive conduct, it is clear that his omission caused a child to be born with deformities. To weigh the child's existence and non-existence against each other is irrelevant. In our opinion it is undoubtedly in the child's best interest to have access to the best possible medical treatment for his condition. Therefore the *boni mores* require that the doctor's conduct be regarded as wrongful and that he should be delictually liable. Justice demands that a child should not face a life of pain, suffering and financial need that could have been prevented by a doctor's positive conduct. In this case justice is veiled behind the façade that this matter ''goes so deeply to the heart of what it is to be human'' that the court cannot be expected to answer the question of whether the child should not have been born. To be human implies a life, as far as possible, free of deformities, pain, discomfort and suffering. Recognition of an action for wrongful life would have gone a long way to alleviate the child's suffering and to vindicate the sanctity of his life and dignity.' See also Mukheibir 2008 *Obiter* 515–23 (cf Van den Heever 2006 *THRHR* 198–9) who criticizes the court's finding that a wrongful life claim is against public policy in a country where abortion is available on demand in the case of an unwanted pregnancy (Choice on Termination of Pregnancy Act 92 of 1996 and s 12(2)*(a)* of the Constitution). Wrongful life claims are recognized in certain foreign jurisdictions (cf Giesen 2009 *THRHR* 257 et seq). (See also Mukheibir 2005 *Obiter* 753; Chürr 2009 *THRHR* 168–74; Blackbeard 1996 *THRHR* 711–15; Pearson 1997 *SALJ* 91; Strauss 1997 *Med Law* 161–73; Brownlie 1995 *Responsa Meridiana* 18; Lind 1992 *SALJ* 428; Louw 1987 *TSAR* 199; cf Loubser 2003 *Stell LR* 440–1.)

A 'wrongful life' claim must be distinguished from a 'wrongful birth' claim which our law does recognize. In the latter instance parents have a claim for maintenance and medical costs resulting from the 'wrongful birth' of a disabled child. Such a claim is normally based on medical negligence, eg a doctor's failure to inform a pregnant woman of the meaning of an ultrasound scan which indicated possible Down's syndrome, thereby depriving her of the opportunity to decide whether to have the child or not (*Premier, KwaZulu-Natal v Sonny* 2011 (3) SA 424 (SCA); *cf Mukheiber v Raath* 1999 (3) SA 1065 (SCA); Mukheibir 2005 *Obiter* 753; Neethling & Potgieter 2000 *THRHR* 162; Roederer 2001 *SALJ*347; McGregor *Damages* 1303-12; Exall *Munkman on Damages* 133–5; Loubser 2003 *Stell LR* 440–1; *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D)). Van den Heever 2006 *THRHR* 189 also identifies 'wrongful conception (pregnancy)' as an action brought by the parents where a normal child was born following the negligent performing of a sterilization procedure or incorrect advice given on contraception.

[36] *Administrator, Natal v Edouard* 1990 (3) SA 581 (A).

[37] Para 9.5.6.

[38] Neethling & Potgieter *Delict* 212.

[39] 1976 *TSAR* 32–3; cf also Boberg *Delict* 592. See para 2.4 on the relationship between damage and unlawfulness.

[40] Van der Walt *Sommeskadeleer* 15.

[41] Para 2.4.12. The reason is that the loss of illegally earned income does not constitute a diminution in the utility of earning capacity as part of someone's patrimony.

[42] Such an event may not only cause damage but also result in certain benefits—see chap 10 on collateral benefits; para 2.1.2 on the causal element in damage—see Bloembergen *Schadevergoeding*15; Reinecke 1976 *TSAR* 34.

[43] Examples of uncertain events are conduct which may result in liability found on a delict or breach of contract, or the realization of risk anticipated in a contract of insurance, or so-called liability without fault. Thus human as well as non-human events may be relevant. See also Neethling & Potgieter *Delict*213.

[44] See on life insurance (non-indemnity insurance) Reinecke et al 12 *LAWSA* (reissue) para 588 et seq.

[45] However, funeral expenses (para 14.7.1) constitute damage despite the fact that such expenditure must be incurred at some or other stage (*Finlay v Kutoane* 1993 (4) SA 675 (W) at 679). Theoretically speaking, a defendant should be liable only for the *acceleration* of such expenditure and the measure of damage should be the interest for the period of acceleration. In an action by a dependant as a result of the death of the breadwinner (para 14.7.2), it is also in fact the acceleration of death which causes damage.

[46] Para 14.3.

[47] Cf Reinecke 1976 *TSAR* 35, who observes that the decision to act is of an uncertain nature before the conduct occurs.

[48] See s 17(1) of the RAF Act 56 of 1996 in terms of which the RAF only has to compensate loss or damage which results from death or bodily injuries caused by the negligent driving of a motor vehicle. Loss due to damage to the motor vehicle, etc, falls outside the ambit of this Act because it is not caused by the defined damage-causing event (cf generally Klopper *Third Party Compensation* 25 et seq).

[49] See Bloembergen *Schadevergoeding* 17–18 on the hypothetical element of damage. Cf chap 6 on prospective damage. See further Van der Merwe *Versekeringsbegrip* 182 et seq on the extension of the concept of damage in order to include harm to expectancies, expenses which are factually necessary and events such as death etc.

[50] See eg s 8(2) of the Civil Aviation Act 13 of 2009, which refers only to 'material damage'; s 17(1) of the RAF Act 56 of 1996, which refers only to loss or damage resulting from death or bodily injuries, and therefore excluding inter alia damage to a motor vehicle; s 22 of the COID Act 130 of 1993, which refers to an 'accident' causing personal injury, illness or death of an employee, etc.

[51] Para 3.1.

[52] Para 5.2.

[53] See Neethling & Potgieter *Delict* 213–14; para 2.3.3 on the similarities and differences between patrimonial and non-patrimonial loss.

[54] 1980 *THRHR* 3.

[55] 1976 *TSAR* 56. See, however, Reinecke 2001 *TSAR* 225.

[56] *Delict* 485.

[57] *Onregmatige Daad* 179.

[58] *Delict* 51. He accepts that damage does not have to be calculable in money in 'an action for personal injuries'.

[59] 1977 *TSAR* 248, where he says the following on the position in common law: '[P]ain, suffering and disfigurement were almost inseparable from patrimonial loss.'

[60] 1942 *THRHR* 12. Pont explains damage and damages in the case of bodily injuries and includes pain and suffering under the concept of damage. See also Erasmus & Gauntlett 7 *LAWSA* para 10.

[61] See in general Neethling & Potgieter *Delict* 213–14. Cf also Van der Walt *Sommeskadeleer* 28 who refers to the author Fischer. The latter accepts a common sense natural concept of damage. This concept is wide enough to include patrimonial and non-patrimonial loss. See also Van der Walt op cit 185 on the wide concept of damage in modern German law.

[62] This is not the only common factor between these two forms of damage: both may be established by means of a comparison of the condition of the relevant interests before and after a damage-causing event (paras 4.4.1 and 5.6.4); in both, money may be given as compensation (see para 9.5 on the compensatory function of damages for pain and suffering in contrast with satisfaction); both may be very difficult to assess (cf the assessment of the loss of earning capacity of a young child); in both, money may be no true equivalent of the loss (cf patrimonial loss, where a unique object is destroyed); it is sometimes difficult to distinguish between the interests involved in these two forms of damage (para 2.4.11); in both the amount of damages may be calculated through an objective process (eg the use of the market-price rule in calculating damages for pecuniary loss resulting from breach of contract—para 12.7.2; and the use of previous awards in assessing damages for pain and suffering—para 15.2.3); in both, exactly the same (delictual) elements of liability are required where there is a single damage-causing event and a single cause of action (para 7.5.3); the 'once and for all' rule applies to both forms of damage (para 7.1); both are subject to the same principles of prescription (para 11.11); in both, similar problems regarding prospective loss arise (para 6.1); in both, the same principles of remoteness of damage may be applicable (para 11.5); in both, matters such as provision for contingencies (para 6.7.3), contributory fault (para 11.4) and the duty to mitigate loss (para 11.3) are relevant; the collateral source rule applies to both forms of damage (para 10.1); legal practice sometimes classifies both forms of loss as 'general damage', and similar rules on pleading, proof and an appeal against an award then apply to both (paras 16.1.3, 16.2.2, 16.3).

[63] See Reinecke 1988 *De Jure* 225, who correctly argues that damage is a concrete and natural phenomenon.

[64] See Neethling & Potgieter *Delict* 214 n 32. The objection by Reinecke 1976 *TSAR* 28 (cf also 1988 *De Jure* 233) that a comprehensive concept of damage attempts to reconcile two irreconcilable concepts cannot be accepted as correct. The similarities between patrimonial and non-patrimonial loss should, just as their differences, not be ignored. Elsewhere (cf *Diktaat* chap 5) Reinecke concedes that there is an affinity between pecuniary and non-pecuniary damage—in both cases, the plaintiff loses something, be it property or eg the amenities of life. See also Reinecke 2001 *TSAR* 225–6.

[65] See para 2.3.3 on the relationship between patrimonial and non-patrimonial damage.

[66] See Neethling & Potgieter *Delict* 214 n 34 who argue that a comprehensive concept of damage is practically and theoretically tenable and that comparable legal systems such as English, German and Dutch law accept damage in this sense (see Visser *Kompensasie en Genoegdoening* 12–41, Van der Walt *Sommeskadeleer* 28, 185; Bloembergen *Schadevergoeding* 23–6; Visser 1988 *THRHR* 484).

[67] 'Damage or loss' in s 17(1) of the RAF Act 56 of 1996 is interpreted as patrimonial damage (eg loss of income, earning capacity and medical expenses) as well as non-patrimonial damage (pain, suffering and loss of amenities). Another example is the word 'damage' in the Apportionment of Damages Act 34 of 1956, where the principles regarding contributory negligence are obviously not restricted to the causing of patrimonial loss but are also applied to non-patrimonial damage (contra De Wet 1970 *THRHR* 80, who is mistaken). See also *Mphosi v Central Board for Co-operative Ins Ltd* 1974 (4) SA 633 (A): 'damages' in s 7 of the Workmen's Compensation Act 30 of 1941 (now s 35(1) of the COID Act 130 of 1993) includes compensation for pain and suffering.

[68] Chap 14. Cf also Klopper *Third Party Compensation* 144 who, for practical purposes, prefers a wide concept of damage.

[69] Paras 1.7.2 and 4.2; *Union Government v Warneke* 1911 AD 657.

[70] eg loss of earning capacity or future income.

[71] See Corbett & Buchanan I 3.

[72] See Neethling & Potgieter *Delict* 214; Visser *Kompensasie en Genoegdoening* 270 et seq; 1983 *THRHR* 43; 1988 *THRHR* 489 et seq. From the case law it can be seen that the action for pain and suffering has for a long time been regarded as a kind of exception to the Aquilian action (which provides damages for patrimonial loss) and not as an extension of the actio iniuriarum, which is the classic remedy providing satisfaction. See eg *Union Government v Warneke* 1911 AD 657 at 665–6: 'The award of

compensation for physical pain caused to a person injured through negligence, which was recognised by the law of Holland, constitutes a notable exception to the rule in question [that only patrimonial loss is compensable]'; *Stoffberg v Elliot* 1923 CPD 148 at 152. See also *Evins v Shield Ins* 1980 (2) SA 814 (A) at 838: 'I use the term Aquilian in an extended sense to include the *solatium* awarded for pain and suffering, loss of amenities of life, etc, which is *sui generis* and strictly does not fall under the umbrella of the *actio legis Aquiliae*.' Cf further *Casely v Minister of Defence* 1973 (1) SA 630 (A) at 642; *Kruger v Santam Versekeringsmpy Bpk* 1977 (3) SA 314 (O) at 318. See, however, *Mutual and Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 11.

[73] This compensation is described as 'imperfect' because full and true restitution through money is impossible in the case of bodily injuries, but the law nevertheless intends the award to fulfil a compensatory function. See also para 9.5. See further Neethling & Potgieter *Delict* 214 n 37: Even though the action for pain and suffering is commonly described as a 'genoegdoeningsaksie', it should be noted that it does not provide satisfaction (frequently with a penal element) in the sense of the actio iniuriarum (see Visser 1988 *THRHR* 489 et seq).

[74] See Neethling & Potgieter *Delict* 214. Contra Van der Walt *Sommeskadeleer* 186. He argues that South African law with its different actions for damage, injury to personality and pain and suffering does not need a wide concept of damage. This viewpoint is, however, not applied in practice and is, in any event, incorrect because it disregards the relationship between the Aquilian action and the action for pain and suffering (see above n 72). Van der Walt also fails to draw the correct conclusions from the way our practice deals with compensation for pain and suffering.

[75] See Neethling & Potgieter *Delict* 214. Contra Van der Walt *Sommeskadeleer* 56 n 9, who exaggerates where he states: 'Spesifiek vir die Suid-Afrikaanse reg kan enige uitbreiding van die skadebegrip om ook allerlei onlusgevoelens (waaronder ook pyn en lyding inbegryp moet word) te huisves, maklik berekenbare katastrofale gevolge hê.'

[76] See Neethling & Potgieter *Delict* 214. Depending on how one defines 'damage' (see para 2.3), there may be damage for which compensation is not recoverable either delictually or contractually but which may be recovered, for example, under the terms of an insurance policy.

[77] See Neethling & Potgieter *Delict* 215.

[78] Para 3.2 on the patrimony; para 5.4 on personality interests.

[79] See *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253 where Moseneke DCJ stated: '[O]ur law recognises patrimonial and non-patrimonial damages. Both seek to redress the diminution in the quality and usefulness of a legally protected interest. It seems clear that the notion of damages is sufficiently wide to include pecuniary and non-pecuniary loss and it is understood to do so ordinarily in practice.' Cf also *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 287, where mention is made of the 'reciprocal relationship [which] necessarily existed between the patrimonial and non-patrimonial elements in the total award of damages'. The concept of consortium (see Van der Merwe & Olivier *Onregmatige Daad* 458; para 5.6) also includes patrimonial and non-patrimonial interests (and thus losses). See also on seduction and breach of promise *M v M* 1991 (4) SA 587 (D) and on injury to a child *Roxa v Mtshayi* 1975 (3) SA 761 (A), where a single award was made for pecuniary as well as non-pecuniary loss. A wide concept of damage does not imply that the differences between patrimonial and non-patrimonial loss should be ignored.

[80] *Delict* 215. See also *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 252–4; Visser *Kompensasie en Genoegdoening* 8–53.

[81] See Neethling & Potgieter *Delict* 215 n 43. Patrimonial loss is also not always directly measurable in money, (although it always has a monetary value)—for instance, when a unique object of which the market value cannot be determined is destroyed. In such a case the court has to assess compensation on an equitable basis—just as in the case of non-pecuniary harm. In determining damages for non-pecuniary harm caused by physical injuries (para 5.6) previous awards in comparable cases are frequently used (para 15.2.3). This proves that a kind of market value has developed in regard to injury to personality (thus highly personal interests have become commercialized). If one accepts the view of Van der Walt *Sommeskadeleer* 281 that the utility of a patrimonial interest need not necessarily have a monetary value, the fundamental distinction between patrimonial and non-patrimonial loss would collapse.

[82] This alleged difference does not prove much. In many cases of patrimonial loss the assessment of damage is based on a fair estimate or even on an informed guess based on assumptions and probabilities. See, eg, the determination of damage in the form of loss of earning capacity and support (paras 14.6 and 14.7.2); future medical expenses (para 14.4); unlawful competition (see Van Heerden & Neethling *Unlawful Competition*; para 13.6); the infringement of copyright (para 13.7), creditworthiness (see Klopper 1992 *THRHR* 33); or the loss of future profits (eg *Versveld v SA Citrus Farms Ltd* 1930 AD 452). See also *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 969 on the assessment of

patrimonial loss with little evidence. On the other hand, the determination of injury to personality caused by bodily injuries can frequently be performed with reasonable accuracy in the light of medical evidence. See Neethling & Potgieter *Delict* 215 n 44.

[83] Frequently estimates ex bono et aequo are used to assess damages for patrimonial loss—see n 82 above. There are also views in favour of a subjective approach to patrimonial loss (see para 3.5) which imply a deviation from objective standards and also introduce less clarity on the dividing line between pecuniary and non-pecuniary damage. Objective factors are relevant in determining damages for non-patrimonial loss. An example is where the law relies on the unhappiness an average person in the position of the plaintiff would experience. The use of previous awards in comparable cases (see paras 2.3.3 and 15.2.3) also demonstrates an objective process. See Neethling & Potgieter *Delict* 215 n 45.

[84] *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 252.

[85] In *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253–4 Moseneke DCJ stated: '[P]atrimonial damages, which in practice are also called special damages, aim to redress, to the extent that money can, the actual or probable reduction of a person's patrimony as a result of the delict or breach of contract. In this sense patrimonial damages are said to be a "true equivalent" of the loss. Ordinarily they are calculable in money ... . On the other hand non-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of highly personal legal interests that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss.' An amount of money is not always a true surrogate or equivalent for patrimonial loss—eg the destruction of a unique or irreplaceable object such as a painting, manuscript, buildings etc. The amount of damages determined through market value merely represents a financial equivalent of the destroyed object. In non-patrimonial loss a similar situation occurs where money is incapable of really neutralizing the loss but nevertheless provides some counterbalance (see para 9.5.4.1). See Neethling & Potgieter *Delict* 215 n 47; *Van der Merwe* supra at 254. See Van der Walt *Sommeskadeleer*185 for a different point of view.

[86] Logically speaking, this can be a distinction only if patrimonial interests are clearly distinguishable from personality interests. See, however, Van der Walt *Sommeskadeleer* 184 who observes that the struggle in German law for awarding damages in respect of inconvenience, the reduction of enjoyment of a home or property, loss of use of property, loss of free time and loss of enjoyment of a holiday, has become a struggle for the expansion of the concept of patrimony. See also Stoll & Visser 1990 *De Jure*353: 'Between "true" pecuniary damage and non-pecuniary damage there is an intermediate form of damage which is characterised by the disturbance or impairment of the personal economic sphere.' Cf also Stoll *Encyclopedia* 19 on damage where the 'economic and non-economic elements blend together inseparably'; para 2.3.3. It is also well known that damages for patrimonial loss in the form of medical expenses necessitated by bodily injuries are recoverable. Unless it is accepted that the body consists of patrimonial *as well as* non-patrimonial interests, this is a case of patrimonial loss caused by the impairment of personality interests. This would imply that the alleged difference in the text is not generally valid. See further Visser 1991 *THRHR* 790–1. These arguments prove that the distinction between patrimonial and non-patrimonial interests is not clear enough to enable an absolute differentiation between patrimonial and non-patrimonial loss to be based upon it.

[87] Para 8.5 (no damages for non-pecuniary loss in terms of this action).

[88] Para 9.5.6 (damages for patrimonial loss only).

[89] See, eg, s 8(2) of the Civil Aviation Act 13 of 2009 (compensation only for 'material' damage); the application of the COID Act 130 of 1993 (para 14.9); s 17(1A) of the Road Accident Fund Act 56 of 1996 (as amended by the Road Accident Fund Amendment Act 19 of 2005) stipulating that non-patrimonial loss can only be claimed in the case of 'serious injury', etc. See para 11.8 n 359.

[90] Para 11.1.6 and *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 597.

[91] eg causes of action (para 7.4 and see also Boberg *Delict* 516); the application of the function of compensation in the case of bodily injuries (para 9.5 and cf also n 79 above).

[92] See generally Visser 1991 *THRHR* 782–94; Boberg *Delict* 479–80; Knobel 2005 *THRHR* 645–54; Coetzee 2004 *THRHR* 661–70. See on satisfaction effecting retribution, para 9.4. The discussion which follows is based on principles and examples taken from the law of delict. However, wrongfulness is also accepted as a requirement for breach of contract (see Van Aswegen *Sameloop* 191–3; Hosten 1960 *THRHR* 258; Van der Walt & Midgley *Delict* 5; Van der Merwe 1978 *SALJ* 324; Van der Merwe & Olivier *Onregmatige Daad* 479; Nienaber 1989 *TSAR* 5). Nevertheless, no special mention will be made of

the relationship between contractual wrongfulness and damage, but it may be assumed that much of what is said on this aspect in the case of delictual liability applies mutatis mutandis to breach of contract.

[93] Wrongfulness in private law (ie the invasion of a right) is seen as the factual infringement of an individual interest in a legally reprehensible manner (see Neethling & Potgieter *Delict* 33 et seq; Visser 1981 *THRHR* 123). Wrongfulness is determined through an investigation into disturbance of an interest (as a result of human conduct) against the background of the relevant legal norm which prohibits any unreasonable impairment. It is an abstract fact based on a value judgement which cannot cause damage but which is a prerequisite for fault. See Neethling & Potgieter *Delict* 123.

[94] Van der Merwe & Olivier *Onregmatige Daad* 179; Scott 1985 *De Jure* 136.

[95] This is the necessary conclusion to be drawn from the views of Van der Walt *Sommeskadeleer* 15 n 15 and 280, where he prefers the economic concept of patrimony.

[96] Para 3.2.4.

[97] Paras 2.4.12 and 11.6.

[98] See in general Boberg *Delict* 591; Davel *Afhanklikes* 53–9; Claasen 1984 *THRHR* 439; 1986 *THRHR* 343; Roos & Clarke 1987 *THRHR* 91; Dendy 1987 *SALJ* 243; Blommaert 1981 *TSAR* 176; Reinecke 1976 *TSAR* 32–3; 1988 *De Jure* 237–8; Van der Merwe & Olivier *Onregmatige Daad* 190; Neethling & Potgieter *Delict* 237–8; Visser 1991 *THRHR* 791–4; Davel 1992 *De Jure* 83; Dendy 1992 *BML*167; Boberg 1993 *THRHR* 154; Dendy 1998 *THRHR* 564; 1999 *THRHR* 34; 1999 *THRHR* 169.

[99] See Bloembergen *Schadevergoeding* 30–1.

[100] See Van der Walt *Sommeskadeleer* 15; Davel 1992 *De Jure* 83; Dendy 1992 *BML* 167; Boberg 1993 *THRHR* 154; Dendy 1998 *THRHR* 571–4.

[101] See n 93 above.

[102] See Neethling & Potgieter *Delict* 33 et seq; Van der Merwe & Olivier *Onregmatige Daad* 50 et seq. See also Knobel 2005 *THRHR* 652; Coetzee 2004 *THRHR* 669.

[103] The liability to pay damages without the necessity to prove wrongfulness (as in some common-law examples of strict liability: see Neethling & Potgieter *Delict* 355 et seq; para 13.9) illustrates that the quantitative reduction is established in the same way as in cases where wrongfulness is required for liability. One may thus conclude that, in a sense, wrongfulness is a neutral factor when damage is assessed.

[104] See *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 111 (the absence of damage does not necessarily prove the absence of wrongfulness). Reinecke (1976 *TSAR* 33) agrees that in the second example there is wrongfulness without damage. Commenting on the first example, he states that there is no damage, since a valueless object does not form part of someone's juridical patrimony (see *Diktaat* chap 3; cf also Van der Walt *Sommeskadeleer* 32).

An impairment of interests which have no direct monetary value may be wrongful. Furthermore, unlawfulness entails more than only the impairment of interests of value because the disturbance of personality interests (which do not form part of someone's patrimony) in conflict with a legal norm will also be wrongful. In the example where X is unlawfully on Y's land one may possibly argue that there is a disturbance of Y's interests (which is necessary for wrongfulness in private law) but that there is no *diminution* in value of these interests. See further Erasmus & Gauntlett 7 *LAWSA* para 18 on nominal damages where the infringement occurs without damage being caused; *Jansen v Pienaar* 1881 SC 276.

[105] Para 2.1.

[106] In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 461 the Appellate Division held that conduct which causes damage is not necessarily unlawful. See also Van der Merwe & Olivier *Onregmatige Daad* 192. In the example of the lightning there is no delictual liability but X may probably claim damages ex contractu from his insurer. Where X is the author of his own loss (eg, he smashes the window of his motor car), he obviously suffers damage but there is no wrongful act, because a person cannot act wrongfully against himself or herself.

[107] This covers cases of delictual (and contractual) liability based on wrongfulness and fault. In liability for damage based on, for example, the actio de pauperie, the actio de pastu, s 8(2) of the Civil Aviation Act 13 of 2009, or s 35 of the National Nuclear Regulator Act 47 of 1999 (see Neethling & Potgieter *Delict* 373) wrongfulness is not required and, accordingly, there can be no question of any connection between wrongfulness and damage.

[108] eg Boberg *Delict* 475.

[109] In any event, damage cannot 'flow' or 'result' from wrongfulness, because wrongfulness is merely a legal description of conduct. On the other hand, *conduct*, which may be lawful or unlawful, is capable of causing damage. See also Knobel 2005 *THRHR* 648.

[110] *Onregmatige Daad* 179, 324 (wrongfulness and damage in misrepresentation).

[111] Op cit 179–80 n 1. These authors prefer this theory in order to identify damage of which the law of delict takes account. They nevertheless refuse to require fault as a prerequisite for damage since the law of delict, for the purposes of an interdict, takes cognizance of a diminution of patrimony resulting merely from wrongful conduct.

[112] Op cit 179.

[113] Van der Merwe & Olivier ibid also warn that a delictual element and its substratum must be clearly distinguished. Just as a disposition is not the same as fault, a diminution in patrimony is not the equivalent of damage. Scott 1985 *De Jure* 122, 136 agrees with these views and adds that it is obvious to him that damage cannot exist without wrongfulness.

[114] See Neethling & Potgieter *Delict* 216–17; Boberg *Delict* 470–80; Van der Merwe & Reinecke 1966 *THRHR* 67; Van der Walt 1973 *THRHR* 394; *Sommeskadeleer* 242–3; Reinecke 1976 *TSAR* 33–4; Coetzee 2004 *THRHR* 661 et seq.

[115] See Neethling & Potgieter *Delict* 216. It would amount to the same kind of mistake if it were contended that an act committed in necessity does not constitute conduct since it does not lead to liability. Lawfulness or unlawfulness does not determine whether someone has acted voluntarily and it is equally incorrect to require a wrongful act before there can be damage. Furthermore, it is untenable to argue that something can be a delictual element only if it leads to delictual liability, since no element of a delict can on its own result in liability; such responsibility is based on the simultaneous presence of all the separate delictual elements.

[116] *Sommeskadeleer* 241–4.

[117] See also Bloembergen *Schadevergoeding* 11–12.

[118] Para 2.4.8.

[119] Van der Walt *Sommeskadeleer* 280.

[120] See more on this in paras 2.4.10 and 3.2.4.

[121] Para 2.4.1.

[122] Para 3.2.1.

[123] Para 2.4.2. Van der Walt *Sommeskadeleer* 282 anticipates this criticism by stating that one does not need the legal concept of patrimony in order to evaluate the subjective position of a plaintiff for the purposes of assessing damage. However, he fails to explain clearly what the connecting factor is between a person and the interests the impairment of which constitutes damage to him. It is inadequate merely to observe that the law of damages evaluates harmful consequences subjectively.

[124] eg *Dhlamini v Protea Ass* 1974 (4) SA 906 (A) (para 11.6).

[125] *Sommeskadeleer* 15 n 24. See, however, Reinecke 1988 *De Jure* 237 n 89 whose view is that an expectancy forms part of someone's patrimony only if it is a justifiable expectation.

[126] Reinecke 1976 *TSAR* 33 et seq; *Diktaat* chap 3; see also Reinecke & Van der Merwe 1966 *THRHR* 66 et seq. Reinecke rejects the suggestion that damage has to result from the infringement of a right. However, he requires some connection between the person who suffers damage and the damage-causing event.

[127] See more on this in para 3.2.4.

[128] Reinecke 1988 *De Jure* 237.

[129] Reinecke 1988 *De Jure* 237 n 89 rejects any criticism that he requires wrongfulness for damage. See Van der Walt *Sommeskadeleer* 15; Neethling & Potgieter *Delict* 217.

[130] The same applies mutatis mutandis to personality interests (para 5.4).

[131] See Neethling & Potgieter *Delict* 33 et seq.

[132] Neethling & Potgieter *Delict* 82 et seq.

[133] See Neethling et al *Law of Personality* 13, 19–20, 65–8; Van der Merwe & Olivier *Onregmatige Daad* 186.

[134] Reinecke 1976 *TSAR* 34 reveals an inconsistency in the views of Van der Merwe & Olivier *Onregmatige Daad* 186 where they maintain (with reference to Joubert *Grondslae van die Persoonlikheidsreg* 144) that damages may be recovered for patrimonial loss as a result of the infringement of a right of personality. He asks how damage 'flows' from wrongfulness in this instance. Patrimonial loss cannot be based on the infringement of a right, since one is dealing with a right of personality (which is not of a patrimonial nature). See Visser 2003 *THRHR* 652–3.

[135] Reinecke *Diktaat* chap 3 avoids this problem by defining this damage in terms of the creation of a debt or the expectation of a debt as part of a patrimony. See Van der Merwe & Olivier *Onregmatige Daad* 456, who refer to an 'aksessore vermoënsreg' which has not been clearly identified in the case where

the infringement of a right of personality causes patrimonial loss. See Visser 2003 *THRHR* 653 who refers to the theory on 'mixed legal interests', as applied in the case of, eg, personal immaterial rights, to explain the patrimonial right infringed in the case of bodily injuries.

[136] See eg Visser 1981 *THRHR* 123.

[137] Neethling (1987 *THRHR* 316; 1990 *THRHR* 101–5; Neethling et al *Law of Personality* 19 et seq) argues convincingly that in the case of loss of earning capacity (eg the loss of future income because of bodily injuries) and loss of creditworthiness a new category of subjective rights has evolved, viz *personal immaterial property rights*. The object of such rights is immaterial property that is closely connected with someone's personality. Thus, pecuniary loss caused by the plaintiff's incapacity to earn money as before and which results from bodily injuries, should not be seen in association with a possible infringement of the right to corpus, but with a newly identified right to earning capacity. This right has as its object certain patrimonial as well as personality interests. The criticism of this theory by Van der Merwe & Olivier *Onregmatige Daad* 186 n 28 is unacceptable and their own views imply that the right to physical and mental integrity is overstretched by the inclusion of earning capacity in the concept of 'corpus'. In general it is impossible to avoid the conclusion that patrimonial interests are involved in all the personality rights that are currently recognized. It may, for practical and theoretical reasons, become necessary in future to classify such interests as belonging to a separate category of rights (similar to the proposed personal immaterial property rights).

[138] 1976 *TSAR* 34.

[139] See also para 11.6, where more practical aspects of this subject are discussed.

[140] See Boberg *Delict* 592; *Dhlamini v Protea Ass Co* 1974 (4) SA 906 (A); *Nkwenteni v Allianz Ins Co Ltd* 1992 (2) SA 713 (Ck); Dendy 1998 *THRHR* 564.

[141] eg Neethling & Potgieter *Delict* 237; Van der Merwe & Olivier *Onregmatige Daad* 189–90; Van der Walt & Midgley *Delict* 223–4.

[142] See Reinecke 1988 *De Jure* 237; para 2.4.10.

[143] The same principle applies to the example of a thief who wants to claim compensation for damage to the stolen article. The thief suffers no damage because he or she has no legally recognized interest in the stolen property. The absence of wrongfulness and damage do not rest on the same grounds. There is no wrongfulness, because the thief has no right that can be infringed; there is no damage because the patrimony of the thief has not been diminished. The connection between the two issues is that wrongfulness is usually established with reference to the (unreasonable) impairment of interests forming part of a patrimony in the juridical sense (see para 2.4.4 for examples of wrongfulness without patrimonial loss). Any suggestion that there is no damage because it cannot 'flow' from the invasion of a right would be incorrect. Proof of the fact that wrongfulness and damage remain separate concepts is found in the following example: X, who uses his legally recognized earning capacity, is shot by Y in reasonable self-defence. X suffers damage but has no remedy because wrongfulness is absent. This proves that X's earning capacity and Y's lawful conduct exist separately. In the case of 'illegal income' no damage is suffered, not on account of the absence of wrongfulness but because the utility of legally recognized interests has not been impaired.

[144] *Diktaat* chap 3.

[145] See Van der Merwe & Olivier *Onregmatige Daad* 86.

[146] If one sees earning capacity as the object of an independent right to personal immaterial property (para 2.4.11), it is clear that the infringement of someone's right to corpus does not necessarily imply that the right to earning capacity has also been violated.

[147] See Neethling & Potgieter *Delict* 238; Boberg *Delict* 530–1, 538–40, 575–7; Dendy 1998 *THRHR*579–81; Millard 2007 *Law, Democracy and Development* 16–18.

[148] Para 3.2.4.2; eg future loss of earnings because of bodily injuries, the infringement of a right to a personal immaterial object, or the frustration of an expectation to earn income.

[149] Para 14.7.2. See also Davel 1992 *De Jure* 83.

[150] See also para 11.6.

[151] According to Dendy 1999 *THRHR* 37 the remarks by Rumpff CJ in *Dhlamini v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) at 912, suggest that in dependants' actions, policy considerations different from those applicable to claims by income earners are at work.

[152] 1988 *De Jure* 238.

[153] Para 2.4.12.

[154] See also *Lebona v President Versekeringsmpy Bpk* 1991 (3) SA 395 (W), which possibly affords authority for this view.

[155] Elsewhere (see *Diktaat*) Reinecke adds that, in determining the value of the dependant's loss, the uncertainties in connection with it as well as its possible legalization should be taken into account.

[156] See *Santam Ins Co Ltd v Ferguson* 1985 (4) SA 843 (A).

[157] Reinecke's opinion (n 154 above) that the source of money from which support comes is res inter alios acta cannot be correct. For example, may a dependant compel his or her breadwinner to undertake non-criminal but illegal activities in order to earn the money required for support? There can also be no legal duty on a breadwinner to provide support from illegal income. See also *Lebona v President Versekeringsmpy Bpk* 1991 (3) SA 395 (W) at 403, where, on the one hand, the court maintains that a breadwinner cannot terminate his duty of support by the way he lives (ie by earning income illegally) but, on the other hand, submits that a duty to provide support depends on his ability to obtain money lawfully. The court, however, adds the following dictum (which possibly supports Reinecke): 'I believe that it would not be a defence to argue that a significant capital fund which is available to the respondent should not be available for providing maintenance to his wife and children because the capital fund was build up through events that ought not to have taken place' (our translation).

[158] See also *Lebona v President Versekeringsmpy Bpk* 1991 (3) SA 395 (W), where the court held that the duty to provide support depends on the earning capacity of the deceased and not on his illegal earnings. In our opinion, evidence of how he earned or could have earned money illegally is irrelevant, because it usually does not prove the value of the right which the dependant has lost but something else which does not form part of his patrimony. See, however, *Dhlamini v MMF* 1992 (1) SA 802 (T) at 806; *Minister of Police, Transkei v Xatula* 1994 (2) SA 680 (TkA).

[159] See, on fault, Neethling & Potgieter *Delict* 123 et seq; Boberg *Delict* 268 et seq.

[160] See Van Aswegen *Sameloop* 193–5 on fault as a possible requirement for breach of contract.

[161] eg Boberg *Delict* 475.

[162] See Neethling & Potgieter *Delict* 123.

[163] Fault, in the sense of legal blameworthiness, is incapable of causing a fact (it is the same with wrongfulness—para 2.4.1). Only human conduct or other physical circumstances are able to cause damage.

[164] Neethling & Potgieter *Delict* 126 (intention); 131 (negligence).

[165] Para 11.4 provides more detail on this point.

[166] See s 2 of the Apportionment of Damages Act 34 of 1956; Van der Merwe & Olivier *Onregmatige Daad* 302. Fault also plays a role in the COID Act 130 of 1993 since an employee may claim increased compensation in terms of s 56 if the accident was caused by the negligence of his or her employer (para 14.9.2).

[167] 'The test for factual causation is the same in delictual and contractual cases' (*Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at para 13 n 1; see also *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191). See on legal causation (remoteness of damage) para 11.5 (generally); para 11.5.5 (on contractual damages). Cf also para 4.6.

[168] See eg *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *S v Mokgethi* 1990 (1) SA 32 (A); *Vision Projects (Pty) Ltd v Cooper Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191; *Napier v Collett* 1995 (3) SA 140 (A) at 143–4; *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 (W) at 574–5; Neethling & Potgieter *Delict* 178–9; Christie & Bradfield *Contract* 565–6.

[169] The so-called test, in terms of which an antecedent is notionally eliminated and it is enquired whether the damage also falls away, is no test (see Visser 1989 *THRHR* 561–2; 2004 *Speculum Juris*138–9); on its own it is incapable of revealing the existence of a causal nexus which has not already been determined in some other way. Cf Neethling & Potgieter *Delict* 181–4; Van Rensburg *Juridiese Kousaliteit* 3–65; Visser 1989 *THRHR* 558–69; Potgieter 1990 *THRHR* 267.

[170] eg whether negligent conduct or a breach of contract has caused damage; or whether an animal has caused damage as alleged (actio de pauperie); or whether the realization of a defined risk caused damage as envisaged under the terms of an insurance policy; or whether damage for the purposes of third-party compensation (the RAF Act 56 of 1996) was caused by the driving of a motor vehicle; or whether 'nuclear damage' was caused as envisaged in the Nuclear Energy Act 131 of 1993, and so on.

[171] Cf Neethling & Potgieter *Delict* 185–7.

[172] Koch *Reduced Utility* 47 states as follows: 'One may discuss causation independently of damage but one may not discuss damage independently of causation.' See Visser 2004 *Speculum Juris* 138–9.

[173] See Neethling & Potgieter *Delict* 217–18; Reinecke 1976 *TSAR* 38 et seq; Van der Walt *Sommeskadeleer* 257 et seq; Koch *Reduced Utility* 47.

[174] See *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 328, 329–30 where Schutz JA emphasized that, as to the proof of damages, (factual) causation had to be distinguished from quantification of damages

since different standards of proof applied. Causation requires the establishment, on a balance of probability, of a causal link between the conduct and the loss, while quantification, where it depends on future uncertain events, is decided not on a balance of probability, but on the court's assessment of the chances of the risk eventuating. To establish causation the plaintiff has to prove a real or substantial chance as opposed to a speculative one, after which the chance has to be evaluated as part of the assessment of the quantum of damages, the range lying somewhere between that qualified as real or substantial on the one hand, and near certainty on the other. In *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 532–3 the court pointed out that it is often impossible to quantify future damages with exactitude, hence speculation was inevitable. Yet there must be a causal connection between such damages and the defendant's conduct which has to be established on a balance of probabilities. See also Visser 2004 *Speculum Juris* 141–3; paras 11.5.2, 16.2.

[175] Para 4.6.

[176] Chap 6.

Chapter 3
NATURE, CAUSING AND FORMS OF PATRIMONIAL LOSS

Damages for patrimonial loss are recoverable in terms of delictual, contractual and many other remedies. [1]

3.1 DEFINITION OF PATRIMONIAL LOSS

Patrimonial loss (as a subdivision of damage) is the diminution in the utility of a patrimonial interest in satisfying the legally recognized needs of the person entitled to such interest. It may also be defined as the loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of his or her patrimony (a patrimonial debt).

Some of the elements of this definition have already been dealt with when the definition of damage was discussed. [2] The alternative definition emphasizes the manner in which patrimonial loss is caused, namely the loss or reduction in value of a particular object. There are other definitions of patrimonial loss, which should be noted. [3]

3.2 PATRIMONY (ESTATE) [4]

Patrimonial loss is defined inter alia in terms of someone's patrimony and it is thus essential to have clarity on what is meant by the concept of 'patrimony'.

3.2.1 Introduction

It is evident that patrimonial damage consists in the diminution or reduction of the utility (as measured in money) of someone's *patrimony*. A difficult question is how to identify the interests or components that constitute a patrimony and how a patrimony may be defined in a scientifically acceptable manner. [5] In the law of damages there are two main schools of thought on the nature of a patrimony:

First there is the *juridical or legal concept of patrimony*, [6] according to which a patrimony consists of all the patrimonial rights of a person (ie rights which have a monetary value) as well as expectancies which may lead to the acquisition of patrimonial rights. In terms of this approach, legally enforceable obligations and expectancies of debts with a monetary value are included in a patrimony.

Secondly patrimony may be seen in *a factual and economic sense* as everything of an individual with a monetary value which may be used to satisfy his or her recognized needs, irrespective of whether that person has any right to such object. [7]

Although from a jurisprudential point of view the concept of patrimony is not very clear, in practice this has fortunately not caused any particular problems and consequently our legal practice has not attempted to develop a comprehensive description of a person's patrimony.

3.2.2 Traditional definition of patrimony and criticism of it

In our early case law patrimony is defined as a universitas of rights and duties. [8] This definition reflects the so-called juridical concept of patrimony and is still good law. [9]

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Reinecke [10] criticizes this definition: The term 'rights' merely refers to subjective rights and is in a sense too narrow because there are interests worthy of protection which do not fall under subjective rights—for example, *business or prospective gains*. [11] In a different sense the definition is, however, too wide because 'rights' include personality rights. Owing to the non-economic nature of such rights, they should not be seen as part of someone's patrimony. [12] A further point of criticism is that valueless subjective rights can hardly be seen as part of someone's patrimony. If X is the owner of a totally worthless object which is destroyed by Y, X does not suffer any patrimonial loss. [13] A further question is whether *rights* are in fact part of a patrimony and whether the *objects* of such rights should not rather qualify as patrimonial elements. Finally, Reinecke points out that it is a controversial question whether obligations (debts) can be said to form part of someone's patrimony. These points of criticism do not imply that the traditional concept of patrimony is unusable but merely that adaptations are required.

Van der Walt [14] rejects the juridical concept of patrimony. [15] He says debts cannot be elements of a patrimony because they are patrimonial liabilities and suggests that the juridical concept of 'patrimony' causes confusion between someone's legal position and that person's patrimonial position and that this may lead to the adoption of principles in the assessment of damage that are foreign to the concept of damage. [16]

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3.2.3 Patrimony in factual and economic sense

Van der Walt [17] explains the concept of patrimony as follows:

> 'Patrimony' does not necessarily have the same meaning in all branches of law. In the law of damages it refers to all the objects (material things, rights or factual opportunities) which may be employed by the subject thereof (a person) in a planned manner in order to satisfy his legally recognized needs . . . . The utility value of an element of patrimony does not have to be a monetary value (our translation).

This explanation may be criticized. [18] How can someone be a 'subject' of, eg, a factual opportunity unless there is a subjective right or objective legal principle which declares that person to be such a 'subject'? [19] The implication is that Van der Walt's theory does not really differ much from the juridical concept of patrimony (and, in any event, he

includes rights as part of his construction of an estate). Furthermore, and irrespective of how a patrimony is construed, the utility of every element of such patrimony must, contrary to the suggestion by Van der Walt, necessarily have a monetary value. [20]

Bloembergen, [21] too, defines patrimony as everything of a person which has a monetary value, irrespective of the existence of a right to its components. [22] He argues against a juridical concept of patrimony (in the sense of someone's rights and obligations) and provides the following example to demonstrate that someone's patrimony in a legal sense may remain unchanged while damage occurs: Where X's property is stolen, he clearly suffers damage but his legal position remains unchanged because he retains ownership of the property. Reinecke [23] correctly disputes the validity of this example and submits that, although X retains ownership, he loses the opportunity *to use his ownership* in any manner. [24]

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Bloembergen [25] furnishes another example with which he attempts to prove that someone's legal patrimony may be impaired without causing any damage: X's worthless property is destroyed. In this case one may argue [26] that the juridical patrimony does not include rights without economic value. [27]

3.2.4 Proposed [28] juridical (legal) concept of patrimony [29]

The juridical concept of patrimony is the one which is the most compatible with legal practice [30] and which should therefore be accepted and theoretically developed.

3.2.4.1 *General*

A legally recognized relationship is required between a person and an object or interest before the person may suffer damage in respect of it. Thus, X is not in general affected by the damage caused to Y's property. [31] The explanation for the absence of damage is not that wrongfulness [32] is not present, but the fact that the impaired interests do not form part of X's patrimony. The juridical concept of 'patrimony' is intended to identify the interests that may be elements of someone's patrimony. [33]

The patrimony of a person consists of positive and negative elements (discussed below) which constitute his or her total patrimony or estate. However, patrimony does not merely concern rights, obligations and expectancies as such, it concerns their monetary value because patrimonial loss must necessarily be expressed in money. [34] Such monetary value can be determined in various ways. [35] In the absence

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of any indications to the contrary, the general exchange value of an element of patrimony may be taken as its value in the eyes of the law. [36]

The time at which value is to be determined for assessment of damage is discussed below. [37] It must be reiterated that the impairment of someone's juridical patrimony is not the same as wrongfulness [38] or breach of contract. [39] Moreover, damages are payable only if all the other legal conditions for such an obligation are present.

Reinecke [40] identifies the patrimonial elements described immediately below. These do not represent a numerus clausus and cannot be classified into watertight compartments.

3.2.4.2 *Positive elements (assets) of someone's patrimony (estate)* [41]

(a) Patrimonial rights

The following are patrimonial rights: the different kinds of real rights, [42] immaterial property rights [43] and personal rights. [44] To these subjective rights may be added the proposed personal right not to be misled [45] as well as the personal immaterial property rights to earning capacity and creditworthiness. [46] In order to ascertain whether a right exists and forms part of someone's patrimony, one must refer to the

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branch of law which deals specifically with such a right. Rights subject to conditions or restrictions or reversionary rights form part of an estate but these factors obviously influence the value of such rights. The *objects* of patrimonial rights [47] do not form part of someone's patrimony (although the reduction in their utility may constitute damage, since it causes a reduction in the value of such rights). [48]

The statement [49] that the infringement of a person's patrimonial rights causes damage known as damnum emergens should be treated with circumspection. [50]

(b) Expectations of patrimonial rights or benefits [51]

This is the legally recognized expectation of a person to acquire patrimonial rights or benefits in future (through which his or her patrimony will be enhanced) [52] or the recognized expectation that that person's patrimony will not diminish. [53] Such an expectation may be so 'convincing' that the law recognizes and protects it by

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awarding damages if it has been frustrated. [54] In this situation we are dealing with a possibility or chance which can be given a market value: If X buys a farm in order to make profit from farming operations and the seller's breach of contract prevents him from making such profit, he is (if all the other requirements are met) entitled to claim damages. [55] This proves that the possibility of making a profit may be recognized as an expectancy worthy of protection. [56] Normally an expectation has a present element (some or other factual basis) as well as a future element (the probabilities in connection with the full realization of the spes).

An important example of a recognized expectation is the expectation that a person has to earn income in future by using his or her abilities. If the anticipated benefit from this expectation cannot materialize because of the negligent infliction of bodily injury, he or she is entitled to damages. Although our law is not precisely clear on this and different approaches are possible, it is apparently accepted that earning capacity is part of someone's estate or patrimony. [57] However, earning

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capacity need not be construed in terms of an expectation of income, since it may be seen as the object of a new subjective patrimonial right, namely a personal immaterial property right. [58]

A contractual right to performance may probably also be seen as an expectation of a benefit. [59]

An expectation must meet certain general requirements [60] before it can be said to form part of someone's estate or patrimony: First, the law must in principle recognize the type of expectation as worthy of protection. [61] Secondly, there must be

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a sufficient degree of probability or possibility that the expectation would be realized. [62] Thirdly, the expectation must have a monetary value. [63] Fourthly, the expectation, though recognized in principle, must not contain an illegal element. [64]

The value of an expectation is generally determined by taking into account the degree of probability of its fulfilment (or realization)—this means that, from the face value of the patrimonial right it envisages, an amount must be deducted to discount for the possibility that the expectation may not be fulfilled. [65] Expenses which must be incurred for the fulfilment of the expectation to occur must also be deducted from its value.

3.2.4.3 Negative elements of patrimony (estate) [66]

(a) Patrimonial debts (expenses)

There is an opinion that the coming into existence of a debt amounts to damage only once assets are used to pay such debt. The correct view, however, appears to be that the mere creation of a debt [67] may constitute damage even if the debtor has no

assets in his or her estate to satisfy such debt. [68] Patrimony for the purposes of the law of damages is thus not (always) seen as the net result obtained after liabilities have been deducted from assets. Debts are considered to be independent patrimonial elements with their own positive value which is inversely proportional to the size of the debt; in other words, the greater the debt the smaller the value of the patrimony, and the smaller the debt the greater its value. Someone's patrimony is burdened or reduced by the creation, acceleration or increase of a debt or liability. [69]

(b) Expectations of patrimonial debts [70]

The expectation of a debt is the opposite of the expectation of a benefit. An event may have the result that a probability is created [71] that a person has to incur future expenses: [72] someone injured in an accident is to undergo medical treatment in future; [73] a vehicle damaged in an accident has to be towed to a garage; [74] a creditor has to pay for the services of someone to complete a swimming pool which the debtor has not constructed in accordance with the contract; [75] or the parents of a child whose conception or birth should have been prevented by a doctor in terms of a contract have to provide maintenance for such child. [76]

As long as the anticipated debt or expense is the reasonable result of the damage-causing event, it constitutes damage even if it has not yet been incurred. When the debt is actually incurred, the expectation of a debt is transformed into a debt as a negative patrimonial element, [77] and when the debt is paid, it is probably done with money which has been received as damages in advance and which has increased the positive patrimony. [78]

3.3 WAYS IN WHICH PATRIMONIAL DAMAGE MAY BE CAUSED

Patrimonial damage is generally seen as the reduction of patrimony, [79] that is, the diminution of the utility value [80] of a positive element of patrimony (an asset) or the creation or increase of a debt (a negative patrimonial element or liability). [81] In the discussion below, some examples are given to illustrate the manner in which the utility of a patrimonial element may be reduced. It should, of course, be remembered that the mere causing of patrimonial loss does not imply that there is also a liability to pay damages. [82]

3.3.1 Loss of patrimonial element

This occurs when a patrimonial right or an expectation with a monetary value is lost. Examples are: where performance in terms of a contract is rendered impossible and a personal right is terminated, [83] or where someone's property is stolen or that person's earning capacity is destroyed through bodily injuries, [84] or where a person's expectation to make profit from a contract is frustrated by a misrepresentation. [85] In general it may be said that the loss of an expectancy occurs when it can probably no longer be realized (ie the benefits cannot materialize).

3.3.2 Reduction in value of patrimonial element

This may occur in the case of a patrimonial right where the object of such right is damaged, [86] or where the debtor delays performance and the value of his or her performance, when received, is less than it would have been had he or she performed timeously. [87] The reduction in the value of the expectation of a benefit takes place when it is partially frustrated; in other words, it may be realized only in part. An example is where X is likely to earn less income from his factory because Y has repaired a machine inexpertly or has damaged X's equipment. To this may be added these examples: where X will earn less money than before on account of bodily injuries, or where the acquisition of a future benefit is less probable than before.

3.3.3 Creation or increase of debt (expense) and delay in receiving benefits

This concerns the creation, acceleration or increase of negative elements of the patrimony such as debts or liabilities. If someone involuntarily incurs a debt on account of an uncertain event [88] or if an existing debt increases, [89] such debt or increased debt constitutes damage. It may also be added that where X has voluntarily and reasonably expended money owing to bodily injuries, such expenses constitute damage. The same applies where X, on account of Y's breach of contract, has had to obtain performance elsewhere (at a higher price). Perhaps one should add to this the example of X who, through misrepresentation, causes Y to incur useless expenses or a harmful debt. It does not matter whether the person who incurred a debt has already effected payment of it, since its mere creation constitutes damage. It also amounts to damage if the economic value ('utility') of an existing debt decreases through increase of the debt.

The question also arises whether it amounts to damage if an existing debt [90] or expenses already incurred are rendered useless. [91] An example is where a motor car is damaged beyond repair and licence fees and insurance premiums paid in advance are rendered useless. [92] The fact that reasonable expenses have become worthless obviously constitutes damage, [93] but it is not clear how this should be explained.

It is also clear that the delay in receiving a benefit constitutes damage.

3.3.4 Creation or acceleration of expectation of debt

Where there is a probability that X has to incur (reasonable) expenses in future as the result of a damage-causing event, he has already sustained damage. The standard example [94] is that of X who has been injured and has to undergo a future operation which will cost Rx. [95] Furthermore, an increase in the probability of future expenses which have to be incurred may be seen as damage.

3.4 FORMS OF PATRIMONIAL LOSS

It may be useful to take note of the different categories into which patrimonial loss may be classified. Nevertheless, the warning [96] should be remembered that the subdivision of damage into different types cannot explain the true nature of damage. [97]

3.4.1 Lucrum cessans and damnum emergens [98]

This distinction is of analytical and practical importance. [99] Literally 'lucrum cessans' means loss of past or future profit and it is used to denote the loss or diminution in value of any legally recognized expectation of a patrimonial benefit. Lucrum cessans has apparently also become synonymous with all prospective loss, that is, damage which is manifested after the trial or settlement. 'Damnum emergens' refers to all other damage. [100] It also denotes all damage suffered up to the date of trial of an action. [101]

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The implications of the differences between damnum emergens and lucrum cessans are discussed below. [102]

3.4.2 Damage to property and pure economic loss [103]

There is a clear distinction between physical damage to property and the concept of damage (damnum or loss). Physical damage denotes the impairment of the object of a real right, whereas damage in the sense of damnum or loss means the diminution of patrimony. [104] Damage to property is but one of the ways in which damage may be caused. In Afrikaans, damage to property is termed 'saakskade', which is contrasted with financial (or pure economic) loss. The latter form of damage indicates patrimonial loss that is not the result of injury to property or personality, [105] or where it is not the *plaintiff's* property or personality which has been injured, [106] or where the plaintiff's personality or property has been injured, the *defendant* did not cause such damage or injury. [107]

3.4.3 Direct and consequential loss [108]

Direct and consequential damage are distinguished for the purposes of limiting liability (remoteness of damage) in terms of legal causation: [109] compensation for consequential loss is often irrecoverable because it is 'too remote'. There is a view [110] that direct loss means the immediate or direct consequence(s) of a damage-causing

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event, while consequential loss is damage that flows from such direct loss. [111] The nature and presence of direct loss is apparently determined by common sense. If X's motor car which he uses as a taxi is damaged, the reasonable cost of repairs is direct loss while the resultant loss of profit is consequential loss. [112]

3.4.4 General and special damage [113]

These terms are derived from English law and various different meanings [114] are given to it in the delictual and contractual spheres. In our law the word *special*denotes some or other special fact or circumstance of the case in question. [115]

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General damage (also referred to as intrinsic damage) [116] often refers to damage which is legally presumed to flow from an unlawful act or breach of contract and which needs to be generally pleaded only, [117] while special damage (also referred to as extrinsic

damage) [118] usually means damage which is not presumed to be the consequence of a damage-causing event and must be specially pleaded and proved. [119]

In a contractual context general damage is that loss which flows naturally from the breach of contract and which the law presumes to have been within the contemplation of the parties. In contrast, special damage is loss which is usually too remote and in respect of which liability exists only if it appears from special circumstances at the time of the conclusion of the contract that it was actually or presumptively foreseen by the parties. [120]

General damage in regard to delictual liability for bodily injuries or death includes all non-patrimonial loss [121] as well as prospective medical expenses and future loss of income or support. [122] Special damage refers to all pecuniary expenses and losses up to the time of trial. [123] In terms of this approach, general damage may include both patrimonial and non-patrimonial loss.

The classification of damage into general and special damage is of limited practical use. [124] These terms are, however, part and parcel of the law of contractual damages. [125] The actual question is what one wants to signify with these expressions

in a particular situation. It is obviously only a way of indicating that particular principles concerning remoteness of damage or the pleading or proof of damage are relevant.

3.5 SUBJECTIVE AND OBJECTIVE APPROACHES TO PATRIMONIAL LOSS [126]

The subjective approach to damage signifies that the interesse of the person in question (ie the diminution in the utility of his or her interests) is judged on how it personally affects the person's patrimonial position. Where, for instance, there is damage to property, one has to determine what the value of the property is to the individual plaintiff. [127]

The following is an example of a subjective approach to damage: [128] A lessee causes damage to a house (the rental property) and the reasonable cost of repairs is R1 000. However, after the termination of the lease, the lessor intends to have the house demolished. Subjectively, the lessor has suffered no damage, since he or she does not intend to have any repairs carried out and they would, in any event, be lost if the house were to be demolished. Objectively speaking, the lessor suffers damage in the amount of R1 000. [129]

Van der Walt [130] favours a subjective approach to patrimonial loss. He even ventures to suggest that the utility of a patrimonial asset does not necessarily need to have a monetary value. [131] However, through this theory he in fact denies the

essential difference between patrimonial and non-patrimonial loss. [132] Monetary value is in fact the expression of exchange value which Van der Walt himself identifies as a quality of a patrimonial asset.

There is some support in our case law for the acceptance of a subjective concept of damage. [133] Nevertheless, our law generally adopts an objective approach [134] with subjective qualifications only in exceptional circumstances. [135] In a sense, damage is always a subjective concept because it is concerned with prejudice suffered by the plaintiff personally. [136] Special damage as a result of breach of contract [137] also deals with the particular role that performance plays in the creditor's patrimony. [138]However,

the assessment of the value of loss can be done only in terms of a standard that contains a sufficient number of objective qualities. [139]

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[1] See para 1.5 on the sources of claims for damage.

[2] Para 2.1.

[3] Some of these definitions accept patrimonial loss as the only form of damage. In a primary sense damage means patrimonial loss but it also includes non-patrimonial damage (see eg Visser *Kompensasie en Genoegdoening* 39–40; para 2.3.2). A problem with some definitions is that the method used to establish damage is erroneously seen as a definition of damage. See Boberg *Delict* 475, 476; '[*D*]*amnum* [is] a calculable pecuniary loss or diminution in [the plaintiff's] patrimony (estate) resulting from the defendant's unlawful and culpable conduct .... Damage (skade) does not mean injury to the plaintiff's person or property; it means "the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act" .... The loss is the diminution in the plaintiff's patrimony (his *interesse* or *id quod interest*).' Reinecke 1976 *TSAR* 28 states that damage presumes a patrimonial reduction and adds that patrimonial loss is a reduction of patrimony as a result of the occurrence of an uncertain event. Van der Walt 1980 *THRHR* 3: Patrimonial loss is the reduction in the utility of an affected element of patrimony or a patrimonial structure in the planned satisfaction of a person's recognized needs; Van der Merwe & Olivier *Onregmatige Daad* 179: Damage means an infringement of patrimony; Klopper *Third Party Compensation* 143: Damage in the strict sense of the word refers to the diminution in a person's patrimony or estate due to the fact that a person can only sustain monetary damage. See further *Santam Versekeringsmpy Bpk v Beyleveldt* 1973 (2) SA 146 (A) at 150: 'Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is ....' (Damage is the unfavourable difference caused by a wrongful act. The reduction must be in respect of something which has a monetary value); *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration (Pty) Ltd* 1981 (4) SA 1 (A) at 8: 'Then "damage" ... will be defined in the terms adopted by the majority in *Swart v Van der Vyver* 1970 (1) SA 633 (A) 643D: "Die vermoënskade ingevolge kontrakbreuk gely, word normaalweg bepaal deur 'n vergelyking van die bestaande vermoënsposisie van die skuldeiser met dié waarin hy sou gewees het indien geen kontrakbreuk plaasgevind het nie".' (Patrimonial loss suffered on account of breach of contract is usually determined through a comparison of the existing patrimonial position with the patrimonial position that would have existed without the breach of contract.) Cf further De Wet & Van Wyk *Kontraktereg en Handelsreg* 222 et seq.

[4] See Van der Walt *Sommeskadeleer* 601, 602 for references to the different aspects of a patrimony and 280–2 for his own views; Reinecke 1976 *TSAR* 28 et seq (the latter source must be considered against the background of his more recent views expressed in his *Diktaat* chap 3 and 1988 *De Jure* 233–7). Cf para 5.4 for personality rights and interests (the 'non-patrimony').

[5] See Van der Walt *Sommeskadeleer* 128, who refers to the view of Mertens that the patrimony is a 'subjektief-funksionele, planmatig gestruktureerde eenheid' (a subjective, functional and planned structured unit).

[6] See Reinecke *Diktaat* chap 3; 1976 *TSAR* 28 et seq; Reinecke et al 12 *LAWSA* (reissue) para 55.

[7] Van der Walt *Sommeskadeleer* 280.

[8] See *Union Government v Warneke* 1911 AD 657 at 665: 'In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties .... Any element of attachment or affection for the thing damaged was rigorously excluded .... As pointed out by Professor *de Villiers* (Injuries, p. 182), the compensation recoverable under the *Lex Aquilia* was only for patrimonial damages, that is, loss in respect of property, business, or prospective gains.' See also *Oslo v Union Government* 1938 AD 584 at 590 where the following quotation from Grüber *Lex Aquilia* 269 appears: '[I]t is the whole loss which the plaintiff has sustained in his property (the word property being taken in the sense of a *universitas* or complex of legal relations, rights, as well as duties).' This was confirmed again in *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 241, 243. See Visser 2004 *De Jure* 378–81 for a discussion of this case. See also *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 316: 'This claim for compensation or right of action in respect of past and future loss of earnings is included in the diminution of the universitas of her right and obligation resulting from the collision.'

[9] See eg *Schnellen v Rondalia Ass Corp of SA* 1969 (1) SA 517 (W) at 520; *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 840–1: 'It is true that the *universitas* concept [of rights and duties] does underlie the Aquilian action and that according to current theories ... the plaintiff's patrimonial loss is measured by the diminution of that *universitas* ... .' See also Van der Merwe & Olivier *Onregmatige Daad* 324, who apparently accept the juridical concept of patrimony.

[10] *Diktaat* chap 3.

[11] See also n 8 above. See on the question of delictual liability for pure economic loss Neethling & Potgieter *Delict* 290 et seq. In the case of misrepresentation there are also problems with classifying the relevant interests in terms of a subjective right. See, however, Neethling 1990 *THRHR* 101 on the so-called right to correct information.

[12] In practice, however, it is accepted that personality rights include some patrimonial interests. This is illustrated by the recoverability of medical expenses as a result of bodily injuries; patrimonial loss caused by defamation; etc. See also paras 2.4.11 and 14.10.3.

[13] Cf also Van der Walt *Sommeskadeleer* 32. It is also possible to argue that a worthless article does form part of someone's patrimony but that its destruction or theft, although unlawful, does not cause damage because its utility, measured in money terms, is not reduced.

[14] *Sommeskadeleer* 243, 282, 444; cf op cit 181: 'The concept of patrimony for the purposes of the law of damages does not merely include objects with monetary value, but also objects with ''user value''—and the plaintiff's obligations are definitely not included. This does not mean that the creation of a new obligation or the increase of an existing obligation is not regarded as damage' (our translation).

[15] As well as the traditional concept of patrimony referred to in n 8 above.

[16] Van der Walt *Sommeskadeleer* gives no examples but presumably he refers to the question of wrongfulness and damage in the case of illegally earned income. However, it seems (see para 2.4.12) that this problem may be solved in a satisfactory manner without rejecting the juridical concept of patrimony or using incorrect principles of assessment. Van der Walt's remark (op cit 34) that every invasion of a right does not necessarily cause damage is obviously correct, but it should be remembered that the juridical concept of damage does not imply that wrongfulness is a prerequisite for damage—para 2.4.9.

[17] *Sommeskadeleer* 280–1 (our translation).

[18] Reinecke 1988 *De Jure* 234 refers, eg, to the vagueness of expressions such as 'feitelike geleenthede' and 'erkende behoeftes'. He also questions the grouping together of different matters such as things ('sake') which are *objects* of rights, and rights themselves. Furthermore, it is debateable whether an object can be part of a patrimony if the person entitled to such object only has a limited right to it—eg a fiduciarius, a mortgagee, lessee or someone exercising a lien. In whose estate does such an object fall? A further problem is that Van der Walt *Sommeskadeleer* 32 holds the opinion that obligations (debts) do not form part of a patrimony but that if a person incurs a debt, this constitutes damage irrespective of whether he or she has assets to satisfy such debt. It seems correct (observes Reinecke) to see debts as negative elements of patrimony. Van der Walt's view that someone's earning capacity is not part of that person's patrimony but that the impairment of such capacity constitutes damage is incorrect. Legal practice accepts earning capacity as an element of patrimony and a good theoretical justification for this is the existence of a so-called personal immaterial property right with earning capacity as legal object (see Neethling 1987 *THRHR* 316).

[19] See also Visser 1991 *THRHR* 783.

[20] The statement by Van der Walt *Sommeskadeleer* 279 that a money measure can definitely not serve as a measure of damage is obviously incorrect. If an element of patrimony need not have a monetary value, it would cause confusion between patrimonial and non-patrimonial loss. Moreover, a defendant may, in terms of the principles of legal causation (para 11.5), only in exceptional circumstances be held liable for damage caused by the unique position (different from the market-related position) which something occupies in a person's patrimony.

[21] *Schadevergoeding* 22–3.

[22] See also Van der Walt *Sommeskadeleer* 34–5 on Fischer's economic concept of patrimony.

[23] 1976 *TSAR* 33; cf also Van der Walt *Sommeskadeleer* 33–4; Reinecke et al 12 *LAWSA* (reissue) para 295; *M Zahn Investments (Pty) Ltd v General Accident Ins Co SA Ltd* 1981 (4) SA 143 (SE).

[24] Reinecke 1988 *De Jure* 234 adds that Bloembergen defines legal patrimony too narrowly because he makes no provision for legally recognized expectancies to acquire patrimonial rights.

[25] *Schadevergoeding* 22.

[26] Para 2.4.4.

[27] Reinecke 1976 *TSAR* 33 states that this is an example of the invasion of a right without causing damage. See also Van der Walt *Sommeskadeleer* 32; in the opinion of Fischer ownership is always an element of patrimony even if its object has no value.

[28] See especially Reinecke *Diktaat* chap 3. See further Reinecke 1976 *TSAR* 28 et seq; Reinecke et al 12 *LAWSA* (reissue) para 55; Van der Merwe *Versekeringsbegrip* 182–3. Through his exposition Reinecke intends to explain all the instances of patrimonial diminution as damage in current law. In other words, he

intends to explain the subject in respect of which a diminution of patrimony takes place. In the discussion which follows, the framework (but not all the detail) of his theory is adopted.

[29] See also Van der Walt *Sommeskadeleer* 32–6, 43, 51, 141, 168, 172, 175, 177, 184, 185, 282, 377, 443–4.

[30] See n 9 above.

[31] Similarly, a thief X clearly suffers no damage if the stolen property in his possession is damaged by Y; and X, who earns income illegally, experiences no patrimonial loss if Y prevents him from carrying on with his activities (para 2.4.12).

[32] Para 2.4.1.

[33] Van der Walt *Sommeskadeleer* 280 mentions the 'subject' of elements of patrimony without revealing the reason why someone is a 'subject'.

[34] See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 224 who declare that a person can only suffer damage to his or her patrimony. A person's body and feelings do not form part of that person's patrimony.

[35] There are different standards of value—eg, replacement value, market value, value of usage, collector's value, sentimental value (affective value), income-generating value etc. See Van der Walt *Sommeskadeleer* 174–5 on how the value of usage has been replaced by exchange value. See also para 3.5 on objective and subjective approaches to patrimonial loss. See, further, Koch *Lost Income* 29; Bloembergen *Schadevergoeding* 52–5; Koch *Reduced Utility* 69.

[36] *Union Government v Warneke* 1911 AD 657 at 665; *Monumental Art Co Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118; *Enslin v Meyer* 1960 (4) SA 520 (T) at 522–3; *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) at 37; *De Lange v Deeb* 1970 (1) SA 561 (O) at 564–5; *Heath v Le Grange* 1974 (2) SA 262 (C) at 263. Cf Koch *Lost Income* 26–7; De Wet & Van Wyk *Kontraktereg en Handelsreg* point out at 224 that sentimental or affective value (which is not of patrimonial significance) should not be confused with historical or collector's value, which is indeed relevant in the patrimonial sphere.

[37] Para 4.5.

[38] Para 2.4.10.

[39] Chap 12.

[40] *Diktaat* chap 3; cf also Reinecke et al 12 *LAWSA* (reissue) para 55.

[41] See also Van der Walt *Sommeskadeleer* 32 on the so-called activa patrimony, which denotes the total of someone's rights with a pecuniary value.

[42] eg ownership, real security rights, servitudes, etc—see Van der Merwe *Sakereg*; Silberberg & Schoeman *Law of Property*. To this may be added the rights of an occupier or holder, a bona fide possessor etc. Cf *Smit v Saipem* 1974 (4) SA 918 (A) at 932. See para 11.1.4; para 13.3 on the use of property.

[43] eg copyright, a right to a patent etc. See Neethling et al *Law of Personality* 8–9, 15, 22 et seq, 39–41; Van der Merwe & Olivier *Onregmatige Daad* 55; Neethling & Potgieter *Delict* 51.

[44] Even if such rights (arising ex contractu or ex variis causarum figuris) to a performance operate (according to some views) only relatively, the impairment of interests protected by them against conduct of the debtor and in some cases a third party (cf Neethling & Potgieter *Delict* 307; Van der Merwe & Olivier *Onregmatige Daad* 370) may constitute damage (see Reinecke 1976 *TSAR* 29). A good example of a personal patrimonial right is the right of a dependant to be supported by his or her breadwinner (cf Reinecke 1988 *De Jure* 235, who uses the term 'continuous right to support'; Boberg *Delict* 488; para 14.7.2). See also on the personal right to someone's services Corbett & Buchanan I 63–4, 74–5; para 14.8. A personal right may also arise from contract as the expectation of the promised performance—para 3.2.4.2*(b)*. See, further, Reinecke 1976 *TSAR* 43 et seq on damage to a res vendita. See also *Holscher v ABSA Bank* 1994 (2) SA 667 (T) at 673.

[45] See Neethling 1990 *THRHR* 104–5.

[46] See Neethling 1987 *THRHR* 316–24; 1990 *THRHR* 101–5; Boberg *Delict* 531, 539; Visser 2004 *De Jure* 379. See *Swanepoel v Mutual & Federal Ins Co Ltd* 1987 (3) SA 399 (W) at 402 (the court correctly accepts earning capacity as part of someone's estate and the criticism by Dendy 1987 *Annual Survey*185 is incorrect). One may also here speak of an expectation to earn income (which has been frustrated—para 3.2.4.2*(b)*). The existence of a right to earning capacity may explain why defamation can lead to an action for patrimonial loss (para 14.10.3; Neethling et al *Law of Personality* 17 et seq, 68 et seq). Personality rights can obviously not be part of someone's patrimony. The examples of damage suffered by an attorney or doctor who loses clients or patients on account of defamation may also be explained on the basis of a (lawful) expectation of profit which has been partly frustrated. The same argument may apply to the loss

of income owing to wrongful detention (cf *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) at 559, 563–4). See also the case where adultery causes patrimonial loss because of the loss of the services of the guilty spouse (eg *Viviers v Kilian* 1927 AD 449; *Bruwer v Joubert* 1966 (3) SA 334 (A) at 337). Damage in this instance can also be explained as the interference with interests covered by a personal right to such services (n 44 above).

[47] eg property, an invention, goodwill, a contractual performance. See also *Swart v Van der Vyver*1970 (1) SA 633 (A), in terms of which a farm to which a fiduciarius was entitled was not part of his estate. See also Sonnekus 1989 *TSAR* 326; Van Wyk 1988 *THRHR* 228 on pension rights. See further *McLelland v Hulett* 1992 (1) SA 456 (D) on a shareholder's financial right or interest in the property of a company.

[48] See n 18 above.

[49] Reinecke *Diktaat* chap 3.

[50] See para 3.4.1 on damnum emergens. The following observations should be made: First, wrongfulness (invasion of a right) is no requirement for damage; damage consists in the reduction of the utility of an object or interest protected in terms of a subjective right. Secondly, if one accepts the existence of a subjective right to earning capacity (see n 46 above) it is clear that the impairment of interests protected by this right has a future dimension which may be described as prospective loss (lucrum cessans—see para 6.1; cf *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 613 but contra Reinecke 1988 *De Jure* 236). Earning capacity is not something of a static nature as its content may change and is determined by probable future events such as, eg, the claimant's life expectancy, health, general economic conditions and many other facts and contingencies (para 6.7.3). The right to support of a dependant also discloses a future dimension which does not relate to damnum emergens but rather to lucrum cessans.

[51] Previously Reinecke 1976 *TSAR* 28; 1971 *CILSA* 325 referred to this as the future patrimony; cf also Reinecke et al 12 *LAWSA* (reissue) paras 55, 306 (on expectations in connection with the law of insurance). See para 6.1 on future loss.

[52] See the following examples where expectations were frustrated: *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D), where X damaged an electric cable to Y's factory which caused Y a loss of production; *Franschhoekse Wynkelder (Ko-op) Bpk v SAR & H* 1981 (3) SA 36 (C), where the defendant sprayed poison next to railway tracks to kill weeds but it caused damage to wine crops and the plaintiff, who was entitled to receive such crops, suffered a loss of turnover; *Shrog v Valentine* 1949 (3) SA 1228 (T): a loss of income caused by damage to a vehicle amounts to patrimonial loss and the implication is that the expectation of such income was part of the plaintiff's patrimony. The mere loss of use of a vehicle which is not employed for business purposes, but which loss nevertheless causes patrimonial loss, should be recognized as the loss of an expectation—*Kellerman v South African Transport Services* 1993 (4) SA 872 (C); *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA)—frustration of an expectation to make reasonable profit on an investment. See Visser & Potgieter 1994 *THRHR* 312; Smith 1994 *JBL* 175–6; Visser 2003 *THRHR* 654–5; 2004 *Speculum Juris*141–2. See also para 11.1.4 on damage to a res vendita and *Bedford v Suid-Kaapse Voogdy Bpk* 1968 (1) SA 226 (C), where there was an expectancy in regard to the acquisition of shares but damage was not proved. See also *Commercial Union Ass Co SA v Stanley* 1973 (1) SA 699 (A) at 704 on the patrimonial component of marriage prospects.

[53] This (somewhat vague) expectation that a patrimony will not be reduced (which may coincide with the coming into existence of a debt as a negative element of patrimony—para 3.2.4.3) is added to cover certain cases of liability for pure economic loss (see Neethling & Potgieter *Delict* 290 et seq). See, eg, *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty)* 1978 (4) SA 901 (N), where A suffered a financial loss because a cheque which B had sent him was stolen and, because the cheque was not crossed, the thief had deposited it and withdrawn the money. Cf also *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicles Distributors (Pty) Ltd* 1972 (4) SA 185 (T), where the lessee of a vehicle suffered damage because of defects which led to expensive repairs; *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D): A's ship damaged B's mooring buoy negligently. This resulted in a delay in the discharge of a tanker of which C (the plaintiff) was the lessee and charterer and he was obliged to pay additional demurrage in terms of his contract with the lessor for the period of delay.

[54] Legal practice usually refers to this as prospective loss or lucrum cessans (see para 3.4.1). Frustration of an expectation does not, however, always imply prospective loss. See, eg, misrepresentation which leads to pure economic loss (in other words, without affecting plaintiff's person or property—cf Neethling & Potgieter *Delict* 297 et seq). Reinecke 1976 *TSAR* 29–30 cites *De Jager v Grunder* 1964 (1) SA 446 (A) as an advanced but correct example of the frustration of an expectancy. Although the representee could not prove that his own contractual performance was worth less than the counter-performance to which he was entitled, the bigger profit he could have made had he not been misled was acknowledged to be his damage (see para 13.4.2). This is an example of a loss of profit already sustained, not future damage—cf *De Klerk*

v ABSA Bank Ltd 2003 (4) SA 315 (SCA); Visser 2004 *Speculum Juris* 141–2. See also *Van Breda v Jacobs* 1921 AD 330 (see Reinecke 1976 *TSAR* 29 n 35), where the defendants, contrary to customary law, caught fish which the plaintiffs were entitled to catch. This case was apparently concerned with the plaintiffs' legally recognized expectation to the fish and not with future loss (in the sense of damage after judgment had been given).

[55] See, eg, *Whitfield v Phillips* 1957 (3) SA 318 (A); *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *North and Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A).

[56] Cf also the example where X's horse has a chance of one in three of winning and earning prize money. If Y injures the horse negligently and thus frustrates X's expectation to receive the winnings, X should be able to recover a third of the prize money (para 6.4.5). See also *Trichardt v Van der Linde*1916 TPD 148. X, the owner of a race horse, contracted with Y to train the horse. Y was to have received part of the winnings. X repudiated the contract before the horse had earned any prize money. The court could not assess the value of the chance in question but awarded Y his expenses as damages.

[57] See *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 241: '[W]here a person's earning capacity has been compromised, ''that incapacity constitutes a loss, *if such loss diminishes the estate*'' (Rumpff CJ in the above quotation from *Dippenaar*'s case) and ''he is entitled to be compensated *to the extent that his patrimony has been diminished*'' (Smalberger JA in *President Insurance Co Ltd v Mathews*)'; Visser 2004 *De Jure* 379. See in general Boberg *Delict* 538–9. Cf *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917: 'The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.' See also *Santam Versekeringsmpy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150; *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A) at 111. From these cases Reinecke *Diktaat* chap 3 concludes that our courts have held that the chance or expectation of earning income is an asset in a person's estate. Contra Van der Merwe & Olivier *Onregmatige Daad* 186, who argue that the loss flows from the right to physical and mental integrity. This view reads too much into the right to corpus and, furthermore, earning capacity consists of more than bodily interests. Since earning capacity includes personality aspects, Van der Walt *Sommeskadeleer* 289 refuses to recognize it as an element of patrimony, though he concedes that impairment of patrimony constitutes damage. This demonstrates that Van der Walt's construction of a patrimony is incomplete since it is an enigma how patrimonial loss can exist without an element of patrimony being affected. According to Koch *Reduced Utility* 216 the asset in the claimant's patrimony is not his or her work capacity but the present discounted value of the income expected from the use of that capacity. See further Koch *Lost Income* 21 and 1989 *THRHR* 74 on the present value of earning capacity. In terms of *Lockhat's Estate v North British Ins* 1959 (3) SA 295 (A) this expectation takes account of someone's actual life expectancy only after an accident and resultant injuries (and not the expectancy the person had before an accident—para 14.6.4. See in general Koch 1986 *De Rebus* 499–502; *Reduced Utility* 213 et seq.

[58] See n 46 above. Reinecke 1988 *De Jure* 235 observes that the Appellate Division has an ambivalent approach to earning capacity. On the one hand it is accepted as an asset in someone's estate, but, on the other hand, it is merely seen as the loss of future income without involving a particular patrimonial asset—he refers to *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A).

[59] The personal right is aimed at the receipt of something else, namely performance. See, however, para 3.2.4.2*(a)*.

[60] See Reinecke *Diktaat*. According to Visser 2003 *THRHR* 654 there is no numerus clausus of legal expectations recognized by our law, but the acceptance in principle that an expectation can form part of the legal patrimony creates the possibility to extend the legal concept of the patrimony even more.

[61] Is, for instance, a spes successionis (an expectation to an inheritance) legally recognized and protected? The following references support recognising such an expectation: *Louw v Engelbrecht* 1979 (4) SA 841 (O) at 846; *Tshabalala v Tshabalala* 1980 (1) SA 134 (O) at 141; *Ross v Caunters* [1979] 3 All ER 580; Radesich 1987 *THRHR* 289: '[I]t ought to be remembered that after the testator's death the beneficiary's potential benefit is transformed into an assured benefit and the loss of an assured benefit constitutes damage'; Midgley *Lawyers' Liability* 167: 'An intended beneficiary may have sacrificed time and money to look after the deceased and the lawyer's negligent conduct may have prevented the deceased from giving some monetary recognition to that fact'; Cilliers 1980 *De Rebus* 389; Erasmus 1980 *De Rebus* 391; Wunsh 1988 *TSAR* 24; Rogers 1986 *SALJ* 607–13; Koch *Reduced Utility* 330 et seq; Visser 2003 *THRHR* 653–4. See, however, Reinecke 1971 *CILSA* 326; 1976 *TSAR* 55–6; and Sonnekus 1981 *TSAR* 175–6, who submit that the expectation of an inheritance should not be recognized.

However, it would seem that our courts have now in principle recognized the frustration of a spes successionis as damage. In *Pretorius v McCallum* 2002 (2) SA 423 (C) the plaintiff claimed damages as a disappointed beneficiary from an attorney who had caused the will to fail by merely initialling (as opposed to signing) the first page as a witness. At 430 Conradie J held that in the South African law there is in

principle no complaint against the existence of a cause of action based on a legal duty by an attorney to ensure that the expectations of a potential beneficiary will be realized. See Van der Schyff 2001 *Stell LR* 454. In *Ries v Boland Bank PKS Ltd* 2000 (4) SA 955 (C) the court also acknowledged a claim by a disappointed beneficiary against an insurance broker. See also *BOE Bank v Ries* 2002 (2) SA 39 (SCA) at 46 and the discussion of the case by Roederer & Grant 2002 *Annual Survey* 394–8 and Neethling & Potgieter 2002 *THRHR* 473; *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C); Wunsh 1996 *SALJ* 46; Hutchison 2000 *SALJ* 186. In *Aucamp v University of Stellenbosch* 2002 (4) SA 544 (C) at 575–6 the plaintiff succeeded as a disappointed beneficiary of a group life insurance scheme in his claim for pure economic loss based on a negligent misrepresentation made by the defendant towards him (see Neethling & Potgieter 2003 *THRHR* 318–22). See para 12.24.3.2 for the assessment of damages in such cases.

The heirs of someone who has been killed may not claim damages from a wrongdoer on the ground that they would have inherited more had the deceased lived longer (*Lockhat's Estate v North British and Mercantile Ins Co Ltd* 1959 (3) SA 295 (A)). The implication of this is that they have no legally recognized expectation in this regard. What is the position regarding a spouse's (statutory) expectation to share in the accrual of the estate of the other spouse (see s 3 of the Matrimonial Property Act 88 of 1984)? This expectation or right may not be attached or ceded during the existence of the marriage and forms no part of a spouse's insolvent estate (s 3(2)). Section 8 provides for the accelerated award of a spouse's share in the accrual where such spouse's right is seriously threatened. What is the position, for example, where X (the husband) is negligently killed and his wife's share in the accrual is smaller than it would have been if he had died later? The same principles mentioned in regard to heirs probably apply here. See in general Sonnekus 1989 *TSAR* 202, 326 on the expectation of a pension.

[62] See Van der Walt *Sommeskadeleer* 274. Apparently no fixed degree of probability or possibility exists in this regard. Probably even a 10 per cent possibility may in a particular case be sufficient to have a monetary value. See also Koch *Reduced Utility* 76.

[63] Reinecke 1976 *TSAR* 30. It is generally accepted that a person may alienate certain expectations. See on the cession of a spes *Schreuder v Steenkamp* 1962 (4) SA 74 (O) at 76. It is also possible to agree to sell the fruits of a spes without bearing the risk in connection with its coming into being. A right to share in the accrual of a spouse (see s 3 of the Matrimonial Property Act 88 of 1984) may, however, not be ceded. Reinecke loc cit adds that the fact that someone may immediately claim damages for the frustration of an expectation serves as proof that such frustration constitutes damage per se.

[64] Thus the expectation to earn money through illegal activities is not protected by law and is not part of someone's patrimony (see *Dhlamini v Protea Ass Co Ltd* 1974 (4) SA 906 (A); paras 2.4.12 and 11.6; Reinecke 1988 *De Jure* 237).

[65] See Koch *Reduced Utility* 71 et seq for a detailed explanation of the technique whereby the present value of an uncertain hypothetical event is calculated by taking the value of that event as a certainty and then reducing it by a percentage to allow for the contingency of non-occurrence.

[66] See Van der Walt *Sommeskadeleer* 32 on the passiva patrimony. See also Reinecke et al 12 *LAWSA* (reissue) para 55.

[67] This may be a voluntary assumed debt resulting from an uncertain event (eg medical expenses on account of bodily injuries), or a 'totally' involuntary debt (eg where a person is vicariously liable for the delict of another) or a debt in terms of an insurance policy. See Reinecke et al 12 *LAWSA* (reissue) para 55: 'Such a liability may arise ex lege (for instance, liability as a result of a delict) or ex contractu (for example the liability of an insurer where it chooses to reinsure itself).' The authors (12 *LAWSA*(1988) para 103) also discuss the difficult question whether expenses already incurred but which have become useless are to be seen as debts and thus damage. Cf where a vehicle is destroyed a day after its licence fee has been paid: 'The concepts of damage and its accompanying shadow, insurable interest, are wide enough to cover such phenomena, if for no other reason than that assets which have been or are to be acquired by the expenses will become partially or totally valueless.' See also para 3.3.3 for more detail.

[68] See Möller 1976 *TSAR* 59, 64.

[69] See *Jonnes v Anglo-African Shipping Co (1936) Ltd* 1972 (2) SA 827 (A) at 837: 'It seems clear, therefore, that the words ''loss of damage'' may bear the meaning of loss or damage sustained as a result of an inescapable obligation to pay money even before the money is actually paid.' See also *Guardian National Ins Co v Van Gool* 1992 (4) SA 61 (A) at 67–8 on the question in whose estate a future debt falls.

[70] Reinecke *Diktaat* chap 3 refers to this as factually necessary expenses. It may also be seen as the expectation of incurring a debt. The same requirements as for an expectation of a benefit (para 3.2.4.2*(b)*) should mutatis mutandis apply here. See further on insurable interest Reinecke et al 12 *LAWSA* (reissue) paras 55 and 72 et seq.

[71] Where, eg, there is a 30 per cent chance that someone has to incur medical expenses of R1 000, that person is awarded R300 (see *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 76).

The amount in question must also be discounted to its present value—see Corbett & Buchanan I 8; Koch *Reduced Utility* 71 et seq and para 14.4.

[72] See also *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D).

[73] Para 6.7.4.

[74] *Shrog v Valentine* 1949 (3) SA 1228 (T).

[75] Joubert *Contract* 260.

[76] Cf *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); *Friedman v Glicksman* 1996 (1) SA 1134 (W); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA); Lind 1992 *SALJ* 428; *Stewart v Botha* 2008 (6) SA 310 (SCA); Mukheibir 2008 *Obiter* 515–23; Mukheibir 2005 *Obiter* 753; Giesen 2009 *THRHR* 257–73; Chürr 2009 *THRHR* 168–74; Van den Heever 2006 *THRHR* 188–200. See para 11.1.1 n 3.

[77] Para 3.2.4.3*(a)*.

[78] It may happen in terms of s 17(4)*(a)* of the RAF Act 56 of 1996 (para 8.4) that an injured person has received an undertaking from the RAF to pay his or her medical costs as incurred. Here the undertaking (also as a positive expectation) creates a counterbalance for the expectation of a debt.

[79] Para 3.2.1.

[80] Para 3.2.1. Patrimonial loss is primarily a real phenomenon (with the exception of pure economic loss—para 3.4.2—or the case where money itself is stolen) but it should always have a direct monetary value. Utility value in the context of patrimonial loss thus refers to monetary value assessed by means of the correct measure of value (para 3.2.4.1). See also Koch *Reduced Utility* 5 et seq.

[81] In the case of a debt or expectation of a debt the mere creation or increase thereof constitutes a reduction in utility. See in general Reinecke 1976 *TSAR* 35–7; Reinecke et al 12 *LAWSA* (1988) para 103.

[82] Similarly, the existence of damage is not determined by whether or not the other elements of a delict or a breach of contract are present.

[83] See also Reinecke 1976 *TSAR* 35, who gives the example of the loss of a contractual right on account of malperformance where X delivers wheat of low quality to Y, who accepts it. Through Y's acceptance of the wheat, his personal right is extinguished and replaced by a (real) right to low-quality wheat. The difference in value between these two rights constitutes damage.

[84] See Reinecke et al 12 *LAWSA* (reissue) para 295 on lost and stolen property; para 14.6 on earning capacity.

[85] See, eg, *De Jager v Grunder* 1964 (1) SA 446 (A). Loss of possession of property also implies that the power to use such property during the time of possession is lost. See para 13.3 on the loss of use of an object.

[86] Paras 11.1.4 and 13.1 where different persons have rights to an object.

[87] See para 12.3 on the ways in which a breach of contract may cause damage.

[88] eg where X is vicariously liable for a delict of his employee Y (see Neethling & Potgieter *Delict*365 et seq).

[89] eg where X's duty to provide support to his child is increased through injury to such child. See *Saitowitz v Provincial Ins Co Ltd* 1962 (3) SA 443 (W); *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A).

[90] This may be contrasted with the case where X, through misrepresentation, causes Y to assume new liabilities.

[91] See also n 67 above. Debts and expenses are relevant in different situations. In addition to the fact that expenses already incurred as well as expected debts and expenses which have been rendered worthless constitute damage, the saving of certain expenses is relevant in regard to the collateral source rule (para 10.7). Hypothetical expenses are also taken into account in calculating net profit (para 4.2.3).

[92] See also the further examples by Reinecke et al 12 *LAWSA* (1988) para 103; and Van der Merwe & Reinecke 1984 *TSAR* 88 with reference to *Probert v Baker* 1983 (3) SA 229 (D) at 235. See also *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 36–7: 'Therefore, expenditure reasonably incurred prior to the breach in contemplation of the promised marriage taking place and which is rendered useless by the breach can obviously be recovered. Expenditure or loss incurred or to be incurred after the breach can also be awarded if the above requisites are present, but only if such damage is not covered by an award of prospective loss.' See also Lubbe 1984 *SALJ* 623; Oelofse 1982 *TSAR* 64; Joubert 1976 *THRHR* 5.

[93] Van der Walt *Sommeskadeleer* 119–20 submits that the person who has incurred a debt may structure his or her patrimony according to his or her own desire and that the defendant cannot argue that an existing debt may not be taken into account in comparing the plaintiff's patrimonial positions. Damage in regard to expenses or debts becoming useless consists in the frustration of the plaintiff's planned

patrimonial structure. Bloembergen *Schadevergoeding* 203 gives the example of X who cannot undertake a holiday on account of Y's delict against him and this constitutes patrimonial loss. X loses the enjoyment of a holiday (which resembles non-patrimonial loss) but its monetary value is the cost of the holiday. Reinecke *Diktaat* observes that damage in the form of useless expenses may be explained in various ways, viz that patrimonial rights which the plaintiff intended to acquire are valueless, or that the expenses will have to be repeated. Van der Vyver & Joubert *Personereg* 481 are of the opinion that wasted expenditure in connection with breach of promise to marry may be explained on this basis. See, however, the obiter remark in *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at 562 that wasted expenses are not caused by the breach of promise per se, but from a number of express and tacit agreements reached during the course of the parties' engagement (cf Slabbert & Van der Westhuizen 2010 *Obiter* 204). See also Van der Merwe & Reinecke 1984 *TSAR* 88 who raise questions as to the test of causation to be used, the problem of unreasonable expenses and the duplication of damages in the *Guggenheim* case (n 92 above).

[94] Cf also where X, on account of Y's malperformance, has to incur expenses in order to protect himself or herself against loss of profit.

[95] See paras 6.4.1 and 14.4.

[96] See Van der Walt *Sommeskadeleer* 278–9.

[97] It is common to find damage being classified according to the different forms it may take. Eg, Bloembergen *Schadevergoeding* 41 et seq distinguishes between the following (in the context of delict): total loss of property, damage to property, temporary interference with the use of an object, encroachment on immaterial property rights, loss of profits, expenses. He adds immaterial (non-patrimonial) and future loss. See also McGregor *Damages* 19 et seq: 'general and special damage', 'normal and consequential losses', 'basic pecuniary loss', 'consequential pecuniary losses', 'past and prospective damage'; Cooper-Stephenson *Personal Injury Damages* 89 et seq distinguishes between pecuniary and non-pecuniary loss, positive and negative losses, special and general damages, aggravated and exemplary damages, nominal and contemptuous damages; Corbett & Buchanan I 2 refer to a threefold division, namely between real and nominal damages, general and special damages and sentimental (or non-pecuniary) and patrimonial damages.

[98] See Erasmus & Gauntlett 7 *LAWSA* para 13, 23 n 1; Bloembergen *Schadevergoeding* 28; Corbett & Buchanan I 4; Neethling & Potgieter *Delict* 220.

[99] See eg chap 6 on prospective loss. The contrary opinion by Erasmus 1975 *THRHR* 108 is obviously incorrect.

[100] See Bloembergen *Schadevergoeding* 28, who describes damnum emergens ('verlies') as a patrimonial diminution and lucrum cessans ('winsderving') as the loss of a patrimonial increase. Visser 2004 *Speculum Juris* 141 sees lucrum cessans as damages for lost gains or profits.

[101] See further Boberg *Delict* 476: 'Because a delict may diminish an estate not only by reducing its value but also by preventing its value from increasing, damage is not confined to actual losses or expenses (*damnum emergens*), but it includes also the deprivation of a financial benefit that would otherwise have accrued (*lucrum cessans*). To the former category belong medical expenses and the depreciation of damaged property; to the latter a loss of earnings or profits.' See also *Whitfield v Phillips*1957 (3) SA 318 (A) on these terms in a contractual context; Van Aswegen *Sameloop* 162; Reinecke 1976 *TSAR* 28–32; *Oslo Land Co v Union Government* 1938 AD 584 at 590–1; *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (1) SA 174 (D) at 177; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 835; Van der Walt *Sommeskadeleer* 19.

[102] Para 4.2.3.

[103] See Lötz 2007 *Fundamina* 90–8 for a detailed discussion of the Roman-Dutch origin of pure economic loss.

[104] See *Oslo Land Co v Union Government* 1938 AD 584 at 590: 'By the word damage is not meant the injury to the property injured, but the *damnum*, that is the loss suffered by the plaintiff by reason of the negligent act.' See Neethling & Potgieter *Delict* 220.

[105] This frequently occurs in misrepresentation and unlawful competition (see *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty)* 1978 (4) SA 901 (N)—n 53 above.

[106] See *Franschhoekse Wynkelder (Ko-op) Bpk v SAR&H* 1981 (3) SA 36 (C)—n 52 above. See further Neethling & Potgieter *Delict* 290 et seq; O'Brien 1989 *TSAR* 274, 279; 1992 *TSAR* 145–7.

[107] eg *Kader v Minister of Law and Order* 1992 (3) SA 737 (C).

[108] See Neethling & Potgieter *Delict* 220; Reinecke *Diktaat* chap 3; Van der Walt *Sommeskadeleer*88. See Millard 2009 *De Jure* 48–68 on 'extended damage'.

[109] In the sphere of contract direct loss may in a sense be identified with general damage and consequential loss with special damage (para 11.5.5.2). See also McGregor *Damages* 23: 'The normal loss is that loss which every claimant in a like situation will suffer; the consequential loss is that loss which is

special to the circumstances of the particular claimant. In contract the normal loss can generally be stated as the market value of the property, money or services that the claimant should have received under the contract, less either the market value of what he does receive or the market value of what he would have transferred but for the breach. Consequential losses are anything beyond this normal measure, such as profits lost or expenses incurred through the breach, and are recoverable if not too remote.'

[110] eg Reinecke *Diktaat* chap 3.

[111] See the following examples of consequential loss from legal practice: in *Kroonstad Westelike Boere Ko-op Bpk v Botha* 1964 (3) SA 561 (A), X bought poison to use against pests harming his sorghum crop. After application of the poison, the sorghum was destroyed but the pests escaped unharmed. X claimed damages and the court held (at 571): '[L]iability for consequential damage [in casu the loss of a crop] caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.' See also *Holmdene Brickworks v Roberts Construction* 1977 (3) SA 670 (A), where a manufacturer of bricks was held liable when walls built with low-quality bricks had to be demolished. This damage was seen as consequential loss. In *Zweni v Modimogale* 1993 (2) SA 192 (BA) Kotzé AJA held that if a wrong has caused destruction of a plaintiff's property, damages based on the value of the property together with any consequential loss flowing from the destruction are recoverable, even though the plaintiff's financial stringency has caused the consequential loss. See further Kahn *Contract* II 173; Koch *Reduced Utility* 45–6; Dendy 1994 *JBL* 17.

[112] Where X sells diseased cows to Y, the latter's direct loss is represented by the low value of the cows. If Y's own herd is also infected, one may probably classify this as consequential damage. See also Van der Walt *Sommeskadeleer* 88 on the views of Larenz concerning the relationship between damage to an object, consequential patrimonial loss, lucrum cessans and damnum emergens. Whereas lucrum cessans is always consequential patrimonial loss, damnum emergens is not necessarily damage to an object. See op cit 88–9 where he furnishes the following example: X's bull used for stud farming is injured and this renders him incapable to be used as before. In addition to the damage suffered in respect of X's inability to use the bull, he may also be unable to use the cows specially maintained to be used in combination with the bull (consequential patrimonial loss). X thus suffers damage in his subjectively structured patrimony which may be described as damnum emergens. However, it is not merely damage to an object.

[113] See Neethling & Potgieter *Delict* 221; Erasmus & Gauntlett 7 *LAWSA* para 17; Corbett & Buchanan I 3, 35–7 Boberg *Delict* 479–80; *Klopper v Maloko* 1930 TPD 860 at 863; Lubbe & Murray *Contract* 618, 619–23, 624–8, 633–4; Wessels *Contrac*t II 846 (damnum commune—general damage—and damnum singulare—special damage). See *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 333-4, 349 (claim for special damages in a defamation action must be brought under the actio legis Aquiliae and the claim for general damages under the actio iniuriarum); *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 252–3; *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A) at 63. See chap 16 on pleading and proof of damage.

[114] See Visser *Kompensasie en Genoegdoening* 12 et seq. Klopper *Third Party Compensation* 145–6 argues that general and special damage should be synonyms for non-patrimonial and patrimonial damage respectively. Cf also McGregor *Damages* 19 et seq, who distinguishes between at least four meanings of general and special damage. English authors also differ among themselves on the nature of the various meanings (Visser op cit 15 et seq). Some of these meanings are related to certain peculiarities of English law which are not part of our law—eg delicts ('torts') actionable per se (ie without proof of damage). Some of the meanings and distinctions in English law are: *(a)* General damage is loss which flows commonly and naturally from a breach of contract while special damage relates to special circumstances. *(b)* A jury may award damages for general damage where there is no particular measure except the opinion of a reasonable person. Damages for special damage are awarded for any consequences which flow 'reasonably and probably' from a breach of contract. *(c)* The existence of general damage is presumed while special damage must be specially pleaded and proved.

[115] Erasmus & Gauntlett 7 *LAWSA* para 17; *Klopper v Maloko* 1930 TPD 860 at 863.

[116] Damnum circa rem. See *Lavery & Co v Jungheinrich* 1931 AD 156 at 174–5; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550.

[117] See *Graaff v Speedy Transport* 1944 PD 236; *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T) at 718; *Durban Picture Frame v Jeena* 1976 (1) SA 329 (D). See, however, in the case of bodily injuries the particulars required in terms of rule 18(10) of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules on pain and suffering, even though it is classified as 'general damage' (para 14.2).

[118] Damnum extra rem. See n 111 above.

[119] *Philip v Metropolitan and Suburban Railway Co* (1893) 10 SC 52; *Thompson v Barclays Bank DCO* 1965 (1) SA 365 (W). According to *Gloria Caterers (Pty) Ltd v Friedman* 1983 (3) SA 390 (T) at 393,

loss of profit does not necessarily amount to special damage and may be general damage in terms of the facts of the case. See, however, *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 574–5, where the injury to the business reputation of a company is described as general damage and the loss of profit as special damage. See also *Dhlomo v Natal Newspapers* 1989 (1) SA 945 (A) at 952–3 on a claim by a juristic person (corporation) for defamation without proof of special damage.

[120] Para 11.5.5.2; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550. A common example of general loss is the loss of interest on money not paid timeously. An example of special damage is the following: X, a farmer, contracts with Y to repair a tractor belonging to X. X informs Y that he needs the tractor in time to plough his fields. Y fails to repair the tractor in time and X loses his harvest. This loss constitutes special damage (see *North and Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A)).

[121] eg pain, suffering, etc; para 5.5.

[122] Cf generally *Brown v Bloemfontein Municipality* 1924 OPD 226; *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T); *Roberts v Northern Ass Co Ltd* 1964 (4) SA 531 (D) at 539; *Strougar v Charlier* 1974 (1) SA 225 (W) at 228; *Graaff v Speedy Transport* 1944 TPD 236; *Lockhat's Estate v North British and Mercantile Ins* 1959 (1) SA 24 (N) at 29.

[123] See Corbett & Buchanan I 3, 35–6; para 14.2.

[124] See *Durban Picture Frame Co (Pty) Ltd v Jeena* 1976 (1) SA 329 (D). De Wet & Van Wyk *Kontraktereg en Handelsreg* 227 describe this classification as useless for practical purposes. Furthermore, the phrase 'general damage' is so vague that it is surprising to see it being used to describe, eg, non-patrimonial loss. See, however, *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 333, 336, 349 where the court clearly distinguished between special damages and general damages in a defamation action by a corporation.

[125] Para 11.5.5.2.

[126] Cf para 5.6.3 on objective and subjective elements in non-patrimonial loss. See also Bloembergen *Schadevergoeding* 36–9 on so-called concrete (subjective) and abstract (objective) damage. See Van der Walt *Sommeskadeleer* 196–205 for a discussion of Bloembergen's views.

[127] See Van der Walt *Sommeskadeleer* 12 on Mommsen's theory that interesse is necessarily subjective. The value of property is determined through an objective measure, eg market value. Subjective interesse may coincide with market value, or may be higher, but can never be lower than market value. According to Van der Walt op cit 31, damage has individual as well as general qualities: the plaintiff's own appreciation of value (a subjective element) must be shared by his or her legal compatriots (an objective element). See further Van der Walt op cit 42, 48–9, 55, 60 (on Möller's objective monetary value as a criterion of damage); 74 (Neuner sees patrimonial loss as the impairment of something with an exchange value); 85 (Larenz accepts exchange value as a measure of damage to an object but prefers a more subjective approach in the case of consequential loss); 96, 122 (Zeuner's view is that damage may be lower than exchange value where the plaintiff has a duty to mitigate his or her loss—para 11.3—or in the case where the collateral source rule does not apply—para 10.1); 132 (Mertens accepts market value as minimum and maximum limits of damage); 174, 197–205 (Bloembergen *Schadevergoeding* 38 et seq subdivides damage into different categories and in some instances follows an objective and in others a subjective approach); 206 (market-price rule); 213–16 (the market-price rule—para 12.7.2—is merely a practical aid and does not detract from a subjective concept of damage). See further Oelofse 1982 *TSAR* 61; Joubert 1982 *THRHR* 79 on the assessment of loss by having regard to the position of the particular plaintiff.

[128] See *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 5.

[129] One may of course argue that the probability of demolishing the house is also relevant where the loss is judged objectively. This is comparable with the provision for future contingencies in assessing loss (para 6.7.3).

[130] *Sommeskadeleer* 281–3.

[131] *Sommeskadeleer* 281. See also op cit 283: 'Juis omdat 'n individuele vermoënsbestanddeel altyd op die een of ander wyse by die eiser se subjektief-funksionele, planmatig gestruktureerde vermoënseenheid ingeskakel is, kan die nuttigheidswaarde van so 'n individuele vermoënsbestanddeel nie sonder meer aan die hand van 'n heersende of markprys bepaal word nie. Die nuttigheidswaarde van so 'n vermoënsbestanddeel ... kan hoër of laer wees as dié wat in 'n gemiddelde prys daarvan (hóé dan ook bereken) tot uitdrukking kom.'

[132] See para 2.3.3. If patrimonial interests do not need to have an (objective) monetary value, they display an essential characteristic of non-patrimonial interests.

[133] See *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration* 1981 (4) SA 1 (A) at 8–9: 'The majority decision in *Swart v Van der Vyver* [1970 (1) SA 633 (A)], however, does not establish

that, in cases of an obligation to reinstate, the damage is constituted primarily by the difference in value between the *res* as it is and as it would have been had the obligation been performed, but also that the *res* must be seen in the light of its economic role in the *patrimonium* of the particular creditor. In effect the majority decision adopted a subjective (concrete) approach to the determination of damage, as opposed to the objective (abstract) approach of the minority ... . The English law, on the other hand, appears, in general, to favour the objective approach.' (See para 12.17n 287 for the facts of this case.) See further *Mlombo v Fourie* 1964 (3) SA 350 (T) at 358: 'The effect of that passage [Voet *Commentarius* 6.1.32] is that the value that must be taken where the defendant has been and is *mala fide* is the value of the articles to the plaintiff.' See also the comments of Koch *Lost Income* 81–2 on *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 466. For a suggested further application of the subjective approach see Reinecke & O'Brien 1998 *TSAR*591–2. Visser 2004 *De Jure* 380 argues that the court's rejection in *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 244–5 of the argument that the plaintiff's injuries would hamper him in general to earn an income in the open job market is proof of the court's application of the subjective approach to patrimonial loss. No evidence was presented to the court to prove that the plaintiff would ever in future have tried to earn an income in the open market.

[134] See eg the application of the market value rule in contractual damages (para 12.7.2) and reasonable costs of repair in damage to property (para 13.1). See generally Lubbe & Murray *Contract*604–5; Oelofse 1982 *TSAR* 61.

[135] eg where there is liability in respect of special damage caused by a breach of contract (para 12.1 and cf the facts in *North and Son v Albertyn* 1962 (2) SA 212 (A)—para 3.4.4). See also *Erasmus v Davis* 1969 (2) SA 1 (A) at 7: 'Where the money value of the undamaged vehicle to the plaintiff is its market value (and it is not necessarily so in every case).'

[136] This is valid in respect of patrimonial loss (cf, eg, para 14.6 on the determination of loss of earning capacity by considering circumstances and contingencies affecting the plaintiff personally) as well as non-patrimonial loss (cf para 5.5).

[137] Para 11.5.5.2.

[138] Compensation is made available for this loss if it was within the contemplation of the parties.

[139] This is even the position in non-patrimonial loss where awards in previous cases provide an important measure in quantification (para 15.2.3). If a (more) subjective approach is to be adopted (and general principles on this have not yet been sufficiently developed) it should be remembered that a defendant can be held liable only for damage which may reasonably be attributed to him or her (para 11.5.1).

Chapter 4
ASSESSMENT OF PATRIMONIAL LOSS

4.1 IMPORTANCE OF COMPARATIVE METHOD

The subject discussed in this chapter is how the existence and extent of damage [1]may be determined in a given situation. In other words, it examines the question: what is the general standard or measure of damage?

Reinecke [2] is apparently of the opinion that damage should not be ascertained through a comparison between someone's position after a damage-causing event and his or her hypothetical position had the damage-causing event not taken place. This author holds that the judging of the actual consequences of an event is sufficient to establish damage and he does not refer to any comparative method. Elsewhere, [3] he expresses the opinion that the value of an asset after a damage-causing event must be deducted from its value before such an event.

Any suggestion that a comparative method is unnecessary to assess damage is obviously incorrect. It is impossible to determine the actual consequences of an event without at least comparing the position before the event (eg unlawful conduct by the defendant) with the position after the event. [4] How else can the *effect* of an event (patrimonial loss) be determined? [5] Moreover, our legal practice correctly accepts that a comparative formula must be used to determine damage. [6] The Supreme Court of Appeal has observed: 'It is now beyond question that damages in delict (and contract) are assessed according to the comparative method.' [7]

4.2 TRADITIONAL SUM-FORMULA APPROACH [8]

4.2.1 Introduction

Traditionally, the sum-formula approach as developed by the German jurist Mommsen has been the basis for the nature and assessment of patrimonial loss in

our law. [9] From the discussion of the sum-formula approach it will become evident that it is actually more concerned with determining the existence and extent of damage than with the nature of loss. [10]

4.2.2 Formulation of sum-formula approach [11]

Van der Walt [12] describes it as follows: [13] In terms of the sum-formula doctrine [14]damage is the negative difference between a person's current patrimonial position (after the occurrence of the damage-causing event) and his or her patrimonial position which would hypothetically have existed if the damage-causing event had not taken place. This means that an actual current patrimonial *sum* is compared with a hypothetical current patrimonial *sum*. This explains the concept *sum-formula*approach. [15]

The measure of damage and damages [16] in delict is known as 'negative interesse': this refers to the calculation of an amount of money which is necessary to place someone in the (hypothetical) financial position he or she would have enjoyed had a delict not been committed. [17] The expression 'negative interesse' also occurs in contractual damages, although here the measure of positive interesse predominates. This matter will be dealt with in some detail below. [18]

4.2.3 Commentary on operation and certain qualities of sum-formula approach

The essential characteristic of this method is found in the comparison of a plaintiff's present patrimonial position after the damage-causing event with the patrimonial position which would have existed but for the damage-causing event. However, before such comparison can be undertaken, the actual present patrimonial position of the plaintiff must first be ascertained and then the hypothetical position which would have existed has to be determined. From this it is clear that the application of the sum-formula approach also involves causation, since it demonstrates that a particular consequence has been caused by an event and quantifies the extent of that consequence.

Although the sum-formula is obviously intended to assess the existence and extent of patrimonial loss, [19] the *principle* involved may also be used to express non-patrimonial loss. [20]

The sum-formula does not (always) provide a method of directly assessing patrimonial loss and may (then) be seen as a broad framework within which other principles may function. [21]

The *hypothetical element* in the definition [22] merits brief discussion.

First, the definition reveals a lacuna, since it is not explained *how* one is to determine a hypothetical patrimonial position. Should one merely use the

incorrect 'test' of the conditio sine qua non approach [23] by notionally eliminating (the effect of) the damage-causing event? This method would be even more inappropriate in the estimation of damage than in the determination of factual causation. [24] The only workable approach seems to be the following: First one has to eliminate (in one's mind) the damage-causing event (as operative factor) and then, taking into account all the other relevant facts both actual or probable, one has to work out the most likely chain of events in order to ascertain what the plaintiff's final patrimonial position would have been. In the case of a delict such as injury to property, it may be correct to eliminate the damage-causing event and construe the plaintiff's hypothetical patrimonial position on the remaining facts. In other instances, however, it may be necessary for the substitution of the damage-causing event by something else. [25] In the case of breach of contract, for example, it is inadequate merely to eliminate the debtor's malperformance, as this instance is concerned with a comparison between the effect of malperformance and the effect of proper and timeous performance on the plaintiff's patrimony. [26] Something (the hypothetical performance in terms of the contract) must necessarily be inserted into the set of facts. The same approach is required when damage caused by an omission or misrepresentation or damage in the form of loss of profits is to be assessed. [27]

Secondly, it appears that in some forms of patrimonial loss which have already occurred fully, the hypothetical part of the sum-formula is superfluous because the effect of the damage-causing event may be ascertained by comparing the patrimonial positions (or elements) of the plaintiff before and after such event. [28] Here the sum-formula is only a way of expressing damage which has already been determined by some other method. Where prospective damage [29] and damage caused by breach of contract [30] are concerned, the hypothetical part of the sum-formula does have particular significance. This is so because prospective loss is

in fact based on a hypothesis or probability regarding the future. [31] However, in establishing prospective loss, the correct application of the formula is not the present position of the plaintiff deducted from his or her hypothetical (future) position, but that person's hypothetical (future) position in view of the damage-causing event deducted from the plaintiff's hypothetical future position without such damage-causing event. [32] One may possibly also formulate this test as follows: from the plaintiff's hypothetical patrimonial position before the damage-causing event (the expectancy which existed but which has become unrealistic) must be deducted the hypothetical patrimonial position (expectation) which exists after the damage-causing event. In contractual damage the rule that the plaintiff is to be placed in the position he or she would have enjoyed had the contract been performed properly implies that the plaintiff's actual present position (without proper and timeous performance) is deducted from his or her present hypothetical position if proper performance had taken place. [33]

These principles may be summarized as follows with reference to the different forms of comparison:

(a)

An actual patrimonial position is compared with an actual patrimonial position: If X's motor car was damaged, one may compare his actual patrimony before the accident with his actual patrimony after the accident. [34]

(b)

An actual patrimonial position is compared with a hypothetical patrimonial position: Examples of this are breach of contract (eg X's actual patrimonial position without proper performance is compared with his hypothetical position with proper performance); past loss of income or profit (eg X's hypothetical net

profit without damage to his vehicle is compared with his actual net profit after injury to the vehicle); expenses already incurred (eg expenses actually incurred by X after sustaining injuries are compared with hypothetical expenses he would have incurred without injury); misrepresentation (eg X's actual patrimony after a misrepresentation is compared with his hypothetical patrimony if the misrepresentation was not made or a true representation was made).

(c)

A hypothetical patrimonial position is compared with another hypothetical patrimonial position: Examples of this are future expenses (eg X's hypothetical future patrimony without having to incur expenses is compared with his hypothetical future position where he is required to incur expenses) and the loss of future profit or income (eg X's hypothetical net profit without damage to the machinery in his factory is compared with his hypothetical net profit in view of such damage, or X's hypothetical income without bodily injury is compared with his hypothetical income with such injury).

From this survey it also appears that in some situations where a hypothetical patrimonial position is considered a net patrimonial position should be used; in other words, saved expenses are to be deducted. [35] Although such saved expenses are usually correctly accommodated in terms of the formula to establish the existence and extent of damage, it is also possible to view them as benefits which must be taken into account in computing damages. [36]

The question as to the correct *date* for assessing patrimonial damage in terms of the sum-formula will be discussed below. [37]

4.2.4 Criticism of sum-formula approach [38]

The sum-formula has been subjected to strong criticism. [39]

4.2.4.1 *'Lack of common-law authority'*

It has been pointed out that the sum-formula is not supported by the doctrine of interesse in Roman law. [40] However, this argument is of little relevance, since the doctrine in question has been accepted in our law for decades and it is now too late to refer to the alleged lack of common-law authority. [41]

4.2.4.2 *'Anonymity of sum expressing damage'*

Damage is the difference between two sums of money and is thus also expressed as an 'anonymous' sum; in other words, it must be clear how the amount has been calculated. This generalization and the failure to indicate which elements of a person's patrimony have been affected create practical problems. [42] This (sound) criticism implies that the

development of a separate doctrine dealing with collateral benefits and compensating advantages [43] is almost made impossible because, theoretically, all benefits brought about by the damage-causing event should be taken into account as part of the plaintiff's present patrimony. [44] Furthermore, it is not in accord with legal practice which requires that in negotiations, formulation of pleadings, [45] evidence and argument, separate heads of damage are identified. It is also unnecessary and long-winded to work with two total patrimonial positions (ie the aggregate position after the damage-causing event and the aggregate position but for this event). [46]

4.2.4.3 *'Sum-formula may cause confusion between patrimonial and causal elements of damage'*

Reinecke [47] submits that, once damage has been determined with the sum-formula, it has at the same time been shown that the damage-causing event is a necessary condition (in terms of the conditio sine qua non 'test' of causation) of the damage in question. It is thus unnecessary to use a further test of causation, because the answer would remain the same. [48] The relationship between the assessment of

damage and causation will be examined in more detail below. [49] At this stage it is sufficient to state that, even if one were to use a comparative method without a hypothetical element (which apparently causes the concurrence between the sum-formula and the conditio sine qua non theory), [50] the problem regarding the confusion between damage and causation will not disappear. [51] If, for example, one compares the value of X's vehicle before a delict with its value after the delict, and there is a difference, one has not merely proved a reduction in X's patrimony but also the *reason* for such reduction (ie the commission of a delict). Furthermore, in attempting to establish factual causation, one has to prove the connection between the alleged damage-causing event and damage (a consequence of such event). It is evident that damage and causation cannot exist without each other. The conclusion is that the alleged confusion between patrimonial and causal elements cannot be attributed only to the sum-formula approach. [52]

4.2.4.4 *'Sum-formula has no use as theoretical notion'*

According to some views, [53] damage or loss are indeed determined by and expressed in terms of a comparative formula, [54] but no comparison is made to evaluate each influence of a damage-causing event on a person's patrimonial assets. The individual heads of damage are separately determined and then added up to express the total damage. Thus, damage is ascertained by adding up and not by subtracting anything. This reasoning is unconvincing. [55] Each separate head of damage must first be calculated by means of a comparison and this implies that in each instance two values have to be subtracted before the individual heads of damage can be added up.

4.2.5 *Development of concrete concept of damage*

Those who argue in favour of the abolition of the sum-formula (an abstract theory of damage) simultaneously advocate the acceptance of a concrete concept of damage. [56] Whereas an abstract theory of damage compares someone's actual and hypothetical patrimonial positions, a concrete approach focuses on the withdrawal or deterioration of a particular part of someone's patrimony. [57] Furthermore, where the abstract approach uses an anonymous arithmetic sum (reflecting damage as well as damages) the concrete theory is concerned with individual heads of damage.

In view of all this, Van der Walt [58] suggests a different comparative test for the assessment of patrimonial loss: Regard must be had, for the purposes of comparison, to the plaintiff's individual elements of patrimony and their utility in satisfying that person's legally recognized needs in terms of his or her own patrimonial situation. The comparison must be undertaken by comparing the utility just referred to before the damage-causing event with their utility after the damage-causing event. What *is* and what *was* are thus compared.

Reinecke emphasizes some advantages that a concrete theory has over the abstract approach. [59]

Although the sum-formula (with its abstract comparative method) is indeed part of our law of damages, it would seem that in certain instances our courts probably pay only lip-service to it and do not actually follow this method. In *Santam Versekeringsmaatskappy Bpk v Byleveldt*, [60] for example, the Appellate Division gave the following formula (in translation): The difference between the patrimonial position of the person suffering loss before and after the delict . . . . Damage is the unfavourable difference caused by a delict. [61] This does not reflect the sum-formula because there is no mention of a hypothetical patrimonial position. [62]

4.2.6 *Sum-formula or concrete concept of damage?*

It would seem that the ideal approach in the development of a concept of damage in our law is to reject only the unacceptable facets of the sum-formula [63] and replace

them by principles of the concrete concept of damage (which are, in any event, already applied in some instances). [64] This would lead to the use of a formula which, in some cases of loss already suffered (damnum emergens), would measure damage without using a hypothetical element. [65] However, in establishing prospective loss and loss of profit, a comparative method with a hypothetical element is, as already indicated, [66] acceptable. [67] The same applies to contractual damage and damage caused by misrepresentation. [68] This approach avoids the disadvantages of the sum-formula [69] but retains elements of its comparative method. [70]

4.3 POSITIVE AND NEGATIVE INTERESSE [71]

In accordance with current theory, the use of the sum-formula leads to the determination of someone's interesse or damage. [72] This measure of damage is referred to as 'negative' interesse in the law of delict because damage (as well as damages) is calculated with reference to the plaintiff's position but for the delict. [73]In contract it is customary to describe the measure of damages as 'positive' interesse, since the plaintiff's damage (and damages) is assessed by considering the patrimonial position he or she would have occupied had proper performance in terms of the contract taken place. [74]

From all this the conclusion is drawn that there is a fundamental difference

between positive and negative interesse. [75] This perception is strengthened by the fact that in a *contractual context* negative interesse is indeed something different from positive interesse. In contract negative interesse is calculated with reference to the position which a contracting party would have occupied had the contract not been concluded (or the position he or she occupied before entering into the contract). [76]

The idea that positive interesse in the law of contract differs fundamentally from negative interesse in delict cannot be supported. [77] This distinction has no practical value and 'tends to obscure rather than clarify'. [78] Positive interesse may also be defined with reference to the position in which the plaintiff would have been if a breach of contract had not occurred. [79] This definition reveals the common ground between contractual positive interesse and delictual negative interesse. Both measures contain a comparison between the present patrimonial position of the plaintiff and the position he or she would have occupied but for the damage-causing event (be it a delict or a breach of contract). [80]

After an analysis of the alleged differences between positive and negative interesse, Van Aswegen [81] makes three important observations:

First, negative interesse in contract has a distinctive meaning and indicates the position which the plaintiff occupied without or before the conclusion of a contract. [82] Secondly, negative interesse in this sense is practically only encountered in two instances, namely misrepresentation inducing contract [83] and as an

alternative measure of contractual damage. [84] Thirdly, contractual positive interesse and delictual negative interesse are incorrectly associated with the compensation of particular types of damage with certain objects. It is accordingly accepted that negative interesse is related to the compensation of actual damage already sustained while positive interesse refers to lost benefits (a 'bargain') or profit. [85] It should, however, be clear that, if the matter is considered in terms of the nature of patrimonial loss, there is no real difference between, for example, the fact that a contractual performance is not received and the causing of damage to a material object. [86] The identification of delictual negative interesse with expenses already incurred (damnum emergens) [87] is incorrect because damages for lucrum cessans [88] are also recoverable. [89] Negative interesse thus includes loss of prospective profits or income. [90] Moreover, in the law of contract damage (expressed as positive interesse) includes lucrum cessans as well as damnum emergens. [91]

There are, of course, other differences between contractual and delictual damages. [92]

4.4 SOME SPECIFIC PRINCIPLES IN MEASUREMENT OF DAMAGE FOR BREACH OF CONTRACT [93]

4.4.1 General

As indicated above, [94] the application of the sum-formula approach to determine damage for breach of contract is often seen as the measure of positive interesse. Positive interesse is estimated with reference to the position which the plaintiff would have occupied if the contract had been carried out properly [95] and this is contrasted with negative interesse which refers to the plaintiff's position had the delict not been committed. In reality, there is no difference between positive interesse in breach of contract and negative interesse in delict. [96] But in the law of contract negative interesse refers to the plaintiff's position before he or she has entered into a contract.

Positive and negative interesse in contract may also be seen against the background of theories on the interests involved. [97] *First*, there is the 'expectation interest' and this refers to damages for the benefits which the plaintiff would have had with proper

performance; *secondly*, the 'reliance interest' which relates to wasted expenditure incurred by the plaintiff in the expectation that the defendant would perform; *thirdly*, the 'indemnity interest' which represents the plaintiff's obligation to pay damages to a third party as a result of the defendant's breach of contract; and, *fourthly*, the 'restitution interest' which indicates benefits conferred by the plaintiff on the defendant in reliance on the defendant's promise to

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perform. [98] The protection of the expectation interest, the reliance interest and the restitution interest are regarded as the principal purposes pursued in awarding contractual damages. [99]

It is important to note that these interests can overlap. [100] The gross expectation interest for instance includes reliance interest, as well as the net profit (if any). [101]

Restitution after cancellation of a contract plays an important role in the calculation of a plaintiff's damage because, just as in the case where he or she has not delivered any performance, it influences the plaintiff's net patrimonial position. [102]

4.4.2 Positive interesse [103]

In accordance with the generally accepted viewpoint, the assessment of damage for breach of contract is done in terms of positive interesse [104] and this refers to actual as well as prospective losses. [105] Therefore, positive interesse should not only be seen as the loss of future profit. Expenses which an innocent party incurred in

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connection with a contract are usually not claimed separately, since the total amount claimed as damages in accordance with positive interesse is based on the plaintiff's final position after performance of the contract. [106] A plaintiff is also entitled to claim only actual expenditure (as part of his or her positive interesse) because the plaintiff may restrict the claim to one part of his or her interesse. [107] Some cases set further requirements for such a claim for expenses. [108] However, a

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relevant question is whether a plaintiff may recover expenses irrespective of what his or her position would have been if the contract had been properly performed. [109]

Positive interesse is also the correct measure of damage when a contract is cancelled, because, although no party has to perform and anything already performed must be returned (restitutio in integrum), the plaintiff is still entitled to be placed in the position he or she would have occupied had there been no breach of contract. [110]

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4.4.3 Negative interesse [111]

When a contract is cancelled because of something which occurred before or during the conclusion of such contract, [112] it may be argued that damage is usually [113]assessed in terms of negative interesse; that is, the position in which the plaintiff would have been had he or she not concluded the contract. [114] In such instances the *conclusion* of a contract (and not any breach of contract) is part of the damage-causing event. [115]

Nevertheless, it has been held that it is also possible to measure damage on the basis of negative interesse if a contract is cancelled due to a breach thereof. [116] The reason for this approach is that often the plaintiff is incapable of proving that he or she has suffered damage according to positive interesse or what the extent of the claimed

damage is. [117] It is usually accepted that the plaintiff has a choice between positive and negative interesse [118] but some authors contend that a plaintiff should in the case of cancellation recover only damages based on negative interesse. [119]Sharrock is of the opinion that damages based on negative interesse are recoverable only where cancellation of the contract operates ab initio (ex tunc) and not when it is ex nunc or in futuro. [120] He also makes suggestions on the types of damage which may be taken into account for the purposes of negative interesse [121] and other

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factors which may have an influence on the amount of damages. [122]

The decision in *Probert v Baker* [123] focused attention on the possibility of recovering damages measured according to negative interesse. The court's decision to allow damages calculated according to negative interesse, provided that the contract has been properly cancelled, and without limiting the amount that can be claimed to positive interesse, [124] received much criticism. [125] One of the implications of the use of negative interesse without limiting the amount that can be claimed to

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positive interesse is that a party to a contract may be placed in a better position than the position he or she would have occupied without breach of contract. [126] In order to avoid this problem, negative interesse is sometimes defined as the position of a contracting party before the conclusion of a contract and not his or her hypothetical position if *no* contract had been concluded. [127] However, the usual approach is to determine the position of a contracting party if no contract had been concluded. [128]

In *Hamer v Wall* [129] the majority refused to follow the decision in *Probert v Baker*and held that only positive interesse could be claimed for breach of contract where

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the contract had been cancelled. [130] Some authors supported this view. [131]

The court, however, declined in *Mainline Carriers (Pty) Ltd v Jaad Investments CC* [132] to follow the decisions in both *Probert v Baker* and *Hamer v Wall* and held that negative interesse (reliance interest) could be claimed for breach of contract without first cancelling the contract. [133] This decision has brought some clarity to the issues involved. [134] The court, without deciding which approach is correct, [135] held that lost expenditure can be claimed either as positive interesse [136] or as negative interessse (reliance damage) subject to the rule that the expectation interest sets the limit of recovery. [137] Cancellation is not a requirement in the first

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approach and should not be required in the second approach. [138] The first approach is to be preferred as it is theoretically sound. [139]

4.4.4 Measure of damage in misrepresentation inducing contract

The expressions 'positive interesse' and 'negative interesse' are frequently used to describe the calculation of damage upon misrepresentation inducing a contract. [140]This matter is discussed below in connection with the measure of damages in misrepresentation. [141]

4.5 PROPER DATE FOR ASSESSMENT OF DAMAGE [142]

An important practical question is the date with reference to which the comparative method of determining damage [143] should be used. [144] The value of a patrimonial

element [145] is not static but may change over time. The effect of a damage-causing event on a patrimony is also subject to change. The comparative approaches discussed above [146] do not, however, disclose at what date after a damage-causing event a plaintiff's position should be considered. According to Van der Walt, [147] the date for an evaluation of the consequences of a damage-causing event must be so chosen that the primary object of the law of damages, namely the fullest possible

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compensation of the plaintiff's damage, can be achieved. Account should also be taken of the fact that all damage caused by an event seldom occurs in its entirety (ie all at once as fully developed damage). The relevant time of assessment should thus be the latest stage in a lawsuit [148] when new evidence may be submitted. This implies that damage may be assessed at the time when the court commences with its judgment. [149]

According to current law, the date of the commission of a delict is generally the decisive moment for determining damage (and this includes prospective loss). [150]There are exceptions to this principle, however. [151] The date of the commission of a delict is the earliest date on which all the elements of a delict are present. As far as damage is concerned, this does not imply that the full extent of the damage should have occurred: if all the other requirements of a delict are present, the relevant date is the date on which the first damage occurs (if there is a series of harmful results caused by the unlawful conduct). [152] The most important practical implications of this principle are discussed with reference to the application of the 'once and for all' rule. [153]

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In the case of breach of contract the date with reference to which damage is to be assessed, [154] is usually the date of breach of contract, [155] but there are various other possibilities, [156] namely the date of performance, [157] the date at which it would be reasonable to have done the repairs or remedial work [158] the date of cancellation, [159] or even before cancellation. [160]

4.6 DAMAGE, CAUSATION, HYPOTHETICAL CAUSATION AND CONTINGENCIES [161]

4.6.1 Introduction

The relationship between the assessment of damage, the determination of causation and the role of hypothetical causation presents some of the most complicated theoretical questions in the law of damages. Fortunately, legal practice has not experienced many problems in this regard and an extensive discussion of this subject is therefore unnecessary.

Damage and factual causation [162] are two separate requirements for both contractual and delictual claims for compensation. [163] However, the relationship between these two concepts should be considered, since factual causation in this context can exist only in respect of damage; and damage is a phenomenon which

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can only be caused by a particular kind of event; [164] and, moreover, the comparative test(s) of damage may overlap with the method through which causation is determined or expressed. [165]

4.6.2 Causation and assessment of damage in general [166]

Reinecke [167] first refers to the test of damage which is adopted by legal practice, namely a comparison of the plaintiff's patrimony after a damage-causing event and the hypothetical patrimony but for such event. [168] He then describes the enquiry into causation as a comparison between the position after the relevant event with the position if the event did not take place. [169]

It appears that the conditio sine qua non 'test' of causation has apparently been incorporated into the measure of damage [170] and this may cause problems in situations such as the following example illustrates: [171] A sets fire to B's house and it is completely destroyed by fire. The very same night an earthquake occurs and the next morning there is only a deep hole where B's house used to be.

In terms of the comparative method applied in practice, one may argue that B has suffered no damage on account of the fire because the house would in any event have been destroyed by the earthquake. [172] It is further possible to contend that in terms of the conditio sine qua non 'test' of causation A's conduct did not actually cause the destruction of the house. [173] Reinecke's analysis [174] of this example is that there is obviously damage and the only question is which event actually

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caused such damage. [175] In our opinion, although the damage was plainly caused by the act of arson, the later events in connection with the earthquake should also be considered in the calculation of damages, implying the adoption of an approach similar to that in hypothetical causation is necessary. [176]

The conclusion by Reinecke [177] is that the traditional comparative method in determining damage is false. He provides an example of a factual situation where damage has been caused and suggests that the correct approach would be first to tabulate the consequences of the damage-causing event by means of the appropriate test of factual causation and, thereafter, to identify the damage represented by such consequences. In order to illustrate how these two methods differ he contends that two experts (an expert on causation and a patrimonial expert) may be employed to perform their tasks in this regard independently of one another.

Unfortunately this example and explanation do not really solve the problem. The expert on causation cannot determine causation without considering damage [178] (as causation in this regard exists only with reference to a harmful consequence) and the patrimonial expert cannot determine the reduction in patrimony without considering causation, since damage is defined in terms of causation, viz as the result of a damage-causing event. [179]

Van der Walt [180] refuses to acknowledge the close relationship between the sum-formula and the conditio sine qua non method. [181] In his view, it is unlikely that Mommsen [182] could have intended to incorporate the latter method into his doctrine of damage. Morever, despite the element of comparison in both methods, Van der Walt is of the opinion that there are important differences in regard to, for example, the essence, direction, timing and nature of the comparison. In causation the comparison is intended to identify the reason for a change, while in the estimation of damage the extent of a patrimonial reduction has to be determined.

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In evaluating these views, it should be remembered that the sum-formula [183] as well as the conditio sine qua non 'test' [184] have unacceptable facets. It cannot be denied,

however, that there is a significant resemblance between the methodologies of these two tests in that a hypothetical position plays an important role in both. [185]But even if the correct approach to factual causation were to be adopted (which would not be based on a comparative method) [186] as well as the correct comparative approach to damage, the overlapping would not suddenly disappear. The determination of causation and damage are thus in a sense inseparably linked. If one has established the value of X's car before and after Y has collided with it, one has not only proved a reduction in value (damage) but has also demonstrated causation in that the reason for the reduction in value—Y's conduct—has been revealed. [187] It is, however, possible to eliminate some confusion between the *tests* involving causation and damage by adopting the correct approach to factual causation. [188]

It should, however, be observed that the determination of damage and causation is not identical. Suppose that, in the example in the previous paragraph, X also feels very unhappy about the damage as he has received the vehicle as a gift from his mother. Although the accident also caused him feelings of unhappiness, such consequence does not meet the further requirements to qualify as patrimonial damage. [189]

4.6.3 Some practical cases where causation and damage are relevant

4.6.3.1 ***Conditions before damage-causing event which render damage more likely or more extensive***

Suppose that X has a very thin skull, with the result that the treatment of an injury Y has inflicted on him costs him R10 000 instead of R1 000 in the case of a normal person. [190] Our legal practice views this as a problem relating to the limitation of

liability (remoteness of damage). [191] The strict application of the talem-qualem principle [192] in cases where pre-existing weaknesses are relevant would lead to the full liability of the defendant for all the losses suffered. This rule is, however, tempered if it can be proven that the plaintiff would in any event at a later stage have shown symptoms or effects of this pre-existing condition. It would be appropriate in such circumstances for the courts to make a contingency adjustment, but the defendant would in principle remain liable for the foreseeable harm. [193] A pre-existing injury, illness or condition would only qualify as a contingency if it can be proven by way of factual evidence that it would in the future have caused the same damage (completely or partially) as the damage-causing event. Furthermore, the contingency must be applied according to the degree of probability proven. [194]

In *Basson v Ongevallekommissaris* [195] a workman with an asymptomatic degenerative back condition injured his back in the course of his work. The court held that although his current condition could be attributed to a combination of the pre-existing degeneration of his spinal column and the accident, the accident should be regarded as the 'effective and predominate cause'. [196]

Existing damage may also in some cases [197] have the result that a person does not suffer damage on account of a further event. [198]

4.6.3.2 ***Double or alternative causation (concurrent causes)*** [199]

This is where damage is caused by more than one antecedent which operates simultaneously while each of the antecedents is sufficient to cause the total loss. [200]An example is where a building contractor X is not able to build because Y, who has

to deliver cement, and Z, who has to supply bricks, both fail to honour their contractual obligations on the same day and thus cause damage to X (eg he loses profit). According to the conditio sine qua non 'test', neither Y nor Z has caused damage since, if the breach of contract of each is notionally eliminated, the damage does not fall away! [201] From the example itself and the use of common sense, it is obvious that both Y and Z caused damage to X. [202] It would thus also be fair in the assessment of X's claim for damages against Y and Z to take account of the fact that they both caused the damage in question. [203]

A further relevant example is where X, through his own negligence, contributes towards damage caused to him by wrongdoer Y. [204]

4.6.3.3 *Actual events from moment damage is caused up to date of trial* [205]

The general rule of positive law is that damage must be assessed on the date of the

delict (the moment damage is caused), [206] but the courts do take relevant information or facts that becomes available after that date into account in the quantification of the damages. [207]

The first example of such an event is where X suffers damage and he then increases its extent (or fails to reduce it) through his unreasonable conduct. [208]

It may further happen that X receives certain benefits as a result of the damage-causing event. [209]

Thirdly, it is also possible that the damage which X has caused Y may be aggravated and that X is liable for such aggravation. [210]

In a fourth category there are cases which can be illustrated with the following example: [211]

Suppose that X injures Y and causes him to lose the sight in one of his eyes. Before the trial he loses the use of his second eye on account of a further accident. In an assessment of the extent of Y's claim for loss of earning capacity [212] against X, it is evident that only damage associated with the loss of one eye may be taken into account. [213]

In *Baker v Willoughby* [214] the plaintiff X had sustained a serious injury to his leg in a motor accident. Before his action came to trial, a robber shot him in this leg and it had to be amputated. [215] The court rejected the defendant's argument that X may claim only for the time before the amputation. [216]

Where a plaintiff dies before the trial, [217] his or her death is relevant in regard to that claim. [218]

It is suggested that, where a supervening event causes the same damage or actually absorbs the previous loss, [219] a fair and elastic approach should be adopted in order to take further events into account without causing unnecessary prejudice to the plaintiff. [220]

4.6.3.4 *Hypothetical causes* [221] *(hypothetical events)*

This may be described [222] as a situation in which the damage-causing event prevents another event from causing all or a part of the damage at a later stage. For example, on his way to work, X is hit by Y's car and loses his earning capacity. However, if X had

arrived at work that day, he would probably have been injured in an explosion which occurred there and which would also have destroyed his earning capacity.

In casu there is no problem as regards factual causation: Y clearly caused X's damage. Nevertheless, the fact that the same damage would in any event have occurred (hypothetical causation) some time later should be considered in placing a value on X's lost earning capacity. [223] Ex post facto was X's earning capacity already 'endangered' at the time of Y's delict and this should be taken into account

in the calculation of his damages. This solution accords with the practical approach to allow for contingencies in the assessment of prospective loss. [224]

The solution [225] to the problem of hypothetical causation is to be found in an elastic and normative approach in terms of which it is, in every case, to be considered what types of hypothetical causes may in principle be taken into account, [226] the degree of probability with which the hypothetical causes could have brought about the same damage, and what the community's sense of fairness and policy considerations are on taking such factors into account in reducing the plaintiff's damages. [227]

4.6.3.5 *Past contingencies* [228]

This concerns *possible* events [229] which could have caused the damage or a part thereof, [230] from the moment the cause of action occurs up to the trial or settlement of the matter.

In *AA Mutual Insurance Association Ltd v Maqula* [231] the court had, inter alia, to consider the plaintiff's loss of income between the commission of a delict and the date of trial. [232] The court took into account that, before his injuries, he had already experienced difficulties in obtaining and retaining employment and for this reason his damages were reduced by 50 per cent. [233] The deduction for past contingencies

need not be the same as that for future contingencies, [234] since the circumstances might differ and the period of uncertainty is usually longer in the case of future contingencies. [235]

Contingencies logically relate to hypothetical causation, since it is involved with other hypothetical causes of the same damage. The approach suggested in that regard should also apply here. [236]

4.6.3.6 *Future contingencies*

It is customary that, in the assessment of prospective loss, a court takes into account possible future events which might have caused the loss or a part of a loss or which may influence the extent of the loss. Contingency adjustments can be made on delictual as well as contractual damages. [237] This matter is discussed below in more detail. [238]

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[1] Chap 2.

[2] 1976 *TSAR* 56.

[3] Reinecke 1988 *De Jure* 236. See also Reinecke 1971 *CILSA* 324.

[4] See also Van der Walt *Sommeskadeleer* 11 n 8 (harm or damage may, from a linguistic and logical point of view, be defined only in terms of a condition of 'no damage' and this means that a comparative method is always implied), 284.

[5] See also Van Aswegen *Sameloop* 168.

[6] Para 4.2.2. See in general Visser 1994 *THRHR* 282.

[7] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) at 304.

[8] See Van der Walt *Sommeskadeleer,* who deals with the following main topics: 9 et seq (sum-formula in German common law); 48 et seq (adaptation of the sum-formula through itemization of damage); 63 et seq (the necessity for further adaptation of the sum-formula to deal with certain special problems); 111 et seq (the modification of the sum-formula through refinement of the concept of patrimony); 136 et seq (the way to the final rejection of the sum-formula approach); 148 et seq (summary of criticism of the sum-formula approach); 291 et seq (the sum-formula and the 'once and for all' rule); chap 7.

[9] See Van der Walt *Sommeskadeleer* 3 et seq who indicates that it has been taken over as the common-law concept of damage in South African law on the authority of Windscheid and Grüber; Zimmermann *Obligations* 824; Roberto *Schadensrecht* 9–18; *Union Government v Warneke* 1911 AD 657 at 665; *Oslo Land Co v Union Government* 1938 AD 584 at 590; *De Jager v Grunder* 1964 (1) SA 446 (A) at 456; *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 8; *Erdmann v Santam Ins Co Ltd* 1985 (3) SA 402 (C) at 406; *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA). See also Lötz 2007 *Fundamina*87–8; Corbett & Buchanan I 4; Koch *Reduced Utility* 57 et seq.

[10] See chap 2 on damage.

[11] The words of Mommsen *Beiträge zum Obligationenrecht* II (Braunschweig, 1855) 3 on the assessment of damage, which have been quoted and discussed for more than a century (see eg the literature referred to by Van der Walt *Sommeskadeleer* 9 et seq) are as follows: 'Die Differenz zwischen dem Betrage des Vermögens einer Person, wie derselbe in einem gegebenden Zeitpunkte ist, und dem Betrage, welchen dieses Vermögen ohne die Dazwischenkunft eines bestimmten beschädigenden Ereignisses in dem zur Frage stehenden Zeitpunkte haben würde.' Grüber *Lex Aquilia* 269 provides this definition: '[T]he difference [between] the plaintiff's property, as it was after the act of damage and as it would have been if the act had not been committed, this so-called *interesse . . .* which has become the object of the Aquilian action in course of time.' See also Bloembergen *Schadevergoeding* 13–14. Although Van der Walt *Sommeskadeleer* 4 remarks that Mommsen's sum-formula has not in principle been taken over by English law, it appears from *Livingstone v Rawyards Coal Co* 1880 App Cas 25–39 that elements of this approach are also found in English law (see para 1.6.4; Erasmus 1975 *THRHR*756). See further Zimmermann *Obligations* 824; Burchell *Delict* 126.

[12] 1980 *THRHR* 4.

[13] Authors' translation. Cf *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917: 'In our law, under the lex Aquilia, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed.'

[14] There are different designations of Mommsen's comparative method. See Van der Walt *Sommeskadeleer* 7, 10–11.

[15] See also Reinecke 1976 *TSAR* 37: 'Hiervolgens word naamlik 'n vergelyking getref tussen twee toestande: die toestand van die vermoë soos dit na die inwerking van die gewraakte gebeurtenis is en die hipotetiese toestand soos dit sonder die gebeurtenis sou gewees het. Die resultaat wat so 'n vergelyking sou kon oplewer, word as die *interesse* van die benadeelde beskou. In hierdie verband word daar onderskeid gemaak tussen positiewe en negatiewe interesse.' (A comparison is made between the position after the damage-causing event and the hypothetical position without such event—the result is the interesse of the person suffering damage.) The use of this method is also advocated in the field of enrichment. See De Vos *Verrykingsaanspreeklikheid* 330: 'Die verryking word bereken deur die werklike stand van die verrykte se vermoë te vergelyk met die stand wat sy vermoë sou gehad het indien die verrykende gebeurtenis nie plaasgevind het nie, met inagneming van alle juridies relevante faktore soos bv skadelike newewerkinge. 'n Aktuele toestand van sake word dus vergelyk met 'n hipotetiese.' (A comparative method is also employed to determine unjust enrichment). See also Sonnekus *Unjustified Enrichment* 51–2. See further the comparative method used to estimate compensation for expropriation (eg Gildenhuys & Grobler 10(1) *LAWSA* para 205; *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) at 255; *Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal* 1991 (1) SA 321 (T) at 329; *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) at 9–10. See also a discussion by Sonnekus (1999 *TSAR* 529) on the application of the sum-formula approach in the law of estoppel; cf *ABSA Bank Ltd v De Klerk* 1999 (1) SA 861 (W).

[16] See also Van Aswegen *Sameloop* 163: '[D]ie sommeskadeleer, wat vermoënskade aan 'n geldsom gelykstel, [het] tot gevolg . . . dat daar beswaarlik 'n onderskeid gemaak kan word tussen die bepaling van vermoënskade en die berekening van die omvang daarvan, oftewel die kwantifisering van die bedrag skadevergoeding.' (The sum-formula makes it almost impossible to draw a distinction between the determination of patrimonial loss and its extent.)

[17] See Reinecke 1976 *TSAR* 37; 1988 *De Jure* 229; Erasmus 1975 *THRHR* 369; *Free State Consolidated Gold Mines v Multilateral MVA Fund* 1997 (4) SA 930 (O) at 949.

[18] Para 4.4.2.

[19] The idea that this method as formulated also includes non-patrimonial loss (see Van der Walt *Sommeskadeleer* 62 on the view of Möller), is apparently incorrect. See also Corbett & Buchanan I 2.

[20] Para 5.6.4. This means that the quality of a plaintiff's personality interests is compared with the quality they would have had, but for the delict. See, however, Van der Walt *Sommeskadeleer* 185.

[21] eg in some cases of breach of contract damage is expressed as the difference between market value and the contract price of a performance (para 12.7.2). This approach is, of course, derived from the measure of the sum-formula.

[22] See also Bloembergen *Schadevergoeding* 17–18.

[23] See Visser 1989 *THRHR* 558 et seq.

[24] The mere elimination will prove nothing that one does not already know on other grounds. See Neethling & Potgieter *Delict* 180–4.

[25] See also the view of Keuk (Van der Walt *Sommeskadeleer* 158–9) who submits that it is insufficient merely to eliminate the defendant's unlawful conduct. In some cases the plaintiff has an interest in a particular form of action by the defendant.

[26] See also Lubbe & Murray *Contract* 605. See, however, para 4.4.3 on the use of negative interesse upon breach of contract.

[27] In misrepresentation the question may arise whether such misrepresentation should not be eliminated and replaced by a true communication—see eg *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A), where there are different approaches. In estimating loss of past income (eg X's taxi was damaged and he could not earn income) the hypothetical course of events with an undamaged taxi is construed (probable income minus probable expenses) and is inserted into the set of facts. The result is then compared with the actual position (no profit and perhaps certain expenses). See in general also Lubbe 1984 *SALJ* 619.

[28] See, however, n 34 below. See also Bloembergen *Schadevergoeding* 17; Van der Merwe & Olivier *Onregmatige Daad* 181 n 3, who suggest that this is merely a terminological issue; see further in para 4.2.5 on the correct comparative method in this instance, ie that which existed before the event is compared with what *is* and not with 'what would have been'. The use of a hypothetical present position in regard to fully developed damage may be relevant only to accommodate hypothetical causes (para 4.6.3.4) and compensating advantages (chap 10) but does not involve the existence of damage.

[29] eg the loss of future profit (para 6.4.3).

[30] Chap 12.

[31] Future patrimonial loss is expressed as the frustration of an expectation (para 3.2.4.2*(b)* on patrimony and cf chap 6 on prospective damage). However, an expectancy consists of two parts, a present factual basis and probable future events. It is therefore impossible only to compare an expectation before and after a damage-causing event without taking into account probable future events in each instance. See eg *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 409: 'A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he or she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss.' See, however, the comments by Van der Walt *Sommeskadeleer* 273 on Reinecke 1976 *TSAR* 29 et seq. Van der Merwe & Olivier *Onregmatige Daad* 181 n 3 voice objections to a test where the position in which a plaintiff would have found himself or herself plays a role. They argue that this test may imply that cognizance is taken of a position in which the plaintiff was never *entitled* to be. However, this criticism is based on the authors' erroneous view that wrongfulness is required for damage (para 2.4.8).

[32] Cf, eg, the formula to determine damages for loss of earning capacity (para 14.6; Corbett & Buchanan I 48). See further Boberg *Delict* 489. See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 233–4.

[33] See eg *Probert v Baker* 1983 (3) SA 229 (D) at 234: 'The aggrieved party is perfectly entitled to cast his eyes forward to the position he would have occupied had the contract been fulfilled.' It is inappropriate only to compare a contracting party's position before and after breach of contract, because his or her right to performance suggests a hypothetical position or some kind of expectation.

[34] One may, however, formulate this differently and compare hypothetical expenses without damage to the motor car with actual expenses after such damage. See para 4.2.5 on the concrete doctrine of damage. See also para 4.4.3 on negative interesse upon breach of contract where a person's (actual) position after breach of contract may apparently sometimes be compared with his or her (actual) position before conclusion of the contract. See further Reinecke et al 12 *LAWSA* (reissue) para 300 on the measure of damage in insurance; para 12.22.

[35] If, for example, one wants to assess how much profit X would have made from his taxi business if Y had not damaged his vehicle, X's savings on fuel must be taken into account. See *Versveld v SA Citrus Farms Ltd* 1930 AD 452 (saving of expenses to collect oranges); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) (saving of inter alia electricity costs where interruption of electricity supply causes loss of production); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) (saving of costs in respect of with unsold products).

[36] See chap 10 on the collateral source rule.

[37] See para 4.5.

[38] See especially Van der Walt *Sommeskadeleer* 148–88. See also Koch *Reduced Utility* 58–9 on the limitations of this approach.

[39] See also Van der Walt *Sommeskadeleer* 61 on the advantages Möller sees in the sum-formula: it expresses the plaintiff's total damage; there is only one period of prescription for the whole action for damages; damages may, just as the damage itself, take the form of an anonymous global sum of money. However, Reinecke 1988 *De Jure* 224 describes it as a very unsatisfactory doctrine of damage. See also Van der Walt *Sommeskadeleer* 183, who observes that the sum-formula compares patrimonial positions without defining such positions. However, his criticism that the sum-formula approach does not make a distinction between patrimonial and non-patrimonial loss perhaps misses the point in that the idea of comparison is inherent in the determination of any kind of damage (para 4.1). Moreover, the use of an expression such as 'patrimonial position' indicates the contrast with non-pecuniary loss.

[40] See also Erasmus 1975 *THRHR* 104 et seq, 268 et seq; para 1.6.4; Van der Walt *Sommeskadeleer* 148–52.

[41] See, by way of analogy, the position regarding estoppel in *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-op Mpy Bpk* 1964 (2) SA 47 (T) at 49, where Trollip J said that even though the passport on which estoppel migrated to South Africa (the exceptio doli) was invalid, this doctrine had become naturalized and domiciled in this country. This argument also applies mutatis mutandis in regard to the sum-formula.

[42] Van der Walt *Sommeskadeleer* 153–6.

[43] See chap 10.

[44] Van der Walt *Sommeskadeleer* 154 demonstrates how our practice has deviated from the sum-formula approach in dealing with collateral benefits. See chap 10.

[45] See, eg rule 18(10) of the Uniform Rules of Court; rule 6(9) of the Magistrates' Court Rules; para 16.1.3.

[46] See also Reinecke 1988 *De Jure* 224–5. In liability for pure economic loss (see Neethling & Potgieter *Delict* 290 et seq; para 13.10) it may in some instances be meaningful to use two total patrimonial positions.

[47] 1988 *De Jure* 225 n 25.

[48] Contra Van der Walt *Sommeskadeleer* 256 et seq.

[49] Para 4.6.

[50] Para 4.6.2.

[51] See Neethling & Potgieter *Delict* 217–18.

[52] Van der Walt *Sommeskadeleer* 157 et seq voices further objections to the sum-formula regarding, eg, the aim of damages and the identification of damage with interesse.

[53] See Van der Walt *Sommeskadeleer* 187, who refers to Keuk and Honsell.

[54] See also para 4.2.2.

[55] See also Van der Walt *Sommeskadeleer* 187.

[56] Reinecke 1988 *De Jure* 226; cf Van der Walt *Sommeskadeleer* 49–51 on the concrete approach in German law. See in general Boberg *Delict* 481–2; Koch *Reduced Utility* 31 et seq.

[57] See also Koch *Lost Income* 32: 'To calculate the full value of the patrimonial estate is a formidable task. However, because we are concerned to find the difference between the two patrimonial estates we may in practice omit from the calculation all items whose value is untouched by the injury.' However, in

some instances it may be difficult to distinguish between the affected and unaffected elements of someone's patrimony.

[58] *Sommeskadeleer* 284 (authors' translation).

[59] 1988 *De Jure* 226. *(a)* The unnecessary comparison of two total patrimonial positions is eliminated. One is only concerned with the patrimonial assets which have been affected and the creation or increase of debts. Damage is expressed in terms of individual heads of damage. *(b)* Hypothetical causation plays no role since a hypothetical patrimonial position is not taken into account. (See, however, para 4.6.3.4.) *(c)* A concrete concept of damage leaves room for restitution in kind in addition to damages. In terms of the sum-formula, damage is only redressed through monetary compensation. (This issue is not of much importance because in our law of delict restitution in kind is not the point of departure as is the case in German law). See para 8.2. *(d)* A concrete approach to damage leaves room for the development of independent principles regarding the application of the collateral source rule (see chap 10). The reason for this is that benefits flowing from a damage-causing event are not taken into account in the calculation of damage and a further set of principles may be developed to address the problem as to which benefits are to be deducted from an amount of damages.

See also Van Aswegen *Sameloop* 167: "n Konkrete skadeleer en itemisering van individuele skadeposte, ingevolge waarvan skade as die ". . . verlies of verslegting van 'n bepaalde bate . . ." of as die ". . . afname in die nuttigheid van 'n getroffe vermoënsbestanddeel . . ." beskryf word, maak die deur oop vir 'n billiker, meer subjektiewe en realistiese skadeleer wat boonop moontlike verklarings vir die voordeeltoerekeningsvraagstuk bied.' (A concrete concept of damage and the itemisation of individual heads of damage open the door to a more subjective and realistic concept of damage which enables one to find possible explanations for collateral benefits.) See also Reinecke et al 12 *LAWSA*(reissue) para 300 on the concrete approach in insurance law.

[60] 1973 (2) SA 146 (A) at 150.

[61] The court nevertheless refers to the well-known authorities on the sum-formula (n 9 above). See also *De Vos v SA Eagle Versekeringsmpy Bpk* 1984 (1) SA 724 (O) at 727.

[62] The formula of damage suggested by Van der Merwe & Olivier *Onregmatige Daad* 180 also differs from the sum-formula: 'Om vas te stel of 'n persoon skade gely het as gevolg van die onregmatige optrede van 'n ander, moet eersgenoemde se vermoënsposisie voor pleging van die delik vergelyk word met die posisie daarna. Indien laasgenoemde posisie die nadeligste is, het die persoon skade gely en staan 'n aksie om skadevergoeding hom tot diens.'

[63] eg the anonymity of the amount of damage, the use of two total patrimonial positions and the taking into account of all benefits flowing from the damage-causing event.

[64] See para 4.2.4.2 on heads of damage, pleadings etc.

[65] Para 4.2.3.

[66] Para 4.2.3.

[67] Contra Van der Walt *Sommeskadeleer* 276 who argues that the question whether prospective loss is suffered and the extent of it cannot be answered through a comparative method. This view is, however, unacceptable as demonstrated clearly by, inter alia, our legal practice in regard to the assessment of damage and damages for loss of earning capacity. See para 14.6.

[68] Para 4.2.3.

[69] Para 4.2.4.2.

[70] The problems regarding hypothetical causes cannot really be avoided by adopting the concrete approach to damage. See, on hypothetical causes, para 4.6.3.4.

[71] See on Mommsen's views on interesse Van der Walt *Sommeskadeleer* 13–14. According to Mommsen, full interesse equals total damage. To calculate full interesse, all the harmful effects of the damage-causing event on the plaintiff's patrimonial assets must be expressed in money (which serves as a common denominator).

See, in general, Van Aswegen *Sameloop* 160, 200–9; Joubert 1976 *THRHR* 1–14; Reinecke & Van der Merwe 1984 *TSAR* 85.

[72] See, eg, *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 8; Lubbe & Murray *Contract* 604; Erasmus 1975 *THRHR* 105, 113–14, 368; Reinecke 1976 *TSAR* 37; Joubert *Contract* 250; Boberg *Delict* 476; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 111; *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917; *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) at 304.

[73] See Van der Merwe & Olivier *Onregmatige Daad* 480 et seq; *Union Government v Warneke* 1911 AD 657 at 665; *Erasmus v Davis* 1969 (2) SA 1 (A) at 9; *De Jager v Grunder* 1964 (1) SA 446 (A) at

456; *Ranger v Wykerd* 1977 (2) SA 976 (A) at 987. In *Kantey & Templer (Pty) Ltd v Van Zyl* 2007 (1) SA 610 (C) at 625–6 wasted expenses incurred and profits foregone were included in the assessment of negative interesse after delict.

[74] See, eg, *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22, 46; *Whitfield v Phillips* 1957 (3) SA 318 (A) at 335; *Novick v Benjamin* 1972 (2) SA 842 (A) at 857, 860; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co (Pty) Ltd* 1977 (3) SA 670 (A) at 687; *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 634; *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 511.

[75] See, eg, *Trotman v Edwick* 1951 (1) SA 443 (A) at 449: 'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct be restored to him.' Cf also *Ranger v Wykerd* 1977 (2) SA 976 (A) at 986, 991, 995. In *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 505–6 it was held that the authority of this dictum 'remains unimpaired and unquestioned in the field of Aquilian liability'. The court added (above): 'The respondent has not alleged that the value of the plant is less than the respondent has paid for it. What the respondent does, in effect, is to sue for the equivalent in money of its bargain. That is the contractual measure of damages.' See also McGregor *Damages* 672: 'The claimant [in breach of contract] is entitled to recover damages for the loss of his bargain. In tort, on the other hand, no question of loss of bargain can arise: the claimant is not complaining of failure to implement a promise but of failure to leave him alone.'

[76] See para 4.4.3 for more detail on negative interesse in contract. Negative interesse in contract is sometimes referred to as restitutionary damages.

[77] See also Van der Merwe & Olivier *Onregmatige Daad* 480–1; Van der Merwe 1978 *SALJ* 317, 325; Van Aswegen *Sameloop* 202; 1993 *SA Merc LJ* 266. See Joubert 1976 *THRHR* 1, 13: 'Die gevolgtrekking waartoe daar gekom moet word, is dat daar geen beginselverskille tussen negatiewe en positiewe interesse bestaan nie. Beide ''toetse'' lewer ooreenstemmende resultate as hulle ten aansien van een bepaalde handeling of gebeurtenis toegepas word.'

[78] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) at 304.

[79] *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643; *Probert v Baker* 1983 (3) SA 229 (D) at 233; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; Van Rensburg et al 5 (1) *LAWSA* para 257; De Wet & Van Wyk *Kontraktereg en Handelsreg* 222; Joubert *Contract* 249; Van der Merwe & Reinecke 1984 *TSAR* 86.

[80] See Van Aswegen *Sameloop* 202; 1993 *SA Merc LJ* 266; Lubbe & Murray *Contract* 604; Lubbe 1984 *SALJ* 619; Mulligan 1958 *SALJ* 160; Reinecke 1976 *TSAR* 37; 1988 *De Jure* 229; Erasmus 1975 *THRHR* 113, 276, 369.

[81] *Sameloop* 315 et seq.

[82] See para 4.4.3.

[83] Para 13.4.

[84] Para 4.4.3.

[85] See n 75 above; *Probert v Baker* 1983 (3) SA 229 (D) at 234: 'Perhaps, for example, he has suffered no loss of profit at all (a form of positive *interesse*) because he entered into a bad bargain, although he had extensive out of pocket expenses (a form of negative *interesse*).'

[86] To determine whether a plaintiff has obtained the performance he or she is entitled to, one has to compare what the plaintiff has in fact received with what he or she should have received. In the case of injury to property, eg, two other items are compared, namely the market value before and after the delict. There is no real difference between these two methods of comparison and only the facts differ. After all, different tests of damage are not used according to whether a damaged vehicle is red or blue and, similarly, the assessment of damage for malperformance does not really differ from estimating damage when injury to property has taken place. Even the fact that the assessment of damage for breach of contract necessarily contains a hypothetical element—in contrast with the position in injury to property (see para 4.2.3) does not imply a real difference as far as positive and negative interesse are concerned.

[87] Para 3.4.1.

[88] Paras 3.4.1 and 6.1.

[89] See also *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) 304–5.

[90] This is demonstrated by the correct measure of damage which makes provision for a hypothetical element in order to accommodate this type of loss (para 4.2.3). See also para 6.4 on the classification of prospective loss in practice.

[91] See the authorities referred to by Van Aswegen *Sameloop* 206 n 117; Lubbe 1984 *SALJ* 623; *Emslie v African Merchants Ltd* 1908 EDC 82 at 91; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Whitfield v Phillips* 1957 (3) SA 318 (A) at 329. See also Kahn *Contract* I 802: 'It appears from this case [*Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1] that a plaintiff may claim *(a)* general damages (''damnum emergens'' or ''intrinsic damage'') arising naturally from the breach; these damages are those that the law would presume to be the necessary consequence of the act complained of; *(b)* special damages (''extrinsic damages'', including ''lucrum cessans'') that arise in the special circumstances of a particular case.' See para 4.4.2 for more detail.

[92] Para 11.9.8.

[93] See para 8.9 on the nature and object of damages and chap 12 on the calculation of the quantum of damages in some cases of breach of contract.

[94] Para 4.3.

[95] See para 4.3 and *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22: 'The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party.' See also *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643: 'Die vermoënskade ingevolge kontrakbreuk gely, word normaalweg bepaal deur 'n vergelyking van die bestaande vermoënsposisie van die skuldeiser met die waarin hy sou gewees het indien geen kontrakbreuk plaasgevind het nie.' De Wet & Van Wyk *Kontraktereg en Handelsreg* 225: 'Soos ons gesien het, moet by die vasstelling of daar skade gely is, en wat die omvang daarvan was, die huidige vermoënsposisie van die onskuldige vergelyk word met dié waarin hy sou gewees het indien geen kontrakbreuk plaasgevind het nie.' See also *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 454; Lubbe & Murray *Contract* 604; *Harker* 1984 *SALJ* 139; Sharrock 1985 *TSAR* 201; Lubbe 1984 *SALJ* 618; *Sandlundlu (Pty) Ltd v Shepstone and Wylie Inc* [2010] JOL 26565 (SCA) at 10–11; *Scoin Trading (Pty) Ltd v Bernstein* 2010 (2) SA 118 (SCA) at 121.

[96] Para 4.3. See also Van der Merwe & Olivier *Onregmatige Daad* 481: 'Kortom, 'n skadevergoedingseis, of dit nou kwansuis *ex contractu* of *delicto* ontstaan, bly 'n skadevergoedingseis' (a claim for damages remains the same, whether it is ex contractu or ex delicto).

[97] See *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) 475–86; Lubbe & Murray *Contract* 606–7; Lubbe 1984 *SALJ* 621–3; Kahn *Contract* I 800; Hutchison 2004 *SALJ* 557; *Erf 1026 Tygerberg CC t/a Aspen Promotions SA v Pick 'n Pay Retailers (Pty) Ltd* 2005 (6) SA 527 (C) at 531–2 who refer to the interests identified in the Anglo-American law of contractual damages on account of an article by Fuller & Perdue 1936 *Yale LJ* 52 and 373. Lubbe 1984 *SALJ* 622–3 points out that both the interesse approach of our law and the interest analysis of Anglo-American law lead to broadly similar results. The identification of the possible components of a claim for damages with the interest analysis circumvents the difficulties inherent in the application of the abstract interesse approach to concrete situations.

[98] These interests are all present in the following example: A buys a horse from B and the parties agree that delivery would take place on B's farm. A pays the purchase price in advance. When A arrives, B refuses to deliver the horse. A is unable to deliver to C to whom he has in the meantime resold the horse. See further Harker 1984 *SALJ* 140; Sharrock 1985 *TSAR* 203–4; Lubbe 1984 *SALJ* 622; Hutchison 2004 *SALJ* 55–7; Treitel *Remedies* 82–8. See *Erf 1026 Tygerberg CC t/a Aspen Promotions SA v Pick 'n Pay Retailers (Pty) Ltd* 2005 (6) SA 527 (C) for an example of indemnity interest (loss of profit of third party).

[99] Fuller & Perdue 1936 *Yale LJ* 53–4; *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 484.

[100] See Hutchison 2004 *SALJ* 57–62. He states (57–8): 'The reliance interest therefore embraces the restitution interest, but is wider in that it covers forms of detrimental reliance that confer no benefit on the other party: wasted expenditure, opportunities forgone and consequential losses.'

[101] Op cit 58–62. Reliance interest consists of wasted expenditure, opportunities forgone and consequential losses. See para 3.4.3 on consequential loss; para 3.3.3 on wasted expenditure. See the discussion of *Svorinic v Biggs* 1985 (2) SA 573 (W) in n 127 below and that of *Hamer v Wall* 1993 (1) SA 235 (T) in nn 129–30 below on opportunities forgone.

[102] A plaintiff who cancels on account of breach of contract is entitled to return of his or her performance as well as damages for any (further) damage which he or she may suffer. See para 12.1and, eg, Van Aswegen *Sameloop* 205; Joubert *Contract* 246; De Wet & Van Wyk *Kontraktereg en Handelsreg* 225. The value obtained through restitution is not part of a plaintiff's damages but it influences his or her patrimonial position and thus the extent of the plaintiff's damage. Where performance does not have to be returned, the plaintiff may sometimes claim an equivalent of money as surrogate of such performance. Such a claim has been described as one of damages (see eg *Bestway Agencies (Pty) Ltd v Western Credit Bank Ltd* 1968 (3) SA 400 (T) at 404; see also Lubbe & Murray *Contract* 593; Mulligan 1950 *SALJ* 43; *Uni-Erections*

v Continental Engineering Co Ltd 1981 (1) SA 240 (W) at 248; *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 474), but Van Aswegen loc cit and 1993 *SA Merc LJ* 271 argues convincingly that this cannot be correct. Thus, a claim for the return of the surrogate of performance should not be seen as one of damages. If a plaintiff's performance or an equivalent of it is not returned, his or her patrimonial position suffers and this increases the amount of damages to which the plaintiff is entitled in accordance with the measure of positive interesse. See further on the relevance of restitution McLennan 1984 *SALJ* 40–1; Lubbe 1984 *SALJ* 621 n 34, 624, 639; Reinecke & Van der Merwe 1984 *TSAR* 86. See Lubbe op cit 620: 'Thus, the fact that an aggrieved party who has cancelled the contract becomes entitled to retain a performance not yet rendered at the time of cancellation, or is entitled to the return of whatever has been performed at that stage, constitutes the starting-point of the measurement of his loss. In such cases the loss is, in the absence of special circumstances, the positive difference between the value of the performance retained or regained by the aggrieved party and the market value of the performance he would have obtained from the contract-breaker upon fulfilment.'

[103] See Kahn *Contract* I 801 et seq.

[104] The damages calculated on this approach are described as 'compensatory damages' which are contrasted with 'restitutionary damages' or negative interesse.

[105] See Lubbe & Murray *Contract* 608; Joubert *Contract* 259; Lee & Honoré *Obligations* 64.

[106] Van Aswegen *Sameloop* 207; 1993 *SA Merc LJ* 272; Harker 1994 *SALJ* 15. This refers to the plaintiff's gross profit or loss without adding his or her expenses, because this would amount to duplication (in other words, the expenses are included in the contract price). If damage upon breach of contract is calculated with reference to net profit or loss, ie the position he or she would have occupied after deduction of such expenses, the plaintiff should receive such expenses in order to place him or her in the position he or she would have been in had the contract run its course (in other words, the plaintiff is entitled to profit as well as expenses in terms of the contract). Reinecke & O'Brien 1998 *TSAR* 591–2 suggest that the reason why reasonable expenses may be claimed as part of positive interesse is to be found in the subjective approach of our courts to the quantification of damages (see para 3.5). As a rule the plaintiff is entitled to the value of the defendant's performance. The subjective value of the defendant's performance is the value of the plaintiff's performance plus the reasonable expenses the plaintiff incurred in order to obtain the defendant's performance. The value of the defendant's performance should therefore be presumed to be equal to the sum of the value of the plaintiff's performance and the reasonable expenses incurred by the plaintiff. This presumption will not readily be rebutted where the value of the defendant's performance is uncertain.

If the compensation which a party to a contract receives for expenses in connection with such contract (eg wasted expenditure) is seen as negative interesse, there may be problems regarding duplication with loss of profit. See also Lubbe 1984 *SALJ* 623; Joubert 1976 *THRHR* 7; McLennan 1999 *SALJ* 525–8; Harker 1994 *SALJ* 15. See, further, *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W). In casu (a case of breach of promise) it was inter alia held that where damages for loss of profit are awarded (for loss of benefits from a marriage) together with expenses incurred or which had to be incurred after the breach, the plaintiff is not entitled to be compensated for expenses that would not have been incurred had the transaction run its course and she made the profit she was now claiming (see Lubbe & Murray *Contract* 608). There appears to be less danger of duplication in regard to expenses incurred prior to the breach of contract (ibid). In casu where the plaintiff travelled from the United States to South Africa and had considerable expenses in this regard, the court awarded damages on the basis that the marriage would have taken place and that the plaintiff would have enjoyed the benefits of such marriage ('positive interesse'). The court accordingly refused to allow damages for certain losses sustained by her (eg her return journey to the United States) because it would constitute duplication (overlapping) of damages (see also para 8.6). She could also not claim damages for expenditure incurred prior to the breach which were necessary to put her in a position to reap the benefits from the intended marriage. See para 12.23 on breach of promise to marry.

See also Lubbe 1984 *SALJ* 620: '[I]t appears to be simplistic to adopt the view that actual losses can never be recovered when, in a contractual claim, damages are assessed according to the so-called positive interesse of the plaintiff.' See Lubbe op cit 624. In *Hamer v Wall* 1993 (1) SA 235 (T) at 240 expenses incurred during the duration of the contract were regarded as part of positive interesse.

[107] See Lubbe & Murray *Contract* 608, who refer to *Acton v Lazarus* 1927 EDL 367. See Joubert *Contract* 249, who sees the ratio in claiming expenses in the fact that these expenses must be repeated if the plaintiff wants to obtain the desired performance. See *Wood v Oxendale and Co* 1906 SC 674; *Tierfontein Boerdery (Edms) Bpk v Weber* 1974 (3) SA 445 (C). For approval of Joubert's view see *Hamer v Wall* 1993 (1) SA 235 (T) at 240; Van Aswegen 1993 *SA Merc LJ* 272–3. See contra *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 808; *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 472 where there was no question of the plaintiff incurring the expenses again.

[108] In *Goedhals v Graaff-Reinet Municipality* 1955 (3) SA 482 (C) at 486–7 the court required the plaintiff to lay a foundation for claiming that it is impossible to assess positive interesse (in casu the value of the chance to make a profit) before the plaintiff could elect to claim the expenditure incurred by him. In *Tweedie v Park Travel Agency (Pty) t/a Park Tours* 1998 (4) SA 802 (W) at 808 required the expenses to be wasted as the result of the defendant's breach of contract and to be reasonably incurred in reliance on the defendant's expected performance. See similarly Van Aswegen 1993 *SA Merc LJ* 274–5. Although the court applied the Australian approach in *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 485–6, no requirements were expressly set. The court discusses the Australian approach at 479–84 and refers to *Goedhals v Graaff-Reinet Municipality* as a South African case which supports the Australian approach. The approach of the High Court of Australia in *Commonwealth v Amann Aviation Pty Ltd* (1991) 104 ALR 1 (HE) is based on the assumption that if the contract is fully performed the plaintiff would at least have covered his or her expenses incurred in carrying out the contract. Most of the judges held that the burden to prove that the plaintiff's reliance expenditure would have been wasted even had the contract been performed rests on the defendant. The expenses would also have to be reasonably incurred. Most of the High Court judges were against giving the plaintiff an unfettered choice to sue for loss of profits or wasted expenditure. Brennan J, for example, required the plaintiff to first lay a foundation by showing that his ordinary expectation interest is impossible to calculate, before reversing the onus (see the approval of Christie & Bradfield *Contract*567–8). Sharrock 1985 *SALJ* 820 also requires that the contractual rules regarding remoteness and mitigation should also apply.

[109] See Lubbe & Murray *Contract* 698; Ogus *Damages* 351: 'D agrees to supply materials to P, a property developer, to build a house. In necessary preparation for the work, P spends [R10 000]. Because of prevailing market conditions, D is able to show that P would have made a nett loss on the sale of the house of [R1 000] (ie P's expectation interest is [–R1 000]. On breach by D, P elects to claim his wasted expenditure of [R10 000]. If he recovers this sum he will be in the position he would have been in if he had not entered into the contract with D, but will be [R1 000] better off than if he had performed his contract.' According to Ogus loc cit the net loss which P would have suffered as a result of the contract, must be deducted from his expenditure ('reliance loss') (para 4.4.1). It may be argued that this view should also be accepted in our law because the general criterion of damage in breach of contract always includes the hypothetical position had proper performance taken place and irrespective of which part of his interesse the plaintiff actually claims. See n 108; *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 808; *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W) at 471–2; *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 481. See para 4.4.3 on negative interesse and *Probert v Baker* 1983 (3) SA 229 (D). See also Lubbe 1984 *SALJ*624.

See further *Whitfield v Phillips* 1957 (3) SA 318 (A) at 334, where the court inter alia had to decide whether the fact that a farm was allegedly sold above market value, could influence the amount of loss of profit on account of repudiation of the contract. The court said (obiter) at 336: 'If by reason of the application of the principle that a plaintiff is to be placed in the position in which he would have been had the contract been carried out, the lesser value of the thing sold is to be deducted from the profits which the plaintiff has lost, then it may well be said that the application of the same principle must logically lead to the result that the lesser value is also to be deducted from other damages such as damages by way of disbursements not absorbed in the value of the farm.'

[110] See Joubert *Contract* 249; 1976 *THRHR* 14; see also *Stowe v Scott* 1929 TPD 450; *Hoets v Wolf*1927 CPD 408; *Marais v Commercial General Agency Ltd* 1922 TPD 440; *Evans & Plows v Willis* 1923 CPD 496; *Microutsicos v Swart* 1949 (3) SA 715 (A); *Radiotronics (Pty) Ltd v Scott, Lindberg Co Ltd* 1951 (1) SA 312 (C); *Whitfield v Phillips* 1957 (3) SA 318 (A) at 328; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550–1; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 468, 470; Kahn *Contract* I 795; Harker 1994 *SALJ* 13. If the innocent party does not regain something performed by him or her, this will influence damages according to positive interesse (see Lubbe 1984 *SALJ* 620, 621 n 34; Van der Merwe & Reinecke 1984 *TSAR* 86). See further Lubbe & Murray *Contract* 607–8 and Lubbe 1984 *SALJ* 626 n 63 on *Whitfield v Phillips* (above) (where the seller of a farm repudiated and frustrated the chance which the buyers had to a profit from a pineapple crop): 'The award of lost profit by the majority of the court . . . also seems to lose sight of the fact that the purchasers who had cancelled the contract, had received back the purchase price. To allow them the use of the money in conjunction with a profit which depended on the money's being expended, in the absence of proof that their present position subsequent to the breach was worse than the position they would have been in upon fulfilment, seems to fly in the face of positive interesse.' Kahn *Contract* I 811 responds to this criticism by arguing that, if the contract had been performed, the buyers would have had a farm (the value of which was equal to the purchase price) as well as profit from farming operations. Consequently, compensation for lost profits did not put the buyers in a better position than they would have been without breach of contract.

[111] See Van Aswegen *Sameloop* 203–8 for a useful summary. See further Lubbe 1984 *SALJ* 616; Van der Merwe & Reinecke 1984 *TSAR* 85; Sharrock 1985 *SALJ* 616; Van der Merwe & Olivier *Onregmatige Daad* 481–2; Joubert 1976 *THRHR* 1–14; Harker 1980 *Acta Juridica* 62–4, 107, 109; 1984 *SALJ* 138.

[112] eg misrepresentation, metus, undue influence (see also para 12.15.4 on the actio redhibitoria).

[113] See also para 13.4.2 in connection with, eg, *De Jager v Grunder* 1964 (1) SA 446 (A).

[114] See Joubert *Contract* 249; *Whitfield v Phillips* 1957 (3) SA 318 (A); Sharrock 1985 *TSAR* 207–8. See also *Probert v Baker* 1983 (3) SA 229 (D) at 234.

[115] See, generally, also Reinecke & Van der Merwe 1984 *TSAR* 87.

[116] See *Probert v Baker* 1983 (3) SA 229 (D) at 235; *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* 1906 SC 250 at 261 (where the court, in the absence of the proof of loss, held that the plaintiff was entitled 'to be placed in the same position in which it would have been if it had never been led or misled, by the defendants into entering into a contract of this nature'); *Clarke v Durban and Coast SPCA* 1959 (4) SA 333 (N) at 338 ('damages . . . are on occasion apparently assessed on a basis of restoring the actual losses (eg, disbursements) incurred'). *Stent v Gibson Bros* (1888) 5 HCG 148 (costs of preparation of an architect's plans); *Trichardt v Van der Linde* 1916 TPD 148 (expenses incurred by the trainer of a horse); *Acton v Lazarus* 1927 EDL 367; *Wood v Oxendale & Co*1906 SC 674; *Stowe v Scott* 1929 TPD 450; *Van der Watt v Louw* 1955 (1) SA 690 (T) (agent's commission which a seller had to pay, recovered from buyer who committed breach of contract); *Goedhals v Graaff-Reinet Municipality* 1955 (3) SA 482 (C); *Svorinic v Biggs* 1985 (2) SA 573 (W) at 580; *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W). See Lubbe 1984 *SALJ*628–34 for a critical evaluation of some of these cases. See further Mulligan 1950 *SALJ* 306; Hahlo & Kahn *The Union of SA* 499; Wille & Millin *Mercantile Law* 125–6; Erasmus & Gauntlett 7 *LAWSA* para 46.

[117] See Sharrock 1985 *TSAR* 201–2 and, eg, *Trichardt v Van der Linde* 1916 TPD 148; *Acton v Lazarus* 1927 EDL 367. In *Goedhals v Graaff-Reinet Municipality* 1955 (3) SA 482 (C) at 486–7 it was held that damages according to negative interesse are recoverable only where they cannot be based on positive interesse. However, this view is not reflected in other cases. See, eg, *Clarke v Durban and Coast SPCA* 1959 (4) SA 333 (N).

[118] *Probert v Baker* 1983 (3) SA 229 (D) at 234; Sharrock 1985 *TSAR* 204–5; Kahn *Contract* I 795; McLennan 1984 *SALJ* 40–1; Van Aswegen 1993 *SA Merc LJ* 267.

[119] See Mulligan 1950 *SALJ* 43; 1957 *SALJ* 306; 1958 *SALJ* 391–2; Harker 1980 *Acta Juridica* 107.

[120] 1985 *TSAR* 205.

[121] See 1985 *TSAR* 206, 212: '*(a)* expenditures incurred by the sufferer as a result of the contract being formed which have been wasted away because of the defaulter's breach; *(b)* gains which the sufferer has forborne from making as a result of the formation of the contract which forbearance has been rendered futile by the defaulter's breach; *(c)* expenditures incurred by the sufferer as a result of the defaulter's breach.' Precontractual expenses (in the expectation of concluding a contract) may possibly also be recoverable in certain situations (Sharrock op cit 207).

[122] Sharrock 1985 *TSAR* 207 et seq. He wants to limit liability to the extent of a plaintiff's positive interesse (Sharrock op cit 209; see also Lubbe 1984 *SALJ* 625), but places the onus in this regard on the defendant. Damages are also limited by principles on remoteness (para 11.5.5.2); mitigation (para 11.3); and compensating advantages (para 10.11). See also Sharrock 1985 *SALJ* 616–21.

[123] 1983 (3) SA 229 (D). X purchased a shareblock from Y for R17 500. In terms of the contract the share certificates and the money were to be deposited with Z, who would deliver them to X and Y respectively on the effective date. The money was properly paid, but when Y failed to deposit the share certificates, X cancelled the sale. Eight days later Z was liquidated and X recovered no dividend from him. X then claimed the sum of R17 500 with interest from Y. The court had problems in allowing the claim if it was based on restitution after cancellation, because Z had no mandate to receive the price on Y's behalf. It then held that although damages for breach of contract are normally based on positive interesse, there is nothing which prevents a plaintiff from measuring his damages according to negative interesse (ie his position if he had not contracted) provided that the contract has been properly cancelled.

In casu the court awarded R17 500 with interest to X. In an appeal (see 1985 (3) SA 429 (A)) the Appellate Division confirmed the decision, but on the basis that Z did have a mandate to accept the purchase price and that a claim for restitution was accordingly in order. Thus the Appellate Division has not yet committed itself on negative interesse. In *Sommer v Wilding* 1984 (3) SA 647 (A) the court was concerned with damages for breach of an option contract and two judges indicated obiter that damages calculated according to negative interesse could be recovered. In the case of an option contract it refers to what the plaintiff would have had if he had not entered into the contract. In *Van Jaarsveld v Bridges*2010 (4) SA 558 (SCA) at 562 the court remarked (obiter) that where an engagement has been broken off, the 'innocent

party' could claim to be placed in the position in which he would have been had the 'innocent party' not made expenses in preparation of the wedding and not suffered loss of income by resigning his or her employment in anticipation of the wedding.

[124] See also n 123. This judgment is based on three grounds (see Lubbe & Murray *Contract* 614 and Lubbe 1984 *SALJ* 628): *(a)* The idea that 'restitutional damages' complements cancellation as a remedy in breach of contract; *(b)* previous decisions in which the principle of negative interesse was accepted (see n 117), and *(c)* considerations of equity. The requirement of cancellation was obiter (*Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 485).

[125] See, in general, Reinecke & Van der Merwe 1984 *TSAR* 85 (who refer to the 'alarming content' of negative interesse); McLennan 1984 *SALJ* 40–1; Kerr 1984 *THRHR* 460; Kahn *Contract* I 800. See also Sharrock 1985 *SALJ* 618; 1985 *TSAR* 204–5; Harker 1994 *SALJ* 10–14. Lubbe 1984 *SALJ* 627 expresses the opinion that the court could, in the absence of evidence of the value of the merx (the shares), have allowed the plaintiff's claim if it was prepared to assume that the defendant's performance had the same value than the purchase price. Lubbe relies heavily on the Anglo-American interest approach (see para 4.4.1) and mentions that in this instance the restitution and reliance interests were relevant. He argues that the court has in casu awarded the plaintiff damages for damage which was not caused by any breach of contract but by her lack of business acumen (see, however, the comments of Kahn *Contract* I 800 on further arguments by Lubbe; see also Lubbe & Murray *Contract* 614–15). Van Aswegen 1993 *SA Merc LJ* 273 points out that damages measured according to negative interesse effectively implies that the conclusion of a contract is the damage-causing event. Positive interesse is the only measure of damage in breach of contract, irrespective of whether the contract is cancelled or not. Van der Merwe & Olivier *Onregmatige Daad* 482 support the idea of negative interesse in breach of contract as long as the law aims to compensate the plaintiff for damage caused by breach of contract and not for damage brought about by the conclusion of such contract. See also Van Aswegen *Sameloop* 207; 1993 *SA Merc LJ* 269–75 who describes the use of the measure of negative interesse in breach of contract as unnecessary and undesirable.

[126] See n 125 as well as the following: *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) 743–4; *Trichardt v Van der Linde* 1916 TPD 148 at 155; Sharrock 1985 *TSAR*209–10, 212; 1985 *SALJ* 620; *McCallum v Cornelius and Hollis* 1910 NLR 52; *Lammers and Lammers v Giovanni* 1955 (3) SA 385 (A); Lubbe 1984 *SALJ* 624–7; Van Aswegen *Sameloop* 208. It can be argued that this benefit to the plaintiff is not unfair since it is the defendant's *breach of contract* which gives him or her the opportunity to escape from a prejudicial transaction. See, however, Reinecke & Van der Merwe 1984 *TSAR* 87, who describe this argument as a type of versari doctrine in a contractual setting. See Lubbe 1984 *SALJ* 639–40 on certain policy issues which play a role, and the response of Kahn *Contract* I 800. See further Harker 1994 *SALJ* 9–10, 14.

[127] See, eg, *Svorinic v Biggs* 1985 (2) SA 573 (W), where a group of musicians concluded a contract with an agent who was supposed to promote their careers. After an alleged breach of contract the musicians claimed damages to place them in the position they would have occupied if they had not contracted with the agent but had concluded more favourable contracts with third parties. The court held that damages calculated on this basis could not be recovered in our law. The musicians' loss of income from hypothetical beneficial contracts with third parties did not flow naturally from the agent's breach of contract but was caused by an unfavourable contract. Profit that could be made from other contracts is irrelevant, irrespective of whether damages are based on positive or negative interesse. The court added, however, that the musicians could possibly have succeeded if they could prove special circumstances which brought the damage within the contemplation of the parties at the time the contract was entered into. (Sharrock 1985 *SALJ* 619 points out that this is difficult to reconcile with the court's attitude that the loss in question was caused by the *conclusion* of the contract—if this is so, the contemplation of such loss cannot change the position). The court also observed that the *Probert* case did not indicate whether negative interesse is to be measured by a comparison of the present position after breach of contract with the position of the plaintiff *if no contract had been concluded* or with the position the plaintiff occupied immediately before entering into a contract. It would seem that the court was of the opinion that the calculation of damage should be based on the second possibility and that afforded it a reason to hold that the musicians' loss flowed not from any breach of contract but from the contract itself. See also Van Aswegen 1993 *SA Merc LJ* 274; *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) at 808 (obiter); Hutchison 2004 *SALJ* 60–2. Clive & Hutchison *Breach*190–1 point out that lost opportunities are 'prevented or sacrificed through reliance on the contract', but that they are not part of the positive interesse (expectation interest). See also Van der Merwe et al *Contract* 423–4. See, however, Sharrock 1985 *SALJ* 618–19; Harker 1994 *SALJ* 14; Reinecke & O'Brien 1998 *TSAR* 592; *Probert v Baker* 1983 (3) SA 229 (D) at 235; Pelser 2006 *De Jure* 51. See further McLennan 1984 *SALJ* 41; Lubbe 1984 *SALJ* 640; Van der Merwe & Reinecke 1984 *TSAR* 88.

See eg Van der Merwe & Olivier *Onregmatige Daad* 481; Lubbe 1984 *SALJ* 618; Mulligan 1957 *SALJ*306; 1958 *SALJ* 391; *Davidson v Bonafede* 1981 (2) SA 501 (C).

[128] Both of these approaches may have the result that plaintiffs involved in a losing contract from their point of view (a 'bad bargain') will be placed in a better position than they would have been without such contract.

[129] 1993 (1) SA 235 (T). The plaintiff (appellant) instituted action in a magistrates' court against the defendant (respondent) for damages arising from the defendant's breach of contract. The plaintiff and defendant had entered into a partnership agreement which was to commence on a future date. The plaintiff resigned from his job on the strength of this partnership. The parties never commenced working in partnership because of the defendant's repudiation of the contract which the plaintiff accepted. As a result of this breach the plaintiff spent a month out of work. He claimed from the defendant the amount of money he would have earned for that month by way of salary. The magistrate ordered absolution from the instance. On appeal, the court (per Goldstein J, Eloff JP concurring; Strydom J dissenting) held that the plaintiff's claim for damages on that basis was a claim for his negative interesse and that he was not permitted to claim damages on that basis. The court further held that a plaintiff could not elect to pursue either his negative interesse or his positive interesse. The appeal was dismissed. Strydom J, however, followed the decision in *Probert v Baker* and allowed the claim.

[130] The majority distinguished (240–1) the plaintiff's claim for lost salary in casu from the claims for wasted expenses which were allowed as part of positive interesse in other previous cases (see para 4.4.2). The majority held (at 241) that the claim for lost salary was indistinguishable from the claim in *Svorinic v Biggs* 1985 (2) SA 573 (W) for loss of profit that the plaintiffs could have been made on other contracts which they could have concluded had they not concluded the contract with the defendant. Some argue that factual causation was absent in the last-mentioned case and *Hamer v Wall*, as the loss flowed from the conclusion and not from the breach of the contract (Van Aswegen 1993 *SA Merc LJ* 274; *Tweedie v Park Travel Agency (Pty) t/a Park Tours* 1998 (4) SA 802 (W) at 808). Others, however, consider that the plaintiff should be able to claim forgone gains as part of his or her positive interest (Sharrock 1985 *SALJ* 618–19; Harker 1994 *SALJ* 17; Reinecke & O'Brien 1998 *TSAR* 592. See also *Probert v Baker* 1983 (3) SA 229 (D) at 235).

[131] Joubert *Contract* 249; Van Aswegen 1993 *SA Merc LJ* 275; Harker 1994 *SALJ* 14. Wasted expenses can be claimed as part of positive interesse.

[132] 1998 (2) SA 468 (C). The plaintiff claimed damages for breach of a warranty in a contract of sale of the share capital in a company. The defendant warranted that the 'profit forecast' annexed to the contract had been prepared in good faith and contained no material inaccuracies and omissions. An accurate forecast would have revealed that the company was insolvent and the shares worthless. The plaintiff alleged that it would not have concluded the contract if the warranty was not breached. The plaintiff did not cancel the contract. The plaintiff claimed the following: the purchase price (R8 568 494), certain restraint payments (R550 000) made to some managers employed by the company, legal and professional costs (R167 340) and the costs (R6.2 million) to financially support the company in order to prevent its liquidation. The defendant raised two alternative grounds for exception: the plaintiff's claim for restitutionary damages representing its negative interesse could only be claimed if the contract was cancelled (based on the *Probert* case) and, alternatively, the claim was not sustainable for breach of contract (based on the *Hamer* case). Both grounds for exception were dismissed. The court held that lost expenditure can be claimed as damages for breach either as positive interesse or as negative interesse (reliance interest) subject to the rule that the expectation interest sets the limit of recovery without first cancelling the contract.

[133] At 485–6. A comparative survey of civil- and common-law legal systems showed that no legal system takes the position of either the *Probert* or the *Hamer* cases.

[134] Christie & Bradfield *Contract* 567–8; Lewis 1998 *Annual Survey* 204; Kerr *Contract* 733 approve of this decision. See further McLennan 1999 *SALJ* 522–5. The court followed a comparative approach. See further Treitel *Remedies* 88–105.

[135] At 484. Both approaches will lead to the same practical result.

[136] 479–83, 485–6. This is the Australian approach. The court set no requirement. For further discussion see n 108.

[137] 481–2, 486. This is the Anglo-American approach in terms of which the plaintiff may freely elect to claim his or her lost expenditure as negative interest. The *Mainline* case (at 486) merely stated the limitation and left the question open whether the plaintiff had to allege this limitation or whether the defendant had to plead it. McLennan 1999 *SALJ* 524 points out that the requirement of the limitation was obiter and criticizes it because it cannot be applied in practice, nor is there any logical reason for it. The problem of a bad bargain is merely a question of causation: was the damage incurred by reason of the breach or the conclusion of the contract? See Pelser 2006 *De Jure* 54 who also argues that the limitation serves no purpose but that this approach could lead to the plaintiff being overcompensated in the case of a bad bargain.

[138] At 484–5.

[139] See Hutchison 2004 *SALJ* 62–3; Clive & Hutchison *Breach* 189–90 who argue that reliance expenses are important components of positive or expectation damages. Van der Merwe et al *Contract*424 state: 'Reasonable expenses and financial sacrifices made by the plaintiff to obtain counter-performance can therefore be seen as indicative of the total value of full counter-performance and its anticipated advantages.' As 'a technique or aid to quantify the loss suffered by the plaintiff' it should be used only when it is difficult to produce direct evidence of the positive interest of the plaintiff (424). Reasonableness of the expenses is determined by the nature of the contract and the surrounding circumstances (423).

[140] See, generally, Van Aswegen *Sameloop* 316–25.

[141] Para 13.4.

[142] See also para 4.6.3.4 on hypothetical causes and para 4.6.3.5 on contingencies up to the time of the trial; para 6.7.4 on prospective loss and the taking into account of events between the time of the damage-causing event and the date of trial; chap 7 on the application of the 'once and for all' rule; para 8.4 on the form of an award of damages; para 11.7 on inflation; chap 12 on specific principles concerning breach of contract. See in general Koch *Lost Income* 104–16; 1989 *THRHR* 67–70; Corbett & Buchanan I 19–20; McKerron *Delict* 120–3; Bloembergen *Schadevergoeding* 130–6; For the relationship between the date of assessment of damages and the duty of mitigation see *Rens v Coltman* 1996 (1) SA 452 (A) at 461; *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 688–9; Visser 1996 *Obiter*187–8.

[143] In other words, the comparison of the plaintiff's patrimonial position before and after the damage-causing event (in terms of the concrete approach) or the plaintiff's present patrimony with his or her hypothetical (present) patrimonial position but for the damage-causing event (abstract theory).

[144] Van der Walt *Sommeskadeleer* discusses this issue in detail. See op cit 14 (Mommsen's view is that the comparison should be undertaken at the time of judgment but that in exceptional cases damages for further damage could be recovered by another action); op cit 26, 39, 45, 76, 90, 135 (according to Mertens, the effect of the damage-causing event upon someone's patrimony should be determined immediately after damage occurs but factors up to the time of judgment may be taken into account); op cit 188–94 (criticism of the fiction adopted by the sum-formula that all damage occurs at once and that only one action is available in terms of the 'once and for all' rule—para 7.3.2); op cit 260 et seq; 291 et seq.

[145] Para 3.2.4.1.

[146] Para 4.2.3.

[147] *Sommeskadeleer* 279.

[148] In the cases settled out of court the parties may, in the absence of any statutory provision to the contrary, agree as to the proper time of assessment.

[149] See, however, *Seattle v Protea Ass Co Ltd* 1984 (2) SA 537 (C) on the refusal of a court to entertain a supplementary actuarial report handed in after judgment was reserved but which was not made available to the court until after its judgment had been formulated. See also Koch 1989 *THRHR* 69 on the position when judgment is delivered long after the commencement of a trial.

[150] See *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 612: 'Wanneer 'n voorwerp soos 'n motorkar vernietig of beskadig word, is die vernietiging of beskadiging daarvan gewoonlik onmiddellik voltooi en kan die omvang van die eiser se skade ook dadelik bepaal word. Dit is dus maklik om te verstaan waarom daar in die geval van sodanige skade vereis word dat die eienaar se skade soos op die datum van die delik bepaal moet word.' For example: if X's vehicle is damaged on 1 May 1989 the reasonable cost of repairs (see para 13.1) is calculated with reference to this date even though he receives the money only on 1 May 1992, after the court has given judgment. See also *Botha v Rondalia Versekeringskorp van SA Bpk* 1978 (1) SA 996 (T) at 1004; Koch 1987 *THRHR* 106; Erasmus 1975 *THRHR* 104, 106. See, however, the argument of Visser 1996 *Obiter* 187 with reference to *Rens v Coltman* 1996 (1) SA 452 (A) that the increased cost of repairs (or replacement) of a thing may be claimed if there was no unreasonable delay and if the increase was reasonably foreseeable.

[151] Cf *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 613, where the court viewed loss of income caused by bodily injuries (loss of earning capacity) as damage which continues into the future well after the time of the commission of delict (see Reinecke 1988 *De Jure* 236 for criticism, but cf paras 3.2.4.2 and 14.6.6). This theory prompted the court to discount damages for loss of earning capacity and loss of support only to the date of trial and not the date of delict (see para 6.7.5). See also *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 557: 'Where there has been a change in the situation between the date of the delict and the date of the judgment this change may affect the amount of damages.' See also *Whigham v British Traders Ins Co Ltd* 1963 (3) SA 151 (W) (life expectancy of dependant taken at date of trial); see further Davel *Afhanklikes* 90–2. See also *Mlombo v Fourie* 1964 (3) SA 350 (T) at 357,

where the court in a vindicatory action assessed the value of cattle at the trial date; *Muller v Government of the RSA* 1980 (3) SA 970 (T) at 974–5: 'The general rule is that damages must be assessed as at the date of the wrong, although it may be that in a case such as the present (where the plaintiffs only became aware of the wrong at the later date, when the damages may have been increased by the amount of additional interest accrued), the time for the assessment of damages may be the date when they got to know of the wrong.' See also *Beverley v Mutual and Federal Ins Co Ltd* 1988 (2) SA 267 (D) (increase in medical costs up to the time of trial).

[152] See, in general, *Oslo Land Co v Union Government* 1938 AD 584; Van der Merwe & Olivier *Onregmatige Daad* 283; para 7.4.2.

[153] See para 7.3.

[154] See, in general, Kerr *Contract* 826–8; para 12.7.2.2; para 12.15.3 on eviction in connection with a contract of sale.

[155] See, eg, *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) at 257; *Voest Alpine Intertrading Gesellschaft mbH v Burwill & Co (SA) (Pty)* 1985 (2) SA 149 (W) at 151; *Culverwell v Brown* 1990 (1) SA 7 (A) at 25; *Rens v Coltman* 1996 (1) SA 452 (A) at 458; *Mostert v Old Mutual Life Ass Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 187; *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 686–8.

[156] The onus should rest on the plaintiff to prove that the date of assessment used is the correct date. See Visser 1996 *Obiter* 187; *Rens v Coltman* 1996 (1) SA 452 (A) at 461; *Mostert v Old Mutual Life Ass Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 187.

[157] *Novick v Benjamin* 1972 (2) SA 842 (A) at 853–4, 860–1; *Culverwell v Brown* 1990 (1) SA 7 (A) at 20, 25.

[158] *Rens v Coltman* 1996 (1) SA 452 (A) at 459.

[159] Which is relevant in regard to repudiation (para 12.7.2.4). See *Culverwell v Brown* 1990 (1) SA 7 (A) at 18, 30; Nienaber 1963 *THRHR* 33, 37, 38; 1989 *TSAR* 15. See Kerr 1986 *SALJ* 340 on the time of mitigation (eg buying of a substitute) as the moment of estimation of loss.

[160] See, on repudiation, Nienaber 1963 *THRHR* 37. It should be remembered that damage does not necessarily occur at the moment of breach of contract. In the case of repudiation, eg (para 12.7.2.4), it is usually manifested only at the time set for performance. See Van Aswegen *Sameloop* 213: 'Myns insiens behoort die reël ten aansien van die tydstip vir skadebepaling so geformuleer te word dat die oomblik waarop skade intree (sy dit by kontrakbreuk, prestasiedatum, repudiëring of terugtrede) met inagneming van die mitigasiereël die bepalende oomblik vir die bepaling van skade en die berekening van skadevergoeding sal wees. Dit is immers die vroegste tydstip waarop al die vereistes vir 'n eis om skadevergoeding op grond van kontrakbreuk teenwoordig is.' (The date on which damage occurs should be the determining date.)

[161] See Van der Walt *Sommeskadeleer* 26, 40, 46, 61, 76, 91, 124, 260–71; Reinecke 1976 *TSAR*37–43; 1988 *De Jure* 225; Bloembergen *Schadevergoeding* 222–41.

[162] See para 11.5, on legal causation and the limitation of liability.

[163] The same observation applies to other kinds of damage claims (para 1.5.2). See para 2.1.2 on a damage-causing event.

[164] Para 2.1.2.

[165] Para 2.6.

[166] See para 6.3 on the different stages at which causation is relevant. See in general *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 328, 329–30; *Norris v Road Accident Fund* [2001] 4 All SA 321 (SCA); *Thompson v SA Broadcasting Corporation* [2001] 1 All SA 329 (SCA); *Mostert v Old Mutual Life Ass Co (SA) Ltd* [2001] 2 All SA 465 (C) and 2001 (4) SA 159 (SCA). Cf para 2.6 n 174.

[167] 1976 *TSAR* 37–8.

[168] Para 4.2 on the sum-formula.

[169] This formulation of conditio sine qua non does not agree with the definitions of most of the current exponents of this method. See, eg, Van Oosten 1982 *De Jure* 19 who simply asks if X (a consequence) falls away when A (the alleged cause) is notionally eliminated. According to his view, this procedure entails a so-called 'condition without which . . .'. See, however, Visser 1989 *THRHR* 560–4.

[170] The disadvantages of this are described by Reinecke *Diktaat: (a)* In situations where causation is not in dispute (but only the patrimonial element of damage), the measure of damage nevertheless reintroduces this issue. *(b)* The conditio sine qua non doctrine may be a false method to establish causation and it also causes problems in connection with alternative (double) causation as well as hypothetical causes.

[171] See also Van Rensburg *Juridiese Kousaliteit* 44; Koch *Lost Income* 56.

[172] Such a view is, however, clearly incorrect. If B's patrimonial positions immediately before and after (see para 4.5 on the time of the assessment of loss) the fire are compared, his damage is the loss of the house through fire. It is apparent that the house would then still have existed had the fire not occurred. The effect of the earthquake which occurs later is, however, relevant in the context of hypothetical causation since, viewed ex post facto, it had already had an influence on the value of the house at the time of the damage-causing event (see para 4.6.3.4).

[173] It would appear, however, that the conditio sine qua non approach possibly does not support this conclusion (see De Wet & Swanepoel *Strafreg* 63). The method of elimination is applied to the situation which prevailed immediately after the house was destroyed by fire and not to the time after the earthquake. This is not really an example of double or alternative causation, because the two catastrophes occurred at different times.

[174] 1976 *TSAR* 39.

[175] See also the analysis by Reinecke 1976 *TSAR* 40–1 of the examples given by Van Rensburg *Juridiese Kousaliteit* 43 et seq (which deal with double causation—para 4.6.3.2). He also rejects Van Rensburg's approach to future loss (lucrum cessans) in making a comparison between an actual and a hypothetical course of events.

[176] Below, n 223.

[177] 1976 *TSAR* 42–3.

[178] See Reinecke's own words (1976 *TSAR* 42): 'Gestel hy [the expert on causation] bevind na aanwendig van die juiste kousaliteitstoets dat B se huis as gevolg van die kontrakbreuk R1 000 minder werd is . . . .' The causation expert's assessment is thus necessarily also relevant to the determination of damage.

[179] Para 2.6. This conclusion does not, of course, imply that damage and causation are identical concepts. Not all the consequences of, eg, a breach of contract or a delict amount to 'damage'. All damage must, however, be the consequence of a damage-causing event. See *Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at 6: 'A plaintiff who enforces a contractual claim arising from the breach of a contract needs to prove, on a balance of probability, that the breach was a cause of the loss' and in n 1: 'The test for factual causation is the same in delictual and contractual cases, see *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191I–J.'

[180] *Sommeskadeleer* 256–60.

[181] See also Van Aswegen *Sameloop* 169, who is of the opinion that in causation one is interested only in whether an act has caused a factual consequence. If, and to what extent, this also constitutes damage is a separate question. See, however, paras 2.6 and 4.6.2.

[182] Para 4.2.1.

[183] See para 4.2.1. See, however, para 4.2.3 on the necessity in some cases to work with a hypothetical patrimonial position when assessing damage in certain situations (eg breach of contract, loss of profit, future loss and misrepresentation).

[184] eg Visser 1989 *THRHR* 561–4.

[185] In conditio sine qua non an alleged cause must be eliminated and the hypothetical course of events without such element construed in order to see whether the result complained of still ensues. In applying the sum-formula, the alleged damage-causing event must be eliminated and the hypothetical events postulated in order to determine what the plaintiff's patrimonial position would have been. The difference in principle which Van der Walt *Sommeskadeleer* 259 sees between these two approaches does not really exist. Both are involved with something fictitious—in causality the hypothetical consequence without the antecedent in question, and in damage the hypothetical consequence without the damage-causing event—revealing that there is no difference in principle between the two.

[186] See also n 188 below; Neethling & Potgieter *Delict* 185–7; see, however, op cit 184–5 on causation in the case of an omission.

[187] See also para 2.1.2 on the causal element in the concept of damage.

[188] If causation between conduct and damage is not determined through the conditio sine qua non approach (see Neethling & Potgieter *Delict* 185–7), then no comparative method is involved and confusion with the measure of damage (which in some cases must also necessarily have a hypothetical element—see para 4.2.3) cannot take place. However, the use of the correct measure of damage will in any event confirm the existence of a causal nexus—see para 4.6.2.

[189] Paras 2.3.1 and 8.5.

[190] See, eg, *Wilson v Birt* 1963 (2) SA 508 (D). It is possible to think of similar examples in the field of contractual liability and liability without fault. See on causation in the sphere of insurance law, *Concorde Insurance Co Ltd v Oelofsen* 1992 (4) SA 669 (A).

[191] See generally para 11.5.4.7 on so-called egg-skull cases. See further *Smit v Abrahams* 1994 (4) SA 1 (A).

[192] Meaning you must take your victim as you find him or her—see para 11.5.4.7.

[193] See Steynberg *Gebeurlikhede* 270–7 for a detailed discussion with references to the application of this aspect in English, Australian and Canadian law.

[194] Steynberg *Gebeurlikhede* 277.

[195] [2000] 1 All SA 67 (C) at 85–8. See also *Santam Ins Co Ltd v Paget* 1981 (2) SA 621 (ZA) at 628: 'One cannot say on the evidence by what period the effects of his pre-existing back condition have been accelerated . . . . The injury he sustained has certainly made him more vulnerable in the labour market, though perhaps in a year or two the poor state of his back would have caught up with him even had there been no accident. These are all rather nebulous facts, but, nevertheless, to do justice to the respondent without being unfair to the appellant, it is necessary to resort to the only course now open and . . . pluck a figure out of the air to compensate him for his diminished earning ability.'

[196] At 87.

[197] See, however, paras 4.6.3.3 and 4.6.3.4 on actual and hypothetical events after a damage-causing event.

[198] See, eg, *Stoffberg v Elliot* 1923 CPD 148, where a part of the plaintiff's body which was afflicted with cancer was unlawfully removed. It was held that the operation caused him no damage. See, for a discussion, Boberg *Delict* 746. Cf also the case where X, owing to an existing illness, is capable of working only for another 5 years and Y causes him serious injuries. In casu X's damage is the elimination of his already shortened earning capacity. See also *Santam Ins Co Ltd v Paget* 1981 (2) SA 621 (ZA) on aggravation of an existing problem and the acceleration of future loss.

[199] See also Bloembergen *Schadevergoeding* 222 et seq.

[200] Where more than one person or event causes different losses to a plaintiff, there is no particular theoretical problem. See on this *Minister of Communications and Public Works v Renown Food Products* 1988 (4) SA 151 (C).

[201] See Neethling & Potgieter *Delict* 181. Cf Van der Merwe & Olivier *Onregmatige Daad* 200–1, who (unsuccessfully) attempt to modify conditio sine qua non in order to avoid this absurd result. See *Silver v Premier, Gauteng Provincial Government* 1998 (4) SA 569 (W) at 575.

[202] See Neethling & Potgieter *Delict* 181; *Portwood v Swamvur* 1970 (4) SA 8 (RA) at 15.

[203] In delictual liability Y and Z would be seen as joint wrongdoers. See, eg, the discussion by Van der Merwe & Olivier *Onregmatige Daad* 292–307 of s 2 of the Apportionment of Damages Act 34 of 1956. In the example it would be fair to compel Y and Z each to pay 50 per cent of X's damages. See also the following example discussed by Van Rensburg *Juridiese Kousaliteit* 43 et seq: S, a singer, has a continuous agreement with T, the owner of a taxi, in terms of which T guarantees that S will be transported to the theatre each evening in time to participate in a performance. One evening T fails to turn up but S has fallen ill earlier and could not sing in any event. Has T caused damage to S in this situation? There is a contention that a comparison between the actual events and the hypothetical events if T had turned up in time does not reveal that S would have been better off—S was in any event unable to sing. It is accordingly reasoned that S has not suffered any damage.

Reinecke 1976 *TSAR* 38–42 rejects this line of reasoning and submits that S has suffered damage since a justified expectation of his has been frustrated. Proof of this, Reinecke argues, is that if S had insured himself against loss of income from his voice for any reason, he would be able to claim compensation from his insurer. But before S may claim damages from T, he will have to prove that T caused his damage. To establish this, one needs a 'good' test of causation to solve the problem of double causation. A variation of this example is where S has insured himself with V against any loss which he may suffer if he is on account of illness unable to sing. It S wants to claim from V, he will have to prove that his illness caused the damage, while he must prove a causal nexus between his damage and the breach of contract if he intends to sue T. There is a view that S may claim damages for his full loss from either T or V. Here it may also be possible to argue that T and V should each be held liable for 50 per cent of the loss.

[204] X's damages will then be reduced in accordance with his degree of fault (see para 11.4 on contributory fault).

[205] Boberg 1963 *SALJ* 544–5; 1964 *SALJ* 199–201 distinguishes between *supervening events*, namely events of which the element of uncertainty that existed at the date of the delict has been extinguished by the occurrence or non-occurrence thereof at the date of the trial, and *supervening evidence*, namely

evidence that casts further light on already known facts, which in itself remained unchanged. A supervening event would have the effect that a contingency (uncertain future event) becomes a reality, whereas supervening evidence only casts more or new light on existing events or facts, but does not change the nature thereof. Both are taken into account by the courts at trial. An example of a supervening event is the actual remarriage of a widow before trial (*Glass v Santam Ins Ltd*1992 (1) SA 901 (W)) and an example of supervening evidence is where the plaintiff had outlived her estimated life expectancy by the date of the trial (*Wigham v British Traders Ins Co Ltd* 1963 (3) SA 151 (W)). See also para 6.7.4; Van der Walt 2002 *SALJ* 649–60. It is possible to make further distinctions such as the time when the trial commences, the presentation of evidence is concluded, judgment is delivered, an appeal is heard, etc. See in general Steynberg *Gebeurlikhede* 277–84; McGregor *Damages* 1179–92; chap 6 on prospective loss; and chap 7 on the 'once and for all' principle.

[206] See para 4.5.

[207] See *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 557: 'Where there has been a change in the situation between the date of the delict and the date of the judgment, this change may affect the amount of damages'; *Carstens v Southern Ins Ass Ltd* 1985 (3) SA 1010 (C) at 1020: 'But it is not judicial policy to disregard subsequent contingencies. Nor will a Court disregard what has occurred between the date of delict and the date of trial'; *Blyth v Van den Heever* 1980 (1) SA 191 (A); *General Accident Ins Co Ltd v Summers* 1987 (3) SA 577 (A) at 615; *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA).

[208] See para 11.3 on the duty to mitigate and how it influences the amount of damages.

[209] See chap 10 on collateral benefits and compensating advantages. Benefits may also be received after the date of trial.

[210] Suppose X injures Y and Y must undergo a dangerous operation. Because of the operation, Y's condition worsens. If the further damage may be reasonably attributed to X, he will be liable to compensate Y for such loss. See para 11.5 on remoteness of damage. See also Koch *Lost Income* 174.

[211] See also the example of the fire and earthquake in para 4.6.2. See further, on an insurance claim in respect of stolen property, Reinecke et al 12 *LAWSA* (reissue) para 295.

[212] Para 14.6.

[213] See McGregor *Damages* 1180.

[214] [1969] 3 All ER 1528 (HL).

[215] See also the following (cf Bloembergen *Schadevergoeding* 223): X injures Y on 1 February and he is unable to work until 1 May. On 1 March Z also causes injuries to Y and, if he was not already incapacitated, it would have prevented him from working until 1 May. Some argue that only X is liable to compensate Y for his total loss from 1 February to 1 May. Their argument is that Y's earning capacity was already impaired for that period and could therefore not have been affected by Z. Others submit that X is only solely liable for the period 1 February to 1 March and that for the period 1 March to 1 May X and Z are jointly liable because they both caused the same damage. It appears that the latter solution is to be preferred on the grounds of fairness towards Y.

[216] Lord Reid said that 'the later injuries merely become a concurrent cause of the disabilities caused by the injury inflicted by the defendant'. Lord Pearson held as follows: (above at 1535): 'The original accident caused what may be called a ''devaluation'' of the plantiff, in the sense that it produced a general reduction of his capacity to do things, to earn money, and to enjoy life. For that devaluation the original tortfeasor should be and remain responsible to the full extent, unless before the assessment of the damages something has happened which either diminishes the devaluation (eg, if there is an unexpected recovery from some of the adverse effects of the accident) or by shortening the expectation of life diminishes the period over which the plaintiff will suffer from the devaluation.'

See, however, *Jobling v Associated Dairies* [1982] AC 794, where X suffered a back injury which reduced his earning capacity. Before the trial commenced, it was found that he suffered from an illness which would completely eliminate his earning capacity. The House of Lords confirmed that he had no claim against the defendant from the moment of total incapacity. The *Baker* case supra was distinguished because in that situation there was no supervening illness but a supervening tort! See for a discussion McGregor *Damages* 1182–5; Luntz *Damages* 194–5. See further, on shipping cases, McKerron *Delict* 120–1; Bloembergen *Schadevergoeding* 239–41.

[217] See para 11.1.6 on the transmissibility of actions; para 14.6.4.1 on the influence of a shortened expectation of life on a claim for loss of earning capacity; para 6.7.4 on events up to the date of trial. See also McGregor *Damages* 1185.

[218] See also the case where an injury impairs X's earning capacity but, before his action is heard, he is sentenced to 10 years' imprisonment (McGregor *Damages* 1185 and *Leschke v Jeffs*

*and Faulkner*1955 *Queensland Weekly Notes* 67). In determining loss of earning capacity, the reduction caused by the period of imprisonment as well as its influence later on, is taken into account.

[219] Cf again the example of the fire and earthquake in para 4.6.2. The fire destroyed a house which would in any event have been destroyed and the earthquake merely removed the ruins. The plaintiff may at least claim damages for half his damage from the arsonist (see also n 223 below). A further example (see Bloembergen *Schadevergoeding* 228) is where X administers poison to Y's horse which will cause it to die within 24 hours. However, an hour later Z shoots and kills the animal. It is evident that Z caused the death of the animal but the horse he killed did not have a normal life expectancy and would in any event have died. Z thus merely hastened the death of a doomed animal. Although Y clearly suffers damage, Z has not in fact caused such damage (the full value of the horse). Y's damage was actually caused by X, who did not kill the horse but rendered it valueless. A different argument may be that both X and Z are liable for Y's damage, because Z cannot rely on X's conduct as absolving him completely from liability.

[220] See para 4.6.3.4 on hypothetical causes.

[221] See, eg, Van der Walt *Sommeskadeleer* 82, 92, 263–4; Bloembergen *Schadevergoeding* 222–41, who deals with this subject under the heading of double causation; Koch *Reduced Utility* 61–2.

[222] It is not clear what exactly should be seen as hypothetical causes or causation. Some of the cases discussed in the previous paragraph may possibly be relevant here.

[223] The same reasoning applies in regard to the example at para 4.6.2 of the house which burned down (even though the ruins were actually destroyed by an earthquake which happened later—ex post facto it was not merely a possible later cause but an actual event). The facts prove that a doomed house, the value of which was obviously much lower than if there was no possibility of an earthquake, burned down—unless it is argued that, in fairness to the owner, the earthquake should be ignored (see Van Rensburg *Juridiese Kousaliteit* 44, who wants to take only unforeseen events of a delict into account in so far as they may be relevant in the acquisition of future assets). See also n 219 above.

[224] Para 6.7.3.

[225] Van der Walt *Sommeskadeleer* 258 observes that it is accepted that hypothetical causation relates to the assessment of damage (and that it is not a problem of causation). He adds that it cannot be expected of a concept or formula of damage to solve the problem and that a substantive doctrine on hypothetical causation has to be developed.

[226] eg only those which were already to be expected at the moment the damage-causing event occurred, or which were reasonably foreseeable at such stage or some time thereafter.

[227] See Steynberg *Gebeurlikhede* 138–40. The degree of probability that the contingency will realize in future must be expressed by the court as a percentage between five per cent and 80 per cent, in view of objective measures and logical conclusions from the expert and other evidence (Steynberg 2007 *THRHR* 238). See also para 6.7.3.

[228] See para 6.7.3 on future contingencies.

[229] See para 4.6.3.3 on actual events.

[230] See also McGregor *Damages* 1118 who refers to *Rouse v Port of London Authority* [1953] 2 Lloyd's Rep 179. After R (a docker) was injured, there was a decline in the employment at the docks and this was taken into account in reducing his damages. Cf also *Ashcroft v Curtin* [1971] 1 WLR 1731 (CA). See further Kerr *Contract* 599 and *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 693–4 on contingencies in the calculation of damages on account of repudiation of a contract.

[231] 1978 (1) SA 805 (A) at 813. Cf also *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 979–80.

[232] See para 14.5 for more detail.

[233] In making a deduction for past contingencies, the same percentage as for future contingencies is sometimes employed (see, eg, *AA Mutual Ins Ass Ltd v Maqula* 1978 (1) SA 805 (A) at 813). See, further, *Nhlumayo v General Accident Ins Co SA Ltd* 1986 (3) SA 859 (D); *Everson v Allianz Ins Co Ltd*1989 (2) SA 173 (C). In considering the impairment of X's earning capacity, it is relevant whether X's health or the general economic conditions would not in any event have reduced the value of his earning capacity. His damages are then reduced by a certain percentage (see eg *Van der Plaats v SA Mutual Fire & General Ins* 1980 (3) SA 105 (A) at 114–15). See further Klopper *Third Party Compensation* 188–91; Koch *Lost Income* 44, 62; Boberg *Delict* 541; *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (W) at 397.

[234] Cf *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at 136 (five per cent for past loss, 15 per cent for future loss); *Road Accident Fund v Delport* 2006 (3) SA 172 (SCA) at 178 (10 per cent for past loss, 20 per cent for future loss); *Fair v SA Eagle Insurance Co Ltd* [1997] 2 All SA 396 (EC) at 410–11 (5 per cent for past loss, 15 per cent for future loss); *Carstens v Southern Insurance Association Ltd* 1985 (3) SA 1010 (C) at 1028 (10 per cent for past loss, 30 per cent for future loss); *Marine and Trade Ins Co Ltd v*

Katz 1979 (4) SA 961 (A) at 979 (10 per cent for past loss, 50 per cent for future loss). In *Nhlumayo v General Accident Ins Co of SA Ltd* 1986 (3) SA 859 (D) the court made a five per cent deduction for past contingencies and a 16 per cent deduction for future contingencies. There may, however, also be a zero rate for past losses but 15 per cent for future loss (see *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 963). See also *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 188; Koch *Reduced Utility* 72, 74–5; Boberg 1963 *SALJ* 549 and n 37: 'The contingencies which affect the estimation of the plaintiff's pre-trial earnings but for his injuries arise from the fact that, while we know what has actually happened to him since the accident, we can never know what would have happened had the accident not occurred. He may have become ill, been injured in some other way, lost his job or even died.' See also Steynberg *Gebeurlikhede* 166–70.

[235] Koch *Reduced Utility* 140 suggests a sliding scale of 1/2 per cent for each year to retirement. See *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 588 in which this sliding scale was applied. In *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 188 the court compared the period of time for the past loss of earnings with the expected period for the future loss of earnings and doubled the contingency deduction for the future loss because it was expected to be twice as long as the past loss. See also Boberg 1963 *SALJ* 549: 'It . . . appears that the plaintiff's pre-trial loss of earnings and his post-trial loss of earnings, while uncertain both, are not both equally uncertain. If this be so, it is respectfully submitted that it is justifiable and indeed desirable to inquire separately into the loss suffered during each of these periods, so that proper weight may be accorded to the different contingencies applicable in each case.'

[236] Para 4.6.3.4. See Steynberg *Gebeurlikhede* 138–40.

[237] See *Sepheri v Scanlan* 2008 (1) SA 322 (C) (50 per cent contingency deduction for remarriage on a contractual claim for breach of promise).

[238] Para 6.7.3.

Chapter 5
NATURE AND ASSESSMENT OF NON-PATRIMONIAL LOSS (INJURY TO PERSONALITY)

5.1 DEFINITION OF NON-PATRIMONIAL LOSS [1]

Non-patrimonial loss is the diminution, as the result of a damage-causing event, in the quality of the highly personal (or personality) interests of an individual in satisfying his or her legally recognized needs, but which does not affect his or her patrimony. [2]

Some aspects of this definition have already been dealt with above. [3]

As far as the damage-causing event is concerned, [4] it should be noted that non-patrimonial loss in connection with physical and mental integrity apparently requires a bodily (physical or psychiatric) injury. [5]

5.2 NON-PATRIMONIAL LOSS AS PART OF CONCEPT OF 'DAMAGE'

It has already been pointed out that damage is a comprehensive concept with patrimonial and non-patrimonial loss as its two mutually exclusive components. [6]There are important differences [7] and similarities [8] between these forms of damage. The boundary between patrimonial and non-patrimonial loss cannot always be precisely drawn. [9]

5.3 NON-PATRIMONIAL LOSS, RIGHTS OF PERSONALITY AND PERSONALITY INTERESTS

Just as patrimonial loss is defined as the reduction in the utility of an element of someone's *patrimony,* non-patrimonial loss is defined with reference to *highly personal or personality interests*. The different rights of personality give an indication of the relevant personality interests and determine the nature and extent of non-patrimonial loss (injury to personality). Our law recognizes personality rights [10] to physical and mental integrity (corpus); reputation, dignity, feelings, privacy and identity. The interests covered by these rights may be referred to as a legally recognized 'non-patrimony'. The following interests form part of such a highly personal 'non-patrimony': [11] freedom from pain, emotional shock, psychological diseases, psychiatric injury and physical suffering; the ability to enjoy the ordinary as well as the particular amenities of life; the aesthetic interest in having a body which is not disfigured; the ability to live for the full duration of one's normally expected lifespan; freedom from any (other) physical infringement of one's body; freedom from an infringement of one's senses; physical freedom of the body; one's good reputation in the eyes of the community; one's unviolated feelings of dignity, chastity, piety and religion; the interest in the consortium of a spouse; and the maintenance of one's privacy and identity.

5.4 RELATIONSHIP BETWEEN PATRIMONY (ESTATE) AND PERSONALITY INTERESTS ('NON-PATRIMONY') [12]

The elements of patrimony which are affected in the case of patrimonial loss have already been identified. [13] The distinction between patrimonial and non- patrimonial interests [14] is not easily described. [15] The latter is not simply the opposite of the former. [16] In a physical violation of the body, for example, both types of interests are infringed [17] in that the injured person experiences pain and suffering and also incurs medical expenses or has the expectation of incurring such expenses. [18]Therefore, an expression such as 'infringement' of the body does not in itself indicate the nature of either the interests or the damage involved. [19]

Patrimonial interests such as earning capacity and creditworthiness can also hardly be seen as existing completely independently of personality interests. Moreover, not all personality interests consist only or merely of feelings or emotions and some objective elements or legal objects can also be relevant. [20] The acceptance of the fact that a legal person (eg a corporation) may have personality interests also demonstrates the non-human nature which these interests may have. [21]

5.5 NATURE AND CHARACTERISTICS OF NON-PATRIMONIAL LOSS (INJURY TO PERSONALITY)

In non-patrimonial loss there is an impairment or factual disturbance of a person's [22]highly personal or personality interests, causing its quality or utility to deteriorate. [23]This implies that the impaired interests can no longer satisfy the plaintiff's legally justified expectations. [24]

A question with important theoretical and practical implications is what role human consciousness, [25] sensation or emotions play in regard to non-patrimonial loss. [26]The

matter of human consciousness helps to reveal the existence of objective and subjective elements in the concept of non-patrimonial loss.

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From legal practice it appears that most forms of non-patrimonial loss have, to a greater or lesser extent, objective as well as subjective facets.

The *objective element* [27] refers to the external or generally recognizable manifestation of the impairment, viz where X is defamed and his good name in the community actually suffers; X's privacy is violated because Y publishes private facts about him; [28] X lies in an unconscious state in hospital and lacks the ability to enjoy the amenities of life as he used to (even though he does not realize it). [29] The loss described in these examples does not exist in the feelings of the person in question. [30]

The *subjective element* is some form of emotional reaction (unpleasant feelings or sensations) which is usually experienced on account of some (objective) fact of impairment. The unpleasant feelings may be of a 'physical' [31] or an 'affective' [32]nature. The law requires such feelings to be the result of an objective impairment of a personality interest. Examples are pain caused by bodily injuries, feelings of insult on account of insulting conduct, (presumed) feelings of outrage after having been defamed; etc. Because of the requirement of a nexus with an objective factor, not every impairment of feelings constitutes non-patrimonial loss—for example, grief caused by the death of another as well as disappointment and discomfort as a result of breach of contract are not recognized; [33] the required nexus referred to above is not present. The subjective element of non-patrimonial loss is to be found in a person's consciousness and consists of the person's emotional reaction to the objective impairment of his or her personality interests. [34] The subjective component is usually part of the loss. [35] This is described as affective loss or injury to feelings and includes, for example, X's personal unhappiness, his sentimental loss, feelings of having suffered an injustice, bitterness and despondency. Since these

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losses are to be found in a person's consciousness and emotions, they are not readily predictable and capable of being assessed objectively. [36]

The following classification is proposed by Neethling and Potgieter: [37]

> In some instances of non-patrimonial loss (eg, shortened expectation of life, [38] invasion of privacy and defamation) [39] the emphasis is placed on the objective element and the plaintiff's emotional reaction (affective loss) is of secondary importance. In other cases (eg, pain and suffering and insult) [40] the emotional reaction of an individual is of primary importance and constitutes the complete non-patrimonial loss. In a third category, objective and subjective elements are more in balance (eg, disfigurement [41] and loss of the amenities of life), [42] but the emotional reaction is nevertheless an important factor in the assessment of the quantum of damages. [43]

Non-patrimonial loss is often described as 'general damage'. [44] This form of damage may, just as with pecuniary loss, take the form of loss already sustained as well as prospective loss. Prospective non-patrimonial loss may be seen as the frustration of a justified expectation that the quality or utility of personality interests will remain constant (or that they may even increase). [45]

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5.6 NON-PATRIMONIAL LOSS (INJURY TO PERSONALITY) CAUSED BY INFRINGEMENT OF PHYSICAL-MENTAL INTERESTS [46]

5.6.1 Forms of non-patrimonial loss [47]

For practical reasons, a distinction is made between the physical and mental aspects of the human body. [48] However, this distinction should not be taken too far, since the physical body and the psyche (feelings and consciousness) are linked through the brain and nervous system. [49]

In terms of the correct analysis, a mere physical injury does not per se constitute non-patrimonial loss, since it is only the *source* of such loss—the actual loss must also

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be present. [50] The following forms of loss are recognized in practice with a view to compensation [51] in terms of the action for pain and suffering: [52]

(a) Pain and suffering [53]

By this is meant all pain, [54] physical and mental suffering and discomfort caused by bodily injury, emotional shock, or the medical treatment necessitated by the injuries. [55] Of importance here is the pain actually experienced by the plaintiff irrespective of whether he or she is more or less sensitive than the average person. [56]

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(b) Shock (psychiatric injury) [57]

Emotional shock [58] is usually associated with pain and suffering, [59] but it may also cause further recognized psychiatric consequences such as insomnia, anxiety neuroses, hysteria, depression or other mental or physical conditions which are recognized as non-patrimonial loss. [60] If emotional shock is only of a short duration and does not have any real impact on the health of the plaintiff, it is usually disregarded. [61] Nevertheless, the term 'shock' is, without any further explanation, frequently (and on a routine basis) included in the list of items for which compensation is recovered in terms of the action for pain and suffering. [62]

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(c) Disfigurement [63]

This loss (also referred to as 'deformity') refers [64] to any defacing or mutilation of the plaintiff's body. The following are included: scars, loss of a limb, a limp caused by a leg injury, and distortions of the body. [65] The loss in this case involves the aesthetic value of the body or a part thereof and not its functional performance.

(d) Loss of amenities of life [66]

This form of damage is present when a person loses the ability and/or will to participate in general and specific activities of life and to enjoy life as he or she could have done previously. [67] Loss of amenities includes a loss already sustained as well as a loss that will probably be experienced in future. [68]

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(e) Shortened expectation of life [69]

The shortening of a person's natural life expectancy [70] is sometimes seen as a separate loss. [71]

The above forms of non-patrimonial loss give an indication of the personality interests involved in the legal object 'physical-mental integrity'. Visser [72] suggests that the abovementioned forms of loss may fall into the following two categories, depending on the role played by human consciousness and the relative importance of a subjective component: [73]

(1)

> *A physical impairment of feelings or infringement of the emotions and consciousness through pain caused by physical injury and through nervous (emotional) shock*. In such cases non-patrimonial loss practically (subjectively) exists only in the mind in which it is experienced. [74]

(2)

> *An affective impairment or infringement of emotional feelings in cases of disfigurement, loss of the amenities of life and loss of expectation of life*. In contrast with the position with pain and suffering, the interests involved here are partially objective because they do not consist only of an emotional experience. In fact, the consciousness of the injured person plays a secondary role only in so far as it is merely the mechanism through which he or she experiences such a loss. Affective loss consists in the fact that the injured person reflects on and reacts to the physical injury he or she has suffered. In the case of disfigurement, for example, a facial scar constitutes the objective part of the loss and the reaction of the injured person is the subjective part of it. In the case of loss of the amenities of life and shortened life expectancy, the loss in question is not primarily found in the emotions of the plaintiff, since its existence may be objectively ascertained without regard to his or her emotions. [75]

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5.6.2 Theories on nature of non-patrimonial loss caused by impairment of physical-mental integrity [76]

The examination of certain theories on the nature of non-patrimonial loss caused by an infringement of the physical-mental integrity is of practical [77] as well as theoretical importance. These theories were referred to by the Appellate Division in *Southern Insurance Association Ltd v Bailey* [78] and in *Collins v Administrator, Cape*. [79] They are [80] the abstract or objective theory, [81] the personal theory, [82] and the personal-functional theory. [83] Ogus gives the following summary of the differences between these theories: [84]

> [T]he award is measured in *(a)* by the extent of the injury, in *(b)* by the extent of the loss of happiness and in *(c)* by the extent to which money can provide the plaintiff reasonable solace.

After considering the relative merits of these theories, Neethling and Potgieter [85]come to the following conclusion:

> [A]s far as injury to personality in the case of a physical impairment of one's feelings

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> through pain, suffering and shock is concerned, the personal theory provides the only logical explanation for the existence of such loss. In such cases, the essence of the harm is to be found in the *conscious experience* thereof and a subjective approach is correct. As far as the other forms of injury to personality are concerned (loss of the amenities of life, disfigurement and shortened life expectancy), it is clear that the essence of the harm is not to be found in the mind or consciousness of the injured person. The harm is not, eg, like pain, which exists only if it is subjectively experienced. Loss of amenities of life is objectively identifiable and consciousness only comes into the picture in respect of affective loss caused by the loss of amenities.

5.6.3 Non-patrimonial loss in cases of unconsciousness and changed personality [86]

The theories on non-patrimonial loss are useful in cases where our courts have to decide on the question whether a plaintiff who is in a permanent state of unconsciousness or has undergone a serious change of personality suffers non-patrimonial loss. [87] With regard to pain and unconsciousness, it has frequently been held that pain exists only in so far as it is consciously experienced. [88] The most difficult question has been the possibility of an award for loss of the amenities of life where the plaintiff suffered from after-effects of a brain injury. In this regard a distinction must be made between the so-called 'twilight' cases and 'cabbage' cases. [89]

In *Gerke v Parity Insurance Co Ltd,* [90] the plaintiff had sustained brain injuries and would never regain consciousness. He obviously had no appreciation of his condition. Having considered English law, the court concluded that the law there had always adopted an objective approach but that, in assessing the quantum of

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compensation, subjective considerations could be taken into account in some instances. The court summarized the position thus: [91]

> In my judgment a similar approach is appropriate in a case like the one before me. I would say that the test *(a)* is objective in that something falls to be awarded for what has been called loss of happiness even in a case where the victim has been reduced to a state in which he has never realised and will never realise that he has suffered this loss; *(b)* is, however, subjective, in the sense that the Court, in fixing *quantum,* will have regard to any relevant data about the individual characteristics and circumstances of the plaintiff which tend to show the extent and degree of the deprivation; *(c)* is subjective, also, in the sense that any realization which the plaintiff has, or did have or will have, of what he has lost, is most material and important. This is the true compensable suffering (as distinct from pain) which will carry far heavier damages than the somewhat artificial and notional award referred to in *(a)* above.

Although this decision has been the object of criticism, [92] it has been followed in certain other cases. [93] However, in *Collins v Administrator, Cape* [94] the court stated:

> There are, I think, two principal objections to what is essentially the English approach, involving, as it does, a notional distinction between a subjective and objective element of the loss of amenities of life and the award of non-pecuniary damages in respect of the objective loss or, as it has been described, the actuality of the loss. As previously indicated, there would appear to be unanimity that an unconscious person is not entitled to damages for pain and suffering or anguish, that is to say the subjective element of the loss of amenities, since he or she suffers no pain and experiences no anguish. The objections to

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> the English approach are the following. First, the award of non-pecuniary damages in respect of the actuality of the loss serves no purpose as the money awarded cannot be used for the benefit of the unconscious plaintiff. Second, it can provide no consolation to an unconscious plaintiff, as consolation presupposes consciousness and some capacity of intellectual appreciation. A conscious person who, by reason of his injuries, is incapable of deriving any advantage from a monetary award can notionally obtain some consolation from the receipt of money and from being able, if he pleases, to give it away. An unconscious person can not even have this consolation.

In our view, the correct approach to this question is possible only if one is clear on the nature of non-patrimonial loss, especially with reference to the existence, significance and interrelationship between relevant objective and subjective elements. [95]

Unconsciousness merely excludes the subjective element of the loss of the amenities of life (namely, affective loss—unhappiness) and does not affect the objective component thereof. [96] Furthermore, the existence of non-patrimonial loss should not be confused with its compensability. [97] It is obvious that the loss of a plaintiff cannot be compensated

if his or her level of consciousness has been so much reduced by the injuries [98] that the plaintiff has little or no appreciation of his or her condition. [99] This does not, however, mean that the plaintiff should be treated as a dead person who suffers no loss and may accordingly receive no amount of money. [100]

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The correct solution in such a case is to acknowledge the existence of the loss [101]and to award a nominal amount of objective satisfaction which serves as a symbolic reparation of the damage by acting as retribution for the injustice done to the plaintiff. [102] The fact of unconsciousness is, of course, an important factor in fixing the quantum [103] of objective satisfaction because this amount should not be nearly as high as when 'true' compensation [104] or 'full' satisfaction is awarded for extensive non-patrimonial loss. [105] In casu the award is not intended to provide the plaintiff with actual psychological satisfaction, [106] or to punish the defendant [107] but signifies a symbolic redress of the harm by effecting retribution for the wrong done to the plaintiff.

5.6.4 Assessment of non-patrimonial loss or injury to personality

The following approach [108] is suggested by Neethling and Potgieter: [109]

> Theoretically, non-patrimonial loss is (like patrimonial damage) determined by means of the comparative method. [110] The utility or quality of the personality interests in question before and after the delict are compared in order to establish the existence and extent of the loss. In this way, information is obtained on the nature, seriousness, extent, intensity and duration of the objective part of the loss as well as the impairment of the plaintiff's feelings. [111]

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5.7 INJURY TO PERSONALITY IN INIURIA AFFECTING BODY [112]

5.7.1 General

The action for pain and suffering applies only in respect of the forms of non-patrimonial loss discussed earlier [113] and is intended to make compensation [114]available in cases of intentional [115] or negligent [116] conduct. In cases of an intentional infringement of bodily integrity amounting to an iniuria, the actio iniuriarum is available [117] to recover satisfaction. [118]

5.7.2 Physical and mental infringement constituting iniuria [119]

Neethling et al [120] summarize the position in regard to a physical impairment as follows:

> [I]t is clear that both common law and case law provide sufficient authority for the view that every infringement of the body [121] where the aspect of physical harm is paramount, [122] whether or not [123] accompanied by violence, [124] with or without pain, [125] direct or indirect, may in principle be seen as an *iniuria*.

Contumelia is not required [126] for an infringement of the body to constitute an

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iniuria (although it will often be present). [127] The distinction drawn in practice between non-patrimonial loss such as pain and suffering and loss in the case of an iniuria and contumelia is justified and should be maintained. [128]

Psychological or mental harm is usually brought about by an assault through the causing of fear [129] and emotional shock (causing psychological lesion or psychiatric injury). [130]

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5.7.3 Deprivation of bodily liberty as iniuria [131]

The obstruction or restriction of a person's physical freedom of movement or action constitutes an injury to personality. [132] It is apparently unnecessary that a person must be aware of the fact that he or she is deprived of freedom, [133] but there must be a material deprivation of liberty. [134] Contumelia is not required as an element of the loss in this situation. [135]

5.7.4 Seduction [136]

There is a view that seduction (the extra-marital defloration of a girl with her consent) amounts to an infringement of her physical integrity and is an iniuria. [137]

5.8 DEFAMATION [138]

Injury to personality caused by defamation has some special characteristics. In reality, the element of loss should be the fact that the plaintiff's good name or reputation in the community has in fact been impaired. [139] However, it would appear that the question whether the plaintiff's reputation has actually suffered is not really taken into consideration. It is determined objectively whether, in the eyes

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of a reasonable person, the good name of the plaintiff has been infringed. [140] Non-patrimonial loss in this instance is not merely objectivated; [141] it is based on a hypothesis or fiction. [142] It must, of course, be accepted that words or conduct with a defamatory likelihood will often actually cause injury to the plaintiff's reputation and that he or she will usually also suffer affective loss, in other words, experience feelings of hurt and injustice. [143] One may see the ratio of allowing a claim for satisfaction based on defamation as the plaintiff's actual or presumed feelings of hurt and outrage [144] which must be neutralized through an award of satisfaction. [145]

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The fact that, generally speaking, the existence of loss caused by defamation is objectively determined, provides a theoretical basis for allowing a corporation (legal person) which lacks feelings and consciousness to sue for defamation. [146]

5.9 INSULT (INFRINGEMENT OF DIGNITY; CONTUMELIA) [147]

A person's dignity includes his or her (subjective) feelings of dignity or self-respect. These feelings may be violated by any conduct [148] that actually insults a person. [149]The essence of loss in this instance is to be found in the impairment of the plaintiff's feelings of dignity and the subjective nature of the loss is apparent. Here there is no primary impairment and a subsequent affective loss. [150] It is accordingly required that the plaintiff must prove that he actually (subjectively) felt insulted on account of the defendant's conduct. [151] The additional requirement in order to succeed with the actio iniuriarum, namely that the conduct complained of must at

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the same time also be of an insulting nature when viewed objectively, [152] refers to wrongfulness and does not qualify the element of loss. [153] Every person has a right to dignity. [154] The decisions in which it was held that a person may in some instances lack feelings of dignity [155] may be interpreted in different ways. [156] It may be accepted that the extent of the alleged infringement of a plaintiff's feelings will always be determined

in accordance with what may reasonably be expected of someone in his or her position. [157]

5.10 INFRINGEMENT OF RIGHT TO FEELINGS [158]

It would appear that our case law often sees insult (contumelia) as the only form of injury to personality in connection with the concept of dignitas. Such an approach is obviously incorrect. [159] Neethling et al [160] declare that non-patrimonial loss in iniuriae such as an infringement of religious feelings, breach of promise, adultery, abduction, harbouring and enticement involves an infringement of feelings other

than feelings of dignity. They submit that a person's feelings consist of legally recognized feelings such as religious feelings and feelings of chastity and piety. There is, however, little authority in practice supporting this theory and the feelings in question are protected in other ways [161] and often in terms of the concepts of dignity [162] or fama. [163]

An infringement of the right to *religious feelings* [164] may cause loss in the form of a disturbance of these feelings, in other words, the generation of unpleasant emotions in regard to the plaintiff's religious convictions. [165]

Breach of promise (the unlawful breach of the promise to marry) [166] may cause patrimonial loss [167] as well as non-patrimonial loss. In terms of the correct analysis [168] breach of promise per se is not an iniuria [169] because the plaintiff also has to prove that it is 'injurious or contumelious'. [170] Different forms of injury to personality may

be caused by a breach of promise, such as an impairment of fama or reputation, [171]dignity, [172] feelings of piety [173] and physical integrity. [174]

In *adultery* [175] an iniuria is committed against the innocent spouse. [176] The feelings, in particular feelings of piety and dignity of the innocent spouse are infringed. [177] A part of the loss is classified under loss of consortium, [178] that is, the so-called 'loss of comfort, society and services' of an adulterous spouse [179]that includes not only patrimonial loss but also immaterial damage associated with the loss of love, friendship and spiritual support. [180] The loss is partly subjective [181] with certain objective elements in respect of both consortium [182] and contumelia. [183]

Abduction, harbouring and enticement [184] may also cause an actionable loss of consortium. Our courts have seldom expressed themselves on the question whether such conduct constitutes an iniuria against the innocent spouse. [185] In addition to patrimonial damage caused by a loss of consortium, [186] there is also the immaterial loss which should be actionable. [187] Neethling et al [188] submit that these delicts involve a violation of the feelings of a spouse. [189]

5.11 NON-PATRIMONIAL LOSS CAUSED BY BREACH OF CONTRACT [190] AND INFRINGEMENT OF PATRIMONIAL RIGHTS

Conduct amounting to breach of contract may also cause non-patrimonial loss. [191] It is accepted that compensation or satisfaction may be recovered for such loss in terms of delictual principles. [192] A contractual remedy does not exist [193] and is in fact unnecessary because of the availability of a delictual remedy. So-called

non-patrimonial loss such as disappointment, discomfort or fear which may be a direct or affective impairment of feelings caused by breach of contract are disregarded. The position is the same in the case of injury to property. This situation may be explained [194] with reference to the principle that these losses are not linked with protected personality interests (and the interests involved are also, of course, not part of a person's patrimony). [195]

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[1] This loss is also referred to as injury to personality, immaterial damage, ideal loss, damage to feelings, moral damage, non-pecuniary loss or incorporeal loss (see Visser *Kompensasie en Genoegdoening* 10). Very few attempts have been made in the South African literature to describe this loss. Cf also De Wet 1970 *THRHR* 73 who criticizes Van der Merwe & Olivier *Onregmatige Daad* 179 because they fail to define non-patrimonial loss.

[2] See also *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)*2006 (4) SA 230 (CC) at 253; *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) at 386.

[3] Chap 2.

[4] Paras 1.7.2 and 2.1.

[5] See, eg, *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 597, where doubt was expressed on whether the failure to perform a sterilization operation and the subsequent birth of a child constitute bodily injury. (In the authors' opinion, it does amount to bodily injury.) Physical or psychiatric injury caused by emotional shock also qualifies as bodily injury (see *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A); Potgieter 9 *LAWSA* paras 2, 3.) See *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) at 62 restating the principle that 'negligently caused shock and emotional trauma resulting in a detectable psychiatric injury are actionable' (see also paras 5.6.1*(b)*, 5.7.2, 11.1.3 and 15.2.4.2). The aggravation of an existing ailment is also regarded as a bodily injury (see *Santam Insurance Co Ltd v Paget* 1981 (2) SA 621 (ZA); Corbett & Buchanan III 240.)

[6] Para 2.3.2; see also Visser 1981 *THRHR* 121.

[7] Para 2.3.3.

[8] Para 2.3.2.

[9] Para 2.3.4.

[10] See *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253–4; Neethling et al *Law of Personality* 25–38.

[11] See also para 5.6, where the damage element relating to these interests is discussed. See also Reinecke 2001 *TSAR* 225.

[12] See also Van der Walt *Sommeskadeleer* 131–2 on the opinion of Mertens that things such as life, health, freedom, time off, art and culture etc are essential in the creation of an estate but that the infringement thereof does not constitute damage. See Neethling et al *Law of Personality* 17–20, 65–68.

[13] Para 3.2.4.2.

[14] Para 5.4.

[15] Para 2.3.3 on the differences between patrimonial and non-patrimonial loss.

[16] The obvious contrast between the two is that patrimonial interests must have a direct monetary value whereas non-patrimonial interests are only indirectly given a monetary value.

[17] See also the right to consortium of a spouse where patrimonial and non-patrimonial interests form a type of unity. See on this Neethling et al *Law of Personality* 209–11; *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9–10. See further *Commercial Union Ins Co Ltd v Stanley* 1973 (1) SA 699 (A) at 704 on earning capacity and marriage prospects.

[18] See on the expectation of a debt para 3.2.4.3*(b)*.

[19] In most cases of the infringement of personality interests it is accepted that patrimonial loss may also be present. In such cases there are in fact patrimonial rights and patrimonial interests involved (which have yet to be recognized) and which exist in unity with true personality interests (see Visser 1991 *THRHR* 790–1; para 2.4.11).

[20] See Neethling et al *Law of Personality* 53: 'Where the objective element of the personality harm can exist completely separate and independently from the subjective wounded feelings (which is possible in instances of assault, deprivation of liberty, defamation, violation of privacy and identity, loss of the

amenities of life, shortened life expectancy and disfigurement), consciousness of the personality harm—with resultant injured feelings—is naturally unnecessary to constitute personality harm. Although the subjective element of the harm is absent, the objective element still exists and constitutes the personality harm in question.'

[21] Neethling et al *Law of Personality* 70; *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A); *Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network (Ltd)* 2011 (3) SA 208 (GSJ) at 219–20; Burchell *Defamation* 39 et seq.

[22] Primarily, natural persons have personality rights. However, a corporation (ie a legal or juristic person) may also have certain rights of personality such as rights to reputation and privacy (see in general Neethling et al *Law of Personality* 68–73; on the right to reputation, inter alia, *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) at 952–3; *Gold Reef City Theme Park (Pty) Ltd v Electronic Media Network (Ltd)* 2011 (3) SA 208 (GSJ) at 219–20; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) (political party may also sue for defamation); *Bitou Municipality v Booysen* 2011 (5) SA 31 (WCC) at 34–7 (the State—including local authorities such as municipalities—are barred from suing for defamation); *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA); para 5.8 n 146 below; and, on the right to privacy, *Financial Mail (Pty) Ltd v Sage Holdings Ltd*1993 (2) SA 451 (A) at 462; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) at 557. Cf *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A) at 456; *Boka Enterprises (Pvt) Ltd v Manatse* 1990 (3) SA 626 (ZH) at 632). Although a juristic person also has a right to identity (cf Neethling et al op cit 72–3), case law has not yet confirmed this fact. A legal person cannot have a right to corpus, dignity and feelings (Neethling et al op cit 71).

[23] See Neethling & Potgieter *Delict* 239. In non-patrimonial loss, utility is not directly measured in money terms as is the case in patrimonial loss.

[24] See Neethling & Potgieter *Delict* 239. See the following examples from daily life: X is injured and his interest in being without pain and to enjoy the normal amenities of life is infringed; X is insulted and his interest that his feelings of dignity should remain unviolated is disturbed; X's privacy is invaded and the quality of his interest in being able to isolate himself from other people is impaired; etc.

[25] In the case of a corporation which suffers non-patrimonial loss, consciousness is obviously irrelevant. See Neethling et al *Law of Personality* 70.

[26] See also Neethling et al *Law of Personality* 51 et seq, 70.

[27] See Neethling & Potgieter *Delict* 239.

[28] Ibid.

[29] *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W); *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W); Visser 1981 *THRHR* 130; para 5.6.3.

[30] See Neethling & Potgieter *Delict* 239. See also Neethling et al *Law of Personality* 52 who give the following examples: the assault of an unconscious person; deprivation of liberty while the victim is asleep; spying on a woman while she is undressing; defamation or infringement of identity of which the victim is unaware.

[31] eg physical pain and suffering.

[32] eg sentimental loss. See Neethling & Potgieter *Delict* 239.

[33] Para 8.9.2. Depending on one's viewpoint, one may see these as forms of non-patrimonial loss but still refuse compensation on other grounds (eg policy considerations).

[34] See Neethling & Potgieter *Delict* 239. See, eg, *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 37: 'There is a very large subjective element in any *injuria*: and if the plaintiff feels aggrieved in his dignity he must say so.' See also *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 288–9: 'Since her mind is clear there must be added her anguish and frustration flowing from the realization of her utter helplessness.' Cf further Visser *Kompensasie en Genoegdoening* 47.

[35] See the remarks by Amerasinghe 1967 *SALJ* 333 on injury to personality in the infringement of bodily liberty: '*[I]niuria* depends on damage to feelings and such damage cannot be experienced unless there is awareness of the wrong. The general principle is that there must be knowledge for this purpose . . . but modern decisions have taken the view that subsequent knowledge is sufficient if the plaintiff feels the injury on getting to know of it. The awareness becomes necessary to complete the requirement of sentimental damage but it does not constitute part of the unlawful *factum* of the *iniuria*as such.' See Neethling et al *Law of Personality* 90–1. There are exceptions to the principle requiring affective loss: in the case of infants and the mentally ill, 'sentimental hurt' is not required (*D* 47.10.3.1, 2; Voet *Commentarius* 47.10.4).

[36] See Neethling & Potgieter *Delict* 240 n 294. This implies that a person may in a sense personally determine the extent of his or her affective loss by reacting to the (primary) infringement of personality interests in a particular way. In order to neutralize individual over-reaction, the law usually takes cognizance only of the unhappiness which an average person in the position of the plaintiff would experience. See *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W) at 494; *Benham v Gambling* [1941] 1 All ER 7 at 12–13; Visser 1988 *THRHR* 476. Van der Merwe & Olivier *Onregmatige Daad* 188 also refer to the criterion of the average person, but add that direct evidence on the plaintiff's actual unhappiness is also relevant. This qualification creates complications. Even though a plaintiff may in fact be extremely unhappy about, eg, his or her loss of amenities or infringement of privacy, it would be unfair to burden the defendant with this in so far as it exceeds the normally expected reaction. An objective criterion thus seems essential.

[37] *Delict* 240.

[38] Para 5.6.1*(e)*.

[39] Para 5.8.

[40] Para 5.6.1*(a)* and para 5.9.

[41] Para 5.6.1*(c)*.

[42] Ibid.

[43] Paras 15.2.2 and 15.2.4.4.

[44] Paras 3.4.4 and 14.2.

[45] See Neethling & Potgieter *Delict* 240; White & Fletcher *Delictual Damages* 49.

[46] Non-patrimonial loss in association with iniuria is discussed in para 5.7. See Boberg *Delict* 516–22; Visser *Kompensasie en Genoegdoening* 91–126, 207–18; De Groot *Inleiding* 3.34.2; *Durham v Cape Town and Wellington Railway Co* 1869 Buch 302; *Hume v Divisional Council of Cradock* 1880 EDC 104 at 117, 134; *Canny v Boorman* 1883 SC 282; *Clair v Port Elizabeth Harbour Board* 1886 EDC 311; *Anna Flurian v Colonial Government* 1891–93 EDC 61; *Snyman v Schenkte* 1891–93 EDC 68 at 76; *Berrange v Metropolitan and Suburban Railway Co* 1989 SC 73; *Storey v Stanner* 1882 GWLD 40; *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 348; *Union Government v Warneke* 1911 AD 657 at 665–6; *Union Government v Clay* 1913 AD 385 at 389; *Braine v Aliwal North Divisional Council* 1912 EDC 319 at 341; *Hartnoll v Municipality of Cape Town* 1922 CPD 354; *Francis v Cape Town Tramway* Co 1930 CPD 258; *De Wet v Paynter* 1921 CPD 576; *Thompson v Kershaw* 1926 EDC 55; *Van der Westhuizen v Du Preez* 1928 TPD 45 at 49–50; *Lentzner v Friedman* 1919 EDL 20 at 24–5, 28–9; *Brown v Bloemfontein Municipality* 1924 OPD 226 at 228; *Greenshields v SAR & H* 1917 CPD 209; *Hammerstrand v Pretoria Municipality* 1913 TPD 374; *Pitman v Scrimgeour* 1947 (2) SA 22 (W) at 36; *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 923; *Pauw v African Guarantee & Indemnity Co Ltd* 1950 (2) SA 132 (SWA); *Sigournay v Gillbanks* 1960 (2) SA 552 (A); *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W); *Hoffa v SA Mutual and Fire General Ins Co Ltd* 1965 (2) SA 944 (C); *Government of the RSA v Ngubane*1972 (2) SA 601 (A); *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A); *Casely v Minister of Defence* 1973 (1) SA 630 (A) at 642; *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A); *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W); *National Guardian Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A) at 65; *N v T* 1994 (1) SA 862 (C) (rape); *Collins v Administrator, Cape* 1995 (4) SA 73 (C); *Clinton-Parker v Administrator Transvaal* 1996 (2) SA 37 (W); *Fose v Minister for Safety & Security* 1997 (3) SA 786 (CC); *Venter v Nel*1997 (4) SA 1014 (D) (HIV); *Mpongwana v Minister for Safety & Security* 1999 (2) SA 794 (C); *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA); *Kekae v Road Accident Fund* [2001] 2 All SA 41 (W); *Road Accident Fund v Sauls* 2002 (2) SA 56 (SCA); *April v Minister of Safety and* Security [2008] 3 All SA 270 (SE); *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC).

[47] See chap 15 on quantification of each of these forms of loss. See, further, Corbett & Honey xiii on medical terms and sketches of the human body for legal purposes. See further in general Exall *Munkman on Damages* 40–61; McGregor *Damages* 1288 et seq; White & Fletcher *Delictual Damages* 38–48; Kemp *Damages* 134 et seq; Cooper-Stephenson *Personal Injury Damages* 484 et seq; Corbett & Buchanan I 40 et seq.

[48] See Neethling & Potgieter *Delict* 241; Neethling et al *Law of Personality* 83–4, 90–3; Visser *Kompensasie en Genoegdoening* 62–8. Eg in *Potgieter v Rangasamy & FNQ Bus Services CC*unreported, case no 1261/2008 (EC), 16 August 2011, where the plaintiff was injured in a bus accident, the court, in assessing general damages, distinguished between her physical and mental injuries (at para 41) and awarded R135 000 'in respect of the neck, knee and hand injuries' and R75 000 'for emotional shock and trauma' (at para 56).

[49] Neethling & Potgieter *Delict* 241–2. In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) (where the plaintiff was shot twice by the police) the court stated (at 281): 'Physical pain and disability,

mental pain and disability, and emotional pain and disability are all natural and sometimes inevitable consequences of the physical injury which results from an assault by the infliction of gunshot wounds. They are all equally real.' See also *Bester v Commercial Union Versekeringsmpy van SA Bpk*1973 (1) SA 769 (A) at 779.

[50] See, eg, *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 571: 'Injuries may leave after-effects and may cause mental anxiety but they are not themselves pain.' But see also *AA Onderlinge Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 142, where the court stresses the injury itself and links the whole award to the loss of an eye.

[51] See para 9.5.

[52] See in general *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253; Neethling & Potgieter *Delict* 242–3. This concerns loss considered for the purposes of compensation ('skadevergoeding') (para 9.5) in contrast with satisfaction recoverable in terms of the actio iniuriarum for an iniuria (para 9.4). The actio de pauperie (para 13.9.1) is included here because it is also available for pain and suffering. Courts can award a single amount of compensation even where the bodily harm manifests itself in different forms of physical-mental injury: *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 172; *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281–3; cf Visser 2004 *THRHR* 314.

[53] See also para 15.2.4.1 on quantification. Cf generally Loubser & Midgley (eds) *Delict* 50–2.

[54] Visser *Kompensasie en Genoegdoening* 94–110 on medical theories regarding pain; Peck 1973 *Michigan LR* 1357 et seq; McGregor *Damages* 1289; Neethling & Potgieter *Delict* 242. See also *Yeko v SA Eagle Ins Co Ltd* Corbett & Honey E3–1 at E3–5.

[55] See Corbett & Buchanan I 40–1; '[A]ll pain, suffering, shock and discomfort . . . includes both physical and mental pain and suffering.' Erasmus & Gauntlett 7 *LAWSA* paras 83, 84; Klopper *Third Party Compensation* 159 et seq; *Hoffa v SA Mutual Fire and General Ins Co of SA Ltd* 1965 (2) SA 944 (C); *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199; *Botha v Minister of Transport* 1965 (4) SA 375 (W) (which is not clear on 'mental pain'); *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 227. Future (expected) pain forms part of the loss. So-called phantom pains 'in' amputated limbs are also considered (*Botha* case supra at 376; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T)); Boberg *Delict* 518–22). See *Muzik v Canzone del Mare* 1980 (3) SA 470 (C), where the court refused to consider anxiety caused by the eating of poisoned food as damage.

[56] See Neethling & Potgieter *Delict* 242 n 326; *Marshall v Southern Ins Ass Ltd* 1950 (2) PH J6 (D) at 14; *Pillai v New India Ass Co Ltd* 1961 (2) SA 70 (N); *Van der Westhuizen v Du Preez* 1928 TPD 45 at 49; Corbett & Buchanan I 39. Someone's social and financial status or his or her race cannot give an indication of his pain and suffering (*Radebe v Hough* 1949 (1) SA 380 (A); *Capital Ass Co Ltd v Richter*1963 (4) SA 901 (A) at 905). Pain can exist only in so far as it is actually experienced and, where it is excluded through unconsciousness or medication, there is no loss (*Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 571). Pain which was experienced but later forgotten qualifies as damage (*Botha v Minister of Transport* 1956 (4) SA 375 (W) at 379–8). Someone who claims damages for pain and suffering must, in terms of rule 18(10) of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules give details of whether the pain is temporary or permanent and by which injuries it has been caused (see para 16.1.3).

[57] The term 'psychiatric injury' is preferred in recent case law: *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA); *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) at 60. See *N v T* 1994 (1) SA 862 (C) for references to 'psychological well-being' in regard to rape; *Grobler v Naspers Bpk* 2004 (4) SA 220 (C) and *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP) on harm due to sexual harassment; Burchell 1999 *SALJ* 697. See paras 15.2.4.2 and 15.3.12 on quantification.

[58] See Potgieter 9 *LAWSA* para 2: 'Emotional shock can be described as sudden, painful emotion or fright resulting from the realization or perception of an unwelcome or disturbing event which involves an unpleasant mental condition such as fear, anxiety or grief.' See further Visser *Kompensasie en Genoegdoening* 105–13; Boberg *Delict* 174–93; Corbett & Buchanan I 29; Neethling & Potgieter *Delict*242, 285–90; *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 349; *Sueltz v Bottler* 1914 EDL 176 at 181; *Hauman v Malmesbury Divisional Council* 1916 CPD 216; *Els v Bruce* 1922 EDL 295; *Creydt-Ridgeway v Hoppert* 1930 TPD 664 at 666; *Marshall v Southern Ins Ass* 1950 (2) PH J6 (D); *Layton and Layton v Wilcox and Higginson* 1944 SR 48; *Moehlen v National Employers Mutual* 1959 (2) SA 317 (SR); *Mulder v South British Ins Co Ltd* 1957 (2) SA 444 (W); *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A); *Lutzkie v SAR & H* 1974 (4) SA 396 (W); *Masiba v Constantia Ins Co Ltd* 1982 (4) SA 333 (C); *Boswell v Minister of Police* 1978 (3) SA 268 (E) at 275; *Swartz v Minister of Police* Corbett & Buchanan II 353. See also *Sebatjane v Federated Employers' Ins Co Ltd* 1989 Corbett & Honey H2–1 at H2–12.

[59] See Erasmus & Gauntlett 7 *LAWSA* para 84; Corbett & Buchanan I 29; Potgieter 9 *LAWSA* para 3 et seq; Visser *Kompensasie en Genoegdoening* 105–13.

[60] It is not necessary that the psychiatric injury must have a specific name (*Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP) at 2835). See in general Neethling & Potgieter *Delict* 242; *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A); see also Neethling & Potgieter 1973 *THRHR* 175; Tager 1973 *SALJ* 123; McQuoid-Mason 1973 *THRHR* 115; Van der Vyver 1973 *THRHR* 169; *Boswell v Minister of Police* 1978 (3) SA 268 (E) at 275; *Swartz v Minister of Police*Corbett & Buchanan II 353; *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) (psychiatric illness caused by negligent baby-swopping by hospital); *Venter v Nel* 1997 (4) SA 1014 (D&C) at 1016 on effects of HIV infection. See also *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA); *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) (teacher suffered, inter alia, post-traumatic stress disorder (PTSD), major depressive disorder and panic disorder with agoraphobia as a result of being attacked with a hammer by a learner in her class in the presence of other learners); *Potgieter v Rangasamy & FNQ Bus Services CC* unreported, case no 1261/2008 (EC), 16 August 2011.

[61] See *Lutzkie v SAR & H* 1974 (4) SA 396 (W) at 398; Neethling & Potgieter *Delict* 242; Neethling et al *Law of Personality* 91; Potgieter 9 *LAWSA* para 3; Boberg *Delict* 175, 516 et seq. See also *Muzik v Canzone del Mare* 1980 (3) SA 470 (C) (n 55 above). In *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) at 61 the court remarked that 'mere nervous shock or trauma' is not enough for a claim—there must be a 'detectable psychiatric injury'.

[62] Note that compensation for so-called 'secondary emotional shock'—ie shock sustained by a person who 'witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle'—can no longer be claimed from the Road Accident Fund but only from the wrongdoer (s 19*(g)* of the RAF Act 56 of 1996). See also paras 11.2.1, 11.8 and 15.2.4.2.

[63] Para 15.2.4.4 on quantification. See *Nanile v Minister of Post and Telecommunications* Corbett & Honey A4–30 at A4–33.

[64] See in general Visser *Kompensasie en Genoegdoening* 124–6.

[65] Neething & Potgieter *Delict* 242; Corbett & Buchanan I 42; Erasmus & Gauntlett 7 *LAWSA* para 86; *Eggeling v Law and Rock Ins Co Ltd* 1958 (3) SA 592 (D); *Solomon v De Waal* 1972 (1) SA 575 (A) at 586; *Pitman v Scrimgeour* 1947 (2) SA 22 (W); *Marine and Trade Ins Co Ltd v Goliath* 1968 (4) SA 329 (A). *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O); *Demosthenous v Poulos* Corbett & Honey G3–1. Neething & Potgieter op cit 242 n 332 state: 'The extent of the loss is determined by the plaintiff's gender (heavier damages in the case of women), age, the visibility of the disfigurement, its influence on the plaintiff's life and the plaintiff's appearance before the injuries.' In terms of rule 18(10) of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules a plaintiff must, inter alia, state whether the disfigurement is temporary or permanent.

[66] Para 15.2.4.3 on quantification. See in general Visser *Kompensasie en Genoegdoening* 113–17; McGregor *Damages* 1290–3.

[67] See Corbett & Buchanan I 43: 'It would include factors such as sexual impotence, sterility, loss of marriage opportunities, loss of general health, change of personality, loss of intellectual function, neurosis, insomnia and the general handicap of a disability, and even the fact that as a result of his disability the plaintiff finds the exercise of his profession more fatiguing and difficult and less pleasurable and efficient.' See *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 189–90; *Pauw v African Guarantee and Indemnity Co Ltd* 1950 (2) SA 132 (SWA). See also *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 288: 'The amenities of life may further be described . . . as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit and stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-sufficiency, happiness and dignity are undoubtedly highly dependent.'

The fact that the plaintiff is temporarily or permanently unconscious does not exclude the existence of a loss of amenities (see para 5.6.3). Corbett & Buchanan I 44 observe that, if loss of amenities is understood in a wide sense, it is unnecessary to recognize loss of general health as a separate form of loss. In practice, loss of general health is usually included in an award for loss of amenities (see also *Kriel* supra). The fact that someone who has eaten poisoned seafood is not prepared to eat seafood again does not constitute a loss of the amenities of life (*Muzik v Canzone del Mare* 1980 (3) SA 470 (C) at 474).

[68] Rule 18(10) of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules require that someone who claims for loss of amenities must give particulars of such loss and state whether the disability and loss are temporary or permanent.

[69] Para 15.2.4.5 on quantification. See Visser *Kompensasie en Genoegdoening* 117–24; McGregor *Damages* 1293–5.

[70] See *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W), where the court referred to *Benham v Gambling* 1941 AC 157 and held that, if compensation may be awarded for such things as pain and suffering which are not really measurable in terms of money, the same should be possible in respect of shortened expectation of life. See further *Dickinson v Galante* 1949 (3) SA 1034 (R) and 1950 (2) SA 460 (A); *Gillbanks v Sigournay* 1959 (2) SA 11 (N); *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W); *Geldenhuys v SAR & H* 1964 (2) SA 230 (C); Corbett & Buchanan II 680, 381; Corbett & Buchanan III 183, 192.

[71] Corbett & Buchanan I 45 state the following principles: 'It is therefore necessary for the court to examine the circumstances of the individual life and ascertain whether the shortening thereof would lead to deprivation of a positive measure of happiness. If the character or habits of the individual were calculated to lead to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. The appropriate figure should be reduced in the case of a very young child since there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made.' Usually, shortened expectation of life is taken into account as part of loss of amenities (see *Du Bois v MVA Fund* 1992 (4) SA 368 (T)). See further Visser *Kompensasie en Genoegdoening* 117–24, 367–9.

[72] 1981 *THRHR* 126.

[73] Para 5.5. See in general *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) at 420, 425–6.

[74] *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 571; see also Visser *Kompensasie en Genoegdoening* 63.

[75] Contra Van der Merwe & Olivier *Onregmatige Daad* 192 n 51; see, however, Visser 1988 *THRHR*479–83. See further Neethling & Potgieter *Delict* 244: 'The difference between physical injury causing emotional harm and a purely emotional disturbance appears from the fact that in a case of pain and suffering, the real subjective experience of the plaintiff (depending of course also on the plaintiff's ability to afford the necessary proof and the other requirements for liability) is decisive for determining the existence and extent of the loss, while in a case of affective loss, the plaintiff may obviously not be allowed to determine the extent of the loss himself by his reaction to the injury; an average criterion must be used.' See n 36 above.

[76] See in general Visser 1981 *THRHR* 127–30.

[77] See, eg, para 5.6.3 on unconscious plaintiffs.

[78] 1984 (1) SA 98 (A). See also Visser 1988 *THRHR* 481.

[79] 1995 (4) SA 73 (C) at 92.

[80] For a comprehensive discussion, see Ogus *Damages* 171–218.

[81] See Neethling & Potgieter *Delict* 244 n 340. 'According to this theory the human personality is seen as a combination of economic and non-economic interests. A person's life, physical or mental faculties and freedom from pain are assets just as are, eg, his house, shares and motor car. An impairment of any of these non-economic assets of a person leads to an action for damages. The value of the asset is determined irrespective of the "social, psychological or moral attitudes of the victim". The consciousness and feelings of the plaintiff thus have no significance. In addition to this, it must be accepted that an injury to personality is usually the same in all people.'

This theory should not be accepted, since it denies the subjective qualities of physical-mental interests.

[82] See Neethling & Potgieter *Delict* 244 n 341: 'This theory rejects the abstract view of personality interests and gives consideration to both the personal circumstances of the plaintiff and his consciousness and feelings. According to this theory the nature of physical-mental interests cannot be appreciated without taking into account the feelings of the injured person. The personal theory sees the essence of injury to personality as a loss of happiness. It is further argued that a delict causes a so-called negative balance in a person's happiness. Although the strength of this theory is to be found in its realistic approach to personality interests, its weakness is that it is too subjective and depends too much on the concept of affective (sentimental) loss.'

This theory is accepted in, for instance, Van der Merwe & Olivier *Onregmatige Daad* 189 et seq. Although realistic in some respects, the weakness of this theory is that it is too subjective and places too much emphasis on affective (sentimental) loss.

[83] See Neethling & Potgieter *Delict* 244 n 342: 'This theory accepts (as its name indicates) the premise of the personal theory that the subjective unhappiness (in the mind) of the injured is the essence of injury to personality. It does, however, go further in as much as it takes into consideration the amount of money which is *reasonably able* to provide the plaintiff with solace in order to remove his unhappiness. This theory actually appears to be more of a compensation theory (ie a theory which explains *how* non-pecuniary loss is compensated by means of money) than a theory explaining the nature of injury to personality: the cart

is put before the horse by assuming that harm only exists insofar as it can be compensated by an award of damages.'

[84] *Damages* 195–6.

[85] *Delict* 244. See also Visser 1981 *THRHR* 129–30; *Marsden v National Employers' General Ins Co*Corbett & Honey A4–56 at A4–62.

[86] See in general Neething & Potgieter *Delict* 244–8; Corbett & Buchanan I 43, Visser *Kompensasie en Genoegdoening* 81–8; Visser 1981 *THRHR* 120; Loubser & Midgley (eds) *Delict* 309–10, 422–3; Luntz *Damages* 233–7; McGregor *Damages* 1291–3.

[87] See the cases referred to below as well as Boberg *Delict* 567–70; Van der Merwe 1966 *THRHR*381; Luntz 1967 *SALJ* 6; Erasmus 1976 *TSAR* 238; Visser 1988 *THRHR* 482 et seq.

[88] See, eg, *Sigournay v Gillbanks* 1960 (2) SA 552 (A); *Reyneke v Mutual and Federal Ins Co Ltd*1991 (3) SA 412 (W) at 426.

[89] In 'twilight' cases a measure of communication with the patient is sometimes possible (see *Roberts v Northern Ass Co Ltd* 1964 (4) SA 531 (D); *Lim Poh Choo v Camden Health Authority* (1979) 2 All ER 910 (HL); *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 983; *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A) at 120). In the 'cabbage' cases the patient is permanently unconscious (see *Wise v Kaye* (1962) 1 All ER 257 (CA); *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W); *Reyneke v Mutual & Federal Ins Co Ltd* 1991 (3) SA 412 (W); *Nanile v Minister of Post & Telecommunications*Corbett & Honey A4–30 at A4–41). See generally the following: *Steenkamp v Minister of Justice* 1961 (1) PH J9 (T) at 26: 'On the other hand it does not seem to me to be proper to award such an amount as would provide more than could be usefully employed in alleviating his unhappy position.' This case favours a functional approach to compensation in terms of which the money must be able to achieve some compensatory object. One should not deduce from this that the court is of the opinion that injury to personality exists only if it is compensable. See further *Scheepers v African Guarantee and Indemnity Co Ltd* 1962 (3) SA 657 (E) (in awarding compensation for brain injuries the court takes into account that the plaintiff is aware of his personality change). In *Roberts v Northern Ass Co Ltd* 1964 (4) SA 531 (D) at 542 the *Steenkamp* case (supra) was rejected and the approach in *Wise v Kaye* [1962] 1 All ER 257 (CA) approved: '[U]nconsciousness, or lack of awareness of the injuries done to a plaintiff, though relevant to exclude an award of damages in respect of pain and matters such as worry, anxiety and anguish, which depend for their existence on an awareness in the victim and can only exist by being felt or thought or experienced, were otherwise irrelevant.' In *Geldenhuys v SAR & H* 1964 (2) SA 230 (C) at 235 the ratio in the *Steenkamp* case was again confirmed, but the plaintiff in casu did not suffer from brain injuries which excluded his consciousness.

[90] 1966 (3) SA 484 (W).

[91] At 494. See, further, Boberg *Delict* 567–70; 1962 *SALJ* 206; Luntz 1965 *SALJ* 6; Buchanan 1965 *SALJ* 457.

[92] See the references in n 86 above; Van der Merwe & Olivier *Onregmatige Daad* 194; *Collins v Administrator, Cape* 1995 (4) SA 73 (C) at 89.

[93] See Neethling & Potgieter *Delict* 245 n 350: 'In *Qunta v Bay Passenger Transport* Corbett and Buchanan II 368 and *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) the court[s] expressly accepted and applied the *Gerke* decision. Also in the case of *Quantana v Union and SWA Ins Co Ltd*: Corbett and Buchanan II 680 682 where the plaintiff's injuries caused him to become insane, the court referred to the *Qunta* case with approval and awarded a large sum of damages although the plaintiff was not aware of his condition. The latest word on this from the Appellate Division is to be found in *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) 119. The court expressed itself in favour of a flexible approach to the making of awards in the type of case under discussion. After consideration of the cases in which a functional approach . . . was followed, the following was said: ''As I read the judgment in [*Marine & Trade Insurance Co Ltd v Katz* 1979 (4) SA 961 (A)], however, it did not lay down that the 'functional' approach was the one to be followed: all that was said was that on the facts of the *Katz* case, an approach of that kind would not call for an interference with the damages awarded by the trial court. This court has never attempted to lay down rules as to the way in which the problem of an award of general damages should be approached . . . . I do not think that we should adopt a different approach . . . . This does not mean, of course, that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account with all the other circumstances.'' The court thus did not condemn the approach in the *Gerke* case.'

See also *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) at 426: 'In making an award . . . the Courts adopt an *objective* approach in determining the amount of damages, that is, it awards damages for loss whether the victim is aware of such loss or not. In awarding damages for loss in this category, the Court *may* (but is not obliged to) take into account, as one of the factors influencing the award, the so-called ''functional approach'' whereby the amount of damages may be increased or decreased

depending on: *(a)* the extent to which the money so awarded can be utilised to benefit the victim in alleviating his/her lot in life; and/or *(b)* the extent to which such money will exclusively benefit the victim's heirs.' See further *Bobape v President Ins Co Ltd* Corbett & Honey A4–43 at A4–55; *Marsden v National Employers' General Ins Co* Corbett & Honey A4–56 at A4–63.

[94] 1995 (4) SA 73 (C). See for a discussion Visser 1996 *THRHR* 179; Katz 1996 *Stell LR* 343.

[95] Para 5.5. See the following analysis of the issue by Neethling & Potgieter *Delict* 247: 'Injury to personality in cases of interests which are directly related to consciousness consists only of an injury to feelings. The operation of the conscious mind is thus a prerequisite for the existence of harm such as pain and (physical) suffering. The other forms of personal loss are only indirectly related to consciousness. Where there is, eg, an impairment of one's reputation, or a loss of the amenities of life, the loss is not only to be found in the feelings or consciousness of the plaintiff: in cases of defamation and loss of amenities, one is able to ascertain objectively, without reference to the feelings of the plaintiff, whether his esteem in society has been lowered or to what extent his capacity to enjoy a normal life has been negatively influenced. The connection with consciousness is only created through affective (sentimental) loss, ie, the reaction of the injured person to his loss, or, in other words, his personal unhappiness. In such a case, injury to personality has an objective as well as a subjective element. Unconsciousness only excludes the subjective element (affective loss) but not the objective part of the loss. An unconscious person with brain injuries does not have a normal life and does not take part in normal activities as he used to: how can it then be correct to say that there is no loss? Where a person is only temporarily unconscious and later regains his consciousness, there is no doubt that the period during which he was unconscious must also be taken into account in assessing his damages. From this, it appears that *the existence of consciousness is not a prerequisite for the existence of injury to personality*. With regard to affective loss, the lack of consciousness only implies that the *experience*of the loss as such is eliminated and nothing more.'

See Loubser 2003 *Stell LR* 441 for interesting questions that underscore the difficult issues relating to damages for a comatose victim.

[96] Para 5.5.

[97] Neethling & Potgieter *Delict* 247; Boberg *Delict* 568.

[98] The same applies where the plaintiff suffers from a serious mental illness.

[99] In other words, money can in no way serve as an equivalent for such loss. See also para 9.4.2.Van der Merwe & Olivier *Onregmatige Daad* 192 n 51 are apparently of the opinion that loss which cannot be compensated ceases to exist for the purposes of the law of delict. Not only is this argument unrealisitc, but it also introduces a new requirement for delictual liability, viz compensability of damage. For this new element there is neither authority nor any good reason. See Neethling & Potgieter *Delict*246 n 355 for further comment.

[100] See also Boberg *Delict* 570; *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) at 425: 'In my view the fallacy in this argument is that it equates a dead man with an unconscious man. It also implies that it is ''cheaper to kill a man than to maim him''.'

[101] See para 5.6.3.

[102] See Neethling & Potgieter *Delict* 246. Boberg *Delict* 570 favours this approach (even though he thinks that the function of satisfaction in this regard is somewhat obscure—op cit 569): '[I]t is believed that our courts will and should continue to award a nucleus of damages for loss of amenities of life to the unconscious plaintiff *à la Gerke*, though any actual evidence of awareness should greatly increase the award. Compromise this solution may be, but it offers the necessary flexibility to deal justly with individual circumstances, and enables the law to express society's sympathy with the victim and its sense of outrage at his grievous loss'. See also Luntz *Damages* 234 et seq. This is basically the position in German law (see Visser *Kompensasie en Genoegdoening* 90; 1988 *THRHR* 481). See further Stoll *Haftungsfolgen im bürgerlichen Recht* (1993) 352–6. Despite a subjective approach in Australian law, the idea of symbolic compensation is also accepted. See, eg, *Skelton v Collins* [1966] 115 CLR 94; Luntz *Damages* 234; Boberg *Delict* 569. See on the position in English law *Lim Poh Choo v Camden and Islington Health Authority* [1979] 2 All ER 910 (HL); *West v Sheppard* 1964 AC 326; McGregor *Damages*1292.

[103] See paras 15.2.2.1 and 15.2.4.3 on quantum.

[104] See para 9.5 on money as compensation for non-patrimonial loss.

[105] The court in *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) probably erred in its high award for loss of amenities of life to an unconscious child. The court based its award on irrelevant grounds, namely the alleged benefit she could derive from her family using the money to visit her even though she was completely unaware of such visits. Otherwise the decision is acceptable, because it reflects a realistic appraisal of the nature of non-patrimonial loss.

[106] See para 9.4 on the nature of satisfaction.

[107] *Collins v Administrator, Cape* 1995 (4) SA 73 (C) at 94 held that there is no room in our law for 'penal damages'. See however paras 9.4.2, 9.4.4 and 15.3.2.4*(f)* on the ongoing debate on this matter. Cf Loubser 2003 *Stell LR* 441 who points out that difficult questions on damages for the comatose victim have not yet been satisfactorily answered.

[108] This may also mutatis mutandis apply to non-patrimonial loss in the case of an iniuria (see para 5.6.4).

[109] At 240.

[110] Para 4.2.2. See also Erasmus & Gauntlett 7 *LAWSA* para 21.

[111] See chap 15 on quantification of non-patrimonial loss.

[112] See paras 14.3, 15.3.12 on quantification.

[113] Para 5.6.1*(a)*.

[114] Para 9.5 on compensation.

[115] See *Brown v Hoffman* 1977 (2) SA 556 (NC); *Boswell v Minister of Police* 1978 (3) SA 268 (E); *Cottam v Speller* 1882 NLR 130.

[116] See *Hoffa v SA Mutual Fire and General Ins Co Ltd* 1965 (2) SA 944 (C).

[117] *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281. See para 11.9.2 on the concurrence between the action for pain and suffering and the actio iniuriarum. See also n 128 below.

[118] Paras 9.4 and 15.3.12.

[119] See Neethling et al *Law of Personality* 83 et seq; Loubser & Midgley (eds) *Delict* 53; para 15.3.12 on quantification.

[120] *Law of Personality* 87.

[121] A physical infringement of a trivial nature may, in view of all the circumstances usually be disregarded in accordance with the rule de minimis non curat lex.

[122] In some cases the element of insult has more prominence, eg, when someone's face is slapped or another spits in his face or where a woman is kissed against her will. See also *Botha v Pretoria Printing Works Ltd* 1906 TS 710 at 714: 'When one man slaps another's face there may be no great pain inflicted, and no doctor's bill incurred; but the insult offered to the man attacked is a thing which the Court is justified in compensating by substantial damages.'

[123] eg serious assault—see *Bennett v Minister of Police* 1980 (3) SA 24 (C).

[124] See Neethling et al *Law of Personality* 86, who give the following examples: the administration of poison or alcohol (see *S v Marx* 1962 (1) SA 848 (N)); the withholding of food and bedding. See also Neethling et al op cit 87 on a non-violent impairment of the physical senses. Examples are when a physical feeling of discomfort, disgust or repugnance is caused by, eg, blinding light, suffocating smoke, smell or noise. Cf eg *Pretorius v Minister of Correctional Services* 2004 (2) SA 658 (T) where prisoners were protected against unwanted radio broadcasts in their cells.

[125] In *Stoffberg v Elliot* 1923 CPD 148 at 151–2 it is argued that an infringement of the body without causing pain and suffering may found an action for satisfaction only if there is an element of contumelia (insult). Neethling et al *Law of Personality* 84–5 point out that in common law pulsare sine dolore was in itself recognized as an iniuria. Furthermore, the intentional infringement of another's body automatically amounts to an iniuria, irrespective of any emotional reaction to it or any pain and suffering (see also n 128 below).

[126] See, eg, *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 37: 'The fact is that *not* all assaults necessarily involve *contumelia*. It depends on the circumstances. A policeman who unlawfully shoots a person does not normally impair that person's dignity; a robber who stabs his victim does not normally insult his victim by so doing.' Contra Dendy 1986 *SALJ* 329–30. See Neething et al *Law of Personality*84–5, who observe that an assault on an unconscious person amounts to an iniuria despite the absence of contumelia. Our courts possibly see contumelia as the affective loss (sentimental hurt or feeling of having suffered an injustice) on account of the bodily infringement.

[127] In practice, the iniuria in respect of which satisfaction is awarded in a case of assault is often described as contumelia. In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) (assault by gunshots) it is stated (at 281–2) that 'the claim for contumelia under the actio injuriarum . . . is awarded for a direct and serious invasion of the plaintiff's bodily integrity and personal dignity'. See also Corbett & Buchanan II 353–60.

[128] In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281–2 Jones J distinguished between these kinds of loss but nevertheless preferred to make a single award since it flowed from the same wrongful act: 'It is . . . necessary to emphasise that an award for contumelia involving the invasion

of bodily integrity is of a different kind from general damages ordinarily awarded in cases of bodily injury. To my mind it belongs with an award for an invasion of the right to personal liberty (in wrongful arrest or imprisonment cases) and for the abuse of legal proceedings (in malicious prosecution cases) and the indignity and offence to one's sense of justice that goes with them. In our modern constitutional era damages for these violations should not be dismissed as mere balm for wounded feelings, and they should not be allowed to become fused or confused with damages for mental pain or anguish, or psychological illness and its consequences. In a case where a person is wrongfully shot and injured by the police there is a serious invasion of his person, his integrity, his dignity, and his sense of personal worth which is distinct from and in addition to physical, mental and psychological damage and their consequences which arise from bodily injury. It is given its own protection by the law of delict, and must be given its own redress. It is nevertheless a consequence of one and the same wrongful act. It is perhaps better, therefore, to attempt a holistic process by which a single award of damages is made, provided that the importance of *contumelia* in its own right is not overlooked.'

The iniuria in a case of bodily infringement goes further than pain and suffering because incidences are included where there is no pain and suffering (eg a slap or a bump) or there is a violation of physical senses (eg an unpleasant smell). Of course, pain and suffering will normally also be present when a plaintiff's bodily integrity is intentionally infringed. Such pain and suffering may then in a broad sense also be seen as forming part of the iniuria. However, the emphasis in an iniuria is on the injustice and retribution through satisfaction (para 9.4). For an iniuria a mere infringement of the body or physical senses is sufficient and the greatest manifestation of injury to feelings is the plaintiff's feeling of having suffered an injustice.

[129] The causing of fear through threats with immediate physical violence may be an iniuria (see Neethling et al *Law of Personality* 90). Fear must, of course, not be of such a short duration or trivial nature that it does not reasonably affect the plaintiff's body. See further *R v Umfaan* 1908 TS 62 at 67–8, where it was held that mere threatening words causing emotional anxiety do not constitute an iniuria upon the corpus. According to the court, threatening words may be an iniuria only if there is an element of insult.

Neethling et al op cit 91 criticize this reasoning and submits that there is no difference in principle between fear caused by threatening actions or threatening words. The court itself remarked (*Umfaan*supra at 67) that 'a verbal threat may possibly put a man in as much bodily fear as a threatening gesture'. In *Els v Bruce* 1922 EDL 295 (cf also Potgieter 1976 *Codicillus* 12) B threatened to arrest E's husband and also made insulting remarks. E suffered emotional shock harmful to her health. The court held this to be a cause of action in terms of the actio iniuriarum. See also *Waring and Gillow Ltd v Sherborne* 1904 TS 340 at 348. There can be little doubt that an intentional infringement of the psyche may amount to an iniuria. Cf also *Boswell v Minister of Police* 1978 (3) SA 268 (E), where the facts supported such a claim (but in casu only compensation for pain and suffering was claimed).

[130] In *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 189–90 a teacher suffered, inter alia, post-traumatic stress disorder (PTSD), major depressive disorder and panic disorder with agoraphobia as a result of being attacked with a hammer by a learner in her class in the presence of other learners. See Neethling et al *Law of Personality* 91–3; paras 5.6.1*(b)* and 15.2.4.2and, on psychiatric injury caused by sexual harassment, para 15.3.12.

[131] See Neethling et al *Law of Personality* 111 et seq; *Tobani v Minister of Correctional Services*[2001] 1 All SA 370 (E); para 15.3.9 on quantification.

[132] See, eg, *Stern v Podbrey* 1947 (1) SA 350 (C) at 362, where it is observed with reference to Voet *Commentarius* 47.10.7 that '[t]o prevent a person from using a public road or place is an *injuria*'. The plaintiff's physical freedom must have been hampered by 'any physical means or obstruction'. See Neethling et al *Law of Personality* 113 et seq and *Sievers v Bonthuys* 1911 EDL 525. In these cases contumelia is often emphasized (see *Kleyn v Snyman* 1936 OPD 99; *Purshotam Dagee v Durban Corp*1908 NLR 391; *Lord v Gillwald* 1907 EDC 64).

[133] See *Birch v Johannesburg City Council* 1949 (1) SA 231 (T) at 238 (this matter is discussed but not decided); Amerasinghe 1967 *SALJ* 331–2.

[134] McKerron *Delict* 159 is of the opinion that there should be a 'total restraint of the plaintiff's liberty'. However, this requirement probably goes too far (Neethling et al *Law of Personality* 113).

[135] Neethling et al *Law of Personality* 113. Cf *Makhanya v Minister of Justice* 1965 (2) SA 488 (N) at 492, where, on the one hand, it is said that contumelia is always an element in deprivation of liberty, but the court nevertheless clearly distinguishes between an 'aggression upon her personal liberty' and 'aggression upon her dignity'. See further *Minister van Wet en Orde v Van der Heever* 1982 (4) SA 16 (C) at 21–2; *Stapelberg v Afdelingsraad Kaap* 1988 (4) SA 875 (C) at 877–8. Cf on further consequences *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C).

[136] See paras 14.10.2 and 15.3.6 on quantification.

[137] See Neethling et al *Law of Personality* 88–90. See further Bekker *Seduksie*. There is also a view that seduction involves a violation of dignity (Van der Linden *Koopmanshandboek* 1.16.4). In terms of yet another theory, feelings of chastity are involved (Neethling et al op cit 199 et seq).

[138] See also paras 14.10.3 and 15.3.2. See Neethling et al *Law of Personality* 129 et seq. Also forming part of defamation (ie the unlawful and intentional publication of words or conduct concerning another which has the effect of injuring his or her good name) are malicious proceedings as well as malicious or wrongful attachment of property. The law accepts that 'every person has a reputation that can be injured' but 'that there may . . . be aggravating or mitigating circumstances relating to a person's reputation' (*Tuch v Meyerson* 2010 (2) SA 462 (SCA) at 468). Cf Loubser & Midgley (eds) *Delict* 56–7.

[139] Neethling et al *Law of Personality* 131, 135. Van der Merwe & Olivier *Onregmatige Daad* 389; Visser 1981 *THRHR* 123.

[140] Neethling et al *Law of Personality* 135–7. It is required only that the publication of words or conduct concerning the plaintiff must have the likelihood or probability of defaming him or her, not that actual defamation has occurred (cf *Le Roux v Dey* 2011 (3) SA 274 (CC) at 306 et seq). This implies that the law is concerned with the probability of loss of a good reputation. Eg, it may not even be asked of a witness how he or she actually understood the alleged defamatory conduct (except in the case of an innuendo—Neethling et al op cit 138); cf, eg, *Sutter v Brown* 1926 AD 155 at 163–4; *Botha v Marais*1974 (1) SA 44 (A) at 48.

[141] In other words, the loss is determined without reference to the feelings of the plaintiff.

[142] Because of the use of the criterion of the reasonable person.

[143] But a plaintiff's feelings are not necessarily injured in every instance of defamation. Eg, Brand JA states as follows *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 342: 'Though traditionally the function of the *actio iniuriarum* was to provide a *solatium* or solace money (satisfaction or ''*genoegdoening*'' in Afrikaans) for injured feelings, the position has become more nuanced in modern law. A natural person is not required to show sentimental loss. He or she will receive damages for defamation even in the absence of injured feelings. A medical doctor defamed by allegations of malpractice will receive non-patrimonial damages for injury to his or her professional reputation, despite the absence of any feelings of hurt or shame and the same will apply to the damaged credit reputation of a businessman. It will be no defence for the defendant to show that the statement did not in fact cause the plaintiff any personal distress.' (See also the citation in n 144 below from *Boka Enterprises (Pvt) Ltd v Manatse* 1990 (3) SA 626 (ZH) at 631–2 to which Brand JA's dictum relates.) On the other hand, see also *Le Roux v Dey* 2011 (3) SA 274 (CC) at 322 where it was pointed out that in some defamation cases the plaintiff's wounded feelings may outweigh his or her loss of reputation. However, where the same conduct causes more than one form of personality infringement (eg impairment of dignity as well as loss of reputation) this does not render the defendant liable by means of more than one actio iniuriarum since the same conduct cannot give rise to two actions under the actio iniuriarum (see para 7.5.11; *Dey* supra at 319–20; *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 218–9, 231). '[A]n award of damages for defamation should compensate the plaintiff for both wounded feelings and loss of reputation' (*Dey* (CC) supra at 322).

[144] See, however, also *Boka Enterprises (Pvt) Ltd v Manatse* 1990 (3) SA 626 (ZH) at 631–2: 'I venture to suggest that true emotional hurt forms the basis of few actions for defamation in contemporary times (with the possible exception of cases where female modesty has been impugned). More usually the motivation for an action for defamation (insofar as it is non-pecuniary) would appear to be the tendency for the person against whom the defamation has been committed to be brought into disrepute. Hurt feelings, per se, matter to a decreasing extent in a crowded, materialistic society.' The court adds that the law is more concerned with the protection of 'external dignity'. In response to this dictum, Brand JA remarks as follows in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 343: 'On the other hand, it is recognised—and in my view, rightly so—that juristic persons have an interest in their external dignity or reputation, akin to that of its natural counterpart, which is worthy of legal protection, despite the fact that it cannot be translated into a quantifiable monetary loss. Why I say ''rightly so'' is that I can see no reason why, for example, the corporate trader would not have a protectable interest in the pride of its employees to work for that company. Or in the fact that because of the defamatory allegations people would be less inclined to deal with the company. Or as Lord Bingham put it in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 (HL) para 26: ''First, the good name of a company, as that of an individual, is a thing of value. A damaging libel may lower its standing in the eyes of the public and even its own staff, make people less ready to deal with it, less willing or less proud to work for it. If this were not so, corporations would not go to the lengths they do to protect and burnish their corporate images. I find nothing repugnant in the notion that this is a value which the law should protect.''' Cf also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A).

[145] See also Neethling et al *Law of Personality* 59–60; Visser 1981 *THRHR* 123–4. Indications of this may be found in the aggravating or extenuating circumstances which are taken into account in fixing the

quantum of satisfaction (paras 15.3.2.3 and 15.3.2.4). Eg, provocative repetition of defamation (which may increase the plaintiff's feelings of outrage); the reputation of the plaintiff as a dishonourable person (which may presumably reduce his or her feelings of outrage); the fact that the defendant is aware of the defamatory nature of his or her words (which may increase the defendant's moral blameworthiness in the eyes of the plaintiff and so increase the sentimental hurt of the latter); the mental instability of the defendant (which may presumably reduce the bitterness felt by the plaintiff). It may, therefore, be concluded that the law by necessary implication presumes the presence of affective loss but that it is only a factor having a bearing on the quantum of satisfaction and is not a factum probandum of the plaintiff's claim.

[146] See *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) at 952 et seq; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 560–1; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) (political parties may also sue for defamation); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A) at 460; *Delta Motor Corporation (Pty) Ltd v Van der Merwe*2004 (6) SA 185 (SCA); *Treatment Action Campaign v Rath* 2007 (4) SA 563 (C) at 568); *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 336-49; *Bitou Municipality v Booysen* 2011 (5) SA 31 (WCC) (municipality may not sue for defamation); Neethling et al *Law of Personality* 70; Neethling & Potgieter *Delict* 322–5; Van der Walt & Midgley *Delict* 51–2; Neethling & Potgieter 1991 *THRHR* 120. Non-patrimonial or general damages are recovered with the actio iniuriarum and patrimonial or special damages with the actio legis Aquiliae (*Media 24 Ltd* supra at 336 and 333 respectively).

[147] See Neethling et al *Law of Personality* 191; para 15.3.3 on quantification. See Neethling et al op cit 77 n 419 on the concept of human dignity in comparison with the common-law concept of dignitas and at 191 on the view that the recognition of the right to (human) dignity as a fundamental right in s 10 of the Constitution emphasizes the fact that dignity as a personality interest is worthy of protection. Cf Loubser & Midgley (eds) *Delict* 53–4.

[148] See Neethling et al *Law of Personality* 192 for practical examples of conduct which may infringe someone's dignity.

[149] An infringement of dignity may, of course, coincide with all other forms of iniuria (cf para 5.8). However, it should be remembered that dignitas (as a description of all personality interests not falling under the corpus or fama) definitely includes more interests than those associated with dignity (self-respect). The unjustified practice of elevating contumelia (insult) to the status of a general requirement for all forms of iniuria, has been correctly criticized: *Foulds v Smith* 1950 (1) SA 1 (A) at 11; *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 248. See also Neethling et al *Law of Personality* 49 et seq; Joubert 1960 *THRHR* 41–2.

[150] As, eg, in the case of defamation (para 5.8). Affective loss can only be relevant where objective interests outside human feelings have been infringed and the victim experiences an emotional reaction to such loss. See also Neethling et al *Law of Personality* 53.

[151] *Delange v Costa* 1989 (2) SA 857 (A) at 862: 'Because proof that the subjective feelings of an individual have been wounded, and his *dignitas* thereby impaired, is necessary before an action for damages for *injuria* can succeed, the concept of *dignitas* is a subjective one.' See also *Bennett v Minister of Police* 1980 (3) SA 24 (C).

[152] ie, according to 'the ordinary decent right thinking person' (*Minister of Police v Mbilini* 1983 (3) SA 705 (A) at 716) or reasonable person (Neethling et al *Law of Personality* 347). See *Dercksen v Webb*[2008] 2 All SA 68 (W) at 76: 'Subjectively the appellant's dignity may have been impaired. That, however, does not necessarily mean that the conduct of the respondents is actionable. It could be that the appellant is a ''hypersensitive'' person by nature. The character of the act cannot alter because it is subjectively perceived to be injurious by the person affected thereby. (See *De Lange v Costa* 1989 (2) SA 857 at 862E.) An objective test of reasonableness is also applied.' See also *Dendy v University of Witwatersrand* 2007 (5) SA 382 (SCA) at 388–9; Burchell *Personality Rights* 328–9.

[153] *Minister of Police v Mbilini* 1983 (3) SA 705 (A) at 716; *Delange v Costa* 1989 (2) SA 857 (A) at 862: 'To address the words to another which might wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *injuria*.'

[154] In terms of s 10 of the Constitution '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. In *S v Makwanyane* 1995 (3) SA 391 (CC) at 422–3 the Constitutional Court referred with approval to the statement in *Gregg v Georgia* 428 US 153 (1976) at 230 that 'even the vilest criminal remains a human being possessed of common human dignity'. In *Ryan v Petrus* 2010 (1) SA 169 (ECG), where the plaintiff was verbally insulted with reference to her adulterous relationship with the defendant's father it was held (at 177) that '[t]he fact that plaintiff is committing adultery does not mean that she has thereby forfeited her right to respect and to be treated with dignity'. See also Neethling et al *Law of Personality* 194 n 31: 'It must be emphasised . . . that every person has feelings of dignity, however negligible these may be.'

[155] eg, the cases in which it was held that the making of immoral suggestions to a prostitute does not constitute an iniuria because she has no feelings of dignity (*R v Van Tonder* 1932 TPD 90 at 91–2; *R v Curtis* 1926 CPD 385 at 388). But see also *Fayd'herbe v Zammit* 1977 (3) SA 711 (D) at 719: 'A person's reprehensible conduct may doubtless be such as to diminish his own self-respect and self-esteem. But I fail to understand why such diminution should enable third persons with complete impunity to make injurious encroachments on his dignity.' If children are too young to have feelings of dignity, they cannot suffer contumelia (De Wet & Swanepoel 253–4; *R v S* 1948 (4) SA 419 (GW) at 426). See generally Neethling et al *Law of Personality* 194 n 31.

[156] One may argue that: *(a)* the law objectively determines that the legal interests or object, viz unviolated feelings of dignity, do not exist in particular circumstances and that consequently no damage can be caused in respect thereof; or *(b)* that the loss in question does in fact exist but that there is no unlawful conduct (n 153 above) because, for instance, the making of immoral suggestions to a prostitute is not insulting if judged objectively.

[157] There is thus an average criterion which may be used to disregard exaggerated (abnormal) reactions.

[158] Para 15.3.5 et seq on quantification.

[159] See the arguments and authority referred to in Neethling et al *Law of Personality* 50. See also *Foulds v Smith* 1950 (1) SA 1 (A) at 11, where it was held that too much emphasis is placed on contumelia. See n 149 above.

[160] *Law of Personality* 29, 199.

[161] eg, in terms of criminal law which protects religious feelings (eg the crime of blasphemy). The offence of cruelty to an animal is clearly also intended to protect the feelings of human beings. See, eg, *R v Moato* 1947 (1) SA 490 (O) at 492, where mention is made of 'fyner gevoelens en gewaarwordings van medemense wat leed aangedoen word by dieremishandeling'.

[162] See Neethling et al *Law of Personality* 199 et seq.

[163] See Potgieter *Godsdiensgevoel* 100–1 with reference to *Pont v Geyser* 1968 (2) SA 545 (A).

[164] Religious feelings are an individual's faith, emotions, perceptions and convictions on religion or his or her relationship with a godly being. See Potgieter *Godsdiensgevoel* 15 et seq, 21, 26–59; cf generally *Geyser v Pont* 1968 (4) SA 67 (W); *Pont v Geyser* 1968 (2) SA 545 (A). See, however, *Hartman v Chairman, Board of Religious Objection* 1987 (1) SA 922 (O) at 929–35. The right to freedom of religion is recognized as a basic human right in s 15(1) of the Constitution (see also *Simonlanga v Masinga* 1976 (2) SA 732 (W) at 740; 1976 (4) SA 373 (W) at 375). Cf Neethling et al *Law of Personality*201–2; Malherbe 2007 *TSAR* 332 et seq.

[165] See Potgieter *Godsdiensgevoel* 116: 'Dit moet met ander woorde seker wees dat die reghebbende werklik seergemaak of gekrenk voel omdat die dader sy godsdienstige oortuigings aangetas of geminag het. Hierdie toets is klaarblyklik subjektief. Die krenking van die godsdiensgevoel moet boonop nie onbenullig nie, maar ernstig wees.' Wrongfulness is, of course, also determined through an objective criterion, viz whether the feelings of a reasonable member of the religious group to which the plaintiff belongs would also be impaired (Potgieter op cit 120–1; 1992 *THRHR* 462).

[166] See Neethling et al *Law of Personality* 204–7; Neethling & Potgieter *Delict* 351; paras 12.23 and 15.3.4.

[167] Paras 12.23 and 15.3.4.

[168] See also Neethling et al *Law of Personality* 205.

[169] See, however, *McCalman v Thorne* 1934 NPD 86 at 91–2; *Radlof v Ralph* 1917 EDL 168 at 174; *Smit v Jacobs* 1918 OPD 30.

[170] See *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 36. The Appellate Division left this question open in *Bull v Taylor* 1965 (4) SA 29 (A) at 37–8 but it was made clear in *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at 561 that breach of promise must be contumelious to justify sentimental damages: breach of promise can only give rise to an iniuria if the personality of the innocent party has been infringed in a wrongful manner and animo iniuriandi. In order to be wrongful, the conduct complained of must not only infringe the victim's subjective feelings of dignity, but must at the same time also be unreasonable or contra bonos mores (cf Neethling 2011 *THRHR* 328; Sharp & Zaal 2011 *THRHR* 333*;* Neethling et al *Law of Personality* 194–5).

[171] Para 5.8. Eg where the man terminates the engagement in the presence of others declaring that he became aware that the woman had previously been engaged in a licentious sex life, but which later appears to be devoid of truth.

[172] See para 5.9 on contumelia. The attitude of our case law always to require a violation of dignity (contumelia) as an element of non-patrimonial loss in the case of breach of promise (*Bull v Taylor* 1965 (4) SA 29 (A) at 36–8) is unacceptable because contumelia constitutes but one form of loss in connection with feelings (see Neethling et al *Law of Personality* 28–9, 119).

[173] See Neethling et al *Law of Personality* 205. Here insult does not play a role. Legal practice apparently acknowledges that feelings (in a wide sense) are involved where it is declared that 'the wounded feelings of the plaintiff' (*McCalman v Thorne* 1934 NPD 86 at 92) and 'the moral suffering she has undergone' (*Triegaardt v Van der Vyver* 1910 EDL 44 at 46) should be taken into account in quantifying a loss.

[174] Eg where the innocent party had a nervous breakdown as a result of the breach of promise (cf n 177 below).

[175] ie, voluntary sexual intercourse between a married person and someone other than his or her spouse. See in general Neethling et al *Law of Personality* 207; Neethling & Potgieter *Delict* 351–3; Neethling 2010 *THRHR* 343; cf para 15.3.7 for quantification of damages.

[176] *Wiese v Moolman* 2009 (3) SA 122 (T) at 125; *Wassenaar v Jameson* 1969 (2) SA 349 (W) at 352; *Bruwer v Joubert* 1966 (3) SA 334 (A); *Chapman v Chapman* 1977 (4) SA 142 (NC); *Smit v Arthur*1976 (3) SA 378 (A); *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C); *Godfrey v Campbell* 1997 (1) SA 570 (C). In *Wiese* at 126–9 the court also held that the action for adultery was not in conflict with the spirit, purport and objects of the Bill of Rights. The actio iniuriarum may only be instituted against the third party and not against the guilty spouse; although the adulterous spouse also commits an iniuria against the other spouse, the action is for policy reasons denied against the latter. The remedy of the innocent spouse against the adulterous spouse is an action for divorce (cf *Wiese* at 128). However, Neethling & Potgieter 2009 *Annual Survey* 826 argue that where the innocent spouse prefers not to sue for divorce (eg for the sake of the children), the said policy considerations fall away and he or she should have the actio iniuriarum also against the adulterous spouse at their disposal. The two adulterous parties should then be regarded as joint wrongdoers vis-à-vis the innocent spouse (see also Neethling 2010 *THRHR* 109).

[177] *Wiese v Moolman* 2009 (3) SA 122 (T) at 125–6; Neethling et al *Law of Personality* 208–9. See, however, *Foulds v Smith* 1950 (1) SA 1 (A) at 11, where it was held that contumelia receives too much attention. Non-patrimonial loss involving the physical-mental integrity may also be relevant where the innocent spouse suffers a nervous breakdown on account of the adultery (*Fuller v Viljoen* 1949 (3) SA 852 (GW); *Diemer v Solomon* 1982 (4) SA 13 (C) at 15; *De Wet v Jurgens* 1970 (3) SA 38 (A)).

[178] Eg *Bruwer v Joubert* 1966 (3) SA 334 (A) at 337; *Diemer v Solomon* 1982 (4) SA 13 (C) at 16. Apart from the two usual claims for adultery on the grounds of iniuria and loss of consortium, 'alienation of affection' is sometimes added as an independent cause of action: *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C) at 852–3.

[179] See *Viviers v Kilian* 1927 AD 449 at 455.

[180] See *Bruwer v Joubert* 1966 (3) SA 334 (A) at 337; *Valken v Berger* 1948 (3) SA 532 (W) at 536–7; *Diemer v Solomon* 1982 (4) SA 13 (C) at 16. See also *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 9: '[This] embrace[s] intangibles, such as loyalty and sympathetic care and affection, concern etc; as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business, etc.'

Neethling et al *Law of Personality* 209 see these forms of loss as violations of the feelings of an innocent spouse (especially feelings of piety). See *Bester v Calitz* 1982 (3) SA 864 (O) at 867, where the claim for loss of consortium was apparently seen as a claim for satisfaction to soothe wounded feelings (see also *Mulock-Bentley v Curtoys* 1935 OPD 8 at 14–15). A problem which may occur is that the feelings of the innocent spouse are left unprotected in cases where the physical part of consortium remains unimpaired (in other words, where the adulterous spouse does not leave the common household) (see, eg, *Biccard v Biccard and Freyer* 1892 SC 473; *Viviers v Kilian* 1927 AD 449 at 456, but cf also *Harris v Harris* 1946 (2) PH B99 (N) at 166).

[181] See, eg *Fraser v De Villiers* 1981 (1) SA 378 (D) at 382, where the plaintiff suffered no 'humiliation or depression' or any 'distress or *iniuria* whatsoever' on account of the adultery and received only nominal damages.

[182] Where the husband and wife do not live together at the time of the adultery, there can be no factual basis for non-patrimonial damage on account of loss of love, support etc of the other spouse (see eg *Michael v Michael and McMahon* 1909 TH 292).

[183] In *Michael v Michael and McMahon* 1909 TH 292 the plaintiff had neglected and left his wife. She committed adultery, but the court found that there was in casu no contumelia committed against him. If a husband has left his wife, adultery by her will not necessarily exclude a contumelia but a 'strong case' is required. See also *Mason v Mason* 1932 NPD 393; *Bird v Bird and Phillips* 1904 CTR 343 at 345. It is also of importance whether the plaintiff has the intention to reunite with the abandoned spouse. In

the *Mason* case (supra) the court held that contumelia was not present because the husband had no intention of taking his wife back. In *Groundland v Groundland and Alger* 1923 WLD 217 at 220 loss was proved where the plaintiff had not given up all hope of a reconciliation.

[184] See Neethling et al *Law of Personality* 212–15; Neethling & Potgieter *Delict* 353–4; *Pearce v Kevan* 1954 (3) SA 910 (D); *Woodiwiss v Woodiwiss* 1958 (3) SA 609 (D); *Van den Berg v Jooste* 1960 (3) SA 71 (W); *Smit v Arthur* 1976 (3) SA 378 (A) at 387; *Diemer v Solomon* 1982 (4) SA 13 (C); para 15.3.7.3.

[185] Ibid.

[186] Para 5.10.

[187] See, eg, *Van den Berg v Jooste* 1960 (3) SA 71 (W) at 73: 'Na my mening is die verlies van die liefde 'n verlies van een van die elemente van *consortium*. Dit is die basis vir die toekenning van skadevergoeding vir *contumelia*'; *Peter v Minister of Law and Order* 1990 (4) SA 6 (E) at 10: 'A husband wronged through another's adultery with or the enticement of his wife, proceeds by way of the *actio injuriarum* to recover damages under the head of *contumelia* and loss of *consortium*.'

[188] *Law of Personality* 214.

[189] There is obiter support for this in *Union Government v Warneke* 1911 AD 657 at 667: 'The loss of a wife's comfort and society (as distinguished from her support and assistance) is a loss which only affects the feelings, and not the property of the husband . . . . The cases referred to in the judgment, where damages were awarded for depriving a man of the society of his wife, were actions of *injuria*. In such proceedings, as already explained, damages may be given by way of satisfaction to the feelings.' Loss in regard to feelings of dignity (para 5.9) as well as physical integrity (n 177 above) may also be relevant.

[190] Para 12.1.

[191] For instance, where X dismisses his employee in breach of their contract and in an insulting manner. See para 11.9 on the concurrence of actions.

[192] See, eg, Joubert *Contract* 248.

[193] See, eg, *Administrator, Natal v Edouard* 1990 (3) SA 581 (A).

[194] See also para 5.5.

[195] See para 8.9.2 on the question of whether these losses should be taken into account.

Chapter 6
PROSPECTIVE DAMAGE AND LUCRUM CESSANS

6.1 DEFINITION

A practical definition of prospective damage is the following: *It is damage in the form of patrimonial and non-patrimonial loss which will, with a sufficient degree of probability or possibility, materialize after the date of assessment of damage resulting from an earlier damage-causing event*.

In terms of a more analytical definition it is: The *total or partial frustration of an expectation that a patrimonial asset will accrue or that a personality interest will exist, or it is the creation of an expectation of a debt*. [1]

Not all prospective damage amounts to lucrum cessans and apparently, not all lucrum cessans can be described as prospective loss. [2]

The view that it is of no practical or analytical value to distinguish between damnum emergens and lucrum cessans (damage already suffered and prospective loss) is neither in accordance with authority nor is it theoretically sound. [3]

6.2 NATURE OF PROSPECTIVE DAMAGE

Prospective damage may take the form of prospective patrimonial loss as well as prospective non-patrimonial loss. As far as the former is concerned, it involves the non-realization or delay of future profit or income as well as the possibility or acceleration of future expenses. [4] Prospective loss may occur as a result of breach of contract, a delict or all the other sources of claims for damages.

Damage is relative to time. This fact makes it possible to subdivide damage into, for example, damage before the accrual of a cause of action, [5] damage from the moment of liability to the commencement of the action, [6] damage from such commencement up to the time of judgment, damage up to the stage of an appeal and damage beyond this date. [7] Theoretically, one may select any moment of pause in the above sequence in order to assess the consequences of an event up to that stage and thus draw a distinction between 'past' and 'prospective' loss. Damage is thus not merely always a past fact. [8] In addition to any diminution of utility or quality which has already taken place, a further reduction may often be expected in future. It is not clear with what degree of probability or possibility a reduction must be expected. It must, however, be a *reasonable* possibility. [9] Apparently, a possibility of less than 10 per cent will not be reasonable.

Prospective loss rests on two legs; it has a prospective element or dimension as well as a present one. This implies that prospective loss is not merely something which will happen in future if one looks into the future from the moment of assessment of damage, since it may also be seen as the present impairment of an expectation of something in future. [10] Put differently, the prospective patrimony [11]is represented in the present patrimony or estate of someone in the form of an expectation [12] (of something which will happen with some degree of probability). Similarly, there is a present expectation as to prospective personality interests. Someone's future patrimonial and personality interests are co-determined by the nature and quality of his or her present interests (which form the basis of future development); [13] likewise, prospective damage as the frustration of a future expectancy [14] is co-determined by how his or her present interests are affected by a

damage-causing event. Even though prospective loss is literally damage which will only manifest itself in money or otherwise fully in future, its basis is to be found in the impairment of the plaintiff's present interests.

Against this background, consideration must be given to the argument that the loss of earning capacity does not constitute prospective loss, since nothing happens in future which completes the damage. [15] The correct view seems to be [16] that in an infringement of earning capacity through conduct which is harmful to its constituent elements, it is only the damage-causing event which is completed. Probable future events which co-determine the content of the expectancy in question must, of course, also be considered. [17] Likewise, the financial position of the plaintiff will in future be affected whenever he or she does not receive an expected amount of money. The fact that legal practice takes future contingencies into account in the calculation of damages, [18] and that damages are discounted to the date of trial, [19]also proves the 'prospective leg' of lucrum cessans. [20] While Reinecke's theory perhaps depends too much on the present manifestation of future damage (ie an expectation), it appears that our practice attaches too much importance to the prospective leg of such loss and in this process fails to appreciate the nature of prospective damage. [21]

It seems as though our practice makes a distinction between prospective damage which 'continues' in future [22] and future damage which will occur as a 'completed' sum. [23]

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6.3 ASSESSMENT OF PROSPECTIVE LOSS [24]

The sum-formula and the concrete approach to damage are discussed above. [25] The correct method of the assessment of prospective damage must be found within the framework of one of these theories.

The hypothetical element of the sum-formula renders it suitable for estimating damage in the case of prospective loss and loss of profit and income. [26] It would therefore appear that *prospective damage should be assessed through a comparison of the hypothetical course of events before and after a damage-causing event*. [27] The hypothetical position (expectation) *before* the damage-causing event has become unreal (it will probably not be realized) and this must be compared with the hypothetical position *after* the damage-causing event which has become real (which will probably be realized). Considering the type of patrimonial assets that are involved, hypothetical positions are apposite, [28] since here the law is actually dealing with a person's expectations regarding future events. As a result of the damage-causing event, the value of his or her future expectations deteriorates and it is quite logical to express damage as the difference between the present values of two expectations. [29]

All this may be illustrated with an example concerning a reduction in earning capacity: [30] Before being injured, X could probably earn an average of R5 000 per month for the forthcoming ten years. This was thus the content of his expectation, or a hypothesis as to the future. After his injuries he will probably be able to earn only R1 000 a month for five years. This new expectation or hypothesis caused by the injuries must be compared with the expectation or hypothesis existing before the injuries. The negative difference between the two constitutes X's loss.

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The opinion has been expressed that this method of assessing damage may imply the use of the conditio sine qua non 'test' of causation. [31] Without going into all the detail (which will be mainly of theoretical value), we submit the following: In terms of the conditio sine qua non 'test' of causation an alleged antecedent is notionally eliminated and the question is then asked whether the consequence also disappears. [32] From practice it would seem that a comparative approach is not used. The suggested formula to assess prospective loss, on the other hand, does not merely involve the notional elimination of something, but a prognosis is made of the plaintiff's expectancies before and after the damage-causing event. This is performed through a construction of the hypothetical course of events in regard to each expectancy (in order to ascertain its content and value) by means of the available evidence, permissible aids, probabilities and reasonable deductions. [33] This is often a difficult and speculative operation, [34] but, as our practice demonstrates, [35] it is possible to perform such an operation in a reasonable manner. [36] The final step in the assessment of the damage is to subtract the value of the expectancy after the damage-causing event from its value before such event. The whole process of the determination of damage does, of course, also involve causation (between hypothetical 'facts') since causation and assessment of loss are, in certain respects, inseparably linked. [37]

6.4 FORMS OF PROSPECTIVE LOSS RECOGNIZED IN PRACTICE

Although our legal practice has experienced problems in quantifying prospective loss, attempts have not really been made to develop a theory on this type of damage. [38]The reason why our practice awards damages for future loss is to be

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found in the 'once and for all' rule [39] in terms of which damages may be recovered once only for all damage based on a single cause of action, irrespective of whether such damage has already been sustained or is expected in future. [40]

In general, five instances of prospective patrimonial loss are recognized in practice. [41]

6.4.1 Future expenses on account of damage-causing event [42]

A common example from the law of delict is where bodily injuries cause the plaintiff to incur medical costs in future. [43] Breach of contract may also cause a plaintiff to expend money in future. [44]

6.4.2 Loss of future income

An example of this is where the injured X suffers from a disability which prevents him from earning income in future. This is viewed as prospective loss. [45]

6.4.3 Loss of business, contractual or professional profit [46]

An example is where X is contractually bound to deliver orange trees of a particular type to Y so that the latter is able to make a profit in future, but he delivers the wrong type of trees. [47] In *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* [48] the Supreme Court of Appeal acknowledged a delictual claim for prospective loss of profit.

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6.4.4 Loss of prospective support

Dependants whose breadwinner was killed may claim for prospective loss of support. [49]

6.4.5 Loss of chance [50]

An example [51] is where a horse with a one in three chance of winning a race and earning prize money for its owner is negligently injured so that it cannot participate in the race. [52]

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6.5 FUTURE NON-PATRIMONIAL LOSS (INJURY TO PERSONALITY)

Pain and suffering which will probably in future be experienced as a result of the infringement of someone's physical integrity [53] is recognized as compensable loss. [54] The same ought to apply in regard to the future effect of nervous shock, [55]loss of the amenities of life [56] and disfigurement. [57] A shortened life expectancy [58]is also a type of prospective loss which the plaintiff experiences for the rest of his or her life. [59]

Non-patrimonial damage in the form of an iniuria [60] may also take the form of prospective loss. [61]

Future non-patrimonial loss may be explained as the frustration of an expectation that personality interests will have a specific quality in future.

6.6 SOME REQUIREMENTS FOR RECOVERY OF DAMAGES FOR PROSPECTIVE LOSS

According to current law, no damages may be recovered for prospective loss on its own. [62] In *Coetzee v SAR & H* [63] the court stated:

> The cases ... go only to this extent, that if a person sues for accrued damages he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may

possibly be sustained in the future ... . Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action.

This approach was basically endorsed in *Jowell v Bramwell-Jones*, [64] although the court found it unnecessary to finally decide this point:

> The advantage of the approach adopted in the *Coetzee* case is of course the certainty it provides. If an action for loss which is prospective is completed only when the loss actually occurs, prescription will not commence to run until that date and a plaintiff will generally be in a position to quantify his claim. To the extent there may be additional prospective loss the court will make a contingency allowance for it. On the other hand, if the completion of an action for prospective loss entitling a person to sue is to depend not upon the loss occurring but upon whether what will happen in the future can be established on a balance of probabilities, it seems to me that the inevitable uncertainty associated with such an approach is likely to prove impractical and result in hardship to a plaintiff particularly insofar as the running of prescription is concerned.

Prospective loss alone constitutes no cause of action because it is not regarded as 'actual' damage. [65]

These principles are sometimes criticized. Boberg [66] states that a plaintiff should be able to institute an action based merely on prospective loss because such loss is included in the concept of 'damage'. He refers to *Jacobs v Cape Town Municipality*, [67] where it was held that parents may institute an action for loss of support on account of the death of their son, even though he did not actually support them at the time of his death. [68] Boberg [69] adds that he does not regard a loss of future support merely as prospective loss, because there is an immediate loss of an expectation of support when the breadwinner dies.

However, it is certain that in our law an action for damages will not lie in the following situation: through Y's negligence, X is exposed to radiation (or, eg, AIDS). At this stage X suffers no loss or damage but there is a 30 per cent chance that he may develop a serious illness which will cause different forms of damage. X will be able to institute his action only if the 30 per cent possibility materializes and he becomes ill. [70] Before the disease occurs there is no cause of action and prescription [71] does not commence to run. [72] Would X be able to sue if there is a 60 per cent chance that X would suffer an illness? Corbett and Buchanan [73] accept that this should be the position.

A person may obviously not claim damages for future loss in respect of hypothetical events after his or her death. [74]

If X claims damages for loss already sustained on account of a damage-causing event, he is obliged to claim compensation for *all* future loss which may flow from such event (ie loss after the date of trial). This principle is based on the 'once and for all' rule. [75] If X claims damages only for loss already sustained and further loss develops unexpectedly in future, he has no remedy. This implies that in the evaluation of a damage-causing

event it is of great importance to determine any possibility of prospective loss so that it may be included in the plaintiff's claim. [76]

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6.7 SOME GENERAL PRINCIPLES IN ASSESSMENT OF PROSPECTIVE LOSS AND DAMAGES FOR SUCH LOSS

6.7.1 Speculative process

There is generally no empirical knowledge regarding future events and in an estimation of prospective loss (and damages in respect thereof), the court's assessment necessarily depends upon speculation. [77] It has to determine probable future events and circumstances (and causation) prognostically in order to assess the present value of a plaintiff's expectancies. [78]

Reinecke [79] states inter alia that it must be proved that the realization of the patrimonial expectation before the damage-causing event was expected with such a degree of probability that it can reasonably be said to have had a monetary value to the plaintiff. The degree of probability of such realization directly influences the value of the expectation in question. [80]

Because of the uncertainties ('guesswork') which are often involved in the quantification of future damage, Van der Walt [81] argues that damage cannot be assessed unless it has materialized and that it is impossible to make a meaningful

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evaluation of all the consequences that may flow from a damage-causing event. [82]He therefore proposes a system [83] in terms of which a plaintiff claims only for damage already sustained *and later* for further damage when it manifests itself. [84]There may be some merit in this proposal [85] and its principle is in fact partially reflected in third party claims in terms of the Road Accident Fund Act (RAF Act 56 of 1996), in terms of which the plaintiff may be compensated when he or she actually incurs medical expenses [86] and prospective loss of income or support may be paid in instalments. [87] However, it would be impractical to postpone judgment on all prospective loss until it has manifested itself. In many branches of science, account has to be taken of probable future events, and the law can be no exception.

6.7.2 Probabilities and possibilities [88]

In estimating prospective loss, the court does not merely take account of the most probable prognosis on the available evidence. It is, for example, unnecessary for a plaintiff to prove on a balance of probabilities (a possibility of more than 50 per

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cent) that he or she will in fact sustain damage in future. [89] Where, for example, a plaintiff proves on a balance of probabilities that there is a 40 per cent chance that he or she may suffer damage in the amount of R1 000 in future, the court will usually make an award of damages calculated on an equity basis as follows: 40 per cent x R1 000 = R400. [90] In this way provision is also made for the 60 per cent possibility that damage will not occur. The onus of proof in this situation should be properly understood. There is a distinction between the *fact* which must be proved (in casu that there is a possibility of damage in future) and the *content* of that fact (a 40 per cent possibility of damage). [91] All that needs to be proved on a balance of probabilities is that there is a 40 per cent chance

that damage may occur. [92]Moreover, the court will not, because the plaintiff bears the onus to prove his or her damage, choose those possibilities which are the most harmful to the plaintiff's case. [93]

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One may criticize an award of 40 per cent of the damages of the expected loss, since it will always be inappropriate: if the damage manifests itself, the compensation is too low, and if the damage does not occur, it will be too high. [94]

What would the position be if a plaintiff proved that there is a 60 per cent chance of future loss. May he or she claim the full amount of damages or only 60 per cent of such damages? Two arguments may be considered: First, it would be inconsistent to require a heavier onus of proof of future loss than of a loss already sustained (in damage already sustained the plaintiff has to prove this fact only on a balance of probabilities—viz a 51 per cent 'chance' that he or she would suffer such loss). However, secondly, it would be illogical to award a plaintiff who has proved a 45 per cent possibility that damage may occur, 45 per cent of the damages, though if the plaintiff proves a 51 per cent chance he or she receives 100 per cent of the compensation! The fairest approach seems to be a general reduction of all damages for prospective loss in accordance with a percentage reflecting the possibility that such loss may not occur. This is in accordance with our courts' approach to contingencies. [95]

6.7.3 Future contingencies [96]

In awarding damages for future loss our courts usually make provision for contingencies. [97] Contingencies include any possible relevant future event independent of the defendant's conduct which, if it should realize, would probably influence a person's health, income, earning capacity, quality of life, life expectancy or dependency on support in the future. [98] In a wide sense contingencies are described

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as 'the hazards that normally beset the lives and circumstances of ordinary people'. [99] This may, for example, [100] imply that provision is made for the fact that the prospective loss which is possible at the time of assessment of damage, might in any event possibly have occurred independently of the delict or breach of contract in question. [101] Contingencies are also relevant in estimating the value of future benefits for the purposes of the collateral source rule. [102] Contingencies are usually taken in account over a particular period of time. [103] The usual effect of an

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adjustment based on contingencies is that the amount of damages is reduced by a percentage which may vary between 5 per cent and 80 per cent. [104] Contingencies should logically not always reduce damages since it should also be possible to consider 'positive' contingencies which may increase the damage (and damages). [105]Provision for contingencies falls squarely within the subjective discretion of the court on what is reasonable and fair [106] and direct evidence on this

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issue cannot be given by anactuary. [107] Actuaries should declare in their report the assumptions on which they based their calculations and whether any contingency adjustments have been included in the calculations. Although contingencies cannot be proved on a preponderance of probabilities [108] (otherwise they would have been proven facts and not contingencies based on uncertainty) [109] it would be in the interest of the plaintiff to present the best possible evidence to court to rebut

any assumption regarding the relevance, or the value of the relevance, of any contingency. [110] The application of contingencies usually reduces the award and therefore it can be argued that the burden of proving the relevance of such contingencies should rest on the defendant. [111]

In, for example, a claim for damages by dependants [112] there are different types of contingencies [113] regarding different persons [114] which may be taken into account at different stages. [115] The courts should distinguish between general contingencies and specific contingencies. General contingencies [116] can be relevant at any stage in all people's lives, to the extent that the court could take judicial notice thereof without the need of proof, for example early death, illnesses, [117] accidents, retrenchments, etc. General contingency deductions are usually on the low side, no more

than 20 per cent. [118] The court should only make general contingency adjustments if it is found that the actuary based his or her calculations on wrong assumptions or if omitted to take a relevant contingency into account. On the other hand, specific contingencies are primarily relevant at specific stages in specific individuals' lives, for example repartnering, [119] divorce, promotion, et cetera. Specific contingencies should therefore be substantiated by evidence, although not necessarily proved on a preponderance of probabilities. [120] The evidence referred to here would include statistics, personal circumstances of the plaintiff or the deceased breadwinner, oral evidence given during the trial, or other documentary evidence presented to the court. Specific contingency adjustments should preferably not be made in the actuarial calculations but be left to the discretion of the court. [121] Specific contingency deductions can vary from small to large, depending on the specific circumstances of the plaintiff. The general practice of the courts to conclude the calculation process by simply making a general contingency adjustment has been subjected to criticism. [122]

The theoretical explanation for the consideration of contingencies can be found in the principles regarding hypothetical causation. [123] Although the damage-causing event is in fact the only cause of such loss, the affected interests were in any event 'threatened' by other factors.

6.7.4 Events from date of damage-causing event to date of action [124]

Our courts make use of evidence concerning events from the damage-causing event to the date of the action in order to reach a more realistic assessment of the damages. This approach is correct since facts are of more value than pure speculation. [125] In *Sigournay v Gillbanks* [126] it is stated:

> Where there has been a change in the situation between the date of the delict and the date of the judgment, this change may affect the amount of damages. [127]

This statement appears to be either in conflict with the so-called rule that damage is to be assessed at the time of the damage-causing event, or it is explained as an exception to that rule. [128] Boberg [129] regards the practice to take account of supervening events [130] not as an exception to the rule that damage must be assessed as at the date of the damage-causing event, but as an expression of the so-called collateral source rule. [131] Van der Walt [132] suggests that the distinction between general and special damages could explain the practice of taking changed circumstances after the date of the delict into account to assess damage as accurately as possible. The extent of general

damages (in the sense of both future loss and non-patrimonial loss) [133] is, in the words of Grosskopf JA in *SA Eagle Ins Co Ltd v Hartley*, [134] *artificially* laid down by the court. Due to its nature, general damages

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cannot be proved with mathematical precision, hence the need to take account of all the relevant factors—including events after the delict—which could contribute to making the artificial assessment as realistic and fair as possible. According to Van der Walt, the extent of special damages, on the other hand, can be proved with a far greater degree of accuracy by evidence that is, in principle, available and clear at the time of the delict. Consequently the court's discretion plays a much smaller role in the calculation of special damages than in the assessment of general damages. This explains why the date of the delict is decisive in the determination of special damages, whereas in the assessment of general damages the courts would take account of changed circumstances after the delict. Another explanation could simply be that the assessment of all damage (general as well as special) takes place at the time of the damage-causing event, whereas for purposes of quantification of the damages to be awarded, all facts and other evidence available at the time of quantification are taken into account. These considerations would include the duty to mitigate loss, the collateral source rule, nominalism, discounting, etc.

In assessing damages, a court will consider certain important events that took place before the trial, such as the death of a party [135] or the repartnering of a person in a claim for loss of support. [136] In a claim based on iniuria some events up to the time of trial may also be relevant. [137] Advantageous events during this period are usually dealt with in terms of the principles associated with the collateral source rule. [138]

6.7.5 Discounting, capitalization and annuity calculation [139]

After damages for prospective patrimonial loss [140] have been calculated, it is reduced in terms of the rate of discount [141] in order to counter the benefit which the

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plaintiff obtains [142] by receiving compensation in advance. [143] In this process the so-called present values of future benefits and losses are determined. This applies in regard to loss of earning capacity, [144] loss of future support [145] as well as the creation of an expectation of debt. [146] The calculation is performed in terms of, inter alia, tables of capital values [147] and annuity and discount tables. [148] As far as loss of earning capacity (future loss of income) and future loss of support are concerned, the Appellate Division has held that damages are discounted only up to the date of trial and not the date of delict. [149]

An annuity calculation is performed in the case of future loss of support. [150] In an annuity calculation there is not only the determination of present value, but account is also taken of periodic payments for the duration of the loss. [151]

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There is no clarity on the precise rate of interest which should be employed in discount and annuity calculations. [152] Actuarial evidence [153] may be offered on this [154] if the parties cannot reach an agreement on the issue of the rate of interest. [155]

6.7.6 Further general matters concerning damages for prospective damage

When the loss of business and professional profits is assessed, different matters are relevant, depending on the circumstances of the case. [156] In, for example, loss of profit on account of injury to property, damages are awarded only for actual and not potential

profits and must be strictly proved. [157] In other instances a plaintiff is allowed to prove loss of general business and professional profits because it would be unfair to expect more of him or her. [158] It may also be very difficult to prove the value of a lost chance. [159] Nevertheless, the court is obliged to make a reasonable estimation and award a fair sum as damages. [160] Where it is impossible to determine

the value of a chance, [161] damages may be assessed on the basis of the plaintiff's expenditure. [162] In future loss matters such as inflation, [163] the duty to mitigate damage, [164] interest, [165] taxation [166] and the collateral source rule [167] are of particular relevance.

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[1] Van der Walt *Sommeskadeleer* 271 mentions the surprising fact that there have not been many attempts to define and analyse prospective damage. See also op cit 19 on Mommsen's views. See in general Koch *Lost Income* 11–17 for references to common-law authorities; Corbett & Buchanan I 7–9. Cf Bloembergen *Schadevergoeding* 28: Prospective damage is loss which has not been sustained as the time of assessment of damage. This description only emphasizes the time element and does not refer to a current expectation. See also Reinecke 1976 *TSAR* 30: 'Damage as a result of the frustration of an expectation is usually described as *lucrum cessans*' (authors' translation). Van der Walt *Sommeskadeleer* 271 apparently sees prospective loss as the consequences of the impairment of a 'wordende vermoënsbestanddeel' (a 'developing' patrimonial asset). See also op cit 276, where he observes that the plaintiff has lost a benefit, the realization and extent of which were almost certain; op cit 294, where reference is made to harmful consequences which cannot be seen as 'afgeslote' (in other words, their occurrence is not an absolute certainty, but also not totally improbable). See in general Lawson *Negligence* 59 et seq; Erasmus & Gauntlett 7 *LAWSA* paras 10–11, 21–3; Boberg 1985 *SALJ* 221.

[2] The precise relationship between 'prospective loss' and lucrum cessans requires further explanation. Lucrum cessans is seen as lost profit or income and it is contrasted with damnum emergens (losses already sustained) (para 3.4.1). However, it is inaccurate to describe all future loss as lucrum cessans. Prospective loss also includes future expenses and this is obviously not lucrum cessans. On the other hand, past loss of profit can, of course, not be prospective loss but it should indeed be classified as lucrum cessans (see also Koch 1991 *THRHR* 129). This approach is necessitated by the fact that the assessment of loss of profit and income in the past as well as in the future is done with the aid of probabilities and hypotheses (para 4.2.3 on the formula of damage; para 6.7.2), while in past expenses and losses it is usually unnecessary to work with a comparative formula containing a hypothetical element (para 4.2.3; see also paras 4.6.3.4 and 4.6.3.5 on contingencies in the past and hypothetical causation). See also Van der Walt *Sommeskadeleer* 271 et seq, who discusses lucrum cessans *and* prospective damage, which apparently indicates that these two concepts are not identical. Finally, lucrum cessans obviously does not refer to future non-patrimonial loss.

[3] See, eg, Erasmus 1975 *THRHR* 108, who denies the relevance of this distinction. His main authority seems to be an unsubstantiated statement by De Wet & Van Wyk *Kontraktereg en Handelsreg*223 n 137. There are indeed important differences between the assessment of damage based on existing facts and an estimation based on probabilities. The contents of this chapter will illustrate some particular principles and problems relating to prospective damage. See also *Jowell v Bramwell-Jones*2000 (3) SA 274 (SCA) at 287.

[4] See para 5.4 on the different forms of prospective loss recognized in practice. Although loss of profit before the date of trial cannot be described as prospective loss, it should be seen as past lucrum cessans (see n 2 above).

[5] See, eg, McGregor *Damages* 342–4; para 7.4.2.

[6] See, eg, McGregor *Damages* 344–8.

[7] See, eg, McGregor *Damages* 348–56.

[8] See Van der Walt *Sommeskadeleer* 291 et seq, who argues that reality may be seen as an uninterrupted sequence of events moving from cause to consequence. Normally the only static moments are those which are artificially created in order to assess the flow of events.

[9] See, eg, McGregor *Damages* 297 et seq; Exall *Munkman on Damages* 7: '[T]he law will disregard possibilities which are slight or chances which are nebulous.'

[10] See para 3.2.4.2*(b)* on expectations of patrimonial benefits or debts as present elements of a patrimony. In 1976 *TSAR* 28 Reinecke still argues in favour of a so-called 'prospective patrimony'.

[11] See n 10.

[12] An expectation that the patrimony will increase or will not decrease.

[13] See Van der Walt *Sommeskadeleer* 271 on Möller's views concerning developing patrimonial assets.

[14] See also para 3.2.4.2*(b)*.

[15] See also chap 3 n 52. See Reinecke 1988 *De Jure* 236 on *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 612–13 (and Bloembergen *Schadevergoeding* 132–3, where mention is made of a continuing loss).

[16] See also Boberg *Delict* 487: '[I]t is obvious that damages cannot literally be assessed ''as at the date of the wrong'': the plaintiff's loss depends on what happens to him *after* the wrong has been committed ... . And how can the economic sequelae of bodily injuries be determined without regard to the plaintiff's subsequent treatment by his doctors and his employers?' These remarks are to be understood to mean that the content of an expectation (irrespective of whether it concerns a future patrimonial benefit or a debt) is determined by the correct prognosis of probable future events.

[17] eg the plaintiff's working life expectancy, the possibilities of illness, dismissal, promotion etc (para 14.6 et seq).

[18] Para 6.7.3.

[19] Para 14.6.6.

[20] Just as the plaintiff usually does not receive his or her salary in advance, the loss which the plaintiff suffers manifests itself only when he or she does not in future receive money which would otherwise have been earned. The fact that damages are discounted to neutralize the benefit of the accelerated receipt thereof affords proof that the plaintiff suffers prospective loss. This line of reasoning may be tested by considering the position when X's earning capacity is *increased* through, for instance, the obtaining of a new qualification. Although X has the potential to earn more money than before and his expectancy has increased, he does not yet enjoy the full (future) benefit.

[21] Para 6.4.

[22] See *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 613, where there is approval of the view of Bloembergen *Schadevergoeding* 132–5 that there is a difference between the moment when damage occurs and the moment when obligation to pay damages accrues, and the moment for the determination of the content of such obligation. This is the position in loss of earning capacity caused by injuries as well as loss caused by the death of a breadwinner. The court apparently sees such damage as loss which will be suffered over a determined or determinable time in future. See also Van der Walt *Sommeskadeleer* 194 on wrongfulness and future damage.

[23] In *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 612–13 the court contrasted continuing loss with damage which has already occurred, eg, damage to a motor car. The same contrast exists with future damage (eg R1 000 for the possibility of specific expenditure). This is also in a sense 'completed' damage which does not have the 'continuing' nature of the damage referred to in n 22.

[24] See also para 6.7 for the relevant principles regarding the calculation of the quantum of damages.

[25] Paras 4.1 and 4.2.

[26] See para 4.2.3 for a discussion. Other facets of the sum-formula (eg the anonymity of the sum of damage) should, however, be rejected.

[27] See also para 4.2.3; De Wet & Van Wyk *Kontraktereg en Handelsreg* 234. Van Rensburg *Juridiese Kousaliteit* 44 correctly accepts the inclusion of a hypothetical element in the comparative method. He is also of the opinion that the assessment of future loss implies a comparison between an *actual* and a *hypothetical* course of events. However, it would seem that in view of the nature of prospective loss and the patrimonial assets involved, it is more accurate to use two hypothetical patrimonial positions. The comparison of such positions *before* and *after* the damage-causing event reveals a facet of the concrete theory (para 4.2.5).

[28] See also Van Aswegen *Sameloop* 163 n 236, who criticizes Van der Merwe & Olivier *Onregmatige Daad* 180–1 for claiming that this is merely a terminological matter. She adds (loc cit): 'M.i. is die vergelyking met 'n hipotetiese posisie noodsaaklik, nie alleen om vir die verskillende vorme van toekomstige skade voorsiening te maak nie, maar ook om by verlies wat reeds gely is, moontlike toekomstige gebeurtenisse in berekening te kan bring, bv waardevermeerdering of gebruiksverlies in die toekoms by vernietiging van 'n saak, of toekomstige vermeerdering van inkomste by verlies van onderhoud of verdienvermoë.' (She regards the comparison with a hypothetical position to be essential in regard to the different forms of future loss, past loss as well as the consideration of possible relevant future events.) See further Van der Walt *Sommeskadeleer* 274–5, 291 et seq.

[29] The statement by Van der Walt *Sommeskadeleer* 276 that damage cannot be assessed unless it has already manifested itself is unrealistic. This applies also in respect of his view (op cit 64) that there is no method by which an equivalent for an 'uncompleted' future development can be found. However, this criticism is not meant to deny the fact that the assessment of future loss (and damages) may be highly speculative or very difficult. See para 6.7.1.

[30] See para 14.6.5 for more detailed examples.

[31] See the discussion by Van der Walt *Sommeskadeleer* 267–71. See also para 4.6 for more detail.

[32] See Van Oosten 1982 *De Jure* 19.

[33] Para 6.7.

[34] See *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 586–7; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 532–3. The assessment of damage and damages for past loss of profit may be just as difficult and speculative: see, eg, *Caxton Ltd v Reeva Forman (Pty) Ltd*1990 (3) SA 547 (A).

[35] Para 14.6.

[36] See Visser 2004 *Speculum Juris* 139. We submit that Van der Walt *Sommeskadeleer* 270 exaggerates the problem where he states: 'Om van 'n beoordelaar te verg dat hy nie net uitmaak of die verlies van die toekomstige geleentheid om 'n voordeel te geniet as skade gereken moet word nie, maar boonop ook nog moet beslis oor die oorsaak van daardie verlies, sal sy voorstellingsvermoë ongetwyfeld oorbelas' (to require of someone assessing loss to determine not merely whether the loss of a future opportunity amounts to damage but also to decide on its cause, would overextend the assessor's capabilities). See also op cit 273–4 on the claim that it is impossible to accurately evaluate future events with a view to factual causation, patrimonial loss (which involves the degree of probability with which a future benefit has become unreal) and remoteness of damage (para 11.5). These objections must be seen against the background of Van der Walt's thesis (op cit 276) that damage cannot be ascertained before it has manifested itself and that judgment in respect of that should be given only when it actually occurs (op cit 486). This approach may be useful in some instances (and see below where it is indirectly recognized); however, in general, a court has no other choice than to give judgment, to the best of its ability, on prospective loss.

[37] Para 4.6 et seq. See *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 328–30; Visser 2004 *Speculum Juris* 141–3.

[38] Prospective loss is seen only as damage which has not yet manifest itself (see, eg, *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 838; *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5).

[39] Para 7.1.

[40] See Boberg *Delict* 476, 482–6.

[41] Erasmus & Gauntlett 7 *LAWSA* para 23. See also Buchanan 1960 *SALJ* 187–92 and para 3.2.4.2on expectations of patrimonial benefits and debts.

[42] This involves the creation of an expectation of debt (para 3.2.4.3*(b)*).

[43] Para 14.4.

[44] Para 12.3. See also the special case *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 647 on the possible future loss sustained by a fiduciary-lessor on account of malperformance by a lessee.

[45] Paras 3.2.4.2*(a)* and 14.6. It is more accurate to speak of loss of earning capacity (see *Santam Versekeringsmpy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A); *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A)). In *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 613 the court again seems to accept this as a loss of future income. Recently also called 'loss of employability'—see *Mokgara v Road Accident Fund* unreported (65602/2009) [2011] ZAGPPHC 50 (1 April 2011); *Kgomo v Road Accident Fund* unreported (25846/2010) [2011] ZAGPJHC 103 (2 September 2011) para 7; *Mngomezulu v Road Accident Fund* unreported (4643/2010) [2011] ZAGPJHC 107 (8 September 2011) para 4; *Van der Mescht v Road Accident Fund* unreported, case no 12182/2008 (GSJ), 12 March 2010 para 10. See also *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5; *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 547–9.

[46] Loss of profit before the date of the action is, of course, not prospective loss, but its assessment (eg the consideration of probabilities and hypotheses) is comparable to the estimation of loss of future profit (see *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A)).

See para 12.13 on loss of profit from a particular contract or a further contract and loss of profit through inability to use the performance. See also para 12.7.2.4*(a)* on damage caused by repudiation before the date of contractual performance.

[47] See *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 455. Cf also *Whitfield v Phillips* 1957 (3) SA 318 (A). In *Victoria Falls and Tvl Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 28 V failed

to deliver electricity for the mining of gold. The gold remained in the ground and the damage was assessed as the difference between the immediate value of the production and its value when mined eventually. This case was thus concerned with deferred profits (see Koch *Lost Income* 168). A comparable situation occurred in the *Versveld* case supra 455: 'So that the time taken by the rebudded trees to ''catch up'' to the bearing capacity of the original Valencias is a vital factor in the assessment of the plaintiff's loss.' See further *Oates v Union Government* 1932 NPD 198; *Shrog v Valentine* 1949 (3) SA 1228 (T).

[48] 2005 (1) SA 299 (SCA) at 304–5. See Visser 2005 *THRHR* 510–14; Pretorius 2006 *TSAR* 385–92.

[49] eg Davel *Afhanklikes* 91; *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A); para 14.7.2.

[50] See Van den Heever *Loss of a Chance* on the application of the doctrine of a loss of a chance to recover damages in medical negligence cases.

[51] *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 330 et seq (frustration of an expectation to make reasonable profit on an investment—Visser 2004 *Speculum Juris* 141–3). Possibly the cases where a person is induced by a fraudulent misrepresentation to conclude a less advantageous contract than he or she would otherwise have concluded may be classified as a loss of a chance. See *SDR Investment Holdings Co (Pty) Ltd v Nedcor Bank Ltd* 2007 (4) SA 190 (C) in which the court identified a loss suffered due to income forgone as a result of the failure to sell only one farm instead of three farms in one sale, as a loss of a chance. This decision was overturned on appeal in *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) on contractual grounds unrelated to loss of a chance. See, further *De Jager v Grunder* 1964 (1) SA 446 (A) at 456: '[D]it is haas vanselfsprekend dat die respondent, indien hy nie mislei was nie, nie sou ingestem het om [die plaas] Magermanskraal teen so 'n hoë syfer in te reken nie, en dat hy gevolglik 'n groter kontantbedrag sou beding het.' (The respondent would have negotiated a higher cash amount had he not been misled in respect of the value of the farm.) This opportunity to have received more from the deceiver (which must, of course, be proved), seems to be a chance frustrated by the defrauder. See also *Colt Motors (Edms) Bpk v Kenny*1987 (4) SA 378 (T); para 13.4.2.

[52] See Buchanan 1960 *SALJ* 191. See also *Trichardt v Van der Linde* 1916 TPD 148 (assessment based on expenditure—para 3.2.4.2*(b)*); *Goedhals v Graaff-Reinet Municipality* 1955 (3) SA 482 (C) (contract for a borehole—plaintiff cannot estimate damage on basis of expenses without proving that it is impossible to calculate value of a chance); Lubbe & Murray *Contract* 605. See also McGregor *Damages* 311: 'Sometimes, however, it is one particular chance that the claimant loses, one particular contingency upon which the accrual of a gain, or the avoidance of a loss, to him has depended. This singleness of chance and contingency highly emphasises the issue of certainty, and leads to the most explicit and most interesting applications of the doctrine.' See *Chaplin v Hicks* [1911] 2 KB 786 (CA). The defendant promised work through a newspaper advertisement to 12 actresses which he could choose out of 50 who secured the greatest number of votes of the readers of the newspaper. Of the 6 000 people who entered the contest, the plaintiff was one of the 50 finalists. The defendant failed to give her a reasonable opportunity of being interviewed in accordance with the advertised rules and the 12 prize winners were chosen in her absence from the 49 other finalists. The court confirmed a jury's award of £100 to the plaintiff and stated inter alia(at 791–2): 'I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize ... I agree ... that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming ... . I only want to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.' See also *Mulvaine v Joseph* [1968] 112 SJ 927, where damages were awarded to an injured golfer 'for loss of opportunity of competing in tournaments, the ensuing loss of experience and prestige which might have resulted in him becoming a tournament professional in America and loss of a chance of winning prize money'. See further McGregor *Damages* 311–30. See also para 3.2.4.2*(b)* on an expectation of a benefit as part of an estate (patrimony); *Forster v Outred & Co* [1982] 2 All ER 753 (CA).

[53] Para 5.6.1*(a)*.

[54] See, eg, *Brown v Bloemfontein Municipality* 1924 OPD 226; *Van der Westhuizen v Du Preez* 1928 TPD 45 at 49–50; *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T) at 717; *Rondalia Versekeringskorporasie van SA Bpk v Mavundla* 1969 (2) SA 23 (N) at 29; *Mair v General Accident Fire & Life Ass Corp* 1970 (3) SA 25 (RA) at 28; *Wilson v Birt* 1963 (2) SA 508 (D); *Marais v Rondalia Versekeringskorporasie* Corbett & Buchanan II 130 at 132; *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 980–1. The requirement of rule18(10)*(b)* of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules that it must be stated whether pain is temporary or permanent is in point since 'permanent pain' apparently includes future pain.

[55] Para 5.6.1*(b)*.

[56] Para 5.6.1*(d)*. Rule 18(10)*(c)* of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules require information on whether the loss of amenities is temporary or permanent.

[57] See rule 18(10)*(d)* of the Uniform Rules of Court; rule 6(9) of the Magistrates' Court Rules. The duration of the disfigurement must be given.

[58] Para 5.6.1*(e)*.

[59] Unless the improbable happens and the plaintiff's prior life expectancy is restored.

[60] Para 5.7.

[61] See, eg, the future effect of defaming the plaintiff; or the future effect of conduct through which the plaintiff was insulted; or an infringement of privacy which continues as long as private facts will be disclosed in future.

[62] *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) at 286: 'This [above-mentioned rule] applies no less to claims arising from pure economic loss than it does to claims arising from bodily injury or damage to property'; *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE) at 799: 'To make out a cause of action, a plaintiff must plead that the wrongful conduct caused damage or, if appropriate, that it will cause prospective damage, even if only on a contingency basis, and he or she must normally quantify the amount of the loss. In my view, the plaintiff must positively allege the prospective harm even if on the facts it can be foreseen only with a relatively low degree of probability at the time of the issue of summons. It is not a cause of action to allege that one of the elements of the cause of action has not yet eventuated and may or may not occur in the future.' See also Visser 2003 *TSAR* 723–7; 2004 *Speculum Juris* 143–5.

[63] 1933 CPD 565. See also Buchanan 1960 *SALJ* 190; *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) at 694.

[64] 2000 (3) SA 274 (SCA) at 287.

[65] See, eg, *Millward v Glaser* 1949 (4) SA 931 (A) at 942: 'The question was discussed at the Bar: to what degree must prospective gains be certain before they can enter into the computation of damages in delict? The question does not arise until it is established that the plaintiff has disclosed a cause of action.' See also *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) at 286; *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) at 694: 'In some cases the cause of action will depend on the occurrence of a reasonable event causally linked to the negligent conduct, even if that takes place some time after that conduct. ... [B]ecause negligence does not become actionable without proof of damage, it is only after damage has been suffered that the cause of action becomes complete ... .' Visser (2004 *Speculum Juris* 144–5) regards the circumstances in *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) (fraudulent misrepresentation causing the plaintiff to make a bad investment) as an example of loss of a legally recognized expectancy to make a profit (lucrum cessans) and as such an 'immediate loss' when judged in terms of the devaluation of the expectancy. He distinguishes the facts of this case from the *Jowell* and *Millward* cases and explains that in *De Klerk* '[f]uture events were only relevant in regard to the *extent*of the devaluation of the lost expectancy and not in regard to its *existence* or the fact that it was caused by the fraudulent or negligent misrepresentation' (at 145).

See, however, Kerr *Contract* 592 et seq on repudiation before the date of performance; para 12.7.2.4*(a)*.

[66] *Delict* 488–9.

[67] 1935 CPD 474.

[68] The court held (at 479) that the parent 'had a reasonable expectation of receiving benefit from the continuance of his son's life' and that he was entitled to recover damages if 'the prospective loss he has suffered owing to the death of his son [is] not too remote and conjectural'. The son must, of course, have had a duty to maintain his parents (see *Petersen v South British Ins Co Ltd* 1964 (2) SA 236 (C); Boberg 1964 *SALJ* 147).

[69] *Delict* 488: 'This is an actual and not a prospective loss: it is the support which was prospective, not the loss.' Boberg then attempts to draw a distinction between 'prospective loss' and the loss of an expectation ('loss of prospective gains'): '[I]n the former, the plaintiff retains his pre-accident financial position, with a prospect of its deteriorating; in the latter, the plaintiff immediately loses the prospect which he had. This loss is his [actual] damage.' See Visser 2004 *Speculum Juris* 144–5; 2003 *TSAR* 726; Spiro 1968 *THRHR* 123. Reinecke 1988 *De Jure* 235 does not accept that a dependant loses an expectation with a speculative value only upon the death of his or her breadwinner; he or she loses a continuous personal right to support. See also Corbett & Buchanan I 9; Koch *Reduced Utility* 56–7.

[70] See in this regard the argument by Howroyd 1960 *SALJ* 448 that if the life expectancy of a wife's husband who supports her has been shortened by a delict, she should be able to recover damages. However, from *Evins v Shield Ins Co (Pty) Ltd* 1980 (2) SA 814 (A) it appears that this suggestion will not be accepted because the cause of action accrues only when the breadwinner dies.

[71] Para 7.3.1.

[72] See also Buchanan 1960 *SALJ* 192. The author refers to the distinction between 'prospective loss' and 'loss of prospective gains'. The example of the illness mentioned in the text is a case of mere prospective loss which is not actionable. An example of the latter is where the plaintiff's horse with a chance to win a race is injured. Here is an immediate loss for which damages should be awarded (para 6.4.5; see also nn 65 and 69 above). See, however, Boberg *Delict* 488: 'The relevance of the distinction between prospective loss and loss of prospective gains, it is submitted, lies not in actionability but in the degree of proof required. Both are actionable, but where prospective loss alone is claimed it must be established as a probability that such loss will occur (though not necessarily its quantum), for otherwise the plaintiff has failed to prove the *damnum* which is an essential element of his cause of action.'

[73] I 9: '[I]t is difficult to see why a wrongful act together with prospective damage, which can be established as a matter of reasonable probability, should not be sufficient to constitute a cause of action.' A possible explanation could be to distinguish between mere prospective loss of which the occurrence in the future cannot be proved on a balance of probabilities and mere prospective loss of which the occurrence in the future can be proved on a balance of probabilities. In the first instance a claim should be rejected and in the latter case perhaps allowed. Visser 2003 *TSAR* 725 and McKerron *Delict* 138 n 91 also share this opinion. See para 6.7.2 below.

[74] See, eg, *Lockhat's Estate v North British Ins Co Ltd* 1959 (3) SA 295 (A); para 14.6.4.1.

[75] Para 7.1.

[76] The part of the claim that is based on future loss is obviously vulnerable to contingency deductions due to the uncertainties surrounding the claim. See para 6.7.3 below.

[77] See especially Van der Walt *Sommeskadeleer* 291–8. At 296 the author says: 'Van [die hof] word daar nou verwag om met profetiese heldersiendheid die onbekende (en onkenbare) toekoms te deurvors. Weliswaar staan verskeie hulpmiddels ook hier tot sy beskikking, byvoorbeeld aktuariële en ander waarskynlikheidstabelle [see eg Koch *Lost Income* 292–327; Klopper *Derdeparty* 475–528]; ervaring; gesonde verstand; ensovoorts.'

See in general Koch 1992 *Quantum Yearbook*; Nienaber & Van der Nest 2005 *THRHR* 547; *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 586–7: 'The calculation of the *quantum* of a future amount, such as loss of earning capacity, is not ... a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a rough estimate .... Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the *quantum* of damages. Even then, the trial Court has a wide discretion to award what it believes is just.' See also *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 545–6.

[78] See para 3.2.4.2*(b)* on the requirements before an expectancy is accepted as a patrimonial asset. See also Van den Heever *Loss of a Chance* 65–7.

[79] 1976 *TSAR* 31.

[80] See para 3.2.4.2*(b)*; Steynberg 2007 *THRHR* 234–6. Reinecke 1976 *TSAR* 31 adds the following principles: 'Normaalweg vereis ons howe in sake van hierdie aard dat op 'n oorwig van waarskynlikhede bewys word dat die betrokke vermoënsvoordeel verkry sou word as dit nie vir die gewraakte gebeurtenis was nie [see *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T)]. Die waarde van sodanige voordele word dan as uitgangspunt geneem en daarna word, waar gepas, 'n bedrag afgetrek om vir enige onsekerhede voorsiening te maak [see para 6.7.2; Boberg 1964 *SALJ* 194, 346; 1965 *SALJ*247, 324; *Delict* 599–603]. Aktuariële getuienis [para 14.6.3] word van belang geag sonder dat die hof ooit sy diskresie prysgee. Somtyds is die onsekerhede van so 'n aard dat die hof slegs 'n min of meer arbitrêre bedrag kan toeken [see *Commercial Union Ass Co v Stanley* 1973 (1) SA 699 (A) at 705]. Die eindresultaat is egter elke keer niks anders nie as dat gepoog is om 'n realistiese indien subjektiewe waarde vir die betrokke vermoënsverwagting te vind.' (Usually our courts require proof on a preponderance of probability that the patrimonial benefit would have been obtained but for the damage-causing event. The value of such benefits is used as a starting point and reduced for uncertainties. Actual evidence is important without the court relinquishing its discretion. In some instances the uncertainties are of such a nature that the court more or less awards an arbitrary amount. However, in the final analysis there is an attempt to find a realistic value in respect of the patrimonial interest.) See Steynberg 2007(1) *PELJ* 141–3 on the important characteristic of 'uncertainty' that identifies contingencies and distinguish them from proven facts.

[81] *Sommeskadeleer* 276, 297–8.

[82] See also *Goodall v President Ins Co Ltd* 1978 (1) SA 389 (W) at 392–3 on the court's reluctance to practise 'the art or science of foretelling the future, so confidently practised by ancient prophets ... [but which] is not numbered among the qualifications for judicial office'; *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 77: 'There are so many variables involved in the assessment of the plaintiff's

damages, that an attempt at mathematical computation would be futile. I would have to take arbitrary figures and modify them by the application of arbitrary factors. I could produce a sheaf of calculations, based on alternative sets of data, and giving a variety of financial results. But I would then have to choose one of those, or adopt a weighted average of all the results. I doubt whether I would do any better in that way than by adopting a more rough and ready method. I find it less unsatisfactory to take an overall view of the probabilities, possibilities and contingencies and to fix a figure which is a matter of impression rather than calculation, but which seems to me to reflect the fairest approach to compensation that I can reach.' See also *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 113; *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A); *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T); *Stephenson v General Accident Fire and Life Ass Corp Ltd* 1974 (4) SA 503 (RA); *De Jongh v Gunther* 1975 (4) SA 78 (W).

[83] Van der Walt's solution (*Sommeskadeleer* 498 et seq) is that when the court gives judgment on loss already sustained, it must also lay down a procedure on how damages for future loss are to be recovered. Partial postponement of the action seems to be the best solution. The court may determine liability in advance for damage which will become 'complete' ('afgeslote') in future and may also lay down certain conditions, for example, that damage must occur within a specified time in order to attract damages. The court may also provisionally and conditionally determine liability in a case where no damage has as yet been suffered and so prevent problems concerning prescription, forgetful witnesses etc. Such an order will probably promote a settlement of the action. See para 7.1 on the 'once and for all' rule. The question remains whether the advantages of these proposals will outweigh their disadvantages (eg prolonging litigation).

[84] Van der Walt *Sommeskadeleer* 294–5 classifies prospective loss into 'afgeslote toekomstige skade' (ie loss which will almost surely occur) and 'verdere skade' (ie further future loss which is not totally improbable). Compensation in advance is recoverable only in respect of damage in the first category.

[85] See, eg, the minority judgment of Jansen JA in *Evins v Shield Ins* 1980 (2) SA 814 (A) and Boberg *Delict* 484: 'The cogently-reasoned submissions of Van der Walt attracted the attention of the Appellate Division.'

[86] Para 14.4.2.

[87] Paras 14.6.7 and 14.7.7.2.

[88] In law 'probability' usually refers to a chance of more than 50 per cent. A 'possibility' indicates a chance of 50 per cent or less. See in particular Steynberg 2007 *THRHR* 230–8 on the role of probabilities and possibilities in making contingency adjustments. See also Van den Heever *Loss of a Chance* 62–3; Koch *Lost Income* 50. See in general Koch op cit 50–5; Erasmus & Gauntlett 7 *LAWSA* para 23; *Whitfield v Phillips* 1957 (3) SA 318 (A) at 331. See further McGregor *Damages* 313–30.

[89] Loss already sustained need only be proved on a balance of probabilities as far as fact and quantum are concerned (para 16.2.2 on onus of proof). Probabilities also play a role in damage already suffered, for instance, in the case of a loss of profit which is difficult to calculate (see eg *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) and para 13.6 on damages for unlawful competition). The statement by Van der Walt *Sommeskadeleer* 304 that 'further damage' (ie damage of which the eventual manifestation is not totally improbable) should not attract compensation is misleading. Damages may even be awarded for damage which is expected with only a low degree of probability or possibility (even as low as 10 per cent—see para 6.2) if provision is made for the possibility of its non-occurrence. See also *Hendricks v President Ins Co Ltd* 1993 (3) SA 158 (C) at 165.

[90] See *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 75: 'A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 per cent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty.' See *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 225–6, which confirms this judgment (in the case of the amputation of an arm and its replacement by an electronic arm). See further *Wilson v Birt* 1963 (2) SA 508 (D) (and Corbett & Buchanan I 177 at 180); *Van Oudtshoorn v Northern Ass* 1963 (2) SA 642 (A) at 650–1; *Kwele v Rondalia Ass Corp* Corbett & Buchanan II 555 at 558–9 (also 1976 (4) SA 149 (W)); Buchanan 1960 *SALJ* 191–2; *Ncubu v National Employers General Ins Co Ltd* 1988 (2) SA 190 (N) at 193 (25 per cent possibility that a child has to undergo an operation when he is 11 years of age). See further *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–45 at A3–59; *Sebatjane v Federated Ins Co Ltd*Corbett & Honey H2–1 at H2–5.

[91] See Boberg *Delict* 602–3: 'For example, if a prominent surgeon is of the opinion that the plaintiff has a 30 per cent chance of developing osteo-arthritis, what has to be proved on a balance of probabilities is that the surgeon *does* hold that opinion, not that the plaintiff *will* develop osteo-arthritis! The position is, however, different where a claim is based *solely* on prospective loss (ie where no actual damage has been suffered by the time the action is brought). Here, it is submitted, a *probability* that some damage will be sustained in the future must be established, for otherwise the plaintiff will have failed to prove one of the elements of his cause of action—viz, the requirement of *damnum*.'

[92] Contra Visser *Kompensasie en Genoegdoening* 358, whose views on this should probably no longer be accepted as correct. The same applies to the statement by Van der Merwe & Olivier *Onregmatige Daad* 189 that damage as a legal fact can hardly be separated from its quantum. See *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE) at 799.

[93] See *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 75: 'In the familiar bone injury case, where the evidence is that the plaintiff will probably suffer from osteo-arthritis at some future time and that it may manifest itself at any time within the next ten years, it is not practice to assume against the plaintiff, because he bears the *onus,* that he will be free of the symptom until ten years have elapsed. Similarly, when the possible remarriage of a widow is relevant to the assessment of damages [para 10.8.5] we do not assume against her that she will remarry in the immediate future, merely because she cannot discharge the *onus* of proving that she will not encounter romance round the next corner.' See further *Sebatjane v Federated Ins Co ltd* Corbett & Honey H2–1 at H2–5; Corbett & Buchanan I 8.

[94] See on this Koch 1989 *THRHR* 77, who observes that the plaintiff may use the money as a premium for insurance against the expected loss so that he or she may be fully covered if it materializes.

[95] Para 6.7.3. See Steynberg 2007 *THRHR* 226–30 on the valuation of a chance as a method to prove the value to be placed on a contingency and generally in this regard also Van den Heever *Loss of a Chance*. See also Steynberg 2007(1) *PELJ* 158–70 on the measure for proving contingencies and Steynberg 2007 *De Jure* 36–51 on the distinction between contingency adjustments and contingency allowances.

[96] See on past contingencies para 4.6.3.5.

[97] See inter alia Steynberg *Gebeurlikhede*; Koch *Lost Income* 57–69, 218–21, 334–8; Corbett & Buchanan I 51–6; Klopper *Third Party Compensation* 147, 175, 188–90, 201, 205–10; Boberg *Delict* 487, 541; Luntz *Damages* 376–89; see, however, Dendy 1987 *Annual Survey* 192; 1988 *Annual Survey* 186. See para 14.6 on quantification of a loss of earning capacity; para 14.7.2 on loss of future maintenance.

[98] Steynberg *Gebeurlikhede* 24; Steynberg 2005 *THRHR* 638–45. See, eg, *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 462 concerning future prices of oranges which were relevant in casu; *Erdmann v Santam Ins Co Ltd* 1985 (3) SA 402 (C) at 404–5, where the court was concerned with the plaintiff's ability to supervise the household and the possibility that she would in any event have required a servant as she became older; *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 365, where, in a widow's claim for loss of support, it was considered she was an apathetic person and that the deceased could possibly in future have divorced her; *Ncubu v National Employers General Ins Co Ltd* 1988 (2) SA 190 (N) at 197–8, where a child had to undergo an operation when he became 11 years of age. The court declined to deduct anything in this regard but did reduce damages by 15 per cent for the possibility that he would in any event not undergo the further prescribed medical treatment. See further on contingencies in the case of a widow, *Van Staden v President Versekeringsmpy Bpk* Corbett & Honey L2–1; *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA).

[99] See *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 585: '... unforeseen contingencies—the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors'; *Saayman v RAF* [2011] 1 All SA 581 (SCA); *AA Mutual Ins Ass Ltd v Van Jaarsveld*1974 (4) SA 729 (A) (Corbett & Buchanan II 360 at 367); *Van der Plaats v SA Mutual Fire and General Ins Co Ltd* 1980 (3) SA 105 (A) (Corbett & Buchanan III 160 at 168); see also *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 116: 'One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case.' See further *Chaza v Commissioner of Police* Corbett & Honey A3–10 at A3–17.

[100] General possibilities for which provision may be made in a deduction for contingencies are the following: incorrect assumptions in actuarial calculations (eg concerning the plaintiff's expectation of life); inflation and deflation; loss of pension benefits; possibility of a divorce (in loss of support); cost of transport to or from work; etc. See Corbett & Buchanan I 51–2. In *Van der Plaats v SA Mutual Fire and General Ins Co Ltd* 1980 (3) SA 105 (A) at 113–14 provision was made for a deduction from the costs of a future operation since the possibility existed that because of improved medical techniques, the operation might be avoided or performed in a more cost-effective manner. See *Dusterwald v Santam Ins Ltd* Corbett &

Honey A3–45 at A3–64 on the possibility of cheaper medicine. In *Nanile v Minister of Post & Telecommunications* Corbett & Honey A4–30 at A4–36 the court refused to regard inflation as a contingency. See also *Jones v Fletcher* Corbett & Buchanan I 234 (value of used prostheses); *Bester v AA Mutual Ass Mpy Bpk* 1972 (2) SA 234 (C) at 242 (possibility of free medical services in future). See further *Fredericks v UNISWA Ins Co Ltd* Corbett & Buchanan II 335 at 341–2 (no deduction in the circumstances of this case); *Page v Rondalia Ins Corp of SA Ltd* Corbett & Buchanan II 524 at 532 (deduction from the costs of an attendant); *Stockenström v Commercial Union* Corbett & Buchanan II 435 at 436; *Van Rensburg v AA Mutual Ins Ass Ltd* Corbett & Buchanan II 40 at 45. See in general Koch *Lost Income* 173–4.

[101] eg loss of earnings on account of an illness which might have occurred even if the plaintiff was not injured in an accident. See *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A) at 116–17; *Van der Plaats v SA Mutual Fire and General Ins Co Ltd* 1980 (3) SA 105 (A) at 114–15; *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 781–2. See also *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–45 on contingencies in regard to the different heads of damage.

[102] Para 10.1 on the collateral source rule. Cf, eg, the case where a widow's prospect of remarriage is seen as a benefit which reduces her claim for loss of support (para 10.8.5). In determining the value of this benefit, provision must inter alia be made for the financial standing of a prospective spouse and the stability of such a marriage (see *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) at 258–63; Koch *Lost Income* 215 et seq; Boberg 1964 *SALJ* 219).

[103] See Steynberg 2008 *THRHR* 298–300. See, eg, *Goodall v President Ins Co Ltd* 1978 (1) SA 389 (W) at 393. In casu the plaintiff was 46 years of age and the court found that the time during which contingencies would operate would be shorter than in some other cases—eg *Van Rij v Employers Liability Ass Corp Ltd* Corbett & Buchanan I 618; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 569. A shorter period of time is reflected in a lower percentage deduction. See also *Smith v SA Eagle Ins Co Ltd*1986 (2) SA 314 (SE) at 319; *Kontos v General Accident Ins Co SA Ltd* Corbett & Honey A2–1 at A2–4; *Roberts v Northern Ass Ltd* 1964 (4) SA 531 (D) at 537; *Oberholzer v National Employers' General Ins Co Ltd* Corbett & Honey A3–1 at A3–10 (provision for contingencies according to a sliding scale—see Koch *Reduced Utility* 150). See eg *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 588; *Pietersen v Road Accident Fund* unreported (19299/2008) [2011] ZAGPJHC 73 (11 August 2011) para 33; *Mngomezulu v Road Accident Fund* unreported, case no 4643/2010 (GSJ), 8 September 2011 para 106 in which this sliding scale was applied. In *Jacobs v Chairman, Governing Body, Rhodes High School*2011 (1) SA 160 (WCC) at 188 the court compared the period of time for the past loss of earnings with the expected period for the future loss of earnings and doubled the contingency deduction for the future loss because it was expected to be twice as long as the past loss.

[104] See Steynberg 2007 *THRHR* 238; *Saayman v RAF* [2011] 1 All SA 581 (SCA) at 584–5 (25 per cent for pre-accident, 30 per cent for post-accident); *Bovungana v Road Accident Fund* 2009 (4) SA 123 (E) at 136 (5 per cent for past loss of earnings, 15 per cent for future loss of earnings); *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 472–3 (10 per cent); *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 591 (20 per cent for the 'but for' period, 30 per cent for the 'having regard to' period); *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 345, 350 (15 per cent for the 'but for' period, 40 per cent for the 'having regard to' period); *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA) (5 per cent); *Van der Plaats v SA Mutual and Fire General Ins* 1980 (3) SA 105 (A) at 114–15; *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 105; *AA Mutual Ins Ass v Maqula* 1978 (1) SA 805 (A) at 813; *Fair v SA Eagle Ins Co Ltd* [1997] 2 All SA 396 (E) at 410; *Muller v Mutual and Federal Ins Co Ltd* 1994 (2) SA 425 (C) at 454–5. The largest contingency adjustment made was 70 per cent for remarriage in *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C). This was combined with a general contingency adjustment of 22 per cent which resulted in a cumulative reduction in the widow's claim of almost 80 per cent. A few more examples of adjustments over 50 per cent can be given: *Blyth v Van den Heever* 1980 (1) SA 191 (A) (60 per cent); *Ncubu v National Employers General Ins Co Ltd*1988 (2) SA 190 (N) (75 per cent); *Protea Ass Co Ltd v Matinise* 1978 (1) SA 963 (A) (65 per cent); *Trimmel v Williams* 1952 (3) SA 786 (C) (70 per cent); *Waring & Gillow Ltd v Sherborne* 1904 TS 340 (60 per cent). See Klopper *Third Party Compensation* 147 n 29 for a number of examples where the deduction varies from 10 per cent to 50 per cent; Koch *Lost Income* 334-8 for examples in table format.

[105] See Steynberg 2008 *De Jure* 109–25 for a detailed discussion on positive and negative contingencies. See, eg, *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 117: 'It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable ... .' In estimating the loss of earning capacity of a young child it would thus be correct not only to consider negative possibilities and uncertainties but also the child could have had an exceptional career but for his injuries; *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 781: 'An adjustment for contingencies need not necessarily involve a diminution of the amount'; *Fair v South African Eagle Ins Co Ltd* [1997] 2 All SA 396 (EC) at 408: 'Each case must be governed by its own facts. I take into account, however, that the fortunes of life may

not always be adverse: they may sometimes be favourable. An adjustment for contingencies, therefore, does not necessarily involve a ''scaling down''.' Boberg *Delict* 541 states: 'One might have thought, then, that the best course was to leave contingencies severely alone, but the courts continue to make deductions for them.' Cf further Koch *Lost Income* 61 et seq; Klopper *Third Party Compensation* 189; Boberg 1964 *SALJ* 198 et seq; Nienaber & Van der Nest 2005 *THRHR* 549; *Bartlett v Mutual and Federal Ins Co Ltd* 1990 (1) PH at J15 Corbett & Honey A4–28 (loss of earning capacity of a youth of 17 years old); *Commercial Union Ass Co of SA Ltd v Stanley* 1973 (1) SA 699 (A) at 704–5; *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 634; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 473, where the court weighed up positive and negative contingencies. See further *Wessels v AA Onderlinge Ass* Corbett & Honey A3–19 at A3–33 (court refused to consider contingencies at a late stage of the action); *Gallie v National Employers' General Ins Co Ltd* 1992 (2) SA 731 (C) at 738–9; *Fair v SA Eagle Ins Co Ltd* [1997] 2 All SA 396 (E) at 408; *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 34; *Protea Ass Co Ltd v Lamb* 1971 (1) SA 530 (A) at 533–4; *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 75. In *Everson v Allianz Ins Ltd*1989 (2) SA 173 (C) at 174–5 and *Protea Ass Co Ltd v Lamb* 1971 (1) SA 530 (A) at 533–4 the courts actually increased the award on the basis of a contingency adjustment. See also on Canadian law Cooper-Stephenson *Personal Injury Damages* 451: 'Although it will always be necessary to consider the issue of contingencies in a given case, it is not mandatory that there be a *reduction* for contingencies. It is now accepted that any reduction will normally be a modest one, and that an award may be *increased*for contingencies. In many if not most cases any contingencies will have been dealt with in the initial assessment, and, in any event, the positive and negative contingencies may cancel each other out.'

[106] See Steynberg 2011(2) *PELJ* 22–7; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 116–17: 'The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case.' Cf *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 781: 'The often difficult, and in the nature of things imprecise, task of deciding on a contingency adjustment must depend on the particular facts of each case'; *Griffiths v Mutual & Federal Ins Co Ltd* 1994 (1) SA 535 (A) at 564: 'In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess'; *Van der Plaats v SA Mutual Fire and General Ins Co Ltd* 1980 (3) SA 105 (A) at 114: 'Dit moet egter nie uit die oog verloor word nie dat die besluit of voorsiening gemaak moet word vir die aftrek van die toegekende skadevergoedingsbedrag van 'n sekere persentasie tov gebeurlikheidsfaktore binne die diskresionêre mag van die Verhoorregter val en daar word op appèl met die uitoefening van sodanige diskresie slegs ingemeng waar die uitoefening daarvan nie behoorlik geskied het nie. Dit is vanselfsprekend dat die korting onder hierdie hoof nie vir akkurate beraming vatbaar is nie' (the court emphasizes that the decision regarding contingencies is based on the discretion of the court a quo and that a court of appeal will not easily interfere since a contingency allowance is not precisely calculated). The deduction varies much from case to case and is closely related to the subjective discretion of the court. This statement has been repeated in almost the same words in *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 472. See *Shield Ins v Booysen* 1979 (3) SA 953 (A) at 965, where reference is made to the 'process of subjective impression or estimation rather than objective calculation'. In dealing with contingencies, Koch *Lost Income* 57 prefers to use an objective standard (contingencies) to ensure a fair result. See further Steynberg 2008 *THRHR* 302–7; Nienaber & Van der Nest 2005 *THRHR* 549–51; *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 34; *Gallie v National Employers' General Ins Co Ltd* 1992 (2) SA 731 (C) at 738–9; *Fair v SA Eagle Ins Co Ltd* [1997] 2 All SA 396 (E) at 407; *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 301; *Guardian National Ins Co Ltd v Engelbrecht* 1989 (4) SA 908 (T) at 911; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 694; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 188; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 344. In *Joubert v Bezuidenhout* unreported, case no 23333/2000 (T), 22 August 2007 paras 47–61 the court held that it is very difficult, if not impossible, to make a fair contingency adjustment to an award in instances where the parties settled on the award and the court never had the benefit of evaluating the evidence: 'Indien 'n hof dus gevra word om gebeurlikhede te bepaal ten aansien van 'n bedrag wat reeds tussen die partye geskik is en dit onbekend is waarom en op watter grondslag en met inaghouding van welke faktore, daardie skikkingsbedrag bereik is, sal die hof in die afwesigheid van volledige getuienis oor al hierdie aspekte, die gevaar loop om 'n totaal verkeerde beslissing te vel. Die hof kan byvoorbeeld op 'n aspek steun ter regverdiging van 'n gebeurlikheidsaftrekking terwyl een of albei die partye dit reeds in ag gehou het vir doeleindes van bereiking van die skikking' (para 510). (If a court is asked to consider contingencies in respect of an amount already agreed between the parties and the basis of the agreement is not known, in the absence of full evidence on the factors on which the agreement has been reached, the court risks making a completely incorrect judgment. The court might, for example, focus on an aspect to justify a contingency reduction which the parties have already taken into account when reaching their settlement.)

[107] See *Shield Ins Co Ltd v Hall* 1976 (4) SA 431 (A) at 444. In *Pringle v Administrateur, Transvaal*1990 (2) SA 379 (W) at 397–8 the court amended an actuary's allowance for contingencies even where his report was accepted by the defendant. See also *Krugell v Shield Versekeringsmaatskappy* 1982 (4) SA 95 (T) at 101; *Mqolomba v* RAF [2002] 4 All SA 214 (Tk) at 226; *Mngomezulu v Road Accident Fund*unreported, case no 4643/2010 (GSJ), 8 September 2011 para 101; *Wright v Road Accident Fund*unreported (3425/2009) [2011] ZAECPEHC 15 (15 May 2011) para 39: 'The calculations made by Mr Jacobson has [sic], correctly, had no regard to contingency adjustments. That is a matter for the court to do'; Nienaber & Van der Nest 2005 *THRHR* 550.

[108] See Steynberg 2007(1) *PELJ* 144–52, 158–70 on appropriate theories on probabilities and the measure of proof in the case of contingency adjustments. See also Steynberg 2007 *De Jure* 36–51 for the distinction between contingency adjustments and contingency allowances.

[109] See Steynberg 2007(1) *PELJ* 142–4.

[110] See Steynberg 2007(1) *PELJ* 156–8; 2011 *THRHR* 388, 400. See also *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (W) at 74–5: 'I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like *Turkstra Ltd v Richards* 1926 TPD 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the quantum of damage. The Court, in such a case, does the best it can with the material available'; *Hendricks v President Insurance* 1993 (3) SA 158 (C) at 165: 'The duty however, remains squarely on the plaintiff to adduce all the evidence reasonably available to him before he can request the Court to come to his assistance by estimating a fair and reasonable *quantum* .... [I]f the Court were obliged to make an estimate in circumstances where further evidence was available, it may *ex post facto* appear that the Court had done an injustice to one of the parties. Also, if the withholding of evidence is permitted, even once, it may result in a party deliberately withholding evidence in the belief or in the hope that the Court's calculation may be more favourable than if all the evidence were led. The already difficult task of assessing damages would be increased'; *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T) at 193: '[I]t is the duty of the Court to assess damages in the best way possible on such evidence as is available, the present is a case where it lay within the power of the respondent to prove his damages quite clearly. That has certainly not been done'; *Eskom v First National Bank of Southern Africa* 1995 (2) SA 386 (A) at 392: 'As a matter of fairness and sound judicial policy it seems reasonable that, where one party has the means of establishing a particular fact and his opponent not, the onus should rather be on the former than on the latter.'

[111] See Steynberg 2007(1) *PELJ* 152–8; *Pillay v Krishna* 1946 AD 946 at 952; Reinecke 1988 *De Jure* 229.

[112] Para 14.7.2. See also Corbett & Buchanan I 51–2 on the different types of contingencies in respect of a loss of earning capacity.

[113] See Steynberg 2011 *THRHR* 386–401 for the distinction between general and special contingencies. See, eg, Koch *Lost Income* 220–1; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011–13.

[114] See, eg, *De Jongh v Gunther* 1975 (4) SA 78 (W) at 80: '[O]ne has to take into account not only contingencies affecting the deceased, but also ... contingencies which might have affected the joint lives of the deceased and the plaintiff, and contingencies which may affect the plaintiff's personal position in the future.' See Nienaber & Van der Nest 2005 *THRHR* 551–4 and Steynberg 2007 *De Jure* 45–50 on contingencies in the case of children.

[115] See Koch *Lost Income* 220; Boberg 1964 *SALJ* 203 et seq; *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 965–6, where in a claim by dependants contingencies such as the deceased breadwinner's illegal activities, violence in the neighbourhood where he stayed and his poor service record had already been taken into account in assessing his future income and it was thus unnecessary to reconsider these factors.

[116] See Steynberg 2011 *THRHR* 389; Koch *Reduced Utility* 149.

[117] See Nienaber & Van der Nest 2005 *THRHR* 546–61 where the authors examine the constitutionality of making a contingency deduction for HIV/AIDS in the case of a black child. They argue that it infringes upon the child's constitutional right to equality (s 9), in particular the right not to be discriminated against on the basis of race, sex or disability (s 9(3)). The unjustifiable infringement of this right entails unfair discrimination (s 9(5)). One could argue that there is not much difference between a contingency deduction on the basis of possible HIV infection in the case of a black child, and a similar contingency deduction on the basis of, eg, the possible future contraction of cancer by a white female child. Instead of making these kinds of contingency deductions, which could rightly be regarded as discriminatory, the actuary should rather make use of standard life expectancy tables into which these realities have already been applied.

[118] In *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) the court applied a 20 per cent general contingency deduction in a claim for loss of future income based on the fact that the plaintiff was only 26 years old and would have been exposed to the work environment for almost 40 years. This adjustment can be justified on the basis of the extended length of time.

[119] See para 10.8.5.

[120] See nn 108 and 109 above.

[121] See Boberg 1964 *SALJ* 197, 213; Steynberg 2011 *THRHR* 400.

[122] See Steynberg 2008 *De Jure* 110–13; Steynberg 2011 *THRHR* 400–1.

[123] Para 4.6.3.4.

[124] See also para 4.6.3.3 and the authority cited in nn 205 and 207. Cf also *Carstens v Southern Ins Ass Ltd* 1985 (3) SA 1010 (C); Boberg 1963 *SALJ* 538; Luntz *Damages: General Principles* (2006) 62–9. See para 11.7 on inflation up to the time of trial.

[125] See, eg, *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 615: 'Dit skyn eerder in te pas by die gedagte, wat na my mening juis en realisties is, dat daar by die verhoor gekyk moet word na al die gebeure wat dit voorafgegaan het en om skadevergoeding in die lig van al die bekende feite en die werklikhede te bepaal' (a trial court should have regard to all events preceding the trial and to determine damages in light of the known facts and realities). See also *Glass v Santam Ins Ltd* 1992 (1) SA 901 (W) at 902: 'Plaintiff's counsel, quite correctly, did not suggest that our Courts will assess damages as at the time when the cause of action first arose without reference to what in fact eventuated. As long as uncertainty exists about the arising and impact of a factor which in its nature is relevant to the assessment, of loss, a Court has no better method than to place a value on that factor according to the Court's prognosis. As certainty arises the need to speculate about probabilities and to evaluate expectations dwindles, and the actual facts form the basis for calculations'; *Wigham v British Traders Ins Co Ltd* 1963 (3) SA 151 (W) at 156: 'It is of course quite true that the general principle requires the amount of damages to be assessed as at date of the wrong but the Court is entitled in the case of prospective damages to inform itself of subsequent facts which are known at the date of the trial and which if taken into account would enable the Court to determine with a greater degree of certainty or accuracy the actual loss of a plaintiff. By so doing the amount of speculation involved in such an assessment is reduced'; *Carstens v Southern Ins Ass Ltd* 1985 (3) SA 1010 (C) at 1020; Van der Merwe & Olivier *Onregmatige Daad* 188–9.

[126] 1960 (2) SA 552 (A) at 557.

[127] See also *Blyth v Van den Heever* 1980 (1) SA 191 (A). Boberg *Delict* 487 states that in foreign legal systems where a widow's loss of support is assessed, her actual remarriage is considered and not merely her possible remarriage. See in this regard *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA). See Boberg 1963 *SALJ* 538 for a comparative study of the influence of supervening events. See also McGregor *Damages* 1180: 'There is today universal acceptance of the sensible and realistic rule that trial courts must look at the position at the time of their judgments and take account of any changes of circumstances which may have taken place since the injury was inflicted. This applies both to change which increases the plaintiff's loss and to change which diminishes it. There are, however, certain differences in effect between aggravation and amelioration of loss ... .' See further McGregor op cit 1180–5. Cf also Corbett & Buchanan I 8: '[W]here prospective damages are claimed, the court is both entitled and bound to inform itself of subsequently occurring facts which are known at the date of the trial and which throw light upon the claim ... . In this way the difficulty of assessing prospective loss and the amount of speculation involved in such assessment are reduced.' These authors then refer to a case where a widow instituted action for loss of the support of her husband but had died before her action came to trial. The court held that her damages should be based on the actual duration of her life and not on her theoretical life expectancy at the time of her husband's death. See further *Wigham v British Traders Ins Co Ltd* 1963 (3) SA 151 (W) at 156; *AA Mutual Ins Ltd v Van Jaarsveld* Corbett & Buchanan II 360 at 367; *Santam Versekeringsmpy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 172; *Phillip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 429; *Victor v Constantia Ins Co Ltd* 1985 (1) SA 116 (C). See, however, also *Seattle v Protea Ass Co Ltd* 1984 (2) SA 537 (C), where the court refused to rectify an award of damages in accordance with a supplementary actuarial report which was handed in after judgment had been formulated.

[128] See Van der Walt 2002 *SALJ* 649 et seq; Boberg *Delict* 487; Koch *Lost Income* 104–5; McKerron *Delict* 120–3; Neethling & Potgieter *Delict* 222; *SA Eagle v Hartley* 1990 (4) SA 833 (A); *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 557; *Botha v Rondalia Versekeringskorporasie van SA Bpk* 1978 (1) SA 996 (T).

[129] Delict 487.

[130] See para 4.6.3.3 n 205.

[131] See chap 10.

[132] 2002 *SALJ* 650–5. See also Steynberg 2007(1) *PELJ* 165.

[133] See para 1.7.2.

[134] 1990 (4) SA 833 (A) at 841. The court applied the principle of nominalism, which entails that the nominal amount of damages assessed by the court with reference to the date of the delict may not be adjusted for inflation. (Allowance for such an adjustment could have a marked effect on the purchasing power of an award.) The court emphasized that the principle of currency nominalism applies only to special damages and not to general damages. See Van der Walt 2002 *SALJ* 654; para 11.7.2.2. See also *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 545 (the court held that the principle of currency nominalism had no bearing on distinguishing between the different costs of living in England and South Africa).

[135] See para 11.1.6 on transmissibility; Corbett & Buchanan I 56–8; *Lockhat's Estate v North British and Mercantile Ins Co Ltd* 1959 (3) SA 295 (A); para 14.6.4 on loss of earning capacity.

[136] *Glass v Santam Ins Ltd* 1992 (1) SA 901 (W) at 902.

[137] eg in a girl's claim based on seduction her subsequent marriage is taken into account (*Botha v Peach* 1939 WLD 153; *Bekker v Westenraad* 1942 WLD 214; McKerron *Delict* 165). The fact that she has had sexual intercourse with other men after the seduction will not exclude her claim (*De Stadler v Cramer* 1922 CPD 16). The conduct of parties up to the time of trial may influence the amount of satisfaction for defamation (para 15.3.2.2*(q)*).

[138] Para 4.6.3.3 and chap 10. See eg *Solomon v Spur Cool Co (Pty) Ltd* 2002 (5) SA 214 (C) at 227-8.

[139] See in general, Koch *Lost Income* 40–2; *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A); Corbett & Buchanan I 46 et seq; Davel *Afhanklikes* 112–15; Luntz *Damages* 391–421.

There are different opinions on the precise meanings of these three terms. See, eg, Newdigate & Honey *MVA* 166, who make a sharp distinction between capitalization and discounting (op cit 157–8). Others use these expressions to denote basically one type of calculation, see, eg, Davel *Afhanklikes*112. See also Koch *Lost Income* xi on the distinction between 'discounting for risk' and 'discounting for interest'. See further Koch op cit 21: 'The expressions "discounted value", "capitalized value", "present value", and "present monetary value" all have the same meaning and refer to the result of using discounting techniques.' Cf on an annuity also *Secretary for Inland Revenue v Watermeyer* 1965 (4) SA 431 (A).

[140] Discounting is irrelevant in non-patrimonial loss.

[141] See, generally, Koch *Lost Income* 76–89 (especially at 86); De Groot *Inleiding* 3.33.2.

[142] The plaintiff has the use of the money and may at least employ it to earn income at the normal rate of interest. See also Koch *Lost Income* 82 on this so-called 'subjective functional approach to loss'; cf also Davel *Afhanklikes* 112–13.

[143] Legal practice sees prospective damage as a loss only sustained after the date of final assessment of damage (usually the date of trial). In *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 839 the court explains it thus: 'The purpose of discounting in such cases is to award the plaintiff a sum of money which, if invested at an appropriate rate of interest, would provide him with the amount of R1 000 (which we assume to be his loss of earnings) *at the time when he would have received it had the injury not been sustained*. In this way he would be placed in the same position as that in which he would have been if the delict had not been committed. However, if the loss of R1 000 had already been sustained when the award is made, there could be no reason why it should be discounted to an earlier date. The plaintiff should then be awarded the full amount'. See also Koch *Lost Income* 40: '"Present monetary value", "present value", "capitalized value", or "discounted value" denotes the amount presently payable which, when accumulated at compound interest, will give the desired future value. Present value is calculated by discounting the future value at a rate known as the *discount rate of interest*. The discount rate of interest will reflect the *average* rate of investment return *expected* over the intervening years. If the receipt of the future value is associated with a high degree of risk or uncertainty the discount rate will be higher than would be the case if the receipt of the future value were a certainty.'

[144] Para 14.6.6. See for criticism Koch 1987 *THRHR* 109.

[145] Para 14.7.4.4.

[146] eg future medical expenses; see para 14.4 for an example. See also *Oberholzer v National Employers' General Ins Co Ltd* Corbett & Honey A3–1 at A3–9; *Wessels v AA Onderlinge Ass* Corbett & Honey A3–19 at A3–28.

[147] See Corbett & Buchanan I 106–31.

[148] Corbett & Buchanan I 137–41.

[149] See *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 615–16: 'Waar nou by die verhoor 'n groter bedrag aan 'n eiser toegeken word as wat toegeken sou gewees het indien betaling op die dag van die delik sou geskied het, beteken dit myns insiens nie dat die eiser 'n onbehoorlike voordeel, tw rente (of die ekwivalent daarvan) op 'n ongelikwideerde skadevergoedingsbedrag, ontvang nie en ek meen ook nie dat, soos betoog is, die verweerder wat die betaling moet doen, daardeur benadeel word nie. Die eiser kry nie meer as wat nodig is om hom in dieselfde posisie te plaas as waarin hy sou gewees het indien die betrokke delik nie gepleeg is nie. Wat die verweerder betref, is dit waar dat hy by die verhoor gelas word om 'n groter bedrag te betaal as wat hy sou hoef te betaal het indien hy op die dag van delik betaal het, maar dit volg nie dat dit vir hom nadeel inhou nie. Hy het immers in die tydperk tussen die datum van die delik en die datum waarop hy ingevolge die Hofbevel betaling doen die gebruik van daardie bedrag geld gehad.' (The plaintiff does not obtain an inappropriate advantage as the plaintiff does not receive more than is necessary to place him in the position he would have been but for the delict. The defendant is also not prejudiced since he had the use of the money up to the date he has to pay in terms of the order of court.) See, however, also Koch 1987 *THRHR* 110; *Majele v Guardian National Ins Co Ltd* 1986 (4) SA 326 (T). See *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) on discounting to the date of *judgment*.

[150] See Davel *Afhanklikes* 112–15.

[151] See Corbett & Buchanan I 69: 'That is, a capital sum must be determined which, allowing for the accrual of interest, will produce an annual payment out of interest and capital equivalent to that portion of the deceased's annual income which the plaintiff would have enjoyed by way of maintenance and support and which sum will exhaust itself so that no capital is left at the end of the period for which the plaintiff is entitled to claim loss of support. This calculation is normally a matter in regard to which the court will require the assistance of the evidence of an expert witness such as an actuary.' See *Gillbanks v Sigournay* 1959 (2) SA 11 (N) at 15; *Arendse v Maher* 1936 TPD 162; *Groenewald v Snyders*1966 (3) SA 237 (A) at 246. See Corbett & Buchanan I 132–6 for annuity and discount tables.

[152] See on the rate of interest Koch *Lost Income* 85–6. From reported cases there are indications of different rates: see, eg, *Saayman v RAF* [2011] 1 All SA 581 (SCA) at 585 (2.5 per cent); *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 849 (3.5 per cent); *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 466 (5 per cent); *De Jong v Gunther* 1975 (4) SA 78 (W) at 80 (6 per cent); *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A) at 116 (11 per cent); *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011, where the rate of interest was fixed at 1.5 per cent higher than the inflation rate. See, however, *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 781 where a net rate of 3 per cent compound interest per year was used. The approach to allow for inflation (as indicated by the low rates of interest) has been criticized. See, eg, Corbett & Buchanan I 50, who submit that someone who receives damages should not be given better protection against inflation than those who earn income. A net rate of discount should in any event not be employed when the income of a deceased or injured person has already been adjusted in order to accommodate future inflation. See *Munro v National Employers' General Ins Co Ltd* Corbett & Honey F2–1 at F2–4 (no discounting on account of future inflation). See for a further discussion Davel *Afhanklikes* 113–14 and para 11.7 on inflation. See also *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 34; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–45 at A3–74; Koch 1992 *Quantum Yearbook* 61 et seq; *Gallie v National Employers' General Ins Co Ltd* 1992 (2) SA 731 (C) (conservative approach to discounting minor's damages).

[153] See para 14.6.3 on the functions of an actuary.

[154] See, eg, Corbett & Buchanan I 50.

[155] See, eg, *Smith v SA Eagle Ins Co Ltd* 1986 (2) SA 314 (SE) at 318: 'There is no evidence on record, nor agreement between the parties, as to what interest rate would be appropriate in respect of any annuity or discount calculations. Furthermore there is no evidence before me as to the trend of inflation rates hitherto or the various possibilities as to such rates in the future or as to the interest rates at which the plaintiff can invest his award, practically speaking.' In such a case the court adopts an approach which it considers to be fair. The court may refer mero motu to annuity and other tables (*Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O)) but retains its judicial discretion (eg *Hulley v Cox* 1923 AD 234).

[156] See Erasmus & Gauntlett 7 *LAWSA* para 23 and n 7.

[157] See *Mossel Bay Divisional Council v Oosthuizen* 1933 CPD 509; *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T); *Aucamp v Morton* 1949 (3) SA 611 (A).

[158] See *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* 1955 (2) SA 1 (W) at 19; *Ratcliffe v Evans* (1892) 2 QB 524 (CA) at 532–3: '[A]s much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done.'

[159] See nn 51 and 52 above.

[160] See also para 16.2.4 on the onus of proof of damage which cannot be readily assessed.

[161] The plaintiff should make such an averment in his or her pleadings—*Goedhals v Graaff-Reinet Municipality* 1955 (3) SA 482 (C).

[162] See *Stent v Gibson Bros* (1888) 5 HCG 148; *Trichardt v Van der Linde* 1916 TPD 148; para 6.4.5.

[163] Para 11.7.

[164] Para 11.3.

[165] Para 8.10.

[166] Para 10.9.

[167] Para 10.1.

Chapter 7
'ONCE AND FOR ALL' RULE AND CAUSES OF ACTION

7.1 STATEMENT AND ORIGIN OF 'ONCE AND FOR ALL' RULE

In claims for compensation or satisfaction arising out of a delict, breach of contract or other cause, the plaintiff must claim damages once for all damage already sustained or expected in future in so far as it is based on a single cause of action. [1]

This rule is derived from English law [2] but it has been recognized and applied [3]for so long that it is not possible to oppose it on historical grounds. [4]

The 'once and for all' rule has a close relationship with the sum-formula. [5]

7.2 CRITICISM OF 'ONCE AND FOR ALL' RULE [6]

Van der Walt [7] has subjected the 'once and for all' rule to thorough investigation and came to the conclusion that any attempt to justify this rule with principles concerning res iudicata, ne bis in idem or continetia causa [8] fails because a claim for loss already sustained and a claim for prospective loss are necessarily based on two causes of action. [9] He also states [10] that it is incorrect to describe the 'once and for all' rule as a principle of law since it is merely based on convenience and may be departed from whenever necessary. This perception of the 'once and for all' rule and the strange concept of cause of action which underlies it (the 'single cause' theory) [11] have caused it to be applied incorrectly and unnecessarily in our law of damages. Van der Walt [12] summarizes his views thus:

> It should no longer be tolerated that recovery of damages for further damage can be frustrated by the ''once and for all'' rule. Courts should be free to decide finally over all matters regarding completely developed damage, whilst indicating the circumstances under which, and the period during which, the defendant will also be liable for further damage developing from the challenged event. [13]

Despite this criticism, our practice still generally accepts the 'once and for all' rule as well as the 'single cause' theory in regard to causes of action. [14] Van der Walt's approach to prospective loss, [15] which forms one of the pillars supporting his arguments against 'once

and for all', is not generally accepted. [16] Moreover, his theory that a claim which involves patrimonial as well as non-patrimonial loss cannot be based on a single cause of action because these two forms of damage have nothing in common [17] is insupportable on practical [18] as well as theoretical

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grounds. [19] While many of Van der Walt's arguments are convincing, the support enjoyed by the 'once and for all' rule in the Supreme Court of Appeal [20] means that this court's power to modify the rule is limited, and it is up to the legislature to rectify its undesirable implications. [21]

7.3 SOME PRACTICAL IMPLICATIONS OF 'ONCE AND FOR ALL' RULE

7.3.1 Prescription [22]

Prescription [23] in regard to a claim for damages [24] commences to run as soon as a cause action [25] accrues [26] and the debt [27] in regard to the payment of damages is

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claimable. [28] This means that all the elements of a delict, breach of contract or other source of an obligation are present (and some damage has in fact occurred) and that the plaintiff is aware of or ought reasonably to know of the identity of the debtor and the facts of the cause of action. [29] Section 12(3) of the Prescription Act 68 of 1969 requires knowledge only of the material facts from which the debt arises for the prescriptive period to begin running, not also of legal conclusions to be drawn from the known facts, such as that the facts constitute negligence. [30]

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Generally, [31] prescription is concluded after three years. [32] Where damage has already manifested itself, the plaintiff must institute his or her claim for compensation within the relevant period and claim for all damage already sustained as well as that to be expected in future. [33] This principle applies even though all damage has not occurred at the time of trial and even though the plaintiff cannot foresee any further damage at such time. [34] Furthermore, a plaintiff may not amend his or her claim (as opposed to merely increasing the quantum of damages claimed) if in this process the plaintiff seeks to introduce a new cause of action which has already become prescribed. [35] The substitution of the plaintiff by means of cession after litis contestatio will not affect the interruption of prescription by the original summons served on the defendant. [36]

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7.3.2 Only one opportunity to claim compensation [37]

A plaintiff who has already sued with or without success [38] for a part of his or her damage may not thereafter sue for another part if both claims are based on a single cause of action. [39] A plaintiff thus has to make a proper assessment of all the possible future loss which falls within a single cause of action as he or she has only one chance to claim compensation in respect of all such damage and possible damage. [40]

7.3.3 Cession [41]

A principle which is possibly related to the 'once and for all' rule is that a claim which falls within a single cause of action may only be ceded as a whole. Thus a claim for medical expenses cannot be severed and ceded separately from a claim for pain and

suffering by which it is accompanied. And since a claim for pain and suffering cannot be ceded before litis contestatio, the claim as a whole (which includes a demand for medical expenses) is incapable of being ceded. [42]

7.3.4 Concurrence of claims for damages

This issue is discussed below. [43]

7.4 GENERAL PRINCIPLES CONCERNING CAUSES OF ACTION

In the application of the 'once and for all' rule the concept of a cause of action is of crucial importance.

7.4.1 What is a cause of action? [44]

The question of what a cause of action is may be approached in two ways. The first is the 'single cause' theory in terms of which every damage-causing event [45]constitutes only one cause of action. Here the emphasis falls on conduct which causes damage and not on the damage itself. [46] This concept of a cause of action has been subjected to severe criticism. [47]

In the second approach to a cause of action, the requirements which are essential

to an action, in other words, the facta probanda of a successful claim, are considered. [48] It can thus be said that a cause of action exists if all its requirements or elements (the facta probanda) are present. In the case of delictual and contractual liability, the substantive rules of the law of delict [49] and the law of contract, [50]according to the case, will determine the nature of the facta probanda of a claim for damages [51] or satisfaction. [52]

These two possible approaches to a cause of action do not really signify a conflict in our law of damages but rather reveal its casuistry. [53] While the 'single cause' approach is well-entrenched in some typical situations, [54] the most recent cases also accept the facta probanda approach [55] in certain situations. [56] From a theoretical

point of view, the facta probanda test is to be preferred and it is consequently supported by most [57] authors [58] but may have undesirable results if applied in an injudicious way. [59]

7.4.2 When does a cause of action arise?

This question is important because prescription of a claim for compensation can commence only once a cause of action has arisen. [60] A cause of action arises at the earliest date when all the requirements of delictual, contractual or any other form of liability [61] are present. [62] This means, inter alia, that damage must be present. [63]The requirement of damage does not imply that all or 'complete' damage should be present: if all the other essentials are met, a cause of action accrues at the earliest

date on which the *first* damage occurs [64] (if there is a series of harmful consequences as a result of wrongful conduct). [65] From this it is apparent that our practice does not accept that a cause of action may be based merely on prospective damage. [66] It is also

obvious that no cause of action can arise if there is only damage without the other requirements of liability. [67]

7.4.3 When are different claims based on a single cause of action? [68]

This matter is obviously of considerable importance in answering questions such as whether a claim has become prescribed or a plaintiff has exhausted his or her remedies. [69] In terms of the 'single cause' theory of a cause of action [70] it is accepted that different claims consequent upon an unlawful act or damage-causing event all fall within a single cause of action. [71] Thus the following statement has been made with regard to the relevant third-party [72] compensation: [73]

> I think that that provision, in conformity with the common law, embodies a single cause of action of all the third party's rights to recover compensation for the loss and damage he has suffered as a result of bodily injuries to himself and his minor children caused by the same wrongful act. [74]

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In accordance with the facta probanda approach [75] the requisites of two or more claims are compared [76] and a decision is then taken on whether there is a substantial difference despite possible overlapping. In *Evins v Shield Insurance Co Ltd* [77] the Appellate Division listed and compared the requirements of a claim on account of bodily injuries and a claim based on the death of a breadwinner. [78] The court concluded as follows:

> From this analysis it is evident that, although there is a measure of overlapping, *the facta probanda* in a bodily injury claim differs substantially [79] from *the facta probanda* in a claim for loss of support. Proof of bodily injury to the plaintiff is basic to the one; proof of death of the breadwinner is basic to the other. Proof of a right to support and the real expectation that, but for the breadwinner's death, such support would have been forthcoming is basic to the one, irrelevant to the other. It is evident, too, that even where both claims flow from the same accident, the cause of action may arise at a different time . . . . [T]he cause of action in respect of bodily injury will normally arise at the time of the accident, ie when the bodily injury and the consequent *damnum* are inflicted; in the case of the cause of action for loss of support, this will arise only upon the death of the deceased, which may occur some considerable time after the accident. [80]

This approach is still followed in legal practice. [81]

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There is also a view that claims for damages based on breach of contract and on delict cannot, in terms of the facta probanda approach, fall within a single cause of action. [82]

Where more than one person suffers damage on account of a single act, it depends on the facts whether one or several causes of action are present. [83]

7.5 PRACTICAL EXAMPLES OF CAUSES OF ACTION [84] AND APPLICATION OR NON-APPLICATION OF 'ONCE AND FOR ALL' RULE [85]

In this paragraph some practical instances where the 'once and for all' rule is applied or not applied are discussed. [86] For practical purposes, the discussion is divided into different subjects.

7.5.1 Nuisance [87] and continuing wrong (invasion of rights) [88]

The 'once and for all' rule is based on the assumption that a single damage-causing event leads to only one cause of action in respect of all damage flowing from such event. [89] If a landowner causes nuisance [90] to his or her neighbour, the damage-causing event is

not 'complete' but there is a series of successive causes of action until the cause of the nuisance has been abated. The 'once and for all' rule is thus

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inapplicable and the plaintiff may claim damages whenever there is 'complete' damage ('afgeslote skade') and may institute a fresh action for any further damage. [91]

Similarly, there are special principles in the case of a so-called continuing wrong. Already in *Symmonds v Rhodesia Railways* [92] the Appellate Division held that the 'once and for all' rule could not apply where there is continuing unlawful conduct (a continuing refusal to take back wrongly delivered sheep). [93] The same approach is evident from *Slomowitz v Vereeniging Town Council,* [94] where V had continuously obstructed a supply road to S's shops and the latter suffered damage because he could not let his shops. [95] The court held that the cause of action in regard to S's action for damages had continued to arise for so long as V's conduct had caused damage. [96] The wrongful seizure and detention of a vehicle by the police was

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regarded as a continuing wrong in *Mbuyisa v Minister of Police, Transkei*. [97]

7.5.2 Subsidence cases [98]

This occurs if a person through his conduct (eg digging or undermining) impairs another person's use of the surface of his or her land in its natural state. [99]According to English law, there is no cause of action until a specific subsidence takes place. Thus, prescription does not run and the 'once and for all' rule cannot be applicable. [100] South African law accepts that a landowner [101] has a right to lateral support of his or her property by neighbouring property. [102]

In *Oslo Land Co v Union Government*, [103] where cattle died through the spraying of poison, it was inter alia contended that the case should be approached on the basis of subsidence in English law, implying that prescription does not run unless damage occurs (even though the unlawful act was committed long before such time). The court rejected this argument, arguing instead that in subsidence cases the cause of action is damage alone (without an unlawful act), whereas in delictual liability there should be an unlawful act plus damage. [104]

This reasoning may be criticized [105] and Van der Walt convincingly contends that because of all the problems in casu in estimating the future consequences of the spraying, the court should have treated it in accordance with the approach in subsidence cases, identifying a cause of action whenever a further harmful consequence came to light. [106]

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In *John Newmark and Co (Pty) Ltd v Durban City Council* [107] it was held that J's claim was based on two causes of action, namely subsidence and delict, and that in both a cause of action may be present only once damage has been caused. [108] In *Gijzen v Verrinder* [109] the position in subsidence cases was extended to apply to a situation where a gradual process of erosion had caused damage. The court [110]nevertheless repeated the earlier view [111] that the cause of action is based on damage only. [112]

Van der Walt [113] concludes that in subsidence cases there has been a refinement of the concept of a cause of action and that the application of the 'once and for all' rule does not depend on the type of conduct which may be present in a particular case. No preferential role should be awarded to either conduct or damage and it should only be ascertained whether the facta probanda are all present.

7.5.3 Infringement of patrimonial right as well as personality right through one and the same act (patrimonial and non-patrimonial loss)

The facts in *Green v Coetzer* [114] may serve as an example: C (driving a motorcycle) was injured in a collision with G (driving a motor car). C claimed from G for damage to his motorcycle and obtained judgment in his favour. Later C again instituted an action against G claiming damages on account of his bodily injuries (medical expenses, temporary disability, pain and suffering). [115] G's defence was a plea of res iudicata and the court had to decide whether C's claim rested on the same cause of action as his previous action. The court held this to be the case, dismissing C's action [116] and in the process rejecting the English decision of *Brunsden v Humphrey* [117] where comparable facts were present. The court thus refused to accept that there could be two causes of action where two rights (in respect of body and property) are infringed. [118] The correctness of this decision is strongly disputed by

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Van der Walt, [119] whereas Boberg's views are more balanced [120] and the Appellate Division has not found it necessary to decide this issue. [121]

We submit that *Green v Coetzer* [122] was correctly decided even though the court's reasoning may in some respects be open to criticism [123] and the position in regard to motor vehicle accidents has been changed by legislation on third-party compensation. [124] In our opinion the nature of the wrongfulness [125] or the type of damage [126] should not be used in the application of the facta probanda test in order to identify more than one cause of action. The following example may illustrate this point: X hits Y in the face in order to humiliate him and in the process breaks Y's glasses. Y feels humiliated, has to incur medical expenses, suffers pain and suffering, loses income because he has to stay away from work and there is a 40 per cent possibility that he will have to incur medical costs in future. If the different facta probanda are classified according to the nature of the damage, [127] there are apparently five causes of action in this set of facts! [128] There can be little doubt that this would constitute

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an impractical approach and therefore there should be only one cause of action to which the 'once and for all' rule would apply. Here the emphasis should fall on the single unlawful act and not on its different consequences. [129] This is also the position adopted in practice. [130]

Even though compensation for pain and suffering (non-pecuniary loss) is in some respects different from compensation for patrimonial loss, [131] and despite the existence of a separate action for pain and suffering, [132] there are good reasons to classify non-patrimonial loss with the financial consequences of personal injuries to constitute a single cause of action (and this is indeed the position in practice). [133] Furthermore, in the application of the actio de pauperie [134] where the plaintiff may claim for patrimonial loss as well as pain and suffering [135] it would be absurd to

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construe two causes of action. [136] Where there is an infringement of a personality right [137] which leads to an action for satisfaction [138] as well as damages for patrimonial loss (for example, where someone who is defamed also sustains pecuniary loss) [139] there should be only one cause of action despite the differences between the actio legis Aquiliae and the actio iniuriarum which are used to claim compensation and satisfaction. [140]

7.5.4 Third-party claims in terms of s 17(1) of Road Accident Fund (RAF) Act 56 of 1996 [141]

7.5.4.1 *General*

The provisions of the RAF Act 56 of 1996 have led to the development of important principles regarding the application of the 'once and for all' rule. Section 17(1) of this Act (as with its predecessors) [142] contains the basic requirements for liability. [143]The following general aspects of this section are relevant in the law of damages:

First, it is settled [144] that this section does not intend to create a completely new statutory cause of action, but merely seeks to enact the common-law remedies to apply against a statutory insurer capable of paying damages. [145]

Secondly, a wide concept of damage [146] is adopted in that the expression 'loss or damage' refers to patrimonial as well as non-patrimonial loss. [147]

Thirdly, the damage-causing event is defined in that damage must, inter alia, flow from the driving of a motor vehicle which has caused bodily injuries to a third party, or death or bodily injuries to someone else. [148]

Fourthly, this section creates two causes of action as far as a particular plaintiff and incident are concerned, [149] viz *(a)* all claims relating to the bodily injuries sustained by a third party as well as certain claims in connection with injury to his or her spouse (or partner), children or breadwinner; [150] and *(b)* a claim on account of loss of support caused by the death of a breadwinner. [151]

7.5.4.2 *Damage to property*

In view of the definitions of damage-causing event and the nature of the loss contained in s 17(1), [152] its provisions do not apply, for example, to damage caused

to a third party's vehicle, false teeth, spectacles, clothes etc. [153] In respect of such losses, there is necessarily a different cause of action for which damages may be claimed only from the wrongdoer. [154]

7.5.4.3 *Damages on account of death* [155] *of breadwinner* [156]

In *Evins v Shield Insurance Co Ltd* [157] the Appellate Division had to decide whether a claim on account of the death of a breadwinner and a claim for personal injuries caused by the same accident fall within a single or two causes of action. If there were two causes of action, the plaintiff's claim for loss of support had become prescribed. [158] The majority of the court [159] discussed and accepted the 'once and for all' rule [160] and stated that it has a close relationship with a plea of res iudicata. The court then held that whether different claims constitute a single or more than one cause of action depends on the facta probanda of each one. [161] Although there is some overlapping between the facta probanda of claims for personal injuries and loss of support, [162] there are also substantial differences since, in the latter, the death of the breadwinner as well as a right and expectation of support must be proved. These differences are evidence of two causes of action but the court also found it

necessary to point to anomalies which would arise if there were only a single cause of action. [163] It is important to note that the mere comparison of the facta probanda of

claims does not on its own provide an answer to the question whether there are one or more causes of action. The court formulated its conclusion thus: [164]

> For these reasons, [165] therefore, and having regard to the criterion for determining a cause of action, the historical development of the claim by dependants as an action *sui generis* and the abovementioned anomalies, [166] I am satisfied that at common law a plaintiff's claim for damages for bodily injury constitutes a separate cause of action from that which accrues to him (or her) by reason of the death of a breadwinner, [167] even though the bodily injury and death result from the same occurrence and the same defendant is legally responsible for both.

These principles apply, of course, mutatis mutandis in regard to claims falling outside the scope of the third-party compensation legislation.

The death of a person may cause not only loss of support but also damage occasioned by funeral costs [168] and loss of services. [169] It is not exactly clear whether such claims fall within one cause of action with a claim for loss of support or whether they form part of the other cause of action in third party claims. [170]

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7.5.4.4 *Claim on account of injury to another, amendment of claim and other matters*

In terms of current law it is correct to assume that s 17(1) of the RAF Act 56 of 1996 [171] creates only two causes of action in connection with a single plaintiff. The first cause of action covers all damage suffered on account of the death of a person. [172] The second includes all other claims. [173] It is not exactly clear whether there is indeed a claim for loss of support where a breadwinner has only been injured. [174] Such a claim as well as a claim for loss of an injured breadwinner's services [175] probably constitutes one cause of action with a third party's claim based on his own injuries or the injuries of another person.

The implications of these principles are the following: Where a parent who has had been involved in an accident with his or her children intends to amend pleadings to add to his or her own claim for medical expenses and pain and suffering the medical costs the parent has had to incur on behalf of the children, he or she does not introduce a new cause of action. [176]

The same applies in regard to medical expenses which a husband has incurred in connection with injury caused to his wife. [177]

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A claim which has been wrongly computed may be amended as long as it is still based on the same cause of action. [178] An amendment to pleadings in respect of an additional injury discovered after institution of the action for compensation does not constitute a new cause of action, but is merely an additional item to the original cause of action. [179]

A third party's cause of action in terms of s 17(1) of the RAF Act [180] can arise only once the party has actually sustained damage [181] (on account of his or her own or another person's bodily injury or another's death) for which compensation may be claimed (even though the full extent of the damage has not occurred). It is nevertheless difficult to imagine a case where the (first) damage does not immediately occur when the delict (eg the collision) is committed. [182]

7.5.5 Damage expected in future

Our practice recognizes the concept of 'prospective loss' [183] as well as the principle that a cause of action may include such an expected loss. The application of the 'once and for

all' rule in this instance means that a plaintiff has only one action with which he or she should claim damages for all future loss. This principle is explained in *Evins v Shield Insurance Co Ltd*: [184]

> The principle of *res judicata,* taken together with the "once and for all" rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (ie loss not taken into account in the award of

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> damages in the original action) even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action. [185]

Prospective damage here under discussion falls within the cause of action even though it is foreseeable only with a low degree of probability. [186]

A cause of action accrues when the first damage occurs (if, of course, the other requirements are present) and prescription commences to run at such time. [187]

Van der Walt [188] sees a dilemma in the fact that the 'once and for all' rule compels one to give judgment on the development of prospective damage. [189] In an apparent acceptance of this view, provision has been made in the field of third-party legislation to prevent some problems in this regard. [190]

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7.5.6 Cases where injury or illness occurs long after damage-causing event took place but nevertheless long before plaintiff could have been aware of it [191]

Here Van der Walt [192] refers to the facts of the well-known American case *Urie v Thompson*. [193] The court held that prescription did not start running with the injury to T's lungs but when he became aware of his illness. This principle was later extended outside the field of labour legislation. [194]

In our law the position is that a cause of action accrues when the first patrimonial or non-patrimonial loss appears (if the other requirements are also present) even though the plaintiff is unaware of such fact. Nevertheless, a potential plaintiff is not prejudiced because the debt in question is not regarded as claimable (and prescription does not run) unless the plaintiff has knowledge of the identity of the debtor as well as the facts on which the debt is based, or should reasonably have had such knowledge. [195]

A plaintiff should undertake a thorough investigation of the nature of damage already sustained and make a prognosis of what may happen in future, for, if he or she has once claimed damages, the plaintiff will be unable to claim again on such cause of action even though it may appear that he or she was under a reasonable misunderstanding regarding the nature and extent of the damage. [196]

Our law has satisfactory principles in terms of the Compensation for Occupational Injuries and Diseases Act [197] for illnesses which develop slowly and secretly. [198]

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7.5.7 Breach of contract [199] and contractual exclusion of 'once and for all' rule

Damages is one of the remedies for breach of contract [200] and the 'once and for all' rule also applies here. [201]

In *Kantor v Welldone Upholsterers* [202] the court stated: [203]

> I can draw no distinction between an action such as this on a contract and an action on tort. The cause of action in both cases is the unlawful act of the defendant together with the occurrence of some damage suffered by the plaintiff. [204] ... So here, it seems to me that the further damage

> which has been caused to the plaintiffs, by further customers insisting upon having their money back and their losing the profits that they would have made, flows from the original breach of contract—the wrongful act of the defendant in selling to them this beetle-infested wood. The fact that they did not know about this further damage when they sued the first time does not affect the matter. [205]

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The 'once and for all' rule was also discussed in *Custom Credit Corporation (Pty) Ltd v Shembe*. [206]

In the course of its judgment the court remarked as follows: [207]

> On the assumption that the plaintiff enjoys the rights accorded it to claim both damages and the relief provided in clause 9*(b)*) of the agreement, it would indeed be strange if the plaintiff enjoyed the right to enforce these remedies piecemeal ... . It is accordingly not a matter for surprise that the learned judge *a quo* was unable to find any precedent for such a procedure where the "double-barrelled" remedy had been adopted by the plaintiff. [208]... The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such a cause. [209]

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Applied to the facts, [210] it means that a plaintiff who uses the so-called double-barrelled approach [211] is allowed to sue on a cause of action which in reality accrues only later. [212] Reference should also be made to the position where there are different contracts between the same parties. [213] In *Mahomed v Mahomed* [214] the court held that there were as many causes of action as there were contracts of sale or delivery transactions. Each contract and its requirements should be separately proved and such requirements would constitute a cause of action. [215] In *National Sorghum Breweries (Pty) Ltd v International Liquor Distributors (Pty) Ltd* [216] the appellant and respondent had entered into written contracts in terms of which the former sold to the latter the distribution rights to a certain product. The respondent duly

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paid the purchase price but later instituted action against the appellant for repayment thereof. The action, based on breach of contract, was unopposed and the appellant repaid the amount in question.

Subsequently, the respondent instituted a new action against the appellant, based on the claim that as a result of the appellant's breach of contract, it had suffered damage.

The court pointed out that the same thing was not claimed in the two actions, nor was reliance placed on the same cause of action. The first action concerned a claim for restitution in the form of repayment of the purchase price, which was a contractual claim. In the second action, damages were claimed, which was clearly distinguishable from restitution. Nor were the causes of action in the two suits the same. This was clear from an examination of the elements required to be proved in each case for the actions to be successful. The mere fact that there were common elements in the two suits did not call the res judicata into operation. A comparison had to be made, looking at the two claims in their entirety. Such a comparison led to the conclusion that the actions were indeed very different.

Because of the problems of proving damage in cases of continuing breaches of contract (or delicts) as well as the effect of inflation on an amount of damages (which cannot be countered by an award of interest), an interdict is in some instances the best remedy. [217]

Parties to a contract may agree to exclude the operation of the 'once and for all' rule. [218]

7.5.8 Subrogation [219]

It is an accepted principle that an insurer which has indemnified its insured in terms of a contract of insurance may, through the operation of subrogation, recoup itself out of the proceeds of any rights the insured may have against a third party responsible for the loss. [220] The insurer is entitled to sue in its own name. [221] However, an insurer who had to indemnify the insured for only a part of his or her loss may not claim such part and leave it to the insured to recover the rest since a single cause of action does not support such different claims. [222]

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7.5.9 Statutory and other causes of action

The 'once and for all' rule finds general application and is thus also relevant in regard to statutory causes of action. In *Cape Town Council v Jacobs* [223] it was, for instance, applied in regard to the former Workmen's Compensation Act 25 of 1914. [224] In *Administrator, Transvaal v AA Mutual Insurance Association* [225] the court recognized the validity of the 'once and for all' rule but held that it was not applicable in casu. [226]

Similarly in instances of liability in terms of, for example, the actio de

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pauperie, [227] the actio de pastu, [228] the Legal Succession to the South African Transport Services Act, [229] the Nuclear Energy Act, [230] and the Civil Aviation Act [231] the general principles of causes of action and the 'once and for all' rule will apply.

7.5.10 Actions for iniuria and other forms of non-patrimonial loss

The general principles regarding causes of action and the 'once and for all' rule are also applicable when the actio iniuriarum [232] or the action for pain and suffering [233]is instituted. [234]

7.5.11 Infringement of more than one personality right through one and the same act

The same conduct which causes the infringement of more than one personality right (such as the right to the good name and the right to feelings of dignity) [235]

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does not give rise to more than one action under the actio iniuriarum. [236] Therefore an award of damages for, for example, defamation should compensate the victim for both loss of reputation and wounded feelings. [237]

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[1] See also Boberg *Delict* 476: 'A single wrongful act gives rise to a single cause of action for all the damage—past and future—that it causes. This means that a plaintiff cannot claim compensation piecemeal for his various losses as they occur: he must sue ''once and for all'' for the whole of his damage, seeking redress not only for the harm he has already suffered (actual or accrued loss) but also for the harm he expects to suffer in the future (prospective loss).' See *Custom Credit Corporation v Shembe* 1972 (3) SA 462 (A) on 472: 'The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause.' This principle is related to the rule on res iudicata of which the ratio is thus explained by Voet *Commentarius* 44.2.1 (Gane's translation): 'To prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different legal proceedings.' See *Evins v Shield Ins Co Ltd* 1980 (2) SA

814 (A) at 835: 'The principle of *res judicata*, taken together with the ''once and for all'' rule, means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (ie loss not taken into account in the award of damages in the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action'; *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C) at 498; *Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at 412: 'This [once-and-for-all] rule is based on the principle that the law requires a party with a single cause of action to claim in one and the same action whatever remedies the law presents upon such cause. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation. As explained by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835 the effect of the rule on claims for damages, both in contract and delict, is that a plaintiff is generally required to claim in one action all damages, both already sustained and prospective, flowing from the same cause of action.' See further *Cape Town Council v Jacobs* 1917 AD 615 at 620; *Oslo Land Co v Union Government* 1938 AD 584 at 591; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) at 625–6; *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A) at 970; *Union Wine Ltd v E Snell & Co Ltd* 1990 (2) SA 189 (C); *African Farms & Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A); *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W); *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W); *Horowitz v Brock* 1988 (2) SA 160 (A); *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W); *Truter v Deysel* 2006 (4) SA 168 (SCA). See also Neethling & Potgieter *Delict* 225–7; Loubser & Midgley (eds) *Delict* 203.

[2] See *Cape Town Council v Jacobs* 1917 AD 615; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 835; *Coetzee v SAR & H* 1933 CPD 565 at 574; Van der Walt *Sommeskadeleer* 304, 329, 378–9.

[3] *Tonyela v SAR & H* 1960 (2) SA 68 (C) at 73, in which it was held that a plaintiff who suffers further damage may bring a new action, does not reflect our law. See Boberg *Delict* 482.

[4] See the historical survey by Van der Walt *Sommeskadeleer* 308–14. Even though this rule comes from the formalism of English law (op cit 436 on the difference between a 'tort actionable per se' and a 'tort actionable on the case'), it is, just like the sum-formula (para 4.2.4), an integral part of our law which may no longer be deported on account of its origin.

[5] See para 4.2 on the sum-formula. See Van der Walt *Sommeskadeleer* 304, who observes that in terms of the sum-formula it is accepted that all damage (already sustained and expected in future) may be expressed by means of a single formula. This idea is also partially reflected in the 'once and for all' rule in terms of which damages for all damage may be claimed only once (para 7.3.2). Van der Walt op cit 436 states that because the sum-formula lacks common-law authority, it cannot provide any authority for the 'once and for all' rule.

[6] See Van der Walt *Sommeskadeleer* loc cit.

[7] *Sommeskadeleer* 425–85.

[8] Op cit 314 et seq. See, eg, for a consideration of the relationship between res iudicata and the 'once and for all' rule, *Union Wine Ltd v E Snell & Co* 1990 (2) SA 189 (C); *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W) at 200–1.

[9] Van der Walt *Sommeskadeleer* 520; contra Christie 2003 *SALJ* 445–7.

[10] Op cit 523. See also *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W) at 200 for possible support.

[11] See para 7.4 on causes of action.

[12] Op cit vi (see also at 524).

[13] See Van der Walt *Sommeskadeleer* 490–7 on the position in German, English and Dutch law, where the possibility exists to recover compensation for further loss.

[14] See the authorities in n 1 above.

[15] Para 6.7.1.

[16] Para 6.7.2.

[17] See, eg, Van der Walt 1978 *THRHR* 315.

[18] See eg *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839, where Corbett JA expressly states that the facta probanda (see para 7.4.1) for a claim based on the actio legis Aquiliae and the action for pain and suffering in a case of bodily injuries are exactly the same. In fact, he uses the word 'damnum' to refer to both kinds of damage.

[19] Para 2.3.2*(c)*.

[20] See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 835. In a minority judgment Jansen JA displays more interest in Van der Walt's views (at 825): 'It may even be desirable to re-examine the so-called ''once and for all'' rule and inquire whether in our law its application should not, in appropriate circumstances, be restricted .... In view of these difficulties I prefer ... to leave the whole matter open'; *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) at 287; *National Sorghum Breweries (Pty) Ltd v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 241; *Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at 412. See also the remarks in *Cape Town Municipality v Allianz Ins Co Ltd* 1990 (1) SA 311 (C) at 332 that this rule 'may, it seems, not endure unrestricted forever'.

[21] See para 7.3.2 et seq.

[22] The so-called expiry terms are also included (see Van der Merwe & Olivier *Onregmatige Daad*283 et seq). See in general Midgley *Lawyers' Liability* 177–82.

[23] See the Prescription Act 68 of 1969. See Van der Merwe & Olivier *Onregmatige Daad* 283–91 for a discussion of this Act as well as other Acts containing terms of prescription and expiry. See further Klopper *Third Party Compensation* 271–84; De Wet & Van Wyk *Kontraktereg en Handelsreg* 284 et seq; Joubert *Contract* 305–10. See further the useful summary by Van Loggerenberg & Allen 1986 *De Rebus*324 et seq. Visser 2003 *TSAR* 726–7 remarks that the rules regarding extinctive prescription should follow the substantive material principles, not determine the principles. See also para 11.11.

[24] The Prescription Act 68 of 1969 refers to the prescription of a debt and this indicates a duty of performance (eg to pay an amount of money). Rights to claim damages or satisfaction are clear examples of such debts.

[25] Para 7.4.1.

[26] Para 7.4.2.

[27] The term 'debt' must not be confused with cause of action ('skuldoorsaak') (see para 7.4; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 317–18), because the latter is the source of the former. See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 842: 'Although Act 68 of 1969 views prescription from the point of view of the debtor in providing that a ''debt'' shall be extinguished by prescription after the lapse of a period of time, it is clear that the ''debt'' is necessarily the correlative of a right of action vested in the creditor, which likewise becomes extinguished simultaneously with the debt .... Where a creditor has two rights, or causes, of action then there are two corresponding debts.' See also *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] 4 All SA 154 (SCA) at 161–2: 'A ''debt'' for purposes of the Act is sometimes described as entailing a right on one side and a corresponding ''obligation'' on the other. But if ''obligation'' is taken to mean that a ''debt'' exists only when the ''debtor'' is required to do something then I think the word is too limiting. At times, the exercise of a right calls for no action on the part of a ''debtor'' but only for the ''debtor'' to submit himself or herself to the exercise of the right. And if a ''debt'' is merely the complement of a ''right'', and if all ''rights'' are susceptible to prescription, then it seems to me that the converse of a ''right'' is better described as a ''liability'', which admits of both an active and a passive meaning.' In *CGU Ins Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at 627–8 the SCA held that 'debt' in the context of s 15(1) of the Prescription Act must bear a wide and general meaning. It does not have the technical meaning given to the phrase 'cause of action' when used in the context of pleadings (*Standard Bank of SA Ltd v Oneanate Investments (in liquidation)* 1998 (1) SA 811 (SCA) at 826). The debt is not the set of material facts; it is that which is begotten by the set of material facts. See also *Rustenburg Platinum Mines Ltd v Industrial Maintenance Painting Services CC* [2009] 1 All SA 275 (SCA) ('debt' refers generally to 'claim' and not 'cause of action'); *Umgeni Water v Mshengu* [2010] 2 All SA 505 (SCA) at 507: 'In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately.' See also Loubser & Midgley (eds) *Delict* 201–2.

[28] See *List v Jungers* 1979 (3) SA 106 (A) at 121; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909; *The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) at 1004; *Benson v Walters* 1984 (1) SA 73 (A) at 82. See also *Erasmus v Grunow* 1978 (4) SA 233 (O). There cannot be different terms of prescription in regard to a single cause of action. In *Harker v Fussell* 2002 (1) SA 170 (T) at 174 the court held that prescription begins to run from the date of the breach 'whether or not damages have become apparent'. Visser 2003 *THRHR* 660–2 correctly points out that the authorities relied upon by the court do not demonstrate that prescription of a delictual or contractual damages claim on account of a wrongful act that has not resulted in actual loss starts to run as from the date of the wrongful act (at 174). The well-known position in our law is that there is no cause of action for the recovery of damages unless some damage has already occurred. The full extent of the damage does not have to be present. See also Visser 2004 *Speculum Juris* 144: 'Although the existence of damage is not a requirement for breach of contract as such, it is obviously a requirement for an *action for damages* based on breach of contract.' See in this regard also *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W). See also *Truter v Deysel* 2006 (4) SA 168 (SCA) at

174; *Anglorand Securities Ltd v Mudau* unreported (125/2010) [2011] ZASCA 76 (26 May 2011) at para 15 (s 14 of the Prescription Act requires 'an acknowledgement of liability' and not merely 'an acknowledgement of indebtedness' for prescription to be interrupted).

[29] In *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) at 40–2 the Constitutional Court held that s 12(3) of the Prescription Act 68 of 1969, which requires the creditor to have knowledge of the identity of the debtor and of the facts from which the debt arises before prescription begins to run, cannot apply to claims under the RAF Act 56 of 1996. See further *Boshoff v Union Government* 1932 TPD 345; *Kantor v Welldone Upholsterers* 1944 CPD 388 at 391; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330; *Van Staden v Fourie* 1989 (3) SA 200 (A) at 216; *Leketi v Tladi* [2010] 3 All SA 519 (SCA) at 524 (the 'deemed knowledge' imputed to the creditor requires the application of an objective standard rather than a subjective standard). See also *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) on when a contractually agreed type of compensation claim accrues and is claimable; Van Jaarsveld *Handelsreg* 198–9 and Loubser *Prescription* 71–5 on acceleration clauses, instalments and cancellation. The former s 12 of the Prescription Act 68 of 1969 stipulated that a debt (including a claim for damages) which originated from contract was claimable (and prescription thus commenced) irrespective of any knowledge on the part of the plaintiff. This is still the position in regard to contractual causes of action which accrued before 7 March 1984 (see *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* 1990 (2) SA 566 (A)). As far as causes of action after this date are concerned, the position stated in the text applies. See further O'Brien 1990 *TSAR* 739.

[30] In *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) the appellant, a woman who was sexually abused as a child, instituted action more than 30 years after the abuse ended. Heher JA found that because the appellant had suffered from post-traumatic stress syndrome, which had been induced by the repeated abuse, she did not have the requisite knowledge and prescription could, therefore, not begin to run (see Mukheibir 2005 *Obiter* 140). In *Truter v Deysel* 2006 (4) SA 168 (SCA) the respondent instituted action against the appellants for damages for personal injury sustained by him as a result of the negligence of the appellants in their performance on him of certain medical and surgical procedures on his eyes. Although the procedures had been performed almost seven years before the summons was issued, the respondent argued that he only by then managed to secure medical opinion on the negligence of the appellants' conduct. The appellants raised a special plea of prescription. The SCA held (at 174) that in a delictual claim the requirements of fault and unlawfulness were not factual ingredients of the cause of action, but were legal conclusions to be drawn from the facts. An expert opinion that certain conduct had been negligent was not itself a fact, but rather evidence. All the facts and information in respect of the medical procedures had been known to the respondent or readily accessible to him very soon after the procedures were done, and accordingly the appeal and the special plea of prescription had to be upheld (at 176–7). Visser 2007 *THRHR* 332–3 disagrees with the reasoning of the court that unlawfulness and negligence are 'legal' conclusions drawn from certain other facts and that such conclusions are not 'facts' themselves. He further states that the court's highly technical approach is not compatible with the general latitude displayed in its earlier judgment in the *Van Zijl*case, supra. Visser feels that the court could have argued that the absence of a favourable medical opinion from which an inference of negligence could be drawn, was indeed also a 'fact' as contemplated in s 12(1) of the Prescription Act 68 of 1969. He concludes (at 333–4) by asking whether the Constitutional Court would not regard denying a claim by the respondent as an unwarranted limitation of his right to bodily integrity (s 12 of the Constitution). See also Loubser & Midgley (eds) *Delict* 204.

[31] It depends on the type of debt—see s 3 of the Prescription Act 68 of 1969. There are numerous other statutes providing for different periods of prescription or expiry. Section 113(1) of the Defence Act 44 of 1957 and s 2(1)*(a)* of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970 were declared unconstitutional and invalid due to an unjustifiable limitation of an individual's right of access to a court of law—see *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 485 (CC). There is now a new Act that regulates the periods of prescription of debts for which most organs of state are liable, namely the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002—see Loubser & Midgley (eds) *Delict* 210.

[32] See s 3(2) of the Prescription Act 68 of 1969. See on third-party claims s 23 of the RAF Act 56 of 1996, which mentions two years, but there are qualifications: see in general Klopper *Third Party Compensation* 271 et seq. See *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) on the constitutionality of s 23 of the RAF Act. Cf also *Swanepoel v Johannesburg City Council* 1994 (1) SA 468 (W). See also para 11.11.

[33] See Boberg *Delict* 476, 482–6. Where a plaintiff first seeks a court order that the defendant is liable to pay compensation while intending to institute a claim for the recovery of a specific amount at some later time, prescription is interrupted (see *Cape Town Municipality v Allianz Ins Co Ltd* 1990 (1) SA 311 (C)).

See also *Neon and Cold Cathode Illumination (Pty) Ltd v Ephron* 1978 (1) SA 463 (A) at 470–1; *Truter v Deysel* 2006 (4) SA 168 (SCA) at 175–6.

[34] See *Cape Town Council v Jacobs* 1917 AD 615 at 620; *Kantor v Welldone Upholsterers* 1944 CPD 388 at 391.

[35] *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 836: 'Where the plaintiff seeks by way of amendment to augment his claim for damages, he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has run, but not if it was part and parcel of the original cause of action and merely represents a fresh quantification of the original claim or the addition of a further item of damages . ...' In *Nonkwali v Road Accident Fund* 2009 (4) SA 333 (SCA) at 336–7 the claim in respect of the subsequently discovered injury did not introduce a new cause of action. In *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) the plaintiff sought to amend her pleadings by adding a claim for past and future loss of earnings. The court held (at 321) 'that the amendment introduced by the plaintiff simply sought to amend a claim which is part and parcel of the original cause of action and merely represents a fresh quantification of the original claim and the addition of a further item of damages'. In *CGU Ins Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) the plaintiff substituted one contract for another in his pleadings in an insurance claim. The court held (at 628) that in an objective comparison between the original particulars of the claim and the particulars of claim as amended, the debt is the same debt in the broad sense of the meaning of that word, although part of the cause of action is now a different contract. See also *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W); *Lampert-Zakiewicz v Marine & Trade Ins Co Ltd* 1975 (4) SA 597 (C) at 601–2; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 328; *Park Finance Corp (Pty) Ltd v Van Niekerk* 1956 (1) SA 669 (T) at 673; *Churchill v Standard General Ins Co Ltd* 1977 (1) SA 506 (A) at 517; *Trans-Africa Ins Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279; Loubser & Midgley (eds) *Delict* 207. See para 7.5.4.4 below.

[36] See *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (E) at 547.

[37] An *interdict* which aims at preventing damage does not exclude a later claim for compensation (see *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C); Van der Merwe & Olivier *Onregmatige Daad* 258). An interdict for the enforcement of contractual obligations may be seen as a claim for specific performance, and similarly, does not exclude a claim for damages. See Kerr *Contract* 700: 'Where defendant fails to comply with an order of specific performance and no method of enforcement is effective or suitable, plaintiff may bring a new action to recover damages.' See *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 470–1; *Industrial & Mercantile Corp v Anastassiou Bros* 1973 (2) SA 601 (W) at 610; *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C); *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 372–3. See also *Cape Town Municipality v Allianz Ins Co Ltd* 1990 (1) SA 311 (C), where it was held that the plaintiff was entitled first to seek an order declaring the liability of the defendant and thereafter to institute an action to prove the quantum of his claim and to obtain judgment in this amount. The court added (at 333): 'In any event, if the two-stage procedure does occasion defendant expense which would not have been incurred in a single action, that hardship can be met by appropriate costs orders.' Interim payments in terms of rule 34A of the Uniform Rules of Court do not detract from the 'once and for all' rule—see, eg, *Karpakis v Mutual and Federal Ins Co Ltd* 1991 (3) SA 489 (O); *Fair v SA Eagle Ins Co Ltd*1995 (4) SA 96 (E). See also rule 18A of the Magistrates' Court Rules.

[38] A criminal prosecution of a wrongdoer does not exclude a claim for damages against him or her—see s 342 of the Criminal Procedure Act 51 of 1977. However, if a complainant in a criminal case has received compensation for loss or damage and he or she does not abolish such award within 60 days, s 300(5) applies. In terms of this provision a person who has had to pay such compensation is no longer civilly liable to the complainant for such loss or damage. See in general Hiemstra *Strafproses* 696–9; Van Heerden 1984 *De Jure* 192–9; Lee & Honoré, *Obligations* 275. See also s 15 of the Stock Theft Act 57 of 1959 and ss 152 and 153 of the National Water Act 36 of 1998.

[39] See para 7.4 on a cause of action. See, eg, *Green v Coetzer* 1958 (2) SA 697 (W) (para 7.5.3); *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D); *Blaikie Johnstone v P Hollingsworth (Pty) Ltd* 1974 (3) SA 392 (D). See also n 1 above.

[40] See the words of Spencer Bower referred to in *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W) at 521: '[W]here there is substantially only one cause of action, and it is a case, not of "splitting separable demands" but of splitting one demand into two quantitative parts, the plea is sustained. In homely phrase, a party is entitled to swallow two separate cherries in successive gulps, but not to take two bites at the same cherry. He cannot limit his claim to a part of one homogenous whole, and treat the inseparable residue as available for future use, like the good parts of a curate's egg.' See Steynberg *Gebeurlikhede* 115–21 on how contingency adjustments could temper the disadvantages of the 'once and for all' rule and lump sum payments in the case of uncertain future loss.

[41] See also para 11.1.5.

[42] See *Regering van die RSA v Santam Versekeringsmpy Bpk* 1970 (2) SA 41 (NC); *Government of the RSA v Ngubane* 1972 (2) SA 601 (A); *Schoultz v Potgieter* 1972 (3) SA 371 (E); Van der Merwe & Nathan 1972 *THRHR* 387; Boberg *Delict* 530; Klopper *Third Party Compensation* 38.

[43] Para 11.9.7.

[44] See especially Van der Walt *Sommeskadeleer* 316–28; 1978 *THRHR* 314; Boberg *Delict* 477; Van Aswegen *Sameloop* 368–72; Samuels 1968 *MLR* 453–5; *Oslo Land Co v Union Government* 1938 AD 584; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A); *Boshoff v Union Government* 1932 TPD 345 at 349; *Yates v Simon* 1908 TS 878; *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265; *In re Grimbly v Akroyd*1848 17 II LJ NS Ex 161–2; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 329; *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W) at 201; *Truter v Deysel* 2006 (4) SA 168 (SCA) at 174; *Umgeni Water v Mshengu* [2010] 2 All SA 505 (SCA) at 507; *Anglorand Securities Ltd v Mudau* unreported (125/2010) [2011] ZASCA 76 (26 May 2011) para 9.

[45] Para 2.1.2. Van der Walt *Sommeskadeleer* 7 speaks of a 'gewraakte gebeurtenis' or a 'challenged event'.

[46] See *Oslo Land Co v Union Government* 1938 AD 584 at 589, where the court speaks of a 'single wrongful act giving rise to one cause of action'; *Casely v Minister of Defence* 1973 (1) SA 630 (A) at 642: 'Under the common law a person or his dependant is only accorded a single, indivisible cause of action for recovering damages for all his loss or damage for the wrongful act causing his disablement or death'; *Santam Versekeringsmpy v Roux* 1978 (2) SA 856 (A) at 870; *Schnellen v Rondalia Ass Corp of SA* 1969 (1) SA 517 (W) at 521; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472; *Kantor v Welldone Upholsterers* 1944 CPD 388 at 391. Cf further *Turkstra Ltd v Richards* 1926 TPD 276; *De Wet v Paynter* 1921 CPD 576; *Aliwal North Municipality v Jeffares* 1917 CPD 408; *Cape Town Council v Jacobs* 1917 AD 615; *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 932. See also *Union Wine Ltd v E Snell & Co Ltd* 1990 (2) SA 189 (C) at 196.

[47] Van der Walt *Sommeskadeleer* 357, 369, 372, 374, 385, 390, 402, 426, 435, 445, 456, 459. Van der Walt 1978 *THRHR* 314 summarizes it thus: 'Die "once and for all"-reël berus op 'n skuldoorsaaksiening wat nie in die Suid-Afrikaanse reg aanvaarbaar is nie. Ons reg ken geen "torts actionable per se" soos die Engelse reg nie. Verbintenisskeppende regsfeite in die Suid-Afrikaanse deliktereg ... moet ... as't ware as "materieel omskrewe" beskou word. Die blote verrigting van 'n omskrewe tipe handeling bring dus geen deliktuele aanspreeklikheid mee nie. Só beskou kan opgemerk word dat die skuldoorsaak vir deliktuele aanspreeklikheid in die Suid-Afrikaanse reg eintlik baie naby ooreenstem met die Engelsregtelike "action on the case" . ... Die ironiese hiervan is daarin geleë dat die "once and for all"-reël in die Engelse reg juis nie geld in gevalle waar "on the case" geageer word nie ... nietemin word daardie reël juis in die Suid-Afrikaanse reg toegepas, waarvolgens daar vir deliktuele aanspreeklikheid dieselfde tipe skuldoorsaakbenadering geld as in die gevalle "on the case". Daar kan in die lig hiervan onomwonde gestel word dat die "once and for all"-reël (saam met die skuldoorsaaksiening wat dit ten grondslag lê) glad nie in die Suid-Afrikaanse reg geduld behoort te word nie.' See further Boberg *Delict* 515–16.

[48] See *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 on 23, in which the court refers to 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved'; *Mahomed v Mahomed*1959 (2) SA 688 (T) at 691; *Abrahamse & Sons v SAR & H* 1933 CPD 626 at 637; *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 135; *Erasmus v Unieversekeringsadviseurs (Edms) Bpk* 1962 (4) SA 646 (T); *Dusheiko v Milburn* 1964 (4) SA 648 (A) at 658; *Makgae v Sentraboer Koöperatief Bpk* 1981 (4) SA 239 (T) at 244; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 328; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 838 ('the basic ingredients of the plaintiff's cause of action'); *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 532; *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) at 77–8 (cf Neethling 1997 *THRHR*705). See also Van der Walt *Sommeskadeleer* 321 et seq; 1978 *THRHR* 314; Boberg *Delict* 477, 485, 515; Van Aswegen *Sameloop* 369–71.

[49] See, eg, *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 838 where the facta probanda of a claim for bodily injuries are listed, ie unlawful conduct, fault and damage. In a claim for loss of support, the list contains the following requirements: unlawful conduct causing the breadwinner's death, fault, a right to support, and damage in the sense of loss of support.

[50] See, eg, *Erasmus v Unieversekeringsadviseurs* 1962 (4) SA 646 (T) at 649—the existence, legality and contents of a contract, breach of contract and damage. See further *Malherbe v Britstown Municipality* 1949 (1) SA 281 (C); *McKenzie v Farmer's Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Da Silva v Janowski* 1982 (3) SA 205 (A); *Swart v Van der Vyver* 1970 (1) SA 633 (A); Joubert *Contract* 247; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T).

[51] Para 8.1.

[52] Para 9.4.

[53] See Van der Walt 1979 *THRHR* 200: 'Tensy 'n mens begryp dat die facta probanda vir 'n suksesvolle aksie 'n haas onbeperkte aantal vorms kan aanneem na gelang dit oor die eiesoortige skuldoorsaak van enige van die gemeenregtelike aksies handel, of oor een van die talle statutêre skuldoorsake, kan dit baie maklik gebeur dat 'n beslissing wat gevel is vir 'n geval met een tipe skuldoorsaak, sonder meer toegepas word op 'n geval met 'n heel ander tipe skuldoorsaak. Dat dit dikwels bedenklike resultate oplewer, behoef geen verdere betoog nie.'

[54] Para 7.5.3.

[55] See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839 (where the court also justifies its decision in terms of the 'single cause' theory and does not reject this theory at all—see below n 74); *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 328; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) at 253: 'In this context ''cause of action'' bears its ordinary and well-accepted legal meaning of ''... every fact which would be necessary for the plaintiff to prove if traversed, in order to support his right to judgment ...''.' According to Van Aswegen *Sameloop* 371, this is the approach of the legislature in s 40 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 (now s 17 of the RAF Act 56 of 1996). This statement is open to doubt (even though the Appellate Division in *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839 identified a claim for loss of support as a separate cause of action) in view of, eg, *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W) at 521 and *Santam Versekeringsmpy v Roux* 1978 (2) SA 856 (A) at 870. See *Walker v Santam Ltd*2009 (6) SA 224 (SCA) at 229–30 on distinguishing between the facta probanda for a delict and indemnity insurance based on contract.

[56] Para 7.5.1.

[57] On the one hand, Boberg *Delict* 515 welcomes 'this erosion of the monolitic ''once and for all'' rule' in *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A), but he anticipates problems with the facta probanda test because it depends on how one formulates the facta probanda of a specific claim. However, this vagueness is welcomed by Van Aswegen *Sameloop* 371 who claims that it may lead to a flexible approach. Boberg *Delict* 516 also criticizes the 'single cause' approach: 'Inasmuch as the single cause of action concept homogenizes what are essentially diverse issues, it is an unsatisfactory tool for implementing policy decisions ....'

[58] See Van der Walt *Sommeskadeleer* 326: '[D]ie essensiële elemente vir die totstandkoming van die komplekse regsfeit waaruit 'n skadevergoedingsaanspraak ontstaan, is 'n regskendende feit; én gevolglike skade; én 'n toerekeningsgrond'; Van der Walt 1978 *THRHR* 315. See also Van Aswegen *Sameloop* 370–1 who advocates the facta probanda theory in view of the following: *(a)* It is supported by Roman and Roman-Dutch law; *(b)* it is apparently in accordance with case law; *(c)* in most cases it provides a satisfactory solution for specific problems; *(d)* the 'single cause' test also implies that there is only one cause of action if one right of the plaintiff has been infringed; if more than one right is involved, there are actually different damage-causing events. The argument in *(a)* should be approached with caution: see Visser 1982 *Obiter* 55 on the fact that in common law the Aquilian action and the action for pain and suffering were based on a single cause of action. See also *Casely v Minister of Defence* 1973 (1) SA 630 (A) at 642 and *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838–9.

[59] See n 128 below and para 7.4.2.

[60] See para 7.3.1.

[61] See para 1.5 on the sources of claims for damages and satisfaction.

[62] Boberg *Delict* 477; *Coetzee v SAR & H* 1933 CPD 565 on 570, with reference to Halsbury 19 para 64: 'A cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.' See also *Abrahamse & Sons v SAR & H* 1933 CPD 626: 'The proper legal meaning of the expression ''cause of action'' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not ''arise'' or ''accrue'' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action.' See further *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W)—suffering of actual damage necessary for cause of action to arise.

[63] See, eg, *Oslo Land Co v Union Government* 1938 AD 584 at 590: 'It is an action for damages for negligence under an extension of the *Lex Aquilia*, and the right of action in such a case is complete as soon as damage is caused to the plaintiff by reason of the defendant's negligent act.' See also *Pohl v Prinsloo* 1980 (3) SA 365 (T) at 371 (no cause of action without damage). The cause of action in a claim for damages based on breach of contract in the form of repudiation in anticipando apparently accrues only when the repudiation is accepted—*Culverwell v Brown* 1990 (1) SA 7 (A). Contra Reinecke 1990 *TSAR* 301. See also *Harker v Fussell* 2002 (1) SA 170 (T) where the court takes the position that where a breach of

contract has not resulted in a loss, prescription still starts to run from the date of the breach. See, however, the comments by Visser 2003 *THRHR* 660–2 on this decision (see n 28 above); *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) and the authorities referred to there. See also *Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at 414: '[T]he ''debt'' which formed the basis of the plaintiff's claim became due when the breach of fiduciary duty allegedly giving rise to its claim for damages occurred.' See in general Midgley *Lawyers' Liability* 179–81.

[64] See *Kantor v Welldone Upholsterers* 1944 CPD 388 at 391: 'The cause of action ... is the unlawful act of the defendant together with the occurrence of some damage suffered by the plaintiff.' Van der Walt *Sommeskadeleer* 458–9 criticizes this qualification of 'some' damage. However, in practice this means damage (as defined—para 2.1) for which compensation may be recovered in terms of general principles as opposed to the mere invasion of a right. See *Coetzee v SAR & H* 1933 CPD 565 at 572: 'It is said that he sustained an injury, but a person may be injured without undergoing pain, or without such pain that a Court would consider merited compensation in damages.'

[65] See the facts of *Oslo Land Co v Union Government* 1938 AD 584 where the spraying of poison led to the death of cattle.

[66] See *Coetzee v SAR & H* 1933 CPD 565 at 571; *Millward v Glaser* 1949 (3) SA 931 (A) at 942; *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) at 286; *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) at 694; *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE) at 799: 'The plaintiff in this case has done no more than raise a possibility that he may suffer some form of undetermined harm, which he may be able to quantify as damages at a later stage. That is insufficient for a cause of action.'

[67] See *Policansky Bros Ltd v L & H Policansky* 1935 AD 89 at 101. See McGregor *Damages* 341–2 for examples from English law.

[68] See also *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 826 for the possibility that a plaintiff may divide one cause of action into two causes of action. See further *Versveld v SA Citrus Farms Ltd*1930 AD 452 at 460.

[69] See para 7.5 et seq for a survey of the case law.

[70] Para 7.4.

[71] In *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 318–19 the court held that the single wrongful act of the insured driver vested in the plaintiff one single right or claim to compensation, to sue for all loss or damage caused to her by such wrongful act, whether such loss or damage resulted from her claim that related to past medical expenses, future medical expenses, general damages or past loss of earnings and future loss of earnings.

[72] At present s 17(1) of the RAF Act 56 of 1996.

[73] See *Schnellen v Rondalia Ass Corp of SA* 1969 (1) SA 517 (W) at 521.

[74] See also *Nonkwali v Road Accident Fund* 2009 (4) SA 333 (SCA) at 336; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 319: '[A] plaintiff who claims compensation for bodily injury under the [RAF] Act has but one cause of action. The various items that make up these claims, for example, in respect of loss of earnings, do not constitute separate claims or separate causes of action'; *Santam Versekeringsmpy v Roux* 1978 (2) SA 856 (A) at 870; *Casely v Minister of Defence* 1973 (1) SA 630 (A) at 642; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 841, where the court, despite its use of the facta probanda criterion, said that, in deciding whether there is one cause of action, it 'depends on whether these different forms of diminution are traceable back to a single wrongful act' and then justified its decision that loss of support rests on a different cause of action from that of a claim for bodily injuries, on the existence of 'two distinct wrongful acts': '[I]n the one case it is the wrongful and negligent infliction of bodily injury to the plaintiff and in the other case it is the wrongful and negligent killing of the breadwinner, the person upon whom the plaintiff was dependent for support.' Boberg *Delict*515–16 correctly observes that there were not two wrongful acts but two consequences of one wrongful act (through which different rights of the plaintiff were infringed). See also *Le Roux v Dey* 2010 (4) SA 210 (SCA).

[75] Para 7.4.1. For criticism see Boberg *Delict* 484.

[76] See also *National Sorghum Breweries (Pty) Ltd v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA). In *Harker v Fussell* 2002 (1) SA 170 (T) the court held that a claim based on breach of contract, alternatively breach of the duty to take care, gives rise to a single cause of action.

[77] 1980 (2) SA 814 (A) at 839.

[78] See above n 49; n 158 below for the facts.

[79] The court is interested in a substantial difference and not merely any difference.

[80] In deciding whether different claims are based on one cause of action, the question of time is not decisive. If, for example, breadwinner X and his dependant are respectively killed and injured

simultaneously, there are two causes of action, although they both arise at the same time. When X sprays poison on 1 May and Y's cattle start dying from 1 June to 1 September, the consequences are separated in time but there is still only one cause of action (*Oslo Land Co v Union Government* 1938 AD 584). Moreover, the fact that several persons are involved does not necessarily imply that there are several causes of action—where X and his dependent children are injured, for damage already suffered there is usually only one claim (accruing to X) (see *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W)). See, however, *Van Gool v Guardian National Ins Co Ltd* 1992 (1) SA 191 (W) with regard to future medical expenses; confirmed on appeal: *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A); para 11.1.3.

See Klopper *Third Party Compensation* 274 on the fact that a claim based on the death of another usually accrues at the time of his or her death (and that prescription commences at such time—see also *Thomas v Liverpool and London & Globe Ins* 1968 (4) SA 141 (C)), but that in a claim against the RAF, prescription runs from the moment of the accident which caused such death.

[81] See, eg, *D & D Deliveries v Pinetown Borough* 1991 (3) SA 250 (D) at 253, where the court compared the facta probanda of a claim for removal of lateral support with that of an action for the negligent causing of damage and held that they were substantially different (see para 7.5.2); see also *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 329: 'In delictual cases it has been held that there is one cause of action for the consequences of a single wrongful act and that the separate heads of damage do not constitute different causes of action ... . That does not mean, in the field of contract, that a party who has several claims arising out of a contract has only one cause of action. Different clauses of a contract may give rise to different forms of relief, each to be based on different antecedents. It may be, for example, that a party is entitled to payment of arrears as well as, and as opposed to, damages. In such cases the mere fact that there is one contract between the same parties will not mean that all relief claimed will arise from one cause of action. An example of this is to be found in *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd* 1983 (3) SA 197 (W).'

[82] Van Aswegen *Sameloop* 370; see also para 11.9.7; *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A). See further *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W); Lubbe & Murray *Contract* 604.

[83] Where, eg, X and Y are injured in an accident, there will normally be two causes of action. But where X is also liable for Y's medical costs, there is (possibly) only one cause of action; cf n 80 above. Where property belonging to co-owners is damaged, there is one cause of action; and the same should be the position if a partnership suffers damage. In the case of several contractual creditors (and debtors) there is apparently only one cause of action when a breach of contract occurs. See generally para 11.1 on who may sue for damages; para 11.2 on from whom damages may be recovered. If there are joint wrongdoers liable ex delicto (para 11.2.2), there is still only one cause of action on which such wrongdoers are jointly and severally liable for the same damage.

[84] Para 7.4.

[85] Para 7.1.

[86] See in general Van der Walt *Sommeskadeleer* 336–485.

[87] See on this Van der Walt *Law of Neighbours* 237–323; Neethling & Potgieter *Delict* 225; Van der Merwe & Olivier *Onregmatige Daad* 500; Van der Merwe *Sakereg* 187; Silberberg & Schoeman *Law of Property* 111–19; para 13.9.5 on quantification.

[88] See in general Van der Walt *Sommeskadeleer* 336–43; Corbett & Buchanan I 9; McGregor *Damages* 340–1.

[89] Para 7.4.1; Van der Walt *Sommeskadeleer* 336.

[90] Through, for instance, an unpleasant smell (eg *Graham v Dittman and Son* 1917 TPD 288); smoke and gas (eg *Gibbons v SAR & H* 1933 CPD 521); leaves (eg *Malherbe v Ceres Municipality* 1951 (4) SA 510 (C)); the conveying of slate (*Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A)); and noise (eg *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D)).

[91] Van der Walt *Sommeskadeleer* 336, 342, who correctly identifies a continuing wrong in the case of nuisance. See also *Saunders v Executrix of Hunt* 1840 Menzies 295; *Reddy v Durban Corporation*1939 AD 293; *Johannesburg City Council v Vucinovich* 1940 AD 365 on an action for damage and an interdict to prevent damage.

[92] 1917 AD 582. R had delivered the wrong sheep to S. S offered to return the sheep and claimed the proper sheep or their value as well as his expenses in taking care of the wrong sheep. The parties reached a settlement, but S then again claimed his costs for taking care of the sheep from the time of the first summons to the settlement. See also Boberg *Delict* 483.

[93] At 587: 'But where there is a continuance of a wrongful act causing fresh damage from day to day, can it be said in such a case that there is only one cause of action and that therefore a plaintiff who has

brought an action for the loss he has suffered up to date, has thereby exhausted his remedy? In my opinion such a contention cannot be sustained.' See also *Wade v Paruk* 1904 NLR 219; *De Villiers v Barlow* 1929 OPD 45 at 51 (where the court incorrectly held that there was no continuing wrong). See also *Oslo Land Co v Union Government* 1938 AD 584 at 589: '[I]n so far as the accrual of a right of action is concerned, there is a distinction between what may be regarded as a single wrongful act giving rise to one cause of action and a continuing injury causing damage from day to day which may give rise to a series of rights of action arising from moment to moment.'

In casu the court was concerned with the spraying of poison on a farm over a period of three months and which eventually caused the death of 287 head of cattle belonging to the plaintiff. The court nevertheless refused to see this as a continuing wrong (even though containers with poison were buried in shallow ground) and held that it was possible to claim only for spraying which constituted complete and finished wrongful acts. The correctness of this judgment is open to doubt. See further *Desraj v Durban City Council* 1964 (1) SA 427 (N) where D was injured when he fell into an uncovered well. The court stated that the City Council continuously failed to safeguard the well and that the cause of action arose when damage occurred. However, this is not really a case of a continuing wrong since the court could have held on general principles that damage was a requirement for a cause of action.

[94] 1966 (3) SA 317 (A).

[95] The question here was whether S's action had become prescribed in terms of the former Transvaal Local Government Ordinance 17 of 1939.

[96] In *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) the court obiter confirmed the principle in *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A). S's action was thus not prescribed as regards damage which had occurred within six months before the date of action. Van der Walt *Sommeskadeleer* 341 supports this decision and argues that it leaves room for V to terminate his wrongful conduct and thus avoid the inconvenience of several actions being instituted against him. In *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 934 (para 7.5.10 n 232 below) the court reluctantly applied the *Slomowitz* case. See also the *Ngcobo* case (supra) at 934: 'Every wrongful act has some duration in time. It is not clear what duration is necessary to qualify the act for the description ''continuing injury''. There is, of course, no conceptual difficulty about a series of repeated acts, each of which would give rise to a fresh cause of action being thus described. In principle, however, a single wrongful act, whatever its duration, gives rise to a single cause of action on its completion.' A continuing breach of contract which is not prevented by an application for an interdict does not prevent an action for damages—*Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C). See also Visser 2002 *THRHR* 649 et seq.

[97] 1995 (2) SA 362 (Tk).

[98] Para 13.9.7 on the calculation of damages. See Van der Walt *Sommeskadeleer* 343–69; Van der Walt *Law of Neighbours* 125–30.

[99] See in general *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D); *Gijzen v Verrinder* 1965 (1) SA 806 (D); *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D).

[100] Van der Walt *Sommeskadeleer* 350, 353 (English law requires that wrongfulness and damage must coincide for a cause of action to arise—the subsidence affords proof of this).

[101] As opposed, for example, to a digger in an open diamond mine (see *Murtha v Von Beek* 1 Buch 121).

[102] eg *Phillips v SA Independent Order of Mechanics* 1916 CPD 61 at 64–5. This relates to the natural condition of land and not to constructions (*East London Municipality v SAR & H* 1951 (4) SA 466 (E) at 473, 482–3). See also Van der Merwe *Sakereg* 197–200; Silberberg & Schoeman *Law of Property*119–21; Van der Walt *Law of Neighbours* 88–131.

[103] 1938 AD 584.

[104] *Oslo Land Co v Union Government* 1938 AD 584 at 592.

[105] The court was apparently of the opinion that the initial act of digging was lawful because it did not immediately cause damage. It is true that conduct is seen as unlawful only with reference to its consequences (see eg Neethling & Potgieter *Delict* 34–5). However, conduct and its consequences are normally separated in time, signifying that unlawfulness becomes apparent only when damage occurs. Thus, in subsidence cases there must necessarily be an unlawful act.

[106] *Sommeskadeleer* 354. See further *Douglas Colliery v Bothma* 1947 (3) SA 602 (T). The question here was whether landowner B could erect permanent buildings where D was entitled to mine coal; in other words, whether reasonable support for such buildings should then have been left by D. The court declined to treat this as a subsidence case and held that B would infringe D's rights the moment he started to erect the buildings (even though D had no intention of mining coal on the land at that stage) and that a cause of action accrued at such time. One must agree with Van der Walt *Sommeskadeleer*359 that there could not

have been a cause of action as one of its elements, ie damage, was not present. The mere possibility of damage is insufficient to found a cause of action (para 7.4.2; *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE) at 798).

[107] 1959 (1) SA 169 (D). This case was concerned with prescription and the court had to decide what constituted a cause of action and when it arose.

[108] See Van der Walt *Sommeskadeleer* 362, who states that the court, in contrast with *Oslo Land Co v Union Government* 1938 AD 584 at 592, did not identify a material difference between the causes of action in delict and in subsidence. Van der Walt op cit 363 approves of the fact that emphasis is placed on the element of damage (and not on an unlawful act), which implies that exceptions to the 'once and for all' rule may be made for practical reasons.

[109] 1965 (1) SA 806 (D).

[110] At 811.

[111] See *Oslo Land Co v Union Government* 1938 AD 584 at 592.

[112] See n 105 above. This view is also found in *D & D Deliveries v Pinetown Borough* 1991 (3) SA 250 (D) at 253; cf also *International Tobacco Co (SA) Ltd v United Tobacco Company (South) Ltd* 1955 (2) SA 1 (W) at 24.

[113] *Sommeskadeleer* 366–7.

[114] 1958 (2) SA 697 (W).

[115] It is not clear why the third-party legislation then in force (Act 29 of 1942) did not apply. See Boberg *Delict* 505.

[116] See *Green v Coetzer* 1958 (2) SA 697 (W) at 700–1: 'It seems to me to follow that damages claimable under the *lex Aquilia* as extended cannot be divided into two separate causes of action, one for damages to property and the other for bodily injury to the person.'

[117] (1884) 14 QBD 141.

[118] The court (at 699) states inter alia that the English case is in conflict with the law in the United States and that differences between English and South African law render the decision inapplicable.

[119] See *Sommeskadeleer* 369–96. He prefers the 'two causes' theory of *Brunsden v Humphrey*(1884) 14 QBD 141 above the 'single cause' approach in the *Green* case. According to him, infringement of a right is one of the facta probanda of a claim and this implies that a violation of different rights necessarily implies different causes of action. An action based on bodily injuries includes a claim for pain and suffering (non-patrimonial loss) and this is not the position in a claim based on damage to property. He also rejects as inappropriate the reliance by Kuper J on *Matthews v Young* 1922 AD 492 at 504 and *Coetzee v SAR & H* 1933 CPD 565 as well as his views on American law. Van der Walt op cit 396 concludes that *Brunsden* was incorrectly rejected and that the present case actually extends the 'once and for all' rule, in contrast with the general trend of limiting its application. See further Festenstein 1958 *Annual Survey* 97; Loubser *Prescription* 88.

[120] *Delict* 504. He argues that if Van der Walt's criticism is taken seriously, it could lead to a strange lumping together of claims. If there are bodily injuries as well as damage to property in a set of facts, it would imply that damage to property, loss of income and medical expenses would be based on a single cause of action, while pain and suffering would fall within a different cause of action. This he holds to be unsatisfactory and he also rejects the facta pobanda test (para 7.4.1), since its application is influenced by how one defines the facta probanda. The difference between a claim for patrimonial and non-patrimonial loss is of more relevance in regard to issues such as transmissibility and cession of an action than in deciding whether claims should be instituted together for all damage caused by a single act.

[121] See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 841, where the somewhat unconvincing argument is advanced (para 7.4.3) that because the death of a breadwinner and the causing of bodily injuries in one accident are two 'distinct wrongful acts', the present case is distinguishable from *Green v Coetzer* 1958 (2) SA 697 (W) where there was only one act. It is obvious that in both cases there was only one act. See *Gold Reef City Theme Park (Pty) Ltd; Akani Egoli (Pty) Ltd v Electronic Media Network Ltd* 2011 (3) SA 208 (GSJ) and *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) on defamation claims by a corporation (juristic person) for patrimonial loss (with the actio legis Aquiliae) and for non-patrimonial loss (with the actio iniuriarum). (Cf also paras 5.5, 5.8, 14.10.3 and 15.3.2.1.)

[122] 1958 (2) SA 697 (W).

[123] As appears from Van der Walt *Sommeskadeleer* 381.

[124] Para 7.5.4. In terms of the provisions of s 17(1) of the RAF Act 56 of 1996, a plaintiff has to claim from the wrongdoer for damage to his or her property and from the RAF for all damage caused by bodily injury or death.

[125] ie, whether a personality right or a patrimonial right has been infringed.

[126] ie, whether it is patrimonial or non-patrimonial loss (injury to personality).

[127] See also Van Aswegen *Sameloop* 113 n 41, who incorrectly claims that an action for damages based on personal injuries and a claim for pain and suffering are not based on the same facta probanda. See further Boberg *Delict* 484.

[128] The first involves damage to property (breaking of the glasses); the second pain and suffering in terms of the separate action for pain and suffering; the third contumelia actionable with the actio iniuriarum; the fourth covers medical costs and past loss of income (according to current opinion, these losses are the result of the infringement of Y's right to bodily integrity and thus cannot fall within the first cause of action involving a right to property); and the fifth relates to Y's possible medical expenses (Van der Walt *Sommeskadeleer* vi argues that future loss and past loss cannot form a single cause of action).

[129] See Boberg *Delict* 516, who refers to the differences between patrimonial and non-patrimonial loss and its implications but then adds: 'But this difference can hardly be relevant in determining whether they should be claimed simultaneously ... .'

[130] See, eg, rule 18(10) of the Uniform Rules of Court and rule 6(9) of the Magistrates' Court Rules which provide for different items of damage in the case of a claim for personal injuries. These items are intended to cover the whole spectrum of patrimonial and non-patrimonial loss in such an action. There is no question of different types of damage constituting separate causes of action. See also *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 287; Boberg *Delict* 19; *Whittaker v Roos and Bateman*1912 AD 92 at 123; *Matthews v Young* 1922 AD 492 at 505.

[131] Para 2.3.3.

[132] As accepted in *Hoffa v SA Mutual Fire and General Ins* 1965 (2) SA 944 (C); *Government of the RSA v Ngubane* 1972 (2) SA 601 (A).

[133] See n 46 above. Historically speaking, the action for pain and suffering has not had an independent development but was seen as a type of extension of the actio legis Aquiliae. This is easy to comprehend, since there can hardly be pain and suffering without patrimonial loss. See Zimmerman *Law of Obligations* 1026, who observes the following on the content of the Aquilian action for personal injuries in Roman-Dutch law: 'People were thus used to the fact that their immaterial interest was taken into account when it came to the award of damages.' See also *Evins v Shield Ins* 1980 (2) SA 814 (A) at 838: 'I use the term Aquilian in an extended sense to include the *solatium* awarded for pain and suffering, loss of amenities of life, etc, which is *sui generis* and strictly does not fall under the umbrella of the *actio legis Aquiliae*.' From this case it does not appear at all that the court regards the facta probanda of a claim for pain and suffering as different from one for medical expenses etc. See also *Casely v Minister of Defence* 1973 (1) SA 630 (A) at 642: 'Even though, as plaintiff's counsel maintained, the claim at common law for non-economic loss for pain, suffering, shock, disfigurement, and loss of amenities is anomalous and regarded as a kind of *solatium* ... it nevertheless still is an indivisible part of that single cause of action of the disabled person'; *Coetzee v SAR & H* 1933 CPD 565: 'Originally only loss in respect of property, business or prospective gains could be recovered, but the law of Holland extended this, and allowed compensation for physical pain'; *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 320: 'A plaintiff ... who suffers bodily injury has a single cause of action in respect of the damages claimable by her notwithstanding that such damages may relate to patrimonial loss or *solatium*for pain and suffering, disfigurement, disability, et cetera.' Cf also *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A); *Wynberg Municipality v Dreyer* 1920 AD 439 at 448, where reference is made to De Groot *Inleiding* 3.34.2. It is suggested that the differences between patrimonial and non-patrimonial loss in personal injuries are not of such a nature that it necessitates the acceptance of two causes of action. See also Boberg *Delict* 19, 505; Visser 1988 *THRHR* 475; 1982 *Obiter* 54–6. The action for pain and suffering has, like the Aquilian action, a compensatory function and it is not really an action aimed at satisfaction as with the actio iniuriarum (see Visser 1988 *THRHR* 490 et seq). All this implies that the existence of a single cause of action is not so anomalous as some authors suggest (see, eg, Van der Merwe & Olivier *Onregmatige Daad* 249). The views of Van der Walt *Sommeskadeleer* 462, who intends to erect an iron curtain between patrimonial and non-patrimonial loss, are thus unrealistic (see para 2.3.2 et seq).

[134] See Neethling & Potgieter *Delict* 357 et seq.

[135] See, eg, *Creydt-Ridgeway v Hoppert* 1930 TPD 664. See *Fourie v Naranjo* 2008 (1) SA 192 (C) on a claim for emotional shock with the actio de pauperie. Cf also *Makone v Sahara Computers (Pty) Ltd*(2010) 31 ILJ 2827 (GNP) in which the court awarded a single amount for both patrimonial and non-patrimonial loss.

[136] The position may possibly be different in the case of the Aquilian action and the action for pain and suffering (which depends on negligent conduct), on the one hand, and the actio de pauperie (based on the risk principle) on the other.

[137] Or a personal immaterial property right to earning capacity (para 2.4.11).

[138] Para 9.4.

[139] See *Gelb v Hawkins* 1959 (2) PH J20 (W); *Moaki v Reckitt and Coleman (Africa) Ltd* 1968 (1) SA 702 (W) at 704; Neethling et al *Law of Personality* 170.

[140] It would be unacceptable to allow Dr X, who has been defamed and has lost patients in the process, first to claim satisfaction for injury to his personality with the actio iniuriarum and thereafter to institute the Aquilian action for damages. Although the facta probanda test (para 7.4.1) may probably lead to the identification of two causes of action, the 'single cause' theory should rather be used under these circumstances. See *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA).

[141] See para 14.1 et seq for the assessment of the different claims involved.

[142] See Klopper *Third Party Compensation* 3–4.

[143] Section 17(1) states: 'The Fund or an agent shall—

(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.'

[144] Contra Van der Walt 1979 *THRHR* 197–201, who relies on *Santam v Roux* 1978 (2) SA 856 (A). However, this case is no authority for the proposition that a statutory cause of action has been created since its approval of *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W) on this issue. See n 145.

[145] See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 837: 'And similarly it has been accepted by our Courts that a plaintiff who suffers bodily injury has, both at common law and under the Motor Vehicle Insurance legislation, a single cause of action in respect of the damages claimable by him, whether such damages relate to actual patrimonial loss or constitute a *solatium* for pain and suffering, disfigurement, disability, etc.' See also *Evins* supra 842: 'I am accordingly of the view that, in regard to the issues as to whether there are two causes of action or one [see para 7.5.4.3], the position is no different under s 21 of the [Compulsory Motor Vehicle Insurance Act 56 of 1972] [now s 17(1) of the RAF Act] from what it would have been under the common law.' See also s 19*(a)* of the RAF Act 56 of 1996, in terms of which the RAF will not be liable if neither the driver nor the owner of the vehicle in question would be liable had the said sections not been included in the RAF Act. See also *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 907; *Reyneke v Mutual & Federal Ins Co Ltd* 1992 (2) SA 417 (W) at 420; Visser *Kompensasie en Genoegdoening* 49; Klopper *Third Party Compensation* 2.

[146] Para 2.3.2.

[147] See n 133 above and cf *Roux v Santam Versekeringsmpy* 1977 (3) SA 261 (T) at 267: 'Die eise vir hospitaalkoste en mediese koste is aksessoor tot die eis vir pyn, lyding ens, en behoort dus oor dieselfde kam geskeer te word ....' (The claims for hospital costs and medical costs are related to the claim for pain, suffering, etc, and they should be treated in the same way). The view that this dictum is incorrect (Van der Walt 1978 *THRHR* 310 et seq) does not rest on authority and is based on too narrow a concept of damage. Note, however, that the obligation of the Fund to compensate a third party for non-pecuniary loss is now limited to compensation for a serious injury as contemplated in subsection (1A) and is payable in a lump sum. See para 11.8.

[148] See in general Klopper *Third Party Compensation* 25 et seq.

[149] Para 7.4.

[150] See para 7.5.4.4 on injury to a breadwinner; para 11.1.3 on who may sue and also para 14.7.

[151] This includes the following heads of damage: a third party's loss of support because of the death of his or her breadwinner; the third party's damage on account of the loss of services of a deceased; the funeral expenses of the deceased (where the third party has to incur such expenses). See para 14.7.1 on funeral expenses. See in general *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A).

[152] See n 143 above.

[153] See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 841; *Kruger v Santam Versekeringsmpy Bpk* 1977 (3) SA 314 (O) at 318–9; *Oberholzer v Santam Ins* 1970 (1) SA 337 (N); Klopper *Third Party Compensation* 90; Boberg *Delict* 485, 505.

[154] This differs from the facts of *Green v Coetzer* 1958 (2) SA 697 (W) (para 7.5.3), where damages in respect of all loss could be claimed from the driver of the vehicle. (It is not clear why the provisions of the former Motor Vehicle Assurance Act 29 of 1942 were not applicable.) A more theoretical problem is where X, who has been involved in an accident caused by Y's negligent driving of a motor vehicle, first institutes an action against Y to recover damages in respect of injury to his property and later claims damages for other losses from RAF, only to find that the RAF is unable to pay such damages (see s 21(2)*(a)* of the RAF Act 56 of 1996), or that part of his or her claim for emotional shock is excluded (see s 21(2)*(b)* of the RAF Act). In terms of s 21(1) of the RAF Act the third party can no longer claim from the wrongdoer the balance of whatever part of his or her claim against the RAF that has been excluded or limited by the Act—see *Law Society of SA v Minister of Transport* 2011 (1) SA 400 (CC) on the constitutionality of this section. If X wants to claim from Y again or wants to claim the remaining part of his damages, Y may offer a plea of res judicata in terms of the 'once and for all' rule. See Klopper *Third Party Compensation* 122–3; 216–20 for the instances where the liability of the RAF is limited or excluded. See also Boberg *Delict* 505.

[155] See para 7.5.4.4 on the position where the breadwinner is only injured. It is suggested that, where X and Y are involved in an accident and X suffers damage on account of his own injuries and damage occasioned by the injury to Y (eg loss of the latter's services or support), there is only one cause of action.

[156] See para 14.7.4 for the calculation of the quantum of damages in such a case.

[157] 1980 (2) SA 814 (A).

[158] E was injured and her husband killed in an accident on 30 March 1972. S was liable as insurer. During May 1973 E handed her claim for damages to S in the prescribed form MVA 13. This form was, however, properly completed only in regard to her claim for personal injuries but not in respect of her loss of support. On 27 September 1976 E supplied S with a second MVA 13 form in which proper notice was given of her claim for loss of support. S argued that this claim also arose in March 1972, was based on a separate cause of action and, because of the prescription terms of two years, had already prescribed. The court agreed with this argument.

[159] The minority also found that E's claim for support had prescribed but declined to decide how many causes of action were involved.

[160] *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 835: 'Its introduction and the manner of its application by our Courts have been subjected to criticism ... but it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation'.

[161] Para 7.4.3.

[162] See n 74 above for more detail.

[163] At 839–40. Suppose M (husband) and W (his wife) are injured in an accident. M dies one year later on account of his injuries. If there were only one cause of action, prescription in regard to W's injuries would commence at the moment of the accident. When M later dies, W's claim would acquire a new dimension (on account of her loss of support) but when would prescription in this regard commence to run? It cannot be on the date of the accident, because M was then still alive. If from the moment of M's death, then how should prescription of W's claim for personal injuries during the previous year be treated? Different parts of a single cause of action can hardly have different periods of prescription. Suppose, further, that on these facts M dies from his injuries three years after the accident and that in the interim W has already obtained judgment in her claim for bodily injuries. If the 'single cause' theory is accepted here, can the defendant successfully raise a plea of res judicata against W's claim for loss of support? Why would such a claim not be successful in view of *Oslo Land Co v Union Government* 1938 AD 584?

[164] At 841.

[165] See n 121 above on the court's argument (at 841) that in casu there were, in any event, two unlawful acts.

[166] See n 163 above.

[167] See on the position where the breadwinner is injured, para 11.2.2.3. It is suggested that, where X claims for loss occasioned by an injury to his breadwinner, a further action will lie if the breadwinner dies as this involves a new cause of action.

[168] See *Rondalia Ass Corp of SA Ltd v Britz* 1976 (3) SA 243 (T) at 245–6; *Commercial Union Ass Co of SA Ltd v Mirkin* 1989 (2) SA 584 (C); *Finlay v Kutoane* 1993 (4) SA 675 (W) at 679 et seq (claim for funeral costs in terms of the actio funeraria granted to the surviving partner of a traditional union); *Nodada*

Funeral Services CC v The Master 2003 (4) SA 422 (TkH) at 427–8 (the court made an obiter remark that it is doubtful whether the actio funeraria is still available in present-day South African law).

[169] See Corbett & Buchanan I 63–4; Davel *Afhanklikes* 138–40.

[170] See para 7.5.4.1 on the different causes of action in third-party compensation. It would probably constitute one cause of action with a claim for loss of support because there is substantial overlapping of the facta probanda of both (the death of a person plays a central role in these claims) and it would be practically convenient to treat them as such. Where a dependant does not incur the funeral costs, there may be a different cause of action accruing to, for example, the executor of the estate. See also Davel *Afhanklikes* 48, who remarks as follows on an action for loss of support and loss of services: 'Die twee aksies kan naas mekaar bestaan maar in die meeste gevalle sal die eise weens verlies aan onderhoud die eise weens verlies aan dienste absorbeer.' (The two actions may coexist but in most cases the claims for loss of support will absorb the claims for loss of services.)

[171] See n 143 above.

[172] Para 7.5.4.3.

[173] *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W) at 320: 'A plaintiff ... who suffers bodily injury has a single cause of action in respect of the damages claimable by her notwithstanding that such damages may relate to patrimonial loss or *solatium* for pain and suffering, disfigurement, disability, et cetera.'

[174] See Neethling & Potgieter *Delict* 275, who argue that there is such a claim where the breadwinner through his or her negligence contributed to his or her own injuries and whose own claim is therefore reduced; see s 2(1B) of the Apportionment of Damages Act 34 of 1956 (para 11.4.2). See further *De Vaal v Messing* 1938 TPD 34 at 38; Davel *Afhanklikes* 84. See on the shortening of a breadwinner's expectation of life Boberg *Delict* 543 (no claim).

[175] See paras 11.2.2.3 and 14.8; *De Vaal v Messing* 1938 TPD 34 at 41–2; *Plotkin v Western Assurance Co Ltd* 1955 (2) SA 385 (W); *De Harde v Protea Ass Corp Ltd* 1974 (2) SA 109 (E); *Erdmann v Santam Ins Co Ltd* 1985 (3) SA 402 (C) at 406; Koch 1986 *De Rebus* 105 et seq.

[176] See *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W) at 521: 'In my view, therefore, the plaintiff, by the amendment is not seeking to introduce a new cause of action which has become prescribed; he is merely seeking to expand or extend his original cause of action which, because of the interruption of prescription, is not prescribed.' Van der Walt *Sommeskadeleer* 443–5 criticizes the court's ratio decidendi based on the 'single cause' correlative of the 'once and for all' rule. He shares the opinion that the parent does not introduce a new cause of action but only a new head of damage. However, it is not clear how he comes to this conclusion in view of the facta probanda criterion of a cause of action he advocates. This test will demonstrate a substantial difference between a claim based on one's own injuries and a claim based on the injuries of another. See, however, also *Van Gool v Guardian National Ins Co Ltd* 1992 (1) SA 191 (W), in terms of which a child also has a separate claim for future loss. This view was confirmed on appeal (*Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A) at 68) and the Appellate Division commented as follows on the *Schnellen* case supra: 'It was never in issue in *Schnellen's* case whether he was entitled in his capacity as *father and natural guardian*to claim on behalf of his minor children *general damages* comprising *prospective* patrimonial loss in respect of their *future* medical and hospital expenses. Nor was the question considered in *Schnellen's*case whether a minor has a delictual action against the wrongdoer for damages in respect of *future*medical and hospital expenses.'

[177] See *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 31 (W). See also *Lampert Zaikiewicz v Marine and Trade Insurance Co Ltd* 1975 (4) SA 597 (C). In the latter case it was held that the plaintiff who sought to amend its claim to include loss of future income could do so without introducing a new cause of action which had already become prescribed. The court stressed that two items (heads of damage) which constitute a claim do not represent separate causes of action.

[178] See, eg, *Wigham v British Traders Ins Co Ltd* 1963 (3) SA 151 (W) at 152: 'Plaintiff still relies on the original and only cause of action contained in the summons and the amendment merely seeks to correct an incorrect computation of the amount of damages which flowed from that cause of action, as to the nature of which defendant could never have been in doubt'; *Dladla v President Ins Co Ltd* 1982 (3) SA 198 (W)—Boberg *Delict* 515 criticizes this case, in which use was made of the facta probanda test because the test is susceptible to manipulation. In *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) it was held that a plaintiff who had first claimed for assault and later wanted to claim for wrongful arrest and detention was attempting to introduce a new cause of action that had become prescribed. See also *Erasmus v Inch* 1997 (4) SA 584 (W); para 7.3.2.

[179] *Nonkwali v Road Accident Fund* 2009 (4) SA 333 (SCA) at 336–7 (the appellant's further claim added to the summons had not prescribed, even though it was only added more than four years after the accident, because this additional item formed part of the original cause of action); *Mntambo v Road Accident*

Fund 2008 (1) SA 313 (W) at 316–18 (plaintiff was allowed to amend her particulars of claim by adding a claim for past and future loss of earnings to her existing claim for past and future medical expenses and general damages more than three years after the accident); *Oosthuizen v Road Accident Fund* unreported (258/2010) [2011] ZASCA 118 (6 July 2011) (new evidence from medico-legal report revealed an increase in the claim for damages beyond the monetary jurisdiction of the Magistrates' Court and no statutory provision authorising transfer to the High Court—plaintiff unable to withdraw case from the Magistrates' Court and issue fresh summons in High Court as new claim had prescribed).

[180] 56 of 1996 (see n 143 above).

[181] See also Van der Walt *Sommeskadeleer* 440.

[182] Without damage there is, of course, no cause of action. Suppose X and his breadwinner Y are involved in an accident. X escapes without harm while Y is seriously injured and dies of his injuries a month later. X's claim on account of Y's death obviously accrues only at such death (para 7.5.4.3).

[183] Para 6.1.

[184] 1980 (2) SA 814 (A) at 835.

[185] See also *Cape Town Council v Jacobs* 1917 AD 615 at 620: 'It may be that after he has recovered damages, it may transpire that the injuries are far more severe than appeared at the date of the trial, but he is nevertheless precluded from claiming further damages in a subsequent action . . .'; *Oslo Land Co v Union Government* 1938 AD 584 at 590 (para 7.4.3), where the court held that the plaintiff should also have claimed damages for future loss on account of the spreading of the poison (he should have made an estimate of how many head of cattle on the farm could have been affected). See further *Turkstra Ltd v Richards* 1926 TPD 276; *De Wet v Paynter* 1921 CPD 576; *Aliwal North Municipality v Jeffares* 1917 CPD 408; *Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at 412.

[186] See *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W); *Kwele v Rondalia Ass Corp of SA Ltd* 1976 (4) SA 149 (W) at 152: 'The prognosis is, however, not entirely free from uncertainty, and I consider it right to make some provision for the contingency that some treatment of the plaintiff's leg, or to his other symptoms, may become necessary. As I am dealing with something which I consider to be less than probable, it would not be right to award the full cost of the possible treatment, or the full loss of earnings associated therewith. But ... it is appropriate in such cases to allow some percentage of the possible loss which will be suffered if the contingency becomes an actuality.' See also *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 224–6; para 6.7.2 above.

[187] See *Coetzee v SAR & H* 1934 CPD 221. In January 1925 C was injured at his place of work when coal from one of S's trucks fell on his head. He remained, however, in the employ of S. In September 1931 it appeared that C was suffering from epilepsy and during October–November 1931 he was dismissed. In September 1932 C claimed damages from S for loss of earning capacity. S's defence was that the action had not been instituted within 12 months after the accrual of the cause of action. S submitted that the cause of action had arisen when C was injured or at the latest when the epilepsy became evident. C, on the other hand, maintained that his cause of action had accrued when it became clear that he would suffer damage on account of the epilepsy. The court held (at 226): 'It seems to me therefore in this case that the *damnum*, the loss which plaintiff suffered and which gives rise to a cause of action, was the injury to his body. It was this which impaired his capacity to earn his living and which caused him pain, and when that injury had developed to such an extent that his future earning capacity was affected he had suffered damage for which he could make a claim against defendants. His subsequent dismissal was not a new damage which he suffered but only a consequence of his impaired capacity for work.' The criticism by Van der Walt *Sommeskadeleer* 461–3 that, because pain etc which C suffered cannot be seen as 'damage' and a cause of action could therefore not then have arisen, is unrealistic. It is obvious that non-patrimonial loss qualifies as damage (para 2.3.2) and it would be impractical to elevate all the different forms of loss in connection with personal injuries to separate causes of action. See in general Koch *Lost Income* 166.

[188] *Sommeskadeleer* 446.

[189] Van der Walt op cit 448 submits that consideration can be given only to future loss the occurrence of which is almost certain and that a decision on further damage is mere guesswork. The res iudicata principle does not exclude a future action for further damage, since the court could not have considered it at an earlier stage. He argues in favour of a deviation from the 'once and for all' principle for practical reasons. See para 6.1 on prospective loss.

[190] See s 17(4)*(a)* and *(b)* of the RAF Act 56 of 1996, which makes it possible to give an undertaking to compensate a plaintiff for medical costs to be incurred in future and the payment of future loss of support and income in instalments (para 8.4). In cases falling outside the scope of this legislation, these possibilities are not yet available.

[191] See Van der Walt *Sommeskadeleer* 397–424.

[192] Op cit 398.

[193] 337 US 163. T had worked on the railways for 30 years as a stoker of steam locomotives. Owing to faulty sand dispensers, T worked in an environment rich with silica and contracted silicosis more than three years before he had instituted his claim.

[194] Van der Walt *Sommeskadeleer* 401 et seq. Cf op cit 402: 'Dit was dus in die Amerikaanse reg moontlik om deur 'n relatief pynlose evolusieproses 'n bevredigende oplossing te vind vir die gevalle van sluipende en langsaamontwikkelende siektetoestande wat uiteindelik ernstige skade en lyding kan meebring. Myns insiens was dit net moontlik omdat 'n soepele, realistiese skuldoorsaakbenadering in Amerika geld. Daar word hoegenaamd nie 'n starre ''single cause''-beginsel gehuldig, ingevolge waarvan die skuldoorsaak in die plaasvind van die gewraakte gebeurtenis geleë is nie.' ('American law evolved a satisfactory solution for cases of insidious and slowly developing disease that might eventually bring about serious damage and suffering. This was possible because a flexible, realistic approach to cause applies in America. No rigid ''single cause'' principle is held to be the cause of the event in question.') See on English law op cit 403–16; 415: 'Die algemene reël in die Engelse reg is steeds dat die skuldoorsaak vir 'n ''damages'' aksie ontstaan sodra aan al die vereistes daarvan voldoen is, naamlik onder andere: dat daar ''damage or injury'' ingetree het. Van hierdie benadering word egter ... geen absolute grondbeginsel gemaak nie. Waar dit nodig is (soos in die onderhawige gevalle) word ook hierdie skuldoorsaakbenadering op die gepaste wyse verfyn.' ('The general rule in English law is still that the cause for a ''damages'' action arises when all requirements of compliance are in place, including that ''damage or injury'' has occurred. However, in appropriate cases, the approach to cause should be appropriately refined.')

[195] Para 7.3.1. See s 12(3) of the Prescription Act 68 of 1969; *Gericke v Sack* 1978 (1) SA 821 (A). See Francis 1967 *SALJ* 429 et seq on the question of on whom the onus of proof rests when there is a dispute as to the date when the delict was brought to the attention of the plaintiff, or when the plaintiff came to learn of the name of the wrongdoer, or it could reasonably have been expected of him or her to know such name.

[196] See in general *Oslo Land Co v Union Government* 1938 AD 584.

[197] Act 130 of 1993. See para 14.9.

[198] See Van der Walt *Sommeskadeleer* 417–22. Where the Director-General considers disability on account of an occupational disease in the COID Act 130 of 1993, he or she may determine a date at which such disability is assumed to have occurred and prescription runs from such moment (s 65(5)). In other cases there is a prescription period of twelve months (s 44). See also s 49(1)*(b)* of the Occupational Diseases in Mines and Works Act 78 of 1973; paras 11.8, 14.9 for more detail on the COID Act.

[199] See in general Van der Walt *Sommeskadeleer* 456–85.

[200] Para 12.1.

[201] See Joubert *Contract* 255; Christie 2003 *SALJ* 445 et seq; Visser 2002 *THRHR* 649 et seq; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 329–30, where the plaintiff first claimed contractual 'compensation' for extra costs and expenses. Later he attempted to amend his claim to recover damages for breach of contract: 'The one striking innovation is the allegation of a breach of contract. To provide a basis for it, new allegations have been made that there were implied terms in the contract in respect of the time within which plans and instructions were to be issued. These were new and necessary allegations for which there was no real need in the framework of the original claim for additional remuneration in terms of the contract. There is of course also the allegation that damage has been suffered. It is true that the amount claimed is the same as the amount previously claimed (after an increase) as contractual remuneration. The fact remains that contractual remuneration and damages are not the same thing. To say that plaintiff is merely seeking compensation for delay in broad terms and that it should not be punished for ineptitude in the initial formulation of its claim is an oversimplification. It is quite clear from the initial formulation of the claim and the unamended further particulars that the plaintiff was very mindful of the particular clauses of the contract on which it wanted to rely. There was no suggestion of breach of contract, only an attempt to relate the claim to what plaintiff thought were the opposite clauses.' Since the new cause of action had already prescribed, his application was dismissed. See also *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd*1983 (3) SA 197 (W) (claims for arrear rent and damages after cancellation of the contract constitute two causes of action). See further *Signature Design Workshop CC v Eskom Pension and Provident Fund*2002 (2) SA 488 (C).

[202] 1944 CPD 388 at 391. See also *Boshoff v Union Government* 1932 TPD 345.

[203] K supplied wood to W for the manufacture of furniture. Although K guaranteed that the wood would be fit for this purpose, it was infested with wood beetles. W manufactured furniture from this wood, which he sold. When a client of W cancelled its contract with W and claimed return of the purchase price because of the infested wood, W recovered the purchase price of the wood from K and also claimed damages. After further clients of W had claimed from him, he again claimed damages from K for lost profit. The court

rejected the second claim by W against K (at 391). The court relied on *Cape Town Council v Jacobs* 1917 AD 615; *Oslo Land Co v Union Government* 1938 AD 584 and *Coetzee v SAR & H* 1934 CPD 221. See also *Saxe v Waite* 1947 (2) SA 359 (W) (the plaintiff, who had been dismissed wrongfully, accepted the amount paid into court and could consequently not institute any further action).

[204] Van der Walt *Sommeskadeleer* 456 criticizes the qualification of *some* damage. A cause of action is based on all its facta probanda and there is no order of precedence regarding these elements. The law does not make allowance that one of the facta probanda may be seen as a vague or less important requirement which may be treated as a fiction.

[205] Van der Walt *Sommeskadeleer* 464 criticizes his judgment. According to him, W could, with his first action, claim for damage already sustained or loss which could be expected with a high degree of probability. Further possible damage could not be part of this claim. In our opinion the decision is correct. With his first action W should have reckoned with the effect of the infested wood on other transactions regarding the furniture and claimed once for all for such loss. See also *Lanfear v Du Toit*1943 AD 59: The motorcars of L and D collided because of D's negligence. D admitted liability and paid damages to L in full and final settlement. Hereafter, further injuries came to light and L again claimed from D. The claim was rejected even though L had concluded a contract to his prejudice. If the settlement is seen as a court judgment, the 'once and for all' rule may prevent a further claim. However, Van der Walt *Sommeskadeleer* 466 is probably correct in reasoning that L was in casu kept only to the terms of his agreement with D.

[206] 1972 (3) SA 462 (A). The question was whether C, who had sold a bus to S, could use the so-called double-barrelled procedure (by asking in one action for an order compelling purchaser S to comply with his duties in terms of their common-law hire-purchase contract and, in the alternative, that if S failed to do so, the contract be regarded as cancelled, S be ordered to return the bus and that part of the purchase price and deposit be forfeited as agreed upon) and could thereafter, in a second action, claim damages from S based on the difference between the unpaid part of the purchase price and the value of the bus after its return, this representing his loss of profit (see Van der Walt *Sommeskadeleer*467).

See also the judgment of the court a quo in 1972 (1) SA 174 (D). The court accepted that a plaintiff may claim fulfilment (performance or prestatio) and, in the alternative, cancellation in one action or even in two actions, since there are two separate causes of action. For practical reasons, both are disposed of in one action. Van der Walt *Sommeskadeleer* 470–6 analyses the arguments of the court and remarks as follows on the causes of action in casu: The plaintiff has to make a final choice between fulfilment (performance) and cancellation of a contract. In claiming performance the plaintiff has to prove a contract, breach of such contract and that he has already performed or intends to perform. If the plaintiff intends to cancel, he has to prove a contract, breach of contract by the other party, the right to cancel and probably also a tender of restitution of what the plaintiff has already received. A claim for damages is often available in conjunction with one of these two options, but is based on its own facta probanda (eg damage must be present). Fulfilment, cancellation and damages thus do not fall within a single cause of action. In casu the question was whether the cause of action of C's claim for damages accrued when he instituted the double-barrelled procedure or later when the order for specific performance was ignored. S argued in favour of the first possibility because by then C had exhausted his remedies on that cause of action when he exercised his right of cancellation. C favoured the latter possibility since he could not have known of any damage before he had repossessed the bus. Van der Walt *Sommeskadeleer* 473 argues that if the court's view is that cancellation by C is a prerequisite of his claim for damages, its decision is contrary to principle (but, see also op cit 472 n 176). According to the court, C should have claimed damages from S when he instituted the double-barrelled procedure even though there was uncertainty as to such damage; a plaintiff need only claim an imaginary sum and may ask for an amendment later. (Van der Walt op cit 474 criticizes this statement, submits that no damages may be recovered if damage has not yet occurred and, further, that damage should not be simulated.) The infringement of a right should not be confused with damage.

[207] At 471.

[208] See n 206 above.

[209] See also *Custom Credit Corp v Shembe* 1972 (3) SA 462 (A) at 474: The court referred to authority in Roman-Dutch law in terms of which the exceptio rei judicatae does not apply where new circumstances have arisen after the first judgment and the argument by C (see the facts in n 206above) that he could only ascertain his damage after he had repossessed the bus. The court rejected this argument, inter alia because C had a contractual right to inspect the bus at any time. The court also qualified the general principle that a cause of action has to exist at the time when summons is issued (at 475): 'Our Courts have recognized the right of a party to sue for relief on a condition to be fulfilled after the issue of the Court's order. Thus, for instance, an order for interest after the date of judgment up to the time of compliance with the order is usual. Solomon, J.A., in *Symmonds* case [1917 AD 582], recognized the right of a litigant to sue for damage not yet accrued at the date of issue of summons. By allowing the adoption of the ''double-

barrelled'' procedure the Courts have sanctioned the institution of a claim based upon a cause of action which will only arise conditionally upon an event occurring subsequent to judgment, i.e., the defendant's failure to comply with the Court's first alternative order.' In regard to C's problem to quantify his claim before he has possession of the bus, he may claim as damages the difference between the contract price and the instalments paid, and the value of the bus. See para 12.18.4 on the court's decision on the Conventional Penalties Act 15 of 1962. See further on this judgment Van der Walt *Sommeskadeleer* 476–85 (who welcomes the decision).

[210] See n 206 above.

[211] See also Kerr *Contract* 706, 734; Joubert *Contract* 302.

[212] See n 209 above. Van der Walt *Sommeskadeleer* 484 comments on the application of the 'once and for all' rule by stating that it is merely a rule of convenience that only one action may be instituted for three different remedies (cancellation, fulfilment and damages). See also *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N); *Western Bank v Honeywill* 1974 (4) SA 148 (D) at 153; *Blaikie Johnstone v P Hollingsworth (Pty) Ltd* 1974 (3) SA 392 (D) at 395. In *Deloitte Haskins & Sells (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) the Appellate Division had to identify the correct cause of action for the purposes of prescription (para 7.3). It was held that a contractual provision that the defendant was liable to pay the cost of completing defective work was not merely a restatement of the plaintiff's ordinary claim for damages (para 12.10) and thus his claim had not prescribed.

[213] See Van der Walt *Sommeskadeleer* 317–22. Cf the English case of *In re Grimbly v Akroyd*(1848) 17 II LJ NS Ex 161–2. A subcontractor of A paid its employees by giving them 3 000 purchase coupons. Each coupon ordered G to supply an employee with goods up to a specified maximum value. G then issued 228 summonses, based on these coupons, against A. The court argued inter alia that, where a series of contracts is concluded with a dealer, each one is so closely related to a subsequent transaction that all claims arising before the institution of an action should be added up to form a single cause of action. It was thus held that, for practical reasons, there was only one cause of action. This case was followed in South Africa: *Yates v Simon* 1908 TS 878. In terms of our civil procedure different causes of action may, of course, be dealt with in one lawsuit. Criticism has also been expressed against the English case, since it was actually concerned with claims based on different causes of action and not different claims falling within one cause of action. See *De la Koski v Bredell, Brown* 1911 TPD 114: There was an agreement to pay commission for each truckload of wood and the court held that 'each truck load of timber, as it arrives, would undoubtedly give rise to a separate cause of action'. Different instalments form separate causes of action: *Locherenberg v Susulu* 1960 (2) SA 502 (EC). See also *African Share Agency v Scott, Guthrie* 1907 TS 410; *Hakos Cabinet Makers v Pretoria City Council* 1971 (4) SA 465 (T) at 468.

[214] 1959 (2) SA 688 (T).

[215] See further *Belfort v Morton* 1920 CPD 589; *Abrahamse v SAR & H* 1933 CPD 626 at 637; *Polakovsky v Gerhardt* 1942 TPD 15 at 16; *King's Transport v Viljoen* 1954 (1) SA 133 (C); *Administrator Transvaal v Husband* 1959 (1) SA 392 (A) at 394; *Slomowitz v Vereeniging Town Council*1966 (3) SA 317 (A) at 330; *Marais v Du Preez* 1966 (4) SA 456 (E) at 458; *Erasmus v Unieversekeringsadviseurs* 1962 (4) SA 646 (T) at 648. See also *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 460. See further on acceleration clauses and cancellation, Van Jaarsveld *Handelsreg* 198–9.

[216] 2001 (2) SA 232 (SCA). See further *Harker v Fussell* 2002 (1) SA 170 (T).

[217] See *Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd* 1989 (3) SA 460 (C) at 475; *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T) at 1123; *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 (1) SA 548 (T) at 555; *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C).

[218] See *Collins Submarine Pipelines (Pty) Ltd v Durban City Council* 1968 (4) SA 763 (A) at 769.

[219] See Van der Walt *Sommeskadeleer* 448–56 and generally Reinecke et al 12 *LAWSA* (reissue) para 373 et seq.

[220] See *Ackerman v Loubser* 1918 OPD 31; *Teper v McGees Motors (Pty) Ltd* 1956 (1) SA 738 (C) at 744; *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA). See also para 10.4.1*(c)*.

[221] *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA) at 519–22; Van Niekerk 2007 *SA Merc LJ* 502.

[222] See *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A) at 625–6. An aircraft let out by A was damaged because of B's negligent failure to keep a runway in proper condition. A was insured against damage to the aircraft but suffered further damage because it also lost profit as well as the benefit of expenses which it still had to incur in connection with the storage and licensing of the aircraft. In terms of the former Local Government Ordinance 21 of 1942 (s 254(2)) a claim against B could be instituted only

one month after proper notice had been given. The question was whether A had complied with these requirements.

The court a quo (1972 (4) SA 626 (N)) held that A had not given proper notice. However, the Appellate Division reversed this decision, holding that A had given notice since its insurer (V) who had paid for the repairs to the aircraft, had written a letter to B demanding payment, failing which V would have had no other option but to institute action. The court held that this notification also covered that part of the damage for which the insurer was not liable. It argued that the damage-causing event led to only a single cause of action and, in terms of the 'once and for all' rule, to a single claim. Van der Walt *Sommeskadeleer* 452–6 criticizes this ratio (but not the judgment itself). He approaches the matter on the basis of the doctrine of subrogation and reasons that V suffered no damage from having to compensate A's loss (because V was contractually obliged to indemnify A). For this reason V had no action against B. However, B should have realized when V informed it of its intention to sue that a claim for A's total damage would be instituted, irrespective of whether A, or V acting in A's name, would sue. He adds that the facta probanda of V's claim against B differs from that of A's claim against B and that there are thus two causes of action. However, on account of the doctrine of subrogation these two claims are channelled into a single process. Therefore, the court's reliance on the 'once and for all' rule was unnecessary.

[223] 1917 AD 615.

[224] It was consequently held that, when a magistrate had finally dealt with a claim of a workman, the latter may not institute any further claim based on the same accident. See now the COID Act 130 of 1993. See *Workman's Compensation Commissioner v Van Zyl* 1996 (3) SA 757 (A) (continued exposure to noxious substance causing additional disablement—this is a 'new accident') (see for the decision of the court a quo 1995 (1) SA 708 (N)); para 14.9. In *Casely v Minister of Defence* 1973 (1) SA 630 (A) (where C claimed on behalf of his son for pain and suffering which he had sustained on account of a motor accident during military service) the question was whether such claim was the one referred to in s 145(1)*(a)* of the Defence Act 44 of 1957 (now repealed by s 106 of the Defence Act 42 of 2002) and s 37 of the War Pensions Act 82 of 1967 (now repealed by s 24 of the Military Pensions Act 84 of 1976). Section 37 stipulated inter alia that no claim arising from the disability of a volunteer may be instituted against the state if the Act in question provides for compensation for the disability. The court held it to be the intention of the legislature to abolish all claims against the State except those that lie in terms of the Act. The court held that C's son was injured as meant by s 145(1) of the Defence Act and that the consequences visualized by s 145(2) set in, namely that s 37 of the War Pensions Act should be applied because C's action was indeed one for a 'disability'. The court added (according to Van der Walt *Sommeskadeleer* 432 this is an obiter dictum) that the 'once and for all' principle supported its decision. It argued that the action for pain and suffering forms an inseparable part of a person's claim for disability. In terms of the common law, C's son would have only one action and s 37 intends to abolish such action. However, Van der Walt op cit 434 rejects the 'single cause' approach in this case and the impression that the Aquilian action and the action for pain and suffering fall within one cause of action. This criticism cannot be supported, because the differences between patrimonial and non-patrimonial loss (para 2.3.3) do not necessarily imply that there should also be different causes of action (see n 133above).

[225] 1960 (4) SA 525 (T).

[226] Here the AA in its capacity as third-party insurer of a motor car which was driven negligently and collided with G, had already paid expenses in connection with G's accommodation in a hospital. The question then arose whether a further claim in terms of s 11(1) of Act 29 of 1942 (now s 17(1) of the RAF Act 56 of 1996) for the cost of hospitalizing G could be instituted against the AA after the period of prescription for third party claims had been concluded. The court held that a claim for the supply of hospital accommodation (see s 17(5) of the RAF Act) could not arise until such service had been rendered, implying that the cause of action did not arise at the time of the collision. Prescription against the AA could accordingly not commence to run before the AA had provided such services to G. The court added that, if G had been the plaintiff, his cause of action would have accrued at the time of the accident. Van der Walt *Sommeskadeleer* 440 correctly points out that G would have an action only if he actually suffered a loss.

[227] See eg Van der Merwe & Olivier *Onregmatige Daad* 486.

[228] Neethling & Potgieter *Delict* 360–1.

[229] Act 9 of 1989.

[230] Act 131 of 1993.

[231] Act 13 of 2009. Liability without fault applies, according to s 8(2), only if 'material' damage is caused in given circumstances. There may thus be two causes of action arising from one incident: the first provided for in s 8(2) and the second in terms of the action for pain and suffering.

[232] Para 9.4.4. If there are, eg, different acts of publication of defamatory words by the same defendant, there are different causes of action. (Repetition of defamatory allegations in one publication will apparently only increase the quantum of satisfaction.) See *Pearce v Kevan* 1954 (3) SA 910 (D) at 914. See further Burchell *Defamation* 81. See also *Ngcobo v Minister of Police* 1978 (4) SA 930 (D). N was unlawfully arrested on 9 January 1975 and released on 4 March 1975. He instituted his action on 2 September 1975. In terms of s 32(1) of the Police Act 7 of 1958 any action had to be instituted within six months (it is three years at present). The defendant submitted that there was only one cause of action covering the wrongful conduct which accrued on 9 January 1975 and that the relevant six-month period had expired before the commencement of the action. The plaintiff, however, argued that at the time of his release he had one cause of action for the whole period and while that portion which lay outside the six-month period was rendered unenforceable he still had a cause of action for his detention on 2, 3 and 4 March. The court held that there were two causes of action (one for arrest and the other for detention). In respect of the detention there was a single cause of action and, following *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A), the court (reluctantly) held that it could award satisfaction only for the three days referred to earlier. See further also *Veley v Vinjevold* 1935 NPD 578—a judgment for damages claimed for seduction does not bar a subsequent claim for lying-in expenses. See further *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) (claim for assault and claim for wrongful arrest based on two causes of action).

[233] Para 9.4.5.

[234] See para 7.5.3 on the position when the action for pain and suffering is instituted together with the Aquilian action.

[235] See, eg, Neething et al *Law of Personality* 85–6; *GQ v Yedwa* 1996 (2) SA 437 (Tk) at 438–9; *Jooste v Minister of Police* 1975 (1) SA 349 (E) at 355; *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281–2; para 5.7.2 for examples where infringement of physical integrity and insult go hand in hand; and *Le Roux v Dey* 2011 (3) SA 274 (CC) at 320 for other instances of overlapping of manifestations of iniuria. See also Visser in Du Bois et al (eds) *Wille's Principles* at 1166.

[236] 'According to established principle, an award of damages for defamation should compensate the plaintiff for both wounded feelings and loss of reputation' (*Le Roux v Dey* 2011 (3) SA 274 (CC) at 322, also 319–20). See also *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 218-19, 231 and cf *Kriek v Gunter*1940 OPD 136 at 140; *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C) at 595; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260.

[237] *Le Roux v Dey* 2011 (3) SA 274 (CC) at 319–20; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 39–40.

Chapter 8
NATURE, ASSESSMENT, OBJECT AND FORM OF DAMAGES FOR PATRIMONIAL LOSS

8.1 DEFINITION OF DAMAGES [1]

Damages [2] *are a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage*. [3]

The following general comment may be offered on this definition:

(a)

Damages must necessarily be expressed in money, [4] but the definition does not restrict the monetary equivalent to a (single) lump sum [5] since damages may also take the form of instalments or other type of payments. [6]

(b)

Damages are in principle available for all forms of damage, in other words, patrimonial as well as non-patrimonial loss. [7] In this chapter only the position in regard to patrimonial loss will be discussed. [8]

(c)

The primary object of damages is to neutralize [9] loss through the addition of a new patrimonial element. [10] If there is prospective damage, [11] a patrimony is thus increased in expectation of the negative influence of the frustration of an expectation of a benefit or the realization of an expectation of debt. [12]Damages are consequently aimed at the completed as well as the future consequences of a damage-causing event.

8.2 DAMAGES AND RESTITUTION IN KIND [13]

Damages are not the only remedy which the law provides for damage. Restitution in kind [14] of the interests of the plaintiff as they were before the damage-causing event is available in some cases. [15] If restitution in kind can be effected only in part or does not neutralize all damage, damages are, of course, still relevant.

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In general one may conclude that damages are the primary remedy which the law provides for loss already sustained. [16] Restitution in kind is therefore not the point of departure. [17] However, through an award of damages the law seeks to attain, as far as possible, the financial equivalent of restitution in kind. [18] As far as damage caused by a breach of contract is concerned, one may possibly argue that the law allows the plaintiff to select restitution in kind in so far as specific performance (fulfilment) of a contractual obligation can be ordered. [19] In delictual liability [20] an order for restitution in kind may generally not be given. In the absence of a specific rule neither the plaintiff nor the defendant may insist on compensation of loss in a manner other than an award of damages. [21]

8.3 ASSESSMENT OF DAMAGES (QUANTIFICATION OF LOSS) [22]

The assessment of damages (quantification) is the process through which damage that the law has found to exist [23] and for which compensation may be awarded is expressed in money in order to reach a specific amount of damages. [24] Quantifying damages is not the same as the assessment of damage. [25] However, damage is often directly expressed in money and this also provides a basic amount of damages. [26] In

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damage such as loss of earning capacity, [27] support [28] and loss of certain forms of profit [29] the process of quantification is usually difficult and to a greater or lesser extent based on speculation. [30] In such cases the court should assess an amount which is fair towards the plaintiff as well as the defendant and is not obliged to adopt a specific method of calculation. [31] Where a meaningful comparison with other cases is possible, this should be used as an aid in calculating the amount of compensation. [32]

But the cliché that the facts of every case are decisive is, of course, also relevant. [33] After damage has been expressed in money and a basic amount of damages has thus been determined, this amount must be adjusted in terms of other principles to obtain the final sum of damages. [34]

The time with reference to which damages are calculated is usually the same as the time used in the assessment of loss. [35]

Some further general principles applicable to the calculation of damages for breach of contract are discussed below. [36]

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8.4 NATURE AND FORM OF DAMAGES

Damages must be expressed in money. [37] When damages are calculated [38] in a foreign currency, [39] the amount should be converted to South African rands, [40] but it may also be paid in that foreign currency. [41] An important question is when conversion to rands should be done, since changes in the rate of exchange may influence the positions of the parties. [42] According to one view, the exchange rate prevailing at the date when payment is actually made may be used. [43] But in terms of another approach the time when the claim accrues (for example, when breach of contract occurs) is the relevant time. [44]

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This question has now been settled in *Standard Chartered Bank of Canada v Nedperm Bank Ltd*: [45]

> I accordingly conclude that the damages to be awarded in this case should be expressed in US dollars. It is implicit in any order to this effect that the judgment debt may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in rand when paid.

The principle of nominalism is applicable in regard to the payment of an amount of damages; this means that the amount may not be adjusted for inflation [46] after it has been determined. [47]

Damages are awarded in the form of a lump sum for damage already sustained as well as for prospective loss. [48] Section 17(4)*(a)* and *(b)* of the Road Accident Fund

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Act 56 of 1996 permits a deviation from this principle by allowing the RAF to supply an undertaking to pay future medical costs necessitated by bodily injuries whenever they have been incurred and to compensate loss of future support or income in instalments. [49]

Damages may be paid in this way only if the RAF chooses this approach and if instalments in lieu of income or support are chosen. The plaintiff must also give his or her consent. [50] In terms of s 17(6) of the RAF Act [51] and rule 34A of the Uniform Rules of Court, interim payments of damages may be made. [52]

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In certain cases of continuing breaches of contract or continuing delicts where it may be difficult to assess damages and where the value of such an award may decline in future on account of inflation, [53] it may be better to grant an interdict than an award of damages. [54]

In certain cases a court has the power to issue orders for the proper administration of an amount of damages which has been awarded. [55]

8.5 GENERAL OBJECT AND OPERATION OF DAMAGES

Boberg [56] states the object of damages in terms of the sum-formula approach:

> The object of awarding Aquilian damages is to place the plaintiff in the position in which he would have been had the delict not been committed, redressing the diminution in his patrimony that the defendant has caused. [57]

A similar principle applies in the case of damages for breach of contract. [58]

In terms of the sum-formula [59] patrimonial loss is expressed as a reduction in the value of someone's patrimony. [60] Damages, however, have the opposite effect on a patrimony or estate; they should, through the addition of a new patrimonial element, neutralize the effect of the damage-causing event as far as possible. In prospective loss the patrimony is increased beforehand in expectation of the probable decrease.

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According to the concrete concept of damage, [61] damages should act as a counterbalance for the decrease in value of specific interests by awarding their financial equivalent as compensation. [62] This expresses the idea of restitution. [63]

The ratio in awarding damages is usually to allow the plaintiff, in so far as this may be factually possible, to replace the impaired patrimonial interests or elements. [64] In the case of patrimonial loss the affected interests have a natural monetary equivalent and money may therefore allow actual restoration. [65]

However, the law is not interested in what a plaintifff actually does with his or her damages and the plaintiff does not have to neutralize his or her damage in real terms. [66]

In an award of damages the emphasis falls on the extent of the plaintiff's damage (ie what he or she has lost) and not on what the defendant ought reasonably to pay. [67]

Van der Walt [68] describes the object of damages as the fullest possible compensation of damage. Absolutely perfect compensation cannot, of course, be attained. The reason for this is to be found in the equivalent nature of compensation; in other words, the aim is not factual restitution, but restitution by means of a substitute, namely, money. [69] The loss of the utility value of something which has been impaired has to be 'imitated' as well as possible afterwards.

The Aquilian action for patrimonial loss is aimed at providing compensation for patrimonial loss and it is not available for affective loss [70] or any other form of injury

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to personality. [71] Injury to personality may, of course, be taken into account for the purposes of an action for *satisfaction* [72] where the defendant acted intentionally and the actio iniuriarum is instituted against him or her. The only general examples where damages which are primarily aimed at *compensation* may be recovered for non-patrimonial loss (injury to personality) are those where the action for pain and suffering or the actio de pauperie are instituted on account of bodily injuries. [73]

Damages for patrimonial loss may not provide for the compensation of inconvenience which does not have a direct pecuniary effect. [74] This principle probably demonstrates a lacuna in our law of damages. [75]

The position in regard to non-patrimonial loss in the law of contractual damages is discussed elsewhere. [76]

8.6 DUPLICATION OF DAMAGES

It is contrary to the object of damages to compensate the same damage (or a part thereof) twice. [77]

If, in the case of bodily injuries, damages are awarded for aids to render the plaintiff's life more tolerable, duplication may occur if damages for pain and suffering are assessed without taking this fact into account. [78] In loss of earning

capacity damages may not be awarded for expenses which the plaintiff would in any event have incurred. [79] If the defamation of a legal person leads to a loss of income, the impairment of its business reputation is to a large extent covered by an award for loss of profits. This fact must, of course, be kept in mind in calculating damages for 'general' damage. [80] If damages are asessed for breach of contract on the basis of a loss of gross profit, damages may not be awarded for expenses incurred by the plaintiff. [81] If benefits which a plaintiff has received are wrongly excluded in the assessment of damages, it would amount to the plaintiff receiving double compensation. [82]

8.7 SATISFACTION AND PUNISHMENT IN DAMAGES [83]

Although Roman-Dutch law accepted compensation of actual patrimonial loss as the main object of damages, [84] the English principles of *aggravated*, *punitive*, *vindictive*, *penal* and *exemplary damages* [85] had a considerable influence on our

law. [86] In the actio iniuriarum [87] punishment of a wrongdoer is regarded as relevant by some because they regard it as the only way in which the plaintiff may receive satisfaction. [88] Such punitive considerations and the influence of English law on this action are discussed elsewhere. [89] In the Aquilian action [90] there is no room for any primary function other than compensating a plaintiff's patrimonial loss. [91] However, there are older cases from which it appears that an award of damages was made in order to punish the defendant [92] and no distinction is made between the actio iniuriarum and the Aquilian action. [93]

It is no longer possible to recover or award an amount to punish someone by

means of an action for damages. [94] The so-called penalties in terms of the Conventional Penalties Act 15 of 1962, are also primarily aimed at compensation and not at punishment. [95] A secondary punitive function may, however, exist in regard to any award of damages, since the defendant who has to pay may experience his or her obligation as punishment. This may cause people to act with more care and be more reliable. In the modern law of damages, however, the idea of punishment with elements such as rehabilitation and deterrence have, to a large extent, lost its significance as more emphasis is being placed on risk-liability (in which fault is not required) and many instances of liability are handled by the insurance industry. This development may possibly cause the law to treat more benefits which a plaintiff receives as collateral matters and thus prevent a windfall to the defendant. [96]

An award of delictual or contractual damages is aimed neither at providing satisfaction [97] nor at neutralizing feelings of outrage which a plaintiff or the community may experience on account of the commission of a delict or breach of contract. [98] Although a plaintiff may subjectively obtain satisfaction from the receipt of an award of damages, his or her possible need of satisfaction should play no role in calculating damages [99] or in an award of nominal [100] damages. [101]

In *Fose v Minister of Safety and Security* [102] the plaintiff claimed damages arising out of the alleged assault for pain and suffering, loss of amenities of life, insult and for past and future medical expenses. In addition, a sum of R200 000 was claimed

under the head of constitutional damages [103] which amount included an element of punitive damages. The Constitutional Court upheld an exception against such a claim. [104] It appears that an award for constitutional damages will only be regarded as appropriate relief in terms of s 38 of the Constitution, 1996 if no other effective compensatory remedy, including a common-law remedy for damages, is available. [105]

8.8 NOMINAL DAMAGES [106]

Under the influence of English law [107] awards of nominal damages have also been made in our law. [108] In following the English concept of a 'tort actionable per se' [109]and in the case of a breach of contract, 'damages' are awarded without proof of loss. Such an award is aimed at confirming a plaintiff's right and as 'a mere peg on which to hang costs'. [110] In some cases nominal damages were even intended to serve as punishment. [111]

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In *Jansen v Pienaar* [112] the following well-known dictum appears:

> The summons set out an infringement of a right, and alleges specific damages. But the moment the plaintiff proved a wrong—as soon as he proved the enticing away, he was entitled to some damages, though he did not prove one farthing of actual damages. [113]

During the nineteenth century and at the beginning of the twentieth century, there were many decisions in which nominal damages were awarded. [114]

Despite opposition, [115] nominal damages were also awarded for breach of contract. [116] Cases where a small amount of damages was awarded for actual loss should not really be cited as support for the concept of nominal damages. [117] In some instances it was held that the court may not award nominal damages unless an action is instituted to vindicate a right which will have some value in future or unless breach of contract was intentionally [118] committed. [119] The availability of an action for nominal damages upon breach of contract has been confirmed by the Appellate Division, [120] but several authors express doubt whether this is still the position. [121]They state that, since 1935, there have been almost no reported cases of nominal

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damages [122] and that a plaintiff who has not proved his or her damage is not entitled to any compensation. [123] It is probably correct to argue that nominal damages have no place in our law, but until the Supreme Court of Appeal finally confirms this view, it cannot be concluded that nominal damages have finally disappeared. [124]

There are some statutory provisions which allow the recovery of damages without proof of actual loss. [125]

8.9 DAMAGES FOR PATRIMONIAL LOSS UPON BREACH OF CONTRACT [126]

8.9.1 General object of damages

Every breach of contract resulting in damage (assessed in terms of a comparative method) [127] to the other contracting party generally forms the basis of an action for damages. [128] Damages may be recovered irrespective of the form of breach of contract present or the availability of other remedies. [129] The object of an award of damages is to place the plaintiff in the position he or she would have occupied had

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the defendant performed properly and timeously. [130] The correlate of this is that a plaintiff should not be placed in a better position than he or she would have occupied had the other party performed properly. [131] Further general principles in assessing damages are discussed elsewhere. [132]

8.9.2 Damages as surrogate of performance

The view is expounded [133] that a plaintiff who is prima facie entitled to specific performance may in the alternative claim damages as substitute for performance. This means that he or she may claim the objective financial value of the performance or a part of it. [134]

However, *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* [135] has brought doubt as to the correct position. Different judgments in this case present problems in finding the true rationes. Three of the judges are of the opinion that our law does not recognize damages as surrogate of performance. [136] Jansen JA argued that damages as surrogate of performance do not really constitute a claim for damages but rather amount to specific performance in a different guise. He added that, if our law were to recognize this remedy, many ancillary rules would

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have to be introduced. Does a plaintiff, for example, have a choice between specific performance and the objective value of performance? Does the decision lie only with the plaintiff? If a court does not order specific performance because it will unreasonably prejudice the defendant, is the plaintiff still entitled to insist on damages as surrogate? The court accordingly held that where the lessee had not returned the premises in the proper condition, [137] the lessor may claim specific performance or his id quod interest, that is, damages calculated in the normal manner. [138]

8.9.3 Compensatory, restitutionary and complementary damages [139]

Compensatory damages usually refer to damages calculated in terms of positive interesse. [140] Restitutionary damages are seen as compensation assessed with reference to negative interesse [141] on account of a breach of contract or misrepresentation inducing a contract. [142] The view that a claim for complete or partial restitution of a performance (eg a purchase price) amounts to 'restitutional damages' [143] is properly subjected to criticism. [144] Restitution is not the same as damages.

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Complementary damages are aimed at 'supplementing' incomplete or defective performance. [145]

8.10 MORA INTEREST ON DAMAGES [146]

8.10.1 General

Interest is relevant in the law of damages in inter alia the discounting of damages for prospective loss [147] and as a measure of damage which is sustained on account of the late payment of a monetary debt. [148] An example of the latter is damage caused by a delay in the possession of damages (as an amount of money) which is due to a plaintiff. [149]

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8.10.2 Debt must be due

Generally speaking, a debtor, in the absence of an agreement to the contrary, has to pay interest on the debt from the moment the debtor is in mora (in other words, from the date the debt is due). [150] The debtor will be in mora as soon as the debt is liquidated, the plaintiff has placed the debtor in mora by a proper demand and the debtor has no valid defence against the claim. [151] Sometimes no demand is required, for instance where the parties have contractually agreed on the date when payment has to occur or in the case of theft. [152]

A liquidated debt is a debt based on a liquid document, or one regarding which the amount has been acknowledged, or the value whereof has been determined or which can easily and speedily be determined. [153]

Despite the principle that interest begins to run from the moment the debtor is in mora, there are a number of cases in which the court awarded the creditor damages in the form of interest from the date of service of the summons. [154] The correct explanation of these cases is probably that the plaintiff was not entitled to damages from an earlier date and that the summons served the function of a demand for immediate payment. [155] One should also suppose that immediate payment of a monetary debt was reasonable in the circumstances. [156]

A judgment debt is a liquidated amount and interest therefore runs on the amount of damages awarded by a trial court from the date of the court's decision even if a court of appeal reduces the amount of damages. [157] If damages are awarded

in a foreign currency, mora interest runs on the amount in the foreign currency. [158]Interest on costs runs from the date of the taxing master's allocatur. [159]

In a claim for unliquidated damages the defendant was not liable in the common law to pay interest thereon in the absence of an agreement as to such quantum or until the amount has been assessed by the court. [160] The legislator has drastically amended the common law in this regard.

Section 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 invests a court with a general discretion to make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run. [161] The court has this wide discretion despite the following two specific provisions of this Act.

Section 2A(2)*(a)* of the Prescribed Rate of Interest Act 55 of 1975 provides that, subject to any other agreement between the parties [162] and the provisions of the National Credit Act 34 of 2005, the interest on unliquidated debts shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier. [163] A demand is defined as a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum of it.

The National Credit Act 34 of 2005 provides that interest on damages for loss or damage suffered as a result of prohibited conduct or the dereliction of required conduct in terms of the National Credit Act will commence on the date of issue of a certificate by the National Consumer Tribunal in which it is declared that the conduct constituting the basis of the claim for damages or loss amounts to prohibited or required conduct in terms of the National Credit Act. [164]

Section 2A(3) of the Prescribed Rate of Interest Act provides that the interest on that part of a debt which consists of the present value of a loss which will occur in the future shall only commence to run from the date upon which the quantum of that part is determined by judgment, arbitration or agreement. [165]

The National Credit Act 34 of 2005 furthermore provides that interest is payable on the final amount owing after unilateral termination by the consumer or debt enforcement from the date of the demand until the date that it is paid at the rate applicable to the credit agreement on any outstanding amount. [166]

The Consumer Protection Act 68 of 2008 determines that interest will be payable on money returned to the consumer from the date it was paid to the supplier to the date it is refunded in the case of unsolicited goods or services as well as of over-selling and over-booking. [167]

Section 17(3) of the RAF Act 56 of 1996 contains a special provision regarding interest on damages in terms of third-party compensation. [168]

8.10.3 Rate of mora interest

At what rate does a money debt (eg an amount of damages) bear interest? Before the Prescribed Rate of Interest Act 55 of 1975, mora interest was calculated in terms of the 'current rate' of interest. [169] In order to rid the law of uncertainty as to the 'current rate' of interest, [170] the Prescribed Rate of Interest Act was adopted which gives the Minister of Justice the power to prescribe a rate of interest from time to time for debts not covered by any other law, or an agreement or trade custom, or in any other way. [171] The Act is not retrospective [172] and the rate has been changed several times. [173]

A creditor who has obtained judgment is from that moment automatically entitled to interest calculated at the prescribed rate (even though he or she has not claimed interest) unless the court orders otherwise in the case of special

circumstances. [174] There is no definition of the nature of 'special circumstance' in the Act. In *Davehill (Pty) Ltd v Community Development Board* [175] the court held that alleged special circumstances should relate to the debt in question and that the mere fact that the Minister has amended the prescribed rate of interest does not per se amount to special circumstances. [176]

Interest will run against the principal sum of the judgment debt and the costs, but not against the interest component of the judgment debt [177] as a judgment debt is defined in the Act as any sum of money due in terms of a judgment or order including an order as to costs but excluding any interest not forming part of the principal sum of a judgment debt. [178]

Despite the Act, it is possible for parties to a contract to come to an agreement concerning the rate of mora interest and whether it will be simple or compound interest. However, such an agreement qualifies as a penalty in terms of the Conventional Penalties Act 15 of 1962 and will thus be subject to reduction. [179]

If common-law principles are applied in respect of the Act, mora interest is simple and not compound interest. [180]

What would be the position if the rate of interest were to change during the existence of a debt? [181] In *Davehill (Pty) Ltd v Community Development Board* [182]the Appellate Division held that the Act 'does not provide for the rate to vary from time

to time in accordance with adjustments made to the prescribed rate [of interest]'. Interest is thus calculated at a fixed rate unless there are special circumstances and the court orders otherwise. [183]

The Consumer Protection Act 68 of 2008 expressly makes the Prescribed Rate of Interest Act applicable to two instances where interest has to be paid on moneys that have to be repaid. Firstly, if a consumer has made any payment to a supplier or deliverer in respect of any charge relating to unsolicited goods or services or the delivery of such goods, the consumer is entitled to recover that amount with interest from the date on which it was paid to the supplier. [184] Secondly, when the supplier cannot supply the goods according to a lay-by agreement due to circumstances beyond the supplier's control, the supplier has to refund the consumer any money paid with interest. [185] In contrast, the interest which has to be paid on any money that the consumer has paid to the supplier in the case of over-selling and over-booking where the supplier's inability to supply the goods or service is due to circumstances beyond the control, of the supplier has to be at the rate prescribed in terms of the the Consumer Protection Act. [186]

There is also a specific provision in the National Credit Act 34 of 2005 on mora interest. [187] The interest rate applicable to an amount in default or an overdue payment under a credit agreement may not exceed the highest interest rate applicable to any part of the principal debt under that agreement. [188] This interest is furthermore subject to the statutory in duplum rule. [189]

8.10.4 In duplum rule

Interest runs until the debtor has satisfied the debt. [190] The debtor is, however, protected by the common-law rule of in duplum, which means that if mora interest reaches an amount equal to the capital sum due, it ceases to run. [191] If a part of the

interest is paid, it accumulates again up to the amount of the capital sum. [192]

The National Credit Act 34 of 2005 has amended and extended the common-law in duplum rule in regard to credit agreements subject to the Act. [193] The National Credit Act provides that interest (default and contractual), initiation fees, service fees, cost of any credit insurance, default administration charges and collection costs which are in arrears, may not in aggregate exceed the unpaid balance of the principal debt at the time the default occurs and may not accrue any further until the debtor is no longer in default. Only when the debtor is no longer in default can interest (and the other costs) accrue again. [194]

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[1] See also McGregor *Damages* 1: 'Damages are the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally and in sterling'; Exall *Munkman on Damages*1: 'Damages are simply a sum of money given as compensation for loss or harm of any kind'; *Halsbury's Laws of England* 4th ed vol 12 para 1102: '*Damages* are the pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him'; Luntz *Damages: General Principles* 1: '"Damages" ... is the word used to describe a sum of money that a court may award to a successful plaintiff in an action in tort or for breach of contract'. See also *Russell, Loveday v Collins Submarine Pipelines* 1975 (1) SA 110 (A) at 145; Bloembergen *Schadevergoeding* 114: 'Het vergoeden van schade is derhalve het zoveel mogelijk goed maken van de schade door het verrichten van een aan die schade gelijkwaardige prestatie ten behoeve van die benadeelde.'

[2] Cf *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 253. The word *compensation* may be used as an equivalent of *damages*('skadevergoeding'). *Compensation* is also useful to refer to an award of damages

('skadevergoeding') of non-patrimonial loss. See Van der Merwe & Olivier *Onregmatige Daad* 279 for an argument in favour of restitution in kind; para 8.2. See further Visser 1983 *THRHR* 43.

[3] See para 2.1 on damage. See, eg, Erasmus & Gauntlett 7 *LAWSA* para 9: '[D]amages in the sense of *solatium*, satisfaction or *genoegdoening* are usually intended to neutralise the wounded feelings of the plaintiff of having to suffer a wrongful act, whilst the object of aquilian and contractual damages is merely to redress the diminution in the plaintiff's patrimony'. See also Van der Walt 1980 *THRHR* 5 (cf *Sommeskadeleer* 285), who defines damages as an amount of money awarded to someone for the impairment or loss of the need-satisfying potential from a patrimonial asset. This definition may be criticized for apparently referring only to damage already sustained and for excluding non-patrimonial loss from the operation of compensation (see para 2.3.2).

[4] See para 8.4 on the nature and form of damages; see however also n 9 below.

[5] See on this Koch *Lost Income* 31, who describes a lump-sum award (for lost income or support) as a buying-off price not really capable of replacing a lost income flow.

[6] See para 8.4 on s 17(4)*(a)* and *(b)* of the Road Accident Fund Act 56 of 1996 (RAF Act), which provides for the payment of medical expenses as they are incurred and loss of income and support in instalments. See also s 47(4) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COID Act) on periodic payments in the case of temporary total disability.

[7] See also Erasmus & Gauntlett 7 *LAWSA* para 9: 'In accordance with the language of damages of English law, the term ''damage'' (and its Afrikaans equivalent *skade*) is used to denote both patrimonial (pecuniary) damage and non-patrimonial (non-pecuniary) damage, and the term ''damages'' (and its Afrikaans equivalent *skadevergoeding*) is used to denote the monetary compensation recoverable in both cases.'

[8] See para 9.5 on damages for non-patrimonial loss.

[9] It is probably an oversimplification to see damages only as an amount of money. Money is the means through which the law compensates someone for patrimonial loss in that the money is made available to restore an impaired interest to its former potential in so far as money is able to achieve this purpose. Viewed in this way, damages in a broad sense indicate a process of restoration; see Visser 1983 *THRHR* 45–6; Neethling & Potgieter *Delict* 211.

[10] Para 3.2. In some cases a new patrimonial expectancy is added as counterbalance to an expectation of debt: for example, an undertaking by the RAF to pay medical expenses as incurred (s 17(4)*(a)* of the RAF Act 56 of 1996 (para 14.4.2).

[11] Para 6.1.

[12] Para 3.2.4.2*(b)* et seq.

[13] See in general Van der Walt *Sommeskadeleer* 23, 24, 44, 50, 64–8, 89, 123, 155, 157, 184, 286. See also Reinecke et al 12 *LAWSA* (reissue) para 304 on reinstatement in the law of insurance.

[14] See Van der Walt op cit 26 on the differences between damages, fulfilment and restitution. See on restitution in regard to contract *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A); *Van Heerden v Sentrale Kunsmis Korp (Edms) Bpk* 1973 (1) SA 17 (A); *Baker v Probert* 1985 (3) SA 429 (A); Lubbe & Murray *Contract* 592; Joubert *Contract* 246; Kerr 1989 *SALJ* 103–8. See para 8.9.3 on damages as surrogate of performance.

[15] See, eg, *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) at 117 on the erection of shacks which have been unlawfully removed. According to the court, use may even be made of material other than the original material. See further *Vena v George Municipality* 1987 (4) SA 29 (C) at 52; Blecher 1978 *SALJ* 11; Sonnekus 1978 *TSAR* 169; Van der Walt 1986 *TSAR* 229–32; *Potgieter v Davel* 1966 (3) SA 555 (O); Harker 1991 *SALJ* 31–2. Van der Merwe *Sakereg* 142 submits that, if it is impossible to restore possession of the original property, delictual damages should be the only remedy. See generally Kleyn *Mandament van Spolie* 398–9. One may regard the rei vindicatio as a remedy aimed at restitution in kind. See also Van der Merwe & Olivier *Onregmatige Daad* 279, who describe the actio Pauliana and the operation of the doctrine of notice as delictual remedies aimed at neutralizing damage through restitution in kind (cf *Nedcor Bank Ltd v ABSA Bank* 1995 (4) SA 727 (W) at 729; *Commissioner, South African Revenue Service v ABSA Bank Ltd* 2003 (2) SA 96 (W). Further examples of restitution in kind are where a court orders the eviction of a lessee, the delivery of property or the release of a person. An apology offered by someone for defaming another, in a sense amounts to (partial) restitution (para 15.3.2.3*(b)*). See also Bloembergen *Schadevergoeding* 123–4. See regarding an interdict and a claim for damages *Signature Design Workshop CC v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C).

[16] An interdict may be sought to prevent damage which is about to be inflicted. See also Neethling & Potgieter *Delict* 364 n 100 on the actio pluviae arcendae.

[17] See Van der Walt *Sommeskadeleer* 24–5 on German law, where restitution in kind is the basic way of compensating loss (see para 249 Bürgerliches Gesetzbuch (BGB)). See further Bloembergen *Schadevergoeding* 122–3.

[18] See para 8.5 on the object of damages. See also *Erasmus v Davis* 1969 (2) SA 1 (A) at 12.

[19] See, eg, *Farmer's Co-operative Society v Berry* 1912 AD 343 at 350: '*Prima facie* every party to a binding agreement who is ready to carry out its own obligation under it has a right to demand from the other party, as far as possible, a performance of his undertaking in terms of the contract.' See also *Benson v SA Mutual Life Ass Society* 1986 (1) SA 776 (A) at 782; Kerr *Contract* 677 et seq. Even though specific performance is ordered, damages may still be relevant where not all the damage is extinguished (see para 12.1 et seq and cf, eg, Joubert 1982 *THRHR* 76 for a brief exposition of the different remedies of a party to a contract).

[20] Which, for this purpose, refers to all cases of liability other than contractual liability.

[21] See para 8.5 on the law's attitude on what the plaintiff does with his award of damages. See also *G & M Builders Supplies (Pty) Ltd v SAR & H* 1942 TPD 120, according to which a plaintiff who has already repaired its property may still claim damages calculated on the basis of the reasonable cost of repairs. The opinion expressed by Van der Walt *Sommeskadeleer* 286 that, where plaintiffs are given money so that they may themselves provide restitution in kind, this is no longer an award of damages proper, cannot be correct. This view would undermine the difference between damages and restitution in kind. It may, of course, happen that the distinction between these two remedies is sometimes rather vague: Where A steals R1 000 from B and has to return an equivalent amount, one may see this as damages or as restitution in kind. This is possibly also the position in compensation for pure economic loss (para 13.10).

[22] See para 12.1 et seq for specific instances of calculating damages; para 6.1 on prospective loss.

[23] See para 4.1 et seq on the determination of damage.

[24] See in general Kerr 1986 *SALJ* 339–40. See para 4.5 on the correct moment for the assessment of damage.

[25] Damage is assessed through a comparison of, for example, the utility of the plaintiff's interests before and after the damage-causing event (see para 4.2 on patrimonial loss and para 5.6.4 on non-patrimonial loss).

[26] eg in injury to property damage and damages may be expressed as the reasonable cost of repairs (see para 13.1*(a)*).

[27] Para 14.6.

[28] Para 14.7.2.

[29] Para 6.4.3.

[30] See para 6.7.1.

[31] See *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 608; *Waring and Gillow Ltd v Sherborne* 1904 TS 340; *Chisholm v ERPM Ltd* 1909 TH 297; *Hulley v Cox* 1923 AD 234; *Smart v SAR & H* 1928 NLR 361; *Paterson v SAR & H* 1931 CPD 289; *Jacobs v Cape Town Municipality*1935 CPD 474; *Arendse v Maher* 1936 TPD 162; *Van Heerden v Bethlehem Town Council* 1936 OPD 115; *Graaff v Speedy Transport* 1944 TPD 236; *Maasberg v Hunt, Leuchars and Hepburn* 1944 WLD 2; *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W).

[32] See Corbett & Buchanan I 5. See, however, *Union and SWA Ins Co Ltd v Humphrey* 1979 (3) SA 1 (A) at 15: 'It has frequently been pointed out that comparisons of this nature are not often helpful, that each case is in a sense without parallel and that previous decisions seldom provide a useful standard of comparison.'

[33] See, eg, *Erasmus v Davis* 1969 (2) SA 1 (A) at 17: 'Whether a plaintiff has indeed suffered damages [sic] and the *quantum* thereof are questions of fact which must be determined according to the circumstances of the particular case.' See also *De Jager v Grunder* 1964 (1) SA 446 (A) at 451.

[34] Provision should be made, for example, that no damages are awarded for damage which may not be attributed to the defendant because of the absence of legal causation (para 11.5); that the amount of damages for which a plaintiff sues in delict is reduced in proportion to his or her contributory negligence (para 11.4); that damages are reduced if benefits which the plaintiff has received are not excluded by the operation of the collateral source rule (para 10.1) or if he or she has not mitigated his loss as expected of the plaintiff (para 11.3); that damages for future loss are discounted (paras 6.7.5, 14.6.6) and provision is made for contingencies (paras 6.7.3, 14.7.5.4). In some cases there are also statutory limitations on the amount of recoverable damages (para 11.8).

[35] Paras 4.5 and 12.7.2.4. Damages may, of course, be adjusted with reference to facts which occur only after the damage-causing event, for instance, the failure of the plaintiff to mitigate his or her loss (para 11.3), future compensating advantages which should be taken into account (para 10.1 et seq) etc.

[36] Para 12.1 et seq.

[37] See Erasmus & Gauntlett 7 *LAWSA* para 16 and the authority in n 1 above. In old cases (eg *Madolo v Munkwa* 1894 SC 181 and *Dantile v M'Tirara* 1892 SC 452) cattle were awarded as damages in terms of indigenous law. See further Bloembergen *Schadevergoeding* 122–3; para 8.2 on restitution in kind.

[38] See, eg, *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) at 674: 'In this case we are dealing with a situation where the main heads of the actual loss suffered by the plaintiff either in the sense of money actually expended or in the sense of money not received was suffered in a foreign currency. That was the currency in which the plaintiff's loss ''was felt''. That being so, the only way in which the plaintiff can be compensated properly for his loss is to grant judgment in a foreign currency.' In *Voest Alpine Intertrading Gesellschaft mbH v Burwill and Co SA (Pty) Ltd* 1985 (2) SA 149 (W) the parties were ad idem that damage has been suffered in US dollars. See also *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pty) Ltd* 1988 (2) SA 690 (Z); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774–5; Kerr *Contract* 642–4.

[39] *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate* 2002 (3) SA 765 (T) at 815; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774–5. See also Koch *Lost Income* 170–2, *Reduced Utility* 176.

[40] This follows from, eg, *Levinson v Batten and Co Ltd* 1940 TPD 41; *Bank of Lisbon v Optichem Kunsmis (Edms) Bpk* 1970 (1) SA 447 (W). See also *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd*1986 (4) SA 671 (C) at 672–3.

[41] See S*tandard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 777; *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate* 2002 (3) SA 765 (T) at 815; *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 29; *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) at 674 (see n 43 below). Payment in foreign currency can occur only if the foreign-exchange regulations are not contravened. See also *Barclays National Bank v Thompson* 1985 (3) SA 778 (A).

[42] See in general McGregor *Damages* 598–628; *Miliangos v George Frank (Textiles)* 1976 AC 443.

[43] See *Elgin Brown and Hamer (Pty) Ltd v Dampskibsselskabet Torm Ltd* 1988 (4) SA 671 (N) at 674: 'When judgment is given in a foreign currency it is necessarily implicit that it may be satisfied in South Africa by payment in the foreign currency or by the payment of its equivalent in rand when paid'; *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 30; S*tandard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 774–5. See Koch 3 (1992) *Newsletter* 5. But see the example by Kerr *Contract* 830–1, where a different date may be relevant.

[44] See *Voest Alpine Trading Gesellschaft mbH v Burwill and Co SA (Pty) Ltd* 1985 (2) SA 149 (W) at 150–1: 'In *Barry Colne and Co Ltd v Jackson's Ltd* 1922 CPD 372 Gardiner J, on the strength of Roman-Dutch authority, held that where the price of goods sold is given in a foreign currency, in the absence of any term in the contract to the contrary, payment may be made in local currency of the place of payment of a value equivalent to the price agreed upon at the rate of exchange ruling at the date when payment falls due. This was followed in *Bassa Ltd v East Asiatic (SA) Co Ltd* 1932 NPD 386 at 390–1. (See too Wessels *Law of Contract in South Africa* (vol 2) 2nd ed paras 2223 and 2270, Wille and Millin's *Mercantile Law* 16th ed at 109; Mostert, Joubert and Viljoen *Die Koopkontrak* at 9; Mackeurtan *The Law of Sale of Goods in South Africa* 4th ed at 277–8.)

'The same rule would, I consider, apply to a contractual claim for damages of the type which is in issue here. Seeing the price of the goods was payable in US dollars, it can be assumed that the plaintiff's claim for damages would be similarly payable. It would be due when the breach occurred. Though only quantified by the judgment, the damages are assessed as at this date. Accordingly, defendant's liability in rand must likewise be determined. Subsequent fluctuations in the value of currency are to be ignored.'

The court added that the failure by the defendant to pay the damages at an earlier stage had caused a considerable loss to the plaintiff for which he could possibly claim damages. See for a general discussion Kerr 1986 *SALJ* 339–43. See also Radesich 1987 *THRHR* 236, 237 who comments as follows: 'Nevertheless . . . the dates relevant to calculation of damages and conversion respectively ought not to be confused and the view that *in casu* damages were calculated at the time of breach cannot be supported ... .

'Recent developments in foreign legal systems compatible with ours provide sufficient persuasive authority for the acceptance of the rule not only that a court order may be expressed in foreign currency but also that an amount in foreign currency is to be converted into local currency at the date when leave was given to enforce the judgment.'

See further Tager 1986 *Annual Survey* 119; *Murata Machinery Ltd v Capelon Yarns (Pty) Ltd* 1986 (4) SA 671 (C). Tager 1986 *Annual Survey* 124 gives the following summary of the latter case: 'The learned judge in *Murata Machinery Ltd* held further that the date of conversion of the foreign debt into South African currency should be the date when payment is actually effected and not when payment falls due. In a claim for damages, however, the date of breach might be the appropriate conversion date.'

In a thoroughly researched article High and Pickering 1994 *SALJ* 286 come to the following conclusion: 'The rule adopted in *Miliangos* [see McGregor *Damages* 606–28] and, to some extent, in *Elgin Brown* is not without its problems. But, it is submitted, the authoritative acceptance of the competency of judgments in foreign currencies, or their *proper* equivalents, would lead to more efficient outcomes and lessen the disincentives and misallocation of resources which the alternative theories induce'. See also *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co of Zimbabwe (Pvt) Ltd* 1988 2 SA 690 (Z); Spiro 1985 *CILSA* 377–84; *Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd* 1989 (1) SA 164 (N) at 167–8: 'It seems that in the circumstances of this case the currency in which the loss was suffered and the proper currency in which the loss is to be expressed is the rand; the money did not have to be sent here from overseas to pay the claims but was already here in rands to pay. Whilst the attachment might have been the *causa sine quo non* in producing the loss it was not the *causa causans*, which was the fall in the rand. Compare *Incorporated General, Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) at 862.'

Cf further *Inter Maritime Management SA v Companhia Portuguesa de Transportes Maritimos EP* 1990 (4) SA 850 (A), where the rate of exchange prevailing at the time when the high security had to be maintained was used (see para 13.13).

[45] 1994 (4) SA 747 (A) at 777. See also *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate* 2002 (3) SA 765 (T) at 815; *Radell v Multilateral Motor Vehicle Accidents Fund*1995 (4) SA 24 (A). See also para 4.5.

[46] See para 11.7 on inflation.

[47] See *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 839–40; *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 29–30; cf *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 328; Delport 1982 *MBL* 115; Lubbe & Murray *Contract* 719; *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate* 2002 (3) SA 765 (T) at 816. However, also see *Beverley v Mutual and Federal Ins Co Ltd* 1988 (2) SA 267 (D).

[48] See also *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451 where the court commented as follows on the lump-sum approach: '[N]o better system has yet been devised for assessing general damages for future loss.' Contra Spandau 1975 *SALJ* 47 et seq, who pleads for instalments which are subject to revision. An application of this idea can be seen in *Wade v Santam Ins Co Ltd* 1985 (1) PH J3 (C), but this case is of doubtful authority. See also Dendy 1995 *SALJ* 653. See further *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A). Here the court a quo did not make a specific order as to the quantum of damages. The Appellate Division held this approach to be in error: 'In 'n skadevergoedingsaksie word dit normaalweg verwag dat daar aan die einde van die saak, na aanleiding van die getuienis, 'n bevinding gedoen word, vir eens en altyd, watter bedrag geld deur die verweerder aan die eiser betaal moet word ter vergoeding van gelede skade. M.a.w., die omvang van die verweerder se vergoedingsplig moet bepaal word, en dít is die bedrag wat in die bevel van die Hof gestel moet word. In die onderhawige geval is dit, egter, nie deur die Hof *a quo* gedoen nie. Die werklike omvang van appellant se vergoedingsplig sal eers bepaal word na aanleiding van die dividend (indien enige) wat uiteindelik betaal word' (a court should normally at the end of the case decide on the amount of money to be paid by the defendant to the plaintiff). There is uncertainty as to the applicability of the English law remedy of an 'enquiry as to damages' in, for instance the case of an action for passing-off in our law (see Neethling *Unlawful Competition* 83; para 13.6). See also *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 328: 'It appears that under the English Chancery practice, in which the order for an enquiry as to damages had its origin, the Court does not itself assess damage but orders an enquiry ... . Such enquiries are ordinarily made by a Master or official referee and the order constitutes the authority of that officer to make the enquiry. Under the South African practice, however, the trial Judge alone decides all the issues in the action, including that of damages, and it seems to me with respect that an order for an enquiry into damages is not apt under our procedure.' But see *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae), President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at 62–3; para 13.6). See also para 13.7 on the fact that an 'account of profits' for an infringement of copyright is not possible.

[49] Paras 7.5.5, 14.4.2 and 14.6.7. See in general Klopper *Third Party Compensation* 213–14.

[50] Para 14.6.7. See also *Dyssel v Shield Ins Co Ltd* 1982 (3) SA 1084 (C) at 1087 for an argument that damages for non-pecuniary loss should similarly be payable in instalments. This is, for example, the position

in German law (see Visser *Kompensasie en Genoegdoening* 336–7; McGregor *Encyclopedia*24). See also *Kleinhans v African Guarantee & Indemnity Co* 1959 (2) SA 619 (E), where the court awarded instalments. See also Spandau 1975 *SALJ* 49 et seq; *Wade v Santam Ins Co Ltd* 1985 (1) PH J3 (C); Burchell & Dendy 1985 *Annual Survey* 209, who urge caution in this regard.

[51] Paras 14.2, 14.4.2 and 14.7.7.2; See Klopper *Third Party Compensation* 312 et seq.

[52] In an action for damages for personal injuries or the death of a person, a plaintiff may at any time after delivery of a notice of intention to defend apply to the court for an order requiring the defendant to make an interim payment in respect of his or her claim for medical costs and loss of income. The court may allow this claim only where the defendant has admitted liability or the plaintiff has obtained judgment against him or her for damages yet to be determined. The court may in its discretion order the defendant to make an interim payment of such amount as it thinks just. This amount shall not exceed a reasonable proportion of the damages which, in the opinion of the court, are likely to be recovered by the plaintiff. The court has to take account of contributory negligence, set-off or a counter-claim. This rule has many other provisions. See further Koch 1989 *THRHR* 73–4; *Karpakis v Mutual and Federal Ins Co Ltd* 1991 (3) SA 489 (O); *Fair v SA Eagle Ins Co Ltd* 1995 (4) SA 96 (E); *Van Wyk v Santam Bpk* 1997 (2) SA 544 (O): Interim payments do not amount to a final judgment on the quantum of damages; they are applicable to third-party claims; the court always has a fair discretion; payment of future damage may be ordered; this rule does not prohibit an applicant from using the money in, for example, defraying his or her legal costs. See also *Nel v Federated Versekeringsmpy Bpk* 1991 (2) SA 42 (T) (Rule 34A does apply to loss of support). See further s 58 of the COID Act 130 of 1993 which also makes provision for advance payments.

[53] Paras 8.4 and 11.7.

[54] *Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd* 1989 (3) SA 460 (C) at 475. See on the relationship between an interdict and a claim for contractual damages, *Signature Design Workshop cc v Eskom Pension and Provident Fund* 2002 (2) SA 488 (C).

[55] Para 16.5; eg, *Roxa v Mtshayi* 1975 (3) SA 761 (A) at 770.

[56] *Delict* 489.

[57] See *Union Government v Warneke* 1911 AD 657 at 665; *Oslo Land Co v Union Government* 1938 AD 584 at 590; *Scrooby v Engelbrecht* 1940 TPD 100 at 102; *Pitt v Economic Ins Co Ltd* 1957 (3) SA 284 (D) at 287; *Janeke v Ras* 1965 (4) SA 583 (T) at 586; *Erasmus v Davis* 1969 (2) SA 1 (A) at 9, 17; *Santam Versekeringsmpy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150; *Dippenaar v Shield Ins Co Ltd*1979 (2) SA 904 (A) at 917; *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 99; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1010: 'Plaintiff's action is for loss of support and the general principle is that the Court should attempt to place her in as good a position, as regards maintenance, as she would have been in had the deceased not been killed.' See also *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 376; *Kruger v Santam Versekeringsmpy Bpk* 1977 (3) SA 314 (O) at 320. See also Klopper *Third Party Compensation*146, who states that '[t]he function of damage [in third party compensation] is to place a third party (in as far [as] it is practicable) by the payment of a sum of money in the same position he or she would have been in but for the delict'. It is clear that Klopper confuses damage and damages. This statement refers to the function (or object) of *damages*, not damage. See also Koch *Lost Income* 31.

[58] Para 12.1 et seq for more detail. See *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 454; *Whitfield v Phillips* 1957 (3) SA 318 (A); Joubert *Contract* 248–50; *Dennill v Atkins and Co* 1905 TS 282 at 288–9.

[59] Para 4.2.

[60] Para 3.2.

[61] Para 4.2.5.

[62] According to McGregor *Damages* 12 the 'object of an award of damages is to give the plaintiff compensation for the damage, loss or injury he has suffered'. However, this does not reveal much about the nature of the object of compensation.

[63] See Exall *Munkman on Damages* 3: 'The word ''compensation'' is derived from a Latin root, ''compensare'', meaning ''weigh together'' or ''balance''. The fundamental principle is to ''give to each person that which is their *right*''. This is essentially a matter of equality or balance. If someone owes a debt, it must be paid back. If he infringes a right, he must pay the equivalent in money of the injury or damage sustained.' See also Visser 1983 *THRHR* 46 for the difference between an equivalent and a substitute in compensation.

[64] If X's motor car valued at R50 000 is destroyed by Y, X may theoretically buy a similar vehicle with his damages of R50 000. The purchase of a new motor car does not, however, replace the loss of use which he has suffered in the meantime and for this he should also be compensated (para 13.3).

[65] In respect of some patrimonial interest or elements, money will not be able to facilitate restoration, for example in the case of the destruction or theft of a unique object (such as a painting or jewellery).

[66] See in general Visser 1988 *THRHR* 485; *Dhlamini v Government of the RSA* Corbett & Buchanan III 583. It may be relevant what a plaintiff does with interim payments in terms of rule 34A of the Uniform Rules of Court (para 8.4): *Karpakis v Mutual & Federal Ins Co Ltd* 1991 (3) SA 489 (O) at 504–5.

[67] See, however, para 8.3. See Erasmus 1975 *THRHR* 271 on the position in Roman-Dutch law (see para 1.6.2). See also McGregor *Damages* 12–13; *General Tire and Rubber Co v Firestone Tyre and Rubber Co* [1975] 1 WLR 819 (HL). See also Van der Walt 1980 *THRHR* 5, who states that damages should in the first instance not be based on something else or more than a plaintiff's actual loss. There may, of course, be secondary aims with an award of damages such as punishment, rehabilitation, deterrence and the distribution of costs (para 8.7).

[68] 1980 *THRHR* 22–3.

[69] See Van der Walt *Sommeskadeleer* 286, who submits that restitution in kind may at most prevent the further development of damage—it can never be an equivalent for the lost utility of a patrimonial asset. See para 8.2 on restitution in kind.

[70] Para 5.5. See also *Union Government v Warneke* 1911 AD 657 at 665: 'Any element of attachment or affection for the thing damaged was rigorously excluded.' In casu the court held the following where a husband instituted action after his wife had been killed: 'There is no authority in our law for the view that ''comfort and society'' of the wife can be taken into account in this action in assessing damages.'

[71] See para 5.6 et seq on non-patrimonial loss. See Boberg *Delict* 475: 'Mere mental distress, injured feelings, inconvenience or annoyance cannot support an award of Aquilian damages.'

[72] Para 9.4.

[73] Para 9.5.

[74] See *Monumental Art Co v Kenston Pharmacy* 1976 (2) SA 111 (C). An employee of K negligently left a tap open and thus caused water to flood M's business premises. In addition to patrimonial loss, M also suffered inconvenience in the process. The court held (at 125): 'I hold that there is no general discretion in a Court in an action such as the present to award compensation for inconvenience in the absence of proof of patrimonial loss being thereby suffered.' Thus compensation for inconvenience may be awarded only if it is the source of patrimonial loss or the result of the infringement of someone's physical-mental integrity. See also *Wynberg Municipality v Dreyer* 1920 AD 439 at 448; *Edwards v Hyde*1903 TS 381 at 385–6.

[75] In English law damages for inconvenience in connection with damage to property may be awarded in some instances: McGregor *Damages* 55–6; *Ward v Connock's Chase District Council* 1986 Ch 546.

[76] Para 9.5.6.

[77] Cf the analogy with the 'once and for all' rule, which prohibits the compensation of damages in different actions (para 7.3.2). (Under-compensation of damage is of course also possible in eg the incorrect accounting of benefits (para 10.1 et seq), the incorrect application of the market price rule (para 12.7.2.5) etc.)

See para 11.1.4 on the problem of duplication of *actions* where non-owners are entitled to claim damages on account of injury to property; *Smit v Saipem* 1974 (4) SA 918 (A) at 932; Reinecke 1976 *TSAR* 48. See also *McLelland v Hulett* 1992 (1) SA 456 (D) (competing actions of a shareholder and a company which, in casu, could not occur); *Van Gool v Guardian National Ins Co Ltd* 1992 (1) SA 191 (W) (actions of a father providing support and his injured daughter); cf also Neethling & Potgieter 1992 *THRHR* 480; *Erdmann v Santam Ins Co Ltd* 1985 3 SA 402 (C); Dendy 1990 *SALJ* 155.

[78] See, eg, *Administrator-General SWA v Kriel* 1988 (3) SA 275 (A) at 287; *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 786: '[I]n addition to the paramedical aids, there are other forms of relief provided for in the award thus far made, which will ameliorate the hardship of appellant's disability and his loss of amenities... . The trial Court, it should be noted, was mindful of this danger of duplication when making [an] assessment of compensation for general damages under this head.' It would also constitute duplication if compensation is given for the removal of a scar as well as damages for its future effects. See also *Niblock-Stuart v Protea Ass Co Ltd* Corbett & Buchanan II 323, 327: 'It would be fair to allow the plaintiff the cost of this operation ... and to reduce the award for general damages because of the improvement which such an operation would be likely to bring about.' See further *Light v Conroy* Corbett & Buchanan I (1985) 444–5; *Dhlamini v Government of the RSA* Corbett & Buchanan III 583; *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 28; *Ngubane v SA Transport Services* 1991 (1) SA 756 (A); *Kontos v General Accident Ins Co SA Ltd* Corbett & Honey A2–5; *Bennie v Guardian National Ins* Corbett & Honey A3–44; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–89; *Marsden v NEGI Co* Corbett & Honey A4–61; *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–33.

[79] See, eg, *Mostert v Shield Ins Co Ltd* Corbett & Buchanan I (1985) 751, 752; *Page v Rondalia Ass Corp of SA* Corbett & Buchanan I 524, 532. See further Koch *Lost Income* 178; *Reduced Utility* 240–1. See also *Commercial Union Ass Co v Stanley* 1973 (1) SA 699 (A) on earning capacity and marriage prospects.

[80] See *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 574–5.

[81] See, eg, Lubbe & Murray *Contract* 607: 'Claims for actual, out-of-pocket losses suffered in consequence of a breach, together with the expected benefit from the contract, sometimes raise the spectre of a duplication of damages.' See further *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 71; Joubert 1976 *THRHR* 7; Ogus *Damages* 352–4. If net profit is awarded, the plaintiff should receive damages for his or her expenses in order to ensure full compensation. See further Harker 1980 *Acta Juridica* 111–12; Lubbe 1984 *SALJ* 623; Kahn *Contract* I 811; McLennan 1999 *SALJ* 520; *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 460.

[82] Para 10.1. See para 10.4.1 on subrogation.

[83] See for a useful summary the following dictum of Ackermann J in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 822: 'The question whether, in addition to compensatory damages, ''penal'' or ''punitive'' or ''exemplary'' damages (expressions often used interchangeably and confusingly) are (or ought to be) awarded in delictual claims is a matter of some debate in South Africa. It appears to be accepted that in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place. The Appellate Division has, however, recognised that in the case of defamation punitive damages may in appropriate cases be awarded. In the case of damages for adultery it has been accepted that a penal component is still appropriate. It must of course be borne in mind that it is not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the *injuria*have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word. There appears to be scant authority for the award of punitive damages in the case of assault, over and above the damages awarded for patrimonial loss, pain and suffering and for, the *contumelia*suffered, which can itself be aggravated by the circumstances of and surrounding the assault.'

[84] See para 1.6.2.

[85] See McGregor *Damages* 365: '[A] possible secondary object [of damages] is to punish the defendant for his conduct in inflicting ... harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages, or even retributory damages, and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like.' Since the decisions in *Rookes v Barnard* 1964 AC 1129 and *Broome v Cassell and Co* 1972 AC 1027, exemplary damages in English law are only possible in exceptional instances because it has been held that they have no general role in the modern law of damages. These damages are awarded only in the case of a statutory authorization, oppressive conduct by a government servant and conduct calculated to result in unlawful profit. In *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 the House of Lords held that the instances in which exemplary damages should be awarded were best defined by 'the features of the behaviour in question' or the 'categories of conduct' and not by the cause of action relied on. See also *Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498; *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065 (CA). See in general McGregor op cit 365–93; Exall *Munkman on Damages* 37–8. See also Okpaluba & Osode *Government Liability* 434 et seq for an overview of recent case law in England, Australia and New Zealand and op cit 458 et seq on punitive damages in Canada.

[86] See Erasmus & Gauntlett 7 *LAWSA* para 19; Van Aswegen *Southern Cross* 578–9. See also Price 1950 *THRHR* 87; Bekker 1974 *THRHR* 403; 1975 *THRHR* 52. See, however, *SA Music Rights Organization v Trust Butchers (Pty) Ltd* 1978 (1) SA 1052 (E) at 1057.

[87] Para 9.4.1.

[88] See Visser 1988 *THRHR* 486–9; 1983 *TSAR* 74 et seq. See further *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) at 822. But see the discussion in the paras listed in n 89 for different opinions regarding the so-called punitive element of the actio iniuriarum. The preferred view nowadays appears to be that the actio iniuriarum no longer has a punitive function.

[89] Paras 9.4.2 et seq, 9.4.4, 15.3.2.3*(c)*, 15.3.7.2, 1.6.3.

[90] And in the action for pain and suffering (para 9.5).

[91] See also McKerron *Delict* 7. See on breach of contract *Woods v Walters* 1921 AD 303 at 310: 'The authorities do not warrant a punitive assessment.'

[92] See Erasmus 1975 *THRHR* 280–2; Van Aswegen *Southern Cross* 579. In *MacGreal v Murray and Burrill* 1872 NLR 19 even so-called nominal damages (para 8.8) were awarded to punish the *plaintiff*.

Because of the plaintiff's fraudulent conduct the defendant had taken the law into his own hands and seized the plaintiff's wagon with merchandise. The court was apparently more interested in punishing the plaintiff than in awarding him damages. The court awarded a farthing as 'damages' without costs. Here the court seems to have confused 'contemptuous damages' (which may be awarded only if a plaintiff has not suffered loss and damages are 'at large') with nominal damages. In *De Villiers v Van Zyl* 1880 Foord 77 V trespassed upon D's land and appropriated wild ostriches. If D had captured them, he could have become their owner. The court held that in an action for trespass it may award damages for collateral acts which aggravate the trespass. See also *Stuurman v Van Rooyen* 1893 SC 35; *Nicholson v Myburgh* 1897 SC 384. The latter case was concerned with 'holding over' in that the defendant intentionally remained in possession of the rented property after expiry of the contract of lease. The court found a 'malicious trespass' and awarded exemplary damages. (Contra *Du Toit v Vorster* 1928 TPD 385; *Phil Morkel Ltd v Lawson and Kirk (Pty) Ltd* 1955 (3) SA 249 (C).) See also *Malcolm v Shaw* (1898) 15 SC 31 at 33; *Van der Westhuizen v Velenski* (1898) 15 SC 237 at 241; *Woods v Walters* 1921 AD 303 at 310. Erasmus 1975 *THRHR* 282 states that two ideas from English law support an award of exemplary damages: 'The first is that in certain torts the damages are ''at large'' and the jury can express its disapproval of the defendant's wilful interference with the rights of another by an award of exemplary damages. The second is that in tort the jury is allowed greater latitude in the assessment of damages, and its award will be upset only if it is excessive or outrageous.' See also *Lord v Gillwald* 1907 EDC 64 (the court ignored the actual loss and awarded R10 because the defendant had taken the law into his own hands); *Trystam v Knight* 1922 NPD 186 (nominal damages awarded for high-handed conduct). See further *Van der Byl v De Smidt* 1869 Buch 183, where the plaintiff claimed damages for loss caused by a fire negligently kindled by the defendant or his servants. Despite proof of negligence, the court found the plaintiff's claim to be 'ungracious and unneighbourly' and punished him by awarding R20, which had no relationship to his actual loss.

[93] Erasmus 1975 *THRHR* 281.

[94] See Van der Walt 1980 *THRHR* 23; *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 27; *Jones v Krok* 1996 (1) SA 504 (A); Erasmus & Gauntlett 7 *LAWSA* para 19. See, however, also Duba 1989 *SALJ* 467 on 'additional' damages in terms of s 24(3) of the Copyright Act 98 of 1978. See para 13.7 on this. The question whether an award has a punitive function, is not determined by its effect on the defendant. Criteria which are relevant here, are, inter alia, whether the amount exceeds the plaintiff's damage, and whether factors such as the defendant's attitude, blameworthiness and patrimonial position as well as the plaintiff's feeling of outrage are considered. See Visser 1983 *TSAR*68–73; Erasmus & Gauntlett 7 *LAWSA* para 19.

In *Jones v Krok* 1996 (1) SA 504 (A) at 515–17 the court had to decide whether courts in South Africa should enforce a foreign judgment for punitive damages. The court held (at 516) that it would be wrong in principle to refuse to enforce a foreign order of punitive damages merely because it was unknown in South Africa: it could not be said that the principle involved was necessarily unconscionable or excessive or exorbitant. However, the punitive damages awarded in the instant case amounted to granting the plaintiff double the amount of damages she had claimed and was awarded. The court held (at 517) that this award was so excessive and exorbitant that it was contrary to public policy in South Africa and that this award of punitive damages would therefore not be enforced.

[95] See para 12.18.5 on the reduction of a penalty to bring it in relation to the prejudice suffered by a plaintiff.

[96] Para 10.1 et seq.

[97] Para 8.9.1.

[98] See Van der Walt 1980 *THRHR* 24 on 'regshandhawing' as possible object of damages. See Visser 1988 *THRHR* 491. Where a defendant's conduct not only causes patrimonial loss but also constitutes an iniuria (see Neethling et al *Law of Personality*; para 5.7 et seq above) satisfaction may be recovered by means of the actio iniuriarum. See *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W); *Hickman v Cape Jewish Orphanage* 1936 CPD 548; Joubert *Contract* 23; in terms of the Conventional Penalties Act 15 of 1962 a defendant may in some cases have to compensate a plaintiff for more than his or her patrimonial loss (see para 12.18.5.3 and para 11.9.4 on non-patrimonial loss caused by breach of contract).

[99] eg in breach of contract a plaintiff's disappointment may not be considered: *Reed v Eddles* 1920 OPD 69; *Solomon v The Alfred Lodge* 1917 CPD 177; para 8.9.2.

[100] Para 8.8.

[101] Lubbe & Murray *Contract* 602.

[102] 1997 (3) SA 786 (CC).

[103] See para 1.6.5 for a discussion of this topic under the rubric of 'appropriate relief' in terms of s 38 of the Constitution, 1996. See on constitutional damages generally Okpaluba & Osode *Government Liability* 415–33; cf Neethling & Potgieter *Delict* 16–21.

[104] 827–8. The court stated (idem): 'For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such magnitude. And if more than one person has been assaulted in a particular police station, or if there has been a patern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages. This would be the case even if, at the time the award is made, the individuals responsible for the assaults had been dismissed from the police force or other effective remedial steps taken. In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are ''multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform'', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.' See also para 1.6.5.

[105] See para 1.6.5 for examples of 'appropriate relief' that have been granted by the courts in terms of s 38 of the Constitution.

[106] See McGregor *Damages* 359–64; *The Mediana* 1900 AC 113 at 116: '''Nominal damages'' is a technical phrase that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to a verdict or judgment because your legal right has been infringed.' In English law nominal damages may be awarded in an action based on breach of contract and in 'torts actionable per se'.

[107] Para 1.6.3; Erasmus 1975 *THRHR* 272–4, 366–8.

[108] See *Breda v Muller* (1829) Menz 425; *Cawoods v Simpson* 1845 Menz 542 (nominal damages for breach of contract in the absence of proof of damage); *Canny v Boorman* 1883 SC 282 (nominal damages where there was insufficient proof of disfigurement). See further Wessels *Contract* II 841–3; Van Aswegen *Southern Cross* 578–9; Erasmus & Gauntlett 7 *LAWSA* para 18.

[109] See Erasmus 1975 *THRHR* 280: '[T]here are certain wrongs of which one is entitled to complain and on proof of which one may recover such ''special damages' as have been proved, or ''nominal damages' for the wrongful act if no ''special damages'' are proved'; Price 1950 *THRHR* 97.

[110] See *Beaumont v Greathead* (1846) 2 CB 494 at 499. In the South African case of *Marillac v Lippert* 1876 Buch 200 nominal damages were awarded but no order as to costs was given.

[111] Above, n 92.

[112] 1880 SC 276 at 277.

[113] See also *Edwards v Hyde* 1903 TS 381, where the court recognized the possibility of damages in instances where there is no damnum or contumelia and the action is merely brought 'to vindicate some right'. This principle is applied in, eg, *Johnstone v Donovan* 1916 NLR 153; *SA Cabinet Works Ltd v Cohen* 1918 CPD 69; *Heydenreich v Van Rensburg* 1926 OPD 47; *Rampersad v Goberdun* 1929 NLR 32; *Ngobese v Slatter Bros* 1935 NPD 284. See Price 1950 *THRHR* 90–105; McKerron *Delict* 52; Van der Merwe & Olivier *Onregmatige Daad* 181.

[114] See in general Price 1950 *THRHR* 87–105; Van Aswegen *Southern Cross* 578–9. See also the following: *Liesching v Colonial Government* 1833 Menz 417; *Lewison v Philips* 1842 Menz 37; *Hart and Constatt v Norden* 1845 Menz 548; *Willit v Blake* 1848 Menz 343; *Upington v Solomon* 1879 Buch 240 at 282; *Baker v Saunders* 1880 Kotze 176; *Canny v Boorman* 1883 SC 282; *Fransman v Kium* 1884 SC 198; *Fleming v Liesbeek Municipality* 1885 SC 268; *London Exploration Co v Howe* 1886 HCG 214; *Beukes v Uys* 1887 SAR 153; *Browning v Van Reenen* 1887 SAR 187; *Proctor v Christ* 1894 SC 254; *Boch v Schroeder and Land* 1894 9 EDC 106; *Retief v Groenewald* 1896 EDC 140; *Sauerman v English and Scottish Law Life Ass* 1898 SC 84; *Wheeldon v Moldenhauer* 1910 EDL 97; *Solomon v The Alfred Lodge* 1917 CPD 177; *Aliwal North Municipality v Jeffares* 1917 CPD 408; *Molefe v Mdibe* 1919 EDL 112; *Postmaster-General v Van Niekerk* 1918 CPD 378; *Commissioner of Public Works v Dreyer* 1910 EDL 325; *Van Heerden v Paetzold* 1917 CPD 221 at 224: 'Voet (45, 1, 12) says that where a breach of contract has been committed but no special damage has been proved a Judge has a wide discretion and should give a small or moderate sum as damages. This principle applies, I consider, in our law of torts of this character' (but see n 117 below); *Weber v Africander GM Co* 1899 CLJ 128; *Edwards v Hyde*1903 TS 281; *Steenkamp v Juriaanse* 1907 TS 980; *Frenkel v Johannesburg Municipality* 1909 TH 260; *Kostoupolos v Mitchell* 1908 CTR 325; *Du Plessis v Singer* 1931 CPD 105 at 108. See also *Stoffberg v Elliot* 1923 CPD 148 at 152.

[115] See *Stow, Jooste & Matthews v Chester and Gibb* 1889 SAR 127 at 133.

[116] See Joubert *Contract* 247; Erasmus & Gauntlett 7 *LAWSA* para 17; Erasmus 1975 *THRHR* 364.

[117] See, eg, *Wheeldon v Moldenhauer* 1910 EDL 97 at 101; *Solomon v The Alfred Lodge* 1917 CPD 177; *Commissioner of Public Works v Dreyer* 1910 EDL 325 at 332; *Van Heerden v Paetzold* 1917 CPD 221 at 224; *Postmaster-General v Van Niekerk* 1918 CPD 378 at 385. Here there is an incorrect interpretation of Voet *Commentarius* 45.1.12. Voet speaks of a trifling amount (exiquam summam). See the correct application in *Viannini Ferro-Concrete Pipes (Pty) Ltd v Union Government* 1942 TPD 71 at 88. See also *Emslie v African Merchants Ltd* 1908 EDC 82.

[118] See *Turtle v Koenig* 1923 CPD 367.

[119] See *Weber v Africander GM Co* 1899 CLJ 128; *Du Plessis v Singer* 1931 CPD 105; *Steenkamp v Juriaanse* 1907 TS 980.

[120] *Farmer's Co-op Society v Berry* 1912 AD 343 at 352: '[I]n the absence of exact proof of loss, this is certainly a case where nominal damages might properly be given.'

[121] See Erasmus & Gauntlett 7 *LAWSA* para 18, who refer to s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, in terms of which a declaration of rights may be applied for. See also Lubbe & Murray *Contract* 602; Lee & Honoré *Obligations* 200, 244. McKerron *Delict* 52 favours nominal damages.

[122] But see *Condé Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (C), where nominal damages were apparently awarded for breach of copyright. However, the court added (at 87) that damage was 'negligible' and from this it may be deduced that some damage was sustained. See also *Bhika v Minister of Justice* 1965 (4) SA 399 (W) where a nominal amount of R10 was awarded as damages; para 15.3.2.1. Erasmus & Gauntlett 7 *LAWSA* para 18 regard this as an example of small damage and not an example of nominal damages. See eg *Fraser v De Villiers* 1981 (1) SA 378 (D) on 382 where the court awarded only 'nominal damages' to the plaintiff because he did not suffer any 'humiliation or depression' or 'any distress or *iniura* whatsoever' (contumelia) as a result of adultery. In *Winterback v Masters* 1989 (1) SA 922 (E) at 925 the plaintiff claimed satisfaction for contumelia caused by an assault. The court stated obiter that provocation by the plaintiff may have the effect 'to reduce to nothing the damages recoverable by him, or that it was such as to justify an award to him of nominal damages only coupled perhaps with an order that he be deprived of his costs, or even that he pay the defendant's costs'. This is not a classic example of nominal damages since the plaintiff did sustain some damage. The amount of satisfaction can be reduced through the application of a specific principle regarding the effect of provocation on the quantum of such satisfaction (see para 15.3.2.3*(g)*). See further *Harker v Fussell*2002 (1) SA 170 (T) at 177 for an obiter opinion that breach of contract entitles the creditor to 'nominal damages'.

[123] See Joubert *Contract* 247; *Ward v Steenberg* 1951 (1) SA 395 (T); *Stow, Jooste and Matthews v Chester and Gibb* 1889 SAR 127; *Turtle v Koenig* 1923 CPD 367. Cf further Lee & Honoré *Obligations*244 on 'contemptuous damages' (where a plaintiff succeeds but should not have brought an action). See *Williams v Shaw* 1884 EDC 105 at 141, 159; *Fyne v Lee* 1900 SC 251 at 253; *Mahomed v Kassim* 1973 (2) SA 1 (RA) at 13.

[124] A reference to nominal damages is found in *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468 where the court, on the basis that every person has a right to reputation, rejected the submission of the defendants in a defamation claim that since no evidence as to the reputation of the defamed person had been tendered at the trial, only nominal damages could be awarded (see para 5.8).

[125] See, eg, s 10*(a)* of the Performers' Protection Act 11 of 1967; s 21 *(b)*(i) of the Heraldry Act 18 of 1962; s 47(1) of the Plants Breeders' Rights Act 15 of 1976.

[126] See para 9.5.6 on damages for non-patrimonial loss upon breach of contract; para 4.3 on the assessment of damage for breach of contract; para 11.5.5 on limitation of liability (remoteness of damage); para 12.1 et seq on the calculation of damages in specific instances of breach of contract.

[127] Para 4.2.2.

[128] See generally Joubert *Contract* 246; Lubbe & Murray *Contract* 602; De Wet & Van Wyk *Kontraktereg en Handelsreg* 222.

[129] See Lubbe & Murray *Contract* 531; De Wet & Van Wyk *Kontraktereg en Handelsreg* 195; Christie & Bradfield *Contract* 543; *Signature Design Workshop CC v Eskom Pension and Provident Fund*2002 (2) SA 488 (C).

[130] Para 4.3; cf also *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 875; *Bellairs v Hodnett* 1978 (1) SA 1109 (A); *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 8; *Rens v Coltman* 1996 (1) SA 452 (A) at 458; *Sandlundlu (Pty) Ltd v Shepstone and Wylie Inc* 2010 JOL 26565 (SCA) at 9; Joubert *Contract* 249 and Kerr *Contract* 799 n 422 for further references.

[131] Para 4.4.2; cf also *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) at 744. See also the principle stated in *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1140: 'Hence,

where there are several ways in which a defendant might have performed his contractual obligation, damages for his breach thereof are to be assessed on the assumption that he would have performed it in the way least profitable to the plaintiff and most beneficial to himself.'

[132] See, eg, para 4.5 on the correct time for assessing damage; para 11.3 on mitigation; para 11.5.5.2 on contemplation of damage; para 10.11 on collateral benefits.

[133] See, eg, Joubert 1973 *SALJ* 37; 1975 *De Jure* 32; De Wet & Van Wyk *Kontraktereg en Handelsreg* 212, 222; *Solomon & Co v Stefani* 1904 SC 515; *Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd* 1951 (1) SA 312 (C); *National Butchery Co v African Merchants* 1907 EDC 57; *Sunjeevi v Wood*1909 NLR 76 at 78 ('damages in lieu of performance').

[134] Damages as surrogate for performance are apposite in a contract of exchange where the plaintiff wants to keep the contract alive and comply with his or her obligations but counter-performance is no longer possible (see Reinecke *Diktaat*). In this situation the debtor should be ordered to pay a sum of money. De Wet & Van Wyk *Kontraktereg en Handelsreg* 222 et seq are of the opinion that, even where a creditor cannot demand specific performance, he or she may still claim damages as a surrogate of performance.

[135] 1981 (4) SA 1 (A). This case was concerned with leased premises where the lessee failed to return the premises in the condition in which it was received. The court had to decide on the lessor's remedies. The lessor (actually its cessionary) claimed the cost of removing certain constructions but not specific performance or damages calculated in accordance with the value of the property before and after the removal of the constructions.

[136] Reinecke *Diktaat* submits that the remarks by Jansen JA were obiter and that there were in fact two judges in favour and two against damages as surrogate of performance. But see, however, Tager & Lewis 1981 *Annual Survey* 114; Lubbe & Murray *Contract* 602; Oelofse 1982 *TSAR* 65; *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 186. See also Joubert 1982 *THRHR* 78, who attempts to put the judgment in a different perspective; De Wet & Van Wyk *Kontraktereg en Handelsreg*212 n 77. See further *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D). For claims for damages which can be distinguished from claims for damages as surrogate for performance see *Van Immerzeel & Pohl v Samancor Ltd* [2001] 2 All SA 235 (A) at 247–8; *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 186.

[137] See n 135 above.

[138] Reinecke *Diktaat* proposes the adoption of the views expressed by Van Winsen JA in *ISEP* n 135above. If a contracting party may obtain specific performance why not the objective value of a performance for which he or she has given consideration? If specific performance is not available, a plaintiff should not recover damages as surrogate of performance but damages assessed in the normal manner. Reinecke also argues that a claim for damages as surrogate for performance is not the same as a claim for specific performance because the debtor has not promised to deliver anything else but the promised performance. A claim of damages as surrogate is thus not a claim for fulfilment of a contract. See further Joubert 1982 *THRHR* 61 and Luiz 1983 *SALJ* 26. Oelofse 1982 *TSAR* 61, 63 submits that the court's approach is in conflict with *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A). In this case the court held that a party who has not performed in full is entitled to a reduced contract price. The agreed price is thus reduced in accordance with the cost of solving the problem of defective performance. This proves that the court does, in some instances, employ the objective value of performance. However, Kahn *Contract* I 790 argues that there is a difference between a reduced contractual price and a claim for the objective value of performance. See also Reinecke 1991 *TSAR* 715, who submits that the issue of a reduced contract price may be explained in two ways. First, it is possible that the plaintiff may claim the contract price minus the other party's counterclaim. He then comments on the problems with this theory (eg the limitation of the counterclaim since consequential loss is excluded and the situation where the defendant's performance does not consist of the delivery of money). The second and more probable explanation is that the plaintiff in effect offers damages to complement his or her defective performance as partial surrogate of such performance and thus becomes entitled to claim full counter-performance. The principle of reciprocity is thus not relaxed. The defendant has to institute a counterclaim for any consequential loss. The criticism has given rise to the call of the Supreme Court of Appeal in *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 186 for a reconsideration of the majority decision.

[139] See para 4.3 on positive and negative interesse; Joubert 1976 *THRHR* 12.

[140] Para 4.4.1.

[141] See para 4.4.3.

[142] See *Probert v Baker* 1983 (3) SA 229 (D) at 233, in which reference is made to *Salzwedel v Raath* 1956 (2) SA 160 (E); *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 416; *Davidson v Bonafede*1981

(2) SA 501 (C) at 505. See also *Svorinic v Biggs* 1985 (2) SA 573 (W) at 581 on wasted expenses in regard to a contract compensated through 'restitutionary damages'. See in general Kerr *Contract* 300, 332–3.

[143] eg *Hackett v G & C Radio and Refrigerator Corp* 1949 (3) SA 664 (A) at 689; *Van Schalkwyk v Prinsloo* 1961 (1) SA 665 (T) at 667; Mulligan 1957 *SALJ* 306–8.

[144] eg Kerr *Contract* 300, who submits that it is concerned with restitution and not damages: 'So also if the court upholds a claim for a part of the amount of money which was paid, the contract otherwise remaining in force, the order should be looked upon as one of partial restitution rather than one of damages *simpliciter* or as one of restitutional damages.' See also Lubbe 1984 *SALJ* 621, 632 who draws a distinction between restitution and exceptional cases of damages for a contracting party's 'restitutionary interest' (para 4.4.1). See further McLennan 1984 *SALJ* 40–1. Kerr op cit 332 gives a list of 'true' restitutional damages in the case of misrepresentation: expenses incurred in transporting the property in question (*Wilcken & Ackermann v Klomfass* 1904 TH 91); expenses incurred in preserving the property (*Dodd v Spitaleri* 1910 SC 196); expenses incurred in discovering and attempting to remedy a defect in a motor car (*Neethling v Hendler* 1930 GWLD 56 at 58–60). See also *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* 1906 SC 250 at 261: 'All expenses ... that the plaintiff company has incurred, all reasonable expenses ... which have become valueless.' See also *Verster v O'Connor* 1946 (2) PH A39 (C); *Ward v Mehnert* 1908 EDC 296; *Hall v Milner* 1959 (2) SA 304 (O) at 316; *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 (3) SA 767 (D). See para 12.15.4 on the actio redhibitoria; para 12.15.6 on misrepresentation. See also ss 52(3) and 56 of the Consumer Protection Act 68 of 2008 (see para 12.19.3).

[145] See eg *Deloitte Haskins & Sells (Pty) Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) at 530: '[D]amages may be claimed in lieu of incomplete performance (''complementary damages'').' See para 12.10 on a failure to perform work properly; Joubert 1982 *THRHR* 78.

[146] See Erasmus & Gauntlett 7 *LAWSA* para 28; Joubert *Contract* 261 et seq; Otto 1988 *TSAR* 560; Otto & Grové 1990 *De Jure* 248; Harms *Amler's Pleadings* 239–42; the Prescribed Rate of Interest Act 55 of 1975; the National Credit Act 34 of 2005; the Consumer Protection Act 68 of 2008; Koch *Lost Income* 105–13; *Reduced Utility* 169 et seq; *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A); *Ex parte Minister of Justice* 1978 (2) SA 572 (A); *Premier Finance Corp (Pty) Ltd v McKie*1979 (3) SA 1308 (T); Wessels *Contract* II 876–8; De Wet & Van Wyk *Kontraktereg en Handelsreg* 230–1; see Working Paper 10 of the SA Law Commission. See also para 12.19.2 (National Credit Act) and para 12.19.3 (Consumer Protection Act).

[147] Para 6.7.5. The courts have repeatedly refused a claim for interest as part of a claim for unliquidated damages: *Muller v Mutual Insurance Co Ltd* 1994 (2) SA 425 (C) at 447–51 (a delictual claim for interest on overdraft refused because such a claim was indistinguishable from a claim for interest on unliquidated damages, factual causation was absent and, even if it was present, such loss was to remote); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 778–9 (a delictual claim for interest as special damages refused because no authority for such a claim exists and it would be contrary to the rule on unliquidated damages); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 593 (interest on overdraft was considered too remote in a claim for contractual damages). See also *Macs Maritime Carrier v Keeley Forwarding and Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) on interest claimed in a claim falling under the Admiralty Jurisdiction Regulation Act 105 of 1983.

[148] Para 12.16.

[149] See, eg, *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 298 on 'mora interest (which is a species of damages)'. See Lubbe 1990 *THRHR* 190–1 on the difference between interest as the price of money in a loan transaction (conventional interest) and interest a tempore morae as damages. See further *Campbell v Ramlaken* 1949 (3) SA 126 (D); *Holt v Brook* 1960 (2) SA 590 (A); *Baliol Investment Co (Pty) Ltd v Jacobs* 1946 TPD 269; *Ex parte Minister of Justice* 1978 (2) SA 572 (A) at 594–5; *Senekal v Trust Bank of Africa* 1978 (3) SA 375 (A) at 384; *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A). See further *Bellairs v Hodnett* 1978 (1) SA 1109 (A) on interest as special damages which must have been within the contemplation of the parties. A liquidated debt is a debt based on a liquid document, or one regarding which the amount has been acknowledged, or the value whereof has been determined or can easily and speedily be determined (*Fattis Engineering v Vendick Spares* 1962 (1) SA 736 (T) at 738).

[150] See *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 32; *Russell and Loveday v Collins Submarine Pipelines Africa (Pty) Ltd* 1975 (1) 110 (A) at155; *Du Toit v Standard General Insurance Co Ltd* 1994 (1) SA 682 (W) at 687; *Certain Underwriters at Lloyds v SA Special Risks Assoc* 2001 (1) SA 744 (W); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594.

[151] *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 32; *West Rand Estates Ltd v New Zealand Ins Co Ltd* 1926 AD 173 at 196–7; *Legogote Development Co*

(Pty) Ltd v Delta Trust and Finance Co 1970 (1) SA 584 (T) at 587; *Schoeman t/a Billy's Garage v Marine & Trade Ins Co Ltd* 1976 (3) SA 824 (W) at 831; *Certain Underwriters at Lloyds v SA Special Risks Assoc* 2001 (1) SA 744 (W); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594; Loubser 2003 *Stell LR* 442. With regard to the requirement that no valid defence exists see *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 652–3; Eiselen & Pienaar *Unjustified Enrichment* 43.

[152] See *C& T Products (Pty) Ltd v MH Goldschmidt (Pty) Ltd* 1981 (3) SA 619 (C) at 631–3 for a discussion of the instances where no demand is necessary. See also *Attorneys Fidelity Guarantee Fund v Tony Allem (Pty) Ltd* 1990 (2) SA 665 (A) at 674 (the Fund pays mora interest in the case of theft of trust money by an attorney from the moment of summons).

[153] See *Fattis Engineering v Vendick Spares* 1962 (1) SA 736 (T) at 738; *Probert v Baker* 1983 (3) SA 229 (D) at 236–7.

[154] *West Rand Estates Ltd v New Zealand Ins Co Ltd* 1926 AD 173; *Peter Bros Ltd v Bey* 1953 (2) SA 655 (SR); *Herrigel v Bon Roads Construction Co (Pty) Ltd* 1980 (4) SA 669 (SWA); *Macs Maritime Carrier AG v Keeley Fowarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) at 390; *Du Toit v Standard General Insurance Co Ltd* 1994 (1) SA 682 (W) at 688–9. See on the influence of exchange control regulations *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1977 (1) SA 298 (W).

[155] See *Du Toit v Standard General Insurance Co Ltd* 1994 (1) SA 682 (W) at 688; *Sandlundlu (Pty) Ltd v Shepstone and Wylie Inc* [2010] JOL 26565 (SCA) at 11-12.

[156] See Joubert *Contract* 263; *Du Toit v Standard General Insurance Co Ltd* 1994 (1) SA 682 (W) at 689.

[157] See *Bailey v General Accident Ins Co Ltd* 1987 (2) SA 702 (C), 1988 (4) SA 353 (A) at 359. Interest is then payable on the reduced amount for the whole period. A plaintiff who accepts an amount of money which has been paid into court does not lose his or her right to claim interest on it (*Government of RSA v Midkon (Pty) Ltd* 1984 (3) SA 552 (T) at 567).

[158] *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T) at 817.

[159] *Administrator, Transvaal v JD van Niekerk en Genote Bk* 1995 (2) SA 241 (A).

[160] See, eg, *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD 1 at 31–2 (if it is impossible for a debtor to determine what damage his or her breach of contract has caused, the debtor does not have to pay mora interest until the amount has been estimated—it may be different where the amount can be ascertained through a reasonable investigation); see also *Chesterfield Investments (Pty) Ltd v Venter* 1972 (2) SA 19 (W) at 27–9); *West Rand Estates Ltd v New Zealand Ins Co Ltd* 1926 AD 173 at 195; *Fouche v The Corp of London Ass Co Ltd* 1931 WLD 146 at 160; *Union Government v Jackson* 1956 (2) SA 398 (A) at 412–13; *Probert v Baker* 1983 (3) SA 229 (D) at 236–7; *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841; *Adampol (Pty) Ltd v Administrator Transvaal*1989 (3) SA 800 (A) at 817; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 779; *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1995 (1) SA 585 (C). See further Corbett & Buchanan I 23–4.

[161] See *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T) at 816. In *Adel Builders (Pty) Ltd v Thompson* 2000 (4) SA 1027 (SCA) at 1032 the court held that in exercising its discretion it is open to the court, in fixing the date from which interest is to run, to give effect to its own view of what is just in all the circumstances and no question of onus arises. If a party wishes certain facts and circumstances to be weighed, he or she must establish them, but there are no facta probanda and no enquiry arises as to whether a necessary fact has been successfully proved. Similarly, absence of proof does not result in failure on any issue. A court may differentiate between the components of damages with regard to the date from which mora interest is awarded (see *Solomon v Spur Cool Co (Pty) Ltd* 2002 (5) SA 214 (C) at 232). In *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 187 the court awarded interest on unliquidated amounts from the date of the breach of contract.

[162] If the quantum has been settled prior to judgment, interest will commence to run from the date of settlement (*Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 926).

[163] Section 4. See *The MV Sea Joy: Owners of the Cargo Lately Laden on Board the MV Sea Joy*1998 (1) SA 487 (C) at 507–8; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594.

[164] Section 164(7); Scholtz et al *National Credit Act* para 20.2. This is the date that the right to damages arises unless an appeal is lodged, in which case the right to damages arises on the date which the appeal process is concluded (s 164(6)). This rule is applicable to all consumers as s 6 does not limit its application.

[165] See *Terminus Centre CC v Henry Mansell (Pty) Ltd* [2007] 3 All SA 668 (C) at 675–6.

[166] Section 127(9); s 1 sv 'credit agreement'. See also para 12.19.2.

[167] Sections 21(9), 47(3)*(a)*.

[168] No interest is payable on the amount of compensation which a court awards to a third party by virtue of the provisions of s 17(1), unless 14 days have elapsed from the date of the court's relevant order.

[169] See on this Joubert *Contract* 262. See in general *Maytom & Co v Williams* 1908 EDC 458; *Becker v Stusser* 1910 CPD 289; *Estate Kriessbach v Van Zitterts* 1925 SWA 113; *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *New Zealand Estates Ltd v New Zealand Ins Co Ltd* 1926 AD 173; *Mavromati v Union Exploration Import (Pty) Ltd* 1949 (4) SA 917 (A); *Linton v Corser* 1952 (3) SA 685 (A); *Enteka Verspreiders (Edms) Bpk v Ellis en Geldenhuys (Edms) Bpk* 1975 (4) SA 792 (O); *Pillay Bros (Pty) Ltd v FM Cash Store* 1976 (2) SA 660 (SE); *Oranje Benefit Society v Volkskas Beleggingskorporasie Bpk* 1976 (4) SA 656 (T); *Rielly v Seligson and Clare Ltd* 1977 (1) SA 626 (A); *Western Bank Ltd v Lester and McLean* 1976 (3) SA 457 (SE) at 464–5; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145.

[170] Revalorization of a debt is also achieved by the exercise of the discretion of the Minister to change the rate of interest to reflect the influence of inflation. Also see *Eden v Pienaar* 2001 (1) SA 158 (W) at 165–7; para 11.7.

[171] It is not clear what 'in any other way' is supposed to mean.

[172] See *Katzenellenbogen Ltd v Mullin* 1974 (4) SA 855 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A).

[173] The current prescribed rate is 15.5 per cent: *Government Gazette* 15143 GN 1814, 1 October 1993.

[174] Section 2(1). Joubert *Contract* 263 says that the award automatically carries interest and this seems to be supported by s 2(1). For the time before judgment, interest must be specifically claimed. See further Devenish 1975 *De Rebus* 547–9; *UAL Leasing Corp Ltd v Frew* 1977 (4) SA 249 (W); *Katzenellenbogen v Mullin* 1977 (4) SA 855 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A). See also Koch *Lost Income* 113.

Magistrates' Court Rule 58, which provided for interest, was abolished in 1986. However, it must be assumed that the Prescribed Rate of Interest Act 55 of 1975 still applies.

[175] 1988 (1) SA 290 (A).

[176] Otto 1988 *TSAR* 565 submits that drastic changes in the pattern of interest rates (which are necessarily relevant in regard to a specific debt under consideration) as well as a change of the prescribed rate of interest may constitute special circumstances. See further *Volkskas Beleggingskorporasie Bpk v Oranje Benefit Society* 1978 (1) SA 45 (A) at 60; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 594.

[177] Vessio 2010 *Obiter* 728–32; *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1998 (1) SA 811 (SCA) at 834 (obiter): '... (ii) once judgment has been granted, interest may run until it reaches the double of the capital amount outstanding in terms of the judgment.'

[178] Prescribed Rate of Interest Act 55 of 1975, s 2(3). Even if s 103(5) of the National Credit Act 34 of 2005 included other costs (initiation fees, service fees, cost of any credit insurance, default administration charges and collection costs) in the in duplum rule (see para 8.10.3), this section cannot be interpreted to mean that the legislator intended to change what was not interest into interest (see Vessio 2010 *Obiter* 733). Mora interest will thus run on these costs.

[179] Para 12.18.5. See Otto & Grové 1990 *De Jure* 249.

[180] See also s 2(3) of the Act. However, Otto & Grové 1990 *De Jure* 248 foresee that a court may in future hold that mora interest be calculated as compound interest. See also *Davehill (Pty) Ltd v Community Development Board* 1988 (1) SA 290 (A) at 298: 'In principle there appears to be no reason why the right to claim interest on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim *mora* interest.' See also Koch 1989 *THRHR* 67. See Otto & Grové op cit 51 n 23 on the difference between 'interest on interest' and 'compound interest'.

[181] Van Jaarsveld *Handelsreg* 176 n 321 submits that the new rate applies from the moment of change in regard to the outstanding balance. A court should therefore order interest to be paid at the rate which prevails from time to time.

[182] 1988 (1) SA 290 (A) at 301.

[183] See n 174 above.

[184] Section 21(9).

[185] Section 62(2)*(b)*(i). Although no date has expressly been prescribed from which interest will start to run, this provision will make sense if it is from the different dates that the money has been paid to the supplier.

[186] Section 47(3)–(6).

[187] Section 47(3)–(6). Where the National Credit Act 34 of 2005 does not have specific rules regarding interest the provisions of the Prescribed Rate of Interest Act 55 of 1975 will apply. The National Credit Act does not trump the Prescribed Rate of Interest Act 55 of 1975 in the case of conflict as s 172(1) read with schedule 1 of the National Credit Act contains no conflict resolution rule.

[188] Section 103(1). Juristic persons are not protected by this provision (s 6*(d)*). For the definition of 'juristic person', see n 193 below.

[189] Section 101(5). See para 8.10.4.

[190] See *Linton v Corser* 1952 (3) SA 685 (A).

[191] See eg *LTA Construction Bpk v Administrateur, Transvaal* 1992 (1) SA 473 (A); *Commercial Bank of Zimbabwe Ltd v MM Builders & Suppliers (Pvt) Ltd* 1997 (2) SA 285 (ZHC); *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1998 (1) SA 811 (SCA); *F & I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk* 1999 (1) SA 515 (SCA); *Commissioner, South African Revenue Service v Woulidge* [2002] 2 All SA 199 (SCA) (the judgment is not entirely correctly reported in the SALR—see *Ethekwini Municipality v Verulam Medicentre (Pty) Ltd* [2006] 3 All SA 325 (SCA) at 331); *Margo v Gardner* 2010 (6) SA 385 (SCA); Lubbe 1990 *THRHR* 200 et seq; Vessio *In Duplum Rule* 34 et seq; Schulze 2006 *SA Merc LJ* 418. The rule applies to all contracts where a capital sum is due and on which interest has to be paid. It only applies to arrear interest (*Ethekwini Municipality* supra; Vessio 2006 *De Jure* 25). The rule is suspended pendente lite (*Standard Bank* supra at 834; *Margo* supra at 388). The benefit of the rule cannot be waived or excluded by contract before or at the time of conclusion of the contract (*Leech v Absa Bank Ltd* [1997] 3 All SA 308 (W) at 314; *Absa Bank v Leach*2001 (4) SA 132 (SCA); *Commercial Bank* supra at 321–2; *Standard Bank* supra at 828). In *F & I Advisors* supra at 525 the court remarked obiter that the benefit of rule can be waived after the debt has been called up (ex post facto) to, for example, avoid litigation. In *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 139–41 it was held that the rule does not apply to a compromise concluded ex post facto. See also Schulze 1999 *SA Merc LJ* 112.

[192] *Van Coppenhagen v Van Coppenhagen* 1947 (1) SA 576 (T); *Stroebel v Stroebel* 1973 (2) SA 137 (T) at 138–9; Joubert *Contract* 263. In *Sanlam Life Insurance v South African Breweries Ltd* 2000 (2) SA 647 (W) at 655 it was decided that the ultra duplum rule is only applicable to arrear interest and not to accumulated interest.

[193] See s 103(5); s 1 sv 'credit agreement'; Kelly-Louw 2007 *SA Merc LJ* 337 (scope of application of National Credit Act rule). These amounts are set out in s 101(1)*(b)–(g)*. Juristic persons are not protected by this provision (s 6*(d)*). A juristic person includes a partnership, association or other body of persons, corporate or unincorporated, or trusts with at least three trustees or where the trustee is a juristic person, but not a stokvel (s 1, *s v* 'juristic person').

[194] *Nedbank Ltd v National Credit Regulator* [2011] JOL 26939 (SCA) at 20 et seq. See also Campbell 2010 *SA Merc LJ* 6. This protection is not available to juristic persons (s 6*(d)*). See n 193above on the definition of a juristic person. The operation of the rule is not suspended pendente lite (see Vessio 2010 *Obiter* 733). Waiver in advance and ex post facto is excluded (Schulze 2006 *SA Merc LJ*428).

Chapter 9
FORMS, NATURE AND OBJECT OF DAMAGES AND SATISFACTION IN CASE OF NON-PATRIMONIAL LOSS (INJURY TO PERSONALITY)

9.1 GENERAL

The nature and assessment of non-patrimonial loss (injury to personality) as well as its different manifestations are discussed above. [1] This chapter deals with the reparation or

indemnification of such loss. Reparation of non-patrimonial loss is usually possible in terms of inter alia the actio iniuriarum, the action for pain and suffering, the actio de pauperie and, for example, the Nuclear Energy Act 131 of 1993. Such reparation may take the form of compensation (damages) or satisfaction.

9.2 REPARATION OF PATRIMONIAL LOSS AND OF NON-PATRIMONIAL LOSS

In patrimonial loss the affected interests are directly measurable in money. Moreover, damage in regard to such interests can usually be directly expressed in money, and damages (which always consist of money) [2] provide a true equivalent of such loss. [3] It is thus correct to conclude that damages are aimed at effecting financial restitution. This process is often described by stating that damages should place a plaintiff in the position he or she would have occupied but for the damage-causing event. [4] The law does not take a plaintiff's emotions into account and damages are not primarily intended to provide a penalty or satisfaction or to uphold the law. [5]

In non-patrimonial loss the affected interests do not have a direct monetary value and cannot be 'naturally' expressed as a sum of money. This implies that monetary compensation does not have the object of literally placing a plaintiff in the position he or she would have been in had the damage-causing event not occurred. [6] Our

practice nevertheless accepts that compensation may be awarded for this kind of damage and it thus becomes the task of legal theory to provide a sound explanation of this phenomenon. It is not sufficient merely to formulate some vague principle that an amount of money serves as solatium which has to console a plaintiff. From the theories which have so far been developed, [7] it appears that satisfaction as well as imperfect compensation are relevant in regard to non-patrimonial loss and that there is a proper explanation of the way reparation is achieved.

9.3 FORM OF DAMAGES FOR NON-PATRIMONIAL LOSS

The principles which have been discussed in regard to damages for patrimonial loss apply mutatis mutandis in this regard. [8]

9.4 SATISFACTION ('GENOEGDOENING') IN REGARD TO NON-PATRIMONIAL LOSS [9]

9.4.1 Introduction

In English legal terminology the expression 'damages' is used to denote both compensation ('skadevergoeding') for patrimonial loss and compensation and satisfaction ('genoegdoening') for non-patrimonial loss. This usage may cause confusion and blur the distinction between two different kinds of compensation. [10]

There have been few attempts to define the concept of satisfaction ('genoegdoening'). [11] Both the actio iniuriarum and the action for pain and suffering are

often referred to as 'genoegdoeningsaksies' [12] without really explaining the function of 'genoegdoening' (satisfaction). The description of both these actions in this manner may lead to confusion between the two remedies, since even among those who regard the action for pain and suffering as a 'genoegdoeningsaksie', it is conceded that this action

does not share the penal characteristics which the actio iniuriarum displays, according to some. [13]

9.4.2 Meaning of concept of satisfaction

Although the idea of satisfaction is found in Roman law, [14] the juridical concept of 'genoegdoening' ('*Genugtuung*') is derived from Swiss law. [15] Satisfaction has no fixed content and the following meanings have inter alia been given to it: penance, retribution, reparation for an insulting act, consolation or balm poured on a plaintiff's inflamed emotions or feelings of outrage. [16] Satisfaction in a wide sense refers to an upholding of the law, while its narrowest meaning relates to the psychological gratification obtained by the victim of a wrongful act. The basis of satisfaction is to be found in the function of the law to provide a peaceful solution to any dispute. In practice satisfaction operates by neutralizing a plaintiff's feelings of outrage and revenge through the infliction of damage on the defendant, in that he or she is compelled to pay an amount of money to the plaintiff. [17] This involves a more refined form of the talio principle [18] in terms of which an aggrieved person may not take the law into his or her own hands but has to use a legal process to obtain what is due to him or her. With legal development, satisfaction transferred

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some of its functions to civil-law damages and criminal-law penalties [19] and today it maintains a position somewhere between compensation and punishment [20] (despite criticism against the penal characteristics of the actio iniuriarum as an action aimed at satisfaction). [21] Satisfaction is the law's answer to an injury to personality for which money is no natural equivalent and where a type of factual or financial restitution is impossible. The function of satisfaction relates primarily to the injustice which the plaintiff has suffered in the causing of damage, [22] while an award of damages takes account only of actual damage which has been caused. There is thus an obvious relationship between satisfaction and damage which is not compensable. [23]

9.4.3 Two uses of term 'damages' in sense of 'genoegdoening' [24]

In our law the Afrikaans term 'genoegdoening' and its imprecise English equivalent 'damages' are used to describe the functions of both the actio iniuriarum [25] and the action for pain and suffering. [26] Since the functions of these two actions are different, [27] the terms 'genoegdoening' and 'damages' have in fact two different meanings. The first refers to penance, retribution etc as discussed previously; the second means imperfect compensation ('skadevergoeding'). [28] Strictly speaking, only the first meaning reflects true 'genoegdoening' (damages in the sense of satisfaction). It should be noted that in some continental legal systems *damages* in the sense of 'genoegdoening' is used correctly as indicating penance or retribution, [29] while in other systems it is used in a wide sense and denotes any compensation for non-patrimonial loss. [30]

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9.4.4 Actio iniuriarum as action aimed at satisfaction ('genoegdoening') [31]

In our law a true and primary function of satisfaction should be limited to the compass of the actio iniuriarum, which may be instituted for an intentional infringement of someone's personality. This action displays all the characteristics which are relevant in satisfaction: [32] it is usually instituted in the case of intentional conduct [33] which highlights the moral blameworthiness of the defendant; many cases have described it as an actio vindictam spirans, [34] which obliges a wrongdoer to pay an amount of money as

a private penalty in favour of a plaintiff; [35] it is neither actively nor passively transmissible before litis contestatio, [36] in other words, it involves a personal dispute between at least two persons; it is available in the case of injury to personality where compensation ('skadevergoeding') can hardly be relevant (such as defamation, infringement of privacy, contumelia etc) [37] and wrongfulness or injustice is prominent.

When this action is instituted, the public condemnation of a defendant and/or an apology by him or her as well as the amount of money the defendant has to pay are intended to neutralize a plaintiff's feelings of outrage and counter his or her affective loss. It is possible that a secondary element of compensation [38] may be relevant [39]in the sense that the receipt of money causes happiness to a plaintiff.

The penal function of the actio iniuriarum which generally forms the basis of 'true' satisfaction [40] is criticized by certain authors and in recent case law mainly on

the basis that punishment is not a purpose of the law of delict but the purview of criminal law. [41] It could be argued that this approach implies that the actio iniuriarum has to lose those qualities which cause it to be an action aimed at satisfaction since, if it no longer contains a punitive element (where matters such as penance, retribution and deterrence may play a role), it can no longer be seen as providing 'true' satisfaction which normally involves an element of penance. [42] To limit satisfaction to the provision of some sort of consolation to a plaintiff without considering how such consolation is effected can be seen as a denaturation of the concept of satisfaction, because too much emphasis is placed on the loss which a plaintiff suffers at the expense of other relevant factors, such as, for example, the blameworthy attitude of the defendant. [43]

Attempts have been made to reconcile the two opposing views that, on the one hand, the penal element of the actio iniuriarum should be retained and, on the other, that the action should be purged of all penal characteristics so that it retains

only its compensatory function. [44] Neethling [45] suggests that 'aggravated compensatory damages' (containing a 'disguised penal element') would fulfil the function of punitive damages, so that the latter is not regarded as punishment but as compensation, including compensation for irate feelings. In this way, he argues, provision would be made for a covert penal element that continues to do justice to the true concept of satisfaction. It remains to be seen whether the idea of 'aggravated compensatory damages' could provide a viable alternative to retaining a penal element in the actio iniuriarum in order to serve the true nature of satisfaction and to provide fair and just compensation in terms of such an action. [46]

9.4.5 Action for pain and suffering as action aimed at satisfaction ('genoegdoening')

Although in Afrikaans legal terminology the damages recoverable with the action for pain and suffering [47] are frequently referred to as 'genoegdoening', [48] such damages are not the same as satisfaction in terms of the actio iniuriarum and actually mean compensation ('skadevergoeding'). [49] The facts which follow prove the accuracy of this statement.

First, it is accepted in our legal system, as in comparative systems, [50] that a form of compensation is possible in regard to loss caused by the impairment of the

physicalmental integrity, since an amount of money does not merely provide 'consolation' to a plaintiff, but counter-balances such loss in a manner not dissimilar from that in patrimonial loss. [51]

Secondly, the action for pain and suffering has no penal purpose. [52] This means that things such as penance for wrongful conduct, the defendant's degree of culpability and an apology are irrelevant. Our courts thus do not take such facts into consideration in quantifying a plaintiff's loss. [53] This action cannot operate as an action aimed at satisfaction without changing its basic non-penal nature and such a change would be contrary to its nature and development.

Thirdly, this action is, in the majority of cases, instituted against a statutory body. [54] This, in contrast with the functioning of the actio iniuriarum, indicates a complete depersonalization of the dispute. This is also the reason why the action may, for all practical purposes, be regarded as passively transmissible. [55]

Satisfaction in terms of the action for pain and suffering is possible only in the following instances: where the plaintiff subjectively (and in a secondary sense) experiences his or her compensation as satisfaction; [56] where compensation is impossible as, for example, where the plaintiff is unconscious and satisfaction can take place only in an objective sense (as a sign that the law is being upheld); [57] or where the plaintiff is so rich that damages awarded will necessarily be too low really to compensate him or her and satisfaction is the only way of effecting reparation.

9.5 COMPENSATION ('SKADEVERGOEDING') OF NON-PATRIMONIAL LOSS [58]

9.5.1 Basic problem

It may appear inconsistent to define non-patrimonial loss as damage which is not directly measurable in money [59] (because such damage does not affect a person's economic position) and then to declare that compensation ('skadevergoeding') [60]may be given for such loss. To speak of compensation in regard to non-patrimonial

loss may imply that money can in a sense be an equivalent for such damage. It is this problem which has convinced some authorities that only satisfaction [61] may be relevant [62] while others have even been persuaded to deny any form of indemnification for non-patrimonial loss. [63]

From the views discussed below it would appear that imperfect compensation is indeed possible in respect of some forms of non-patrimonial loss (caused by an infringement of the physical-mental integrity). [64]

It should be remembered that where money is able actually to neutralize 'non-patrimonial' loss, such loss in fact amounts to patrimonial damage. [65]

9.5.2 'Imperfect' compensation for patrimonial loss [66]

Although money is usually a direct and true equivalent of patrimonial loss, there are also cases of 'imperfect' compensation where such loss can be determined only through estimation [67] or even a guess [68] or where an amount of money cannot be a direct or true equivalent of loss. An example of the latter is where a unique object (eg an original painting) is destroyed. It will be possible to determine the painting's market value, [69] but an amount of damages will not cause the painting or a comparable substitute to reappear. [70] These facts prove that compensation for non-patrimonial loss may not be

dismissed merely because it is difficult to calculate the amount of damages or by reason of the fact that money cannot actually restore the affected interests. [71]

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9.5.3 Commercialization of personality interests

It is true that human feelings (and an injury to feelings) are not objects of commerce and trade. This nevertheless does not prove that they do not have a type of money value, since monetary value is not inherent in anything except money itself: [72]

> Values become attached to things by common judgement of mankind: and this judgement can be applied to determine the fair value of an injury. Indeed the practice of appraising the value of a life or limb may be traced in early legal systems, for example amongst the Babylonians and the Anglo-Saxons ... . When courts assess damages for personal injuries, they endeavour to arrive at a fair social valuation, just as they would for a unique building or personal possession. [73] They are not concerned with the probably enormous value that a person would place on his own life and limb, but with the dispassionate and neutral value which society at large, on the basis of prevailing money values in that society, would give to it.

Although these arguments do not exactly prove how an amount of money actually serves as compensation of non-patrimonial loss, [74] they provide an accurate description of what actually occurs. Our legal practice which, in assessing damages for personal injuries, considers previous awards in comparable cases, [75] provides clear evidence that non-patrimonial loss has developed a kind of 'market value'. The phenomenon of commercialization may act as an explanation for compensation of non-patrimonial loss, since money serves as a type of substitute of the interest in question. [76]

9.5.4 Theories on compensation for non-patrimonial loss [77]

It is insufficient merely to declare that it is fair or equitable to award an amount of money for non-patrimonial loss. The real question is how money, which cannot be a natural equivalent of non-patrimonial loss, will have the effect of limiting or neutralizing such loss. Although various theories exist, there are two which especially find support in our law.

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9.5.4.1 *Creation of happiness to counter-balance impairment of feelings* [78]

According to this theory, non-patrimonial loss is accompanied by feelings of unhappiness in the plaintiff and such feelings may be reduced through the potential happiness which may be obtained through the use of an amount of money. Money is thus no true remedy (for such loss) but something which soothes the plaintiff and causes him or her to forget unpleasantness through an attempt to create new happiness.

The following qualifications should be added to this theory: Since the actual unhappiness of an aggrieved is taken into account, [79] an average criterion must be used to establish the degree of unhappiness that an average person in the position of a plaintiff would experience. [80] Furthermore, compensation to someone who attaches little value to money (for example, a person who is very wealthy) cannot be explained in terms of this theory, since such a person presumably requires an enormous amount of money in order to experience subjective happiness. This implies that compensation of the plaintiff's loss is in fact impossible and that satisfaction is the only function which remains. [81] Furthermore, this theory is unable to explain compensation of an unconscious plaintiff. [82]

This theory implies not only merely the use of money to create happiness through the purchasing of 'luxuries', but its use in a manner which will render a plaintiff's life more comfortable and convenient. [83] Damages, therefore, do not merely have some symbolic value. This theory of compensation is generally accepted in our law. [84]

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9.5.4.2 *Overcoming non-patrimonial loss* [85]

In terms of this theory the receipt of money allows a plaintiff greater economic freedom and so assists him or her to overcome the non-patrimonial loss which the plaintiff experiences. In the case of serious injuries, it is insufficient to expect money to provide enough artificially created happiness to neutralize a plaintiff's unhappiness. [86] An award of money has to enable an injured person to do something him- or herself [87] —the mere fact that the defendant pays the plaintiff money is insufficient. Despite the vagueness of this theory [88] and the fact that it cannot always be clearly distinguished from the 'happiness' theory, [89] it does have merit [90] and aspects of it have been referred to in some cases. [91]

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9.5.4.3 *Comprehensive theory of compensation*

It would seem that the two theories which are discussed above (concerning the creation of 'happiness', and victory) should be combined, since they supplement each other. In the case of serious and comprehensive non-patrimonial loss, the idea of victory over such loss should receive priority, since what is relevant here is the mobilization of all of a plaintiff's powers of resistance in overcoming his or her setback. Compensation is not intended to remove the consequences of an injury in a factual sense (just as actual restitution is not always possible in all cases of patrimonial loss), [92] but to influence such loss where it affects human consciousness, [93] in other words, in connection with affective loss. Although affective loss (unhappiness, sentimental hurt) is in certain cases not a requirement for the existence of non-patrimonial loss, it may be a subjective component of such loss [94] and it actually constitutes the compensable part of such loss. Affective loss exists in someone's consciousness (mind) and the idea of overcoming personal loss functions by influencing his or her mind in a positive way: if, through an award of money, a plaintiff may be influenced to think that despite his or her physical (objective) disability the plaintiff still wants to live and is willing to accept his or her condition, this person has triumphed over such loss. In such a case it may be said that sufficient compensation has taken place and it is also the best that the law can achieve.

If non-patrimonial loss does not create a crisis of existence to a plaintiff, the theory of 'happiness' is sufficient to explain compensation. Here the injury to the plaintiff's feelings or his or her affective loss may be influenced by the fact that money creates new benefits which can dissipate the plaintiff's unhappiness. In so far as money is used to make things more comfortable for a plaintiff, a type of restitution takes place. [95]

It therefore appears that, depending on the nature and extent of non- patrimonial loss as well as on the personal qualities which a plaintiff may possess,

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compensation may operate in two ways. A functional approach is adopted in the sense that actual compensation is only relevant if non-patrimonial loss may be influenced in some positive way. The possibilities of so influencing a plaintiff's loss are directly related to his or her consciousness and mental abilities. If compensation cannot take place, the

only function which remains is that of providing satisfaction, [96] which may be seen as an ultima ratio of the law of delict.

9.5.5 Remedies for recovery of damages for non-patrimonial loss [97]

The action for pain and suffering has developed as an action with a compensatory function [98] and its object is still to provide compensation for injury to personality caused by bodily injuries. It is only if compensation is not possible that the function of satisfaction becomes of primary importance. [99] The actio de pauperie, which is an action for patrimonial as well as non-patrimonial loss caused by animals, [100] provides compensation for pain and suffering on the same basis as the action for pain and suffering. [101] The actio iniuriarum is primarily an action aimed at satisfaction. [102] In case of an intentional infringement of personality, where it applies, compensation (in the sense of a monetary equivalent for loss) can hardly be relevant. Compensation may nevertheless be a secondary function. [103]

9.5.6 Damages for non-patrimonial loss upon breach of contract [104]

According to some older cases, damages for non-patrimonial loss [105] (eg in the form of inconvenience) may be awarded for breach of contract. [106] In most of these cases

either it was simply accepted that such damages may be awarded or the decisions were based on English authority. [107] The impression has also long existed that in *Jockie v Meyer* [108] the Appellate Division held physical inconvenience caused by a breach of contract to be actionable. [109] However, this decision has now been placed in its correct perspective by *Administrator, Natal v Edouard*. [110] Here, [111] the Appellate Division held that a claim for compensation for pain and suffering cannot merely be based on breach of contract and, furthermore, there is no common-law authority which generally allows damages for any non-patrimonial loss caused by a breach of contract. [112] In response to a request to extend our law to allow damages for

non-patrimonial loss in conformity with English principles regarding damages where hotel accommodation does not meet the specifications of a contract, [113] the court held: [114]

> In my view there is no sufficient reason of policy or convenience for importing into our law such an extension of contractual liability. To do so would be to graft onto a contractual setting elements of the *actio iniuriarum*. Moreover, the party guilty of breach of contract would be liable to compensate the innocent party for loss which is not even recoverable by the Aquilian action. In any event, in most instances the principles of our law relating to liability for breach of contract appear to be adequate to afford the innocent party sufficient satisfaction. Take the holiday cases. The plaintiff would be entitled to claim the difference between the value of the promised facilities and those actually available to him. It is also conceivable that the latter facilities might have been virtually worthless, in which case the plaintiff could recover the full contract price ... . More fundamentally, I cannot agree with the submission that there are compelling reasons why damages for pain and suffering should be recoverable in an action for breach of contract. [115]

This judgment does not, of course, prevent the institution of a separate claim for non-patrimonial loss if such breach also amounts to a delict. [116]

The conservative approach of the court cannot be welcomed. The court should have used the opportunity to bring our law of damages into line with comparable legal systems. [117] Just as the action for pain and suffering has developed as a type of extension of Aquilian liability to non-patrimonial loss, [118] so a similar development

ought to take place in the field of contractual damages. [119] Furthermore, the court's solution for the holiday cases will not always ensure a just result. [120]

Cases in which it has been held that in a claim based on breach of contract against a bank which has negligently dishonoured its client's cheque, damage need not be proved or that damages (solatium) may be recovered for non-patrimonial loss, [121]are apparently no longer good authority. [122] A plaintiff claiming satisfaction will have to prove an iniuria [123] and if he or she seeks damages for patrimonial loss, damage should be proved. [124]

If it is accepted that nominal damages may no longer be awarded, [125] the only real exception to the principle that only damages for a patrimonial loss are recoverable is provided by a contractual agreement to pay an amount of damages. [126]

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[1] Para 5.1 et seq. See also para 8.6 on duplication of damages.

[2] Para 8.4.

[3] A sum of money will usually enable the plaintiff to obtain a substitute for the affected interests and thus cause a form of restitution. However, the law is not interested in what the plaintiff actually does with his or her award of damages.

[4] Para 8.5.

[5] Para 8.7.

[6] See, eg, *Mutual and Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 10–11: 'In particular, freedom from pain and the enjoyment of the pleasures of life do not have a monetary value which form part of the *universitas* of a human being. Payment of general damages therefore does not fill a gap in the estate of the victim of the tort, but affords him ''the comfort which is assumed to flow from being put in the possession of a sum of money'' (*Hoffa v SA Mutual and Fire General Ins Co Ltd* 1965 (2) SA 944 (C) at 954).' In *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)*2006 (4) SA 230 (CC) at 253–4 Moseneke DCJ stated: '[N]on-patrimonial damages, which also bear the name of general damages, are utilised to redress the deterioration of a highly personal legal interest that attach to the body and personality of the claimant. However, ordinarily the breach of a personal legal interest does not reduce the individual's estate and does not have a readily determinable or direct monetary value. Therefore, general damages are, so to speak, illiquid and are not instantly sounding in money. They are not susceptible to exact or immediate calculation in monetary terms. In other words, there is no real relationship between the money and the loss. In bodily injury claims, well-established variants of general damages include ''pain and suffering'', ''disfigurement'', and ''loss of amenities of life''.'

[7] Para 9.5.4.

[8] Para 8.4. See in general Visser *Kompensasie en Genoegdoening* 336–8 and his references to foreign law. See also *Dyssel v Shield Ins Co Ltd* 1982 (3) SA 1084 (C) at 1087 on damages paid in instalments; *Kleinhans v African Guarantee & Indemnity Co* Corbett & Buchanan I 175–6 (see also 1959 (2) SA 619 (E)).

[9] See Visser 1983 *TSAR* 54–77; 1988 *THRHR* 468–91.

[10] See Erasmus & Gauntlett 7 *LAWSA* para 9; Boberg *Delict* 475.

[11] See Van der Merwe 1966 *THRHR* 384: 'Waar dit by skadevergoeding gaan om die herstel van 'n vroeëre vermoënsregtelike posisie waarby ook ander as die eiser belang kan hê, is die doel van genoegdoening om die benadeelde se gekwetste gevoelens te salf en dit is nou maar eenmaal so dat geen beter medikament hier tot die hof se beskikking staan as die toekenning van 'n geldsom nie. Die feit dat by sowel skadevergoeding as genoegdoening met somme geld te doen gekry word, doen egter geen afbreuk aan die funksie van genoegdoening om, anders as skadevergoeding, vir die ongelukkigheid van die benadeelde te probeer vergoed nie.' (An award of damages in the form of a sum of money is the only salve at the court's disposal to soothe the plaintiff's injured feelings. The fact that damages and satisfaction are both achieved by awarding a sum of money does not change the fact that satisfaction is intended to compensate for the unhappiness of the plaintiff.)

This exposition is unsatisfactory. The author does not explain what is meant by 'gekwetste gevoelens' ('injured feelings') and whether it refers to a direct or affective impairment of feelings (para 5.6.1*(e)*) and how money acts as a remedy. The views expressed by Olivier *Pyn en Leed* at 266 do not sufficiently clarify

this issue either. See further Neethling et al *Law of Personality* 59–61; Burchell *Defamation* 291 et seq; *Personality Rights* 435 et seq.

[12] viz actions aimed at satisfaction. See, eg, Van der Merwe & Olivier *Onregmatige Daad* 191, 237 (see also op cit 241); Erasmus 1976 *TSAR* 239.

[13] eg Olivier *Pyn en Leed* 266; cf however para 9.4.4 for different views on the so-called penal nature of the actio iniuriarum.

[14] As the word 'satisfactio' indicates—see Visser 1988 *THRHR* 469.

[15] See Visser 1983 *TSAR* 55.

[16] The balming effect of an award for compensation in a defamation action is evident in the following statement by Hattingh J in *Esselen v Argus Printing and Publishing Company Ltd* 1992 (3) SA 764 (T) at 771: 'In a defamation action the plaintiff essentially seeks the vindication of his reputation by claiming compensation from the defendant; if granted, it is by way of damages and it operates in two ways—as a vindication of the plaintiff in the eyes of the public, and as conciliation to him for the wrong done to him. Factors aggravating the defendant's conducts may, of course, serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a *solatium*.' This dictum was approved in *Mogale v Seima* 2008 (5) SA 637 (SCA) at 641–2 where Harms JA warned against the granting of a generous amount in the form of a solatium in order to teach the defendant a 'lesson' (see para 9.4.4 for views on the so-called penal function of the actio iniuriarum). Cf *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558–9; Loubser & Midgley (eds) *Delict* 385–8.

[17] The fact that the punishment of a defendant, albeit not in the form of an award of damages, provides comfort to the plaintiff to some extent has been recognized by the Constitutional Court in *Le Roux v Dey* 2011 (3) SA 274 (CC) at 322. The plaintiff, a deputy principal of a school, succeeded with a defamation claim against the defendants, three schoolchildren, who had defamed and insulted the plaintiff by publishing a computer-created image of the plaintiff and the principal in a sexually suggestive posture. The school punished the defendants for their conduct. The Constitutional Court, in lowering the lower courts' award for compensation for defamation and insult, took into account inter alia the fact that the plaintiff 'should ... have taken substantial consolation from the fact that he had to some extent been vindicated in the eyes of the school community—who observed the picture—by the punishment that the wrongdoers had already endured'.

[18] Private revenge in the form of an eye for an eye.

[19] See Visser 1983 *TSAR* 56 for references to German law.

[20] The distinction between public-law punishment and satisfaction is often seen as the fact that retribution is an object in itself when a wrongdoer is punished, while in the case of satisfaction retribution is merely a means to satisfy an aggrieved person.

[21] Para 9.4.4.

[22] See also Van der Walt *Sommeskadeleer* 66. See also para 2.4.7 on the contemporaneous presence of damage and unlawfulness.

[23] Visser 1988 *THRHR* 471.

[24] See n 11 above.

[25] Para 9.4.4.

[26] Para 9.4.5.

[27] Ibid.

[28] See para 8.1 et seq on compensation in regard to patrimonial loss and para 9.5 in the case of non-patrimonial loss.

[29] eg in German law, where it is seen as ultima ratio of the law of delict where non-patrimonial loss is incompensable. The aim is to provide psychological satisfaction to an aggrieved person and reflects the traditional concept of satisfaction. It also includes an objective element, in the sense of upholding the law. See Visser 1983 *TSAR* 63 for the necessary references; Visser 1988 *THRHR* 472–3. In German law *Schmerzensgeld* has two functions, viz compensation and satisfaction, and the latter enjoys priority where compensation is irrelevant, eg, in the case of serious injuries accompanied by unconsciousness. There is much criticism of satisfaction as a function of *Schmerzensgeld* (Visser op cit 474 et seq).

[30] eg in Swiss and Austrian law. These systems reflect the notion that true compensation ('skadevergoeding') of non-patrimonial loss is impossible and that 'genoegdoening' is the only relevant option. However, it appears that what is termed 'genoegdoening' by these systems in fact corresponds to imperfect compensation of non-patrimonial loss. There is also strong criticism of the concept of 'genoegdoening' in these two systems; see n 29 above.

[31] See for a brief summary Lee & Honoré *Obligations* 244–5. See *CCP Record Co (Pty) Ltd v Avalon Record Centre* 1989 (1) SA 445 (C) at 450 on a type of satisfaction in terms of s 24 of the Copyright Act 98 of 1978. See also *Priority Records (Pty) Ltd v BAN-NAB Radio and TV* 1988 (2) SA 281 (D) at 291.

[32] Para 9.4.2.

[33] Neethling et al *Law of Personality* 57 et seq.

[34] An 'action breathing punishment'.

[35] See on (private) revenge and punishment *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338 (concerning adultery); see also *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 615–16, 617, 618; *Lynch v Agnew* 1929 TPD 974 at 977; *Pont v Geyser* 1968 (2) SA 545 (A) at 558; *Potgieter v Potgieter* 1959 (1) SA 194 (W) at 195 (adultery); *Mulock-Bentley v Curtoys* 1935 OPD 8 at 21; *SA Associated Newspapers v Yutar* 1969 (2) SA 442 (A) at 458; *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 772 ('the primary object of an *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium*'); *Salzmann v Holmes* 1914 AD 471 at 480, 482, 483; *Gray v Poutsma* 1914 TPD 203, 211; *Mhlongo v Bailey* 1958 (1) SA 370 (W) at 373; *Pauw v African Guarantee and Indemnity Co Ltd* 1950 (2) SA 132 (SWA) at 135; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *Brenner v Botha* 1956 (3) SA 257 (T) at 262 (infringement of dignity); *Kahn v Kahn* 1971 (2) SA 499 (RA) at 500, 501–2 (punitive/exemplary damages); *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 399–401 (punitive and exemplary damages); *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 538, 539 (exemplary/punitive damages); *Whitaker v Roos & Bateman* 1912 AD 92 at 118; *Manamela v Minister of Justice* 1960 (2) SA 395 (A) at 401; Scott *Oorerflikheid* 178; De Wet 1970 *THRHR* 75; Burchell *Defamation* 293 ('even the critics of ''punitive'' damages would, I think, accept that factors aggravating the defendant's conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as solatium'). Cf para 8.7; Neethling 2008 *Obiter* 238 et seq; Neethling *Bestraffende Genoegdoening* 173 at 178–9 and Okpaluba & Osode *Government Liability* 434–81 on the concepts 'punitive', 'exemplary' and 'aggravated' damages; Loubser & Midgley (eds) *Delict* 385–8; para 15.3.2.4*(f)* on other defamation cases.

[36] Para 11.1.6.

[37] Para 15.3.

[38] Para 9.5.

[39] See Van der Merwe & Olivier *Onregmatige Daad* 245 (cf Burchell *Defamation* 293) on the *compensatory* function of satisfaction. However, it is not exactly clear what this is intended to mean. See para 9.5.5.

[40] A plaintiff is supposed to receive personal satisfaction from the condemnation of the defendant and his or her liability to pay an amount of money; cf para 4.6.2.

[41] Cf also paras 9.4.2 and 15.3.2.4*(f)*; see eg *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 823–8 where Ackermann J in the Constitutional Court appeared to favour a total rejection of punitive damages in private and constitutional matters (see Burchell *Personality* 461, 474; but see 474–5 on the judgments of Didcott and Kriegler JJ). In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 263 Mokgoro J put it thus: 'Equity in determining a damages award for defamation is therefore an important consideration in the context of the purpose of a damages award, aptly expressed in *Lynch* [*Lynch v Agnew* 1929 TPD 974 at 978] as solace to a plaintiff's wounded feelings and not to penalise or deter people from doing what the defendant has done. Even if a compensatory award may have a deterrent effect, its purpose is not to punish. Clearly, punishment and deterrence are functions of the criminal law. Not the law of delict ... . In our law a damages award therefore does not serve to punish for the act of defamation. It principally aims to serve as compensation for damage caused by the defamation, vindicating the victim's dignity, reputation and integrity. Alternatively, it serves to console.' (See Midgley 2006 *Annual Survey* 346.) See also *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379; *Esselen v Argus Printing and Publishing Co Ltd* 1992 (3) SA 764 (T) at 771; *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 29–30; *Innes v Visser* 1936 WLD 44 at 45; *Collins v Administrator, Cape* 1995 (4) SA 73 (C) at 94; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 641–2; *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W) at 500. See also the minority judgment of Nugent JA in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 350 et seq. Nugent JA opposed the granting of an actio iniuriarum for non-patrimonial damages to corporations (juristic persons) for defamation. He argued (at 357, 363-4, 365-6) that, since such entities have no feelings that can be impaired and consoled by an award of non-patrimonial damages, such an award could only amount to punitive damages aimed at punishing the juristic person, which is a function of criminal law and not the law of defamation. Corporations should therefore avail themselves of alternative remedies for defamation. (See also para 15.3.2.3*(b)* below for more detail.) See also Van der Merwe & Olivier *Onregmatige Daad* 238 n 72, 245 n 6, 246, 441–2, 445 n 34; Van der Walt & Midgley *Delict* 3–4; Burchell *Defamation* 291–4; Loubser & Midgley (eds) *Delict* 10; Midgley 2006 *Annual Survey* 346; cf

Neethling et al *Personality* 58 n 218; Neethling & Potgieter *Delict* 7 n 29. For an overview, see Neethling 2008 *Obiter*238 et seq; Neethling *Bestraffende Genoegdoening* 182 et seq.

[42] It is generally accepted in German literature that 'satisfaction' without an element of penance is empty and meaningless. See Visser 1988 *THRHR* 487; paras 4.6.2 and 9.4.2. See also *Le Roux v Dey*2011 (3) SA 274 (CC) at 322 where the Constitutional Court acknowledged that the fact that the defendants in a defamation case had been subjected to punishment for their defamatory deed (albeit not in the form of an award for damages) should have provided 'substantial consolation' for the plaintiff (see n 17 above for more detail).

[43] See Visser 1988 *THRHR* 489 for additional arguments.

[44] See Neethling *Bestraffende Genoegdoening* 173 et seq; 2008 *Obiter* 238 et seq; cf Burchell *Defamation* 293. Neethling suggests that the following considerations appear to open the door for a conciliatory approach: it is often difficult to separate the punitive and compensatory elements in damages for an iniuria (cf *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 48; Burchell *Defamation* 290–4); even punitive or exemplary damages may (sometimes) be seen as part of compensation (cf para 9.4.2; *Gray v Poutsma* 1914 TPD 203 at 211: '[E]xemplary damages may be awarded as punishment of the defamer with the view of satisfying the injured feelings of the plaintiff, and not so much with a view to preventing the commission of similar torts'; *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 772 where the court held that the pecuniary penalty under the actio iniuriarum is 'payable to plaintiff as a *solatium* for the injury to his feelings'); (aggravated) compensation may have a deterrent effect, even though deterrence is mainly a function of criminal law (*Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 263); and a judge, not a jury, has control over the extent of damages in our law (Burchell *Defamation* 293).

[45] *Bestraffende Genoegdoening* 183–4; 2008 *Obiter* 238 et seq; see para 9.4.2.

[46] Cf para 15.3.2.4*(f)* on defamation. See also the illuminating minority judgment of Nugent JA in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 350 et seq for strong arguments against the granting of a defamation claim for general damages in terms of the actio iniuriarum to corporations since such damages could only amount to punitive damages; corporations should avail themselves of alternative remedies for defamation (at 365; see also para 15.3.2.3*(b)* below for more detail).

[47] Para 5.6.1.

[48] See n 11 above; *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A).

[49] Para 9.5.1. Contra *Potgieter v Rondalia Ass Corp of SA Ltd* 1970 (1) SA 705 (N) at 712, where the court incorrectly refers to the action for pain and suffering as an actio vindictam spirans.

[50] See Stoll *Encyclopaedia* 36: 'However, most legal systems do not exclude the idea of compensation with respect to non-pecuniary losses and employ the concept of indemnification or compensation for the adjustment of non-pecuniary harm as well as in connection with pecuniary losses. In favour of this view it can be argued that the adjustment of non-pecuniary losses by the payment of money is in essence not different from the compensation of non-measurable economic losses.' On the relevance of satisfaction in such cases, Stoll op cit 9 remarks as follows: 'From a comparative point of view, the objection can be raised that the broad notion of satisfaction encompasses the adjustment of non-pecuniary harm in a general sense, namely, by providing appropriate amenities and joys of living—a form of adjustment which is viewed in many legal systems as a matter of compensation.' See para 7.5.3 n 133.

[51] Para 9.5.4.

[52] In common law this action developed with the Aquilian action and the Appellate Division still emphasizes the relationship between the two actions, even though the action for pain and suffering is described as sui generis: *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 595. See also *Hoffa v SA Mutual Fire & General Ins Co Ltd* 1965 (2) SA 944 (C) at 952: 'I can find no evidence that our Roman-Dutch writers ever regarded the claim for pain and suffering as penal or that it was circumscribed by the other limitations peculiar to the *actio iniuriarum*.' See also *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 27; *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A).

[53] Para 15.2.2.1.

[54] The Road Accident Fund (RAF) in terms of the Road Accident Fund Act 56 of 1996. See para 14.1.

[55] The death of the wrongdoer (the negligent driver of a vehicle) has no effect since the action is almost exclusively instituted against the RAF. See also Scott *Oorerflikheid* 191 et seq.

[56] This is also possible in the Aquilian action for patrimonial loss. This is referred to as 'reflex' satisfaction. Where X's property has been damaged and he receives R1 000 as compensation for patrimonial loss, this amount may also provide him with psychological satisfaction, although it is, of course, not the primary purpose of such an award. See Visser 1988 *THRHR* 470.

[57] Para 9.4.2.

[58] See generally Visser *Kompensasie en Genoegdoening* 127–57; Corbett & Buchanan I 33; *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 983; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 117.

[59] Para 5.1. See also *Mutual and Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 10–11.

[60] In terms of the action for pain and suffering.

[61] Para 9.4.

[62] See Visser 1983 *THRHR* 46 et seq.

[63] See Visser 1983 *THRHR* 50–2.

[64] See n 50 above. See further Boberg *Delict* 517.

[65] eg the improvement of a plaintiff's health (the removal of pain) through medical treatment. Medical expenditure is intended to remove non-patrimonial loss and such expenses constitute patrimonial loss. See para 8.6 on the duplication of damages.

[66] See para 3.1.

[67] See, eg, the case of damage caused by unlawful competition (para 13.6). See Reinecke 2001 *TSAR* 222–6; Neethling *Van Heerden-Neethling Unlawful Competition* 82 et seq.

[68] eg loss of earning capacity of a young child (para 14.6.2).

[69] See Munkman *Damages* 18: 'First, take the case of goods which are kept in a shop for sale, and are destroyed by fire or flood. These goods are bought and sold every day, a market value has become attached to them, and the loss is easily converted into money. Next take the case of the destruction of a rare piece of Chinese porcelain. Such things are not bought and sold every day, but sales do take place, and a value can be quoted by an expert. The expert may have to reach his valuation by taking into account the price paid for a different piece of porcelain, which is comparable in some way to the piece destroyed. Finally, take the case of a rare and unique building, such as St Paul's Cathedral. Such a building is not for sale: but if it were destroyed by some tortious act, a value could be placed upon the structure by experts, by comparison with smaller buildings and sites which have a market value.'

[70] Cf also the problem of estimating the market value of objects which are not bought and sold, eg a dam wall, a church building, a monument (Reinecke 1990 *TSAR* 775; para 12.7.2.1).

[71] Just as the law does not expect of a plaintiff who claims for patrimonial loss to use his or her damages in order to neutralize his or her loss in a factual sense, the law should not require this of someone who suffers non-patrimonial loss. See also *Dhlamini v Government of the RSA* Corbett & Buchanan III 583: 'Whether the award was for pain and suffering, for a future surgical procedure or whatever, the plaintiff is at liberty to squander it on the gambling tables ... if he is so minded.'

[72] See Munkman *Damages* 18–19. See however also *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 10.

[73] See n 70 above.

[74] One may argue that Munkman sidesteps the true problem, ie the relationship between money and highly personal personality interests, because he does not answer the question of how an award of money will have a factual influence on a plaintiff's damage. See on this Visser 1983 *THRHR* 48–9.

[75] See para 15.2.3; *Protea Ass Co Ltd v Lamb* 1971 (1) SA 530 (A).

[76] See, however, n 74 above. See also Visser 1983 *THRHR* 49–50 for examples similar to those presented by Munkman. These views are based on the fact that an interest may always be represented by any other interest and that money is an instrument which may be used to obtain immaterial benefits. In *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) at 254 Moseneke DCJ stated: '[I]t is important to recognise that a claim for non-patrimonial damages ultimately assumes the form of a monetary award. Guided by the facts of each case and what is just and equitable, courts regularly assess and award to claimants general damages sounding in money. In this sense, an award of general damages to redress a breach of a personality right also accrues to the successful claimant's patrimony. After all, the primary object of general damages too, in the non-patrimonial sense, is to make good the loss; to amend the injury. Its aim too is to place the plaintiff in the same position he or she would have been but for the wrongdoing.'

[77] See also Boberg *Delict* 520; *Collins v Administrator, Cape* 1995 (4) SA 73 (C).

[78] In German this is known as the *Lust-für-Leid-Gedanke*. See Visser 1983 *THRHR* 53–6. See also Corbett & Buchanan I 33–4; *Hoffa v SA Mutual Fire and General Ins Co Ltd* 1965 (2) SA 944 (C); *Oosthuizen v Thompson & Son* 1919 TPD 124 at 130–1: 'I suppose the only way, so far as mere money compensation goes, by which one could compensate for pain and suffering is by giving the man enough money to have a

good enough time to wipe out the memory of the past ....' See also *Kruger v Santam*1977 (3) SA 314 (O) at 320 on the effect money may have on pain and suffering.

[79] See para 5.6.2 on the personal theory.

[80] Para 5.5; Van der Merwe & Olivier *Onregmatige Daad* 192 n 50; Visser 1983 *THRHR* 54: an objective measure is used (eg the reasonable person yardstick) to determine what positive feelings of happiness should be generated to act as counterbalance to negative feelings of unhappiness).

[81] Para 9.4.

[82] Para 5.6.3 on so-called 'twilight' and 'cabbage' cases.

[83] See the cases in n 84 below.

[84] In English law there are judgments which, in an unconvincing manner, attempt to ignore the element of personal unhappiness (impairment of feelings) in regard to non-patrimonial loss. See *Wise v Kaye* [1962] 1 All ER 257 (CA) at 264: 'Wealth and fine physique do not ensure happiness, nor do poverty or disablement necessarily entail unhappiness. Money is a false standard of assessment of man's inner feelings although, no doubt, it plays a part in the enjoyment of life of many .... Can it be said that a man who has lost a leg above the knee is any less happy than if he had lost it only below the knee? I do not think it follows at all, but he might well be awarded more for the physical injury because he would be more handicapped in all probability in doing all he could have done before.'

See Van der Merwe & Olivier *Onregmatige Daad* 192; *Geldenhuys v SAR & H* 1964 (2) SA 230 (C), where it was held that an amount must be given 'that can be usefully employed in alleviating the plaintiff's unhappy condition'. In *Van den Berg v Motor Union Ins* Corbett & Buchanan I 533 the possibility was mentioned that the money which a plaintiff receives may enable her to indulge in new hobbies to compensate her for those which she has lost. Cf also *Roux v Minister of Sport* Corbett & Buchanan II 157, 160; *Steenkamp v Minister of Justice* 1961 (1) PH J9 (T): 'On the other hand it does not seem to me to be proper to award such an amount as would provide more than could be usefully employed in alleviating his unhappy position ... .' The court added: 'It is not for the court to determine what kind of [capital] expenditure by the plaintiff would be justified, but in considering possible needs and compensatory activities, I have given thought to reasonable capital expenditure such as a home, a car adapted to his condition to allow him to be driven round ... .'; *Marine & Trade Ins v Katz* 1979 (4) SA 961 (A) at 983: 'Moreover, other ways in which the money could be used to alleviate her lot in life or bring her pleasure or consolation are not difficult to conceive. Some electronic devices were mentioned at the trial that might be useful; for example, one to switch on or off her radio and television set, a gadget to turn the pages of books or magazines, a reading machine, and other such appliances which would enable her to use her very limited motor powers to do things for herself. Some person or persons could be engaged to pay her social visits to entertain her or relieve the boredom ... . The point to emphasize is that, since she fully retains her intelligence and normal mentation ... ways and means can and doubtlessly will be found to use the award to her best advantage.'

Here the distinction between patrimonial and non-patrimonial loss is not always clear since in *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) the court found that an award to be used in making life more comfortable to an injured person has to be taken into account in reducing the amount of damages for non-patrimonial loss. See further Boberg *Delict* 538.

[85] See Visser 1983 *THRHR* 56–60. In German this theory is described as the *Überwindungsgedanke*.

[86] This involves something different from (true) satisfaction (para 9.4). Satisfaction must primarily assist an aggrieved to overcome the *injustice* which he or she has suffered, while the theory under discussion is chiefly aimed at obtaining victory over *non-patrimonial loss*.

[87] See the reference by Visser 1983 *THRHR* 58 to an author who equates the theory of overcoming injury to personality with a life-jacket which is made available to help someone who is drowning; such person still has to employ his or her own power to put on the jacket. In casu the plaintiff has to realize that the law wants to assist him or her and he or she is expected to react positively to that.

[88] The manner in which money has to be used in order to strengthen a plaintiff's resistance has not been adequately researched. The mere fact of increased economic freedom does not of necessity have a bearing on a plaintiff's will to triumph over his or her setback. It would appear that this theory is based too much on the personal qualities which are (coincidentally) present in a particular plaintiff. This theory can also be relevant only where an aggrieved has insight into his or her own condition and may develop the will to overcome the obstacles that have arisen. Although this theory has been developed with a view to serious injuries, it does not provide an answer to the most serious cases where there are brain injuries or a changed personality. In such instances plaintiffs lack the capacity to perform the activities which would be required to overcome the effects of the injury.

[89] Para 9.5.4.1. The 'happiness' theory does not specifically mention victory over the effects of injuries as an object but provides the same psycho-mechanical means (money) to make an aggrieved happier or to render his or her life more comfortable. According to some, the difference between the two theories is to be found in the fact that, where money is intended to provide a plaintiff with a measure of happiness, only the extent of the loss (the person's unhappiness) is relevant, whereas in the other theory the degree of difficulty a plaintiff has in overcoming his or her loss is relevant in assessing an amount of money which will be adequate to assist in strengthening the plaintiff's mental resistance.

[90] The subjective value of money to an individual plaintiff plays no role because money is not intended to create artificial happiness. Although an amount which will assist a poor person will not be sufficient in providing a rich person with the necessary economic freedom, the latter in fact already has the necessary economic freedom.

[91] See, eg, *Parity Ins Co Ltd v Hill* Corbett & Buchanan I 680, 688: 'The learned judge *a quo*remarked upon the respondent's positive and courageous approach to the misfortune which befell her so undeservedly, and it seems certain she will be able to so adapt herself that she will live a reasonably normal and happy life, despite the physical impairment referred to above.' *Naidoo v Rondalia Ass Corp*Corbett & Buchanan I 805, 808: 'In all these cases there is the further matter that has some relevance—namely the attitude of the patient. It is notorious that some people have the courage to endure the embarrassment and discomfort of the kind of situation in which the plaintiff finds himself and have the will to survive; others lose the desire to live'; *Goodall v President Ins Co* 1978 (1) SA 389 (W) at 391: 'Although he [the plaintiff] described the frustration he had encountered in his work, here was no evidence of despair. On the contrary, I gained the impression that he has been applying himself to the task of self-rehabilitation ....' See also *Bezuidenhout v Berman* 1929 OPD 148 at 163: 'He [the doctor] thinks that recovery partly depends on the will to recover—that the plaintiff has treated herself too much like an invalid'. See further *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 227; *Sigournay v Gillbanks*1960 (2) SA 552 (A) at 571; *Cullinan v Protea Ass Co* 1983 2 PH J46 (C). This theory has also been referred to in English law in *Povey v Governors of Rydal School* [1970] 1 All ER 841 at 843: 'He [the plaintiff] is a young man acknowledged on all sides to be of great courage and fortitude. If any man can be said to have triumphed over disaster, it can be said of the plaintiff'. See also *Bennie v Guardian National Ins Co Ltd* Corbett & Honey A3–44. The only problem in all these cases (see n 88 above) is that the relationship between the amount of damages and victory over the personal loss is not sufficiently explained.

[92] Para 9.5.1.

[93] Para 5.6.1*(e)*.

[94] Para 5.5.

[95] See, however, the distinction between patrimonial and non-patrimonial loss in this regard—cf n 84 above.

[96] Para 9.4.

[97] See also para 1.5.2 on the sources of claims for damages and satisfaction. See on solatium in the case of expropriation, Gildenhuys *Onteieningsreg* 219–21; Jacobs *Expropriation* 152. See also *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) on pension as a type of solatium.

[98] See also *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 595: 'As is well known, Roman-Dutch law, unlike Roman law, did, however, by way of exception allow the recovery in delict of intangible loss flowing from the wounding of a free man. It has now been authoritatively established that a claim for such loss, although sounding in delict, is an *actio sui generis* differing from the Aquilian action only insofar as it is not from its inception actively transmissible.' See further Visser *Kompensasie en Genoegdoening* 263 et seq.

[99] Thus Van der Merwe & Olivier *Onregmatige Daad* 245 n 6 err when they state that Visser 1983 *Obiter* 34 et seq is of the opinion that there is no question of satisfaction in terms of the action for pain and suffering.

[100] Paras 1.5.3 and 13.9.1.

[101] The actio de pauperie is also available to recover damages for injuries resulting from emotional shock (*Fourie v Naranjo* 2008 (1) SA 192 (C) at 201–2). In *Fourie* ibid the court also pointed out that a person bitten by a dog is entitled to damages with the actio de pauperie not only for the direct injury sustained in the attack, but also for subsequent physical disorders caused by nervous shock suffered as a result of the incident; that there is support for the view that damages may be claimed by a dependant for loss of support if an animal has caused the death of a breadwinner; and that the extent of the defendant's liability should be limited only in accordance with the flexible criterion for legal causation. The actio de pauperie is also available to a person who suffered shock and resultant injuries at the sight of someone else being attacked by a dog. See also Scott '*Caveant* dog owners' 103–4.

[102] Para 9.4.4.

[103] See, eg, Van der Merwe & Olivier *Onregmatige Daad* 245 n 6 who mention the 'compensatory function of satisfaction'. Although they do not explain what this means, such a concept is tenable. See also Burchell *Defamation* 293: 'The critics of punitive damages rightly stress that the court in a civil case must not make an award of damages (or a portion of an award) purely to penalize the defendant for his conduct or attempt to deter people in future from doing what the defendant has done; punishment and deterrence are functions of the criminal law, not delict.'

[104] See Joubert *Contract* 247–8; Kerr *Contract* 800–1; *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); Lee & Honoré *Obligations* 63; Lubbe & Murray *Contract* 602; Wessels *Contract* II 843–5.

[105] See on non-patrimonial loss in general para 5.1 et seq.

[106] See, eg, *Smith & Watermeyer v Union Steamship Co* 1867 Searle 311; *Bennet v Shaw* 1902 SC 248; *Ward v Gardner* 1902 EDC 73; *Commissioner for Public Works v Dreyer* 1910 EDL 325; *Reed v Eddles* 1920 OPD 69; *Silbereisen Bros v Lamont* 1927 TPD 382; and also *Jockie v Meyer* 1945 AD 354; *Bester v Smit* 1976 (4) SA 751 (C).

[107] See *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 594. Our law has been influenced either by the English concept of nominal damages (para 8.8) or by the case of *Hobbs v London and South Western Railway Co* (1875) 10 QB 111 at 117, where damages were awarded for physical inconvenience simply because there was no authority against such a proposition. In especially *Commissioner for Public Works v Dreyer* 1910 EDL 325 heavy reliance was placed on English law.

[108] 1945 AD 354. X reserved a room in a hotel. Upon arrival, he was informed that accommodation was not available. The Appellate Division held that compensation was not recoverable for X's humiliation and emotional damage (unless he instituted the actio iniuriarum—para 9.4). However, the court confirmed an award for physical inconvenience suffered by X.

[109] See, eg, Kerr Contract 4th ed 609. See also Christie *Contract* 2nd ed 639.

[110] 1990 (3) SA 581 (A) at 595: 'It will thus be seen that in *Jockie* this Court was not asked to consider—and therefore did not consider—whether a claim for damages in respect of physical inconvenience may be based upon breach of contract. This was because the defendant had in effect conceded that some award for physical inconvenience should have been made.' See also Christie & Bradfield *Contract* 569–70.

[111] The plaintiff claimed damages for the expenses involved in the maintenance of a child as well as pain and suffering on behalf of his wife caused by a pregnancy and birth, after the defendant had failed to perform a sterilization operation on her as agreed and she fell pregnant. The court awarded damages for the first claim but rejected the claim for pain and suffering and argued that it was not merely a claim for damages for non-patrimonial loss caused by a breach of contract, but that no allegation had been made that the defendant had acted negligently (which is a requirement of the action for pain and suffering) and that it is not clear that a failure to sterilize someone may be equated with a bodily injury (see para 5.6). A final argument used by the court is that in a claim for seduction (paras 5.7.4, 14.10.2and 15.3.6) damages for pain and suffering are not awarded if the girl becomes pregnant.

[112] Above at 596: 'It follows that insofar as it was decided in the older cases ... that a breach of contract may give rise to a claim for damages in respect of physical inconvenience, they are in conflict with the general principles of our law. Such damages may not even be recovered by the Aquilian action unless, of course the physical inconvenience was brought about by bodily injury.' See Kerr *Contract* 4th ed 609 et seq, who discusses the position on the assumption that *Jockie v Meyer* 1945 AD 354 is authority for the proposition that damages for non-patrimonial loss may be recovered, and also refers to foreign judgments.

The court referred to Voet *Commentarius* 45.1.9; cf also 39.2.1. See further *D* 7.47.1; 9.2.33; 46.8.13; *Emslie v African Merchants* Ltd 1908 EDC 82; *Dominion Earthworks (Pty) Ltd v M J Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A).

[113] See, eg, *Jarvis v Swan's Tours Ltd* [1973] 1 All ER 71 (CA) 74 at 76; *Jackson v Horizon Holidays Ltd* [1975] 1 WLR 1468 (CA); *Heywood v Wellers* [1976] 1 All ER 300 (CA) 306 at 308; *Cook v Swinfen*1967 1 WLR 457 (CA) at 461; *Griffiths v Evans* [1953] 1 WLR 1424. See also Kerr *Contract* 4th ed 612–14; McGregor *Damages* 59–71.

[114] Above at 596–7. See also *Tweedie v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W); *Masters v Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W).

[115] The reasons which the court advances for this last statement are as follows: *(a)* Damages for non-patrimonial loss are recoverable in delict only on proof of intentional or negligent conduct, while fault is not required for breach of contract. This would imply that damages will be awarded in contract in cases where it will not even be recoverable in delict. This is not a compelling argument, since fault is usually present and/or required in most forms of breach of contract. Although the plaintiff need not prove fault in some cases (eg mora debitoris), the defendant may prove its absence (see also Van Aswegen *Sameloop* 187–8).

On the other hand, there are also instances of delictual liability where damages for pain and suffering may be recovered without proof of fault (eg in terms of the actio de pauperie). *(b)* The court also held that claims for contractual damages are always actively transmissible while this is not the case with a delictual claim for pain and suffering. The court was thus not prepared to create a situation where a claim for non-patrimonial loss may be transmissible if it lies ex contractu but not where it is claimed ex delicto. This argument, too, is unconvincing. If the law is to be adapted to allow compensation for pain and suffering upon breach of contract, why should such compensation be transmissible? Although the court also conceded that it may in some cases be desirable to allow compensation for non-patrimonial loss in a contractual context, it saw law reform on this as the task of the legislature. This suggestion is unrealistic, since the Appellate Division is in the best position to effect such a change. See further Lubbe & Murray *Contract* 603. The suggested approach to the holiday cases became reality when the claim for restitution of the full price was allowed. See the cases in n 114above.

[116] Para 11.9.4. If inconvenience leads to patrimonial damage (expenses incurred to abate such loss), damages may probably be recovered (see also n 112 above) if the damage is not too remote (para 11.5.5).

[117] See, eg, McGregor *Damages* 59 et seq; Taitz 1991 *THRHR* 142.

[118] See Visser *Kompensasie en Genoegdoening* 226 et seq.

[119] The court in *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) itself referred (see n 112above) to the fact that damages for pain and suffering are recoverable with the Aquilian action if the plaintiff's physical inconvenience is caused by bodily injuries. The court added (at 595) that the action for pain and suffering differs from the Aquilian action only in so far as the former may not ab initio be transmitted.

[120] eg where breach of contract causes so much inconvenience that restitution of the plaintiff's money will not give him or her enough compensation. Consider also the case where wedding photographs were not taken on the wedding day (*Disen v Samson* 1971 SLT 49).

[121] In view of *Administrator, Natal v Edouard* 1990 (3) SA 581 (A). The court did not, however, expressly consider this situation. See, eg, *Goldsmith v Bank of Africa* 1882 HCG 53 at 54; *Leon v Natal Bank* 1899 CLJ 276; *Bekker v Standard Bank of SA* 1900 EDC 6 at 7; *Freeman v Standard Bank of SA Ltd* 1905 TH 26 at 34; *Van Aswegen v Volkskas Bpk* 1960 (3) SA 81 (T); *Klopper v Volkskas Bpk* 1964 (2) SA 421 (T), where it was held that a plaintiff who does not base his or her claim on an iniuria may lead evidence of 'indignity and humiliation'. See also *Barclays Bank v Giles* 1931 TPD 31; *Witbank District Coal Agency v Barclays Bank* 1928 TPD 18 in terms of which a bank which has wrongfully dishonoured a client's cheque has to pay damages even if patrimonial loss has not been proved. See further *Trust Bank of Africa Ltd v Marques* 1968 (2) SA 796 (T); Lubbe & Murray *Contract* 603; Van Aswegen *Sameloop* 125; Per 1968 *SALJ* 237; Van der Merwe 1965 *THRHR* 165; Van der Merwe & Olivier *Onregmatige Daad* 473–5; Willis *Banking* 36–9, 135.

[122] The court in *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) did not expressly consider this situation. In *First National Bank of South Africa Ltd v Budree* 1996 (1) SA 971 (N) at 981 it was held that non-patrimonial loss cannot be claimed on breach of contract.

[123] Possibly there should in the case of iniuria be liability without fault (or rather liability based on negligence). See, however, *First National Bank of South Africa Ltd v Budree* 1996 (1) SA 971 (N) at 982 where animus iniuriandi is required.

[124] See, however, *First National Bank of South Africa Ltd v Budree* 1996 (1) SA 971 (N) at 980–1. The court held that a client whose cheque has been dishonoured will be entitled to recover from the bank his or her patrimonial loss occasioned by the breach if it was within the contemplation of the parties. A rebuttable presumption will assist the plaintiff (981): 'When credit is an essential element in the conduct of the client's business, it will be presumed that the dishonour occasioned him such loss by damaging his credit, and the court will be obliged to award him an amount of damages in respect of such loss which it must determine in the light of all the circumstances of the case, even though the client is unable to prove his actual loss. This is not a departure from the rule that only patrimonial loss is recoverable for breach of contract; it is merely a means of facilitating the recovery of his loss by someone who might otherwise be unable to do so because of the peculiar difficulty involved in proving the amount of the loss.'

[125] Para 8.9.

[126] See on this para 12.18; *Van Staden v Central SA Lands and Mines* 1969 (4) SA 349 (W).

Chapter 10
COLLATERAL SOURCE RULE AND COMPENSATING ADVANTAGES (RES INTER ALIOS ACTA)

10.1 BASIC PROBLEM AND TERMINOLOGY

A damage-causing event [1] often not only causes loss but also has the result that a plaintiff receives some benefit. Examples are where X's contract of service is terminated without the necessary notice, but a sympathetic member of his family donates his lost salary to him; or where Y's vehicle is damaged through the negligence of another, but he receives payment from his insurer. [2] What role, if any, does the receipt of these benefits play in calculating the damages to which X and Y are entitled? [3] The question whether such benefits from a third party may be taken into account in reducing a plaintiff's compensation (in other words, whether 'voordeeltoerekening' may take place or not) is one of the most complex problems of the law of damages. [4] Legal practice deals with the problem casuistically, while jurisprudence has not really been able to develop a generally acceptable theory. [5]

Just as there are principles to determine whether damage may in certain situations be attributed to a defendant, [6] the question also arises as to the criteria which should be used to attribute benefits to a plaintiff and thus correspondingly reduce the liability of the defendant.

A 'benefit' in respect of patrimonial loss [7] can be seen as the opposite of damage, in other words, an increase or expected increase of a plaintiff's patrimony [8] as a result of a damage-causing event. [9]

If a benefit is disregarded in calculating damages, it is usually said that the collateral source rule applies in that the receipt of such benefit is a collateral matter which does not concern a defendant (it is res inter alios acta). If a benefit is taken into account ('voordeeltoerekening' takes place), the benefit may be described as a compensating advantage, in other words, an advantage which acts as compensation.

10.2 POSSIBLE APPROACHES TO PROBLEM [10]

Suppose Y causes damage to X in the amount of R1 000 and Z presents X with a gift of R1 000. Does Y still have to pay damages of R1 000 to X? This problem may be approached in different ways.

10.2.1 Collateral source rule and concept of damage [11]

The following two solutions are possible:

First, in terms of the sum-formula, [12] it may be argued that Y is liable only for damage which X actually suffers and that one must take into account all the harmful and beneficial consequences of a damage-causing event. [13] If this theory is applied to the facts in the example, [14] it appears that X suffers no damage and that Z has in fact donated the R1 000 to Y! [15]

Secondly one may, in terms of the concrete concept, [16] merely consider the loss which Y caused in respect of the patrimonial asset in question. The formula of damage which is used takes no account of any beneficial results of the damage-causing event, so that, while X suffers damage in the amount of R1 000 he actually receives R2 000. Such an approach, [17] in terms of which all benefits are automatically excluded from consideration, can obviously not be correct, [18] because the basic object of damages is only the compensation of actual loss. [19]

If one supports a flexible approach to the matter of collateral benefits in terms of the concept of damage, an important question which still has to be answered, is when a particular benefit will be seen as reducing *damage* or not. [20]

10.2.2 Res inter alios acta [21]

This rule means that evidence of a transaction between X and Z is irrelevant in a dispute between X and Y. [22] However, res inter alios acta contains no answer to the

problem of whether a benefit may be taken into account or not. [23] This maxim is only a way of expressing a conclusion, which has been reached through a different process, namely that a benefit is not to be taken into account. [24]

10.2.3 Collateral source rule and factual and legal causation [25]

If X, in the example mentioned above, receives R1 000 from Z by reason of the latter's generosity, some argue that the wrongdoer Y did not *cause* X to receive such benefit. It is quite obvious that this conclusion is incorrect, [26] since there is indeed a factual causal nexus [27] between the damage-causing event and the benefit. [28] If one also requires legal causation [29] —in other words, that the benefit may reasonably be attributed to a plaintiff—one is on the right track, [30] but this approach still does not per se offer a meaningful answer to a practical problem; further principles on how legal causation is supposed to function will have to be developed.

10.2.4 Collateral source rule as normative problem of law of damages [31]

The correct analysis [32] of problems regarding the collateral source rule and the effect of compensating advantages reveals that one is not dealing with the assessment of *damage* but with the calculation of *compensation*. [33] Thus damage is determined without reference to the benefits resulting from the damage-causing event. However, when the appropriate amount of damages is to be calculated, it must be considered if, and to what extent, the beneficial consequences of the damage-causing event should influence the award to which a plaintiff is entitled. In this process two conflicting considerations must necessarily be weighed up in the light of what is fair and just in all the circumstances of the case. The one is that a

plaintiff should not receive double compensation. The other is that the wrongdoer or his or her insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party. [34]

It can be said that it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The two generally accepted examples are *(a)* benefits received by the plaintiff under ordinary contracts of insurance for which he or she has paid the premiums; [35] and *(b)* moneys and other

benefits received by a plaintiff as a solatium or from the generosity of third parties motivated by sympathy. [36] These are, however, not the only benefits which are to be treated as res inter alias actae. [37] Therefore, the application of the collateral source rule presents the law with problems of a normative nature [38] which have to be solved in terms of principles on what is just, fair and acceptable. [39]

This interpretation naturally does not offer a ready solution to all practical problems. It nevertheless facilitates a flexible approach, since the area of the problem is correctly identified and one may disregard the rigid theory that everything turns on the assessment of damage. The collateral source rule deals with how the beneficial results of a damage-causing event should be taken into account in view of the interests of the plaintiff, the defendant, the source of the benefit, the community and any other interested party, while applying certain basic principles. [40]

10.3 COLLATERAL SOURCE RULE IN CASES OF EX GRATIA BENEFITS [41]

10.3.1 Generous employers [42]

A common example is where an employer continues to remunerate his or her injured employee despite the fact that the employee does not render any service. In, for example, *Major v Yorkshire Insurance* [43] the court held that the continued payment of a salary has to be disregarded in assessing a plaintiff's damages for his disability. [44]

In *Van Heerden v African Guarantee Insurance Co* [45] a shop assistant continued to receive a salary despite his absence from work due to injuries sustained in a motor accident. The court distinguished the case of *Major* [46] on the somewhat unconvincing ground that in the former case the court was concerned with a contract (and counter-performance was given) while in casu delictual liability was relevant. On the strength of the evidence of the plaintiff (Van Heerden) that he received the amount in question as a *salary* and not as a gift, the court held that it was a compensating advantage reducing his damages. [47]

In *Henning v South British Insurance* [48] the court confirmed that, where an employer out of generosity continues to pay his employee's salary, this fact will not reduce his claim for damages. [49]

The locus classicus is *Santam v Byleveldt*. [50] B, a mechanic, suffered brain damage in a motor accident which left him permanently unfit for work. Notwithstanding this, his former employer allowed him to perform simple tasks and continued to pay him his salary as a motor mechanic. The question arose as to whether this amount of money had to be deducted from his damages for loss of earning capacity. The majority of the court was of the opinion that B's employer had not concluded any

contract of service with him in allowing him to perform simple work. B received his so-called salary as a result of his employer's generosity and it therefore had to be disregarded in calculating his damages. [51] It would be unjust and contrary to the employer's intention to allow the wrongdoer (or his insurer) to benefit from the employer's liberality. [52]

In *Standard General Ins Co Ltd v Dugmore* [53] the employer paid over the proceeds under a group accident insurance policy to the employee. The premiums payable under the policy were paid by the employer and the payment by the insurer were to be made

to the employer. The court therefore held that the payment of this policy constituted additional insurance benefits procured by the benevolence of the employer and should be regarded as res inter alios acta.

10.3.2 Other cases of generosity

In *Klingmann v Lowell* [54] the injured K stayed with his parents for some months without having to pay board and lodging. Before his injuries he stayed elsewhere, where he had had to pay for his accommodation. The court refused to deduct the benefit of free accommodation from K's damages. [55] In *Dippenaar v Shield Insurance* [56] the Appellate Division confirmed in an obiter dictum that payment on account of 'benevolence' is to be disregarded in computing damages. [57] This will also be the position in calculating damages of dependants for loss of their breadwinner. [58]

10.4 COLLATERAL SOURCE RULE IN CASE OF INSURANCE [59]

10.4.1 Indemnity insurance [60]

This concerns instances where a person has insured himself or herself with an insurer against the risk of damage by agreeing to pay a premium. [61] The doctrine of subrogation, which has been adopted from English law [62] is a naturalia of an indemnity insurance contract [63] that allows an insurer which has indemnified an insured to take the place of the insured with regard to the insured's rights and remedies against third parties. [64] This principle underlies the following more specific rules: [65]

(a) *The rule of cumulation:* The insured is entitled to receive the proceeds of an insurance policy as well as an amount of damages. The third party wrongdoer is not entitled to benefit from the fact that the person wronged was insured. [66]

(b) *The rule of non-enrichment:* The insured may not be enriched at the expense of the insurer by receiving both damages from the wrongdoer and an indemnity from the insurer. An insured who has been indemnified by his or her insurer becomes a type of trustee for such insurer in regard to any amount of compensation he or she receives from the wrongdoer in excess of the insured's loss.

(c) *The rule of reimbursement:* The insurer replaces the insured and may claim compensation for the loss from a wrongdoer in its own name (if the wrongdoer is not prejudiced thereby in a procedural sense) or in the name of the insured.

From these rules two principles emerge, namely: (1) the prevention of double compensation to a person who has suffered damage; and (2) the prevention of benefit to a wrongdoer on account of an insurance payment. It is also clear that a wrongdoer cannot rely on the fact that a plaintiff has received full compensation for

his loss from his or her insurer, since the insured has paid for such benefit and, furthermore, the interests of the insurer have to be safeguarded. [67]

In following this approach the court in *Ackerman v Loubser* [68] held that a plaintiff could claim the costs of repairing his motor car (even though his insurer had already indemnified him) from the defendant as the policy of insurance was res inter alios acta as far as he was concerned. This did not imply double compensation because the plaintiff

had to account to his insurer for any money received by him in excess of his actual loss. The insurer could, after having indemnified the insured, claim damages from the wrongdoer in the insured's own name (in terms of subrogation) or as cessionary of the plaintiff's rights. Of course, the defendant has to pay damages only once and in principle the plaintiff will not be able to recover more than his or her actual damage. [69]

The legal position may be summarized as follows in the case where P is the plaintiff, X the insurer and W the wrongdoer:

(a) If P has recovered full damages from X, he may nevertheless claim from W and the latter cannot be heard to say that the benefits under the insurance policy must reduce P's damages.

(b) If P has recovered his full loss from W, he no longer has a claim against X.

(c) If P has been compensated by X and W, he will have to give account of any excess to X.

(d) If X has paid compensation to P, X has an action against W to recover damages from him.

(e) Where P has been only partially indemnified by X or W, he may claim the balance from X or W (according to the case).

10.4.2 Social insurance [70]

An employee who is injured in circumstances described in the Compensation for Occupational Injuries and Diseases Act (COID Act) 130 of 1993 [71] is entitled to

indemnification from the Director-General. If the injured also wants to claim damages from the wrongdoer, [72] the assessment of his or her damages for patrimonial loss has to take into account the amount which the wrongdoer will probably have to pay to the Director-General. [73] The Director-General (or employer individually liable) has a claim against the wrongdoer in so far as he or she has indemnified an employee, but the wrongdoer's damages may not exceed the amount which the employee would have obtained if the Act in question did not exist. [74]

In *Zysset v Santam Ltd* [75] the plaintiffs, who were Swiss citizens, received certain benefits in terms of a Swiss compulsory social insurance scheme as a result of a motor vehicle accident in Namibia. The question arose whether those benefits were to be dealt with as collateral benefits and deducted from the amount to be awarded in terms of the South African Compulsory Motor Vehicle Insurance Act of 1972. The court held that since the source of funds for both the motor insurance and the

other schemes is largely the general public, no justification can exist for allowing a claimant to be doubly compensated by awarding him or her compensation under both schemes. [76]

A child's claim for loss of support against the Road Accident Fund upon the death of his or her breadwinner should not be reduced by a foster child grant that the foster parent receives, because it is is given to enable the foster parent to comply with his or her obligations to the child and the child will never have a claim to it. [77]However, the

Supreme Court of Appeal distinguished child support grants from foster parent grants and reduced a claim for loss of support against the RAF with the amount of the child support grants which the mother had received because the grants were directly linked to the death of their father and both the damages for loss of support and the social security grant originated from state coffers. [78]

Something which possibly relates to social insurance is the decision in *Barnard v Union and South West Africa Insurance Co*, [79] where a plaintiff was treated free of charge in a provincial hospital and this benefit was deducted from his damages.

Section 297A of the Criminal Procedure Act 51 of 1977 is also relevant. In terms of this provision the state is vicariously liable for patrimonial loss caused by an accused who commits a delict during community service. Subsection (3) states that the damages recoverable from the state for such loss are reduced by any amount which a plaintiff may be entitled to from another source. [80]

10.4.3 Liability insurance

This concerns the following problem: [81] X, the insurer of W (a wrongdoer), pays damages to plaintiff P for damage caused by W. Thereafter P claims from W. It is probably correct to argue that W may rely on the benefit which P has already

received from X. W concluded a contract with X and paid premiums and it is fair that the benefit should accrue to him by reducing or extinguishing any damages payable by him.

10.4.4 Non-indemnity insurance

Insurance benefits derived from non-indemnity insurance (for example, life assurance or personal accident insurance) [82] are not regarded as compensating advantages and thus not taken into account in the computation of damages. [83] If a person who has been injured becomes entitled to payment in terms of a personal accident insurance policy, this money will therefore be disregarded. [84]

In *Burger v President Versekeringsmaatskappy Bpk* [85] the plaintiff had received a benefit from the group life assurance scheme of which she was obliged, in terms of her conditions of service with her employer, to be a member. The premiums were paid by the plaintiff herself. The court distinguished this case from the *Dippenaar*decision [86] and held that the benefit under the group life assurance scheme should not be taken into account in her claim against the defendants for loss of future earnings. [87] In *Standard General Ins Co Ltd v Dugmore* [88] the court regarded payments under a group accident insurance policy as res inter alios acta. [89]

10.5 COLLATERAL SOURCE RULE IN CASE OF PENSION BENEFITS [90]

10.5.1 Dippenaar decision

The leading case is *Dippenaar v Shield Insurance Co*: [91] D, a civil servant, was seriously injured in a motor accident. As a result of his injuries, he became totally unemployable and had to retire six years prematurely. During his service he had contributed 7 per cent of his salary to a pension fund and the state had contributed 2.7 times this amount. On his retirement D became entitled, in terms of the regulations governing his contract of employment with the State, to a pension and other retirement benefits. The question which had to be decided was whether from D's

claim for loss of earning capacity (future earnings) there had to be deducted the present value of the pension he had received prematurely. The unanimous decision of the court was that the pension had to be deducted from his damages.

The court argued as follows: The plaintiff claimed for loss of his earning capacity. To prove the monetary value of that loss he had relied on his contract of employment with the State. In terms of this contract the plaintiff was entitled to two benefits, viz a salary and a pension. The contract as a whole was the basis of proof of D's damage. From this it followed that in order to assess D's loss of earning capacity the pension had to be taken into account. [92]

In casu the court took the fact into account that it was the State which was liable to pay D's pension and that he therefore had maximum security. [93] It follows that in a case where in similar circumstances a plaintiff's pension has to be paid by a private company, the court will reduce the deduction from his damages if there are indications that the pension may not be fully paid out. If someone voluntarily contributes to a pension scheme, such pension will not be taken into account. The Appellate Division is apparently not inclined to extend the application of *Dippenaar* beyond what was expressly held in that case. [94] In *Standard General Ins Co Ltd v Dugmore* [95] the Appellate Division confirmed its decision in *Dippenaar*:

> Taking the criticism against *Dippenaar's* case fully into consideration, I am not convinced that the ratio decidendi in that case, as explained or qualified in *Mutual and Federal Insurance Co Ltd v Swanepoel (supra)* is palpably wrong.

10.5.2 Criticism of Dippenaar approach

Pauw [96] submits that *Dippenaar* does not have fair results. He argues that the benefit which the plaintiff derived from his contract of service was not the receipt of a pension (which only became payable when he could no longer work), but his employer's contributions to the pension fund. This in effect increases his gross salary. It is also anomalous that the pension would have been disregarded had the plaintiff been a voluntary contributor, while the contract would still have formed the basis of assessing his loss of earning capacity. [97]

Claasen and Oelofse [98] point to the turnabout which the *Dippenaar* decision represents and that there is now a direct conflict with the position of dependants. [99]This decision also discriminates against persons whose benefits flow from service contracts instead of from other sources. [100]

Burchell [101] argues that the plaintiff had purchased the pension by accepting a lower salary and that there is no reason why he should not have had the benefit of receiving the pension as well as damages for his loss of earning capacity. [102]

Boberg [103] submits that the court's argument that one has to look at the service contract as a whole has only a superficial logical appeal. The court in fact attached substantive legal consequences to merely evidentiary material. The plaintiff's fate now depends on the method he or she chooses to prove his loss of earning capacity. [104]Boberg [105] makes two observations: First the receipt of a pension cannot reduce the loss of earning capacity. Secondly the plaintiff in *Dippenaar* was not fully

compensated as pension payments are not future earnings but deferred remuneration for past services and to deduct them is just as illogical as deducting a portion of the plaintiff's previous salary!

10.5.3 Support for Dippenaar approach

Van der Merwe and Olivier [106] support *Dippenaar* and refer with approval to the court's statement [107] that 'the law does not require the person who committed the delict to compensate the plaintiff for more than his loss'. However, the approach of these writers to collateral benefits is rather unsophisticated and is to the effect that all benefits are to be deducted from a plaintiff's damages—a solution which for obvious reasons is not adopted by any developed legal system.

Le Roux [108] correctly observes that insurance companies have interpreted *Dippenaar* too widely, but he also errs where he regards a plaintiff's entitlement to a pension as a sort of diminished earning capacity left over after the accident. The receipt of a pension is co-determined by someone's past earning capacity (before the damage-causing event) and not by his possible future earning capacity.

Reinecke [109] submits that there are arguments which may be advanced in favour of *Dippenaar*. [110] He argues that the plaintiff in effect conducted his case on the basis of a loss of rights from a specific contract of service. In using such a method of assessing damage, he left the court with no other choice but to draw up a balance sheet of everything which the plaintiff should have received and had in fact received from his contract. The court thus had to determine the value of the service contract to the plaintiff where he had offered no other evidence of his earning capacity. Seen in this light, *Dippenaar* was not concerned with collateral benefits but with the assessment of damage. [111] If an alternative approach is followed and a pension is seen as analogous to insurance (since pension is a sort of insurance of future income), it is a partial substitute for prospective income and the principles discussed above [112] ought to apply, except that subrogation should not be possible. However, if a pension is not seen as indemnity insurance but as analogous to life assurance, it is a type of solatium and may thus not be considered as a factor reducing a plaintiff's damages.

10.5.4 Pension payable in terms of certain other legislation

Pension payments to a member of the Citizen Force in terms of the Military Pensions Act 84 of 1976 are not taken into account in calculating damages for disability. The pension is seen as a type of solatium for all the consequences of the injuries. [113]Disability pension received from the State in terms of the Social Assistance Act 59 of 1992 [114] must be deducted from any other amount of damages payable in terms of another statute where the source from which the compensation came was also public, for example the Road Accident Fund Act 56 of 1996 (RAF Act), the COID Act 130 of 1993, etc. [115]

10.6 BENEFITS FROM MEDICAL FUND AND SICK PAY (SICK LEAVE)

Where an employer is contractually (or statutorily) obliged to grant a plaintiff sick pay, such benefit will be taken into account in reducing the plaintiff's damages. [116] In, for example, *Serumela v SA Eagle Insurance Co*, [117] benefits flowing from a contractual right to sick payment were deducted. However, an allowance should be made for the contingency that the sick leave which has been exhausted due to the wrongdoer's conduct, may be needed in future for some other illness. [118] If the plaintiff has to take

vacation leave during a period of incapacity due to injury caused by the wrongdoer, the salary received during this period should not be deducted from the claim for loss of earnings. [119]

The position with regard to where the employer has a discretion to grant sick

leave is uncertain. In *Krugell v Shield Versekeringsmaatskappy* [120] the court reduced damages to provide for the possibility that discretionary sick pay would be granted to an employee of the Post Office. The court argued as follows: Although the employer has a discretion to grant sick pay, the injured employee will accept that he or she is entitled to such pay and, moreover, the employer has to exercise its discretion in a reasonable manner. However, in *Gehring v Unie Nasionaal Suid-Britse Versekeringsmaatskappy* [121] the court disregarded paid sick leave where the employer had a discretion to grant it. [122]

In *Gehring* [123] the court deducted medical benefits to which the plaintiff was entitled in terms of police regulations. Even though medical benefits are deducted from a claim for past medical expenses, one should not lose sight of the fact that there may be a maximum limit placed on the benefits. If high claims by an employee due to a delict committed by a wrongdoer negatively influence the employee's future benefits, that should be seen as a loss caused by the wrongdoer's conduct. Such loss (of future benefits) should be valued and claimed from the wrongdoer.

In most instances the medical benefits received from a medical aid scheme is in substance a form of indemnity insurance [124] and thus past and future medical benefits are not deducted from a claim for medical expenses. [125]

10.7 MISCELLANEOUS INSTANCES OF SAVINGS CAUSED BY DAMAGE-CAUSING EVENT [126]

An example is where X buys a house from Y but Y commits a breach of contract and X does not receive the house. This also results in savings for X in that he does not have to move his furniture to the house or pay registration fees. Unless X will in any event purchase another house and has to incur such expenses (or part of them), these benefits must be taken into account in reducing the damages to which he is entitled from Y.

In *Roberts v Northern Assurance Co* [127] the 15-year-old R was seriously injured and had to spend the rest of his life in a state institution. The court refused to consider R's loss of earning capacity in isolation and took account of the fact that he would have almost no expense in maintaining himself. [128] The court went even further in *Reid v SAR & H* [129] and held that R's bodily injuries (which destroyed his sexual functioning) made it improbable that he would ever marry and have children. Although this was taken into account because it constituted non-patrimonial loss in the form of loss of the amenities of life, [130] it was also deducted from his claim for loss of earning capacity since he would have no duty of support towards a wife and children. However, the Appellate Division has obiter expressed reservations on the correctness of this decision. [131]

Our law has refused to deduct a plaintiff's savings on normal living expenses from a claim for hospital costs. [132]

In *Bane v D'Ambrosi* [133] the Supreme Court of Appeal refused to treat the saving of cost-of-living expenses as a collateral benefit in a claim for loss of income that would have accrued in a foreign country. The plaintiff was injured before being able to take up his employment in England and decided to stay in South Africa. The court held that the difference in cost of living is indeed relevant in determining the plaintiff's loss of earning capacity and the mere fact that it is difficult to assess should not prevent the court from taking it into account. [134]

10.8 BENEFITS RECEIVED BY DEPENDANTS WHOSE BREADWINNER HAS DIED [135]

10.8.1 Accelerated benefits from estate of deceased breadwinner [136]

The dependants of a deceased breadwinner may derive financial benefit from his or her death where they receive an inheritance earlier than would have been the case had the deceased died in accordance with his or her normal life expectancy. Since *Hulley v Cox* [137] it is clear that the accelerated receipt of a benefit from the estate of a breadwinner has to be deducted from the claim by a dependant for loss of support sustained on account of his or her death. [138]

An important question is exactly *how* such benefits should be taken into account. According to one view, the full value of the benefit is to be deducted from a plaintiff's damages. [139] The alternative, and probably correct approach, is that it is merely the accelerated receipt of an inheritance which constitutes the benefit to be taken into account. [140] Exactly how accelerated value is to be assessed has not been finalized. In some judgments it is suggested that future savings on premiums in regard to insurance effected on the breadwinner's life, or interest which may be

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earned on an inheritance for the period by which it has been accelerated, constitutes the correct method. [141] Another point of view is that this method does not sufficiently take into account the possibility that the dependant might have inherited less or nothing had the breadwinner died in the normal course of events. [142]Accordingly, a specific formula has to be employed to assess the value of the accelerated benefit. [143]

10.8.2 Accelerated acquisition of sole ownership [144]

Suppose that X and Y are married in community of property and that X dies on account of a delict. Usually Y will now acquire full ownership of property of which she has already had the use previously (such as a motor car, house and furniture). Should this be seen as a benefit and deducted from her damages? The mere division of the joint estate cannot be regarded as a deductible benefit but the advantage of being able to dispose of property does constitute such a benefit. [145] In order to determine the extent of such a deductible benefit, the factual circumstances as a whole must be considered. [146] In most cases no deduction takes place. [147]

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There are also different views on the acquisition of a house. [148]

10.8.3 Insurance money, pension and certain other benefits

Here s 1 of the Assessment of Damages Act 9 of 1969 is of importance: [149]

> **1.** (1) When in any action, the cause of which arose after the commencement of this Act, damages are assessed for loss of support as a result of a person's death, no insurance money, pension or benefit which has been or will or may be paid as a result of the death, shall be taken into account.

Before the section came into operation such benefits were taken into account, [150] but the legislature apparently felt this to be unfair. [151] The criticism directed against this provision is unconvincing, [152] since a breadwinner has during his of her lifetime

bargained, worked or paid for such benefits and it is not clear why a wrongdoer or the breadwinner's insurer should be enriched by them. [153]

The provisions of this Act will probably not prevent the deduction of a spouse's claim in terms of s 2 of the Maintenance of Surviving Spouses Act 27 of 1990 from damages such spouse may be entitled to. However, a right to accrual in terms of the Matrimonial Property Act 88 of 1984 or the Civil Union Act 17 of 2006 will probably not reduce the quantum of a claim for loss of maintenance. Compensation paid under s 36 of the COID Act 130 of 1993, even if it is in the form of a pension, has to be deducted from any award of common-law damages. [154]

In *Erasmus, Ferreira and Ackermann v Francis* [155] the Supreme Court of Appeal decided that pension money received by a dependant will not be deducted from her claim against her attorney for the loss she suffered when the attorney negligently caused her claim for loss of support against the Road Accident Fund to become prescribed.

10.8.4 Earning capacity of dependant (surviving spouse or partner [156])

In older decisions it was accepted that a wife whose husband dies has to mitigate [157] her loss of support by assuming the duty of supporting herself (using her earning capacity). [158] This approach was obviously incorrect, since the earning capacity of a spouse or partner normally already exists at the time of death of the breadwinner and is thus not a benefit caused by the damage-causing event. In *Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk* [159] the court rejected the ratio in older cases, namely that the widow has to mitigate her loss by earning money. According to the court, a duty to mitigate can arise only if the income which a widow may earn has some relevance in regard to her damage. A spouse's or partner's earning capacity may be relevant in estimating the amount which the breadwinner would have spent on maintaining the dependant spouse or partner [160] but has no bearing on his or her right to support. To this may be added the consideration that it would be ridiculous to expect of a dependant to work in order to reduce the amount of

damages which a wrongdoer has to pay. [161] This approach was confirmed in *Peri-Urban Areas Health Board v Munarin* [162] and is still followed. [163]

It has also been held that a widow's improved financial position on account of her husband's death may not be taken into account in reducing a claim by children for loss of support. [164]

10.8.5 Re-partnering prospects of dependant (surviving spouse or partner) [165]

Where a dependant and a deceased breadwinner were married or in a civil partnership, [166] the dependant naturally acquires the competence to re-partner upon the breadwinner's death. Such a re-partnership normally creates a new right of support [167] and accordingly the prospect of a re-partnership should be taken into account

in the assessment of damages for the death of a breadwinner according to the theory on compensating advantages. [168]

It is evident from case law that re-partnering or the probability thereof has an

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influence on a claim for loss of support, [169] although the extent of such influence is not always clear. According to Davel, [170] the demands for fairness, justice and public policy requires that the widow's claim for damages should not be influenced by her remarriage. In line with her sentiments are those who believe that the benefits received from re-partnering, or the probability of re-partnering, are res inter alios acta and should for this reason not be taken into account in a claim for support. [171]Koch [172] on the other hand, holds the view that adjustments for remarriage (re-partnering) are reasonable if compensation in a lump sum is understood correctly, namely as a fair price in exchange for the right to litigate further against the defendant. [173] Roederer [174] criticizes the personal assessment of a person's remarriageability and suggests that actuarial evidence mixed with a strong element of deference to the views and aspirations of the plaintiff might render the practice reasonable and justifiable. It is also argued that considering the remarriage prospects of a person is contrary to the spirit of the Constitution, 1996 and it infringes several fundamental rights of the dependant, inter alia the right to dignity (s 10), freedom of association (s 18), freedom and security of the person (s 12) and

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marital status (s 9(3)). [175] In spite of these academic opinions re-partnering or the probability thereof is taken into account [176] in the quantification of a claim for loss of support in South African law. [177]

The exact way in which the speculative matter of prospects of re-partnering is to be expressed and treated remains a question of considerable complexity. In applying re-partnering as a contingency, the court must firstly determine the probability of a subsequent re-partnership, [178] and for this the court must consider the facts known at the time of the hearing. [179] In considering these factors the court does not perform some mathematical calculation but expresses an equitable opinion. In this regard it has been stated that a court is therefore in a better position to form an opinion than an actuary. [180] Once the court has, as a first step, completed the value judgment on the probability of re-partnering, the court needs to quantify this probability. The new relationship does not, however, necessarily

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mean that the dependant spouse or partner automatically loses his or her right to a claim for loss of support. It is also not only the mere fact of a subsequent marriage or civil partnership that is relevant, since the subsequent marriage (or civil partnership) may well be less secure or the new breadwinner less blessed by health or wealth. [181]The income of the new partner and his or her life expectancy will be taken into account in the calculation of the extent of the claim. [182] If the new partner is not able to support the dependant at the same level as the deceased, the loss to the dependant is deemed to continue beyond the date of the new relationship, though it is reduced by whatever support is likely to be obtained from the second or a subsequent partner.

The courts, in most cases, will either reduce the contingency to an amount, [183] or they will express the value of the contingency as a percentage of the value of the loss of support. [184] Where the court during the initial step considered facts, it is now obliged to venture 'guesses' in terms of the quantification process. According to Koch [185] the court

must give consideration to two factors during this process, namely the expected number of years that the plaintiff will remain without a formal

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partner [186] and the financial position of his or her next partner. In respect of the financial position of the next partner, it is expected that the dependant spouse or partner would re-partner into the same social class as before and that his or her financial circumstances would also be similar to what he or she had with the previous partner. [187] The onus of proof rests on the defendant to prove the extent to which the dependant spouse or partner will be financially benefitted by re- partnering.

10.8.6 Some benefits of children when parent dies

The amount of damages to which a child may be entitled is not reduced because of the subsequent marriage or civil partnership of the child's widowed mother. [188]

In *Constantia Versekeringsmaatskappy Bpk v Victor* [189] it was held that there are no considerations of logic or equity in terms of which the damages of a child upon the death of his father should be reduced if the child is later adopted. [190]

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10.9 SAVINGS [191] OF INCOME TAX [192]

10.9.1 Basic problem [193]

Suppose X is injured and loses income or his earning capacity (loss of future income). [194] Since the earning of income attracts liability to pay tax, a benefit accrues to X as he does not have to pay income tax. The question is if and how such benefit should be taken into account in regard to damages for lost income or the loss of earning capacity. [195]

10.9.2 Taxation of damages

In considering the problem under discussion it should be remembered that an amount of damages is usually not taxable as income since it is of a capital nature. [196] There are, however, cases where damages are taxable. In, for example, *Omega Africa Plastics v Swisstool Manufacturing Co* [197] the court assumed that damages awarded for the infringement of a registered design would probably be taxable as income and therefore declined to deduct tax. [198]

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There have been suggestions for tax to be payable on damages in the form of a capital amount. [199]

10.9.3 Approach in case law

In the leading English case of *British Transport Commission v Gourley* [200] it was held that in assessing damages for loss of income in the past or future caused by bodily injuries, tax savings have to be taken into account where the damages themselves are not taxable but the lost income would be subject to taxation. [201] A South African court quickly adopted this view in *Pitt v Economic Insurance Co Ltd*; [202] however, the court did not perform precise calculations.

In *Whitfield v Phillips*, [203] the Appellate Division obiter refused to take future taxation into account as a contingency in assessing damages. However, in *Gillbanks v*

Sigournay [204] the court followed the decisions in *Gourley* and *Pitt*. [205] From a remark in *Van der Plaats v SA Mutual Fire and General Insurance* [206] it seems that actuaries make a practice of deducting tax from estimates of future income, that trial courts usually accept this and that this point is seldom raised on appeal. [207]

Boberg [208] provides the following summary:

> And so it is on this uncertain basis—the provincial courts apparently at odds with the Appellate Division—that matters stand in South African law today.

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10.9.4 Commentary on legal position

The majority of academics [209] favour the solution adopted in *British Transport Commission v Gourley*. [210] However, a strong case against the deduction of tax savings is made out by Van Heerden [211] who comes to this conclusion on the basis of further considerations of fairness and convenience. He argues that there is not a sufficient reason why a benefit which would have accrued to the fiscus should now be utilized to the benefit of the wrongdoer. He further argues that a situation where a trial must be held within a trial to determine the extent of the hypothetical taxability would be unnecessarily detrimental to the plaintiff.

Generally speaking, the cogency of these remarks must be acknowledged. It is for the State to decide whether it wants to tax someone whose income has been replaced by a capital amount. It is unacceptable to allow a wrongdoer to benefit at the expense of an aggrieved person as well as the state.

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10.10 CASES WHERE WRECK HAS SOME VALUE [212]

The measure of damage in the case of injury to property [213] is to compare the market value of the property before the damage-causing event with its value thereafter; any difference constitutes the loss suffered. Usually the value of a wreck (the damaged property) is relevant in the assessment of loss, but what is to become of the wreck itself? According to Van der Walt, [214] the value of a wreck must be deducted from the damages which a defendant has to pay. However, it appears that this matter has nothing to do with the collateral source rule and it is actually primarily a question of assessing loss. Any value which a wreck may have and to which the plaintiff is entitled [215] will influence his damage and thus his or her damages. [216]

10.11 COLLATERAL SOURCE RULE IN CASE OF BREACH OF CONTRACT

In the case of breach of contract it is often a problem to distinguish clearly between assessment of damage [217] and the operation of the collateral source rule in terms of which some benefits may be left out of consideration in calculating damages. [218]There is also some confusion between a creditor's duty to mitigate his or her loss [219] and the collateral source rule. [220] If the collateral source rule is merely seen as a question of assessing damage, there is, of course, a tendency to deduct all benefits flowing from a breach of contract from a plaintiff's damages. [221]

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In *Hunter v Schapiro* [222] the seller of premises failed to give timeous occupation to purchaser X and the latter was thus unable to honour his obligations to a lessee Y. The seller knew that X had leased the property to Y, who cancelled the contract, and X sold

the property to Z at a profit in mitigation as X could not find another lessee. This profit amounted to more than the damages which X claimed from the seller. X claimed the loss of rental from the date on which occupation was to take place and the date of resale of the property. The court refused to take X's profit on his transaction with Z into account in calculating the amount of damages owed to him by the seller. The court held that the resale was a new supervening event to which the seller was a complete stranger and that the resale was wholly independent of the relations created by the contract of sale between the seller and Y. [223]

A different type of case may be illustrated by the following: In terms of a contract, X has to paint Y's house. Long before X has to start painting, Y commits breach of contract (repudiation). X rescinds the contract and claims damages. It is obvious that in calculating the damages to which X may be entitled, account has to be taken of the fact that he has probably not incurred any expenses in purchasing paint etc. Y may thus claim that saved expenses be deducted from X's claim for loss of gross profit. In *Goolam v Comrie* [224] it was held, in a case comparable with the example, that

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a plaintiff may claim as damages only the difference between the contract price and the hypothetical expenses in performing his or her part of the contract. The plaintiff's damages are thus restricted to loss of profit and saved expenses are taken into account as benefits accruing to him or her. [225]

After consideration of the cases referred to above, Van der Walt [226] comes to the tentative conclusion that the law of contract solves the problem of collateral benefits in such a way that a plaintiff does not lose his or her profit. This is evidently an equitable solution. [227]

In *Everett v Marian Heights (Pty) Ltd* [228] the court took account of some benefits caused by a breach of contract but in *Sandown Park v Hunter Your Wine and Spirit*

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Merchant (Pty) Ltd [229] an alleged benefit was disregarded.

In *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* [230] the defendant breached the sale by supplying goods that did not comply with the specifications. The plaintiff contracted with another manufacturer for the supply of the goods, but the plaintiff's holding company paid for it. The court held that the payment of the plaintiff's debt by its holding company was at its best a collateral benefit whether the holding company paid the plaintiff's debt as agent, negotiorum gestor or donor. In *Solomon v Spur Cool Co (Pty) Ltd* [231] the court found that the proceeds of a sale of

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leased property after the breach of the lease was not a collateral recoupment and disallowed any damages for lost rental for the period after transfer of the leased property to the purchaser.

In *Mostert v Old Mutual Life Assurance Co (SA) Ltd* [232] the plaintiff, acting on behalf of a pension fund, instituted a claim for the recovery of the proceeds of a pension fund which the defendant paid out to the employer in breach of the policy conditions. The court held that the recoveries made by the plaintiff was from a collateral source as these payments were not made by or on behalf of the defendant nor by a third party in discharge of the defendant's debt.

10.12 BENEFITS CAUSED BY PERFORMANCE OF DUTY TO MITIGATE DAMAGE

The law expects of someone who claims damages to undertake reasonable steps to restrict or reduce his or her damage. [233] The obvious correlative of this is that the positive consequences of performance of the duty to mitigate have to be offset against a claim for damages. [234]

10.13 CONTRACTUAL RIGHT OF OWNER-SELLER OF PROPERTY TO REINSTATEMENT

In *Botha v Rondalia* [235] it was held that, where X had sold a vehicle to Y in terms of which the latter had the duty to have the vehicle repaired in the case of damage (through insurance), X as owner could still claim damages for damage to such vehicle. [236]

10.14 COLLATERAL SOURCE RULE IN REGARD TO NON-PATRIMONIAL LOSS [237]

There is a view that compensating benefits should be excluded from consideration if there is a claim for solatium (consolation money) [238] or where the benefit is in the form of solatium. [239] The authority for this proposition is *Mutual and Federal Insurance Co Ltd v Swanepoel*: [240]

> [It] cannot be said that a plaintiff is over-compensated [241] if, when assessing his general damages, no regard is had to an extraneous benefit conferred upon him for the purpose of ameliorating pain and suffering, loss of amenities, disability, etc.

This dictum should be restricted to the situation with which the court was concerned, namely a benefit in terms of the Military Pensions Act 84 of 1976 which, according to the court, amounts to a solatium for all the pecuniary and non-pecuniary consequences of disability. In *Zysset v Santam Ltd* [242] *Swanepoel's* case was applied wider than that to include all claims for non-patrimonial loss. The court in *Swanepoel's*case could hardly have intended to decide that it is generally inappropriate to take into account any benefit in assessing damages for non-patrimonial loss. It is, for example, well known that, where bodily injuries cause unconsciousness, the plaintiff receives less compensation for pain and suffering. [243] One may argue that his unconsciousness has a 'beneficial' result in that it excludes or minimizes pain. [244]Furthermore, in *Administrator-General, SWA v Kriel* [245] it was held that an award for medical and paramedical costs for aids which may reduce a

person's loss of amenities of life is to be taken into account in reducing damages for loss of amenities. [246] Also relevant is the fact that in the actio iniuriarum for an iniuria the self-help which a plaintiff has employed to obtain satisfaction, [247] or an apology by a defendant, [248] are seen as factors reducing an amount of satisfaction. The correct interpretation is that they are benefits, causally connected with the wrongful conduct, which are taken into account.

There is thus authority supporting the view that factual as well as monetary benefits may be taken into account in assessing damages for non-patrimonial loss. There is also an opinion that non-patrimonial loss in itself should in some cases be seen as a 'benefit' in regard to patrimonial loss. [249]

10.15 BENEFITS OF CONTRACT INFLUENCED BY MISREPRESENTATION

The assessment of damages where misrepresentation has induced a contract are discussed elsewhere. [250] The attitude of the courts is that, where misrepresentation has caused someone to conclude a contract (dolus dans), the benefits of such a contract should be offset against any loss. [251] In a case where there would still have been a contract in the absence of misrepresentation, but on other terms (dolus incidens), the principle is that benefits which a plaintiff (who upholds the contract) obtains are not taken into account in reducing his damages. [252]

10.16 ONUS OF PROOF IN REGARD TO COLLATERAL SOURCE RULE [253]

The principle is well known that a plaintiff has the onus to prove the extent of his or her loss as well as how it should be quantified (expressed in an amount of money). [254] However, in terms of the correct approach to the collateral source rule, it does not relate to the assessment of damage [255] but concerns the normative question whether particular benefits have to be deducted from an amount of damages; in other words, it relates to the adjustment of an amount of damages in

favour of a defendant. It would therefore be logical to accept that, once a plaintiff has proved his or her damage and quantified such loss, any subsequent reduction thereof in favour of a defendant is a matter that the latter has to prove. [256] There is an analogy with the onus of proof resting on a defendant to demonstrate that a plaintiff has not taken reasonable steps to mitigate his or her loss. [257] However, if the incorrect theory is adopted that the collateral source rule relates to the assessment of damage, it will be for a plaintiff to prove that particular benefits do not reduce his or her damage (and damages).

10.17 ANALYSIS OF COLLATERAL SOURCE RULE AND COMPENSATING BENEFITS

10.17.1 Boberg

Boberg [258] comments as follows on the current legal position:

> The existence of the collateral source rule can therefore not be doubted; to what benefits it applies is determined casuistically: where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.

10.17.2 Reinecke

Reinecke [259] emphasizes that the collateral source rule can be properly applied only if one uses the correct concept of damage. [260] He also observes that a third party (the source of the benefit) normally does not have the intention to perform a wrongdoer's duty to pay damages. He attempts to develop general principles in regard to the application of the collateral source rule:

(a)

> *Causation:* Benefits may be taken into account only if there is a causal nexus between them and the damage-causing event. The causal nexus should be the same as that which should exist between the damage-causing event and the loss sustained. [261]

(b)

An actual benefit: [262] A benefit may be considered only if it is an 'actual' benefit and not merely a 'prospective' one. An example is the rule that a child's claim for loss of support is not reduced if he or she has been adopted by someone after the death of the parent. The benefit caused by such adoption is merely prospective, since the child may claim support from the new parent only if the support which he or she already receives is insufficient. [263] However, our legal practice does allow in some instances that uncertain or prospective benefits may be taken into account. [264]

(c)

Compensatory object: [265] It is only where a benefit is intended as full or partial compensation of loss that it may have the effect of reducing a plaintiff's damages. [266] Gifts [267] are usually not meant as compensation and will thus not be taken into account. [268] There is a problem with this requirement in the case of insurance since the proceeds of insurance are clearly intended as compensation, but it is nevertheless left out of account in assessing damages. [269]

(d)

Benefits not to be taken into account in a case of solatium: In a claim for solatium or where an advantage takes the form of solatium, damages should be assessed without reference to any benefit. [270] This requirement is unacceptable. As stated, [271] it is not clear why there should be an absolute principle which excludes all benefits from consideration in the case of non-patrimonial loss. A court should possibly be more reluctant to allow benefits to influence the assessment of damages in non-patrimonial loss than in pecuniary loss, but

there is no convincing reason why the nature of the loss should be decisive in regard to the application of the collateral source rule.

Reinecke's attempt to identify general principles which are intended to facilitate a better operation of the collateral source rule is useful. Nevertheless, one will also additionally have to employ vague and general principles in regard to equity, reasonableness and the public interest.

10.17.3 Van der Walt

Van der Walt [272] discusses various possible approaches to collateral benefits.

The *first* is that a defendant is liable only for damage which he or she has caused and this implies that the question of collateral benefits may be handled in terms of causation. If the plaintiff has received a benefit through the generosity of a third party, such benefit was not 'caused' by the defendant and should therefore be disregarded. [273]

The *second* is that the defendant is liable to compensate a plaintiff only for damage actually sustained by him or her. This implies that problems concerning the collateral source rule may be solved in terms of the concept of damage. [274]

Thirdly one may, in terms of the approach apparently favoured by the Appellate Division, attempt to solve the problem by means of concepts such as equity, reasonableness and public interest. [275]

Van der Walt's [276] conclusion is that the problems regarding collateral benefits have to be solved in terms of the basic philosophy of the law of damages. This philosophy of compensation (which requires the fullest possible compensation of damage attainable in

the circumstances) has to take account of developments in other areas of life, such as the realities of the insurance industry and measures aimed at social care.

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10.17.4 Other authors

There are numerous other views which attempt to clarify or explain the position in legal practice. [277] Koch submits that it is useful to disregard some benefits. [278]

Meier develops a classification of benefits according to the true nature of five groups of benefits. [279] He attaches consequences to each group with regard to whether the benefit should be taken into account or not when calculating damages. They are:

(a)

Pseudo-benefits: This is the remaining patrimonial value of a patrimonial object or right after the infringement. They are not real accounting benefits, but are part of the process of determining the damage. An example is a case where a wreck has some value.

(b)

Quantifying benefits: These are not accounting benefits, but are general factors or elements which are relevant in quantifying damage more accurately. He identifies inflation, saving of expenses and the saving of income tax as examples.

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(c)

Adjustment benefits: These are accounting benefits that adjust the provisional amount of damages with a view to calculating the final amount. Examples are ex gratia benefits, pension benefits and indemnity insurance benefits.

(d)

Mitigating benefits: These originate after the damage-causing event through the act(s) of the plaintiff and limit the damage. They are either adjusting benefits or relate to the applicable measure of damage.

(e)

Collateral benefits: These are the benefits that are not taken into account when quantifying damages. The distinction between adjustment benefits or collateral benefits depends on public policy.

Meier makes a useful distinction between those benefits that relate to the assessment of damage and those that relate to the quantification of damages, but he has to fall back on public policy and the classes of collateral benefits that are already identified in case law to distinguish between adjustment benefits and collateral benefits.

10.17.5 Summary of relevant factors and principles

The question whether benefits should be considered or not arises in different factual situations [280] and casuistry has developed which hampers the development and application of general principles. However, it is possibly useful to identify some [281] of the relevant factors and principles.

(a)

Nature of the benefit: It is normally a patrimonial benefit [282] and it appears that the benefit may consist of, for example, the receipt of money (as a single sum or instalments), goods, services, [283] savings, a contractual right to performance, [284] or the availability of another action. [285] It may be a benefit which has already been received or is merely of a prospective nature. [286]

(b)

Assessment of the value of the benefit: The value of an immediate benefit is assessed in view of current values and facts. In prospective benefits the degree of probability with which the benefit is expected [287] as well as contingencies are to

be taken into account. [288] Any loss connected with a benefit must be taken into account as well. [289]

(c)

Reason for and basis of the benefit: A person may purchase a benefit (indemnity insurance), [290] he or she may bargain for its inclusion in a service contract, [291] or it may arise from someone's generosity. [292] A benefit may be created ex lege (tax savings) [293] or it may be based on facts (marriage (or re-partnering) prospects of a surviving spouse or partner or a saving on living expenses). [294] The plaintiff may have a choice in regard to the benefit (eg indemnity insurance) or he or she may have no choice (a saving on living expenses). In some instances the plaintiff may be contractually or statutorily entitled to a benefit, [295] in others it depends on the exercise of someone's discretion [296] and in further cases the plaintiff may have no right to the benefit at all. [297]

(d)

Source of the benefit: This source may be, inter alia, an employer, the State, a generous or sympathetic person, an insurer, the defendant him- or herself, [298]a deceased person, the community, [299] or the plaintiff him- or herself. [300] The source of the benefit (eg an insurer) may in some cases have a right of recourse against the wrongdoer but usually there is no such right.

(e)

The intention with which the benefit is given or received: There may be a motive of generosity with or without the intention of relieving the wrongdoer of liability, [301] it may occur in terms of a contract or a statute, or there may be a discretionary element. A benefit may be given and/or received as compensation of damage [302] or merely meant as some form of assistance.

(f)

Financing of the benefit: Tax money may be used in financing a benefit, [303] or it may be financed by the plaintiff as well as taxpayers, [304] or by the plaintiff and the other clients of an insurer, or by a private person, or by someone who may pass the burden on to the general public, or by an employer etc.

(g)

Causation: It is obvious that only a benefit which was caused by the damage-causing event may be taken into account, but this fact alone is, of course, not decisive. [305] The benefit may also stand in a 'normative' relation to the damage-causing event and the question then is whether there is a sufficiently close relationship to see it as a benefit which may be taken into account. Further principles have to be developed before the law will be able to give a meaningful answer to this question.

(h)

Relevance of the benefit: This relates to a kind of relationship between the benefit and the loss. [306] This principle seems to be able to explain the application of the collateral source rule in the assessment of contractual damages. [307] However, the case law on delictual damages seems to be ambivalent. [308] For example, the benefit represented by the earning capacity of a dependant is irrelevant in regard to his or her loss of support, [309] the saving of expenses connected with marriage

is possibly irrelevant in regard to a claim for loss of earning capacity, [310] savings on taxes are regarded as relevant in relation to a loss of earning capacity, [311] and the view that a pension is relevant in relation to a loss of earning capacity is disputed. [312] But the Supreme Court of Appeal expressly rejected the 'like from like' principle in *RAF v Maphiri* and held that compensation in terms of the COID Act 130 of 1993 has to be deducted from the total liability of the defendant. [313]

(i)

The nature of the damage: The collateral source rule may apply to all forms of patrimonial loss [314] and also to some forms of non-patrimonial loss. [315]

(j)

The defendant (wrongdoer): The defendant may be a blameworthy person who acted intentionally or negligently or he or she may be liable without fault. This is relevant in regard to the question whether a punitive element may play a role. [316]

(k)

Some basic and general considerations: The benefit may be taken into account by directly subtracting it from the amount of damages, or by subtracting a percentage of the damages, [317] or by offsetting it against a particular facet of the plaintiff's damage. Whether a benefit is to be taken into account or disregarded should be determined by applying the following principles in a balanced manner to the facts of a given situation: The plaintiff is entitled to full compensation of his or her loss (the fullest compensation attainable and desirable in the circumstances); [318] the defendant need not compensate the plaintiff for more than his or her loss; [319] in terms of general considerations of justice and fairness [320] benefits should be disregarded if, by taking them into account in the assessment of damages, it would supply an advantage to a wrongdoer only without any gain to the community or the source of such benefit. [321]

In view of the many variables referred to above, it is improbable that any 'rule of thumb' will ever be conceived to cover all situations. The legislature and the courts should, however, allow the law to develop in such a way that in as many situations as possible the source of a benefit can have a right of recourse against the defendant. This will have the result that in more instances benefits may be taken into account with neither the source of the benefit suffering an irrecoverable loss nor the plaintiff being compensated twice.

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[1] Para 2.1.

[2] See also Bloembergen *Schadevergoeding* 332–3, who mentions interesting examples: the owner of a house which has been destroyed by fire finds a treasure in the ruins; X's copyright is infringed but, as a result of this, his work becomes famous and sales soar; a factory which causes nuisance is the reason why property prices in the vicinity rise.

[3] See para 10.14 on the possibility of collateral benefits in regard to non-patrimonial loss.

[4] See, eg, *Santam v Byleveldt* 1973 (2) SA 146 (A) at 150; *Standard General Ins Co Ltd v Dugmore*1997 (1) SA 33 (A) at 41. See in general McGregor *Damages* 1238–57, 1271–87, 1373–84; Bloembergen *Schadevergoeding* 313–49; Fleming *Encyclopedia* ch 11; Luntz *Damages* 423–78; Cooper-Stephenson *Personal Injury Damages* 563–630; Kemp *Damages* 197–237; Exall *Munkman on Damages*136–60; Koch *Reduced Utility* 179–212; Lewis *Deducting Benefits* 4–12.

[5] *Santam v Byleveldt* 1973 (2) SA 146 (A) at 150–1; *Standard General Ins Co Ltd v Dugmore* 1997 (1) SA 33 (A) at 41–2: 'The question thus is one of demarcation only: which benefits are deductable from the plaintiff's claim? Various approaches to the question of demarcation have been developed here and in England. None of those approaches has escaped criticism, a fact readily acknowledged by our courts and academic writers. Boberg (*The Law of Delict* vol 1 479) succinctly states: ''The existence of the collateral

source rule can therefore not be doubted; to what benefits it applies is determined casuistically: where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.'' It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country and in England it is acknowledged that policy considerations of fairness ultimately play a determinative role.' See also the minority judgment in *Dugmore* supra at 47; *Zysset v Santam Ltd* 1996 (1) SA 273 (C) at 278–9; *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 915; Mukheibir 2002 *Obiter* 328; Corbett & Buchanan I 11. See also the report by the Law Commission in England (*Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits* No 262 1999), in which the Law Commission declined to recommend only legislative changes; Visser 1997 *THRHR* 542; Van der Walt & Midgley *Delict*232–4.

[6] Para 11.5.1.

[7] See para 10.14 on non-patrimonial loss.

[8] See para 3.2 on a patrimony (estate). A benefit can take the form of money, goods or services or an expectation of such benefits. A benefit may also take the form of the avoidance of loss—eg, where an injured person would have to pay income tax on income he could have earned but for his or her injuries (para 10.9).

[9] See also Bloembergen *Schadevergoeding* 314–15.

[10] See para 10.17 for an analytical approach.

[11] See also Meier *Voordeeltoerekening* 38–40, 93–5. Bloembergen *Schadevergoeding* 314, 316 considers this possibility and concludes that the concept of damage is not relevant in this regard.

[12] Para 4.2.

[13] The assessment of damage (ie the comparison of a plaintiff's current position with his or her hypothetical position but for the damage-causing event) may sometimes indicate that a plaintiff has not sustained any loss but that his or her position has in fact improved—this should not, of course, be confused with the application of the collateral source rule. Cf, eg, where X buys a house worth R1 000 000 from Y for R1 200 000. If Y commits a breach of contract, X does not (on these facts alone) suffer any damage since his present position with R1 200 000 is more favourable than his hypothetical position without R1 200 000 and a house worth only R1 000 000. See also *Standard General Ins Co Ltd v Dugmore* 1997 (1) SA 33 (A) at 41.

[14] See, eg, *Ranger v Wykerd* 1977 (2) SA 976 (A) at 991, where (in regard to fraud) it was said that a plaintiff's 'loss on the swings, [may be] compensable by his gain on the roundabouts'. See also the comments by Van der Merwe & Olivier *Onregmatige Daad* 182 on *Botha v Rondalia* 1978 (1) SA 996 (T). See also para 10.11 on saved expenses in respect of lost profit.

[15] This is the approach advocated by Van der Merwe & Olivier *Onregmatige Daad* 317 et seq, who apparently want to have all the benefits of a damage-causing event to be taken into account. (See also *Ackerman v Loubser* 1918 OPD 31 at 35.) Reinecke 1988 *De Jure* 224 uses an example to illustrate how untenable this view is: X's child Y is negligently injured by Z. Y dies after a week in hospital. X claims medical and funeral costs from Z. Should Z be able to argue that Y's death has bestowed considerable financial advantages on X in that he no longer has to provide Y with support? If the collateral source rule is merely an exercise in arithmetic in terms of which all the benefits of a damage-causing event are subtracted from the loss caused by it, Z's absurd 'defence' will have to be allowed. However, all reasonable people will agree that Z's defence is inequitable and should not succeed. See also Van der Walt 1980 *THRHR* 4; *Standard General Ins Co Ltd v Dugmore* 1997 (1) SA 33 (A) at 41.

[16] Para 4.2.5.

[17] In *Santam v Byleveldt* 1973 (2) SA 146 (A) at 152 it was said that the lex Aquilia contemplates payment of damages by the wrongdoer and no-one else. In general this statement is incorrect. There is no reason why Z cannot pay a debt which Y owes ex delicto. According to Koch *Reduced Utility* 182 the focus here is on burdening the wrongdoer with as large a liability as possible, rather than concern for comprehensive compensation for the victim. Such a consideration is clearly punitive, and the modern Aquilian action is, in theory at any rate, no longer punitive. In cases of collateral benefits Z usually does not have the intention to perform Y's obligation towards X.

[18] See also Bloembergen *Schadevergoeding* 317, who explains the ratio for taking some benefits into account as follows: The defendant is liable for bringing about the damage-causing event. It would be arbitrary and unreasonable to isolate the advantageous consequences of his or her conduct from its detrimental effects and conclude that the former do not concern the defendant. Anyone who wants to present a defendant with an account of his or her conduct should (in principle) present a complete account and may not omit certain items.

[19] See also *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 915: 'On the other hand the law does not require the person who committed the delict to compensate the plaintiff for more than his loss.' If a plaintiff receives double compensation, it may place a too heavy burden on the community.

[20] See *Botha v Rondalia* 1978 (1) SA 996 (T) at 1004, where the court proposed the principle that a plaintiff's damage has to be assessed at the *time* of the damage-causing event. The implication is that benefits received after this stage are irrelevant. This is obviously an artificial approach. See, eg, Boberg *Delict* 625.

[21] See also Meier *Voordeeltoerekening* 85–93.

[22] See *Santam v Byleveldt* 1973 (2) SA 146 (A) at 172. The rule is as actually formulated as follows: 'res inter alios acta alteri nocere non debet'. It is a difficult rule to apply, since there are instances where the relationship between X and Z influences the relationship between X and Y. Whether this is the case is determined by factors such as reasonableness, equity and public policy. These factors are relevant in regard to the collateral source rule (as in most other legal principles) but are too vague to provide any clear solution. See also Van der Walt 1980 *THRHR* 9. See further *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 (SCA) at 666 on the 'inter alios' aspect.

[23] See also *Santam v Byleveldt* 1973 (2) SA 146 (A) at 151. In casu the court refused to take account of ex gratia payments on the basis of equity instead of applying the res inter alios acta rule (see also Reinecke 1988 *De Jure* 224). See further *Botha v Rondalia* 1978 (1) SA 996 (T) at 1002; *HK Outfitters v Legal & General Ass* 1975 (1) SA 55 (T) at 63.

[24] A further possible explanation for considering a benefit is that a plaintiff can be said to be unjustly enriched if he receives damages *as well as* an additional benefit. However, it may be asked at whose expense a plaintiff is enriched and what the nature of the defendant's impoverishment is. See Bloembergen *Schadevergoeding* 316–17.

[25] See also Meier *Voordeeltoerekening* 79–84.

[26] See also *Santam v Byleveldt* 1973 (2) SA 146 (A) at 151.

[27] See, eg, Neethling & Potgieter *Delict* 231 n 190; Van der Walt & Midgley *Delict* 232.

[28] See also n 26 above.

[29] Para 11.5.

[30] See paras 10.2.4 and 10.17.5, where it is argued that the whole problem is of a normative nature. See also Koch *Reduced Utility* 207–9; Lewis *Deducting Benefits* 215–22.

[31] See also Meier *Voordeeltoerekening* 98–103.

[32] See also Bloembergen *Schadevergoeding* 315.

[33] Para 8.3. See also Van der Walt & Midgley *Delict* 233: 'What is not clear is whether courts are concerned with the assessment of the extent of the harm, or the calculation of damages. Academic opinion appears to favour the latter, but it seems that both approaches are relevant. From an assessment of harm point of view, any benefit accruing, or expected to accrue, to the estate must be included in the *universitas*.'

[34] *Zysset v Santam Ltd* 1996 (1) SA 273 (C) at 279; *Standard General Ins Co Ltd v Dugmore* 1997 (1) SA 33 (A) at 48; *Van Wyk v Santam Bpk* 1998 (4) SA 731 (C) at 737; *Erasmus, Ferreira and Ackermann v Francis* 2010 (2) SA 228 (SCA) at 628–9.

[35] See para 10.4.

[36] See para 10.3. See also *Zysset v Santam Ltd* 1996 (1) SA 273 (C) at 278; *Standard General Ins Co Ltd v Dugmore* 1997 (1) SA 33 (A) at 42; Corbett & Buchanan I 17.

[37] See, inter alia, *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A); *Zysset v Santam Ltd*1996 (1) SA 273 (C) at 278; Corbett & Buchanan I 11 et seq; Erasmus & Gauntlett 7 *LAWSA* para 43.

[38] See also Van der Walt 1980 *THRHR* 5: 'Só gestel, is die voordeeltoerekeningsvraag nou eenmaal nie 'n bloot rekenkundige vraag nie maar een wat ook, en veral, behorenselemente bevat.' See also *Klaas v Union and SWA Ins Co Ltd* 1981 (4) SA 562 (A) at 577: 'The question (which is one of principle) whether a plaintiff's measure of damages in respect of medical and other treatment for personal injuries is the value of services necessitated by the injuries or the reasonable costs actually incurred, should not be confused with the further question whether the fact that a plaintiff received a benefit in the form of partial or full free treatment should be taken into account in quantifying the wrongdoer's liability. If the measure of damages is the aforesaid value, then in regard to the second question one enters the field of what in German law is aptly described as 'Vorteilsausgleichung' (set-off of benefits as against loss).'

[39] Van der Walt & Midgley *Delict* 232: 'Based upon policy considerations of fairness, reasonableness and justice, the collateral source rule serves as an *ex post facto* rationalisation of a judge's conclusion that compensation, or a benefit derived from a particular source of recoupment, is legally irrelevant to the claim

before the court. The exact basis for the approach is unclear and controversial, and this is compounded by the anomalous results reached in practice. The approach of the courts is none the less justified, for the exclusion of a collateral benefit is often fair and equitable in the circumstances. And, since it amounts to a departure from the fundamental rule of compensation, courts will exclude a benefit only if there are policy grounds which clearly justify the exception.'

[40] See para 10.17.2 for attempts to develop some general principles in this field.

[41] See in general Corbett & Buchanan I 13; Van der Walt 1980 *THRHR* 6–11; Boberg 1973 *Annual Survey* 185–91; Koch *Lost Income* 126–8; *Reduced Utility* 190–3; Dendy 1989 *BML* 169; Bloembergen *Schadevergoeding* 346–8; McGregor *Damages* 1245–8, 1272–3; Kemp *Damages* 201–3; Lewis *Deducting Benefits* 65–8; Luntz *Damages* 458–60; Meier *Voordeeltoerekening* 379–410.

[42] See also para 10.6 on an employer's discretion in allowing sick pay and medical benefits.

[43] 1949 (1) PH J1 (D).

[44] It was successfully contended that the employee's position was analogous to that of the beneficiary under a contract of insurance and that by rendering services in the past he had already paid for the salary received only later when he was disabled.

[45] 1951 (3) SA 730 (C).

[46] See n 43 above.

[47] The court looked for assistance in the field of legal causation and the 'direct consequences' approach (see *Richards v Richardson* 1929 EDL 146). Van der Walt 1980 *THRHR* 7 comments that Van Heerden must have regretted the fact that he had not stated in court that he knew that he was not entitled to any remuneration and that he received the money merely as an ex gratia payment. If he had done this, the court would have disregarded the payment! See for further criticism McKerron *Delict* 123.

[48] 1963 (1) SA 272 (O).

[49] Here H had received compensation from the Compensation Commissioner for his loss of income in terms of s 38 of the Workmen's Compensation Act 30 of 1941 as well as from his employer in terms of civil service regulations. The deduction of benefits from the Compensation Commissioner was not in dispute (para 10.4.2), but no account was taken of his salary from his employer because he had no enforceable right to it and it was thus given out of generosity. The ratio for this decision was the English rule of evidence 'res inter alios acta alteri nocere non debet' (cf para 10.2.2). See also *Campbell v Van Niekerk* 1967 (2) PH J27 (D) (ex gratia payment of salary disregarded). See further Corbett & Buchanan I 13–14.

[50] 1973 (2) SA 146 (A). See for a discussion Boberg *Delict* 587–8.

[51] The majority (at 150) found support in the English case of *Parry v Cleaver* [1970] 1 AC 1 at 14, where it was held as follows on benefits arising from generosity: 'It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relatives or of the public at large and that the only gainer would be the wrongdoer.' The court (at 153) also approved of the following statement by McKerron *Delict* 124: 'The interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure than by allowing the wrongdoer to benefit by the fact that some other person has discharged his liability. Moreover, the effect of refusing to allow the recovery in full would be to deprive the third party of the possibility of obtaining reimbursement from the injured party ... .' In practice, a right of recourse referred to here is acknowledged in only a few instances.

[52] But see also Koch 1989 *THRHR* 213: 'When an employer continues to pay wages to an injured employee, this will seldom be a ''donation'' in the strict sense of the word. The employer of a large workforce has much to gain in terms of worker contentment if he is perceived to be a caring and generous employer.'

This case is authority only in regard to ex gratia benefits and is not applicable to sick pay: see Boberg *Delict* 587. The minority of the court held, in accordance with the English law of evidence (concerning res inter alios acta), that the benefit had to be taken into account. It also argued that because of B's continued employment, he had not suffered any damage. This opinion is obviously incorrect (para 10.2.3). Corbett & Buchanan I 15 are also of the opinion that the decision in *Dippenaar's* case (see at n 56 below—that every benefit accruing under the contract must be taken into account) by implication overruled the older decisions in, inter alia, *Henning v South British Ins Co Ltd* 1963 (1) SA 272 (O).

[53] 1997 (1) SA 33 (A) at 43–5. See also Visser 1997 *THRHR* 539–40 and his discussion at 540–1 of the minority decision on this point.

[54] 1913 WLD 186.

[55] The court's reasons are not clear but the decision appears to be correct. See also Van der Walt 1980 *THRHR* 11. See, however, also *Erdmann v Santam* 1985 (3) SA 402 (C) at 409; Koch 1986 *De Rebus* 105.

[56] 1979 (2) SA 904 (A) at 920.

[57] See *Mills v Church* 1935 GWL 24, where the court inter alia refused to award the costs of a free doctor. See also *G & M Builders Supplies (Pty) Ltd v SAR & H* 1942 TPD 120 (free repair of a plaintiff's property by a third party is irrelevant in assessing damages); *Du Randt v Erikson Motors (Welkom) Ltd*1953 (3) SA 570 (O) (voluntary payment of damages by a third party is irrelevant); *Lamb v Protea Ass Co Ltd* 1970 (2) SA 539 (E) (medical costs recoverable though waived by the hospital); 1970 *Annual Survey* 194–5. See further *Swanepoel v Mutual and Federal Ins Co Ltd* 1987 (3) SA 399 (W) at 401; *Indrani v African Guarantee & Indemnity Co Ltd* 1968 (4) SA 606 (D); *Dusterwald v Santam Ins Ltd*Corbett & Honey A3–48. See on free medical services *Free State Consolidated Gold Mines (Operations) Ltd t/a The Ernest Oppenheimer Hospital v Multilateral Motor Vehicle Accidents Fund* 1998 (3) SA 213 (SCA); Meier *Voordeeltoerekening* 583–9.

[58] See Davel *Afhanklikes* 124.

[59] See Van der Walt 1980 *THRHR* 16–20; Corbett & Buchanan I 12; Koch *Lost Income* 122–6; *Reduced Utility* 185–90; McGregor *Damages* 1239–40, 1271; Bloembergen *Schadevergoeding* 344–6; Luntz *Damages* 431–3; Lewis *Deducting Benefits* 51–63; Meier *Voordeeltoerekening* 379–410.

[60] See also para 12.22.4.

[61] See also Koch 1989 *THRHR* 211.

[62] See Van der Walt 1980 *THRHR* 16; Koch 1989 *THRHR* 211; *Yates v White* 1838 4 Bing NC 272; *Bradburn v Great Western Rail Co* 1874–80 All ER 195. Cf also Van Niekerk 2008 *Annual Survey* 606–8; *Commercial Union Insurance Co of SA Ltd v Lotter* 1999 (2) SA 147 (SCA) at 153.

[63] See *Rand Mutual Assurance Co v RAF* 2008 (6) SA 511 (SCA) at 519; *The MT Yeros v Dawson Edwards & Associates* [2007] 4 All SA 922 (C) at 930.

[64] See *Commercial Union Ins Co of SA Ltd v Lotter* 1999 (2) SA 147 (SCA) at 154; *Rand Mutual Ass Co v RAF* 2008 (6) SA 511 (SCA) at 517–18. The theoretical explanation of how the insurer steps into the shoes of the insured remains uncertain. See *Rand Mutual Ass Co v RAF* 2008 (6) SA 511 (SCA) at 520.

[65] See Van der Walt 1980 *THRHR* 16; Reinecke et al 12 *LAWSA* (reissue) para 373; Van Niekerk 2008 *Annual Survey* 609–19; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 (1) SA 617 (A); *Rand Mutual Assurance Co v RAF* 2008 (6) SA 511 (SCA) at 519–22.

[66] See the incorrect assumption in *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV*2008 (6) SA 606 (SCA). See Van Niekerk 2007 *Annual Survey* 608; Van Niekerk 2007 *SA Merc LJ* 115 et seq.

[67] Corbett & Buchanan I 12 state that even if the result is double compensation, on the basis of fairness the result will be less objectionable in that the recipient has in some sense 'paid for' the compensation. On the other hand, Koch *Reduced Utility* 190 argues that in general a wrongdoer must take a victim as he or she finds the victim. If the wrongdoer is so unfortunate as to injure a person with the proverbial 'eggshell skull' then the damages will be substantial. Koch continues to state that if justice were even-handed then the injury of a well-insured victim would likewise require the payment of minimal damages. He further argues that foreseeability is commonly invoked by the courts as a test for whether a gain or loss should be ignored. Koch states that it is usually foreseeable that the victim may be insured.

[68] 1918 OPD 31. L's dog had run into A's motor car and damaged it. The insurer of A paid for the repairs, but A nevertheless claimed damages from L.

[69] See further *Van der Westhuizen v Du Preez* 1928 TPD 45 (benefits from medical fund ignored) (see para 10.6 on medical benefits); *Chi v Lodi* 1949 (2) SA 507 (T) (insurer who has indemnified his insured has an action against wrongdoer even if no cession has taken place); *Teper v McGee's Motors (Pty) Ltd* 1956 (1) SA 738 (C) (a defendant cannot argue that a plaintiff's damage has been compensated by an insurer but there are further principles to prevent double compensation—evidence of an insurer's performance may be relevant in regard to the intention with which it was done); *Van Dyk v Cordier* 1965 (3) SA 723 (O): A plaintiff whose motor car had been repaired by his insurer instituted an action in his own name for the benefit of his insurer. The court held that the insurer's payment for the repairs was not accompanied by an intention to perform the defendant's obligations. See also the special position in regard to s 17(5) of the RAF Act 56 of 1996: A supplier of medical services to a third party may claim its value directly from the RAF and this amount obviously has to be deducted from a third party's own claim.

[70] See Steynberg & Millard 2011(4) *PELJ* 267 et seq. In *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 550 it was held that the mere fact that medical aid schemes under the Medical Schemes Act 131 of 1998 have a statutory obligation to accept all applicants as members does not change the nature of benefits into social insurance benefits, as there is no statutory obligation to become a member of such a scheme.

[71] See para 14.9; Meier *Voordeeltoerekening* 560–5.

[72] Section 36(1)*(a)* of the COID Act 130 of 1993. Where an employee wants to claim for non-patrimonial loss, the award from the Director-General will not be taken into account, because indemnification by the latter does not include compensation for such loss. See in general *Bonheim v South British Ins Co Ltd* 1962 (3) SA 259 (A) at 265–8. See, however, *RAF v Maphiri* 2004 (2) SA 258 (SCA) at 275.

[73] Section 36(1)*(b)* of the COID Act 130 of 1993. See *SAR & H v SA Stevedores Services* 1983 (1) SA 1066 (A) at 1091; *Scheepers v African Guarantee & Indemnity Co Ltd* 1962 (3) SA 657 (E); *Klaas v Union & SWA Ins Co Ltd* 1981 (4) SA 562 (A) at 581. See also the example by Newdigate & Honey *MVA*53 (references are to the previous Workmen's Compensation Act 30 of 1941): '[T]he commissioner has paid to the workman an amount of R1 000 in respect of disability and has paid his medical expenses in an amount of R500, so that the total workmen's compensation is R1 500; the workman has not claimed any medical expenses from the insurer, content that these have been paid by the commissioner, and he is then awarded R5 000 for general damages. In the light of *Bonheim's* case [1962 (3) SA 259 (A)] the total amount of R1 500 must be deducted from the award, and the workman receives from the insurer only R3 500. If, however, the workman had claimed from the insurer the medical expenses amounting to R500, his total award would have been R5 500 and deduction of the total workmen's compensation would have left him with R4 000.'

Where an employee was contributorily negligent in regard to his or her loss, that employee's damages are first reduced on account of this fact (para 11.4) and thereafter the indemnification of the Director-General is deducted. See *Senator Versekeringsmpy Bpk v Bezuidenhout* 1987 (2) SA 361 (A); *RAF v Maphiri* 2004 (2) SA 258 (SCA) at 274. See, however, Koch 1987 *THRHR* 475; 1990 *De Rebus*343. See in general *Kruger v Santam* 1977 (3) SA 314 (O) at 321; *Wille v Yorkshire Ins Co Ltd* 1962 (1) SA 183 (D) at 187; *Botha v Miodownik & Co (Pty) Ltd* 1966 (3) SA 82 (W) at 89; Corbett & Buchanan I 19. See also Koch *Lost Income* 128; Van der Merwe & Olivier *Onregmatige Daad* 560–1. Where the Director-General per errorem makes a payment to someone whom he or she considers to be an employee, such payment will not be taken into account in reducing the recipient's damages: *Lichaba v Shield* 1977 (4) SA 623 (O).

[74] Section 36 of the COID Act 130 of 1993. See also *Maasberg v Springs Mines* 1944 TPD 1 at 8; *Scheepers v African Guarantee & Indemnity Co* 1962 (3) SA 657 (E) at 650; *Botha v Miodownik* 1966 (3) SA 82 (W) at 88; *Wille v Yorkshire Ins Co Ltd* 1962 (1) SA 183 (D); *Van der Westhuizen v SA Liberal Insurance Co Ltd* 1949 (3) SA 160 (C); *Vogel v SA Railways* 1968 (4) SA 452 (E); *Masuku v Road Accident Fund* [2002] 2 All SA 554 (T); *RAF v Maphiri* 2004 (2) SA 258 (SCA) at 274; para 14.9. The court held in *Maphiri* (at 275) that the compensation in terms of the COID Act 130 of 1993 has to be deducted from the total liability of the defendant and that the 'like from like' principle does not apply: 'It does not matter under which head of damage the Commissioner has paid or will be liable to pay compensation, nor that the amount exceeds the amount to which the plaintiff has been found entitled under that head by the court.'

[75] 1996 (1) SA 273 (C).

[76] *Zysset* supra at 280. See also Visser 1996 *De Jure* 191–3; *Van Wyk v Santam Bpk* 1998 (4) SA 731 (C) at 738–9; *RAF v Cloete* [2010] 2 All SA 161 (SCA) (with reference to a High Court decision, which turned out to be irregular, that *Zysset* was incorrectly decided); Steynberg & Millard 2011(4) *PELJ*266–7.

[77] *Makhuvela v RAF* 2010 (1) SA 8 (GSJ) at 34.

[78] *RAF v Timis* [2010] JOL 25244 (SCA) at 7–8. Both grants are payable in terms of the Social Assistance Act 13 of 2004. The SCA did not overrule the *Makhuvela* case but distinguished child support grants from foster care grants because the latter was received by the foster parents for the purpose of enabling them to comply with their 'constitutional and other obligations' (at para 12). Mukheibir 2011 *SALJ* 251 argues that the distinction is unsound as the child support grants should not have been been deducted in *Timis* from damages awarded for the loss of support. Steynberg & Millard 2011(4) *PELJ* 269, 273–6 point out that the death of the child's father in *Makhuvela* led him to being placed in foster care and to his grandmother applying for a foster care grant. They argue (274–6) that the grant should only be deducted if the grant would not have been awarded if the amount awarded as loss of support was taken into account, because there is a means test (the child's income) for both grants. See also *Indrani v African Guarantee & Indemnity Co Ltd* 1968 (4) SA 606 (D) on payments in terms of s 89(1) of the former Children's Act 33 of 1960. Amounts already received were taken into account but not any amount payable in future.

[79] 1971 (1) SA 537 (E) at 538.

[80] Ex gratia payments are apparently excluded from consideration. Some other situations are less clear. Are only cases in which an employer is contractually or statutorily liable to pay included, or also those in which he or she has a discretion? (para 10.6). What is the position in regard to payments by an insurer? (para 10.4.1).

[81] Van der Walt 1980 *THRHR* 20 says he cannot find authority in our law on this. Most American courts allow such benefits to be taken into account. See *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 (SCA) at 666 on payments by a delictual wrongdoer—which are obviously taken into account.

[82] See para 12.22; Reinecke et al 12 *LAWSA* (reissue) para 588 et seq.

[83] Reinecke 1988 *De Jure* 233.

[84] See *Paton v Santam* 1965 (2) PH J25; *Burger v President Versekeringsmaatskappy Bpk* 1974 (3) SA 68 (T).

[85] 1994 (3) SA 68 (T).

[86] See para 10.5.1. In *Burger* supra at 77–8 the court held that the only nexus between the plaintiff's service contract with her employer and the payment which she had received under the policy was the fact that she had been obliged by her employer to become a member of the group life assurance scheme. In order to remain a member of the scheme and thereby to obtain the benefits under the common policy, the plaintiff had to continue to pay the premiums out of her own pocket. It could therefore not be said that the amount which the plaintiff had received under the policy of the group life assurance scheme had been paid to her under the service contract with her employer: it was an ordinary contract of insurance which she had concluded.

[87] *Burger* supra at 80. See also Dreyer 1995 *THRHR* 144.

[88] 1997 (1) SA 33 (A) at 43–5. See also Visser 1997 *THRHR* 539–40.

[89] See para 10.3.1.

[90] See in general Reinecke 1988 *De Jure* 227–9; Van der Merwe & Olivier *Onregmatige Daad* 182–3; Boberg *Delict* 603–11; Corbett & Buchanan I 15–16; Dendy 1989 *BML* 205; McGregor *Damages*1241–5; Luntz *Damages* 444–8; Lewis *Deducting Benefits* 81–6; Koch *Reduced Utility* 183–5; Meier *Voordeeltoerekening* 411–38.

[91] 1979 (2) SA 904 (A).

[92] See *Dippenaar* supra at 920: 'If the plaintiff were to be allowed to say that, although the pension is included in the monetary value of the contract as at the date of the delict, the defendant must nevertheless pay him as though he had lost this benefit, the result would be so startling that one wonders why the problem had caused such conflicting views. To suggest that wages and pensions are of a different kind or that pensions are some form of insurance may be partly true if one looks only at the meaning of the words ''wages'', ''pensions'', and ''insurance'' without looking at the context of the contract as a whole and without considering the purpose for which such contract as a whole is used in determining a plaintiff's loss of earning capacity.' In casu the court referred to the arguments in the English case *Parry v Cleaver* [1970] 1 AC 1, where the court held that the receipt of a pension has to be taken into account in certain circumstances. In this case a policeman was injured when he was 35 years of age. He retired from the force at 36 and became entitled to a disability pension for life. In the normal course of events he would have retired at 48 with a full pension and would then have taken civilian employment till the age of 65. In casu the plaintiff had taken up new employment and earned a salary which he would have received had there been no injury from the ages of 48 to 65. The majority held that the disability pension did not have to be taken into account against his lost police force salary to the age of 48. After this stage, the disability pension had to be taken into account against his lost full retirement pension. Furthermore, account had to be taken of his higher civilian pension after the age of 65 (since he had started civilian employment at 36 instead of 48). See McGregor *Damages* 1243–4.

[93] *Dippenaar* supra at 921.

[94] See *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 10: 'In my view this passage [see n 83 above] relates to the case in which the plaintiff assesses his loss of earnings on the basis that, but for his injuries, he would have continued to earn income in terms of an existing contract of employment. In such a case benefits due under or arising from that very contract fall to be deducted from the loss of earnings. The passage is therefore not authority for the wider proposition that, merely because at the time of the delict the plaintiff was in receipt of wages, a benefit flowing from the relationship of employment accrues to the benefit of the defendant.'

[95] 1997 (1) SA 33 (A) at 42.

[96] 1979 *TSAR* 256.

[97] He further adds that, in a sense, the plaintiff paid for his pension rights in return for security so that a pension should, just as in the case of insurance benefits, be disregarded (para 10.4.1).

[98] 1979 *De Rebus* 588.

[99] Para 10.8.3; in the case of a claim by dependants a pension is not deducted.

[100] They also argue that this case conflicts with *Santam v Byleveldt* 1973 (2) SA 146 (A) (para 10.2.2), in which the general attitude was to disregard collateral benefits. (This argument exaggerates the position, since in *Byleveldt* it was held only that ex gratia benefits should be disregarded and this was confirmed in *Dippenaar* above at 920.) The authors also refer to many provincial decisions which are incompatible with *Dippenaar* and add the following arguments: *(a)* In casu it was held that, since a pension is deferred payment, it should be deducted, while Lord Wilberforce in *Parry v Cleaver* (see n 92above) used this same argument to disregard it; *(b)* the real service contract has ended when the pension becomes payable (usually by someone other than the employer) and it should make no difference if it is the employer who has to pay the pension; *(c)* a pension is something for which he has already paid and to which he is unconditionally entitled; *(d)* the value of a totally disabled person's earning capacity is nil, irrespective of whether he is entitled to a pension; *(e)* the distinction between voluntary and compulsory contributions to a pension scheme is fallacious, for the service contract which entails membership of a 'compulsory' scheme is itself entered into voluntarily.

[101] 1979 *Annual Survey* 211.

[102] He also points out that no reference is made in *Dippenaar* to *Oberholzer v Santam Ins Co Ltd*1970 (1) SA 337 (N), where the court declined to deduct a pension because it was in return for the plaintiff's past services.

[103] *Delict* 610.

[104] If a plaintiff does not use a former contract of employment to prove his loss, he or she may be better off than the plaintiff in *Dippenaar*, and this is an unjust result. In casu the plaintiff's contract with the State was relevant only in so far as it proved the earning capacity actually lost by him. Not everything in the service contract can be relevant. Boberg *Delict* 610 states: 'If, for example, it contained a clause entitling the plaintiff to use the executive wash-room, no-one would suggest that it had any bearing upon the issue.'

[105] *Delict* 610.

[106] *Onregmatige Daad* 183.

[107] 1979 (2) SA 904 (A) at 915.

[108] 1980 *De Rebus* 483.

[109] 1988 *De Jure* 227 et seq.

[110] See also Koch 1989 *THRHR* 210: 'The arithmetic of the *Dippenaar* case was such that the claimant was in no way prejudiced by the deduction of the pension. What happened was that his past savings were included as part of net lifetime utility in the uninjured condition. The same amount of savings was included in the corresponding value for the injured condition. The effect of deduction was merely to deduct savings from the same amount of savings, with a net nil effect on the compensation awarded.' Cf further Koch *Lost Income* 32 and the interpretation of *Dippenaar* in *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T).

[111] Para 10.2.4, where it was pointed out that the collateral source rule is concerned with the calculation of damages and not with assessing damage.

[112] Para 10.4.1. The plaintiff may thus claim his damages but has to give account of the proceeds to his or her 'insurer'.

[113] See *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 11. In *Pretorius v Transnet Bpk* 1995 (2) SA 309 (A) at 314 the court qualified an aspect of its decision in *Mutual & Federal Ins Co Ltd v Swanepoel*. The court held that, although the pension was determined without reference to the effect of the member's disability on his particular earning potential, it was still clear that the pension was primarily intended as an arbitrary, but still a specific, compensation for probable earning capacity. The court further interpreted s 20 of the Military Pensions Act 84 of 1976. Section 20 provides that '[n]o action of law shall lie against the State to recover damages in respect of the disablement ... of a member where provision is made in this Act for compensation in respect of such ... disablement ...'. The court held (at 318) that the legislature did not contemplate to exclude an action for general damages with the inclusion of s 20. See also Koch *Reduced Utility* 206; *Van der Westhuizen v Multilaterale Motorvoertuigongelukkefonds* [1998] 3 All SA 674 (T); Meier *Voordeeltoerekening* 201–3.

[114] This Act has been replaced by the Social Assistance Act 13 of 2004.

[115] See *Van Wyk v Santam Bpk* 1998 (4) SA 731 (C).

[116] Koch *Reduced Utility* 198; Dendy 1989 *BML* 235. See the older cases where sick leave was not taken into account: *Major v Yorkshire Ins Co Ltd* 1949 (1) PH J1 (D) (sick leave as a result of generosity not deductible); *Bosch v Parity Ins* 1964 (2) SA 449 (W); see Boberg *Delict* 559–60 for the fate of this case which will probably not be followed again in view of, eg, *Krugell v Shield* 1982 (4) SA 95 (T) and *Serumela v SA Eagle Ins Co Ltd* 1981 (1) SA 391 (T)); Luntz 1964 *SALJ* 288; *Morris v African Guarantee & Indemnity*

Co Ltd 1964 (4) SA 747 (W) at 751; *Venter v Van der Westhuizen* 1965 (2) PH J17 (T) (*Bosch* case supra followed with misgivings); *May v Parity Ins Co Ltd* 1967 (1) SA 644 (D) (*Bosch* case supra followed because a right to sick pay is analogous to insurance); Corbett & Buchanan I 12-15.

[117] 1981 (1) SA 391 (T). See also *Richards v Richardson* 1929 EDL 146; cf McKerron *Delict* 124; 1951 *SALJ* 372.

[118] In *Bosch v Parity Ins Co Ltd* 1964 (2) SA 449 (W) at 452 the value of such a contingency was actuarially calculated: '[B]ecause he has to start a new cycle for the accumulation of sick leave in terms of his contract of service he has lost an asset which can be valued at about R60.' See Koch *Reduced Utility* 198; Luntz *Damages* 435.

[119] According to Koch *Reduced Utility* 198 annual leave is in the nature of savings in that if the employee leaves service the employer must pay out the commuted value of such leave. See also Luntz *Damages* 435–6.

[120] 1982 (4) SA 95 (T). See generally Luntz *Damages* 434–43.

[121] 1983 (2) SA 266 (C).

[122] See *Gehring* supra at 272, where the court relied on *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) to decide that the medical benefits must be deducted. See further Boberg *Delict* 615. In *Klaas v Union and SWA Ins Co* 1981 (4) SA 562 (A) the different viewpoints referred to above were discussed in a case which was actually concerned with the Workmen's Compensation Act 30 of 1941 (now the COID Act 130 of 1993). The Appellate Division restricted its judgment to the Workmen's Compensation Act, but there appears to be support for the principles adopted in the *Gehring* case. See Gough 1983 *THRHR*474–7, who argues in favour of *Krugell* supra. He submits that, where an employer has discretion, the question is how he or she would probably exercise such discretion. If, on the probabilities, it appears that the employer will exercise his or her discretion against the employee, possible benefits are to be disregarded (the opposite also applies). A problem that employers have (in contrast with insurers) is that they have no right of recourse against a wrongdoer where they suffer damage on account of injury to their employees (*Union Government v Ocean Accident Corp Ltd* 1956 (1) SA 577 (A)). See further Koch 1989 *THRHR* 210, *Reduced Utility* 198. See on the consideration of the value of used prostheses, *Jones v Fletcher* Corbett & Buchanan I 234.

[123] *Gehring v Unie Nasionaal Suid-Britse Versekeringsmaatskappy* 1983 (2) SA 266 (C) at 272.

[124] See *Thompson v Thompson* 2002 (5) SA 541 (W) at 547: 'A medical aid scheme is, if not in law then in substance, a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums, or claims which far exceed the value of the premiums.' See the cases in n 125 below; Van Niekerk 2003 *JBL* 47–8; Visser 2007 *THRHR* 667; paras 10.4.1, 12.22.3.Benefits from medical aid schemes under the Medical Schemes Act 131 of 1998 do not amount to social insurance (see *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 550; para 10.4.2).

[125] See *McKenzie v SA Taxi Cab* 1910 WLD 232; *Van der Westhuizen v Du Preez* 1928 TPD 45 at 46–8; *Mills v Church* 1935 GWL 24; *Thompson v Thompson* 2002 (5) SA 541 (W) at 547; *D'Ambrosi v Bane* 2006 (5) SA 121 (C) at 133–4; *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 550; Meier *Voordeeltoerekening* 472–6.

[126] A saving of income tax is discussed separately (para 10.9). See in general Luntz *Damages: General Principles* 75–87. Where X claims damages from Y for loss of profit (see, eg, para 4.2.3), expenses which X would have incurred to make such profit possible are obviously taken into account. This is, however, not really a case of saved expenses but of determining the net profit which X has lost.

[127] 1964 (4) SA 531 (D) at 537. See also *Dyssel v Shield Ins Co Ltd* 1982 (3) SA 1084 (C) at 1086, 1087, 1088 (no award for future medical costs because the plaintiff will be accommodated in a state institution); Boberg *Delict* 492–3, 576; 1962 *SALJ* 53 (an injury may 'benefit' someone in that his or her working life is prolonged). See also on savings of living expenses occasioned by a shortened expectation of life *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 921–2 and Koch *Lost Income* 35. See also Buchanan 1965 *SALJ* 457; *Kontos v General Accident Ins Co SA Ltd* Corbett & Honey A2–1.

[128] See further the suggestion in *Fletcher v Autocar & Transporters Ltd* [1968] 1 All ER 726 (CA) that, where injuries prevent someone from pursuing an expensive hobby, it should be taken into account. See, however, *Lim Poh Choo v C & IAHA* [1979] 2 All ER 910 (HL) and on this Koch *Lost Income* 33 and *Reduced Utility* 225–31. Where a husband claims for the loss of services in the case where his wife was wrongfully killed, the savings in regard to her living expenses have to be taken into account (*Yorkshire Ins Co Ltd v Porobic* 1957 (2) PH J16 (A)).

[129] 1965 (2) SA 181 (D) at 190.

[130] Paras 4.2.4.4 and 15.2.4.3.

[131] See *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 617. The court refused to accept a relationship between the saving of future expenses and loss of earning capacity. The court is probably correct, since the expenses saved in such a case are too uncertain and hypothetical to constitute an actual benefit. See, however, also *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–66 (fact that plaintiff probably would not marry considered); on the other hand, *Bobape v President Ins Co Ltd* Corbett & Honey A4–54: 'I cannot agree that such a deduction is justifiable. How [plaintiff] would have spent his money when he would have earned it is his choice and decision.' See also Bloembergen *Schadevergoeding* 325: The injured X does not have to incur holiday expenses because he has to stay in hospital. But, according to him, this benefit should be disregarded, because X also loses the advantage represented by the holiday. See also Koch *Reduced Utility* 229–30.

[132] See *Palmer v SA Mutual and Fire General Ins Co Ltd* Corbett & Buchanan I 327; cf generally on this Luntz *Damages: General Principles* 76 et seq and *Shearman v Folland* [1950] 2 KB 43 (CA) (plaintiff saved on expenses for hotel accommodation while hospitalized—this benefit not taken into account). In *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 782 the court, for lack of evidence, rejected an argument that the savings caused by the fact that the plaintiff would stay in a cheap area should be deducted from his claim for loss of earning capacity.

[133] 2010 (2) SA 539 (SCA) at 546.

[134] At 547–9. See also para 14.6.

[135] See also para 14.7.5.2 and in general Davel *Afhanklikes* 120 et seq; Van der Merwe & Olivier *Onregmatige Daad* 183; Van der Walt 1980 *THRHR* 12–13, 19. See Neethling & Potgieter 1992 *THRHR*480 on a different type of situation where an injured child has already been provided with medical benefits by its breadwinner. In this situation the child should have no claim, whereas his or her breadwinner has the right to sue. This approach seems to be acceptable.

[136] See also para 14.7.5.3*(c)*; Davel *Afhanklikes* 122–3; para 14.7.2 on the quantum of damages for loss of support; Meier *Voordeeltoerekening* 528–36.

[137] 1923 AD 234.

[138] See also, eg, *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 11–12; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011; *Lambrakis v Santam Ltd* 2002 (3) SA 710 (SCA).

[139] See *Laney v Wallem* 1931 CPD 360 at 362; *De Wet v Odendaal* 1936 CPD 103 at 107–8; *Evins v Shield Ins Co Ltd* 1979 (3) SA 1136 (W); *Van Heerden v Bethlehem Town Council* 1936 OPD 115 (where the position is not clearly stated). See also Reinecke 1976 *TSAR* 52, who suggests that, if a dependant's action is based on the infringement of his or her right to support, the full value of an inheritance has to be considered, since support can be provided from such benefit. He adds that a spes successionis does not form part of someone's patrimony (see para 3.2.4.2*(b)*) and the frustration of such an expectancy does not therefore constitute damage.

[140] See *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 851; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 620–1; *Groenewald v Snyders* 1966 (3) SA 237 (A) at 246; *Snyders v Groenewald*1966 (3) SA 785 (C) at 791; *Milns v Protea Ass Co Ltd* 1978 3 SA 1006 (C) at 1011; *Lambrakis v Santam Ltd* 2002 (3) SA 710 (SCA) at 715. Cf Davel *Afhanklikes* 122; Koch *Lost Income* 207; *Reduced Utility* 333–42; Van der Walt 1980 *THRHR* 12; Boberg 1969 *SALJ* 339.

[141] See, eg, *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 11–12; *Milns v Protea Ins Co Ltd* 1978 (3) SA 1006 (C) at 1011.

[142] See *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614; *Groenewald v Snyders* 1966 (3) SA 237 (A) at 246; *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 725; Davel *Afhanklikes* 122; Boberg 1965 *SALJ* 330–2.

[143] See *Groenewald v Snyders* 1966 (3) SA 237 (A) at 248: 'The better way is to value the benefit as the excess of *(a)* the sum received, over *(b)* the value of the prospect, which the dependant had, of receiving it eventually. The latter value will take into account any contingencies, such as the possibility that the breadwinner might have altered his testament where he had not ceded the policy to the dependant.' Other contingencies such as further children who could have inherited, early retirement (see eg *Lambrakis v Santam Ltd* 2000 (3) SA 1098 (W) at 1111–12) or the insolvency of the breadwinner have to be considered. Mathematical precision is, of course, impossible (see eg *Lambrakis v Santam* Ltd 2002 (3) SA 710 (SCA) at 715), especially if the inheritance was conditional or subject to a trust or fideicommissum. See Koch *Lost Income* 207–9 for further information and examples. Evidence by an actuary may be presented to determine the correct method of calculating the accelerated value of a benefit (see eg *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 851; *Legal Ins v Botes* 1963 (1) SA 608 (A) at 621–2). In *Lambrakis v Santam Ltd* 2002 (3) SA 710 (SCA) at 715, 718 the actuarial evidence was rejected: 'In assessing the value of the benefit—and indeed the loss—the court ''may be guided but is certainly not tied down by inexorable actuarial calculations'' ... . The actuarial basis for the computation of the children's loss was ... inappropriate

in this case.' Events from the date of the delict to the time of trial may be considered in this regard (see Boberg 1965 *SALJ* 332). An example is the sale of the business of a deceased breadwinner for a certain amount (see *Legal Ins v Botes* above at 617–21). Where the breadwinner was so old that his death was imminent, the question of the accelerated value of a benefit does not arise (Boberg 1965 *SALJ* 332) and the value of the inheritance should be completely disregarded. However, where a dependant would in the normal course of events not have inherited anything (eg because he or she is older than the breadwinner), the inheritance should be fully deducted from the dependant's damages (see Davel *Afhanklikes* 123).

[144] See Davel *Afhanklikes* 123; Koch *Lost Income* 195, 207; *Reduced Utility* 339.

[145] See *De Wet v Jurgens* 1970 (3) SA 38 (A) at 46–51; *Santam Ins v Meredith* 1990 4 SA 265 (Tk A) at 269.

[146] See *Marine and Trade Ins Co Ltd v Mariamah* 1978 (3) SA 480 (A) at 488–9.

[147] See *Maasberg v Hunt, Leuchars & Hepburn* 1944 WLD 2 at 13; *Chapman v London Ass Co Ltd*1951 (2) PH J8 (W) at 26; *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 963; Howroyd & Howroyd 1958 *SALJ* 81; Boberg 1965 *SALJ* 332. Cf also *Legal Ins Co Ltd v Botes* 1963 1 SA 608 (A) at 620, 622, where the accelerated receipt of ownership of furniture was ignored but the acquisition of a motor car was taken into account. See *Snyders v Groenewald* 1966 (3) SA 785 (C) at 791 for a similar view and *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011, where a deduction was made in respect of a motor car. See also *Santam Ins Co Ltd v Meredith* 1990 (4) SA 265 (Tk AD) at 270, where M's husband carried on business which would have caused further benefit to the joint estate and M's share thereof. Upon the death of her husband, this growth potential was terminated and there was no net benefit. The court referred with approval to the statement by Boberg 1964 *SALJ* 197 (see *Hulley v Cox* 1923 AD 234; *Indrani v African Guarantee and Indemnity Co Ltd* 1968 (4) SA 606 (D) at 607–8, which provide authority): '[T]he actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of death.' In *Mohan v RAF*2008 (5) SA 305 (D) at 308–9 the court found that there was no indication that the matrimonial home (as such, or any part of it) occupied by the plaintiff (the widow) and her two children would be let out or sold to provide some benefit that had not accrued prior to the death of the deceased. The court decided (at 309) not to make any deduction because she was in no better position than she had been before her husband's death, nor did she acquire any other benefit because of his death.

[148] Davel *Afhanklikes* 123 argues that a house has a resale value or a lease value and that the acquisition of the power to dispose of it does indeed represent a benefit. However, if a widow lets the house, there is also a disadvantage (the fact that she has to pay rent for alternative accommodation) which must be weighed against such benefit (see Boberg 1965 *SALJ* 333–4 and *Maasberg v Hunt, Leuchars & Hepburn* 1944 WLD 2 at 13–14, where the accelerated benefit in acquiring the house is compared with rent she herself has to pay); see also *Laney v Wallem* 1931 CPD 360 (rent value of R240 minus a widow's own rent of R80 leaves a balance of R160). A different and erroneous approach (see Davel loc cit) appears from *Snyders v Groenewald* 1966 (3) SA 785 (C). Here the court worked with the difference between the value of the house and the mortgage debt. No provision was made for the accommodation requirements of a widow and her four children. The court in fact overestimated the benefit in question.

[149] Section 1(2) provides as follows: '(2) For the purposes of subsection (1)—

''benefit'' means any payment by a friendly society or trade union for the relief or maintenance of a member's dependants;

''insurance money'' includes a refund of premiums and any payment of interest on such premiums;

''pension'' includes a refund of contributions and any payment of interest on such contributions, and also any payment of a gratuity or other lump sum by a pension or provident fund or by an employer in respect of a person's employment.'

See *Du Toit v General Accident Ins Co of SA* 1988 (3) SA 75 (D) (widow's pension actually received on account of her husband's death and is therefore disregarded); *Santam Ltd v Gerdes* 1999 (1) SA 693 (SCA) (payment made by German BG Fund—towards which the deceased had not made any contribution—not deducted); *Mqolomba v RAF* [2002] 4 All SA 214 (Tk). See in general Koch *Lost Income* 211–15; 1989 *THRHR* 214; *Reduced Utility* 345–7. See also *Heyns v SA Eagle Ins Co Ltd* 1988 (2) PH J18 (T).

[150] See Davel *Afhanklikes* 120.

[151] See eg Van der Walt 1980 *THRHR* 19, who refers to (1969) 25 *Hansard* cols 860–1. See further Boberg 1964 *SALJ* 363, 367; 1965 *SALJ* 96, 106, who argued in favour of such legislation. See also Boberg 1969 *SALJ* 339.

[152] See, eg, Van der Merwe & Olivier *Onregmatige Daad* 181–2, who submit that it is not the object of damages to cause the plaintiff to make a profit. However, in no developed legal system are damages

assessed by merely deducting the benefits from a damage-causing event from the losses occasioned by it. See also Koch *Lost Income* 214–15 for further points of criticism and Davel *Afhanklikes* 12 n 872, who submits that these benefits are subject to a joint wrongdoer's right of recourse (op cit 84); para 11.2.2.3.

[153] See Boberg 1965 *SALJ* 107; 1969 *SALJ* 342–3; McKerron 1951 *SALJ* 373; Pauw 1979 *TSAR* 259.

[154] *Sasol Synthetic Fuels (Pty) Ltd v Lambert* 2002 (2) SA 21 (SCA) at 30–1; *Masuka v RAF* [2002] 2 All SA 554 (T) at 562–3.

[155] 2010 (2) SA 228 (SCA) at 235. The court also found (at 232–3) that s 1 of the Assessment of Damages Act 9 of 1969 is not applicable to such a claim as it is not a claim for loss of support, but for the lost opportunity to recover that loss.

[156] See s 8 of the Civil Union Act 17 of 2006.

[157] Para 11.3 on the duty to mitigate damage.

[158] See, eg, *Clair v Port Elizabeth Harbour Board* 1886 EDC 311 at 318; *Chisholm v ERPM* 1909 TH 297 at 301–2; *Smart v SAR & H* 1928 NPD 361; *Van Heerden v Bethlehem Town Council* 1936 OPD 115; *Arendse v Maher* 1936 TPD 162 at 164.

[159] 1965 (2) SA 193 (T) at 203. Earlier in *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 618–19 the Appellate Division cast doubt on the correctness of older decisions.

[160] See also para 14.7.4.3; Davel *Afhanklikes* 129 n 971.

[161] A plaintiff may thus not generally be compelled to create compensating benefits and, even if he or she does so, they are irrelevant as far as the defendant is concerned. The same applies where a plaintiff passes his or her damage on to others (eg a merchant seller who increases the prices of his products). See Bloembergen *Schadevergoeding* 331–2. It is also analogous to an insured who passes his or her damage on to his or her insurer without thereby creating any benefit for a wrongdoer.

[162] 1965 (3) SA 367 (A) at 376: 'To suggest that she [the widow] is obliged to mitigate her damages by finding employment is to mistake the nature of her loss. What she has lost is a right—the right of support. She cannot be required to mitigate that loss by incurring the duty of supporting herself. If she does obtain employment, it is more appropriate to regard her earnings as being the product of her own work than as consequent upon her husband's death ... .' This dictum enjoys wide support: Van der Merwe & Olivier *Onregmatige Daad* 185; Boberg 1964 *SALJ* 222–5; 1965 *SALJ* 277 et seq; Davel *Afhanklikes* 130; Koch *Reduced Utility* 320–2; Corbett & Buchanan I 71–2.

[163] eg *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (A) at 727–8.

[164] Cf *Groenewald v Snyders* 1966 (3) SA 237 (A) at 246–7, where a widow's position was improved through the receipt of policies and an inheritance, though the children did not receive anything. The court held that the children had in any event a claim for support against their mother and that the defendant may not prescribe to them from whom they should claim support. For criticism see Boberg 1966 *SALJ* 411 et seq and Dendy 1990 *SALJ* 155 et seq. But cf also *Victor v Constantia Ins Co Ltd* 1986 (1) SA 601 (A) at 614.

[165] 'Re-partnering' has a wider meaning than 'remarriage', since it includes all solemnized unions under the Civil Union Act 17 of 2006. See in general Steynberg 2007(3) *PELJ* 122–45; Davel *Afhanklikes*124–8; Koch *Lost Income* 215–20; *Reduced Utility* 324–9; 1988 *De Rebus* 631–5; Thomson 1988 *De Rebus* 67–70; Boberg 1988 *BML* 55–6.

[166] See s 8 of the Civil Union Act 17 of 2006. Also see s 31 of the Black Laws Amendment Act 76 of 1963 and the Recognition of Customary Marriages Act 120 of 1998. Most cases are concerned with a widow but the principles in point apply mutatis mutandis in regard to a widower and other partners in a civil partnership. See Davel *Afhanklikes* 127; *Cooke and Cooke v Maxwell* 1942 SR 133 at 136; Boberg 1964 *SALJ* 216; Koch *Lost Income* 217; *Reduced Utility* 329. See also *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy* 1982 (4) SA 458 (O) at 466, where the court was concerned with the action by an unmarried woman on account of the death of her son. Her prospects of marriage were considered but the ratio is not clear, since the death of her son (as opposed to the death of a husband) did not bestow any new benefit on her.

[167] Davel *Afhanklikes* 125; Koch *Lost Income* 215. See also *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 376: 'Marriage prospects are relevant because marriage would reinstate her right of support.' Corbett & Buchhanan I 70-1 criticize this dictum because, in their view, damage consists not of the loss of a right to support but of support itself. See also *Constantia v Victor* 1986 (1) SA 601 (A) at 614, where the court mentioned obiter that a subsequent marriage does not reinstate the previous right to support, but creates a new right to support. The above dictum was therefore also criticized. The court added that in English law a widow's remarriage or prospects of remarriage are no longer relevant.

[168] In *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) at 263 the court confirmed that the possibility of remarriage cannot be disregarded totally in a claim for loss of support. See also

Davel *Afhanklikes* 51–2, 125 n 911, 127. See in general *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 850; *Bester v Silva Fishing Corporation (Pty) Ltd* 1952 (1) SA 589 (C) at 600; *Legal Ins Co Ltd v Botes*1963 (1) SA 608 (A) at 617–18; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 790; *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 726; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011.

[169] *Clair v Port Elizabeth Harbour Board* 1886 EDC 311 at 318; *Kennedy v Port Elizabeth Harbour Board* (1886) 5 EDC 311; *Waring & Gillow v Sherborne* 1904 TS 340 at 350; *Chisholm v ERPM Ltd* 1909 TH 297 at 302; *Hulley v Cox* 1923 AD 234 at 244: 'But the object being to compensate them for material loss, not to improve their material prospects, it follows that allowance must be made for such factors as the possibility of remarriage'; *Paterson v South African Railways and Harbours* 1931 CPD 289 at 300; *De Wet v Odendaal* 1936 CPD 103 at 107; *Legal Ins Co v Botes* 1963 (1) SA 608 (A) at 617–18; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A); *Snyders v Groenewald* 1966 (3) SA 785 (C) at 790; *Nochomowitz v Santam Ins* 1972 (1) SA 718 (T) at 726; *Milns v Protea Ass* 1978 (3) SA 1006 (C) at 1014.

[170] 1989 *De Jure* 370, 372.

[171] See Davel *Afhanklikes* 127–8: *(a)* It is undesirable to express such a highly personal matter in terms of a percentage (see also Boberg 1972 *SALJ* 149–50; Roederer 2003 *SALJ* 905–7). *(b)* The considerable measure of speculation in determining the value of this benefit is unacceptable (see also Van der Walt 1980 *THRHR* 13). *(c)* It is not a right to support that is lost, because damages include more than the loss of a mere right. (It would, however, seem that a 'right to support' does refer to what a dependant factually expects to receive; the value of such right is determined by the circumstances of the case—see para 14.7.3). An obvious solution would be to allow compensation in the form of revisable instalments in order for a subsequent marriage to be taken into account when it materializes (see also Spandau 1975 *SALJ* 50; Boberg 1964 *SALJ* 221–2; para 14.7.7.2 on possibilities already existing in terms of the RAF Act 56 of 1996 (s 17(4)*(b)*). A further possibility is to disregard re-partnering prospects completely. Davel *Afhanklikes* 128 correctly criticizes this suggestion, since it would mean ignoring a relevant factor. The Supreme Court of Appeal investigated this possibility in *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) and came to the conclusion (at 258–63) that remarriage (or re-partnering) prospects must be considered.

[172] *Reduced Utility* 329.

[173] Koch 1986 *THRHR* 221.

[174] 2003 *SALJ* 906.

[175] See Roederer 2003 *SALJ* 905–7.

[176] In England re-partnering may not be taken into account in a claim for loss of support (ss 3 and 4 of the Fatal Accidents Act 1976). This is also the approach in three jurisdictions in Australia—the Northern Territories (s 10(4)*(h)* of the Compensation (Fatal Injuries) Act 1974 (NT)), Victoria (s 19(2) of the Wrongs Act 1958) and Queensland (s 23A(2) of the Supreme Court Act 1995).

[177] The question arises whether possible benefits from informal or de facto heterosexual and homosexual relationships should not also be taken into account in the quantification of a claim for loss of support. In terms of the new Civil Union Act 17 of 2006 all monogamous relationships, whether homosexual or heterosexual, have the potential to be recognized some time in the future (once the partners choose to make use of the registration procedures); for this reason benefits from such relationships should in principle also be taken into account.

[178] See Koch 1986 *THRHR* 217.

[179] See Davel *Afhanklikes* 125–6, who lists the following: age (*Snyders v Groenewald* 1966 (3) SA 785 (C) at 790); character (*De Jong v Gunther* 1975 (4) SA 78 (W) at 81–4); appearance (*Nochomowitz v* Santam 1972 (1) SA 718 (T) at 725); the duration and happiness of the marriage with the deceased (*Legal Ins v Botes* 1963 (1) SA 608 (A) at 618); the presence of small children which may hinder social intercourse (*Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 375–6); the existence of a relationship at the time of the trial (*Shield Ins v Booysen* 1979 (3) SA 953 (A) at 962); the plaintiff's own views on remarriage (*Masiba v Constantia Ins Co Ltd* 1982 (4) SA 333 (C) at 344); the fact that the receipt of damages apparently increases the prospects of remarriage (*Roberts v London Ass Co Ltd*1948 (2) SA 841 (W) at 850; contra Koch *Lost Income* 217: '[I]t would be inappropriate for the court to take account of the effect on the prospects of remarriage of the payment of compensation'); high esteem for the deceased (*Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 726); health (*Legal Ins* case supra at 618); statistical facts regarding remarriage (*Legal Ins* case supra at 617: '[S]tatistics ... should not be regarded as a starting point, but merely as one of the facts, to be considered along with all the other facts—one of which is that Cupid is notoriously incorrigible and unpredictable'). As far as the latter is concerned, it is apparently only a general indication and not a directive (see Steynberg 2007(4) *PELJ* 134–5; *Smart v SAR & H* 1928 NPD 361 at 365, in terms of which 53 per cent of widows aged 31 remarry but the court

assessed the plaintiff's chance of remarriage at 36 per cent). Statistics do not demonstrate how long a widow will have to wait to remarry and what the chances of success of such a marriage will be. See also Davel 1989 *De Jure* 370; *Paterson v South African Railways and Harbours* 1931 CPD 289 at 300: 'The plaintiff is a young and comely woman aged 29 and the prospect of her remarrying must be taken into consideration'; Boberg 1964 *SALJ* 218 n 43: 'I devote no time to consideration of the likelihood of a widow with seven children remarrying.' Koch *Reduced Utility* 328 comments that the courts do not attach much value to a white widow's opinion about her remarriage possibilities, while they do in the case of black women. Such an approach would necessarily be contentious on the basis of the non-discrimination principle in the Constitution. See also Koch *Reduced Utility* 327 for a discussion of the use of statistics for the probability of remarriage by black women.

[180] See *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 461. The court may find guidance in other decisions (*Snyders v Groenewald* 1966 (3) SA 785 (C) at 970). It has also been held that a court should adopt a realistic approach and should, eg, not be over-optimistic (see *Trimmel v Williams* 1952 (3) SA 786 (C) at 793; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 376).

[181] See Corbett & Buchanan I 71. In *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) at 258 the court specifically referred to various factors or situations which could in fact have the effect that a widow would be worse off after remarriage, eg it could be that the second husband earns a smaller income than the first, or that he has more children of his own dependent on his income, or that he is older and would not be able to support her for as long as the first husband could have done. See further *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 850; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 617–18; Boberg 1966 *SALJ* 408–9; 1964 *SALJ* 216 (comparative law); Koch *Lost Income* 217. There is a view that a widow's or widower's or surviving partner's chances of a financially beneficial marriage or re-partnership are in direct proportion to the financial position of his or her late husband or wife or partner. See, however, *Glass v Santam* 1992 (1) SA 901 (W) at 903: 'The pertinent issue remains whether the established need to adjust calculations to allow for remarriage reflects *(a)* an allowance for the contingency that a new marriage will cause the claimant to have no further entitlement to a financial substitute for (damages for) the infringed right of support, or *(b)* an allowance for the possibility that (i) there will be a remarriage which (ii) will have such qualities and consequences that its impact on the facts will be that the claimant is not worse off. The most reliable and a fully adequate answer will be found in observing the perceptions prevailing in this country. An assessment of the current law tells that the former is the case.' This view was rejected in *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA) at 259. The court held further that the remarriage of the widow before the trial did not extinguish her possible claim for loss of support. This fact will, however, play a role in the extent of her claim.

Davel *Afhanklikes* 126 suggests that, where a plaintiff remarries during the trial, her loss should be calculated in view of the period of her widowhood. However, *Legal Ins v Botes* 1963 (1) SA 608 (A) at 617–18 is not authority for this proposition.

[182] Davel *Afhanklikes* 126; *De Wet v Odendaal* 1936 CPD 103 at 107; *Roberts v London Assurance (3)* 1948 (2) SA 841 (W) at 850; *Legal Insurance Company v Botes* 1963 (1) SA 608 (A) at 618.

[183] See, eg, *Clair v Port Elizabeth Harbour Board* 1886 EDC 311 at 318; *Chisholm v ERPM* 1909 TH 297 at 302; *Paterson v SAR & H* 1931 CPD 289 at 300.

[184] See, eg, *Nochomowitz v Santam Ins Co Ltd* 1972 (3) SA 640 (A) at 646 (5 per cent); *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy* 1982 (4) SA 458 (O) at 466, 468 (10 per cent); *Snyders v Groenewald* 1966 (3) SA 785 (C) at 790 (20 per cent); *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 849–50 (25 per cent); *Bester v Silva Fishing Corporation Ltd* 1952 (1) SA 589 (C) at 600 (25 per cent); *Coetzer v AA Onderlinge Ass Bpk* 1972 (3) SA 555 (N) at 561 (35 per cent); *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 962–3 (50 per cent); *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) (70 per cent); *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 364 (40 per cent); *Van Staden v President Versekeringsmpy Bpk* Corbett & Honey L2–24 (10 per cent).

See also *De Wet v Odendaal* 1936 CPD 103 at 107, where this benefit was compared with some other disadvantage and was further disregarded. See further Thomson 1988 *De Rebus* 70.

[185] *Damages* 215.

[186] Koch Reduced *Utility* 325–6.

[187] In *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 850 the court took into consideration that the deceased 'was a man of earning powers above the average in his walk of life and that a second husband would probably not be so effective a wage earner'. Based on this, the court reduced the deduction for the widow's probable remarriage from a third to 25 per cent. See Koch *Reduced Utility*328–9; Howroyd & Howroyd 1958 *SALJ* 74: 'An assumption which is implicit in the use of the average deduction is that by

remarriage the widow will be afforded the same degree of support as she received from her deceased husband. In certain circumstances this might be a quite invalid assumption.'

[188] See, eg, *De Jong v Gunther* 1975 (4) SA 78 (W) at 80; *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 963. See Davel *Afhanklikes* 127. Cf also *Senior v National Employers General Ins Co Ltd*1989 (2) SA 136 (W): where a child's parents were divorced without provision for his support and his mother actually maintained him, his damages upon her demise are calculated without regard to the fact (benefit) that his father has to support him. See Burchell 1989 *Annual Survey* 137–8, who criticizes this judgment on the ground that damages will place the child in a better position than he was before the delict. See further Davel 1989 *De Jure* 365; Dendy 1990 *SALJ* 155. See also *Ismail v General Accident Ins Co of SA Ltd* 1989 (2) SA 468 (D). See also para 10.8.4 on the improved financial position of a surviving spouse or partner which does not influence the claim by a child (*Groenewald v Snyders* 1966 (3) SA 237 (A) at 247). See Koch *Lost Income* 206 on the fact that a dependant does not have to reduce his or her damages because the claim for support is against the deceased's estate.

[189] 1986 (1) SA 610 (A). See also 1985 (1) SA 118 (C).

[190] The same applies where someone is contractually bound to maintain such child. Reinecke 1988 *De Jure* 231 argues that this is merely a prospective benefit (see also Bloembergen *Schadevergoeding*325 on *actual* benefits). The plaintiff would be able to claim support from his or her adopting parent only if the plaintiff's existing means were inadequate. To allow a deduction from his or her damages would only benefit the wrongdoer. This solution is, however, not easy to reconcile with the principle permitting the re-partnering prospects of a surviving spouse or partner to be taken into account (para 10.8.5). See further Dendy 1986 *Annual Survey* 201–2. See in general on a dependant's claim for support against the breadwinner's estate, Koch *Lost Income* 206–7; *Reduced Utility* 329; Corbett & Buchanan I 72; *Indrani v African Guarantee & Indemnity Co Ltd* 1968 (4) SA 606 (D) at 609; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 794–5.

[191] See para 10.7 on other types of savings which may be taken into account.

[192] See in general Boberg *Delict* 533, 543–6; Van Heerden *Belastingpligtigheid* 1 et seq; Erasmus & Gauntlett 7 *LAWSA* para 43; Corbett & Buchanan I 52–4; Koch *Lost Income* 94–9; *Reduced Utility* 231–3; McGregor *Damages* 487 et seq; Bloembergen *Schadevergoeding* 333 et seq; Luntz *Damages* 347–53; Meier *Voordeeltoerekening* 492–508.

[193] See para 14.7.4.2 on instances where taxation is relevant outside the sphere of collateral benefits (assessing the probable income of a breadwinner when dependants claim for loss of support). Assessment of damages is relevant here, not collateral benefits. See n 201 below on breach of contract. Cf further Boberg *Delict* 544.

[194] The same situation may be caused by a breach of contract. See Van Heerden *Belastingpligtigheid* 1 et seq.

[195] See, eg, *Victoria Falls and Tvl Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 29: 'The defendant cannot be called upon to compensate the plaintiff for the loss of such share of its profits as would in any event have been appropriated by the State.'

[196] Boberg *Delict* 533; *CIR v African Oxygen Ltd* 1963 (1) SA 681 (A).

[197] 1978 (3) SA 465 (A). See also *Solomon v Spur Coal Co (Pty) Ltd* 2002 (5) SA 214 (C) at 230.

[198] In *Kommissaris van Binnelandse Inkomste v Hogan* 1993 (4) SA 150 (A) it was confirmed by the Appellate Division that instalment payments made by the RAF (then the Multilateral Motor Vehicle Accidents Fund—MMF) as part of an undertaking given by the Fund under s 17(4)*(b)* of the RAF Act 1996 shall be regarded as an annuity and therefore be taxed. Joubert ACJ held (above at 157) that although the term 'annuity' is not defined in the Income Tax Act 58 of 1962, two main characteristics can be drawn from earlier authority (*Secretary for Inland Revenue v Watermeyer* 1965 (4) SA 431 (A) at 437; *ITC* 761 (1952) 19 SATC 103 at 106), namely (1) the making of recurrent annual (or more frequent periodic) payments; and (2) the right of the beneficiary to receive more than one such payment. Dendy 1995 *SALJ* 647 adds a third element: the payments must not amount to the liquidation by instalments of a definite or ascertainable capital sum due. The court held that instalment payments made under s 21(1C)*(b)* of the Compulsory Motor Vehicle Insurance (MVA) Act 56 of 1972 (now s 17(4)*(b)* of the RAF Act 56 of 1996) satisfy these requirements. See also Van der Linde 1994 *THRHR* 338–9; 1994 *JBL* 37–8; Dendy 1995 *SALJ* 643. The trial judge in *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A) accepted an actuary's assumption that tax would be payable on each annual instalment of damages awarded as part of such an undertaking. The actuary calculated each instalment of damages as follows: First, he estimated the plaintiff's gross income for that year; secondly, he deducted normal tax; thirdly, he reduced this amount by 50 per cent for contingencies; fourthly, he added the tax payable on the instalment of damages to arrive at a gross figure which, after the payment of tax, would be equal to the amount calculated at the third stage. This method was not challenged on appeal. See further Koch *Lost Income* 96. Therefore, where damages are paid in instalments,

the defendant must pay a larger amount in order to compensate the plaintiff for the loss represented by tax.

[199] See Boberg *Delict* 546. This would mean that a defendant does not receive a benefit if tax is taken into account and that the South African Revenue Service is not disadvantaged. There are, however, numerous problems with this approach—for instance at what rate should damages be taxed? Should it be precisely the same rate as that used to tax the lost income? Where the receipt of damages itself is taxable, care must be taken that a plaintiff is not undercompensated.

[200] [1956] AC 185 (HL).

[201] See McGregor *Damages* 487–500 on the applicability of *Gourley* when a claim is based on breach of contract.

[202] 1957 (3) SA 284 (D) at 287, 289; cf Boberg *Delict* 544; Erasmus & Gauntlett 7 *LAWSA* 1st ed para 21: '[P]rovided that in doing so one does not overlook income tax which might be expected to accrue if the court's award were to be invested in such a manner as to attract tax upon the income derived therefrom.' See Luntz *Damages* 347 et seq on *Gourley* in Australia.

[203] 1957 (3) SA 318 (A).

[204] 1959 (2) SA 11 (N) at 19; see also McKerron 1957 *SALJ* 372; Boberg 1960 *SALJ* 275. See also *Oberholzer v Santam Ins Co Ltd* 1970 (1) SA 337 (N) at 342, where taxation was taken into account.

[205] See n 202 and para 8.6. On appeal (*Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 568) the Appellate Division seemed to be against taking taxation into consideration but nevertheless left the question open.

[206] 1980 (3) SA 105 (A) at 114. See also *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 104 and *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS), where taxation was taken into account in regard to lost income in the past as well as the future.

[207] Boberg *Delict* 544. See, eg, *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–61. It would however appear that the court in *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) at 481 (obiter) declined to consider taxability. See also *Muller v Mutual & Federal Ins Co Ltd* 1994 (2) SA 425 (C).

[208] *Delict* 544.

[209] See, eg, CJJ 1950 *SALJ* 296; Boberg 1960 *SALJ* 275; Corbett & Buchanan I 52–4 (who describe a saving on tax as a contingency—see para 6.7.3 on this). In view of the practical difficulties in estimating future taxation (see Van Heerden *Belastingpligtigheid* 11, who describes it as a trial within a trial) the best course is probably to consider it as a (vague) contingency. However, past savings of tax may usually be determined with reasonable accuracy. See further Van der Merwe & Olivier *Onregmatige Daad* 182 (who, in any event, want to deduct all benefits except a widow's earning capacity); Lee & Honoré *Obligations* 249. Van der Walt 1980 *THRHR* 15 submits that it is logical to take saved tax into account but has reservations on the fact that a wrongdoer is the person who benefits; presumably the state did not have this in mind in exempting damages from taxation. Honoré 1959 *SALJ* 342 argues that the benefit of taxation should be disregarded since a plaintiff's benefit is not caused by the damage-causing event but by tax law. This argument is incorrect, since it is clear that the benefit is also caused by the damage-causing event. Klopper *Third Party Compensation* 190–1 argues that if a claimant will be worse off compared to his or her position prior to the damage-causing event and after his or her income tax liability is taken into account, income tax as a factor has to be disregarded.

[210] [1956] AC 185 (HL). This decision was also accepted in *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS).

[211] *Belastingpligtigheid* 9 et seq. He submits the following: *(a)* In each case it should be ascertained whether the damages itself are taxable. If so, tax which the plaintiff would have paid is to be disregarded or it should be considered to increase the amount of damages. Difficult questions may arise as to whether an award is taxable or not and the Secretary of Inland Revenue (now the Commissioner for the South African Revenue Service) is not bound by the court's decision. *(b)* In cases where the loss will exist over some years in future, it is almost practically impossible to determine with accuracy the amount of tax which the plaintiff would have had to pay additionally if he or she had not been injured. Income tax is not merely a percentage of yearly income but depends on factors such as other sources of income, discounts and the tax structure, which is subject to change. The fact that a plaintiff might have had a net loss is a further complicating factor. Any decisions on the future incidence of tax are actually based on speculation and any real investigation of the matter would considerably prolong civil trials. *(c)* If the judgment in *Gourley* is followed, it would be illogical not to take account of taxation caused by the award of damages itself. *(d)* The consideration of tax savings may encourage a person to commit breach of contract. An employer may find that it would be beneficial to him or her to dismiss his employees wrongfully and then pay them their net salaries as damages (viz after provision has been made for tax) instead of their full salaries on which they

would have to pay income tax! *(e)* Where damages for future loss are discounted (see paras 6.7.5, 14.6.6 and 14.7.4.4) in order to prevent a plaintiff who may earn interest on the capitalized amount from receiving an improper benefit, taxation on such interest should be taken into account. There is some support for these views in *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) at 481.

[212] See Van der Walt 1980 *THRHR* 13; Bloembergen *Schadevergoeding* 326, 329; Meier *Voordeeltoerekening* 132.

[213] Para 13.1.

[214] 1980 *THRHR* 13.

[215] It may be that a plaintiff's insurer is ex contractu entitled to the wreck.

[216] See further *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N): Components of an aircraft were given to Midland to assemble for the plaintiff but they were damaged to such an extent that the assembly could no longer be done. The court held that the plaintiff did not have to receive the remaining components and that their value could not be deducted from his damages. The existence of the plaintiff's contractual claim was given as reason for the court's refusal to allow their value to be taken into account.

[217] Damage is assessed by a comparison between a plaintiff's current position and his or her hypothetical position if the debtor had performed as he or she was supposed to have done.

[218] See, eg, De Wet & Van Wyk *Kontraktereg en Handelsreg* 225, whose measure of damage makes provision for taking into account (all?) benefits caused by a breach of contract. See further *Goolam v Comrie* 1925 NPD 103; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Dykes v Gavanne Investments (Pty) Ltd* 1962 (1) SA 16 (T). Cf also *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C); *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC); *Solomon v Spur Cool Co (Pty) Ltd* 2002 (5) SA 214 (C). The consequences of restitution after cancellation of a contract (para 8.9.3) obviously play a role in determining damage and may, in terms of this approach, also be seen as some form of benefit.

[219] Para 11.3.

[220] See *Dykes v Gavanne Investments (Pty) Ltd* 1962 (1) SA 16 (T); see also some of the arguments offered by Kerr & Harker 1986 *SALJ* 176. Contra Lotz 1986 *SALJ* 704.

[221] See, eg, De Wet & Van Wyk *Kontraktereg en Handelsreg* 225. See also a stereotypical case where the market-price rule is applied: X sells a merx valued at R1 000 to Y for R1 100. Y commits a breach of contract and X resells the merx to Z for R1 200. Y caused X damage in the amount of R100 but the further transaction which shows a profit of R200 may probably be seen as extinguishing X's damage, so that he is unable to recover R100 from Y. See, however, para 12.13. See also para 12.17on 'holding over'. See further Van Heerden *Passing On* 261 et seq on 'passing on'. This involves the situation where A and B enter into a contract and B commits a breach of contract but A is able to pass his loss on to his customers. The question is whether this extinguishes or reduces B's duty to pay damages. Van Heerden op cit 269 submits that this is not the case.

[222] 1955 (3) SA 28 (D).

[223] *Hunter* supra at 70. Van der Walt 1980 *THRHR* 14 submits that the case followed an equitable approach, although clear reasons were not supplied. Reinecke 1988 *De Jure* 230–1 argues that the purchaser entered into an advantageous contract and there is no reason why he should be deprived of this benefit because of the seller's breach of contract. De Wet & Van Wyk *Kontraktereg en Handelsreg*225 n 144 justify this decision by pointing to the absence of a causal nexus between the benefit and the breach of contract. It could be argued that the purchaser need not have sold the property in terms of his duty to mitigate (para 11.3.2), that Y could have decided at any stage to sell the property and that the reselling was thus not caused by the breach of contract by the seller. However, the court in *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) was of the opinion that the sale of the property to Z in *Hunter v Schapiro* was caused by the defendant's breach of contract because the sale to Z was in mitigation. See also Kerr & Harker 1986 *SALJ* 180; Floyd 2003 *THRHR* 556 and Meier *Voordeeltoerekening* 565.

Floyd 2003 *THRHR* 556 points out that the sale to Z had, besides the profit on the sale, the advantage that Y's loss of rental came to an end. As soon as a contract of sale is perfecta the risk passes to Z as well as that of fruits (rent). The profit on the sale to Z does not stand in a relationship to the loss of rental (the profit is not the mirror image of the loss of rental) and should not be taken into account, but the advantage of no further loss of rental does stand in such relationship and should be taken into account. In any case, X did not claim damages for the loss of rental after the date of the sale to Z. Meier *Voordeeltoerekening* 567 argues that the advantage of the profit of the sale should not be taken into account because the sale to Z was not required of X as it would be an unreasonable step to require in mitigation; any benefit resulting

from such a step in mitigation should therefore not be taken into account. But see Floyd 2003 *THRHR* 554–5; n 234 below. See further Oelofse 1982 *TSAR* 66–7; Van Heerden *Belastingpligtigheid* 8.

[224] 1925 NPD 103 (benefit of reselling bricks after repudiation by purchaser-resale, however, has to occur at place of delivery and expenses have to be deducted). Cf also *Vahl & Sanders v Mfinelli* 1915 NPD 149 at 159 (damages calculated on basis of loss of net profit); *Denny v SA Loan, Mortgage & Mercantile Agency* 1883 EDC 47 at 59. In the last-mentioned case, it was held that future beneficial results of a breach of contract should be reckoned with. Someone who is discharged has the benefit that he may obtain new employment. According to *Byron v Cape Sundays River Settlements Ltd* 1923 EDL 117 at 139, this cannot apply where it is improbable that an employee may find new employment. See also *Farrington v Arkin* 1921 CPD 286 at 290; *Bulmer v Woollens Ltd* 1926 CPD 459 at 468; *Myers v Abramson* 1952 (3) SA 121 (C) at 127 (doctor's services repudiated and his damage calculated as the difference between the stipulated wage for the unfinished part of his contract and any income which he had earned or could have earned); *Versveld v SA Citrus Farms* 1930 AD 452 at 454, 460; *Dykes v Gavanne Investments* 1962 (1) SA 16 (T) at 18 (where a building contract was repudiated by the owner, the availability of other work was relevant in assessing his damages); *Hazis v Transvaal and Delagoa Bay Investment Co* 1939 AD 372 at 388; *Lampakis v Dimitri* 1937 TPD 138 at 143.

[225] See also *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 325–7. It may possibly be argued that these cases are not concerned with the collateral source rule and compensating benefits and that they merely reflect a method of assessing damage (see para 10.2; Meier *Voordeeltoerekening* 545–6, 550–4). See also Floyd 2003 *THRHR* 550–1. See further *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A), which is possibly also relevant. S undertook to manufacture steel moulds for B in accordance with specifications. The moulds did not comply with the specifications but B made use of them. B had to offer only a reduced counterperformance, being the contract price less the cost of rectifying the defective blocks. Naturally the benefit obtained by B was taken into account. See Christie & Bradfield *Contract* 581. Restitution after cancellation of a contract influences the amount of damages. See para 8.9.3 and Reinecke & Van der Merwe 1984 *TSAR* 86. See also Sharrock 1985 *TSAR* 207–8 on the taking into account of benefits in the case of negative interesse (para 4.4.3).

[226] 1980 *THRHR* 15.

[227] Van der Walt loc cit, however, mentions that in *Hunter v Schapiro* 1955 (3) SA 28 (D) the purchaser received his loss of profit as a result of the breach of contract, as well as his profit on reselling the property. For other explanations see n 223 above. See further Oelofse 1982 *TSAR* 67 on the following case: X buys land from Y for less than the market value. Thereafter Z damages the land in circumstances which would grant X a remedy against Z (see *Smit v Saipem* 1974 (4) SA 918 (A)—para 11.1.4). Z cannot in a claim for reduction in value of the land rely on the beneficial contract concluded between X and Y.

[228] 1970 (1) SA 198 (C) at 204–5. The seller of immovable property failed to secure the vacation of certain tenants and was in breach of his undertaking to give vacant possession to the purchaser by a particular date. Both the houses fell under the Rents Act 43 of 1950 which provided the lessees with a measure of protection in respect of their tenure. The purchaser then reached an agreement with them in terms of which they would vacate at some later date. One tenant would continue to pay rent but also receive R750, whilst the other tenant, after paying one month's rental, would be allowed to occupy the premises rent-free for three months. The rental thus forfeited by the purchaser was R177 and he claimed this as well as the R750 from the seller. His case was that this represented expenditure reasonably incurred to prevent a far greater loss than would have been suffered, seeing that the property was required for a redevelopment scheme. The seller knew of this purpose. The defendant pleaded that the rentals received by the plaintiff should be deducted, since, had the tenants vacated on the due date, the property would have remained vacant until the commencement of the scheme. The court held that the receipt of rental was a consequence of the seller's breach of contract. The occupation by the tenants at the same time constituted breach of contract and pecuniary advantage. The rent therefore had to be deducted from the R750. As far as the R177 was concerned, it did not constitute damage, since on proper performance of the contract the purchaser would not have received any rent. See further Van Heerden *Passing On* 269; Floyd 2003 *THRHR* 559–60; Meier *Voordeeltoerekening* 568–71. See also the well-known English case *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL). Here it was held that if the benefit of a further transaction is to be taken into account, it should flow from the breach of contract 'in the ordinary course of business'. See further *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 590.

[229] 1985 (1) SA 248 (W). See for the facts para 11.3.2 (mitigation) and para 12.17 ('holding over'). After breach of contract by H, S was in a position to conclude a very favourable lease and the question was whether this should have been taken into account. H argued that S had proved no damage. The court rejected this argument and regarded the subsequent favourable lease as res inter alios acta. According to the court it would be inequitable to give H the benefit of S's 'windfall'. Although Kerr & Harker

1986 *SALJ* 176–84 sharply criticize this judgment (see also Kerr & Harker 1987 *SALJ* 324–9), Lotz 1986 *SALJ* 704–5 correctly points out that the decision is correct in terms of reasonableness and public policy. Lotz gives the following example: X concludes a service contract with Y for five years in terms of which he will receive R50 000. Suppose that before he can commence work he is injured by Z's negligent conduct and is unable to work for a year. Y then cancels his contract with X. Suppose, further, that after X's recovery he concludes a contract with Q for four years which is worth R60 000 to him. Should Z be able to argue, when X claims the loss of a year's income from him, that his delict actually caused a net benefit to X in that he could conclude a new and better contract? The answer should surely be 'no'. The reason for this is not to be found in some mechanical formula but in common sense and equity. See further Lubbe & Murray *Contract* 605–6. Back to *Sundown Park* supra: S furthermore only claimed for his loss of rental value based on two of the three possible causes of action S had against H. The three causes of action (see eg *Goldfields Laboratories (Pty) Ltd v Pomate Engineering (Pty) Ltd*1983 (3) SA 197 (W)) are: *(a)* H's breach of contract which gave S ground to validly cancel the lease. The ordinary measure for the assessment of damages on a claim based on this cause of action is the loss of rental for the unexpired period of the lease (para 12.17). The rental refers to the rent in terms of the contract of lease between S and H. *(b)* H's wrongful holding over after the cancellation. The usual measure for assessment of damages for holding over is the rental value of the property for the period the defendant was in unlawful occupation (para 12.17). *(c)* H's breach of his contractual duty to return the shop in the condition it ought to be in (Cooper *Landlord and Tenant* 217–18). S may claim the difference between the value of property at the termination of the lease and what its value would have been had the lessee kept it in the condition it ought to have been in (H paid for the cost of repairs) as well as the rental value for the time reasonably required for repairs (*Swart v Van der Vyfer* 1970 (1) SA 633 (A) at 643; *Claasen v African Batignolles Construction* 1954 (1) SA 552 (O) at 564). S only claimed for the rental value of the property for the periods of holding over and repair of the property. S thus based his claim on the causes of action set out in *(b)* and *(c)* and the benefit (rent) of the lease of the property to X should be disregarded as collateral. It did not partially or completely neutralize the loss of rental caused by the holding over or the loss of rental during the period of repair. The benefit of the lease to X should have been taken into account if S based his claim on cause *(a)* and then only for the period that overlaps with the lease with H. See Floyd 2003 *THRHR* 557–8. See also Meier *Voordeeltoerekening* 578–9. Cf further on the significance of gifts between the parties in an action for breach of promise, Sinclair & Heaton *Law of Marriage* 330–3.

[230] 2000 (1) SA 639 (SCA) at 646.

[231] 2002 (5) SA 214 (C) at 227–8. This case is similar to *Hunter v Schapiro* 1955 (3) SA 28 (D) discussed above. See also Floyd 2003 *THRHR* 317–18.

[232] 2002 (1) SA 82 (SCA) at 87.

[233] Para 11.3.

[234] See, eg, Kerr *Contract* 763; Meier *Voordeeltoerekening* 536–50. The reduction of damages to provide for an amount which should reasonably have been saved is actually the taking into account of a potential benefit. It is uncertain whether the benefit of unreasonable steps taken in mitigation should also be taken into account. See para 11.3.4 n 163. The view that it should be is based on *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*[1912] AC 673 (HL) at 689–90. The other view is that as the innocent party carries the risk of not being able to claim expenses for his or her unreasonable steps, the party should also enjoy the benefit of such unreasonable steps if they are successful. See Floyd 2003 *THRHR* 554.

[235] 1978 (1) SA 999 (T). The owner of a vehicle (which had sold to S) ceded his right to the plaintiff, who claimed damages from the defendant. S had insured the vehicle and the insurer caused the vehicle to be repaired. The defendant argued that the vehicle had already been repaired at the time of cession and that the owner could therefore not prove any loss. This submission was rejected.

[236] The court based its decision on the collateral source rule (at 1000): 'i.e., the rule that generally any compensation . . . that the injured party receives from a collateral source, wholly independent of the wrongdoer or his insurer, does not operate to reduce the damages recoverable by him . . . . Thus a defendant in the situations referred to is generally not entitled to rely for his protection on a contractual arrangement between the plaintiff and a third party entitling the former to recoup his losses from the latter. Such right stems from an extraneous source which is regarded as legally irrelevant.' See further *Van Wyk v Herbst* 1954 (2) SA 571 (T); *Rondalia Finansieringskorporasie van SA Bpk v Hanekom* 1972 (2) SA 114 (T); *Smith v Banjo* 2010 (2) SA 518 (KZP) at 522. Cf Burchell 1978 *Annual Survey* 278–9; Van der Merwe & Olivier *Onregmatige Daad* 182 for criticism. See also *Lehmbeckers Transport (Pty) Ltd v Rennies Finance (Pty) Ltd* 1994 (3) SA 720 (C).

[237] See para 5.1 et seq on the nature of this loss. See also Meier *Voordeeltoerekening* 193.

[238] Compensation awarded for unfair dismissal in terms of s 194 of the Labour Relations Act 66 of 1995 is not in the nature of damages but it is a solatium and the amount of damage actually suffered is

only one of the factors to be taken into account to determine whether compensation will be awarded. See Cohen 2003 *ILJ* 744; Grogan *Dismissal* 538. The compensation awarded in terms of s 194 should be regarded as from a collateral source in a claim for damages for breach of a contract of service.

[239] See Reinecke 1988 *De Jure* 233; Visser 1994 *THRHR* 99–100; *Administrator, Natal v Edouard*1990 (3) SA 581 (A) at 590–1 (benefits connected with the birth of a child are non-patrimonial in nature and cannot be taken into account against the financial burden to maintain the child.) See also Visser 1994 *THRHR* 101–2.

[240] 1988 (2) SA 1 (A) at 12.

[241] It should be obvious that a too-high award for non-patrimonial loss may be made if the court does not give effect to all the relevant principles (para 15.2.2 and para 16.3.1 on an appeal). In casu the court means only that in the present case the plaintiff is not overcompensated if the benefits in question are disregarded. See Visser 1994 *THRHR* 100 for a discussion on this point.

[242] 1996 (1) SA 273 (C) at 281: 'It is necessary to emphasize, however, that what I have said above regarding double recovery applies only to compensation in respect of patrimonial loss. The reason is that, having regard to the decision in *Mutual and Federal Insurance Co Ltd v Swanepoel* [1988 (2) SA 1 (A)], it would now appear to be settled that an extraneous benefit conferred for the purpose of ameliorating pain and suffering, loss of amenities of life and disability, that is to say non-patrimonial loss, is not to be deducted from the damages to be awarded for non-patrimonial loss.' See also criticism on this part of the decision by Visser 1996 *De Jure* 191–2.

[243] See Corbett & Buchanan I 41–2; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 569–71; *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 379–80; Visser 1994 *THRHR* 100–1.

[244] See paras 5.6.3 and 15.2.4.1. However, this may also be treated as a factor relating to the extent of damage.

[245] 1988 (3) SA 275 (A). See also para 8.6 on duplication of damages; see Koch *Lost Income* 178; *Reduced Utility* 205.

[246] In other words, the damages are intended as compensation of patrimonial loss but its beneficial effect of reducing non-patrimonial loss has to be considered.

[247] See, eg, *Potgieter v Potgieter* 1959 (1) SA 194 (W), where the plaintiff assaulted the man who had committed adultery with his wife; para 15.3.7.2.

[248] *Norton v Ginsberg* 1953 (4) SA 537 (A). See also *Makhanya v Minister of Justice* 1965 (2) SA 488 (N), where it was held that an apology or satisfactory explanation is relevant in reducing the amount of satisfaction for unlawful detention. See also Visser 1994 *THRHR* 101.

[249] See para 10.7 n 131 above on the saving of expenses as a result of non-patrimonial loss.

[250] Para 13.4.

[251] See, eg, *Ranger v Wykerd* 1977 (2) SA 976 (A) at 991–3. This is described as the 'swings and roundabouts principle'. See, however, Van Aswegen *Sameloop* 323 (the benefit should be disregarded because it is from a collateral source); Woker & McLennan 1992 *SA Merc LJ* 376 (a contractual measure of damages should be applied to misrepresentation). Considerations of equity require that the collateral source rule should apply to instances of dolus dans. McLennan 1977 *Annual Survey* 9 is dissatisfied with *Ranger v Wykerd*, because he (incorrectly) thinks that the decision created uncertainty about the general application of the 'swings and roundabouts' principle.

[252] See, eg, *De Jager v Grunder* 1964 (1) SA 446 (A); Cameron 1982 *SALJ* 102; Van Aswegen *Sameloop* 322–3. See further *Hunt v Van der Westhuizen* 1990 (3) SA 357 (C) at 363; Cameron 1982 *SALJ* 119.

[253] Reinecke 1988 *De Jure* 229; Bloembergen *Schadevergoeding* 325; Meier *Voordeeltoerekening*214–26.

[254] Para 16.2.

[255] Para 10.2.4.

[256] See *Standard General Ins Co Ltd v Dugmore* 1997 (1) SA 33 (A) at 44; Visser 1997 *THRHR* 539. See also *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 (SCA) at 666–7.

[257] Para 11.3.

[258] *Delict* 479. See also op cit 492: 'That the collateral source rule cannot be dispensed with as long as it seems right to disregard *some* benefits (charitable and insurance payments are the obvious candidates) is clear. The issue is therefore not the existence, but the application, of the rule. If the goal of compensating the true loser be acknowledged, it is necessary either to grant that loser an independent right of action . . . or to allow the injured party to recover in full . . . in the hope or expectation that the

true loser will recoup the benefit from him as a condition of its payment in the first place . . . . The alternative of deducting benefits in slavish adherence to the pecuniary loss principle, in the absence of legislation entitling the true loser to sue, means that a loss to society goes uncompensated . . . and leaves only the wrongdoer happy.'

[259] 1988 *De Jure* 226.

[260] Para 4.2.5 on the concrete concept of damage. See also Reinecke et al 12 *LAWSA* (1988) para 374, who summarize positive law as follows: 'Whenever the courts take benefits in account, they seem to do so on equitable considerations. It is therefore a matter of policy and not a logical conclusion from a particular concept of damage.'

[261] Reinecke 1988 *De Jure* 230. The existence of a causal nexus is an obvious requirement, but what is meant by 'the same' causal nexus? In what sense can a causal nexus between conduct and damage be the same as between conduct and a benefit? In any event, the absence of a causal nexus was the reason why the benefit in, for instance, *Hunter v Schapiro* 1955 (3) SA 28 (D) was disregarded (para 10.11).

[262] Reinecke 1988 *De Jure* 231.

[263] See *Constantia Versekeringsmpy v Victor* 1986 (1) SA 601 (A) (para 10.8.6). Cf also the case where P insures his property against all risks with X and D then delictually damages such property. When P claims from X, the latter cannot rely on P's claim against D to reduce his own liability towards P. (X may of course, claim the benefits afforded to him by the doctrine of subrogation.)

[264] eg the marriage prospects of a surviving spouse of partner (para 10.8.5); savings on the payment of income tax in future (para 10.9).

[265] Reinecke 1988 *De Jure* 231–2.

[266] In, eg, *Mutual & Federal Ins Co v Swanepoel* 1988 (2) SA 1 (A) (para 10.5.4) the plaintiff claimed for loss of earning capacity. Since he was injured during military service, he received a military pension. The court held that the pension was not intended as compensation for his loss of earning capacity but as a kind of solatium for all the consequences of his disability (including non-pecuniary loss). The pension was thus disregarded.

[267] Cf para 10.3.

[268] If a donation is seen as compensation in a particular case, it will reduce a plaintiff's damages. The terms of such a donation and the intention of the donor are relevant (Reinecke 1988 *De Jure* 231).

[269] Para 10.4.1. Reinecke 1988 *De Jure* 232–3 discusses this problem and refers to the argument that a plaintiff has paid for the advantages under an insurance policy and that the defendant may therefore never rely on such benefits. However, the true explanation, according to Reinecke, is to be found in the doctrine of subrogation, ie the insurer's rights to the insured's claims against third parties. If insurance benefits were allowed to influence the computation of damages, subrogation would be impossible. Where subrogation (which is a naturale of indemnity insurance) is excluded by agreement, the defendant should be able to demand that the damages he or she has to pay be reduced by the proceeds of the insurance policy. However, it should be noted that the rule against considering insurance benefits also applies in the case of non-indemnity insurance (eg a personal accident insurance), though subrogation is irrelevant here.

[270] Reinecke 1988 *De Jure* 233, who cites *Mutual & Federal Ins Co v Swanepoel* 1988 (2) SA 1 (A) at 11 (cf para 10.5.4).

[271] Para 10.14.

[272] 1980 *THRHR* 20 et seq.

[273] The problem with this approach is that the benefit was indeed caused by the damage-causing event and that the apparent solution rests on ex post facto rationalization. See further Meier *Voordeeltoerekening* 79–84.

[274] Van der Walt 1980 *THRHR* 21–2. He adds that, since the collateral benefit rule is not concerned with the concept of damage, even using the correct notion of damage will not assist in solving the problem. The sum-formula (cf para 4.2) with its two anonymous sums (ie a plaintiff's patrimony after the damage-causing event and his or her hypothetical patrimony had the event not occurred) gives no indication of either the beneficial consequences of an event or whether or not the beneficial consequences should be taken into account.

[275] See, eg, *Santam Versekeringsmpy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150. A complication with this approach is that, in a given set of facts, there may be two equally equitable solutions of which the one is, for different reasons, more desirable than the other. Furthermore, primitive notions of revenge may actually inspire a decision apparently based on equity. Although notions of equity, reasonableness, etc have an important function in the field of collateral benefits, they do not represent some magic solution to all problems. See Van der Walt 1980 *THRHR* 26.

[276] 1980 *THRHR* 26.

[277] See in general Fleming *Encyclopedia* chap 11 (who discusses four basic solutions: *election*—a plaintiff has to choose between his or her remedy against the wrongdoer and the benefit; *cumulation*—a plaintiff may claim damages as well as the benefit; *reimbursement*—the wrongdoer pays the full amount but any excess is paid over to the source of the benefit; *relieving the tortfeasor*—the benefit reduces the liability of the wrongdoer); Luntz *Damages* 423 et seq; McGregor *Damages* 1238 et seq, 1271 et seq; Goldrein & De Haas *Personal Injuries* 59 et seq; Exall *Munkman on Damages* 136 et seq. Corbett & Buchanan I 16–17 state the following principles in regard to bodily injuries: *(a)* There is no single test as to which benefits are collateral and which are to be deducted. *(b)* The problem in each instance is to be approached on the basis of the general principles of Aquilian liability. This involves a comparison between the plaintiff's position and its projected position had the delict not occurred. *(c)* Earning capacity is an asset in a plaintiff's estate. To place a monetary value on this, every benefit under the contract of employment (such as sick pay and pension) has to be taken into account. (This statement does not indicate why benefits in a service contract which are not affected by the damage-causing event are relevant in regard to a loss of earning capacity.) *(d)* The benefits which fall to be deducted are those benefits which are remuneration for services under the contract of employment. If wages or some form of pension is paid as a solatium, it should not be taken into account. *(e)* There is no real analogy between benefits accruing from a service contract and benefits under a contract of insurance once regard is had to the contract as a whole and its function in determining a loss of earning capacity. (Our positive law apparently accepts this proposition as correct, but this further complicates the search for an equitable solution since an employer frequently carries a large part of his employee's medical costs but has no right of recourse against the wrongdoer—see *Union Government v Ocean Accident and Guarantee Corp Ltd* 1956 (1) SA 577 (A). Because such benefits are taken into account, it is only the wrongdoer or his or her insurer who really benefits—an untenable situation.) *(f)* In general, only insurance payments or ex gratia payments should be regarded as res inter alios actae.

[278] 1989 *THRHR* 211–12: 'There are a number of good reasons for treating certain collateral benefits as *res inter alios acta*. The existence of a right of subrogation is one such consideration; the existence of an obligation, legal or moral, to reimburse the source of the collateral benefit is another. Under the dependants' action there is a rule that no account shall be taken of support provided by others after the death. This is eminently fair, because such persons do not have a personal action for recovery of the financial loss they suffer by reason of providing support. The practical effect of the collateral benefit rule is to appoint the claimant as representative for his associates who are out of pocket by reason of the injury. This is an administratively convenient arrangement. To require that each individual should bring his own action may be good in law but it creates procedural hurdles which render it all that more difficult to achieve fairness. When a breadwinner is injured his right of action is effectively a class action for himself and his dependants.'

[279] *Voordeeltoerekening* 129–31.

[280] Para 10.2.4.

[281] We shall not attempt to cover all possibilities.

[282] See, however, on non-patrimonial loss where unconsciousness and self-help may in a sense be seen as benefits (para 10.14).

[283] eg the supply of medical treatment (see *Mills v Church* 1935 GWLD 24).

[284] eg that a purchaser of a vehicle sold on hire-purchase has to pay the costs of reinstatement if the vehicle is damaged: *Botha v Rondalia Versekeringskorp van SA Bpk* 1978 (1) SA 996 (T); para 10.13.

[285] eg the rei vindicatio: X's property is stolen by Y, who sells it to Z. X claims Aquilian damages from Y but still has his rei vindicatio against Z.

[286] eg the marriage prospects ('re-partnering') of a surviving spouse or partner (para 10.8.5); future savings on income tax (para 10.9); future savings on living expenses (para 10.7).

[287] See, eg, *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 921 on the risks where a private company has to make pension payments.

[288] When the marriage prospects ('re-partnering') of a surviving spouse or partner are taken into account, contingencies in regard to the financial status of a hypothetical spouse or partner and the stability of the relationship must also be considered (cf Koch *Lost Income* 217; *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA)). Contra *Glass v Santam* 1992 (1) SA 901 (W); para 10.8.5.

[289] eg the receipt of taxable interest on an amount of damages or possible tax on damages paid in instalments.

[290] Para 10.4.1.

[291] Para 10.5.1.

[292] Para 10.3.2.

[293] Para 10.9.

[294] Para 10.8.5.

[295] Para 10.6.

[296] Ibid.

[297] Para 10.3.1.

[298] See, eg, *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 8–9: 'Nor does the fact that the defendant is the very person who conferred a benefit upon the plaintiff necessarily prevent the benefit from being regarded as extraneous. It is trite law that insurance benefits are not to be set off against a plaintiff's damages. If, therefore, a plaintiff takes out an accident policy with company A, and is then injured under circumstances giving rise to an action for damages against that company as the third party insurer of the wrongdoer, any payment in terms of the policy will still be *res inter alios acta*as far as the claim for damages is concerned.'

[299] eg where the plaintiff can pass his or her damage on to the public by increasing the prices of his or her products.

[300] eg where the plaintiff was successful in mitigating his or her loss (para 11.3).

[301] Para 10.2.1.

[302] Para 10.17.2.

[303] eg when there is a saving of tax (para 10.9) or where the state pays for particular benefits (para 10.4.2).

[304] eg a pension to which the State as well as the plaintiff have made contributions.

[305] See also Erasmus & Gauntlett 7 *LAWSA* para 42, 38–9.

[306] This should not be confused with the relationship between the benefit and the damage-causing event (para 2.1.2). Bolt *Voordeelstoerekening* has analyzed this principle in a number of countries and suggests (194–6) the application of two guidelines: *(a)* a benefit is a compensating advantage if it is the mirror image of a head of damage for which the defaulting party will be held accountable; and *(b)* a benefit is a compensating advantage if the benefit has the effect of partially or completely neutralizing a head of damage. The purpose or effect of the benefit must be to compensate the innocent party for his or her loss. Bolt recognizes (200) that other principles, besides the existence of a relationship between benefit and loss, are also relevant where the benefit arises from the act of a third party.

[307] See Floyd 2003 *THRHR* 547 et seq; para 10.11.

[308] See Meier *Voordeeltoerekening* 206–21.

[309] Para 10.8.4.

[310] Para 10.7.

[311] Para 10.9.

[312] Para 10.5.1.

[313] 2004 (2) SA 258 (SCA) at 274–5. See also *Mutual & Federal Ins Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 400; Meier *Voordeeltoerekening* 211.

[314] Para 3.1 et seq.

[315] Para 10.14.

[316] It is to a defendant's advantage if benefits are taken into account and the question then arises whether there may be cases where he or she should be 'punished' by leaving some benefits out of consideration. See *Parsons v BNM Laboratories Ltd* [1964] 1 QB 95: 'I find it difficult to appreciate that it can be in any way regarded as punishing a wrongdoer because the courts do not give him the benefit of an injured person's prudence or thrift or contractual provision.'

[317] eg in the case of the marriage (or re-partnering) prospects of a surviving spouse or partner.

[318] Van der Walt *Sommeskadeleer* 285.

[319] *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 915.

[320] eg *Santam Versekeringsmpy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150.

[321] This is the reason why, inter alia, tax savings should never be deducted in favour of a wrongdoer, because there is no reason why taxpayers should assist a wrongdoer to meet his or her liability to pay damages.

Chapter 11
MISCELLANEOUS PRINCIPLES REGARDING RECOVERY OF DAMAGES AND SATISFACTION

11.1 WHO MAY CLAIM DAMAGES AND SATISFACTION?

A person may claim damages and satisfaction only if, in addition to damage, all the other requirements for such a claim are satisfied. A discussion of these principles falls outside the scope of this work. [1] There are also many rules indicating who the claimant as regards a particular type of damage might be, and under what circumstances. These principles may conveniently be considered as part of the law of damages.

11.1.1 Basic rules

It is obvious that the person who may claim damages or satisfaction (as the case may be) is the one who in fact suffers damage and whose rights or legally protected interests are directly influenced by a damage-causing event. [2] In practice, a person who has, for example, suffered bodily injuries [3] is the one who may claim for inter

alia medical expenses, loss of earning capacity, pain and suffering etc. [4] In terms of the same principle, the person who has been defamed must institute an action for satisfaction [5] against the defendant. [6] Likewise it is the person who is, for example, contractually entitled to a performance who may claim from his or her debtor who has caused damage by breach of contract. Where a person suffers pure economic loss there are certain specific principles according to which the defendant will be held liable. [7] Only recently has the action of the disappointed beneficiary also been recognized in this regard. [8] In these cases the person concerned may claim personally or through his or her legal representative, or, depending on the facts, through the person's parent or guardian. The parent or guardian of a minor who is entitled to damages [9] or satisfaction may claim on the minor's behalf, [10] or the minor, with the necessary assistance, may make the claim him- or herself. There are, however, other instances where the damage is not so obviously connected with a particular claimant and which have to be discussed in further detail.

11.1.2 Changed powers or restrictions on account of marriage

Section 29 of the General Law Fourth Amendment Act 132 of 1993, which replaced s 11 of the Matrimonial Property Act 88 of 1984, abolished the marital power which the husband could have had over the person and property of his wife. [11] Section 15(1) of Act 88 of 1984 lays down that a spouse married in community of property can perform any juristic act with regard to the joint estate without the consent of

the other spouse, except such juristic acts as are specifically excluded by the Act. [12]This section has the effect that both spouses' capacity to act is restricted equally.

A husband and wife married out of community of property may claim patrimonial loss (and non-patrimonial loss caused by bodily injuries) from each other. [13]

Before the Constitutional Court's decision in 2006 in *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* [14] a husband and wife married in community of property could not claim damages for patrimonial loss from each other because damages would have been payable out of the joint estate into the joint estate—a senseless exercise. [15] The spouses could, however, in terms of s 18*(b)* of the Matrimonial Property Act 88 of 1984 claim damages from each other for non-patrimonial loss caused by bodily injuries despite the fact that they were married in community of property [16] because in terms of s 18*(a)* of the Act compensation recoverable for non-patrimonial loss does not fall into the joint estate. [17] In *Van der Merwe* [18] Moseneke DCJ held that s 18*(b)* was unconstitutional since it discriminated against couples married in community of property and had to be amended. [19] In the result, the amended s 18*(b)* now allows the innocent spouse to institute an action for compensation for both patrimonial and non-patrimonial loss, flowing from personal (bodily) injuries, against the other spouse. [20]

If a spouse married in community of property is delictually liable for damages, such compensation (and any costs awarded against him or her) is to be recovered from the defendant's separate estate, if any, before the plaintiff has recourse to the joint estate. [21] If the joint estate is indeed utilized for this purpose, an adjustment in favour of the innocent spouse (or his or her estate) must take place upon dissolution of the joint estate. [22]

For reasons of public policy, a husband and wife may not claim satisfaction with the actio iniuriarum from each other. [23]

The position concerning claims for damages by married persons where a third party is involved (for example, where one spouse is injured by the other spouse and a third party) is discussed below. [24]

11.1.3 Compensation in respect of injury or death of another

In certain instances someone can suffer damage as a result of the bodily injuries of another as the former, because of his or her duty of support, is, for example, legally obliged to incur medical expenses on the latter's behalf. Where the minor child of a parent has been injured, [25] there are decisions in terms of which the parent has a claim, [26] but according to the Appellate Division the child in question personally has a claim for future medical expenses. [27] The child also has a claim himself or herself for damages for loss of earning capacity and non-pecuniary loss such as pain and suffering and the child's parent [28] may therefore claim only on the minor's behalf and not in his or her own right. [29] Where the child's bodily injuries prevent him or her from rendering services to the parent, or the child's death causes the parent to

suffer loss of support, the parent should be entitled to institute a claim. [30] A husband may claim for injuries to his wife [31] if he loses her services [32] as a consequence. [33]

Where the husband is injured, it is probably correct [34] to accept that his wife or children may also institute an action because of the loss of his services or support [35]in instances where the breadwinner's claim is not available or not of similar value. [36]Where a child has to support a parent, he or she will be entitled to claim for injuries to such parent which increase the child's duty of support. [37] In general an employer does not have a claim for damages if he or she suffers loss as a result of injury to or the death of an employee. [38]

In third-party compensation cases in terms of the Road Accident Fund Act (RAF Act), certain suppliers may claim directly from the Fund. [39]

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A person who can prove that he or she had a right of support against the deceased [40] may claim damages if the death of the deceased caused that person loss in this regard. [41] A person who has a mere contractual claim to support has in principle no claim for loss of support resulting from the death of his or her breadwinner. [42] The interference with a contractual relationship of support may, however, be regarded as contra bonos mores and therefore wrongful under certain circumstances. [43] This could then lead to delictual liability.

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Nobody may institute an action to recover solatium for non-patrimonial loss [44]suffered as a result of another person's death. [45]

Heirs and legatees have no claim for damages on the ground that the premature death of the deceased has probably prevented their future estate from being larger. [46]

The executor of a person's estate may claim damages in respect of medical expenses and loss of income from the time of the (delictual) injury until his or her death, as well as funeral expenses. [47] The heirs and immediate family of a deceased may claim damages if they have paid the reasonable funeral expenses of the deceased. [48]

Someone who suffers psychiatric injury as a result of the death or injury of another may claim damages if the specific requirements for such an action (especially reasonable foreseeability) are satisfied. [49]

11.1.4 Claims for damages by owners and non-owners of property

In certain cases those who have only a personal right involving property may not claim damages for injury to such property. [50] The owner of a thing obviously has a

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claim for damages [51] for damage to it and he or she retains title to claim damages even if the person has sold the property in question (with the retention of ownership) in terms of an instalment agreement [52] (previously called a hire-purchase agreement) [53] to someone who bears the risk of injury or destruction thereof, [54] or where the claim for damages has been subrogated by an insurer of the damaged thing. [55] Provided that if a consumer (previously, hire-purchaser) is the holder of the purchased article, [56] he or she may claim damages ex delicto from a third party to the extent that the consumer has been prejudiced. [57] Reconciling the possible actions by different claimants in respect of the same article is a difficult matter. [58]

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The bona fide possessor of a thing can also institute the Aquilian action for damages resulting from injury to such article. [59] There are further instances where holders may institute an action for damages. [60]

An owner may institute the actio legis Aquiliae because of trespass onto his or her land despite the fact that the owner has never been in possession of it. [61]

11.1.5 Cession

In principle a claim for damages may also be enforced by a person to whom it has been legally ceded (the cessionary). [62] A claim for damages for patrimonial loss is in general

freely cedable either before or after litis contestatio. [63] A claim for satisfaction in terms of the actio iniuriarum is not capable of cession before litis

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contestatio [64] but is cedable thereafter. [65] As far as cedability is concerned, a claim for compensation for non-patrimonial loss in terms of the action for pain and suffering will probably be treated like the actio iniuriarum. [66]

It is important to note that a claim for damages based on a single cause of action [67] may only be ceded as a whole in accordance with the principle that a debt may not be ceded piecemeal. [68] This means that, in an action for damages in respect of bodily injuries which includes compensation for pain and suffering, cession of the claim for patrimonial loss cannot take place even after litis contestatio [69] without the consent of the debtor as it would amount to a splitting up of the total debt. [70]

11.1.6 Active transmissibility [71]

A claim for damages for patrimonial loss is transmissible in the sense that such claim becomes part of the estate of the deceased plaintiff. [72] A claim for damages for non-patrimonial loss in terms of the action for pain and suffering or for satisfaction through the actio iniuriarum is not transmissible before litis contestatio but only

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thereafter. [73] Where claims for damages for both patrimonial and non-patrimonial loss are based on a single cause of action, only the claim pertaining to patrimonial loss can be transferred to the estate of the deceased if he or she passes away before litis contestatio. [74]

11.1.7 Insolvency

A claim by an insolvent for damages or satisfaction because of defamation or bodily injury does not fall into the insolvent estate. [75] The insolvent may, without the permission of his or her curator, contract in connection with the compensation he or she has received. Assets acquired with such compensation do not form part of the insolvent estate. [76]

However, a claim for damages as a result of remarks that injured the insolvent's business is the curator's due. [77] An insolvent intending to claim from his or her curator on the ground of malicious prosecution or defamation has to obtain the court's permission first. [78] If a provisional sequestration order is lifted, the court can forthwith award damages to the debtor (the former insolvent) if the creditor has acted maliciously. [79]

11.1.8 Examples of certain claims for recourse involving damages

In certain instances the law allows rights of recourse—usually in respect of compensation that has already been paid. A few examples will suffice.

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Where an insured, in addition to having a claim against the insurer, has a claim against a third party, the person's insurer who has indemnified him or her has a claim for damages against the third party in the name of the insured. [80]

The Director-General of Labour or the employer, who has compensated an employee as a result of an accident, has a right of recourse against any third party liable for the damages thus paid out. [81]

When the Road Accident Fund has paid damages to a third party, the Fund may, under certain circumstances, recover from the owner of the vehicle or any other person whose

culpable conduct caused the particular damage the damages which would have been recoverable by the third party. [82]

A right of recourse exists between joint wrongdoers in terms of s 2 of the Apportionment of Damages Act 34 of 1956. [83]

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There are also certain recourse claims (claims for adjustment) between husband and wife after the dissolution of their marriage in respect of damage suffered by the joint estate. [84]

The legal position inter se of contractual co-debtors, joint debtors or joint and several debtors, including their rights of recourse against one another, is regulated by their relationship. [85]

11.2 WHO IS OBLIGED TO PAY DAMAGES AND SATISFACTION?

11.2.1 General

The obvious rule is that the person who committed a delict or breach of contract or who is indicated as the responsible party according to the principles of risk liability [86]is the one responsible for the payment of damages or satisfaction. [87]

Claims for damages for patrimonial loss are passively freely transmissible (viz, the estate of a deceased person has to make good the loss), but the position regarding claims for non-patrimonial loss seems to be that the estate of the deceased defendant is liable only if litis contestatio [88] has taken place. [89]

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In terms of certain legislative provisions, actions for damages may not be instituted against certain persons or bodies. [90]

Third-party claims on account of bodily injuries or death as a result of the negligent driving of a motor vehicle are in general not instituted against the perpetrator [91] but against the Road Accident Fund. [92]

When a person married in community of property is liable for the payment of damages or satisfaction resulting from a delict committed by him or her, or when a contribution as joint wrongdoer is recoverable from that person, [93] it is first paid out of his separate estate (if he or she has one) and only thereafter out of the joint estate. [94]

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An insolvent person, and not that person's estate, is liable for damages as a result of a delict committed by him or her. [95]

11.2.2 Joint wrongdoers

11.2.2.1 *General*

There are particular principles concerning the liability of joint wrongdoers in specific situations. These principles are adequately discussed elsewhere [96] and only some basic rules will be referred to here.

Joint wrongdoers are persons who are jointly and severally liable in delict [97] for

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the same [98] damage. [99] Joint wrongdoers are in solidum liable for the full damage [100] and the plaintiff has the right to sue whichever joint wrongdoer he or she

chooses for the full amount of damages. [101] Joint wrongdoers may be sued in the same action. [102] If the court is satisfied that all the joint wrongdoers are before it, it may apportion the damages among them on the basis of which the court, taking into account the respective degrees of negligence or intent [103] in relation to the damage,

considers fair. [104] If the plaintiff recovers only part of his or her damages from a joint wrongdoer, the plaintiff may sue any other wrongdoer for the balance. [105]

11.2.2.2 *Damage suffered by spouse as a result of conduct of other spouse and third party* [106]

Since the coming into operation of the Apportionment of Damages Amendment Act 58 of 1971, X, who is married in community of property to Y and who, with Z, causes damage to Y, is considered to be a joint wrongdoer with Z vis-à-vis Y. [107] Y may thus recover his or her claim for patrimonial and non-patrimonial damages from Z [108]but Z has a right of recourse [109] against the joint estate through X as joint wrongdoer.

Since the coming into operation of s 18 of the Matrimonial Property Act 88 of 1984, the position has been further regulated: a distinction is made between claims for patrimonial damages and those for non-patrimonial damages. [110] Non- patrimonial damages now become the separate property of the spouse to whom they have been awarded (Y in the example above) and the third party (Z) cannot exercise his right of recourse against it, as it falls outside the joint estate. [111] Damages recovered for patrimonial damage, however, form part of the joint estate and are

therefore subject to the third party's right of recourse. [112] In addition, the Act [113]allows the innocent spouse to institute an action for patrimonial and non- patrimonial damages as a result of bodily injuries against the other spouse. [114] The innocent spouse may thus sue the other spouse, or the third party, or both. The Act also provides [115] that if a spouse is delictually liable for damages or satisfaction, [116]such compensation (and costs) are to be recovered from his or her separate estate (if any) before the plaintiff has recourse to the joint estate. [117]

In marriages out of community of property where each spouse has his or her own estate, there has never been a problem regarding one spouse as joint wrongdoer as against the other spouse. [118]

11.2.2.3 *Damage as a result of death or injury of another* [119]

First we deal with the case where a dependant [120] suffers loss of maintenance as a result of the death or injury of his breadwinner as a result of the conduct of both the breadwinner and a third party.

In the event of death, the present position [121] is that the third party and the estate of the deceased are now considered as joint wrongdoers and that the dependant may claim jointly and severally from them. [122] In principle this means that the

dependant may now claim the full amount of damages [123] from either the third party or the estate of the deceased and that a right of recourse exists between the two joint wrongdoers. [124]

The Apportionment of Damages Act further regulates the way in which the court is to calculate the amount awarded to the dependant for loss of maintenance. The court may [125] subtract any benefit derived by the dependant under the law of succession from

the estate of the deceased person, from the estimated value of the deprived maintenance. [126] If the third party has paid this amount of damages to the plaintiff in full, he or she still retains a right of recourse against the estate of the deceased. In regard to this right of recourse, the Act provides that if the court deducts such benefit from the loss of maintenance, the prejudiced party may never be deprived of this benefit. [127]

As far as bodily injury is concerned, reference can be made to the example where a father suffers loss because of injuries to his child [128] but the child has also been negligent in relation to his or her injuries. At present, both the child and the third party are deemed to be joint wrongdoers as against the father. [129] In principle the father may sue any one of them for damages, but in practice he will naturally claim from the third party. [130]

A problematic case is still the one where a breadwinner is injured through his or her own negligence and that of a third party. According to *De Vaal v Messing*, [131] the dependants have no claim against the third party as the breadwinner can institute an action himself or herself. The latter's damages will, of course, be reduced in relation to his or her contributory negligence, possibly leaving the dependants with very little. [132] According to the literal wording of the Apportionment of Damages Amendment Act 58 of 1971, the dependant should have a full action against the third party (who will have a right of recourse against the breadwinner as a joint wrongdoer).

11.2.3 Several contracting parties

In the event of contractual co-liability, the general rule is that, in the absence of an agreement to the contrary and excluding certain specific cases, [133] each of the parties who is liable for a divisible performance may be held accountable only for a pro rata part of the performance. [134] Apparently the same principles apply in the case of payment of damages and each one is liable for payment of a pro rata part of the damages. [135] Where parties are jointly liable [136] for performance or liable in solidum (jointly and severally), [137] their liability for damages should also be joint and several.

11.2.4 Independent breaches of contract

Where overlapping damage is caused by two independent breaches of contract, each party is independently liable for the damage caused by such party and the

plaintiff is not obliged to excuss one contract breaker before suing or recovering compensation from the other. [138] The Apportionment of Damages Act 34 of 1956 [139] is not applicable to this situation. [140]

11.3 DUTY TO MITIGATE LOSS [141]

11.3.1 General

It is a recognized principle in an action for damages that a plaintiff may not recover damages for loss which is the factual result of the defendant's conduct but could nevertheless have been prevented if the plaintiff had taken reasonable steps. [142]This principle is equally applicable to patrimonial and non-patrimonial loss and applies to damage already suffered (up to the date of trial) as well as to future loss. [143]

The theoretical explanation of this principle is not very clear. Since one is concerned with the conduct of the plaintiff after the damage-causing event, contributory

fault [144] cannot be relevant. A possible explanation is that there is a legal duty upon the aggrieved person not to unreasonably burden the duty of the defendant to pay damages. In other words, we are not dealing with a legal duty resting on the prejudiced party not to cause damage to him- or herself (legally speaking, such a duty cannot exist) but with a specific duty towards the debtor. [145]

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This duty is enforced indirectly by reducing a plaintiff's damages in so far as he or she has failed to fulfil this duty properly. [146]

Parties to a contract may determine the extent of a contracting party's duty to mitigate and can even stipulate that no duty to mitigate will rest upon him or her. [147]

11.3.2 Plaintiff must take reasonable steps

A failure to prevent the accumulation of damage can be regarded as an omission on the part of the plaintiff [148] to take reasonable steps to mitigate the initial loss (whether caused by delict, breach of contract or another cause of action). [149] The same holds true in respect of a failure to prevent further damage. [150]

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The duty to mitigate arises as soon as the plaintiff in fact suffers loss and knows or should reasonably be aware that he or she should mitigate the loss. [151] A plaintiff who fails to mitigate his or her loss in this manner cannot recover damages in respect of loss that the plaintiff could reasonably have prevented. [152] A very high

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standard of care is not required of the plaintiff, since the defendant usually is a culpable person who has committed breach of contract or a delict. [153] It is not, for example, expected of a plaintiff to take steps which would infringe upon his or her reputation or dignity [154] or which would be unreasonable in his particular

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circumstances. [155] The test is that of the reasonable person. [156]

In the case of breach of a contract of sale, certain principles exist in this regard which also involve the market-price rule. [157]

11.3.3 Plaintiff also compensated for loss caused by discharging his or her duty to mitigate

A plaintiff who took reasonable steps to mitigate his or her loss may also recover damages for the loss caused by performing such reasonable steps. [158] For example, X, who hires a vehicle to replace the vehicle used in his business and damaged by

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the defendant, can recover the reasonable rent from the defendant. [159] Expenses incurred by the plaintiff to prevent further damage are recoverable from the defendant only if compensation for such further damage would have been recoverable had it manifested itself. [160] Reasonable expense in discharging the duty to mitigate is recoverable even if the ultimate damage is more than it would have been without the attempted mitigation, provided that the plaintiff acted reasonably in the particular circumstances. [161]

11.3.4 Plaintiff compensated only for actual loss

Where the plaintiff has reduced his or her loss by taking reasonable steps, the defendant will be liable only for damage actually sustained even if the plaintiff did more than was legally expected of him or her. [162] This rule emphasizes the purpose of an award for damages, namely that it is concerned only with loss actually suffered. [163]

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11.3.5 Onus of proof

The onus of proving that the plaintiff unreasonably failed to exercise his or her duty to mitigate loss rests upon the defendant. [164] Consequently the defendant has to prove that the plaintiff should have restricted his or her damage or that the plaintiff should have used a better or alternative method. [165] However, where the defendant proves that the plaintiff has unreasonably failed to mitigate his or her loss, the onus rests on the *plaintiff* to prove what his or her loss would have been had the plaintiff taken reasonable mitigation steps. [166] Where the plaintiff incurred expenses in order to mitigate his or her loss, it is not required of the plaintiff to show that he or she had acted reasonably—the defendant must prove that the plaintiff incurred the expenses unreasonably. [167]

11.4 CONTRIBUTORY FAULT

11.4.1 Introduction

The fact that the plaintiff in a delictual action for damages also contributed to the loss by his or her own culpable conduct serves to reduce the amount of damages recoverable by the plaintiff. This matter is of great importance in practice, but since

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it is comprehensively dealt with in various works on the law of delict, [168] the present discussion is restricted to certain basic principles. [169]

11.4.2 Section 1(1)(a) *and* (b) *of Apportionment of Damages Act 34 of 1956 [170]*

Section 1(1)*(a)*: 'Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.'

Section 1(1)*(b)*: 'Damage shall for the purpose of paragraph *(a)* be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.'

11.4.3 Meaning of 'damage', 'fault' and 'apportionment of damages'

The term 'damage' is correctly interpreted in a wide sense by the courts, and is not restricted to patrimonial loss but also includes non-patrimonial damage such as pain and suffering, loss of amenities etc. [171] Damage, however, does not include cost of suit. [172] Payment of compensation by an employer in terms of the COID Act 130 of 1993 is also not regarded as 'damage'. [173]

The term 'fault' implies that the Act is applicable only where fault is a requirement of liability. [174] Although the general meaning of 'fault' includes intent and negligence, it nevertheless appears that the Act is not applicable where the

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defendant has *intentionally* caused damage to the plaintiff. [175] In *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* [176] the Witwatersrand Local Division held that the Act will apply where the plaintiff intentionally contributed to his or her damage (in a situation where the defendant also acted intentionally). [177] In general the Act applies where the defendant was negligent and the plaintiff acted with contributory negligence. [178]

The expression 'apportionment of damages' is inaccurate. The amount of damages to which the plaintiff is entitled is *reduced* in accordance with the contributory fault of the plaintiff. [179] First the damage and the damages must be determined before the amount of damages can be adjusted downwards.

11.4.4 Criteria for reduction of damages

The criterion of the 'reasonable person' test for negligence is employed to reduce damages. [180] The principles described below appear from two leading cases. [181]

In applying the Act, regard must be had to negligent conduct of both the plaintiff [182] and the defendant which is causally connected to the loss. This causal

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relationship is determined in the normal manner [183] and the court does not apply the concept of degrees of causation. [184] The court then compares the degrees of negligence of the plaintiff and defendant: each party's degree of negligence is determined by expressing its deviation from the norm of the reasonable person as a percentage figure; the two percentages are then compared in order to establish the defendant's liability and, consequently, how much of the loss the plaintiff has to bear him- or herself.

It was previously accepted that, once the plaintiff's degree of negligence had been established, it was unnecessary also to determine the degree of negligence of the defendant. If the court had established, for example, that the plaintiff had been 40 per cent negligent, it was accepted automatically that the defendant was 60 per cent negligent and that he or she had to pay 60 per cent of the plaintiff's damages. In *Jones v Santam Bpk* [185] a new approach was adopted whereby the conduct of both the plaintiff and the defendant are to be tested separately against the norm of the reasonable person. [186] However, in *AA Mutual Insurance Association Ltd v Nomeka* [187] the court apparently reverted to the former view [188] that the degree of the plaintiff's fault automatically determines the degree to which the defendant was at fault. At present, therefore, there are two methods by which the effect of contributory negligence may be established. [189]

In *General Accident Versekeringsmaatskappy SA Bpk v Uijs* [190] it was held that the extent of a plaintiff's fault is merely one of a number of factors which the court may take into account in order to reduce the plaintiff's damages in a just and equitable manner. [191]

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11.4.5 Contributory negligence of minor

Here the question is whether the conduct of a child of seven years or older who has allegedly acted with contributory negligence has to be tested against that of the 'reasonable child' or the reasonable person.

In *Jones v Santam Bpk* [192] the court held that it must be determined whether the child acted like a reasonable person (bonus paterfamilias) in his or her position. Thereafter it has to be ascertained whether the child is culpae capax, in other words, whether the negligence may be imputed to the child. Despite criticism, [193] the Appellate Division has in effect confirmed this approach. [194] The preference of the 'reasonable person' test to the 'reasonable child' test has important practical implications. [195]

11.4.6 Onus of proof

The defendant must prove contributory negligence on the part of the plaintiff on a balance of probabilities. [196] Although contributory negligence is usually pleaded expressly, it has been decided that the court may take it into account without it having been pleaded in so many words. [197]

11.4.7 Fault in regard to 'damage' or 'damage-causing event'?

In *King v Pearl Insurance Co Ltd* [198] it was held that the plaintiff's failure to wear a crash helmet while driving a scooter which was involved in a collision did not constitute contributory negligence. Thus the court in effect restricted the relevant act to conduct of the plaintiff which contributed to the accident (the damaging-causing event) itself. [199] On the other hand, the Appellate Division in *Union National*

South British Insurance Co Ltd v Vitoria [200] held that the failure to wear a seat belt which aggravated the plaintiff's injuries does constitute contributory negligence. [201]

11.4.8 Breach of contract

The majority of the Supreme Court of Appeal has held in *Thoroughbred Breeders' Association v Price Waterhouse* [202] that the Apportionment of Damages Act 34 of 1956 was not applicable to a claim for damages for breach of contract where the plaintiff's carelessness contributed to his own loss. [203] There is, however, a pressing need for legislative intervention to provide for a solution in situations such as these. [204]

11.5 LIMITATION OF LIABILITY (REMOTENESS OF DAMAGE; LEGAL CAUSATION)

11.5.1 Introduction

No legal system holds a defendant liable without limitation for all the harmful consequences suffered by the plaintiff. There is general agreement that some means must be found for limiting the defendant's liability. The question of legal causation arises whenever one must determine for which of the damaging consequences actually caused by the wrongdoer's wrongful, culpable act, or breach of contract, or any other legal fact creating a duty to pay damages, he or she should be held liable; in other words, which harmful consequences should be imputed (attributed) to the wrongdoer. Because this

subject is fully dealt with in standard textbooks on the law of delict [205] and the law of contract, [206] only the most important principles will be discussed here. [207]

11.5.2 Factual and legal causation distinguished

A delictual and contractual duty to pay damages can arise only if the wrongdoer's conduct, in addition to other requirements, factually caused the harm suffered by the plaintiff. [208] Consequently conduct can be described as a damage-causing event [209]only with reference to the damage actually flowing from such event. [210] Without factual causation, [211] no duty to pay damages can arise. [212] Factual causation

on its own, however, is not sufficient as it is undesirable to hold a person liable for all the damage which has been caused. In *International Shipping Co (Pty) Ltd v Bentley* [213] the court stated as follows:

> [D]emonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liablility to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called ''legal causation''.

Stated differently, legal causation is determined by evaluating the nature and quality of factual causation on the basis of relevant criteria.

11.5.3 Role of legal causation

In most claims for damages based on delict, breach of contract or other legal fact, the damage so clearly falls within the limits of liability that it is unnecessary to examine expressly legal causation or imputability of harm. The question of legal causation is then tacity dealt with within the other requirements for liability. [214] Normally legal causation is problematic only where the question of so-called 'remote consequences' or 'ulterior harm' arises and it is alleged that the wrongdoer should not be held liable for all such consequences. [215]

11.5.4 Legal causation in law of delict (including cases of liability without fault) [216]

The best-known theories for determining legal causation are the flexible approach, based on policy consideration reasonableness, fairness and justice; the theory of adequate causation; the 'direct consequences' criterion; the theory of wrongfulness and fault; and the reasonable foreseeability criterion. [217] Formerly it was generally accepted that the reasonable foreseeability criterion is preferred by the courts. [218]However, the Supreme Court of Appeal has now expressed itself in favour of a *flexible approach*, in terms of which there is no single criterion which can be applied to all situations. [219] Legal causation is determined with reference to the moment of the causing of damage. [220]

11.5.4.1 *Flexible approach*

In *S v Mokgethi* [221] the Appellate Division adopted a flexible approach to legal causation or remoteness of damage. The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice. [222] There is no single and general criterion for legal causation, independent of the flexible approach, which is

applicable in all instances. [223] However, other criteria for legal causation (such as direct consequences and reasonable foreseeability) [224] may play a subsidiary role in determining legal causation within the framework of this elastic approach. [225]

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11.5.4.2 *Adequate causation* [226]

According to this theory, a consequence which has in fact been caused by the wrongdoer is imputed to him or her if the consequence is 'adequately' connected to the conduct. The connection is termed 'adequate' if, according to human experience, the act has, in the normal course of events, the tendency to bring about that type of consequence. In order to determine whether the act has such a tendency, the following questions are, for example, asked: was the damage the reasonably-to-be-expected consequence of the act?; does the damage fall within the expected field of protection envisaged by the legal norm that was infringed?; were the consequences 'juridically relevant' with reference to the cause? [227] This test is not generally applied in practice.

11.5.4.3 *Direct consequences* [228]

According to this theory, a wrongdoer is liable for all the 'direct consequences' of his or her negligent conduct. [229] It is clear that this theory is not used as the general test for the imputability of harm, [230] although courts sometimes refer to it in combination with reasonable foreseeability. [231] There is, however, a view that the direct consequences doctrine finds application in personal injury cases where a

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wrongdoer is held liable for any harm flowing from the plaintiff's physical condition, however unforeseeable, as expressed by stating that the wrongdoer 'must take his victim as he finds him'. [232]

11.5.4.4 *Wrongfulness and fault*

Some argue that limitation of liability may take place by utilizing concepts such as wrongfulness, [233] intent and negligence. [234] Although it is often possible tacitly to dispose of legal causation during the investigation into the traditional requirements for a delict, in principle it remains necessary to apply an additional criterion to determine legal causation. [235] The Appellate Division also holds this view. [236]

11.5.4.5 *Reasonable foreseeability* [237]

This citerion, whereby a wrongdoer is held liable only for the reasonably foreseeable consequences of his or her conduct, has been applied in a number of instances [238]but in terms of the prevailing flexible approach it plays a subsidiary

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role, just like the other traditional tests for legal causation. [239] The precise content of the foreseeability criterion and how it is to be distinguished from the reasonable foreseeability test for negligence, [240] are, however, not always clear. [241] The moment of causing damage is the relevant one in determining reasonable foreseeability. [242] Reasonable foreseeability can serve as (subsidiary) [243] criterion for the imputability of harm in regard to intentional delicts as well as to liability without fault. [244]

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11.5.4.6 *Novus actus interveniens (new intervening cause)* [245]

A novus actus interveniens is an independent event [246] which, after the wrongdoer's act had been concluded, either caused [247] or contributed to [248] the consequence concerned. [249] The effect of this on the liability of the defendant for the eventual damage depends on the particular criterion used in respect of legal causation. [250] An event will qualify as a novus actus only if such event was not reasonably foreseeable. [251]

11.5.4.7 *Principles concerning so-called egg-skull cases ('talem-qualem' rule)* [252]

These cases arise where the plaintiff, because of one or other physical, psychological or financial weakness, suffers more extensive injury as a result of the wrongdoer's conduct than would have been the case had the plaintiff not suffered

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from such a weakness. In these instances the rule 'you must take your victim as you find him [or her]' applies and the defendant remains liable to compensate the plaintiff's full [253] damage. [254] Despite criticism against the principle, namely that it occasionally holds the defendant liable for unforeseeable consequences, [255] it offers a just solution to the problem. [256]

11.5.5 Limitation of liability for damage caused by breach of contract

11.5.5.1 *Introduction and terminology*

In addition to the fact that a person can naturally not be liable to pay damages if damage did not actually flow from his or her breach of contract, it is likewise clear that he or she is not necessarily liable for all damage resulting from such breach. [257]

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In the literature the problem of limitation of liability is usually not referred to as legal causation [258] but is rather dealt with as, inter alia, 'limitation of damages' or 'remoteness of damages'. [259]

Limitation of liability in the case of breach of contract functions with reference to expressions such as 'general damage' and 'special damage', the contemplation principle (foreseen and foreseeable damage) and the convention principle (an agreement that damages will be payable).

11.5.5.2 *Basic principles regarding general and special damage, contemplation and convention*

Our law distinguishes between general (intrinsic) damage and special (specific or extrinsic) damage as a result of a breach of contract. [260]

General damage is seen as loss which flows 'naturally' [261] from the breach of contract in question [262] and which the law assumes was foreseen or reasonably

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foreseeable by the parties and was thus within their contemplation [263] as a realistic possibility of occurrence. [264] In such a case the plaintiff has to prove merely the extent of his or her damage and not that it was foreseeable, as the law presumes such foreseeability.

Special damage is seen as all damage excluding general damage and which, being 'too remote', does not qualify for compensation. [265] Damages in respect of special

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damage are recoverable only if special circumstances were present at the conclusion of the contract from which it can be deduced that the parties in fact or presumably foresaw that the damage could set in (and thus that it was within their contemplation). [266]

Even if it has not been proven that the parties actually foresaw certain damage, it may nevertheless in the circumstances be deemed to have been within their contemplation. [267] These principles are applicable in the case of both positive and negative interesse. [268]

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The exact test for liability in the event of special damage is problematic. In *Lavery v Jungheinrich* [269] the contemplation principle or foreseeability test was applied to ascertain whether damage was too remote or not. [270] The court also stated the necessary allegations which have to be made by a plaintiff if he or she intends to claim damages for special damage: the plaintiff must allege (and prove), first, that the defendant had the necessary knowledge of the special circumstances (apart from the contract) and, secondly, that the contract was concluded by the parties on the basis of such knowledge.

The second requirement raises something additional to mere foreseeability, contemplation or knowledge, since it refers to a particular contractual intention or contractual term. It has become customary to refer to this as the 'convention principle', since it deals with a presumed agreement between parties that damages will be payable in respect of loss of a specific kind. [271]

In *Shatz Investment v Kalovynas* [272] the court held that the convention principle still reflected the current legal position but added that the time was perhaps rapidly approaching to reappraise critically the *Lavery* case, referred to above. The court also referred to the principle that foresight of damage relates to the *moment of conclusion of the contract* and stated that there are those who submit that the moment of breach of contract is the relevant time. The reason given for the last-mentioned

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time is that at the conclusion of the contract the parties contemplate performance in terms of the contract rather than breaching it, whereas here the consequences of *breach of contract* are at stake. [273]

The court, however, considered another viewpoint, namely that the rights and duties of parties are laid down at the conclusion of the contract and that they can determine their liability at that stage. [274] Despite opinions that the *Lavery* case only makes provision for the contemplation principle, [275] the court declined to hold that the convention principle is no longer applicable in our law. Until such time as the Supreme Court of Appeal rejects the *Lavery* decision, the existence of the convention principle must consequently be accepted. [276]

Although the formulation of the abovementioned criteria suggests that the damage must have been foreseen (or foreseeable) by all (both) parties to the contract, [277]there are writers [278] who require foresight of damage by the debtor alone. [279] A further problem is where the contracting parties fail to foreseee the same extent of damage. [280]

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There is also authority in case law for the viewpoint that the specific consequence or type of damage for which damages are claimed must have been foreseeable, [281]but not the precise manner in which the damage has been caused. [282] Unlike the position in delictual liability, [283] it is apparently required in cases of breach of contract that not only

the nature of the damage but also the extent thereof must have been within the contemplation of the parties. [284]

11.5.5.3 *Evaluation of positive law*

There is convincing criticism [285] of the use of the convention principle as a type of supplement [286] to the contemplation principle. The convention principle is based on an unnecessary fiction. [287] If the contracting parties have actual or presumed knowledge that breach of contract can lead to specific damage and then enter into a contract, the person who is in breach of contract cannot suddenly turn around and allege that he or she did not agree to make good the damage. Conclusion of the contract with actual or presumed knowledge points to his or her acceptance of the duty to make good foreseen or foreseeable damage.

Writers have expressed a variety of opinions on what the correct test for limitation of liability should be. Reinecke [288] suggests that the problems will be obviated by a proper understanding of the nature of general damage. General damage is determined by reasonable foreseeability when a breach of contract occurs. This implies that all damage foreseeable at the moment of breach of contract is

compensable. All other damage is uncompensable unless otherwise agreed. De Wet and Van Wyk [289] argue that liability to pay damages is not based on the fact that the guilty party committed him- or herself thereto, but arises because of a breach of contract by this party. His or her liability extends to loss which the person foresaw, or should reasonably have foreseen, when breach of contract occurs. [290]

The flexible or supple test for legal causation [291] has been suggested as a possible replacement of the convention principle when the Supreme Court of Appeal reconsiders the use of the convention principle. [292]

11.6 LIMITATION ON RECOVERY OF DAMAGES FOR INCOME OR SUPPORT UNLAWFULLY EARNED [293]

The fact that certain kinds of loss may be described as 'unlawful' results in a restriction on the recoverability of damages in respect thereof. This matter is also discussed elsewhere in connection with wrongfulness and the patrimony. [294]

In *Dhlamini v Protea Assurance Co Ltd* [295] it was held that a hawker who had never had a hawker's licence and who had been injured in a motor vehicle accident could not claim damages in respect of loss of income. Loss of income derived from an immoral or criminal activity would not be compensated because it would be against public policy. The same rule would apply to income derived from a colourless statutorily prohibited activity ('kleurlose statutêr verbode aktiwiteit') [296] when the income derived from the activity is unenforceable by reason of the invalidity of the underlying transaction. Rumpf CJ held that compensation for loss of income of that kind would also be contrary to public policy. [297]

Various authors have expressed a range of opinions in their attempts to explain this principle theoretically. [298] In practice the correct approach to this type of case is to distinguish between loss of unlawful income in the past and future, on the one hand, and the loss of earning capacity on the other. [299] An injured person who has earned income in an unlawful manner usually also has an earning capacity which is not necessarily

connected to the unlawful activity. Should this earning capacity be infringed, compensation for this capacity would be recovered but only if acceptable evidence of the extent of the loss is offered. [300] In addition, proper provision will have to be made (by reducing the amount of damages) for the fact that this person failed to employ his or her lawful earning capacity or in all probability would not have done so in future. [301]

In *Booysen v Shield Insurance* [302] the principle of *Dhlamini* [303] was extended to the action of dependants. The court held that, where the breadwinner had earned the support out of a business carried on without a licence, the action of his dependants for the loss of such income will have to be refused. [304]

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In *Fortuin v Commercial Union Assurance Co of SA* [305] the wife of the deceased breadwinner succeeded in her action because the unlawfulness of his earnings had been merely temporary. [306]

In *Santam Insurance v Ferguson* [307] the plaintiff's husband was negligently killed in a motor vehicle collision. For a period of 20 years the deceased had earned his income unlawfully by acting as a panelbeater without a licence. Although the court a quo allowed the action, it was rejected by the Appellate Division. The court stressed that the Registration and Licensing of Business Ordinance 15 of 1953 (Cape) requiring the licence is not a mere fiscal measure and that contravention thereof constituted an offence. Considerations of public policy arise in the issuing of a licence. Moreover, in view of the requirements of the Ordinance, the deceased would not have obtained a licence had he applied for one. In addition, the results of such an unlawful trade cannot be legally valid. Consequently, the income earned in such a way is of an unlawful nature. [308]

However, it appears that different divisions of the Supreme Court easily evade the *Ferguson* case. For example, a realistic new approach appears from *Lebona v President Versekeringsmaatskappy Bpk,* [309] where the deceased breadwinner earned his living as as hawker without a licence. On the facts the court held that, despite his unlawful activities, he had a duty to support his dependants and that his earning capacity, in contrast to income in fact earned, had to be considered. [310] In *Minister of Police, Transkei v Xatula* [311] the court held that the illegality of the source of the income does not deprive a dependant of a right of compensation for loss of support. [312]

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These decisions follow the correct approach, but in cases where no future possibility exists for the breadwinner to earn his or her income in a legal manner, [313] the dependants still face a problem. [314]

11.7 INFLUENCE OF INFLATION ON AMOUNT OF COMPENSATION [315]

11.7.1 Introduction

It is known that money in which damages and satisfaction are payable, [316] is subject to inflation; in other words, the real value (buying power) thereof usually decreases annually at a rate which can fluctuate from year to year. [317] The relevant question is in what cases inflation may be considered in calculating or adjusting an amount of compensation. This question is specially linked to the matter of the date on which damages or satisfaction is to be assessed. [318] The cases which will be discussed hereafter deal with delictual damages. Inflation may also be relevant in some cases of breach of contract. [319]

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11.7.2 Damage already suffered but where delay in receiving compensation reduces buying power of latter [320]

The fact that a plaintiff has to wait for the payment of damages or satisfaction naturally entails prejudice, since during that period he or she does not have the use of the money. [321] Inflation aggravates the prejudice in that the money loses value over time. However, the award of mora interest [322] on liquidated and unliquidated [323] amounts of damages may fully or partially offset the effects of inflation. [324] This principle must be kept in mind in considering the instances referred to below. In the event of contractual liability, the parties may agree on a term which provides for the impact of inflation.

11.7.2.1 *Destruction of or damage to thing*

Suppose X's vehicle worth R20 000 is destroyed in January 2010 and he receives his compensation only in January 2011. During this year he does not have the use of the money and, in addition, its buying power has decreased by, for example, 15 per cent. X's damage and damages are calculated as at the date of delict [325] and he is not compensated for the effects of inflation after that date. [326] Suppose in this example that X's vehicle was merely damaged and that damages must be calculated according to reasonable cost of repairs, [327] which costs have excalated between the date of delict and the date of receipt of damages. Here, too, inflation has to be disregarded and damages are calculated as at the date of delict.

11.7.2.2 *Loss of income*

Suppose X is injured on 10 January 2010 and is unable to work for one year. He forfeits his salary of R200 000 for this period. He receives judgment in his favour on

10 January 2011 and in the meantime the inflation rate has reduced the purchasing power of the R200 000 by 10 per cent to R180 000. Although previously inflation was taken into consideration in calculating such damages, [328] the Appellate Division rejected this viewpoint in *SA Eagle Insurance Co Ltd v Hartley*. [329] According to the court, adjustment of the amount changes the quantum of the debt and this is contrary to the principle of nominalism of damages which applies in our law of obligations. [330] This principle implies that a monetary debt must be paid in the proper amount of money irrespective of any change in its value. The creditor carries the risk of devaluation of the money and the debtor the (unlikely) risk of any appreciation of it. The court applied this argument to the facts in the following manner: [331]

> The respondent suffered a loss of income, expressed in rands, prior to the trial. That loss has to be made good by the appellant paying to the respondent the number of rands which he has lost, irrespective of whether the purchasing power of the rand has varied in the interim. [332]

11.7.2.3 *Expenses already incurred*

In the event of expenses already incurred by an aggrieved person (for example, medical costs), inflation can harm him or her in that the value of the award may be diminished during the period between incurring the expenses and the receipt of compensation. The plaintiff not only has to do without the use of the money, but in effect he or she receives a reduced amount. In all probability, inflation cannot be taken into consideration with a view to an adjustment. [333]

11.7.2.4 *Damages and satisfaction for non-patrimonial damage*

No adjustment for inflation can be made for the period between the date of delict and the date of trial.

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11.7.3 Future damage [334]

In the event of loss of earning capacity or support, [335] future adjustments in income as a result of inflation are taken into consideration for certain purposes. [336]Receiving money in advance has certain advantages for a plaintiff (for example, he or she can invest it at interest) [337] but also holds the disadvantage of inflation. It appears that the mere prospect of future inflation is not relevant. [338]

As regards future increase of medical or other expenses, the decision in *Beverley v Mutual and Federal Insurance Co* [339] is probably still sound authority. The court decided:

> If the price of operative procedures has increased since the date of accident, then, in assessing his prospective claim for future medical expences, I would be bound to have regard to the facts as they exist as at the date of the trial, that is to say to have regard to the current cost of any such procedures and not what it might have been several years before as at the date of the delict. I can see no reason why this does not apply also to the matter of the devaluation of money. [340]

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Inflation should be taken into account in estimating damages for future non-patrimonial loss. [341]

11.7.4 Use of previous awards for purposes of comparison

It is a recognized method of quantification in the law of damages (especially in the case of non-patrimonial damage) [342] to employ as a guideline amounts previously awarded in comparable cases. [343] Obviously the quantum awarded in a previous case must be expressed in its current value. [344]

11.7.5 Determination of inflation

In cases where the court takes inflation into account, Erasmus and Gauntlett [345] are of the opinion that the court may take judicial notice thereof. It has been said that, since inflation cannot be determined with accuracy, the court should follow a reasonably conservative approach. [346] An actuary is qualified to give evidence on how to determine inflation. [347] There is in general uncertainty as regards the correct manner in which to determine inflation, whether in the past or in future. [348]

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11.8 CERTAIN STATUTORY LIMITATIONS AND EXCLUSIONS ON AMOUNT OF COMPENSATION WHICH MAY BE RECOVERED

Only some examples of substantial practical importance will be considered here.

Certain provisions of the Compensation for Occupational Injuries and Diseases Act (COID Act) 130 of 1993, [349] the Road Accident Fund Act 56 of 1996 (RAF Act) [350]and the Labour Relations Act 66 of 1995 limit or exclude the amount of damages as well as the type of damage in respect of which it may be recovered.

Section 35(1) of the COID Act excludes the liability of the employer and replaces it with a claim against the Director-General. [351] An employee is limited to a claim for patrimonial loss against the Director-General and compensation for pain and suffering is

therefore not recoverable. [352] Indemnification in terms of this Act is aimed especially at temporary and permanent incapacity to work and is determined by the Director-General in terms of standards laid down in the Act. [353] Section 22(3) limits the extent of an employee's claim against the Director-General in some respects.

In terms of s 17(1) of the RAF Act [354] the Road Accident Fund or an agent is obliged to compensate a person (a third party) who has suffered patrimonial or non-patrimonial loss as a result of any bodily injury to him- or herself or the death of or any bodily injury to any other person arising out of the negligent driving of a

motor vehicle. [355] Damage to property is thus not included in the wording of s 17(1). [356] In terms of s 17(1A) the obligation of the Fund to compensate a third party for non-patrimonial loss is limited to compensation for a serious injury and will be paid as a lump sum. [357] In terms of s 17(4) a claim for loss of income or support shall be proportionately calculated on an amount not exceeding R160 000 per year in the case of a claim for loss of income and R160 000 per year in respect of each deceased breadwinner in the case of a claim for loss of support. This amount is adjusted on a quarterly basis in order to counter the effect of inflation. [358]

Section 18 of the RAF Act [359] imposes important restrictions on certain plaintiffs regarding both the maximum amount recoverable and the type of damage for which compensation maybe recovered. Section 18(2) [360] contains the following [361]principles: [362] where the loss or damage contemplated in s 17 is suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle and the third party is entitled to compensation under the COID Act, [363] in respect of such injury or death—

(a)

the liability of the Fund or an agent, in respect of the bodily injury to or death of any one such employee, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent and any lesser amount to which that third party is entitled by way of compensation under the said Act; [364] and

(b)

the Fund or such agent shall not be liable under the said Act for the amount of the compensation to which any such third party is entitled thereunder.

Section 18(3) of the RAF Act contains the following [365] principles: [366] where the loss or damage contemplated in s 17 is suffered as a result of bodily injury to or death of a member of the South African National Defence Force, other than a person referred to in sub-s (2), and the third party is entitled to compensation under the Defence Act of 1957, [367] —

(a)

the liability of the Fund or an agent, in respect of the bodily injury to or death of any such member of the said Force, shall be limited in total to the amount representing the difference between the amount which that third party could, but for this paragraph, have claimed from the Fund or such agent and any lesser amount to which that third party is entitled by way of compensation under the said Defence Act; and

(b)

the Fund or such agent shall not be liable under the said Defence Act for the amount of the compensation to which any such third party is entitled thereunder.

Section 18(4) limits the liability of the Fund or an agent in respect of funeral expenses to the necessary actual costs to cremate the deceased or to inter him or her in a grave. [368]

The liability of the driver, the owner or the employer is excluded by s 21 [369] and replaced by the liability of the Fund in terms of s 17(1). The third party will only be entitled to institute a common-law claim against the wrongdoer who caused the motor vehicle accident if the Fund is unable to pay any compensation or for secondary emotional shock suffered due to the accident. [370] The third party is, therefore, statutorily forbidden to claim from the wrongdoer that part of his or her loss due to bodily injuries that falls outside the ambit of the Act. [371]

Section 194 of the Labour Relations Act 66 of 1995 places certain maximum limits on the compensation [372] that the Labour Court can award to an employee in a contract of service:

(a)

If the dismissal for misconduct or incapacity or for operational reasons is substantively or procedurally unfair or both, [373] the maximum amount of compensation is 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

(b)

If the dismissal is automatically unfair, [374] the maximum amount of compensation is 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.

An award of compensation in terms of the above is in addition to, and not a

substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment. [375]

11.9 CONCURRENCE OF AND RELATIONSHIP BETWEEN CERTAIN CLAIMS FOR COMPENSATION [376]

11.9.1 Introduction

A single damage-causing event or factual situation may sometimes give rise to different claims for damages or satisfaction. [377] These remedies may be similar (for example, delictual actions) or dissimilar (delictual and contractual actions, or delictual actions and actions based on other legal principles imposing a duty to pay damages). The simultaneous presence of claims based upon different forms of damage (concerning different legal interests) or having different objectives can be described as concurrence in the wide sense. [378] No real theoretical problem arises here as such claims can co-exist alongside one another. Concurrence in the narrow sense [379]exists where the various actions concerned are directed towards the same objective or performance while the debtor is obliged to pay damages only once. [380]

Something having a close bearing on concurrence of action is the matter of causes of action, which is discussed elsewhere. [381]

11.9.2 Different delictual actions aimed at compensation and satisfaction [382]

The actio iniuriarum and the Aquilian action may concur in circumstances where a single act causes an iniuria [383] as well as patrimonial damage. [384] Examples are where an assault [385] results in hospital expenses or where a doctor loses patients on account of defamation. The Aquilian action is available to claim damages for patrimonial

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loss, [386] whereas satisfaction [387] can be claimed with the actio iniuriarum. Sufficient averments to support both claims must be set out in pleadings. [388]

In practice the concurrence of the Aquilian action and the action for pain and suffering [389] often occurs in the case of bodily injuries. [390] The plaintiff must then claim damages for patrimonial loss with the actio legis Aquiliae [391] and compensation [392] for the personality infringement (non-patrimonial loss) [393] with the action for pain and suffering.

It is sometimes suggested that concurrence of the action for pain and suffering and the actio iniuriarum is impossible. [394] According to this viewpoint, if X assaults Y only the actio iniuriarum will be available to obtain satisfaction for the full damage (including pain and suffering). This view is incorrect. [395] The actio iniuriarum has a (true) function of satisfaction, [396] whereas the action for pain and suffering has a compensatory function. [397] In the above example involving assault, X can therefore claim satisfaction on account of iniuria [398] with the actio iniuriarum and compensation for the pain and suffering with the action for pain and suffering. [399] This view is by implication also apparent from case law where in principle a distinction is made between satisfaction for contumelia (iniuria) and compensation for physical pain and suffering. [400]

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11.9.3 Delictual and other claims for damages

Concurrence is also possible between an Aquilian claim and other types of delictual actions. [401] In addition, concurrence of the delictual actions mentioned above [402]and various other common-law [403] and statutory [404] actions for damages can also be relevant.

For present purposes it will suffice to refer to the following example: where X handles his dog negligently and it injures Y, X can be liable in terms of the actio de pauperie or the Aquilian action and the action for pain and suffering. [405] Here the prejudiced party, or the law, will have to give the decisive answer as to the nature of the action for damages with which Y should proceed. [406]

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11.9.4 Claims in terms of actio iniuriarum and for breach of contract

Concurrence may occur where conduct constitutes both an iniuria and a breach of contract. [407] Breach of promise (breach of the contract of engagement) can give rise to the actio iniuriarum if the breach was 'injurious or contumelious'. [408] Furthermore, the breach of an ordinary commercial contract can also be the basis of the actio iniuriarum. [409] The concurrence of this action with a contractual action for damages has occurred, for example, in cases such as the breach of a contract of employment, [410] the dishonouring of a client's cheque by a banker, [411] and the disregard of a reservation agreement by the owner of a hotel. [412] The correct approach to be followed appears from *Ndamse v University College of Fort Hare*, [413]where the court stated that a wrongful dismissal from employment (breach of contract) is not in itself an iniuria, but that 'the

manner of a wrongful dismissal may constitiute an *iniuria'*, in which case 'the plaintiff must set out facts other than the mere fact of dismissal, which constitute an *iniuria'*.

11.9.5 Claims in terms of action for pain and suffering and contractual action

Concurrence occurs where the infringement of a person's bodily integrity also constitutes breach of contract. An example is where a building contractor erects a roof badly, causing it to fall on someone and injure the person, [414] or where a physician who has an agreement with a patient treats him or her negligently, causing the patient to endure pain and suffering in the process. In these cases the person harmed has a contractual action for damages for patrimonial loss caused by the malperformance as well as a claim for compensation for pain and suffering with the appropriate action. [415] Naturally, compensation for pain and suffering cannot be claimed ex contractu. [416]

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11.9.6 Claims with Aquilian action [417] and based on breach of contract [418]

The Aquilian action and a contractual action for damages concur in a situation where breach of contract also causes patrimonial damage in a wrongful and culpable manner. [419] However, in practice the Aquilian action is available alongside the contractual action only if the conduct complained of, apart from constituting breach of contract, also infringes a legally recognized interest which exists independently of the contract [420] in a wrongful and culpable manner. [421] Concurrence in the

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narrow sense is present here since both claims serve the same purpose. [422] In solving the problem of narrow concurrence, [423] election or choice of actions is usually suggested [424] and the plaintiff may institute the actions in the alternative. [425] Most writers regard this as the best solution. [426] Although the Appeal Court decision in *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* [427] has been interpreted as accepting exclusivity ('contract only') in the case of pure economic

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loss, [428] the Supreme Court of Appeal rejected this interpretation in *Holtzhausen v ABSA Bank Ltd*: [429]

> *Lillicrap* decided that no claim is maintainable in delict where the negligence relied on consists in the breach of a term of contract ... *Lillicrap* is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent.

The prejudiced party thus has a choice between a delictual and contractual action if a legal duty to prevent pure economic loss exists according to the reasonableness criterion or boni mores independent of the contractual duty. [430]

The view concerning the relationship between contractual and delictual liability in terms of which negligent misrepresentation inducing a contract is not actionable [431]has been rejected by the Appellate Division. [432]

11.9.7 Causes of action in situations of concurrence [433]

Van Aswegen [434] submits that, even in the case of narrow concurrence, [435] the cause of action for damages as a result of breach of contract differs from that of a claim ex delicto. [436] If one accepts this, the solution of consecutive alternativity of actions can

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be adopted [437] as the 'once and for all' rule will not bar a subsequent action, since it is based on a different cause of action. Without further examination of the theoretical

position, [438] it appears as if election and alternative claims, the approach followed in practice in cases of narrow concurrence, will be applied in such a manner that the plaintiff would have only a single opportunity to institute all possible claims he or she might have. It is unlikely that the court will recognize a variety of causes of action even in cases of concurrence in the wide sense (for example, where X breaches his contract with Y in an insulting manner), giving Y the opportunity to claim satisfaction first and compensation for patrimonial loss at a later stage. [439]

11.9.8 Differences between delictual and contractual claims for damages [440]

Where a choice between delictual and contractual damages is possible in a situation of concurrence of actions, [441] it is important to consider certain differences between the two kinds of claims. Delictual actions for compensation include damages and satisfaction for non-patrimonial loss, [442] whereas satisfaction and compensation for non-patrimonial loss cannot be claimed ex contractu (or with the Aquilian action). [443]This distinction leads to further difference in connection with the transmissibility and cession of actions for compensation [444] and the requirement of fault. [445]

The difference between actions for damages ex delicto and ex contractu are summarized as follows by Van Aswegen: [446]

> Although there is no material difference with regard to the source of the claims for damages, [447] the nature of the damage which can be compensated [448] or the measures for the assessment of damages, [449] there are a number of far-reaching practical differences. First, the extent of damages recoverable may differ because measures limiting liability [450] and the time for computation of damages [451] differs. Secondly, the requirements for the capacity of persons for the two types of liability are such that, in a given case, a person may

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'qualify' for delictual liability but not for liability for breach of contract. [452] Thirdly, the liability of joint delictual wrongdoers differs from that of joint parties to a contract. [453] Fourthly, vicarious liability differs in the two instances in so far as it may be more extensive in the case of delict than for breach of contract. [454] Fifthly, unilateral waiver of his rights by a prejudiced party may extinguish the (possible) liability of a delictual wrongdoer, as in the case of consent, whereas unilateral waiver of a contractual right to performance [455] cannot extinguish the other contracting party's obligation to perform. [456] In the sixth place, a contractual term excluding or limiting liability may, depending on the interpretation thereof, apply only to contractual liability. [457] A penalty clause [458] will also not apply to delictual liability. [459] In the seventh place, contributory negligence may only be raised against a delictual claim as defence [460] and in the eighth place the onus of proof may differ in respect of contractual and delictual claims. [461] Lastly, different courts may have

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jurisdiction and the rules of private international law differ in respect of these two types of claims. [462]

In addition to these differences, delictual actions for damages are sometimes subject to limitations pertaining to quantum [463] which differ from those applicable to contractual actions for damages. [464] In some cases particular requirements of notice exist against certain defendants in delictual actions. [465]

11.10 REGULATION OF LIABILITY FOR DAMAGES BY MEANS OF AGREEMENT [466]

11.10.1 Unilateral waiver

In a sense, unilateral consent or waiver is a defence against a delictual claim for damages or satisfaction, as a result of the defence of volenti non fit iniuria. [467] This involves an absence of wrongfulness and is therefore not directly concerned with the law of damages. As regard a claim for damages or satisfaction which has already come into being, it appears that unilateral waiver (that is, without agreement between the parties) cannot absolve the other party of his or her obligation to pay compensation. [468]

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11.10.2 Release

This involves an agreement between parties whereby, for example, a debtor is absolved from an obligation to pay damages. [469] Strictly speaking, waiver is possible only in respect of an obligation which has already come into existence. [470] Waiver can nullify a party's liability which results from breach of contract, delict or other cause. [471]

11.10.3 Pactum de non petendo [472]

This is a contractual undertaking not to enforce a personal right and, in the present context, it involves an undertaking not to institute a claim for damages or satisfaction against another. [473] Because such a pactum does not affect the existence of a personal right, [474] there is nothing to prevent the parties entering into it provisionally before the obligation to pay damages comes into existence. [475]

11.10.4 Terms limiting liability

Persons may exclude or limit their possible liability for the payment of damages or satisfaction by agreement. [476] There are two main groups of these terms: [477] First,

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possible liability on the basis of certain causes of action may be excluded. [478]Secondly, liability on the basis of a cause of action can be limited in a prescribed manner. [479]

A limiting term can have a bearing on any type of liability which may possibly arise between the parties. [480] In addition to the normal requirements that have to be met for validity, such a term must not be in conflict with public policy or the morals of society. [481] Liability for damage caused by grossly negligent conduct may be

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excluded. [482] In all cases where the validity of a term is in doubt, the interpretation of public policy plays a decisive role. [483]

The effect of a limiting term is determined by the interpretation of the intention of the parties but there is a tendency to interpret such terms restrictively. [484]

Although clear provisions of the term will be given their intended result, the provisions will be restricted to the basis of liability on which it has a direct bearing. [485] Where a term is unclear, it is interpreted in terms of the contra proferentem rule against the party benefiting from it. [486]

Where a term does not expressly refer to contractual or delictual liability, both are included. [487]

The onus of proving that an alleged owner's risk clause does not form part of an agreement rests on the plaintiff. [488]

A seller's liability for latent defects in a purchased article [489] can be excluded, limited or varied by agreement between the parties. The term 'voetstoots' is generally used to identify all agreements which exclude liability. [490] Liability of the merchant publicly professing to have attributes of skill and expert knowledge and of the manufacturer for consequential loss arising from latent defects can likewise be excluded. [491] The seller's liability for eviction can only partially be excluded. [492]However, the warranties of quality in consumer agreements may not be contractually excluded. [493]

11.11 PRESCRIPTION AND EXPIRY PERIODS [494] AND REQUIREMENTS REGARDING NOTICE OF ACTIONS FOR COMPENSATION

In practice, the enforceability of claims for damages or satisfaction is influenced by prescription. This matter is discussed extensively in other works [495] and this paragraph will only refer to certain basic principles.

The Prescription Act 68 of 1969 embodies the principle of extinctive prescription of *debts* [496] and the courts correctly interpret this as referring also to an action for

compensation. [497] Whether a debt in the form of a claim for compensation exists in turn depends on the existence of a cause of action. [498] The general prescription period for actions for compensation is three years [499] and the applicable period commences to run when the debt is claimable. [500] This means that as soon as a cause of action arises [501] a debt becomes claimable. [502] The prescription period in respect of a 'judgment debt' is thirty years, [503] whereas 'any other debt' prescribes after three years. [504] There are also specific principles regarding the delay and interruption of prescription. [505]

The Prescription Act does not affect the provisions of any other Act stipulating specific periods of prescription. [506] There are many of these provisions, [507] some of

which are also described as expiry terms [508] and on which the ordinary principles of extinctive prescription are inapplicable. [509]

There are many statutory provisions containing requirements of notice before an action for damages may be instituted against a specific defendant. [510] The court may interpret such provisions restrictively against the defendant who benefits from them. [511]

At present it is uncertain whether someone may validly waive the running of prescription before it starts running, [512] but an undertaking not to invoke prescription after it has been completed is valid, even if it is for an unlimited period. [513]

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[1] Cf para 1.2 above on the nature of the law of damages.

[2] Cf para 3.2 on the patrimony and para 5.3 on personality interests. See, eg, *Prok Africa (Pty) Ltd v NTH (Pty) Ltd* 1980 (3) SA 687 (W) on the legal 'possessor' of confidential information who may claim as a result of the dishonest use thereof by another. Cf also *McLelland v Hulett* 1992 (1) SA 456 (D) on a claim for damages by a shareholder against the directors of a company. In *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) the court refused to extend the common-law action for loss of support to dependants whose breadwinner was incarcerated due to his own intentional criminal activities. See Neethling 2009 *THRHR* 296–304; Neethling & Potgieter *Delict* 280 n 52. See, however, *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA) in which the dependants of a police officer who committed

suicide succeeded in a claim for loss of support against the Minister of Safety and Security on the basis of breach of the statutory duty to declare the deceased unfit to possess a firearm in circumstances where his fellow police officers and the station commander knew this to be the case. Cf *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA). See also in general Corbett & Buchanan I 25. On the view whether the dependant's action is based on a delict committed against the dependant or against the breadwinner, see Neethling & Potgieter *Delict* 278–9 and the authority cited there; Neethling & Potgieter 2009 *Obiter* 407–10; Neethling & Potgieter 2009 *Annual Survey* 806–10; *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) at 97–8; *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA) at 359; Neethling 2009 *THRHR* 296–304.

[3] Cf *Pinchin v Santam* 1963 (2) SA 254 (W) at 260 and *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) on the position of an unborn child. In *Pinchin* a pregnant woman was involved in a motor car accident caused by the defendant's negligence. At birth, the child was found to suffer from serious brain damage. Compensation was claimed from the defendant on the child's behalf. The court, relying on the nasciturus fiction—that an unborn child is deemed born if doing so is in its interest—held that the child had an action in principle but that the action had to fail because there was no proof that the brain injuries were caused by the accident. In *Mtati* the SCA followed the approach of Joubert 1963 *THRHR* 61 et seq who pointed out that because an act and its consequences are separate in time and space, it is unnecessary to rely on the nasciturus fiction to find that a child who is born with defects resulting from pre-natal injuries has an action: the defendant's conduct at the time of the accident may be classified as wrongful much later when the child is born with such defects. (See also Neethling & Potgieter *Delict* 35; Van der Merwe & Olivier *Onregmatige Daad* 53 et seq.) See para 2.3.1 n 35 on claims for so-called 'wrongful life' and 'wrongful birth'.

[4] Cf Corbett & Buchanan I 29 et seq; para 14.3 et seq. Cf also *Card v Sparg* 1984 (4) SA 667 (E) on the fact that a woman who voluntarily had intercourse (where there was no seduction) cannot claim for her personal expenses as a result of the birth of a child. The position is different with regard to the child (at 671): 'It seems clear from the authorities that the lying-in expenses are regarded as being for the benefit of the child, and that the same applies to the maintenance for the mother during the period immediately before and after the birth of the child. It would seem logical that these expenses be borne by both parents in accordance with their means.'

[5] Para 15.3.2.

[6] Cf on the so-called iniuria per consequentias *Spendiff v East London Daily Dispatch Ltd* 1929 EDL 113; Neethling et al *Law of Personality* 61. Both a trading and non-trading juristic person may claim for defamation(*Gold Reef City Theme Park (Pty) Ltd, Akani Egoli (Pty) Ltd v Electronic Media Network Ltd*2011 (3) SA 208 (GSJ); *Media 24 v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA); *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A); *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) (claim by political party); Grogan & Midgley 1989 *SALJ* 587; Burchell *Defamation* 39–53). See *Lindsay v Stofberg* 1988 (2) SA 462 (C) at 467 on the locus standi of an executor.

[7] See Neethling & Potgieter *Delict* 290–7.

[8] See paras 2.3.1 and 3.2.4.2*(b)*; *Pretorius v McCallum* 2002 (2) SA 423 (C); *BOE Bank v Ries* 2002 (2) SA 39 (SCA); *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C); *Aucamp v University of Stellenbosch* 2002 (4) SA 544 (C) at 575–6.

[9] Para 11.1.3.

[10] Cf, eg, *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A) at 775; *Snyders v Groenewald* 1966 (3) SA 785 (C); Corbett & Buchanan I 25–6. The claim still accrues to the injured person himself or herself (see especially *Van Gool v Guardian National Ins Co Ltd* 1992 (1) SA 191 (W) at 193). See *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 196–7; *Road Accident Fund v Mtati*2005 (6) SA 215 (SCA).

[11] See Heaton *Family Law* 74–5; *Godfrey v Campbell* 1997 (1) SA 570 (C).

[12] These juristic acts are listed in s 15(2) of the Matrimonial Property Act 88 of 1984. See Heaton *Family Law* 75–83 for a discussion of s 15 of Act 84 of 1988 and the protective measures in respect of the administration of the joint estate.

[13] Cf *Rohloff v Ocean Accident and Guarantee Corp Ltd* 1960 (2) SA 291 (A) at 304. Here the husband's marital power was excluded but marital power should not make any difference (see Van der Merwe & Olivier *Onregmatige Daad* 359).

[14] 2006 (4) SA 230 (CC).

[15] Cf *Tomlin v London and Lancashire Ins Co Ltd* 1962 (2) SA 30 (D) at 32–3; *Kleinhans v African Guarantee and Indemnity Co Ltd* 1959 (2) SA 619 (E) at 626; *Delport v Mutual & Federal Ins Co Ltd*1984 (3) SA 191 (D); Sonnekus 1986 *De Jure* 150.

[16] Section 18*(b)* provided that notwithstanding the fact that a spouse is married in community of property, 'he may recover from the other spouse damages, other than damages for patrimonial loss, in respect of bodily injuries suffered by him and attributable either wholly or in part to the fault of that spouse'.

[17] Section 18*(a)* provides that notwithstanding the fact that a spouse is married in community of property, 'any amount recovered by him by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him, does not fall into the joint estate but becomes his separate property'. See *Van den Berg v Van den Berg* 2003 (6) SA 229 (T) for an interpretation of this article (see also Mailula 2005 *THRHR* 308 et seq for a critical discussion). Nothing into which such compensation has been converted will fall into the joint estate, because a different interpretation of the Act will prejudice the recipient of the compensation. See in general Boberg 1984 *SALJ* 613.

[18] *Van der Merwe (Women's Legal Centre Trust as Amicus Curiae) v Road Accident Fund* 2006 (4) SA 230 (CC). For discussions of this judgment see Robinson 2007 (3) *PELJ* 70–88; Sonnekus 2006 *TSAR*848–63; Visser 2006 *De Jure* 466–71; Klopper 2007 *THRHR* 672–87; Neethling & Potgieter *Delict* 268–9.

[19] The court ordered that the words 'other than damages for patrimonial loss' in s 18*(b)* (see n 16above) had to be removed. Moseneke DCJ held that s 18*(b)* was unconstitutional since it discriminated unfairly against spouses married in community of property in not allowing a spouse, married in community of property, to institute an action for patrimonial loss in respect of bodily injuries against his or her spouse. The court held that s 18*(b)* had to be amended to provide, firstly, that spouses married in community of property are entitled to institute such actions, and, secondly, that such compensation for patrimonial loss does not fall into the joint estate to avoid the senseless result that the amount which the plaintiff takes from the joint estate with one hand, must be returned to the joint estate with the other hand. See Neethling & Potgieter *Delict* 269 n 31.

[20] This is possible because the compensation is now the separate property of the innocent spouse, and the objection that the existence of the joint estate made such a claim senseless has therefore disappeared (Neethling & Potgieter *Delict* 269).

[21] Section 19 of the Matrimonial Property Act 88 of 1984. See Neethling & Potgieter *Delict* 269.

[22] See para 11.1.8 on claims for recourse and adjustment against each other when the marriage is dissolved.

[23] *Mann v Mann* 1918 CPD 89; *C v C* 1958 (3) SA 547 (SR). See, however, *Rohloff v Ocean Accident & Guarantee Corp Ltd* 1960 (2) SA 291 (A) at 301 and *Van der Walt v Van der Walt*unreported, case no 42736/2008 (SG), 26 March 2009, which question this principle. Cf further Lee & Honoré *Obligations* 226; Visser 2006 *De Jure* 471; Neethling & Potgieter *Delict* 269 n 34.

[24] Para 11.2.2.2.

[25] The same should apply where the child is a major but is still supported by his or her parent (cf Corbett & Buchanan I 26). Cf also Koch *Lost Income* 156; McKerron *Delict* 150; *Bursey v Bursey* 1999 (3) SA 33 (SCA). See in general Dendy 1990 *SALJ* 155–67.

[26] Cf *Bellstedt v SAR & H* 1936 CPD 399; *Nieuwenhuizen v National Ins Co Ltd* 1962 (1) SA 760 (W) at 763; *Schnellen v Rondalia Ass Corp of SA* 1969 (1) SA 517 (W); *Du Preez v AA Mutual Ins Ass* 1981 (3) SA 795 (E); *Mashini v Senator Ins Co Ltd* 1981 (1) SA 313 (W); *Premier of the Province of KwaZulu-Natal v Sonny* 2011 (3) SA 424 (SCA). Cf further Voet *Commentarius* 9.2.11; *Abbott v Bergman* 1922 AD 53. The parent has a claim in his or her personal capacity only if this person in fact supports the child (cf *Ncubu v National Employers General Ins Co Ltd* 1988 (2) SA 190 (N); Faul 1988 *TSAR* 583). Otherwise the parent may claim the expenses on behalf of the child.

[27] See *Van Gool v Guardian and National Ins Co Ltd* 1992 (1) SA 191 (W); *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A), where G in his capacity as father of his minor daughter claimed on her behalf for patrimonial and non-patrimonial loss. In other words, the claim was that of the daughter. The court a quo dissented from the *Schnellen* case (see n 26 above) and held that the father may succeed in such a claim. On appeal, however, the *Schnellen* case was distinguished (see para 7.5.4.4). See further Neethling & Potgieter 1992 *THRHR* 480.

[28] Usually the father, but the mother may also claim in certain instances (cf Corbett & Buchanan I 26).

[29] See *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A) at 775; *Schnellen v Rondalia Ass Corp of SA* 1969 (1) SA 517 (W); *Santam Versekeringsmpy Bpk v Roux* 1978 (2) SA 856 (A) at 866. In *Lityeli Tyesi Litholi v RAF* unreported (225/2008) [2009] ZAECBHC 13 (10 December 2009) the plaintiff sued for loss of earning capacity on behalf of his minor son.

[30] Cf Corbett & Buchanan I 26 who refer to *Plotkin v Western Ass Co Ltd* 1955 (2) SA 385 (W); *Yorkshire Ins Co Ltd v Porobic* 1957 (2) PH J16 (A). Cf Koch *Lost Income* 154; *Pike v Minister of Defence*1996 (3) SA 127 (Ck). See *Fosi v Road Accident Fund* 2008 (3) SA 560 (C) for the application of customary law to determine whether a needy parent had a right to support from his child. See also *Jacobs v Road Accident*

Fund 2010 (3) SA 263 (SE) on the voluntary assumption of a duty to support a parent and the irrelevance of the co-liability of siblings in a claim against one of them.

[31] The position with regard to medical expenses resulting from bodily injuries is discussed in para 11.1.2. In *Fourie v Santam Ins Ltd* 1996 (1) SA 63 (T) the father instituted action on behalf of his minor children for loss of support as a result of the death of their mother.

[32] Cf para 14.8 for the principles concerning the determination of quantum.

[33] Cf, eg, *Abbott v Bergman* 1922 AD 53; *Plotkin v Western Ass Co Ltd* 1955 (2) SA 385 (W) (husband received damages resulting from injuries to his wife, who had to assist him in his business); *Yorkshire Ins Co Ltd v Porobic* 1957 (2) PH J16 (A); *De Harde v Protea Ass Co Ltd* 1974 (2) SA 109 (E). Cf also *Erdmann v Santam Ins Co Ltd* 1985 (3) SA 402 (C). Where a wife, because of injuries, is no longer able to take care of the household without assistance, both the husband and wife may in principle claim damages for such expenses up to the date of trial. However, if the husband has already paid these expenses in performing his duty of support, he alone may claim. For the period thereafter, the injured person himself or herself should claim. For a critical discussion see Burchell & Dendy 1985 *Annual Survey* 205–6 who argue inter alia that the wife suffered no damage in casu. See further Koch 1986 *De Rebus* 105; *Reduced Utility* 265; Corbett & Buchanan I 27.

[34] See, however, *De Vaal v Messing* 1938 TPD 34; confirmed in *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) at 99–100; para 11.2.2.3.

[35] Cf Neethling & Potgieter *Delict* 284–5; Van der Merwe & Olivier *Onregmatige Daad* 336–9, 341; Davel *Afhanklikes* 84; Koch *Reduced Utility* 266–7. Contra Corbett & Buchanan I 28; Lee & Honoré *Obligations* 280. Cf further *De Harde v Protea Ass Co Ltd* 1974 (2) SA 109 (E): the husband was injured and his wife accepted employment at a lower salary in order to be able to assist him. Her claim for the reduction in her salary was rejected, apparently since she had no legal duty to act as she did. Cf on this case Boberg *Delict* 123.

[36] In *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) at 99 the court held that 'so long as a right of action exists in a breadwinner there cannot also be a right of action in his/her dependants for loss of maintenance'. See Neethling & Potgieter *Delict* 271; *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA).

[37] Corbett & Buchanan I 28. A child has a duty to support his or her parents. The duty arises if both parents are indigent and are unable to support themselves and if the child is able to provide the support (*Pike v Minister of Defence* 1996 (3) SA 127 (Ck) at 133). Such a parent has a right to claim damages for loss of support resulting from, eg, the death of the child (cf *Jacobs v Road Accident Fund* 2010 (3) SA 263 (SE) at 266–8).

[38] Neethling & Potgieter *Delict* 275–6. Cf also s 36 of the COID Act 130 of 1993. *Union Government v Ocean Accident & Guarantee Corp Ltd* 1956 (1) SA 577 (A); *Pike v Minister of Defence* 1996 (3) SA 127 (Ck).

[39] Section 17(5) of the RAF Act 56 of 1996 states that, where a third party is entitled to damages and incurs expenses for accommodation for himself/herself or someone else in a hospital or for treatment or the rendering of goods or services, the supplier of the goods or services concerned may claim its costs directly from the RAF. The claim is restricted to the amount claimable by the third party. See Klopper *Third Party Compensation* 40–6; *Van der Merwe v Road Accident Fund* 2007 (6) SA 283 (SCA); *Road Accident Fund v Abdool-Carrim* 2008 (3) SA 579 (SCA); Klopper 2007 *THRHR* 469–81; Klopper Jan/Feb 2008 *De Rebus* 59; Klopper Aug 2008 *De Rebus* 18; Ahmed 2010 *THRHR* 307–17.

[40] Those who may claim are a widow or widower (Davel *Afhanklikes* 69–70); surviving partners in civil unions (Civil Union Act 17 of 2006); children (Davel op cit 71–3); parents (*Fosi v Road Accident Fund* 2008 (3) SA 560 (C); *Jacobs v Road Accident Fund* 2010 (3) SA 263 (SE); Davel op cit 73–6); grandparents and grandchildren (Davel op cit 76–8; *Tyali v University of Transkei* [2002] 2 All SA 47 (Tk)); brothers and sisters (*Smith v Mutual and Federal Ins Co Ltd* 1998 (4) SA 626 (C); Davel op cit 78–9). Cf Davel op cit 79–81 on further possible relatives. Cf also Corbett & Buchanan I 59–64; Van der Merwe & Olivier *Onregmatige Daad* 333–4; Lee & Honoré *Obligations* 277; Koch *Lost Income* 182–4; *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C); *Zimelka v Zimelka* 1990 (4) SA 303 (W); Koch 1992 *THRHR* 128; McKerron *Delict* 150; *Chawanda v Zimnat Ins Co Ltd* 1990 (1) SA 1019 (Z). Cf regarding marriages according to indigenous law s 31 of the Black Laws Amendment Act 76 of 1963; *Road Accident Fund v Mongalo; Nkabinde v Road Accident Fund* 2003 (3) SA 119 (SCA); Maithufi & Bekker 2009 *Obiter* 164–74; Davel op cit 63–6; *Pasela v Rondalia* 1967 (1) SA 339 (W); *Mayeki v Shield Ins Co Ltd* 1975 (4) SA 370 (C); *Makgae v Sentraboer* 1981 (4) SA 239 (T); *Dlikilili v Federated Ins Co Ltd* 1983 (2) SA 275 (C); *Hlela v Commercial Union Ass Co of SA Ltd* 1990 (2) SA 503 (N); *Kewana v Santam Ins Co Ltd* 1993 (4) SA 771 (Tk AD) and *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) (children adopted according to customary law); Labuschagne & Davel 2002 *De Jure* 181 et seq; *Thibela v Minister van Wet*

en Orde 1995 (3) SA 147 (T) (paid lobola for wife and her minor son and under duty to support both); Maithufi 1986 *De Rebus* 555. See also ss 22 and 54 of the COID Act 130 of 1993 on the claim of the dependants of a deceased employee. Cf further *Senior v National Employers General Ins Co Ltd* 1989 (2) SA 136 (W); *Ismail v General Accident Ins Co of SA Ltd* 1989 (2) SA 468 (D); *Smith v Mutual & Federal Ins Co Ltd* 1998 (4) SA 626 (C); Davel 1989 *De Jure* 365; Dendy 1990 *SALJ* 155. See *Govender v Ragavayah (Women's Legal Centre Trust as Amicus Curiae)* [2009] 1 All SA 371 (D) on recognition of a spouse in a Hindu marriage, and *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) on claim for loss of support by dependant widow married to breadwinner in terms of Islamic law—Freedman 1998 *THRHR* 532–8; Goldblatt 2000 *SAJHR* 138–44; Rautenbach & Du Plessis 2000 *THRHR* 303–14; Neethling & Potgieter 2001 *THRHR* 484–8; Neethling 2002 *TSAR* 156–60.

[41] The claim is for loss of support only and the fact that the death of the parent may, for instance, prejudice the child's future earning capacity is irrelevant (cf Koch *Lost Income* 24, 204). See further *Witham v Minister of Home Affairs* 1989 (1) SA 116 (Z) (no claim for alleged loss of income from deceased wife's business). See also *Henery v Santam Versekeringsmpy Bpk* [1997] 3 All SA 100 (T); *Santam Bpk v Henery* 1999 (3) SA 421 (A) (claim as a result of the death of a former husband who, in terms of a court order, was obliged to pay maintenance to plaintiff—reversing *Heyns v SA Eagle Ins Co Ltd* 1988 (2) Ph J18 (T)). See Francis & Freemantle 1992 *SALJ* 197–203; Neethling & Potgieter 2001 *THRHR* 484–8. A cohabitant also has no claim—*Henery v Santam Versekeringsmpy Bpk* [1997] 3 All SA 100 (T) at 111. See also *Volks v Robinson* 2005 (5) BCLR 446 (CC) where the Constitutional Court declared s 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990, which do not include claims by cohabitants, constitutionally valid. In *Santam Ins Co Ltd v Fourie* 1997 (1) SA 611 (A) it was held that the children of a working mother, who had been killed negligently, did not suffer any patrimonial loss due to her death. The mother was under a duty to support her children, but she received more from the household money pool than she had contributed to it. It can therefore not be said that she made any contribution to the maintenance of the children.

[42] *Nkabinde v SA Motor & General Ins Co Ltd* 1961 (1) SA 302 (N); *Henery v SantamVersekeringsmpy Bpk* [1997] 3 All SA 100 (T) at 111; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) at 1331; Neethling & Potgieter 2001 *THRHR* 484 et seq. Cf further *Santam Bpk v Fondo* 1960 (2) SA 467 (A).

[43] The nature of the contractual relationship founding the duty or right of support will be decisive in this respect—see Neethling & Potgieter 2001 *THRHR* 488; Neethling & Potgieter *Delict* 282. See *Amod v Multilateral Motor Vehicle Accidents Fund (Commissioner for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) (Muslim marriages); *Nkabinde v SA Motor & General Ins Co Ltd* 1961 (1) SA 302 (N) and *Santam Bpk v Fondo* 1960 (2) SA 467 (A) (black customary unions, but cf Recognition of Customary Marriages Act 120 of 1998); *Metiso v Padongelukkefonds* 2001 (3) SA 1142 (T) (adoption of a child under indigenous law—see Neethling 2002 *TSAR* 156 et seq; Labuschagne & Davel 2002 *De Jure* 181 et seq); *Du Plessis v Road Accident Fund* 2004 (1) SA 359 (SCA) (same-sex marriages—see Steynberg & Mokotong 2005 *THRHR* 330 et seq; cf Civil Union Act 17 of 2006).

[44] ie affective and emotional loss.

[45] Cf, however, Koch 1989 *THRHR* 215, who argues (probably in vain) in favour of such a claim. Cf also Lee & Honoré *Obligations* 276 on the possibility of a claim on the basis of iniuria where another is intentionally killed.

[46] *Lockhat's Estate v North British and Mercantile Ins Co Ltd* 1959 (3) SA 295 (A) at 304.

[47] Ibid. Unless litis contestatio was reached before the death of the deceased, the executor cannot claim for loss of future income (Neethling & Potgieter *Delict* 276). This statement appears to be incorrect. Where the plaintiff has died, only loss of income up to the date of death can be claimed. The question whether an executor may claim as a result of the loss of a provisional right which the deceased had established before his or her death was left open in *De Vos v SA Eagle Versekeringsmpy Bpk* 1985 (3) SA 447 (A) at 451 (see para 2.3).

[48] In *Nodada Funeral Services CC v The Master* 2003 (4) SA 422 (TkH) at 427–8 the court remarked obiter that it is doubtful whether the actio funeraria is still available in present-day South African law. In casu the claim failed because it was instituted against the Master (holding proceeds from a life insurance policy on behalf of a beneficiary), instead of against the executor of the deceased estate. The applicant, who performed the funeral arrangements, had no standing to institute the actio funeraria, since it was the sister of the deceased who supervised the funeral arrangements. She should have instituted the actio funeraria against the executor of the deceased estate, due to her contractual obligation to pay for the funeral. The applicant should first have exhausted his contractual remedies against the deceased's sister. See Thomas 2004 *THRHR* 331–5 who discusses Roman law on the actio funeraria and the Roman-law principle that a person should be buried at his or her own expense (*D* 11 7 14 1). He explains (at 335) that

in Roman law they lay claim to assets to pay for the funeral wherever they could be found, such as a legacy or dowry, to give effect to the principle that a person should pay for his or her own funeral. Cf *Commercial Union Ass Co of SA Ltd v Mirkin* 1989 (2) SA 584 (C); *Rondalia Ass Corp of SA Ltd v Britz* 1976 (3) SA 243 (T) at 245–6; *Finlay v Kutoane* 1993 (4) SA 675 (W) ('spouse' in terms of a customary union).

[49] See Neethling & Potgieter *Delict* 285 et seq.

[50] See, eg, *Union Government v Lee* 1927 AD 202 at 206; *Gillespie v Toplis* 1951 (1) SA 290 (C) at 296 (agreement in respect of a grave on another's property). Cf also *Nienaber v Union Government*1947 (1) SA 392 (T); *Nkadia v Mahlazi* 1982 (2) SA 441 (T).

[51] See regarding the owner's rei vindicatio Silberberg & Schoeman *Law of Property* 242–62; on the actio negatoria, op cit 262–3; on the actio ad exhibendum, op cit 263–5; and on (other) delictual remedies op cit 265–7. See further op cit 710–13 on compensation for expropriation in terms of the Mineral and Petroleum Resources Development Act 28 of 2002. The possessor of property who has successfully raised the defence of estoppel against the rei vindicatio of the actual owner should thereafter be regarded as owner for the purposes of claiming compensation. See in general on this problem Van der Merwe *Sakereg* 373; Silberberg & Schoeman *Law of Property* 259; *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C); *Apostoliese Geloofsending van SA (Maitland Gemeente) v Capes*1978 (4) SA 48 (C). See also *Baldric Farms (Pty) Ltd v Wessels* 1994 (3) SA 425 (A) in which the owner claimed for damage caused to his land before he became owner. See also *Roy v Basson* 2007 (5) SA 84 (C) where a claim for damages arose as a result of the appellant losing property that she had stored at a hotel while she travelled elsewhere. The hotel was destroyed by fire. Her action was based upon the praetor's edict de nautis cauponibus et stabularis which still forms part of our law.

[52] See s 1 sv 'instalment agreement' of the National Credit Act 34 of 2005.

[53] Cf *Rondalia Finansieringskorp van SA Bpk v Hanekom* 1972 (2) SA 114 (T); *Van Wyk v Herbst*1954 (2) SA 571 (T); *Kruger v Strydom* 1969 (4) SA 304 (NC); *Alderson & Flitton (Tzaneen) (Pty) Ltd v EG Duffey Spares (Pty) Ltd* 1975 (3) SA 41 (T) at 52. Cf, however, *Spolander v Ward* 1940 CPD 24 which possibly does not support this view.

[54] *Botha v Rondalia* 1978 (1) SA 996 (T). Cf further *Palmer v President Ins Co* 1967 (1) SA 673 (O); *Lehmbeckers Transport (Pty) Ltd v Rennies Finance (Pty) Ltd* 1994 (3) SA 727 (C).

[55] *Smith v Banjo* 2011 (2) SA 518 (KZP) at 522–3.

[56] Reinecke 1976 *TSAR* 43 disapproves of *Sulaiman v Amardien* 1931 CPD 509 at 511, where it was intimated that a purchaser who is not in possession of the res vendita suffers loss when it is damaged, although he or she does not bear the risk. A purchaser who bears the risk can, in general, only take action against a third party who caused damage to the article after cession of rights by the seller to the purchaser (*Van Wyk v Herbst* 1954 (2) SA 571 (T) at 574). Cf further on a mere purchaser *Smit v Saipem* 1974 (4) SA 918 (A) at 931; *Grobbelaar v Van Heerden* 1906 EDC 229 at 232, 234; *Hudson's Transport (Pty) Ltd v Du Toit* 1952 (3) SA 726 (T) at 730.

[57] *Smit v Saipem* 1974 (4) SA 918 (A) at 926: the court held that the plaintiff, as lawful holder of three damaged erven, may claim damages because he, and not the seller, is the one suffering from its depreciation in value. He bears the risk and has to pay the full purchase price whether the thing perishes or not. The res vendita belongs to the owner but it stands to be replaced by the purchase price. Cf further *Raqa v Hofman* 2010 (1) SA 302 (WCC); *Lean v Van der Mescht* 1972 (2) SA 100 (O); *Moodley v Bondcrete (Pty) Ltd* 1969 (2) SA 370 (N); *Vaal Transport Corp (Pty) Ltd v Van Wyk Venter*1974 (2) SA 575 (T). Cf also *Alderson & Flitton (Tzaneen) (Pty) Ltd v EG Duffey Spares (Pty) Ltd* 1975 (3) SA 41 (T) at 52. Where the consumer (hire-purchaser) institutes his or her own action, the extent of damages will be reduced if the consumer was contributorily negligent (para 11.4), but this will, of course, not happen if he or she has received cession of the owner's action, because the latter was, after all, not guilty of contributory negligence (cf *Stolp v Kruger* 1976 (2) SA 447 (T); *Dhlamini v Protea Furnishers (Natal) (Pty) Ltd* 1982 (2) SA 50 (N)). Cf also Boberg *Delict* 667–8. In *Raqa v Hofman* supra the court emphasized that not only possession of the property involved but also the risk-bearing responsibility of the possessor form the bases for granting the Aquilian action to such a possessor. See Neethling & Potgieter *Delict* 307–8.

[58] Cf *Smit v Saipem* 1974 (4) SA 918 (A) at 932. The court held that the defendant will never be liable to pay more than once. Cf Reinecke 1976 *TSAR* 43–50, who suggests two possible approaches: first, the interests of the purchaser and seller can be delimited, enabling the purchaser and seller to claim damages in different circumstances. Secondly, it can be arranged that both of them could be entitled to claim in specific circumstances but that the action of one of them will be excluded by that of the other. The first option seems practical. Consequently, it has to be decided who suffers which damage, ensuring that each one receives only his or her due. Cf in general Pauw 1977 *TSAR* 62; Klopper 1983 *Obiter* 71–107; Boberg *Delict* 638.

[59] *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 647, 657; *Lean v Van der Mescht* 1972 (2) SA 100 (O) at 111; *Vaal Transport Corp v Van Wyk Venter* 1974 (2) SA 575 (T) at 576. However, a mala fide possessor has no action (*Hudson's Transport (Pty) Ltd v Du Toit* 1952 (3) SA 726 (T) at 729).

[60] See, eg, O'Brien 1989 *TSAR* 276–7; Pauw 1977 *TSAR* 56. See *Melville v Hooper* 1985 3 SC 261 (depository of livestock who has accepted responsibility therefor, has a personal claim for damages); *Spolander v Ward* 1940 CPD 24 (borrower for use has an action where he or she has accepted liability for damage). Cf further *Erasmus v Mittel & Reichman* 1913 TPD 617 at 622; *Bower v Divisional Council of Albany* (1893) 7 EDC 211; *Marcus v Stamper & Zoutendyk* 1910 AD 58 at 75, 76; *Geldenhuys v Keller* 1912 CPD 623; *Van Heerden v De Beer* 1916 TPD 469; *Hofmeyr and Son v Luyt* 1921 CPD 831; *Caluza v Nyonwana* 1930 NPD 157. Already in common law, the Aquilian action was granted to a colonus partiarius and also to a borrower (cf *Maraisburg Divisional Council v Wagenaar* 1923 CPD 94; *Refrigerated Transport (Edms) Bpk v Mainline Carriers (Edms) Bpk* 1983 (3) SA 121 (A) at 125 (holder who bears risk to make good the damage has an action for damage to or destruction of the property). Cf also *Tarmacadam Services (SA) (Pty) Ltd v Minister of Defence* 1980 (2) SA 689 (T), where it was held that A, who had hired a vehicle from B and was obliged to bear all loss to the vehicle, could institute an action for damages against C, who negligently damaged the vehicle even though at the end of the term of lease A would be entitled only to the market value thereof. Cf further on a hirer *Maraisburg DC v Wagenaar* 1923 CPD 94 at 96; Sonnekus 1987 *TSAR* 223; O'Brien 1992 *TSAR* 146; *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C) ('real' lessee does not lose his or her action because of a fictitious contract in terms of which his or her employee is the lessee); on a usufructuary *Philps v Cradock Municipality* 1937 EDL 382 at 389; on a conductor operis *Smit and Shapiro v Van Heerden* 1941 TPD 228 at 231; on the actio de pastu of a non-owner *Heron v Skinner* 1971 (1) SA 399 (RA) at 400; Van der Merwe 1973 *THRHR* 111; and the capacity of a non-owner to institute the condictio furtiva *Clifford v Farinha* 1988 (4) SA 315 (W); *Crots v Pretorius* 2010 (6) SA 512 (SCA); Scott 2011 *TSAR* 383–93. Cf in general Lee & Honoré *Obligations* 254; McKerron *Delict* 117. Although the actio pluviae arcendae (para 13.9.4) is usually available only to the owner of land (see *Austen Bros v Standard Diamond Mining Co Ltd* 1882 HCG 363 at 379–80; *Texas Co (Pty) Ltd v Cape Town Municipality*1926 AD 467 at 472), it can probably also be instituted by usufructuaries and holders of servitudes (Van der Merwe *Sakereg* 207). See in general Dendy 1987 *BML* 172.

[61] *Hefer v Van Greuning* 1979 (4) SA 952 (A). Cf Burchell 1979 *Annual Survey* 182. Cf also *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) at 394 (lessee who is not in occupation can probably not claim damages; see on this case O'Brien 1989 *TSAR* 274). See further *Kanniappen v Govender* 1962 (1) SA 101 (N); *Thomas v Guirguis* 1953 (2) SA 36 (W) at 38.

[62] Consequently, the cedent in an 'out and out' cession retains no claim (*Thos Barlow & Sons (Natal) Ltd v Dorman Long (Africa) Ltd* 1976 (3) SA 97 (D) at 103). Cf further *Van Dyk v Cordier* 1965 (3) SA 723 (O). See, however, *Barrie Marias & Seuns v Eli Lilly (SA) (Pty) Ltd* 1995 (1) SA 469 (W) where it was held that the cedent was entitled to initiate a claim for damages as the cessionary's agent.

[63] Cf *Government of the RSA v Ngubane* 1972 (2) SA 601 (A); *Botes v Hartogh* 1946 WLD 157; *Walker v Matterson* 1946 NPD 495; *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA). In *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys* 2001 (4) SA 360 (W) litigant in proposed damages action ceded to attorney 'all my claims for costs ... arising from the action which is presently taking place'. See *Van Rensburg v Condoprops 42 (Pty) Ltd* 2009 (6) SA 539 (EC) at 544: '[W]here a cession of a claim takes place after *litis contestatio*, the cessionary cedes not his or her interest in the claim, but in the result of the litigation, and that, as the subject-matter of the cession is *res litigiosa*, the cession itself does not transfer the right to prosecute the action to the cessionary. That right only accrues when the court substitutes the cessionary as plaintiff, the requirement that the substitution be approved by the court being designed to ensure that the defendant is not prejudiced.' See, however, *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C) where the original agreement prohibited cession.

[64] ie the closing of pleadings. Cf also *Government of the RSA v Ngubane* 1972 (2) SA 601 (A) at 608: 'Hence it seems to me that, in regard to a cession after *litis contestatio*, you are not ceding your interest in the claim but in the result of the litigation.' Cf further *Jankowiak v Parity Ins Co Ltd* 1963 (2) SA 286 (W). It is unnecessary to investigate the nature and tenability of the litis contestatio rule here. Cf in general Van der Merwe & Nathan 1972 *THRHR* 387 and Anon 1911 *SALJ* 290, 291; Scott *Cession*188–9.

[65] Cf inter alia *Pienaar and Marais v Pretoria Printing Works Ltd* 1906 TS 654 at 656; *Paiges v Van Ryn Gold Mine Estates Ltd* 1920 AD 600 at 614; *Government of the RSA v Ngubane* 1972 (2) SA 601 (A) at 607.

[66] Cf *Regering van die RSA v Santam* 1970 (2) SA 41 (NC) at 43 (personality infringement is not in nostris bonis—therefore neither it nor compensation in respect of it can be transmissible); *Government of the RSA v Ngubane* 1972 (2) SA 601 (A) at 608; *Milne v Shield Ins Co Ltd* 1969 (3) SA 352 (A) at 358; *Schoultz v Potgieter* 1972 (3) SA 371 (E) at 372; *Administrator, Natal v Edouard* 1990 (3) SA 581 (A)

at 595, 597; Scott *Cession* 191. Cf further Visser *Kompensasie en Genoegdoening* 300–5; Nathan 1973 *THRHR* 190; Van der Merwe & Nathan 1972 *THRHR* 387.

[67] Para 7.4.3.

[68] Scott *Cession* 192 et seq.

[69] Before litis contestatio a claim for non-patrimonial damage is, in any event, incapable of cession. This means that, if it is based on the same cause of action as a claim for patrimonial loss (eg for bodily injuries), the whole claim becomes non-cedable (cf authority in n 70 below).

[70] Cf *Schoultz v Potgieter* 1972 (3) SA 371 (E); *Government of the RSA v Ngubane* 1972 (2) SA 601 (A). Cf further on this Nathan 1973 *THRHR* 190; Van der Merwe & Nathan 1972 *THRHR* 387 et seq; Boberg *Delict* 530. What will the position be in respect of, for example, the actio de pauperie when a claim for both patrimonial and non-patrimonial loss is included? Cession will probably not be possible.

Cf n 57 above on the effect of the cession of a claim in the event of contributory fault.

[71] ie the transmissibility of a claim for compensation to the estate of the plaintiff. Passive transmissibility is discussed in para 11.2.1.

See also para 11.1.3 on the claim of an executor of a deceased estate; *Lockhat's Estate v North British and Mercantile Ins Co Ltd* 1959 (3) SA 295 (A). Cf also McKerron *Delict* 142–3.

[72] Cf Van der Merwe & Olivier *Onregmatige Daad* 235; Corbett & Buchanan I 73; Van der Walt & Midgley *Delict* 56–7; *Hoffa v SA Mutual Fire and General Ins Co Ltd* 1965 (2) SA 944 (C) at 950; Lee & Honoré *Obligations* 272; *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 295 (A) at 304; *Engelbrecht v Estate Van der Merwe* 1889 NLR 117 at 118; *Conradie v Gray* 1902 NLR 303; *Rondalia Ass Corp of SA Ltd v Britz* 1976 (3) SA 243 (T) at 246; Boberg *Delict* 520–1.

[73] See Scott 1978 *THRHR* 144; Van der Merwe & Olivier *Onregmatige Daad* 239–41; Corbett & Buchanan I 73–4; Visser *Kompensasie en Genoegdoening* 294–300. Cf in general *Hoffa v SA Mutual and Fire General Ins Co Ltd* 1965 (2) SA 944 (C); *Jankowiak v Parity Ins Co (Pty) Ltd* 1963 (2) SA 286 (W); *Executors of Meyer v Gericke* 1880 Foord 14; *Milne v Shield Ins Co Ltd* 1969 (3) SA 352 (A); *Potgieter v Rondalia Ass Corp of SA* 1970 (1) SA 705 (N) at 712; *Government of the RSA v Ngubane* 1972 (2) SA 601 (A). Cf also *Potgieter v Sustein (Edms) Bpk* 1990 (2) SA 15 (T) (re active transmissibility of the action for pain and suffering and the meaning of closing of pleadings in regard to litis contestatio). Cf Van der Merwe & Olivier *Onregmatige Daad* 455 on the claim of a woman for seduction. The claim is probably actively intransmissible if litis contestatio has not taken place. Cf McKerron *Delict* 166 on the difference of opinion if the woman died before litis contestatio; Voet *Commentarius* 48.5.5. The actio de pauperie should probably be seen as actively transmissible irrespective of litis contestatio.

[74] Cf Corbett & Buchanan I 74.

[75] Section 23(8) of the Insolvency Act 24 of 1936. Cf Bertelsmann *Mars Insolvency* 192; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) at 79; *De Wet v Jurgens* 1970 (3) SA 38 (A); *Santam Versekeringsmpy Bpk v Kruger* 1978 (3) SA 656 (A) at 662. Damages for medical expenses and loss of income, therefore, do not fall into the insolvent estate. An order for costs in such an action also belongs to the insolvent personally (*Schoeman v Thompson* 1927 WLD 298).

[76] *Fairley v Raubenheimer* 1935 AD 135 at 143.

[77] Cf *Ex parte Wood* 1930 SWA 117; *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W); Bertelsmann *Mars Insolvency* 193.

[78] Section 23(8) of the Insolvency Act 24 of 1936. The court will refuse permission unless the insolvent has a reasonable chance of success (*Peltu v Hersman* 1935 TPD 216). Where the insolvent recovers damages from the curator for the latter's maladministration of the estate, the amount falls into the insolvent estate but the costs of the action belong to the insolvent personally. The court may in a suitable case order that any costs not recovered from the curator are to be recovered from damages paid to the estate. Cf *Ecker v Dean* 1940 AD 206; Bertelsmann *Mars Insolvency* 193.

[79] Section 15 of the Insolvency Act 24 of 1936. The debtor may also institute an action later (cf *Askwe v Moller* 1 CTR 128; *Cohen v Stegmann* 1 CTR 149; *Christie v Marcuson* 19 CTR 32).

[80] Cf para 10.4.1*(c)*; Van Jaarsveld *Handelsreg* 725–6; *Rand Mutual Assurance Co Ltd v Road Accident Fund* 2008 (6) SA 511 (SCA) (insurer entitled to claim in its own name, as long as wrongdoer is not prejudiced in a procedural sense). Cf also s 297A(4) of the Criminal Procedure Act 51 of 1977. The State, which has compensated someone for the damage caused by an accused, acquires the legal remedies of the prejudiced person. Cf also s 99 of the Deeds Registries Act 47 of 1937; s 8 of the Civil Aviation Act 13 of 2009.

[81] Cf s 36(1)*(b)* of the COID Act 130 of 1993; *Wille v Yorkshire Ins Co Ltd* 1962 (1) SA 183 (D); *Bonheim v South British Ins Co Ltd* 1962 (3) SA 259 (A). The damages are not subject to reduction as a result of

the employee's contributory fault, because the claim of the Director-General or the employee does not arise ex delicto. Cf *SAR & H v SA Stevedores Co Ltd* 1983 (1) SA 1066 (A) at 1088.

[82] These circumstances are outlined in s 25 of the RAF Act 56 of 1996. They involve situations where the owner allowed a person who, to his knowledge, was under the influence of liquor or drugs, or who did not have a valid licence, to drive the vehicle; or where the owner drove the vehicle while under the influence or without a licence; or that the owner failed to comply with s 22(1) on the giving of information pertaining to the accident. The RAF also has a right of recourse against the driver of a vehicle in the circumstances set out above, whether or not he or she drove with the permission of the owner. See Klopper *Third Party Compensation* 317–23; *Dodd v Multilateral Motor Vehicle Accidents Fund*1997 (2) SA 763 (A); *Ribeiro v Santam Ltd* 1996 (3) SA 1035 (W); *Coetzer v Multilateral Motor Vehicle Accidents Fund* [2002] 1 All SA 526 (E); *Crouse v Multilateral Motor Vehicle Accident Fund* [1997] 4 All SA 251 (E). See further s 73 of the Nuclear Energy Act 131 of 1993.

[83] See s 2(6)*(a)*. If joint wrongdoer A has to pay the full damages, he can claim recourse from joint wrongdoer B, who was not sued by the plaintiff. The court has to determine a fair amount in proportion to B's 'responsibility' for the damage, taking into account his degree of negligence. Cf Van der Merwe & Olivier *Onregmatige Daad* 302 on this unclear criterion and para 16.4 on the legal costs of the action. See further s 2(7)*(a)*: A may claim recourse from B in so far as he has paid more than is justified by the degree of his fault. Recourse is, however, limited to what B should have paid in proportion with his degree of fault, or the amount which A has paid more than justified by his degree of fault, whichever amount is the lesser. See Van der Merwe & Olivier *Onregmatige Daad* 303–4 on the problems with this provision. See in general *Van Wyk v Netherlands Ass Co of SA Ltd* 1971 (2) SA 264 (W) at 273; *Laubscher v Commercial Union Ass Co of SA* 1976 (1) SA 908 (E). A joint wrongdoer from whom a contribution is claimed can raise any defence which the wrongdoer could have against the plaintiff. There are different decisions on the defence of prescription and consent to postponement of prescription. See *Thwala v Santam* 1977 (2) SA 100 (D); *Reis v AA Mutual Ins Ass Ltd* 1981 (1) SA 98 (T). In the latter case it was held that, where a joint wrongdoer who claims recourse has waived prescription as against the plaintiff, the wrongdoer from whom a contribution is claimed may not avail him- or herself of the defence of prescription. This principle was confirmed in *Naidoo v Santam* 1986 (1) SA 296 (N). See also Dendy 1986 *Annual Survey* 205. The court, however, distinguished between cases where the defence of prescription was renounced before and after the completion of the period of prescription. See, however, also *Standard General Ins Co Ltd v Verdun* 1988 (4) SA 779 (C): where a claim is paid after it has become prescribed, there is no right of recourse against a joint wrongdoer. This right of recourse also applies where an employer is vicariously liable for the damage caused by an employee (cf Van der Merwe & Olivier *Onregmatige Daad* 519; *Botes v Van Deventer* 1966 (3) SA 182 (A)). A right of recourse can exist where intentional joint wrongdoers are involved. If one accepts that intentional conduct constitutes a 100 per cent deviation from the norm of the reasonable person (Neethling & Potgieter *Delict* 265 n 6), the Act can apply. See *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W) on 620 and *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 (2) SA 591 (W) at 609 which state that a right of recourse does exist between intentional joint wrongdoers. Cf *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998 (2) SA 667 (W) at 672–3 (Act also applicable where one joint wrongdoer acts intentionally and the other negligently). However, what will the position be if X acts intentionally and Y is liable without fault? See also rule 13 of the Uniform Rules of Court on the procedure to join a wrongdoer and *Rabie v Kimberley Munisipaliteit* 1991 (4) SA 243 (NC); n 102 below. See further s 8 of the Civil Aviation Act 13 of 2009.

[84] Cf, eg, s 15(9)*(b)* of the Matrimonial Property Act 88 of 1984: in certain cases where the joint estate suffered a loss as a result of a transaction entered into without the necessary consent, an adjustment must take place when the estate is divided. This remedy takes the place of a claim for damages between spouses. If the joint estate suffered loss through a delict of one of the spouses, a claim for adjustment may be instituted by the innocent spouse at the dissolution of the marriage. Cf eg, Van der Merwe & Olivier *Onregmatige Daad* 364; Heaton *Family Law* 80 et seq. Cf also s 19 of the Matrimonial Property Act 88 of 1984; para 11.1.2.

[85] Cf in general *Gerber v Wolson* 1955 (1) SA 158 (A); Joubert *Contract* 315.

[86] Neethling & Potgieter *Delict* 355 (eg the actio de pauperie, vicarious liability).

[87] Cf also Neethling & Potgieter *Delict* 357 et seq on damage caused by animals (actio de pauperie; actio de pastu; actio de feris); vicarious liability (employer-employee; principal-agent; motor car owner-motor car driver); Lee & Honoré *Obligations* 229 on liability for delicts of children. Cf on the vicarious liability of partners *Lindsay v Stofberg* 1988 (2) SA 462 (C) at 467; and on liability regarding the mandator-mandatory relationship, *Minister of Community Development v Koch* 1991 (3) SA 751 (A).

It is unnecessary to refer to all possible defendants in a claim for compensation. It is sufficient to mention the following: a seller (or possibly, the purchaser) can be liable in terms of the aedilitian actions

(para 12.15.4); cf also the liability of a carrier (Lee & Honoré *Obligations* 147–51); nautae, caupones and stabularii (Lee & Honoré op cit 384–5; *Essa v Divaris* 1947 (1) SA 753 (A); *Stocks and Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A)); depositor and 'bewaarnemer' (Lee & Honoré op cit 130–2; Bester 8(1) *LAWSA* paras 126–9, 182, 185); a co-owner (Van der Merwe *Sakereg* 384); a pledgee (Van der Merwe *Sakereg* 665); the borrower of a thing (Lee & Honoré op cit 125–9; Joubert 15(2) *LAWSA* paras 290–1; partners (Lee & Honoré op cit 102 et seq; *Mdletshe v Litye* 1994 (3) SA 874 (E)); an insurer; (Reinecke et al 12 *LAWSA* (reissue) para 266 et seq); the State (s 1 of the State Liability Act 20 of 1957); the directors of a company (*McLelland v Hulett* 1992 (1) SA 456 (D)).

[88] See n 64 above.

[89] Cf Neethling et al *Law of Personality* 78–9. As far as the actio iniuriarum is concerned, the reason seems to be that an action for satisfaction usally involves a personal dispute (with a penal element). The action for pain and suffering does not involve satisfaction in the sense of the actio iniuriarum and consequently this action should be freely transmissible (cf Visser 1988 *THRHR* 489–91). This is actually the postion in practice since the action is mostly instituted against the RAF. Cf Corbett & Buchanan I 57; Lee & Honoré *Obligations* 273; Van der Merwe & Olivier *Onregmatige Daad* 461; cf also the cases referred to in para 11.1.6. As regards seduction, it also appears that the action for satisfaction is not passively transmissible before litis contestatio (cf McKerron *Delict* 166). See in general Lee & Honoré *Obligations* 242 on an executor and, eg, *Dykstra v Emmenis* 1952 (1) SA 661 (T) at 663; *SA Ass Newspapers Ltd v Estate Pelser* 1975 (4) SA 797 (A) at 803; *Richter v Estate Hammann* 1976 (3) SA 226 (C). The actio de pauperie is probably passively freely transmissible to the estate of the owner of the animal.

[90] Cf, eg, s 35 of the COID Act 130 of 1993, which abolishes an employee's claim for damages against his or her employer and provides the employee with an action against the Director-General (see, eg, *Bhoer v Union Government* 1956 (3) SA 582 (C); *Pettersen v Irvin & Johnson Ltd* 1963 (3) SA 255 (C); *Vogel v SAR* 1968 (4) SA 452 (E); *Twalo v The Minister of Safety and Security* [2009] 2 All SA 491 (E)); the provisions on diplomatic immunity (ss 3 and 4 of the Diplomatic Immunities and Privileges Act 37 of 2001); and indemnity legislation which may also place restrictions on the liability of persons (Promotion of National Unity and Reconciliation Act 34 of 1995 and Indemnity Act 13 of 1977). There are many other examples. See s 88 of the Banks Act 94 of 1990; s 23 of the Financial Services Board Act 97 of 1990; s 32 of the Air Services Licensing Act 115 of 1990; s 19 of the Agricultural Product Standards Act 119 of 1990. See on the police Bouwer et al 20(2) *LAWSA* para 184 et seq; ss 55 and 56 of the South African Police Service Act 68 of 1995. See further s 46 of the Auditing Profession Act 26 of 2005; s 59 of the Marine Living Resources Act 18 of 1998; s 30(6) of the National Nuclear Regulator Act 47 of 1999; s 17 of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988; s 34 of the Agricultural Produce Agents Act 12 of 1992. Cf further general Lee & Honoré *Obligations* 209 et seq. See also para 11.10 on the contractual limitations to liability.

[91] Cf also s 21 of the RAF Act 56 of 1996. Only if the RAF is unable to pay damages can the claim be instituted against the driver, the driver's employee or the owner of the vehicle, as the case may be. In terms of s 19*(g)* of the RAF Act 56 of 1996 the RAF can no longer be held liable for 'secondary' emotional shock, but the wrongdoer can be held personally liable for this loss in terms of s 21 of the Act. (Section 19*(g)* states that 'secondary emotional shock' is shock sustained by a person who 'witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle'.) See also paras 5.6.1*(b)*; 11.8; 15.2.4.2. See *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) where it was held that common-law liability existed in instances where the vehicle concerned carried foreign insurance.

[92] Cf, eg, Klopper *Third Party Compensation* 19 et seq; *Rabie v Kimberley Munisipaliteit* 1991 (4) SA 243 (NC).

[93] Para 11.2.2.2.

[94] Section 20 of the Matrimonial Property Act 88 of 1984. See on the question whether the joint estate can in fact be liable for the delicts of a spouse, Van der Merwe & Olivier *Onregmatige Daad* 354; Lee & Honoré *Obligations* 224; *Pretoria Municipality v Esterhuizen* 1928 TPD 678 at 682; *Lock v Keers*1945 TPD 113. According to one viewpoint, it is the culpable spouse who is liable to the extent of his or her half-share of the joint estate (*Hayes v McNally* 1910 TPD 326 at 330; *Levy v Fleming* 1931 TPD 62 at 66). However in terms of another view the whole estate is liable (*Erikson Motors (Welkom) Ltd v Scholtz*1960 (4) SA 791 (O); *Opperman v Opperman* 1962 (3) SA 40 (N); McKerron *Delict* 84. The latter approach appears to be correct. Of course, the innocent spouse has the right of recourse against the guilty spouse (para 11.1.8). In marriages out of community of property, spouses are not liable in damages for the delict or breach of contract by the other spouse save in exceptional cases (for instance, where the wife functions as the husband's employee—*Castle and Castle v Pritchard* 1975 (2) SA 392 (R) at 395; *Grove v Ellis* 1977 (3) SA 388 (C) at 390). Where a marriage is dissolved before damages on account of a delict committed by one of the spouses have been paid, only the spouse who committed the delict will be liable.

[95] Section 23(10) of the Insolvency Act 24 of 1936. Claims for delict and breach of contract committed before sequestration must, of course, be instituted against the estate.

[96] See, eg, Neethling & Potgieter *Delict* 265 et seq; Van der Walt & Midgley *Delict* 245 et seq; Loubser & Midgley (eds) *Delict* 426–30; Van der Merwe & Olivier *Onregmatige Daad* 293 et seq.

[97] Cf s 2(1) of the Apportionment of Damages Act 34 of 1956. See *Maphosa v Wilke* 1990 (3) SA 789 (T) at 797–9 where the defendant, a negligent driver, succeeded in joining the owner of a bus driven negligently by his employee and the insurer of the bus (in terms of the Compulsory Motor Vehicle Insurance Act 56 of 1972) as joint wrongdoers. Although they were not delictual wrongdoers they were (jointly) liable *in delict* to the plaintiff for the damage that the bus driver caused: the employer on the ground of vicarious liability for the delict of his employee, and the insurer in terms of s 21(1) of the 1972 Act. On the other hand, in *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA) at 595–6, the defendant failed to have the Road Accident Fund joined as joint wrongdoer where the accident leading to the plaintiff's injuries were caused by the defendant and the unidentified driver of another vehicle (see Neethling & Potgieter *Delict* 265–6; Midgley 2006 *Annual Survey* 342; cf further *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute* 2000 (1) SA 141 (D) at 145; *Harrington v Transnet (Ltd)* 2007 (2) SA 228 (C)). Where more than one person is liable in terms of the Consumer Protection Act 68 of 2008, their liability is joint and several (s 61(3))—they are thus regarded as joint wrongdoers (see also Neethling & Potgieter 2008 *Annual Survey* 809).

[98] 'Same damage' refers to all the damage suffered by the plaintiff. If the plaintiff's damage is caused in part by one wrongdoer, in part by another wrongdoer and in part by both wrongdoers jointly, they are not joint wrongdoers in terms of s 2 of the Apportionment of Damages Act 34 of 1956 (*Minister of Safety and Security v Rudman* 2005 (2) SA 16 (SCA) at 45; however, see *Wright v Medi-Clinic Ltd*2007 (4) SA 327 (C)). Where more than one person therefore causes separate damaging consequences with regard to a plaintiff, each is, according to the ordinary principles of delict, only liable for the specific damage he or she has caused (Van der Merwe & Olivier *Onregmatige Daad* 293–4) and there is no question of joint wrongdoers (cf *Minister of Communications and Public Works v Renown Food Products*1988 (4) SA 151 (C)). See further *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank*1998 (2) SA 667 (W) at 672 (two wrongdoers were concurrent wrongdoers at common law and therefore joint wrongdoers within the meaning of s 2(1) of the Act). Where it is not possible to determine what the two wrongdoers' separate contributions to the plaintiff's damage are, and action is instituted against only one of them, the court can on considerations of fairness hold that he or she is liable for half of the damage. This wrongdoer has a common-law right of recourse against the other wrongdoer for half of the amount he or she has paid (*Rudman* at 44; see further Neethling 2006 *Obiter*369). In *Wright* supra, the court inquired whether the damage was divisible to determine whether two wrongdoers contributed separately to the damage. The criteria for determining whether the damage was divisible or not were logic on the one hand, and pragmatism on the other (at 359 et seq, 372). The court found that part of the damage was indeed divisible and could therefore be regarded as separate damage. In respect of the other part, that was not divisible, the parties were jointly and severally liable as joint wrongdoers, each for half thereof (at 378–9). (See Kelly 2001 *JBL* 58; 2001 *SA Merc LJ* 521–7.) See also *Harrington v Transnet (Ltd)* 2007 (2) SA 228 (C) which concerned the question as to how damages should be apportioned between a contributorily negligent plaintiff and joint wrongdoers (cf Neethling & Potgieter 2007 *Annual Survey* 785–8 for a discussion). See in general Neethling & Potgieter *Delict* 265 et seq.

[99] See *Maphosa v Wilke* 1990 (3) SA 789 (T) (two parties can be liable in delict without both of them having committed a delict (eg on the basis of vicarious liability)). See further *Mazibuko v Santam*1982 (3) SA 125 (A); *Mzamo v De Lange* 1990 (1) PH F28 (E); Van der Walt 1995 *THRHR* 421 et seq.

[100] Section 2(1) of Act 34 of 1956.

[101] Cf s 6*(a)*; *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998 (2) SA 667 (W) at 673–4; cf Boruchowitz J's (idem at 674–5) valid criticism of *Holscher v ABSA Bank* 1994 (2) SA 667 (T) in this respect (see also *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 916 (SCA) at 921–3; Neethling 1998 *THRHR* 521–2; Dendy 1998 *THRHR* 512 et seq).

[102] Section 2(1) of Act 34 of 1956. See s 2(3) on the separation of trials. A joint wrongdoer who was not sued in the first action and who also did not receive notice in terms of s 2(2) cannot be held accountable later by the plaintiff, except with the consent of the court. Contra *ABSA Brokers (Pty) Ltd v RMB Financial Services* 2009 (6) SA 549 (SCA). Cf also *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) at 422 et seq; Van der Merwe & Olivier *Onregmatige Daad* 301.

The RAF (or its predecessors) has on a few occasions in terms of s 2 of Act 34 of 1956 joined the negligent driver of a motor vehicle that caused an accident to the proceedings, or alternatively, claimed a contribution from the driver in terms of the same s 2 of the Act in conjunction with s 25 of the RAF Act 56 of 1996 (s 64 of the MMF Act 93 of 1989). See *Du Plessis v President Versekeringsmpy Bpk* 1991 (2) SA 447 (T); *Dodd v Multilateral Motor Vehicle Accidents Fund* 1997 (2) SA 763 (A); *Crouse v Multilateral Motor*

Vehicle Accident Fund [1997] 4 All SA 251 (E). In *Coetzer v Multilateral Motor Vehicle Accidents Fund* [2002] 1 All SA 526 (E) the Fund joined the heir of the deceased where the deceased was a joint wrongdoer.

[103] *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W) (joint wrongdoers acting intentionally); *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank*1998 (2) SA 667 (W); 2000 (4) SA 915 (SCA) and *ABSA Bank v Bond Equipment (Pretoria) (Pty) Ltd*[2001] 1 All SA 1 (A) (one joint wrongdoer acted intentionally and the other negligently). See also Neethling & Potgieter *Delict* 266 n 6; Kelly 2001 *JBL* 58–62; Nagel 2001 *De Jure* 214–17; Potgieter 1998 *THRHR* 731–41; Dendy 1998 *THRHR* 512–18; Neethling 1998 *THRHR* 518–22; Neethling & Potgieter 1992 *THRHR* 658–62; 1999 *TSAR* 772–7.

[104] Section 2(8) of Act 34 of 1956. For example: A's damage amounts to R20 000. B, C, D and E are joint wrongdoers before the court. Their degrees of fault are 20 per cent, 30 per cent, 40 per cent and 10 per cent respectively. The court will award damages against them as follows: B (R4 000); C (R6 000); D (R8 000) and E (R2 000). See Neethling & Potgieter *Delict* 266; *Maphosa v Wilke* 1990 (3) SA 789 (T); *General Accident Versekeringsmpy SA Bpk v Uijs* 1993 (4) SA 228 (A).

[105] Section 2(5) and (8) of Act 34 of 1956. See also para 11.1.8 on rights of recourse between joint wrongdoers.

[106] See for a comprehensive and systematic discussion Van der Merwe & Olivier *Onregmatige Daad*351–65 and also the summary op cit 369–70. See also Neethling & Potgieter *Delict* 267 et seq.

[107] See s 2(1A) of Act 34 of 1956: a person shall be regarded as a joint wrongdoer if he or she would have been a joint wrongdoer but for the fact that the person is married in community of property to the plaintiff. Before this provision, a spouse married in community of property could not be regarded as a joint wrongdoer as against the prejudiced spouse. The reason for this was that a spouse married in community of propery could not institute a delictual claim against the other spouse—cf, eg, *Tomlin v London and Lancashire Ins Co Ltd* 1962 (2) SA 30 (D) at 32–3—since the existence of a joint estate would make such a claim senseless. Where a wife Y was, for example, injured by the negligent conduct of her husband X and a third person Z, compensation for the full amount could be recovered from Z, while Z had no right of recourse (para 11.1.8) against X. The fact of X's negligence could, of course, also not reduce Y's claim (see para 11.4 on contributory negligence). If, however, X claimed, his claim would be subject to reduction. Cf, however, *Van Zyl v Gracie* 1964 (2) SA 434 (T), where a motor car (a joint asset of a husband and wife) was damaged as a result of the negligence of the wife and a third party. The husband's claim for damages was reduced in accordance with his wife's negligence—identification of fault was erroneously allowed. Cf in general *Labuschagne v Cloete* 1987 (3) SA 638 (T) at 645 (where *Van Zyl v Gracie* supra was rejected); *Kleinhans v African Guarantee & Indemnity* 1959 (2) SA 619 (E); *Pretoria Municipality v Esterhuizen* 1929 TPD 678; *Grove v Ellis* 1977 (3) SA 388 (C) at 389–90. See also Neethling 1988 *THRHR* 106; Neethling & Potgieter *Delict* 267–9.

[108] Because of the joint estate the innocent spouse can generally still not claim from the guilty spouse (for patrimonial loss). Cf *Delport v Mutual & Federal Ins Co Ltd* 1984 (3) SA 191 (D) at 194–5, but see further down in this para (and n 113 below) for the position on non-patrimonial and patrimonial loss for bodily injuries. See further Sonnekus 1986 *De Jure* 150.

[109] Para 11.1.8.

[110] Para 2.3.4.

[111] Section 18*(a)* of Act 88 of 1984. See *Van den Berg v Van den Berg* 2003 (6) SA 229 (T) for an interpretation of this article (see also Mailula 2005 *THRHR* 308 et seq for a critical discussion).

[112] See Van der Merwe & Olivier *Onregmatige Daad* 363–4 for examples which also cover this situation. Cf further SA *Onderlinge Brand en Algemene Versekeringsmpy v Van den Berg* 1976 (1) SA 602 (A).

[113] As amended by *Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) (see Sonnekus 2006 *TSAR* 848 et seq); *Van der Merwe v Road Accident Fund* 2007 (1) SA 176 (C); Neethling & Potgieter *Delict* 268–9. Moseneke DCJ held in the CC that s 18*(b)* of the Matrimonial Property Act 88 of 1984 was unconstitutional, insofar as it did not allow a spouse, married in community of property, to institute an *action for patrimonial loss in respect of bodily injuries* against his or her spouse, and thus discriminated unfairly against spouses married in community of property. The court held that s 18*(b)* had to be amended to provide, firstly, that spouses married in community of property are entitled to institute such actions, and, secondly, that such compensation for patrimonial loss does not fall into the joint estate (to avoid the senseless result that the amount which the plaintiff takes from the joint estate with one hand, must be returned to the joint estate with the other hand). See Neethling & Potgieter *Delict* 269.

[114] Section 18*(b)*: ie for pain, suffering etc; para 5.6.1. See also Heaton *Family Law* 72.

[115] Section 19 of Act 88 of 1984.

[116] Or from whom a contribution is recoverable in terms of the Apportionment of Damages Act 34 of 1956.

[117] If the joint estate is actually utilized for this purpose, an adjustment in favour of the innocent spouse (or his or her estate) must take place upon dissolution of the estate (s 19).

[118] Cf *Rohloff v Ocean Accident & Guarantee Corp Ltd* 1960 (2) SA 291 (A) at 304; Van der Merwe & Olivier *Onregmatige Daad* 359–60. The courts previously held the opinion that the actio iniuriarum is not available mainly because such an action between spouses stante matrimonio is considered to be undesirable from a legal policy point of view (*Mann v Mann* 1918 CPD 89; *C v C* 1958 (3) SA 547 (SR)). Now, however, see *Van der Walt v Van der Walt* 2009-03-26 case no 08/42736 (SG).

[119] Cf para 11.1.3 on when such a claim is recognized; para 14.7 on quantification; generally Neethling & Potgieter *Delict* 269 et seq.

[120] See para 11.1.3; Neethling & Potgieter *Delict* 279 et seq on who qualifies as a dependant.

[121] Cf Van der Merwe & Olivier *Onregmatige Daad* 332–9 for the previous position.

[122] Section 2(1B) of Act 34 of 1956. It has been argued (see Neethling 2009 *THRHR* 303) that where a breadwinner has committed suicide because of the negligent failure of the police to prevent the suicide, the deceased breadwinner and the police should be regarded as joint wrongdoers as against the dependant because both are in principle liable in delict for the dependant's loss of support (cf *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA)).

[123] Only damages for patrimonial loss are involved because our law does not permit a person to claim for non-patrimonial loss as a result of the death or injury of another. Cf para 11.1.3.

[124] See para 11.1.8 on a right of recourse. See also *Coetzer v Multilateral Motor Vehicle Accident Fund* [2002] 1 All SA 526 (E).

[125] Cf Neethling & Potgieter *Delict* 270 on the court's discretion.

[126] See para 10.8 on compensating benefits. Davel *Afhanklikes* 84 correctly points out that the benefits from the inheritance can be subtracted in full only if the dependant in the normal course of events would never have inherited from the deceased. Other instances are only concerned with the *accelerated* receipt of the inheritance which constitutes the benefit.

[127] Section 2(6)*(a)* of Act 58 of 1971. Cf the example by Neethling & Potgieter *Delict* 270: A dies as a result of a motor car collision between himself and B. A was 80 per cent and B 20 per cent negligent. The loss of maintenance suffered by C, A's wife, is R10 000 and she inherits R5 000 from A's estate. Suppose that the court adjusts C's actionable loss of maintenance to R5 000 (estimated value minus benefit—see, however, n 126 above) and B pays the R5 000 to C. B then has a right of recourse of R4 000 (80% of R5 000) against A's estate provided that the R5 000 inheritance that C should receive is not affected. From this it follows that, if A's estate contains no assets apart from the inheritance, B will have to pay the full amount of R5 000. Cf Van der Merwe & Olivier *Onregmatige Daad* 341–2.

[128] This usually involves medical expenses. Cf also para 11.1.3.

[129] A father may also be liable as joint wrongdoer as against his or her child (see Neethling & Potgieter 1992 *THRHR* 480).

[130] The father's claim will also not be reduced in accordance with the child's contributory negligence (para 11.4). Cf, eg, *Niewenhuizen v Union & National Ins Co Ltd* 1962 (1) SA 760 (W); *Saitowitz v Provincial Ins Co Ltd* 1962 (3) SA 443 (W); *Du Preez v AA Mutual Ins Ass Ltd* 1981 (3) SA 795 (E). Where the father's claim is combined with the claim on behalf of his child for non-patrimonial loss, the child's claim is reduced in proportion to his or her own negligence but not the claim of the father. Cf *South British Ins Co Ltd v Smit* 1962 (3) SA 826 (A) at 838; *Jones v Santam* 1965 (2) SA 542 (A) at 556; *Neuhaus v Bastion Ins Co Ltd* 1967 (4) SA 275 (W) at 278. Where the father who claims has been negligent in relation to the child's injuries, his own claim will indeed be reduced (*Kleinhans v African Guarantee & Indemnity* 1959 (2) SA 619 (E) at 629).

As regards a claim by a spouse married *in* community of property, a distinction is made between an action by the guilty party and one instituted by the innocent party. In the former case the claim is reduced according to the contributory negligence of such a spouse (para 11.4). A claim by the innocent spouse is not reduced but the result is the same, since the third party has a right of recourse (para 11.1.8) against the joint estate. Consider the following example regarding the marriage *out ofcommunity* of property (see Van der Merwe & Olivier *Onregmatige Daad* 343): the husband and third party are equally at fault as regards the husband's injuries. The husband's loss of income is R20 000 and accordingly he recovers R10 000 of this amount. Suppose the wife and children lose R5 000 support as a result of his injuries (para 14.7). If their claim should succeed, the third party has a right of recourse against the husband and this again prejudices the wife and children. Cf Van der Merwe & Olivier *Onregmatige Daad* 343 on this vicious circle. If a master suffers loss as a result of injury to his domestic servant because of the negligent conduct

of the servant and a third party, they are joint wrongdoers against the master in accordance with the general principles stated above.

[131] 1938 TPD 34 at 38; confirmed in *Brooks v Minister of Safety and Security* 2009 (2) SA 94 (SCA) at 99–100; see further *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA) at 359; Neethling & Potgieter 2009 *Obiter* 407–10.

[132] See Neethling & Potgieter *Delict* 271.

[133] eg in partnerships, co-signatories of a bill of exchange and certain cases of surety. Cf, eg, Joubert *Contract* 313.

[134] Van der Merwe et al *Contract* 245; cf Van Aswegen *Sameloop* 338 et seq.

[135] Van Aswegen *Sameloop* 339; *Henwood & Co v Westlake & Coles* 1887 SC 341 at 347; *Prinsloo v Roets* 1962 (3) SA 91 (O) at 95; *Kock and Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A). Cf further De Wet & Van Wyk *Kontraktereg en Handelsreg* 129–31, 139–42.

[136] Van der Merwe et al *Contract* 247.

[137] Van der Merwe et al *Contract* 247–50.

[138] *Van Immerzeel & Pohl v Samancor Ltd* 2001 (2) SA 90 (SCA) at 99–101. In construction contracts where one party has to supervise the work done by another party both parties stand in a contractual relationship with the employer. The question was left open whether the party who compensates the plaintiff has a claim for indemnity against the other party.

[139] Para 11.4.

[140] *27/36 Siphosethu Road (MTE) (Pty) Ltd v Vanderverre Apsey Robinson & Associates Inc*(unreported D&C case no 2779/98). See Havenga 2001 *THRHR* 126–7 for a discussion of this case. See also *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 581 (SCA) at 591, 604; para 11.4.8. The solution may lie in causation (para 4.6.3.2; Kerr *Contract* 779–81; Van der Merwe et al *Contract* 420; Lubbe & Loubser 1999 *Stell LR* 154–5).

[141] See in general Neethling & Potgieter *Delict* 233; Loubser & Midgley (eds) *Delict* 402; Van der Merwe & Olivier *Onregmatige Daad* 187–8; Norman *Sale* 247 et seq; Christie & Bradfield *Contract* 578–9; Lubbe & Murray *Contract* 628–30; Kerr *Contract* 758–68; Joubert *Contract* 254–5; Erasmus & Gauntlett 7 *LAWSA* paras 37–40; Wessels *Contract* II 872–5; McGregor *Damages* 216–96; Bloembergen *Schadevergoeding* 390–420.

[142] See *Butler v Durban Corporation* 1936 NPD 139; *Van Almelo v Shield Insurance Co Ltd* 1980 (2) SA 411 (C); *Da Silva v Coutinho* 1971 (3) SA 123 (A); *Shrog v Valentine* 1949 (3) SA 1228 (T); *Modimogale v Zweni* 1990 (4) SA 122 (B).

[143] For example, X neglects his duty to mitigate if he unreasonably refuses to take painkillers or to otherwise undergo other medical treatment for the diminution of his non-patrimonial loss resulting from bodily injuries. In *Allie v The Road Accident Fund* [2003] 1 All SA 144 (C) the plaintiff suffered emotional shock and trauma which required psychotherapy and medication. He failed to have psychotherapeutic treatment at an earlier stage and the court held that he had a duty to mitigate his general damage. Cf further Corbett & Buchanan I 10. See on future loss, *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A).

[144] Para 11.4.

[145] See, however, *Da Silva v Coutinho* 1971 (3) SA 123 (A). Kerr 1972 *SALJ* 465; *Contract* 759; Lubbe & Van der Merwe 1999 *Stell LR* 144–5 see the basis for the principle in causation. Cf also De Wet & Van Wyk *Kontraktereg en Handelsreg* 229. See *Jayber v Miller (Pty) Ltd* 1980 (4) SA 280 (W) at 282–3; Mulligan 1956 *SALJ* 423. Cf also Van der Merwe & Olivier *Onregmatige Daad* 187; *Hazis v Tvl and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388: 'This rule about mitigating damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence—neglect to do what a reasonable man would do if placed in the position of the person claiming damages.' See also *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5.

[146] Cf also *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 663. Cf Lubbe & Murray *Contract*630, who speak of 'a duty ... which, on the basis of good faith, is owed to the contract-breaker'; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687. See, however, Joubert *Contract* 254, who refers to a moral duty and a 'rule of equity limiting the loss recoverable'. Kerr *Contract* 667 also prefers to speak of a rule of mitigation and not of a duty. Cf further Ogus *Damages* 85, who seeks the explanation in reasonableness and in the economic use of resources in the community. Cf further *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd*1915 AD 1 at 27; *Shrog v Valentine* 1949 (3) SA 1228 (T); *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372; *Russel and Loveday v Collins Submarine Pipelines (Pty) Ltd* 1975 (1) SA 110 (A); *De Pinto v Rensea Investments (Pty) Ltd* 1977 (4) SA 529 (A).

[147] *Russel and Loveday v Collins Submarine Pipelines (Pty) Ltd* 1975 (1) SA 110 (A).

[148] In *De Harde v Protea Ass Co Ltd* 1974 (2) SA 109 (E) a wife gave up her more profitable position in order to assist her husband to reduce his loss (see also para 11.1.3). A successful exception was raised against her claim as she had failed to aver that she had a legal duty to assist him in this matter.

[149] Sharrock 1985 *SALJ* 620 submits that the mitigation rule also applies in relation to negative interest in a claim for breach of contract.

[150] See *Da Silva v Coutinho* 1971 (3) SA 123 (A) at 145 (failure of a person injured in a motor car accident who could not locate third-party insurer to claim from the fund concerned was not unreasonable). See also *Zweni v Modimogale* 1993 (2) SA 192 (BA). Cf the following examples of the duty to mitigate in the field of contract: a lessor must take reasonable steps to find a new lessee after the original lessee has left the leased premises (*Freedman v Raywid* 1930 CPD 161; *Jayber (Pty) Ltd v Miller* 1980 (4) SA 280 (W)); a dismissed employee must take reasonable steps to find new employment (*Isaacson v Walsh and Walsh* 1903 SC 569; *Crawford v Tommy* 1906 TS 843; *Kinemans Ltd v Berman*1932 AD 246; *Cunningham v Brown* 1936 SR 175; *A1 Taxi Service v Kumwembe* 1942 SR 8); a purchaser must take reasonable steps to buy elsewhere an article which he or she needs (*Nourse v Moore* 1910 EDL 317; *Richter v Van Aardt* 1917 OPD 85; *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C)); the seller of an object of declining value must sell such object if the purchaser refuses to accept delivery (*Kaplan & Co v Basel Bros* 1931 CPD 457); the purchaser of a motor car must not drive an unlicensed vehicle if the seller is unable to obtain a licence (*Silbereisen v Lamont* 1927 TPD 382); a builder must find other employment (*Dykes v Gavanne Investments* 1962 (1) SA 16 (T)); a plaintiff who builds with defective bricks supplied by the defendant acts reasonably if he or she causes the walls to be demolished and rebuilt (*Holmdene Brickworks v Roberts Construction* 1977 (3) SA 670 (A)); *Butler v Durban Corporation* 1936 NPD 139 (failure to undergo operation not proved to be unreasonable); *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 455 (rebudding of orange trees); *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 25–7 (complicated mitigation plan unreasonable); *Rens v Coltman* 1996 (1) SA 452 (A) at 461 (the remedial work necessitated by defective workmanship should be done as soon as it is reasonable to do so). See on resale of goods as a way of mitigating loss where a sale is breached Kerr 1996 *SALJ* 575–6. The sale of the leased property can also be a way of mitigating loss of rental in certain circumstances (*Nedfin Bank Ltd v Muller* 1981 (4) SA 229 (D) at 235–8; *Solomon v Spur Cool Co (Pty) Ltd* 2002 (5) SA 214 (C) at 225–8.

See *Sandown Park v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) (para 10.11) on which there is difference of opinion. See especially Kerr *Contract* 763–7. S leased premises to H for 5 years as from 1 July 1977. The rent was approximately R2 200 per month. In January 1981 S cancelled the contract but H remained in unlawful occupation until February 1982. After repair work, the premises were leased to X at approximately R11 000 pm. During the period of unlawful occupation H made payments of approximately R11 000. Against S's claim for damages in respect of 'holding over' (para 12.17) H contended that, if he had vacated the premises in January 1981, S would have entered into a less favourable contract with an American company. The receipt of the high rent by S meant that he suffered no damage. The court held that the favourable contract was irrelevant (at 256): 'There are, in my view, no considerations of fairness, equity or public policy in giving [H] the benefit of what I may term [S's] windfall. It was certainly never its intention to save the plaintiff from a bad bargain.' Kerr & Harker 1986 *SALJ* 175–84 do not concur. They concede that mitigation in the form of a hypothetical contract of lease with the American company was not relevant because H was in occupation of the premises which made further lease impossible. However, they regard the later contract with X as relevant to S's duty to mitigate. The advantages of such contract extinguished S's loss (op cit 183). This viewpoint is criticized by Lotz 1986 *SALJ* 704, who argues that S did not claim damages on the basis of agreed rent (therefore to be placed in the position in which he would have been had H fulfilled the contract), but merely damages for unlawful occupation. Mitigation was impossible as long as H was in occupation. (Cf also para 10.11 on compensating benefits.) Kerr & Harker 1987 *SALJ* 324–9 reply that Lotz wrongly supposes that a plaintiff can exclude the mitigation rule 'by choosing to claim for a period before the accruing to the aggrieved party from the breach can take effect' (op cit 326). They use a contract of service as an example: where X is dismissed unlawfully, it is expected of him to look for new employment. Although it might take time, the benefits of such a contract are taken into account against his claim for damages. Kerr *Contract* 673–5 furthermore gives four valid examples where the benefits of mitigation should be taken into account with regard to loss flowing from breaches of contracts of lease. We submit that in the light of the facts of the case and the relevant principles of equity, the court reached the correct conclusion. There is no mechanical rule which determines that the benefit of a later contract must necessarily subsidize the person who commits breach of contract. Cf also Reinecke *Diktaat,* who basically follows the argument of Lotz op cit. In the case of unlawful dismissal Reinecke op cit moots whether perhaps the duty to mitigate is relevant only in the event of loss of earning capacity and not where the advantages of a specific contract of service are at stake. S furthermore only claimed for his loss of rental value based on two of the three possible causes of action S had against H. The three causes of action (see eg *Goldfields Laboratories (Pty) Ltd v Pomate*

Engineering (Pty) Ltd 1983 (3) SA 197 (W)) are: *(a)* H's breach of contract which gave S ground to validly cancel the lease. The ordinary measure for the assessment of damages on a claim based on this cause of action is the loss of rental for the unexpired period of the lease (para 12.17). The rental refers to the rent in terms of the contract of lease between S and H. *(b)* H's wrongful holding over after cancellation. The usual measure for assessment of damages for holding over is the rental value of the property for the period the defendant was in unlawful occupation (para 12.17). *(c)* H's breach of his contractual duty to return the shop in the condition it ought to be in (Cooper *Landlord and Tenant* 217–18). S may claim the difference between the value of property at the termination of the lease and what its value would have been had the lessee kept it in the condition it ought to have been in (H paid for the cost of repairs) as well as the rental value for the time reasonably required for repairs (*Swart v Van der Vyfer* 1970 (1) SA 633 (A) at 643; *Claasen v African Batignolles Construction* 1954 (1) SA 552 (O) at 564). S only claimed for the rental value of the property for the periods of holding over and repair of the property. S thus based his claim on the causes of action set out in *(b)* and *(c)* and the benefit (rent) of the lease of the property to X should be disregarded as collateral. The benefit of the lease to X should have been taken into account if S based his claim on cause *(a)* and then only for the period that overlaps with the lease with H. Floyd 2003 *THRHR* 557–8 supports this analysis. See, however, *Terminus Centre CC v Henry Mansell (Pty) Ltd*[2007] 3 All SA 668 (C) at 675 where the court was prepared to take the rental of the period of the second lease which does not overlap with the period of the first lease into account, but no evidence was presented to the court that this was indeed a benefit. Cf further Van Heerden 'The "passing-on" defence' 268 on the defence of 'passing on' which must be distinguished from mitigation; para 10.11.

[151] Cf *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 99; *Terminus Centre CC v Henry Mansell (Pty) Ltd* [2007] 3 All SA 668 (C) at 673–4. A duty to mitigate cannot exist before damage has been proved.

[152] See the cases in n 150 above and cf also *D* 19.1.21.3; *D* 19.1.45.1; *Isaacson v Walsh and Walsh*1903 SC 569; *Bird v Carlis* 1904 TS 637; *Crawford v Tommy* 1906 TS 843; *Nourse v Moore* 1910 EDL 317; *Saley and Co v Chapty* 1917 TPD 105; *Reed v Eddles* 1920 OPD 69; *Silbereisen Bros v Lamont*1927 TPD 382; *Kaiser v Goosen* 1927 SWA 4; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Freedman v Raywid* 1930 CPD 161; *Lampakis v Dimitri* 1937 TPD 138; *Brown v Webster* 1946 WLD 254; *Moyes and Mckenzie v Frenkel & Co* 1912 NLR 282; *Richter v Van Aardt* 1917 OPD 85; *Probart v SAR & H* 1926 EDL 205; *Kaplan & Co v Basel Bros* 1931 CPD 457; *Kinemas Ltd v Berman* 1932 AD 246; *Butler v Durban Corp* 1936 NPD 139; *Whitfield v Phillips* 1957 (3) SA 318 (A); *Dykes v Gavanne Investments (Pty) Ltd*1962 (1) SA 16 (T); *Hochmetals (Africa) (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 (1) SA 571 (A); *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 (2) SA 521 (C); *Jayber (Pty) Ltd v Miller* 1980 (4) SA 280 (W); *Nedfin Bank Ltd v Muller* 1981 (4) SA 229 (D) (where a machine leased for the removal of soil is taken back, the plaintiff must take reasonable steps to find a new lessee and if this fails, the machine must be sold at market value); *Cowley v Hahn* 1987 (1) SA 440 (E) (para 12.7.2.5).

[153] See *Da Silva v Coutinho* 1971 (3) SA 123 (A) at 145; *De Pinto v Rensea Investments (Pty) Ltd*1977 (2) SA 1000 (A); 1977 (4) SA 529 (A); *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201. In these cases references was made to the following well-known dictum from *Banco de Portugal v Waterlow and Sons* 1932 AC 452 at 506: 'The law is satisfied if the party [the plaintiff] placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.' See also *Smit v Abrahams* 1994 (4) SA 1 (A) at 17 in which the court held that the respondent had been placed in a quandary through the conduct of the appellant. The respondent's conduct in reaction thereto had been reasonable in all respects: to regard his shortage of money and consequent inability to purchase another vehicle as an obstacle to the recovery of his expenses in hiring a vehicle would be unfair and unjust towards him. Cf further *Victoria Falls and Tvl Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 25–7; *Hazis v Tvl and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 398. Cf also *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 689, where the plaintiff demolished walls because the bricks which had been supplied by the defendant crumbled: 'In a case such as the present one, where the breach of contract creates something of an emergency and the sufferer finds himself in a position of embarrassment as a consequence of the breach, the measures which he may be [forced] to adopt to extricate himself ought not to be weighed in nice scales and the Court should not be astute to hold that this *onus* has been discharged ... . The law is satisfied if the sufferer from the breach has acted reasonably in the adoption of remedial measures.' See further *Jayber (Pty) Ltd v Miller* 1980 (4) SA 280 (W) at 282; *Myers v Abramson* 1952 (3) SA 121 (C) at 129; *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D&C) at 382.

[154] An employee who has been dismissed need therefore not accept an offer of new employment from the employer who has committed breach of contract. Cf *Jayber (Pty) Ltd v Miller* 1980 (4) SA 280 (W) at 284; *Kinemas v Berman* 1932 AD 246.

[155] In *Swart v Provincial Ins* 1963 (2) SA 630 (A) it was held that it would be unreasonable to expect an injured plaintiff who was 27 years old and had a wife and four children to improve his school training in order to enhance his earning capacity. In *Williams v Oosthuizen* 1981 (4) SA 182 (C) it was stated that a plaintiff must limit future medical expenses by undergoing treatment in a public rather than a private hospital. However, in *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) it was held that private medical treatment can also be reasonable. Cf also *Maja v SA Eagle Ins Co Ltd* 1990 (2) SA 701 (W) at 710. In *Van Almelo v Shield Ins* 1980 (2) SA 411 (C) it was decided that the defendant did not discharge his burden of proof by showing that the plaintiff had acted unreasonably in refusing to quit employment at a municipality for better-paid employment with less security in the private sector. Cf *Soar v JC Motors* 1992 (4) SA 127 (A) (only steps which a reasonable and careful businessperson would take in the normal course of business are required). It would be unreasonable in the circumstances to expect a purchaser of a huge quantity of uranium oxide (a nuclear source material) to find an alternative source of supply (*Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd* 1994 (4) SA 26 (W) at 85–7). If the seller refuses to accept the return of the thing sold after the sale has been validly sold, it would be reasonable for the purchaser to mitigate his or her damages by selling the article if the article is liable to deteriorate, or is rapidly falling in value or the expense of storing it is unduly heavy (*Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 988). In *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 687–8 (upheld on appeal—2000 (4) SA 1027 (SCA) at 1030) the plaintiff's financial circumstances were taken into account as a relevant factor in determining the reasonableness of the plaintiff's failure to mitigate his loss earlier. The court held that the plaintiff acted unreasonably by not selling his non-essential assets to finance the repair work at the time when the defects manifested themselves. See further Nortjé 1999 *Annual Survey* 182–3; *Smit v Abrahams* 1994 (4) SA 1 (A).

[156] Cf *Hazis v Tvl and Delagoa Bay Investment Co Ltd* 1939 AD 372 at 388; *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 633. See also *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) at 382: '[W]hether the claimant has acted reasonably in the circumstances is a question of fact and not law.'

[157] See on the market-price rule para 12.7.2. See also para 12.7.2.4; Kerr *Sale* 169: 'This rule involves the proposition that if other similar goods are available from other sources on the relevant date the buyer has an opportunity to mitigate his loss by buying such goods on that date. If he buys then he avoids any further loss there may be if values rise thereafter. If a buyer fails to take such an opportunity he has only himself to blame for any further loss and cannot recover such further loss from the seller.' Cf also Joubert 1973 *THRHR* 59: 'The seller has the opportunity to resell the property and if he decides to do so only later when the price has dropped, he is to blame for such loss.' In the event of breach of contract where a perishable article is involved it can be expected of a seller, upon breach of contract by a purchaser, to sell the merx as soon as possible (cf, eg, *Ullman Bros Ltd v Kroonstad Produce Ltd* 1923 AD 449 at 457). See generally *Novick v Benjamin* 1972 (2) SA 842 (A); *Culverwell v Brown* 1990 (1) SA 7 (A) at 31 (damages for repudiation measured as the difference between the contract price and the price upon resale or repurchase *provided that there was no unreasonable delay*), and *Dennill v Atkin & Co* 1905 TS 282 at 289; *Oellermann v Natal Indian Traders Ltd* 1913 NPD 337; *Chapman v Dwor* 1921 CPD 433; *Bremmer v Ayob Mohamed* 1920 TPD 303 at 305–7; *Kaplan & Co v Basel Bros* 1913 CPD 457 at 463; *Central Produce v Hirschowitz* 1938 TPD 350 at 357; Norman *Sale*248. Cf also para 12.7.2.3 on the application of the market-price rule. Cf also *Benson v SA Mutual Life Ass Soc* 1986 (1) SA 776 (A) at 786.

[158] See *Romansrivier Koöp Wynkelder v Chemserve Manufacturing* 1993 (2) SA 358 (C) at 367 where the plaintiff claimed necessary and reasonable repair costs, as well as an agent's commission and advertising costs as part of his duty to mitigate. The plaintiff sold the repaired goods and this resulted in a saving of R4 800 for the defendant. See also *Solomon v Spur Cool Co (Pty) Ltd* 2002 (5) SA 214 (C) at 228–30 (possible diminution in market value of leased property caused by the conclusion of a less advantageous lease in mitigation of rental loss).

[159] Cf *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1237: 'When he hired another truck to replace the damaged one, he was incurring an expense to avoid loss of profits, and the negligent defendant may be called upon to pay for such hire, not because it is damage which flows from his negligent act; but because the plaintiff shows that he has avoided the loss by an expenditure in another respect. He has taken steps to mitigate his loss, so that the expense of taking those steps is what has to be paid to him to place him in the position he would have been in had the defendant not interfered with him.' In our opinion, renting the substitute truck indeed flowed from the defendant's negligent conduct. Cf also *Zweni v Modimogale* 1993 (2) SA 192 (BA). Here the plaintiff's motor car was damaged and she rented a taxi at R17 per day to transport her between her businesses. She did not have her vehicle repaired immediately since, from a business point of view, she did not want to spend money in advance. The court held that she acted reasonably and that the defendant had to pay the rent of the taxi until the date of judgment. Cf also *Dodd Properties (Kent) Ltd v Canterbury City Council* 1980 (1) All ER 928 (CA); *Smit v Abrahams* 1994 (4) SA 1 (A); *Kellerman v SATS* 1993 (4) SA 872 (C); para 11.5.4.6.

[160] See *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C).

[161] See Erasmus & Gauntlett 7 *LAWSA* para 38 n 9, who rely on English authority. There is no reason why our law will not accept this logical principle. Cf McKerron *Delict* 139.

[162] Erasmus & Gauntlett 7 *LAWSA* para 38 n 10 refer to English authority, but the principle is consistent with our law.

[163] Para 8.5. One may also relate this principle to compensating benefits (para 10.12): the plaintiff created a benefit for him- or herself which must reasonably be deducted from the claim.

Kerr *Contract* 763 is of the opinion that both the positive and the negative results of mitigation must be taken into account. He criticizes the viewpoint in *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W), as far as the difference between expenses incurred and the beneficial results (if any) thereof is concerned. He declares that in casu one must look at what the position would have been if H had vacated the premises in time (see n 150 above for the facts). Cf Kerr op cit 762 for a general formula for damage where mitigation is involved: '(1) such loss flowing from the original breach as is agreed upon or is provided for in the residual rules, plus (2) *(a)* expenses which were incurred, and/or charges for work done, in taking reasonable steps, whether successful or unsuccessful, to mitigate loss flowing from the original breach or which would have been incurred or charged for had a reasonable method of mitigating loss been taken, and *(b)* additional loss, if any, which was caused, or which would have been caused, by taking such steps, if the agreed figure under (1) above, if any, does not cover these amounts, minus (3) whatever benefit is obtained or would have been obtained had reasonable steps been taken to mitigate the loss.'

[164] Cf *Butler v Durban Corp* 1936 NPD 139; *Hazis v Tvl and Delagoa Bay Investment Co Ltd* 1939 AD 372; *Allers v Rautenbach* 1949 (4) SA 226 (O); *Dykes v Gavanne Investments (Pty) Ltd* 1962 (1) SA 16 (T); *North and Son v Albertyn* 1962 (2) SA 212 (A) at 216; *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C); *Jayber (Pty) Ltd v Miller* 1980 (4) SA 280 (W); *Nedfin Bank v Muller* 1981 (4) SA 229 (D); *Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd* 1970 (1) SA 228 (A); *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 633; *Maja v SA Eagle Ins Co Ltd* 1990 (2) SA 701 (W) at 710; *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D&C) at 381; *Courtis Rutherford and Sons CC v Sasfin (Pty) Ltd* [1999] 3 All SA 639 (C) at 650–1; *Terminus Centre CC v Henry Mansell (Pty) Ltd* [2007] 3 All SA 668 (C) at 672. There are conflicting points of view on whether a plaintiff, upon allegedly losing earning capacity, must prove that he or she is unable to earn income in any other way. See *Van Almelo v Shield Ins Co Ltd* 1980 (2) SA 411 (C) at 413; *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 99; also *Nayende v Santam Ins Co Ltd* 1988 (1) PH J14 (SWA). The correct view is that the plaintiff must indeed provide prima facie proof of this (his or her disability). A relationship between the date of assessment of contractual damages and the duty of mitigation exists when the date of assessment is the same as the date on which mitigation should take place (*Rens v Coltman* 1996 (1) SA 452 (A) at 461; *Adel Builders (Pty) Ltd v Thompson*1999 (1) SA 680 (SE) at 686–8). Visser 1996 *Obiter* 187–8 points out that the plaintiff carries the burden of proof with regard to the time at which damages should be assessed, because the plaintiff has to prove the quantum of his or her damage and damages. Visser argues that the defendant should carry the burden of proof if he or she places the date of assessment into dispute, because it then becomes a question of mitigation.

[165] *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201; *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1237: 'And if he has incurred expense which the defendant considers is unreasonable, the defendant can show that he could reasonably have avoided the loss at a lesser expense, in which case only the smaller amount can be recovered.'

[166] See *Jayber v Miller* 1980 (4) SA 280 (W); Kerr 1981 *SALJ* 306; *Nedfin Bank Ltd v Muller* 1988 (4) SA 229 (D). See further *South Cape Corp (Pty) Ltd v Engineers Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548; *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 766.

[167] Cf *Walker v Santam Ltd* 2009 (6) SA 224 (SCA) at 231; *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1237; *Modimogale v Zweni* 1990 (4) SA 122 (B) at 127: 'There is ... no *onus* on the plaintiff to prove the exact loss of profits which would have been suffered by her had she not hired the taxi, as this is not the real basis of her claim.'

[168] Neethling & Potgieter *Delict* 161–74; Van der Walt & Midgley *Delict* 239–45; Loubser & Midgley (eds) *Delict* 420–6; Van der Merwe & Olivier *Onregmatige Daad* 156–67; Boberg *Delict* 652–724; McKerron *Delict* 58–66; Lee & Honoré *Obligations* 260–4. Cf further McGregor *Damages* 89-97. For a detailed study on apportionment of damages, see Botha *Verdeling van Skadedragingslas*.

[169] See also Erasmus & Gauntlett 7 *LAWSA* paras 35–6.

[170] Also note s 4 of the Act in terms of which the Act inter alia does not have the effect of raising the amount of damages above the maximum limit in a statute or agreement applicable to a claim for damages. Cf also s 1(2), which stipulates that a defence of prescription is incompatable with a claim in terms of s

1(1)*(a)* by the person raising prescription (see *Pretoria Stadsraad v Public Utility Transport Corp Ltd* 1963 (3) SA 133 (T) at 135 and *Vaal Maseru Busdiens (Edms) Bpk v Wascon Siviel CC* 2003 (3) SA 226 (O) where the plaintiff's claim for damages arising out of a motor vehicle collision was forfeited when it raised the defence of prescription against the counterclaim by the defendant (cf Roederer & Grant 2003 *Annual Survey* 359–60). See further s 8 of the Civil Aviation Act 13 of 2009.

[171] Cf, eg, *South British Ins Co Ltd v Smit* 1962 (3) SA 826 (A) at 838; Van der Merwe & Olivier *Onregmatige Daad* 163. See also s 58(2) of the Auditing Profession Act 26 of 2005 which determines that the reference in s 1 of the Apportionment of Damages Act 34 of 1956 to 'damage' must be construed as a reference also to damage caused by a breach, by an registered auditor, of a term of a contract concluded with the registered auditor.

[172] Cf para 16.4.

[173] *SAR & H v SA Stevedores Services* 1983 (1) SA 1066 (A).

[174] In instances of so-called no-fault liability the defence of contributory negligence can therefore not be raised (cf also Van der Walt & Midgley *Delict* 240). For a different point of view, see Botha *Verdeling van Skadedragingslas* 331–2. In the case of the actio de pauperie and the actio de pastu (para 13.9) liability will nevertheless be excluded by the culpable conduct of the plaintiff (*Pieters v Botha*1989 (3) SA 607 (T) at 621).

[175] Neethling & Potgieter *Delict* 162–3; *Wapnick v Durban Garage* 1984 (2) SA 414 (D) at 418; *Mabaso v Felix* 1981 (3) SA 685 (A) at 877; *Bender v Claasen* 1986 (2) PH J26 (C); *Minister van Wet en Orde v Ntsane* 1993 (1) SA 560 (A); cf *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) at 585.

[176] 1997 (2) SA 591 (W) at 606. See also Malan & Pretorius 1997 *THRHR* 155; Scott 1997 *De Jure*388; Kelly 2001 *SA Merc LJ* 516.

[177] Neethling & Potgieter *Delict* 163. The Appellate Division has, however, reservations about such a defence (*Netherlands Ins Co Ltd v Van der Vyver* 1968 (1) SA 412 (A) at 422). Cf, however, Van der Merwe & Olivier *Onregmatige Daad* 167 et seq. If one regards intentional conduct as a 100 per cent deviation from the standard of the reasonable person, the Act should indeed be applicable. See Neethling 1985 *THRHR* 250. Cf further Boberg *Delict* 656, 663.

[178] Section 1(3) of the Apportionment of Damages Act 34 of 1956 defines 'fault' as including any act or omission which would, but for the provisions of the Act, have given rise to the defence of contributory negligence.

Where a plaintiff was negligent him- or herself but sues on the basis of a claim that has been ceded to the plaintiff, the ceded claim is not subject to reduction. Cf *Windrum v Neuborn* 1968 (4) SA 286 (T) at 288; *Lean v Van der Mescht* 1972 (2) SA 100 (O); *Dhlamini v Protea Furnishers (Natal) (Pty) Ltd* 1982 (2) SA 50 (N).

[179] It is also incorrect, as pointed out by Midgley 2006 *Annual Survey* 341–2, to refer to an 'apportionment of fault' as was done in *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) at 586. According to Midgley at 341 'the question is not one of apportionment of fault, . . . but apportionment of damages'. Strictly speaking, s 1(1)*(a)* of Act 34 of 1956 calls for neither an apportionment of fault nor for an apportionment of damages, but that the plaintiff's damages be *reduced*by the court 'to such an extent as the court may deem just and equitable having regard to the degree in which the [plaintiff] was at fault in relation to the damage'. There is also no indication in this provision that the fault of the *defendant* should be taken into account for purposes of 'apportionment': only the plaintiff's fault appears to be relevant. Nevertheless, although the courts do not always apply s 1(1)*(a)*consistently (see para 11.4.4), the particular method applied to 'apportion' damages does not appear to have a very meaningful influence on the outcome of the enquiry in a given case (cf also Midgley at 342).

[180] See eg *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) at 586; *Kriel v Premier, Vrystaat* 2003 (5) SA 67 (O) at 71–2; *Brauns v Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (E); *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) at 200; cf *Coetzee v Fourie* 2004 (6) SA 485 (SCA) at 490 (criticized by Neethling Potgieter 2004 *TSAR* 607).

[181] *South British Ins Co Ltd v Smit* 1962 (3) SA 826 (A); *Jones v Santam Bpk* 1965 (2) SA 542 (A). Cf Boberg *Delict* 657–8, 668–9; Van der Merwe & Olivier *Onregmatige Daad* 159 et seq.

[182] Strictly speaking, the plaintiff cannot be negligent in respect of his or her own loss, as wrongfulness is a requirement for negligence and no-one can act wrongfully in regard to him- or herself. The 'negligence' of a plaintiff (termed 'contributory negligence') is, however, determined in the same manner as that of the negligence of the defendant, ie by means of the 'reasonable person' test (cf Neethling & Potgieter *Delict* 165).

[183] Cf Neethling & Potgieter *Delict* 175 et seq. The last opportunity rule applied in common law ('who had the last chance to avoid the damage?') is not employed (op cit 157).

[184] The court does not inquire into who in fact made the largest contribution to the damage.

[185] 1965 (2) SA 542 (A). Cf Boberg *Delict* 670–1.

[186] It is, for instance, possible that the plaintiff's conduct deviated 20 per cent from this norm and that of the defendant 60 per cent. Thus their fault is in the relationship 3:1 and the plaintiff will receive 75 per cent of damages claimed. However, judgments do not reflect such a detailed 'mathematical' method. The finding in *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) at 586 is typical of the approach of the courts: the court assessed 'the relative degree of negligence of the defendant on the one hand and the plaintiff on the other hand', found on the evidence that 'the conduct of the plaintiff deviated from the norm, being that of a reasonable man, to a substantially higher degree than that of the defendant' and that it would therefore 'be equitable to reduce the damage[s] suffered by the plaintiff by two thirds'. See also *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) at 479.

[187] 1976 (3) SA 45 (A). Cf also, eg, *Santam Versekeringsmpy Bpk v Letlojane* 1982 (3) SA 318 (A); *Manuel v SA Eagle Ins Co Ltd* 1982 (4) SA 352 (C); *Smith v SA Eagle Ins Co Ltd* 1986 (2) SA 314 (SE); *Maphosa v Wilke* 1990 (3) SA 789 (T); *Guardian National Ins Co Ltd v Engelbrecht* 1989 (4) SA 908 (T) at 911; Van der Merwe & Olivier *Onregmatige Daad* 162.

[188] *South British Ins Co Ltd v Smit* 1962 (3) SA 826 (A) at 835.

[189] Cf Neethling & Potgieter *Delict* 163–6; Van der Merwe & Olivier *Onregmatige Daad* 162; Boberg *Delict* 669.

[190] 1993 (4) SA 228 (A).

[191] See Neethling & Potgieter *Delict* 166; Scott 1995 *TSAR* 127–32.

[192] 1965 (2) SA 542 (A) at 551; Boberg *Delict* 674 et seq, 681, 685.

[193] Cf Boberg *Delict* 355 et seq; Van der Merwe & Olivier *Onregmatige Daad* 137 et seq.

[194] Cf *Weber v Santam Versekeringsmpy Bpk* 1983 (1) SA 381 (A) at 400. The court warned against placing 'an old head on young shoulders' in determining accountability. See the criticism by Van der Merwe & Olivier *Onregmatige Daad* 139–40. Cf also Boberg *Delict* 659.

[195] Cf Neethling & Potgieter *Delict* 137 n 101. The reasonable-child approach benefited the child since his or her percentage (degree) of negligence was calculated with reference to the fact that he or she was a child—which would decrease the percentage of the child's negligence. In terms of the 'reasonable person' test, childhood cannot be considered in lowering the percentage of negligence; it plays a role only in determining accountability for negligence. Juvenility does, however, play a role in respect of the conduct of adults with regard to children, because of children's lack of self-control. Cf Boberg *Delict* 660 and *Weber v Santam Versekeringsmpy Bpk* 1983 (1) SA 381 (A). In *Ndlovu v AA Mutual Ins Ass* 1991 (3) SA 655 (E) it was held that in casu a seven-year-old child did not have the capacity to act with contributory negligence.

[196] *Schoeman v Unie en SWA Versekeringsmpy Bpk* 1989 (4) SA 721 (C).

[197] *AA Mutual Ins Ass v Nomeka* 1976 (3) SA 45 (A); para 16.3.3.

[198] 1970 (1) SA 462 (W). Cf also Tager 1970 *SALJ* 156; Boberg 1970 *Annual Survey* 173; Amicus Curiae 1972 *SALJ* 236; Boberg 1980 *SALJ* 204; Kerr 1980 *SALJ* 545; Buchanan 1982 *SALJ* 209; Boberg *Delict* 403–8; Neethling & Potgieter *Delict* 167; Loubser & Midgley (eds) *Delict* 422.

[199] Cf, however, the criticism in *Bowkers Park Komga Co-operative Ltd v SAR & H* 1980 (1) SA 91 (EC) and cf Van der Merwe & Olivier *Onregmatige Daad* 157.

[200] 1982 (1) SA 444 (A); Neethling & Potgieter 1981 *THRHR* 204; Visser 1982 *THRHR* 81; Boberg *Delict* 436–9.

[201] The court recognized the problems in considering contributory negligence in such a case. The court added that a bona fide failure to wear a seatbelt will weigh less than an intentional omission. In casu the contributory negligence of the plaintiff was relevant only in so far as it had *increased* the damage. Suppose X suffers a loss of R10 000 due to a motor accident which was caused entirely by Y's negligence, but that X's damage would have amounted to only R6 000 if he had used a seatbelt. X's neglect therefore contributed to the R4 000 increase in the damage. Y alone is responsible for the R6 000, whereas the R4 000 must be reduced in proportion to X's contributory fault (he is, of course, not alone responsible). Cf also *Vorster v AA Mutual Ins Ass Ltd* 1982 (1) SA 145 (T) where the court followed the correct approach; the plaintiff's damages for the further loss was reduced by 20 per cent. See further *General Accident Versekeringsmpy SA Bpk v Uijs* 1993 (4) SA 228 (A) at 232–5. Cf Boberg *Delict* 427–8.

[202] 2001 (3) SA 551 (SCA); *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 (2) SA 521 (C) at 528.

[203] At 589–91, 597–604 (Olivier JA dissenting). The plaintiff claimed contractual damages from the defendant, a firm of auditors, which it had employed to audit its financial statements for the 1993 financial year. The defendant failed to appreciate the significance of and to pursue the unusual features and discrepancies in the plaintiff's books. M, the financial manager of the plaintiff, had at that stage stolen some

money from his employer and continued to do so after the audit. The plaintiff claimed as damages the amount stolen by M after the audit. The court (Olivier JA concurring) found that the defendant was negligent in conducting the audit (at 574, 576) and as a result M's thefts were not discovered and the further thefts were not prevented (at 579). The court (Olivier JA also concurring) held furthermore that the plaintiff contributed to its own loss by failing to supervise M despite finding out that M had a criminal record (at 584–6). The majority held that that two unrelated determinants (negligence of the defendant and carelessness of the plaintiff) had converged in causing the plaintiff's loss (at 586–7). The majority held that the defence of preponderance of fault did not apply to the law of contract (at 588). Therefore, as the plaintiff was able to prove that the breach by the defendant was a cause of the loss, even if there was another contributing cause, the plaintiff's claim had to succeed (at 588–9). A careless plaintiff would only be non-suited where *(a)* there was a contractual term to that effect; *(b)* his own carelessness was the sole cause of loss; or *(c)* the defendant's negligence was, comparatively speaking, so negligible as to be discountable as a significant cause of the loss (at 589). The majority (Olivier JA dissenting) held, furthermore, that the Apportionment of Damages Act 34 of 1956 did not apply to a claim for contractual damages.

[204] See eg *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (3) SA 551 (SCA) at 590, 604, 632; Lötz 1996 *TSAR* 173; Havenga 2001 *THRHR* 130; Mqeke 2002 *De Jure* 178 et seq; Christie & Bradfield *Contract* 582–3. The South African Law Commission's Discussion Paper 67, Project 96, on the Apportionment of Damages Act 1956 recommended that the Act be extended to cover claims for contractual damages. See, however, Kerr 2000 *SALJ* 215–18; *Contract* 780–1 and Lötz 1996 *TSAR* 174 who submit that the rules of causation and not fault should be used to reduce the amount of contractual damages in such a situation.

[205] Cf Neethling & Potgieter *Delict* 175–210; Van der Walt & Midgley *Delict* 196–211; Loubser & Midgley (eds) *Delict* 85–96; Van der Merwe & Olivier *Onregmatige Daad* 202–5; Boberg *Delict* 380–474.

[206] Cf Joubert *Contract* 251–4; De Wet & Van Wyk *Kontraktereg en Handelsreg* 226–8; Kerr *Contract* 615–40; Christie & Bradfield *Contract* 565–6; Lubbe & Murray *Contract* 616–29; Kahn *Contract*I 813–22; Joubert 1972 *THRHR* 65.

[207] Cf in general also Erasmus & Gauntlett 7 *LAWSA* paras 31–4; McGregor *Damages* 98–104; Bloembergen *Schadevergoeding* 149 et seq; cf Visser & Vorster *Criminal Law* 99–178; Snyman *Criminal Law* 72 et seq, 82 et seq; Van Oosten 1982 *De Jure* 239 et seq; 1983 *De Jure* 36 et seq; Van Rensburg *Juridiese Kousaliteit* 154 et seq; Van Rensburg *Normatiewe Voorsienbaarheid* 1–63.

[208] A person can thus not be liable unless he or she has *caused* damage: *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA) at 320 (for a discussion see Schulze 2006 *TSAR*834 et seq); see further *mCubed International (Pty) Ltd v Singer* 2009 (4) SA 471 (SCA) at 479; Neethling & Potgieter *Delict* 175. 'The test for factual causation is the same in delictual and contractual cases' (*Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at 6 n 1; *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191). See also paras 2.6, 11.5.5.1; cf para 4.6. In *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 532–3 the SCA pointed out that it is often impossible to quantify future damages with exactitude, hence speculation was inevitable. Yet there must be a causal connection between such damages and the defendant's conduct which has to be established on a balance of probabilities. See on the necessity to distinguish between (factual) causation and the quantification of damages with regard to the proof of damages, *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 328, 329–30; paras 2.6, 16.2.2 and 16.2.4.

[209] Para 2.1.

[210] In cases of risk-liability or of liability in terms of a contract of insurance the defendant does not necessarily commit an act which can be described as a damage-causing event. The causal element in such cases however still exists between the damage-causing fact and the damage—eg, loss caused by the use of an aircraft (s 8 of the Civil Aviation Act 13 of 2009—para 13.13); or by an animal of which the defendant is the owner (actio de pauperie—para 13.9.1); or by events (risks) foreseen in a contract of insurance etc.

[211] See generally on factual causation in delict, Neethling & Potgieter *Delict* 176–87. With regard to contract, '[a] plaintiff who enforces a contractual claim arising from the breach of a contract, [also] needs to prove, on a balance of probability, that the breach was a [factual] cause of the loss' (*Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at 6). Cf also paras 2.6, 4.6 and 11.5.5.1.

[212] See, eg, *Esterhuizen v Brandfort Munisipaliteit* 1957 (3) SA 768 (A) at 771; *Ocean Accident and Guarantee Corp v Koch* 1963 (4) SA 147 (A), where the plaintiff was injured in an accident and later suffered a thrombosis. On the factual evidence it was impossible to find that the eventual thrombosis was caused by the accident and liability could therefore not ensue. Cf also *Mouton v Mynwerkersunie*1977 (1) SA 119 (A) at 148. Cf further *Sommer v Wilding* 1984 (3) SA 647 (A) where S claimed damages as a result of W's repudiation of an option to buy shares which he had granted S. The court found that S failed to prove that he would have exercised the option. The required causal nexus (at 659) between the breach of contract and the damages was therefore not proved. See further *Benson v De Beers Consolidated Mines Ltd* 1988

(1) SA 834 (NC) at 842; *Crede v Standard Bank of SA Ltd* 1988 (4) SA 786 (E); *Bayer (SA) (Pty) Ltd v Viljoen* 1990 (2) SA 647 (A).

[213] 1990 (1) SA 680 (A) at 700. Cf also *Tuck v Commissioner for Inland Revenue* 1988 (3) SA 819 (A) at 832; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 163–4; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 763 et seq; *Napier v Collet* 1995 (3) SA 140 (A) at 143 et seq; *Standard Bank of South Africa Ltd v OK Bazaars (1929) Ltd* 2000 (4) SA 382 (W) at 399; *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd*2002 (3) SA 688 (SCA) at 697–700; *Meevis v Sheriff, Pretoria East* 1999 (2) SA 389 (T) at 397; *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) at 55; *Vigario v Afrox Ltd* 1996 (3) SA 450 (W) at 464; *Gibson v Berkowitz* 1996 (4) SA 1029 (W) at 1039–40; *Ncoyo v Commissioner of Police, Ciskei*1998 (1) SA 128 (Ck) at 137–9 (see Scott 1998 *De Jure* 179; Dendy 1998 *SALJ* 583 for discussions); *Bonitas Medical Aid Fund v Volkskas Bank Ltd* 1992 (2) SA 231 (W) at 49; *Clarke v Hurst* 1992 (4) SA 630 (D) at 659; *Ebrahim v Minister of Law and Order* 1993 (2) SA 559 (T) at 564–6; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34–5; *Siman and Co (Pty) Ltd v Barclays National Bank* 1984 (2) SA 888 (A) at 914; *Standard Bank of SA v Coetsee* 1981 (1) SA 1131 (A) at 1134, 1140; *Kruger v Van der Merwe* 1966 (2) SA 266 (A); *S v Mokgethi* 1990 (1) SA 32 (A) at 39 et seq; *Smit v Abrahams* 1992 (3) SA 158 (C) at 161; Van der Walt & Midgley *Delict* 202; Van der Merwe & Olivier *Onregmatige Daad* 197; Burchell *Delict* 32–4, 112–14; Neethling & Potgieter *Delict* 188; 1993 *THRHR* 157; 1995 *THRHR* 343; Boberg *Delict* 380 et seq.

[214] Neethling & Potgieter *Delict* 188–90. In the law of delict the defendant's liability is thus also limited by those elements establishing liability, such as wrongfulness and negligence. Cf in this regard *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 163–4; *mCubed International (Pty) Ltd v Singer* 2009 (4) SA 471 (SCA) at 481.

[215] An example is where a culpable act gives rise to further damaging events as a result of an exceptional course of causally linked events. Cf, eg, in the law of delict, *Alston v Marine and Trade Ins Co Ltd* 1964 (4) SA 112 (W): A sustained a brain injury in a motor car accident. He started to suffer from manic depression for which he was treated with parstellin, an acknowledged remedy. After taking parstellin, A ate cheese and this led to a stroke resulting in the additional loss of R900. The question was whether the (negligent) defendant was liable for this additional loss. (Cf also *Kantey & Templer (Pty) Ltd v Van Zyl* 2007 (1) SA 610 (C) at 624–5; *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) at 466, 472.)

In the contractual sphere, the question of limitation of liability usually arises where the loss was not the 'direct' or 'natural' result of the breach. Cf, eg, *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A): K leased premises from S for the purpose of running a business in take-away meals. S undertook inter alia not to let any other premises in the building for the same type of business but acted in contradiction of this obligation and allowed a competing business. K claimed damages for loss of 'goodwill' because the selling price of this business was now less than before the breach. See also the example given by De Wet & Van Wyk *Kontraktereg en Handelsreg* 226–7.

[216] See Schlemmer 1997 *TSAR* 531 on causation in insurance law.

[217] Cf in general Neethling & Potgieter *Delict* 190 et seq.

[218] Van der Walt & Midgley *Delict* 202 et seq; Boberg *Delict* 445–7; cf Van der Merwe & Olivier *Onregmatige Daad* 216, 223–4; Van Rensburg *Normatiewe Voorsienbaarheid* 31 et seq; *Juridiese Kousaliteit* 233–41.

[219] Para 11.5.4.1.

[220] Cf also Van Aswegen *Sameloop* 330, who considers it to be the logical and fair moment for deciding on the limitation of liability.

[221] 1990 (1) SA 32 (A) at 39 et seq. In this case the deceased was a bank teller, and was shot between the shoulder blades by one of the appellants during a robbery. The deceased did not die immediately, but only six months later. The deceased had become a paraplegic as a result of the shot and had to make use of a wheelchair. His condition improved to such an extent that he later resumed his work at the bank. He was, however, later readmitted to hospital suffering from serious pressure sores and septicaemia, which had developed because he had failed to change his position in the wheelchair frequently, as he had been advised to do by the medical practitioners who treated him. The Appellate Division held that the wounding of the deceased could not be regarded as the juridical (legal) cause of the deceased's death for the purposes of a charge of murder. Cf Neethling & Potgieter *Delict*191 et seq; Potgieter 1990 *THRHR* 267 et seq.

[222] *S v Mokgethi* 1990 (1) SA 32 (A) at 40–1; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700–1; *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) at 697 et seq; *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA) at 1113; *Smit v Abrahams*1994 (4) SA 1 (A) at 18; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765; *Napier v Collett* 1995 (3) SA 140 (A) at 143; *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) at 55

et seq; *Vigario v Afrox Ltd* 1996 (3) SA 450 (W) at 464 et seq; *Gibson v Berkowitz*1996 (4) SA 1029 (W) at 1039 et seq; cf Neethling & Potgieter *Delict* 191–3; Neethling & Potgieter 1995 *THRHR* 343, 1997 *THRHR* 548; Dendy 1998 *SALJ* 583; Blackbeard 1995 *THRHR* 219. Constitutional imperatives also play a part in applying this approach: *Van der Spuy v Minister of Correctional Services*2004 (2) SA 463 (SE) at 475–6 (cf Knobel 2005 *THRHR* 493 et seq; Neethling & Potgieter 2004 *TSAR* 764 et seq).

[223] Cf Van der Walt & Midgley *Delict* 203: 'The adoption of any single formula would clearly represent too dogmatic and oversimplified an approach to the complex and practical problems relating to legal causation. The flexible approach which the Appellate Division has adopted accommodates both approaches represented by the formulae contained in the two major theories [direct consequences and reasonable foreseeability], and therefore strikes a fair and equitable balance between the causally relevant and irrelevant consequences of wrongful conduct.' Cf also *Da Silva v Coutinho* 1971 (3) SA 123 (A) at 147–8 where the court refused to make a choice between direct consequences, adequate causation and foreseeability, as the loss was imputable to the wrongdoer in terms of all these theories. In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 297–8 Ponnan JA stated that a court 'should be flexible in its approach' to the remoteness enquiry and found that the loss was not too remote on the basis of either the direct-consequences test or reasonable foreseeability; see also *Minister of Safety and Security v WH* 2009 (4) SA 213 (E) at 221 for a similar approach. (See also n 225 below.)

[224] Para 11.5.4.2 et seq.

[225] See the references in n 222 above. In *Smit v Abrahams* 1994 (4) SA 1 (A) at 17 Botha JA questioned the view of the court a quo that reasonable foreseeability of loss (para 11.5.4.5) is the single, decisive criterion for determining liability. According to Botha JA, reasonable foreseeability may be used as a subsidiary test in the application of the flexible approach, but it cannot exclude the latter approach. Indeed, in terms of his approach, the present matter could have been disposed of without any reference at all to reasonable foreseeability. He would, on the facts, *merely as a matter of policy*, have imputed to the defendant the loss for the renting of a substitute vehicle by the plaintiff, whose vehicle was irreparably damaged and who, because of his impecuniosity, was unable to purchase a replacement vehicle. This the judge would have done even if the damage had been so exceptional that it could not have been regarded as reasonably foreseeable (at 19). In *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765, Corbett CJ to an extent associated himself with this view of the role of reasonable foreseeability, although he apparently placed less emphasis on the subsidiary nature thereof. He considered it to be one of the many factors that can play a role in legal causation: '[T]he test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part . . . . In applying this general test there are two matters on which I propose to concentrate: firstly [certain facts of the matter] and, secondly, the question of reasonable foreseeability.' Cf *S v Mokgethi* 1990 (2) SA 32 (A); *Meevis v Sheriff, Pretoria East* 1999 (2) SA 389 (T) at 398. The impression may have been created in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 164–5 (see further *mCubed International (Pty) Ltd v Singer* 2009 (4) SA 471 (SCA) at 482; cf *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 297–8) that the flexible approach is not an independent criterion for legal causation but merely requires that the traditional tests for remoteness (such as foreseeability and direct consequences) should not be applied dogmatically, but rather in a flexible manner. This view is not supported by the weight of authority and is subject to criticism. Although the application of the 'subsidiary' criteria of direct consequences and reasonable foreseeability to legal causation (as, eg, in *Minister of Safety and Security v WH* 2009 (4) SA 213 (E) at 221) cannot be faulted, this approach should not be interpreted as a disregard for the supple test. Any attempt to subvert the supple approach to remoteness of damage should be resisted (see Neethling & Potgieter *Delict* 192 n 106; Potgieter 2010 *Obiter* 746).

[226] To an extent this test corresponds with the 'probable consequences test' (cf Boberg *Delict* 445, 447).

[227] See Joubert 1965 *Codicillus* 10–11; Van der Walt 1966 *THRHR* 250–2; Snyman *Criminal Law* 85 et seq. Cf *R v Loubser* 1953 (2) PH H190 (W), where this approach was followed. Cf also *S v Daniels*1983 (3) SA 275 (A) at 332; Neethling & Potgieter *Delict* 193–4. For criticism see Van Rensburg *Juridiese Kousaliteit* 198 et seq; Van der Merwe & Olivier *Onregmatige Daad* 207.

[228] See, eg, McGregor *Damages* 111–14; Boberg *Delict* 440–2; Van der Walt & Midgley *Delict* 206–7; McKerron *Delict* 126; Neethling & Potgieter *Delict* 195–7; Burchell *Delict* 119.

[229] Cf Van der Walt & Midgley *Delict* 206: 'Direct consequences are those which follow in sequence from the effect of the defendant's act upon existing conditions and forces already in operation at the time, without the intervention of any external forces which come into operation after the act has been committed. It does not matter whether such direct consequences were probable or improbable, foreseeable or unforeseeable . . . . In an attempt to restrict the limits of liability in accordance with the direct consequences

test, courts limited liability to the direct physical consequences of wrongful conduct. The doctrine of the foreseeable plaintiff [it must be reasonably foreseeable that the particular plaintiff would suffer loss] . . . also provides an effective limitation of the potentially extensive liability inherent in the theory of direct causation.' The direct consequences theory was formulated in the English case *In re Polemis and Furness, Withy & Co Ltd* [1921] 3 KB 560. This theory was, however, later rejected in favour of the principle that only foreseeable damage is compensable (cf *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] 1 All ER 404 (PC)). Cf Neethling & Potgieter *Delict* 195–7.

[230] In the law of delict it was probably only accepted explicitly in a few cases: see *Frenkel & Co v Cradle* 1915 NPD 173; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 165 and *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 297–8 (see further *mCubed International (Pty) Ltd v Singer* 2009 (4) SA 471 (SCA) at 482; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1081. See also *Alston v Marine and Trade Ins Co Ltd* 1964 (4) SA 112 (W) (cf n 215 above for the facts—the court held that the stroke was attributable to a 'superseding cause' and that the defendant was not liable); *Da Silva v Coutinho* 1971 (3) SA 123 (A); *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 705; *Smit v Abrahams* 1992 (3) SA 158 (C) at 163; McKerron *Delict* 130.

[231] In *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 705 (see also 1991 (4) SA 862 (A)) Van Rensburg J held that the consequence in question (the unlawful detention of the plaintiff by the Ciskeian security police) was both a direct consequence and the reasonably foreseeable result of the conduct of the South African police in unlawfully arresting the plaintiff and then handing him over to the Ciskeian police. See further *Smit v Abrahams* 1992 (3) SA 158 (C) at 164 where reference is made to a combination of direct consequences and reasonable foreseeability. Cf Van der Walt & Midgley *Delict* 206.

[232] Van der Walt & Midgley *Delict* 206; Neethling & Potgieter *Delict* 196–7; para 11.5.4.7.

[233] Cf, eg, *Standard Bank of SA Ltd v Coetsee* 1981 (1) SA 1131 (A) at 1140; Van Oosten 1983 *De Jure* 57–8; Van der Merwe & Olivier *Onregmatige Daad* 222–3.

[234] Van der Merwe & Olivier *Onregmatige Daad* 198 argue that liability must be limited to the consequences which a person, aware of their wrongfulness, had intended, and the wrongful consequences which he or she should reasonably have foreseen and prevented. Cf in general Boberg *Delict* 381 et seq; Van Rensburg *Juridiese Kousaliteit* 155–60; Van Oosten 1983 *De Jure* 57–60.

[235] Cf Neethling & Potgieter *Delict* 198 n 158, 202 et seq for the arguments on why imputability of harm is different from the question whether the act was in conflict with the legal convictions of the community (wrongfulness), and the question whether the wrongdoer can be blamed for his or her conduct (fault).

[236] Cf *S v Mokgethi* 1990 (1) SA 32 (A) at 39.

[237] See Neethling & Potgieter *Delict* 204–6; Van der Walt & Midgley *Delict* 208–10; Burchell *Delict*120–1; Boberg *Delict* 288–9, 442–5; McKerron *Delict* 128–9; Erasmus & Gauntlett 7 *LAWSA* para 33; Van der Merwe & Olivier *Onregmatige Daad* 214–16.

[238] See, eg, *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 165; *mCubed International (Pty) Ltd v Singer* 2009 (4) SA 471 (SCA) at 482; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 297–8; *OK Bazaars (1929) Ltd v Standard Bank of South Africa* 2002 (2) SA 688 (SCA) at 699 ('prominent role' of foreseeability in determining presence of new intervening cause—see para 11.5.4.6); *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) at 57 ('foreseeability may well be a factor to be considered in determining liability'); cf *Meevis v Sheriff, Pretoria East* 1999 (2) SA 389 (T) at 398; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) (where reasonable foreseeability—and direct consequences—are apparently used as factors for limitation of liability); *Vigario v Afrox Ltd* 1996 (3) SA 450 (W) at 464–7; *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 705 (in combination with the 'direct consequences' theory); *Smit v Abrahams* 1992 (3) SA 158 (C) at 164 (however, see the appeal; 1994 (4) SA 1 (A) at 13 et seq; cf Neethling & Potgieter 1995 *THRHR* 345); *Retief v Groenewald* 1896 EDC 140 at 148; *Workman's Compensation Commissioner v De Villiers* 1949 (1) SA 474 (C) at 481; *Van den Bergh v Parity Ins Co Ltd* 1966 (2) SA 621 (W) at 624: '[T]he foreseeability rule is part and parcel of our system of law ... only foreseeable harm is recoverable ...'; *Pietersburg Municipality v Rautenbach* 1917 TPD 252; *Fischbach v Pretoria City Council* 1969 (2) SA 693 (T) at 700; *Mafesa v Parity Versekeringsmpy Bpk* 1968 (2) SA 603 (O) at 605; *Ocean Accident and Guarantee Corp Ltd v Koch* 1963 (4) SA 147 (A) at 152, 158; *Kruger v Van der Merwe* 1966 (2) SA 266 (A) at 272; *Botes v Van Deventer* 1966 (3) SA 182 (A) at 191: 'He cannot escape liability by proving that the extent of the damage was not foreseeable. It is sufficient if he should have foreseen the nature of the damage—in this instance, damage flowing from the collision with animals' (our translation) (cf on this case Van der Walt 1967 *THRHR* 76–8; Boberg *Delict* 293; Van der Merwe & Olivier *Onregmatige Daad* 207, who are of the opinion that the extent of the damage must also be foreseeable); *Herschel v Mrupe* 1954 (3) SA 464 (A) at 474 (if X collides with the rear of Y's motor car, breaking valuable china, he will be liable for the china

too, although a reasonable person would not have foreseen its presence); *Portwood v Swamvur* 1970 (4) SA 8 (RA) at 17; *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A) at 780–1 (damage as a result of emotional shock more foreseeable where the plaintiff was in danger him- or herself than in the case where the plaintiff was merely informed of another's danger); *Brown v Hoffman* 1977 (2) SA 556 (NC); *Bennett v President Versekeringsmpy Bpk* 1973 (1) SA 674 (W) at 683; *Minister van Binnelandse Sake v Van Aswegen* 1974 (2) SA 101 (A); *Minister van Polisie v Skosana* 1977 (1) SA 31 (A); *Churchill v Standard General Ins Co Ltd* 1977 (1) SA 506 (A); *Masiba v Constantia Ins Co Ltd* 1982 (4) SA 333 (C) at 343; Van Rensburg *Normatiewe Voorsienbaarheid* 31 et seq; Van der Walt & Midgley *Delict* 208–10; Boberg *Delict* 445, 447; cf Van der Merwe & Olivier *Onregmatige Daad* 216 et seq, 223–4. For criticism of reasonable foreseeability, see McKerron *Delict* 132.

[239] Para 11.5.4.1.

[240] In determining negligence, the enquiry is whether the reasonable person in the position of the defendant would have foreseen loss and would have taken steps to prevent it (eg *Kruger v Coetzee*1966 (2) SA 428 (A) at 430). Limitation of liability does not involve the latter part of the enquiry (prevention of damage through reasonable steps). Cf Neethling & Potgieter *Delict* 202.

[241] Van der Walt & Midgley *Delict* 208 interpret case law as follows: 'The reasonable foreseeability test ... limits liability to those factual consequences which a reasonable person in the position of the defendant would reasonably have foreseen. It is not necessary that all the consequences of the defendant's conduct should have been foreseen: only the general nature or the kind of harm which actually occurred must have been reasonably foreseeable. The exact extent or precise manner of occurrence need not have been reasonably foreseeable. However, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being far-fetched.' Van Rensburg *Normatiewe Voorsienbaarheid* 56 suggests the following test: '[W]as the consequence, as well as the causal progression between the act and the consequence at the time of the act foreseeable with such a degree of probability that the consequence can, in the light of the circumstances, reasonably be imputed to the alleged wrongdoer?' (our translation). In *Smit v Abrahams* 1992 (3) SA 158 (C) at 165 the following formulation from *The Wagon Mount (No 2) (Overseas Tankships) (UK) Ltd v Miller Steamship Co (Pty) Ltd* 1967 (1) AC 617 (PC); 1966 (2) All ER 709) was accepted: 'real risk, one which would occur to the mind of a reasonable man in the defendant's position and which he would not brush aside as far-fetched'.

[242] Para 4.5.

[243] Subordinate to the flexible approach to legal causation (para 11.5.4.1).

[244] Cf *Brown v Hoffman* 1977 (2) SA 556 (NC); *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 705; Neethling 1985 *THRHR* 250. It would be untenable to hold the defendant liable for all damaging consequences in the case of no-fault or risk liability. See, however, Van der Merwe & Olivier *Onregmatige Daad* 493.

[245] Cf in general Van der Walt & Midgley *Delict* 207–8; Van Oosten 1982 *De Jure* 244–50; 1983 *De Jure* 43–6, 54–5; Boberg *Delict* 441, 448–9; Neethling & Potgieter *Delict* 206–8 and the following cases: *Kantey & Templer (Pty) Ltd v Van Zyl* 2007 (1) SA 610 (C) at 624–5; *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA) (on whether suicide consititutes an actus novus interveniens); cf *Minister of Safety and Security v Madyibi* 2010 (2) SA 356 (SCA); *Mafesa v Parity Versekeringsmpy Bpk* 1968 (2) SA 603 (O); *Alston v Marine and Trade Ins Co Ltd* 1964 (4) SA 112 (W); *Fourie v Hansen* 2001 (2) SA 823 (W); *Ebrahim v Minister of Law and Order* 1993 (2) SA 559 (T); *Napier v Collett* 1995 (3) SA 140 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A); *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W); *Gibson v Berkowitz* 1996 (4) SA 1029 (W); *Vigario v Afrox Ltd* 1996 (3) SA 450 (W); *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA); *S v Mokgethi* 1990 (1) SA 32 (A).

[246] It can be brought about by culpable conduct by the plaintiff him- or herself or by a third party or by natural events.

[247] Suppose X administers poison to Y's horse but, before it dies, it is shot and killed by Z. Z's conduct is a novus actus interveniens.

[248] Cf the facts in *Mafesa v Parity Versekeringsmpy Bpk* 1968 (2) SA 603 (O): M's leg was fractured and, whilst his leg was still in a cast, he was discharged from hospital and moved about on crutches. M was, however, not careful enough: he slipped and fell. His leg was fractured again and his recovery delayed for six months, increasing the medical expenses. The second fall can be described as a novus actus. Cf, however, *Smith-Wright v Van der Linde* Corbett & Buchanan I 454.

[249] 'Whether or not a new intervening cause relieves the original actor of liability for the consequence of his act is one aspect of the broader enquiry into legal causation ... . It might, in some instances, have the effect of "severing the legal *nexus* with the result that the consequence should not be imputed to the [original] actor" (Neethling, Potgieter and Visser *Law of Delict* 4th ed (2001) at 205) notwithstanding that

the causative link remains factually intact' (*OK Bazaars (1929) Ltd v Standard Bank of South Africa* 2002 (2) SA 688 (SCA) at 699).

[250] In the event of the flexible approach, the question is, therefore, whether the novus actus between the defendant's conduct and the relevant consequence has been such that the consequence cannot be imputed to the defendant on the basis of policy, reasonability, fairness and justice; in applying the direct consequences test, the question is whether the novus actus breaks the 'directness' of the consequence which is required for liability; and in the event of foreseeability, the question is whether the novus actus influences the degree of probability of the foreseeability to such an extent that the consequence and the causal course of events were not reasonably foreseeable (see Neethling & Potgieter *Delict* 207 and the case law referred to there).

[251] '[T]he test for legal causation is, in general, a flexible one. When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the new act occurring will clearly play a prominent role ... . If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability' (*OK Bazaars (1929) Ltd v Standard Bank of South Africa* 2002 (2) SA 688 (SCA) at 699).

[252] See in general Neethling & Potgieter *Delict* 208–10; Van der Walt & Midgley *Delict* 209; Van der Merwe & Olivier Onregmatige *Daad* 211 et seq; Van Rensburg *Normatiewe Voorsienbaarheid* 59–60, *Juridiese Kousaliteit* 278–84.

[253] The principles pertaining to egg-skull cases extend a defendant's liability. The initial damage must have been reasonably foreseeable (cf Boberg *Delict* 193). The entire matter should probably be dealt with within the framework of the flexible criterion for legal causation (para 11.5.4.1).

[254] This approach is derived from the English case *Dulieu v White* [1902] 2 KB 669 at 679: 'If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.' Cf also *Wilson v Birt (Pty) Ltd* 1963 (2) SA 508 (D) at 516, where it was held that 'once the variety of damage which has in fact taken place could reasonably have been foreseen then the fact that the particular plaintiff is peculiarly prone to more excessive injury is not relevant to a decision of the defendant's liability'. In casu W had been stabbed with a knife and part of his skull bone removed a few years before. W was then struck on the head by a pole which was negligently caused to fall on his head. The former injury had the result that he suffered more serious injuries than would otherwise have been the case. The court held the defendant liable for the full extent of the injury despite the fact that it may have been partially attributable to the weak spot on the plaintiff's head. Cf also *Potgieter v Rondalia* 1970 (1) SA 705 (N) (plaintiff's weak heart); *Boswell v Minister of Police* 1978 (3) SA 268 (E) (high blood pressure); *Masiba v Constantia Ins Co Ltd* 1982 (4) SA 333 (C) (high blood pressure). Cf also *S v Van As* 1976 (2) SA 921 (A); *S v Bernardus* 1965 (3) SA 287 (A); Boberg *Delict* 305–8. In *Smit v Abrahams* 1992 (3) SA 158 (C) the 'talem-qualem' rule was also applied to a case where the plaintiff, owing to financial inability, was unable to purchase a substitute vehicle but was compelled to hire one. See also the following cases: *Charles v Malherbe, Bosch & Co Ltd*1949 (3) SA 381 (C); *Ntuli v Hirsch and Adler* 1958 (2) SA 290 (W); *Muller v Govt of the RSA* 1980 (3) SA 970 (T); *Davidson v Bonafede* 1981 (2) SA 501 (C); *Incorporated General Ins Ltd v Saayman* 1982 (1) SA 739 (T); *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (E); *Modimogale v Zweni* 1990 (4) SA 122 (B); *Smit v Abrahams* 1992 (3) SA 158 (C) at 171; *Zweni v Modimogale* 1993 (2) SA 192 (BA); *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) at 62, 64–5; *Gibson v Berkowitz* 1996 (4) SA 1029 (W) at 1048–50 (where the plaintiff was a typical 'thin skull' case in the emotional and psychological sense) (cf Neethling & Potgieter 1997 *THRHR* 548–50; Neethling 1998 *THRHR* 342; 2000 *TSAR* 10; Dendy 1994 *JBL* 17.

[255] Cf Van der Merwe & Olivier *Onregmatige Daad* 212. It is the view of Van Rensburg *Normatiewe Voorsienbaarheid* 59 et seq that the test of reasonable foreseeability is able to explain these cases. The same approach is followed in *Smit v Abrahams* 1992 (3) SA 158 (C) at 180.

[256] Van der Walt & Midgley *Delict* 206 submit that the principle of liability for unforeseeable or abnormal personal injuries ('you must take your victim as you find him [or her]') is inherent in the direct consequences theory (para 11.5.4.3). It is, of course, also possible that a case is so exceptional that the law would not want to hold a defendant liable for the loss sustained despite the fact that it was a direct consequence. Cf, eg, *R v John* 1969 (2) SA 560 (RA).

[257] In regard to factual causation, Snyders JA stated in *Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at 6: 'A plaintiff who enforces a contractual claim arising from the breach of a contract needs to prove, on a balance of probability, that the breach was a cause of the loss' and in n 1: 'The test for factual causation is the same in delictual and contractual cases, see *Vision Projects (Pty) Ltd v Cooper Conroy Bell & Richards Inc* 1998 (4) SA 1182 (SCA) at 1191'. Cf on 'limitation of liability' in the contractual setting, the example by De Wet & Van Wyk *Kontraktereg en Handelsreg* 226–7 and generally

Joubert *Contract* 251; Lubbe & Murray *Contract* 624; *Emslie v African Merchants Ltd*1908 EDC 82; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; Joubert 1972 *THRHR* 65.

[258] Cf Van Aswegen *Sameloop* 196.

[259] Cf Joubert *Contract* 251 and Christie & Bradfield *Contract* 575 respectively.

[260] Cf also para 3.4.4; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550; *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) at 818–19; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 580–1; *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 125–6; *Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at 5. Cf the reference to Pothier by Lubbe & Murray *Contract* 625; Wessels *Contract* II 848–52, 857–72. See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687: 'To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage (*ibid*.) and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to *(a)* those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and *(b)* those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach (*Shatz Investments (Pty) Ltd v Kalovyrnas*, 1976 (2) SA 545 (AD) at p. 550). The two limbs, *(a)* and *(b)*, of the above-stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of *Hadley v Baxendale,*(1984) 156 ER 145, which read as follows (at p. 151): ''Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'' As was pointed out in the *Victoria Falls* case, *supra*, the laws of Holland and England are in substantial agreement on this point. The damages described in limb *(a)* and the first rule in *Hadley v Baxendale* are often labelled ''general'' or ''intrinsic'' damages, while those described in limb *(b)* and the second rule in *Hadley v Baxendale* are called ''special'' or ''extrinsic'' damages.' See also Eiselen *Specific Performance* 250 et seq.

[261] This actually refers to reasonable foreseeability. See *Bruce v Berman* 1963 (3) SA 21 (T): '[U]nless one can say that the defaulting party should have foreseen the consequences of his breach one can hardly be heard to contend that the loss can be reasonably said to flow naturally'.

[262] Examples are the loss of interest on money not timeously received; the loss of the lease value of premises, but not the fact that, as a result of breach of contract, the business on the premises can be sold only at a reduced price (*Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550); the loss of an architect's time and work in the preparation of plans because of a failure to transport the plans safely, but not the loss of a chance to win a prize in a competition for architects (*Stent v Gibson Bros* (1888) 5 HCG 148); the loss sustained where property was sold in execution at less than its value as a result of breach of contract to obtain payment on a promissory note and to pay a debt (*Steenkamp v Du Toit* 1910 TPD 171); the cost to demolish a building flows naturally from a breach of contract to supply good quality bricks and cement (*Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*1977 (3) SA 670 (A) at 688; *Evans and Plows v Willis and Co* 1923 CPD 496); the cost of providing a pipe and water in a case of failure to do so, but not the loss of profit because the premises could not be used as a camping site (*Graham v McGee* 1949 (4) SA 770 (D)); the difference between the contract price and the market value in the case of failure to deliver the thing or guarantee for the purchase price in terms of a contract of sale (*Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 879–80; *Mia v Verimark Holdings* [2010] 1 All SA 280 (SCA) at 288); the cost of support of a child flowing from a failure to execute an agreed-upon sterilization procedure (*Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 588); future thefts flowing from negligently auditing a company's books, but not interest on the company's overdraft (*Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 581–2, 593); the loss of the charter hire of the ship, cost of temporary repair work on the ship to enable it to go back into service and the cost of redoing of work which was done while the ship was afloat in the case of a failure to make a dry-dock available for the repair of a ship (*Owner of MV Snow Crystal v Transnet Ltd t/a National Ports Authority* [2007] 2 All SA 426 (C) at 431–7; *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 125–7); interest a temporae morae where debtor is in mora with the payment of a sum of money (*Scoin Trading (Pty) Ltd v Bernstein* 2010 (2) SA 118 (SCA) at 121–2); the loss of rental and legal cost of rectification of lease where attorney fails to insert orally agreed rental in written lease (*Sandlundlu (Pty) Ltd v Shepstone & Wylie Inc* [2010] JOL 26565 (SCA) at 10–11).

[263] In case law, terminology is employed which suggests that the direct consequences theory (para 11.5.4.3) is applicable here. See, eg, *Emslie v African Merchants Ltd* 1908 EDC 82 at 90 and *Natal Shipping and Trading Co Ltd v African Madagascar Agencies Ltd* 1921 TPD 530 ('direct, proximate and natural result'); *Lavery v Jungheinrich* 1931 AD 156 ('probable consequence') and at 174 ('direct pecuniary loss'). Cf also Lee & Honoré *Obligations* 62 ('natural and direct consequences'). However, in effect, all of these cases deal with foreseeable loss. Cf *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550. For criticism see Joubert *Contract* 251.

[264] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 581: 'That approach, postulating as it does not a likelihood (at the upper end of the scale) of the harm complained of occurring but (at the lower end) a realistic possibility thereof, appears to me to be sensible and sound. Parties cannot contemplate what they cannot foresee. In the end it will usually turn on the degree of foreseeability of the kind of harm incurred (compare *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 43–5). What matters to the law is, of course, not infinite but reasonable foreseeability. Leaving aside a typical situation (such as, for instance, a circumstance which was foreseeable by only one of the parties or only at the time of breach and not *also* at the time of contract), what is required to be reasonably foreseeable is not that the type of event or circumstance causing the loss will in all probability occur but minimally that its occurrence is not improbable and would tend to follow upon the breach as a matter of course.' In this case the court held that the defendant, a firm of auditors, breached the contract of mandate of auditing the plaintiff's financial statements for the 1993 financial year by failing to appreciate the significance of and failing to pursue the unusual features and discrepancies in the plaintiff's books. M, the financial manager of the plaintiff, had at that stage stolen some money from his employer and continued to do so after the audit. The court held that the loss suffered (the thefts by M after the audit which could not be redeemed from M) was general damages (at 582). Dishonesty was one of three conceivable and predictable reasons why the discrepancies had occurred (the other being an innocent explanation and neglect) and dishonesty was thus a realistic possibility. See further Kerr *Contract* 805–13; *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 125–7. The court stated (at 126): 'To sum up therefore, to answer the question whether damages flow naturally and generally from the breach one must enquire whether, having regard to the subject-matter and terms of the contract, the harm that was suffered can be said to have been reasonably foreseeable as a realistic possibility.'

[265] For example, an infringment of A's business reputation caused by the fact that B has supplied him with defective products which he again sells to his clients (*Lavery and Co Ltd v Jungheinrich* 1931 AD 156); an infringement of a person's creditworthiness in that the bank erroneously dishonours his cheque (*Trust Bank of Africa Ltd v Marques* 1968 (2) SA 796 (T); the fact that A can sell his business only at a lower price after B has committed breach of contract by allowing a competing business in the same building (*Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A)); A's loss of harvest because of B's failure to repair his tractor in time (*North and Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A)); the loss of profit in that a ship's owner lost a crate containing spares for a sawmill, resulting in the sawmill's coming into operation only a year later (*British Columbia & Vancouver's Island Spar, Lumber and Saw-Mill Co Ltd v Nettleship* 1868 LR 3 CP 499); interest on an increased overdraft (*Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 593). Cf also Lubbe & Murray *Contract* 626: '[C]an it be said that extrinsic losses [special damage] are those which occur because of a particular interest which a specific creditor might have in performance by a debtor which goes beyond the interest in performance normally at stake in such cases?'

[266] The distinction between general and special damage is relative. Lubbe & Murray *Contract* 625 quote from the American decision *Kerr SS Co Inc v Radio Corporation of America* 245 NY 284, 157 NE 140 (Ct App 1927): '[D]amage which is general in relation to a contract of one kind may be classified as special in relation to another. If A and B contract for the sale of staple goods, the general damage on breach is the difference between the market value and the price. But if A delivers to X a telegram to B in cipher with reference to the same sale, or a letter in a sealed envelope, the general damage upon the default of X is the cost of carriage and no more. As to him the difference between price and value is damage to be ranked as special, and therefore not recoverable unless the damage is disclosed.' Cf further *Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd* 1977 (3) SA 670 (A) at 687; *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 126: 'In the case of ''special damages'' the foreseeabilty of the harm suffered will be dependent on the existence of special circumstances known to the parties at the time of contract'; *Southern Africa Enterprise Development Fund Inc v Industrial Credit Co of South Africa* 2008 (6) SA 468 (W) at 477–8; *Mia v Verimark Holdings* [2010] 1 All SA 280 (SCA) at 286–9; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 287–91.

[267] See, eg, Kerr *Contract* 811: 'Thus some matters of common experience are so obvious that if they were not in fact contemplated or foreseen they are deemed to have been within the contemplation or

foresight of the parties. For example, the price of goods sold is subject to variation: therefore if I do not deliver the thing I have sold and the aggrieved party buys a similar thing at the ruling price which is in excess of the price originally agreed upon with me I must make good his loss.' See para 12.7.2 on the market-price rule. Cf further Kerr op cit 812–13 on the role of the 'habits of the community' and special circumstances familiar to both parties. Cf also *Whitfield v Phillips* 1957 (3) SA 318 (A) at 329 on the profitable resale of a res vendita which normally is not in the parties' contemplation, whereas loss of other profit (which involves uncertainties) can indeed be within their contemplation.

[268] See on positive and negative interesse para 4.3. See on contemplation in the case of negative interesse, Sharrock 1985 *TSAR* 208; McLennan 1999 *SALJ* 522; *Van der Watt v Louw* 1955 (1) SA 690 (T) (seller who cancelled because of purchaser's failure to pay the price, cannot recover compensation for transporting his implements to the farm as it was not in the contemplation of the parties); *Inhambane Oil and Mineral Development Syndicate v Mears and Ford* 1906 SC 250; *Trichardt v Van der Linde* 1916 TPD 148; *Acton v Lazarus* 1927 EDL 367 at 372. Sharrock loc cit criticizes the decision in *Probert v Baker* 1983 (3) SA 229 (D) (see para 4.4.3 for the facts) because the court failed to give sufficient attention to the matter of contemplation of damage. Sharrock op cit requires foreseeability of two matters, viz that the plaintiff would incur expenses and that the expenses would be wasted. See further *Svorinic v Biggs* 1985 (2) SA 573 (W) at 580 and also n 262 above.

[269] 1931 AD 156 at 169. Cf further *Thompson v Barclays Bank DCO* 1965 (1) SA 365 (W), 1969 (2) SA 160 (W).

[270] *Lavery and Co Ltd v Jungheinrich* 1931 AD 156 at 169: '[W]hether at the time when the contract was made, such damage can fairly be said to have been in the actual contemplation of the parties or may reasonably be supposed to have been in their contemplation, as a probable consequence of a breach of the contract ... . It may also be possible for a Court to come to such a conclusion on consideration merely of the subject matter and of the terms of the contract. But in most cases such special damages would entirely depend on special circumstances which would have to be proved before a Court could possibly say that such damage can reasonably be supposed to have been within the contemplation of the parties as the probable consequence of a breach of the contract.' Cf further *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462; *Dennill v Atkins* 1905 TS 282; *Steenkamp v Du Toit* 1910 TPD 171; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 (loss of profits resulting from failure to provide electricity, in the contemplation of the parties); *Lazarus Bros v Davies and Kapmann* 1922 OPD 88; *Slotar and Sons v De Jongh* 1922 TPD 327; *Probart v SAR & H* 1926 EDL 205; *Bower v Sparks, Young and Farmer's Meat Industries* 1936 NPD 1; *Jockie v Meyer* 1945 AD 354; *Bayley v Harwood* 1954 (3) SA 498 (A); *Whitfield v Phillips* 1957 (3) SA 318 (A) (loss of profits resulting from failure to deliver farm in the contemplation of the parties); *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 (4) SA 391 (D); *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C); *Katzenellenbogen v Mullin* 1977 (4) SA 855 (A); *Buys v Lennox Residential Hotel* 1978 (3) SA 1037 (C); *Watt v Standard Bank National Industrial Credit Corp*1982 (2) SA 47 (D); *Administrator, Natal v Edouard* 1990 (3) SA 581 (A). Cf also Kerr *Contract* 803, 805–13; *Koufos v C Czarnikov Ltd* [1969] 1 AC 350 (HL).

[271] See *North and Son v Albertyn* 1962 (2) SA 212 (A) at 215 (mere foreseeability (contemplation) is insufficient; the parties must have entered into the contract on the basis of the special circumstances). Cf, however, Joubert *Contract* 253: 'It is possible that the parties contemplated some damage and then contracted in respect of that damage, but in the ordinary case the parties presume performance and even if they do cogitate on the possibility of a breach they do not normally contract in respect thereof.' See also Joubert *Essays in Honour of Kahn* 173 on the differences between contemplation and convention. Cf further para 12.18 and Kerr *Contract* 813–14 et seq.

[272] 1976 (2) SA 545 (A). Here X rented premises from Y in order to conduct his business. Y committed breach of contract, impairing X's business. X alleged that, as a consequence, he could now only sell the business at a lower price than if Y had not committed breach of contract.

[273] Affirmed in *Mia v Verimark Holdings* [2010] 1 All SA 280 (SCA) at 286. Joubert *Contract* 253; 1972 *THRHR* 69 submits that there is authority for the view that the moment of breach of contract can be considered despite the fact that the damage was unforeseeable at the time the contract was concluded: *Outeniqua Produce Agency v Machanick* 1924 CPD 315; cf further Christie & Bradfield *Contract* 576. Cf also De Wet & Van Wyk *Kontraktereg en Handelsreg* 227–8 who submit that the damage must be foreseeable at the time of breach of contract. The example then given does not bear them out, because the innocent party would also be able to recover his or her loss ex delicto. Kerr *Contract* 819 advocates a flexible approach, but suggests the moment of conclusion of the contract as point of departure. For reasons of fairness, he will accept the moment of breach of contract where the debtor intentionally commits breach of contract.

[274] This submission has merit. After all, breach of contract cannot be determined without reference to the conclusion of a contract and therefore it is logical to allow it a role in judging breach of contract and its

consequences. It may sometimes be unfair to hold a party liable for consequences which were not foreseen or foreseeable at the moment of conclusion of the contract. The viewpoint that the date of conclusion of the contract is the relevant moment applies in English law (see, eg, *Hadley v Baxendale*(1854) 156 ER 145) as well as American law. Cf Joubert *Contract* 253 n 241 for the position in other systems.

[275] Cf, eg, MacKeurtan *Sale of Goods* (3rd ed) 337 n 18; Norman *Sale* (4th ed) 449; Kerr *Contract*815; Mulligan 1956 *SALJ* 37–40. See also Conradie *'Convention' en 'Contemplation'* 115–46. See, however, Norman *Sale* 258.

[276] In *Mia v Verimark Holdings* [2010] 1 All SA 280 (SCA) at 286 the SCA once again refused to solve the problem regarding 'contemplation' and 'convention' because in casu only general damage was involved. Cf further *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 582; *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) at 126; para 11.5.5.3.

[277] Cf *Victoria Falls and Tvl Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Whitfield v Phillips* 1957 (3) SA 318 (A) at 328; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 580.

[278] eg Joubert *Contract* 253; De Wet & Van Wyk *Kontraktereg en Handelsreg* 227–8; Lubbe & Murray *Contract* 626. Cf, however, Kerr *Contract* 805, who avers that the damage must be in the contemplation of both parties. However, he makes provision for the situation where the one party did in fact foresee the damage whilst the other party should have foreseen it.

[279] It will probably only be in exceptional cases that the debtor (who commits breach of contract) knew or should have known of special circumstances of which the creditor had no knowledge (or could reasonably not have had any knowledge).

[280] Cf Kerr *Contract* 816–17: '[W]here the parties contemplate loss of different extents, damages may be given up to the lesser amount which the defaulting party ... might have foreseen.' He refers to English authority and *Whitfield v Phillips* 1957 (3) SA 318 (A). It appears, however, that where the party who commits breach of contract foresees more damage than the innocent party, he or she should in fairness be held liable for the larger amount. See, however, Conradie *'Convention' en 'Contemplation'*156–9.

[281] See, eg, *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd* 1977 (3) SA 670 (A); *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 581.

[282] See Christie & Bradfield *Contract* 578 and Kerr *Contract* 825, who refer to *BAT Rhodesia Ltd v Fawcett Security Organisation (Salisbury) Ltd* 1972 (4) SA 103 (R) and the English case *The Heron II*[1967] 3 All ER 686 (HL). Cf also Lubbe & Murray *Contract* 628.

[283] Para 11.5.4.4.

[284] See Kerr *Contract* 826. Cf, eg, *Dennill v Atkins* 1905 TS 282 at 288–9; *Victoria Falls and Tvl Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22. Contra Conradie *'Convention' en 'Contemplation'* 158–9.

[285] De Wet & Van Wyk *Kontraktereg en Handelsreg* 227 observe that the distinction between general and special damage, and Pothier's viewpoint as applied by our courts, are artificial, theoretically unsound and practically useless. They refer to incorrect decisions: *Lazarus Bros v Davies & Kamann*1922 OPD 88; *Mannix & Co v Osborn* 1921 OPD 138. Lubbe & Murray *Contract* 627 submit that the convention principle does not rely on strong positive-law authority because there are various decisions of the Appellate Division where damages were awarded without expressly referring to this principle. By employing the convention principle, our law also deviates from important comparable legal systems. Usually an agreement to compensate damage rests on a fiction since the usual test for tacit terms (the officious bystander test—cf Christie & Bradfield *Contract* 577) will normally produce a negative answer. It is, of course, conceivable that the parties can expressly or tacitly make provision for compensation of loss, but this will occur only in exceptional cases. See also Kerr *Contract* 712 who observes that there is no case in which the convention principle was in fact applied, whereas there are many Appellate Division cases which have been incorrectly decided should convention really have played a role. Cf idem for his discussion of a few examples. See further Joubert *Essays in Honour of Kahn* 173.

[286] In a sense the two principles are not in conflict as convention cannot exist without contemplation: one cannot agree to compensate loss without actual or presumed knowledge.

[287] Van der Merwe et al *Contract* 432. In *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) the court interpreted the facts in a manner exceptionally favourable towards the plaintiff in order to point out that the requirements of the convention principle have been met. See also De la Harpe 2003 *THRHR* 498.

[288] *Diktaat*.

[289] *Kontraktereg en Handelsreg* 228.

[290] De Wet & Van Wyk *Kontraktereg en Handelsreg* 228 n 158 refer to the following cases in which a fair result was reached without applying Pothier's theory on an agreement to compensate loss: *Silbereisen Bros v Lamont* 1927 TPD 382; *Acton v Lazarus* 1927 EDL 367; *Lampakis v Dimitri* 1937 TPD 138; *Durr v Buxton White Lime Co* 1909 TS 876; *Joubert Bros v Abrahamson* 1920 CPD 103; *Richter v Van Aardt* 1917 OPD 85; *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462; *National Butchery Co v African Merchants* 1907 EDC 57; *Lazarus etc v Hayman and Co* 1907 TS 106; *Steenkamp v Du Toit* 1910 TPD 171.

[291] See para 11.5.4.1.

[292] See the obiter remarks of Nienaber JA in *Thoroughbred Breeders' Association v Price Waterhouse* 2001(4) SA 551 (SCA) at 582–3. The competence of the parties to regulate, limit or expand the consequences of any prospective breach is an important factor present in contract which is absent in those areas where the flexible approach is already employed. See also the reaction of the majority (at 597). See also De la Harpe 2003 *THRHR* 498–9.

[293] Cf in general Boberg *Delict* 591–4; Koch *Lost Income* 168–70; Neethling & Potgieter *Delict* 237–8; Loubser & Midgley (eds) *Delict* 400; paras 2.4.1, 2.4.12 and 2.4.13.

[294] Paras 2.4.1, 2.4.12 and 2.4.13.

[295] 1974 (4) SA 906 (A) at 915. See also *McClean v President Ins Co Ltd* Corbett & Buchanan III 68, 78–9; *Lende v Goldberg* 1983 (2) SA 284 (C); *Nkwenteni v Allianz Ins Co Ltd* 1992 (2) SA 713 (Ck) at 716: '[I]f the only measure of income earned by a plaintiff is derived from illegal activity, then there is nothing to go on to establish his loss of future earning capacity.'

[296] Rumpf CJ explained (at 915) that the word 'colourless' refers to activities that were neither immoral nor criminal per se.

[297] See Dendy 1998 *THRHR* 565–81 for a detailed discussion of the *Dhlamini* case. He criticizes this decision on inter alia the following two grounds: *(a)* the enforceability of the underlying income-producing transactions is not always appropriate as a test for the recoverability of damages in delict for remunerative loss, and *(b)* the denial of compensation in the categories mentioned in *Dhlamini* is incompatible with the governing principle that in cases of remunerative loss, damages must be awarded for loss of earning capacity. Boberg *Delict* 591 states that a thief whose capacity to proceed with his or her criminal activities is affected clearly has no action for damages. However, the matter is much more complicated and he poses the following questions: *(a)* Is all unlawful income non-compensable despite the absence of moral considerations? *(b)* What is the correct legal basis for non-compensability? *(c)* To what extent should the innocent dependants of a violator of the law be prejudiced? *(d)* Can someone who earns income unlawfully nevertheless claim damages, not on the basis of income unlawfully earned but on the basis of impaired earning capacity?

[298] Cf Van der Merwe & Olivier *Onregmatige Daad* 186, who state that a person has no right to earn income through an unlawful activity. Reinecke 1976 *TSAR* 32–3; 1988 *De Jure* 237 submits that loss is absent since the expectation to earn money in an unlawful manner does not form part of someone's earning capacity. It appears that both these views are correct. Naturally the absence of damage and wrongfulness is not based on exactly the same considerations. Cf para 2.4.8; Visser 1991 *THRHR* 792; Davel 1992 *De Jure* 83; Visser 2003 *THRHR* 653.

[299] Cf Boberg *Delict* 594 (see also 530–1, 538–40, 575–7); *Lebona v President Versekeringsmpy Bpk* 1991 (3) SA 395 (W) at 402–3.

[300] See *Nkwenteni v Allianz Ins Co Ltd* 1992 (2) SA 713 (Ck) at 720–2.

[301] Where a criminal has no *earning capacity* other than the one based on unlawfulness, he or she will, of course, not recover any damages. The usual case, however, is that of someone whose *income*is, technically speaking, fully or partially earned in an illegal manner. In this situation it is usually quite possible to determine earning capacity without evidence of income unlawfully earned by considering the plaintiff's general capacity to earn future income in a lawful manner. The existence of unlawful activities or unenforceable income may indeed be relevant in that it may serve to reduce the amount of damages recoverable by the plaintiff. See further Claasen 1984 *THRHR* 441; 1986 *THRHR* 343–4. Cf, however, also *Santam Ins Co v Fick* (Appellate Division 24 May 1982, unreported—cf Koch *Lost Income* 170), where, apparently, damages were awarded for loss of income from a scheme intended to evade tax. Also of importance is *Metro Western Cape v Ross* 1986 (3) SA 181 (A). Here it was held that the fact that a general dealer ran a business without a certificate or licence as required by the Registration and Licensing of Business Ordinance 15 of 1953 (Cape) did not affect the enforceability of the contracts between the trader and his clients. The *Dhlamini* case (1974 (4) SA 906 (A)) above is distinguished on the basis that the legal provision in that case was promulgated for reasons of public policy whereas in casu it was not the case. The *Metro* case nevertheless casts doubt on the *Dhlamini* case, although the court's attempt to distinguish

the *Dhlamini* case is not very convincing (see, eg, Boberg 1986 *BML* 20; Davel *Afhanklikes* 54). See further *Dhlamini v MVA* 1992 (1) SA 802 (T); see n 313 below.

[302] 1980 (3) SA 1211 (SE) (the case was decided in 1978).

[303] See n 295 above.

[304] This decision was upheld on appeal (see 1979 (3) SA 953 (A)) and also confirmed in *MBA v Southern Ins Ass* 1981 (1) SA 122 (Tk) (no damages where breadwinner earned money from unlawful taxi business).

[305] 1983 (2) SA 444 (C).

[306] The deceased peddled wood without a licence. Four days before his death, he sent a note to the authorities, applying for a permit to sell wood. He was informed by the authorities to apply for a hawker's licence in the prescribed manner. The evidence showed that he would probably have obtained his licence had his untimely death not occurred. Cf also *Mankebe v AA Mutual Ins Ass* 1986 (2) SA 196 (D) on 203, where the breadwinner was also a hawker without a permit: 'The right of a dependant to recover damages resulting from the death of the deceased who derived his or her income from carrying on an illegal trade or business will, in my view, depend on the nature of the trade or business carried on and the nature of the prohibition against such trade or business and the reason therefor ... . [M]any of the otherwise lawful activities of citizens of this country are rendered unlawful by their failure to obtain a permit or similar authorisation. Where such failure does not constitute a danger or potential danger to the public, as it did in the cases of *Dhlamini* [1974 (4) SA 906 (A)] and *Ferguson* [1985 (4) SA 843 (A)], I do not think that public policy demands that the activities carried on by such persons be declared invalid or ''nie-regsgeldig nie''.' See further on this decision Dendy 1986 *Annual Survey* 202–4.

[307] 1985 (4) SA 843 (A). See 1985 (1) SA 207 (C) for the judgment of the court a quo.

[308] See Claasen 1986 *THRHR* 347; Davel 1986 *De Jure* 167; 1992 *De Jure* 83; Dendy 1987 *SALJ*248; 1999 *THRHR* 34; Roos & Clarke 1987 *THRHR* 96. Cf also Vorster 1985 *De Jure* 17; Claasen 1984 *THRHR* 439.

[309] 1991 (3) SA 391 (W). See also *Dhlamini v MMF* 1992 (1) SA 802 (T) at 806.

[310] On the facts the court (at 405) found it unnecessary to refer expressly to *Dhlamini v Protea Ass Co Ltd* 1974 (4) SA 906 (A) and *Santam Ins Ltd v Ferguson* 1985 (4) SA 843 (A).

[311] 1994 (2) SA 680 (TkA) at 684. See Dendy 1999 *THRHR* 174–5.

[312] Goldin JA (at 683–4) advanced various reasons for this statement. First, it would punish the dependants and relieve the wrongdoer. Second, after the death of the breadwinner, it is impossible to ascertain possible factors pointing against the violation of public policy. Also, because the breadwinner is dead, he would not indirectly benefit from his illegal activities. The court held further that the duty to maintain cannot be circumvented by a parent alleging that his sole source of income is an illegal one. The illegality should, however, be considered in assessing the quantum. In casu the deceased was a senior officer in Transkei of uMkhonto weSizwe, the military wing of the African National Congress. The fact that the ANC was unbanned in 1990 was a factor that played a role, since the illegal activity would not have continued for much longer.

[313] See, eg, Claasen 1986 *THRHR* 345–6. According to Dendy 1999 *THRHR* 172–3 dependants should succeed in their claim for loss of support on the basis of what the deceased could lawfully have earned had he or she lived, even where it is probable that the deceased would in fact have continued to earn income illegally. An appropriate deduction could then be made from the award of damages to cater for the contingency that the breadwinner's unlawful activities would have been stopped by the authorities sooner or later, or perhaps even that the income-earner may have been imprisoned for his or her unlawful behaviour. See also *Dhlamini v MMF* 1992 (1) SA 802 (T), where the deceased had been employed as a taxi driver and had contravened s 31 of the Road Transportation Act 74 of 1977. The court held that his illegal taxi-driving could be taken into consideration as an indication of his earning capacity. What was uncertain was the time when the deceased would have changed over from illegal to legal taxi driving. The deceased could have earned the same monthly income from legal taxi driving. The court held that a deduction should be made for the contingency of the aforesaid changeover and that a deduction of 30 per cent to provide for general contingencies and the said changeover would be appropriate.

[314] Most writers express marked sympathy with the dependants whose breadwinner earned money for support in an unlawful manner. Cf, eg, Boberg *Delict* 593: '[T]here is no need to visit the deceased's sins upon his dependants. The policy of discouraging illegality and declining to enforce unlawful transactions has no application to them. Already deprived of a tenuous support whose source was beyond their control and may well have caused them more heartache and worry than anything else, are they now also to incur the law's displeasure and be sent away empty handed?' However, it is obvious that the dependant bears the risk attached to unlawful income. The dependant's right of support does not extend so far as to compel the breadwinner to resort to unlawful activities to furnish the necessary support and, therefore, he or she cannot complain if a third party prevents the breadwinner from carrying out unlawful activities. However,

the general earning capacity of the breadwinner is indeed relevant and consequently the decision in *Lebona v President Versekeringsmpy Bpk* 1991 (3) SA 395 (W) deserves approval. See also Neethling & Potgieter *Delict* 237–8; *Dhlamini v MMF* 1992 (1) SA 802 (T). According to Dendy 1999 *THRHR* 37 no distinction should be made between the breadwinners' claims and dependants' actions.

[315] Cf in general Spandau 1975 *SALJ* 31–58; Delport 1982 *MBL* 115; Boberg *Delict* 541; Luntz *Damages* 391–421; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 619; *Stephenson v General Accident Fire & Life Ass Corp Ltd* 1974 (4) SA 503 (RA); *Shield Ins Co Ltd v Hall* 1976 (4) SA 431 (A) at 443–4; *AA Mutual Ins Ass Ltd v Maqula* 1978 (1) SA 805 (A) at 812–13; *Marine & Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 976–80; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 116; Koch 1991 *THRHR* 128–33; Dendy 1990 *Annual Survey* 166–9; Koch 1992 *Quantum Yearbook* 6 et seq.

[316] Para 8.4.

[317] See on changes in the exchange rate of money para 8.4; *Voest Alpine Intertrading Gesellschaft v Burwill SA* 1985 (2) SA 149 (W) at 151.

[318] Para 4.5. See Van der Walt 2002 *SALJ* 649.

[319] See, eg, *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 461, where the future price of oranges was relevant to determine the plaintiff's loss of profit. The principles relating to future expenses (discussed below) are also applicable in the case of contractual damages. Furthermore, inflation-linked adjustments to a salary are relevant when a service contract is unlawfully terminated. Cf also para 12.7.2.3 on increases in the market price of an article that has been sold.

[320] Attention is usually given to the time lapse between the date of the damage-causing event and the date of trial. Cf, however, Koch 1989 *THRHR* 69 on the effect of a delay caused by the trial (especially where judgment is reserved). Obviously a plaintiff can also be prejudiced by such a delay as well.

[321] Cf *General Accident Ins Co of SA v Summers etc* 1987 (3) SA 577 (A) at 613; cf also Reinecke 1988 *De Jure* 236.

[322] See para 8.10. See further *Eden v Pienaar* 2001 (1) SA 158 (W) at 165–7 on 'revalorization' to protect a creditor against inflation.

[323] See also *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T) at 816.

[324] See *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841.

[325] *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 613. Cf also *Phillip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A) at 429 on this principle pertaining to the alienation of a vehicle. Cf, however, Koch 1991 *THRHR* 130, who submits, with reference to *Modimogale v Zweni* 1990 (3) SA 122 (B), that there is scope for considering the replacement value of a motor car at the time of trial as a measure of damages. This view is attractive, though it lacks authority.

[326] It is obvious that, if X buys an article in January 2003 at its market value (R1 000) and it is destroyed a year later when its market value has risen to R1 200, the latter amount is taken as the basis of X's damage and damages. The increase in (nominal) value (resulting from inflation) of a destroyed thing after the damage-causing event will normally not be relevant unless it is considered to be a loss of profit in respect of the use of such object. See in general regarding a contract of sale para 12.15.

[327] Para 13.1.

[328] Cf *Everson v Allianz Ins Co Ltd* 1989 (2) SA 173 (C); *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) at 481.

[329] 1990 (4) SA 833 (A). See also *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T).

[330] See *D'Ambrosi v Bane* 2010 (2) SA 539 (SCA) at 545.

[331] At 840.

[332] The court (at 841) conceded that it is unfair that an innocent plaintiff who has to wait for the compensation has to be paid in money of reduced value, but avers that it is for the legislature to solve the problem. Perhaps the court approached its own task in calculating damages too rigidly. The court is, after all, entitled to consider events between the date of delict and the date of trial (para 6.7.4) and this would provide for inflation to be considered. See also Dendy 1990 *Annual Survey* 168 for criticism: 'With respect, it seems both arbitrary and inconsistent to determine damages for non-patrimonial loss in terms of the value of currency at the date of judgment [para 11.7.5] while assessing pecuniary loss in terms of the purchasing power of money at an earlier time.' Cf further Koch 1991 *THRHR* 128–33 for interesting criticism in the light of the nature of earning capacity ('[t]he assessment of loss of earning capacity is an exercise in valuation, not an adding up of debts'—at 132). See in general McGregor *Damages* 595 et seq. See also Van der Walt 2002 *SALJ* 649 et seq.

[333] Para 11.7.2.1.

[334] See also Luntz *Damages* 398 et seq; Dendy 1990 *Annual Survey* 167.

[335] In, eg, *Snyders v Groenewald* 1966 (3) SA 785 (C) at 788 the court had regard to inflation-linked salary increases to employees of the group to which the deceased belonged and, in calculating the deceased's future salary, the court accepted that such increases would continue. Cf further *Goodall v President Ins Co Ltd* 1978 (1) SA 389 (W) at 506; *Stephenson v General Accident Fire and Life Ass Corp Ltd* 1974 (4) SA 503 (RA) at 506: 'This Court, I think, is entitled to take judicial notice of the fact that there is a continual fall in purchasing power of money today. We are entitled to look back and see what has happened in the past and we are entitled to assume that what has happened in the past is likely to be repeated in the future—to what extent it will be repeated is of course another imponderable'; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 619 (where the court considered it as a type of contingency); *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 362; *Kotwane v Unie-Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O); *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 104; Howroyd & Howroyd 1958 *SALJ* 70; Spandau 1975 *SALJ* 44; Newdigate & Honey *MVA* 157, 168 et seq; Corbett & Buchanan I 95.

[336] See *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 840–1, which relied on the following dictum from *Cookson v Knowles* [1979] AC 556 at 576 (which, according to the court, is also applicable to loss of future income flowing from injury): 'What is relevant here is not inflation in general, but simply increases in the rate of earnings for the job in which the deceased person would probably have been employed. The reason for the increase is irrelevant. There would be no justification for attempting to protect dependants against the effects of general inflation, except to the extent that they might reasonably expect to have been protected by increases in the deceased person's earnings.' In *Hartley*(supra) at 841 the court added: 'Ultimately, in respect of both future loss of support and future loss of earnings, the Court must calculate what such loss is likely to be in rand terms. The expected rate of inflation is only one of the features bearing on this enquiry.' See *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–36; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–60. See also *Moekoena v President Ins Co Ltd* 1990 (2) SA 112 (W). It appears that a court would not be prepared to consider the devaluation of money during the period between delict and trial in order to increase an amount of damages for future loss.

[337] Cf para 6.7.5 on discounting which must neutralize these advantages.

[338] See, eg, *Moekoena v President Ins Co Ltd* 1990 (2) SA 112 (W), where the court declined to consider inflation per se since it had already been considered in calculating the breadwinner's income. Cf, however, Corbett & Buchanan I 51, who, without reference to authority, specify future inflation as a contingency. Cf also idem 49–50 on the role of inflation on the interest rate in discounting and calculation of annuities (para 6.7.5).

[339] 1988 (2) SA 267 (D).

[340] At 271. Although the court did not spell it out in so many words, it cannot merely consider inflation between date of delict and date of trial concerning damages in respect of an operation which lies still further into the future. In order to award full damages, the court (in so far as the evidence proves a probable escalation of future medical costs) must make provision for the cost at the stage when medical treatment will in fact have to be undergone. Cf, eg, *Van der Plaats v SA Mutual Fire & General Ins Co Ltd* 1980 (3) SA 105 (A) at 117; *Protea Ass Co Ltd v Matinise* 1978 (1) SA 963 (A) at 975–6; *Oberholzer v NEGI Co Ltd* Corbett & Honey A3–9. In third-party cases s 17(4)*(a)* of the RAF Act 56 of 1996 makes provision for inflation implicity by stipulating inter alia that the RAF may compensate the third party for medical expenses *after* they have been incurred and on proof thereof (and after furnishing the third party with an undertaking to that effect).

[341] See Visser *Kompensasie en Genoegdoening* 339.

[342] See paras 15.2.3 and 15.3.2.2*(h)* for more detail on this. Cf *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 325; *AA Onderlinge Assuransie Ass v Sodoms* 1980 (3) SA 134 (A); Klopper *Third Party Compensation* 154–7; *Norton v Ginsberg* 1953 (4) SA 537 (A) at 541, 551.

[343] See on this practice in regard to loss of support, Davel *Afhanklikes* 133; *Clair v Port Elizabeth Harbour Board* 1886 5 EDC 311 at 322. Cf further *May v Parity Ins Co Ltd* 1967 (1) SA 644 (D) at 647; *Lutzkie v SAR & H* 1974 (4) SA 396 (W) at 398; *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 77; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA); *Road Accident Fund v Delport* 2006 (3) SA 172 (SCA) at 180. See on inflation in regard to the quantum of satisfaction for an iniuria, Neethling et al *Law of Personality* 109, 121.

[344] Cf *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 841; *Ramakulukusha v Commander Venda National Force* 1989 (2) SA 813 (V) at 847; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 353; *Valentine v Road Accident Fund* [2007] 3 All SA 210 (C) at 220; *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 324–5. See in general Koch 1992 *Quantum Yearbook* 3 et seq; Corbett & Honey lxiii et seq.

[345] 7 *LAWSA* para 29 with reference inter alia to *Norton v Ginsberg* 1953 (4) SA 537 (A) at 541, 551; *May v Parity Ins Co Ltd* 1967 (1) SA 644 (D). Cf also Koch *Lost Income* 72 et seq.

[346] See *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A).

[347] See *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 567. Cf, however, *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 466–7, where the court took notice of prevailing economic circumstances and made its own actuarial calculations. The court refused the leading of actuarial evidence.

[348] The Consumer Price Index (CPI) is usually employed as criterion for the determination of inflation (see in general *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–39). A distinction must be made between cases where future inflation is considered (eg adjustments in salaries and medical costs) and where it is relevant for comparative purposes. In the former case, precision is, of course, impossible and the court has to perform a calculated guess in the light of available evidence, facts of which judicial notice may be taken and common sense (cf also *Stephenson v General Accident Fire & Life Ass Corp Ltd* 1974 (4) SA 503 (RA)—n 335 above). As regards the latter, precision is possible but the calculations should not be taken too far since previous awards are in any event merely a single aid in the process of quantification. Cf in general Klopper *Third Party Compensation* 156–7 and Koch *Lost Income* 295, who suggest a formula using the CPI (the proportional increase in the index from the basis year until the year in which the calculation is made is determined and thereafter multiplied by the comparable amount of money). In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 324–5 it was pointed out that while one should not slavishly rely on the CPI (see also *AA Onderlinge Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 141) it is still a useful guide for assessing the devaluation of money. Cf further *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A) at 116, from which it also appears that courts demand the necessary room for the exercise of discretion. There are some cases in which provision is made for inflation without indicating exactly how it is actually done—eg the *Bailey* case supra; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A); *Bennett v Sun Ins Co Ltd* Corbett & Buchanan I 391. Cf also *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 556, where it was stated that inflation has to be considered 'but not with such an adherence to mathematics as may lead to an unreasonable result'. Newdigate & Honey *MVA* 150 propose a simple percentage adjustment (namely 5 per cent compound annual increase for all damage until 1972 and 10 per cent per annum thereafter). Klopper *Derdeparty*13 submits that the index for the area in which the plaintiff is resident must be used. Cf in general Corbett & Buchanan I 6; *Beverley v Mutual & Federal Ins Co Ltd* 1988 (2) SA 267 (D); Corbett & Honey lxiii–lxv; Van der Walt 2002 *SALJ* 649.

[349] Cf para 14.9 for more detail on when damages are payable in terms of this Act.

[350] See especially Klopper *Third Party Compensation* 215–70 for a comprehensive discussion of the position in terms of the RAF Act 56 of 1996 (and the RAF Amendment Act 19 of 2005). Take note that the discussion below refers to the position after the coming into effect on 1 August 2008 of the provisions contained in the RAF Amendment Act. For the law on claims arising before that date, see Klopper op cit 215–70.

[351] See Rautenbach 2011 *TSAR* 527–40.

[352] Cf *Bhoer v Union Government* 1956 (3) SA 582 (C); *Dominion Ins Co of SA Ltd v Pillay* 1954 (3) SA 967 (N); *South British Ins Co v Hartley* 1957 (3) SA 368 (A); *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC); *Mlomzale v Mizpah Boerdery (Pty) Ltd*1997 (1) SA 790 (C).

[353] Sections 47–54 of the COID Act 130 of 1993 (read with sch 4). Cf s 22(3)*(b)* for the extension of indemnification also to include the cost of medical treatment. Cf on the *suspension* of payment of compensation in specific circumstances, s 72(2)*(a)* of the Nuclear Energy Act 131 of 1993.

[354] Section 8 of the RAF Act 56 of 1996 provided for the appointment of appointed agents. Since May 1997 the system of appointed agents has been discontinued leaving the RAF as the only liable entity dealing with all third party claims. See Klopper *Third Party Compensation* 19 n 3, 20 n 7.

[355] See para 7.5.4 for the different causes of action.

[356] See para 7.5.4.2.

[357] Section 17(1A) of the RAF Act 56 of 1996, read with reg 3, determines that the RAF will compensate for non-patrimonial loss only if the injuries resulted in 30 per cent or more impairment of the claimant (whole person impairment, WPI), or if the injuries fall within one of the following categories: *(a)* serious long term impairment or loss of a body function; *(b)* permanent serious disfigurement; *(c)* severe long term mental or behavioural disturbance or disorder; or *(d)* loss of a foetus. See *Mngomezulu v Road Accident Fund* unreported (4643/2010) [2011] ZAGPJHC 107 (8 September 2011).

[358] Section 17(4A) of the RAF Act 56 of 1996. In the most recent adjustment in GN 34478, Notice No 130 on 29 July 2011, the amount was adjusted to R189 017 with effect from 31 July 2011.

[359] Section 18(1) of the RAF Act 56 of 1996 has been repealed by s 7 of the RAF Amendment Act 19 of 2005 with effect from 1 August 2008. See, however, the decision in *Mvumvu v Minister of Transport and the RAF* unreported (67/2010) [2011] ZACC 1 (17 February 2011) on the validity of s 18(1) in respect of claims arising before 1 August 2008.

[360] As amended by s 7 of the RAF Amendment Act 19 of 2005 with effect from 1 August 2008.

[361] Practically this section means that one must distinguish between two types of employees: *(a)* an employee in the service of the owner or driver of the vehicle whose claim against the RAF is limited; and *(b)* other employees whose claims are not limited in this manner. See for a comprehensive discussion Klopper *Third Party Compensation* 246–64.

[362] This section does not affect any liability of the RAF to pay costs which have been awarded against it in any action.

[363] Or similar statutes in other parts of South Africa.

[364] See on the question of how adjustment or deduction must take place in the event of contributory negligence on the part of the employee *Senator Versekeringsmpy Bpk v Bezuidenhout*1987 (2) SA 361 (A); Koch 1987 *THRHR* 475; *Ngcobo v Santam Ins* 1994 (2) SA 478 (T). Klopper *Third Party Compensation* 260 points out that third-party loss has to be reduced first as a result of contributory negligence (para 11.4), after which the compensation of the Director-General is deducted. See also para 14.9.

[365] See for a comprehensive discussion Klopper *Third Party Compensation* 263–4.

[366] This section does not affect any liability of the RAF to pay costs which have been awarded against it in any action.

[367] Or another Act of Parliament governing the SA National Defence Force in respect of such injury or death.

[368] See *Finlay v Kutoane* 1993 (4) SA 675 (W).

[369] As amended by s 9 of the RAF Amendment Act 19 of 2008, with effect from 1 August 2008.

[370] See s 19*(g)* of the RAF Act 56 of 1996 for a definition of secondary emotional shock (quoted in para 11.2.1 n 91).

[371] The third party can, however, claim from the wrongdoer any damage to property, ie damage to the motor vehicle, spectacles, false teeth, etc—see para 7.5.4.2.

[372] Compensation is not in the nature of damages, but a solatium. See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC); Cohen 2003 *ILJ* 744; Grogan *Dismissal*538; para 12.20.

[373] Sections 188, 189, 189A and 194(1).

[374] Sections 187, 194(3). See *Atkins v Datacentrix (Pty) Ltd* [2010] 4 BLLR 351 (LC).

[375] Section 195 of the Labour Relations Act 66 of 1995.

[376] See for a comprehensive discussion Van Aswegen *Sameloop*. Cf also Neethling & Potgieter *Delict* 255–62; Van der Merwe & Olivier *Onregmatige Daad* 463–85; Hosten 1960 *THRHR* 251; Midgley 1990 *SALJ* 621; Van der Walt & Midgley *Delict* 57–61.

[377] Cf para 7.3.2 on the relationship between the interdict and an action for damages. In *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 (1) SA 548 (T) at 555 it was held that the availability of an action for damages does not exclude the right to an interdict. See *Ngobese v Slatter* 1935 NPD 284 at 287 on the distinction between an action for damages and a claim on the basis of quantum meruit. Cf also Lee & Honoré *Obligations* 114 et seq.

[378] See, eg, the case where X is assaulted, entitling him to satisfaction with the actio iniuriarum and damages with the Aquilian action. See Van Aswegen *Sameloop* 9.

[379] Cf also Hosten 1960 *THRHR* 251.

[380] Cf Van Aswegen *Sameloop* 9. An example would be where the same factual situation would support an action for damages both ex contractu and ex delicto. See para 11.9.7.

[381] See para 7.4 and see on the relevance thereof para 11.9.7. See also para 8.6 on duplication of damages and para 7.4.3 on multiple plaintiffs in a single factual situation.

[382] See also Van Aswegen *Sameloop* 128–9; Neethling & Potgieter *Delict* 256–7; Neethling 1997 *THRHR* 705.

[383] An (intentional) personality infringement. Cf para 5.7 and Neethling et al *Law of Personality* 65 et seq.

[384] Cf *Union Government v Warneke* 1911 AD 657 at 665: 'The difference between the two forms of relief is emphasized by *Voet* (44.7.16), who states that where one and the same act gives ground for both

actions, the receiving of satisfaction for the *injuria* does not bar the claim for patrimonial loss resulting from the *culpa*.' Cf Neethling & Potgieter *Delict* 256.

[385] Cf, eg, *Bennett v Minister of Police* 1980 (3) SA 24 (C).

[386] Sometimes it is erroneously stated that compensation for patrimonial loss can be recovered with the actio iniuriarum (cf, eg, *Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 at 7). See Neethling et al *Law of Personality* 66 et seq for criticism.

[387] Para 9.4.

[388] It may be argued that, in the light of the presence of two different types of damage (patrimonial and non-patrimonial loss—iniuria), two causes of action (cf para 7.5.3) are present here (see, eg, Van Aswegen *Sameloop* 113). A result of this could be that the prejudiced person may, eg, claim for satisfaction first and then two years later institute an action for patrimonial damages—an intolerable situation unless the law of procedure is adapted in order to compel the simultaneous institution of both claims. Cf further Boberg *Delict* 18–20. It must also be borne in mind that although the Aquilian action and the actio iniuriarum are kept separate in theory, in practice damages and satisfaction are claimed simultaneously and that the two actions are seldom mentioned by name (Joubert *Grondslae* 144). This does not mean, however, that the differences between the requirements of the two actions have disappeared (Neethling et al *Law of Personality* 67–8; Neethling & Potgieter *Delict* 256 n 42).

[389] Para 5.6. Cf Olivier *Pyn en Lyding*; Visser *Kompensasie en Genoegdoening*; Neethling & Potgieter *Delict* 256.

[390] Chap 14.

[391] eg for medical costs, loss of income and earning capacity etc—chap 14.

[392] Many writers and certain judgments refer to this as 'genoegdoening' (satisfaction), but this may cause confusion with satisfaction available with the actio iniuriarum, which is something quite different (cf para 9.4.2).

[393] eg pain and suffering, loss of amenities etc. Cf para 5.6.

[394] eg Van der Merwe & Olivier *Onregmatige Daad* 465; cf Neethling & Potgieter *Delict* 256.

[395] See Visser *Kompensasie en Genoegdoening* 290–1.

[396] Para 9.4.4. Cf also Visser 1988 *THRHR* 486–91.

[397] Para 9.4.5. If the two actions had the same function, concurrence in the narrow sense would be present and the law would have to find a solution (cf Van Aswegen *Sameloop* 128).

[398] eg the insult, feeling of injustice etc.

[399] See *Brown v Hoffman* 1977 (2) SA 556 (NC) and *Boswell v Minister of Police* 1978 (3) SA 268 (E), from which it appears that the action for pain and suffering is also available in the case of intentional conduct. Case law also distinguishes between contumelia resulting from assault, and pain and suffering: *Radebe v Hough* 1949 (1) SA 380 (A) at 384–5; *Magqabi v Mafundityala* 1979 (4) SA 106 (E) at 110; *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE). Cf further Van Aswegen *Sameloop*128 n 109.

[400] Visser *Kompensasie en Genoegdoening* 290–1; for examples see *Radebe v Hough* 1949 (1) SA 380 (A) at 384–5; *Magqabi v Mafundityala* 1979 (4) SA 106 (E) at 110; *N v T* 1994 (1) SA 862 (C) at 854–5; *GQ v Yedwa* 1996 (2) SA 437 (Tk) at 438–9. In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281–2 the court, in a case of assault in the form of bullet wounds, differentiated between compensation for pain and suffering and satisfaction for contumelia, but nevertheless followed a holistic approach because of overlap between the two forms of damage and accordingly awarded a single amount to avoid double compensation). Cf also *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) at 78 where the distinction between and concurrence of the actio iniuriarum, the action for pain and suffering and the actio legis Aquiliae in connection with assault were ignored (see Neethling & Potgieter *Delict* 257 n 50; Neethling 1997 *THRHR* 707–9 for comment).

[401] For instance, the actio legis Aquiliae may concur with the actio doli, the actio ad exhibendum, or the condictio furtiva. See on this Van der Merwe & Olivier *Onregmatige Daad* 466 (for criticism of the distinction between 'vindictory damages' and 'delictual damages'), 483; Van Aswegen *Sameloop* 129, who regards it as narrow concurrence since the actions concerned fulfil the same object with regard to the same damage. The principles on the concurrence of the Aquilian action and a contractual claim for damages (para 11.9.6) can mutatis mutandis be applicable here. See also Van der Merwe *Sakereg* 354 on the relationship between the rei vindicatio and the actio ad exhibendum; op cit 359 on the alternative availability of the rei vindicatio and the condictio furtiva where the thief is in possession of the stolen article; loc cit on the concurrence of the actio ad exhibendum and the condictio furtiva. See in general *Minister van Verdediging v Van Wyk* 1976 (1) SA 397 (T); Pauw 1976 *SALJ* 395; Olivier 1963 *THRHR*173; Beyleveld

1977 *TSAR* 187; *Clifford v Farinha* 1988 (4) SA 315 (W); *Crots v Pretorius* 2010 (6) SA 512 (SCA); Scott 2011 *TSAR* 383–93.

[402] ie the Aquilian action, the action for pain and suffering and the actio iniuriarum.

[403] eg the actio de pauperie, the actio de pastu (liability without wrongfulness and fault), the actio quod metus causa and the condictio furtiva (where wrongfulness and fault are required) and the action on the ground of nuisance (where liability without fault is possible), the action as a result of the removal of lateral support, claims based on vicarious liability etc. It is unnecessary to examine all these possibilities here.

[404] eg s 30 of the National Nuclear Regulator Act 47 of 1999; s 8 of the Civil Aviation Act 13 of 2009; the COID Act 130 of 1993.

[405] Cf also *Portwood v Swamvur* 1970 (4) SA 8 (RA); *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D) at 52, where the court is of the opinion that nothing in *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) (para 11.9.6) places a restriction on the availability of the actio de pauperie. See Visser *Kompensasie en Genoegdoening* 293–4 on the action for pain and suffering and the actio de pauperie. Of course, the actio de pauperie goes wider than the action for pain and suffering in so far as the former also includes a claim for patrimonial loss. See *Fourie v Naranjo*2008 (1) SA 192 (C) on a claim for emotional shock with the actio de pauperie.

[406] In an action in terms of the COID Act 130 of 1993 the position is different: if employee X suffers loss as a result of the delict of Y (not being the employer), X can claim from both the Director-General (if it was an 'accident'), and the perpetrator. The claim against the perpetrator, however, excludes the compensation payable by Y to the Director-General (para 10.4.2), but includes compensation for non-patrimonial loss.

[407] Cf Van der Merwe & Olivier *Onregmatige Daad* 468; Neethling & Potgieter *Delict* 257.

[408] *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 36; *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at 561. See further para 15.3.4.

[409] Cf also Van der Merwe & Olivier *Onregmatige Daad* 473; Joubert *Contract* 248.

[410] Cf, eg, *Hickman v Cape Jewish Orphanage* 1936 CPD 548; *Ndamse v University College of Fort Hare* 1966 (4) SA 137 (E); *Viljoen v Nketoana Municipality* 2003 24 *ILJ* (LC) 437 at 444–7.

[411] *First National Bank of South Africa Ltd v Budree* 1996 (1) SA 971 (N).

[412] *Jockie v Meyer* 1945 AD 354 at 364. Cf also *Matthews v Young* 1922 AD 492 at 503; *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 390–1; *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) 593–6.

[413] 1966 (4) SA 137 (E). Cf also *Brenner v Botha* 1956 (3) SA 257 (T); Neethling et al *Law of Personality* 64–5; Neethling & Potgieter *Delict* 257–8.

[414] De Wet & Van Wyk *Kontraktereg en Handelsreg* 224.

[415] Cf Van der Merwe & Olivier *Onregmatige Daad* 475–7. In *Van Wyk v Lewis* 1924 AD 438 a surgeon left a swab in a patient's body after an urgent operation. The surgeon was sued for pain and suffering but the court confused the delictual and contractual elements of the case. Cf supra at 455–6: 'Though the case is not founded on a breach of contract it is one of those cases where the relationship between the parties arises out of a contract but where the act complained of is an injury or delict done in consequence of carrying out the contract.' As correctly pointed out by Van der Merwe & Olivier *Onregmatige Daad* 476, it was unnecessary to attempt to make a single action out of two, since each possible claim could exist on its own. Cf also Hosten 1960 *THRHR* 263, who apparently confuses the two actions. See in general also *Administrator, Natal v Edouard* 1990 (3) SA 581 (A); *Correira v Berwind*1986 (4) SA 60 (Z); Dendy 1986 *Annual Survey* 183–5.

[416] *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 596–7; cf Neethling & Potgieter *Delict*258.

[417] For the purposes of this discussion, all other delictual and non-delictual actions for the recovery of compensation for patrimonial loss are included.

[418] See *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) at 37 on the concurrence of an action ex delicto for misrepresentation and the actio quanti minoris. Cf on the question whether the claim for 'holding over' (para 12.17) is of a delictual or contractual nature, Kerr & Harker 1987 *SALJ* 325; Hawthorne 2010 16(1) *Fundamina* 153, 2010 16(2) *Fundamina* 52. See also *Holmdene Brickworks (Pty) Ltd v Roberts Construction Ltd* 1977 (3) SA 670 (A) on the liability of a trader for consequential loss as a result of latent defects (the precise nature of the liability is not altogether clear). See *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D) on the relationship between a contractual claim for damages, the actio de pauperie and the Aquilian action.

See Van der Walt & Midgley *Delict* 4–5; Van der Merwe & Olivier *Onregmatige Daad* 478 who observe that cases which frequently occur in practice are concerned with the destruction of an entrusted article by a depository, or damaging of a leased article by a lessee. Usually the courts hold that the plaintiff's claim is based on contract. Cf in general *Weiner v Calderbank* 1929 TPD 654; *Lituli v Omar* 1909 TS 192; *Enslin v Meyer* 1925 OPD 125; *Silhouette Chemical Works (Pty) Ltd v Steyn's Garage (Brooklyn) (Pty) Ltd* 1967 (3) SA 564 (T); *Government of the RSA v Fibre Spinners & Weavers (Pty) Ltd* 1977 (2) SA 324 (D). Cf, however, also *Pilkington Bros (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 (2) SA 157 (W) and 1985 (1) SA 475 (A), where the claim was clothed in delictual terms. Cf also *Otto v Santam Versekering Bpk* 1992 (3) SA 615 (O). Here the plaintiff's vehicle, by order of his insurer, was inexpertly repaired by X. The court held that the plaintiff could not claim delictual damages from X.

[419] See Van der Merwe & Olivier *Onregmatige Daad* 478–83. Cf Van Aswegen *Sameloop* 220–1, who distinguishes the following factual situations where ex contractu and ex delicto claims can possibly occur: *(a)* The conduct of the party to the contract is of such a nature that in the absence of the contract it will never qualify as conduct which wrongfully causes damage—eg where X fails to pay rent. Here concurrence is possible only if breach of contract is considered to be a delict per se. *(b)* The conduct of the contracting party is such, that even in the absence of the contract, it would still be a delict against any other person—eg where the lessee negligently damages the hired object. *(c)* The conduct of the contracting party (X) is of such a nature that it will not be wrongful against any party other than the other contracting party (Y) or anyone in the same factual position as the latter. The factual relationship between parties thus establishes delictual wrongfulness. Examples are cases of negligent misrepresentation in breaching the terms of the contract, or the provision of incorrect information by a professional person. Cf Van Aswegen *Sameloop* 292–9 for a discussion of these instances in our case law. From *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) it appears as if only possibility *(b)* above is recognized. Van Aswegen *Sameloop* 299, however, submits that breach of contract can be described as delictually wrongful only where liability ex delicto would have existed in the absence of a *valid* contract. See in general Boberg 1985 *SALJ* 213; Hutchison & Visser 1985 *SALJ* 587; Beck 1985 *SALJ* 222; Van Warmelo 1985 *SALJ* 227; Burchell & Dendy 1985 *Annual Survey* 181–7; *Otto v Santam Versekering Bpk* 1992 (3) SA 615 (O) at 623; Lewis 1992 *SALJ*389.

[420] Cf, eg, the case of a surgeon who performs an operation on his patient in a negligent manner and in so doing fails to perform in accordance with the contract. If the patient has to incur additional medical expenditure as a result of the negligently performed operation, it is possible for him or her to claim the damages either in terms of the Aquilian action or in terms of a contractual action for damages (Neethling & Potgieter *Delict* 258–62). It appears as if the courts—unlike the case where the breach of contract results in damage to a thing or personality infringement—will not readily construe an interest independent of the contract in cases of pure economic loss. Cf *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 499–500; *Erasmus v Inch* 1997 (4) SA 584 (W) at 594–5. See, however, Van Aswegen *Sameloop* 295–7 for criticism; op cit 298: 'The test for a independent delict is to think away only the contract and not the factual circumstances of the contract or the existing relationship between the parties' (our translation). See also Van Aswegen 1992 *THRHR* 271. In the case of the negligent provision of professional services in terms of an agreement (eg by attorneys, auditors and architects) the wronged person will thus as a rule only have the contractual action at his or her disposal (cf *Lillicrap* 500; *Erasmus v Inch* 592–5; Van der Walt & Midgley *Delict* 57–8; Wunsh 1989 *TSAR* 1; 1996 *SALJ* 46; Midgley 1998 *SALJ* 275–6).

[421] Cf *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496, 499; *Van Wyk v Lewis* 1924 AD 438; *Correira v Berwind* 1986 (4) SA 60 (Z) at 63–6; *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D); *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute* 2000 (1) SA 141 (D) at 145; *Otto v Santam Versekering Bpk* 1992 (3) SA 615 (O) at 623–4; *Cathkin Park Hotel v JD Makesch Architects* 1992 (2) SA 98 (W) at 102–3; *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 (4) SA 428 (C) at 432–3. See also Hutchison & Van Heerden 1997 *Acta Juridica* 101–10.

[422] Cf Van Aswegen *Sameloop* 99 et seq; Hosten 1960 *THRHR* 251. For a discussion of concurrence in its wide and narrow sense see Van Aswegen 1994 *THRHR* 150–2; 1997 *Acta Juridica* 75–7.

[423] Cf Van Aswegen *Sameloop* 386 et seq; 1997 *Acta Juridica* 79 et seq, who points to the following possible solutions: alternativity or election; exclusivity; cumulation or co-ordination; or a flexible approach which differs from one case to the other. Van Aswegen op cit 422 et seq; 1997 *Acta Juridica*85 et seq mentions also the following policy factors in solving the problem of concurrence: the purpose and function of the concurring legal principles, the area of application of the law of contract and delict, freedom of contract and autonomy of parties, single reparation, compensation, harmonizing of interests and the structure of the law. A solution must also be found within legal principles concerning res iudicata, the 'once and for all' rule (chap 7) and rules relating to pleadings. Cf Van Aswegen Sameloop 454 et seq. See further Hutchison 1997 *Acta Juridica* 109–12; Loubser 1997 *Stell LR* 125–8.

[424] Cf, eg, *Van Wyk v Lewis* 1924 AD 438; *Correira v Berwind* 1986 (4) SA 60 (Z) at 63–6; *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496, 499; *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) at 393. Cf also *Pockets Holdings (Pvt) v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R); *Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (C) (the inclusion of a misrepresentation as warranty in a contract does not prevent a delictual action); *Cathkin Park Hotel v JD Makesch Architects* 1992 (2) SA 98 (W) at 102–3; *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 (4) SA 428 (C) at 432–3. See also *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T) at 395. Cf Van Aswegen *Sameloop* 470 on the gravamen approach where the plaintiff does not exercise his or her choice expressly—the court must then determine the nature of the claim.

[425] *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N); *Wellworths Bazaars Ltd v Chandler Ltd* 1948 (3) SA 348 (W); see also *Klopper v Volkskas Bpk* 1964 (2) SA 421 (T). Van der Walt & Midgley *Delict* 58–9 mention the possibility of cumulation where a plaintiff has recovered part of his or her loss with an earlier action (naturally a plaintiff may not recover more than his or her full damage). Cf Van Aswegen *Sameloop* 469 on successive alternativity. According to this, payment of a claim also extinguishes the concurrent claim in so far as the claims overlap. Nothing prevents the recovery of any further damage with the concurrent claim. Cf, however, para 7.3.2 on the 'once and for all' rule.

[426] Van Aswegen *Sameloop* 469; Van der Walt & Midgley *Delict* 57 et seq; Hosten 1960 *THRHR* 271; Lee & Honoré *Obligations* 194; Neethling & Potgieter *Delict* 256; Erasmus & Gauntlett 7 *LAWSA* para 30; Havenga 1987 *TSAR* 59; Midgley 1990 *SALJ* 629; Müller 1983 *SA Ins LJ* 113; Hutchison 1981 *SALJ* 496; Davis 1985 *SA Ins LJ* 57. However, Van der Merwe & Olivier *Onregmatige Daad* 478–80, 482 argue that from a theoretical point of view there is no distinction between damages ex contractu and ex delicto. Consequently, they submit that the problem of choice of actions does not arise.

[427] 1985 (1) SA 475 (A). See for an application of the policy considerations mentioned in this case, *Otto v Santam Versekering Bpk* 1992 (3) SA 615 (O) at 624–5. See Midgley 1993 *THRHR* 306. Cf further *Bayer (SA) (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 570.

[428] Cf *Kohler Flexible Packaging v Marianhill Mission Institute* 2000 (1) SA 141 (D) at 144–5; *Erasmus v Inch* 1997 (4) SA 584 (W) at 594–5; *Alfa Laval Agri (Pty) Ltd v Ferreira* 2004 (2) SA 68 (O) at 76. Van Aswegen *Sameloop* 472 (and especially n 99). She submits, however, that in *Lillicrap*concurrence was not really in issue since the court found that delictual liability cannot arise where one contracting party has caused pure economic loss to another. However, it was foreseen that the policy considerations mentioned by the court, may play a role in solving the problem of concurrence. See also Midgley 1993 *SALJ* 66; 1998 *SALJ* 275–6; Hakime & Steynberg 2001 *THRHR* 448–51.

[429] 2008 (5) SA 630 (SCA) at 633. See also *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA) at 350–1; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 292.

[430] This approach has been welcomed by Neethling & Potgieter *Delict* 260–1. The question of legal policy remains: should delictual liability for pure economic loss be extended to specific instances where the parties had the opportunity to regulate the relationship contractually but failed to do so? See Neethling & Potgieter op cit 261 n 85; Neethling 2009 *THRHR* 573 et seq; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 145 et seq; *Thatcher v Katz*2006 (6) SA 407 (C) at 411–12; *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) at 602–3; *AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA) at 620–3; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 294–8.

[431] See, eg, *Hamman v Moolman* 1968 (4) SA 340 (A) at 348. The court said that sufficient protection exists ex contractu (it is, for instance, possible to insist on warranties). Cf also *Latham v Sher*1974 (4) SA 687 (W) at 695 and *Combrinck Chiro Kliniek v Datsun Motors* 1972 (4) SA 185 (T) at 192, where the courts refused to allow delictual liability for all cases of damage caused wrongfully and culpably since it could amount to duplication of actions. Cf also *Alfa Laval Agri (Pty) Ltd v Ferreira* 2004 (2) SA 68 (O) at 76; *Thatcher v Katz* 2006 (6) SA 407 (C) at 411–12.

[432] *Bayer (SA) (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 568.

[433] See para 7.4 on causes of action and the 'once and for all' rule.

[434] *Sameloop* 370.

[435] ie where there are competing claims with the same object in respect of the same damage. Cf also Van Aswegen *Sameloop* 370 n 208, who argues that this type of concurrence arises only where the infringement of a contractual right to performance violates some other right or legal duty existing independently of the contract. Existence of the contract, therefore, cannot be a factum probandum for a delictual claim.

[436] This conclusion is arrived at if one views a cause of action according to the facta-probanda test (para 7.4.1). Should one apply the single-cause approach (para 7.4.1), the cause of action may be the same since the emphasis falls on the damage-causing conduct.

[437] See n 425 above.

[438] Cf Van Aswegen *Sameloop* 462–5.

[439] Theoretically, the principles relating to res judicata should actually develop in such a manner as to require claims based on different causes of action to be disposed of in one process. In practice, the principles concerning causes of action are apparently manipulated in order to reach results desired from a procedural point of view (cf the single-cause theory para 7.4.1).

[440] Van Aswegen *Sameloop* 309–79; Neethling & Potgieter *Delict* 257–62. Cf also Van der Merwe & Olivier *Onregmatige Daad* 478 et seq; Van der Merwe 1978 *SALJ* 317; Loubser 1997 *Stell LR* 128–40.

[441] Para 11.9.6.

[442] Chap 5.

[443] Paras 8.5, 8.9.2.

[444] Para 11.1.5.

[445] Cf *Administrator, Natal v Edouard* 1990 (3) SA 581 (A).

[446] *Sameloop* 451 et seq. Our translation. See also Van Aswegen 1997 *THRHR* 401–11.

[447] Cf para 1.5. The general view, however, is that a claim for damages based on breach of contract arises ex contractu and not from a wrongful and culpable act as in the case of delict.

[448] Patrimonial loss is, therefore, involved in both cases. The action for pain and suffering and the actio iniuriarum are not taken into account.

[449] See para 4.3 on positive and negative interesse.

[450] See para 11.5 on remoteness of damage.

[451] See para 4.5 on the date of the assessment of damage.

[452] Viz, there are differences between accountability and the capacity to act (cf Van Aswegen *Sameloop* 333–8).

[453] In the case of delictual liability, joint wrongdoers are jointly and severally liable for the payment of damages and satisfaction (cf para 11.2.2 and s 2 of the Apportionment of Damages Act 34 of 1956). See on contractual damages para 2.3.

[454] Cf Van Aswegen *Sameloop* 341–3. In delict, vicarious liability exists in respect of a delict committed by a person in the course of his or her relationship with another person who is liable for his conduct (cf Neethling & Potgieter *Delict* 365 et seq). A contracting party is held liable for 'breach of contract' by another who is not a party to the contract only if the 'contract-breaker' acted in the performance of the contracting party's duties under the contract. Cf *Weinberg v Oliver* 1943 AD 181; *Cardboard Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 (3) SA 178 (W) at 180; Hosten 1960 *THRHR* 257 at 294. This can be the case where the party breaching the contract acts in terms of a contract of service or where he or she acts as mandatory. See further *Otto v Santam Versekering Bpk* 1992 (3) SA 615 (O).

[455] This refers to an action for damages upon breach of contract (cf Van Aswegen *Sameloop* 345).

[456] Van Aswegen *Sameloop* 346 n 124 refers to inter alia the following: Reinecke 1986 *TSAR* 221; Lubbe & Coetzee 1990 *TSAR* 64; Joubert *Contract* 297; Lubbe & Murray *Contract* 729.

[457] Cf Van Aswegen *Sameloop* 352–60 on terms relating to limitation of liability (para 11.10.4). There are no differences in principle regarding the effect of an exclusionary term in respect of delictual and contractual damages. In each instance the question is merely which type of liability has been excluded and in the concurrence situation the exclusion of a specific action may still allow the retention of an alternative one. But cf also *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 503; *Essa v Divaris* 1947 (1) SA 753 (A), from which it can be deduced that a term excluding contractual liability cannot be circumvented by instituting a delictual claim. Van Aswegen op cit 359 is of the opinion that the exclusion of liability for negligence refers to liability both ex delicto and ex contractu in the situation of narrow concurrence. It should also be noted here that liability flowing from intentional wrongful conduct (supporting, for example, the actio iniuriarum) cannot be excluded contractually, whereas liability for intentional breach of contract may indeed be excluded in such a manner.

[458] Para 12.18.

[459] Cf Van Aswegen Sameloop 360–1. What is the position if ordinary delictual liability is extended by contract? Suppose employer X makes an agreement with his employees that if they should steal money they would have to repay the amount plus 20 per cent interest. It would seem that such a case is concerned

with the problem whether all the requirements of contractual liability have been complied with. Cf in general Van Jaarsveld *Handelsreg* 57 n 214.

[460] Cf para 11.4 on contributory negligence.

[461] In an action for damages ex delicto the onus is on the plaintiff (para 16.2.1) to prove fault on the part of the defendant. In the case of contractual damages, fault (negligence) is not required in every instance, and where it is required, the burden of proof is reversed by stipulating that the defendant has to prove the absence thereof. Especially relevant are cases where the plaintiff claims compensation for damage to property from the person in whose possession the article has been in terms of lease, depositum, commodatum, pledge, or locatio conductio. If the plaintiff claims ex delicto, he or she must prove negligence on the part of the defendant, whereas if the plaintiff sues ex contractu, the defendant must prove that he or she has not been negligent (see Van der Walt & Midgley *Delict* 59). In *Alex Carriers (Pty) Ltd v Kempston Investments (Pty) Ltd* 1998 (1) SA 662 (EC) the court held at 673–4 that in a contractual claim for damage to goods carried the owner first had to lay a foundation by proving that his goods were in fact damaged (which includes the quantum of his loss) and only then did the carrier carry the onus of showing that the damage to or destruction of the goods occurred without dolus or culpa on his part, but that in a delictual claim the onus remained on the plaintiff throughout.

[462] See Van Aswegen *Sameloop* 373–9; para 16.6.

[463] eg para 11.8 on actions in terms of the RAF Act 56 of 1996.

[464] eg para 12.19 on agreements subject to consumer protection legislation.

[465] Para 11.11. See also para 11.2.1 on the exclusion of liability as against certain defendants.

[466] See in general Van Aswegen *Sameloop* 343–59.

[467] See on this Neethling & Potgieter *Delict* 103–9.

[468] See Van Aswegen *Sameloop* 346 n 124, who refers to inter alia the following: *Laws v Rutherford*1924 AD 261 at 263; *Union Free State Mining and Finance Corp Ltd v Union Free State Gold and Diamond Mining and Finance Corp Ltd* 1960 (4) SA 547 (W) at 549; *Resisto Dairy (Pty) Ltd v Auto Protection Ins Ltd* 1962 (3) SA 565 (C) at 571; *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 (1) SA 279 (N) at 294; *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 WLD 224 at 226.

Unilateral waiver is possible in respect of rights other than personal rights (rights to performance) and in the case of election (choice between remedies). Some powers of a contracting party in the event of breach of contract which apparently amount to a waiver of the right to damages are in fact examples of election or waiver by agreement (para 11.10.2; cf Van Aswegen *Sameloop* 347–8). Joubert *Contract* 297 states: 'It is also accepted that the creditor can unilaterally renounce his right to claim damages for a breach of contract. Since a right to claim damages for delict is ordinarily only capable of being renounced by agreement, this possibility obviously concerns a special case.' See *Frost v Leslie* 1923 AD 276; *Mine Workers' Union v Brodrick* 1948 (4) SA 959 (A); *Capital Waste Paper Co (Pty) Ltd v Magnus Metals (Pty) Ltd* 1964 (3) SA 286 (N); *Naran v Pillai* 1974 (1) SA 283 (D). Conscious acceptance of defective performance can, however, not constitute unilateral waiver of a claim for damages, because it takes place by agreement and probably amounts to a type of datio in solutum (Joubert loc cit). Cf further in general Lubbe & Murray *Contract* 729; Reinecke 1986 *TSAR* 221; Lubbe & Coetzee 1990 *TSAR*64; Christie & Bradfield *Contract* 453 et seq. See also *Gillon v Eppel* 1991 (4) SA 656 (B), where it was held that in the circumstances the receipt of a deposit cheque did not imply waiver.

[469] Cf n 448 as well as *Lanfear v Du Toit* 1943 AD 59 at 62, 74; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 (1) SA 279 (N) at 294; *Jonathan v Haggie Rand Wire Ltd* 1977 (2) PH J45 (N); Joubert *Contract* 296; Lubbe & Murray *Contract* 728–9. In effect, a party's liability for breach of contract can be excluded by release where he or she is exempted from his primary obligation to perform in terms of the contract. In addition, release after breach of contract can also extinguish the obligation to pay damages. The same applies in respect of an obligation to pay damages or satisfaction ex delicto. Cf Van Aswegen *Sameloop* 350–1; McKerron *Delict* 143–4.

[470] Van Aswegen *Sameloop* 350; Van Dorsten 1986 *THRHR* 202–4. A provisional agreement of release in connection with a future obligation to pay damages is possible. In such a case, however, it is actually a case of exclusion of liability where no right of performance has come into existence.

[471] Cf also s 33 of the COID Act 130 of 1993, which states that any contractual provision in terms of which an employee waives any right is null and void. Cf further *Ex parte Oliphant* 1940 CPD 537 (agreement does not affect dependants of injured person).

[472] Cf Neethling & Potgieter *Delict* 109; Van der Merwe & Olivier *Onregmatige Daad* 102; *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775; *Hughes v SA Fumigation Co (Pty) Ltd* 1961 (4) SA 799 (C); *Soobramoney & Anor v R Acutt & Sons* 1965 (2) SA 899 (D); *Frocks Ltd v Dent & Goodwin* 1950 (2)

SA 717 (C); *Bristow v Lyceff* 1971 (4) SA 223 (RA); *District Bank Ltd v Hoosain* 1984 (4) SA 544 (C); *Payne v Minister of Transport* 1995 (4) SA 153 (C) at 159–61.

[473] See *Jameson's Minors v CSAR* 1908 TS 575; *Morrison v Angelo Deep Gold Mines Ltd* 1905 TS 775; *Estate Logie v Priest* 1926 AD 312; *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 535. Cf further Boberg *Delict* 729, 733–4; Joubert *Contract* 296–7.

[474] In contrast to the position concerning release (para 11.10.2; see Van Aswegen *Sameloop* 351).

[475] Cf, eg, *Jameson's Minors v CSAR* 1908 TS 575 (where the agreement did not preclude the claim of the dependants of the deceased, where the latter undertook not to institute a claim); *Ex parte Oliphant* 1940 CPD 537 at 543–4; *Union Government v Lee* 1927 AD 202; Van Dorsten 1985 *De Rebus*293; 1986 *THRHR* 292–3.

[476] Cf Van Aswegen *Sameloop* 352; Christie & Bradfield *Contract* 190 et seq. Such agreements can be described as terms of exclusion, exemption, exception, exoneration, exculpation, limitation, non-liability, and disclaimer. Cf Van Dorsten 1986 *THRHR* 194. See also *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W): contractual limitation of liability between A and B is irrelevant in respect of a delictual claim by C against one of them. See further *Richard Ellis SA (Pty) Ltd v Miller* 1990 (1) SA 453 (T) on a tacit exemption clause in respect of vicarious liability.

[477] Cf in general *Rosenthal v Marks* 1944 TPD 172 at 178; *Weinberg v Oliver* 1943 AD 181 at 188; *Essa v Divaris* 1947 (1) SA 753 (A) at 774; *Stocks and Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 763; *Du Toit v Atkinson's Motors* 1985 (2) SA 893 (A) at 903; Van Dorsten 1986 *THRHR* 199–202. Van der Merwe & Olivier *Onregmatige Daad* 102 n 21 also view these terms as pacta de non petendo in anticipando (para 11.10.3). Cf further *Naylor v Munnik* 1859 Searle 187 at 191; *CSAR v Adlington* 1906 TS 964 at 974; *The Farm Implement Co of Kroonstad v Minister of Railways* 1916 OPD 183 at 190; *Mahomed v Teubes* 1918 CPD 398 at 400; *Weber and Pretorius v Pretoria Municipality* 1921 TPD 19 at 24; *Nightingale and Adams v SAR & H* 1921 EDL 91 at 100; *SAR & H v Conradie* 1922 AD 137 at 156; *SAR & H v Williams* 1930 TPD 514 at 521; *Beinashowitz and Sons (Pty) Ltd v Night Watch Patrol (Pty) Ltd* 1958 (3) SA 61 (W) at 64; *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N); *Havenga v De Lange* 1978 (3) SA 873 (O); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Van Deventer v Louw* 1980 (4) SA 105 (O); *Yeats v Hoofwegmotors* 1990 (4) SA 289 (NC); *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (4) SA 150 (ZS); *Santam Ins Co Ltd v SA Stevedores Ltd* 1989 (1) SA 182 (D) (on a 'Himalaya clause'); *Minister of Education and Culture (House of Delegates) v Azel* 1995 (1) SA 30 (A); *Visagie v Transsun (Pty) Ltd* [1996] 4 All SA 702 (Tk); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA).

[478] eg no liability for any damage to a vehicle in a parking lot.

[479] eg damages are limited to a certain maximum amount.

[480] Cf the following examples: the primary obligation to perform ex contractu (*Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T); *Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD)) and any other liability which arises out of or with regard to a contract, eg undue influence, misrepresentation, latent defects, consequential losses (cf, eg, *Stocks and Stocks (Pty) Ltd v TJ Daly and Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 763; *Rosenthal v Marks* 1944 TPD 172 at 176; *Cockroft v Baxter*1955 (4) SA 93 (C); *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A); *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 686–7; 2000 (4) SA 1027 (SCA) at 1030; *Pete's Warehousing and Sales CC v Bowsink Investment CC* 2000 (3) 833 (E) at 842); *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 644–5). Cf on breach of contract also *Wells v SA Alumenite Co* 1927 AD 69 at 72; *Weinberg v Oliver* 1943 AD 181 at 188–9; *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A). Cf on delictual liability *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 (3) SA 178 (W); *Essa v Divaris* 1947 (1) SA 753 (A).

[481] See eg Van der Merwe et al *Contract* 191 et seq; Hutchison & Pretorius *Contract* 173 et seq; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). A statute can prohibit such a term—eg s 90(2)*(g)–(h)* of the National Credit Act (NCA) 34 of 2005, which prohibits a term to the effect that the consumer acknowledges that no misrepresentation or warranties were made by the credit provider or his or her agent in connection with the credit agreement. The Consumer Protection Act (CPA) 68 of 2008 prohibits similarly a number of terms excluding or limiting liability: s 51(1)*(b)* read with s 41 (false, misleading or deceptive misrepresentations), s 51(1)*(b)* read with s 40 (unconscionable conduct), s 51(1)*(b)* read with ss 55 and 56 (warranty of quality) and s 51(1)*(c)* (any loss caused by gross negligence of supplier of goods or services, or any person acting for or controlled by the supplier). See also *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 285–7. Exclusion of liability for fraud, intentional conduct or intentional breach is also contra bonos mores and therefore invalid (cf, eg, *Wells v SA Alumenite Co* 1927 AD 69; *Rosenthal v Marks* 1944 TPD 172 at 180; *East London Municipality v South African Railways & Harbours* 1951 (4) SA 466 (E) at 490; *Hughes v SA Fumigation Co (Pty) Ltd*1961 (4) SA 799 (C) at 805; *Government of the RSA v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 803; Lubbe & Murray *Contract* 340, 425;

Joubert *Contract* 137; O'Brien 2001 *TSAR* 597). For a discussion of the exclusion of liability for such conduct on the part of an employee or agent, see *Goodman Brothers (Pty) Ltd v Rennies Group Ltd* 1997 (4) SA 91 (W); *Hotels, Inns and Resorts SA (Pty) Ltd v Underwriters at Lloyds* 1998 (4) SA 466 (C). Since South Africa became a constitutional state in 1994 the Constitution and the values enshrined in the Bill of Rights in particular have informed public policy, but this is not the only source of public policy. See *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 34; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 37; *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* 2004 (6) 66 (SCA) at 73; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 333. Exclusion of liability for negligent homicide is perhaps against public policy because of the high value which the Constitution places on the sanctity of life. See *Johannesburg Country Club v Stott* 2004 (5) SA 517 (SCA) at 518–19. For an obiter application to an exemption clause excluding liability for bodily injury in a lease, see *Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD) at 311–13.

[482] *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 807; *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) at 201; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 35. Cf also *Yeats v Hoofwegmotors* 1990 (4) SA 289 (NC) at 293–4; *Van Deventer v Louw* 1980 (4) SA 105 (O) at 112; O'Brien 2001 *TSAR* 597. Such intention of the parties should not readily be assumed. See *Page v First National Bank Ltd* 2009 (4) SA 484 (ECD) at 487. See however s 51(1)*(c)* of the CPA 68 of 2008 which prohibits the exclusion of liability for any loss caused by gross negligence of the supplier of goods or services, or any person acting for or controlled by the supplier.

[483] Cf, eg, Aronstam 1977 *SALJ* 67; Stoop 2008 *SA Merc LJ* 502–3.

[484] eg *Essa v Divaris* 1947 (1) SA 753 (A); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA) at 989; *First National Bank of SA Ltd v Rosenblum* 2001 (4) SA 189 (SCA) at 195–6; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at 34; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 468–9; *Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom* 2003 (5) SA 180 (SCA) at 186; *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at 516; *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) at 87; *Walker v Redhouse*2007 (3) SA 514 (SCA) at 518–19; *ER24 Holdings v Smith* 2007 (6) SA 147 (SCA) at 153; *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) at 662 et seq; *Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD) at 307–8. See also the approach in *Transport and Crane Hire (Pvt) Ltd v Hubert Davies & Co (Pvt) Ltd* 1991 (4) SA 150 (ZS) where the 'three-stage test', described as follows in the summary, was employed: '*(a)* If clause contains language expressly exempting proferens from consequences of his servants' negligence, effect to be given to clause; *(b)* if clause contains no express reference to negligence, then Court has to consider whether words used are wide enough in their ordinary meaning to cover negligence of proferens' servants and, if doubt exists, such doubt to be resolved against proferens; *(c)* if words wide enough to cover negligence of proferens' servants, Court to consider whether head of damage might be based on some ground other than negligence.' See also *Cotton Marketing Board v Zimbabwe National Railways* 1990 (1) SA 582 (ZS). On the interpretation of exemption clauses see Visser 2007 *De Jure* 188; Marx & Govindjee 2007 *Obiter*622. How a reasonable person understands the exemption clause is one of the factors which the court should consider when interpreting such a clause (*Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD) at 308, 311). See also Stoop 2008 *SA Merc LJ* 503–6.

[485] Van Aswegen *Sameloop* 357; Lubbe & Murray *Contract* 340 at 428. Accordingly, a clause pertaining to misrepresentation will not apply to warranties, latent defects etc and vice versa. Cf *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Schmidt v Dwyer* 1959 (3) SA 896 (C); *Cockroft v Baxter* 1955 (4) SA 93 (C). If the wording of a clause is wide enough to include liability for negligence but fails to refer expressly to negligence (eg an 'owner's risk' clause), negligence will come under the clause only if liability can exist on no ground other than negligence (Van Aswegen op cit 357 n 181). If there is another possible source for an obligation to pay damages, the clause will be applicable only to that particular clause and will not be extended to negligence. See on this *Weinberg v Oliver* 1943 AD 181; *Essa v Divaris* 1947 (1) SA 753 (A); *SAR & H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 (3) SA 647 (C); *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D) at 53.

[486] *Bristow v Lycett* 1971 (4) SA 223 (RA); *Lawrence v Kondotel Inns (Pty) Ltd* 1989 (1) SA 44 (D); *Cotton Marketing Board v Zimbabwe National Railways* 1990 (1) SA 582 (ZS); *Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD) at 307–8, 311.

[487] See, however, para 11.10.4 on negligence. A clause may not be circumvented contrary to the intention of the parties by basing a claim on delict (cf *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) Pty Ltd* 1985 (1) SA 475 (A) at 503; *Essa v Divaris* 1947 (1) SA 753 (A)). Where the clause is unclear, the contra proferentem rule has the effect that delictual damages are not excluded (cf *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 (3) SA 178 (W); *Galloon v Modern Burglar Alarms (Pty)*

Ltd 1973 (3) SA 647 (C). For criticism see Lotz 1974 *SALJ* 424–6. But see *Swinburne v Newbee Investments* 2010 (5) SA 296 (KZD) at 307–8, 311).

[488] *Yeats v Hoofwegmotors* 1990 (4) SA 289 (NC) at 293; *Stocks & Stocks (Pty) Ltd v TJ Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) at 767.

[489] Para 12.15.4.

[490] See in general Mostert et al *Koopkontrak* 206–7; Kerr *Sale* 146–55; Norman *Sale* 176–81. As is known, the clause does not protect a seller who is aware of a latent defect at the time of conclusion of the contract and dolo malo (intentionally) kept silent about its existence (*Van der Merwe v Meades* 1991 (2) SA 1 (A); *Mkhize v Lourens* 2003 (3) SA 292 (T); *Waller v Pienaar* 2004 (6) SA 303 (C); *Beyers v Ackerman* [2007] 3 All SA 125 (C); *Odendaal v Ferraris* 2009 (4) SA 313 (SCA)). A seller can protect him- or herself against liability for negligent or innocent misrepresentations but a voetstoots clause is not wide enough to give effect to this intention (*Wells v SA Alumenite Co Ltd* 1927 AD 69; *Cockroft v Baxter* 1955 (4) SA 93 (C); *Soobramoney & Anor v R Acutt & Sons (Pty) Ltd* 1965 (2) SA 899 (D)). See Kerr *Sale* 149–50 on the different possibilities pertaining to misrepresentation. Where the seller gives an express warranty, a voetstoots clause cannot protect him or her (*Mouton v Wessels* 1951 (3) SA 147 (W)). See in general *Agricultural Supply Association v Olivier* 1952 (2) SA 661 (T); *Welgemoed v Sauer*1974 (4) SA 1 (A); *Janowsky v Payne* 1989 (2) SA 562 (C). The voetstoots clause will not protect the seller where the goods which are delivered differ substantially from what has been sold. See *Orneleas v Andrew's Cafe* 1980 (1) SA 378 (W); *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 (4) SA 276 (SCA) at 285.

[491] See *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA).

[492] *Vrystaat Motors v Henry Blignaut (Edms) Bpk* [1996] 1 All SA 449 (A). The seller's liability for damages may be excluded, but not his or her liability for the return of the purchase price.

[493] See s 51(1)*(b)* read with ss 55 and 56 of the Consumer Protection Act 68 of 2008; para 12.19.3.

[494] Cf also para 7.3 where the 'once and for all' rule is discussed.

[495] Cf, eg, De Wet & Van Wyk *Kontraktereg en Handelsreg* 284 et seq; Joubert *Contract* 305–10; Lubbe & Murray *Contract* 756–64; Van der Merwe & Olivier *Onregmatige Daad* 283–91; Kerr *Contract*560–7; Klopper *Third Party Compensation* 271–84; Loubser *Prescription*; Van der Merwe et al *Contract*554–69; Saner *Prescription* 3–1 et seq, 21 *LAWSA* para 103 et seq; Loubser & Midgley *Delict* 201 et seq.

[496] In *Ramdin v Pillay* 2008 (3) SA 19 (D) the court held that a claim for repayment of money held in an attorney's trust account constitutes a 'debt' as contemplated in s 10(1) of the Prescription Act 68 of 1969. Such debt becomes due, as contemplated in s 12(1) of the Act, upon demand by the client and prescribes three years later. See also *Nicor IT Consulting (Pty) Ltd v North West Housing Corporation*2010 (3) SA 90 (NWM) (the definition of a 'debt' in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 is confined to a claim for damages).

[497] See, eg, *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 842; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) at 253; *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at 403; *Umgeni Water v Mshengu* [2010] 2 All SA 505 (SCA). A defendant's claim against a joint wrongdoer for contribution or indemnification arises on the date on which the defendant is held liable (see *Lamont v Rockland Poultry* 2010 (2) SA 236 (SE) at 245).

[498] See para 7.4.

[499] See s 11 of the Prescription Act 68 of 1989.

[500] Section 12(1) of Act 68 of 1969.

[501] Para 7.3 and cf also *Pohl v Prinsloo* 1980 (3) SA 365 (T) at 371.

[502] *LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C). It should be added that, if the debtor intentionally prevents the creditor from becoming aware of the debt, prescription does not begin to run until he or she comes to know of it (s 12(2)). A debt is also regarded as unenforceable until the creditor is aware of the identity of the debtor and the facts regarding the debt or should reasonably have been aware of it (s 12(3); *Danielz v De Wet* 2009 (6) SA 42 (C) at 51–2). In *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) a woman who was sexually abused as a child instituted action more than 30 years after the abuse ended. Heher JA found that because the appellant had suffered from post-traumatic stress syndrome, which had been induced by the repeated abuse, she did not have the requisite knowledge and prescription could, therefore, not begin to run (see Mukheibir 2005 *Obiter* 140). See also *Truter v Deysel* 2006 (4) SA 168 (SCA) at 175 where the SCA held that it is only the material facts that must be known to the plaintiff, not also legal conclusions drawn on the negligence of the conduct based upon those facts. See, however, *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) on third-party claims in terms of the RAF Act 56 of 1996; Visser 2007 *THRHR* 329–34. With regard to a debt arising from a breach of contract see Loubser *Prescription* 76, 84; *Burnett v Deloitte & Touche* 2010 (5) SA 259 (WCC) at

264; *Anirudh v Gunase* 2010 (6) SA 531 (KZD) at 536. With regard to when prescription starts running in the case of arbitration after a breach of contract see *Burnett* supra at 265–6.

[503] Section 11*(a)*(ii) of the Prescription Act 68 of 1969. In *Eley (formerly Memmel) v Lynn & Main Inc* 2008 (2) SA 151 (SCA) the court held that a claim against a surety who has bound herself as surety and co-principal debtor in respect of a debt which was confirmed and reinforced by a judgment against the principal debtor will prescribe only after thirty years. See also *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA).

[504] Section 11*(d)* of the Prescription Act 68 of 1969.

[505] Cf s 13 and 14; Loubser *Prescription* 117–22, 139–42; Saner *Prescription* 3–75 et seq, 21 *LAWSA* paras 126–9; Van der Merwe et al *Contract* 562–8. See in general *Van Staden v Venter* 1992 (1) SA 552 (A). Where there are different causes of action, arresting prescription of one cause of action naturally does not entail arresting prescription of another (cf *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A); para 7.5.4.3). See also *Nonkwali v Road Accident Fund* 2009 (4) SA 333 (SCA).

[506] Section 10(1) of Act 68 of 1969. Cf also s 16(1), which states that the provisions of the Prescription Act are applicable to any debt except in so far as the particular provisions are incompatible with an Act of Parliament which prescribes a specific period within which a claim pertaining to a debt has to be instituted or prescribes conditions for the collection of a debt. Cf, eg, *Apalamah v Santam* 1975 (2) SA 229 (D). See *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) on the constitutionality of s 23 of the RAF Act 56 of 1996.

[507] See for a list Van der Merwe et al *Contract* 554–6; Saner *Prescription* 5–1, 21 *LAWSA* para 148 et seq. See also Klopper *Third Party Compensation* 271 et seq. Many (but not all) of these statutory provisions with diverse time limitation and extinctive periods have been replaced or have been brought to uniformity by the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. This Act also addresses the unconstitutionality of some of these provisions.

[508] Loubser *Prescription* 172–6. See also *Meintjies v Administrasieraad van Sentraal-Tvl* 1980 (1) SA 283 (T) at 293: The difference between prescription periods and expiry periods is that in the case of prescription the unenforceability of the debt is viewed from the perspective of the creditor (the creditor's personal circumstances and 'negligence' in respect of enforcing the debt). In the case of an expiry period, the matter is viewed from the perspectives of the debtor without taking into account any personal factors or excuses. Cf further Boulle 1982 *SALJ* 509; *Pizani v Minister of Defence* 1987 (4) SA 592 (A); *Stambolie v Commissioner of Police* 1990 (2) SA 369 (ZS).

[509] See for a comprehensive discussion of the position pertaining to third-party claims in terms of the RAF Act 56 of 1996, Klopper *Third Party Compensation* 271–84; cf *Road Accident Fund v Mdeyide*2011 (2) SA 26 (CC). See also s 43(1)*(a)* of the COID Act 130 of 1993 and s 2(6)*(b)* of the Apportionment of Damages Act 34 of 1956.

[510] Cf Loubser *Prescription* 170 et seq; Saner *Prescription* 5–1 et seq for an overview. See s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 prescribing notice given within six months from the date on which the debt became due. Although many of these expiry provisions have been amended by said Act, some have not and may yet be held to be unconstitutional. See further *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

[511] See eg *Van Niekerk v Verwoerdburgse Stadsraad* 1989 (4) SA 244 (T) at 252.

[512] *Nedfin Bank Bank v Meisenheimer* 1989 (4) SA 701 (T) (valid); *Absa Bank Bpk t/a Bankfin v Louw* 1997 (3) SA 1085 (C) (invalid); *Ryland v Edros* 1997 (2) SA 690 (T) at 713 (invalid). It should be regarded as invalid since extinctive prescripition serves the needs of the public in that it promotes certainty. But see Loubser & Midgley (eds) *Delict* 208.

[513] *De Jager v Absa Bank Bpk* 2001 (3) SA 537 (SCA). The debt has been extinguished, the debtor has certainty as to his or her position and everything now revolves around the interests of the parties. It seems that such undertaking should also be valid where the parties agree during the running of prescription to 'postpone' or 'extend' prescription if the undertaking mainly affects the interests of the parties and is not manifestly contrary to public interest. See *Absa Bank Bpk t/a Bankfin v Louw* 1997 (3) SA 1085 (C) at 1089 (obiter); *De Jager* supra at 485 (obiter); *Friederich Kling GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C) at 971.

PART II
QUANTUM OF DAMAGES IN SPECIFIC CASES OF BREACH OF CONTRACT

Chapter 12:
Quantum of damages in specific cases of breach of contract

Chapter 12
QUANTUM OF DAMAGES IN SPECIFIC CASES OF BREACH OF CONTRACT

12.1 BREACH OF CONTRACT AND REMEDIES [1]

The forms of breach of contract [2] are mora debitoris, [3] mora creditoris, [4] positive malperformance, [5] repudiation [6] and prevention of performance. [7]

The remedies in a case of breach of contract are aimed at performance or fulfilment of contractual obligations, [8] or at cancellation (rescission) and withdrawal from a contract, [9] or at compensation (damages) for loss caused by breach of contract.

A claim for damages may be instituted as a remedy in itself or in conjunction with remedies aimed at fulfilment or cancellation of the contract. [10] The assessment of damages may, of course, be influenced by the fact that a contract is upheld [11] or cancelled. [12]

Although these remedies are made available by operation of law upon breach, the contract itself may contain provisions in this regard. There is also a view that the remedies referred to are based on the contract and not a breach of contract. [13]

An award of damages means that an amount of money has, as far as possible, to play the role in the creditor's patrimony which performance by the debtor was supposed to do. [14]

12.2 GENERAL PRINCIPLES CONCERNING CLAIMS FOR DAMAGES

Before a party to a contract may institute a claim for damages for breach of contract, [15] the following requirements must be met: [16]

(a)

The other party must have committed a breach of contract. [17]

(b)

The plaintiff must already [18] have suffered actual [19] patrimonial loss [20] in a determined or determinable amount [21] as a result of the breach. A causal nexus [22] between the breach of contract and the patrimonial damage has to be proved.

(c)

The party who commits a breach of contract must be liable in law to compensate such loss. This means that the damage must, in terms of the principles regarding remoteness of damage (ie limitation of liability), fall within the contemplation of the parties. [23]

12.3 WAYS IN WHICH BREACH OF CONTRACT MAY CAUSE LOSS [24]

The effect of a breach on someone's patrimony is generally assessed through a comparison of his or her current patrimonial position with the person's hypothetical patrimonial position had there been proper and timeous performance. [25] In a specific instance breach of contract may cause damage in one or more of the following ways:

(a)

The value of the promised performance (determined by the correct measure) [26]is not received in cases where it is worth more than the counter-performance or where the counter-performance has already been delivered. [27]

(b)

Possession of the promised performance is delayed until actually received or a suitable substitute is obtained. [28]

(c)

Malperformance or the failure to perform causes some further expenses or losses. [29]

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(d)

A loss of profit which does not fall under one of the abovementioned instances. [30]

12.4 DIFFERENT MEASURES OF DAMAGES

Damages are generally calculated as the amount of money which is required to place a plaintiff in the position he or she would have occupied had there been proper and timeous performance [31] or, in some instances, the position in which he or she was before conclusion of the contract. [32]

Damages have to be calculated by the appropriate measure of value [33] with regard to the correct time [34] and place [35] and by taking into account the principles regarding collateral benefits, [36] a plaintiff's duty to mitigate his or her loss [37] and any relevant statutory provision. [38]

Various measures of value may be used, as illustrated by the following examples:

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(a)

Where a purchaser does not obtain delivery of the merx, the difference between purchase price and the market value is used. [39] To this must sometimes be added the reasonable cost of transport from another market. [40]

(b)

Where delivery of the merx is delayed and the market-price has fallen in the meantime, a plaintiff's damage may be estimated as the difference between the two market-prices. [41]

(c)

Where a plaintiff receives a defective merx, his or her damages may be calculated as the difference in value between what the plaintiff has in fact received and what he or she was supposed to have received in terms of the contract. [42]

(d)

In some instances, where a merchant may claim loss of profit, the proper measure of his or her loss is the difference between the market-price of a merx and its cost price. [43] The difference between the market-price and the contract price in a subsequent transaction, [44] as well as the price at which a contracting party has to purchase a substitute, may also be relevant.

(e)

In regard to particular losses or expenses (eg cost of repairs) the measure of 'reasonableness' applies. [45]

(f)

Parties may contractually agree as to the appropriate measure of damages, as in the case of a penalty provision [46] or in a contract of insurance. [47]

(g)

Legislation [48] and other legal principles [49] may prescribe a particular measure.

(h)

Estimation ex bono et aequo. [50]

(i)

The price obtained at reselling of the res vendita (contract price minus price obtained at resale). [51]

12.5 POSSIBLE APPROACHES TO SUBJECT OF CONTRACTUAL DAMAGES

The assessment of damages for breach of contract may be approached in different ways, eg, the different forms of breach of contract, [52] the ways in which damage is caused, [53] or type of contract. [54] Furthermore, one may have regard to the position of a particular contracting party and whether the contract was rescinded. [55]It is also

possible to conduct a discussion in terms of the measures of value referred to above. Academic writers have therefore treated the subject of quantifying loss upon breach of contract in a variety of ways. [56]

In this work we start by discussing the application of a number of general principles in regard to some typical examples of damage, breach of contract and the appropriate measure of value. Then we turn to further principles which apply to specific contracts but with a minimum of repetition of the principles already discussed.

12.6 DAMAGES IN SOME TYPICAL SITUATIONS

The damages which may be recovered in any particular case will depend upon the facts of that case and the application of the general principles. However, certain stereotypic solutions have been developed for certain sets of factual circumstances. [57] Examples are: in the case of a failure to pay an amount of money, damages calculated on the basis of lost interest will be awarded; [58] in the defective performance of work, the reasonable cost of remedying the defect represents the damages; [59] when there is a failure to deliver

a thing, damages are calculated with reference to its market value. [60] However, a standard solution to a particular problem may sometimes be applied in a manner which conflicts with general principles. [61] The best view seems to be that the application of specific rules does not supersede any of the general principles. [62]

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12.7 FAILURE TO DELIVER THING OR PERFORMANCE

12.7.1 Basic method of assessment [63]

Whenever a debtor fails to perform (for example, to deliver a thing), the creditor is entitled to claim such thing or its value [64] while he or she tenders counter- performance. In many cases this would mean that the creditor claims the value due minus the value of his or her own performance.

In a contract of sale, [65] for example, the purchaser or seller is entitled to the difference between the purchase price and the value of the thing sold, this value being established by means of the ruling market-price [66] of similar goods or, if there is no market-price, the price which similar goods would fetch on resale or for which they may be bought, according to the case. [67] In exceptional cases the unfavourable consequences of this method may be avoided. [68]

12.7.2 Application of market-price rule

12.7.2.1 *Nature and determination of market value* [69]

The application of the method of assessment referred to earlier turns on the market-price (market value) of the object in question. [70] The market-price of something is taken as its value [71] and refers in the first instance to the price at which

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it is actually sold, [72] but also the price which a person who really wants to acquire such a thing or performance is reasonably prepared to pay. [73] The word 'market' in connection with 'price' does not, therefore, necessarily imply that there should be an organized market. It refers to any source to which a purchaser may reasonably turn in order to obtain the performance which should have been delivered to him or her. [74]

However, market-price is not the only or exclusive indication of value and a court may consider other relevant evidence as to the value of a performance. [75] The market-price rule is based on the assumption that there is a ready market for the article in question at the place where its value has to be measured. [76] If, therefore, there is no market and consequently no market-price, other methods are used to determine its value. One possibility, depending on the facts, is to have regard to the

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price actually obtained by resale [77] to another. [78] However, the price so obtained is merely prima facie proof of value and the time which has elapsed between the date of performance and the time of resale is obviously relevant. [79] Another approach is to consider expert evidence on the value of something. [80] Where there is a market somewhere else, the court may use the value at such place [81] and add transport costs if the creditor needed the thing at another place or subtract such costs if he or she needed it at that market. [82] Finally, an award of damages may be based on the market value of a suitable substitute of such performance. [83]

A person who intends to compute damages by means of a method different from the market-price rule bears the onus of proving that there is no market or that this measure is inappropriate. [84]

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Time [85] and place [86] are naturally relevant factors where market value differs from time to time and place to place. The reason for this [87] is that the performance represents something of particular value in the estate (patrimony) of the creditor which he or she could also turn into money by selling it at that time and place.

Market value is usually calculated with reference to the place of delivery in terms of the contract; the value at such place is the price at the nearest available market plus reasonable transport costs to the place where delivery should take place. [88] Where a purchaser or a seller has to repurchase or resell, according to the case, for the purposes of mitigation of loss [89] upon breach of contract such party has to act reasonably by concluding a transaction in the local or nearest market. [90]

The relevance of the time factor in calculating damages in terms of the market-price rule is discussed below.

12.7.2.2 *General principles regarding date at which market-price to be determined* [91]

The statement is sometimes made that the market value of something has to be determined at the time of breach of contract. [92] Thus, if a seller is in mora regarding delivery of the merx, it is said that damages are computed with reference to the time

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at which delivery should have taken place. [93] If the buyer rescinds the contract at that stage, he or she has to act reasonably and purchase from another source what is required in order to mitigate his or her damage. [94]

Where the court awards damages for loss of future profit, it is in some instances necessary to work with the estimated market-price which something will have in future. [95]

The principles mentioned above have to be discussed further especially in respect of repudiation and of mora. [96]

12.7.2.3 *Operation of market-price rule where contract upheld*

Where a purchaser, for example, ignores repudiation by a seller, he or she remains entitled to performance in terms of the contract at the time set for performance [97]and, if such performance does not take place, damages are to be calculated (as in any other case of a failure to perform) with reference to the time stipulated in terms of the contract. [98]

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See the following summary by Joubert: [99]

> Since the creditor can in cases where he does not in fact rescind the agreement claim specific performance, whether or not the court will grant the decree, and damages as the surrogate of performance in the alternative, [100] it would appear that the creditor can claim the value of the goods at the time of the action and is not restricted to the value at the time of delivery. If the debtor can deliver after the time fixed for performance, then the creditor can claim the value at such time. If the value is less at the time than the former time he can also claim the difference as though there was late delivery. [101] If the value has risen, then he can still claim the value at the time of the action. This means that the creditor can claim either the value at the time fixed for delivery or the value at the time of the action, whichever is the higher. [102]

It is not clear whether a party to a contract who has elected to ignore repudiation may claim damages for damage which could have been avoided had he or she earlier elected to cancel the contract. [103]

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12.7.2.4 *Operation of market-price rule where contract cancelled*

(a) Date for performance already determined

In the case of *Novick v Benjamin* [104] shares had to be allotted within a reasonable time after they had been issued and before being traded. The court apparently treated this as a case where a date for performance had been fixed. [105] The debtor repudiated before the time of performance and the creditor cancelled. The question was whether the creditor's damages had to be assessed at the market value of the shares at the time of the breach (repudiation and acceptance thereof in February) or on the date of performance (beginning of April). The court held that the date of performance was the decisive moment to establish the value of the shares but added that the creditor had to mitigate [106] his damage. In casu the evidence did not disclose that the creditor had acted unreasonably in not buying the shares elsewhere before April. [107] The creditor's evidence proved the value of the shares at 16 April (more or less two weeks after the date set for performance). However, the court held this not to be fatal to his case. [108]

An example of repudiation (and cancellation) after the date of performance is found in *Bremmer v Ayob Mahomed & Co*. [109] Here the court (where the debtor was already in mora) held that the market value had to be calculated at the date of performance (December) and not at the date of breach of contract (repudiation)

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in January. [110] This decision may be criticized [111] and damage should have been assessed with reference to the date of acceptance of repudiation (cancellation). [112]

(b) Date for performance not determined [113]

In *Culverwell v Brown* [114] a purchaser made an unjustified attempt to withdraw from a contract on 6 December 1984, which constituted repudiation. On 15 March 1985 the seller resold the merx to another and on 18 March 1985 he informed the (first) purchaser that his repudiation was accepted and that he was claiming damages. The seller calculated his damages as the difference between the contract price and the price he obtained on resale at 15 March 1985. The purchaser argued that the seller had to assess his damages with reference to the prevailing market value at the time of repudiation (there being no evidence of the market value at that stage).

The court held [115] the date of acceptance of repudiation to be the proper time for the assessment of damages where no date for delivery was set. There are exceptions to this and where an article is resold or similar goods are bought, the difference between the original contract price and the market value at the time of reselling or repurchasing may be recovered if there has been no undue delay in reselling or repurchasing. This implies that, if a further transaction occurs before acceptance of repudiation, such acceptance should take place within a reasonable time thereafter. On the other hand, if the transaction is to take place after acceptance of repudiation, reselling or repurchasing must occur within a reasonable time after acceptance. In casu there was no unreasonable delay. Furthermore, the merx

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was sold for more than its market value (but less than the contract price) and damages were assessed as the difference between the original purchase price and price at which it was resold. [116]

The measure of damages adopted in this case provided the correct result but there is criticism of the court's construction of repudiation and rescission and the implications it may have on the calculation of damages. [117] However, this criticism is not correct in all respects. [118]

12.7.2.5 *Criticism of and deviation from market-price rule* [119]

The view has been expressed [120] that, although the market-price rule often performs satisfactorily, [121] our courts should not follow it blindly. The basic object of damages—that is, to place the plaintiff in the position he or she would have occupied had the contract been properly performed [122] —should always be remembered and the individual circumstances of each case have to be considered in deciding on the appropriate measure of damages that gives expression to this object. [123]

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An example [124] of where the market-price rule should not be used is where a cleaner, X, damages an old suit belonging to Y. X will not adequately compensate Y if he merely pays him the 'value' of an old suit. On the other hand, Y is apparently not entitled to the price of a new suit as this would be more than the compensation he ought to receive. [125] Perfect compensation is impossible in such a case and the court should determine a reasonable amount ex bono et aequo. [126] Furthermore, the general rule that the value of something is to be determined at the place and date of delivery may be inappropriate in a given case. [127]

In *Novick v Benjamin* [128] the court acknowledged the validity of this criticism. Thus, a deviation from the market-price rule is possible in order to apply general principles of the assessment of damages. [129]

The decision in *Cowley v Hahn* [130] is also noteworthy. [131] The court held that it was not strictly bound by the difference between the contract price and the alleged market-price. Value may also be determined through an actual resale after a reasonable time has elapsed and reasonable efforts have been made to find a buyer. Although this judgment is criticized, [132] it does seem to be supportable. [133]

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According to *Katzenellenbogen Ltd v Mullin*, [134] a deviation from the market-price rule is permissible, but since this rule embodies the normal measure, a plaintiff bears the onus to convince a court that the measure he or she proposes is the correct one in the circumstances of the case. [135]

12.8 REPUDIATION [136] AND PREVENTION OF PERFORMANCE [137]

The application of the market-price rule in assessing damages upon repudiation has already been discussed. [138] The present writers suggest that the same principles are mutatis mutandis applicable in the case of prevention of performance. [139]

12.9 DEFECTIVE RES VENDITA (MERX) OR PERFORMANCE [140]

In cases where the debtor delivers a defective performance (for example, a res vendita suffering from a defect) which the creditor accepts, [141] his or her damages are assessed

as the difference between the value actually received and the value he or she was supposed to have received. [142] In determining damages our courts often

accept the price as a prima facie indication of the value of performance [143] so that the creditor is entitled to the difference between the contract price and the value actually received. [144] If the value of an article cannot be easily determined, the reasonable expense of removing the defect is taken as a fair indication of the difference between the actual value of something and the value it is supposed to have. [145] The same applies in regard to the reasonable cost of supplementing any deficiency. [146]

Damages are, of course, also recoverable for consequential loss caused by defective performance [147] if such damage was foreseen or foreseeable [148] and could not have been avoided through the exercise of reasonable care. [149]

12.10 FAILURE TO PERFORM, OR TO PERFORM PROPERLY, WORK AGREED UPON [150]

If a debtor has agreed to complete some work but he or she fails to do so, damages are calculated as the difference between the contract price and any higher price which the creditor has to pay in order to have the work done. [151] Where the work is not completed, the measure of damages is the (reasonable) cost to have the work

completed minus the contract price in so far as it has not been paid. [152] In the case of defective work the correct measure is usually the reasonable cost of remedying any defect so that the work may measure up to the standard prescribed in the contract. [153]

In *Schmidt Plant Hire (Pty) Ltd v Pedrelli* [154] it was held that our courts have always used the reasonable cost of repairs as the appropriate measure of damages in the case of defective construction work. Thus, the point of departure is cost of repairs and not the difference in value between the performance received and the performance which should have been received. A court will depart from the measure of reasonable cost of repairs and adopt the difference in values only if it would be unreasonable to use the former approach. [155]

In *Rens v Coltman* [156] is was held that the time at which the cost of repairs should be assessed is when it is reasonable for the plaintiff to start repairs which may be as

late as the date of the trial if the plaintiff was acting reasonably in not mitigating the loss. [157]

Where a debtor is prevented by the creditor from completing a piece of work or the debtor cancels the contract as a result of breach of contract, the debtor is usually entitled to claim the contract price minus his or her expenses. [158]

12.11 FAILURE TO DELIVER PROPERTY OF CREDITOR OR DELIVERY THEREOF IN DAMAGED CONDITION

If a debtor delivers the property of a creditor in a damaged condition, the creditor is in principle entitled to damages calculated on the basis of the decrease in its market value. [159] Here, too, the reasonable cost of repairs can be the correct measure of

damages. [160] Where the property has become valueless or is not returned at all, the creditor may claim its market value as damages. [161]

12.12 LATE DELIVERY (MORA DEBITORIS) [162]

If a creditor receives performance some time after the time fixed for performance, his or her damage and damages are assessed with reference to the fall in the market value of the performance. [163] Instead of being able to dispose of the performance at the market-price prevailing at the time of delivery, he or she can now dispose of it only at a lower price. Damage caused by the lack of possession of a performance is

also taken into account. [164] Damages for these two forms of loss are recoverable only if such loss was within the contemplation of the parties. [165]

12.13 LOSS OF PROFIT [166]

Loss of profit upon breach of contract may be caused in various ways. [167] A creditor may, for example, be prevented from using the performance to make a profit [168] or he may lose the benefit of such transaction [169] or the advantage of a further transaction. [170]

In the case of a contract of sale, the general rule is that neither the buyer nor the seller may claim a loss of profit concerning that transaction or a possible future transaction. [171] The ratio is apparently that a seller may resell the res vendita and make the same profit (taken in conjunction with his or her claim for damages as discussed above). [172] Similarly, a buyer may repurchase on the open market and, in conjunction with his or her claim for compensation as discussed above, make good any possible loss. It is not normally foreseen that a purchaser or a seller will make a special profit above the market value out of a transaction or a possible further

transaction. However, the law does allow the recovery of damages for loss of profit [173] if such loss (as special damage) was foreseen or foreseeable by the parties. This will normally be the case where the seller is a manufacturer [174] or a merchant [175] who has a large supply of goods, since he or she has lost the opportunity to make a profit from that specific transaction. [176] Furthermore, if a seller knows that a buyer has the opportunity to resell the merx at a profit, he or she will, upon breach of contract, be liable to make good a loss of profit in so far as such loss cannot be recovered in terms of the principles relating to market value. [177]

12.14 DELAY OF PERFORMANCE BY CREDITOR (MORA CREDITORIS) [178]

Where a creditor fails to co-operate towards performance, the debtor will be in possession of such performance. Where the debtor has obtained counter- performance, this person may remain in possession of the performance he or she has to deliver and claim damages from the creditor for costs incurred in taking care of this. [179] The debtor may also dispose of the performance as negotiorum gestor and give account to the creditor of the net proceeds. [180] However, where the debtor resiles from the contract, he or she remains in possession of a performance of a certain value and the damage is the difference in value between such performance and the performance he or she was entitled to. The debtor can claim such

difference in value, which is calculated in terms of market-price, as his or her damages. [181] The price obtained on resale may be an indication of the value of a performance, but a seller is not obliged to resell [182] and may claim damages in any event. If the debtor sells a performance, he or she does so for own account and not as negotiorum gestor. [183] In such a case the debtor does not have to account for the proceeds and may recover any loss (ie if the price fetched on resale is less than the counter-performance) from the creditor if he or she sells promptly on the open market. [184] Where the debtor retains performance, he or she does so for private speculation. [185] The debtor is also entitled to his or her wasted costs in attempting to deliver performance to the creditor. [186]

12.15 CONTRACT OF SALE [187]

The contract of sale was used as a basic example in the earlier discussion of general principles in regard to some typical instances of damage. In this paragraph further principles which are peculiar to this type of contract are described. [188] A number of statutory provisions are also applicable to credit sales and sales that are consumer agreements, but these provisions are discussed later. [189]

12.15.1 General principles in regard to seller

Where a seller upholds a contract and sues for the purchase price, he or she may also claim the following: mora interest; [190] damages for reasonable costs incurred in connection with the storage and maintenance of the res vendita from the moment performance was due; [191] and possibly some further amounts. [192] Where the seller

cancels before delivery, [193] his or her damages are generally [194] assessed as the difference between the contract price and the market value of the res vendita [195] and by taking into account certain reasonable expenses [196] and, in some instances, loss of profit. [197] The seller's duty to mitigate his or her loss must obviously be taken into account in the computation of damages. [198]

If the seller cancels after delivery, [199] he or she may reclaim the res vendita as well as one of the following: the net income which the purchaser obtained from the res vendita or could have obtained from it; [200] the net value of the use of the res vendita which the purchaser had; or interest on the purchase price from the date it was due until restitution of the res vendita. Where the purchase price has been partially paid, the seller must tender its restitution [201] and, if he or she claims for loss of use of the res vendita, the seller also has to tender interest on the amount of the purchase price which he or she returns. [202] There may be other facts which have an influence on the amount of damages claimed by a seller. [203] The seller may decide not to claim restitution of the res vendita but rather to claim its value at the time of breach of contract. [204]

12.15.2 General principles regarding purchaser [205]

Where a purchaser upholds or cancels a contract, he or she may claim damages on the basis of the difference between the purchase price and the market value of the res vendita [206] as well as further damage occasioned by late delivery [207] or non-possession [208] or partial delivery [209] thereof or, in some instances, for loss of profit. [210]

Where the purchaser rescinds the contract [211] he or she may also claim expenses in connection with the storage and maintenance of the res vendita. [212]

12.15.3 Eviction [213]

Upon eviction a purchaser is entitled to his or her full interesse [214] and the purchase price is taken as the basis for calculations. Kerr [215] explains this as follows:

> [A] buyer claiming performance of the warranty against eviction is entitled, except in the case of eviction from a rapidly depreciating asset or from a diminishing one, to repayment of the price (or of whatever portion he has paid) and, if loss over and above the amount of the price can be shown, compensation for such loss, provided that the amount does not exceed what ''was contemplated or foreseeable by the parties at the time of conclusion of the agreement''. [216]

Different opinions have been expressed on the correct time at which the value of the res vendita should be taken. [217] It may sometimes be unfair to the purchaser as well as the seller to use the date of eviction, and the time when the contract was concluded then seems to be correct. [218] In some instances, where the article sold has

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risen in value, this higher value should form the basis of a purchaser's claim. [219] If the value of the res vendita has fallen since the conclusion of the contract, it would be fair to use the value it has at the time of eviction. [220]

A purchaser's claim for damages against the seller is calculated by taking into account the following: the value of fruits (of the thing sold) which he or she had to surrender to the true owner; [221] legal costs in connection with the eviction; [222]compensation for improvements to the res vendita; [223] an increase in value of the res vendita between the time of conclusion of the contract and the time of eviction; [224] the amount necessary to buy the property from its owner; [225] and the purchaser's liability towards a further buyer. [226]

There are also principles relating to damages in the case of partial eviction. [227]

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12.15.4 Latent defects: actio redhibitoria [228]

Where a res vendita [229] suffers from a material defect, or where its presence has been intentionally concealed, or if there was a false dictum et promissum, [230] or where the absence of a defect has been guaranteed, a purchaser [231] may use the actio redhibitoria to claim cancellation of the contract and restitution of performances made in terms thereof. [232] The purchaser can inter alia claim interest on the purchase price (but the benefit of using the res vendita must be deducted from this amount) [233] as well as compensation for all foreseeable expenses he or she has had in connection with the sale. [234]

However, damages for all consequential losses [235] or positive interesse [236] to place the purchaser in the position he or she would have occupied if a res vendita without a defect had been delivered may not be recovered by means of the actio redhibitoria. [237]

Where a purchaser institutes the actio redhibitoria, a seller is, in addition to the return of the res vendita, [238] entitled to compensation for all its fruits which should have been collected by the purchaser but which was not done due to his or her mala

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fides; [239] a seller is also entitled to money earned with the res vendita by, for example, letting it, [240] repayment of damages which the buyer has recovered from the seller because of, for example, late delivery; [241] and compensation for a drop in value of the res vendita for which the purchaser is responsible. [242]

12.15.5 Latent defects: actio quanti minoris [243]

With this action a purchaser claims return or remission of a part of the purchase price because the res vendita is different from what was suggested by dicta et promissa in connection therewith or it suffers from a latent defect, or the presence of a latent defect has been intentionally concealed or its absence guaranteed. [244] The reduction in price is determined by the difference between the purchase price and the value of the thing sold, [245] but there is also a view that it should be measured by what lesser amount the purchaser would have paid for it if he or she had had knowledge of the defect or had known the dicta et promissa to be false. [246] Mostert et al [247] argue against the latter approach, which is applied in the case of intentional misrepresentation inducing contract, [248] since that concerns delictual liability whereas the actio quanti minoris relates to contractual liability. [249] They submit that a purchaser is entitled only to the difference between value and price if the latter is more than the former. If the res vendita is worth more than the price paid for it, despite a defect or the fact that it does not live up to dicta et promissa concerning it, the purchaser will not recover anything. [250]

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Normally market value is taken as the value of a res vendita. [251] If, however, the thing sold has no market value, the reasonable cost of repairs may possibly be used to calculate the amount by which the price should be reduced. [252]

The value of the res vendita may be measured at different times [253] but there is a view that the time of conclusion of a contract fits in best with the general principles regarding a contract of sale. [254]

12.15.6 Misrepresentation [255]

This is especially the case where a seller knows that the res vendita suffers from a latent defect but does not disclose this fact. [256] The principles concerning the computation of damages for intentional misrepresentation (fraud) are discussed elsewhere. [257] Negligent misrepresentation is also discussed in regard to delictual damages. [258] In a case of so-called innocent (or 'simple') misrepresentation concerning latent defects or the qualities of a res vendita there is no action for damages in the ordinary sense. [259] Thus a purchaser may not claim the difference in value between what he or she received and the value the purchaser would have received had the misrepresentation been true [260] or the difference between what he or she received and the position that person would have occupied in the absence of a misrepresentation. The representee does, however, have the right to resile from

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the contract [261] or to claim a reduction of the purchase price (sometimes referred to as 'restitutionary damages') [262] by means of the actio quanti minoris [263] in so far as there was a false dictum et promissum. [264] Thus there is no claim for consequential loss.

12.15.7 Warranties [265]

If a seller has not made good any express, implied [266] or ex lege warranty, [267]damages are generally calculated as the difference between a contracting party's present position and the position he or she would have occupied if the seller had made good the warranty. [268] The exact amount he or she is entitled to will depend on the relevant facts. The measure of damages will generally be the difference in value between the res vendita as it is and the value it would have had if it had lived

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up to the warranty. [269] It is sometimes stated that the measure is the amount which is necessary to repair the res vendita so that it conforms with the warranty. [270]Where a breach of warranty causes further damage (ie consequential loss), this may also be taken into account [271] if such claim has not been contractually excluded. [272]Consequential loss includes loss of profit. [273]

12.16 MONEY DEBTS

The basic measure of damages for a failure to pay an amount of money is the current rate of mora interest on such amount. Interest is payable from the moment of mora and the relevant principles are discussed elsewhere. [274] Where the non-

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possession of money causes special damage, compensation is recoverable if such damage was foreseen or foreseeable. [275]

12.17 CONTRACT OF LEASE AND 'HOLDING OVER'

In the discussion which follows, attention is mainly given to the principles applicable to the lease of immovable property. However, basically the same principles apply in the case of moveable property. [276] The Consumer Protection Act 68 of 2008 and the National Credit Act 34 of 2005 can also be applicable to certain leases but these provisions will be discussed below. [277]

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Should a lessor deliver property to a lessee [278] which does not comply with the terms of the contract, [279] the lessee's damages are usually calculated as the difference between the rental value of the property he or she received and the rental value the lessee is entitled to. [280] In the absence of evidence to the contrary, it is normally accepted that the rental value to which a lessee is entitled is equal to the agreed rent. The rental value actually received has to be determined on the evidence. A lessee may, in terms of this approach, be entitled to a reduction in rent. [281] Where defects in the leased property cause further damage to the lessee, he

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or she can also claim damages for such losses if the lessor knew or ought to have known of the defects. [282]

Damages are also available if a lessor prevents a lessee from using the leased property. [283]

A lessor may claim damages from a lessee who repudiates his or her obligations or fails to pay the rent or to pay it timeously [284] and may also claim for loss suffered on account of a lessee's failure to maintain the premises [285] or to restore the premises timeously [286] and in the required condition. [287] A lessor may also claim lost rental as

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damages if he or she cancels the contract for breach of contract. [288]

'Holding over' [289] refers to the situation where a lessee, upon termination of a lease, unlawfully remains in possession of the property or where a lessee occupies it in terms of a void contract of lease. [290] It is not exactly clear whether the basis of the claim is delict (trespass), [291] contract, [292] breach of contract [293] (or both) or unjust

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enrichment. [294] In so far as it would make a difference in practice, [295] a lessor should be able to choose the basis which is the most advantageous to him or her. Damages [296] are generally calculated in terms of the rental value of the premises for the period the defendant was in unlawful occupation [297] and with regard to other possible losses. [298] Such losses should, however, not be too remote; [299] in other words, they should be imputable to the defendant. The questions of mitigation and collateral benefits in respect of such a claim [300] are much in dispute.

12.18 DAMAGES AGREED BY CONTRACT: CONVENTIONAL PENALTIES ACT 15 OF 1962 [301]

12.18.1 General

Parties to a contract may reach agreement on the recovery of damages or the exclusion of such a claim. [302] In view of the problems in regard to proof of damage and the assessment of damages, parties may agree that upon breach of contract an innocent party will receive a specific amount of money or obtain some other advantage. It was formerly [303] necessary to draw a distinction between a fair pre-estimate of damage (liquidated damages) and a penalty stipulated in terrorem. [304]The former was enforceable but the latter was valid only in the case of a forfeiture clause coupled with a failure to pay instalments timeously. [305] These rules did not work well and were abolished by the legislature. [306]

12.18.2 Provisions of Conventional Penalties Act 15 of 1962

The relevant sections of the Act are as follows:

> **1. Stipulations for penalties in case of breach of contract to be enforceable.—**
>
> (1) A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.
>
> (2) Any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty.
>
> **2. Prohibition on cumulation of remedies and limitation on recovery of penalties in respect of defects or delay.—**
>
> (1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.
>
> (2) A person who accepts or is obliged to accept defective or non-timeous performance shall not be entitled to recover a penalty in respect of the defect or delay, unless the penalty was expressly stipulated for in respect of that defect or delay.

> **3. Reduction of excessive penalty.**—If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.

4. Provisions as to penalty stipulations also apply in respect of forfeiture stipulations.—A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, remain liable for the performance of anything thereunder, shall have effect to the extent and subject to the conditions prescribed in sections *one* to *three*, inclusive, as if it were a penalty stipulation.

12.18.3 Field of application of Conventional Penalties Act 15 of 1962

Through this Act the distinction between a penalty and a genuine pre-estimate of damages was abolished and both are enforceable [307] but subject to reduction. [308]All that is relevant at present is whether a contractual stipulation falls under the Act (and is thus subject to moderation). [309]

12.18.3.1 *Examples of contractual provisions which are not penalty stipulations*

The following contractual provisions do not constitute penalty stipulations:

(a) A stipulation which embodies a creditor's common-law claims to cancellation and restitution upon breach of contract. [310]

(b) A stipulation that a debtor has to restore property and forfeits his or her claim to compensation for any improvements. [311]

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(c) An acceleration clause. [312]

(d) 'Rouwkoop' (forfeit money), in other words, a stipulation in terms of which a party has to forfeit something or pay something for the right to resile from a contract without his conduct amounting to a breach of contract. [313]

(e) Arrha, in other words, something given by one party to a contract to another party as proof of his or her earnest intention regarding the contract in question. [314]

(f) A stipulation in terms of which parties agree that in the event of litigation a judgment debtor has to pay a judgment creditor's attorney-and-client costs. [315]

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(g) Some matters outside the field of operation of the Act, such as claims for arrear rent and interest thereon. [316]

(h) A claim for performance which does not depend on breach of contract. [317]

12.18.3.2 *Examples of some contractual provisions which amount to penalty stipulations* [318]

In addition to stipulations which clearly fall within the scope of the Act, [319] the following are also regarded as penalty clauses:

(a) A forfeiture stipulation, irrespective of whether it relates to something which was performed or has to be performed. [320]

(b)

A stipulation providing for the recovery of collection charges regardless of whether they have been earned or not. [321]

(c)

An acceleration clause which provides that a creditor is entitled to all finance charges which he or she would have received had the contract taken its normal course. [322]

(d)

A stipulation for a higher rate of interest once the debtor is in default. [323]

12.18.4 Some general principles in regard to penalties

The circumstances under which a creditor will have the right to put a penalty into effect are defined in the contract. Penalty stipulations may be coupled to claims for specific performance as well as cancellation. [324] Conduct which constitutes a breach of contract is a prerequisite for the operation of a penalty stipulation. [325]

There is a prohibition on the cumulative recovery of a penalty as well as damages. [326] Damages calculated in the normal manner and a penalty are not

available in the alternative [327] unless the contract expressly allows a creditor this choice. [328] Thus a contractual provision giving a creditor a choice between these two possibilities is valid. [329]

A creditor will be entitled to claim performance as well as a penalty only if the contract specifically provides for this. [330]

12.18.5 Reduction or moderation of penalty [331]

12.18.5.1 *General*

If a penalty comes into operation upon a debtor's breach of contract, the creditor may ask the court to enforce such penalty stipulation. However, the court has discretion to reduce the penalty if it is out of proportion to the prejudice suffered by the creditor as a result of the breach of contract. [332] The court may reduce the amount in question to such an extent as it may consider equitable, although the penalty may then still be more than the creditor's actual patrimonial loss. [333]

12.18.5.2 *Application for reduction, onus of proof etc*

Usually a plaintiff relies on a penalty and the defendant may then ask for its moderation. [334] A plaintiff does not have to prove damage for a penalty stipulation to come into operation. [335] The onus of proof is on the defendant to convince the

court that a penalty ought to be reduced as well as the extent of such moderation. [336] This he or she will normally do by tendering prima facie proof which the creditor will have to rebut. [337] However, the provisions of s 3 have also been interpreted [338] to mean that a court may mero motu raise the prima facie excessiveness of a penalty amount (ex facie the pleadings) when, for example, a defendant is in default. [339] This interpretation has been strengthened by the view that s 3 gives a court not only a discretion but also a duty to moderate an excessive penalty. [340] A court may thus reduce a penalty [341] or refuse default judgment, summary judgment [342] or

provisional sentence [343] and afford a creditor the opportunity to unsettle prima facie impressions. [344]

12.18.5.3 *Criteria in and extent of reduction of penalty*

The basis for moderation of a penalty is that it is out of proportion to the prejudice (loss) suffered by a creditor. [345] This can be determined only if there is clarity as to the extent of the loss a creditor has suffered. The starting point is actual and

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potential prejudice and the Act apparently does not restrict this to damage for which compensation may in fact be recovered. [346] However, could it have been the intention of the legislature that a creditor is completely absolved from his or her duty to mitigate [347] or that damage which occurs in an extraordinary manner may be regarded as 'prejudice'? [348] The Act employs the vague concept of 'prejudice' (of the creditor) and this clearly includes more than patrimonial loss. Thus a court regards every rightful interest of a creditor that is affected by the breach of contract and this concept was widely interpreted in *Van Staden v SA Central Lands and Mines*. [349]Accordingly it includes affective loss, inconvenience etc [350] which are not normally regarded as compensable. [351] The failure to mitigate loss is a further factor to be taken into consideration in evaluating the proportionality of the stipulated penalty. [352]

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After the extent of a creditor's prejudice has been determined, it is compared with the penalty to ascertain whether the penalty is out of proportion to the prejudice. [353] The Act does not disclose the degree to which the penalty should be out of proportion to the prejudice. It would seem that the approach of our courts is to intervene if the penalty deviates markedly from the prejudice. [354] There is obviously no precise measure which can be used.

A court may, when it considers a penalty to be excessive, moderate such penalty to the extent which it considers to be equitable in the circumstances. [355] The Act does not stipulate that a court is obliged to reduce the penalty, but it is difficult to see why a court would refuse to do so and, moreover, the courts assume that they have a duty in this regard. [356] According to *Western Credit Bank Ltd v Kajee*, [357]the object of a reduction is

> to ameliorate to an equitable extent the effects of the penalty; although the debtor is not expressly mentioned in this respect, it appears to me, on the one hand, that the intention is to soften the blow for him, whilst on the other hand to assure that the creditor is not prejudiced.

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In general it may be said that the new equitable amount of damages should reasonably reflect the full extent of the loss. Where a forfeiture clause is moderated by a court, the debtor has the right to claim any excess in the hands of the creditor. [358]

12.18.6 Waiver of rights

A debtor may waive the protection of the Act after he or she has committed a breach of contract. [359] It is improbable that a debtor may validly agree when entering into a contract that he or she will not rely on the provisions of the Act. [360]

12.19 AGREEMENTS SUBJECT TO CONSUMER PROTECTION LEGISLATION [361]

12.19.1 General

In this paragraph some basic principles which are important for the law of damages are drawn from the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008, and the Alienation of Land Act 68 of 1981. [362] A discussion of the fields of application of these statutes as well as their interrelationship is beyond the scope of this analysis. [363] In as far as a contract is not governed by one of these statutes, common-law principles referred to above are applicable to the law of damages. [364]

12.19.2 National Credit Act 34 of 2005

This Act prescribes what may be recovered from the consumer [365] in a credit agreement and limits the interest rate and amount of other charges which may be

recovered. [366] Section 100, for example, provides that the credit provider may not impose a monetary liability on a consumer in respect of a credit fee or charge prohibited by the Act and may not charge the consumer any amount (fees, charges and interest) which exceeds the maximum amount that may be charged in accordance with the Act. [367]

The Act allows the consumer to unilaterally settle the whole credit agreement in advance by paying the settlement value at that time. [368] The settlement value is the total of the unpaid balance of the principal debt, the unpaid interest charges and other fees and charges, and the early termination charge. Only in the case of a large agreement may an early termination charge be levied. [369] The amount of this charge is either prescribed or calculated according to a prescribed formula. [370]

The Act contains several provisions on types of damages that may be claimed. A consumer who is in default has the right to reinstate a credit agreement before the credit provider cancels the agreement by paying the credit provider all the amounts that are overdue, the permitted default charges [371] and reasonable costs of enforcing the agreement up to the time of reinstatement. [372]

The credit provider may furthermore sell the goods where the consumer unilaterally terminates the credit agreement (whether the consumer is in default or not) [373] by the voluntary surrender of the moveable goods and where the credit provider has claimed repossession of the goods after the consumer has defaulted (debt enforcement). [374] After the goods have been sold [375] the credit provider credits

or debits the consumer with a payment or charge equivalent to the proceeds of the sale less any expenses reasonably incurred by the credit provider in connection with the sale of the goods and gives the consumer a written notice in which certain amounts are set out. [376] If the amount credited to the consumer's account is less than the settlement value immediately before the sale, the credit provider may claim payment of the remaining settlement value in the written notice. [377] The final amount (if any) that the consumer owes the credit provider is thus calculated by deducting the net proceeds of the sale (gross amount realized by the sale minus the permitted default charges [378] if applicable and reasonable costs of the sale) from the settlement value [379] of the agreement immediately before the sale. [380]

A person (either a credit provider or consumer) who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct in terms of the Act has the right to institute an action in a civil court. [381]

The provisions regarding mora interest are discussed elsewhere. [382]

12.19.3 Consumer Protection Act 68 of 2008

This Act is applicable to the supply of goods and services and can therefore be applicable to contracts of sale, mandate, lease and carriage which are discussed in this chapter. [383]

The protection provided by this Act overlaps with and vastly extends the pre-contractual protection afforded by the common law. The detail of these provisions goes beyond the scope of this work, [384] but it is important to note that the

court [385] is inter alia empowered to compensate the consumer for losses or expenses relating to the transaction, agreement or the proceedings of the court. [386]

In addition, the Act creates new naturalia [387] which may only be partially excluded if the consumer has been expressly informed that particular goods were offered in a specific condition. [388] The implied warranties with regard to quality of the goods are in addition to any other ex lege or contractual warranties. [389] The consumer may return the goods to the supplier, without penalty and at the supplier's risk and expense, if these implied warranties are breached and the supplier must, at the direction of the consumer, either repair or replace the failed, unsafe or defective goods, or refund the price paid by the consumer for the goods. [390] If a supplier repairs any particular goods or any component of any such goods, and within three months after that repair, the failure, defect or unsafe feature has not been remedied, or a further failure, defect or unsafe feature is discovered, the supplier must replace the goods or refund to the consumer the price paid by the consumer for the goods. [391] It also seems that the consumer will be able to claim damages from the supplier for failure to comply with any of these duties. [392]

The consumer has the right to unilaterally cancel a fixed term contract during its operation, [393] but the supplier may impose a reasonable cancellation penalty with respect to any goods supplied, services provided or discounts granted to the consumer in contemplation of the agreement enduring for its intended fixed term. [394] The consumer also remains liable for any amounts owed to the supplier. [395] The manner, form and basis for determining the reasonableness of this charge may

be prescribed [396] and the factors that may be taken into account to determine the reasonableness of the credits or charges have been comprehensively listed in the regulations. [397]

The supplier in a lay-by agreement [398] has to compensate the consumer with double the amount the consumer has paid the supplier where the supplier's inability to supply the goods is not due to circumstances beyond the control of the supplier (thus a case of breach of contract). [399]

Where the consumer terminates the lay-by agreement before fully paying the goods or fails to complete payment within a certain period after the anticipated date of completion, the supplier may charge a termination penalty if the consumer has been informed of the fact and extent thereof at time of conclusion of the agreement [400] and must refund any amount paid by the consumer after deducting the penalty. [401] No such penalty may be charged if the consumer's failure was due to the death or hospitalization

of the consumer. [402] The basis for calculating the maximum amount of the penalty may be prescribed [403] which has been done. [404]

If in the case of over-selling and over-booking, the supplier fails to supply goods or services on the specified date or at a specified time as agreed upon because of insufficient stock or capacity to supply those goods or services or similar goods or services of the same or better quality, class or nature, [405] the supplier must refund

the consumer the amount, if any, the consumer paid together with interest and the cost directly incidental to the supplier's breach of contract if the supplier's inability is not due to circumstances beyond the control of the supplier. [406]

The Act provides that a person (either a supplier or consumer) who has suffered loss or damage as a result of prohibited conduct or dereliction of required conduct in terms of the Act, has the right to institute an action in a civil court. [407] The Act furthermore does not diminish the right of the consumer or supplier to recover interest or special damages which it otherwise may have. [408] A court may also award damages against a supplier for collective injury to all or a class of consumers generally. [409]

The provisions regarding mora interest are discussed in more detail elsewhere. [410]The Act creates a very wide no-fault liability for damage caused by supplying unsafe goods which is also discussed elsewhere. [411]

12.19.4 Alienation of Land Act 68 of 1981 [412]

Section 12(2) of the Alienation of Land Act provides that a seller may not obtain judgment on a contract for an amount which exceeds the amount permissible in terms of the Act. [413] Damages are not recoverable for a loss exceeding this amount. [414] A rouwkoop [415] clause in a contract in terms of which a purchaser, who is deemed to have terminated a contract by an act or omission, is liable to forfeit something or to pay a penalty or damages or deliver anything else, is subject to the

Conventional Penalties Act. [416] A seller can claim damages only after he or she has properly notified the purchaser. [417] Certain other provisions in this Act also relate to damages. [418]

12.20 TERMINATION OF SERVICE CONTRACT [419]

If a service contract [420] is cancelled upon breach of contract by an employer, an employee's damages are calculated in the following manner: [421]

> The measure of damages accorded such employee is ... the actual loss suffered by him represented by the sum due to him for the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment. [422]

The principles regarding collateral benefits [423] and the duty to mitigate [424] are thus seen as part of the measure of damages. Apparently the law does not view the matter

merely as a loss of benefits from a particular contract since the reference to the employee's duty to obtain other work indicates the use of his or her earning capacity in reducing the loss in terms of a specific contract of employment.

Where the employment contract provides for the termination of the contract at will by notice, the measure of damages is the loss of salary for the notice period. [425]

Unlawful dismissal is not per se an iniuria for which satisfaction is recoverable. [426]A labour court can also [427] award an employee compensation for unfair dismissal in terms of s 193 of the Labour Relations Act 66 of 1995. [428] This compensation is a solatium. [429]

There is little authority on breach of contract by an employee. [430] The most probable measure of damage is the amount which it would cost to acquire a new employee for the duration of the contract minus any amount payable to the former employee (which is a deductible saving). [431] In principle, damages are also

recoverable for consequential loss such as loss of profit [432] or expenditure which has become useless. [433] The causal nexus between breach of contract and damage has to be clearly demonstrated. [434]

12.21 CARRIAGE OF GOODS [435]

The numerous principles in regard to conditions of carriage and the exclusion or restriction of liability in regard to the various types of contracts and carriers [436] are not relevant here and reference will be made only to some issues dealing with the quantum of compensation. The Consumer Protection Act 68 of 2008 can also be applicable to the contracts of carriage that qualify as consumer agreements, and these provisions have already been discussed above. [437]

As far as damage to goods which are conveyed is concerned, it is accepted that an owner does not have to receive goods which are irreparably damaged and may claim damages ex contractu or ex delicto from the carrier. [438] The basic measure of damage in regard to damaged goods is the diffence between the market value of the goods in their undamaged condition and the market value of the goods in their damaged condition or the reasonable cost of repair. [439]

Where conveyed property is not delivered, [440] the owner is prima facie entitled [441] to its value at the time and place where it ought to have been delivered. The value of property is not merely its cost price, [442] but also does not normally exceed its market value. [443]

The late delivery of property can cause damage in various ways for which damages may be recoverable. [444]

Damages for consequential losses such as loss of profit, [445] loss of profit from a resale of the property, [446] or particular expenses, [447] may be recovered if they were foreseen or foreseeable by the parties. [448]

In some forms of contract of carriage there is a restriction as to the maximum amount of compensation recoverable. [449]

12.22 CONTRACT OF INSURANCE [450]

12.22.1 Introduction

In practice, a contract of insurance is probably the most important source of the provision of damages or indemnification. [451] In view of the extent of the principles regarding insurance, only a brief summary of some rules which relate directly to the quantum of damages will be provided here.

12.22.2 Indemnity and non-indemnity insurance

It is well known that there are two main forms of insurance, namely indemnity insurance ('skadeversekering') and non-indemnity insurance ('somme- versekering'). [452] The basic difference between the two is that in indemnity insurance the insured is entitled to damages (indemnity) [453] for actual patrimonial loss sustained, while in the case of non-indemnity insurance there is not necessarily a relationship between the amount of the claim and damage (if any) which may exist. [454]

12.22.3 Indemnity insurance

12.22.3.1 *General*

Indemnity insurance indicates a contractual undertaking by an insurer to compensate the insured for damage caused by the event (risk) insured against. [455] In addition to the amount of damage, an insured's claim may be limited by the insurable value [456]as well as other possible terms of the contract.

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12.22.3.2 *Damage, insurable interest and assessment of damages* [457]

In insurance law, loss or damage is often expressed in terms of the concept of insurable interest which is actually the yardstick of damage. [458] An insurable interest indicates a particular value relationship between the insured and certain interests, and damage consists in an infringement of this relationship. [459] However, it is probably correct to state that the concept of damage in insurance law is the same as that outside insurance law, [460] so that an insurable interest can be determined by means of the assessment of damage. [461] There are instances which may create the impression that the concept of damage in insurance law goes further than its general meaning. [462] Nevertheless, on closer examination these cases are in accordance with general principles and do not imply a wider concept of damage. [463] However, there is a strong movement in court decisions recently in the direction of the acceptance of such a wider concept of damage in the law of insurance, but this has not yet become the general view of our law. [464]

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Normally the liability of an insurer is limited to 'direct' loss, but this term actually means nothing more than the loss and risks agreed upon. [465]

Reinecke et al [466] explain the measure of damages in insurance as follows:

> The question how to quantify or assess an insured loss is fraught with theoretical and practical difficulties. Not surprisingly, the matter of quantification is often referred to arbitration. These difficulties can be totally avoided by incorporating a reinstatement clause into the contract, while they may be largely surmounted by concluding either a valued policy or a policy for new value.
>
> The broad aim to be achieved by compensation is to restore the insured financially to a position similar to the one he occupied in respect to the affected insured object before the insured event took place, subject to any limitations contained in the contract. This calls for a comparison between the actual or real monetary value of the affected asset or interest before the event insured against and its value immediately after the event. The comparison should be made at the time and place of the loss. No allowance should be made for mere sentimental value or for prospective profits or othe consequential loss. The value to be taken into account is the value to the insured. For insurance purposes the difference produced by such a comparison constitutes the insured's maximum loss in financial terms. This measure applies whether the insured's loss is total or partial.

In order to assess the extent of damage or loss a value has to be placed on the insured's loss. In *Nafte v Atlas Insurance* [467] the court held that the value of the damage may be

assessed with reference to the following principles: the value of the insured property at the time of the loss (the 'real and actual value'); the place of the loss; only the 'intrinsic value' of an interest is taken into account and not any affective loss, consequential loss or loss of profit. In some cases the market value of property will reflect its true value, [468] while in other instances the cost of repairs or the cost of replacement will give a better indication of the extent of the loss. [469]

Since only actual value at the time of the occurrence of the event insured against is proof of value at such time, any depreciation in the value of an asset from the time

of the contract to the occurrence of such event is irrecoverable. [470] On the other hand, any increase in value between these two dates may be recoverable, depending on the terms of the contract. [471]

12.22.3.3 *Some specific principles in regard to indemnity insurance*

The compensatory function and amount [472] are influenced by principles in regard to under-insurance, [473] an average clause, [474] over-insurance, [475] double insurance, [476] contribution, [477] and subrogation. [478]

Furthermore, a policy may contain provisions [479] on taxed values (valued

policy), [480] a contribution by the insured, [481] choice of reinstatement, [482] and diverse principles [483] which may influence the amount payable.

In the different forms of indemnity insurance [484] there may be cases where the recovery of compensation is limited or excluded, [485] or is extended to further forms of damage. [486]

12.22.4 Non-indemnity insurance [487]

Non-indemnity insurance is only indirectly related to damages [488] and it is unnecessary to provide any detail on it in this work. [489] The most common forms of non-indemnity insurance are personal accident insurance and the different forms of life insurance. [490] In personal accident insurance [491] the insured receives

insurance cover in the event of injury, disability, and death caused by an accident or illness. [492] Periodic or pro rata payments may be made. [493]

12.22.5 Third-party insurance

The RAF Act 56 of 1996 provides for the payment of damages for patrimonial and non-patrimonial loss flowing from bodily injuries or death caused by the negligent driving of a motor vehicle. [494] The purpose of this Act is to create a type of ex lege insurance relationship in order to provide for a defendant who would be financially capable of paying damages. However, damages in terms of this Act are payable mainly in terms of delictual principles discussed elsewhere. [495]

12.23 BREACH OF PROMISE TO MARRY [496]

A contract of engagement is a particular type of contract in terms of which two parties undertake to marry each other. Until recently it has been trite to say that where this contract is unlawfully breached, the innocent party is entitled to be placed in the

patrimonial position he or she would have occupied if the parties had married each other. [497] This involved a claim for the loss of patrimonial advantages from the prospective marriage [498] as well as expenses incurred in connection with the preparation for the marriage. [499]

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In *Van Jaarsveld v Bridges* [500] the Supreme Court of Appeal remarked obiter that an engagement should not be regarded as a binding contract, but only as an unenforceable pactum de contrahendo providing a time for the parties to get to know each other better and to decide whether or not to marry. The 'innocent party' should not have a claim for prospective losses caused by the breach of a promise to marry because of the uncertaintiy of quantifying such losses, [501] but indeed one for actual losses suffered. [502]

12.24 PROFESSIONAL LIABILITY OF LEGAL PRACTITIONER [503]

12.24.1 Contractual or delictual liability?

It is accepted that, if an attorney negligently provides professional services to his or her client in terms of an agreement, the client generally has only a contractual action at his or her disposal. [504] In so far as a delictual claim may be relevant, the

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general principles in regard to quantum apply. [505] However, there is a view that the measure of damages in contract and delict should be the same. [506] The Consumer Protection Act 68 of 2008 can also be applicable to mandates that qualify as consumer agreements. These provisions have been discussed above. [507]

12.24.2 General measure of damage and damages [508]

The following principles should apply: [509]

> Whether the claim is brought in contract or tort, the fundamental principle governing the measure of damages is that the plaintiff should be put, as far as money can do it, in the position he would have occupied if the solicitor has discharged his duty. Broadly speaking, this may be achieved in one of two ways, depending upon the particular facts of the case: (i) by paying to the plaintiff the monetary equivalent of any benefits of which he has been deprived; (ii) by indemnifying the plaintiff against any expenses or liabilities which he has incurred. Damages are generally, but not invariably assessed at the date of the breach.

12.24.3 Quantum of damages in different situations

12.24.3.1 *Damage in regard to litigation* [510]

If a claim fails, there are two possible approaches. In terms of the first the quantum of compensation can be determined with reference to what the plaintiff ought to have recovered from the litigation, from which a percentage has to be deducted for the contingency that he or she could possibly not have recovered anything. [511] The alternative method is to determine on a balance of probabilities if the plaintiff would have succeeded in the original action and then to award the plaintiff the full

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amount he or she would have recovered. [512] The question is, of course, not only how much the plaintiff would have been awarded, but how much he or she would actually have recovered from the defendant. [513] Where a claim against the plaintiff was not properly defended while he or she had a defence which would probably have been

successful, the measure of the plaintiff's claim is the damages he or she had to pay. [514] An order as to costs in previous litigation forms part of the compensable damage. [515] In criminal proceedings a penalty which a plaintiff (unnecessarily) had to pay would constitute his or her loss. [516]

12.24.3.2 *Other cases* [517]

Where, for example, property is bought on wrong advice, the measure of damages is normally the difference between the value of the property and its price. [518]

In the loss of a benefit the damage is usually assessed in terms of the value of the lost benefit. Damages are awarded for the complete or partial frustration of an expectation to an inheritance. [519]

Where an attorney negligently failed to insert the correct rental (which the parties had orally agreed upon) in the written contract of lease, the measure of damages is usually the loss of rental as well as the legal costs (on an attorney and client scale) to rectify the lease to reflect the correct rental. [520]

Where an attorney failed to advise his or her client as to the prejudicial tax consequences of couching a sale as two agreements, the amount of income tax plus interest thereon was awarded as contractual damages. [521]

The measure of damages is the amount the plaintiff would have been able to claim in litigation if the attorney had not negligently breached the contract of mandate by not properly investigating the plaintiff's claim. [522]

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[1] See for a summary Van Rensburg et al 5 (1) *LAWSA* paras 459–504; Erasmus & Gauntlett 7 *LAWSA* paras 44–61; Van der Merwe et al *Contract* 325–448. See also Kerr *Contract* 637–842; Joubert *Contract* 222–74; Kahn *Contract* I 766–839; Christie & Bradfield *Contract* 543–88.

[2] See in general Lubbe & Murray *Contract* 470–529; Joubert *Contract* 201–21; De Wet & Van Wyk *Kontraktereg en Handelsreg* 157–93; Kerr *Contract* 509–62; Van Jaarsveld *Handelsreg* 134–48; Reinecke 1990 *TSAR* 677–80; Christie & Bradfield *Contract* 515–41; Van der Merwe et al *Contract* 325–78.

[3] This is a failure to perform timeously while performance is still possible. Mora can occur only if performance is due (all conditions have been met and the time for performance has occurred). See *Nel v Cloete* 1972 (2) SA 150 (A); Lubbe & Murray *Contract* 502–3; Joubert *Contract* 201–6; De Wet & Van Wyk *Kontraktereg en Handelsreg* 157–68. See para 12.12.

[4] *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 (3) SA 339 (SCA). This is where a creditor fails to co-operate towards performance. Cf Lubbe & Murray *Contract* 527–9; De Wet & Van Wyk *Kontraktereg en Handelsreg* 180–93. In addition to delaying peformance, a creditor may also commit breach of contract by rendering performance impossible or by repudiating his or her obligations. Although Reinecke 1990 *TSAR* 680 adds positive malperformance by a creditor, it is unclear how this is to be distinguished from prevention of performance. See para 12.14.

[5] This is where someone acts contrary to his or her contractual obligations or acts contrary to an obligatio non faciendi. Cf Lubbe & Murray *Contract* 490–2; De Wet & Van Wyk *Kontraktereg en Handelsreg* 177–80; *Sishen Hotel (Edms) Bpk v SA Yster en Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A); *Sweet v Ragerguhara* 1978 (1) SA 131 (D); para 12.10.

[6] For repudiation there must be words or conduct by which a contracting party indicates that he or she is not going to perform in terms of his or her contractual obligations. See *Tuckers Land and Development Corp (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) at 653; *Culverwell v Brown* 1990 (1) SA 7 (A); *Van Rooyen v Minister van Openbare Werke* 1978 (2) SA 835 (A); Lubbe & Murray *Contract* 476–80; Nienaber 1989 *TSAR* 1–16; para 12.8.

[7] This is where one of the parties in a culpable manner renders performance in terms of the contract partially or totally impossible. See *Benjamin v Myers* 1946 CPD 655; Lubbe & Murray *Contract*482–4; De Wet & Van Wyk *Kontraktereg en Handelsreg* 172–7. See para 12.8.

[8] This occurs through an order for specific performance; an interdict (cf Kerr *Contract* 736–7); and the exceptio non adimpleti contractus. See Lubbe & Murray *Contract* 531 et seq; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

[9] Lubbe & Murray *Contract* 582–6, 591–4; De Wet & Van Wyk *Kontraktereg en Handelsreg* 214–22; Joubert *Contract* 236–46.

[10] De Wet & Van Wyk *Kontraktereg en Handelsreg* 195; Lubbe & Murray *Contract* 531. See also the so-called 'double-barrelled' procedure in terms of which a plaintiff may first claim specific performance and obtains judgment therefor and in the same action in the alternative asks the court that if the defendant should fail to comply with the court's order, to set aside the contract and grant damages—*Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) (para 7.5.7); *Walters v Andre* 1934 TPD 341; *Fourie v Morley & Co* 1947 (2) SA 218 (N); Erasmus & Gauntlett 7 *LAWSA* para 44; Kerr *Contract*733–5 on the different possibilities.

[11] A plaintiff who upholds the contract remains entitled to performance and may retain what he or she has received. This has a positive influence on the plaintiff's patrimonial position and is thus relevant in the calculation of his or her damages. Cf Lubbe & Murray *Contract* 605; para 4.4.2.

[12] An innocent party who cancels is usually entitled to restitution of what he or she has already performed or the value of it. That which is restored to the innocent party cannot be part of his or her damages but obviously affects the party's patrimonial position and thus has to be taken into account in assessing such damages. The opposite applies where restitution does not occur. See further Lubbe & Murray *Contract* 605; Van Aswegen *Sameloop* 205, who submits that a guilty party is also entitled to restitution but may never claim damages.

Cf also Kerr *Contract* 840: 'An aggrieved party cannot claim both restitution and the damages which would compensate for the same loss; but there is authority for the proposition ... that he can claim restitution and damages supplementary to restitution if loss over and above that compensated for by restitution can be shown to have been suffered.'

[13] See para 1.5 on the sources of a claim for compensation.

[14] See para 8.5 on the object of damages and para 3.5 on the subjective approach to damage.

[15] See chap 7 on the 'once and for all' rule and causes of action; para 11.3 on the duty to mitigate; para 11.9 on the concurrence of delictual and other claims for damages; para 11.10 on the contractual exclusion or restriction of claims for damages; para 8.9.3 on the fact that damages as surrogate for performance are not recognized; para 8.4 on damages in a foreign currency.

[16] See Joubert *Contract* 246–7; Kerr *Contract* 734–5: 'Damages may be awarded to an aggrieved party who shows that he has suffered loss; that the breach of contract is the significant factor or cause in bringing about the loss; that the amount claimed and proved is either as agreed upon or as provided for in the residual rules; and that in appropriate cases the rules on notices relating to cancellation have been complied with.'

[17] Para 12.1.

[18] See chap 6 on prospective loss; see, eg, *Victoria Falls and Transvaal Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Whitfield v Phillips* 1957 (3) SA 318 (A); *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A). See para 7.5.7 on the so-called 'double-barrelled' procedure. The view in *Harker v Fussell* 2002 (1) SA 170 (T) at 177 that breach of contract leads to nominal damages becoming due immediately and that a cause of action arises without damage being present (at 172) cannot be accepted as correct. See n 19.

[19] See para 8.8 on nominal damages; *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 650: 'Onder die omstandighede, by onstentenis van bewys van werklik gelede skade, bring die feit dat al sou die verweerder wanpresteer het, nie vir hom aanspreeklikheid mee nie' (the fact that the defendant did not perform does not lead to liability in the absence of actual loss). See also Wessels *Contract* II 840; *Schoombee v Marais* [2010] 2 All SA 184 (SCA) at 187; *Combined Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS* [2011] 1 All SA 10 (SCA) at 15–16.

[20] See chaps 3 and 5 on patrimonial and non-patrimonial loss; para 8.9.2 on the non-recoverability of damages for non-patrimonial loss. See, however, para 11.9.4 for instances where there is delictual liability for non-patrimonial loss.

[21] See para 4.1; and para 4.4.3 on how damage is assessed in terms of negative interesse: where a party's present financial position is compared with his or her financial position before entering into the contract.

[22] Para 2.6; De Wet & Van Wyk *Kontraktereg en Handelsreg* 225–6.

[23] Para 11.5.5.2.

[24] See especially Joubert *Contract* 255–6.

[25] See para 4.4.2 on positive interesse and para 4.4.3 on negative interesse.

[26] Para 12.4.

[27] The first applies where a contract is upheld or cancelled and the second where a contract is upheld.

[28] This may cause damage such as loss of profit if a performance cannot be used or loss in that the performance has to be obtained at a higher price.

[29] eg wasted expenditure; costs involved in supplementing or repairing a defective performance; consequential loss in the sense of harm to the plaintiff's present patrimonial assets; loss of profit from a further transaction; loss of managerial time. In *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*2000 (1) SA 639 (SCA) at 646 it was held that the loss of managerial time which otherwise might have been engaged in the trading activities of a concern and which had to be deployed in managing the consequences of the breach of contract could be claimed as damages if the loss could be quantified. There had to be some evidence that the managers would have expended their time on one or other income-generating venture and that managing the consequences of the breach had not simply been dealt with within the ordinary course of their duties.

[30] eg loss of profit suffered by a merchant or manufacturer of property (para 12.13).

[31] See para 4.4.2 on positive interesse.

[32] See para 4.4.3 on negative interesse.

[33] See below. Cf *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) 881–2.

[34] See paras 4.5 and 12.7.2.2 on the relevant time in applying the market-price rule. It is difficult to state a general rule regarding the time of the assessment of damages for breach of contract. See Van Aswegen *Sameloop* 211–13 for a useful summary of the various possibilities. There is a view that the time of assessment depends on the type of breach of contract (Radesich 1987 *THRHR* 234). However, Van Aswegen op cit 212 n 435 prefers to have regard to the nature of the loss and the time when it occurs. In some cases the time of breach was accepted as the relevant time (eg *Voest Alpine Intertrading Gesellschaft mbH v Burwill & Co SA Pty Ltd* 1985 (2) SA 149 (W) at 151) and in other instances the date of performance (*Novick v Benjamin* 1972 (2) SA 842 (A) at 853–4, 860–1). Van Aswegen op cit 212 submits that this does not reveal any conflict since the date of performance and the date of breach often coincide. However, damage does not necessarily occur immediately upon breach of contract. In, for instance, repudiation (paras 12.7.2.3, 12.7.2.4) damage occurs only at the date set for performance or on cancellation (because it is then certain that performance will not take place). Another example is the rule that the cost of repairs should be assessed when it is reasonable to start the repairs (*Rens v Coltman* 1996 (1) SA 452 (A); para 12.10) A different time may be relevant in the light of the operation of the rule on mitigation, or if no date for performance has been set and the date of rescission ('acceptance' of repudiation—para 12.7.2.4) is used. See for further views Reinecke 1990 *TSAR* 301; Nienaber 1963 *THRHR* 33, 37–8; 1989 *TSAR* 15; Kerr *Contract* 826–8; 1986 *SALJ* 340–3; Christie & Bradfield *Contract* 580–1. See further *Mayes v Noordhof* 1992 (4) SA 233 (C) (date of conclusion of contract induced by misrepresentation).

[35] Para 12.7.2.1.

[36] Para 10.11.

[37] Para 11.3.

[38] See paras 12.18 and 12.19 on, eg, the Conventional Penalties Act 15 of 1962; the National Credit Act 34 of 2005; the Consumer Protection Act 68 of 2008 and the Alienation of Land Act 68 of 1981.

[39] Para 12.7.1.

[40] Para 12.7.2.1.

[41] Para 12.12.

[42] Para 12.9; cf also *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 506.

[43] Para 12.13.

[44] Para 12.14.

[45] Para 12.10; also para 13.1*(a)* on the reasonable cost of repairs as a measure of damages in the case of injury to property.

[46] See para 12.18 on the Conventional Penalties Act 15 of 1962.

[47] See para 12.22 on an agreement as to insurable value.

[48] See para 12.19 on, eg, the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008 and the Alienation of Land Act 68 of 1981.

[49] eg paras 12.15.4 and 12.15.5 on the principles which apply where the actio quanti minoris or the actio redhibitoria is instituted.

[50] See para 12.7.2.5.

[51] See para 12.7.2.4.

[52] Para 12.1.

[53] Para 12.3.

[54] eg contracts of sale, lease, carriage, service etc.

[55] Para 12.1.

[56] See, eg, McGregor *Damages* 685 et seq, whose discussion is based on the different forms of breach of contract in regard to specific contracts; Joubert *Contract* 256 et seq, who emphasizes the manner in which damage is caused; Van der Merwe et al *Contract* 435 et seq where there is an emphasis on stereotype cases; Erasmus & Gauntlett 7 *LAWSA* paras 48–57, where there is a combination of stereotype cases and different types of breach of contract; Wessels *Contract* II 839 et seq where general principles and specific contracts are discussed. Cf further Norman *Sale* 245 et seq; De Wet & Van Wyk *Kontraktereg en Handelsreg* 222 et seq for a brief analytical discussion.

[57] See Erasmus & Gauntlett 7 *LAWSA* para 48: 'In giving effect to the general rules which govern the award of damages, practice has evolved certain fixed or stereotypic methods of calculating damages for breach of contract under certain circumstances. Thus a body of subsidiary rules has grown up. These subsidiary rules are not hard and fast rules.' See *Western Bank Ltd v Lester and McLean* 1976 (3) SA 457 (SE); *Swart v Van der Vyver* 1970 (1) SA 633 (A) at 642–3.

[58] Para 8.10.1.

[59] Para 12.10.

[60] Para 12.7.1.

[61] See Joubert *Contract* 255: 'Further, the stereotype solutions only give answers to the stereotype cases and in individual cases the plaintiff may be entitled to more or to less than the sum of money calculated by the popular solution to that case.'

[62] See De Wet & Van Wyk *Kontraktereg en Handelsreg* 231 with reference to *Novick v Benjamin*1972 (3) SA 842 (A).

[63] See Joubert *Contract* 256–7; 1982 *THRHR* 77–8; Norman *Sale* 245 et seq; Kerr *Sale* 168 et seq.

[64] Even though damages as surrogate for performance are apparently not recognized in our law (para 8.9.3).

[65] See Joubert 1973 *THRHR* 46–62. In a contract of barter a plaintiff who has not received performance, or has received defective performance, should be able to claim the difference between the values of his of her performance and the counter-performance the plaintiff is entitled to at the date and place of delivery, or, as the case may be, reasonable cost of repairs. In a case of a donation, damages should in general be assessed as the (market) value of the donation at the time and place of performance. See also para 12.7.2.1.

[66] See *Van Es v Beyer's Trustee & Bosman* 1884 SC 9; *Raw v Parker* 1890 NLR 160; *Transvaal Silver Mines v Brayshaw* 1895 OR 95; *Celliers v Papenfus and Rooth* 1904 TS 73; *Delany v Medefindt*1908 EDC 200; *Oellermann v Natal Indian Traders Ltd* 1913 NLR 337; *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184; *Ahmod Bhyat v Doherty* 1919 NLR 44; *Bremmer v Ayob Mahomed & Co* 1920 TPD 303; *Slotar & Sons v De Jongh* 1922 TPD 327; *Frankel & Co v Michalowsky* 1921 CPD 696; *Leviseur v Highveld Supply* 1922 OPD 233; *Goolam v Comrie* 1925 NPD 103; *Stephens v Liepner* 1938 WLD 30; *Bland & Sons v Peinhe and De Villiers* 1945 EDL 26; *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd*1959 (1) SA 816 (W); *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A); *Visagie v Gerryts* 2000 (3) SA 670 (C) at 678–9. See in general Van der Walt *Sommeskadeleer* 206–7; Wessels *Contract* II 858*,* 895 et seq.

[67] See *Manasewitz v Oosthuizen* 1914 CPD 328; *Wald v Disler* 1918 CPD 305; *Montese Township & Investment Corp v Standard Bank of SA Ltd* 1964 (3) SA 221 (T).

[68] Where a purchaser or seller claims negative interesse (para 4.4.3; Lubbe & Murray *Contract* 613 et seq).

[69] See especially Joubert 1973 *THRHR* 46; Lubbe & Murray *Contract* 638–40; Norman *Sale* 251–6; Kerr *Sale* 170–6; Van der Merwe et al *Contract* 435–40.

[70] See n 66 above and inter alia *Kahn v Beirowski* 1933 TPD 43; *Wald v Disler* 1918 CPD 305; *Jordaan v Symon* 1925 OPD 207; *Lazarus Bros v Davies & Kamann* 1922 OPD 88; *Markus & Co v Louw*1930 CPD 123; *Mills v Schmahmann Bros* 1909 TS 738; *Stark v Union Stores* 1920 EDL 358; *Manasewitz v Oosthuizen* 1914 CPD 328; Lubbe & Murray *Contract* 638; Van der Merwe et al *Contract* 435–40.

[71] Cf *Slotar & Sons v De Jongh* 1922 TPD 327; *Robinson v Randfontein Estates Gold Mining Co Ltd*1924 AD 151; *Hersman v Shapiro & Co* 1926 TPD 367.

[72] Joubert 1973 *THRHR* 50: If goods of the sort in question are sold at the relevant time and place, this may afford proof of the market-price. If there is an actual organized market (eg for gold, shares, sugar), prices quoted there should be used. Cf also *SAR & H v Theron* 1917 TPD 67 at 69: 'If they are goods [in casu fodder and potatoes] of such a nature as are always being bought and sold on the market, the value can be more or less ascertained by taking the market or current value of such goods.' Supra at 71: 'When the phrase ''market value'' is used in connection with damages, what it means is the general selling price in that particular neigbourhood, and that general selling price is determined not only by the price at the public market but also by the general prices throughout the district among people who deal in that particular commodity.' *Durr v Buxton White Lime Co* 1909 TS 876 at 883: 'If the article can be obtained at open market, the marketprice is its cost on the market. If it has to be bought at a shop, it is the retail price charged at that shop. If it has to be imported, it is the cost of importation.' See further *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) SA 344 (A).

[73] See Reinecke 1990 *TSAR* 776. See also *Celliers v Papenfus and Rooth* 1904 TS 73 at 84: 'It is not generally possible in the case of land to go into the market and buy other land exactly equivalent, and an ordinary purchaser has to prove what the real value of the land is upon the date on which he founds, and claim the difference between the contract price and that value.' In *Romansrivier Koöp Wynkelder v Chemserve Manufacturing* 1993 (2) SA 358 (C) at 368 the court accepted that the only offer received for a damaged filter was proof of its market value after various steps had been taken to advertise it.

[74] *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) at 287, 288; *Durr v Buxton White Lime Co* 1909 TS 876; *SAR & H v Theron* 1917 TPD 67; Joubert 1973 *THRHR* 50: regard may be had to the price asked by other persons who sell such goods to the public; Lubbe & Murray *Contract* 639; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 878–9: '[I]f ordinarily any commodity is of a kind which, if offered for sale, is likely to attract potential purchasers who would be prepared to buy if agreement on the purchase price (the contract price) were to be reached, the commodity in question is in a commercial sense a marketable one and, as such, capable of having a determinable money value.' See also *Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd*1994 (4) SA 26 (W) at 85–6.

[75] See, eg, *Microutsicos v Swart* 1949 (3) SA 715 (A) at 731; *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N) at 662; *Gouws v Montesse Township Investment Corp (Pty) Ltd v Standard Bank of SA Ltd* 1964 (3) SA 221 (T) at 233; *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O) at 215. Offers at a public auction may be prima facie proof of the value of something: *In re Estate late Margaret Young* 1942 NPD 276; *Estate Hemraj Mooljee v Seedat* 1945 NPD 22; *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 884 (see, however, n 77 below).

[76] In some cases property or a performance does not really have a market value because it is not traded in the ordinary sense, while it may still be inherently valuable. See Reinecke 1990 *TSAR* 776, who refers to a church building, monument etc. See generally Norman *Sale* 254–6.

[77] It may be that resale does not take place at the relevant time (*Serman & Co v Brown* 1939 TPD 244); or the price obtained on resale at the relevant time is less than its value (*Chapman v Dwor* 1921 CPD 433). See also *Microutsicos v Swart* 1949 (3) SA 715 (A) at 731–2: 'I do not think, however, that, when there is other evidence on the record as to the value of the property at the time the sale to the respondents fell through, we are obliged to take the highest auction bid as necessarily representing what the property was still worth to the appellants; nor are we bound by the price obtained by private treaty, especially as one of the sellers was closely associated with the buying company.' The defendant has to prove that the price does not correspond to value (*Jardine v Van Niekerk* 1918 EDL 246; *Microutsicos* supra at 731—here the court estimated the value as R14 000 despite a highest auction bid of R13 000).

[78] See *Rubens v Marais* 1920 NLR 119; *Rademan v Whewell* 1925 OPD 14; *De Lange v Deeb* 1970 (1) SA 561 (O); *Allers v Rautenbach* 1949 (4) SA 226 (O). Resale may occur in different situations: *Wald v Disler* 1918 CPD 305 and *Lazarus Bros v Davies & Kamann* 1922 OPD 88 (buyer sells res vendita which is not in accordance with the contract); *Jardine v Van Niekerk* 1918 EDL 246 and *Rubens v Marais*(seller fails to deliver to buyer but resells and delivers to second buyer); *Delany v Medefindt* 1908 EDL 200 and *Serman & Co v Brown* 1939 TPD 244 (buyer is in mora regarding the receipt of the merx and the seller resells to a third person). See further *Taggart v Green* 1991 (4) SA 121 (W) at 127.

[79] See *Jardine v Van Niekerk* 1918 EDL 246; *Microutsicos v Swart* 1949 (3) SA 715 (A); *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N); *Compagnie D'Elevage et D'Alimentation du Katanga v Rhodesia Railways* 1956 (1) SA 243 (SR); *Sermon & Co v Brown* 1939 TPD 244; *Paola v Hughes (Pty) Ltd* 1956 (2) SA 587 (N).

[80] *Microutsicos v Swart* 1949 (3) SA 715 (A); *Machanick v Bernstein* 1920 CPD 380; *Broughton v Davis* 1921 TPD 409 at 411; *Manasewitz v Oosthuizen* 1914 CPD 328 (unconfirmed evidence by plaintiff is insufficient).

[81] *Hersman v Shapiro & Co* 1926 TPD 367 at 378–9; *Slotar & Sons v De Jongh* 1922 TPD 327, from which it appears that if the merx has to be delivered at A where there is no market but there is a market at B which governs the price at A, the value at B may be used.

[82] See *Hersman v Shapiro & Co* 1926 TPD 367; *Salomon & Co v Stefani* 1904 SC 515; *Durr v Buxton White Lime Co* 1909 TS 876; *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) at 820.

[83] *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) at 287; *Van Es v Beyer's Trustees and Bosman* 1884 SC 9; *Chapman v Dwor* 1921 CPD 433; *Kaplan & Co v Basel Bros*1931 CPD 457; *Slotar & Sons v De Jongh* 1922 TPD 327; *Hersman v Shapiro & Co* 1926 TPD 367; *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W); Joubert 1973 *THRHR* 46. See also *Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T) at 871 on the use of the difference between the cost price and the contract price where there is no market for the article in question.

[84] See, eg, *Van Es v Beyer's Trustees & Bosman* 1884 SC 9; *Durr v Buxton White Lime Co* 1909 TS 876 at 883; *Mills v Schmahmann Bros* 1909 TS 738: 'The plaintiffs say that they did not know what the market-price was. But it lay upon them to prove it. And if there was no market at those places, it was for them to prove that also.' Cf further *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 877; Norman *Sale* 255.

[85] See, eg, *Norden v Shaw* 1847 (2) Menzies 150; *Celliers v Papenfus and Rooth* 1904 TS 73; *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184; *SAR & H v Theron* 1917 TPD 67; *Ruffel v Webb*1919 OPD 122; *Kaplan Bros v Kroomer* 1920 CPD 618; *Rademan v Whewell* 1925 OPD 14; *Bester v Visser* 1957 (1) SA 628 (T); *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W).

[86] *Raw v Parker* 1890 NLR 160;*Transvaal Silver Mines v Brayshaw* 1895 OR 95; *Salomon & Co v Stefani* 1904 SC 515; *Durr v Buxton White Lime Co* 1909 TS 876; *Rademan v Whewell* 1925 OPD 14; *Slotar & Sons v De Jong* 1922 TPD 327 at 332; *Goolam v Comrie* 1925 NPD 103; *Markus v Louw* 1930 CPD 123; *Kaplan & Co v Basel Bros* 1931 CPD 457; *Sam Hackner v Saltzmann* 1940 OPD 200 at 204; *Bland & Sons v Peinhe and De Villiers* 1945 EDL 26; *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N) (value of aircraft in South Africa and not in the United States); *Garavelli & Figli v Gollach & Comperts (Pty) Ltd* 1959 (1) SA 816 (W).

[87] See Joubert *Contract* 257.

[88] Cf n 86 above and also *Central Produce Co v Hirschowitz* 1938 TPD 350; *Louw v Stewart* 1878 Buch 87; *Colonial Government v Nathan Bros* 1892 NLR 100. See Joubert 1973 *THRHR* 52 n 34: transport costs may be claimed either separately or as part of the market-price. See further *Chapman v Dwor* 1921 CPD 433; *Hersman v Shapiro & Co* 1926 TPD 367; Norman *Sale* 253–4; Kerr *Sale* 172.

[89] See para 11.3.

[90] A purchaser's damages are assessed as though he or she acted reasonably (cf Joubert 1973 *THRHR* 52). There may be exceptions as in *Durr v Buxton White Lime Co* 1909 TS 876: S had to deliver in Pretoria for transport to Johannesburg. S failed to deliver and P had to pay a higher price in Johannesburg in order to have a supply there in time. (S was aware that time was of the essence.) P's damages were calculated with reference to the higher price in Johannesburg. Where a seller may resell the res vendita on account of a purchaser's breach of contract, he or she has to sell it on the open market where delivery was to have taken place (eg *Markus & Co v Louw* 1930 CPD 123; *Kaplan & Co v Basel Bros* 1931 CPD 457), or at the nearest available market (*Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T)). See Joubert op cit 53: If a purchaser fails to receive the merx, the seller may resell for the account of the purchaser on the open market at the place where delivery was to have taken place or, if there is no market, at the nearest market. In this case transport costs are recoverable and this leads to the following measure of damages: contract price plus reasonable transport costs minus the resale price. If the purchaser resiles from the contract, he or she is entitled to damages calculated on the basis of the difference between the price and value of the article at the place of delivery. If there is no market at such a place, the price ruling at the nearest market may be taken *minus* the costs of transport to such market.

[91] See n 85 above; Norman *Sale* 53; Kerr *Sale* 172–6.

[92] See *Slotar & Sons v De Jongh* 1922 TPD 327 at 332; *Serman & Co v Brown* 1939 TPD 244 at 248; *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184 at 186: 'The rule is that the damages are assessed according to the price ruling [where the debtor fails to perform at the time set for performance] on the earliest date on which [the goods] could be sold.' Joubert 1973 *THRHR* 53: The ratio for this is that the plaintiff should be placed in the position he or she would have occupied had there been no breach of contract at that stage.

[93] See Joubert 1973 *THRHR* 54; *Norden v Shaw* 1847 (2) Menz 150; *Teubes v Wiese* 1912 WLD 148 (here there was a donation); *SAR & H v Theron* 1917 TPD 67 (the liability of a carrier to which these principles applied); *Ruffel v Webb* 1919 OPD 122; *Kaplan Bros v Kroomer* 1920 CPD 618. See further Mulligan 1957 *SALJ* 66.

[94] The ratio is that a purchaser may not, at the risk of the seller, remain passive to see whether the market-price is going to rise or fall before heor she repurchases. See, eg, *Oellerman v Natal Indian Traders Ltd* 1913 NLR 337 at 340: 'The buyer, upon the failure of the sellers to implement their contract by giving delivery as agreed on, was then entitled to go into the open market and to buy against them; and he is only entitled to claim as damages the surplus, if any, which he has had to pay over the price agreed upon in the market at the time when the delivery under the original contract was due; he is not entitled to wait until the price has risen, and so increase the damages against the sellers.' Joubert 1973 *THRHR* 54 criticizes the emphasis placed on the repurchase price. He submits that one is concerned with the value of the merx at the time in question and not with the price at which it or similar goods may be bought. See also Joubert op cit 48–9: it can only be expected of a purchaser to repurchase if he or she has resiled from the contract (or else the seller may still tender performance). A puchaser who cancels a contract is in any event entitled to damages, whether he or she repurchases or not.

See also Joubert 1973 *THRHR* 54, who suggests that it would be a satisfactory solution to use the market-price on the next business day or as soon thereafter as the purchaser resiles from the contract in the assessment of damages. See *Celliers v Papenfus and Rooth* 1904 TS 73 and *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184 according to which damages are assessed at the date stipulated for performance or the date when the purchaser withdraws, provided that he or she does so within a reasonable time.

[95] See, eg, *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 462.

[96] See para 12.1. These principles are mutatis mutandis applicable in the case of prevention of performance.

[97] If no date for performance has been fixed and the creditor ignores the repudiation, such a date must first be set and the position then is as though such a date has been determined ab initio and the debtor has failed to perform. See, however, *Strachan & Co Ltd v Natal Milling Co Ltd* 1936 NPD 327 and the criticism by Joubert 1973 *THRHR* 56 n 50. See *Visagie v Gerryts* 2000 (3) SA 670 (C) at 679 where the date on which an option was exercised was regarded in an obiter dictum as the correct date.

[98] See Joubert 1973 *THRHR* 56; Mulligan 1955 *SALJ* 362, 371; Nienaber 1963 *THRHR* 19; *Oellerman v Natal Indian Traders Ltd* 1913 NLR 337; *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184; *Ahmod Bayat v Doherty* 1919 NLR 44; *Broughton v Davis* 1921 TPD 409 at 411; *Bremer v Ayob Mohamed & Co*1920 TPD 303. See Joubert *Contract* 257, who explains this as follows: 'The underlying ratio appears to be that if the creditor had the possession of the object of performance at the time and place of delivery he would have had something with a particular value which he could turn into ready money by selling it on the open market at that time and place. If he wished to retain it for sale at a later date with intent to speculate and the value rose then the debtor should not have the benefit of the creditor's action; nor should the debtor be penalized by the decision to speculate when the value falls. This ratio is, however, based on the assumption either that the creditor has resiled from the contract and cannot claim specific performance or that the courts refuse specific performance, eg in the case of goods freely available on the open market, and cannot succeed where there is no free and open market in the goods so that the courts would grant specific performance.' See further also Kerr & Glover 24 *LAWSA* para 69: 'If the buyer elects to cancel the contract and to ask for damages in lieu of performance or if the court in the exercise of its discretion refuses a claim for specific performance, the buyer is entitled to whatever loss he or she has suffered, provided that it is of a kind and extent that was within the contemplation or foresight of the parties at the time the contract was entered into. It is within the contemplation of most parties that prices rise and fall. Hence, were it not for the rule on mitigation of loss, the value of the thing sold would be assessed at the time of action. When the rule on mitigation of loss is taken into account the crucial question is: did the aggrieved party take such steps as were reasonable in the circumstances in which he or she found him- or herself?' See, however, Joubert 1973 *THRHR* 58–9.

[99] *Contract* 257. See also Van der Merwe et al *Contract* 438.

[100] See, however, para 8.9.3 on the non-availability of damages as surrogate of performance.

[101] See n 102 below.

[102] See also *Long & Co v Munnik and Van der Bijl* 1853 SC 35: the highest value of raisins from the date of delivery to the date of the action; Joubert 1973 *THRHR* 58–9. See *Stephens v Liepner* 1938 WLD 30 on 95 where the average price during the relevant period was employed. Wessels *Contract* II 899 approves of this approach. See, however, Kerr & Glover 24 *LAWSA* para 69: 'If the buyer elects to ask for specific performance, he asks for the thing, not for its value. If the court grants the remedy there is no question of assessing the value of the thing at the time when it ought to have been made available.' See

further Reinecke *Diktaat* on damages as surrogate of performance (but also para 8.9.3): Where a purchaser claims damages as surrogate for performance, he or she may choose between the value on the day of performance or the day of the action. If the value is higher at the date of performance than at the time of the action, the purchaser may claim the difference if he or she wanted to sell the performance or had to obtain a substitute. If the value is higher at the date of the action, the purchaser may claim this value provided that he or she could obtain specific performance on that day.

[103] Erasmus & Gauntlett 7 *LAWSA* para 56 n 4. It can be argued that a duty to mitigate damage arises only when repudiation has been accepted since the contract is otherwise in full operation. See *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmis Korp (Edms) Bpk* 1973 (2) SA 680 (T) at 682; *Benson v SA Mutual Life Ass Soc* 1986 (1) SA 776 (A) at 786. However, in *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) at 205–9 it was held that repudiation is a form of breach of contract and does not bring the contract to an end. There is no rule that the innocent party must cancel the contract where continuation of the contract may lead to 'wasteful performance'. This is a factor which the court will consider when exercising its discretion to grant specific performance. See, however, Kerr *Contract* 717–21.

[104] 1972 (2) SA 842 (A). See McLennan 1972 *SALJ* 424; Kerr *Contract* 599–601; Nienaber 1989 *TSAR* 15.

[105] *Novick v Benjamin* 1972 (2) SA 842 (A) at 858: '[D]elivery to the [plaintiff] should, therefore, have taken place early in April'. See also *Culverwell v Brown* 1990 (1) SA 7 (A) at 25.

[106] Para 11.3. The application of the rule on mitigation may in effect imply that damages are calculated at the time of (the acceptance of) repudiation. See McLennan 1972 *SALJ* 426–7.

[107] See Joubert 1973 *THRHR* 55 on the position where a purchaser repurchases after repudiation but before the date of performance. If the market-price rises after such a transaction, he or she may claim only the difference between the contract price and the price at which the purchaser repurchased. If the market-price falls after he or she has repurchased, it would be unfair (if the purchaser has acted reasonably) to award him or her only the difference between the contract price and the market-price at the date of delivery because the actual loss is higher.

[108] *Novick v Benjamin* 1972 (2) SA 842 (A) at 859: 'The market value, as a measure of damages, is, it is true, ordinarily related to the time and place of performance (with some slight latitude); but, so related, it is only a *prima facie* measure, and merely an application of the basic rule that the innocent party should be placed in the same position as that in which he would have been had no breach occurred ... . It must yield, in appropriate circumstances, to other evidence of damage ... . In the present case a Court could reasonably find that, in all the circumstances, the market value of the shares on 16th April ... was the most appropriate means of determining the damage sustained by the appellant as a result of the respondent's unlawful repudiation of the contract.' See Kerr *Contract* 593, 599–600 on 'prospective assessment' of damages where a claim is increased before the date of performance. See *The Mihalis Angelos* [1971] 1 QB 164 (CA) (relevance of supervening events); *Novick* supra at 858. See, however, n 118 below. See also *Taggart v Green* 1991 (4) SA 121 (W). Here A sold land to B for R250 000 which included capitalized interest. After repudiation by B, A sold the land to C for R195 000 on a more or less cash basis. The price of the first sale without interest was R230 000 (according to an estate agent). The court calculated damages as R230 000 − R195 000 = R35 000.

[109] 1920 TPD 303.

[110] The seller undertook to deliver meal in November and December. He delivered some of it, but in December he was in mora in regard to part of it. In January the seller repudiated his obligations. The purchaser cancelled and claimed damages calculated on the price of meal in January. The court held that he should have assessed damages with reference to the price in December.

[111] De Wet & Van Wyk *Kontraktereg en Handelsreg* 215 submit that the plaintiff should have been allowed to measure his damages with reference to prices in January, since there was no duty on him to cancel in December. If he could claim delivery in January, why could he not calculate damages on that date? See also Erasmus & Gauntlett 7 *LAWSA* para 57 on the ratio of the decision, viz that damages are to be computed at the earliest opportunity for reselling or repurchasing on the open market: 'This approach, however, seems to negate the fact that upon the other party falling into mora the innocent party may have no right to cancel and first has to obtain that right by sending a notice of rescission, or that the innocent party may not wish to exercise the right but prefers to give the defaulting party an opportunity to purge the default, or that the innocent party waits in the hope of performance following until repudiation supervenes which he or she then accepts.' See also the criticism by Kerr *Sale* 1st ed 329–30. See also Norman *Sale* 250; *Moyes and McKenzie v Frenkel & Co* (1912) 33 NLR 282. See further the following dictum from *Culverwell v Brown* 1990 (1) SA 7 (A) at 31 on the correct measure of damage (also para 12.7.2.4*(b)*): '[T]he difference between the contract price and the price ruling on the date that the property is resold or similar property is bought can be recovered by way of damages.' The only question is whether the rule

which is apparently intended for the situation where no date of performance has been set also applies where such a date has been fixed. See further *Oellermann v Natal Indian Traders Ltd* 1913 NPD 337, which was apparently incorrectly decided. See further *Strachan & Co v Natal Milling Co* 1936 NPD 327 where it was correctly held that S could ignore repudiation in June but when he resiled in January his damages were calculated with reference to the price in June. Cf further *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184; *Stephens v Liepner* 1938 WLD 30; *Serman & Co v Brown* 1939 TPD 244; *Hackner v Salzmann* 1940 OPD 200; Joubert 1973 *THRHR* 57.

[112] See also Nienaber 1963 *THRHR* 37; De Wet & Van Wyk *Kontraktereg en Handelsreg* 215. The innocent party is not obliged to cancel. See further para 12.7.2.3; *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) at 204–9.

[113] See in general Joubert *Contract* 258; 1973 *THRHR* 58.

[114] 1990 (1) SA 7 (A). See Reinecke 1990 *TSAR* 299–302; Lewis 1990 *SALJ* 376.

[115] Supra at 30–1 (majority judgment).

[116] See further *Stephens v Liepner* 1938 WLD 30; *Wolff & Co v Bruce, Mavers & Co* 1889 SC 133 at 135; *Dennill v Atkins & Co* 1905 TS 282 at 289; *Oellermann v Natal Indian Traders Ltd* 1913 NPD 337; *Chapman v Dwor* 1921 CPD 433; *Bremmer v Ayob Mahomed & Co* 1920 TPD 303 at 305–7; *Kaplan & Co v Basel Bros* 1931 CPD 457 at 463; *Central Produce Co v Hirschowitz* 1938 TPD 350 at 357.

[117] See Reinecke 1990 *TSAR* 301. Formerly it was held in *Tuckers Land and Development Corp (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) that repudiation immediately constitutes breach of contract and that it does not have to be accepted by the innocent party. In *Culverwell* the court does not even refer to *Tuckers* and seems to require acceptance of repudiation. Reinecke op cit argues that repudiation in itself amounts to breach of contract and forms the basis of a claim for damages, but that the content of such claim depends on the circumstances. He adds that, just as in other cases of breach of contract, cancellation is not a requirement for a claim for damages. Where a date for performance has not been set, it would not imply that damages are to be calculated on the date of repudiation unless there was a duty on the innocent party to withraw from the contract without further delay. Normally an innocent party has a reasonable opportunity to decide whether he or she wants to cancel. If damages are to be assessed after cancellation, it should be done with reference to all relevant factors in order to compensate the plaintiff as far as possible for the consequences of the breach. See, however, *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) at 204–9 where it was held that there is no rule that the innocent party must cancel the contract after repudiation in certain circumstances. See para 12.7.2.3.

[118] The difference between breach of contract and damage should be kept in mind. Even though repudiation immediately amounts to breach of contract, it is unrealistic to attempt to assess damage before the innocent party has reacted to it. Since damage cannot be assessed at that stage, damages are not relevant at all. It is doubtful whether the court in *Tuckers Land and Development Co v Hovis*1980 (1) SA 645 (A) (by holding that repudiation in itself amounts to breach of contract) intended to lay down that a claim for damages immediately arises upon breach of contract. It is incorrect to recognize a claim for damages which has no content (as Reinecke apparently does in 1990 *TSAR* 301). If a contracting party does not or may not cancel after repudiation, his or her claim for damages arises only when actual damage manifests itself through, for example, mora, malperformance etc. If the innocent party wants to acquire a claim for damages before the date of performance, cancellation (in other words, acceptance of repudiation) is essential. Cancellation does not play the same role in repudiation as it does in other instances where breach of contract occurs during or after the time set for performance.

[119] See also para 12.7.2.1 where it is impossible to determine market value.

[120] See De Wet & Van Wyk *Kontraktereg en Handelsreg* 231–2.

[121] Here De Wet & Van Wyk *Kontraktereg en Handelsreg* 232 refer, eg, to *Amod Bayat v Doherty*1919 NLR 44 and *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184.

[122] See also *Culverwell v Brown* 1990 (1) SA 7 (A) at 30.

[123] Cf, eg, *Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T). The yardstick of market value is merely an application of general principles and not necessarily the correct method in every situation.

[124] Cf the following cases for examples of the incorrect use of the market-price rule: *Kahn v Beirowski* 1933 TPD 43, where a seller did not deliver inoculated mules (which were not so prone to disease) but mules which were not inoculated. Four of them died and the court refused to award the plaintiff the value of inoculated mules but assessed his damages as the difference in value between inoculated and ordinary mules. It is clear that the purchaser was entitled to the full value of inoculated mules. See also *SAR & H v Theron* 1917 TPD 67; *Jordaan v Symon* 1925 OPD 207; *Markus & Co v Louw*1930 CPD 123. However,

De Wet & Van Wyk *Kontraktereg en Handelsreg* 232 are in agreement with the decisions in *Kaplan & Co v Basel Bros* 1931 CPD 457 and *Chapman v Dwor* 1921 CPD 433.

[125] Cf De Wet & Van Wyk *Kontraktereg en Handelsreg* 233; *Van Es v Beyer's Trustee & Bosman*1884 SC 9; *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T); *West Rand Steam Laundry Ltd v Waks* 1954 (2) SA 394 (T).

[126] See also Van der Merwe et al *Contract* 439.

[127] See De Wet & Van Wyk *Kontraktereg en Handelsreg* 233. Suppose X buys potatoes of a particular quality free on rail at an inland station and then sends it to Cape Town for resale. Only there it appears that the potatoes are not of the required quality. X's damage should not be determined with reference to the price of potatoes at the small station. See further Lubbe & Murray *Contract* 639.

[128] 1972 (2) SA 842 (A) at 858–9; n 108 above.

[129] Cf *Dennill v Atkins* 1905 TS 282; *Hope v Unterhalter* 1934 TPD 392; *Kritzinger v Marchand & Co*1926 CPD 397; *Vianini Ferro-Concrete Pipes v Union Government* 1942 TPD 71. These cases were concerned with lost profit (see para 12.13). See further *Wald v Disler* 1918 CPD 305; *Durr v Buxton White Lime Co* 1909 TS 876; *Joubert Bros v Abrahamson* 1920 CPD 103; *Maennel v Garage Continental Ltd* 1910 AD 137; *Moyes & McKenzie v Frenkel & Co* 1912 NLR 282; *Van Es v Beyer's Trustee & Bosman*1884 SC 9; *Richter v Van Aardt* 1917 OPD 85; *Stephens v Liepner* 1938 WLD 30; *Mills v Schmahmann Bros* 1909 TS 738; *Stark v Union Stores* 1920 EDL 358; *Broughton v Davis* 1921 TPD 409; *Jardine v Van Niekerk* 1918 EDL 246; *Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T); *Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd* 1999 (4) SA 26 (W) at 85–6.

[130] 1987 (1) SA 440 (E). See Kerr 1988 *SALJ* 202.

[131] C sold a smallholding to H for R50 000. H repudiated his obligations and C withdrew from the contract. An estate agent failed to sell the property and eventually C sold it to her brother for R44 000. C needed the money to pay a mortgage debt of R18 000 as well as payment for another property which she had bought in the meantime. Although there was no material decline in property prices in the time between the two contracts, the court accepted that C could obtain damages in the amount of R6 000.

[132] See, eg, Sharrock 1987 *SALJ* 230–2.

[133] Reinecke *Diktaat* doubts the correctness of this decision but indicates that *Novick v Benjamin*1972 (3) SA 842 (A) does in principle provide authority for such a situation.

[134] 1977 (4) SA 855 (A) at 876–9, 882.

[135] See also *Ranger v Wykerd* 1977 (2) SA 976 (A) at 992: the circumstances of each case must be considered to find 'the most practical, effective, and objective way of establishing . . . patrimonial loss'.

See also Lubbe & Murray *Contract* 639: 'In a case where a party attempted to depart from the market value rule, it was held that this was only permissible if the party showed that the application of the standard measure was impossible, impracticable or inappropriate in the circumstances.' Cf, however, *Whitfield v Phillips* 1957 (3) SA 318 (A) (para 12.13 on loss of profit).

[136] See paras 12.7.2.3 and 12.7.2.4; Joubert *Contract* 257–8; McLennan 1972 *SALJ* 424; Nienaber 1989 *TSAR* 1; *Culverwell v Brown* 1990 (1) SA 7 (A); Kerr *Contract* 575 et seq.

[137] See Joubert *Contract* 208–10; Lubbe & Murray *Contract* 481–4; Van Rensburg et al 5 (1) *LAWSA*para 492; see n 139 below.

[138] See para 12.7.2.3 on the position where repudiation is not accepted; para 12.7.2.4 on the position where it is accepted, where a date for performance has been determined, and if no date for performance has been set.

[139] Joubert *Contract* 209 summarizes the position as follows: 'The creditor now has a choice. He can complete the contract by completing his part of the bargain and then claim whatever he would be entitled to in the absence of an order for specific performance, usually damages in lieu of performance and additional damages to compensate him for the fact [that] specific performance was not given. He can also cancel the contract and claim the remedies following upon such a step, viz return of whatever he has performed, as well as damages for breach of contract. The debtor cannot demand that the creditor should delay cancelling the contract until such time as he can rescind the contract because of a failure to perform timeously, since making performance impossible is a breach of contract in anticipando.' See ibid on where a creditor makes performance impossible: 'The position is then simply that where the creditor who has made performance impossible does not bear the risk in respect of the counter-performance, he is liable for damages, which can be calculated as the value of the counter-performance less anything that has been saved by the other party due to not having to render performance or to having to receive counter-performance specifically.' See in general *Benjamin v Myers*1946 CPD 655 at 662; *Grobbelaar v Bosch* 1964 (3) SA 687 (E); *McCabe v Burisch* 1930 TPD 261; *Pohl v Prinsloo* 1980 (3) SA 365 (T); *East Asiatic Co v Hansen* 1933 NPD 297; *Hovey v Hill* 1904 EDC 115; *Louw v Hoogendyk* 1907 CTR 984; *Pay v Norton* 1908 CTR 818; *Visser v*

Vincent 1917 CPD 475; *Wireless Rentals (Pty) Ltd v Stander* 1965 (4) SA 753 (T); *Lipschitz v Black* 1921 CPD 337.

[140] See also paras 12.15.4 and 12.15.5 on the contract of sale.

[141] Where performance is rejected and cancellation takes place, damages are calculated as explained at para 12.7.2.4.

[142] Cf *Kinnear v Huxham* 1903 CTR 421; *Steyn v Davis and Darlow* 1927 TPD 651; *Kahn v Bierowski* 1933 TPD 43; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA (1) (A); *Maennel v Garage Continental* 1910 AD 137 at 145; *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 at 413; *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N) at 38; *Grosvenor Motors (Border) Ltd v Visser* 1971 (3) SA 213 (E) at 216; *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T) at 827.

[143] The value of a peformance according to the contract may often be seen as the value of that which was in fact received plus the cost of repair, and the value of that which was received is the value of the performance promised less the cost of putting it in a proper condition (see Joubert *Contract* 260). This cannot apply in all cases since the cost of remedying the defect may not improve the value by an equal amount (para 13.1*(a)* and *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA (1) (A)).

[144] According to Joubert 1973 *THRHR* 48, market-price is irrelevant here. However, in determining the value of something with or without a defect, the market-price may give a prima facie indication of value.

[145] See *Cugno v Nel* 1932 TPD 289; *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 (2) SA 824 (T); *Wallace Hatton (Pty) Ltd v Craig* 1931 NPD 538; *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N); *Heath v Le Grange* 1974 (2) SA 262 (C); *Albertus v Jacobs* 1975 (3) SA 836 (W). In *Schmidt Plant Hire v Pedrelli* 1990 (1) SA 398 (D) (this case dealt with an obligatio faciendi—see below) the court refused to accept the measure of difference in value. Here S undertook to build a dam wall for P. However, the wall was defective and P claimed damages calculated as the costs of repairing the defect. S's submission that P's damages ought to be based on the difference in value between a defective dam wall and a proper one was rejected. P's claim for reasonable cost of repairs was accepted.

[146] See, eg, *Graham v McGee* 1949 (4) SA 770 (D). Here a supply of water had to be provided to a campsite. The court reasoned that the correct measure (in view of the parties' contemplation—para 11.5.5.2) was not the difference in value of the premises with and without a waterpipe, but the cost of laying a pipe as well as further cost involved in actually supplying water.

[147] Para 12.15.7; Erasmus & Gauntlett 7 *LAWSA* para 51. Kerr 1986 *SALJ* 341 refers to *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) as proof of the fact that damages are assessed on a date later than the date of the breach.

[148] See para 11.5.5.2 on remoteness of damage.

[149] See para 11.3 on mitigation.

[150] See in general Van Jaarsveld *Handelsreg* 876; McKenzie *Building and Engineering Contracts* 49–69, 113–21, 147–51; Hudson *Building and Engineering Contracts*; Loots *Construction Law*; Malherbe & Lipshitz *Building Contracts*; Nienaber 2(1) *LAWSA* para 213 et seq; Wessels *Contract* II 909–15; Van Deventer *Construction*; Hyman *Construction*. See para 12.20 on the contract of service.

[151] See *Pirie v Frankel* 1936 AD 397; *Regering van die RSA v SGC Elektriese Kontrakteurs* 1977 (4) SA 652 (T); *Government v Thorne* 1974 (2) SA 1 (A); *Reid v LS Hepker & Sons (Pvt) Ltd* 1971 (2) SA 138 (RA); De Wet & Van Wyk *Kontraktereg en Handelsreg* 231.

[152] See *Pirie v Frankel* 1936 AD 397 at 407; *Graham v McGee* 1949 (4) SA 770 (D) at 779; *Hamer v Cathcart Municipality* 1886 EDC 112; *Reid v LS Hepker & Sons (Pvt) Ltd* 1971 (2) SA 138 (RA); *Hauman v Nortjé* 1914 AD 293; *Swart v Van der Vyver* 1970 (1) SA 633 (A). See also *Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutch (Pty) Ltd* 1991 (1) SA 525 (A) at 51. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 435 is also relevant. Here it was held that a person performing work agreed upon and who has performed only in part may in some instances claim a reduced contract price which is calculated in terms of the expense to remedy the defects. As far as consequential loss is concerned, the plaintiff will have to institute a counter-claim to have the contract price reduced still further. See for an evaluation Reinecke 1991 *TSAR*714–16; para 8.9.2.

[153] *Cardoza v Fletcher* 1943 WLD 94; *McAllister v Salem Dipping Tank Committee* 1913 EDC 497; *Plymouth Court (Pty) Ltd v Bergamasco* 1945 CPD 53; *Hughes v Fletcher* 1957 (1) SA 326 (SR). See further De Wet & Van Wyk *Kontraktereg en Handelsreg* 231; *Colin v De Guist* 1975 (4) SA 223 (NC) at 225. There is also provision for compensation of further loss such as wasted expenditure (eg *Hoets v Wolf* 1927 CPD 408) and loss of profit (which fell within the contemplation of the parties). See further McKenzie *Building and Engineering Contracts* 50–3 on damage caused by the mora of the employer.

[154] 1990 (1) SA 398 (D); see n 145 above for the facts. Cf Lewis 1990 *Annual Survey* 69–73.

[155] See Erasmus & Gauntlett 7 *LAWSA* para 50: 'The question is whether it would be reasonable to require a correction of the work so as to make it conform to the contract. If it would not, the contractor would be liable in damages to the extent to which the value of the completed work is less than the value of the work as contracted for.' See also, eg, *Cardoza v Fletcher* 1943 WLD 94. The court in *Pedrelli*(supra n 145) also justifies its acceptance of the measure of reasonable cost of repairs by arguing that the innocent party 'obtains what he bargained for (albeit that this may be translated into a monetary equivalent as damages' (at 419). The problem with the measure of difference in value in casu is, of course, that there is hardly a market-price for dam walls so that the market-price rule is difficult to apply (see para 12.7.2.1). Reinecke 1990 *TSAR* 776 supports the reasoning in *Pedrelli*. Although he is of the opinion that the Appellate Division in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) attached considerable value to the measure of difference in value, this is only a primary yardstick. Where a thing or performance has no real market value or this value is unrealistic (eg in used property), market value cannot be the ultimate criterion. Where, as in the *Pedrelli* case, it is a case of malperformance of an obligatio faciendi, and it is reasonable to repair the defective performance, the court correctly (Reinecke submits) deviated from a rigid application of the yardstick of difference in value. See also Clive & Hutchison *Breach* 191–2.

[156] 1996 (1) SA 452 (A). R, a quantity surveyor, negligently advised C with regard to the cause of the subsidence and cracking of her house. R was aware that C proposed recovering the cost of remedial work from the builder. C settled her claim in May 1989 against the builder on this advice, which proved to be incorrect. The final remedial work was only done in June 1992. C succeeded in her claim for two sums: one for the cost of the correct remedial work in May 1989 (minus the amount paid by the builder) and a second sum made up of the wasted cost of the unnecessary work, the extra cost to accommodate this work when effecting the correct repairs and the increased cost of the remedial work done in June 1992. C's claim was upheld on appeal. The delay of the plaintiff to effect the repairs was reasonable in the circumstances.

[157] 458–9. Visser 1996 *Obiter* 186 welcomes this decision. He points out that the court was probably applying the test of reasonable foreseeability (see para 11.5.5.2), because the loss can be described as special damage (186). The onus of proving which date is the correct date for the assessment of the damage and damages rests on the plaintiff (187). It can be argued that if the defendant places this date in dispute, the onus in this regard then rests on him or her as the defendant bears the burden of proof with regard to mitigation (188; see para 11.3.2). This shows the close relationship between the date of assessment of damage and damages and mitigation. See further para 4.5; *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) at 686–8.

[158] See Wessels *Contract* II 910; *Dykes v Gavanne Investments (Pty) Ltd* 1962 (1) SA 16 (T); *Totalquip (Pty) Ltd t/a Total Tech v Connec Joint Venture* [2007] 3 All SA 200 (SE) at 208–9.

[159] See also para 12.17 on the contract of lease. Joubert *Contract* 260. See in general *Medallie and Schiff v Roux* 1903 SC 438; *Lituli v Omar* 1909 TS 192; *Rosenthal v Marks* 1944 TPD 172; *Essa v Divaris*1947 (1) SA 753 (A); *Kerr v Banti* 1904 EDC 277; *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957; *Momsen v Mostert* 1881 SC 185. Cf further *Enslin v Meyer* 1925 OPD 125; *Manley van Niekerk (Pty) Ltd v Assegai Safaris and Film Productions (Pty) Ltd* 1977 (2) SA 416 (A); *Parsons v MacDonald* 1908 TS 809; *Daly v Chisholm & Co Ltd* 1916 CPD 562; *Van der Merwe v Scribante* 1940 GWL 36; *Melville v Hooper* 1885 SC 261; *Mposelo v Banks* 1902 SC 370; *Geldenhuys v Keller* 1912 CPD 623; *Caluza v Nyonwana* 1930 NPD 157; *Gonstana v Ludidi Duna* 1892 EDC 60.

[160] This principle does not always apply since the goods may be incapable of restoration (*Wijtenburg Holdings t/a Flamingo Dry Cleaners v Brobroff* 1970 (4) SA 197 (T)) or restoration may not have an effect on its value (*ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A).

[161] See *De la Rey Transport (Edms) Bpk v Lewis* 1978 (1) SA 797 (A); *Pretoria Light Aircraft Co (Pty) Ltd v Midlands Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N). See also *Long & Co v Munnik & Van der Byl* 1853 Searle 35: Raisins were left with someone in deposit but were not returned. Damages were caculated as the highest value from mora until payment.

[162] See Joubert *Contract* 259; Lee and Honoré *Obligations* 86; Norman *Sale* 251.

[163] Para 12.7.1 and *Teubes v Wiese* 1912 WLD 148; *Phil Morkel v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C); *Garavelli & Figli v Gollach & Gomperts (Pty) Ltd* 1959 (1) SA 816 (W). See further *Dennill v Atkins & Co* 1905 TS 282; *Hersman v Shapiro & Co* 1926 TPD 367.

[164] For example, where the creditor could not employ the performance to make a profit or to avoid further loss. It may also be that he or she had to buy or rent a substitute.

[165] Joubert *Contract* 259.

[166] See Joubert *Contract* 258; De Wet & Van Wyk *Kontraktereg en Handelsreg* 232; Lee & Honoré *Obligations* 85; Kerr & Glover 24 *LAWSA* para 69; *Sale* 176–7; *Contract* 620; Norman *Sale* 255, 259; Wessels *Contract* II 898.

[167] Loss of profit caused by the fact that a creditor did not have possession of something or could not have used it may be recoverable as special damage if it was foreseen or foreseeable.

[168] See, eg, *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 460: 'The measure of damages is the value of the crops (less cost of gathering and marketing) which the plaintiff would have obtained from 411 Valencia trees, which crops, in fact, he cannot obtain owing to the defendant's failure to deliver these 411 trees.' In *Whitfield v Phillips* 1957 (3) SA 318 (A) A and B bought a farm from C for planting pineapples. A and B also purchased one million pineapple plants and commenced preparing the land. However, C repudiated the contract and A and B claimed damages for loss of one year's crop in respect of the million new plants as well as a loss of crop from pineapple plants which were already established on the farm. The court awarded damages to A and B for loss occasioned in connection with the one million plants. As far as the existing plants were concerned, the claim failed because they could not prove that the value of the spes did not form part of the consideration for the purchase price. The court also dismissed C's argument that A and B had paid too much for the farm and that this should be taken into account in reducing any possible claim by them, as it was not proved that the price and the market value were different. De Wet & Van Wyk *Kontraktereg en Handelsreg* 232 n 173 doubt the correctness of this judgment. Lubbe 1984 *SALJ* 616, 626 submits that A and B could not claim for loss of profit since the purchase price was restored to them and without spending this money they could not have made a profit. Kahn *Contract* I 811 correctly rejects this submission and argues that, had the contract not been cancelled, A and B would have had the farm and they would have made the profit. Thus, they were not in a better position after an award of damages for loss of profit (and, moreover, the purchase price had never been paid). See further Millner 1957 *SALJ* 371. Cf also *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Lavery & Co v Jungheinrich* 1931 AD 156; *Durban Picture Frame Co (Pty) Ltd v Jeena* 1976 (1) SA 329 (D); *North & Son (Pty) Ltd v Albertyn* 1962 (2) SA 212 (A).

[169] For instance, a merchant for whom a transaction is part of his turnover and who sells at a price higher than cost price.

[170] For instance, where a purchaser of property has already resold it at a higher price.

[171] See *Brunskill v Preston* 1886 SAR 113; *Colonial Government v Nathan Bros* 1892 NLR 100; *Phillips Metropolitan and Suburban Railway Co* (1893) 10 SC 52; *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T); *Orda AG v Nuclear Fuels Corporation of South Africa (Pty)*Ltd 1994 (4) SA 26 (W). See on the contract of lease Wessels *Contract* II 905.

[172] For example, the case where performance is delayed (para 12.12).

[173] See, eg, *Lazarus Bros v Davies and Kamann* 1922 OPD 88; *Saffer Clothing Industries (Pty) Ltd v Worcester Textiles* 1965 (2) SA 424 (C). See also *Gloria Caterers t/a Connoisseur Hotel v Friedman*1983 (3) SA 390 (T).

[174] Cf, eg, *Vianini Ferro-Concrete Pipes (Pty) Ltd v Union Government* 1942 TPD 71. Here there was a contract for the manufacture and delivery of concrete pipes. The purchaser repudiated after some pipes had been manufactured. It was held that damages had to be assessed in accordance with the profit which the manufacturer could have earned from the supply of the pipes. As far as the pipes already made were concerned, their cost of manufacture could be recovered if they were no longer usable. Cf further *Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T).

[175] See *Dennill v Atkins & Co* 1905 TS 282; *Hope v Unterhalter* 1934 TPD 392; *Kritzinger v Marchand & Co* 1926 CPD 397; *Cohen v Orlowski* 1930 SWA 125; De Wet & Van Wyk *Kontraktereg en Handelsreg* 232.

[176] See Lubbe & Murray *Contract* 639–40. Suppose a merchant's costs in connection with a merx are 20 and he or she sells at the market-price of 30. Applying the market-price rule, the merchant will not recover damages since the contract price is in accordance with the market-price. If the merchant's costs are taken as part of the measure of damages, he or she can, of course, recover the loss of profit of 10.

[177] See Joubert *Contract* 261. Cf also *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462; *Mills v Schmahmann Bros* 1909 TS 738; *Richter v Van Aardt* 1917 OPD 85; *Stark v Union Stores* 1920 EDL 358; *Joubert Bros v Abrahamson* 1920 CPD 103; Bodenstein 1915 *SALJ* 154; Mulligan 1955 *SALJ* 152; *Gloria Caterers (Pty) Ltd t/a Connoisseur Hotel v Friedman* 1983 (3) SA 390 (T); *Orda AG v Nuclear Fuels Corporation of South Africa (Pty) Ltd* 1999 (4) SA 26 (W) at 85–6; *Woolfson's Import and Export Enterprises CC v Uxolo Farms* 1995 (2) PH A29 (A). Loss of profit calculated in terms of the market-price rule is not a sufficient measure of a merchant's damage. If, for example, the merchant sells something at 20 which costs 10 while the market-price is 15, the damage should not be seen as 5 (difference between contract price and market value) but as 10, since the difference between cost price and contract price should be used. See further *Wald v Disler* 1918 CPD 305; *Wireless Rentals (Pty) Ltd v Stander* 1965 (4) SA

753 (T); *Mannix & Co v Osborn* 1921 OPD 138; *Phillips v Greyvenstein* 1922 EDL 29; *Bhayla v Cassim* 1945 NPD 208.

[178] Cf Joubert *Contract* 258–9; 1973 *THRHR* 48–9, 53, 59; Wessels *Contract* II 896. *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 (3) SA 339 (SCA).

[179] *Dennill v Atkins & Co* 1905 TS 282.

[180] *Wolff & Co v Bruce Mavers & Co* 1889 SC 133; *Jacobs v Maree* 1902 SC 152. If the debtor recovers less than the purchase price, he or she is entitled to recover the difference from the buyer (if the latter has not paid the purchase price in full), and if the debtor recovers more than the purchase price, he or she will have to pay the difference to the purchaser.

[181] The market-price of the merx (para 12.7.2.1) at the time of the breach; cf *Serman & Co v Brown* 1939 TPD 244.

[182] *Cooper v Kohn's Produce Agency Ltd* 1917 TPD 184 at 186; *Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T).

[183] Our courts do not always distinguish between the case where the seller resells for his or her own account (after cancellation) and where the seller resells as negotiorum gestor for the account of the purchaser (cf Joubert 1973 *THRHR* 49).

[184] A seller should act reasonably and sell perishable produce as soon as possible (cf *Ullmann Bros Ltd v Kroonstad Produce Co* 1923 AD 449 at 457). If the seller fails to do this, it is possible that the price which could have been obtained on a reasonable resale may be taken into account (cf Joubert 1973 *THRHR* 59).

[185] If the seller retains the merx for some time and sells it only when the price has fallen, that person is the author of his or her own loss (cf Joubert 1973 *THRHR* 59). It is also possible that a seller neither cancels nor resells. The seller can then still claim the price but may have to subtract the value of the merx from what the purchaser owes him or her (cf Joubert loc cit).

[186] *Acton v Lazarus* 1927 EDL 367.

[187] See also McGregor *Damages* 685 et seq; Wessels *Contract* II 892–904.

[188] See paras 12.19.2 and 12.19.4 on some particular principles in regard to credit sales.

[189] See para 12.19.3.

[190] See para 8.10 and Mackeurtan *Sale* 234; Kerr *Sale* 224; *Stewart v Ryall* 1887 SC 146 at 157. See also *Applebee v Berkovitch* 1951 (3) SA 236 (C).

[191] Cf Mackeurtan *Sale* 234; Kerr *Sale* 229. Norman *Sale* 251 argues that, where a purchaser fails to receive the merx, costs may be awarded from the date the contract was concluded. See further Wessels *Contract* II 896.

[192] See, eg, Mackeurtan *Sale* 234: 'The amount of necessary capital expenditure disbursed upon the thing sold from the date of sale ... . Any deficiency where the income derived from the article is less than the revenue expenditure in order to earn it ... . Any other sum wasted directly or naturally as a result of the breach.' See further *Williams v West* 1921 EDL 352; *Koch v Panovka* 1933 NPD 776; *Union Government v Foster* 1915 CPD 204; *Merrington v Davidson* 22 SC 148.

[193] Cf also Erasmus & Gauntlett 7 *LAWSA* para 53; Lee & Honoré *Obligations* 94.

[194] See para 12.7.2.5 on the exceptions to the market-price rule.

[195] Para 12.7.1.

[196] See Mackeurtan *Sale* 235: 'If the seller has incurred expenses he may also recover that as part of his normal damage—where *(a)* it has not been already taken into account in fixing the measure of damages, *(b)* it was necessarily or reasonably incurred, and *(c)* it has produced no benefit to him, as a direct result of the breach.' See *Acton v Lazarus* 1927 EDL 367.

[197] See para 12.13.

[198] Para 11.3. Cf also Kerr *Sale* 226.

[199] See Mackeurtan *Sale* 237; Lee & Honoré *Obligations* 96.

[200] There is no contract to pay anything for use and occupation (cf, eg, *Wepener v Schraader* 1903 TS 629; *Brown v Brown* 1929 NPD 41) but see Mackeurtan *Sale* 237 n 3.

[201] Unless there is a forfeiture clause. See para 12.18 on conventional penalties. Damages may not be claimed in conjunction with a penalty.

[202] The matter of interest is uncertain: cf Mackeurtan *Sale* 237.

[203] See Mackeurtan *Sale* 237–8 on a decrease or increase in the value of a merx and improvements to it.

[204] Mackeurtan *Sale* 238.

[205] See Mostert et al *Koopkontrak* 133–4; Erasmus & Gauntlett 7 *LAWSA* para 54; Kerr *Sale* 159 et seq; Lee & Honoré *Obligations* 84–6.

[206] Para 12.7.1. See on where the purchaser pays the purchase price in advance, Wessels *Contract*II 898–900; *Stephens v Liepner* 1938 WLD 30 on 95.

[207] Para 12.12 and cf *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462 at 470.

[208] This implies that the merx could not be employed to produce profit. The reasonable cost of a substitute is included. See para 12.13 on loss of profit. Cf also Kerr & Glover 24 *LAWSA* para 69.

[209] See *Blore v Chiappini* (1836) 2 Menz 96; *Irvin & Johnson (SA) Ltd v Kaplan* 1940 CPD 647.

[210] Para 12.13.

[211] See para 12.7.2.4 and Lee & Honoré *Obligations* 85 on where the purchaser does not cancel.

[212] *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 988. The purchase may resell the res vendita if it is liable to deteriorate, or is rapidly falling in value or the expense of storing it is unduly heavy (at 988). See further Mostert et al *Koopkontrak* 215 (purchaser acts as negotiorum gestor).

[213] See in general Mostert et al *Koopkontrak* 168–82; Kerr *Sale* 200–5; Norman *Sale* 151–4; Lee & Honoré *Obligations* 87–8; Van Jaarsveld *Handelsreg* 350–1; De Wet & Van Wyk *Kontraktereg en Handelsreg* 331. See for a delictual claim, *Minister van Veiligheid en Sekuriteit v Japmoco BK* 2002 (5) SA 649 (SCA).

[214] See, eg, De Groot *Inleiding* 3.14.6: 'Dat hy den kooper boven den koopschat soo veel soude vergoeden als den selven kooper aen den eigendom van de saeck gelegen was.' See also Norman *Sale*152–3, who refers to an example by Pothier.

[215] *Sale* 200; cf Kerr & Glover 24 *LAWSA* para 83.

[216] See *Alpha Trust (Pty) Ltd v Van der Watt* 1975 (3) SA 734 (A); *Watt v Standard Bank National Industrial Credit Corp* 1982 (2) SA 47 (D) at 49; *Katzeff v City Car Sales (Pty) Ltd* 1998 (2) SA 644 (C) at 652. In the *Alpha* case the court (at 749) argued that it may be that the purchaser of a rapidly depreciating or diminishing asset who is evicted after a long period of undisturbed use will not necessarily be entitled to repayment of the whole of the purchase price. (However, it is not clear how one can have *long* use of a *rapidly* depreciating asset.) The court added that in the case of a diminishing asset it may possibly not be the same as that which was purchased. The use the purchaser had of the merx can be seen as a type of compensating benefit (chap 10) which must be subtracted from the purchase price. See, however, Kerr *Sale* 202, who correctly submits that the seller has had the benefit of using the money. In casu the court further held that the purchaser was entitled to that part of the purchase price already paid by him and that he was released from his obligation to pay anything else.

[217] See Mostert et al *Koopkontrak* 169–70; *Hendler Bros Garage Ltd v Lambons Ltd* 1967 (4) SA 115 (O) (value at the time of eviction).

[218] See *Alpha Trust (Pty) Ltd v Van der Watt* 1975 (3) SA 734 (A) at 747–8, where this point is illustrated with two examples. Where a collector is prepared to pay an excessive price for a coin to complete his collection, it would prejudice a purchaser to use its value at the time of eviction; where, on the other hand, a purchaser buys a painting at a moderate price and only upon eviction determines that it is extremely valuable, he or she should be compensated for all damage foreseeable at the time of entering into the contract. In *Katzeff v City Car Sales (Pty) Ltd* 1998 (2) SA 644 (C) at 652–5 the court applied the *Alpha* case and found that the purchaser was entitled to restoration of the full purchase price because there was no equitable reason why this should not be done. It was held (at 653): '*In casu* the plaintiff was evicted from "the whole thing" he had purchased. In such a case it would be manifestly inequitable to alow a seller, who deceives the purchaser and sells a thing which does not belong to him or her, to take advantage of his or her own wrongful conduct by retaining a portion of the purchase price.' It was not inequitable that the purchaser had the use of the car before eviction because the seller had the use of the purchase price in the meantime (*Katzeff* supra 644–5).

[219] Mostert et al *Koopkontrak* 174; Norman *Sale* 152. The ratio is simply that the purchaser would have had an asset with an increased value in his or her estate and that this person has lost this benefit. However, only appreciation in value which was reasonably foreseeable when the contract was concluded should be considered. See further Mostert 1968 *Acta Juridica* 43; *Soar v JC Motors* 1992 (4) SA 127 (A).

[220] See Norman *Sale* 152 for convincing arguments. This does not influence the example in the *Alpha* case (n 216 above), since the coin has not depreciated in value.

[221] Mostert et al *Koopkontrak* 170–2. The third party may not claim compensation from the purchaser for fruit used by the latter as bona fide possessor and the purchaser does not have to account for it against a claim for return of the purchase price of the merx (cf *Govindsamy v Govindsamy* 1957 (4) SA 495 (D)).

[222] Cf Mostert et al *Koopkontrak* 172–4; Norman *Sale* 153. This includes the cost of notifying the seller, his or her own attorney-and-client costs, the third party's party-and-party costs and damages paid to such third party, but not any unnecessary costs or costs incurred after the buyer has received notice by the seller of the third party's title. See *Scheibe v Heroldt & Louw* 5 Searle 247; *Nunan v Meyer*1905 SC 203. Cf also *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd*1983 (1) SA 295 (A) on a reasonable settlement.

[223] Mostert et al *Koopkontrak* 175–80; *Lammers and Lammers v Giovanni* 1955 (3) SA 385 (A).

[224] Mostert et al *Koopkontrak* 174–5.

[225] *General Finance Co v Robertson* 1980 (4) SA 122 (ZA).

[226] Cf Lee & Honoré *Obligations* 88.

[227] See Mostert et al *Koopkontrak* 180–2; Norman *Sale* 153–4; *Glass v Hyde* 1932 WLD 19. Where the purchaser cancels the contract and returns the remaining part of the res vendita to the seller, damages are calculated as discussed above. If the contract is maintained, the purchaser can claim damages for the value of the evicted part at the time of eviction. In some cases (see Norman *Sale* 153–4) this amounts to a claim for a pro rata part of the purchase price. See also *Rustenburg v Douglas*1919 EDL 12: A bought land from B after B had convinced him that it had a well on it. A then sold the land with the well to C. It later appeared that the well was not on the land which A had bought and A gave C a discount on the purchase price. The court held that A could recover this amount from B.

[228] See Mostert et al *Koopkontrak* 210 et seq; Kerr *Sale* 106 et seq; Norman *Sale* 163 et seq; Joubert 1976 *THRHR* 8; De Wet & Van Wyk *Kontraktereg en Handelsreg* 334. It is uncertain whether the aedilitian remedies are available to the seller where the trade-in is not in accordance with dicta et promissa concerning the item or where it has a latent defect. In *Wastie v Security Motors (Pty) Ltd* 1972 (2) SA 129 (C) it was held that the remedies should be extended to latent defects in a trade-in. In *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) it was also held that the remedies should be extended to dicta et promissa made with regard to a trade-in. See, however, *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 (1) SA 172 (D); *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O). Some authors (Stoop 1991 *THRHR* 184–8, Kerr *Sale* 113; Grogan 2000 *SALJ* 163–6; Woker 2000 *SA Merc LJ* 432) submit that the remedies should be extended in both instances. Others (De Wet & Van Wyk *Kontraktereg en Handelsreg* 314 n 5; Flemming *Krediet* 204; Hawthorne 1990 *THRHR* 120–1; 1992 *THRHR* 149–51) submit that the remedies are applicable, because a trade-in is an in solutum datio.

[229] See, eg, Norman *Sale* 163–7; Kerr *Sale* 113; Mostert et al *Koopkontrak* 199–201.

[230] See *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) at 417–18; Kerr *Sale* 124–6; *Hackett v G & G Radio and Refrigerator Corp* 1949 (3) SA 664 (A) at 686.

[231] See Norman *Sale* 206–7 for the position where there is more than one purchaser. These principles apply also to a contract of barter. See eg Reinecke 1989 *TSAR* 442; Lubbe 1989 *Annual Survey* 77.

[232] Mostert et al *Koopkontrak* 210 et seq; op cit 214–18 on the position if the merx can no longer be returned.

[233] *Mackay Bros v Scott* 1938 TPD 56. It was also held that a seller may be denied compensation for the use of the merx if a buyer does not claim interest on the purchase price (cf *Beneke v Laney*1949 (3) SA 967 (E)). See further *Seggie v Philip Bros* 1915 CPD 292 and *Kirsten v Niland* 1920 EDL 87 (warranties).

[234] See *Inhambane Oil Mineral Development Syndicate Co v Mears & Ford* 1906 SC 250 and *Seggie v Philip Bros* 1915 CPD 292. In both these cases there were warranties (para 12.15.7). See Mostert et al *Koopkontrak* 212 and Norman *Sale* 206 on the following expenses for which a purchaser may claim damages: drafting of the contract; the cost of transporting the merx to the buyer's house or place of business and returning it (*Natal Shipping & Trading Co v African Madagascar Agencies Ltd* 1921 TPD 530; *Pringle v Ellis* 1898 EDL 119); taxes paid; expenses to preserve the merx (eg food to animals) provided that any benefit of the merx is set off against this (eg *Nourse v Malan* 1909 TS 202); the cost of treating sick animals (cf *Kirsten v Niland* 1920 EDL 87 and the cases at the beginning of this note). Any other foreseeable and necessary expenses may be claimed. See further Bodenstein 1915 *SALJ* 35.

[235] Norman *Sale* 206.

[236] Para 4.4.2.

[237] It may recovered in terms of a different claim (para 12.15.7). *Theron v Africa* 10 SC 246; *Wilcken & Ackermann v Klomfass* 1904 TH 91; *Erasmus v Russel's Executors* 1904 TS 365; *Nathanson & Sim v J & E Hall & Co Ltd* 1907 TH 221; *Vorster Bros v Louw* 1910 TPD 1099; *Evans & Plows v Willis & Co* 1923 CPD 496; *Neethling v Hendler* 1930 GWLD 56; Mulligan 1950 *SALJ* 47.

[238] See on this Mostert et al *Koopkontrak* 214–15; Norman *Sale* 207.

[239] Mostert et al *Koopkontrak* 213.

[240] Op cit 214.

[241] Ibid.

[242] *Wingeren v Ross* 1951 (2) SA 82 (C); *Ace Motors v Barnard* 1958 (2) SA 534 (T).

[243] See Kerr *Sale* 129–30; Mostert et al *Koopkontrak* 218 et seq; Norman *Sale* 207–8; Wessels *Contract* II 901. See para 12.15.4 with regard to the uncertainty whether the aedilitian remedies are available to the seller with regard to the trade-in.

[244] Mostert et al *Koopkontrak* 218. Compensation for consequential loss may not be claimed with this remedy (eg *Gannet Manufacturing Co (Pty) Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C).

[245] Cf, eg, *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400; *Zieve v Verster*1918 CPD 296; *Jordaan v Symon* 1925 OPD 207; *Steyn v Davis & Darlow* 1927 TPD 651; *Grosvenor Motors (Border) Ltd v Visser* 1971 (3) SA 213 (E). Cf further *Labuschagne Broers v Spring Farms (Pty) Ltd* 1976 (2) SA 824 (T) at 825–6; *Du Plessis v Semmelink* 1976 (2) SA 500 (T) at 501; *Gannet Manufacturing Co Ltd v Postaflex (Pty) Ltd* 1981 (3) SA 216 (C) at 226; *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O) at 215; *Sarembock v Medical Leasing Services (Pty) Ltd*1991 (3) SA 344 (A); *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C).

[246] See Bodenstein 1915 *SALJ* 40; Mulligan 1953 *SALJ* 132–44. The reason for this is that the normal measure would allow the purchaser to escape the prejudicial consequences of concluding a bad bargain (Mostert et al *Koopkontrak* 219).

[247] *Koopkontrak* 220.

[248] Para 13.4.

[249] The authors (op cit 220) point to the relationship between the actio quanti minoris and the actio redhibitoria and indicate that a purchaser in a case of redhibition may shake off the loss caused by a bad bargain, but not with the actio quanti minoris. See, however, also Kerr *Sale* 129–30.

[250] See *Mostert v Noach* (1884) 3 SC 174; *Boorstein v Garcia* 1908 EDC 246. The same applies if the difference has not been proved (cf *Grosvenor Motors (Border) Ltd v Visser* 1971 (3) SA 213 (E); *Bloemfontein Market Garage (Edms) Bpk v Pieterse* 1991 (2) SA 208 (O)).

[251] See para 12.7.2. See also Kerr *Sale* 129; *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 (1) SA 344 (A).

[252] See Kerr *Sale* 129–30. Cf Kerr op cit 130–1 on animals suffering from disease. The question is raised whether the buyer of an animal which temporarily suffers from a disease and who incurs expenses may recover them from the seller. Kerr op cit 130 submits that the buyer may claim such expenses with the actio quanti minoris. See, however, Mostert et al *Koopkontrak* 210 n 2. See also Kerr op cit 130–1 on the question of whether there is an actio if an animal recovers from a temporary disease without any expenditure on the part of the buyer.

[253] For example, when the action is instituted; when the defect is discovered or ought reasonably have been discovered; at the time of delivery; at the time of conclusion of the contract. See also Norman *Sale* 208; *Jordaan v Symon* 1925 OPD 207; *Mostert v Noach* (1884) 3 SC 174; *Pocklington & Co v Hayne & Co* 1904 NLR 174; *Scheepers v Handley* 1960 (3) SA 54 (A).

[254] See Mostert et al *Koopkontrak* 221. A purchaser who does not rescind bears the risk of depreciation in value from the conclusion of the sale and the purchaser is placed in the position he or she would have occupied if the defect had been known when the contract was concluded. See also *Maennel v Garage Continental Ltd* 1910 AD 137 at 149; *Wilson v Simon and Lazarus* 1921 OPD 32 at 37; *McDaid v De Villiers* 1942 CPD 220 at 240; *Grosvenor Motors (Border) Ltd v Visser* 1971 (3) SA 213 (E) at 216; Kerr *Sale* 131; Norman *Sale* 208 (Kerr loc cit rejects the conclusion (eg Norman *Sale* 4th ed 367) that *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 is authority that the time at which the action is instituted is to be used). Norman *Sale* 208 adds *Ranger v Wykerd* 1977 (2) SA 976 (A) as apparent support.

[255] See also para 13.4; Kerr *Contract* 285–300; De Wet & Van Wyk *Kontraktereg en Handelsreg*340–1.

[256] Mostert et al *Koopkontrak* 248–9; *Hackett v G & G Radio & Refrigerator Corp* 1949 (3) SA 664 (A); *Cullen v Zuidema* 1951 (3) SA 817 (C); *Cloete v Smithfield Hotels (Pty) Ltd* 1955 (2) SA 662 (O); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A); *Ranger v Wykerd* 1977 (2) SA 976 (A); *Orban v Stead* 1978 (2) SA 717 (W). See also *Dibley v Furter* 1951 (4) SA 73 (C); *Hadley v Savory* 1916 TPD 385; *Van der Merwe v Culhane* 1952 (3) SA 42 (T); *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N).

[257] Para 13.4.

[258] Para 13.4. See also Kerr *Contract* 314–7; *Bayer (SA) Pty Ltd v Frost* 1991 (4) SA 559 (A).

[259] See in general Burchell 1950 *SALJ* 121; Mulligan 1951 *SALJ* 157; Van der Spuy 1961 *THRHR*261; Olivier 1964 *THRHR* 20; Lubbe *Innocent Misrepresentation* 113; Van der Merwe & Reinecke 1974 *THRHR* 175; De Vos *Onopsetlike Wanvoorstelling* 63; Kerr *Contract* 273–9, 295–6; *Vigne v Leo* 9 HCG 196; *Viljoen v Hillier* 1904 TS 315; *Dickson v Levy* (1894) 11 SC 33; *De Kock v Grafney* 1914 CPD 377; *Bell v Ramsay* 1929 NPD 265; *Steyn v Davis and Darlow* 1927 TPD 651; *Glass v Hyde* 1932 WLD 19.

[260] Cf, eg, *Steyn v Davis and Darlow* 1927 TPD 651 at 659.

[261] Cf, eg, *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A); Norman *Sale* 50.

[262] *Steyn v Davis and Darlow* 1927 TPD 651 at 656; *Hackett v G & G Radio and Refrigerator Corp*1949 (3) SA 664 (A) at 689; *Van Schalkwyk v Prinsloo* 1961 (1) SA 665 (T) at 667; Mulligan 1957 *SALJ*306–8. See, however, the criticism by Kerr *Contract* 300 and 332–3 on what he classifies as 'true' restitutionary damages (see para 12.15.4 on the actio redhibitoria).

[263] Para 12.15.5.

[264] Cf *Hall v Milner* 1959 (2) SA 304 (O); *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd*1962 (3) SA 767 (D); *Elsie Motors (Edms) Bpk v Breedt* 1963 (2) SA 36 (O); *Phame (Pty) Ltd v Paizes*1973 (3) SA 397 (A). See *Labuschagne Broers v Spring Farms (Pty) Ltd* 1976 (2) SA 824 (T), where the court confirmed the measure of damages as laid down in *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400, viz the difference between the purchase price and the value of the merx. The measure of the difference between what the purchaser paid and would have paid with knowledge of the defect may cause problems.

[265] Mostert et al *Koopkontrak* 236–58; Van Jaarsveld *Handelsreg* 357–61; Norman *Sale* 202–3, 209–19; Kerr *Sale* 205 et seq; *Contract* 458–61; De Wet & Van Wyk *Kontraktereg en Handelsreg* 339–40; Wessels *Contract* II 902 et seq.

[266] See *Jaffe & Co (Pty) Ltd v Bocchi* 1961 (4) SA 358 (T); *Minister van Landboutegniese Dienste v Scholtz* 1971 (3) SA 188 (A). See Mostert et al *Koopkontrak* 242 on a warranty that property will be suitable for a specific purpose; Kerr *Sale* 205 et seq.

[267] See, eg, *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 (3) SA 561 (A) at 571: 'In my opinion the preponderant judicial view ... is that liability for consequential damage caused by latent defect attaches to a merchant seller, who was unaware of the defect, where he publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold.' See also *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A); *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk*1996 (2) SA 565 (A); *Sentrachem Bpk v Prinsloo* 1997 (2) SA 1 (A); *Ciba-Geigy (Pty) Ltd v Lushof Plase (Pty) Ltd* 2002 (2) SA 447 (SCA). A manufacturer per se is liable for consequential loss caused by latent defects. See *Holmdene Brickworks (Pty) Ltd v Roberts Construction (Pty) Ltd* 1977 (3) SA 670 (A); *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 (3) SA 593 (SCA); Maleka 2009 *SA Merc LJ* 576. See Lötz & Nagel 2005 *THRHR* 342–4 for a critical view of the common-law requirements for liability; *SA Oil and Fat Industries v Park Rynie Whaling Co Ltd* 1916 AD 400 on purchasing something with reference to a sample or description; *Grossberg v Central Cabinet Works (Pty) Ltd* 1955 (2) SA 346 (T); Mostert et al *Koopkontrak* 244–8; Lötz & Van der Nest 2001 *De Jure* 219. See Kerr *Sale* 215–18 on a warranty that something is of reasonable merchantable quality; Kerr op cit 211–14 on warranties by merchants and manufacturers; Kerr op cit 219–20 on warranty of quality by exhibition of a sample. Cf also Norman *Sale* 214–15; De Wet & Van Wyk *Kontraktereg en Handelsreg* 342. Section 61 of the Consumer Protection Act 68 of 2008 has introduced strict (no-fault) liability for damage caused by supplying unsafe goods. See para 13.12.

[268] See in general *Button v Bickford Smith* 1910 WLD 52; *Corbett v Harris* 1914 CPD 535; *Evans & Plows v Willis & Co* 1923 CPD 496; *Marais v Commercial General Agency Ltd* 1922 TPD 440; *The Louvre v Jaspan & Miller* 1922 TPD 242; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Myers v Van Rensburg*1930 SWA 14; *Cugno v Nel* 1932 TPD 289; *Lockie v Wightman & Co Ltd* 1950 (1) SA 361 (SR); *Beneke v Laney* 1949 (3) SA 967 (E); *Erasmus v Russel's Executor* 1904 TS 365; Mulligan 1950 *SALJ* 39–53; *Radiotronics (Pty) Ltd v Scott Lindberg & Co Ltd* 1951 (1) SA 312 (C); *Steyn v Davis and Barlow* 1927 TPD 651; *Clarke v Durban and Coast SPCA* 1959 (4) SA 333 (N) at 338; *Desmond Isaacs Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T); Norman *Sale* 202.

[269] See, eg, *Mostert v Noach* (1884) 3 SC 174; *Inhambane Oil & Mineral Development Syndicate v Mears & Ford* 1906 SC 250; *Steyn v Davis and Barlow* 1927 TPD 651; *Kahn v Beirowski* 1933 TPD 43; *Radiotronics (Pty) Ltd v Scott Lindberg & Co Ltd* 1951 (1) SA 312 (C); De Wet & Van Wyk *Kontraktereg en Handelsreg* 232. Norman *Sale* 202, however, distinguishes between the various duties of a seller in terms of a warranty. In the following example the purchaser (P) has, according to Norman, no claim: The seller (S) sells a farm which is worth R500 000 to P for R500 000 and guarantees that it is worth R700 000.

This conclusion is probably incorrect and the analogy with misrepresentation (para 13.4) is irrelevant. The measure of damage is not how much more P has paid on account of the warranty, but the difference between what he has received and should have received. See further on the choice between an action for breach of warranty and one based on fraud *Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (C); *Davidson v Bonafede* 1981 (2) SA 501 (C).

The value of a merx which is in conformity with a warranty is, in the absence of contradictory evidence, represented by the purchase price. This sometimes leads to the following measure of damage: the difference between actual value and purchase price. See Mostert et al *Koopkontrak* 257.

[270] See *Maennel v Garage Continental Ltd* 1910 AD 137; *Wallace Hatton (Pty) Ltd v Craig* 1931 NPD 538; *Graham v McGee* 1949 (4) SA 770 (D); *Crawley v Frank Pepper (Pty) Ltd* 1970 (1) SA 29 (N); *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D); para 13.1. Cf further *Theunissen v Burns* 14 CTR 606; *Wessels v Kemp* 1921 OPD 58; *Reid v Springs Motor Metal Works* 1943 TPD 154 on an agreement that a seller may effect changes to a merx so that it fulfils the requirements of the contract. A purchaser who fails to afford a seller this opportunity is guilty of mora creditoris (para 12.14) and the seller may claim counter-performance less the amount required for proper completion (Mostert et al *Koopkontrak* 248).

[271] *Kroomer v Hess & Co* 1919 AD 204; *Bouwer v Ferguson* 1884 EDC 90; *Holden & Co v Morton & Co* 1917 EDL 210; *Marais v Commercial General Agency Ltd* 1922 TPD 440; *Evans & Plows v Willis & Co*1923 CPD 496 (removal of pipes because of weak cement); *Cugno v Nel* 1932 TPD 289 (obiter dictum on a doctor's expenditure to lease a substitute vehicle); *Young's Provision Stores (Pty) Ltd v Van Ryneveld* 1936 CPD 87 (inter alia medical expenses to treat poisoning caused by tinned food); *Bower v Sparks, Young and Farmer's Meat Industries Ltd* 1936 NPD 1 (loss of members and future members of a Christmas club caused by the supply of defective hams); *Beneke v Laney* 1949 (3) SA 967 (E); *Holmdene Brickworks (Pty) Ltd v Roberts Construction (Pty) Ltd* 1977 (3) SA 670 (A) (cost of demolishing walls built with low-quality bricks and re-erecting them); *Kroonstad Westelike Boere Ko-operatiewe Vereniging Bpk v Botha* 1964 (3) SA 561 (A) (damage to sorghum caused by a defect in pesticide meant for the destruction of lice); *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) (weed killer caused a lower crop yield); *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 (2) SA 565 (A) (seed caused crop failure); *Sentrachem Bpk v Prinsloo* 1997 (2) SA 1 (A) (toxin meant for the control of eelworm destroyed biological control of another pest which led to virtual obliteration of crop); *Ciba-Geigy (Edms) Bpk v Lushof Plase (Edms) Bpk* 2002 (2) SA 447 (SCA) (weed killer caused damage to pear trees); *D & H Piping Systems (Pty) Ltd v Trans Hex Group Ltd* 2006 (3) SA 593 (SCA) (defective aggregate and sand caused failure of concrete pipes); *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) (bottles treated with a certain gas caused damage to wine).

[272] *Minister van Landboutegniese Dienste v Scholtz* 1971 (3) SA 188 (A) at 199; *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) at 20–1.

[273] See, eg, *Holz v Thurston* 1908 TS 158; *Vivian v Woodburn* 1910 TS 1285; *Bower v Sparks, Young and Farmer's Meat Industries Ltd* 1936 NPD 1, 13–15; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Desmond Isaacs (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T) at 287.

[274] Para 8.10. See in general *Maytom & Co v Williams* 1908 EDC 458; *Becker v Stusser* 1910 CPD 289; *Estate Kriessbach v Van Zitterts* 1925 SWA 113; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *West Rand Estates Ltd v New Zealand Ins Co Ltd* 1926 AD 173; *Mavromati v Union Exploration Import (Pty) Ltd* 1949 (4) SA 917 (A); *Linton v Corser* 1952 (3) SA 685 (A); *Enteka Verspreiders (Edms) Bpk v Ellis en Geldenhuys (Edms) Bpk* 1975 (4) SA 792 (O); *Pillay Bros (Pty) Ltd v FM Cash Store* 1976 (2) SA 660 (SE); *Oranje Benefit Society v Volkskas Beleggingskorporasie Bpk* 1976 (4) SA 656 (T); *Reilly v Seligson and Clare Ltd* 1977 (1) SA 626 (A); *Western Bank Ltd v Lester and McLean* 1976 (3) SA 457 (SE) at 464–5; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1145; Van Rensburg et al 5 (1) *LAWSA* para 469; Wessels *Contract* II 876–8.

[275] Para 11.5.5.2. See also *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T) at 315–16; De Villiers & Nagel 1996 *THRHR* 276 et seq.

[276] See in general Cooper *Landlord and Tenant*; Kerr *Sale* 286 et seq; Wessels *Contract* II 904–9; McGregor *Damages* 803 et seq, 855 et seq. See regarding moveable property, *Western Credit Bank v Kajee* 1967 (4) SA 386 (N) at 393–4: 'That the ascertainment of the damages suffered as a consequence of the breach by the hirer of a letting and hiring agreement relating to movables is a matter of some complexity appears from the three judgments in *Robophone Facilities Ltd v Blank* (1966) 3 All ER 128 CA.

'That the ordinary measure of damages for breach of such a contract is the difference between the rent for the remainder of the period of the letting and the rent which the lesser obtains, or can be reasonably expected on a balance of probabilities, to obtain on a re-letting is, I consider, clear. Account will be taken of the fact that for some period, probably short, re-letting is not reasonably to be expected and that thereafter, perhaps, the rent to be obtained will be lower than that provided for in the broken agreement. In the case of letting and hiring of immovable property that is, I do not doubt, the general basis of finding

damages, but in the case of movables, the situation may well be different; it may well be that there is always a supply to meet any demand, so that

''It cannot be right to bring into account against the plaintiffs a notional rehiring of the (vehicle) taken back from the defendant, for the substituted transaction with a new customer would not in truth diminish the loss sustained by the plaintiff at all, inasmuch as that substituted customer would simply be taking on hire the (vehicle) taken back from the defendant instead of another (vehicle) which . . . the plaintiff could have provided.''

'This was the basis upon which, in *Inter Office Telephones Ltd v Robert Freeman & Co Ltd*, (1958) 1 QB 190 CA, the conclusion was reached that, as the evidence showed that there was always such a supply to meet any demand, the plaintiff was entitled to the unpaid rent, which in that particular case was all the rent due in the future, subject, however, to the allowance of a discount ''by reason of the fact that the plaintiffs would be receiving in one sum an amount which, had the contract run its full length, they would have received only over a period of six years''. This decision was applied in *Robophone Facilities Ltd v Blank, supra,* and in our Courts in *Wireless Rentals (Pty) Ltd v Stander*, 1965 (4) SA 753 (T).

'It seems proper also, if the evidence establishes it, to take into account against the plaintiff the fact that it has received the vehicle earlier than it would have done had the defendant not breached the agreement. In *Inter Office Telephones Ltd v Robert Freeman & Co. Ltd*., supra, from the amount arrived at in respect of loss of rentals a deduction was made for the depreciated value of the equipment recovered, this being its depreciated value less the estimated cost of re-conditioning it. I incline to the view that, in a case such as the present, Mr. Broome's approach is the better; the plaintiff must make an allowance for the difference between the present value of the vehicle and an estimate of what its value would in the ordinary course be at the expiration of the agreement. To establish both these values evidence is required.' See also *Bid Financial Services (Pty) Ltd v Isaac* [2007] JOL 19125 (T) at 5–9.

[277] See paras 12.19.2-12.19.3; s 1 of the Consumer Protection Act 68 of 2008, *s v* 'service'; s 1 of the National Credit Act 34 of 2005, *s v* 'lease'.

[278] See on damage if the lessor fails to deliver the property, Cooper *Landlord and Tenant* 87–8 (who is in favour of a decree for specific performance, where possible, since damages are normally not a sufficient remedy); *Stacy v Sims* 1917 CPD 533; *Woods v Walters* 1921 AD 303. The measure of damages should be the general one of the difference between the rental value of the property (according to market-price) and the rent. The lessee's duty to mitigate is, of course, also relevant and consequential damage (eg loss of profit or wasted expenditure) should be considered if it was foreseen or foreseeable. See on damage caused by late delivery of the property, Cooper op cit 88; *Levy v Rose*1903 SC 189; Wessels *Contract* II 907 on the unlawful eviction of a tenant (damages calculated as the difference between the rental value and the stipulated rent, or, in some cases, the difference between the rent in terms of the contract and the higher rent provided for in a subsequent contract); and on damages where the lessee is troubled by third parties with a better title, *Dias v Lawrence* 1895 SC 404 at 408; *Graham v Estate of Alcock* 1906 TH 38; *Loubser v Vorster & Vorster* 1944 CPD 380. The general rule applies, viz that the lessee has to be placed in the position he or she would have occupied if the lessor had acted in terms of the contract of lease and he or she may inter alia claim loss of profit and reasonable legal costs occasioned by the eviction. See also *Shatz Investments (Pty) Ltd v Kalovyrnas*1976 (2) SA 545 (A) at 550: 'Usually the damages naturally and generally sustained by a lessee for being deprived of the use and occupation of the leased premises through the lessor's breach of lease are basically (ie, apart from direct out-of-pocket expenses) the net loss of the rental value of the leased premises for the unexpired term of the lease. The net loss means the rental value less the rentals payable under the lease. The loss is determinable in various ways according to the circumstances peculiar to each case. One well known example is ascertaining the extra cost of hiring other comparable premises. (See, for example, *Pothier, supra,* para. 161; *Graham v Alcock's Estate* 1906 TH 38 at 43, 44; *Melas v Hellyar*, 1910 TH 46 at p.48). Where the premises are expressly let for a profit-making business, as is the case here, loss of profits for the unexpired term of the lease may be recoverable in appropriate circumstances. Such damages are ordinarily regarded, however, not as general damages, but as special damages (*Pothier, supra,* para. 162; *Hinz and Hinz v Kahlbetzer* 1933 SWA 96 at p. 98; *Yates v Dalton* 1938 EDL 177 at p. 183).' See Lee & Honoré *Obligations* 104 on a breach of warranty; Kerr *Sale* 296 and *Woods v Walters* 1921 AD 303 on consequential loss in the form of additional expenses to lease other accommodation; loss of profit from a hotel; and loss of profit from crops. See further on loss of profits Wessels loc cit and on compensation for discomfort *Ward v Gardner* 1902 EDC 73; para 9.5.6.

[279] Either when the property is delivered or because of a failure by the lessor to perform repairs which he or she was obliged to effect. See Kerr *Sale* 301–13; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A).

[280] See Joubert *Contract* 260 and in general Kerr *Sale* 313–16. See further *Salmon v Dedlow* 1912 TPD 971 at 978; *Hunter v Cumnor Investments* 1952 (1) SA 735 (C); *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 (4) SA 391 (D). A lessor's remedies are not exactly the same as,

for instance, those of a buyer in terms of the actio quanti minoris (para 12.15.5): cf Lee & Honoré *Obligations* 104. Where a lessor takes too long to get the leased property in a condition to conform to the contract, damages for loss thus caused may be recovered (*Poynton v Cran* 1910 AD 205 at 226–7). See this case, too, on where a lessee him- or herself undertakes to do the repairs and claims the cost from the lessor. However, where a lessee has not made a demand on the lessor to perform the repairs, he or she will not recover his expenses from the latter (*Bowen v Daverin* 1914 AD 632 at 650–1).

[281] See *Bardopoulos and Macrides v Miltiadous* 1947 (4) SA 860 (W); *Capital Waste Paper Co (Pty) Ltd v Magnus Metals (Pty) Ltd* 1964 (3) SA 286 (N); *Appliance Hire (Natal) (Pty) Ltd v Natal Fruit Juices (Pty) Ltd* 1974 (2) SA 287 (D); *Steynberg v Kruger* 1981 (3) SA 473 (O). See Kerr *Sale* 315-16 on a reduction of rent proportional to the deprivation if it is something more than 'slight inconvenience'. Two opposing views are held on whether the lessee can claim a reduction of rent where the lessee remains in occupation of the thing let. In a long line of cases it has been held that the lessee cannot, but that a counter-claim for such a reduction can be instituted or that it can be claimed by means of set-off (*Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (Pty) Ltd* 1976 (3) SA 112 (W) at 121). The SCA has approved in an obiter dictum the minority view that the lessee should be able to claim a reduction of rental even if the lessee remains in occupation in *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 246. For a discussion of the different views see *Mpane v Sithole* 2007 (6) SA 598 (W) at 596–8. Cf further *Levy v Rose* 1903 SC 189 at 195 on repayment of rent paid in advance and Kerr *Sale* 296 n 27 on loss upon resale of supplies ordered for a hotel (which actually refers to consequential loss—n 282below).

[282] See, eg, *Stewart & Co v Executors of Staines* 1861 Searle 152. Here the upper floor of the property collapsed when the lessee placed on it goods it ought to have been able to bear. The lessor was held liable to compensate the lessee for damage to the goods. This decision has been criticized since the lessor should be liable only if he or she knew or ought reasonably to have known of the defect. See *Alexander v Armstrong* 1879 Buch 233 at 237–8 (if a lessor does not know of a defect, he or she only loses rent to the maximum amount of damage sustained by the lessee); *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129; *Nannucci v Wilson & Co* 1894 SC 240 at 245; *Bensley v Clear* 1878 Buch 89; *Watson v Geard* 1884 EDC 417 at 425; *Nicholson v Myburgh* 1897 SC 384; *Atkins v Delpont* 1903 CTR 686 at 689; *Tee v McIlwraith* 1905 EDC 282 at 289; *Gillison v Thomas Estate* 1920 EDL 146 at 152; *Salmon v Dedlow* 1912 TPD 971; *Amin v Ebrahim* 1926 NPD 1 at 6; *Hunter v Cumnor Investments (Pty) Ltd* 1952 (1) SA 735 (C) at 754. In *Marks v Thompson, Watson & Co* 1900 CTR 516 negligence on the part of the lessor was required. However, Cooper *Landlord and Tenant* 90–1 supports the decision in *Stewart* (supra); see also Cooper op cit 109: 'In principle a lessor should be liable for all damage sustained by a lessee which flows from the lessor's breach of his obligation to maintain in proper condition the premises let to the lessee. There appears to be no legal justification for making the lessor's liability dependent upon knowledge of the defect.' Cf further Kerr *Sale* 343–5; *Smook v Dreyer*1918 OPD 1; *The Treasure Chest v Tambuti Enterprises (Pty) Ltd* 1975 (2) SA 738 (A) at 744; *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 (4) SA 391 (D) at 393; *Tee v McIlwraith* 1905 EDC 282; *Wheeler v Van Reenen* 1883 SC 269; *Viljoen v Cleaver* 1945 NPD 332; *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A). See also the authorities cited by Wessels *Contract* II 908–9.

[283] See, eg, *Dias v Lawrence* 1895 SC 404 at 408; *Tonkin v Kupfer* 1892 EDC 65 at 69; *McNeil v Eaton* 1903 SC 507. An example is where the lessor evicts a subtenant—damages are then calculated as the rent lost by the lessee; see *Seligson v Ally* 1928 TPD 259 at 263. See also Kerr *Sale* 299–301 and *Aggouras v Macfarlane* 1943 CPD 103 at 109 on where a lessee is prevented from using part of the premises. See further *Enter Centre Enterprise (Pty) Ltd v Brogneri* 1972 (1) SA 117 (C) at 123–4 on damages where there is a breach of other terms of the contract which does not directly affect the use of the premises (no reduction of rent in such a case).

[284] See Kerr *Sale* 362. Lost interest is the standard measure of damages for a failure to pay rent timeously (see para 8.10 on mora interest). See on repudiation by the lessee, *Bacon v Hartshorne* 1899 SC 230; Wessels *Contract* II 905.

[285] *Estate Leathern v Taylor and Fowler* 1909 NLR 1; *Groenewald v Duvenhage* 1915 OPD 25; *Henning v Le Roux* 1921 CPD 587; *Bresky v Vivier* 1928 CPD 202; *Bowman v Stanford* 1950 (2) SA 210 (D); *Claasen v African Batignolles Construction (Pty) Ltd* 1954 (1) SA 552 (O) at 564; *Swart v Van der Vyver* 1967 (4) SA 731 (E). A lessor may recover the reasonable cost of repairs as well as damages for loss of rent for the time reasonably required for repairs (if he or she could otherwise have relet the premises). See Cooper *Landlord and Tenant* 119. See on damages as a result of misuse of the rented property De Wet & Van Wyk *Kontraktereg en Handelsreg* 368 n 86; *Shapiro v Yutar* 1930 CPD 92; *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129.

[286] See below on 'holding over'. See also Kerr *Sale* 416–18.

[287] See Kerr *Sale* 419–20; Cooper *Landlord and Tenant* 215, 226–32; De Wet & Van Wyk *Kontraktereg en Handelsreg* 368 n 88. The lessee has to restore the property in the same condition as that in which it

was when he or she received it (normal wear and tear is not taken into account since this is not damage—Cooper op cit 217–18; *Bower v Dow* 1887 SAR 175; *Spies v Lombard* 1950 (3) SA 469 (A)). Damages are calculated with reference to the termination of the contract of lease (Cooper op cit 226). The general measure of damage is the difference between the value of the property at the termination of the contract and what its value would have been if the lessee had placed it in the condition it ought to have been in (*Swart v Van der Vyver* 1970 (1) SA 633 (A) at 643). There is, however, considerable authority for the acceptance of reasonable cost repairs as the yardstick for damages (see *De Beers Consolidated Mines v London and SA Exploration Co* 1893 SC 359 at 373; *Halse Bros v English County Colonization Assoc* 1895 EDC 14; *Greyvenstein v Thompson* 1906 CTR 505; *Frenkel & Co v Rand Mines Produce Supply Co* 1909 TS 129; *Daly v Chisholm & Co Ltd* 1916 CPD 562 at 571; *Bresky v Vivier* 1928 CPD 202; *Getz v Pahlavi* 1943 TPD 142 at 146; *Lategan v Hickenbotham*1956 (2) PH J14 (N)). Where a house which will in any event be demolished has been damaged (see para 3.5), the correct measure is apparently not the reasonable cost of repairs but the reduction in value of the property (see *Swart v Van der Vyver* supra at 643 and *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A); Kerr *Sale* 420).

In *Swart v Van der Vyver* supra the majority of the court held that not even an owner-lessor is entitled without exception to the reasonable cost of having repairs carried out which the lessee was obliged to undertake. Where, as in the present case, it was a fiduciary who acted as lessor, he or she may suffer loss under one or more of three heads, viz: *(a)* loss of the right of enjoyment of the property; *(b)* the damages payable to the fideicommissary for deterioration of the property; and *(c)*forfeiture of a claim against the fideicommissary for improvements. Thus a diminution or appreciation in the value of the property does not directly affect the patrimony of the fiduciary. In casu the plaintiff did not prove actual patrimonial loss. Cooper *Landlord and Tenant* 231 criticizes this judgment: 'In the circumstances, it is submitted, the court should have accepted the evidence of the reasonable cost to repair and restore as prima facie evidence of reduced value.' In *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* supra ISEP leased land from J and sublet it to X, who had erected several ramps on it. Later, Inland bought the land from J and obtained cession of action against ISEP in regard to the removal of the ramps. The reasonable cost of removing the ramps was R12 500 and this would have placed the land in the condition it was when ISEP had received it. The court held that Inland could claim specific performance or damages, but not the objective value of the performance, viz R12 500. Damages had to be calculated on how the presence of the ramps affected the value of the property to J. There was no evidence as to how the price that J agreed on with Inland had been influenced and no damages were accordingly awarded.

[288] The standard measure of damages where the contract is cancelled is the lost rental for the unexpired period of the lease. See *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1938 WLD 167 at 387; *Wireless Rentals (Pty) Ltd v Stander* 1965 (4) SA 753 (T) at 754–5; *Western Credit Bank v Kajee* 1967 (4) SA 386 (N) at 393; *Solomon v Spur Cool Co (Pty) Ltd* 2002 (5) SA 214 (C) at 228; *Terminus Centre CC v Henry Mansell (Pty) Ltd* [2007] 3 All SA 668 (C) at 673. See, however, Kerr *Contract* 674 who regards the rental value of the property as the correct measure of damages. In *Solomon* supra at 227 the court formulated a new possible measure where the leased property was sold in mitigation: 'It is conceivable that the vacant space in the building or the less advantageous replacement lease could have adversely affected the market value of the property. If that were so, it would have been appropriate for the plaintiffs to have formulated their damages claim with regard to the value of lost rental up to the date of the transfer of the property and the adverse effect of the loss of the tenant on the market value of the property.' See also Floyd 2003 *THRHR* 314 et seq.

[289] See, eg, Kerr *Sale* 417–18, 421–4; Kerr & Harker 1987 *SALJ* 324; Cooper *Landlord and Tenant*233–4; De Wet & Van Wyk *Kontraktereg en Handelsreg* 369; Hawthorne 2010 16(1) *Fundamina* 153, 2010 16(2) *Fundamina* 52.

[290] See Lee & Honoré *Obligations* 106; Wessels *Contract* II 906.

[291] See para 13.9.6; Cooper *Landlord and Tenant* 233. For a discussion of the possible impact of the Constitution see Hawthorne 2010 16(2) *Fundamina* 58–61.

[292] See, eg, *Sapro v Schlinkman* 1948 (2) SA 637 (A), in terms of which a lessor may claim rent. See however De Wet & Van Wyk *Kontraktereg en Handelsreg* 369 n 95; Hawthorne 2010 16(2) *Fundamina* 58.

[293] *Matz v Simmond's Assignees* 1915 CPD 34; *Du Toit v Vorster* 1928 TPD 385. Kerr *Sale* 418; Kerr & Harker 1987 *SALJ* 325; Cooper *Landlord and Tenant* 233.

[294] See in general *Nicholson v Myburgh* 1897 SC 384; *Arenson v Bishop* 1926 CPD 73; *Du Toit v Vorster* 1928 TPD 385 at 389; *Sussman v Mare* 1944 GWLD 64; *Van der Merwe v Erasmus* 1945 TPD 97; *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C); Anon 1956 *SALJ* 14. See however Hawthorne 2010 16(2) *Fundamina* 62.

[295] See para 11.9.8 on the differences between a claim for damages ex contractu and ex delicto; Van Aswegen *Sameloop* 452–3.

[296] The common-law provisions regarding a penalty no longer apply—*Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C).

[297] See *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) at 256; *L & SA Exploration Co v Noonan* 1887 HCG 357 at 364; *Nicholson v Myburgh* 1897 SC 384; *Davy v Walker & Sons* 1902 TH 114 at 130; *Sussman v Mare* 1944 GWLD 64 at 68; *Van der Merwe v Erasmus* 1945 TPD 97 at 102; *Murphy v SA Exploration Co* 1887 SC 259 at 265; *Trustees of the Wesleyan Church v Eayrs* 1902 SC 107.

[298] Kerr *Sale* 418 n 627 calculates further damage as follows: it may be the difference between the value of the enjoyment of the property and the amount which the lessor has had to pay as damages to a subsequent lessee to whom he or she could not give the property and who had to find accommodation for the period during which the first lessee remained in occupation (see *Nicholson v Myburgh* 1897 SC 384); the difference between the abovementioned value and damages payable to a buyer on account of late delivery (see *Du Toit v Vorster* 1928 TPD 385); the amount wasted on the preparation of a lease with a subsequent lessee who cancelled the lease on not being given possession of the property on the due date (*Matz v Simmond's Assignees* 1915 CPD 34). Further losses, such as where a lessor would occupy the property him- or herself and has to pay higher rent in order to obtain accommodation or storage room elsewhere, may be compensated for, having regard to the amount received for unlawful occupation (see *Van der Merwe v Erasmus* 1945 TPD 97—no damage was proved here). Loss of profit may also be taken into account. This may be assessed as the difference between what the person who occupies unlawfully has to pay and a higher amount which the next lessee agreed to pay, less the amount received from a third lessee who finally takes occupation (*Matz v Simmond's Assignees* supra). Loss of profit includes the amount which a lessor could earn by personally occupying and using the premises (see *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C) at 252–5).

[299] Para 11.5.5 on limitation of liability (remoteness of damage); *Matz v Simmond's Assignees* 1915 CPD 34 at 36; *Du Toit v Vorster* 1928 TPD 385 at 391; *Phil Morkel Ltd v Lawson & Kirk (Pty) Ltd* 1955 (3) SA 249 (C) at 254. See Cooper *Landlord and Tenant* 234: 'A lessor is entitled to claim from a lessee who holds over such pecuniary loss which flows from, and is the natural, reasonable and probable consequence of, the lessee's unlawful conduct.' Whether a claim is based on delict or contract may affect the nature of the criteria to determine remoteness of damage (see above). If the claim is delictual in nature, one should, generally speaking, use the test of reasonable foreseeability in regard to damage caused by holding over.

[300] Paras 10.11 and 11.3.2. See *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W); Kerr & Harker 1986 *SALJ* 175–84; 1987 *SALJ* 324–9; Lötz 1986 *SALJ* 704; Kerr *Contract* 763–7.

[301] See in general De Wet & Van Wyk *Kontraktereg en Handelsreg* 234 et seq; Joubert *Contract*264–73; Lubbe & Murray *Contract* 640–4; Kahn *Contract* I 826; Kerr *Contract* 684–94; Christie & Bradfield *Contract* 584–8; Van Jaarsveld *Handelsreg* 177–82; Erasmus & Gauntlett 7 *LAWSA* paras 58–61; Van Rensburg et al 5 (1) *LAWSA* paras 504–7; Bamford 1972 *SALJ* 229; Van Rhijn & Van Rensburg 1977 *THRHR* 261; Belcher 1964 *SALJ* 80; Hepple 1961 *SALJ* 445; Flemming *Krediet* 344 et seq; Jamneck 1996 *THRHR* 122; 1997 *De Jure* 52; 1998 *THRHR* 61 229 463; 2001 *TSAR* 41.

[302] Cf on the latter para 11.10.

[303] Before 16 March 1962 (see Joubert *Contract* 266–8). The common law still applies to agreements concluded before this date. See Wessels *Contract* II 879–92.

[304] See, eg, *D & DH Fraser Ltd v Waller* 1916 AD 494; *Pearl Ass Co Ltd v Union Government* 1934 AD 560; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A).

[305] *Pearl Ass Co Ltd v Union Government* 1934 AD 560.

[306] See Van Jaarsveld *Handelsreg* 178–81; Kerr *Contract* 4th ed 598–600; Bamford 1972 *SALJ* 230–2. See also *Rosenstein v Botha* 1965 (4) SA 195 (C); *Van Rensburg v Van Rensburg* 1962 (3) SA 646 (O); *Die Meester v Protea Assuransiempy Bpk* 1981 (4) SA 685 (T). See on surety of a penalty stipulation De Wet & Van Wyk *Kontraktereg en Handelsreg* 394 n 18.

[307] Section 1; cf *B N Aitken (Pty) Ltd v Tamarillo* 1979 (4) SA 1063 (N); *Die Meester v Protea Assuransiempy Bpk* 1981 (4) SA 685 (T).

[308] Section 3 (para 12.18.5).

[309] See Lubbe & Murray *Contract* 642: 'The mere fact that a clause is linked to a breach of contract is not sufficient to bring it within the ambit of the Act. Of decisive importance according to the courts is the intention of the parties as it has been held that the wording of s 1 implies that only clauses entered into either as purely penal clauses or as pre-estimates of loss qualify as penalties within the meaning of the Act.' See on this *De Pinto v Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A) at 1007 (the court must determine whether the parties intended a term to operate in terrorem); *Da Mata v Otto* 1972 (3) SA 858

(A); *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A); *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A); *Bank of Lisbon International Ltd v Venter* 1990 (4) SA 463 (A) at 476 (there is not much sense in trying to determine whether a term operates in terrorem before it is accepted as a penalty). See further Jamneck 1998 *THRHR* 70–2.

[310] *Da Mata v Otto* 1972 (3) SA 858 (A); *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A); *Sasol Dorpsgebiede v Herwarde Beleggings* 1971 (1) SA 128 (O) (duty to retransport land against restitution of purchase price). These remedies are in any event at the disposal of a creditor (unless they are restricted) and it cannot be the intention of the Act to regulate them also. Lubbe & Murray *Contract*643 state that the exercise of a lex commissoria has the result that a contract-breaker is no longer entitled to performance and ask whether this amounts to a penalty. The answer to this must be in the negative, since a duty of restitution upon cancellation affects both parties equally.

[311] That is if the term has been included 'to ensure that, on cancellation of the sale, the seller should get the property back without being hampered by any liability for compensation or by any right on the part of the purchaser to retain possession [until he receives compensation]' (*Da Mata v Otto* 1972 (3) SA 858 (A) at 872); see Joubert *Contract* 268 for criticism but cf on the other hand De Wet & Van Wyk *Kontraktereg en Handelsreg* 248 n 253. Forfeiture of a right to compensation may be a penalty if it relates to improvements in terms of the contract (*Da Mata* supra at 871, 878). See also Kerr *Contract*790–1. In terms of s 15(1)*(b)* of the Alienation of Land Act 68 of 1981 a forfeiture clause concerning improvements on land bought on instalments shall be null and void. See further Jamneck 1998 *THRHR*230–2.

[312] In terms of which the full balance may be claimed if a single instalment is not paid. See Joubert *Contract* 269; *J W Janke v Du Plessis* 1925 TPD 434. According to *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N) this is a penalty (rental for the whole unexpired period of the lease was accelerated without cancellation and the leased thing repossessed by the lessor). An accelerating clause of future rentals was also regarded as a penalty in *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 56. See, however, De Wet & Van Wyk *Kontraktereg en Handelsreg* 243; *Premier Finance Corp (Pty) Ltd v Rotainers (Pty) Ltd* 1975 (1) SA 79 (W) at 83–4 (loan disguised as lease; acceleration of 'rentals' with cancellation); *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 (3) SA 618 (D) at 628 (claim was settled and sum owing was made payable in instalments; *Claude Neon* supra involved acceleration of several debts (rentals) not yet due but in this case only one amount was owing and nothing accrued to applicant after acceleration which was not already owing). Cf *Citibank NA, South African Branch v Paul* 2003 (4) SA 180 (T) at 190–3; *Affinity Logic (Pty) Ltd v Fourie* [2005] JOL 14898 (T) at 20–7. See also Jamneck 1997 *De Jure* 56–8, 1998 *THRHR*232–5.

[313] See *Dreyer's Trustees v Hanekom* 1919 CPD 196; *Ex parte Swift* 1923 OPD 182; *Adam v The Curlews Citrus Farms* 1930 TPD 68; *Reinhold v Levy* 1931 AD 316; *Mine Workers Union v Prinsloo* 1948 (3) SA 831 (A); *Classen v Ann-Fenwich Eiendomme Bpk BK* 1996 (2) SA 99 (O); Jamneck 1997 *De Jure*60–1, 2001 *TSAR* 41. See, however, s 12(5) of the Alienation of Land Act 68 of 1981 which stipulates that rouwkoop in contracts governed by chap 2 of the Act is subject to the Conventional Penalties Act.

Rouwkoop differs from a penalty clause in that the latter becomes relevant only where a debtor commits breach of contract. In such a case the creditor may cancel or uphold the contract and the penalty clause may operate in either case (if so stipulated). Where a creditor cancels in accordance with rouwkoop, breach of contract is irrelevant. Whether a contractual term constitutes a rouwkoop clause depends on the freedom of choice of the party who uses it. Where a party's freedom of choice is materially restricted and it is objectively determined that he or she exercised his right to rouwkoop, it amounts to a penalty. See eg *Epic Properties (Pty) Ltd v Le Hanie* [2011] JOL 26777 (GNP).

[314] See Joubert *Contract* 264; Jamneck 1998 *THRHR* 236. Arrha may be given during negotiations and a party who breaks off negotiations forfeits his or her arrha. Arrha after conclusion of a contract is forfeited if a party acts in breach of his or her obligations (and is returned on completion of the contract). See *Baines Motors v Piek* 1955 (1) SA 534 (A). Arrha which has been forfeited does not influence a claim for damages.

[315] See *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at 13–14; *Neuhoff v York Timbers Ltd* 1981 (4) SA 666 (T) at 684; *Noord-Kaapse Lewendehawe Ko-operasie Bpk v Broden* 1975 (4) SA 643 (NC) at 647; *Western Bank Ltd v Lester and McLean* 1976 (3) SA 457 (SE) at 461; *Ebrahim v Mahomed* 1962 (2) SA 183 (N); *Western Bank v Meyer* 1973 (4) SA 697 (T); *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N); *Santam Bank v Kellerman* 1978 (1) SA 1159 (C); *Moolman v Marba Contractors* 1982 (2) SA 223 (C); *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N). Legal costs are normally not considered to be a part of damage (see *D & D H Fraser Ltd v Waller* 1916 AD 494 at 501 on the difference between collection charges and costs). In exceptional cases costs may be a part of damage: *Bruce v Berman* 1963 (3) SA 21 (T). Kerr *Contract* 791–2 submits that, despite the Conventional Penalties Act, a court has discretion to refuse to enforce such a term, since costs are in the discretion of the court. Cf *SA Permanent Building Society v Powell* 1986 (1) SA 722 (A) 728.

[316] *Western Bank v Meyer* 1973 (4) SA 697 (T) at 704; *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 55. Cf further *Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd* 1976 (3) SA 112 (W) at 123–4. See also *Claassen v Igesund* 1970 (4) SA 41 (D) at 45 on a settlement which was made an order of the court.

[317] *Steel v Umbilo Development (Pty) Ltd* 1964 (1) SA 406 (D); *De Pinto v Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A); *Vreulink v Sun Packaging (Pty) Ltd* 1995 (2) SA 326 (C) at 328; *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A). See Joubert *Contract* 269: 'It is merely a conditional promise to give some performance upon the fulfilment of the condition and not subject to moderation. Where the clause makes the performance depend either upon rescission following a breach of contract or termination for some other reason, then the character of the clause taken as a whole will determine whether it is a penalty clause or not. The fact that its operation is not dependent upon a breach of contract in all cases is strong evidence that it is not a penalty clause even when brought into operation by a breach of contract.' Cf, however, Kerr 1977 *SALJ* 379. See further *De Klerk v Old Mutual Ins Co Ltd* 1990 (3) SA 34 (E) at 42 (no penalty since there was no breach of contract). Cf also De Wet & Van Wyk *Kontraktereg en Handelsreg* 242; Jamneck 1998 *THRHR* 62–8.

[318] See also s 4 on forfeiture clauses. See also *De Klerk v Old Mutual Ins Co Ltd* 1990 (3) SA 34 (E) at 42 (s 4 not applicable).

[319] See also the following penalties (collected in Kerr *Contract* 789–90): *(a)* a clause in terms of which an employee who is not summarily dismissed is, on termination of service, entitled to six months' notice and one year's salary (*Labuschagne v Northmead Investments Ltd* 1966 (4) SA 120 (W)); *(b)* a provision in restraint of trade in terms of which X had to pay R200 per month for each month he was in breach of his undertaking (*Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N)); *(c)* a clause in a lease of a motor vehicle stating that, if the lessor cancelled with good reason, he would be entitled to the full balance of the rental as well as all other amounts whether due or not minus an allowance of 20 per cent (*Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N); *Western Bank Ltd v Lester and McLean* 1976 (3) SA 457 (SE) at 461; 1976 (4) SA 200 (E)); *(d)* a clause in terms of which a seller is entitled to cancel the sale if the purchaser is in breach of any term whatsoever and may repossess the property and regard any money already paid as rouwkoop (*De Lange v Deeb* 1970 (1) SA 561 (O); see also *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 (3) SA 460 (T)); *(e)* a duty to pay collection commission regardless of whether or not the collection has taken place (*Noord-Kaapse Lewendehawe Ko-operasie Bpk v Broden* 1975 (4) SA 643 (NC)).

[320] See *Claassen v Igesund* 1970 (4) SA 41 (D); *Western Bank v De Klerk* 1973 (4) SA 712 (W); *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 (3) SA 460 (T); *Epic Properties (Pty) Ltd v Le Hanie* [2011] JOL 26777 (GNP); De Wet & Van Wyk *Kontraktereg en Handelsreg* 247–8; Jamneck 1997 *De Jure* 55–6; *Simopoulos v Antoniou* [2000] 4 All SA 427 (SE).

[321] Van Jaarsveld *Handelsreg* 180; Joubert *Contract* 269. Where a plaintiff attempts to recover more than he or she owes an attorney, it is subject to reduction. See in general *Van Rensburg v Van Rensburg* 1962 (3) SA 646 (O) (claim for collection charges dismissed but plaintiff afforded opportunity to amend his summons to accommodate costs actually incurred); *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N) (where the court inter alia ordered that 'the defendant pay to the plaintiff collection commission at the rate of 10 per cent on any amounts actually collected in pursuance of this judgment, with a maximum of R50 per payment or instalment'); *Noord-Kaapse Lewendehawe Ko-operasie Bpk v Broden* 1975 (4) SA 643 (NC) at 647 (collection charges recoverable only where collection was successful; if there is an undertaking to pay collection charges irrespective of whether collection has taken place, it is enforceable but subject to reduction); *Basie Heckroodt Veilings v Barker*1979 (3) SA 384 (NC); see however *Blaikie-Johnstone v D Nell Developments* 1978 (4) SA 883 (N). See further *Trinidad and General Asphalt Contracting Co (Pty) Ltd v O'Connel* 1970 (2) SA 779 (NC); *SA Mutual Life Ass Society v Uys* 1970 (4) SA 489 (O) (term for collection charge amounts to a penalty).

[322] The debtor thus has to pay finance charges without the benefit of credit. See *Du Plessis v Oribi Estates* 1972 (3) SA 75 (N); *Massey-Ferguson (SA) Ltd v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T); *Western Bank v Heunis* 1972 (4) SA 703 (NC); *Premier Finance Corp (Pty) Ltd v Steenkamp* 1974 (3) SA 141 (D); *Western Bank v Lester and McLean* 1976 (4) SA 200 (O); *Bank van die OVS Bpk v Theron*1981 (1) SA 700 (NC); 1982 (3) SA 618 (D); *Pareth v Shah Jehan Cinemas (Pty) Ltd* 1982 (3) SA 618 (D). See paras 8.10.3 and 12.19.2 on the National Credit Act 34 of 2005. Cf also De Wet & Van Wyk *Kontraktereg en Handelsreg* 242.

[323] Otto & Grové 1990 *De Jure* 249 n 11; *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 56–7 (6 per cent above prime on arrear and future rentals); *Structured Mezzanine Investments (Pty) Ltd v Davids* 2010 (6) SA 622 (WCC) at 628–9: 'It comes into operation and thus becomes enforceable on breach of the agreement. It is intended to compensate the credit giver in the event of a loss arising from non-performance.' Cf *Citibank NA, South African Branch v*

Paul 2003 (4) SA 180 (T) at 192; *Company Unique Finance (Pty) Ltd v Johannesburg Northern Metropolitan Council* 2011 (1) SA 440 (GSJ) at 467–8. Contra *Slip Knot Investments 777 (Pty) Ltd v Project Law Pro (Pty) Ltd* unreported case no 36018/2009 1/4/2011 (GHC) at para 16.

[324] Van Jaarsveld *Handelsreg* 181.

[325] Section 1; para 12.18.2.

[326] Section 2(1) (para 12.18.2). Lubbe & Murray *Contract* 643 ask: 'Does a clause which provides a penalty for delay in the completion of construction work preclude an action for damages on account of the defective execution of the work?' The answer to this question depends on the interpretation of such a clause. Section 2(1) deals with a penalty in regard to an act or omission of the other party. A penalty clause restricted to a delay in performance can thus hardly affect a claim for damages for defective performance. From *Bank of Lisbon International Ltd v Venter* 1990 (4) SA 463 (A) it appears that 'damages' in terms of s 2 necessarily refers to damages which fall outside the scope of a penalty. It was also held that a trial court should not in a defended action mero motu consider the applicability of s 2(1).

[327] See also *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A). Thus, where a plaintiff demands and obtains forfeiture, a court cannot award damages and the plaintiff may not circumvent this principle by tendering restitution of instalments already paid or by giving the debtor credit for them. In *Bestway Agencies (Pty) Ltd v Western Credit Bank Ltd* 1968 (3) SA 400 (T) it was held that a plaintiff who claims the value of an article which the guilty party could not return upon rescission was suing for damages and that his claim was thus not permissible. See, however, De Wet & Van Wyk *Kontraktereg en Handelsreg* 244, who are correct in arguing that the Act does not prohibit such a claim.

[328] Section 2(1).

[329] See *De Lange v Deeb* 1970 (1) SA 561 (O); *Custom Credit Corp (Pty) Ltd v Shembe* 1972 (3) SA 462 (A); *Tierfontein Boerdery (Edms) Bpk v Weber* 1974 (3) SA 445 (C).

[330] This principle may apply to a building contract where the contractor has to pay a penalty amount for every day the completion of the project is delayed. In such a case it is not possible to rely on a general penalty stipulation and it must be specifically stipulated that the penalty is recoverable in such a case. See Van Jaarsveld *Handelsreg* 181; De Wet & Van Wyk *Kontraktereg en Handelsreg* 245.

[331] See Joubert *Contract* 270–2; Kerr *Contract* 793–7; Lubbe & Murray *Contract* 643 et seq.

[332] The words in s 3 of the Act '[i]f upon the hearing of a claim for a penalty ...' have inter alia been interpreted to mean: 'if upon the hearing of a claim for a penalty or the return of a penalty' (see *Matthews v Pretorius* 1984 (3) SA 547 (W) at 551–2). It thus also covers the case where a party to a cancelled contract claims restitution of something which he or she has forfeited in terms of a penalty stipulation. See also *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D) at 88.

[333] See, eg, Bamford 1972 *SALJ* 229.

[334] Cf *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N); *Bloemfontein Munisipaliteit v Ulrich* 1975 (4) SA 785 (O). In a defended action the court will not on its own initiative consider the reduction of a penalty (*Smit v Bester* 1977 (4) SA 937 (A) at 942; *Chrysafis v Katsapas* 1988 (4) SA 818 (A) at 828; *Bank of Lisbon International Ltd v Venter* 1990 (4) SA 463 (A) at 475). It was held in *Courtis Rutherford and Sons CC v Sasfin (Pty) Ltd* [1999] 3 All SA 639 (C) at 650 that it was not necessary to expressly or specifically apply for a reduction in the pleadings as long as it was raised and the court given the opportunity to consider it. In *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 53 this approach was followed where the action, although formally opposed, was in effect unopposed as the defendant was neither represented, nor did she appear in person.

[335] See, eg, De Wet & Van Wyk *Kontraktereg en Handelsreg* 243.

[336] See *Smit v Bester* 1977 (4) SA 937 (A) at 942; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*1984 (4) SA 874 (A) at 906; *Chrysafis v Katsapas* 1988 (4) SA 818 (A) at 828–9; *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 241; *Steinberg v Lazard* 2006 (5) SA 42 (SCA) at 45–6. This burden is a full legal onus (*Steinberg* supra at 46). After the *Steinberg* case it is clear that the following cases have been discredited insofar as they require the plaintiff to prove some prejudice: *Cous v Henn* 1969 (1) SA 569 (GW) at 573; *Bloemfontein Munisipaliteit v Ulrich* 1975 (4) SA 785 (O) at 790; *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 394; *Western Bank Ltd v Lester* 1976 (3) SA 357 (SE) at 394; *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N) at 63. For an critical evaluation of the logic, fairness and consistency of this onus being carried by the defendant see Visser 2006 *De Jure* 688–9; Nortje & Bhana 2006 *Annual Survey* 228–9.

[337] *Smit v Bester* 1977 (4) SA 937 (A) at 942.

[338] *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 (3) SA 226 (W) at 230; *Du Plessis v Oribi Estates (Pty) Ltd* 1972 (3) SA 75 (N) at 79; *Western Bank v Meyer* 1973 (4) SA 697 (T) at 699; *Premier*

Finance Corp (Pty) Ltd v Steenkamp 1974 (3) SA 141 (D) at 144. See also De Wet & Van Wyk *Kontraktereg en Handelsreg* 246 n 243.

[339] *Smit v Bester* 1977 (4) SA 937 (A) at 942. See also *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 (3) SA 226 (W) at 230. Cf *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 53. See, however, also Kerr *Contract* 793–4, who submits that a court may be disinclined to raise the matter if no evidence is placed before it and refers (by way of analogy) to *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 (3) SA 460 (T) at 469 and *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 906–8. See also Jamneck 1996 *THRHR* 124–6. See also n 334 above on defended actions.

[340] *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 391 which has been followed in many other cases. See further *Western Bank Ltd v Lester and McLean* 1976 (4) SA 200 (E); *Premier Finance Corp (Pty) Ltd v Steenkamp* 1974 (3) SA 141 (D); *Matthews v Pretorius* 1984 (3) SA 547 (W); *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D).

[341] See *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 (3) SA 226 (W); *Matthews v Pretorius*1984 (3) SA 547 (W).

[342] See, eg, *Premier Finance Corp Ltd v Steenkamp* 1974 (3) SA 141 (D) at 144.

[343] See *Du Plessis v Oribi Estates* 1972 (3) SA 75 (N) at 80, where provisional judgment was given in respect of the debt but not the penalty, since it was prima facie out of proportion to the prejudice. The plaintiff could rely on the penalty at the trial and the matter would then be decided on the evidence.

[344] See *Premier Finance Corp (Pty) Ltd v Steenkamp* 1974 (3) SA 141 (D) at 144; *Peters v Janda*1981 (2) SA 339 (Z) at 343; *SA Mutual Life Ass Society v Uys* 1970 (4) SA 489 (O); *Western Bank v Meyer* 1973 (4) SA 697 (T); *Smit v Bester* 1977 (4) SA 937 (A); *Trinidad and General Asphalt Contracting Co (Pty) Ltd v O'Connel* 1970 (2) SA 779 (NC) (where the court was of the opinion that the penalty was prima facie fair). Cf *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 52–3.

[345] Section 3. According to De Wet & Van Wyk *Kontraktereg en Handelsreg* 247 the penalty must be reduced if an obvious discrepancy exists between the penalty and the loss or possible loss resulting from breach of contract.

[346] See *Van Staden v Central SA Lands and Mines* 1969 (4) SA 349 (W) at 352–3: 'The test to all this is, in my view, a subjective test of prejudice. It seems to me that there can be no room for the concept that the prejudice suffered must, as in damage cases, be within the contemplation of the parties; nor is the date of the infliction of the harm or hurt relevant. If when the matter is heard by the Court the harm or hurt has been inflicted, or if it appears that it might reasonably be expected to occur at some future date, the Court will have regard to it.' See the incorrect limitation of prejudice to actual patrimonial loss in *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 56–7.

[347] Para 11.3.

[348] Section 3 of the Act is aimed at restricting immoderate 'compensation' of damage. Even though damage need not have been in the contemplation of the parties, there has to be some or other reasonable nexus between the damage and the breach of contract. See, however, Kerr *Contract* 795–6: 'The position would therefore appear to be that, where a penalty is stipulated for which would be grossly excessive if the only loss which occurred was loss which both parties could foresee at the time the contract was entered into, the penalty may nevertheless be recoverable if unforeseeable loss occurs and brings the amount of the actual loss up to a figure which is not out of proportion to the stipulated figure.' Thus, where someone includes a penalty stipulation in a contract, he or she does not have to prove special damage.

[349] 1969 (4) SA 349 (W) at 352: '[E]verything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must, if it is brought to the notice of the Court, be taken into account by the Court in deciding whether the penalty is out of proportion to the prejudice suffered by the creditor as a result of the act or omission of the debtor.' See also *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 57 (prospect of recovering judgment debt and legal costs not taken into account); *ABSA Technology Finance Solutions (Pty) Ltd v Leon Hattingh t/a Corner Savings Supermarket* [2009] JOL 23504 (GNP) at 18 (the manner defendant behaved taken into account by abandoning leased equipment and making no attempt to reduce plaintiff's damage); *Murcia Lands CC v Erinvale Country Estate Home Owners Ass* [2004] 4 All SA 656 (C) at 661 (prejudice to association's right to enforce concerted action for the common good and its interest in obtaining concerted action).

[350] See *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (W); *Maiden v David Jones (Pty) Ltd*1969 (1) SA 59 (N); *Massey-Ferguson (SA) Ltd v Ermelo Motors (Pty) Ltd* 1973 (4) SA 206 (T); *Bloemfontein Munisipaliteit v Ulrich* 1975 (4) SA 785 (O); *Bester v Smit* 1976 (4) SA 751 (C); Hunt 1962 *Annual Survey* 94; De Wet & Van Wyk *Kontraktereg en Handelsreg* 247. Bamford 1972 *SALJ* 232 gives the example, inter alia, of the frustration of vacation plans (para 3.3.3). He also argues (op cit 234) that positive factors such as an apology should be weighed against the prejudice.

[351] Para 5.11.

[352] *Courtis Rutherford and Sons CC v Sasfin (Pty) Ltd* [1999] 3 All SA 639 (C) at 651. The existence of a penalty stipulation does not exclude the duty to mitigate loss. In *ABSA Technology Finance Solutions (Pty) Ltd v Leon Hattingh t/a Corner Savings Supermarket* [2009] JOL 23504 (GNP) at 15–17 the plaintiff failed to sell or rehire repossessed goods. The court remarked (at 17): 'A financier normally should not be expected to become a dealer in secondhand equipment.' The court seemed to be prepared (at 17) to take into account the residual value of the equipment, but no evidence was available on its value.

[353] See *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N); *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 (1) SA 143 (N) at 148 on two basic approaches, viz to take the plaintiff's damage as a starting point in assessing his or her prejudice, or just to approach the matter in terms of a court's general and equitable discretion. In *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janab Joseph t/a Project Finance* 2008 (3) SA 47 (C) at 56 the whole investigation was limited to comparing the plaintiff's damage to the penalty. This approach is too limited; other interests should also be considered. See *Company Unique Finance (Pty) Ltd v Johannesburg Northern Metropolitan Local Council*2011 (1) 440 (GSJ) at 468. In *Murcia Lands CC v Erinvale Country Estate Home Owners Ass* [2004] 4 All SA 656 (C) at 661 the court proposed that where a plaintiff suffers no monetary prejudice, the test as set out in *Western Bank v Meyer* 1973 (4) SA 697 (T) at 700 should be used. The court has to make a value judgment in order to decide whether the penalty is 'unduly severe to an extent that it offends one's sense of justice and equity'. The court compared (at 661–3) the penalty in question with similar penalties employed by other similar home owners' associations and took into account (at 663–4) the financial benefit the association gained from all the penalties in relation to its other income and expenses.

[354] See *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 391: 'The words ''out of proportion'' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the Legislature would have said so. What is contemplated ... is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded.' Although doubt has been raised in *Van Staden v Central SA Lands and Mines* 1969 (4) SA 349 (W) at 352 about the suitability of the phrase 'not infinitesimally', the test as formulated in *Kajee* supra has received general approval by the courts (see Christie & Bradfield *Contract* 588; *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA) at 58 (obiter)).

[355] See, eg, *Burger v Western Credit Bank Ltd* 1970 (4) SA 74 (T); *Bank van die OVS Bpk v Theron*1981 (1) SA 700 (NC). See Bamford 1972 *SALJ* 234 on the factors which a court may consider (eg the conduct of the parties, their relationship, their relative bargaining power, the nature of a plaintiff's business, the reason for the breach of contract, attempts by the debtor to reduce the creditor's damage, etc).

[356] eg *Cous v Henn* 1969 (1) SA 569 (GW); see above.

[357] 1967 (4) SA 386 (N) at 390.

[358] See *Matthews v Pretorius* 1984 (3) SA 547 (W); *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D).

[359] See *Portwig v Deputation Street Investments (Pty) Ltd* 1985 (1) SA 83 (D) (settlement to forfeit deposit).

[360] See Kerr *Contract* 797, who submits that such an agreement would be contrary to public policy since the court has discretion to reduce the amount.

[361] See in general Kelly-Louw 5(1) *LAWSA*; Scholtz et al *NCA*; Otto *NCA*; Van Eeden 5(1) *LAWSA*; Jacobs et al 2010(3) *PELJ* 302 et seq; Boraine & Renke 2007 *De Jure* 230 et seq; Van Rensburg & Treisman *Alienation of Land*.

[362] The Conventional Penalties Act 15 of 1962 also plays a role here (see s 5; para 12.18.2).

[363] See in general Kelly-Louw 5(1) *LAWSA* paras 6–11; Scholtz et al *NCA* chap 4; Otto *NCA* 15 et seq; Van Eeden 5(1) *LAWSA* paras 6–20. Because the areas of application of these Acts can overlap, the National Credit Act and Consumer Protection Act have rules to resolve conflicts. Section 172(1) read with sch 1 of the National Credit Act 34 of 2005 provide that if the provisions of the Conventional Penalties Act 15 of 1962 and chap 2 of the Alienation of Land Act 68 of 1981 are in conflict with those of the National Credit

Act, the provisions of the National Credit Act prevail. Section 2(9) of the Consumer Protection Act provides that if there is any inconsistency between the Consumer Protection Act and other Acts (besides those set out in s 2(8)), the provisions of both Acts apply concurrently to the extent that it is possible. If it is not possible, then the provisions of the Act that extends the greater protection to the consumer prevail. Section 5(2)*(d)* of the Consumer Protection Act determines that the Consumer Protection Act does not apply to a credit agreement under the National Credit Act, but that the goods and services that are subject to the credit agreement fall within the ambit of the Consumer Protection Act. See Melville & Palmer 2010 *SA Merc LJ* 272 et seq.

[364] See para 12.4 et seq above and para 12.15 on the contract of sale.

[365] Consumers that are juristic persons do not enjoy this protection (see s 6*(d)*). A juristic person is defined in s 1 to include a partnership, association or other body of persons, corporate or unincorporated, or trusts with at least three trustees or where the trustee is a juristic person, but not a stokvel.

[366] See ss 100–6; chap 5 of the National Credit Regulations 2006 (GN R489 in GG 28864 of 31 May 2006 as amended).

[367] Section 101 provides that the credit provider can hold the consumer liable for only the principal debt, an initiation fee, service fees, interest, the cost of credit insurance, default administration charges and collection costs. Section 102 allows additional fees and charges in respect of instalment agreements, mortgage agreements, secured loans and leases. See Kelly-Louw 5(1) *LAWSA* paras 95, 97–103; Scholtz et al *NCA* para 10.1 et seq.

[368] Section 125; s 1 sv 'settlement value'; Kelly-Louw 5(1) *LAWSA* para 126; Scholtz et al *NCA* para 9.5.3. This provision applies to existing credit agreements as well (item 4(2) of sch 3).

[369] Section 125(2)*(c)*; Kelly-Louw 5(1) *LAWSA* para 126 n 9. These provisions also apply to credit agreements which were in existence when the National Credit Act came into effect (see Kelly-Louw op cit para 126 n 4).

[370] The interest that would have been payable under the agreement for a period equal to the difference between three months and the period of the notice (if any) given by the consumer.

[371] This term is not defined, but 'default administration charge' is defined in s 1 as a charge that may be imposed by a credit provider to cover administration costs incurred as a result of consumer defaulting on an obligation under a credit agreement. Reg 46 of the National Credit Regulations 2006 (GN R489 in GG 28864 of 31 May 2006 as amended) provides that the credit provider may require payment by the consumer of default administration charges in respect of each letter necessarily written in terms of Part C of chap 6 of the Act (ss 129–33). Such payment may not exceed the amount payable in respect of a registered letter of demand in an undefended action in terms of the Magistrates' Courts Act 32 of 1944 in addition to any reasonable and necessary expenses incurred to deliver such letter.

[372] Section 129(3).

[373] Section 127; Kelly-Louw 5(1) *LAWSA* para 129; Scholtz et al *NCA* para 9.5.4. This provision is applicable to instalment agreements, secured loans or leases. For a definition of these terms see s 1. This provision also applies to existing agreements (item 4(2) of sch 3).

[374] Sections 129–31; Kelly-Louw 5(1) *LAWSA* paras 142–6; Scholtz et al *NCA* para 9.5.4. These provisions are applicable to credit agreements. See s 1 sv 'credit agreement'. These provisions also apply to existing agreements (item 4(2) of schedule 3). See Otto *NCA* 95–7 on the enforcement of remaining obligations after attachment and sale of the goods.

[375] Some of the steps of the process which should be followed when selling the goods (s 127(2)–(9)) have been left out of this discussion. See Kelly-Louw 5(1) *LAWSA* para 129.

[376] Section 127(5). In debt enforcement, the credit provider may in addition apply to court for any costs of repossession of property in excess of those permitted under s 131 (see s 132 and the limitation in reg 47 of the National Credit Regulations 2006 (GN R489 in GG 28864 of 31 May 2006 as amended).

[377] Section 127(7).

[378] This term is not defined, but 'default administration charge' is defined in s 1 as a charge that may be imposed by a credit provider to cover administration costs incurred as a result of the consumer defaulting on an obligation under a credit agreement. Reg 46 of the National Credit Regulations 2006 (GN R489 in GG 28864 of 31 May 2006 as amended) describes administration costs (see n 371 above).

[379] As calculated in s 125(2).

[380] Payment may be judicially enforced (s 127(8)).

[381] Section 164. Section 164(6) determines when the right to damages arises and s 164(7) when interest on such damages will commence. See also para 8.10.1. This can be a delictual or contractual claim for damages.

[382] Para 8.10.

[383] Sections 1 (*s v* 'goods' and 'service') and 5.

[384] See Van Eeden 5(1) *LAWSA* paras 245–7, 265, 272–3 and 275; Jacobs et al 2010(3) *PELJ* 335–6, 346–7, 353–7 and 360–2; ss 40, 41 and 48 of the Consumer Protection Act. Section 40 prohibits the use of physical force, coercion, undue influence, pressure, duress or harassment, unfair tactics, or any similar conduct. This conduct is prohibited in connection with the marketing and supply of goods or services, negotiations, conclusion, execution or enforcement of a contract for the supply of goods or services to consumers or demand of or collection of payment for goods or services or recovery of goods from consumers. Section 41 prohibits direct or indirect false, misleading or deceptive representations to a consumer, the use of exaggeration, innuendo or ambiguity as to a material fact, failure to disclose material facts that will amount to deception and failure to correct a misapprehension that will amount to false, misleading or deceptive representation. Section 48 introduces substantial fairness to the law of contract (in contrast to procedural fairness) by requiring that contractual terms should be fair, just and reasonable.

[385] This is a normal court of law and not a consumer court. See s 1 *s v* 'court'; Jacobs et al 2010(3) *PELJ* 361–2.

[386] See s 52(3)*(b)*(ii). See also the remedy of damages discussed below (s 115(2)).

[387] See ss 53–7; Van Eeden 5(1) *LAWSA* paras 295–8; Jacobs et al 2010(3) *PELJ* 362–76. Section 56(1) read with s 55(2) provides that in any transaction or agreement pertaining to the supply of goods to a consumer there is an implied provision that the producer or importer, the distributor and the retailer each warrant that the goods *(a)* are reasonably suitable for the purposes for which they are generally intended; *(b)* are of good quality, in good working order and free of any defects; *(c)* will be useable and durable for a reasonable period of time, having regard to the use to which they would normally be put and to all the surrounding circumstances of their supply; and *(d)* comply with any applicable standards set under the Standards Act 29 of 1993, or any other public regulation. Section 55(3) also provides that there is implied warranty that the goods are reasonably suitable either for the specific purpose for which the consumer wishes to acquire the goods or for the use to which the consumer intends to apply those goods and which the consumer has specifically informed the supplier of, and the supplier either ordinarily offers to supply such goods or acts in a manner consistent with being knowledgeable about the use of those goods. These warrianties go far wider than the warranty against latent defects. See also s 54 (the consumer's right to demand quality service); s 57 (warranty on repaired goods); s 65 (supplier to hold and account for consumer's property).

[388] See s 55(6). The warranties are that the goods are *(a)* reasonably suitable for the purposes for which they are generally intended, and *(b)* are of good quality, in good working order and free of any defects (see n 387 above). The consumer has to expressly agree to accept the goods in that condition, or knowingly act in a manner consistent with accepting the goods in that condition.

[389] See s 56(4).

[390] See s 56(2).

[391] See s 56(3).

[392] See s 115(2) and the discussion below.

[393] Section 14(2)*(b)*(i)(*bb)*.

[394] Section 14(3)*(b)*(ii).

[395] Section 14(3)*(a)*.

[396] Section 14(4)*(c)*.

[397] See reg 5(2) of the Consumer Protection Regulations (GN 293 of 1 April 2011). The overal test for reasonableness is set out in reg 5(3): a charge may not have the effect of negating the consumer's right to cancel a fixed term consumer agreement. It would seem that these charges will not qualify as penalties under the Conventional Penalty Act 15 of 1962: The consumer has the right to cancel and the charges are similar to 'rouwkoop' (see paras 12.18.2 and 12.18.3). A complaint by the consumer regarding the reasonableness of a charge will have to be addressed under the Consumer Protection Act (see ss 69–71).

[398] A lay-by is an agreement in which the supplier agrees to sell goods to the consumer, to accept payment in instalments and to hold those goods until the consumer has paid the full price (s 62(1)).

[399] Section 62(2)*(b)*(ii). This will probably not qualify as a penalty under the Conventional Penalties Act 15 of 1962 (para 12.18) because this statutory provision fixes the amount and it does not change its character by incorporation in a contract. An equivalent quantity of goods that are comparable or superior in quality may in the alternative, and at the option of the consumer, be supplied (s 62(2)*(a)*). See also s 62(2)*(b)*(i); para 8.10.2.

[400] Section 62(4)*(a)*.

[401] Section 62(4)*(b)*.

[402] Section 62(5)*(a)*.

[403] Section 62(6).

[404] Reg 34(1) of the Consumer Protection Regulations (GN 293 of 1 April 2011) provides that a penalty shall be reasonable, but may not exceed one per cent of the full purchase price of the goods. Whether this penalty will be subject to the Conventional Penalties Act 15 of 1962 (see paras 12.18.2–12.18.3) depends on the question whether the consumer has a right to cancel the lay-by agreement or whether the consumer's conduct amounts to a breach of contract. Section 62(4) envisions two situations: the consumer terminates the agreement and the consumer fails to complete payment within the prescribed time period. Regulation 34(2) merely provides that on cancellation, the supplier must, upon request by a consumer, immediately provide the consumer with written details on how the penalty was calculated, unless the consumer waives this right in writing. In contrast the right to cancel is expressly given to the consumer in s 14(2). Furthermore, s 76(2) envisions a claim for special damages. It would seem that this is a case of breach of contract and that the penalty will qualify as a penalty under the Conventional Penalties Act. The criteria for the reduction of the penalty in terms of s 3 of this Act will then apply (see para 12.18.5.3). A complaint by the consumer regarding the reasonableness of penalty can still be addressed under the Consumer Protection Act (see ss 69–71).

[405] Section 47(3). Section 47(2) prohibits the supplier from accepting payment or other consideration for any goods or services if the supplier has no reasonable basis to assert an intention to supply these goods or provide those services, or if the supplier intends to supply goods or services that are materially different from the goods or services in respect of which payment or consideration was accepted.

[406] Section 47(3)–(6). See also para 8.10.2. Where the supplier's inability is due to circumstances beyond his or her control, only the amount paid has to be refunded with interest.

[407] Section 115(2).

[408] Section 76(2). It seems strange that only special and not general damage (see para 11.5.5) as well is included in this section. Both should still be available. A claim for restitutio in integrum and enrichment is also available. When goods are returned to the supplier in terms of s 20, the supplier must refund the price, less certain charges. The latter are made up of the reasonable cost of the use or depletion or consumption of the goods or the reasonable restoration costs of the goods (s 20(5)–(6)).

[409] Section 76(1)*(c)*. The court may determine the terms or conditions of payment which it considers just and equitable and suitable to achieve the purposes of the Consumer Protection Act.

[410] Para 8.10.2; s 62(1)*(b)*(i) (supplier cannot deliver goods); s 21(9) (consumer returns unsolicited goods or services); s 47 (over-selling and over-booking).

[411] See s 61; para 13.12.

[412] See n 418 below on the Property Time-sharing Control Act 75 of 1983 and the Share Blocks Control Act 59 of 1980. See also Flemming *Krediet* 62 et seq; Diemont & Aronstam *Credit Agreements*381–2; Kelly-Louw 5(1) *LAWSA* paras 185–6, 200–2.

[413] The amount is calculated as follows: the purchase price and interest thereon; certain expenses actually incurred by a seller (inter alia in connection with the drafting and registration of a contract, taxes, premiums on a life insurance policy and maintenance of land); actual collection commission of the seller; mora interest. According to s 12(4), s 12(2) does not affect any right which a seller may have in cancelling a contract. See Flemming *Krediet* 350 who points out that a claim for damages is therefore not limited to the items listed in s 12(2). Sections 100–6 of the National Credit Act 34 of 2005 can also be applicable to the sale of land on instalments and will have preference above the provisions of the Alienation of Land Act (see s 172(1) read with Sch 1 of the NCA; n 363; para 12.19.2).

[414] See also Flemming *Krediet* 348.

[415] See also para 12.18.3.1.

[416] Para 12.18.

[417] See s 19(1)*(c)* for the requirements with which a notice must comply. See, however, also s 19(4), which creates exceptions and which is possibly also applicable to some claims for damages (Flemming *Krediet* 349). The requirements of ss 120–9 of the National Credit Act 34 of 2005 with regard to notice can also be applicable. To the extent that the provisions of the two acts are in conflict, the provisions of the National Credit Act wil prevail (s 172(1) and sch 1 of the NCA) See further Otto 2009 *De Jure* 166 et seq.

[418] See, eg, s 21(4) which provides that there can be no liability without fault for the violation of duties in terms of s 21(2)*(b)* (notice to certain persons to take transfer of land). See Flemming *Krediet*347, who indicates situations where the Act does not create a statutory claim for damages but is to the effect that

the available remedies are not intended to exclude a claim for damages. See further s 28 on the consequences of deeds of sale which are void or are terminated. The person to whom land has been alienated may recover the following from the other party: interest on money paid from the moment of payment to the time of its recovery; reasonable compensation for necessary expenses or improvements. The party who alienated land may recover: reasonable compensation for occupation, use and occupation of the land and compensation for loss caused intentionally or negligently by the purchaser or someone for whose conduct he or she is liable.

Flemming *Krediet* 120 submits that damages are not recoverable for loss caused by use and loss due to a depreciation in value. It would, however, seem that reasonable compensation for occupation would cover these cases. See further on time-sharing s 9(1) of the Property Time-sharing Control Act 75 of 1983; Butler 27 *LAWSA* para 489(c). See also s 18 of the Share Blocks Control Act 59 of 1980 on reasonable compensation in cases comparable to those described above. See also s 19 on the liability of directors of a share block company if a member suffers damage caused by their failure to properly insure immovable property of the company.

[419] The Consumer Protection Act 68 of 2008 is not applicable to contracts of employment (sv 'service' s 1).

[420] See para 13.11 on interference with a contractual relationship; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 202. See also *Murdoch v Bullough* 1923 TPD 495; Le Roux 1991 *TSAR* 545. See in general *Clark v Denny* 1884 EDC 300; *Kinemas Ltd v Berman* 1932 AD 246; *Brown v Webster* 1946 WLD 254; *Swart v Vosloo* 1965 (1) SA 100 (A); *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A); Kerr 1980 *SALJ* 375. See also Wessels *Contract* II 909–15; *Falconer v Juta* 1879 Buch 22; *Isaacson v Walsh & Walsh* 1903 SC 569; *Denny v SA Loan, Mortgage, and Mercantile Agency Co (Ltd)* 1883 EDC 47; *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D).

[421] *Myers v Abramson* 1952 (3) SA 121 (C) at 127.

[422] Cf also *Gründling v Beyers* 1967 (2) SA 147 (W); *Spruyt v De Lange* 1903 TS 277; *Brown v Sessel* 1908 TS 1137 at 1141; *Faberlan v McKay & Fraser* 1920 WLD 23; *Bulmer v Woollens Ltd* 1926 CPD 459; *Beeton v Peninsula Transport Co (Pty) Ltd* 1934 CPD 53 at 59. See also *Flemmer v Ainsworth*1910 TPD 81; *Byron v Cape Sundays River Settlements* 1923 EDC 117; *Hunt v Eastern Province Boating Co* 1883 EDC 12; *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC) (obiter).

[423] Chap 10.

[424] Para 11.3. See also *Crawford v Tommy* 1906 TS 843; *Saley & Co v Chapty* 1917 TPD 105; *Kinemas Ltd v Berman* 1932 AD 246; *McMillan v Mostert* 1912 EDL 183; *Brown v Webster* 1946 WLD 254; *Clark v Denny* 1884 EDC 300; *Myers v Abrahamson* 1952 (3) SA 121 (C); Lee & Honoré *Obligations* 119.

[425] See *Harper v Morgan Guarantee Trust Co of New York, Johannesburg* 2004 (3) SA 253 (W) at 258; *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) at 1008; *National Entitled Workers Union v Commission for Conciliation, Mediation and Arbitration* (2007) 28 ILJ 1223 (LAC) at 1229 (obiter). However, the view is held that should the dismissal be unfair, damages are then calculated as the employee's loss of salary for the unexpired period of employment. See *Key Delta v Marriner* [1998] 6 BLLR 647 (E) (obiter) at 646; *Maseko v Jongwe Printing & Publishing Co (Pvt) Ltd* [2003] JOL 10663 (ZH). Cf Cohen 2007 *SA Merc LJ* 39–40.

[426] See *Hickman v Cape Jewish Orphanage* 1936 CPD 548; *Ndamse v University College of Fort Hare* 1966 (4) SA 137 (E); *Jackson v NICRO* 1976 (3) SA 1 (A); *Prinsloo v Harmony Furnishers (Pty) Ltd*(1992) 13 ILJ 1593 (IC). See para 11.9.4 on the concurrence of actions in the case of breach of contract; para 15.3.3 on the quantum of satisfaction in the case of contumelia.

[427] In *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at 57–9, 60: 'In my view chap 8 of the 1995 Act is not exhaustive of the rights and remedies that accrue to an employee upon the termination of a contract of employment. Whether approached from the perspective of the constitutional dispensation and the common law or merely from a construction of the 1995 Act itself I do not think the respondent has been deprived of the common-law right that he now seeks to enforce. A contract of employment for a fixed term is enforceable in accordance with its terms and an employer is liable for damages if it is breached on ordinary principles of the common law.'

[428] Section 194(1) and (2) places certain limits on the amounts of compensation. See para 11.8.

[429] In the old s 194 the nature of the unfair dismissal determined which formula had to be used to calculate compensation. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* 1999 *ILJ*89 (LAC) at 100 it was thus held that the compensation for a procedurally unfair dismissal in terms of the old s 194(1) was in the nature of a solatium and not damages. The method to quantify compensation was entirely arbitrary. In *HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* 2002 *ILJ* 278 (LAC) at 287 it was held that the fact that patrimonial loss was suffered was only

one of the factors which may be relevant in considering whether compensation should be awarded in terms of the old s 194(2) (substantively unfair dismissal). Compensation may be awarded even if no patrimonial loss is suffered (287). Consequently it may be concluded that compensation awarded in terms of the old s 194(2) is also in the nature of a solatium. See also Grogan *Dismissal* 528–37. The new s 194 collapsed this distinction and actual loss is always a factor to be taken into account. See eg *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) at 1009. The amendment of s 194 of the Labour Relations Act does not change the nature of compensation awarded in terms thereof. Grogan op cit 538 states: 'It seems, therefore that compensation for unfair dismissal remains sui generis—the equivalent neither of patrimonial damages nor damages for personal injury, but a combination of the two.' See further Cohen 2003 *ILJ* 744; Grogan op cit 537–41; para 9.5.3.

[430] See Wessels *Contract* II 913; *Stuttaford & Co v Barrow* 1873 Buch 94; McGregor *Damages* 956 et seq.

[431] See *Richards v Hayward* (1841) 2 M&G 574.

[432] *Vale Steel Co v Tew* [1935] 79 SJ 593 (CA).

[433] *Anglia Television v Reed* [1972] 1 QB 60 (CA).

[434] See, eg, *National Coal Board v Galley* [1958] 1 WLR 16 (CA): the defection of a supervisor at a mine did not cause any drop in production.

[435] See in general Lee & Honoré Obligations 147–51; Wessels *Contract* II 91; Bamford *Carriage*; Wille & Millin *Mercantile Law* 619–42; Van Jaarsveld *Handelsreg* 906 et seq; Slabbert 2 (1) *LAWSA* paras 144–212; Moss 2 (1) *LAWSA* paras 599–616; Gibson *Mercantile Law* 579–96; *Cotton Marketing Board of Zimbabwe v Zimbabwe National Railways* 1990 (1) SA 582 (ZS); *Anderson Shipping (Pty) Ltd v Polysius (Pty) Ltd* 1995 (3) SA 42 (A); *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV* 2008 (6) SA 606 (SCA).

[436] See, eg, the liability of public and non-public carriers, transport of passengers and their baggage by the railways, carriage of goods, sea and air carriage. See the references in n 435. See on the quantum of damages when *passengers* are conveyed, Wessels *Contract* II 917–18; *Leonard v Commissioner of Public Works* 1907 EDC 146; *Lawrence v Ross* 1906 SC 478; *Smith & Watermeyer v Union SS Co* 1867 Searle 311.

[437] See para 12.19.3; sv 'service' s 1.

[438] *De la Rey's Transport (Edms) Bpk v Lewis* 1978 (1) SA 797 (A).

[439] *Anderson Transport (Pty) Ltd v AM Transport CC* [2003] 2 All SA 353 (C) at 358; Conradie *Carriage* 141: 'This does not, however, mean that no matter how badly goods have been damaged the owner is obliged to accept them in their damaged condition, subject to his right to claim the cost of repairs, because there is authority for the proposition that where goods are so badly damaged in transit as not to be easily repaired, the owner may reject them and the carrier is liable for their full value. In such a case the carrier will, of course, be entitled to dispose of the damaged goods for his own account.' See also para 13.1*(a)*.

[440] For instance, where property goes missing or is destroyed or delivered to the wrong person (see Conradie *Carriage* 133). Cf further *Pilkington v Tomlinson* 1898 EDC 1. See Wessels *Contract* II 916: 'If goods are forwarded to a wrong destination, the carrier is liable for all expenditure involved in the transmission of the goods and for damages sustained by the consignees by being deprived of the goods pending their return'.

[441] Cf where a plaintiff may not claim because he or she has not given an address (*Levinsohn v Nel*1921 NPD 79, 81–2).

[442] See *SAR v Simonowitz* 1911 TPD 92.

[443] See para 12.7.2 on market value. In regard to goods without any market value in South Africa, the purchase price abroad as well as importation costs and profit are used as guidelines: see Wessels *Contract* II 915. Cf *SAR & H v Theron* 1917 TPD 67. T contracted with S to deliver potatoes to his shop in Johannesburg. The goods were wrongly delivered and sold on the open market. T claimed as damages the difference between the cost price plus transport cost and the price he could have obtained if he had disposed of it by retail. The court rejected this measure of damages (at 73): 'The general rule is that the value of the goods on the date and the place of delivery must be the measure of damages. If we apply that rule, it seems to me the best evidence we have before us is the value which the very goods fetched on the Johannesburg market that day. There is no other value to contradict that, and therefore we should take that.' Commission and expenses in connection with the sale were not deducted. The court pointed out that loss of profit was not recoverable since S could not have known that T intended the potatoes for resale. Furthermore, T had not led evidence that he had to repurchase potatoes on the market that day and had suffered a loss in consequence thereof. See De Wet & Van Wyk *Kontraktereg en*

Handelsreg 232 n 172 for criticism of this judgment. See further *Compagnie D'Elevage et D'Alimentation du Katanga v Rhodesia Railways* 1956 (1) SA 243 (SR) (decided on the basis of English law): the defendant wrongfully sold the plaintiff's meat at Ndola before it had reached its destination (Elizabethville). There was no market-price for it at its destination. The court used the following measure: the difference between the price which the meat obtained at Ndola (that which the plaintiff had received) and the cost price.

[444] Where the property declines in value, reasonable cost of repair may be relevant (para 12.17). Where there is a decrease in the market-price of the property, damages may be calculated as the difference between the market-price at timeous delivery and at late delivery. See Conradie *Carriage*134–5; para 12.12.

[445] For example, because of the loss of the opportunity to employ the property (see para 12.12 and Conradie *Carriage* 135–9); Wessels *Contract* II 916.

[446] See, eg, *SAR & H v Theron* 1917 TPD 67; Conradie *Carriage* 139–41.

[447] See Conradie *Carriage* 141 on, for example, an increase in import tax and reasonable expenses incurred in an attempt to recover lost goods. See also *Wiggil v Levy* 1885 HCG 265 on the cost of estimating damage. See further *Laxter v Daly* 1914 EDL 23; Wessels *Contract* II 915.

[448] See para 11.5.5 on limitation of liability.

[449] See on carriage by sea and air transport: Van Jaarsveld *Handelsreg* 919–20; Slabbert 2(1) *LAWSA* paras 148, 158, 184, 210; *Nagos Shipping Ltd v Owners, Cargo Lately Laden On Board MV Nages*1996 (2) SA 261 (D).

[450] See in general Reinecke et al 12 *LAWSA* (reissue) para 1 et seq; Davis *Insurance*; Lee & Honoré *Obligations* 181–7; Wille & Millin *Mercantile Law* 566–601; Van Jaarsveld *Handelsreg* 683–761; Kahn *Contract* II 645–765. The Consumer Potection Act 68 of 2008 is not applicable to contracts of insurance (sv 'service' s 1).

[451] See in general Möller 1976 *TSAR* 59 et seq; Fleming 1973 *CILSA* 259; Van Jaarsveld *Handelsreg*684; Van der Walt *Sommeskadeleer* 289 et seq.

[452] eg life assurance.

[453] Van Jaarsveld *Handelsreg* 722 n 3 attempts to make a distinction between damages for loss caused by breach of contract and indemnification through performance in terms of a contract of insurance. This distinction seems unnecessary.

[454] Cf Van Jaarsveld *Handelsreg* 686; Reinecke et al 12 *LAWSA* (reissue) para 9. The difference also lies in the interest insured (Reinecke et al op cit para 9). The interest has a patrimonial nature in indemnity insurance, but a non-patrimonial nature in non-patrimonial insurance. See, however, Reinecke 1971 *CILSA* 194 who argues that there is insurance against damage in life assurance, viz loss of someone's earning capacity. Reinecke et al op cit para 86 submit that non-indemnity insurance may provide for solatium and compensation of immaterial damage. See further Reinecke et al op cit para 41.

[455] See Van Jaarsveld *Handelsreg* 722; Reinecke et al 12 *LAWSA* (reissue) para 109.

[456] See Davis *Insurance* 247. See on calculation of the insured amount Atkins 1979 *BML* 219; 1980 *BML* 23, 37; 1982 *BML* 69, 116, 145; Van Niekerk 1981 *MB* 125. See also Reinecke et al 12 *LAWSA*(reissue) para 299.

[457] Van Jaarsveld *Handelsreg* 710–12; Reinecke et al 12 *LAWSA* (reissue) paras 56, 63, 72 et seq; Lee & Honoré *Obligations* 184–5; Atkins 1991 *BML* 81; Reinecke & Van der Merwe 1984 *SALJ* 608; Midgley 1985 *SALJ* 466; 1986 *SALJ* 18; Reinecke 1971 *CILSA* 193.

[458] See Reinecke et al 12 *LAWSA* (reissue) para 56.

[459] See on the definition of insurable interest Reinecke et al 12 *LAWSA* (reissue) para 57: 'The classic definition of insurable interest therefore makes it abundantly clear that persons other than owners may have an insurable interest in an object. However, to describe insurable interest solely with reference to a tangible object is too narrow an approach for modern conditions: there are forms of insurance known today which do not refer to any object [solvency insurance and certain forms of liability insurance]. The more advanced definitions of insurable interest therefore describe it as an interest in the non- occurrence of an event rather than an interest in a particular object of risk'. See for examples of insurable interests Reinecke et al 12 *LAWSA* (reissue) para 72 et seq; Davis *Insurance*100–10.

[460] Reinecke et al 12 *LAWSA* (reissue) paras 56–63.

[461] See chap 4 on assessment of damage; see Reinecke et al 12 *LAWSA* (reissue) paras 56, 61; Van Niekerk 1998 *THRHR* 343 et seq.

[462] See Reinecke et al 12 *LAWSA* (reissue) paras 36, 38, 57–60, 82 and Reinecke *Diktaat*. These cases are: *(a)* The insurance of property for its full value by a person who has only a limited interest in it (eg a carrier insures an article for its value although his or her interest is limited to the liability towards the

owner). The correct explanation of this is probably insurance for the benefit of a third party (Reinecke 1971 *CILSA* 215). *(b)* Insurance by spouses (cf *Littlejohn v Norwich Union Ins Society* 1905 TH 374, where a husband insured the full value of a shop belonging to his wife to whom he was married out of community of property and *Phillips v General Accident Ins Co (SA) Ltd* 1983 (4) SA 652 (W) where a husband insured his wife's jewels; see also *Price v IGI* 1980 (3) SA 683 (W); 1983 (1) SA 311 (A); Reinecke & Van der Merwe 1984 *SALJ* 608). According to the courts, insurable interests were present in these cases and apparently the true explanation is that of insurance for the benefit of the wife; *(c)* Insurance for new value (eg an existing article is insured for an amount necessary to replace it by a new one). Reinecke *Diktaat* submits that this measure of damage should also apply outside insurance law. This proposal is realistic, especially because of the fact that our law does not allow mora interest on damages for injury to property from the date of delict to the date of action (para 8.10) and the effect of inflation on the cost of repairs is not taken into account (para 11.7.1); *(d)* The case of *Steyn v Malmesbury Board of Executors* 1921 CPD 96, where the non-owner of a stack of chaff which was on a leased farm had insured it against fire. According to Reinecke *Diktaat*, the lessor's right against the lessee not to remove the stack of chaff (a right which was rendered valueless by the fire) may be seen as damage and one has only to place a value on it; *(e)* The case of *Steyn v AA Onderlinge Assuransie Assosiasie Bpk* 1985 (4) SA 7 (T), where it was held that someone who has a right to occupy a house free of charge has an insurable interest in it.

[463] Reinecke *Diktaat*. See, however, Van Niekerk 1996 *TSAR* 572.

[464] Reinecke et al 12 *LAWSA* (reissue) para 63 note: 'If on the other hand, insurable interest went beyond assets and liabilities known to the law of damages, the concept of an insurable interest would be of decisive importance in defining the object of insurance . . . . In this sense insurable interest would denote a type of asset or involvement which is peculiar to the law of insurance . . . . Consequently loss or damage would have a wider import in the law of insurance than in other sections of the law of damages. There appears to be a strong tendency in the latest judicial decisions to move in the direction of this . . . approach. Nevertheless it cannot yet be said with certainty that our law has made a final choice in this regard.'

[465] For instance, when a lorry is insured against damage, the insurance is concerned with the value of the lorry and any consequential loss such as loss of profit caused by injury to it, will have to be specifically included in the policy. See further Reinecke et al 12 *LAWSA* (1988) para 103: 'It is submitted that all expenses which result from the uncertain event complained of and which are reasonably necessary to restore the position quo ante are items of loss within a person's insurable interest . . . . Furthermore, although the liability of an insurer is often limited to a specific sum (that is, the sum insured) this is no reflection of the extent of the insured's insurable interest.' See also Reinecke et al 12 *LAWSA* (reissue) paras 277–9.

[466] 12 *LAWSA* (reissue) para 300.

[467] 1924 WLD 239. See further Kahn *Contract* II 757 for an extract from *Reynolds & Anderson v Phoenix Ass Co Ltd* [1978] 2 Lloyd's Rep 440, which also deals with the extent of an insurer's liability.

[468] The court (*Nafte* supra at 247) explained it thus: 'But, whichever basis is adopted, it is only as a basis for calculating the real value of the property, and the assured does not recover the market-value or the cost of reinstatement as such.' See also Reinecke et al 12 *LAWSA* (reissue) para 301; para 13.1*(a)* on damage to property.

[469] In assessing cost of replacement inequity must be avoided by allowing 'for the difference in value between the property destroyed and the new property of a similar description by which it is replaced' (*Nafte* supra at 248); see also Davis *Insurance* 250 on replacement of 'old' by 'new'; n 462above; Reinecke et al 12 *LAWSA* (reissue) paras 302, 304.

[470] *Palmer v President Insurance Co Ltd* 1967 (1) SA 673 (O).

[471] See Van Niekerk 1981 *MB* 125.

[472] See also Reinecke et al 12 *LAWSA* (1988) para 104: 'If the event insured against brings about a consequence which fits the description of damage, such damage or loss must in most cases be translated into monetary terms. In doing so the "real or actual value" of the asset immediately before the loss must be ascertained.'

[473] For example, property which is valued at R10 000 at the time damage occurs is insured for R5 000. The claim for damages will be restricted to R5 000 (see Van Jaarsveld *Handelsreg* 723; Van Niekerk 1981 *MB* 125, 128).

[474] This means that the insured is his or her own insurer in proportion to the extent of his or her under-insurance. In cases other than marine insurance, an average clause has to be agreed upon. Van Niekerk 1981 *MB* 125 gives the following formula in a case of average:

$$\text{the amount recoverable} = \frac{\text{insured amount} \times \text{damage}}{\text{actual value}}$$

$$\text{actual value}$$

If X insures his motor car for R50 000 and the car is worth R100 000 whereas the event insured against causes damage in the amount R50 000, X will recover only R25 000. See also Reinecke et al 12 *LAWSA* (reissue) para 298.

[475] Where something valued at R5 000 is insured for R7 000, the insured only obtains its actual value if it is destroyed (see Van Jaarsveld *Handelsreg* 724).

[476] For example, where X insures his property valued at R5 000 at two insurers for R5 000 in each instance. X may claim the full amount from any insurer but he will not be able to recover more than R5 000. There is also a right of recourse between insurers. See Van Jaarsveld *Handelsreg* 725.

[477] A contribution clause in a contract of insurance may result in every insurer being only liable for his or her pro rata share. See Davis *Insurance* 289–91.

[478] See para 10.4.1 in connection with collateral benefits. See also Van Jaarsveld *Handelsreg* 725–6. Although subrogation applies ex lege, it is usually regulated by an express contractual provision. See in general *United Plant Hire (Pty) Ltd v Hils* 1976 (1) SA 717 (A); *Manley van Niekerk (Pty) Ltd v Assegai Safaris & Film Productions (Pty) Ltd* 1977 (2) SA 416 (A); Van Niekerk 1977 *De Jure* 414. Reinecke et al 12 *LAWSA* (reissue) para 373 et seq; Davis *Insurance* 257–65; Moll 1977 *TSAR* 138.

[479] See on the interpretation of an insurance contract, eg, *Kali v Incorporated General Ins Ltd* 1976 (2) SA 179 (D) at 186. See also *Russell, Loveday v Collins Submarine Pipelines* 1975 (1) SA 110 (A) at 129 et seq; at 145: 'In effect, therefore, the parties by their agreement adopted the measure that the law usually applies in the computation of damages awardable in such cases.' See also *Schoeman t/a Billy's Garage v Marine and Trade Ins Co Ltd* 1976 (3) SA 824 (W). See also Reinecke et al 12 *LAWSA*(reissue) para 216 et seq.

[480] The parties may specify the value of the insured interest for the time of the insurance. In the case of a total loss the insured need only prove the fact of the loss and not his or her actual damage. See Davis *Insurance* 250–1, 286–7. See also Reinecke et al 12 *LAWSA* (reissue) para 13.

[481] The insured has to pay a contractually agreed amount of every successful claim (see *African Guarantee and Indemnity Co v Jacobs* 1965 (1) SA 758 (A) at 761). (See Reinecke et al 12 *LAWSA*(reissue) para 297 on a so-called 'excess clause' and on a 'franchise clause' in terms of which an insurer is liable only if the loss exceeds a certain amount or percentage.) Consecutive claims are possible during the period of insurance in so far as the insured amount is not exceeded (Van Jaarsveld *Handelsreg* 727).

[482] The insurer may have the contractual right to restore something instead of paying damages. The implication is that the property has to be restored to its pristine condition within a reasonable time (see Van Jaarsveld *Handelsreg* 727–8). If the insurer elects to reinstate, the liability is no longer limited to an insured's damage but to any amount which it may cost to restore the status quo ante (see *Smit v Rondalia Versekeringskorporasie van SA Bpk* 1964 (3) SA 338 (A)). An average clause does not apply here. Cf also *Otto v Santam Versekering Bpk* 1992 (3) SA 615 (O) from which it appears that an insured cannot claim damages in delict from a panelbeater who repaired a damaged vehicle on instruction of the insurer.

[483] For example, that an insurer becomes entitled to the remains where the insurer pays full damages on total loss (see Davis *Insurance* 252, 264).

[484] For example, property insurance, motor insurance, house-owner's insurance, fire insurance, marine insurance, personal liability insurance, insurance against future legal costs, consequential damage, loss of profit, and, in exceptional cases, personal accident insurance (see para 12.22.4 on non-indemnity insurance). See Van Jaarsveld *Handelsreg* 728–33; Reinecke et al 12 *LAWSA* (reissue) para 393 et seq). See the following definition of personal liability insurance by Davis *Insurance* 482: 'In liability insurance the insurer undertakes to indemnify the insured against liability to a third party arising in contract or delict or under some statute. A personal liability policy, for instance, insures against ''all sums which the insured shall become legally liable to pay as compensation in respect of death or bodily injury to any person, and damage to property''.'

[485] A maximum amount may be agreed upon (see, eg, *M Zahn Investments v General Accident Ins Co* 1981 (4) SA 143 (SE); *Fransba Vervoer v IGI* 1976 (4) SA 970 (W)); damages in the case of motor vehicle insurance may be excluded if the vehicle is not maintained in a roadworthy condition or if it is driven with the permission of the owner by a drunk or unlicensed driver (see, eg, *IGI v Boonzaaier*1974 (4) SA 200 (C); *Pretorius v Aetna Ins* 1960 (4) SA 74 (W); *Imprefed v American International Ins*1981 (2) SA 68 (W) and 1983 (3) SA 335 (A); *General Chemical Corp v Interskei* 1984 (3) SA 240 (D)). See on fire insurance *Oos Randse Bantoesake Administrasieraad v SANTAM* 1978 (1) SA 164 (W); *Joosub Investments*

(Pty) Ltd v Maritime & General Ins Co Ltd 1990 (3) SA 373 (C). See further on exclusions and limitations *Sentraboer Koöperatief Bpk v Boshoff* 1990 (4) SA 687 (T). See on marine insurance Van Jaarsveld *Handelsreg* 730–1.

[486] For example, for consequential loss and lost profit (see Van Jaarsveld *Handelsreg* 732).

[487] See also para 10.4.4 on collateral benefits.

[488] Para 12.22.2.

[489] See for a survey Reinecke et al 12 *LAWSA* (reissue) para 588 et seq.

[490] See Van Jaarsveld *Handelsreg* 736–41; Reinecke et al 12 *LAWSA* (reissue) paras 590, 594. A life insurance policy is 'a contract in which the insurer undertakes to pay a given sum of money upon the happening of a particular event contingent upon the duration or termination of human life' (See *Gould v Curtis* [1913] 3 KB 84 (CA) at 91).

[491] Cf also COID Act 130 of 1993; paras 10.4.2, 14.9.

[492] 'Personal accident' is difficult to define and policies usually refer to bodily injuries caused by external, accidental, visible and violent occurrences. See *Cloete v Shield Versekeringsmpy Bpk* 1978 (1) SA 357 (C); *Lourens v Colonial Mutual Life Ass Soc* 1986 (3) SA 373 (A) at 384. Cf further *Poole v Currie & Partners* 1966 (2) SA 693 (RA); *Griessel v SA Myn en Algemene Ass* 1952 (4) SA 473 (T); *Niemand v African Life Ass Soc* 1969 (3) SA 259 (C).

[493] See also Davis *Insurance* 473; *Yorkshire Ins Co v Garde* 1966 (2) SA 176 (RA).

[494] See Klopper *Third Party Compensation*.

[495] Chap 14.

[496] Marriage should include any solemnized relationship in terms of the Civil Union Act 17 of 2006. See also para 15.3.4 on satisfaction for the delictual element in a claim based on breach of promise.

[497] See, eg, Sinclair & Heaton *Marriage* 324–30; Heaton *Family Law* 11–13; Schäfer *Family Law* 14–16; Idenburg 1946 *THRHR* 141–81; Bekker 1974 *THRHR* 403–10; 1975 *THRHR* 54–65; *Mocke v Fourie*1893 CTR 313 at 315; *Radlof v Ralph* 1917 OPD 168 at 174; *McCalman v Thorne* 1934 NPD 86 at 90, 91; *Combrink v Koch* 1946 NPD 512 at 514; *Davel v Swanepoel* 1954 (1) SA 383 (A) at 387; *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 34–6; *Bull v Taylor* 1965 (4) SA 29 (A) at 36–8; *Bibi v Variawa* 1965 (4) SA 675 (N) at 679–81; *Pswarayi v Pswarayi* 1960 (4) SA 925 (SR); *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 336–7.

[498] See *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 40; Van der Vyver & Joubert *Personereg*481; *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 337; para 10.8.5 on repartnering prospects as a benefit in a claim by a dependant. Regard must be had inter alia to the type of marriage or partnership, its possible duration and the patrimonial and expected patrimonial positions of the parties. Repartnering prospects of the innocent party should, of course, be taken into account in reducing the amount of damages.

[499] Van der Vyver & Joubert *Personereg* 481 submit that these expenses have to be repeated in future in connection with a next betrothal and should therefore be recoverable. See also *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) at 36–7: 'In regard to contractual damages, both the prospective loss of the benefits of the marriage and the actual monetary loss or expenditure incurred or to be incurred can be awarded. The latter must either flow directly from the breach of promise or must be reasonably supposed to have been within the contemplation of the parties at the time the contract was entered into as a probable consequence of the breach. Therefore, expenditure reasonably incurred prior to the breach in contemplation of the promised marriage taking place and which is rendered useless by the breach can obviously be recovered. Expenditure or loss incurred or to be incurred after the breach can also be awarded if the above requisites are present, but only if such damage is not covered by an award of prospective loss. A duplication of damages in this respect must be safe-guarded against.'

In casu the plaintiff had given up her apartment in New York to marry the defendant in South Africa and had incurred certain expenses. She could not prove that her vehicle and furniture were sold for less than their value and, accordingly, received no damages in this regard. She was, however, awarded damages for the storage of her furniture until it was to be transported to South Africa. Compensation for a longer time would amount to duplication with damages awarded for loss of benefits from the proposed marriage. The same applied in regard to her loss of salary and the loss of her apartment in New York. For the same reason the court refused her the cost of a journey back to New York. For the loss of the benefits from a marriage (out of community of property) R2 000 was awarded and factors such as a possible divorce (with the defendant as the blameworthy party—which would, however, have meant a claim for support) and her chances of again concluding a marriage were taken into account on a speculative basis. This raises the problem of duplication. (See para 3.3.3 on wasted expenses; para 4.3on positive and negative interesse; para 8.6 on duplication of damages.)

[500] 2010 (4) SA 558 (SCA) at 561. An engagement should not have more serious consequences than a marriage itself: the irretrievable breakdown of a marriage is a cause for divorce and so should the unwillingness to marry lead to the irretrievable breakdown of an engagement. See also *Lloyd v Mitchell* [2004] 2 All SA 542 (C) at 547–8 (obiter); *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 330–1 (obiter).

[501] At 562. The parties' intended marital regime was uncertain. A claim for loss of support in divorce proceedings is in the court's discretion but it is a matter of commercial entitlement in a breach of contract. The court concluded: 'I do not believe that courts should involve themselves with speculation on such a grand scale by permitting claims for prospective loss.' This comment is open to critisism as the quantification of future loss always involves some form of speculation. See further Joubert 1990 *De Jure* 215; para 6.7.1.

[502] At 562–3. These include wasted expenses in preparation of the wedding and losses suffered by one of the parties reliquishing employment in anticipation of the wedding. These losses 'do not flow from the breach of promise per se, but from a number of express or tacit agreements reached between the parties during the course of their engagement' (at 561). The claim of the 'innocent' party is to be placed in the position in which he or she would have been had the relevant contract not been concluded but whatever the other party has paid or provided should be set off against the amount claimed. The court referred to *Probert v Baker* 1983 (3) SA 229 (D) as authority for its view. *Probert* has been severely criticized. See para 3.3.3 on wasted expenses and para 4.4.3 on negative interesse. See also Joubert 1990 *De Jure* 215, who argues that a claim for damages should be restricted to reasonable expenses and costs incurred by the innocent party.

[503] See in general Midgley *Lawyers' Liability*.

[504] See Neethling et al *Delict* 260; Loubser & Midgley *Delict* 268. The SCA explained in *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA) at 633 that it was not decided in *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) Pty Ltd* 1985 (1) SA 475 (A) that an action cannot be brought in delict if a contractual claim is competent, but only held that no claim is maintainable in delict where the negligence relied on consists in the breach of a term of contract. See paras 11.9.4–11.9.6 on the concurrence of delictual and contractual claims and para 13.10 on delictual liability for pure economic loss. See also Van der Walt & Midgley *Delict* 60 n 23: '[A]n attorney-client relationship not only creates proximity and reliance, but also serves to prevent indeterminate liability. These are all factors which serve to indicate that a delictual duty to render proper services rests upon a legal practitioner ... .' See further in general *De Villiers v De Villiers* 1887 SC 369; *Van der Spuy v Pillans* 1875 Buch 133; *Schutte v Bukes* 1904 ORC 68; *Bukes v Theron* 1905 ORC 77; *Steenkamp v Du Toit* 1910 TPD 171; *Van der Merwe v Rathbone* 1934 SWA 62; *Dhooma v Mehta* 1957 (1) SA 676 (D); *Ntuli v Hirsch and Adler* 1958 (2) SA 290 (W); *Bruce v Berman* 1963 (3) SA 21 (T); *Du Preez v Marais Pienaar en Vennote* 1979 (1) PH J8 (C); *Broderick Properties (Pty) Ltd v Rood* 1964 (2) SA 310 (T); *Mouton v Die Mynwerkersunie*1977 (1) SA 119 (A); *Honey and Blanckenberg v Law* 1966 (2) SA 43 (R); *SA Bantoetrust v Ross en Jacobz* 1977 (3) SA 184 (T); *Bouwer v Harding* 1997 (4) SA 1023 (SE); *Sandlundlu (Pty) Ltd v Shepstone and Wylie Inc* [2010] JOL 26565 (SCA).

[505] See, eg, para 13.10 on pure economic loss; para 13.4 on misrepresentation; para 13.1 on injury to property.

[506] See, eg, *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5 (CA) at 15: 'Damages should be, and are, the same, whether he is sued in contract or in tort.' Midgley *Lawyers' Liability* 163 adds: 'Indeed, it should make no difference to the measure of damages, where some service is performed negligently, whether the action is framed in delict or in contract. The measure of damages should depend on the type of loss that has occurred and the nature of the task performed.'

[507] See para 12.19.3; *s v* 'service' s 1.

[508] See also chap 4.

[509] Jackson & Powell *Professional Negligence* 254–5 as quoted by Midgley *Lawyers' Liability* 163.

[510] See Midgley *Lawyers' Liability* 168–72. Cf also *Washaya v Washaya* 1990 (4) SA 41 (Z) at 45: An attorney who consents to judgment without the necessary authority may be ordered to pay the costs in connection with such an order as well as the application to have it rescinded. In *Schoombee v Marais*[2010] 2 All SA 184 (SCA) the plaintiff failed to prove that she would not have settled the divorce matter if her attorney had made certain information available to her.

[511] See Midgley *Lawyers' Liability* 168; *Kitchen v Royal Air Force Ass* 1958 (1) WLR 563 (CA).

[512] See, eg, *Slomowitz v Kok* 1983 (1) SA 130 (A); *Gibbins v Williams, Muller Wright & Mostert Ingelyf* 1987 (2) SA 82 (T) at 85.

[513] See Midgley *Lawyers' Liability* 177.

[514] See Midgley *Lawyers' Liability* 170: 'Here the principle is to estimate, on a balance of probabilities, the result of the original action, had the defence been put, and to compare the two results. Any unfavourable difference in respect of the client will constitute loss.'

[515] See Midgley *Lawyers' Liability* 171 on this as well as on costs in the action against the attorney. See also *Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd* 1989 (1) SA 164 (D). In the case of an insufficient settlement, the loss is the difference between what the client should have received and what he or she actually received. Where the plaintiff was the defendant and the settlement was too high, his or her damage is the amount he or she had to pay more than this defendant would have had to pay upon a proper settlement. See Midgley op cit 172.

[516] See Midgley *Lawyers' Liability* 171; McGregor *Damages* 961. In the case of imprisonment a delictual claim for satisfaction similar to a claim for wrongful imprisonment may be relevant (para 15.3.9) if the requirements are met (see Neethling et al *Law of Personality* 123 et seq). Other claims (eg loss of earning capacity (para 14.6) may also be relevant.

[517] See Midgley *Lawyers' Liability* 172–7.

[518] The view (see eg Midgley *Lawyers' Liability* 172) that 'loss of bargain' is not recoverable is unacceptable. Where X buys property of which the value is 20 on the (incorrect) advice of his or her attorney for 20 while he would have been able to pay 15 had he received proper advice, he should be able to recover 5. See para 13.4 on misrepresentation. See further Midgley op cit 172–3 for cases from Anglo-American law on loss sustained in the selling of a client's property and loss in the acquisition of property.

[519] See para 3.2.4.2; *Pretorius v McCallum* 2002 (2) SA 423 (C); *Pinshaw v Nexus Securities (Pty) Ltd* 2002 (2) SA 510 (C); *Ries v Boland Bank PKS Ltd* 2000 (4) SA 955 (C); *Boe Bank v Ries* 2002 (2) SA 39 (SCA).

[520] See *Sandlundlu (Pty) Ltd v Shepstone and Wylie Inc* [2010] JOL 26565 (SCA) at 10–11. The court only allowed recovery of the lost rental for the period until the lessee had become unable to pay the rental and not the full period until the lessee was evicted.

[521] See *Bouwer v Harding* 1997 (4) SA 1023 (SE). The client would not have sold the property had he known of the consequences.

[522] See *McClain v Mohamed and Associates* [2003] 3 All SA 707 (C). The plaintiff was hurt in a car accident. Her attorney failed to investigate the question whether comprehensive insurance and particularly passenger liability insurance was available to the driver. Such insurance did exist. She only succeeded in claiming the amount of R25 000 from the RAF (her claim as passenger was limited by the repealed s 18(1) of the RAF Act 56 of 1996). She was awarded her damages less the amount of R25 000.

PART III
QUANTUM OF DAMAGES AND SATISFACTION IN CERTAIN FORMS OF DELICT

Chapter 13:
Quantum of damages for patrimonial loss caused by certain forms of delict

Chapter 14:
Quantum of damages for patrimonial loss caused by bodily injury, death or infringement of personality rights

Chapter 15:
Quantum of damages and satisfaction for non- patrimonial loss (injury to personality)

Chapter 13
QUANTUM OF DAMAGES FOR PATRIMONIAL LOSS CAUSED BY CERTAIN FORMS OF DELICT

This chapter deals with the calculation of damages for patrimonial loss resulting from delicts other than the causing of bodily injury or death or an infringement of personality rights (which is discussed in chapter 14).

The following matters are discussed here: damage (injury) to property, theft, destruction or alienation of property, the loss of use of an object, intentional and negligent misrepresentation, the infringement of certain immaterial property rights, damages in terms of certain actions, pure economic loss, interference with contractual relations, manufacturer's liability and certain statutory actions.

13.1 DAMAGE TO PROPERTY [1]

The general measure of damage caused by injury to property [2] is usually the diminution in its market value. [3] In some cases damages may also be claimed for the fact that the property could not have been employed to make a profit. [4]

The criterion of market value [5] is employed to estimate loss and this is measured

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by a comparison of market value before and after the damage-causing event. [6] The plaintiff should prove both these values [7] in order to establish the quantum of his or her loss. [8] This method is not often used in practice, since it is simpler and more realistic to rely upon the reasonable cost of necessary repairs as a measure of damages. [9]

There are, however, three instances where the cost of repairs cannot serve as a measure of damage and damages: [10]

(a)

Where the cost of repairs exceeds the pre-accident (market-)value of the property. [11] Here the cost of repairs is more than what the plaintiff could reasonably obtain (ie, repairs are not an economic option) and the basic method of comparison of values should be used. [12]

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(b)

Where the cost of repairs exceeds the diminution in value of the property. [13]Here, too, the cost of repairs is more than what the plaintiff is entitled to.

(c)

Where the repairs, though restoring the property to its pre-accident condition, do not also restore its pre-accident market value. [14] In this situation the cost of repairs is too low to serve as a yardstick for full compensation. [15]

In *Erasmus v Davis* [16] the majority of the court held that evidence of the reasonable cost of repairs constitutes prima facie proof of the diminution in value of property [17]and that it is for the defendant to cast doubt on the validity of this measure of loss. [18] There is, however, no onus of proof on the defendant but only 'a burden of restoring (whether by cross-examination or adducing evidence) the equilibrium of uncertainty that prevailed

before the plaintiff's evidence of the cost of repairs had been led—in short a ''weerleggingslas'' '. [19] If the defendant fails to cast such doubt

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on the criterion used by the plaintiff, the latter's prima facie proof of the quantum of his or her damages [20] will be accepted as final. [21]

Since the cost of repairs is evidence only of damage in the form of a diminution in value, such repairs need not actually have been effected and it is also irrelevant that a plaintiff does not even intend to have such repairs done. [22] The cost of repairs is thus an abstract measure of damage. It is also irrelevant that the repairs were done gratuitously or paid for by an insurer or hire-purchaser of a vehicle, since the rule on collateral benefits [23] applies to such cases.

Damages may also be awarded for further damage such as the loss of use of property (including loss of profit) [24] as a result of damage to it, [25] but not in respect of non-patrimonial loss. [26]

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A practical problem is that the reasonable cost of repairs *at the time of the delict*(for example, a motor vehicle accident) [27] is regarded as decisive. Thus a plaintiff may not claim compensation in respect of an increase in such cost between the date of delict and the date of judgment. This may have the result that a plaintiff who has to wait for the completion of his or her action may find that the money received at that stage is insufficient to have the necessary repairs carried out. [28]

If an article which has been sold is damaged, [29] a purchaser may suffer damage in different ways. [30]

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13.2 DESTRUCTION, THEFT OR ALIENATION OF PROPERTY [31]

If property is destroyed or stolen, a plaintiff's damage and damages are assessed as the market value [32] of the property at the time [33] and place [34] of the loss. [35] The correct measure of damages is thus not the replacement value of the property [36] at the time of trial. [37] In addition to damages for the value of the property,

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compensation may also be awarded for further damage. [38] A difficult question is at what point in time there will be total loss of stolen property. [39]

13.3 LOSS OF USE [40]

A loss of the possibility to use property and, for example, earn income, may be the result of different types of damage-causing events. [41] Furthermore, loss of use may cause damage in the form of a loss of profit or income because an article could not be employed, or damage in the form of the reasonable cost to acquire a substitute. Damages for the loss of use of property are usually awarded in conjunction with a claim for reasonable cost of repairs. [42] In this regard, a plaintiff's duty to mitigate

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must be taken into account and thus the reasonable cost of hiring a substitute (for example, a vehicle) may be recoverable. [43] In *Kellerman v SA Transport Services* [44]the Cape Court recognized the right of the appellant to hire another vehicle while the

damaged vehicle is being repaired, even though the damaged vehicle was not primarily used for business purposes, but by the appellant's wife for domestic purposes. [45]

In *Modderfontein Squatters* [46] the owner of a farm on which an informal settlement of some 40 000 residents had been established, was unable to have an eviction order against the squatters enforced. The Supreme Court of Appeal held that in the circumstances the only appropriate relief was that of constitutional damages [47]due to the breach of a constitutionally entrenched (property) right [48] and noted that an 'enquiry into damages' [49] would be appropriate to determine the amount of damages. [50]

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Lee and Honoré [51] also submit that a claim for the loss of use of something should not be confined to an article (for example, a vehicle) used for business purposes. They argue that a plaintiff who proves patrimonial loss is entitled to the reasonable cost of providing him- or herself with a substitute vehicle. [52]

Van der Walt offers a systematic discussion of this subject, but there is also criticism of his views. [53]

Bodily injuries may also result in a person being unable to use his or her property, but it is not clear whether damages will be recoverable. [54]

Pillay [55] suggests that a claim for loss of use could be apportioned if contributory negligence is proven. There seems to be no reason why this should not be done.

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13.4 FRAUDULENT AND NEGLIGENT MISREPRESENTATION [56]

13.4.1 Introduction and basic rules in assessing damages

If fraud or negligent misrepresentation causes loss, damages are to be computed in terms of the basic criterion of placing the plaintiff in the position he or she would have occupied had the misrepresentation not been made. [57] Misrepresentation may cause damage in different ways and its assessment as well as the computation of damages will depend upon the facts of the case as well as the principles regarding, for example, remoteness of damage and contributory negligence. [58] Examples in the field of negligent misrepresentation indicate cases of damage to property, [59] wasted expenses, [60] the loss of an opportunity to purchase foreign exchange at a lower rate of exchange, [61] the erroneous payment of money, [62] necessary expenses in regard to property, [63] losses in connection with a debtor who is unable to pay, [64]

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confinement and maintenance costs, [65] the loss suffered by a 'disappointed beneficiary', [66] loss resulting from purchasing shares in a bank whose financial position had been misrepresented [67] and loss suffered in an overseas investment. [68] If misrepresentation causes damage to property [69] or bodily injury, [70] the general principles of assessment in such cases are applicable. In other instances [71] it depends on how the general measure is applied to the particular circumstances. [72]

Where intentional misrepresentation induces a contract, there is a difference of opinion on how damage and damages are to be assessed. [73] This is influenced by incorrect perceptions on positive and negative interesse as measures of damages. [74]

The basic principles are the following: [75] The misrepresentee is entitled to cancel or uphold the contract. If the contract is rescinded, he or she must through an award of

damages be placed in the position he or she was in before the conclusion of the contract. [76] Where the contract is upheld, a distinction is to be made between a case where there would have been no contract without the misrepresentation (dolus dans) and where there would still have been a contract but on different terms (dolus incidens). [77] In the former case damages are calculated by determining

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the position in which the misrepresentee would have been without a contract and in the latter instance by assessing his or her position if a hypothetical contract had in fact been concluded. [78]

We submit that these principles are, mutatis mutandis, applicable to the situation where a negligent misrepresentation has induced a contract. [79]

There are views which do not take account of the difference between dolus dans and dolus incidens or which suggest that confusion exists between the measures for contractual and delictual damages. [80]

13.4.2 Case law [81]

In this paragraph a number of leading cases on the assessment of damages in the situation under discussion will be considered.

In *Trotman v Edwick* [82] the seller of land with two flats on it misrepresented to a purchaser thereof that a strip of land belonging to the municipality was part of the

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property sold. This was a case of dolus dans. [83] The measure of damages adopted by the court was the difference between the purchase price and the actual value of the property sold. [84]

The next case is *Bill Harvey Investment Trust v Oranjegezicht Citrus Estates*. [85]The court saw this as a case of dolus incidens (which did not affect the whole transaction) and stated that damages were to be assessed by asking how much more the plaintiff was prepared to pay than would otherwise have been the case. The court awarded R3 000 as the value of the missing trees and added that a plaintiff cannot recover damages because he or she has entered into a bad bargain but only for such loss as was caused by the intentional misrepresentation. [86]

In *Scheepers v Handley* [87] the measure of damages apparently accepted by the court was the amount '[he] has been induced to pay [more] by reason of his having relied upon the truth of the misrepresentation'. However, the plaintiff had exaggerated his loss on account of the fraud, since his offer of R32 per morgen for the farm was greatly influenced by improvements on it and not so much by the misrepresentation as to its size. The plaintiff had also actually received these improvements. The court accordingly awarded damages of R4 620 as the value of the shortfall calculated at R20 per morgen. [88]

This question was again considered by the Appellate Division in *De Jager v Grunder*. [89] The majority of the court held that damage caused by fraud does not merely relate to a comparison of the value of the performance and the

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counter-performance. Such a comparison is correct only in the case of dolus dans where there would have been no contract in the absence of the misrepresentation. The possibility that damage caused by fraud may overlap with an amount of damages which may be recoverable upon breach of contract cannot be excluded. [90] The court held that in a contract with different performances where fraud affects only one performance, it

would be intolerable that a defrauder may 'compensate' for the loss caused in respect of such performance through another performance which is advantageous to the plaintiff. The court pointed out that it was not the fraud which caused a favourable price to be negotiated for G's land and that it would be unfair to deprive him of such benefit. The court accordingly rejected the appeal against the award by the court a quo of R15 000 as well as the argument that G had not proved that the value he had received was less than the value he had given to D. [91]

In *Ranger v Wykerd* [92] X bought a house with a swimming pool from Y for R22 000. However, Y's husband Z had fraudulently represented to X that the swimming pool was in good condition whereas it leaked and was in need of repair. Y also kept silent on the condition of the swimming pool with the intention of defrauding X. X had the swimming pool repaired at a cost of R1 250, which he claimed from Y and Z. He based his claim on the fact that, had he known of the defect, he would not have paid more than R20 750 for the property. In the alternative, X argued that R1 250 also represented the difference between the market value and the purchase price. The Appellate Division accepted the reasonable cost of repairs to be R1 000 and

awarded this amount to X. The majority of the court also pointed to the (alleged) difference between delictual and contractual damages. [93]

In casu the court approached the problem on the basis that if Y and Z had intentionally or negligently physically damaged the swimming pool after X had taken transfer of the property, they would have been liable for the reasonable cost of repairs as an indication of the diminution in value of the property. [94] Does it make any difference that the delict in casu is fraud and not wilful injury to property? The court held the correct answer to be in the negative and also referred to the 'swings and roundabouts principle', which means that one must consider the advantages and disadvantages which a particular transaction has for the plaintiff. In casu the fraud affected only the swimming pool and not the transaction as a whole, implying that the 'swings and roundabouts principle' is irrelevant. However, the court assumed in favour of Y and Z that the fraud affected the transaction as a whole (dolus dans) and that a comparison of the values of the performance and the counter-performance had to be undertaken. The court then made the crucial assumption that the market value of the property in its represented condition (ie without a leaking swimming pool) was R22 000. This assumption could only be disturbed by evidence, which was, however, not produced. The actual value of property with a leaking swimming pool was accordingly less than R22 000 and, thus seen, the reasonable cost of repairs of R1 000 represented this difference. [95]

The decision in *Colt Motors (Edms) Bpk v Kenny* [96] makes a useful contribution to solving the problem under discussion. The defendant had purchased a new motor car from the plaintiff. As part of the price the defendant had traded in a motor car which he had represented to be a 1980 model whereas in fact it was a 1979 model. The plaintiff argued that he had agreed to a trade-in value that was R1 550 more than he would have agreed to had he not been misled and claimed this amount as damages. The plaintiff did not prove the market value of the vehicle which was traded in (but such value had, of course, to be higher than the trade-in value).

The court accepted that the misrepresentation affected only one aspect of the contract and not its other terms or the contract as a whole. The court was of the opinion that the

majority of cases of fraud inducing a contract could be placed in one of the following categories:

(a)

Damage may be measured by a comparison of the market value of the plaintiff's patrimony before and after the commission of the unlawful conduct. This is the correct method of calculation in a case of dolus dans where one may directly compare the values of performance and counter-performance.

(b)

Damage is seen as the reasonable cost of repairs. This approach is an extension of category *(a)* and is adopted where it is impractical to compare two patrimonial positions. *Ranger v Wykerd*, referred to above, serves as an example of this.

(c)

An increase in price caused by misrepresentation is seen as damage. A plaintiff proves his or her damage without reference to market value by demonstrating how much more he was induced to pay for the counter-performance. This method is appropriate in a case involving dolus incidens such as *De Jager v Grunder*. [97]

The court then proceeded to formulate a practical approach to the assessment of damages (even if it does not cover all possibilities). The court's guidelines may be summarized as follows: [98]

(a)

In his particulars of claim a plaintiff has to allege only what he or she would have been prepared to pay, what he or she actually performed as a result of the misrepresentation (or undertook to perform) and that he or she has suffered damage in the amount of the difference between the actual and putative performances. (Thus a plaintiff is not obliged to prove the market value of the other party's performance.)

(b)

If these allegations are supported by the evidence, the defendant bears an onus of rebuttal ('weerleggingslas') to show that he or she would not have accepted such putative performance. The defendant may initially discharge this onus by merely showing that the market value of the performance which the plaintiff would have been prepared to render is less than that of the counter- performance which the defendant has delivered (or undertaken to deliver).

(c)

If the defendant takes the steps outlined in *(b)* above, a plaintiff will be held to have discharged the onus of proof only if he or she can show that the defendant would in fact have accepted the putative performance.

(d)

On the other hand, if it appears that the putative performance has the same (or a higher) market value than that of the defendant's counter-performance, the defendant will be held to have discharged the onus of rebuttal only if the defendant can convince the court that he or she would not have accepted the putative performance.

In casu the court held that, although the trade-in value which the plaintiff would have allowed in respect of the defendant's motor vehicle in the absence of fraud would have been lower than its market value, he had in fact proved that the

defendant would have accepted it. This meant that the plaintiff had proved the causal nexus between the misrepresentation and the damage as well as the extent of his damage.

In *Hunt v Van der Westhuizen* [99] the plaintiff purchased a house and a swimming pool from the defendant for R140 000. The defendant had fraudulently represented to the plaintiff that the pool was of a particular quality. The plaintiff claimed R11 500 as being the market price of ensuring the swimming pool conforms to such standard. The court referred to the distinction between dolus dans and dolus incidens and its effect on the calculation of damages as well as the criticism against this distinction. According to the court, it is difficult to classify fraud properly and, furthermore, it is unacceptable that a plaintiff who relies on dolus incidens should be in a more favourable position than one who alleges dolus dans. Dolus dans is in fact more serious, since there would have been no contract in the absence of the misrepresentation; furthermore, one could ask why, in such a case, the values of performance and counter-performance should be compared, whereas in dolus incidens (where there would have been a contract even without the misrepresentation) one uses the difference between actual and hypothetical prices. The court added that honesty in commercial relations is more likely to be achieved by a policy of compelling fraudulent wrongdoers to compensate their victims on a broad basis. According to the court, there is much to be said for the view that any benefit which has accrued to the plaintiff should be regarded as res inter alios acta vis-à-vis the wrongdoer and should therefore not figure in the assessment of damages.

In casu the court held that it would be irrelevant to compare the real market value of the property with the purchase price. To the extent that the value of the property was diminished by the substandard swimming pool, damages must be measured as the reasonable cost of improving the swimming pool (viz R11 500). The court nevertheless assumed in favour of the defendant that it was a case of dolus dans which affected the transaction as a whole. However, even on this approach the plaintiff was held to be entitled to damages of R11 500, since the purchase price (of R140 000) was prima facie the market value of the property 'in its represented condition'. This meant that the plaintiff had paid too much for the property, since it would cost R11 500 to restore the performance to its required condition.

In *Mayes v Noordhof* [100] the defendant fraudulently concealed the existence of an informal settlement on the property adjacent to the res vendita. Even though the plaintiff would not have concluded a contract in the absence of the misrepresentation, the court calculated damages on the basis of the difference between the market value of the property with the informal settlement next to it and its value without such a settlement.

13.4.3 Critical evaluation of and comment on case law [101]

First, there are those who deny the relevance of the distinction between dolus dans and dolus incidens and submit that a plaintiff should always through damages be placed in the position he or she would have occupied if the plaintiff had not entered into a contract. [102] This approach is not realistic and the Appellate Division has correctly declined to accept it.

Secondly, there is an opinion that delictual damages are based on loss which has actually been sustained and loss of profit is thus excluded. This implies that, where a person shows a profit he or she suffers no loss in the case of dolus incidens, since the deprivation of the opportunity to make a larger profit is irrelevant. [103] This approach is

untenable, [104] since the reason why a loss of profit is allegedly irrecoverable is based on incorrect views of positive and negative interesse as measures of damages. [105]

Related to the second point is the argument that the measure of damages used in practice erroneously employs a person's interest in receiving contractual performance as a measure of damages. [106] Van Aswegen [107] offers the following explanation: if the truth of the misrepresentation were guaranteed and a breach of

warranty occurred, the plaintiff would, according to positive interesse, have to be placed in the position he or she would have occupied had the representation been true. However, the fact that an award of damages in terms of delictual negative interesse may sometimes have the same result does not justify the conclusion that an incorrect measure of damages has been used. [108]

One may also argue that the collateral source rule [109] does not apply in cases of dolus dans but is applicable where there is dolus incidens. Considerations of equity may require that the collateral source rule also be applied in the former situation. [110]

In practice, the debate [111] has moved beyond the objections which Van der Merwe and Olivier [112] voice against *De Jager v Grunder* [113] and is currently concerned with how misrepresentees may be awarded even more compensation. Criticism has also been expressed against the distinction between dolus dans and dolus incidens and there is an argument in favour of extending the measure of damages in dolus incidens to the case of dolus dans. [114]

There are numerous further views on the decisions discussed above [115] which are often partially based on the alleged difference [116] between contractual positive interesse and delictual negative interesse. [117]

13.5 DURESS (METUS) [118]

A contract concluded as a result of duress may be cancelled or upheld by the victim. [119] It would appear that damage is required before the contract may be cancelled, [120] but this requirement is sometimes watered down. [121] In a claim for damages [122] damage must, of course, be proved by comparing a plaintiff's present patrimony with his or patrimonial position had the duress not occurred. [123]

If it is not a case of duress inducing a contract, damage and damages will be assessed through the application of the general measure of damage to the specific facts.

13.6 UNLAWFUL COMPETITION [124]

Damages may be recovered for loss caused by the different forms of unlawful competition. [125] However, the usual principles in assessing patrimonial loss and damages in respect thereof [126] are modified in this instance. Although it is seldom

difficult to show that (some) damage has been suffered, [127] its extent can normally not be proved with precision. [128] Consequently, Neethling [129] submits that it should not be expected of a plaintiff to adduce proof of special damage. [130] In the interests of the equitable administration of justice, mathematically precise proof of loss should not be overemphasized. The court should, on the probabilities revealed by the evidence, make an assessment of the loss and estimate an amount of damages ex bono et aequo in

respect thereof. [131] Thus, in some cases, damages were awarded without any proof of special damage, [132] but in other instances only nominal damages [133] were awarded. [134]

Some authors are of the opinion that there is some slight possibility [135] that a court may order an 'enquiry as to damages' [136] or direct the defendant to render an

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'account of profits'. [137] In s 34(4) of the Trade Marks Act 194 of 1993 specific provision is made for an inquiry for the purposes of determining the amount of any damages or reasonable royalty. [138] In terms of this section the court may prescribe such procedures for conducting an inquiry as it deems fit. [139]

13.7 INFRINGEMENT OF COPYRIGHT ETC [140]

Section 24(1) of the Copyright Act 98 of 1978 stipulates that, in the case of the infringement of copyright, the owner of such right may inter alia claim relief by way of damages and interdict, as is available in any corresponding proceedings in respect of infringements of other proprietary rights. There is a view that it is not necessary for a plaintiff to prove special damage. [141] It is doubtful whether this still reflects the correct position. [142] The quantum of damages where music is played

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without consent may be determined with reference to a licence fee which would normally be payable. [143]

Section 24(1A) [144] permits a plaintiff to calculate damages on the basis of the amount of a reasonable royalty which would have been payable. [145] These provisions allow no room for a so-called 'account of profits'. [146]

Reference must also be made to s 24(3). This gives the court a discretion to award 'additional' damages. [147]

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The Performers' Protection Act 11 of 1967 [148] provides for the payment of damages under certain circumstances. [149]

The Heraldry Act 18 of 1962 also contains provisions dealing with damages. [150]

13.8 INFRINGEMENT OF PATENT, DESIGN OR PLANT BREEDERS' RIGHTS [151]

The infringement of a patent constitutes a delict and the usual principles of delictual damages (compensation for actually sustained or prospective patrimonial loss) [152]apply in such a case. [153] The general measure of damages is the amount of money required to place the plaintiff in the position he or she would have occupied but for the infringement. [154] Actual patrimonial loss must be proved [155] and the profit made by the defendant is taken into account. [156] Damages are also intended as

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a substitute for the loss of income suffered by a patentee as a result of the infringement. [157]

Section 65(6) of the Patents Act 57 of 1978 [158] stipulates that damages may be calculated on the basis of a reasonable royalty which would otherwise have been payable by a licensee or sub-licensee to the patentee. Indirect damage such as the loss of goodwill of a business may be taken into account. [159]

There are many other principles on damages in regard to patents. [160]

The Designs Act 195 of 1993 [161] permits the recovery of damages under certain circumstances. [162]

The holder of a plant breeder's right may claim damages not exceeding R10 000 if his or her right has been infringed or the breeder may claim damages for loss actually sustained. [163]

13.9 DAMAGES IN TERMS OF CERTAIN OTHER ACTIONS

13.9.1 Actio de pauperie [164]

It is unnecessary to conduct a separate discussion of the calculation of damages in terms of the actio de pauperie since damages for patrimonial and non-patrimonial loss are assessed in accordance with (Aquilian) principles discussed elsewhere. [165]

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13.9.2 Actio de pastu [166]

Damages are assessed here for damage caused by an animal in the eating of plants. Not only are damages assessed in respect of plants which are grazed but also loss caused by trampling and breaking of branches and even the consumption of harvested crops. [167] The measure of damage is the replacement value of the plants [168] or the value of the prospective harvest which has been lost. [169]

13.9.3 Actio de effusis vel deiectis and actio positi vel suspensi [170]

Damages for patrimonial and non-patrimonial loss in terms of these actions [171] are calculated in accordance with general (Aquilian) principles and need not be discussed here.

13.9.4 Actio aquae pluviae arcendae and interdictum quod vi aut clam [172]

These remedies apply to damage caused by the violation of the prohibition against the interference by a landowner with the natural flow of water over his or her property. [173] With the actio (which also functions as an interdict) damages may be

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recovered for all damage caused after litis contestatio has taken place. [174] Damage caused before litis contestatio may be recovered with the interdictum. [175]

13.9.5 Nuisance [176]

The basic remedy for nuisance—the unreasonable use of property by one neighbour to the detriment of another—is an interdict which is aimed at the abatement of unlawful conduct. [177] Where nuisance causes damage to property or bodily injuries, [178] the relevant general principles discussed in that regard find application in assessing the quantum of damages. [179] Damages may not be claimed in the

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absence of actual patrimonial loss. [180] Where nuisance causes a loss of profit, [181]damages should be recoverable in respect thereof. The same applies in regard to other forms of consequential loss. [182] Where nuisance is accompanied by the animus iniuriandi, the actio iniuriarum should be available for the recovery of satisfaction. [183]

13.9.6 Trespass and disturbance of possession [184]

Damages for an act of trespass [185] may be recovered [186] if actual patrimonial loss has been caused. [187]

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13.9.7 Removal of lateral support [188]

If the lateral support of land has been removed, [189] the basic measure of damages is the reasonable cost to provide support to the property in question; to repair the damage caused by withdrawal of lateral support. [190] In addition to or instead of damages for repair work, the plaintiff can recover the depreciation in value of his or her property. [191] In the case of damage to property [192] and the loss of use of property [193] the general principles discussed earlier ought to apply. [194]

13.9.8 Infringement upon servitudes [195]

Damages are assessed according to general principles, viz the amount of money required to place the aggrieved person in the position he or she would have occupied but for the damage-causing event. [196]

13.10 PURE ECONOMIC LOSS [197]

As stated above, [198] this form of damage is patrimonial loss which does not result from any damage to the plaintiff's property or the infringement of his or her personality. The assessment of the quantum of damages in certain forms of pure

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economic loss is discussed elsewhere. [199] In other cases damage may occur in a variety of factual situations. It frequently takes the form of a loss of profit, increased expenses or the loss of a particular benefit. [200]

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The only general criterion is the basic measure of damage, viz that the plaintiff is to be placed in the position he or she would have occupied but for the damage-causing event. [201] The principles in regard to the limitation of liability (remoteness of damage) [202] are of particular significance in this regard, since our courts want to prevent a 'multiplicity of actions'. [203]

13.11 INTERFERENCE WITH CONTRACTUAL RELATIONSHIP [204]

Some cases falling under this heading are discussed elsewhere. [205] There are not many cases from which principles on quantification may be drawn. [206] In this case, too, one has to employ the general criterion of placing a plaintiff in the position he or she would have occupied but for the defendant's conduct. In practice this may usually imply an estimation of the loss of profit which the plaintiff could have

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obtained from the breached contract, a loss of profit from a subsequent contract, expenditure that he or she had to incur, [207] as well as the higher cost of concluding a new contract.

13.12 MANUFACTURER'S LIABILITY [208]

The question as to how the quantum of damages must be assessed for patrimonial loss [209] caused by a defective product is discussed under other headings. [210]

The Consumer Protection Act 68 of 2008 [211] has introduced strict (no-fault) liability for damage caused by supplying unsafe goods. [212] Compensable harm includes death, injury or illness of a natural person, damage to property, and economic loss resulting from the aforementioned instances of harm. [213] Where more than one person is liable in terms of the Act, their liability is joint and several. [214] A court [215] has the the authority to assess whether any harm has been proved and adequately mitigated; [216] to determine the extent and monetary value of the damages, [217] including economic loss; and to apportion liability among persons who are jointly and severally liable. [218]

13.13 CLAIMS IN TERMS OF CERTAIN STATUTES [219]

Before 2002 the railway service was strictly liable in terms of Item 2(1) of Schedule 1 of the Legal Succession to the South African Transport Services Act 9 of 1989 for fire damage caused by a burning object coming from a locomotive or train. This provision was repealed by s 60 of the National Railway Safety Regulator Act 16 of 2002, with the result that ordinary delictual principles are applicable again. [220]

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The normal principles of quantification apply to liability in terms of s 25 of the Electricity Regulation Act 4 of 2006. [221]

Damages are payable according to s 8(2) of the Civil Aviation Act 13 of 2009 in respect of all 'material damage' caused by the use of an aircraft. [222] Liability is strict. [223] The usual measures for damages apply in this instance. [224]

In terms of s 30 of the National Nuclear Regulator Act 47 of 1999 the holder of a nuclear installation license is strictly liable for all 'nuclear damage' [225] caused by or

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resulting from the installation during his or her period of responsibility. Damages should be assessed in terms of general principles of quantification. [226]

Section 5(4) of the Admiralty Jurisdiction Regulation Act 105 of 1983 creates liability for loss or damage caused by the making of an excessive claim or the demand of excessive security or the attachment of property or by obtaining a court order without reasonable and probable cause. [227]

There are many other statutes in terms of which a liability to pay damages is created and where, unless the Act stipulates otherwise, the general measure of damages [228] should be applied. [229]

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[1] See Boberg *Delict* 622–37; Lee & Honoré *Obligations* 249–52; Erasmus & Gauntlett 7 *LAWSA* paras 63–4; Loubser & Midgley (eds) *Delict* 396. See para 11.1.4 on who may claim in regard to damaged property which has been leased, sold etc. See also para 13.9.7 on the removal of lateral support of land. See Van der Merwe *Sakereg* 382 on actions by co-owners of property against each other.

[2] There must be actual damage to property. See *Monumental Art Co v Kenston Pharmacy (Pty) Ltd*1976 (2) SA 111 (C) at 117: a mere reasonable apprehension of damage is not sufficient. See also *Freeman v Corporation of Maritzburg* 1882 NLR 117 at 121–3.

[3] See, eg, Boberg *Delict* 622: 'The primary loss suffered by an owner whose property has been damaged is the diminution in value of the thing.' See also *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118: 'Damages claimed in delictual actions for injury to a thing are to be assessed on the

principle that the plaintiff must by monetary compensation be placed in as good a position financially as he would have been had the damage not been inflicted. The damage to be compensated is the patrimonial loss of the injured plaintiff. Whether there has been such a loss and what the amount of that loss is, are questions of fact to be decided on the evidence. The measure of the loss and the evidence proving the loss may vary according to the circumstances of each case. A formalistic approach is to be avoided.' Cf also *Witwatersrand Gold Mining Co Ltd v Cowan* 1910 TPD 312 at 314; *Scrooby v Engelbrecht* 1940 TPD 100 at 102; *Janeke v Ras* 1965 (4) SA 583 (T) at 586; *Erasmus v Davis* 1969 (2) SA 1 (A) at 9, 17; *Reid v LS Hepker & Son (Pvt) Ltd* 1971 (2) SA 138 (RA) at 141; *Albertus v Jacobs* 1975 (3) SA 836 (W) at 837. See also Reinecke et al 12 *LAWSA* (reissue) para 301; Lamprecht 1995 *The Magistrate* 111 et seq.

[4] Para 13.3.

[5] Although the purchase price or cost-price of property is usually not a reliable indication of its market value, there may be instances where this is the case (*West Rand Steam Laundry v Waks* 1954 (2) SA 394 (T) at 396; *Paola v Hughes (Pty) Ltd* 1956 (2) SA 587 (N) at 596. *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 119, 121 (on purchase price and the cost of manufacture); *SAR v Simonowitz* 1911 TPD 92 at 99; *Enslin v Meyer* 1960 (4) SA 520 (T) at 522). A vehicle's trade-in value may also be insufficient proof (*Du Plessis v Nel* 1961 (2) SA 97 (GW) at 102; *Paulsen v Josling* 1964 (2) PH O31 (GW); see, however, *Myburgh v Hanekom* 1966 (2) SA 157 (GW) at 161). Speculative and vague evidence of value does not suffice (*Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T)). Cf further *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N) at 663. See also Lamprecht 1995 *The Magistrate* 111 on various methods to determine market value.

[6] See, eg, *Smit v Saipem* 1974 (4) SA 918 (A) at 932 (diminution in value of land); McKerron *Delict*116; *Erasmus v Davis* 1969 (2) SA 1 (A) at 17.

[7] The selling price of the wreck of a motor car may be proof of its market value (cf *Erasmus v Davis*1969 (2) SA 1 (A) at 11). See *Romansrivier Koöp Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd*1993 (2) SA 358 (C) at 368 where it was held that the offers actually received for damaged goods provide the best indication of the market value at the time. The plaintiff, however, decided that the damaged filter in casu was worth more than the only offer received, and opted to have it repaired and to offer it for sale in proper working condition. The plaintiff not only claimed for these reasonable repair costs, but also for the agent's commission and advertising costs. The price realized for the repaired filter was obviously deducted from the market value of the filter before the accident. The plaintiff succeeded in his claim.

[8] See *Joubert v Santam* 1978 (3) SA 328 (T) at 332; *Albertus v Jacobs* 1975 (3) SA 836 (W).

[9] See in general *Scrooby v Engelbrecht* 1940 TPD 100 at 102; *Hugo v Rossouw* 1946 CPD 54; *Paarl Transport Services v Du Toit* 1946 CPD 189; *Field Engineering and Cleaning Corp of SA (Pty) Ltd v Polliack & Co* 1948 (4) SA 312 (T); *De Witt v Heneck* 1947 (2) SA 423 (C) at 426; *Chi v Lodi* 1949 (2) SA 507 (T) at 512; *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1236; *Ward v Steenberg* 1951 (1) SA 395 (T) at 402; *Boshoff v Erasmus* 1953 (1) SA 103 (T) at 106; *De Beer v Bothma* 1955 (1) SA 295 (T); *Botha v Van Zyl* 1955 (3) SA 310 (SWA); *Enslin v Meyer* 1960 (4) SA 520 (T) at 523; *Du Plessis v Nel*1961 (2) SA 97 (GW) at 101; *Van Dyk v Cordier* 1965 (3) SA 723 (O) at 725; *Janeke v Ras* 1965 (4) SA 583 (T) at 588; *Erasmus v Davis* 1969 (2) SA 1 (A) at 5, 9, 12, 21; *Minister of Transport v Barnard* 1971 (2) PH J43 (C); *Heath v Le Grange* 1974 (2) SA 262 (C) at 263; *Albertus v Jacobs* 1975 (3) SA 836 (W) at 837; *Hanos v Barnett* 1972 (1) SA 334 (T) at 336; *De Bruin v Visagie* 1980 (2) PH J59 (C); *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D). See also *Municipality of the City of Cape Town v Foentjies* 1982 (1) PH J11 (C). See *GDC Hauliers (Pvt) Ltd v Chirundu Valley Motel (1988) (Pvt) Ltd* 1999 (3) SA 51 (ZSC) at 53–4 in which it was held that although the cost of repairs was an acceptable method of establishing patrimonial loss, the plaintiff had to show that the repairs were necessary and that the cost of the repairs was fair and reasonable. The repairs must also be shown to be necessary to bring the damaged article back into its pre-accident condition. The court further held that where the quantum of the plaintiff's claim is specifically put in issue in the plea, it is not sufficient for the plaintiff simply to produce invoices. See also *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D&C) in which case a chartered vessel was damaged in Durban, but the repairs were done in Rotterdam. The cost of actual repairs at Durban would have been materially less than the cost of repairs at Rotterdam. However, the total recoverable expenditure incurred at Rotterdam was less than that which would have been incurred at Durban, owing to off-hire losses and daily related expenses which would have been incurred at Durban. In *Nissan Zimbabwe (Pvt) Ltd v Hoppit (Pvt) Ltd* 1998 (1) SA 657 (ZSC) the court held that wasted expenses is not a measure of damages in a case of damage to property. See Visser 1998 *De Jure* 175 for a discussion of this decision.

[10] See *Erasmus v Davis* 1969 (2) SA 1 (A) at 18.

[11] See *Enslin v Meyer* 1960 (4) SA 520 (T) at 522.

[12] eg *Rodriques v Schmidt* 1963 (1) SA PH O23 (T); *Riebeeck Concession Store (Pty) Ltd v Administrator, OFS* 1961 (1) PH J15 (O). See, however, *Minister of Transport v Barnard* 1971 (2) PH J43 (C) and see 1971 *Annual Survey* 185–6 for criticism.

[13] *Botha v Van Zyl* 1955 (3) SA 310 (SWA); but see also *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 419, in terms of which a court will, in some cases, be prepared to accept the cost of repairs even though this is more than the decrease in market value. However, this should probably be limited to contractual liability (para 12.10).

[14] *Du Plessis v Nel* 1961 (2) SA 97 (GW) at 101; *Myburgh v Hanekom* 1966 (2) SA 157 (GW). See also *Nu-Life Battery Reconditioners (Pty) Ltd v Roddington* 1974 (2) SA 175 (R) (no presumption that repaired motor car is worth less than before). See further *Page v Lyon* 1938 EDL 235 at 242. The trading value of property is in general equal to its market value. If something has been physically repaired but the repairs do not restore its pre-accident (market) value, the owner may, in addition to the cost of repairs, also claim the amount by which the market value has declined (provided that such amount as well as the reasonable cost of repairs do not exceed the pre-accident market value). It would seem that these principles sufficiently provide for a so-called decrease in trading value. According to Van der Walt *Sommeskadeleer* 286–7 it is unnecessary to prove actual and hypothetical transactions in terms of which a lower price would be obtained. This exposition may be criticized as it is not clear how else someone would prove a decrease in trading value.

[15] *Page v Malcomess* 1922 EDL 284: the plaintiff received the reasonable cost of repairs as well as damages for diminution in value not eliminated by repairs.

[16] 1969 (2) SA 1 (A).

[17] Here the plaintiff claimed R930 from the defendant for damage to her motor car for which the defendant was delictually liable. The evidence of an insurance assessor indicated that the value of the motor car before the accident was R1 200 and that the reasonable cost of repairs was R771. After the accident the motor car was sold to a scrap-car dealer as salvage for R270. There was no other evidence of the motor car's post-accident value. A magistrate awarded the plaintiff R930 as claimed, this being the difference between the motor car's pre-accident value (R1 200) and its post-accident value (R270). On appeal to the Transvaal Provincial Division, the award was changed to R771, ie the reasonable cost of repairs. The Appellate Division dismissed an appeal against this award. According to the court, the plaintiff had not properly proved the diminution in value of the vehicle. However, this did not mean that she was not entitled to damages, since she had proved the reasonable cost of repairs. According to the majority, proof of reasonable cost of repairs constitutes sufficient proof of damage as it indicates the diminution in value which has taken place. The argument by Boberg 1969 *Annual Survey* 153 that *Erasmus* was incorrectly decided since it is not per se the most probable inference that the cost of repairs is less than the pre-accident market value, is unconvincing. In most cases it will be impractical to assess the market value of a motor vehicle involved in an accident and the reasonable and necessary cost of repairs would be the best indication of diminution in value.

[18] See *Erasmus v Davis* 1969 (2) SA 1 (A) at 8, 12. In *Walker v Santam Ltd* 2009 (6) SA 224 (SCA) at 229–30 the court held that the measure of damage set out in *Erasmus v Davis* does not apply to assessing damage in claims based on indemnity insurance.

[19] Boberg *Delict* 622–3; *Erasmus v Davis* 1969 (2) SA 1 (A) at 12: if a plaintiff has produced acceptable evidence of reasonable cost of repairs and it does not sufficiently appear that the diminution value indicated in terms thereof may perhaps be incorrect, the defendant has a duty to create a sufficient measure of doubt in this regard. The statement by Lee & Honoré *Obligations* 251 of an onus on the defendant (see also *Janeke v Ras* 1965 (4) SA 583 (T) at 588) can thus not be accepted as correct.

[20] See on the proof in regard to repairs: *Boshoff v Erasmus* 1953 (4) SA 103 (T) (evidence that the lowest of three quotations was accepted proves cost of repairs to be reasonable); *Toyi v Morrison* 1980 (2) SA 705 (Tk) (lowest of two quotations not necessarily reasonable); *Hanos v Barnett* 1972 (1) SA 334 (T) (lowest of three quotations for repairs not necessarily reasonable—*Boshoff* supra distinguished on procedural grounds); *Du Plessis v Nel* 1961 (2) SA 97 (GW) (methods of proving damages when a motor car has been damaged). See also *Albertus v Jacobs* 1975 (3) SA 836 (W) on this as well as on the use of second-hand parts in repairing a vehicle—if second-hand parts are not readily available, new parts may be used; see further *De Beer v Bothma* 1955 (1) SA 295 (T) at 297; *Myburgh v Hanekom* 1966 (2) SA 157 (GW) ('before' and 'after' trade-in offers by a dealer constitutes proof of the diminution in value). See further *Ward v Steenberg* 1951 (1) SA 395 (T) (no evidence of reasonableness); *De Witt v Heneck* 1947 (2) SA 423 (C) (account by reputable firm on repairs does not prove necessity or reasonableness of repairs); *Joubert v Santam* 1978 (3) SA 328 (T) (vague and unsatisfactory evidence); *Coetzee v Jansen* 1954 (3) SA 173 (T). In determining reasonableness regard should be had not only to each individual item but to the net result of all items (*Field Engineering & Cleaning Corp of SA v Polliack & Co* 1948 (4) SA 312 (T)). See also *Turner v Galleymore* 1976 (2) PH J40 (N) (who may give evidence on value).

[21] Earlier it was held in *Janeke v Ras* 1965 (4) SA 583 (T) that a plaintiff was entitled to adduce merely evidence of reasonable cost of repairs. The plaintiff does not have to prove that the diminution in value of the vehicle is less than the repair costs. The onus of proof is on the defendant to demonstrate that the plaintiff's assessment of his or her loss is too high. According to *Heath v Le Grange*1974 (2) SA 262 (C), a plaintiff has to prove that the cost of repairs is not only necessary but also 'fair and reasonable'. See *Paola v Hughes (Pty) Ltd* 1956 (2) SA 587 (N) on a failure to attack a plaintiff's evidence on the quantum of his claim. Where a plaintiff has failed to adduce prima facie proof of reasonable cost of repairs, a defendant's failure to cross-examine will not support the plaintiff (*Ward v Steenberg* 1951 (1) SA 395 (T)). See also *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 120; *GDC Hauliers (Pvt) Ltd v Chirundu Valley Motel (1988) (Pvt) Ltd* 1999 (3) SA 51 (ZSC) at 52–5.

See also *Reid v LS Hepker & Son (Pvt) Ltd* 1971 (2) SA 138 (RA) at 146 and *Swart v Van der Vyver*1970 (1) SA 633 (A) at 648 for the view that, where repairs have been carried out, the question is not whether the expenses are reasonable but whether they have been incurred reasonably. See in general on the assessment of quantum in this regard: CJJ 1951 *SALJ* 144; McKerron 1954 *SALJ* 206; 1953 *SALJ*340; 1952 *SALJ* 321, 384; *Delict* 116–17; Price 1950 *THRHR* 92; Boberg 1960 *Annual Survey* 171–2; 1969 *Annual Survey* 149–56; De Wet 1954 *SALJ* 286; Reinecke 1990 *TSAR* 773; Erasmus & Gauntlett 7 *LAWSA* para 63.

[22] Boberg *Delict* 623; *Botha v Rondalia Versekeringskorporasie van SA Bpk* 1978 (1) SA 996 (T); *G & M Builder's Supplies v SAR & H* 1942 TPD 120; *Albertus v Jacobs* 1975 (3) SA 836 (W) at 837; *Erasmus v Davis* 1969 (2) SA 1 (A) at 7.

[23] Para 10.13.

[24] Para 13.3 on the loss of use of something.

[25] See *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 123 on reasonable cost to salvage property (even if a plaintiff uses his or her own employees) and to clean up; *Lock v SAR & H* 1919 EDL 212 (cost of towing in); *Shrog v Valentine* 1949 (3) SA 1228 (T) (towing in). In *Castle and Castle v Pritchard* 1975 (2) SA 392 (R) the plaintiff's motor car was damaged during a holiday and the court awarded airfares home for him and his family. See also *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D&C) at 385 (off-hire for every day that the vessel was not being gainfully put to use by the charterers in accordance with the vessel's planned itinerary).

[26] *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 124–5: where damage to property occurs, our law does not provide compensation for inconvenience, discomfort or frustration in connection with such damage, unless there is actual patrimonial loss. This view is supported by old decisions such as *Wynberg Municipality v Dreyer* 1920 AD 439 at 448; *Edwards v Hyde* 1903 TS 381 at 385–6. Cf also *Gillespie v Toplis* 1951 (1) SA 290 (C); *Kellerman v SA Transport Services* 1993 (4) SA 872 (C) at 878.

[27] See para 4.5 on the time of the assessment of damage; cf also Boberg *Delict* 625: 'The oft-repeated proposition that ''damages must be assessed as at the date of the wrong'' . . . is patently false because it is only on the basis of subsequent events (eg the price obtained for the damaged vehicle, the cost of repairs) that the effect of the delict upon the plaintiff's patrimony can be assessed. Nor does it help to say that only *relevant* subsequent events may be considered, for how is it to be decided which are relevant?' See, however, *Botha v Rondalia* 1978 (1) SA 996 (T) at 1005; McKerron *Delict* 120: '[T]he plaintiff is entitled to recover in full the difference between the market value of the thing immediately before and immediately after the commission of the wrong, notwithstanding the fact that before judgment the thing may have perished or received further damage.' But see also para 4.6.3.4 on hypothetical causation. See, however, Visser 1996 *Obiter* 187 who submits that the rule stated in *Rens v Coltman* 1996 (1) SA 452 (A) which dealt with the assessment of contractual damages should also apply to delictual damages: the time when damages should be assessed is the date when it would be reasonable for the plaintiff to repair the property.

[28] *General Accident Ins Co of SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 613. See also Koch 1991 *THRHR* 130. See, however, para 8.10 on mora interest, which could alleviate the negative impact of delay in receiving compensation.

[29] See para 11.1.4 on who may claim in respect of injury to property; *Swart v Van der Vyver* 1970 (1) SA 633 (A) and para 12.17 on damage suffered by a fiduciary-lessor of property.

[30] See Reinecke 1976 *TSAR* 43–9: If an article is damaged before delivery, a purchaser will suffer a loss if he or she factually or legally bears the risk in respect of damage thereto; if the purchaser loses the benefit of a bargain; or if he or she loses the benefit of possession of the merx and suffers consequential loss. Reinecke loc cit also discusses the position after delivery before a purchaser becomes owner (as well as the position of the seller). It would seem that a purchaser's damage and damages may be assessed in terms of the principles stated in para 12.17 (and paras 13.1, 13.3 on the loss of use) and that the actual problem is to reconcile such claim with a possible action by the owner (para 11.1.4). See further *Smit v*

Saipem 1974 (4) SA 918 (A); Van der Merwe *Sakereg* 151; Silberberg & Schoeman *Law of Property* 311–12; McKerron *Delict* 117: 'Where the person suing is not the owner of the property damaged but merely has a limited interest therein, the ordinary measure of damages is the resulting diminution in the value of his right or interest.' See *Smit & Shapiro v Van Heerden* 1941 TPD 228, where dress materials of which the plaintiff was not the owner but on which she had done certain work were damaged. It was held that she could recover damages in respect of the labour she had expended on the materials, but she could not claim the value of the materials since she was under no liability towards the owners.

[31] See in general Van der Merwe *Sakereg* 347–59 on the requirements for and relationship between the rei vindicatio, the actio ad exhibendum and the Aquilian action. See also Van der Merwe op cit 142–3 on 'besitskade'; Van der Walt 1986 *TSAR* 229–32; Klopper 1983 *Obiter* 88–92; Kleyn *Mandament van Spolie* 398–9; para 11.9.3.

[32] See on market value Lamprecht 1995 *The Magistrate* 111 et seq; para 12.7.2.

[33] In a claim based on the unlawful alienation of a vehicle, damages are computed on the basis of its value at the time of the delict—*Phillip Robinson Motors v Dada* 1975 (2) SA 420 (A) at 428: 'The time at which to measure the delictual damages is ordinarily the date of the delict, because that is when the owner's patrimony is reduced . . . . The measure of damages is the value of the article to the owner.' See also above at 429: 'I would add that the present case is distinguishable from a vindictory action claiming restoration or value where the defendant is in possession or can acquire possession. In such actions the value is determined as at the date of trial or judgment.' See also *Mlombo v Fourie* 1964 (3) SA 350 (T); *Standard Bank of SA Ltd v Stama* 1975 (1) SA 730 (A); *Pennefather v Gokul* 1960 (4) SA 42 (N) at 50. In *Mpisi v Trebble* 1992 (4) SA 100 (N) the plaintiff claimed the purchase price of materials used to erect a structure burned down by the defendant. The court held that 'there was simply no evidence of the post-demolition value of the material. The only evidence relating to value was evidence of the purchase price or value of items which were built into the structure' (at 104). Cf also Van der Merwe *Sakereg* 352–5; Blecher 1978 *SALJ* 360–1: 'An owner who wishes to proceed against someone who with *dolus* parted with the owner's property may in theory have a number of courses open to him. In effect, however, he has a choice of two courses, to proceed in delict or to claim vindictory damages (or their equivalent with the *actio ad exhibendum*). Which of these alternatives he chooses will be decided by a consideration of whether the *res* is (or can be assumed to be) in existence at the time the action is instituted by the owner (if it is not in existence its value cannot be assessed and a delictual action must be resorted to) and, if it is in existence, whether it has appreciated or depreciated in value since the time that the defendant parted with it (if it has appreciated the owner would prefer vindicatory damages, if it has depreciated he would prefer delictual damages).' However, one has to agree with Van der Merwe & Olivier *Onregmatige Daad* 466 that it is not clear why an increase in the value of a destroyed or stolen article should not be taken into account in assessing damages claimed with the Aquilian action. See also *Frankel Pollak Vinderine Inc v Stanton* 2000 (1) SA 425 (W) at 452: 'It may be unjust if an owner, seeking recovery of his property, discovers only some time after it was wilfully destroyed by a ''knowing'' defendant that it was so destroyed and he or she can recover only the value at the time of the actual destruction. This is because he or she could reasonably be expected to take steps to replace the destroyed property only on discovery of its fate. There is support for the view that an increase in the value of a stolen or destroyed article may be claimed by the plaintiff.' However, Wunsh J left this point open as he did not consider it appropriate to determine an issue like this on exception.

[34] See *Pretoria Light Aircraft Co Ltd v Midland Aviation Co (Pty) Ltd* 1950 (2) SA 656 (N) at 662.

[35] *SM Goldstein v Gerber* 1979 (4) SA 930 (A); *Central SAR v Geldenhuis Main Reef GM Co Ltd* 1907 TH 270 at 290–4. Cf also *Bondcrete (Pty) Ltd v City View Investments (Pty) Ltd* 1969 (1) SA 134 (N) on the proof of value. Cf further *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118. See *Holscher v ABSA Bank* 1994 (2) SA 667 (T) on the assessment of the value of a stolen cheque.

[36] See, eg, the English case *Uctkos v Mazzetta* [1956] 1 Lloyd's Rep 209, where it was held that the owner of an unusual type of motor-boat which was destroyed was not entitled to damages to replace such boat. The court held that he could obtain 'the reasonable cost of another craft which reasonably meets his needs ... and which is reasonably in the same condition.'

[37] See, however, n 33 above and *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 121–2: 'Indeed in an appropriate case that [cost of manufacture of an article] may well be the measure of damages, as for example where a plaintiff is indemnified to the extent of the cost of replacing destroyed property which can only be replaced by its equivalent being manufactured or rebuilt and where the circumstances justify or render replacement necessary or reasonable. See, e.g., *Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd.,* (1970) 1 All ER 225 (CA) at 236D, 240C and 242D, where the cost of rebuilding factory premises destroyed by fire was found in the special circumstances of the case to be a more appropriate and proper measure of indemnity than the difference in market value of the premises before and after damage.' See, however, Visser 1996 *Obiter*189 (see para 13.1 n 27).

[38] See on the loss of use and loss of profit para 13.3. If X's property is stolen or destroyed at a certain place and he needs a substitute at such place, the reasonable cost to have it delivered there should form part of his recoverable loss. See further Van der Merwe *Sakereg* 352 on a mala fide possessor who has to give account of fruit used by him. In all cases of consequential loss the principles concerning remoteness of damage (para 11.5) should, of course, be kept in mind.

[39] See, eg, Reinecke et al 12 *LAWSA* (reissue) para 295. See further Atkins 1992 *BML* 172. In addition to this, there is the question of how an action for damages by a victim of theft will be influenced by the availability of the rei vindicatio (see also De Vos *Verryking* 37). Where the actio ad exhibendum has been instituted, the owner may no longer proceed with the rei vindicatio (Van der Merwe *Sakereg*355). See on damages on account of theft with the condictio furtiva, *Crots v Pretorius* 2010 (6) SA 512 (SCA) at 513: 'The *condictio furtiva* is a delictual action for the recovery of patrimonial loss as a result of theft. It is available to an owner or anyone who has an interest in the stolen thing, against a thief or his heirs.' In casu the defendant acted with dolus eventualis, but in principle the condictio furtiva is available against a thief even where the loss of the stolen thing is not attributable to the fault of the thief; the thief simply bears the risk of even accidental loss of the stolen thing and is therefore strictly liable (see eg *Clifford v Farinha* 1988 (4) SA 315 (W) at 322–3; Neethling & Potgieter *Delict* 362–3). The condictio furtiva allows the highest value of an article since the theft to be claimed as well as incidental losses suffered by the owner. See also *Minister van Verdediging v Van Wyk* 1976 (1) SA 397 (T) at 400, 402–3; Pauw 1976 *SALJ* 395; Beyleveld 1977 *TSAR* 187; Van der Merwe *Sakereg* 358–9; Silberberg & Schoeman *Law of Property* 265–6; Sonnekus *Unjustified Enrichment* 147–50; Scott 2011 *TSAR* 383 et seq; and De Vos op cit 38 who does not regard this action as one based on enrichment but as an action for damages which concurs with the rei vindicatio.

[40] See in general Koch *Reduced Utility* 163 et seq on the loss of use.

[41] eg damage to property (para 13.1); theft, alienation or destruction of property (para 13.2); nuisance (para 13.9.5); the removal of lateral support of land (para 13.9.7); trespass (para 13.9.6); breach of contract (para 12.12); being driven off a farm by inhabitants of neighbouring informal settlement (*Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA); cf *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae), President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA)); spillage of truckload of asbestos resulting in closure of toll road (*Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA)), etc.

[42] See, eg, *Shrog v Valentine* 1949 (3) SA 1228 (T) on 1236: 'Where a vehicle which is damaged through the negligence of another has been in use in a business of its owner, the damages which can be recovered, apart from the cost of repairs, include the loss of income to the owner due to the loss of the use of vehicle.' See *Mossel Bay Divisional Council v Oosthuizen* 1933 CPD 509, where the owner of a damaged taxi recovered loss of income caused by such damage. See also *Mainline Carriers v Refrigerated Transport* 1980 (2) PH J66 (C) (damages for loss of use); *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T) at 192 (loss of income caused by damaged boring-machine should be clearly proved). In *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) the plaintiff leased part of a building. Negligent conduct by the defendant caused that part to be flooded and it took nine days to restore everything. The plaintiff succeeded in its claim for damages for a proportional part of the rent (one may thus conclude that rent may be indicative of the value of the use of property). In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) the defendant's truck, loaded with asbestos, overturned and spilled its cargo onto the surface of a toll road. In order to remove the dangerous asbestos powder, the road was closed for 24 hours, resulting in the toll company (plaintiff) to lose revenue for the duration of the clean-up. The plaintiff succeeded in its claim. See further *Odendaalsrust Gold General Investments and Extensions Ltd v Naude* 1958 (1) SA 381 (T) (loss of the value of leased property). See also *Lock v SAR & H* 1919 EDL 212, where the lease of a vehicle for business purposes was accepted as damage; *Retief v Horn* 1986 (2) PH J21 (O). See further *Oates v Union Government* 1932 NPD 198: the plaintiff's apple orchard was destroyed by fire and the court held that he was entitled to the cost of restoring it by planting trees bearing fruit more quickly than the trees which had been destroyed (after six years instead of 13 years) and that he could claim loss of profits for six years.

[43] See n 42 above; *Van Schalkwyk v Le Grange* 1957 (1) PH J5 (O), where the plaintiff was awarded the reasonable cost of hiring a vehicle to drive to work while his motor car was being repaired; *Page v Malcomess* 1922 EDL 284 at 293–4, where no compensation was awarded in respect of a substitute vehicle acquired gratuitously. See, however, para 10.3.2 on the collateral source rule. See also *Zweni v Modimogale* 1993 (2) SA 192 (BA) (acquiring vehicle as part of duty to mitigate loss); *Smit v Abrahams* 1994 (4) SA 1 (A) (rent of substitute vehicle). See further Koch 1991 *THRHR* 130; Reinecke 1988 *De Jure* 236–7; Dendy 1994 *JBL* 17–19; Stoll & Visser 1990 *De Jure* 347; Visser 2003 *THRHR* 654–5.

[44] 1993 (4) SA 872 (C) at 879. See Visser & Potgieter 1994 *THRHR* 312–17; Smith 1993 *JBL* 175–6; Pillay 1996 *De Rebus* 467–8.

[45] Above at 879: 'Once it is accepted, as I think it must be, that ownership of a *res* embraces the right to use it for the functional purpose for which it was designed, that its availability for such use has an economic value reflected in the prevailing rate of hire of such a *res*, and that a deprivation of use, occurring at a time when the owner reasonably desired to use the *res*, has resulted in the owner incurring expense to which he otherwise would not have been put in obtaining the temporary use of a substitute, it seems to me to be entirely in accord with the principles of Aquilian liability that the third party whose negligence caused the loss of use of the owner's own *res* should have to compensate the owner for expense so incurred.' Cf further *Zweni v Modimogale* 1993 (2) SA 192 (BA); *Smit v Abrahams*1994 (4) SA 1 (A). Cf Loubser 2003 *Stell LR* 445 for questions on damages for the loss of use that still need to be addressed.

[46] *Modderfontein Squatters Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae), President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA), confirmed by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC); cf Van der Walt *Law of Neighbours* 58–9; 2005 *SAJHR* 144–61; Pretorius 2004 *Annual Survey* 316–18.

[47] See para 1.6.5 on constitutional damages.

[48] Section 25(1) of the Constitution. On the other hand, the squatters had a right of access to housing under s 26(1) of the Constitution and the court declared that the residents are entitled to occupy the land until alternative land has been made available to them (at 65).

[49] Referring to *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 330; cf para 13.6.

[50] The court declared that the owner is entitled to the payment of damages and that damages are to be calculated in terms of s 12(1) of the Expropriation Act 63 of 1975.

[51] *Obligations* 251–2.

[52] Op cit 252: 'For instance, a retired pensioner whose vehicle has been damaged should not have to rely on charity for transport but should be entitled to recover an amount equal to his usual transport costs for the period. Damages should be assessed as the difference between the cost of the substitute transport and the usual running costs of the damaged vehicle.' There is merit in this suggestion. See Boberg *Delict* 627, who agrees that 'it accords both with principle and common sense'. In fact the South African law is under-developed in respect of damages for the loss of use of an object. The decision in *Kellerman* is therefore commendable since a loss of use is not dependent upon the fact that the property is used in earning income. See in general for a comparative discussion Stoll & Visser 1990 *De Jure* 347–54. See Van der Walt *Sommeskadeleer* 18 n 35, 116–17 (who inter alia discusses the question whether a substitute article may just be as luxurious as a damaged one).

[53] *Sommeskadeleer* 18 n 35, 116–17. He submits that the *permanent loss* of use of an object constitutes damage irrespective of whether the plaintiff could or would actually have used it. Reinecke *Diktaat* criticizes this qualification since if a subjective approach to damage is adopted (see para 3.5), it is relevant whether a plaintiff would have used his or her property or not. Where property would in any event not have been used, there can be no damage. Usually the prospective permanent loss of the use of property is adequately compensated if the plaintiff receives (as damages) the market value of an article which has been destroyed. The plaintiff should, however, be compensated for loss between the time of delict and the time of judgment, since he or she does not have the use of the money during this period. The plaintiff must, therefore, be awarded the reasonable rent value of a similar or comparable article. Where there is *temporary* loss of the use of property, Van der Walt submits that a distinction has to be made between the position of an owner and a non-owner. A *non-owner* (eg a lessee) suffers damage irrespective of whether he or she would have used the article during the relevant period or not (however, the question is whether this accords with a subjective approach to damage (para 3.5)). Where an *owner* suffers a temporary loss of use, different principles apply as his or her power to use the property is not of limited duration. Thus, temporary loss of use can amount to damage only if the plaintiff proves one of the following three requirements: *(a)* that he or she would have used the article during the relevant period; or *(b)* that he or she has already incurred expenses to protect him- or herself against the consequences of a temporary loss of use; or *(c)* that he or she has suffered lucrum cessans (loss of profit). The reason why it may be expected of an owner to prove one of these three matters is that the owner should mitigate his or her loss by postponing use of the property in question or by adopting alternative measures. Reinecke op cit criticizes these requirements and submits that only *(a)* above may be relevant (as being in accordance with the subjective concept of damage). He adds that *(c)* is clearly irrelevant, since it involves loss of profit. The exact meaning of *(b)* appears to be uncertain. Would it, for example, be sufficient if a plaintiff has insured him- or herself against the loss of use of something? Or does it mean that the plaintiff who has hired a substitute may

recover his or her expenditure? Reinecke op cit intends to simplify the position by accepting loss of the use of property as damage. A plaintiff must, therefore, prove that he or she would have used the article in question and that such use could not have been postponed. He regards an owner's power to use his or her property as part of a substantive right (eg ownership or rights in terms of a contract of lease).

[54] For example, where X loses an eye on account of Y's negligence and is no longer able to pilot his aircraft. Possibly an award of damages for loss of the amenities of life may be seen as compensation for such a loss. If X has to sell the aircraft at a loss, he will probably recover compensation. If increased needs constitute compensable damage (eg a new motor car—see para 14.3 in connection with bodily injuries), the same ought perhaps to apply in regard to the loss of use of property.

[55] 1996 *De Rebus* 468.

[56] See on false dicta et promissa para 12.15.4. See on fraud and negligent misrepresentation in general Boberg *Delict* 58–103; Van der Merwe & Olivier *Onregmatige Daad* 309–28; Neethling & Potgieter *Delict* 297 et seq; Erasmus & Gauntlett 7 *LAWSA* paras 65–6; Kerr *Contract* 285–95; Joubert *Contract* 98–103; Vorster 17(2) *LAWSA* paras 304–23. See in respect of intentional misrepresentation in modern law *Standard Bank of South Africa Ltd v Supa Quick Auto Centre* 2006 (4) SA 65 (N); *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A). In these cases reliance is usually placed on the requirements stated in *Geary and Son (Pty) Ltd v Gove* 1964 (1) SA 431 (A) for intentional misrepresentation in respect of unlawful competition (deception in respect of one's own performance and disparagement of a competitor's performance); see Neethling *Van Heerden-Neethling Unlawful Competition* 148–9, 272–3. According to *Supa Quick* supra at 70–1 any form of intention, thus also dolus eventualis, satisfies the intention requirement. See further *Minister of Safety and Security v Howard*2009 (5) SA 201 (GSJ) on false statements to the police that a crime has been committed (cf n 60below).

[57] See, eg, Erasmus & Gauntlett 7 *LAWSA* paras 65–6; *Mayes v Noordhof* 1992 (4) SA 233 (C) at 249. See also para 3.2.3 on the use of a measure of loss which incorporates a hypothetical element.

[58] See on the (factual) causal link between misrepresentation and resultant damage *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA); Visser 2004 *Speculum Juris* 137 at 142; Roederer & Grant 2003 *Annual Survey* 367–70; cf para 2.6. See on remoteness of damage in negligent misrepresentation *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 701; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1078; O'Brien 1992 *TSAR* 139. In intentional misrepresentation (fraud), reasonable foreseeability may also serve as a criterion limiting liability (see Neethling & Potgieter *Delict* 204). See Kerr *Contract* 295 on contributory negligence in the case of negligent misrepresentation (para 11.4). See *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE); para 16.2.3 on the pleadings and proof of damages regarding a claim for negligent misrepresentation.

[59] *Bayer (SA) (Pty) Ltd v Frost* 1991 (4) SA 559 (A) at 564; see also *Bayer (SA) (Pty) Ltd v Viljoen*1990 (2) SA 647 (A).

[60] *Herschel v Mrupe* 1954 (3) SA 464 (A). In *Minister of Safety and Security v Howard* 2009 (5) SA 201 (GSJ) at 211 a declaratory order was made that 'South African law recognises a claim at the instance of the Minister of Police against any individual ... who, by causing a false report to be made to the police that a crime has been committed, causes the police to suffer monetary loss as a result of its having to spend time, effort and resources in investigating the content of the false report in the belief that the report was a genuine one'. A claim for damages for certain wasted costs was however denied since such claims are not sustainable in motion proceedings (cf Neethling & Potgieter 2009 *Annual Survey* 783–5). See *Kantey & Templer (Pty) Ltd v Van Zyl* 2007 (1) SA 610 (C) at 627 where it was held that 'the nature of the damages proved by [the] respondents [as a result of a negligent misrepresentation was] that of negative interesse, consisting of wasted expenses incurred and profits [forgone]'.

[61] *Siman & Co (Pty) Ltd v Barclays National Bank* 1984 (2) SA 888 (A).

[62] *Administrator, Natal v Trust Bank* 1979 (3) SA 824 (A); *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA).

[63] *EG Electric Co (Pty) Ltd v Franklin* 1979 (2) SA 702 (E).

[64] *Standard Bank of SA Ltd v Coetsee* 1981 (1) SA 1131 (A); *Great Karoo Eco Investments (Edms) Bpk h/a Grobbelaarskraal Boerdery v ABSA Bank Ltd* 2003 (1) SA 222 (W). See also *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *Perlman v Zoutendyk* 1934 CPD 151; *Hedley Byrne & Co Ltd v Heller and Partners* [1964] AC 465 (HL).

[65] *Mukheiber v Raath* 1999 (3) SA 1065 (SCA).

[66] *Aucamp v University of Stellenbosch* 2002 (4) SA 544 (C).

[67] Cf *Axiam Holdings Ltd v Deloitte & Touche* 2006 (1) SA 237 (SCA).

[68] *Page v First National Bank Ltd* 2009 (4) SA 484 (E) (cf Neethling & Potgieter 2009 *Annual Survey*795–6).

[69] Para 13.1. See also *Lennon Ltd v BSA Co Ltd* 1914 AD 1 at 5, 15; *Fichardt's Motors (Pty) Ltd v Nienaber* 1936 OPD 221; *Blore v Standard General Ins Co Ltd* 1972 (2) SA 89 (O) at 98.

[70] Para 14.3. Cf also *Fichardt's Motors (Pty) Ltd v Nienaber* 1936 OPD 221 at 225; *Bristow v Lycett*1971 (4) SA 223 (RA) at 239.

[71] eg cases of pure economic loss (eg *Perlman v Zoutendyk* 1934 CPD 151 at 161; *Western Alarm System (Pty) Ltd v Coini & Co* 1944 CPD 271 at 276; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1068). See para 13.10 on pure economic loss.

[72] See, eg, *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) (expenses to remove, store and replace parts of a building declared to be a monument). See also the interesting examples in *De Jager v Grunder* 1964 (1) SA 446 (A) at 468–9; Kerr *Contract* 291–2. See also *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A).

[73] See in general Kahn *Contract* I 238–52; Kahn *Contract* (1971) 134–5; De Vos 1964 *Acta Juridica*26, 30, 36; Lotz 1988 *THRHR* 92; Cameron 1982 *SALJ* 116–17; McLennan 1977 *Annual Survey* 89, 92; Van der Merwe & Olivier *Onregmatige Daad* 318–28; Van Aswegen *Sameloop* 315–23.

Damages may also be recovered for negligent misrepresentation inducing a contract—*Kern Trust (Edms) Bpk v Hurter* 1981 (3) SA 607 (C) (damage caused by unfavourable purchase of hotel and borrowing of money at a high rate of interest); *Bayer (SA) (Pty) Ltd v Frost* 1991 (4) SA 559 (A); O'Brien 1992 *TSAR* 134. See in general Hunt 1968 *SALJ* 379; Hutchison 1981 *SALJ* 486; Olivier 1964 *THRHR* 20; Kerr *Contract* 292 et seq.

[74] See para 4.3. Positive interesse in the law of contract is the same as negative interesse in delict and these expressions do not signify particular types of loss (eg expenses already incurred as opposed to loss of profit). See Van Aswegen *Sameloop* 314 et seq; Lötz 1997 *THRHR* 241–9.

[75] See also Erasmus & Gauntlett 7 *LAWSA* paras 65–6 for a summary. See further Joubert *Contract*100 et seq; Kerr *Contract* 287 et seq.

[76] '[I]t is that sum which will restore the misrepresentee to his or her patrimonial position prior to the misrepresentation, or the sum of all losses sustained as a direct consequence of having been induced to enter into the contract' (Erasmus & Gauntlett 7 *LAWSA* para 65).

[77] See, eg, *De Jager v Grunder* 1964 (1) SA 446 (A); *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T); *Hunt v Van der Westhuizen* 1990 (3) SA 357 (C).

[78] See para 13.4.2 for more detail. See also Lotz 1988 *THRHR* 92; 1997 *THRHR* 428. Van Aswegen *Sameloop* 316–17 (see also Erasmus & Gauntlett 7 *LAWSA* paras 65–6) does not draw a distinction between the position with and without rescission but merely asks whether there would have been a contract or not in the absence of the misrepresentation. However, she adds that rescission may be relevant in determining the quantum of damages, since restitution which accompanies cancellation may influence a plaintiff's patrimonial position.

[79] See the authority in n 73 above. See also Lewis 1992 *SALJ* 390; Lötz 1997 *THRHR* 412. Since this is a relatively new field of liability, principles in regard to quantification have not yet been developed (as in the case of fraud inducing a contract—para 13.4.2). The misrepresentee who resiles from the contract should thus be placed in the position he or she would have occupied without such representation and, where the misrepresentee would still have contracted, the person's present position must be compared with his or her contractual position if terms of the contract had not been affected by the misrepresentation. See, eg, the case of *Hamman v Moolman* 1968 (4) SA 340 (A), where there was a misrepresentation in regard to a swimming pool and braai area as part of the res vendita. If the contract had been upheld (in casu it was rescinded), one could, for example, have determined how much the purchase price would have been without the misrepresentation in connection with the swimming pool etc. See para 12.15.5 on the actio quanti minoris and para 12.15.4 on the actio redhibitoria.

On 'damages' in the case of innocent misrepresentation, see Kerr *Contract* 300, 332–3 on 'restitutionary damages'. See further Burchell 1950 *SALJ* 121; Mulligan 1951 *SALJ* 157; Van der Spuy 1961 *THRHR* 261; De Wet & Van Wyk *Kontraktereg en Handelsreg* 41; *Hall v Milner* 1959 (2) SA 304 (O); *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A); *Overdale Estates (Pty) Ltd v Harvey Greenacre & Co Ltd* 1962 (3) SA 767 (D); *Bloemfontein Market Garage (Edms) Bpk v Pieters*e 1991 (2) SA 208 (O) at 211.

[80] See para 13.4.3 and Van Aswegen *Sameloop* 319–22 for a summary.

[81] See also *Nathan v Blake's Executors* 1904 TS 626 at 630, 632; *Jenkins v Durban Bay Lands Co Ltd* 1905 NLR 455 at 465; *Caxton Printing Works (Pty) Ltd v Tvl Advertising Contractors Ltd* 1936 TPD 209 at 215; *Claassens v Pretorius* 1950 (1) SA 37 (O) at 43; *Amiradakis v Rumble* 1951 (4) SA 674 (T) at 677; *Flaks v Sarne* 1959 (1) SA 222 (T) at 227; *McInnes v White* 1962 (1) SA 26 (W) at 27; *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 441; *Pockets's Holdings Ltd v Lobel's Holdings Ltd* 1966 (4) SA 238 (R) at 250; *Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 (2) SA 477 (C) at 483; *Latham v Sher* 1974

(4) SA 687 (W) at 694; *Mayes v Noordhof* 1992 (4) SA 233 (C); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA); *Aucamp v University of Stellenbosch* 2002 (4) SA 544 (C); *Great Karoo Eco Investments (Edms) Bpk h/a Grobbelaarskraal Boerdery v ABSA Bank Ltd* 2003 (1) SA 222 (W); *Axiam Holdings Ltd v Deloitte & Touche* 2006 (1) SA 237 (SCA); *Standard Bank of South Africa Ltd v Supa Quick Auto Centre* 2006 (4) SA 65 (N); *Kantey & Templer (Pty) Ltd v Van Zyl* 2007 (1) SA 610 (C); *Holtzhausen v ABSA Bank Ltd* 2008 (5) SA 630 (SCA); *Minister of Safety and Security v Howard* 2009 (5) SA 201 (GSJ).

[82] 1951 (1) SA 443 (A).

[83] Para 13.4.1.

[84] The court would not, however, lay down a general rule and emphasized that each case depends upon its own facts. A plaintiff may, of course, recover damages only for such loss as was caused by the fraud. This measure was also applied to an instance of dolus dans in *Hulett v Hulett* 1992 (4) SA 291 (A) at 311. In *Mayes v Noordhof* 1992 (4) SA 233 (C) at 249 the court used as measure of damages in a case of dolus dans the difference between the market value of the property at date of sale as misrepresented (or the price) and the value of the property if there was an informal settlement next to the property at the date of the sale.

[85] 1958 (1) SA 479 (A). Here the plaintiff bought a citrus farm from the defendant for R111 000. There had been a fraudulent misrepresentation that there were 5 570 citrus trees whereas there were only 4 892. The plaintiff claimed R22 000, being the difference between the purchase price and the actual value of the farm.

[86] According to Kahn *Contract* (1971) 135, the court applied the test of damages for breach of contract. In *Ranger v Wykerd* 1977 (2) SA 976 (A) at 996, however, the majority of the court declared that in *Bill Harvey* supra n 85 (as well as *Scheepers v Handley* 1960 (3) SA 54 (A)—infra n 87) the courts had not assessed damages on a contractual basis (viz as the difference between the purchase price and the value of the farm in terms of the misrepresentation) but according to delictual principles as 'the amount by which the plaintiff was out of pocket because of the defendant's fraud'. These two measures of damages may coincidentally produce the same result in some cases.

[87] 1960 (3) SA 54 (A). Here the defendant had fraudulently represented to the plaintiff that the extent of a farm bought by the plaintiff from him was 997 morgen while it was in fact only 766 morgen. The plaintiff claimed damages at R32 per morgen for the missing morgen.

[88] According to Kahn *Contract* (1971) 135, the court treated the matter as one of dolus incidens and awarded damages as though there were a breach of contract. However, according to *Ranger v Wykerd*1977 (2) SA 976 (A) damages were assessed in terms of the delictual measure.

[89] 1964 (1) SA 446 (A). G and D entered into an agreement of exchange. G had to hand over his farm S as well as certain movables to D (the total value was R97 000). D's obligation was to transfer his farms M1 and M2 on which the values respectively of R24 000 and R30 000 were placed plus certain movables and R7 000 in cash. D would also take over G's bond over farm S. D had fraudulently misrepresented that there were 9 000 pine trees worth R2 each on M1 whereas there were only 5 000 trees worth only R1 each. If G had known the truth, he would not have agreed to the greater valuation which D had placed on his performance. However, the value of everything which G had received was R97 000. The crucial question was whether one should consider the transaction as a whole or whether one should only have regard to farm M1 in determining the loss.

[90] Supra at 451. The court emphasized that where a fraudster intentionally causes damage, it would be anomalous to refuse an action against such person merely because the innocent purchaser concluded a favourable transaction. Our law should not treat a fraudster more leniently than a contract breaker acting without fraud.

[91] In a minority judgment it was held that damages were recoverable ex delicto and that a purchaser should not attempt to enforce a contract under the pretext of a delictual action. However, the following principles were added: if a purchaser retains the merx and complains that he or she was induced by fraud to pay too much for it, the purchaser has to prove what he or she would have paid had it not been for the fraud. Usually it may be accepted that he or she would have bought the merx at its market value. If a purchaser alleges that he or she would have bought at a price less than market value, the purchaser must prove this statement (and not merely the amount he or she would have paid that the seller would have accepted for concluding the contract). In such a case the purchaser's damage is the difference between the purchase price and the price he or she would have paid (lower than market value). If the purchaser would have paid more than market value of the merx despite the absence of misrepresentation, his or her damage is measured as the difference between that purchase price and the price the purchaser would have paid (higher than market value). If the present case is treated as one of dolus dans, G had not proved any loss. If it is accepted to be one of dolus incidens (in other words, a different contract with other prices), G had also not proved any damage since he had not proved what the prices would have been in the absence of

fraud and it had therefore to be accepted that the parties would have agreed upon the basis of market value.

In *Heckroodt v Nurick* 1966 (4) SA 76 (W) the court was concerned with the sale of a house infested with woodborers whose presence the seller had not disclosed. It would cost R1 515 to solve the problem. The court was of the opinion that the measure of the purchaser's damage is the lesser amount that person would have paid if he or she had known the truth. Where the purchaser in casu upholds the contract, his or her damage is the difference between the market value of the house and the purchase price paid for the house. The court, however, ordered absolution from the instance since the reasonable cost of solving the problem is not prima facie proof of damage and the plaintiff had failed to prove the market value of the house. (In *Ranger v Wykerd* 1977 (2) SA 976 (A) the Appellate Division rejected this decision.)

[92] 1977 (2) SA 976 (A).

[93] At 986 reference was made to the following dictum in *Trotman v Edwick* 1951 (1) SA 443 (A) at 449: 'A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.' Cf on the alleged differences between delictual and contractual measures of damage *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 (2) SA 846 (A) at 872.

[94] Para 13.1.

[95] See above at 994: 'Indeed, the present is *a fortiori* the kind of case in which the reasonable cost of repairs ought to be awarded as representing appellant's patrimonial loss directly flowing from the fraud, for the respondents [Y and Z] must have foreseen it as an inevitable consequence of their fraud.'

The *minority* of the court argued that our courts had in fact calculated damages by applying a contractual measure under the pretext of using a delictual measure. It would lead to less misunderstanding if, for reasons of policy, it was frankly acknowledged that in actions for fraudulent misrepresentation a contractual measure of damages (viz making good the representation) may be applied in appropriate circumstances. It is untenable that someone who commits fraud should be better off than a person who commits breach of contract. In casu the minority also awarded R1 000 damages but only against Y as a contracting party and not against Z, since he was not a party to the contract. In respect of Z the normal delictual measure of damages applies which is based on the market value of the property (and no such proof was adduced in the present case). See also *Mayes v Noordhof* 1992 (4) SA 233 (C) (damages calculated as difference in value of property with and without adjacent informal settlement).

[96] 1987 (4) SA 378 (T) (see also the *Bill Harvey* case n 85 above); cf *Stainer v Palmer-Pilgrim* 1982 (4) SA 205 (O) (damages calculated as the difference between the actual and the putative purchase price).

[97] 1964 (1) SA 446 (A).

[98] See Lotz 1988 *THRHR* 92, 96. Cf also Dendy 1987 *Annual Survey* 185–9.

[99] 1990 (3) SA 357 (C). See also Lewis 1990 *Annual Survey* 37–9.

[100] 1992 (4) SA 233 (C) at 249.

[101] See in general Cameron 1982 *SALJ* 99–119; Van Aswegen *Sameloop* 319 et seq; Dlamini 1985 *De Jure* 346; Joubert *Contract* 100–3; Kerr *Contract* 285 et seq; Van der Merwe 1978 *SALJ* 318; Lötz 1997 *THRHR* 412 et seq.

[102] See, eg, Van der Merwe & Olivier *Onregmatige Daad* 320. See further *Davidson v Bonafede*1981 (2) SA 501 (C) at 506; Dlamini 1985 *De Jure* 347–8, 351, 361, 367; Van der Merwe 1965 *THRHR*184 n 37; Van Aswegen *Sameloop* 319 for further references.

[103] See, eg, Van der Merwe & Olivier *Onregmatige Daad* 324–5, who also provide the following example: A purchases property of which the market value is R400 from B for R300 after B has represented to him that it is worth R500 and that he may thus make a profit of R200. According to these authors, A has not in casu sustained any loss since the fact that he would have made a profit of R200 if the misrepresentation were true is entirely irrelevant. A had no legally protected interest to have the misrepresentation made good. (However, the problems in practice are usually not really concerned with making good a misrepresentation but with what A's position would have been in the absence of the misrepresentation—which usually refers to the conclusion of a more favourable contract.) The authors also analyse the following example: A wants to purchase an article worth R400 for R600 but on account of B's fraud he buys it for R900. Here A suffers damage of R500 but for the law of damages only R300 will be relevant, since that was the only damage caused by the delict. Even in the absence of a delict A would have been R200 worse off. See also De Wet 1960 *Annual Survey* 94: 'Surely a plaintiff whose action is based on tort must show *ante omnia* that he has suffered loss, and this he can only show by proving that the *merx* delivered to him was worth less than he paid for it. If, in spite of the misrepresentation, he paid

less for the *merx* than it was actually worth, he will have suffered no patrimonial loss, even if he can show that by reason of a misrepresentation he paid more than he would otherwise have done.'

[104] In terms of the views in n 103 above the incorrect items are compared and accordingly the proper amount of damage and damages cannot be computed. Furthermore, the endorsement by Van der Merwe & Olivier *Onregmatige Daad* 322 of the minority judgment of Rumpff JA in *De Jager v Grunder* 1964 (1) SA 446 (A) at 458 creates the wrong impression. Even the views of Rumpff JA differ in important respects from those advanced by Van der Merwe & Olivier and are better developed than theirs.

[105] See Van Aswegen *Sameloop* 320, 325–7. Cf op cit 325: The author warns against associating negative interesse exclusively with 'out of pocket loss' and positive interesse with 'benefit of the bargain'. Out of pocket expenses do form part of positive interesse according to various dicta from judgments. In delictual actions negative interesse has often been interpreted as including loss of prospective profit or loss of a chance—which is the same as loss of 'benefit of the bargain' in the case of breach of contract.

[106] See the minority judgment in *Ranger v Wykerd* 1977 (2) SA at 976 (A) at 989 (para 13.4.2); De Wet & Van Wyk *Kontraktereg en Handelsreg* 45 n 155; De Vos 1964 *Acta Juridica* 37; Dlamini 1985 *De Jure* 348–9; McLennan 1977 *Annual Survey* 89–92; see further Van Aswegen *Sameloop* 321 for further references.

[107] *Sameloop* 321. See also Kerr *Contract* 288–9. Lubbe 1984 *SALJ* 619 gives the following summary: 'It is submitted, therefore, that if a comparison between the injured party's present position and that which he would have been in but for the delict reveals that he has, because of the delict, been deprived of the benefits of a better bargain than the one he in fact concluded, an award of such a loss is fully compatible with the interesse measure properly understood.'

[108] *Sameloop* 321–2: The fact that a contract has been concluded should not be ignored. It is thus not surprising that the market value of the hypothetical performance would often coincide with what the prejudiced person would have paid had the misrepresentation not been made.

[109] Para 10.15.

[110] Van Aswegen *Sameloop* 323; McLennan 1977 *Annual Survey* 9; Woker & McLennan 1992 *SA Merc LJ* 376; Lötz 1997 *THRHR* 429.

[111] See Reinecke & Van der Merwe 1964 *THRHR* 291 et seq and 1966 *THRHR* 66 et seq where support is expressed for *De Jager v Grunder* 1964 (1) SA 446 (A); Van der Merwe 1965 *THRHR* 173; De Vos 1964 *Acta Juridica* 26; Van der Merwe & Olivier *Onregmatige Daad* 325.

[112] *Onregmatige Daad* 319–26.

[113] 1964 (1) SA 446 (A).

[114] This development was anticipated by Kahn *Contract* (1971) 135, where he made the following submission on the distinction between the two forms of fraud: 'The oddity is that in certain circumstances the plaintiff would be better off by alleging incidental rather than causal fraud [dolus dans].' See also *Hunt v Van der Westhuizen* 1990 (3) SA 357 (C) at 362, where the question is posed: 'Why should one who alleges a fundamental fraud be any worse off?' See Cameron 1982 *SALJ* 106. This may result in a further development in terms of which damages will always be computed on the basis of dolus incidens if a misrepresentee upholds the contract. Thus, if a plaintiff has the right to cancel, that person should carefully consider whether it would be in his or her interest to exercise such a right.

[115] Above, n 106.

[116] Para 4.3.

[117] Cameron 1982 *SALJ* 113–14 (see also Kahn *Contract* I 251–2), who mentions two possibilities: the first is to use a contractual measure as suggested by the minority in *Ranger v Wykerd* 1977 (2) SA 976 (A) at 980 et seq (see also *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T) at 395 on the position where what commenced as a misrepresentation ended up as a contractual term and where it would be more beneficial to institute a contractual action). Cameron describes this possibility as unacceptable since it is, inter alia, in conflict with previous decisions of the Appellate Division. The second is to make the necessary factual assumptions as the majority of the court did in *Ranger v Wykerd* above. This approach is not above criticism as it does not, for example, give an answer to the question whether the principle of 'swings and roundabouts' applies. Cameron's own suggestion is that the 'physical damage after the contract' analogy adopted by the majority of the court in *Ranger v Wykerd* above (the hypothesis where Y and Z after transfer physically damage the swimming pool) should be used (taking into account all consequential loss). This approach would prevent the court from being incorrectly influenced by the accidental fact that a delict has been committed in a contractual context. See also Cameron 1982 *SALJ* 117–18 for more detail on this, but cf also Van der Merwe & Olivier *Onregmatige Daad* 326. This delictual measure should also generally have equitable results in the case of *negligent misrepresentation* (see *Kern Trust v Hurter* 1981 (3) SA 607 (C)).

[118] See in general Joubert *Contract* 104–10; Kerr *Contract* 318–26; Van der Merwe & Olivier *Onregmatige Daad* 229–30.

[119] See in general *Broodryk v Smuts* 1942 TPD 47; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C); *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W); Lubbe & Murray *Contract* 362–5.

[120] See, eg, *Broodryk v Smuts* 1942 TPD 47 at 53; *Kruger v Sekretaris van Binnelandse Inkomste*1973 (1) SA 394 (A). But see Kerr *Contract* 323.

[121] *Union Government v Gowar* 1915 AD 426 at 436; Lubbe & Murray *Contract* 365.

[122] See in general *Freedman v Kruger* 1906 TS 817; *Salter v Haskins* 1914 TPD 264; *Houtappel v Kersten* 1940 EDL 221.

[123] If no contract would have been concluded, damages are assessed as in dolus dans and if there would still have been a contract but with different terms, damages ought to be assessed as in dolus incidens (para 13.4.1).

[124] See also para 14.10.3 on patrimonial loss caused by defamation; para 13.7 on infringement of copyright; para 13.8 on infringement of patent. See on 'injurious falsehood' Lee & Honoré *Obligations*348–9; McKerron *Delict* 213–14.

[125] See in general Neethling & Potgieter *Delict* 309–16; Neethling *Van Heerden-Neethling Unlawful Competition* 82–4, 190, 222, 223, 257–8, 289, 291, 293; Webster & Page *Unlawful Competition* 457–8, 463–8; Van der Merwe & Olivier *Onregmatige Daad* 382–8; Boberg *Delict* 141 et seq; Lee & Honoré *Obligations* 349–55; Erasmus & Gauntlett 7 *LAWSA* para 67. Damage is normally suffered in that clients or potential clients contract with a competitor instead of with the plaintiff (see *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape)* 1968 (1) SA 209 (C) at 221 and 222–3 on general loss of trade). In *African National Congress v Congress of the People* 2009 (3) SA 72 (T) at 75–6 it was held that the law of unlawful competition is applicable to political parties and that a political party may therefore not employ unlawful means to attract votes. If by using a particular name a political party deliberately conveys a false message to voters, it would be competing unlawfully (cf Neethling & Potgieter 2009 *Annual Survey* 818–19). See Knobel 1990 *THRHR* 498 et seq on damage and damages in the misuse of trade secrets. Generally speaking, a plaintiff's position is compared with his or her patrimonial position if the plaintiff alone had the use of the trade secret. The period during which a trade secret will be of benefit is also relevant. See further *Harchris Heat Treatment (Pty) Ltd v Iscor* 1983 (1) SA 548 (T). An interdict is, of course, the most important remedy in order to prevent damage (see Neethling *Van Heerden-Neethling Unlawful Competition* 84–7).

[126] Chaps 4 and 8.

[127] See, eg, *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 204–6 (especially on the assessment of loss of profit in view of the relevant circumstances); *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 (2) SA 276 (E) at 286–7. As far back as *Van Heerden v Paetzold* 1917 CPD 221 at 224 the court held that it would award damages in respect of malicious statements even though special damage had not been proved.

[128] In the case of passing off, damage manifests itself in two ways, viz *(a)* a diversion of custom from the business of the aggrieved party, and *(b)* injury to the business reputation of the aggrieved party. See *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T) at 1138.

[129] *Van Heerden-Neethling Unlawful Competition* 83.

[130] This was earlier incorrectly required in reliance on English law: see, eg, *Patz v Greene & Co*1907 TS 427 at 438; *Grobbelaar v Du Toit* 1917 TPD 433 at 436.

[131] See *International Tobacco Co (SA) Ltd v United Tobacco (South) Ltd* 1955 (2) SA 1 (W) at 17; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 573; *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd* 1997 (4) SA 399 (SCA) at 412–13. See also the following dictum from *Draper v Trist* [1939] 3 All ER 513 (CA) at 519, which is intended to cover cases of passing off but is also of general application: 'That a jury would be entitled, if it were shown that goods were sold under a deceptive appearance or description, to award something more than nominal damages is, in my opinion, the law ... . It is a matter in which the ordinary knowledge of business which a juryman is entitled to use tells him that it is impossible in business to put upon the market large quantities of deceptive goods without doing, at any rate, some damage. What that damage is to be is a matter which is to be considered in the light of all the facts of the case and the whole of evidence led.' See also McGregor *Damages* 1468–9, who states that little attention has been devoted to the computation of damages despite the wealth of reported cases. He adds: 'The principal head of damage is the loss of business profits caused by the diversion of the claimant's customers to the defendant as a result of the defendant's misrepresentation; beyond this, damages may be awarded for any loss of business goodwill and reputation resulting from the passing off ... . Also, the claimant should be

able to recover for further loss of profits through reduction of his prices, provided that the reduction is necessary to compete with the goods passed off by the defendant.' See further Webster & Page *Unlawful Competition* 463 (general principles); 464 (special damage); 466 (loss of business reputation).

[132] *Mills v Salmond* 1863 SC 230 at 234; *Gertzen v Uhlig* 1910 CTR 26 at 30.

[133] Para 8.8.

[134] *Van Ryn Wine and Spirit Co Ltd v Frye* 1909 CTR 389; *J Goddard & Sons v RS Goddard and J Mentz* 1924 TPD 290.

[135] Neethling *Van Heerden-Neethling Unlawful Competition* 83.

[136] In other words, the court itself does not determine the loss but directs an official to do so. See, however, *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 328, where the court held that such a procedure seems to be not apt under our law (see also para 8.4 n 48). But see *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae), President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) at 62–3 where the court, with reference to *Harvey Tiling* supra 330, ordered an 'enquiry into damages' in a loss-of-land-use claim involving 'constitutional damages' (cf paras 1.6.5, 3.3). See also *Haggar & Co v SA Tailorscraft (Pty) Ltd* 1985 (4) SA 569 (T); *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 (C) (stating that there are no procedural principles in the Uniform Rules of Court that support such a remedy); Webster & Page *Unlawful Competition* 467–8.

[137] See *Peter Jackson (Overseas) Ltd v Rand Tobacco* 1938 TPD 450 at 457; *William Laser v Sabon Precision Machine Co (Pty) Ltd* 1954 (2) PH A37 (W). From more recent decisions it would appear that a court will issue such an order only if there was a relationship of trust between the parties or if such a duty is based on statute or a contract (see *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 963; *Klimax v Manufacturing Ltd v Van Rensburg* 2005 (4) SA 445 (O) 459: 'It is the practice of the English Courts for the plaintiff, in an action for passing-off or infringement, to elect whether he will ask for ''an inquiry as to damages'' or ''an account of profits''. Recent decisions of our courts reveal a consistent refusal to adopt the English practice on the basis that neither remedy is competent under the South African law. The right to an account of profits exists under our law only when there is a substantive duty to account, arising by virtue of contract, statute or fiduciary relationship. A mere debtor and creditor relationship does not give rise to such a duty.' Cf also *Rectifier and Communication Systems (Pty) Ltd v Harrison* 1981 (2) SA 283 (C) at 286 et seq. In *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 (C) at 66 the court rejected such a remedy as it 'would run counter to the fundamental precept of our law that the commission of a delictual act entitles the injured party to compensation from the wrongdoer *for calculable pecuniary loss actually sustained or likely to be sustained* in consequence of the wrong'. Such a remedy may still develop in our law, but only through legislation.

Webster & Page *Unlawful Competition* 468 submit that at present the best course a plaintiff may take is to attempt to set out its claim in the usual manner but ask for judgment on it to be withheld until the matter of liability has been determined. See also the approach suggested in *Harvey Tiling (Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 328–30.

[138] Cf *Smith and Nephew Ltd v Mediplast Pharmaceutical Sales CC* 1999 (2) SA 646 (D) at 655, 656.

[139] Kelbrick 1998 *SA Merc LJ* 165–6. According to Kelbrick both the Trade Marks Act and the Copyright Act (see para 13.7) make provision for a procedural, not a substantive, remedy. An inquiry in South Africa is thus a procedural aid to quantifying damages, not a substantive remedy.

[140] See in general Dean *Copyright* 2A–6 to 2A–8; 5–42 to 5–45; 1986 *SALJ* 103; Copeling *Copyright*59–66; 5(2) *LAWSA* paras 24–64; Erasmus & Gauntlett 7 *LAWSA* para 75; s 24 of the Copyright Act 98 of 1978; Cornish *Intellectual Property* 60–6. See also s 10 of the Performer's Protection Act 11 of 1967; and s 21 of the Heraldry Act 18 of 1962.

[141] See, eg, *Braby v Donaldson* 1926 AD 337 at 344; *Condé Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (C) at 87: 'As far as the damages are concerned there has been no proof of specific or special damage. It does not seem to me to be necessary to prove such damages for ... damages for infringement of copyright are at large ... [I]t was laid down that an element in assessing damages for breach of copyright is the vulgarizing of the work by the unlawful publication.' See also Copeling *Copyright* 59: 'So, for example, a plaintiff would be entitled to sue for the general loss to his trade occasioned by the infringement, which would include loss incurred as a consequence of the vulgarization of his work by the infringing copy.'

[142] See, eg, *Priority Records (Pty) Ltd v Ban-Nab Radio and TV* 1988 (2) SA 281 (D) at 292: 'The damages claimable under s 24(1) of the Act are ordinary delictual damages regulated by the common law. Such damages are ''aimed at compensating the proprietor for his patrimonial loss, actual or prospective, sustained through the infringement''. The authorities in n 141 above refer to the position when the English law of copyright was in force in South Africa, whereas the current Act contains different provisions. See,

however, *CCP Record Co (Pty) v Avalon Record Centre* 1989 (1) SA 445 (C) at 449: '[D]amages for breach of copyright are said to be ''at large'' which means that even damages for vulgarization of a plaintiff's work, awarded by way of assessment rather than computation, are competent.'

[143] See on lost royalties as a measure of damages Dean *Copyright* 2–A7 for a list of examples. See also *SA Music Rights Organization Ltd v Trust Butchers (Pty) Ltd* 1978 (1) SA 1052 (E) at 1057–8, where the plaintiff not only recovered a licence fee as damages but also the cost of proving the infringement of copyright. See further *Performing Rights Society Ltd v Berman* 1966 (2) SA 355 (R) at 356; *Performing Rights Society v Butcher* 1973 (1) SA 562 (R). In the case where music is performed, the number of persons attending the performance as well as the admission fee may be used in assessing the loss. Thus, the loss of business profits is recoverable. See in general *Performing Rights Society Ltd v Matthysen* 1941 NPD 269.

[144] See the Copyright Amendment Act 125 of 1992 and s 55 of the Intellectual Property Laws Amendment Act 38 of 1997.

[145] In assessing damages the court inter alia takes the following into account: the extent and nature of the infringement of copyright; the amount which would be payable to the owner in respect of the exercise of copyright by some other person. Section 24(1B) states that the court may direct that an inquiry be held to determine this amount.

[146] See *Paramount Pictures Corp v Video Parktown (North) (Pty) Ltd* 1983 (2) SA 251 (T) and *Montres Rolex SA v Kleynhans* 1985 (1) SA 55 (C) (decided under previous legislation), where it was held that an 'account of profits' is a procedural remedy which may be employed by a plaintiff using the action procedure to determine and assess damage and damages. However, the Full Bench decision in *Video Parktown North (Pty) Ltd v Paramount Pictures Corp* 1986 (2) SA 623 (T) is to the effect that there is no such procedural remedy. Damage must be established in accordance with the usual rules of court. The substantive remedy of 'account of profits', which is based on English law, is no longer part of our law. However, Dean 1986 *SALJ* 103 et seq criticizes the latter decision and concludes (at 116): 'I submit that the position in our law of copyright is that, unlike other branches of law, the English-law remedy of an account of profits [see, eg, Cornish *Intellectual Property* 63–4] is a remedy which is available to a copyright owner and should be recognized by our courts.' He argues that this remedy should also be available in motion proceedings (see, eg, *Kalamazoo Division (Pty) Ltd v Gay* 1978 (3) SA 184 (C) at 192. See, however, Copeling *Copyright* 61–2, who submits that South African law knows no remedy which is directly corresponding to an account of profits in English law: 'This is not to say that claims for an account of profits are unknown in South African law. On the contrary, such claims are frequently made [eg between partners], but they imply no more than an inquiry into the profits which the defendant has made as a consequence of his breach of the plaintiff's right ... .' A plaintiff, however, does not always recover the profit in question since he or she has to prove that it coincides with his loss.

Where, eg, A prints a number of infringing copies of B's book and sells these at twice the price of B's original copies, this action will not affect sales of B's book and B may not claim such profits. See *Chopra v Sparks Cinemas (Pty) Ltd* 1973 (4) SA 372 (D) at 379 on the position under the previous Act. See further Rutherford 1980 *MBL* 100. See *JL & JE Walter Enterprises (Pvt) Ltd v Kearns* 1990 (1) SA 612 (Z), where it was held, in interpreting a provision similar to the former s 24(1), that an account of profits as known by English law was recognized in Zimbabwe. The court thus ordered an investigation into profits made by the defendant and awarded it to the plaintiff.

[147] According to s 24(3), a court may, if an infringement of copyright is proved, having regard to all material considerations as well as the flagrancy of the infringement and benefit shown to have accrued to the defendant, award such additional damages as it may deem fit if it is satisfied that that effective relief would not otherwise be available to the plaintiff. See on this Copeling *Copyright* 65–6. See *Priority Records (Pty) Ltd v Ban-Nab Radio and TV* 1988 (2) SA 281 (D), where the court held that the legislature could not have intended s 24(3) to permit the award of damages not recognized by the South African common law; damages may be similar to that obtainable in terms of the actio iniuriarum but is not restricted thereto. In casu the court refused to award additional damages (the plaintiff received only R1,50 as the loss of profit on two cassettes!) See for a discussion Faul 1989 *TSAR* 283. See further *CCP Record Co (Pty) Ltd v Avalon Record Centre* 1989 (1) SA 445 (C) at 449–50: '[O]ne must not by peering at the words ''effective'' and ''additional'' in the expressions ''effective relief'' and ''additional damages'' lose sight of the fact that, by making benefit to a defendant and flagrancy criteria for an award of damages, the section not merely augments existing delictual remedies by widening the power of the Court to award damages but introduces relief where no cause of action for relief had existed before. Additional damages, then, are damages of a kind which would not, but for the provisions of s 24(3), be recoverable at all, either because they are unprovable (and the scope for finding damages unprovable in our law is small) or because, other than in s 24(3), no cause of action for their recovery exists ... I think that the Court is in s 24(3) given an enormously wide discretion, limited only by the consideration that the money which the defendant is made to pay must go to providing relief for the plaintiff. The defendant may not simply be fined. I do not think that it is helpful

to call the ''additional damages'' ''punitive'' or ''exemplary''. Too much imported confusion and controversy surrounds these terms.'

In casu the court awarded R3 000 as additional damages. See Duba 1989 *SALJ* 467 for a critical discussion. See further Copeling *Copyright* 63–5 on the claiming of infringing copies or plates and the possibility of recovering nominal damages in respect of the possession thereof.

[148] As amended by Intellectual Property Laws Amendment Act 38 of 1997.

[149] See s 10*(a)*, which allows recovery of an amount not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, without any proof of damage. Section 10*(b)* also provides for damages in respect of loss actually sustained.

[150] See s 21. Someone who misuses a registered heraldic representation, name or uniform may be ordered to pay damages not exceeding R1 000. No actual proof of loss is required. Alternatively, a court may award such damages as may appear to it to be reasonable in the circumstances, or grant an interdict or both award damages and grant an interdict. See Smith 10(2) *LAWSA* para 480.

[151] See Steyn 20(1) *LAWSA* para 185 et seq; ss 65–71 of the Patents Act 57 of 1978; Burrell *Patent*381–7; Erasmus & Gauntlett 7 *LAWSA* para 77; Designs Act 195 of 1993; Plant Breeders' Rights Act 15 of 1976.

[152] *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing (Pty) Ltd* 1978 (3) SA 465 (A) at 471 (where the court dealt with the infringement of a registered design); Steyn 20(1) *LAWSA* para 189. See, however, *SA Cabinet Works (Pty) Ltd v Cohen* 1918 CPD 69 at 70, where the court apparently awarded nominal damages. Burrell *Patent* 379 concludes that the cause of action (see para 7.4) does not depend upon the existence of 'commercial loss'.

[153] See, eg, Steyn 20(1) *LAWSA* para 189; s 65(3)*(c)* of the Patents Act 57 of 1978.

[154] It may thus include profits which the plaintiff could have made in respect of the sale of articles which he or she could have sold but for the defendant's conduct (see *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) at 471. In casu it was, however, held that the plaintiff would not have sold all the infringing articles but for the defendant's conduct (above at 472)). The position of the plaintiff vis-à-vis other competitor(s) must also be taken into account. Cf further *Omega Africa* (supra at 475) on the calculation of loss of profit; (at 476) on an account etc of the defendant's profit. See further Burrell *Patent* 383–4 on a plaintiff's loss of profit; op cit 380 on an 'enquiry as to damages' which is permitted here but not an 'account of profits'.

[155] *Edison-Bell Phonographic Co v Garlick* 1899 SC 543 at 544, 545; *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) at 474.

[156] See *Frank and Hirsch (Pty) Ltd v Rodi and Wienenberger Aktiengesellschaft* 1960 (3) SA 747 (A) at 752; *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 (3) SA 465 (A) at 476. The profit earned by the defendant through the unlawful use of the plaintiff's immaterial property may, in an appropriate case, be used in the assessment of damages. This will be the position especially where this is easier to prove than the loss sustained by the plaintiff (see Van der Walt *Sommeskadeleer*288).

[157] See, eg, *Firestone SA (Pty) Ltd v Gentiruco AG* 1968 (1) SA 611 (A) at 628.

[158] As amended by Intellectual Property Laws Amendment Act 38 of 1997.

[159] See Erasmus & Gauntlett 7 *LAWSA* para 77.

[160] See Steyn 20(1) *LAWSA* para 189 et seq—cf eg s 70 of the Patents Act 57 of 1978. See further in general *Selero v Chauvier* 1982 (2) SA 208 (T); *Par Excellence Colour Printing (Pty) Ltd v Ronnie Cox Graphic Supplies (Pty) Ltd* 1983 (1) SA 295 (A) (action by purchaser of infringing article against seller). See also Burrell *Patent* 385–7 on 'parasitic damages', interest on damages and further matters. See s 66 of the Patents Act regarding restrictions on the recovery of damages.

[161] As amended by Intellectual Property Laws Amendment Act 38 of 1997.

[162] See s 35(3). This relates to damage actually suffered. See the general principles on the infringement of patents above, which are probably applicable here. See also Burrell 8(1) *LAWSA* paras 268–75.

[163] Section 47 of the Plant Breeders' Rights Act 15 of 1976 (as amended by Act 15 of 1996). It is suggested that the general principles in regard to damages on account of an infringement of a patent are also relevant here.

[164] See Neethling & Potgieter *Delict* 357–60; Van der Walt *Law of Neighbours* 331 et seq; Van der Merwe & Blackbeard 1 *LAWSA* paras 464–9; Scott '*Caveant* dog owners' 95. See on the actio de feris (damage by wild animals) Neethling & Potgieter op cit 361; Van der Walt op cit 331, 332, 335; Van der Merwe & Blackbeard op cit para 475 et seq; *Le Roux v Fick* 1879 Buch 29 at 41; Erasmus & Gauntlett 7 *LAWSA* para 69; Lee & Honorè *Obligations* 372. See also n 165 below. See on the liability for damage caused by animals in terms of the Aquilian action Van der Merwe & Blackbeard op cit para 481 et seq; Lee

& Honoré *Obligations* 373–4; McKerron *Delict* 256–7; Van der Walt *Law of Neighbours* 331 et seq, 336; para 9.5.5.

[165] See para 13.1 on damage to property (see also *Robertson v Boyce* 1912 AD 367 at 373; *O'Callaghan v Chaplin* 1927 AD 310; *SAR & H v Edwards* 1930 AD 3; *Le Roux v Fick* 1879 Buch 29; *Kuit v Union-Castle Steamship Co* 1905 SC 39; *Maree v Diedericks* 1962 (1) SA 231 (T); *Coetzee & Sons v Smit* 1955 (2) SA 553 (A)); para 14.3 on medical costs and loss of income and earning capacity (see also *Solomon v De Waal* 1972 (1) SA 575 (A); *SAR & H v Edwards* supra; *Geldenhuis v Wilson* 1949 (4) SA 534 (T); *Batchoo v Crick* 1941 NPD 19); para 5.6 on non-patrimonial loss (pain and suffering) (see *Lentzner v Friedman* 1919 OPD 20; *Chetty v Minister of Police* 1976 (2) SA 450 (N); *Solomon v De Waal*supra; *Creydt-Ridgeway v Hoppert* 1930 TPD 664; *Klem v Boshoff* 1931 CPD 188; *Fourie v Naranjo*2008 (1) SA 192 (C) at 201–2 (personal injuries and emotional shock; cf Scott '*Caveant* dog owners' 103–4; Potgieter 'Skuldlose aanspreeklikheid' 210–13). See also *Paul v Rappoport* 1930 WLD 1 (where the question of whether dependants may claim was left open). The extent of the defendant's liability in terms of the actio de pauperie should be limited in accordance with the flexible criterion for legal causation (*Fourie* supra at 202; Neethling & Potgieter *Delict* 360). See in general Lee & Honoré *Obligations* 368–9; Erasmus & Gauntlett 7 *LAWSA* para 62; Van der Merwe & Blackbeard 1 *LAWSA* paras 464 et seq; Loubser & Midgley (eds) *Delict* 360–4.

[166] See Neethling & Potgieter *Delict* 360–1; Van der Merwe & Blackbeard 1 *LAWSA* paras 470 et seq; Van der Merwe & Olivier *Onregmatige Daad* 494; Loubser & Midgley (eds) *Delict* 364; Lee & Honoré *Obligations* 370–1; Erasmus & Gauntlett 7 *LAWSA* para 68; Van der Merwe 1973 *THRHR* 112; *Van Zyl v Kotze* 1961 (4) SA 214 (T); *Heron v Skinner* 1971 (1) SA 399 (RA); *Potgieter v Smit* 1985 (2) SA 690 (D); *Van Zyl v Van Biljon* 1987 (2) SA 372 (O); *Pieters v Botha* 1989 (3) SA 607 (T) (damages for loss of crops).

[167] *Vermaak v Du Plessis* 1974 (4) SA 353 (O) at 359; *Crous v Jaffe Bros* 1921 OPD 2; but see also the obiter dictum in *Coetzee & Sons v Smit* 1955 (2) SA 553 (A) at 558. See further *Constant v Louw*1951 (4) SA 143 (C).

[168] *Van Zyl v Kotze* 1961 (4) SA 214 (T) at 217.

[169] Voet *Commentarius* 9.1.1. In such cases provision has to be made for contingencies as well as saved expenses. See Van der Merwe & Olivier *Onregmatige Daad* 496 on the position where the animals of different owners are involved. See *Pieters v Botha* 1989 (3) SA 607 (T) at 616–17 (where damages were recovered with the Aquilian action).

[170] Neethling & Potgieter *Delict* 362; Van der Walt *Law of Neighbours* 251–4; Erasmus & Gauntlett 7 *LAWSA* paras 70–1; Van der Merwe & Olivier *Onregmatige Daad* 499; Loubser & Midgley (eds) *Delict*364–5; Lee & Honoré *Obligations* 362.

[171] For damage caused by objects thrown out or falling from a building. See *Colman v Dunbar* 1933 AD 141; *Bowden v Rudman* 1964 (4) SA 686 (N) at 691; *Clair v Port Elizabeth Harbour Board* 1886 EDC 311; *Silansky v Board of Executors* 1916 CPD 683; *Lentzner v Friedman* 1919 OPD 20.

[172] See Van der Merwe *Sakereg* 185, 205–10, 211, 346, 494; Van der Walt *Law of Neighbours* 231–6; 251 et seq; Erasmus & Gauntlett 7 *LAWSA* para 72. See in general for damage where water plays a role Van der Walt op cit 204 et seq; Vos *Water Law* 77–83, 125–6, 193–4.

[173] See, eg, *Cape Town Council v Benning* 1917 AD 315; *Van Schalkwyk v Van der Wath* 1963 (3) SA 636 (A); *Redelinghuys v Bazzoni* 1976 (1) SA 110 (T); *Williams v Harris* 1998 (3) SA 970 (SCA); *Pappalardo v Hau* 2010 (2) SA 451 (SCA); cf Van der Walt *Law of Neighbours* 211 et seq, 226–8.

[174] See Van der Merwe *Sakereg* 207; Van der Walt *Law of Neighbours* 232; Badenhorst et al *Law of Property* 128. Damages are assessed in the normal manner.

[175] *Council v Benning* 1917 AD 315; see Van der Merwe *Sakereg* 210; Van der Walt *Law of Neighbours* 233. All damage caused by the artificial change of the course of water may be recovered.

[176] See Van der Walt *Law of Neighbours* 237–323; Milton 1969 *Acta Juridica* 123–269; Van der Merwe *Oorlas*; Neethling & Potgieter *Delict* 121–2, 363–4; Lee & Honoré *Obligations* 296–301; Van der Merwe *Sakereg* 196; Church & Church 19 *LAWSA* paras 202–6; Silberberg & Schoeman *Law of Property*111–19.

[177] Cf Van der Walt *Law of Neighbours* 260 et seq, 291 et seq, 301–2 who remarks as follows (at 292): 'Judging from recent case law it appears as if the doctrinal distinction between nuisance in the narrower sense (causing an annoyance or disturbance for neighbours' use and enjoyment of their property; generally prevented, terminated or mitigated by an interdict) and nuisance in the wider sense (causing actual damage to property; founding a claim for damages) is crystallising into a tendency to rely on interdicts to rectify the former (annoyance) and on a normal Aquilian action for damages to rectify the latter (damage).' On the related issue of *encroachment* (permanent physical intrusions upon neighbouring land when building

works or plants violate the boundary line between properties and encroach onto neighbouring land) and its distinction from nuisance, see Van der Walt *Law of Neighbours*132–203, 2008 *SALJ* 592 et seq. Here one view is that courts have a wide discretion to grant damages instead of a demolition order on the basis of fairness, although such discretion is not unfettered (cf eg *Rand Waterraad v Bothma* 1997 (3) SA 120 (O) at 130 et seq; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C)). Van der Walt 2008 *SALJ* 608 summarizes the position as follows: 'In principle, an order for compensation in lieu of demolition should be regarded as an exceptional remedy, to be used only when the circumstances justify it. This might appear to indicate that the compensation award is better suited for instances where a small encroachment cannot be demolished, but the courts do seem willing to grant such an order even if the encroachment is significant, with the effect that the affected landowner is effectively deprived of all use of her own land', and, (at 626), '[g]enerally speaking, it seems as if South African law has taken a decisive step towards acceptance of liability rules in encroachment cases. Despite—in fact contrary to—the traditional rhetoric, injunctive relief does not appear to be the default remedy in cases where the encroachment is significant and a compensation award is much more likely'. The matter is however complicated and legislative reform appears to be necessary to clarify the issues involved, including 'the considerations that influence the decision when to deny injunctive relief and grant compensation instead (always, or just when the balance of loss favours the encroacher?) and the basis for calculation of compensation (both for denial of injuctive relief an for forced sale of the land). In the meantime, the courts should be careful with orders that deny the affected landowner injunctive relief, especially in large or total encroachments, and they should abstain completely from ordering transfer of the affected land to the encroacher' (627–8; see also Van der Walt *Law of Neighbours* 167 et seq, 202–3).

[178] Cf Van der Walt *Law of Neighbours* 291 et seq; Badenhorst et al *Law of Property* 114–16.

[179] See para 13.1 and *Cosmos (Pvt) Ltd v Phillipson* 1968 (3) SA 121 (R) on damage to property; para 14.3 and *Herrington v Johannesburg Municipality* 1909 TH 179 at 203 on bodily injuries. See also *Flax v Murphy* 1991 (4) SA 58 (W) (reasonable and necessary cost to render a wall safe). Van der Walt *Law of Neighbours* 293 states that generally speaking, 'compensation for damage caused by nuisance could be claimed for expenditure incurred in trying to prevent or mitigate the damage or loss; actual loss caused by material damage to corporeal property; and depreciation in the value of property, provided the loss is permanent and irreversible'. See further *Gibbons v SAR & H* 1933 CPD 521 at 537; *Eato v Woodstock Municipal Council* 1909 SC 551 at 564–5; *Bell v East London Municipality* 1928 EDC 354 at 363; *JL Armitage v Pietermaritzburg Corp & GS Armitage* 1908 NLR 91 at 102, 103, 105.

[180] *Wynberg Municipality v Dreyer* 1920 AD 439; *Bhayroo v Van Aswegen* 1915 TPD 195 at 197, 199; *Turkstra Ltd v Richards* 1926 TPD 276 at 278, 284. Cf also Lee & Honoré *Obligations* 303: 'Where a nuisance merely causes inconvenience, discomfort or annoyance the plaintiff will not recover damages unless the nuisance diminishes the value of his property or otherwise causes him pecuniary loss.' McKerron *Delict* 230 opines that damage includes 'interference with the plaintiff in the lawful enjoyment of his property'. (See *Holland v Scott* 1882 EDC 307 at 322.) He also appears to regard material discomfort as compensable damage. There may be merit in this suggestion but there is probably insufficient authority for this proposition. See also *Herrington v Johannesburg Municipality* 1909 TH 179 at 203, where the court refused to award compensation for mere physical inconvenience. Van der Walt *Law of Neighbours* 295–6 states that 'the minimal annoyance and even actual loss or damage caused by stray golf balls being hit into one's garden [*Allaclas Investments (Pty) Ltd v Milnerton Golf Club* 2008 (3) SA 134 (SCA)] or by the threat of infectious disease in one's cattle herd [*PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA)] has to be tolerated without the prospect of compensation, provided it remains within the bounds of reasonableness as this standard has been developed by the courts'.

[181] For instance customers who avoid business premises. See also *Herrington v Johannesburg Municipality* 1909 TH 179 at 203; *Turkstra Ltd v Richards* 1926 TPD 276 at 277, 283.

[182] For instance, where an owner has to vacate his or her premises temporarily and find alternative accommodation. See further in general *Van der Westhuizen v Du Toit* 1912 CPD 184 (an award of R20 despite proof of actual damage); *Harkness v Knapp* 1912 NPD 599 (R200 for 'material discomfort' and depreciation in value of property); *Bhayroo v Van Aswegen* 1915 TPD 195 (small amount of damages awarded so that moistness may be isolated); *Van der Merwe v Carnarvon Municipality* 1948 (3) SA 613 (C); Price 1949 *SALJ* 379.

[183] See para 9.4 on satisfaction; Neethling 1979 *THRHR* 448 et seq for the view that a claim for compensation on the basis of the actio iniuriarum could be available to the plaintiffs in *Gien v Gien* 1979 (2) SA 1113 (T) for the infringement of their physical integrity (inter alia sleep deprivation and other physical effects) caused by sustained loud noise. See also para 15.3.3; *Wynberg Municipality v Dreyer*1920 AD 439.

[184] See *Hefer v Van Greuning* 1979 (4) SA 952 (A); Boberg *Delict* 170–4. In the above-mentioned case the parties had agreed on the quantum of damages. The court (above at 960) therefore left the

question open whether a concrete (subjective) or abstract (objective) approach to damages should be adopted. See Bloembergen *Schadevergoeding* 72 et seq. See above para 13.3 on the loss of use of property. See further Pauw 1980 *SALJ* 221; *Adams v De Klerk* 16 SC 456.

[185] See McKerron *Delict* 225–6, who wants it to apply to the disturbance of possession of movables. See also Lee & Honoré *Obligations* 295–6.

[186] See also Blecher 1978 *SALJ* 11–13, who submits that a spoliatus in the case of the mandament of spolie is entitled to damages equal to his or her interest in retaining the property until the dispute has been decided on the merits. Blecher sees this as possessory damage which is not Aquilian in nature. See for criticism Van der Merwe *Sakereg* 142. See further Van der Walt 1986 *TSAR* 229–32.

[187] See para 13.3 on the loss of use of an article (which includes loss of profit). Any actual patrimonial loss which may reasonably be attributed to the defendant should be recoverable. Where an iniuria is committed in the process, satisfaction may be recovered in respect thereof.

[188] See Van der Merwe *Sakereg* 198–201; Van der Walt *Law of Neighbours* 125–7; Van der Walt 1987 *THRHR* 462; Van der Vyver 1988 *SALJ* 9–16; Silberberg & Schoeman *Law of Property* 119–21.

[189] See, eg, *Grieves v Anderson* 1901 NLR 225; *Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd* 1923 WLD 99 at 112; *East London Municipality v SAR & H* 1951 (4) SA 466 (E) at 480, 483; *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 (1) SA 169 (D) at 175; *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 811; *Foentjies v Beukes* 1977 (4) SA 964 (C) at 966; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D).

[190] *Gordon v Durban City Council* 1955 (1) SA 634 (N) at 639; *Foentjies v Beukes* 1977 (4) SA 964 (C) at 967; *Demont v Akals' Investments (Pty) Ltd* 1955 (2) SA 312 (N) at 316. The mere removal of support does not in itself establish a cause of action in the absence of damage. See in general Van der Walt *Law of Neighbours* 125–7.

[191] *Gijzen v Verrinder* 1965 (1) SA 806 (D) at 815. In such a case the plaintiff must prove depreciation and that it was caused by the excavation and the withdrawal of support (cf Van der Walt *Law of Neighbours* 126).

[192] Para 13.1.

[193] Para 13.3.

[194] If bodily injuries have been caused, the principles stated in para 14.3 should apply. See, however, *Foentjies v Beukes* 1977 (4) SA 964 (C), where the court refused to compute damages on a delictual basis as the decline in the value of property since liability is in casu not based on fault. In this case the defendant, who had removed a sand dune on his land which caused a part of the plaintiff's land to subside and threatened an ash road, was held liable for the cost of moving a portion of the road and refilling the subsided part with sand. Van der Merwe *Sakereg* 200 finds this approach acceptable.

[195] Van der Merwe *Sakereg* 542–3; Van der Walt *Law of Neighbours*.

[196] See in general *Loxton v Staples* 1884 BAC 381; *Kimberley Mining Board v Stanford* 1882 BAC 129; *Wilhelm v Norton* 1935 EDL 143; *Weilbach v Diedriksen & Bruwer* 1896 OR 80; *Conradie v Kloppers* 1893 SC 189; *Neilson v Mahoud* 1925 EDL 26; *Setlogelo v Setlogelo* 1921 OPD 161 at 169 ('There should therefore be judgment for the plaintiff for a sum [R40] which is more than nominal though not excessive'); *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A); *Botha v Minister of Lands*1965 (1) SA 728 (A) at 740, 741; *Moller v SAR & H* 1969 (3) SA 374 (N) at 381.

[197] See Neethling & Potgieter *Delict* 290–7; Boberg *Delict* 103–48; Loubser & Midgley (eds) *Delict*224 et seq; Lee & Honoré *Obligations* 252–3.

[198] Para 3.4.

[199] See, eg, para 13.4 on misrepresentation; para 13.6 on unlawful competition; paras 11.1.3, 11.2.2.2 and 14.7.2 on actions based on the death or injury of another; para 13.3 on loss of use of property; para 13.11 on interference with contractual relations.

[200] See in general Neethling & Potgieter *Delict* 290 et seq and, eg, the following cases (the claimants did not succeed on the merits in all cases): *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) (where damage took the form of the loss of the proceeds of a cheque); *Arthur E Abrahams and Gross v Cohen* 1991 (2) SA 301 (C) (financial loss through a failure to pay out timeously the proceeds of policies upon the death of a person to the beneficiaries: viz the difference between what they had in fact received and the investment they would have had with timeous payment); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) (loss of production upon interruption of electricity supply to a factory—saved expenses taken into account); see also *Spartan Steel & Alloys Ltd v Martin & Co Contractors Ltd* 1973 (1) QB 27 (CA) (expenses to prevent further loss of profit after interruption of electricity supply to a factory); *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D) (increased expenditure in that the plaintiff had to pay additional demurrage

upon delay in the discharge of a tanker); *Franschhoekse Wynkelder (Ko-op) Bpk v SAR & H* 1981 (3) SA 36 (C) (loss of income resulting from damage to grape harvest of farmers); *Weller v Foot and Mouth Disease Research Institute* [1966] (1) QB 569 (loss of income from closure of cattle markets as a result of spreading of a disease for which the defendant was to blame); *Tobacco Finance (Pvt) Ltd v Zimnat Ins Co Ltd* 1982 (3) SA 55 (Z) (loss resulting from the direct payment of the proceeds of a policy to a farmer instead of to the person who should have received it); *Bedford v Suid-Kaapse Voogdy Bpk* 1968 (1) SA 226 (C) (loss of the opportunity to obtain shares at a lower price); *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T) (expenses in connection with and loss of use of a hired vehicle); *Zimbabwe Banking Corp Ltd v Pyramid Motor Corp (Pvt) Ltd* 1985 (4) SA 553 (Z) (loss of a cheque); *Barlow Rand Ltd v Lebos* 1985 (4) SA 341 (T) (wasted legal costs); *DC Ltd v Bank of Credit and Commerce Zimbabwe Ltd* 1990 (3) SA 529 (Z) (loss in connection with a cheque—interest payable from the date of wrongful payment); *Worcester Advice Office v First National Bank of SA Ltd* 1990 (4) SA 811 (C); *Bonitas Medical Aid Fund v Volkskas Bank Ltd* 1991 (2) SA 231 (W); *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991 (4) SA 82 (ZS); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A); *Knop v Johannesburg City Council* 1995 (2) SA 1 (A); *Ries v Boland Bank PKS Ltd* 2000 (4) SA 955 (C); *The Oil Rig South Seas Driller: Sheriff of Cape Town v Pride Foramer SA* 2001 (3) SA 841 (C); *Aucamp v University of Stellenbosch* 2002 (4) SA 544 (C) ('disappointed beneficiary': plaintiffs unable to claim death benefits in terms of group insurance scheme due to negligent misrepresentation of deceased's employer); *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* [2007] 2 All SA 489 (SCA) (loss of income from shipment of fruit that perished due to negligent failure to advise plaintiff of a delay in the commencement of the voyage and a change in the proposed route of the carrier); *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA); *Minister of Finance v Gore* 2007 (1) SA 111 (SCA); *Steenkamp v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA); cf *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA) (loss due to unsuccessful tenders); *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) (loss arising from failures in aquarium exhibit tanks due to negligent design); *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) (loss flowing from negligence in adjudicative process); *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) (loss resulting from closure of toll road due to spillage of truckload of asbestos; cf Neethling & Potgieter 2009 *Annual Survey* 810–7); *Brooks v The Minister of Safety and Security* 2008 (2) SA 397 (C), 2009 (2) SA 94 (SCA) (dependant suffering loss when breadwinner jailed due to the latter's own intentional wrongdoing); *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) at 510 (plaintiff awarded out-of-pocket expenses for infringement of his right to administrative justice after tendering unsuccessfully for a civil-engineering contract); *Page v First National Bank Ltd* 2009 (4) SA 484 (E) at 491 (loss suffered in overseas investment due to negligent advice); *Delphisure Group Insurance Brokers Cape (Pty) Ltd v Dippenaar* 2010 (5) SA 499 (SCA) (wheat farmers suffering loss as a result of the defendants' negligent misrepresentation that a crop insurance product was in place, thereby causing them not to take out insurance with another insurer); *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) (manufacturer negligently supplying foodstuff containing illegal colourant to client, thereby causing distributor, who had no contract with manufacturer, pure economic loss). See also *Muller v Government of the RSA* 1980 (3) SA 970 (T) at 975, where the Deeds Office failed to register a bond: 'The amount of damages jointly sustained by Snyman [purchaser of the property with unregistered bond] and the Allied ... is the amount which it would have cost, at the relevant date to free the said land from the burden of the Standard Bank bond, namely, the amount owing thereunder on such date' (cf para 4.5 on time of the assessment of damage). See further *Ndonga v Crous* 1962 (2) SA 591 (E) at 598 on the sale of the plaintiff's interest in a house. According to the court, damages are to be assessed as 'all damage, loss of profits, costs and expenses proved'. See also *McLelland v Hulett* 1992 (1) SA 456 (D) (a shareholder's loss caused by the non-exercise of an option to purchase land by the directors of a company); cf O'Brien 1989 *TSAR* 279; Hutchison 2001 *SALJ* 651–8.

[201] Para 4.2.2.

[202] Para 11.5.

[203] The delictual requirement of wrongfulness also plays an important role in keeping liability within acceptable limits (see Neethling & Potgieter *Delict* 291–7 for a summary of the various factors that play a role in determining whether a legal duty to avoid pure economic loss existed; see also *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at 295–8 for a discussion of four relevant factors). Reasonable foreseeability also plays a role (*Arthur E Abrahams and Gross v Cohen*1991 (2) SA 301 (C): 'possibility of that kind of loss was reasonably foreseeable'; *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) at 163 (cf Neethling & Potgieter 2009 *Annual Survey* 810–17); *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D) at 659). See in general *Callinicos v Burman* 1963 (1) SA 489 (A); *Halsey v Jones* 1962 (3) SA 484 (A); *Broderick Properties v Rood* 1964 (2) SA 310 (T); *Barclays Bank DCO v Minister of Lands*1964 (4) SA 284 (T); *Smit*

v Van Wyk 1966 (3) SA 210 (T); *Trust Bank van Afrika Bpk v Geregsbode Middelburg* 1966 (3) SA 391 (T); *Meskin v Anglo American Corporation* 1968 (4) SA 793 (W); *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia* 1972 (2) SA 703 (R); *Tonkwane Sawmill Co Ltd v Fimalter*1975 (2) SA 453 (W); *Philsam Investments (Pvt) Ltd v Beverley Building Society* 1977 (2) SA 546 (R); *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A); *Worcester Advice Office v First National Bank of SA Ltd* 1990 (4) SA 811 (C); *Bonitas Medical Aid Fund v Volkskas Bank Ltd* 1991 (2) SA 231 (W). To address the fear of limitless liability, the flexible criterion for legal causation should be given due regard (see para 11.5.4.1; cf Van Aswegen 1993 *THRHR* 192–3).

[204] Neethling & Potgieter *Delict* 306–9; Loubser & Midgley (eds) *Delict* 230–3; Van der Merwe & Olivier *Onregmatige Daad* 370–82; Lee & Honoré *Obligations* 306; Erasmus & Gauntlett 7 *LAWSA* para 78; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A); O'Brien 1989 *TSAR* 274.

[205] See para 11.1.4 on the claims by non-owners when property is damaged; paras 11.1.3 and 14.7.2 on claims based on the injury or death of another; para 13.6 on unlawful competition; para 13.3on loss of the use of property.

[206] See, eg, *Jansen v Pienaar* 1881 SC 276 (enticement of a servant allegedly caused a loss of cattle but only nominal damages awarded); *Roberts Construction v Verhoef* 1952 (2) SA 300 (W) (the court held that it was in casu so difficult to assess damages that an alternative remedy would be more suitable); *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D&C) (defendant's holding over had interfered with plaintiff's contractual relationship and caused a loss of profit); see also *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 204, where the court held the damage caused by the enticement of staff to be so uncertain that no award was made in respect thereof. See further in general *Isaacman v Miller* 1922 TPD 56; *Alliance Building Society v Deretich* 1941 TPD 203; *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) Pty Ltd* 1968 (1) SA 209 (C) at 215; *Lehmbeckers Transport (Pty) Ltd v Rennies Finance (Pty) Ltd* 1994 (3) SA 727 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA).

[207] See, eg, *British Motor Trade Ass v Salvadori* 1949 Ch 556.

[208] See Neethling & Potgieter *Delict* 317–20, 374–5; Loubser & Midgley (eds) *Delict* 243–51; Boberg *Delict* 193–206; Van der Merwe & De Jager 1980 *SALJ* 83.

[209] See on non-patrimonial loss chap 15.

[210] See para 13.1 on damage to property; para 13.3 on the loss of use of property; para 13.4 on misrepresentation; para 14.3 on bodily injuries; para 12.15.5 on the actio quanti minoris etc. See in general *Wagener and Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA); *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* 2002 (2) SA 447 (SCA); *Bayer (SA) (Pty) Ltd v Viljoen* 1990 (2) SA 647 (A); *A Gibb and Son (Pty) Ltd v Taylor and Mitchell Timber Supply Co (Pty) Ltd* 1975 (2) SA 457 (W); *Combrinck Chiropraktiese Kliniek Edms Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T); *Lennon Ltd v BSA Co* 1914 AD 1 (damages for dead cattle); *Cooper & Nephews v Visser* 1920 AD 111; cf *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA).

[211] Section 61(1). (The Act came into operation on 24 October 2010.)

[212] Including product failure, a defect or hazard in any goods, or inadequate warnings or instructions about any danger posed by the goods (s 61(1)). See generally Neethling & Potgieter *Delict*374–5; cf Loubser & Reid 2006 *Stell LR* 412.

[213] Section 61(5). Pure economic loss (see para 13.10) is thus not covered by the Act. See s 61(4) and Neethling & Potgieter *Delict* 374–5 for exclusions of liability.

[214] Section 61(3). They are thus regarded as joint wrongdoers (see para 11.4; Neethling & Potgieter *Delict* 265 et seq.)

[215] Section 61(6).

[216] Para 11.3.

[217] Chaps 14 and 15.

[218] Para 11.4.

[219] See para 14.9 on the Compensation for Occupational Injuries and Diseases Act 130 of 1993; para 11.8 on the Road Accidents Fund Act 56 of 1996. See also para 1.5.4.

[220] The change is probably justified by the fact that the risk of fire damage is much smaller in the case of electrical and diesel-powered locomotives than in the case of steam locomotives (cf Neethling & Potgieter *Delict* 375 n 198). See also s 46 and s 47 of Act 16 of 2002 which may be relevant to a claim for damages:

'46. Enquiry in respect of compensation for harm, loss or damage suffered.—

Where a person is convicted of an offence in terms of this Act and—

(a)

another person has suffered harm or loss as a result of the act or omission constituting the offence; or

(b)

damage has been caused to property or to the environment, the Court may, in the same proceedings—

(i)

at the written request of the person who suffered the harm or loss; or

(ii)

at the written request of the Minister or the Regulator in respect of the damage caused to property or the environment; and

(iii)

in the presence of the convicted person, enquire without pleadings into the harm, loss or damage and determine the extent thereof.

47. Award of damages.—

After making a determination in terms of section 46, the Court may—

(a)

award damages for the loss or harm suffered by the person referred to in section 46 against the convicted person;

(b)

order the convicted person to pay for the cost of any remedial measures to be taken; or

(c)

order that the convicted person implement remedial measures.'

[221] The effect of s 25 of Act 4 of 2006 is that the strict liability of the electricity undertaker in terms s 26 of the Electricity Act 41 of 1987, which it repealed, is replaced by the creation of a rebuttable presumption of negligence on the side of the licensee. Section 25 of Act 4 of 2006 stipulates as follows: 'Liability of licensee for damage or injury—In any civil proceedings against a licensee arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.' In light of the high risk of damage created by electricity, the amendment seems to be a step in the wrong direction (cf Neethling & Potgieter *Delict* 375 n 198).

See on damage caused by electricity, *PMB Armature Winders v Pietermaritzburg City Council* 1981 (2) SA 129 (N) (applicable Act applies to all 'electrical damage', however caused), 1983 (3) SA 19 (A); *Naboomspruit Munisipaliteit v Malati Park (Edms) Bpk* 1982 (2) SA 127 (T) (R1 500 for the electrocution of a giraffe); *Syce & Kramer v Port Elizabeth Municipality* 1986 (1) SA 441 (SE) (agreement on the quantum of damages for patrimonial and non-patrimonial loss caused by burns); *Black v Kokstad Town Council* 1986 (4) SA 500 (N) (loss of cattle).

[222] 'Where material damage or loss is caused by—*(a)* an aircraft in flight, taking off or landing; *(b)*any person in any such aircraft; or *(c)* any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the registered owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his wilful act, neglect or default.'

[223] Section 8(2); n 222 above. However, the fault ('negligence or wilful act') of the prejudiced person may be raised as a defence (s 8(3)).

[224] See eg on damage to property para 13.1 and on bodily injuries para 14.3. Principles of limitation of liability (remoteness of damage) should be used to keep liability within the reasonable bounds which the legislature presumably intended (para 11.5).

[225] In terms of s 1 of the Act 'nuclear damage' means '(*a*) any injury to or the death or any sickness or disease of a person; or (b) other damage, including any damage to or any loss of use of property or damage to the environment, which arises out of, or results from, or is attributable to, the ionizing radiation associated with a nuclear installation, nuclear vessel or action'. See also s 35 on the defrayment of expenses of and payment of compensation to employees of the National Nuclear Regulator as a result of certain nuclear-related injuries, disease or death suffered by them.

[226] See eg para 13.1 on damage to property and para 14.3 on bodily injuries. Damages for non-patrimonial loss (chap 15) should also be recoverable. If property can temporarily not be used, damages may be assessed as its reasonable rent value or that of comparable property.

Although a licensee is literally liable *for all* nuclear damage (s 30(1) of Act 47 of 1999), the legislature could hardly have intended that there should be boundless liability. Liability should be limited by applying

the appropriate criterion of remoteness (para 11.5) in the light of the intention of the legislature and the circumstances of the particular case.

[227] See *Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd* 1989 (1) SA 164 (D) at 166: ' "Loss or damage" ("verlies of skade") referred to in the section is no different from and is to be equated with delictual damages under our common law—*Santamversekeringsmaatskappy Bpk v Kruger*1978 (3) SA 656 (A); *Norex Industrial Properties (Pty) Ltd v Monarch SA Insurance Co Ltd* 1987 (1) SA 827 (A) at 839—and is also subject only to considerations of causation or remoteness.' See also *Inter Maritime Management SA v Companhia Portuguesa De Transportes Maritimos EP* 1990 (4) SA 850 (A) at 871: 'What the trial Court should have done was to calculate respondent's loss by comparing the security it was actually obliged to furnish because of the excessive claim with the security it would have been obliged to furnish had the claim been limited to US$6 608 548,08.' Thus the wasted expenditure in maintaining too high a security constituted damage. The court expressed the final calculation of damages thus (above at 872):

'Amount whereby claim was excessive.....US$6 299 659,92

Establishment fee: 1/4 % thereof.....US$15 749,15

Converted to Rands at agreed exchange rate of R1 = US$0,50.....R31 498,30.'

See para 8.4 on the date at which damages in foreign currency are to be converted to South Africa rands.

[228] See also eg para 11.5 on the limitation of liability; para 11.3 on the duty to mitigate.

[229] See the following examples: s 297A of the Criminal Procedure Act 51 of 1977 on the vicarious liability of the State in respect of patrimonial loss caused by an accused performing community service; s 5(4) of the Animals Protection Act 71 of 1962 (reasonable expenses incurred in destroying an animal recoverable from its owner); cf also s 6 (reasonable expenses of poundmaster); s 59 of the National Forest Act 84 of 1998 (court may order person convicted of offence in terms of Act to pay damages to any person who suffered loss as a result of offence); s 19 of the Animal Diseases Act 35 of 1984 (compensation for animal or thing destroyed or otherwise disposed of pursuant to control measures in terms of Act); s 19 of the Perishable Products Export Act 9 of 1983 (damage caused to the control board by an employee); s 300 of the Criminal Procedure Act 51 of 1977 (a court may award damages where an offence causes damage to or loss of property; see Hiemstra *Strafproses* 695–9; *S v Mape* 1972 (1) SA 754 (E); *S v Joxo* 1964 (1) SA 368 (E); *R v Mazonko* 1962 (2) SA 366 (R); *R v De Bruyn* 1949 (4) SA 298 (C); *S v Zulu* 1972 (4) SA 464 (N); *S v Dunywa* 1973 (3) SA 869 (E); *S v Du Plessis* 1969 (1) SA 72 (N); *S v Makaula* 1970 (4) SA 580 (E); *S v Liberty Shipping and Forwarding (Pty) Ltd* 1982 (4) SA 281 (D); cf also s 28 of Act 51 of 1977 (compensation for damage suffered in consequence of unlawful entry, search or seizure). See further ss 19, 152 and 153 of the National Water Act 36 of 1998; s 15 of the Stock Theft Act 57 of 1959; s 27(2) of the Marine Pollution (Control and Civil Liability) Act 6 of 1981 (employee who causes damage to the state); s 18 of the Share Blocks Control Act 59 of 1980 and s 40 of the Sectional Titles Act 95 of 1986. See also para 11.1.8 on claims for recourse and adjustment where general principles are usually applicable (eg para 4.2). See, however, on joint wrongdoers para 11.1.8.

Chapter 14
QUANTUM OF DAMAGES FOR PATRIMONIAL LOSS CAUSED BY BODILY INJURY, DEATH OR INFRINGEMENT OF PERSONALITY RIGHTS

This chapter deals with the assessment of damages for patrimonial loss [1] flowing from the bodily injury of the plaintiff himself, or the bodily injury or death of another (such as

the breadwinner or dependant of the plaintiff), or damage resulting from the infringement of personality rights to objects such as freedom, reputation and dignitas.

Bodily injury, illness or death with the consequent patrimonial loss may be caused by negligent conduct (for example, the negligent driving of a motor car and culpable homicide), assault, murder, rape and the causing of emotional shock. Furthermore, patrimonial loss may be the result of personality infringements such as kidnapping, defamation, unlawful and malicious proceedings and attachment of property, adultery, abduction, enticement and harbouring.

Patrimonial loss may take different forms such as medical and related expenses, loss of income and earning capacity, loss of support, funeral expenses and loss of services. [2]

14.1 APPLICATION OF ROAD ACCIDENT FUND ACT 56 OF 1996 AND COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 OF 1993

Most claims for damages on account of bodily injury and death are the result of motor vehicle accidents. For this reason the legislature has adopted s 17(1) of the Road Accident Fund Act 56 of 1996 (the 'RAF Act'), [3] which constitutes an embodiment of the common-law actions. [4] However, the principles regarding quantum discussed in this chapter apply (unless otherwise indicated) both to cases falling inside and those falling outside the scope of the RAF Act.

Claims for indemnification in terms of the Compensation for Occupational

Injuries and Diseases Act 130 of 1993 (the 'COID Act') are also an important source of damages for bodily injury and death. [5] Some principles regarding this specialized subject are discussed below. [6]

14.2 CLASSIFICATION OF DAMAGES FOR BODILY INJURY AND DEATH [7]

In the case of bodily injury to or the death of a person damages may be claimed for both past and future medical, hospital and other similar expenses; loss of income in the past; loss of earning capacity [8] (ie loss of future income); loss in connection with the death of another (mainly loss of support on account of the death of a breadwinner); non-patrimonial loss (pain, suffering, shock, disfigurement, loss of the amenities of life, loss of the expectation of life). Non-patrimonial loss is dealt with in a separate chapter. [9]

In practice, [10] damages for the loss caused by bodily injury and death are usually classified as general damages and special damages. [11] General damages are compensation for general damage [12] such as non-patrimonial loss, loss of earning capacity (prospective income), future medical expenses [13] and loss of support caused by the death of a breadwinner. [14] Special damages are compensation for special damage [15] such as medical expenses already incurred, loss of income already sustained, and funeral costs of a deceased. [16] When it is impossible or undesirable to classify damages in this manner, different types of damages are grouped together. [17]

A simple classification of damage under the headings 'general' and 'special' is seldom adopted in practice, since that would group together forms of loss which are dissimilar (for example, patrimonial and non-patrimonial loss). [18] The theoretically pure distinction between patrimonial and non-patrimonial loss [19] is not very useful in practice either,

since it may, for example, group together loss of income in the past as well as the future (whereas these are treated differently). [20] A practical method of classification is the one described by McKerron, [21] who adopts a threefold division: *(a)* all pecuniary losses already sustained; *(b)* non-patrimonial loss (injury to personality), and *(c)* prospective expenses and loss of earning capacity. This is a useful classification in practice, since it harmonizes the recognized divisions into general and special damage and patrimonial and non-patrimonial damage. [22]

The classification of damages for bodily injury and death is described in rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules [23] on the pleading of damage. [24]

Reference to the decisions of our courts show that there is no uniform approach (except in so far as rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules have to be followed). [25] The Appellate Division has held that it is desirable that a claim for damages be itemized so that the amounts awarded for patrimonial and non-patrimonial loss are separated. [26] The modern tendency is to compute special damages item by item and then to assess general damages under the various main heads of damages. [27]

Interim payment of damages for bodily injury and death may be made in terms of s 17(6) of the RAF Act 56 of 1996 and rule 34A of the Uniform Rules of Court. [28]

14.3 MEDICAL AND OTHER EXPENSES INCURRED ON ACCOUNT OF BODILY INJURY [29]

A person who has sustained bodily injuries is entitled to compensation for all medical and similar expenses reasonably incurred by him or her in the treatment of bodily injuries and their consequences. The onus [30] is on the plaintiff to show that these requirements have been met. An operation or other treatment should therefore be fairly attributable [31] to the injuries for which the defendant is liable. [32]

The existence of damage is a factual question which depends on the circumstances of the case. The nature, extent and effects of bodily injuries can usually be proved only by expert medical evidence. For these purposes it is normally necessary to obtain a medico-legal report from a specialist.

A plaintiff is not obliged to undergo medical treatment at the lower rates of a provincial hospital and may make use of (more expensive) private medical services. [33]

A plaintiff may recover damages for treatment on the advice of a medical practitioner even though such advice was mistaken. In this case, however, it is required that the diagnosis was in principle a difficult one or that the patient's life was in danger. [34]

Rule 18(10)*(a)* of the Uniform Rules of Court and rule 6(9)*(a)* of the Magistrates' Court Rules states that a plaintiff should indicate separately what amount is claimed for medical costs and hospital and other expenses and how these costs and expenses are made up. [35] Section 17(5) of the RAF Act 56 of 1996 stipulates that a supplier of medical services may in some instances claim directly in respect of such services. [36] Some medical expenses are, according to RAF regulations, irrecoverable from the RAF. [37]

An injured person may, in addition to compensation for medical expenses, recover reasonable damages for the following items: [38] cost of transport to and from a hospital

or doctor; [39] cost of travelling to a holiday resort for the purpose of convalescence; [40] the travelling costs of the plaintiff's wife who visits him in hospital

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to minister to him; [41] the cost of special transport to and from school; [42]compensation for paramedical assistance and aids such as prostheses, crutches, special shoes, socks etc; [43] the cost of an attendant for someone who is seriously injured; [44] in the case of a paraplegic it is conceivable that reasonable expenses in respect of the modification of a vehicle or house or the acquisition of apparatus to render his or her life more comfortable may be recoverable; [45] the expense of purchasing a vehicle by a paraplegic in view of his or her place of abode and needs; [46] and compensation for accomodation in a specialized institution. [47]

Expenses which are normally regarded as medical costs which primarily relate to injury to property may not be recovered from the RAF. [48] Where, for example, a plaintiff's false teeth are broken in an accident, he or she will have to recover the expense of replacing them from the wrongdoer. [49] The same applies in regard to prostheses, spectacles, contact lenses and hearing-aids. [50]

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14.4 FUTURE MEDICAL AND RELATED COSTS ON ACCOUNT OF BODILY INJURIES [51]

14.4.1 General

It frequently happens that, at the time that an injured person's action is settled or heard, his or her medical treatment has not been completed, necessitating an assessment of damages for prospective medical treatment. In general the same principles discussed in connection with medical expenses in the past (and also the requirement of reasonableness) apply to the assessment of damages for prospective treatment.

The general principles on the nature, proof and quantification of prospective damage are relevant here. [52] In respect of prospective medical expenses a plaintiff does not necessarily have to prove on a balance of probabilities [53] that he or she will have to incur such expenses, since it suffices if the plaintiff merely proves a possibility (expressed as a percentage) that he or she will have to incur them. [54]

It is obvious that a decision on the future medical treatment of an injured person can be based only on expert medical evidence. [55] A plaintiff's medico-legal report should thus also deal with his or her prognosis (the future development of the injuries and their consequences) as well as the nature and cost of the required treatment.

In respect of future medical expenses, our law has regard to the cost of medical treatment at the date of trial and not what such costs might have been years before at the date of the delict. [56] In practice, it would appear that plaintiffs go further and produce evidence on the probable cost of operative procedures and other forms of medical treatment at the relevant time in future. [57]

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The amount of compensation has to be discounted (capitalized) at the appropriate rate of discount [58] in order to prevent the plaintiff who may earn interest on it from obtaining an unfair advantage. [59]

Contingencies should also be taken into account. [60]

14.4.2 Undertaking by RAF to pay future medical expenses

Section 17(4)*(a)* of the RAF Act 56 of 1996 reads as follows:

> Where a claim for compensation under subsection (1)—
>
> *(a)*
>
> includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate the third party in respect of the said costs after the costs have been incurred and on proof thereof ... .

The purpose of this provision is to eliminate uncertainties in the assessment of prospective medical expenses and to change the common-law principle that damages are awarded once only and then only in the form of a capital amount. [61] According to Klopper [62] this provision should not be construed as an exception to the 'once and for all' rule since the claimant is still required to prove the likelihood of the payment of all future medical expenses on a balance of probabilities before the particular section can be applied. At most, it modifies the time of actual payment of future damages. [63]

In the leading case on this subject [64] the Appellate Division stated that it is no model piece of legislation. The section has been adopted mainly for the benefit of the RAF and it does not apply without the Fund's consent. The court has no power to direct mero motu that the Fund should supply an undertaking. The RAF may

offer an undertaking (in the form of a certificate) with a particular content and terms to an injured person. If the person accepts it, [65] then cadit quaestio. However, if the undertaking is not accepted, the court has to resolve the matter by directing that the undertaking be given to the plaintiff if he or she is successful (if the RAF so chooses). The undertaking becomes binding on the parties through an order of the court.

The court has no discretion to decide on the content of the undertaking as the choice in this regard is that of the party supplying such undertaking. Similarly, the plaintiff has no say in the matter. However, an undertaking by the RAF has to be in accordance with the provisions of s 17(4)*(a)* concerning the items in respect of which an undertaking must be given. The undertaking has to state that the RAF assumes liability for the said items. Without the consent of the RAF the court may not direct that any further stipulations be included. [66] It is important to note that the common-law principles on the reasonableness of expenses still apply. [67] The undertaking thus covers only costs which are *reasonably* incurred as a result of bodily injuries (even if these are not expressly mentioned in the undertaking). [68]

In *Maja v SA Eagle Insurance Co* [69] the court referred to the requirement of reasonableness [70] and added that no further detail on this criterion may be contained in the undertaking. It may thus not be stipulated that only treatment in a provincial hospital will be covered, since it may in some instances be reasonable to undergo treatment at a private clinic. [71]

An undertaking [72] benefits the RAF, since all medical expenses do not have to be paid immediately, unnecessary speculation is eliminated and liability is terminated if the plaintiff dies prematurely. Moreover, the plaintiff also benefits in that he or she may be compensated for expenses which might have been unforeseeable at the

trial and because medical expenses may through inflation eventually be much higher than originally foreseen. Furthermore, the court does not have to guess [73] the life expectancy of the plaintiff. A considerable problem for a plaintiff who does not possess the necessary financial means is how he or she will be able to carry the medical expenses before receiving compensation in respect of such expenses. [74]

An undertaking may be issued in respect of damages apportioned in terms of the Apportionment of Damages Act 34 of 1956 [75] or in instances where other limitations or conditions apply. [76]

There are further practical problems relating to an undertaking. [77]

14.5 LOSS OF PAST INCOME OR EARNINGS (FROM DATE OF DELICT TO DATE OF TRIAL) [78]

Where as a result of his or her injuries a person has been precluded from earning income [79] or has earned less income than normal, he or she is entitled to damages representing the income the injured person would have earned but for his or her incapacity. [80] It is incumbent upon the plaintiff to prove what his or her income would have been had the person not been injured and what his or her actual

earnings were for the duration of the injuries (if applicable). [81]

A claim for loss of earnings exists irrespective of whether a plaintiff is in someone else's employ or is self-employed. In the latter case, it may be more difficult to assess the plaintiff's loss than in the former. [82] *Sandler v Wholesale Coal Suppliers Ltd* [83]is a leading case. [84] Newdigate and Honey suggest a practical approach. [85]Damages may also be assessed as being the reasonable cost of employing a substitute for the plaintiff. [86]

The principles already discussed concerning the collateral source rule (especially income tax savings), [87] the duty to mitigate, [88] contingencies [89] and unlawful income [90] are to be taken into account. The damages for past loss of income are not discounted [91] to the date of delict and are thus not to be reduced. [92]

14.6 LOSS OF EARNING CAPACITY (PROSPECTIVE INCOME, FUTURE EARNINGS AFTER DATE OF ACTION) [93]

14.6.1 Introduction [94]

Bodily injuries may result in a person being unable in future (in other words, after the trial or settlement) to earn the income he or she would have earned but for those injuries. [95] This inability may be permanent or temporary. The precise theoretical explanation for this type of damage is not clear, but the best explanation seems to be the existence of a subjective right to earning capacity [96] as legal object (that is, the ability to earn money). [97] The legal object in question is closely related to a person's bodily integrity, but is not the same thing. There is also a view that the loss under discussion is merely the loss of actual future earnings without it being necessary to identify a specific patrimonial asset. [98] However, in *Rudman v Road Accident Fund* [99] the Supreme Court of Appeal clearly stated that a physical disability which impacts upon

capacity to earn does not necessarily reduce the estate or patrimony of the injured person. [100] There must be proof that the reduction in

earning capacity indeed gives rise to pecuniary loss. [101] In practice the calculation of damages for a loss of earning capacity is often very difficult, since it is based on assumptions regarding future events which cannot be proved with any certainty. [102]

14.6.2 Different methods of calculation

There is not only one generally accepted measure of damages for loss of earning capacity. In a number of cases our courts were sceptical of an annuity calculation [103]based on mathematical principles and instead placed more emphasis on a court's discretion to award a reasonable and fair amount of damages. [104] A better view is reflected in *Goldie v City Council of Johannesburg*: [105]

> [B]ut if the fundamental principle of an award of damages under the *Lex Aquilia* is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork. [106]

In *Southern Ins Ass Ltd v Bailey* [107] the Appellate Division stated that there are two possible approaches: [108]

> [1] is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.
>
> [2] is to try to make an assessment, by way of mathematical calculations, on the basis of

> assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

The second method should as far as possible be used. However, in some instances, where, for example, the court has to determine a young child's loss of earning capacity [109] or other difficult cases [110] the process of assessment is very speculative and the court is more inclined to adopt the first approach, although actuarial calculations [111] may still be used. In the assessment of damages for loss of earning capacity our courts enjoy wide discretion and are not obliged to employ some standard method of calculation. [112] For example, in some instances a court may use the cost of a substitute for an injured plaintiff as the correct measure of damages. [113]

There are different methods of calculation in terms of the second approach referred to above. The method used in a particular case depends on the precise

circumstances as well as the preference of the actuary performing the calculations. [114]

14.6.3 Actuarial evidence [115]

An actuary is an expert witness whose opinion is merely part of all of the other evidence before the court, to be given greater or lesser weight according to the circumstances of the case. [116] The calculations by and evidence of an actuary often plays an important role. An actuary is someone with specialist training who is able to perform complicated mathematical calculations [117] and, for example, calculates insurance premiums in the light of probable events. An actuary possesses the necessary skill to calculate, on the basis of facts and probabilities, a future loss of income in a logical way. [118] The court is not obliged to accept the evidence presented by the actuarial expert, and if the evidence of two or more experts differs, the court must attempt to reconcile the inconsistencies or otherwise choose the evidence of one expert above that of the other. [119] The court should

not merely accept the actuary's figures and make a deduction for contingencies, but should

endeavour to come to grips with the underlying reasoning of the actuary. [120]Therefore it is submitted that expert witnesses should give reasons for reaching their conclusions. [121]

The court must ensure that the opinion of an expert witness does not usurp the function of the court. [122] In addition, if there is a shortcoming in the actuarial calculations, the court can request a fresh actuarial calculation based upon assumptions dictated by the court. [123] A court may also mero motu, but with the consent of both parties, request expert assistance to perform complex calculations. [124] The latter procedure would be preferred to a situation where the court decides to make its own calculations on complicated issues. [125] It is also possible to have instances where the uncertainties regarding the future of the specific plaintiff and his or her circumstances are of such a nature that they do not justify actuarial calculations. [126]

14.6.4 Basic method of assessing loss of earning capacity

The following formula is supplied by Corbett and Buchanan: [127]

(a) Calculate the present value of the future income which the plaintiff would have earned but for his or her injuries and consequent disability.

(b) Calculate the present value of the plaintiff's estimated future income, if any, having regard to his or her injuries and disability.

(c) Subtract the figure obtained in *(b)* from that obtained under *(a)*.

(d) Adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies.

The application of this formula [128] is discussed below, step by step.

14.6.4.1 *Assessing present value of plaintiff's income without injuries* [129]

First, it is necessary to determine the *period* for which the plaintiff would have earned income but for his or her injuries. However, if a plaintiff's expectation of life has been shortened by his or her injuries or otherwise to something less than the plaintiff's 'normal' working-life expectancy, this shorter period is used. [130]

Secondly, it must be established what the plaintiff's average annual *income* would

have been had he or she not been injured. This calculation may, of course, be speculative, especially in the case of children. [131] The logical starting-point would be a plaintiff's (gross) earnings before his or her injuries. All lawful [132] sources of income based on his or her earning capacity have to be considered. [133] Obviously, fluctuations in income over certain periods must be taken into account. [134] It would be simpler (though less accurate) to base the calculation on a plaintiff's average annual income than on fluctuating income over different periods. [135] The annual increases in salaries to provide for inflation should also be taken into account. [136] In determining the plaintiff's future income, deductions are often made for items such as insurance, pension and taxes in

order to arrive at the net income. However, these factors may be taken into account at a different stage of the process of assessment (for example, in considering contingencies). [137]

Thirdly, the *present value* of the income which the plaintiff would have earned but for his or her injuries is to be calculated. This means that the amount is discounted in terms of an annuity calculation, since the plaintiff receives it in advance and can earn interest on the money. [138] An important practical question is the rate of (compound) interest to be used in the calculations. One may use a gross rate of interest or a net rate, that is after provision for inflation has been made. [139] Actuarial

calculations, however, are always to be tested against what a court perceives to be the equities of a case. [140]

14.6.4.2 *Assessing present value of plaintiff's income with disability* [141]

It is obvious that, where a plaintiff has been totally disabled by his or her injuries, this amount will be nil. [142] But where the plaintiff has not been completely disabled and may still earn income, [143] his or her probable average annual earnings for the relevant period must be determined and then reduced to their present value. [144]Proof of a physical injury which impaired the ability to earn an income does not automatically prove that there was in fact a diminution in earning capacity or in the plaintiff's patrimony. [145] Only income made possible by a plaintiff's earning capacity

is relevant and there are obviously different methods of calculating this amount. [146]Practical problems may arise, since the calculation involves assumptions regarding future events. An alternative method is to express a plaintiff's disability from an income-earning point of view as a percentage and to estimate his or her future income as being this percentage of the future income the plaintiff would have earned but for his or her injuries. [147] It would, however, seem that this method is usually not accurate enough. [148]

A plaintiff's probable average annual earnings in the light of the injuries must be assessed for the period for which he or she is likely to be able to earn such income. It may be that the injuries have not shortened the plaintiff's working life and then the period is the same as it would have been without any injury. Where the plaintiff's injuries have caused a diminution in his or her working life (proved by medical evidence), the plaintiff's income is to be calculated with reference to the shorter period. [149]

The present value of a plaintiff's future income with his or her injuries must then be estimated in the same manner (and with the same rate of interest) as the plaintiff's income but for those injuries. [150]

14.6.4.3 *Further calculation and adjustment*

The amount in paragraph 14.6.4.1 above has to be subtracted from the amount computed in paragraph 14.6.4.2 and must be adjusted further for contingencies. [151]

Contingencies are factors or circumstances which have a direct influence on the income which a plaintiff could have earned but for his or her injuries and also which could now in the plaintiff's injured state influence any possible income still to

be earned. [152] Care should be taken that factors which have already played a role in the application of the formula discussed above are not considered again. [153]

14.6.5 Simple examples of calculation of damages for loss of earning capacity [154]

Example 1 [155]

Suppose X, aged 30, would have earned an average of R5 000 a year until his retirement at 65. After sustaining injuries, he can earn only R3 000 a year. His average loss per annum is thus R2 000. One may not simply calculate his damages by multiplying 35 (years) by 2 000 (rand) and then award R70 000 as damages. X may invest the amount at interest so that he will eventually obtain a great deal more than R70 000. A capital sum must be calculated which, if invested at a particular rate of interest, will produce R2 000 per year and will be reduced to nil at the end of 35 years. In order to calculate this amount of capital (the process of capitalization) annuity tables have to be consulted. [156] Suppose an interest rate of 3,5 per cent is used for capitalization. [157] Using the annuity tables under the column 3,5 per cent and against the number of years (35) a factor of 20,007 will be found. Then the following calculation is performed:

20,007 x R2 000 = R40 014.

This is the capitalized value of the amount which has to be awarded to X in the simple example. [158]

Example 2 [159]

Suppose X had a guaranteed income of R1 500 per month for the ensuing 15 years. As a result of injuries his income is reduced to R500 per month for the following 5 years. The present value at 14 per cent interest for 15 years of X's income without injuries is calculated as follows:

R1 500 x 7870 [160] x ,01 = R118 050

The present value at 14 per cent interest for 5 years of X's actual future income with his injuries is:

R500 x 4399 x ,01 = R21 995

Thus the present value of X's loss of earning capacity (future income) is:

R118 050 – R21 995 = R96 055.

Then provision must still be made for contingencies.

Example 3 [161]

Suppose that X, a male worker aged 45, has a monthly earning capacity of R200 after tax until the age of 65. As a result of his injuries he is unable to earn anything. It is assumed that the net rate of interest exceeds the inflationary increases in income by 2 per cent. The present value of his earning capacity but for his injuries is calculated as follows:

R200 x ,01 x 17478 [162] = R34 956

Example 4 [163]

Suppose that X, a worker, is totally disabled at the age of 55. There are no pension benefits and his employer lays off employees at 65. During the year preceding his injury X earned R6 000. The matter comes to trial 3 years after the injury. Over those 3 years comparable workers earned R7 000, R8 100 and R9 200 respectively. The employer expects that future earnings will increase by at least 1 per cent in

excess of the rate on inflation. The net rate of capitalization is 1,5 per cent. [164]Koch [165] applies a simple gross-multiplier method [166] as follows:

Expectation of working life from 58 to 65	6,07
(according to tables—Koch *Lost Income* 310)	
Annuity for 6 years at 1,5%	5,697
(according to tables—Koch *Lost Income* 322)	
Expected earnings in year preceding trial	R9 200
less 5% for taxation (R9 200 x 0,95)	R8 740
Discounted value of lost earnings future wards of date of trial	
(R8 740 x 5,697)	R49 792
add undiscounted income for 3 years since date of injury to date of trial	
(less 5% for taxation)	R23 085
Subtotal	R72 877
deduct contingencies (10%)	R7 288
Total	R65 589

14.6.6 Date of discount

In the fourth example above, Koch computes the loss of earning capacity *as at the date of trial*. Loss of earning capacity may, however, also be calculated as at the date of delict and then the plaintiff would receive a lower amount, since the lost income for the 3 years between the date of delict and date of trial is assessed at R6 000 per year discounted to the date of delict.

Future loss of income will also be considerably lower, since it will be discounted to the date of delict.

Before *General Accident Ins Co of SA Ltd v Summers etc* 1987 (3) SA 577 (A) [167] there was uncertainty as to whether loss of past income and (prospective) loss of earning capacity should be discounted to the date of delict or the date of trial. [168] In the *Summers* case the Appellate Division held as follows:

In respect of past losses of income it is permissible to award unadjusted damages for lost income from the date of injury to the date of trial. Discounting (reduction) of such damages to the date of delict would prejudice a plaintiff, since he or she has not received damages immediately upon commission of the delict (the cause of the injuries). Up to the date of trial the defendant has had the use of such money and it would be unfair to assess a plaintiff's damages as though he or she had received payment at the date of delict.

Damages for loss of earning capacity (loss of future income) have to be discounted to the

date of trial and not the date of delict. Loss of earning capacity cannot be compared with the loss of an asset such as a motor car (where market value is determined at the date

of delict). Loss of earning capacity is neither 'complete' at the date of delict nor is it capable of precise assessment, since it continues into the future. Furthermore, a plaintiff does not receive the amount in question at the date of delict and the defendant has the use of it until the date of judgment. All these considerations justify discounting to the date of trial and a plaintiff does not obtain more than is required to place the plaintiff in the position he or she would have occupied had the delict not been committed. [169]

14.6.7 Further general principles in quantifying a loss of earning capacity

The principles regarding the collateral source rule, [170] mitigation, [171] inflation, [172]taxation, [173] lawful income, [174] contributory negligence, [175] and some restrictions on the maximum amount of damages [176] are discussed elsewhere in this book. Recently in a few cases the court has awarded an amount for appointing a case manager—not a curator bonis—to manage the plaintiff's financial and medical needs. [177]

Section 17(4)*(b)* of the RAF Act 56 of 1996 provides for the payment of compensation for loss of earning capacity (and support) [178] by instalments. [179]

Although the RAF has the right to elect to pay damages by instalments, a third party is not obliged to accept compensation in this form, since the section in question mentions 'instalments *as agreed upon*'. If the parties are unable to agree, the court has to award damages as a capital sum. [180] The payment of instalments has to continue until the time the injured would have ceased earning an income. A party may not approach the court to have the instalments revised. An undertaking may also be given in regard to a percentage of the loss of earning capacity where a

plaintiff was guilty of contributory negligence. [181] In *Kommissaris van Binnelandse Inkomste v Hogan* [182] the court held that these instalment payments are taxable because they are received in the form of an annuity. An annuity forms part of remuneration as defined in the Income Tax Act 58 of 1962 and this means that employees' tax has to be deducted by the person who makes the payments. The court therefore held that the Fund is under a statutory duty to deduct employees' tax from instalment payments and could not change this contractually. [183]

In *Commercial Union Ass Co of SA v Stanley* [184] the plaintiff, a young unmarried girl, was injured in a motor vehicle accident. Here, injuries caused a serious loss of earning capacity and marriage prospects. Before the accident she had been employed as a bank clerk and, according to the evidence, female bank clerks had an average career of five years, after which marriage usually supervened and led to resignation. At the time of the accident the plaintiff had already worked for two years as a bank clerk. The plaintiff's loss of future earnings therefore had to be limited to the three years she would have worked as a bank clerk. However, the court held that under her claim for loss of marriage prospects she was also entitled to compensation for the loss of the material benefits of marriage. Moreover, the plaintiff could also recover compensation for the diminution in her earning capacity unaffected by her marriage or resignation as a bank clerk. [185]

In *Krugell v Shield Versekeringsmpy Bpk* [186] the court stressed that a plaintiff must not merely prove that his or her capacity to continue his or her former occupation has been extinguished: a plaintiff has to prove in addition that he or she is incapable of earning anything (in a reasonable manner) or less than before.

14.7 DAMAGES FOR LOSS OF SUPPORT CAUSED BY DEATH (OR INJURY) OF ANOTHER [187]

The death (or injury) of a person may cause damage to others. Reference is made elsewhere to who may claim damages in such cases (and in which instances there is no action). [188] In this chapter attention is mainly devoted to the quantification of such claims in respect of loss of support (or services).

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14.7.1 Damages on account of death of someone: medical costs [189]and funeral costs [190]

The executor of a deceased's estate may claim damages for his or her medical expenses (and loss of earnings) up to the date of death. [191] Funeral costs may be claimed by the executor or a dependant [192] and comprises the following: [193] the reasonable cost of preparing the body for interment or cremation, the cost of a hearse, the reasonable and necessary travelling costs to attend the funeral or cremation, telephone calls, [194] the reasonable cost of refreshments, and the reasonable expense of erecting a tombstone. The RAF is only liable in respect of *necessary actual* costs in respect of the burial or cremation of the deceased and it has also been held that some expenses in connection with a funeral are irrecoverable. [195]

14.7.2 Damages on account of death of someone: claims by dependants [196]

The most important instance where damages are payable upon the death of a person is where dependants institute an action for loss of support resulting from the unlawful and culpable killing of their breadwinner. [197] The basic aim in the calculation of damages is to place the dependant as far as support is concerned in the position he or she would have enjoyed had the breadwinner not been killed. [198] A plaintiff has, of course, to prove, inter alia, that he or she had a right of support against the deceased [199] and that such death has in this respect caused damage to the plaintiff. [200]

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In the calculation of damages, note is, of course, taken of loss of support until the date of trial as well as prospective loss of support for the relevant period. [201]

14.7.3 Methods by which damages may be calculated

The process of assessing damages is concerned with subtracting the current patrimonial position of a dependant [202] from the hypothetical patrimonial position he or she would have occupied if the breadwinner had not been killed (or injured).

In *Hulley v Cox* [203] the court referred to two methods [204] in terms of which the damages of a dependant may be computed. The first is based on the principle of an annuity [205] while the second amounts to a fair and general estimate of such loss. Our courts accept that they are not bound by some fixed method of calculating damages. [206] The courts also use a combination of these two approaches and in some instances actuarial calculations [207] play a more prominent role, while in other cases a court's equitable discretion dominates the process of assessment. [208] It is usually necessary to use the annuity basis of calculation as a starting-point and to adjust the figure thus arrived at in accordance with the general equities of the case (for example, benefits caused by the death of the deceased).

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14.7.4 Basic formula for calculation of damages [209]

The basic formula could be as follows:

(a) Calculate the period during which the plaintiff (dependant) has been deprived of support.

(b) Determine what the breadwinner's net annual income over that period would have been.

(c) Estimate how much of the deceased's annual income would have been devoted to the plaintiff.

(d) The total amount of support calculated under *(c)* which would have been devoted to the dependant must then, in terms of an annuity calculation, be reduced to its present value (capitalization or discounting).

(e) The amount computed under *(d)* has to be adjusted in an equitable manner in accordance with the general circumstances and contingencies of the case.

The application of this formula is discussed below, step by step.

14.7.4.1 *Period of support* [210]

The period of support depends upon three factors, viz the joint expectation of life of the plaintiff and his breadwinner, the period within this joint expectation of life during which the breadwinner would have continued to earn an income, and during which the deceased breadwinner, but for his or her death, would have devoted a portion of this income to the plaintiff.

Expectation of life [211] can be established through actuarial evidence if the health and circumstances of the person in question were normal [212] and otherwise by means of medical evidence. [213] If such evidence has not been adduced, the court may still base an assessment of damages on the available facts. [214]

The period during which the breadwinner would have earned income depends upon factors such as his or her general state of health, nature of employment and expected retirement age, etc. [215]

The period during which the breadwinner would have devoted a portion of his or her income to the plaintiff depends upon their relationship. In the case of a widow or partner it is the same as the period within their joint expectation of life during

which the deceased would have continued to earn an income. However, provision must also be made for the possibility that divorce or separation could have shortened this period. [216] In respect of children, [217] there is no general rule as to when they become self-supporting and are no longer entitled to claim. The circumstances of each case will determine up to what age a child will have a right to support. Factors such as the deceased's social standing and his or her intentions may be relevant.

14.7.4.2 *Income which breadwinner would have earned* [218]

A breadwinner's lawful [219] net annual income over the period of maintenance must be estimated on evidence as to inter alia the following: actual earnings at the time of

death, [220] nature of work, [221] capabilities and prospects. [222] Other benefits in addition to the breadwinner's salary must also be considered. [223] General contingencies which could have reduced or extinguished the breadwinner's income must be taken into account [224] as well as factors which could have caused it to increase. [225] Furthermore, gross income has to be reduced by expenses necessary to earn income [226] and some other deductions. [227] There are periodic deductions from

income which will not be taken into account in establishing net income, [228] but on certain items there is uncertainty. [229] Provision may be made for increases in income on account of inflation. [230] There is also a suggestion that the income which a deceased could have earned after retirement should be considered. [231]

14.7.4.3 *Portion of breadwinner's income which would have been devoted to support of dependant* [232]

This is not the (minimum) amount which the deceased was obliged to spend on maintaining his dependant (ie on the basic necessities of life) but the amount the dependant could actually have expected. [233] This will depend upon the relationship between the plaintiff and the deceased, [234] the actual amount of maintenance furnished before his or her death, [235] the needs of the plaintiff and the breadwinner, [236] and other relevant facts. It is often difficult to determine this amount accurately where the breadwinner has maintained a whole family. In such a situation the income is divided into fractions and allocated in equal shares to each partner [237] and as half-shares to each child. [238] Thus, for example, where breadwinner X left a wife and two children, a one-third share will be allocated to the

widow and a one-sixth share to each child. [239] In a case where X left only his widow and the parties had dealt with his income as a common fund, the court divided the income equally between them. [240]

Many other factors may be relevant here—for example, the fact that the breadwinner saved a substantial portion of his or her high income, [241] the fact that as children grow older and become more self-supporting they need less maintenance, [242] the ill-health of a particular child (which implies the allocation of a larger proportion of the income) [243] and the fact that the breadwinner also furnished maintenance to someone else. [244] If the surviving partner of the deceased also earned income, he or she would probably have received a smaller portion than normal of the deceased's income. [245] Other factors may also be relevant. [246] Where there was already a court order or an agreement in existence on the quantum of maintenance, it may serve as prima facie proof of the amount of lost support. [247]

An objection to the method employed by our courts is that provision is not made in respect of expenses which remain constant after the death of a breadwinner. [248]According to Klopper [249] this principle of proportional allocation of the deceased's income has become trite law—possibly even to the extent that the proportions usually allocated are in practice almost accepted as immutable rules of law rather

than guides used by the courts to assess this type of damage ex aequo et bono. [250]He states that the personal expenditure of the deceased for his or her own exclusive benefit should be the point of departure in determining what the deceased actually had available or used to support his or her dependants. [251] In the absence of direct evidence, the

guide to be used is an average of 20 to 33 per cent utilized by a breadwinner for his or her own exclusive expenditure—the remainder (80 per cent to 67 per cent) is then to be applied as support for his or her dependants to be allocated in such proportions as the circumstances and facts of each case may dictate. It is, however, the duty of the plaintiff to supply the court with sufficient information to enable it to make a just and equitable assessment of what the plaintiff has lost. [252]

14.7.4.4 *Calculation of annuity* [253]

The total amount of loss of support during the relevant period has to be calculated. However, this sum does not represent the final amount of damages, since the immediate receipt of it may give a dependant an improper advantage if account is not taken of the interest that may be earned on it. Accordingly, this total must be reduced to its present value, which means that a capital sum must be calculated to purchase an annuity which will produce periodic (annual) payments equal to the loss of support and which sum will exhaust itself at the end of the relevant period (in other words, no capital or interest will be left). [254] Actuarial evidence [255] on this is of considerable importance but not absolutely indispensable. [256] Different rates of interest have been used for the purposes of capitalization and the rate used should be appropriate at the time when the calculations are done. [257] Usually a net rate of interest is used. [258] If allowance has not been made for inflation [259] in calculating the

income of the deceased, [260] it should be taken into account in the computation of an annuity. [261] Where a minor's compensation is paid into the guardian's fund, the rate of interest which should be used is the rate allowed upon money invested in such fund. [262]

14.7.5 Equitable adjustment of amount of damages [263]

14.7.5.1 *General* [264]

From *Hulley v Cox* [265] as well as other cases it appears that the amount arrived at by way of an annuity calculation should be adjusted in accordance with the so-called general equities of a particular case. [266] In essence this means the consideration of further advantageous or disadvantageous consequences of a breadwinner's death and this process is also concerned with the collateral source rule discussed above. [267] The extent to which an annuity sum will be adjusted depends on how a court exercises its discretion in an individual case.

14.7.5.2 *Some advantages taken into account*

The following possible financial benefits caused by a breadwinner's death are discussed elsewhere: new sources of income such as a pension or insurance money; [268] an inheritance; [269] the re-partnering prospects of a dependant; [270]the exercise of a dependant's own earning capacity; [271] the acquisition of sole-ownership of assets; [272] the adoption of a child; [273] ex gratia benefits; [274]indemnification in terms of the COID Act 130 of 1993. [275]

14.7.5.3 *Some specific disadvantages for consideration*

(a) Loss of breadwinner's contribution towards joint expenses [276]

The fact that some household expenses remain constant after a breadwinner's death [277] may result in a loss to a dependant spouse or partner who has to defray such costs out of only half of the available income. [278] Usually such a loss is not reflected in actuarial calculations and it is therefore incumbent upon a court to make an equitable allowance in respect of this when calculating the final amount of compensation. This implies that the annuity sum should be increased. [279]

(b) Loss of social advantages [280]

In some instances a dependant's amount of compensation may be increased as the result of a loss of social advantages sustained by him or her on account of the death of his or her breadwinner. [281] Social advantages are relevant [282] only in so far as they constitute a patrimonial loss, since damages are not available for mere non- patrimonial loss [283] or the non-patrimonial element of a loss of consortium [284]caused by the death of a breadwinner. [285] Since a court cannot calculate the amount of damages in respect of this loss with any degree of accuracy, it has to exercise an equitable discretion. Our courts approach an award for loss of social advantages on a conservative basis by rather allowing too little than too much. [286]

(c) Loss of prospective inheritance [287]

In a proper case a court may increase the amount of an annuity if it appears that a breadwinner would have amassed further assets and that his or her dependants would probably have benefited from this by receiving larger inheritances. [288]Although a dependant has no right to an inheritance, a claim for loss of support is not confined to that which a dependant could legally claim but extends to all the material advantages, comfort and support which, as a matter of reasonable probability, the dependant would have enjoyed but for the death of his or her breadwinner. [289]

This matter may also be accommodated by not deducting the savings of the deceased from the amount which would have been devoted to the dependants, since it was meant to have been spent on the dependants eventually. [290]

The amount of compensation awarded to a dependant who is not an heir may, of course, not be increased on this basis. [291]

14.7.5.4 *Other factors and contingencies* [292]

Corbett and Buchanan [293] consider inflation as a factor to be taken into account at this stage. However, it should rather be taken into account in estimating a breadwinner's expected income [294] or in selecting the appropriate rate of discount. [295]

Koch [296] gives a survey of contingencies [297] which are relevant in quantifying a loss. These factors [298] do not merely play a general role in the increase or decrease of an amount of damages, but are considered at a determined stage of the process of assessment when a value has to be placed on certain benefits or disadvantages.

Certain further expenses may be considered, such as a widow's or partner's expenses in reorganizing her affairs. [299]

14.7.6 Final calculation of amount of damages [300]

The facts referred to in paragraph 14.7.5 above (and any other relevant facts) are considered by a court when increasing or decreasing (according to the case) the amount

of the annuity. It is also possible to set a factor tending to enhance the damages off against a factor having the reverse effect. [301] This whole process is not one which may be done with mathematical precision and a court's equitable discretion, which has to be exercised in the light of the relevant facts, plays a decisive role. Our courts do not favour formulae which tend to restrict this equitable discretion. [302] A comparison with other cases is recommended in so far as it may be instructive to a court in the exercise of its discretion. [303] Obviously an assessment must be made in view of the particular facts of an individual case. [304] In general our courts apparently adopt a conservative approach and would rather award too little than too much. [305]

14.7.7 Further principles on damages for loss of support

14.7.7.1 *Particulars to be furnished in claims for loss of support*

This matter is discussed elsewhere. [306]

14.7.7.2 *Payment of damages in instalments and interim payments*

In terms of s 17(4)*(b)* of the RAF Act 56 of 1996 the RAF is entitled to furnish an undertaking to pay damages in instalments as agreed upon. [307] Provision is also made for interim payments, but only in so far as such costs have already been incurred and any such losses have already been suffered. [308]

14.7.7.3 *Simple example of calculation of damages for loss of support and correct date of assessment* [309]

Suppose the employee discussed earlier in Example 4 [310] had not merely been disabled at the age of 55 but had died as a result of his injuries and assume, further, that he left a widow aged 50 at the time of the accident. Her share of the family income is taken to be one-half of the total income. The first step is to determine their joint life expectancy within the husband's working life (he is expected to retire at 65). This is obtained from the joint mortality tables for the population group in question. [311] The parties' joint expectation of working life is 5,60 years. The process of calculation proceeds as follows:

Joint expectation of working life	5,60
Annuity for 5 years at 1,5% (obtained from tables)	4,783
Share of family income in year preceding date of trial:	
R9 200 x 0,95 x 0,5	R4 370
(0,95 is to allow for a reduction of 5% for tax and 0,5 is for the plaintiff's half-share)	
Discounted value of lost support from date of judgment: R4 370 x 4,783	= R20 902
add undiminished value of losses for 3 years from date of delict to date of trial:	
(R7 000 + R8 000 + R9 000) x 0,95 x 0,5	R11 400
Subtotal:	R32 302
deduct contingencies (10%)	R3 230
deduct 3% for re-partnering (R20 902 x 0,03)	R627
Net loss of support at date of trial:	R28 445

This method used by Koch [312] (a simple gross-multiplier method) to calculate future loss of support as at the date of the action, and allow loss of support in the past without any deduction, is in accordance with the decision in *General Accident Ins Co of SA Ltd v Summers etc*. [313] If the award had been discounted to the date of the delict, the plaintiff would have received only R18 625.

Generally speaking, delictual damages are assessed at the date of delict. [314]However, in *Wigham v British Traders Ins* [315] the court held that it would be better to estimate an elderly plaintiff's expectation of life at the date of the action. The court first assessed damages for lost support up to the date of trial and thereafter made a

separate calculation for the period after the date of the action. The court held the opinion that it is realistic to base an assessment of prospective loss on facts known at the date of trial. [316]

14.8 DAMAGES FOR LOSS OF SERVICES OF ANOTHER PERSON [317]

The question of who may sue on account of the death or injury to another has been discussed above. [318]

Damages for the loss of a breadwinner's services are computed on a basis similar to that employed in the calculation of damages for loss of support. The annual value of the lost services and the period over which they would have been rendered are actuarially expressed in its present or annuity value. The annuity figure must then be adjusted in view of the relevant contingencies and the equities of the case.

In *Yorkshire Ins Co v Porobic* [319] the plaintiff claimed damages for loss of his deceased wife's services in running his business. The value of her services was assessed on the basis of the minimum monthly wage payable for such services. [320]This amount was reduced by the monthly cost of maintaining his wife. [321] The amount in question was multiplied by the probable time for which such services would have been rendered. [322]

14.9 COMPENSATION IN TERMS OF COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT 130 OF 1993 [323] AND OTHER STATUTORY PROVISIONS

14.9.1 General [324]

Reference will be made only to some basic principles of this specialized subject. This Act in effect creates statutory insurance [325] which entitles an 'employee' [326] and his or her dependants [327] to claim compensation [328] on account of an 'accident'. [329]This Act enjoys a specific relationship with the Road Accident Fund Act, [330] the Apportionment of Damages Act 34 of 1956 [331] as well as the Occupational Diseases in Mines and Works Act 78 of 1973. [332]

Section 35(1) of the Act substitutes the right to compensation provided therein

against the Director-General for any other claim which the employee might have against his or her employer. [333] Compensation [334] is recoverable from the Director-General without having to prove the normal requirements for delictual liability (such as fault). All that has to be proved is that an employee met with an accident arising out of or in the

course of his or her employment which resulted in that employee's disablement, illness or death. [335] If a third party is liable for such accident, the employee may claim damages from the third party [336] if certain requirements are met. However, compensation payable by the Director-General will reduce the damages which may be claimed from the third party. [337] The Director-General is liable to pay damages only in respect of patrimonial loss and not damages for pain and suffering. [338]

14.9.2 Some principles regarding assessment of compensation

Chapter V of the COID Act contains the technical principles on how the amount of compensation is to be assessed in the following cases: [339] temporary total or partial

disability; [340] permanent disability; [341] the death of an employee. [342] There are also provisions on how earnings are to be assessed. [343]

Section 22(3) limits the extent of an employee's claim against the Director-General in some respects. Of particular importance is the fact that no compensation is payable if an accident is due to the serious and wilful misconduct of the employee, unless it results in serious disability or the employee dies in consequence thereof leaving a dependant who was totally financially dependent on him or her. [344]

Section 56 provides for increased compensation if an accident was caused by the negligent conduct of an employer (or certain other persons) or if the accident was brought about by a perceptible defect in the condition of the premises, machinery, etc and that the negligence of the employer has either caused such a defect or resulted in it not being repaired. [345] Where an employee's claim is subject to apportionment in terms of the Apportionment of Damages Act 34 of 1956, [346] the reduced claim is used to calculate the amount recoverable from the RAF. [347]

Section 72 states that the reasonable cost of transporting an injured employee must be paid by the Director-General. Also of importance is s 73 in terms of which the Director-General has to pay the reasonable cost incurred by or on behalf of an employee for medical aid necessitated by an accident for a maximum period of two years after its occurrence. [348]

14.9.3 Nuclear Energy Act 131 of 1993 and National Nuclear Regulator Act 47 of 1999

Section 72(2)*(a)* of Act 131 of 1993 stipulates that some provisions of the COID Act 130 of 1993 apply in regard to injuries sustained by persons employed by the

corporation or one of its subsidiaries. [349] Section 35(2) of Act 47 of 1999 also stipulates that an employee of the Regulator may claim benefits in terms of the COID Act 130 of 1993. [350]

14.10 DAMAGES [351] FOR INFRINGEMENT OF PERSONALITY RIGHTS

14.10.1 General

In practice, it is accepted that an infringement of rights to the corpus (body), fama (reputation) and dignitas may cause patrimonial loss. [352] Important examples of patrimonial loss caused by an aggression on the body (and life) of another have been discussed above. [353] In this paragraph attention is devoted to the calculation of damages

in cases not yet discussed from the viewpoint of particular delicts against personality interests.

14.10.2 Infringement of body and bodily freedom [354]

In the case of seduction [355] the girl or woman may, inter alia, claim compensation for reasonable lying-in and medical expenses if a child is born, as well as for her own maintenance during the relevant period. [356] The plaintiff's loss of income may probably not be taken into account. [357] In a case of sexual harassment that leads to psychiatric injury, a claim for future medical expenses may be instituted. [358]

An infringement of bodily freedom may also cause loss of income. [359] This loss must be quantified as discussed above. [360]

14.10.3 Infringement of fama through defamation, malicious proceedings and unlawful attachment of property [361]

The defamation of a natural person may result in patrimonial loss, as in the case of an attorney, a businessman or a doctor who loses clients, customers or patients. [362] In reality these cases are often concerned with separate patrimonial rights to goodwill, earning capacity or creditworthiness. [363] In such cases damages must be computed with reference to the loss of income or profit. One is thus concerned with the number of clients, customers or patients lost and its impact on a plaintiff's patrimony. Just as in the case of unlawful competition [364] it can be very difficult to assess the extent of the loss as well as the fact that it was caused by the defamation. Precise proof of damage is often impossible and the court should assess an amount ex bono et aequo. [365] Regard should also be had to the principles of legal causation in order to keep liability within reasonable limits. [366]

If a trading corporation (a legal person) is defamed, [367] the same principles as those stated above should apply. [368] A corporation may claim damages 'if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial prejudice'. [369]

14.10.4 Infringement of dignitas [370]

Adultery with a plaintiff's spouse or partner as well as abduction, enticement and harbouring may result in patrimonial loss in respect of the material side of consortium. [371] An example is the loss of a wife's or partner's supervision of the household and children. [372] The amount of damages should be computed as indicated above [373] and by deducting an amount to provide for a possible re-partnership by the innocent partner if the loss is permanent as well as a possible saving on the cost of his or her maintenance. [374]

An invasion of privacy may cause patrimonial loss for which damages, assessed in terms of general principles, may be recoverable.

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[1] Compensation and satisfaction for the causing of *non-patrimonial loss* in such cases is discussed in chap 15.

[2] Para 14.3.

[3] As amended by the Road Accident Fund Amendment Act 19 of 2005. Cf para 7.5.4 on causes of action in third-party claims; para 11.8 on limitations and exclusions in third-party claims. See in general

Klopper *Third Party Compensation* 25–108 (requirements for liability); 109–20 (liability in the case of unidentified vehicles); 121–42 (exclusion of liability); 215–70 (limitations on damages); 271–84 (prescription of claims); 285–316 (claim procedure). See also Klopper *RAF Practitioner's Guide*.

[4] See *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 841; Klopper *Third Party Compensation* 2.

[5] The fact that damage and damages (indemnification) have a particular meaning under this Act does not mean that they fall outside the scope of the law of damages.

[6] See para 14.9.

[7] See in general Corbett & Buchanan I 29 et seq.

[8] Recently also called 'loss of employability'—see *Mokgara v Road Accident Fund* unreported (65602/2009) [2011] ZAGPPHC 50 (1 April 2011); *Kgomo v Road Accident Fund* unreported (25846/2010) [2011] ZAGPJHC 103 (2 September 2011) para 7; *Mngomezulu v Road Accident Fund*unreported (4643/2010) [2011] ZAGPJHC 107 (8 September 2011) para 4; *Van der Mescht v Road Accident Fund* unreported, case no 12182/2008 (GSJ), 12 March 2010 para 10.

[9] Chap 15.

[10] See in general Corbett & Buchanan I 2–4, 35–7; Boberg *Delict* 480; Lee & Honoré *Obligations*245–9; *Guardian National Ins Co Ltd v Van Gool* 1992 (4) SA 61 (A). For the application of this distinction, see Van der Walt 2002 *SALJ* 650–5 and Steynberg 2007(1) *PELJ* 165.

[11] Para 3.4.4. See Buchanan 1965 *SALJ* 458: 'It is interesting to note the tendency in modern judgments to get away from the technical distinction between special and general damages in favour of observing the much more real distinction between patrimonial (or pecuniary) and non-patrimonial (or non-pecuniary) damages, incidentally using the term 'general damages' to refer exclusively to the vast conglomeration of heads of non-patrimonial damages consisting of pain and suffering, loss of amenities, etc. It is submitted, with respect, that the observance of this distinction is sound and may well lead to resolving conflicts of principle.' See also *Media 24 v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) and *Gold Reef City Theme Park (Pty) Ltd; Akani Egoli (Pty) Ltd v Electronic Media Network Ltd*2011 (3) SA 208 (GSJ) for the use of the terms 'special damages' and 'general damages'. See further Klopper *Third Party Compensation* 145–6; Steynberg *Verdeling van Skade in Skadeposte* 160–2.

[12] See para 16.1.2 on the pleading and proof of general damage.

[13] See *Brown v Bloemfontein Municipality* 1924 OPD 226; *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T); *Roberts v Northern Ass Co Ltd* 1964 (4) SA 531 (D) at 539; *Strougar v Charlier* 1974 (1) SA 225 (W) at 228.

[14] *Graaff v Speedy Transport* 1944 TPD 236.

[15] See para 16.1.2 on pleading and proof of special damage.

[16] *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (1) SA 24 (N) at 29.

[17] See *Ncubu v National Employers General Ins Co Ltd* 1988 (2) SA 190 (N) at 200, where compensation for loss of earning capacity was classified with damages for pain and suffering. See also *Roberts v Northern Ass Co Ltd* 1964 (4) SA 531 (D); *Nanile v Minister of Posts and Telecommunications*Corbett & Honey A4–36. See, however, *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 113: 'Indeed, in cases where the damages are at large, it is desirable, where it is possible to do so, to itemise the amounts awarded in respect of pecuniary damages (such as loss of earning capacity) and non-pecuniary damages (such as loss of amenities etc)'; *Muller v Mutual and Federal Ins Co Ltd* 1994 (2) SA 425 (C) at 432–57. Cf further *Shasha v President Ins Co Ltd* Corbett & Honey A2–10.

[18] Corbett & Buchanan I 35.

[19] See para 2.3.3 on this distinction.

[20] See, however, *Oosthuizen v Thomson & Son* 1919 TPD 124.

[21] *Delict* 117–18.

[22] See Corbett & Buchanan I 35.

[23] See para 16.1.3 on the pleading of damage. See also *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 112.

[24] In terms of these rules damage is subdivided as follows: *(a)* medical costs etc (apparently in the past and future); *(b)* pain and suffering; *(c)* disability in respect of income (further divided into income already lost and future loss) and in respect of the amenities of life; *(d)* disfigurement. These rules can be criticized from a theoretical point of view as follows: as far as medical expenses are concerned, there is no clear distinction between loss already sustained and future loss; loss of amenities should not be so closely associated with loss of earning capacity; there is no provision for shock and the shortening of life

expectancy; patrimonial and non-patrimonial loss are mixed up; and apparently no provision is made for special expenses such as, eg, the purchasing of a motor car necessitated by injuries (see para 14.3).

[25] See Corbett & Buchanan I 35 et seq and Boberg *Delict* 536–8; para 16.1.3.

[26] See *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 113. Cf, however, *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP) at 2835–6.

[27] In other words, for pain, suffering etc, loss of earning capacity, future medical expenses etc. See Corbett & Buchanan I 36; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA).

[28] See for more detail para 8.4. See further rule 36 of the Uniform Rules of Court on medical examinations.

[29] See Corbett & Buchanan I 37–8; cf also Klopper *Third Party Compensation* 170 et seq; Boberg *Delict* 535 et seq. Cf further *Klaas v Union & SWA Ins Co Ltd* 1981 (4) SA 562 (A) at 577; *Revelas v Tobias* 1999 (2) SA 440 (W) at 444. See Corbett & Honey xiii et seq and Potgieter *Quantum of Damages*177-226 for medical terms and sketches.

[30] See also *Truter v Deysel* 2006 (4) SA 168 (SCA); para 16.2.

[31] Corbett & Buchanan I 37 submit that the test of whether medical costs are recoverable is not whether the treatment was strictly necessary but whether the plaintiff has acted reasonably in undergoing such medical treatment. A plaintiff may also recover the cost in respect of as many doctors and medical staff as are reasonable in the circumstances (see *Marais v Loutitit* 1911 TPD 307). See also Klopper *Third Party Compensation* 170.

[32] In *Selikman v London Ass* 1959 (1) SA 523 (W) a plaintiff sustained an injury to his pelvis and on examination at a hospital he was found to have a bleeding ulcer. In order to stop the bleeding a so-called 'short-circuiting' operation was performed. Although the bleeding ulcer was caused by the accident, the operation was actually carried out to remove the ulcer, for which an operation was necessary in any event. The plaintiff did not lead evidence to show that the bleeding could not have been stopped by any other method than the operation. The court held that the plaintiff had not proved that the operation was necessitated by the accident. In *Smith-Wright v Van der Linde* Corbett & Buchanan I 454 it was held that the plaintiff could recover damages for an operation to her knee necessitated by her having fallen while moving about on crutches and recovering from the injuries received by her in the accident. The court held that the knee operation was the direct result of the initial injuries.

[33] *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 784. 'By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course ... receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving.' The court further held that where a plaintiff produced evidence of the use of private medical services, he or she has proved his or her damages unless one may on all the evidence (including evidence of less expensive alternative medical services) conclude that the plaintiff has not proved on a balance of probabilities that these medical expenses are reasonable. Thus, a defendant has to adduce evidence that medical services in a provincial hospital are comparable to those under private management and the access a plaintiff has to such services. (The court made these remarks on prospective medical costs—see para 14.4—but they are naturally also valid in regard to medical expenses incurred before the action.) Formerly it was held in *Williams v Oosthuizen* 1981 (4) SA 182 (C) that a plaintiff is not entitled to the cost of a private hospital where he or she can obtain equivalent and satisfactory treatment in a less expensive provincial hospital. However, this judgment must be interpreted in the light of the *Ngubane* case (above) and the fact that it may in some instances be quite reasonable to seek treatment at a private clinic (eg where the plaintiff's medical specialist does not practise in a provincial hospital). Factors which are relevant here are the seriousness of the plaintiff's injuries and the nature of the treatment. See further *Munro v NEGI Co Ltd* Corbett & Honey F2–3; *General Accident Versekeringsmpy SA Bpk v Uijs* 1993 (4) SA 228 (A) at 236–7. See also *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC) at 433–6 declaring reg 5(1) of the Road Accident Fund Act 56 of 1996 unconstitutional. Reg 5(1) provided that the liability of the Fund will be in accordance with the Uniform Patient Fee schedule for fees payable to *public* health establishments. Consequently all references to 'tariffs' in the principal Act (see ss 17(4B*)(a)*, *(b)* and *(c)*, 17(5) and (6)) are pro non scripto and the position in respect of claims for medical expenses reverts back to what it was prior to the promulgation of the Amendment Act 19 of 2005.

[34] See Corbett & Buchanan I 37.

[35] In practice a plaintiff will submit medical accounts (ie accounts from a hospital, similar institution, paramedical staff, and pharmacists) as basic proof of loss and the quantum of the damages.

[36] Section 17(5) stipulates: 'Where a third party is entitled to compensation in terms of this section and has incurred costs in respect of accommodation of himself or herself or any other person in a hospital or nursing home or the treatment of or any service rendered or goods supplied to himself or herself or any

other person, the person who provided the accommodation or treatment or rendered the service or supplied the goods (the supplier) may, notwithstanding s 19*(c)* or *(d)*, claim an amount in accordance with the tariff contemplated in subsection (4B) direct from the Fund or an agent on a prescribed form, and such claim shall be subject, *mutatis mutandis*, to the provisions applicable to the claim of the third party concerned, and may not exceed the amount which the third party could, but for this subsection, have recovered.' The third party must be personally liable for the 'costs', in other words, the supplier cannot rely on this section if it delivers medical treatment to the third party free of charge. See, however, *Free State Consolidated Gold Mines (Operations) Ltd t/a The Ernest Oppenheimer Hospital v Multilateral Motor Vehicle Accidents Fund* 1997 (4) SA 930 (O); 1998 (3) SA 213 (SCA); *Van der Merwe v Road Accident Fund* 2007 (6) SA 283 (SCA). See also *Road Accident Fund v Abdool-Carrim*2008 (3) SA 579 (SCA); Klopper *Third Party Compensation* 40–6; Klopper 2007 *THRHR* 469–81; Klopper 2008 *De Rebus* 18–21; Ahmed 2010 *THRHR* 307–17.

[37] For example the fees of a medical practitioner who renders service in the course of his or her duties at a provincial hospital (see Klopper *Derdeparty* 143) or if the claim has been extinguished, eg, by payment by a medical aid or if it had prescribed (see Klopper *Third Party Compensation* 44).

[38] See also the exposition in *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A) at 283–5; *Shasha v President Ins Co Ltd* Corbett & Honey A2–16 to A2–17; *Wessels v AA Onderlinge Ass* Corbett & Honey A3–21 to A3–22, A3–28; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–46; *Ndhlovu v Swaziland Royal Ins Co* Corbett & Honey E2–1; Klopper *Third Party Compensation* 171–4.

[39] *Mills v Church* 1935 GWL 24 at 33; *Marais v Louttit* 1911 TPD 307; *Stephenson v General Accident Fire & Life Ass Corp Ltd* Corbett & Buchanan II 376 at 380 (airfare awarded). A visit to a medical practitioner for purposes other than treatment (eg as expert witness) falls under litigation costs and no damages are recoverable (see *Scheepers v African Guarantee & Indemnity Co Ltd* 1962 (3) SA 657 (E); *Fredericks v UNISWA Ins Co Ltd* Corbett & Buchanan II 335). See also *Griffiths v Mutual and Federal*1994 (1) SA 535 (A).

[40] *Broom v Administrator, Natal* 1966 (3) SA 505 (D) at 526; *McKenzie v SA Taxi-Cab Co* 1910 WLD 232; *Creydt-Ridgeway v Hoppert* 1930 TPD 664 at 670; *Light v Conroy* Corbett & Buchanan I 444; *Griffiths v Mutual & Federal Ins Co Ltd* 1994 (1) SA 535 (A) (no claim for airfare for annual holidays because of the difficulty of travelling by car caused by the injury).

[41] *Dickinson v Galante* 1949 (3) SA 1034 (R). This judgment has been criticized: see Corbett & Buchanan I 38 n 118; *Broom v Administrator, Natal* 1966 (3) SA 505 (D) at 526. See also *Lowndes v President Ins Co Ltd* 1977 (2) PH J44 (O).

[42] *Ehlers v SAR & H* Corbett & Buchanan I (1985) 250; *Kloppers v Rondalia Ass Corp* Corbett & Buchanan II 289; *Stephenson v General Accident Fire Life Ass Corp Ltd* Corbett & Buchanan II 376 at 380.

[43] See *Esterhuizen v Administrator, Transvaal* 1975 (3) SA 710 (N); *Gillbanks v Sigournay* 1959 (2) SA 11 (N); *Madolo v Cemane and Whitby* Corbett & Buchanan II 3; *Protea Ass Co Ltd v Lamb* Corbett & Buchanan II 117; *Ehlers v SAR & H* Corbett & Buchanan I 250; *Kloppers v Rondalia Ass Corp* Corbett & Buchanan II 289. *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 635. See also *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 226 on an electronic arm; *Chaza v Commissioner of Police* Corbett & Honey A3–15 on a wheelchair.

[44] *Mostert v Shield Ins* Corbett & Buchanan II 751; *Ngubane v South African Transport Services*1991 (1) SA 756 (A) at 758; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); *Gillbanks v Sigournay* 1959 (2) SA 11 (N); *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 555; *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 226 (a claim for a personal assistant—as opposed to an attendant or helper—not allowed); *Troos Transport t/a Ekonoliner Luxury Coach Lines v Abrahams* 1999 (2) SA 142 (C) at 146–7 (claim for an assistant and driver where claimant lost his sight not allowed); *Page & Anor v Rondalia Ass Corp Ltd* Corbett & Buchanan II 520; *Fredericks v UNISWA Ins Co Ltd* Corbett & Buchanan II 335 at 342. See further *Rondalia Ass Corp Ltd v Gonya* 1973 (2) SA 550 (A); *Oberholzer v NEGI Co Ltd* Corbett & Honey A3–8; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–85 (gardener and handyman); *Bartlett v M & F Versekeringsmpy* Corbett & Honey A4–28 (assistant/ward/consort). This claim will be allowed even though the plaintiff may choose not to make use of an attendant but rather to be treated by a family member—*General Accident Versekeringsmpy SA Bpk v Uijs* 1993 (4) SA 228 (A) 236–7; Klopper *Third Party Compensation* 172–3.

[45] See Newdigate & Honey *MVA* 161 on the problem of deciding what is reasonable in such circumstances. See further *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 783–4; *Shasha v President Ins Co Ltd* Corbett & Honey A2–13 to A2–15 regarding inter alia a burglar alarm, floodlight control, remote control switches and the special construction of a home; *Ndhlovu v Swaziland Royal Ins Co* Corbett & Honey E2–9.

[46] *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 783. See further *Shasha v President Ins Co Ltd* Corbett & Honey A2–19 to A2–20 (lease of a motor vehicle); *Oberholzer v NEGI Co Ltd* Corbett & Honey A3–7; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–82.

[47] In *General Accident Versekeringsmpy SA Bpk v Uijs* 1993 (4) SA 228 (A) at 236–7 the court awarded compensation for accommodation in a specialized institution despite the fact that the plaintiff might choose not to make use of it. The court held further that a contingency allowance should be made for the possibility that the plaintiff may from time to time make use of semi-structured accommodation. See also *Joubert v Bezuidenhout* unreported, case no 23333/2000 (T), 22 August 2007 paras 23–46 on the choice between an affordable subsidized institution and a more expensive private institution. The court awarded an amount between these two extremes.

[48] Section 17(1) of the RAF Act 56 of 1996 requires that the source of damage has to be bodily injury or death. See para 7.5.4.2.

[49] See *Oberholzer v Santam Ins Co* 1970 (1) SA 337 (N); para 7.5.4.2.

[50] Where, however, a bodily injury for example requires the plaintiff to use spectacles, such costs are recoverable from the RAF. See Klopper *Third Party Compensation* 90.

[51] See chap 6 on future loss. Cf further Boberg *Delict* 536 et seq and, eg, *Bennie v Guardian National Ins* Corbett & Honey A3–41; *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–33.

[52] Chap 6.

[53] *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 225.

[54] See *Wilson v Birt* 1963 (2) SA 508 (D) at 517 and *Van Oudtshoorn v Northern Ins* 1963 (2) SA 642 (A) at 650–1. If, for instance, there is a 40 per cent possibility that the plaintiff will spend R1 000 on medical costs in future, he or she may be awarded R400 as damages. See further *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W) at 75; *Kwele v Rondalia Ass Co Ltd* 1976 (4) SA 149 (W) at 152; *Marais v Rondalia Ass Corp* Corbett & Buchanan II 130 at 132. See, however, Corbett & Buchanan I 30.

[55] In certain jurisdictions it is permissible to place expert evidence before the court by way of affidavits—*Havenga v Parker* 1999 (3) SA 724 (T). See *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 410–11 on expert evidence in general; *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) for a detailed analysis of all evidence presented by the various medical experts in this case. See also *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 471–2 on conflicting medical expert reports; *Road Accident Fund v Delport* 2006 (3) SA 172 (SCA) at 174–7; *Valentine v Road Accident Fund* [2007] 3 All SA 210 (C) at 212–14; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 340–3.

[56] See *Beverley v Mutual and Federal Ins* 1988 (2) SA 267 (D).

[57] See, eg, *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 783; *Singh v Ebrahim (1)*[2010] 3 All SA 187 (D) at 217 et seq.

[58] Para 6.7.5. See, however, *Munro v NEGI Co Ltd* Corbett & Honey F2–4 where the damages were not discounted. In *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 215–16 the court applied a 2,5 per cent capitalization rate as suggested by Koch in his *Quantum Year Book* 2007. See para 11.7 where this issue in respect of inflation is discussed in general.

[59] Corbett & Buchanan I 137 furnish the following example: The injured X proves that he will have to undergo an operation in 6 years' time at a cost of R3 000. If this amount is to be discounted at 14 per cent, the calculation is done as follows: R3 000 x 9420 x 0,0001 = R2 826. (The factor 9420 x 0,0001 is obtained from the tables in Corbett & Buchanan I 140 opposite the corresponding number of years and interest on R10 000.) See *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–35. Furthermore, the amount has to be reduced by a certain percentage to allow for contingencies (eg the early death of the plaintiff) (see *Ngubane v SA Transport Services* 1991 (1) SA 756 (A)). See also *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 226.

[60] See para 6.7.3 on this; *Van der Plaats v SA Mutual Fire & General Ins Co Ltd* 1980 (3) SA 105 (A) at 114; *Singh v Ebrahim (2)* [2010] 3 All SA 240 (D) at 244: 'There are obviously positive and negative factors which could affect many items. It seems to me that within the usual parameters of a contingency deduction in respect of medical costs, varying between 5% to 20%, that a 10% contingency deduction would *in casu* be appropriate.'

[61] Para 8.4. See generally *Bobape v President Ins Co Ltd* Corbett & Honey A4–49; *Munro v NEGI Co Ltd* Corbett & Honey F2–3. See also Klopper *Third Party Compensation* 176–8.

[62] *Third Party Compensation* 176–8.

[63] Klopper 1996 *De Rebus* 94 et seq; *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A) at 970; *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 835.

[64] *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A). See also *Hartnick v SA Eagle Ins Co Ltd* 1982 (1) PH J10 (C).

[65] Once an undertaking made by the RAF is accepted by the third party, it constitutes a binding contract between the parties and the Fund may not at a later stage attach an additional term to the certificate. That will amount to repudiation of the contract—see *Peens v RAF* 2002 (2) SA 636 (D) at 641.

[66] For example a plaintiff may not insist that the undertaking should contain details of the nature of hospital accommodation, treatment or goods to be supplied.

[67] Para 14.3.

[68] In *Arendse v RAF* [2002] 1 All SA 436 (C) it was held that compensation for 'costs' includes costs of attorney appointed to administer a trust where this task is beyond the claimant's capabilities. See also *Brink v Guardian Nasionale Versekering Bpk* 1998 (1) SA 178 (O) (compensation for 'costs' to include costs which a plaintiff might incur in the future by appointing somebody to assist him in his farming activities as a result of the injuries which he sustained); *Reyneke v Mutual & Federal Ins Co Ltd*1992 (2) SA 417 (T) (compensation for 'costs' wide enough to include the cost of appointing a curator bonis to administer the claimant's estate). See *Reyneke v Mutual & Federal Ins Co Ltd* 1991 (3) SA 412 (W) at 428 on the use of damages for loss of the amenities of life to acquire luxury items not covered by an undertaking.

[69] 1990 (2) SA 701 (W).

[70] In *Van der Westhuizen v Multilaterale Motorvoertuigongelukkefonds* [1998] 3 All SA 674 (T) the court instructed that the reference to 'necessary treatment' in the certificate be changed to 'reasonable treatment'.

[71] If the RAF is of the opinion that in a particular instance a plaintiff should have used the facilities at a provincial hospital in order to mitigate his or her loss, it should tender only the lower costs. If the plaintiff is dissatisfied, the court will have to decide the matter. The costs of negotiations on an undertaking which is allegedly too narrowly formulated are to be carried by the RAF (*Dladla v Minister of Defence* 1988 (3) SA 743 (W) at 749). See also *Law Society of SA v Minister for Transport* 2011 (1) SA 400 (CC).

[72] See Koch *Lost Income* 248 for an example and further information. See also Klopper *Third Party Compensation* 176–8.

[73] See para 6.7 on the problems concerning prospective loss.

[74] In such a case a plaintiff may be assisted before conclusion of the case by an interim payment in terms of s 17(6) of the RAF Act and rule 34A of the Uniform Rules of Court. In *Dladla v Minister of Defence* 1988 (3) SA 743 (W) the parties agreed on an undertaking going beyond the provisions of s 17(4)*(a)* in order to eliminate this problem. In this case the court also suggested that the legislature consider the problems in connection with an undertaking. See *Reyneke v Mutual & Federal Ins Co Ltd*Corbett & Honey A4–80 on the possible use of damages for non-patrimonial loss in this regard.

[75] *Dladla v Minister of Defence* 1988 (3) SA 743 (W); *Majele v Guardian Ins Co Ltd* 1986 (4) SA 326 (T); *Mutual & Federal Ins Co Ltd v Ndebele* 1996 (3) SA 553 (A) at 560–2. Contra *Ndebele v Mutual & Federal Ins Co Ltd* 1995 (2) SA 694 (W).

[76] In *Van der Westhuizen v Multilaterale Motorvoertuigongelukkefonds* [1998] 3 All SA 674 (T) the court held that it is proper to give a conditional undertaking. The Fund undertook to compensate the third party once the party no longer received free medical treatment. In *Peens v RAF* 2002 (2) SA 636 (D) at 642 the decision in *Van der Westhuizen* was confirmed and the court added obiter that the RAF may tender a certificate excluding liability to pay amounts claimable by the third party under the COID Act 130 of 1993. See also *Nokhutla Mwelase v MMF* (unreported NPD case no 38496/96) in which it was held that a 43 of the Multilateral Motor Vehicle Accidents Fund Act (which corresponds to s 17(4) of the RAF Act) cannot be confined to apply only to claims that are not restricted in terms of a 46 (s 18)—Klopper 1998 *De Rebus* 47. See also *RAF v Clayton* 2003 (2) SA 215 (SCA).

[77] Newdigate & Honey *MVA* 159 suggest that the qualification in *Marine and Trade Ins v Katz* 1979 (4) SA 961 (A) that only *reasonable* expenses are recoverable may lead to uncertainty and litigation. It also involves a risk to a plaintiff who bona fide incurs medical expenses only to learn later that they are unreasonable. It is perhaps advisable that the plaintiff and the RAF agree in advance on medical expenses before they are actually incurred in order to avoid later disputes. See Klopper *Third Party Compensation* 177.

[78] See also Corbett & Buchanan I 39–40; Boberg *Delict* 531 et seq; 536 et seq; Koch *Lost Income*167; *Reduced Utility* 219–22; 1991 *THRHR* 129, who speaks of past lucrum cessans.

[79] In assessing the loss of income in the past, it is not only the cash earnings of the injured person which are taken into account, but also any other bonus or benefit which he or she could have received.

[80] See *Sandler v Wholesale Coal Supplies Ltd* 1941 AD 194; *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A); *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 567; *Kwele v Rondalia Ass Corp* Corbett &

Buchanan II 255 at 259–61; *Pitt v Economic Ins Co Ltd* 1957 (3) SA 284 (D); *Matross v Minister of Police*1978 (4) SA 79 (E) at 83; *Bennie v Guardian National Ins* Corbett & Honey A3–37. Cf Koch *Lost Income*240 on the collection of evidence.

[81] This loss is seen as special damage and has to be specially pleaded and proved. Rule 18(10) of the Uniform Rules of Court and rule 6(10)*(c)*(i) of the Magistrates' Court Rules require that a plaintiff has to provide information on the earnings lost up to date and how the amount is made up.

[82] See Klopper *Third Party Compensation* 178–9; Koch *Reduced Utility* 220; Millard 2007 *Law, Democracy and Development* 15–16.

[83] 1941 AD 194.

[84] The plaintiff was the proprietor of a garage business to which he devoted his personal attention. As a result of bodily injuries he was absent from his business for a period of four months during which time it was conducted by his manager. The court held as follows on the question whether the plaintiff had proved his loss (at 198): 'When the owner of a business of this nature, who works in it in the way in which the appellant worked, is confined to hospital for four months and unable to do the work which he previously did, the business as a profit-earning concern must necessarily suffer. It seems reasonable to assume that the appellant's skill and energy and his activities in the affairs of the business were a source of some profit to the business. These were taken away and nothing put in their place. It is also not unreasonable to assume that the personal presence of the owner of the business is a factor in keeping up the efficiency of his employees and of the services rendered to the public, and so attracting customers.' In *Deyzel v Santam Ins Co Ltd* Corbett & Buchanan I 40 *Sandler* supra was referred to in a case where a farmer could, on account of injuries, not personally attend to his farming operations.

[85] *MVA* 160: 'In such cases you normally have to do the best you can with balance sheets and income tax returns, bearing in mind contingencies such as drought or economic conditions, and any additional expenditure to which the plaintiff may have been put by having to employ temporary assistance.'

[86] Eg a locum tenens for an injured doctor or a manager for a commercial traveller or a farmer (*President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5). See *Brink v Guardian Nasionale Versekering Bpk* 1998 (1) SA 178 (O) where allowance was made for the cost of employing somebody to assist the injured third party in his farming activities as part of an undertaking in terms of s 17(4)*(a)* of the RAF Act 56 of 1996. In such a case this cost cannot also be claimed under the heading of loss of income (above at 181). In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) the court dismissed a claim for loss of earning capacity by a game farmer and professional hunter who sustained serious bodily injuries, due to lack of proof that he suffered any financial loss in his personal estate. His farming and hunting business was done through a 'family' company behind which the plaintiff was the driving force. Although the plaintiff had proved disabilities which, potentially at any rate, could give rise to a reduction in his earning capacity, he had failed to prove that this had resulted in patrimonial loss to him personally, since the loss of earnings (inter alia the costs involved in appointing a maintenance manager to replace him) was a loss to the company and not to his private estate. There was no evidence, eg, that the value of his shares in the company had fallen, or even that he received less from the company by way of dividends or fees because of the company's reduced income, or that he would do so in future. The plaintiff's real function was that of CEO of a large farming undertaking, and there was no evidence that his disabilities had impaired his capacity to perform as such. See Visser 2004 *De Jure* 378–81; n 127 below.

[87] Para 10.9.

[88] Para 11.3.

[89] For example, illness and other factors which could have prevented the plaintiff from earning income. See para 6.7.3.

[90] Para 11.6.

[91] Para 6.7.5.

[92] See *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A).

[93] See n 8 above. See also Koch *Lost Income*; *Reduced Utility* 213 et seq; Boberg *Delict* 538 et seq; Newdigate & Honey *MVA* 164 et seq; Corbett & Buchanan I 46 et seq; Klopper *Third Party Compensation*181–93; Koch 1989 *THRHR* 76 et seq; paras 2.4.11, 2.4.12 and 11.6 on earning capacity; chap 6 on prospective damage. Millard 2007 *Law, Democracy and Development* 18 suggests that 'earning capacity is a diminution of a claimant's ability to generate an income'. Marx 2004 *Obiter* 233–7 analyses case law and identifies four categories of cases dealing with loss of earning capacity: Cases where loss of earning capacity is equated to loss of future income, where loss of earning capacity is quantified by the cost of supplementary labour skills, where it is impossible to quantify loss of earning capacity with any degree of accuracy, and where loss of earning capacity is included under general damages.

[94] The leading cases are *Santam Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150; *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 111; *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A); *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA); *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA); *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA).

[95] See *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 300; *SA Eagle Ins Co Ltd v Cilliers* 1988 (1) PH J7 (A) (no loss of earning capacity as a farmer, since a farm manager performs the work in any event—however, loss as a builder was proved). See, however, *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) and criticism of the decision by Marx 2004 *Obiter* 238–41.

[96] Boberg *Delict* 538–9 explains the importance for damages to be calculated on the basis of loss of earning capacity (instead of loss of actual earnings), because it extends compensation to those who do not utilize their earning capacity, such as a housewife, an engineer who repairs watches or a famous doctor who becomes an unpaid medical missionary. Our courts, however, do not distinguish clearly enough between loss of income as damage and loss of income as proof of a loss of earning capacity. See also Boberg 1973 *Annual Survey* 182: 'Compensation for loss of future *earnings* depends upon proof of what the plaintiff would, as a matter of probability, actually have *earned* in the future had he not been injured. Compensation for loss of *earning capacity*, on the other hand, requires no such proof. It does not signify whether the plaintiff would actually have earned the money or not: it is for the loss of his *capacity* to earn—irrespective of how he would have utilized it—that he is being compensated.' However, proof of probable future income is the best proof of the value of someone's earning capacity. See in general Koch 1986 *De Rebus* 499–502.

[97] See Neethling 1987 *THRHR* 316; 1990 *THRHR* 101. The view of Van der Merwe & Olivier *Onregmatige Daad* 186 n 28 that loss of earnings is only a consequence of the right to physical-mental integrity is theoretically unsound. See further Reinecke 1988 *De Jure* 235; Neethling et al *Law of Personality* 17–20; para 2.4.11.

[98] Cf, eg, *Van der Plaats v SA Mutual Fire General Ins Co Ltd* 1980 (3) SA 105 (A) at 113 (loss of future income for three months caused by an operation).

[99] 2003 (2) SA 234 (SCA) at 241–2; Visser 2004 *De Jure* 378–81; Marx 2004 *Obiter* 231–41.

[100] Marx 2004 *Obiter* 238–9 disagrees and states that once diminished earning capacity is proved, it diminishes the estate because the capacity to earn is considered part of a person's estate. He rightly submits that, once the court has found that there is diminished earning capacity, the court must, to the best of its ability, on the basis of the evidence at its disposal, quantify that loss. If the court followed this route in the *Rudman* case (n 99) and quantified his loss based on the evidence presented to court, a much smaller amount than what had been claimed would have been awarded, but at least the infringement of the plaintiff's right would have been vindicated in some way.

[101] *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 244: '[I]n the final analysis an award cannot be based upon speculation. It must have an evidential foundation.' See also *RAF v Zulu*unreported (50/11) [2011] ZASCA 223 (30 November 2011) para 10.

[102] Cf chap 6 on prospective loss. See, eg, *August v Guardian Ins Co Ltd* Corbett & Honey E2–15; *Griffiths v Mutual & Federal Ins Co Ltd* 1994 (1) SA 535 (A) at 546. See also Nienaber & Van der Nest 2005 *THRHR* 547–8.

[103] See para 6.7.5. For criticism, see Koch 1987 *THRHR* 109; Spandau 1975 *SALJ* 47 et seq.

[104] See, eg, *Union Government v Clay* 1913 AD 385 at 389–90; *Hulley v Cox* 1923 AD 234 at 243–4, relying on Voet; *Dyssel v Shield Ins Co* 1982 (3) SA 1084 (C); Corbett & Buchanan I 47–8. See also Millard 2007 *Law, Democracy and Development* 30: 'It is submitted that the award for loss of earning capacity on the basis of the somehow-or-other approach where the judge awards an amount that is deemed fair and reasonable in the circumstances, based on the evidence placed before the court, is in essence the same as a *solatium* and does not differ essentially from general damages awarded for pain and suffering.'

[105] 1948 (2) SA 913 (W) at 920. See also *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 30.

[106] See *Gillbanks v Sigournay* 1959 (2) SA 11 (N) at 14–15: 'As I appreciate the law on this aspect of the case, the Court is not required to give an absolutely perfect compensation. Exact mathematical calculation is impossible. A computation upon an annuity basis affords some guide, but ought not to be considered as a perfect guide and other circumstances must be given due weight .... T[he] principle . . . is that when one is asked to assess a claim based upon an estimated loss of future earnings one is really required to arrive at such a sum presently payable as will give to the plaintiff a periodic payment, and the figure arrived at should be such that at the end of the period there would be no capital sum left.' See also *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917; *Krugell v Shield Ins Co Ltd* 1982 (4) SA 95 (T) at 101, where the court remarked that if data are available and actuarial calculations are practically possible, it would be incorrect to use an intuitive guess. See further Koch *Lost Income* 48.

[107] 1984 (1) SA 98 (A) at 113–14. See also *Bobape v President Ins Co Ltd* Corbett & Honey A4–54; Boberg *Delict* 540; Dendy 1984 *Annual Survey* 232–4.

[108] See Millard 2007 *Law, Democracy and Development* 20–9; *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 586.

[109] Damages for loss of earning capacity cannot be calculated on an annuity basis without sufficient data (see *Roxa v Mtshayi* 1975 (3) SA 761 (A)—a young child). See further *Ncubu v National Employers General Ins Co Ltd* 1988 (2) SA 190 (N) at 200; *Dyssel NO v Shield Ins Co Ltd* 1982 (3) SA 1084 (C) at 1086; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 114; Koch *Lost Income* 158–63; *Nanile v Minister of Posts and Telecommunications* 1990 (1) PH J19 (E) (Corbett & Honey A4–36) (use of actuarial evidence and awards in previous cases to assess a global amount). See further *Maja v SA Eagle Ins Co Ltd* 1990 (2) SA 701 (W); *Road Accident Fund v Maasdorp* [2004] 2 All SA 242 (NC); *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 193–6, 235–6; Nienaber & Van der Nest 2005 *THRHR* 551–4; Steynberg 2007 *De Jure* 45–50.

[110] See, eg, *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 301; *Santam Ins Co Ltd v Paget* 1981 (2) SA 621 (ZA); *August v Guardian Ins Co Ltd* Corbett & Honey E2–18; *Otto v Road Accident Fund* [2004] 2 All SA 328 (W).

[111] See para 14.6.3. In *Lityeli Tyesi Litholi v Road Accident Fund* unreported, case no 225/08, 10 December 2009 (ECHC) actuarial calculations were used to assess loss of earning capacity of a minor child.

[112] See *Legal Ins Co v Botes* 1963 (1) SA 608 (A) at 614; *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 608; *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 587: 'The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. Courts have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial court has a wide discretion to award what it believes is just.' See also Millard 2007 *Law, Democracy and Development* 30–1.

[113] eg, in the case of a doctor, commercial traveller or farmer. In *Muller v Mutual & Federal Ins Co Ltd* 1994 (2) SA 425 (C) at 452 the court held that the cost of employing an assistant to substitute for her in performing the specialized physical tasks she can no longer undertake would be a fair measure of the diminution in her earning capacity. The court further held that her substitute will in effect take the place of her injured limbs. See also *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5–6 (the court declined to state whether this is really a case of loss of earning capacity or some other kind of loss—however, it does seem to be a reduction in earning capacity which is compensated in a specific manner); *Estate De Villiers v Bell* Corbett & Buchanan II 454. In *Mathews* (supra at 7) the court added that the cost of a substitute will naturally be reduced if he enables an injured plaintiff to make more profit with his assistance than in the past. In casu damages were computed in terms of a substitute's annual salary but the reported judgment gives no information on the nature of the actuarial calculations. A contingency deduction of 15 per cent was allowed. In *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) the injured plaintiff, a shareholder in a large family farming company, did not succeed in his claim because he failed to prove that his diminished earning capacity also resulted in patrimonial loss to him personally. See Marx 2004 *Obiter* 231–41; Visser 2004 *De Jure* 378–81; Roederer & Grant 2002 *Annual Survey* 455–6. In *Otto v Road Accident Fund* [2004] 2 All SA 328 (W) at 330 the court distinguished the facts of this case from the *Rudman* case. In *Otto* the plaintiff was the sole shareholder in the company and there was a direct traceable connection between any loss sustained by the company and the inability of the plaintiff to function as manager at an inconvenient time. See n 86 above.

[114] Koch *Lost Income* 46 et seq; 257 et seq describes the following methods: a simple gross-multiplier method (used with reference to the date of delict or the date of trial); a precise gross-multiplier method; the year-by-year method (*Snyders v Groenewald* 1966 (3) SA 785 (C) at 789). Newdigate & Honey *MVA* 166 et seq discuss the so-called Murfin method (see also *Goodall v President Ins Co Ltd* 1978 (1) SA 389 (W) at 392). See Koch op cit 48 on the English net multiplier; McGregor *Damages* 1201 et seq.

[115] See in general Steynberg 2011(2) *PELJ* 15–22; Nienaber & Van der Nest 2005 *THRHR* 546–61; Koch *Lost Income* 4 et seq; 238 et seq; Newdigate & Honey *MVA* 164. See also *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 466, where the court did not consider that an actuary could make a useful contribution in that particular case; *Glass v Santam* 1992 (1) SA 901 (W) at 904, where the court referred to actuarial evidence as 'parasite industries to litigation' and *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 410–16 in which expert medical evidence and actuarial calculations were rejected. See, however, *Guardian National Ins Co Ltd v Engelbrecht*1989 (4) SA 908 (T) at 911–12; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–61; *Singh v Ebrahim (2)* [2010] 3 All SA 240 (D).

[116] See Koch *Lost Income* 6: 'It would seem that the role of the actuary as an expert witness is not that of a valuator but rather that of an expert calculator, economist and statistician who makes his skills available to assist the court in arriving at a fair and proper value for the loss . . . . An actuary may thus

appropriately be seen to act as a calculation assistant to the court in circumstances where the court does not itself have the necessary technical ability. In acting in this capacity the actuary does not have an unfettered discretion to exercise his own judgment as to what is fair, for the law is responsible for the purpose and framework within which the calculations are to be performed'; Klopper 2007 *THRHR*446. See also *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 101; *Singh v Ebrahim (1)*[2010] 3 All SA 187 (D) at 199.

[117] See *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 200 et seq.

[118] He or she may also give evidence on discounting, annuity calculations, contingencies, general economic conditions, life expectancy and other probabilities. See Koch *Lost Income* 239: 'The most important function of an actuary would seem to be that of an expert calculator who uses his skills to put into effect the rules of calculation laid down by the [law].' Although an actuary performs his or her calculations in terms of actuarial science, such a person has to take account of the relevant legal principles and his or her evidence is subject to the fact that the court still has a bona fide discretion in the matter (see *Legal Ins v Botes* 1963 (1) SA 608 (A) at 614). See also Morris & Mullins 1995 *De Rebus*375–7; *RAF v Zulu* unreported (50/11) [2011] ZASCA 223 (30 November 2011) para 14.

[119] See *Van der Mescht v Road Accident Fund* unreported, case no 12182/2008 (GSJ), 12 March 2010 para 17.

[120] Koch *Lost Income* 6–7.

[121] Steynberg 2011(2) *PELJ* 19.

[122] *Carstens v Southern Ins Ass Ltd* 1985 (3) SA 1010 (C) at 1021: 'While the Court will generally have regard to arithmetical calculations and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case'; *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451: 'When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss . . . . The actuary, in the course of his evidence, referred to mortality tables, rates of interest, currency depreciation, and certain calculations such as the present value of various sums capitalized over a period of years. This evidence is helpful in a general way but, as was mentioned in *Legal Insurance Co Ltd v Botes* 1963 (1) SA 608 (AD) at p 614, the court is not tied down by inexorable actuarial calculations; *RAF v Zulu* unreported (50/11) [2011] ZASCA 223 (30 November 2011) para 15.'

[123] See *Smart v SAR&H* 1928 NLR 361; *Snyders v Groenewald* 1966 (3) SA 795 (C); *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 728: 'The matter will now stand down until such time as the actuaries have completed their calculations on the foregoing basis. It may then be mentioned again for the purpose of leading further evidence, if necessary, and of enabling me to make such final awards or orders as may be appropriate'; *Saayman v RAF* [2011] 1 All SA 581 (SCA) at 585–6: 'It should be clear that there is a need for a proper and accurate recalculation of the damages to be awarded to the apellant. The parties agreed that, once we have decided on the proper basis for the recalculation of the appellant's damages, the matter be referred to an independent actuary for a correct recalculation.' See also *Mokgara v Road Accident Fund* unreported (65602/2009) [2011] ZAGPPHC 50 (1 April 2011) para 12; *RAF v Zulu* unreported (50/11) [2011] ZASCA 223 (30 November 2011) para 24.

[124] See Koch *Lost Income* 48. In *Trimmel v Williams* 1952 (3) SA 786 (C) at 792–3 the court requested the actuary to recalculate the damages award based on amended assumptions. See also *Snyders v Groenewald* 1966 (3) SA 785 (C) at 795; *Singh v Ebrahim (2)* [2010] 3 All SA 240 (D).

[125] See *Mngomezulu v Road Accident Fund* unreported, case no 4643/2010 (GSJ), 8 September 2011 para 111 where Kgomo J states that he has done his own calculations and then 'applies' the sum-formula approach without comparing two scenarios, thus arriving at an incorrect result. Fortunately the court's erroneous calculations end up close to the amount claimed by the plaintiffs and the judge consequently awarded more or less that amount. See also *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 355 for a confession by the judge that he made some of his own calculations of which he is not too confident.

[126] *Griffiths v Mutual & Federal Ins Co Ltd* 1994 (1) SA 535 (A) at 546: 'In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess.'

[127] I 48; see also Erasmus & Gauntlett 7 *LAWSA* para 82; Boberg *Delict* 541: 'The annuity calculation entails subtracting what the injured plaintiff will now probably earn from what he would probably have earned had he not been injured (his total lost income), and reducing the figure thus obtained by a certain percentage for ''contingencies'' and by another percentage to ''capitalize'' it (ie allow for the economic

advantage of receiving a capital sum instead of periodic income).' Cf further *Krugell v Shield Ins Co Ltd* 1982 (4) SA 95 (T) at 99; *Oosthuizen v Homegas (Pty) Ltd* Corbett & Honey G2–8 to G2–9.

[128] *Sumesur v Dominion Ins Co of SA Ltd* Corbett & Buchanan I 228; *Brijall v Naidoo & Naidoo*Corbett & Buchanan I 266; *Marine and Trade v Katz* 1979 (4) SA 961 (A) at 976–82; *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917; *Kotwane v UNSBIC Bpk* 1982 (4) SA 458 (O). See also *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 410: 'A person's all-round capacity to earn money consists, *inter alia*, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, *in casu*, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. *In casu*, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss.'

[129] See Corbett & Buchanan I 49–50. Cf Koch *Lost Income* 153 et seq; *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 (A) at 917 on evidence concerning earning capacity; *Dusterwald v Santam Ins Ltd*Corbett & Honey A3–49 et seq; *Reyneke v Mutual & Federal Ins Co Ltd* Corbett & Honey A4–80.

[130] *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 201, 215; *Road Accident Fund v Delport* 2006 (3) SA 172 (SCA) at 178; *Valentine v Road Accident Fund* [2007] 3 All SA 219 (C); *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 259 (A) at 306–8. (See on this McKerron 1953 *SALJ* 399; Boberg 1960 *SALJ* 438; 1962 *SALJ* 43; 1965 *SALJ* 556; Howroyd 1960 *SALJ* 448; Luntz 1965 *SALJ* 9; 1967 *SALJ* 10–11; Reinecke 1976 *TSAR* 50; Gough 1983 *De Rebus* 486; McKerron *Delict* 123.) For example where X, who is 40 years old, would have worked until he was 60 years of age, but will now probably die at 55 years, his loss is calculated over a period of 15 years (55 – 40 = 15). In *Lockhat*supra the ratio for this is explained as follows (at 306): 'A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss that they have sustained.' See further Boberg *Delict* 542–3, 557; see also *Goldie v City Council of Johannesburg*1948 (2) SA 913 (W) at 920; *Wessels v AA Onderlinge Ass* Corbett & Honey A3–33; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–70.

In order to determine life expectancy actuarial evidence based on life tables may be used (where a plaintiff's health was normal)—see also Koch 1992 *Quantum Yearbook* 62, 65—or medical evidence (where the plaintiff's health was not normal). The plaintiff's retiring age will depend upon various factors such as his or her general state of health, the nature and circumstances of the plaintiff's work and the normal retirement age in employment of that nature. See on expectation of life Koch *Lost Income* 100–3. See Boberg 1962 *SALJ* 53–4 for a suggestion that an injury may prolong a person's expectation of life and his comments on *Commercial Union Ass Co of SA Ltd v Stanley* 1973 (1) SA 699 (A) (see para 14.6.7); see Boberg *Delict* 576: 'In *Stanley* the plaintiff's life expectancy was not increased, but her *working* life expectancy was—which is the same thing for present purposes.' See further *Pringle v Administrator, Transvaal* 1990 (2) SA 379 (W) at 397.

[131] See *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 113–14; Marx 2004 *Obiter* 236–7. See also Nienaber & Van der Nest 2005 *THRHR* 551–4 and Steynberg 2007 *De Jure* 45–50 on contingencies in the case of children. See also *Megalane v Road Accident Fund* [2007] 3 All SA 531 (W) (child to exceed parents' academic achievements); *Kgomo v Road Accident Fund* unreported (25846/2010) [2011] ZAGPJHC 103 (2 September 2011) (stable family background applied as a factor); *Pietersen v Road Accident Fund* unreported (19299/2008) [2011] ZAGPJHC 73 (11 August 2011) (reference to father's employment background and socio-economic conditions as it relates to unemployment); *Prinsloo obo Prinsloo v Road Accident Fund* unreported (A5022/2007) [2008] ZAGPHC 116 (24 April 2008) (predictions for future career of child rejected by the court).

[132] Para 11.6. See also Millard 2007 *Law, Democracy and Development* 16–18.

[133] See, eg, *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 588–9; *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 634–5 on prospects of promotion and overtime. See also *Krugell v Shield Ins Co Ltd* 1982 (4) SA 95 (T) at 106 on loss of a gratuity and pension. See further Koch *Lost Income*135 et seq.

[134] See *Gillbanks v Sigournay* 1959 (2) SA 11 (N) at 16; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 559–69; *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–60. If sufficient detail is available, one may calculate on the basis of different scales of income over different periods. See further *Sumesur v Dominion Ins Co of SA Ltd* Corbett & Buchanan I 228; *Swart v Provincial Ins Co Ltd* Corbett & Buchanan I 499. In *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) the actuary presented two possible retirement ages with a probability percentage linked to each one.

[135] See in general *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 569; Newdigate & Honey *MVA* 168; Koch *Lost Income* 259.

[136] Para 11.7.2.2; see Koch *Lost Income* 133–5; Morris & Mullins 1995 *De Rebus* 375.

[137] In *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 545–9 the savings in living expenses due to the fact that the plaintiff would no longer relocate to London resulted in a 20 per cent contingency deduction.

[138] Para 6.7.5.

[139] Para 6.7.5. See in general Koch *Lost Income* 74 et seq. Koch op cit 257 gives an example where the appropriate rate of interest (1,5 per cent) is determined with reference to the yield on Eskom stock *minus* the expected rate of inflation minus the rate at which earnings are expected to increase in excess of the rate of inflation (thus, (12,5% – 10%) – 1,0% = 1,5%). There are considerable problems and controversy on the relevance and determination of future rates of interest. Usually actuaries assume a rate of inflation which for the first three years is equal to or higher than the rate of interest, a lower rate of inflation for the next five years and thereafter an even lower rate. See also the approach in *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–60. Newdigate & Honey *MVA* 165 et seq use a net rate of interest of between 3 per cent and 3,5 per cent. In *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 781 a net capitalization rate of 3 per cent compound per year was used, in *Gallie v National Employers General Ins Co Ltd* 1992 (2) SA 731 (C) at 738 a rate of 1,5 per cent was applied and in *Saayman v RAF* [2011] 1 All SA 581 (SCA) at 585 a rate of 2,5 per cent was used. In order to prove present value, the evidence of an actuary should be produced. See also Morris & Mullins 1995 *De Rebus* 375. In the absence of an actuary the court may, however, take judicial notice of recognized interest and annuity tables (*Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 461–2). Cf further Corbett & Buchanan I 50.

[140] *Hulley v Cox* 1923 AD 234 at 244.

[141] See Corbett & Buchanan I 50–1.

[142] See *Gillbanks v Sigournay* 1959 (2) SA 11 (N); *Marine and Trade Ins Co v Katz* 1979 (4) SA 961 (A); *Joubert v Bezuidenhout* unreported, case no 23333/2000 (T), 22 August 2007 para 62.

[143] Even through a different occupation from that before his or her injuries (*Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 98–9). See also rule 18(10)*(c)*(i) of the Uniform Rules of Court and rule 6(9)*(c)*(i) of the Magistrates' Court Rules: '[T]he nature of the work the plaintiff will in future be able to do' has to be disclosed. See *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 632, where a plaintiff retained his pre-accident occupation though his prospects of promotion were ruined. See further Koch *Lost Income* 164 et seq. In *Allie v Road Accident Fund* [2003] 1 All SA 144 (C) the court accepted that the work the plaintiff was doing at the time of the trial (driving a shuttle) was a reasonable basis on which to calculate the plaintiff's post-injury earning capacity. In *Prinsloo obo Prinsloo v Road Accident Fund* unreported (A5022/2007) [2008] ZAGPHC 116 (24 April 2008) para 24 the court held that in a case where a young professional has been permanently incapacitated it will usually be necessary to call on evidence from an experienced member of that profession as to the particular plaintiff's reasonable expectations.

[144] Para 6.7.5.

[145] See *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) where the plaintiff failed to discharge the onus of proving that he had suffered a diminution in his patrimony, even though he proved that due to his physical disability he could no longer operate as a professional hunter or physically manage his farming operation. In *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) at 410–19 the court rejected the opinion of the expert on the plaintiff's career possibilities and she therefore failed to prove that her earning capacity had been compromised by her injury. On appeal, in *Prinsloo v Road Accident Fund* unreported (139/2009) [2010] ZAECGHC 9 (25 February 2010) para 8, Jones J referred with approval to the decision in *Rudman* (supra) and confirmed the decision of the court a quo: 'In essence, the learned trial judge found that although the appellant had proved that she had suffered injuries which physically impaired her ability to perform certain kinds of police work and which prevented further advancement in the police force in those lines of work, she had not proved that she was unable to continue in her employment in the police force in other lines of work, or that she had been deprived of promotional prospects which she would in fact otherwise have had. He held in effect that on the acceptable evidence the appellant would probably not have been promoted above the rank of inspector even if she had not been injured [because there is a surfeit of white female police officers]; that she will probably continue in her employment in the police force until normal retirement age without any reduction in salary; and that she has therefore not shown that she has suffered loss.' See also *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A).

[146] See Corbett & Buchanan I 51: 'In many cases the approach has been to estimate the plaintiff's probable future annual earnings, having regard to the nature and extent of the disability and the opportunities available for earning a living.' See *Goldie v City Council of Johannesburg* 1948 (2) SA 913

(W); *Sumesur v Dominion Ins Co of SA Ltd* Corbett & Buchanan I 228. See also Millard 2006 *TSAR* 690–704.

[147] See *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 379; *Mills v Church* 1935 GWL 24 at 35; *Beukes v Mushet* Corbett & Buchanan I 204; *Brandon v Santam Ins Co* Corbett & Buchanan I 415; *Protea Ass Co Ltd v Matinese* 1978 (1) SA 963 (A).

[148] *Jones v Fletcher* Corbett & Buchanan I 234; *Pitman v Scrimgour* 1947 (2) SA 22 (W) at 34–6.

[149] Corbett & Buchanan I 51. See Nienaber & Van der Nest 2005 *THRHR* 554–61 on the influence of the HIV/AIDS epidemic on life expectancies and the constitutionality of taking this into account.

[150] Para 14.6.4.1. See *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA) at 547–8: 'When a court measures the loss of earning capacity, it invariably does so by assessing what the plaintiff would probably have earned had he not been injured and deducting from that figure the probable earnings in his injured state (both figures having been properly adjusted to their ''present-day values''). But in using this formulation as a basis of determining the loss of earning capacity, the court must take care to make its comparison of pre- and post-injury capacities against the same background.'

[151] Para 6.7.3 on contingencies. See Koch *Lost Income* 164–5; Steynberg 2005 *THRHR* 638–45; Nienaber & Van der Nest 2005 *THRHR* 548–54; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 350; *Saayman v RAF* [2011] 1 All SA 581 (SCA) at 584–5. In *Joubert v Bezuidenhout* unreported, case no 23333/2000 (T), 22 August 2007 paras 47–61 the court held that it is very difficult, if not impossible, to make a fair contingency adjustment to an award in instances where the parties settled on the award and the court never had the benefit of evaluating the evidence.

[152] See, eg, *AA Mutual Ins Ass Ltd v Maqula* 1978 (1) SA 805 (A); *Goodall v President Ins Co Ltd*1978 (1) SA 389 (W); *Gallie v National Employers General Ins Co Ltd* 1992 (2) SA 731 (C) at 738–9. In *Marine and Trade Insurance v Katz* 1979 4 SA 961 (A) at 978–80 Trollip AJ refers specifically to the probability of remarriage as a contingency (or possible eventuality) in a claim for loss of income. The plaintiff was divorced from her husband a few months before the motor car accident in which she was seriously injured. It does seem strange that the probability of remarriage was mentioned as a contingency in the claim for loss of income. It is rather a contingency which belongs to a claim for loss of support. The courts also sometimes distinguish between contingency adjustments in the 'but for the accident' stage and the 'having regard to accident' stage—*Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA); *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 350; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 472–3; *Van der Mescht v Road Accident Fund* unreported, case no 12182/2008 (GDJ), 12 March 2010 paras 19–21. See also *Singh v Ebrahim (2)* [2010] 3 All SA 240 (D).

[153] See, eg, *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 590: 'The possibility that increased psychological intervention and further medical treatment might assist appears to me to have been taken into account in making the contingency deduction of 30% rather than the 40% suggested by the actuary'; *Joubert v Bezuidenhout* unreported, case no 23333/2010 (T), 22 August 2007 para 49: 'Die kwessie van lewensverwagting is dus reeds in die aktuariële berekenings in ag geneem en hoef nie by wyse van 'n gebeurlikheidsaftrekking in berekening gebring te word nie' ('The issue of life expectancy has already been considered in the actuarial calculations and therefore no contingency reduction needs to be made'); *Krugell v Shield Versekeringsmpy Bpk*. 1982 (4) SA 95 (T) at 104. The following may be examples of some contingencies which may be relevant in regard to earning capacity: errors in the estimation of a plaintiff's life expectancy and retirement age; the likelihood of illness and unemployment which would have occurred in any event; inflation or deflation of money in the future; alterations in cost-of-living allowances; cost of transport to and from work; pension contributions; accidents which could have affected the earning capacity in any event; liability to pay income tax; loss of pension benefits; the fact that the plaintiff stays in a dangerous neighbourhood where he or she may be assaulted; a plaintiff's poor work record; the possibility of promotion; a gradual weakening of the plaintiff's eyesight; the juvenility of the plaintiff, which causes many uncertainties; a shortened expectation of life. See Corbett & Buchanan I 51–6; Newdigate & Honey *MVA* 175 et seq, 295 et seq.

[154] See, eg, Koch *Lost Income* 113–16, 257 et seq.

[155] See Newdigate & Honey *MVA* 165 et seq.

[156] See, eg, Newdigate & Honey *MVA* Appendix VI.

[157] Para 6.7.5.

[158] This calculation does not provide for the fact that X may die before he reaches the age of 65. If this contingency is taken into account by using the Murfin method (see Newdigate & Honey *MVA* 166 et seq), X's working life expectancy is reduced from 35 years to 31 years and, after further calculations, the amount of damages is reduced to approximately R37 500. Then a further 5 per cent may be deducted for contingencies, which leaves a total of R35 625. See also Koch 1992 *Quantum Yearbook* 63.

[159] See Corbett & Buchanan I 132.

[160] The figure of 7870 is obtained from the annuity and capitalization tables (Corbett & Buchanan I 133 et seq), which give the present value of instalments of R100 per month at various rates of interest and for various periods.

[161] See Corbett & Buchanan I 106.

[162] The figure 17478 is obtained from Corbett & Buchanan I 106 et seq, whose tables of capital values are integrated with the South African life tables which indicate the life expectancy for people of different ages, sexes and population groups. These tables show the present value of R100 per month for someone of a particular age until his death or when he or she reaches the age of 55 or 65. Before these tables can be used, actuarial practice requires information on the following five aspects of the person involved: age, sex, race, the net amount of lost income, and the age at which income would cease. The figure (factor) which is used in calculation is ascertained with reference to a particular net rate of interest, the age of the plaintiff and the time at which the income is assumed to cease.

[163] See Koch *Lost Income* 257 et seq.

[164] Para 6.7.5.

[165] *Lost Income* 258.

[166] See further Koch *Lost Income* 258 for an example of where a *precise* gross-multiplier method is used and Koch op cit 259 for an example of the year-by-year method. With the latter method every year when income will be lost is analysed separately under the following columns: age, expected unadjusted earnings (A), adjustment for escalation (B), discount factor (C), chance of survival (D), value of loss as the product of A, B, C and D. The different amounts of each year are then added and provision is made for contingencies and taxes to compute the total net loss of earning capacity. For an example of this method, see *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 977.

[167] 1987 (3) SA 577 (A).

[168] See Koch *Lost Income* 258; 1987 *THRHR* 105–12; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 557–8; *Wigham v British Traders Ins Co* 1963 (3) SA 151 (W). See also Dendy 1987 *Annual Survey*189–92.

[169] See Van der Walt 2002 *SALJ* 652–4.

[170] Chap 10.

[171] Para 11.3.

[172] Para 11.7.

[173] Para 10.9. See also Koch 1992 *Quantum Yearbook* 37.

[174] Para 11.6.

[175] Para 11.4.

[176] Para 11.8.

[177] See *Joubert v Bezuidenhout* unreported, case no 23333/2000 (T), 22 August 2007 paras 60–1; *Singh v Ebrahim (2)* [2010] 3 All SA 240 (D) at 246.

[178] Para 14.7.7.2.

[179] 'Where a claim for compensation under subsection (1)—

(b) includes a claim for future loss of income or support, the amount payable by the Fund or the agent shall be paid by way of a lump sum or in instalments as agreed upon.' See also para 8.4. In *Motor Vehicle Accidents Fund v Andreano* 1993 (3) SA 214 (T) the court held that the amount of the instalments (in respect of future loss of income or support) in terms of the undertaking have to be fixed and cannot be left open for future determination. In *Coetzee v Guardian National Ins Co Ltd* 1993 (3) SA 388 (W) it was held that the court cannot determine the amount of the instalments in the absence of an agreement by the Fund and the third party as to instalments. See *Marine & Trade Ins Co Ltd v Katz*1979 (4) SA 961 (A) at 975; Klopper *Third Party Compensation* 213–14; *Gray v Mutual & Federal Ins and MMF* (unreported WLD case no 20481/94).

[180] See Klopper *Third Party Compensation* 213–14. Formerly the section in question made it possible for a court to itself determine the instalments in the absence of an agreement (see *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 974). Owing to the amendment of s 17(4)*(b)*, much said about it in that judgment is no longer relevant. See para 8.4; *Coetzee v Guardian National Ins Co Ltd*1993 (3) SA 388 (W) at 392.

[181] *Majele v Guardian National* 1986 (4) SA 326 (T); *Mutual & Federal Ins Co Ltd v Ndebele* 1996 (3) SA 553 (A).

[182] 1993 (4) SA 150 (A).

[183] See para 9.2. See in general Koch *Lost Income* 253 et seq for an example of an undertaking to pay instalments and how such instalments are to be calculated. See also Koch 1989 *THRHR* 71–3; Van der Linde 1994 *THRHR* 338–41; Dendy 1995 *SALJ* 643–54.

[184] 1973 (1) SA 699 (A).

[185] Boberg 1973 *Annual Survey* 180–5 criticizes this judgment because of the inadequate distinction between loss of earnings and loss of earning capacity. See also Boberg *Delict* 576–7. The possible relationship between marriage prospects, a marriage and earning capacity should be further analysed.

[186] 1982 (4) SA 95 (T) at 98–9. Cf *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA). See para 11.3 on mitigation of loss.

[187] See para 7.5.4.3 on causes of action and the 'once and for all' rule; para 11.6 on unlawful income; para 3.2 on patrimony; para 10.8 on the collateral source rule.

[188] Para 11.1.3.

[189] Para 14.3. The principles discussed there apply also when one person claims damages for loss sustained by having to pay the medical expenses of another who has been injured (see para 11.1.3).

[190] 'Funeral costs' is not a technical expression (*Commercial Union Ass Co of SA Ltd v Mirkin* 1989 (2) SA 584 (C) at 588).

[191] Para 11.1.3.

[192] Para 11.1.3. See *Finlay v Kutoane* 1993 (4) SA 675 (W) and the discussion on the actio funeraria in *Nodada Funeral Services CC v The Master* 2003 (4) SA 422 (TkH); Thomas 2004 *THRHR*331–5.

[193] See *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 295 (A); *Rondalia Ass v Britz* 1976 (3) SA 243 (T); *Commercial Union Ass Co Ltd v Mirkin* 1989 (2) SA 584 (C). See also *Young v Hutton* 1918 WLD 90; De Groot *Inleiding* 3.33.2. See also para 2.3.1.

[194] For example, to inform the family of the time and place of the funeral.

[195] See s 18(4) of the RAF Act 56 of 1996. Irrecoverable costs are costs in connection with the holding of a funeral ceremony, funeral clothes, flowers, and glass and other wreaths. See *Commercial Union Ass Co Ltd v Mirkin* 1989 (2) SA 584 (C); Klopper *Third Party Compensation* 99.

[196] See in general Davel *Afhanklikes*; Neethling & Potgieter *Delict* 278–84; Koch *Lost Income* 179–225; *Reduced Utility* 273–351; Corbett & Buchanan I 59–75; Newdigate & Honey *MVA* 170–83; Erasmus & Gauntlett 7 *LAWSA* paras 88–92; Lee & Honoré *Obligations* 276–9.

[197] See Davel *Afhanklikes* 48–88; Neethling & Potgieter *Delict* 279–82 on the general requirements for the institution of a claim for loss of support.

[198] See, eg, *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) at 376; *Groenewald v Snyders* 1966 (3) SA 237 (A) at 246; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1010; *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk*1982 (4) SA 458 (O) at 463. See further *Witham v Minister of Home Affairs* 1989 (1) SA 116 (Z) at 131.

[199] See para 11.1.3 on who may claim.

[200] *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839. See on what support or maintenance includes Davel *Afhanklikes* 51–3. See also *Jameson's Minors v CSAR* 1908 TS 575 at 602: 'I do not think that Voet intended to restrict, or that we should restrict, the word ''maintenance''—*victus*—to the supply of mere necessities of life. It must include all the material advantages, conveniences, comfort and support, which the father would have afforded the claimants, but for his death. The language used shows that the court must pay regard to what the deceased used to supply in the past—that is, to the station in life of the parties, and the comforts, conveniences and advantages to which they had been accustomed.' See, however, also *Van Vuuren v Sam* 1972 (2) SA 633 (A) at 642. See further *Santam Ins Co Ltd v Fourie* 1997 (1) SA 611 (A) in which the court held that the minor children did not suffer any patrimonial loss as a result of their mother's death: it was true that her income had been lost, but on the other hand the family had saved the cost of her maintenance, which had been higher than her income. See Visser 1997 *THRHR* 715–19.

[201] See in general *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A); Davel *Afhanklikes* 91.

[202] Where there are claims by more than one dependant, compensation is, in theory, to be assessed separately, but the principles regarding the division of a breadwinner's income (para 14.7.4.3) may result in claims influencing each other.

[203] 1923 AD 234 at 243–4.

[204] See Davel *Afhanklikes* 95–8 for the different possible ways in which damages may be calculated.

[205] This means that a court calculates a capital sum which, with the compound interest which may be earned on it, will produce an annual payment equal to that part of the breadwinner's annual income that the dependant would have received. At the end of the period there must be no capital or interest left (see Davel *Afhanklikes* 112; *Arendse v Maher* 1936 TPD 162; *Gillbanks v Sigournay* 1959 (2) SA 11 (N) at 14; *Groenewald v Snyders* 1966 (3) SA 237 (A) at 246; *Nhluymayo v General Accident Ins Co of SA Ltd* 1986 (3) SA 859 (D) at 861–2; *Constantia Versmpy Bpk v Victor* 1986 (1) SA 601 (A) at 613; Corbett & Buchanan I 65. Koch *Lost Income* 31, 82 (see also 1986 *THRHR* 223; 1987 *THRHR* 108) rejects this so-called 'functional approach' and proposes a year-by-year method. He argues that a lump-sum award is incapable of replacing lost income (from support) but may only replace its value. This statement actually confirms the basic object of damages, viz to act as a substitute for lost value (para 8.5) and not to promote restitutio in integrum or specific performance in a literal sense.

[206] See *General Accident Ins Co SA v Summers etc* 1987 (3) SA 577 (A); *Road Accident Fund v Monani* 2009 (4) SA 327 (SCA) at 329.

[207] eg *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2.

[208] *Hulley v Cox* 1923 AD 234 at 243–4: 'Some authorities consider that the calculation should be based upon the principle of an annuity (see *Grotius* 3.33.2; *Matthaeus De Criminibus* 48.5.11). *Voet*, on the other hand, favours a more general estimate. Such damages, he thinks, should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and had usually afforded to his wife and children (*Ad Pand*9.2.11). That would seem the preferable view as giving a greater latitude to deal with varying circumstances. It is at any rate desirable to test the result of an actuarial calculation by a consideration of the general equities of the case.' See also *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A) at 608.

[209] See Corbett & Buchanan I 65. See also Davel *Afhanklikes* 99, who divides the process of quantification into two stages: first the calculation of an annuity and, secondly, the adjustment of the amount thus obtained. See also *Road Accident Fund v Monani* 2009 (4) SA 327 (SCA) at 329.

[210] Corbett & Buchanan I 66–7; Davel *Afhanklikes* 100–4.

[211] See in general rule 18(11) of the Uniform Rules of Court and rule 6(10) of the Magistrates' Court Rules: A plaintiff suing for damages resulting from the death of another must state the date of birth of the deceased as well as his or her own birthdate.

[212] The estimation of life expectancy may be based on life tables but deviation is possible if special factors are present (*Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 722–4; Boberg 1972 *SALJ*147–52).

[213] See, eg, *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 5–9; *De Jongh v Gunther* 1975 (4) SA 78 (W) at 84.

[214] See *Arendse v Maher* 1936 TPD 162; *Mashini v Senator Ins Co Ltd* Corbett & Buchanan III 82.

[215] See *Chisholm v ERPM* 1909 TH 297 at 300–1; *Hulley v Cox* 1923 AD 234 at 245; *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 5; *Arendse v Maher* 1936 TPD 162 at 164; *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 848–50; *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 722–4; Davel *Afhanklikes* 102; Koch 1986 *De Rebus* 551 on the possibility that the retirement age is not reached.

[216] *Clair v Port Elizabeth Harbour Board* 1886 EDC 311 at 317; *De Jongh v Gunther* 1975 (4) SA 78 (W) at 81–3; Koch *Lost Income* 64; Howroyd & Howroyd 1958 *SALJ* 66.

[217] See *Smart v SAR & H* 1928 NPD 361 at 363; *Paterson v SAR & H* 1931 CPD 289 at 300; *Bester v Silva Fishing Corp (Pty) Ltd* 1952 (1) SA 589 (C) at 600; *Trimmel v Williams* 1952 (3) SA 786 (C) at 792–3; *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 850; *In re Estate Visser* 1948 (3) SA 1129 (C) at 1138; *Van Heerden v Bethlehem Town Council* 1936 OPD 115; *Boonzaaier v Provincial Ins Co Ltd*Corbett & Buchanan I 67; *Legal Ins v Botes* 1963 (1) SA 608 (A) at 616; *Shield Ins Co Ltd v Booysen*1979 (3) SA 953 (A) at 963; *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 364; *Bursey v Bursey* 1999 (3) SA 33 (SCA). See further Koch *Lost Income* 202–3.

[218] Corbett & Buchanan I 67–8; Davel *Afhanklikes* 104–9.

[219] Paras 2.4.13 and 11.6. Where the breadwinner has not earned income in a lawful manner, it is justified to take his or her earning capacity to earn lawfully into account. See, eg, *Dhlamini v MMF* 1992 (1) SA 802 (T); *Lebona v President Versekeringsmpy Bpk* 1991 (3) SA 395 (W).

[220] *Waring and Gilow Ltd v Sherborne* 1904 TS 304; *Hulley v Cox* 1923 AD 234 at 245; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614–15; *Shield Ins v Booysen* 1979 (3) SA 953 (A) at 962–4. Statistical evidence may be used if no better evidence is available (Koch *Lost Income* 53).

[221] *Chisholm v ERPM* 1909 TH 297.

[222] *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1010; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 788; *De Jongh v Gunther* 1975 (4) SA 78 (W) at 79–80; *Van Staden v President Versekeringsmpy Bpk* Corbett & Honey L2–8.

[223] eg an allowance (*Bester v Silva Fishing Corp (Pty) Ltd* 1952 (1) SA 589 (C) at 599–600); a bonus (*De Jongh v Gunther* 1975 (4) SA 78 (W) at 79); overtime payment (*Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 10); a company motor car (*Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 361).

[224] eg the uncertainties and hazards of the deceased's work, a shrinkage of income due to a diminution of mental vigour, economic recession, etc. See *Chisholm v ERPM* 1909 TH 297 at 302; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1013; *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 848; *Jacobs v Cape Town Municipality* 1935 CPD 474 (the deceased was in any event often without work); *Shield Ins Co Ltd v Booysen* 1979 (3) SA 953 (A) at 962–3; *Hulley v Cox* 1923 AD 234 at 235; *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 467.

[225] See *Paterson v SAR & H* 1931 CPD 289 at 299–300; *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 724; *Khan v Padayachy* 1971 (3) SA 877 (W) at 878; *Kotwane v UNSBIC Bpk* 1982 (4) SA 458 (O) at 466; *Parity Ins Co Ltd v Van den Bergh* 1966 (4) SA 463 (A) at 469–70; *Marine and Trade Ins Co Ltd v Mariamah* 1978 (3) SA 480 (A) at 487–8; *Van Staden v President Versekeringsmpy Bpk*Corbett & Honey L2–24.

[226] eg travelling expenses (*Maasberg v Hunt Leuchars & Hepburn Ltd* 1944 WLD 2 at 10–11); salaries of employees (*Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 724–5).

[227] Pension contributions (*Provincial Ins Co Ltd v Boonzaaier* Corbett & Buchanan I 87; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 789); income tax (*Munarin v Peri-Urban Areas Health Board* 1965 (1) SA 545 (W) at 556; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 789); contributions to unemployment insurance if the deceased would probably not have become unemployed (*Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 11).

[228] eg medical fund contributions (*Maasberg v Hunt Leuchars & Hepburn Ltd* 1944 WLD 2 at 11). This is merely an expense in exchange for services and may therefore not be deducted. Similarly, no deduction is made in respect of bond payments (Davel *Afhanklikes* 105).

[229] eg life-insurance premiums (see Davel *Afhanklikes* 105–6; *Parity Ins Co Ltd v Van den Bergh*1966 (4) SA 463 (A) at 471 (premiums deducted); *Groenewald v Snyders* 1966 (3) SA 237 (A) at 244–7 (premiums not deducted)). See also Boberg 1964 *SALJ* 369–70; 1966 *SALJ* 413–14; Koch *Lost Income*191.

[230] Para 11.7; see eg, *Moekoena v President Ins* 1990 (2) SA 112 (W); *Snyders v Groenewald* 1966 (3) SA 785 (C) at 787–8; *Goodall v President Ins Co Ltd* 1978 (1) SA 389 (W) at 392.

[231] See Davel *Afhanklikes* 108–9 on this and on retirement age. See also Howroyd & Howroyd 1958 *SALJ* 71.

[232] Klopper 2007 *THRHR* 440–58; Corbett & Buchanan I 68; Davel *Afhanklikes* 109–12; Koch *Lost Income* 192 et seq; Klopper *Third Party Compensation* 201–4.

[233] *Jameson's Minors v CSAR* 1908 TS 575 at 602 (n 200 above). From *Van Vuuren v Sam* 1972 (2) SA 633 (A) at 642 one may possibly conclude that the claim of a dependant (the mother of the deceased) is limited to the necessities of life. Davel *Afhanklikes* 52–3 submits that the needs of an alleged dependant have to be ascertained to establish whether there was a duty of support as such duty can exist only if there is a lack of money for the necessities of life. In the *Sam* case the court held that there was no duty of support and the quantification of loss was thus irrelevant. See further *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmpy Bpk* 1982 (4) SA 458 (O) at 463 ('necessities' are judged with reference to the plaintiff's station in life).

[234] See *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 616.

[235] *Hulley v Cox* 1923 AD 234 at 245; *Trimmel v Williams* 1952 (3) SA 786 (C); *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 728; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1012.

[236] *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A); *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C).

[237] See Koch *Lost Income* 200 on single-parent families. See Maithufi & Bekker 2009 *Obiter* 164–74 on simultaneous claims by a surviving customary wife and a civil wife against the Road Accident Fund.

[238] See Davel *Afhanklikes* 110–11 for a critical survey. Cf also *Van Heerden v Bethlehem Town Council* 1936 OPD 115 at 117; *Bester v Silvas Fishing Corp (Pty) Ltd* 1952 (1) SA 589 (C) at 600; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 789; *Burns v National Employers General Ins Co Ltd*1988 (3) SA 355 (C) at 362, 365 (here a deduction was made to provide for further possible children which the breadwinner would have fathered); *Road Accident Fund v Monani* 2009 (4) SA 327 (SCA) at 331–2 (one dependent child died contemporaneously with the breadwinner-father and the court held that her share had to be divided amongst the remaining children and the mother).

[239] See *Boonzaaier v Provincial Ins Co Ltd* Corbett & Buchanan I 67; *Roberts v London Ass Co Ltd*1948 (2) SA 841 (W) at 849; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 616. Where a husband leaves a wife and three children, the division will be two-sevenths to the wife and one-seventh to each child.

[240] *Maasberg v Hunt Leuchars & Hepburn Ltd* 1944 WLD 2 at 12.

[241] *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 849; *Smart v SAR & H* 1928 NPD 361; *Marine and Trade Ins Co Ltd v Mariamah* 1978 (3) SA 480 (A) at 488–9. It may also be argued that these savings were in any event meant to be spent on the dependants later (*Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 725–6). See further Boberg 1972 *SALJ* 148.

[242] *Laney v Wallem* 1931 CPD 360 at 361–2; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 616. A larger proportion of the income will then be devoted to the maintenance of the wife.

[243] *Smart v SAR & H* 1928 NPD 361.

[244] See *Munarin v Peri-Urban Areas Health Board* 1965 (1) SA 545 (W) at 556, where he sent money to his sickly mother in Italy although he was not obliged to do so. See further Koch *Lost Income*183, 193, but also *President Versekeringsmpy Bpk v Buthelezi* 1977 (1) PH J26 (A) at 40.

[245] *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1012–13. Burchell 1978 *Annual Survey* 280–2; *Ongevallekommissaris v Santam Versekeringsmpy Bpk* 1965 (2) SA 193 (T) at 203, 206; *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 363–4 (effect of plaintiff's income on claim by children); Koch 1992 *THRHR* 128 et seq for a discussion of this issue. See also Koch *Lost Income* 197; 1986 *De Rebus* 108.

[246] eg, that the plaintiff was young (*Chisholm v ERPM* 1909 TH 297 at 301); that the parties would have had more children had the breadwinner not died (*Chisholm* supra at 301); remarriage (*Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA); *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1013).

[247] See *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 431 for an example of a divorced woman entitled to a specified amount for maintenance in terms of an order of court. The court held that her claim for loss of support is not restricted to the amount in terms of the court order, but that it is a factual question of what amount she would in fact have received from the deceased had he remained alive. See also Howroyd & Howroyd 1958 *SALJ* 68.

[248] See Davel *Afhanklikes* 111 who refers to *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 616, where the court refused to accept the relevance of this matter. The most equitable approach seems to be to divide income after provision has been made for expenses which remain the same (Howroyd & Howroyd 1958 *SALJ* 70; *Nochomowitz v Santam Ins Co Ltd* 1972 (3) SA 640 (A) at 726; Koch *Lost Income* 194–5). Another possibility is to consider this issue later in the process of assessment (see para 14.7.6 and *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 15).

[249] 2007 *THRHR* 442.

[250] Klopper 2007 *THRHR* 456 states that one cannot oversimplify the process by reducing the claim for loss of support to a formula.

[251] See Klopper 2007 *THRHR* 457 for a list of factors that have to be considered in determining the amount spent by the deceased on him- or herself.

[252] See Klopper 2007 *THRHR* 456–8.

[253] Corbett & Buchanan I 68–9; Davel *Afhanklikes* 112–15; Pont 1942 *THRHR* 7; Howroyd & Howroyd 1958 *SALJ* 68; Erasmus & Gauntlett 7 *LAWSA* para 90.

[254] Para 6.7.5; *Arendse v Maher* 1936 TPD 162 at 163; *Groenewald v Snyders* 1966 (3) SA 237 (A) at 246; *Gillbanks v Sigournay* 1959 (2) SA 11 (N) at 15; *Nochomowitz v Santam Ins Co Ltd* 1972 (3) SA 640 (A) at 645–6.

[255] See Davel *Afhanklikes* 112–13 on the possibility that an actuary may also at this stage consider certain risks in the earning of income. See also Koch *Lost Income* 22.

[256] See *Arendse v Maher* 1936 TPD 162 at 163; *Mashini v Senator Ins Co* Corbett & Buchanan III 82 at 92; *Kotwane v UNSBIC Bpk* 1982 (4) SA 458 (O) at 466; *Southern Ins Co Ltd v Bailey* 1984 (1) SA 98 (A) at 112.

[257] *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 849; *Bester v Silvas Fishing Corp (Pty) Ltd*1952 (1) SA 589 (C) at 600; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 616–17; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 790; *Sumesur v Dominion Ins Co of SA Ltd* Corbett & Buchanan I 228; *Swart v Provincial Ins Co Ltd* Corbett & Buchanan I 499; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 565–7.

[258] In other words, after the effect of inflation has been taken into account by using a rate which is lower than the current rate of interest. See para 6.7.5 on rates of interest. Cf Davel *Afhanklikes* 113–14

and *Roberts v London Ass Co Ltd* 1948 (2) SA 841 (W) at 849; *Bester v Silva Fishing Corp (Pty) Ltd* 1952 (1) SA 589 (C) at 600; *Gillbanks v Sigournay* 1959 (2) SA 11 (N) at 14–15. But see also *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011.

[259] See in general para 11.7.

[260] Para 14.7.4.2.

[261] See Davel *Afhanklikes* 114–15; Spandau 1975 *SALJ* 45: 'Ideally, the actual rate of return on investment should compensate the plaintiff, not only for the discount rate, but also for the rate of inflation. If, say, the discount rate applied by the court is 4 per cent, and if the rate of inflation is 12 per cent, then a safe investment should be available to the plaintiff at 16 per cent in order to compensate the loss.' Davel op cit 115 adds that should a court decide to make allowance for inflation in this manner, the following should be considered: the extent of the amount of damages, the availability of an investment which would be inflation-proof, the amount of cash which a plaintiff would need for the necessities of life. In the case of a small award, inflation should rather be accounted for in connection with the income of the deceased (para 14.7.4.2). See also *Kotwane v UNSBIC Bpk* 1982 (4) SA 458 (O) at 466, where the rate of discount was 5 per cent and the amount was increased by 12 per cent to provide for inflation.

[262] *Provincial Ins Co Ltd v Boonzaaier* Corbett & Buchanan I 69.

[263] Davel *Afhanklikes* 115–32; Corbett & Buchanan I 69–74.

[264] See also Davel *Afhanklikes* 115–20.

[265] 1923 AD 234 at 244.

[266] See inter alia Boberg 1964 *SALJ* 194 and *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 723–4.

[267] Para 10.8.

[268] Para 10.8.3 on the Maintenance of Surviving Spouses Act 27 of 1990.

[269] Para 10.8.1.

[270] Para 10.8.5.

[271] Para 10.8.4.

[272] Para 10.8.2.

[273] Para 10.8.6.

[274] Para 10.3.2.

[275] Para 10.4.2.

[276] Corbett & Buchanan I 72–3; Davel *Afhanklikes* 130–1.

[277] For example, wages of servants, municipal taxes, expenses in regard to sanitation, water, electricity etc.

[278] See Davel *Afhanklikes* 130; *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T) at 726. See the discussion in para 14.7.4.3 above.

[279] See, eg, *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 15: 'But she is entitled to be put into the position of providing herself with a servant and of paying the whole of the servant's wages. If she had to do this out of half the income, she will be worse off. Similarly with the other items I have mentioned. In a household such as this, approximately the same amount of fuel and light would be required for two people as she will require for herself, and on the actuarial calculation she would have to pay the whole of the cost of such things out of half the joint income. The loss of her husband's contribution to the cost of services or commodities enjoyed in common is a pecuniary loss to her.'

[280] Corbett & Buchanan I 73; Davel *Afhanklikes* 131; Koch *Lost Income* 185.

[281] See *Roberts v London Ass Co Ltd* 1948 (2) SA 840 (W) at 851: '[I]t is clear that some evidence must be adduced to show what social advantages the surviving widow and children may have reasonably expected if the husband and father had lived. The wife and children of a person of high or exalted social position may reasonably expect tangible advantages to flow from their relationship to such person and no doubt their loss of such advantages could be taken into account in assessing damages.'

[282] See *Union Government v Warneke* 1911 AD 657 at 667; *Nochomowitz v Santam Ins Co Ltd*1972 (1) SA 718 (T) at 720–1; *Van Vuuren v Sam* 1972 (2) SA 633 (A) at 625; *Barnes v UNISWA Ins Co*1977 (3) SA 502 (E).

[283] See, eg, *Nochomowitz v Santam Ins Co Ltd* 1972 (1) SA 718 (T), where participation in a busy social schedule and vacations abroad were not seen as a material loss and thus no compensation could be recovered. However, although these advantages may be described as 'immaterial', they may be obtained

by means of money and it seems that the plaintiff should have been (partially) compensated in respect of such a loss. See Boberg 1972 *SALJ* 152.

[284] Paras 5.10 and 15.3.7.1.

[285] *Union Government v Warneke* 1911 AD 657 at 667.

[286] *Hesselson v SAR & H* Corbett & Buchanan I 73; *Jameson's Minors v CSAR* 1908 TS 575 at 602; *Laney v Wallem* 1931 CPD 360 at 361; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 616; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1011.

[287] Corbett & Buchanan I 73–4; Davel *Afhanklikes* 131–2. See further the comment by Boberg *Delict* 542 on *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 295 (A); Reinecke 1976 *TSAR* 50 et seq.

[288] *Jameson's Minors v CSAR* 1908 TS 575 at 605; *Glaser v Millward* 1949 (2) SA 853 (W) at 862–4; 1949 (4) SA 931 (A) at 939–41. Contra Howroyd & Howroyd 1958 *SALJ* 77; see also Koch *Lost Income*205.

[289] See Corbett & Buchanan I 73; Boberg 1964 *SALJ* 150; Buchanan 1960 *SALJ* 190.

[290] See *Nochomowitz v Santam Ins Co Ltd* 1972 (3) SA 640 (A); Boberg 1972 *SALJ* 148. This method is not desirable where there is no direct link between income and savings (eg a future inheritance). Where savings come from investment income, it would be better to adjust the amount of an annuity.

[291] According to current law, a person has no claim on account of the frustration of his expectation to an inheritance (*Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 295 (A) at 304) and there is only limited protection where an heir is also a dependant. See also para 3.2.4.2*(b)*.

[292] See on contingencies para 6.7.3.

[293] I 74.

[294] Para 12.24.3.2.

[295] Para 6.7.3.

[296] *Lost Income* 220–1.

[297] See in general para 6.7.5; *De Jongh v Gunther* 1975 (4) SA 78 (W) at 80; *Milns v Protea Ass Co Ltd* 1978 (3) SA 1006 (C) at 1013–14.

[298] Consider, eg, contingencies which affect a *wife (or female partner)*: any contingency affecting the earning capacity of the partner; the expectation of further children; the expectation of a divorce or separation; the expectation of re-partnering and the expected financial standing of a future partner (see, *Ongevallekommissaris v Santam Bpk* 1999 (1) SA 251 (SCA)); her skills in managing her investment portfolio; the expectation of additional support to enable her to support her own natural children; contingencies regarding expectations of inheritance and relocation expenses.

Contingencies affecting a *husband (or male partner)*: the possibility that illness or accident may have prevented his partner from providing services and earnings; the expectation that in later years his partner may have gone out to work and provided a greater financial contribution than during the years of child-rearing; the possibility of divorce or separation; the expectation of re-partnering, including the expected financial standing of a new partner; the expectation of further children and the expectation that his partner may have inherited something.

Contingencies affecting *children*: contingencies affecting a breadwinner's earning capacity; further children which may share in the family income; the expectation of failing at school or university.

[299] See *Laney v Wallem* 1931 CPD 360; Koch *Lost Income* 219 on relocation expenses.

[300] See Davel *Afhanklikes* 133–8.

[301] See Corbett & Buchanan I 74; *De Wet v Odendaal* 1936 CPD 103 at 107; *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2 at 13.

[302] *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A).

[303] Corbett & Buchanan I 74; *Dyssel v Shield Ins Co Ltd* 1982 (3) SA 1084 (C) at 1087–8. Provision must, of course, be made for the decrease in the purchasing power of money in order to obtain the correct idea of the amount actually awarded (para 11.7.5).

[304] *Hulley v Cox* 1923 AD 234 at 246; *Snyders v Groenewald* 1966 (3) SA 785 (C) at 790.

[305] Davel *Afhanklikes* 133.

[306] Para 16.1.3.

[307] Para 8.4. See also Davel *Afhanklikes* 134–7.

[308] See paras 8.4 and 7.5.5, s 17(6) of the RAF Act 56 of 1996. See also *Nel v Federated Versekeringsmpy Bpk* 1991 (2) SA 422 (T).

[309] See in general Koch *Lost Income* 179–225, 279–91.

[310] Para 14.6.5.

[311] Koch *Lost Income* 310.

[312] *Lost Income* 279–80. See Koch op cit 270 et seq for the application of other methods (the precise gross-multiplier method and the year-by-year method). He also furnishes examples of a woman with a child, a working mother with a child etc.

[313] 1987 (3) SA 577 (A).

[314] See Koch 1989 *THRHR* 67–70; para 4.5.

[315] 1963 (3) SA 151 (W).

[316] See also *Nhlumayo v General Accident Ins* 1986 (3) SA 859 (D), where the court deducted 5 per cent for contingencies between the date of delict and the date of trial and 16 per cent for future contingencies. See *Burns v National Employers General Ins Co Ltd* 1988 (3) SA 355 (C) at 360 for discounting to the date of judgment instead of discounting to the date of commencement of the trial. See also *General Accident Ins Co SA Ltd v Summers etc* 1987 (3) SA 577 (A).

[317] See Corbett & Buchanan I 74–5; Davel *Afhanklikes* 139–40; Lee & Honoré *Obligations* 280. See further *Plotkin v Western Ass Co Ltd* 1974 (2) SA 109 (E); *Abbott v Bergman* 1922 AD 53; *De Harde v Protea Ass Co Ltd* 1974 (2) SA 109 (E); *Erdmann v Santam* 1985 (3) SA 402 (C) at 404, 409; Koch 1986 *De Rebus* 105–8.

[318] Para 11.1.2.

[319] 1957 (2) PH J16 (A).

[320] See also *Union Government v Warneke* 1911 AD 657 at 669: 'It is possible that the plaintiff may prove that after making allowance for the fact that he no longer has to support his wife, the arrangements necessitated to replace her supervision and assistance in the upbringing of the children entail a pecuniary loss.' See further *Bennett v Sun Ins Office Ltd* Corbett & Buchanan I 391 at 394 (wife gives up her employment to act as nurse to her husband—damages computed on the basis of the cost of hiring a nurse); *Richter v Capital Ass Co Ltd* Corbett & Buchanan I 101 at 108 (farmer's wife injured and the cost of four servants was awarded). See Koch *Lost Income* 151–2, 186.

[321] Where a parent claims damages for the loss of services of his or her child, his savings by not having to maintain the child are taken into account (see *Bertram v CSAR* 1905 TH 234). See also *Hendricks v Pres Ins Co Ltd* 1993 (3) SA 158 (C).

[322] See also *Cooke and Cooke v Maxwell* 1942 SR 133 for the loss of a wife's services in the care and upbringing of a baby of 14 months. The value of such services was calculated but the court took into account the fact that the plaintiff would probably remarry and that, as the child grew older, it would require less attention.

[323] See Van der Merwe & Olivier *Onregmatige Daad* 558–61; Newdigate & Honey *MVA* 49–56; Corbett & Buchanan I 18–23; Lee & Honoré *Obligations* 220–2; Klopper *Third Party Compensation* 218 et seq; Coetzee *Die Toepassingsterrein van Ongevallewetgewing in die SA Reg*; Schaeffer and Heyne *Workmen's Compensation in South Africa*; Van der Walt *Sommeskadeleer* 417–21; Van Jaarsveld *Handelsreg* 679–80 for further references.

[324] See Koch 1987 *THRHR* 475: 'When a workman [employee] is injured in the course of his employment, he becomes entitled to benefits in terms of the Workmen's Compensation Act 30 of 1941 [COID Act]. Such benefits typically include the payment of medical and travelling expenses, the payment of a temporary pension and, for serious injuries, the granting of a pension payable for life. If he is killed, pensions become payable to his dependants and a contribution may be made towards funeral expenses.' See *Healy v Compensation Commissioner* 2010 (2) SA 470 (EC) at 478 for an interpretation of the administrative guidelines issued by the Director-General to assist decision-makers exercising powers in terms of the COID Act. The court (at 477) also explained the application of sched 2: 'The starting point for determining the percentage of a permanent disablement is Schedule 2. It, like the Compensation Act of which it is part, must be interpreted generously so as to do justice to the employee, to the extent possible within the ''give and take framework'' of the Compensation Act.'

[325] See Van der Merwe & Olivier *Onregmatige Daad* 558.

[326] See s 1. In *ER24 Holdings v Smith* 2007 (6) SA 147 (SCA) a volunteer worker was not regarded as an employee for purposes of the Act. See also *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA); Scott 2007 *De Jure* 391–402.

[327] Section 1. This refers mainly to a widow, widower and children, but would most probably also include other 'dependants' in light of the Constitution and the Civil Union Act 17 of 2006.

[328] The Act uses the term 'compensation' (Afrikaans: 'vergoeding')—see eg s 22—but this is the same as damages in the ordinary sense (para 8.1). The best evidence of this is that the compensation payable by the Director-General must in effect be deducted as a benefit from damages awarded by a court if a third party is delictually liable on account of the accident (para 10.4.2; ss 36(1)*(a)* and (2)). If 'compensation' can reduce an amount of damages, such compensation must necessarily be of the same nature as damages. See, however, *Grace v Workmen's Compensation Commissioner* 1967 (4) SA 137 (T) n 334 below; see also *SAR & H v SA Stevedores Services Co Ltd* 1983 (1) SA 1066 (A) at 1081.

[329] See ss 1 and 22: an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or death. Sexual harassment can be regarded as an 'accident' for purposes of the Act—*Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA). In *Twalo v The Minister of Safety and Security* [2009] 2 All SA 491 (E) the intentional killing of a colleague at the workplace was not regarded as an 'accident' for purposes of the Act.

[330] See para 11.8 on limits to the amount of damages recoverable; Newdigate & Honey *MVA* 50 et seq. An employee who sustains an 'occupational injury' as defined in the COID Act 130 of 1993 will have no claim under the RAF Act 56 of 1996 if the wrongdoer is his or her employer—*Road Accident Fund v Monjane* 2010 (3) SA 641 (SCA); Ahmed 2011 *THRHR* 494–500; Millard & Smit 2008 *TSAR* 596–604; Mokotong 2008 *THRHR* 343–9. See also *Mphosi v Central Board for Co-operative Ins Ltd* 1974 (4) SA 633 (A).

[331] Paras 11.4 and 14.9.2. See especially *Road Accident Fund v Maphiri* 2004 (2) SA 258 (SCA).

[332] See *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC)—s 100(2) of the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA) provides that no person is entitled to benefits from more than one source in respect of the same disease and therefore excludes a claim in terms of the COID Act 130 of 1993. ODIMWA does not exclude a common-law claim against the employer, but s 35(1) of COIDA does exclude such a common-law claim. This exclusion in s 35(1) only applies to 'employees' who are entitled to compensation in respect of 'occupational diseases' under the COID Act. The plaintiff received compensation in terms of s 100(2) of ODIMWA. The Constitutional Court held that s 35(1) of the COID Act did not apply to his case and he could institute a common-law claim for the balance of his loss from the negligent mine owners.

[333] See *Pettersen v Irvin and Johnson Ltd* 1963 (3) SA 255 (C); *Padayachee v Ideal Motor Transport* 1974 (2) SA 565 (N); *Mkhunqwana v Minister of Defence* 1984 (4) SA 745 (O); *Gciltshana v General Accident Ins Co of SA Ltd* 1985 (2) SA 367 (C); *Louw v Joshua Doore* 1987 (2) SA 645 (C). In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) the constitutionality of s 35(1) was affirmed. See also *Mlomzale v Mizpah Boerdery (Pty) Ltd* 1997 (1) SA 790 (C); *Road Accident Fund v Monjane* 2010 (3) SA 641 (SCA). The employer will be exempted from delictual liability for an occupational injury, even if the employer failed to report the accident to the authorities under the Act—*Skorbinski v Bezuidenhout t/a DB Transport* 2009 (5) SA 461 (ECP) at 462. See *MEC for Education, Western Cape Province v Strauss* 2008 (2) SA 366 (SCA) for a situation where s 60(1) of the South African Schools Act 84 of 1996 and s 35(1) of the COID Act applied. The Constitutional Court held in *Mankayi v Anglogold Ashanti Ltd* 2011 (3) SA 237 (CC) that s 35(1) does not cover an 'employee' who qualifies for compensation in respect of 'compensatable diseases' under the Occupational Diseases in Mines and Works Act 78 of 1973. The exclusion of liability in s 35(1) is therefore limited to 'employees' who are entitled to compensation in respect of 'occupational diseases' under the COID Act. See in particular the detailed discussion by Rautenbach 2011 *TSAR* 527-40.

[334] In *Road Accident Fund v Maphiri* 2004 (2) SA 258 (SCA) at 258–9 Harms JA held that 'compensation' was not the same as 'damages'—a distinction drawn clearly by s 36 of the Act. There might be a complete overlap, as in the case of hospital and medical expenses; there might be a partial overlap, as in the case of loss of income and compensation for disablement under the Act; or there may be no congruent relief, such as in the case of general damages for pain and suffering, for which there is no corresponding head of compensation in the Act.

[335] In *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N) at 206–8 the court held that post-traumatic stress disorder is an occupational disease and that in casu it arose as a result of and in the course and scope of his employment.

[336] Section 36.

[337] Para 10.4.2; *Road Accident Fund v Maphiri* 2004 (2) SA 258 (SCA).

[338] See, eg, *Bhoer v Union Government* 1956 (3) SA 582 (C); *Senator Versekeringsmpy Bpk v Bezuidenhout* 1987 (2) SA 361 (A) at 368.

[339] See also sched 2 of the Act on the percentage disability in regard to certain injuries.

[340] Sections 47 and 48, read with scheds 4.

[341] Sections 49 to 53, read with sched 2 and 4.

[342] Section 54, read with sched 4 on the different possibilities regarding dependants. From *Ongevallekommissaris v Santam Versekeringsmpy Bpk* 1965 (2) SA 193 (T) it appears that the financial position of a widow or surviving partner is irrelevant in the assessment of her compensation.

[343] Section 63.

[344] See *Louw v Joshua Doore* 1987 (2) SA 645 (C).

[345] *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T); *Grace v Workmen's Compensation Commissioner* 1967 (4) SA 137 (T); *Le Roux v SAR & H* 1954 (4) SA 275 (T); *Jordaan v Oosthuizen* 1969 (2) SA 606 (O); *Young v Workmen's Compensation Commissioner* 1998 (3) SA 1085 (T).

[346] Para 11.4.

[347] Cf *Grace v Workmen's Compensation Commissioner* 1967 (4) SA 137 (T); Boberg *Delict* 672. See para 10.4.2 where the Act is applicable to an employee's claim. In *Ngcobo v Santam Ins Co Ltd*1994 (2) SA 478 (T) the court made an apportionment of damages to the plaintiff's claim, after payment was effected by the Workmen's Compensation Commissioner. The court took the plaintiff's common-law damages and apportioned these according to his contributory negligence. These apportional damages amounted to less than what the plaintiff already received from the Commissioner and therefore his claim for further damages failed (supra at 486). See *Road Accident Fund v Maphiri* 2004 (2) SA 258 (SCA) where the 'like from like' principle was not applied. The total amount of compensation payable was deducted from the total amount of damages awarded. Where damages were apportioned, the compensation payable was to be deducted from the total amount of damages apportioned to the defendant. See also Klopper *Third Party Compensation* 260; *Senator Versekeringsmpy Bpk v Bezuidenhout* 1987 (2) SA 361 (A); Koch 1990 *De Rebus* 343 et seq. See para 11.4.3 on the fact that contributory negligence is irrelevant in regard to a claim by the Director-General.

[348] See also s 76 on fees for medical aid.

[349] See also s 100 of the Occupational Diseases in Mines and Works Act 78 of 1973 and *Jiya v Durban Roodepoort Deep Ltd* 2000 (1) SA 181 (W).

[350] See also s 32 of the National Nuclear Regulator Act 47 of 1999.

[351] This concerns damages for patrimonial loss. Compensation and satisfaction for non-patrimonial loss are discussed in chap 15. Sometimes an award for both patrimonial and non-patrimonial loss is combined into a single amount of damages: eg in *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 *ILJ*2827 (GNP), where the plaintiff suffered psychiatric injury as a result of sexual harassment in the workplace, Du Plessis J (at 2835–6) held that compensation for future medical expenses must be included in the award of 'general damages for pain, suffering and shock'. (The court awarded a single amount of R60 000.)

[352] It has already been pointed out (para 2.4.11) that it is theoretically unsound to state that the infringement of a personality right may cause patrimonial loss. In this situation there is in fact an infringement of patrimonial rights in respect of the personality.

[353] See paras 14.3, 14.4, 14.5 and 14.6 on medical costs, loss of income and earning capacity (which is actually concerned with a right to earning capacity where aspects of physical-mental integrity are relevant) as well as claims by dependants for loss of support. See also generally *Mahomed v Silanda* 1993 (1) SA 59 (ZH); *Venter v Nel* 1997 (4) SA 1014 (D).

[354] See Neethling *Law of Personality* 108–10, 121–2.

[355] Which Neethling *Law of Personality* 88 et seq classifies as a type of bodily infringement.

[356] *Spies's Executors v Beyers* 1908 TS 473; *Jacobs v Lorenzi* 1942 CPD 394; *Bekker v Westenraad*1942 WLD 214. Cf further *Sager v Bezuidenhout* 1980 (3) SA 1005 (O); Van der Merwe & Olivier *Onregmatige Daad* 454. If the child dies, the man will have to pay the burial costs, but that is apparently a claim in terms of family law.

[357] See *Lourens v Van Biljon* 1967 (1) SA 703 (T) at 713 but also *Scholtemeyer v Potgieter* 1916 TPD 188 and *Smit v Swart* 1916 TPD 197. See further *Botha v Peach* 1939 WLD 153; *Perreira v Da Silva*1977 (2) PH J28 (C).

See also McKerron *Delict* 165–6: A claim for lying-in expenses may be instituted even before the birth of the child (*M'guni v M'twali* 1923 TPD 368; *Kalamie v Armadien* 1929 CPD 490). A claim for seduction does not bar a subsequent claim for lying-in expenses (*Veley v Vinjevold* 1935 NPD 578). From this one may deduce that there are two causes of action (chap 7).

[358] *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP) at 2835–6.

[359] *Shoba v Minister van Justisie* 1982 (2) SA 554 (C) at 559, 563–4; *Ngcobo v Minister of Police*1978 (4) SA 930 (D) at 935; Amerasinghe 1967 *SALJ* 335; *Whittaker v Roos en Bateman* 1912 AD 92 at

123; *Makhanya v Minister of Justice* 1965 (2) SA 488 (N) at 491; *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E) at 440–1.

[360] Para 14.6.

[361] Neethling et al *Law of Personality* 168–71, 187–8.

[362] See, eg, *Salzmann v Holmes* 1914 AD 471 at 480; *Die Spoorbond v SAR, Van Heerden v SAR*1946 AD 999 at 1005, 1011; *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* 1955 (2) SA 1 (W); *Gelb v Hawkins* 1959 (2) PH J20 (W); *Moaki v Reckitt & Coleman (Africa) Ltd* 1968 (1) SA 702 (W).

[363] Neethling et al *Law of Personality* 17–20, 170; Neethling *Unlawful Competition*100 et seq, 276 et seq; Boberg *Delict* 20.

[364] Para 13.6; Neethling *Unlawful Competition* 82–4.

[365] As in *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd* 1955 (2) SA 1 (W).

[366] See para 11.5 and McKerron *Delict* 208; *Die Spoorbond v SAR* 1946 AD 999 at 1005.

[367] See McKerron *Delict* 181.

[368] See *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 567–75. At 573 the court remarked as follows on the damages claimed for special loss (loss of turnover): 'And in the nature of things the Court's assessment of the loss here cannot be more than a rough estimate.' See also at 574 for a formula of loss of profit which deals with expected sales less actual sales less the cost of lost sales. An important question, however, is what actually caused the lower than expected sales and the plaintiff has to exclude the causal effect of other possible factors. On damages for general damage the court held as follows at 575: 'Defamatory statements concerning the way a trading corporation conducts its business can no doubt prove very damaging but, as I have shown, this is largely compensated for where special damages are awarded. And unlike a natural person a trading corporation does not need a *solatium* for wounded feelings, etc.' See also *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 320 (SCA) at 348-9.

[369] See *Gold Reef City Theme Park (Pty) Ltd; Akani Egoli (Pty) Ltd v Electronic Media Network Ltd*2011 (3) SA 208 (GSJ); *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 320 (SCA) at 344: '[A] plaintiff who seeks to recover special damages resulting from a defamatory statement, must allege and prove the elements of the *Aquilian* action. And, I may add, it matters not in this regard whether the plaintiff is a corporation or a natural person'; *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 (1) SA 945 (A) at 954; *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) (political party can also claim). The most important factor in the assessment of damages should be how the defamatory publication has affected the income and prospective income of the corporation. This, however, is not essential and in the absence of clear evidence on actual and potential losses, a court will calculate an amount ex bono et aequo. See also para 15.3.2.1 below.

[370] See Neethling et al *Law of Personality* 191 et seq.

[371] Neethling et al *Law of Personality* 207 et seq, 212 et seq.

[372] See *Viviers v Kilian* 1927 AD 449 at 455; *Joubert v Bruwer* 1966 (1) PH B5 (G).

[373] Para 14.8.

[374] Para 10.7. Other relevant factors should be the extent to which a partner has actually contributed to the household, the fact that the marriage or civil partnership was already doomed even without the defendant committing adultery with the other partner, etc. See, in general, *Joubert v Bruwer*1966 (1) PH B5 (G); *Fuller v Viljoen* 1949 (3) SA 852 (GW) (hospital costs in respect of nervous breakdown caused by adultery); *Doyle v Doyle* 1957 (2) PH F85. See also *Gradwell v Hayward* 1932 EDL 324 (no compensation for expenses in respect of a wife's 'confinement'); Lee & Honoré *Obligations* 292 submit that any patrimonial loss caused by adultery should be recoverable and refer to *Millward v Glaser* 1949 (4) SA 931 (A).

Chapter 15
QUANTUM OF DAMAGES AND SATISFACTION FOR NON-PATRIMONIAL LOSS (INJURY TO PERSONALITY)

15.1 INTRODUCTION

The nature of non-patrimonial loss is discussed elsewhere [1] and it has also been pointed out that both compensation and satisfaction are relevant in regard to such loss. [2] The two actions which are prominent here [3] are the action for pain and suffering [4] (which permits compensation for non-pecuniary loss resulting from an infringement of the bodily integrity) and the actio iniuriarum [5] which has the primary function of providing satisfaction in a case of iniuria.

15.2 QUANTUM OF DAMAGES (COMPENSATION) FOR INFRINGEMENT OF PHYSICAL-MENTAL INTEGRITY IN TERMS OF ACTION FOR PAIN AND SUFFERING [6]

15.2.1 General

Where a person's physical-mental integrity has been infringed, compensation may be recovered for the following forms of non-patrimonial loss: [7] pain and suffering, shock (including psychological or psychiatric illness), disfigurement, loss of the amenities of life; loss of the expectation of life. [8] Losses such as pain and suffering and shortened expectation of life may be associated with an impairment of physical as well as mental health. [9]

In terms of rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules a plaintiff suing for damages for personal injury

(which includes compensation for non-pecuniary loss) has to specify inter alia the nature and extent of the injuries as well as the nature, effects and duration of the resultant disability. In addition, he or she has to state separately the amount claimed for the different forms of non-patrimonial loss. [10]

15.2.2 Some general principles in assessment of amount of compensation

It is widely recognized that, as a point of departure, a court has wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his or her bodily injuries and their sequelae. [11]The court's discretion is however not unfettered; it is influenced by the circumstances of the particular case and a variety of principles and factors. [12]

15.2.2.1 *Extent or seriousness of non-patrimonial loss* [13]

It goes without saying that the quantum of compensation must bear relation to the extent of the loss suffered. Although it is conceptually impossible to express non-pecuniary harm directly in monetary terms, the amount of compensation [14] should nevertheless be directly proportionate to the extent of the loss. [15] Generally speaking, the extent of non-pecuniary loss may be expressed as the product of the following: *the intensity of an injury*

to feelings (affective or physical), [16] *its nature*, and *its duration*. [17] In considering the intensity of an injury to feelings a court has regard to certain objectively ascertainable factors such as a plaintiff's age (and expectation of

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life), [18] gender, [19] social status, culture and lifestyle, [20] race (which is obviously not relevant per se), [21] and degree of consciousness. [22] Some matters are considered to be irrelevant. [23]

15.2.2.2 *Object of compensation* [24]

A court which makes an award in respect of non-patrimonial loss should have some purpose in mind (even if it is not expressed) otherwise the award is based on arbitrary speculation. [25] An award may, for example, be intended as *(a)* a counter-balance to a plaintiff's unhappiness, [26] or *(b)* to give him or her the ability to overcome the effects of the injuries in respect of which the claim is being made, [27] or *(c)* to provide psychological satisfaction for the injustice done to him or her. [28] All this does not imply that a court should in every case determine in detail how the money will enable the plaintiff to achieve the object of compensation or satisfaction, but the tribunal should nevertheless keep this in mind as a general guideline. The amount of money awarded should theoretically enable a plaintiff to receive appropriate compensation without placing an unreasonable burden on the defendant. There is authority in our law for the statement that a court should have regard to the purpose to be served by an award of damages. [29]

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15.2.2.3 *Effectiveness of compensation* [30]

A controversial matter which relates to the purpose of an amount of damages is the ability of an award to achieve its object given a particular set of facts. This question is not an enquiry into factors which determine the extent of non-pecuniary loss but rather with facts which are relevant to compensation. Although the value which an individual plaintiff attaches to money could be considered, [31] it is preferable that the patrimonial position of a plaintiff or the value he or she subjectively attaches to money should be ignored. A plaintiff's financial status may, however, give an indication of his or her lifestyle, which may, in turn, be relevant in determining the extent of some forms of non-patrimonial loss (eg loss of the amenities of life). [32]

15.2.2.4 *Principles of fairness and conservatism*

In the process of quantifying [33] non-patrimonial loss, principles of fairness and conservatism play a decisive role in assessing damages. [34] Although damage in the form of non-patrimonial loss cannot be directly expressed in terms of money, the relationship between the two is found by using *fairness* as a type of formula. [35] In practice this means that a defendant will not be compelled to pay a large amount of

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damages just because of the law's sympathy with an injured plaintiff. [36] In *Pitt v Economic Insurance Co Ltd* [37] the court stated:

> I have only to add that the Court must take care to see that its award is fair to both sides—it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense. [38]

However, an award must not be so 'conservative' that the defendant receives preferential treatment at the expense of the plaintiff. [39]

In a sense 'fairness' (equity) is a vague concept without a fixed meaning and a court should therefore guard against describing its award as 'fair' merely for safety's sake without having actually used a fair method of assessment. Fairness is probably a collective concept in respect of inter alia the following principles: the court should consider all the relevant circumstances which give an indication of the extent of the non-pecuniary loss and ignore irrelevant considerations such as undue sympathy for the defendant; the basic compensatory function should receive the necessary emphasis; [40] the court should, without being unreasonable, excercise its discretion carefully and conservatively and rather award too little than too much; [41] the amount of damages should not unnecessarily burden a defendant in favour of the

plaintiff; an award should as far as reasonably possible be consistent with awards in comparable previous decisions; [42] the tendency to grant higher awards may be considered as a factor; [43] the high value placed on personality interests in the Constitution must be taken into consideration in assessing damages; [44] the general economic conditions in the country should be taken into account in a justifiable manner. [45] If these principles are applied, one may safely assume that a fair approach has been adopted.

15.2.3 Use of previous awards in comparable cases as yardstick [46]

15.2.3.1 *General*

In view of the particular problems in assessing damages for non-patrimonial loss in a just and predictable manner, an important and useful technique is to consider previous awards in comparable cases. Such cases provide a court called upon to award damages with a general indication of what is fair and appropriate. The volumes by Corbett and Buchanan contain many unreported judgments on the assessment of damages for non-patrimonial loss which have been selected for this very purpose. [47]However, as pointed out by the Supreme Court of Appeal in *De*

Jongh v Du Pisanie, [48] the guiding principle remains that the determination of non-patrimonial damages lies in the discretion of the court. [49] In exercising this discretion, comparing awards in previous cases provides the court with wide parameters within which the quantum of its award should appropriately fall. It also ensures consistency, which is a requirement for fairness. But comparison with previous cases remains a guideline. [50] It does not replace the court's discretion with a requirement for strict compliance with the adjusted value of previous awards. [51]

15.2.3.2 *Basic principles* [52]

The locus classicus on the technique of considering previous cases is *Protea Assurance Co Ltd v Lamb*: [53]

It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At

the same time it may be permissible ... to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their *sequelae* may have been either more serious or less than those in the case under consideration. [54]

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15.2.3.3 *Considering depreciating value of money*

It is obvious that, if a court considers a previous award made in a comparable case, regard should be had to its actual present monetary value. This matter is well summarized in an obiter dictum in *SA Eagle Ins Co Ltd v Hartley*: [55]

As stated by Lord Diplock in *Wright v Railways Board*, [56] non-ecomomic loss is not susceptible of measurement in money. Any figure which is awarded cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncrasies of the assessor, the figure must be "basically a conventional figure derived from experience and from awards in comparable cases" (*Ward v James*.) [57] The need for even-handedness requires that, when comparing awards in comparable cases, regard must be had to the purchasing power of the currency at the time when such cases were decided, otherwise one would not be comparing comparables ... In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss. Such a valuation must obviously be made in terms of currency values as they are at the time of valuation, and not in the terms of the values of an earlier time. In the same way ... a valuer determining the present value of a farm would not use the currency values of the past.

The question is which method of calculation should be used to express a previous award in current monetary value? [58] Inflation should usually be computed with reference to changes in the Consumer Price Index. [59]

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15.2.3.4 *Practical method of using previous awards* [60]

Newdigate and Honey [61] state that, where there are no recent cases which are directly comparable with the case under evaluation, one should attempt to establish a *pattern of previous awards* in cases where there were comparable injuries and consequences. It may be very difficult to find comparable cases in instances of multiple injuries. In such a case one may attempt to consider each individual injury against the background of similar awards for such injury in the past. However, this method should be used carefully lest the global award of damages is unreasonably increased.

What makes cases comparable and how is a pattern of cases to be established? The authors submit that the following factors are to be considered: [62]

(a) The similarity of the physical injuries.

(b) The type and duration of medical treatment.

(c) The permanence of some types of injury.

(d) The similarities in loss of the amenities of life.

(e) The age (and sometimes the gender) of the plaintiff.

Once a pattern of cases has been identified, the next step is to fit the case under consideration into such a pattern. This is done by comparing the seriousness of such case with the cases available for comparison. In this way one will obtain a general idea of the compensation which may be recoverable. [63]

15.2.3.5 *Evaluation*

Non-patrimonial loss (injury to personality) does not have a natural monetary equivalent, since no trading in respect thereof takes place. However, the fact that our courts acknowledge that awards in comparable cases may give an indication of the amount of damages which may be awarded in a particular case is evidence of the fact that a type of 'market value' has developed in respect of non-patrimonial loss. Such market value is determined with reference to what the courts have in the past awarded as fair and reasonable compensation. It is thus correct to conclude that, in a sense, a commercialization of non-pecuniary loss has taken place.

The general impression from case law is that previous awards in comparable cases indicate the upper and lower parameters of awards from which arbitrary deviation should not take place. In this field, as with many other legal problems, the golden

mean between the following two extremes must be found: the unfettered discretion of a court to make an award in a particular case merely on the basis of what it considers to be fair and equitable and, on the other hand, a rigid tariff system in terms of which fixed amounts are awarded for defined forms of non-pecuniary loss and which excludes the possibility of considering all the relevant facts of an individual case. It must be obvious that neither of these two extreme positions is tenable. Consequently, our legal practice adopts a golden mean which allows for judicial discretion but which does not permit completely unpredictable awards. Damages for non-pecuniary loss should to an extent be predictable, since general uncertainty may harm the insurance industry and the third-party practice. Furthermore, the unpredictability of compensation would create an obstacle to a legal practitioner in providing his or her clients with reliable advice, the drafting of pleadings and in negotiating a settlement. [64]

15.2.4 Compensation for different forms of non-patrimonial loss [65]

In all the instances to be discussed here the general principles referred to above are applied (in addition to the specific principles relevant in quantification). It is, of course, not essential that an award of damages for non-pecuniary loss should be subdivided into the different forms such loss may take; courts can award a single amount of damages for the infringement of different facets of the physical-mental integrity. [66]

15.2.4.1 *Pain and suffering* [67]

This includes all pain, discomfort, physical and mental suffering on account of a physical impairment of the body or the causing of emotional shock. [68]

Compensation is payable in respect of pain and suffering in the past and expected in future. [69] Pain and suffering associated with surgical operations necessitated by the initial injuries must also be considered. [70]

So-called phantom pains 'in' amputated limbs will be taken into account in the assessment of compensation. [71]

It is, of course, impossible to express 'pain and suffering' directly in money, since it lacks an inherent patrimonial value. The following dictum from *Sandler v Wholesale Coal Suppliers Ltd* [72] has frequently been cited:

> [I]t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all circumstances of the case.

However, in view of the use of previous awards [73] and the commercialization of non-patrimonial loss, it is, of course, not literally true that there are no scales by which pain and suffering can be measured. [74]

In the assessment of fair compensation for pain and suffering the *subjective experience* of the plaintiff (which may be established through evidence by the plaintiff, the plaintiff's family and medical staff) is of paramount importance, while awards in previous cases [75] should also be taken into account. A plaintiff's subjective experience is determined by the nature, duration and intensity of the pain and suffering. The plaintiff's actual experience is decisive and the fact that he or she is, for example, more sensitive to pain does not imply that his compensation has to be based on the pain which an average person in the plaintiff's position would have experienced. [76] Conversely, where a plaintiff is less sensitive to pain than the average person, his or her damages must also be calculated in respect of the plaintiff's personal experience. Someone's social or financial status or his race are irrelevant,

because it cannot give an indication of how much pain a person has suffered. It is the physical-mental make-up of the individual plaintiff that has to be established. [77]

The question of a plaintiff's age is problematic. [78] The relatively high age of a plaintiff may reduce his or her resistance to pain in comparison with a younger person. At the same time it is plausible that pain may negatively affect a young child to a greater extent than a more mature person. [79] The position thus appears to be that, if age is to be taken into account, it should be done only against the background of expert evidence which indicates its relevance in the particular situation. [80]

Pain and suffering can, of course, only exist to the extent that it is actually experienced by the injured person. Thus a plaintiff will not be able to recover for 'pain' which, because of medication or unconsciousness, he or she has not subjectively experienced. [81] Pain actually experienced but later forgotten by the plaintiff may, however, be compensated. [82] The circumstances under which the pain and suffering has been caused play no role in the process of quantification. In *Radebe v Hough* [83]the Appellate Division held that a plaintiff's award of damages for pain and suffering may not be reduced because he attacked the defendant earlier. The court emphasized that a plaintiff's individual experience of pain determines his or her damages and that the plaintiff's race, or the value he or she attaches to money, are irrelevant. [84]

15.2.4.2 *Shock (psychiatric injury)*

Damages are sometimes awarded for shock which is directly associated with physical injuries or the treatment of physical injuries. It is, however, not always precisely clear what is meant by shock (also referred to as mental suffering, mental distress, psychic

pain, fright etc). [85] In any event, here the term 'shock' refers to a type of non-physical loss caused by physical injuries which can hardly be distinguished from

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'pain and suffering'. The quantification of this kind of loss usually takes place together with that of pain and suffering and no separate principles exist. [86]

Compensation may also be awarded for emotional shock which does not necessarily arise from physical injury and which causes further forms of loss, including psychiatric injury. This shock may be described as a sudden, painful emotion or fright resulting from the realization or perception of an unwelcome or disturbing event which brings about an unpleasant mental condition such as fear, anxiety or grief. According to *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*, [87] damages are not recoverable for emotional shock of a negligible nature and short duration which has no material effect on the well-being of the person in question. [88] On the other hand, compensation will be awarded for emotional shock (or nervous shock) that results in a loss which may be described as 'recognized psychiatric injury'. This refers to stress disorder, neurosis, phobia, psychosis, hysteria, insomnia et cetera. [89]

Damages for the consequences of emotional shock are assessed with reference to its effect upon the plaintiff. [90]

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15.2.4.3 *Loss of amenities of life* [91]

This form of non-pecuniary damage refers to the loss of the ability or will of someone to participate in the general or specific activities of life and to enjoy life as he or she did previously. [92] Corbett and Buchanan [93] suggest a general approach in the assessment of compensation. In determining damages, the following specific losses are taken into account: sexual impotence, [94] sterility, [95] loss of marriage opportunities, [96] loss of general health, [97] change of personality, loss of intellectual function, insomnia, neurosis, and the fact that a plaintiff's disability causes him or her to find the exercise of his or her profession more difficult. [98] In assessing compensation, a court has to take account of a loss of amenities already suffered as well as a probable future loss.

It may be accepted that a plaintiff's health, age and social, cultural or financial status are relevant in determining compensation for loss of amenities. [99] Specific losses (for example, regarding participation in sport) play an important role in determining the extent of the loss and thus the quantum of compensation. [100]

Administrator-General, SWA v Kriel [101] is a locus classicus in which emphasis is placed on how the impairment of a person's normal functions constitutes a loss of amenities. [102] In this judgment it was held that an award for medical and

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paramedical expenses and aids which may directly counter a loss of amenities of life should be taken into account in the assessment of damages for non-pecuniary loss. [103] The fact that a plaintiff is temporarily or permanently unconscious does not mean that there is no loss of the amenities of life. [104] However, permanent unconsciousness (as well as an abnormal mental condition) [105] is a highly relevant factor in reducing the quantum of damages to an appropriate amount of objective satisfaction, since actual compensation is impossible. [106] A plaintiff's knowledge that he or she suffers a serious loss will usually increase the extent of such loss as well as the amount of compensation. [107]

Rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules require that someone who claims damages in respect of a loss of amenities has to state separately how much is claimed for 'disability' in respect of the enjoyment of amenities, having to furnish particulars and state whether the disability is temporary or permanent.

15.2.4.4 *Disfigurement* [108]

Regard is had to all forms of facial and bodily disfigurement, including scars, loss of limbs, a limp caused by a leg injury, and facial or bodily distortion. Usually, heavy damages are not awarded, [109] but in some instances disfigurement may have serious effects on a plaintiff and then a considerable amount should be awarded. [110]The amount of damages is influenced by inter alia a plaintiff's gender (usually heavier

damages are awarded to women), [111] age, the visibility of the disfigurement, [112]and its influence on a plaintiff's personal and professional life (the humiliation and discomfort to which he or she will be exposed), [113] the plaintiff's sensitivity [114] and obviously the appearance of the plaintiff before he or she became injured.

Compensation may not be recovered for the future effects of disfigurement if medical costs are awarded to remedy the problem. [115]

15.2.4.5 *Shortened expectation of life* [116]

There is authority for the proposition that a person whose natural life expectancy has been reduced by injuries may claim damages in respect thereof. [117] Corbett and Buchanan [118] provide the following principles on quantification:

> It is therefore necessary for the court to examine the circumstances of the individual life and ascertain whether the shortening thereof would lead to deprivation of a positive measure of happiness. If the character or habits of the individual were calculated to lead to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. The appropriate figure should also be reduced in the case of a very young child since there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. [119]

Usually, shortened expectation of life is classified with a loss of the amenities of life for the purposes of compensation. [120]

15.3 QUANTUM OF DAMAGES (SATISFACTION) FOR NON-PATRIMONIAL LOSS (PERSONALITY INFRINGEMENT) IN TERMS OF ACTIO INIURIARUM

15.3.1 General

Satisfaction (solatium or 'genoegdoening') [121] for intentional personality infringement (iniuria) is awarded in terms of the actio iniuriarum. [122] The actio iniuriarum was traditionally regarded as an actio vindictam spirans, a revenge action, to neutralize the plaintiff's feeling of outrage, hurt or suffering as a result of the infringement of his or her personality. [123] Consequently, the actio iniuriarum is not aimed at compensation for patrimonial loss which can be directly expressed in money but at the reparation of an iniuria. Where a person suffers patrimonial loss as a result of the infringement of a personality right, he or she can recover damages with the actio legis Aquiliae. [124]

There is no fixed formula for the assessment of damages with the actio iniuriarum. [125] Therefore a court has the power to estimate an amount ex aequo et bono. [126] Consequently, the courts enjoy a wide discretion in this regard, with *fairness* as the dominant norm. [127] However, the term 'fairness' does not imply arbitrariness and haphazard estimation. [128] Thus there are many factors which have to be considered by the court in the determination of an award. [129] Fairness or equity implies that policy considerations as well as all the relevant factors which may influence the amount of satisfaction, including the circumstances of an individual

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case, must be considered when making the assessment. [130] Generally speaking, the principle of fairness can be embodied in the judgement of the *reasonable person*: will the reasonable person, in the light of all the relevant circumstances, view the award as fair and in accordance with the legal convictions of the community? Voices have been raised in favour of the view that courts should place a high premium on personality interests and that this attitude should be reflected in the quantum of satisfaction. [131] However, the courts tend to emphasize a more cautious approach. [132]

The infringement of different personality rights (such as the right to reputation and the right to feelings of dignity) through the same conduct gives rise to only one action under the actio iniuriarum and the award of damages should compensate the victim for all the infringements suffered. [133]

15.3.2 Defamation [134]

15.3.2.1 *Introduction*

Satisfaction can be recovered with the actio iniuriarum where a person's good name, esteem or reputation is intentionally harmed [135] by a defamatory

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publication. [136] The granting of a defamation action has been described as a vindication of the plaintiff in the eyes of the public and as consolation to him or her for the wrong the plaintiff has suffered. [137] The purpose of satisfaction is no longer to punish the defendant as in terms of the former Roman and Roman-Dutch law actio vindictam spirans; [138] the current approach is that the actio iniuriarum no longer has a penal function in instances of defamation—the latter is the function of criminal law. [139] Especially earlier case law held the view that satisfaction does not merely imply redress for the plaintiff's injured reputation and that the notions of revenge and penance play some role in determining the amount of satisfaction. [140]

A court has wide discretion to determine an award for compensation [141] and must estimate the amount of satisfaction ex aequo et bono (in attempting) to effect reparation for the diminishment of the plaintiff's good name and reputation as a result of the defamation. [142] However, an award involves not merely the court's subjective impression as to what is reasonable and fair. The court must have regard to all the circumstances of the case and the prevailing attitudes of the community and consider a wide variety of factors in the process of assessment. [143]

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The general trend nowadays appears to be that the courts are not very generous in their awards of solatia for defamation. The Supreme Court of Appeal stated in 2008 that 'too high an award of damages may act as an unjustifiable deterrent to exercise the freedom of expression and may inappropriately inhibit the exercise of that right'. [144] Another view is that a substantial amount must be awarded in order to effect

reparation of the plaintiff's injury to his or her personality [145] and to discourage others from committing defamation. [146] The premium placed on fundamental

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rights in the Constitution may also play a role in increasing awards for damages for personality infringements such as defamation. [147]

As will presently be shown, apart from general factors there are 'aggravating' and 'mitigating' considerations influencing the amount of satisfaction. [148] Although these factors will be separately analysed for purposes of efficacy, in a given case they may influence one another and every case must also be considered as a whole: the seriousness of a statement [149] can, for example, be aggravated [150] by the important position of the plaintiff. [151]

15.3.2.2 *General factors influencing amount of satisfaction*

(a) Character of plaintiff

Although as point of departure every person has a right to reputation that can be infringed, [152] evidence pertaining to the character of the plaintiff can either diminish or increase the amount of satisfaction. [153]

The defendant may submit evidence on the general bad character of a plaintiff in order to reduce the amount of satisfaction. [154] Specific facts and circumstances concerning the plaintiff which have a direct relationship to the defamatory words concerned can also be taken into account in reducing the amount of satisfaction. [155]However, evidence of specific acts perpetrated by the plaintiff and which are indicative of a tarnished character are as a rule inadmissible. [156] Moreover, evidence which merely indicates that other persons made defamatory remarks similar to

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those uttered by the defendant, or that the same rumours (malicious gossip) as those contained in the defamatory publication have been circulating, does not prove that the plaintiff has a bad reputation. [157] The evidence must have a bearing upon the bad reputation of the plaintiff prior to, and at the time of, the defamatory statements and the plaintiff must receive reasonable warning of the defendant's intention to lead such evidence. [158]

There is disagreement on the question whether the character and reputation of the plaintiff is relevant as a whole or whether it is of importance only in so far as it relates to the area of the defamatory words. [159] In *Sachs v Du Preez* [160] aspects of the plaintiff's character which had not been questioned by the defendant in the defamatory statements concerned were taken into account in reducing the amount of satisfaction, and in *Naylor v Jansen; Jansen v Naylor* [161] evidence that fell short of justifying the defamation nonetheless mitigated the impact of the statement in question. [162] But in *Field v Rhodes University College* [163] it was held that certain aspects of the plaintiff's character were too remote from the case and therefore could not be taken into consideration.

In *Buthelezi v Poorter* [164] the plaintiff's good reputation and character were taken into consideration in justifying a *higher* amount of satisfaction. In this case it was shown that the plaintiff was someone of 'international repute' and admired by people all over the world. [165]

In *Le Roux v Dey* [166] the fact that the plaintiff may have taken the matter too much to heart played a role in the assessment of compensation.

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(b) Position and status of plaintiff and defendant

The position and esteem of the *plaintiff* in society influences the amount of satisfaction. [167] The fact that the plaintiff is a professional person increases the award. [168] The high status of the plaintiff was expressly taken into consideration as an aggravating factor [169] in *Buthelezi v Poorter*. [170] Likewise, the fact that the plaintiff was an
advocate, [171] attorney, [172] teacher, [173] magistrate, [174]policeman, [175] missionary, [176] attorney-general, [177] chairman of a public company, [178] well-known rugby player [179] or supervisor [180] has played a role in calculating the amount of satisfaction. On the other hand, it was held in *Hefer v Botha* [181] that the reputation of a young man at the beginning of his career was especially worthy of protection. The court accordingly rejected the argument that the youth of the plaintiff (he was 19 years old) justified a reduction of the amount of satisfaction. Likewise, the fact that the defamed person was a 12-year-old child was taken into account in determining appropriate relief in *W v Atoll Media (Pty) Ltd*. [182]

The status of the *defendant* can also influence the award: a defamatory statement made by a much-respected person is more serious and justifies a higher award than a statement by a young man without particular status or reputation in society. [183] On the other hand, the fact that the defamatory reports were made by a reputable reporter who relied on reputable sources, has been regarded as a mitigating factor. [184]

(c) Nature and extent of publication

The nature of the publication in which the defamation appears, is of importance. A distinction is made between daily newspapers which are seldom read a day or two after publication and, for example, a news magazine which can be found in a physician's waiting room for weeks. [185] It was also considered to be an aggravating circumstance where the defamation appeared in a prestigious magazine represented as an accurate and fair publication with an alleged international readership of educated, informed and influential people, and even more so since the defamation was written by the editor himself and appeared as an editorial. [186]

It is to the detriment of the defendant if he or she did not perpetrate the defamation in the heat of an emotionally charged argument where unguarded statements are easily made, [187] but had time to reflect calmly and objectively on his or her actions.

It is self-evident that the wider the circulation of the publication, the heavier the damages will be. [188] As Burchell points out, [189] a person's reputation reflects the estimation other people have of him or her, and the more the people become aware of the defamation, the greater the potential loss of reputation.

The nature of the publication obviously plays an important role in the liability of the mass media. Factors such as the prominence given to certain words by, for example, printing them on the front page or in large or bold print, [190] increase the exposure of the published statements. However, numbers are not necessarily decisive; the identity of the target group is also of importance: publication to relatively few people can still have a strong effect if it is published to persons with whom the

plaintiff would like to retain his or her good name ('in whose high estimation it is most important for the plaintiff to be in'). [191]

The reverse also applies. Defamation which received sparse publication—for example, because the report was obscured—with the result that fewer people read it, normally merits a smaller amount of satisfaction. [192]

Usually a person who publishes a defamatory statement is not liable for the damage flowing from the unlawful re-publication of it. [193] There are, however, exceptions: 'Where republication is authorised or intended or where repetition is the natural and probable result then responsibility will attach.' [194]

(d) Gravity of defamation

The gravity of the defamation naturally has a direct influence on the damages. [195]

The graver the defamation, the higher the award. An allegation that an attorney-general had intentionally misled a court was considered as particularly serious and heavy damages were accordingly awarded. [196] An allegation of theft of R5 to R6 million was considered to be 'so serious that substantial damages should be awarded'. [197] In *Pont v Geyser* [198] the Appellate Division noted the unbridled harshness of certain allegations and awarded R10 000 as satisfaction. In *Maree v De*

Villiers [199] the court awarded the maximum amount within its jurisdiction where the defendant accused the plaintiff, a missionary, of being responsible for the pregnancy of two women. In *Buthelezi v Poorter* [200] the graveness of the defamation, described by the court as inter alia 'a vicious piece of character assassination', also resulted in a (then) high award of R13 500.

The less serious the defamation, the lower the award. Mere allegations of immorality or political unreliability were considered as having a low degree of seriousness in *Muller v Palmos* [201] and *Raubenheimer v Greeff* [202] and only R500 was awarded in each case. [203]

(e) Political matters

In *Frazer v Hertzog* [204] it was held that the fact that the defendant uttered defamatory words (but without 'malice or ill-feeling') in order to gain a political advantage over his opponent was an extenuating circumstance diminishing the amount of satisfaction. [205] On the other hand, Burchell [206] observes that in particular cases the political setting in which the defamation was published may constitute an aggravating circumstance:

> For instance, if the day before an important election is to take place the media widely publicize the false information that the favourite candidate has been convicted of fraud, the timing of the publication may operate in aggravation of damages.

(f) Oral defamation

Although our law in principle does not draw a distinction between oral and writtten defamation, Burchell [207] suggests that oral defamation may have a more transient impact than written defamation and that this fact should be taken into consideration in calculating satisfaction. He concedes, however, that in a particular situation oral defamation may have a wider effect than written defamation.

(g) Conduct of defendant until date of trial; failure to apologize

The conduct of the defendant from the time of publication of the defamation until the time of assessment of damages is relevant. [208]

Thus it is an aggravating circumstance if the defendant denies having made the offending statement, [209] fails to attempt to prove the truth of his or her defamation [210] but persists in claiming that it is not far from the truth. [211] The same applies where the defendant threatens to repeat the defamation, shows no regret and fails to put things right when he or she has the opportunity to do so. [212]

(h) Previous decisions

As in other cases of assessing of damages and satisfaction for non-patrimonial loss, [213] the court may consider previous decisions in calculating an appropriate amount of satisfaction. [214] The court generally considers comparable cases (identified with regard to the type of defamation and factors that have been taken into account) and from them attempts to identify guidelines on how low or high the particular amount should be. [215] In general, previous cases play the role of mere

directives [216] and provide information on the relative weight that should be attached to the various factors. Comparison with previous cases can also provide a basic sum which the court may further adjust in the light of the particular circumstances under consideration. In considering previous cases, the court must naturally take the falling value of money into account in order to determine in real terms the awards in those cases. [217]

(i) Amount of satisfaction suggested by plaintiff and defendant [218]

Since a court, in its assessment, sometimes takes into consideration the amount of satisfaction claimed by the plaintiff and offered by the defendant, there is a duty on the respective legal representatives to propose realistic amounts. Exorbitant claims and ridiculous offers will be disregarded and can therefore not make a constructive contribution to the calculation of the amount of satisfaction. [219] In one case the court awarded the amount claimed, [220] whereas in another the court rather allowed itself to be influenced by the submission of the defendant. [221]

(j) Certain further considerations in assessing quantum of satisfaction [222]

Where a group of persons has been defamed, each individual has a separate claim against the defendant. Of importance in determining the quantum in such a case is that 'the sting of the charge is diffused among them'. [223] In the *Pienaar* case, [224]154 persons had been defamed of whom (initially) only two instituted actions for damages. Judgment in favour of the two plaintiffs would to an extent also satisfy the others who did not claim. The court also recognized two relevant factors, namely the restoration of the plaintiff's good name and compensation for his loss. In *Geyser v Pont* 1968 (4) SA 67 (W) [225] there were two plaintiffs who each claimed R20 000 for defamation. The court calculated the amount of satisfaction as R11 000 but awarded R10 000 to each plaintiff in the light of the cumulative effect of two plaintiffs, and two separate claims, originating from the same defamation. [226]

Where there are several defendants, satisfaction has to be separately determined according to the blameworthiness of each defendant. [227] Different defendants can therefore be compelled to pay different sums of satisfaction.

In *Le Roux v Dey* [228] the Constitutional Court reduced the lower courts' award of R45 000 to R25 000 because, amongst other reasons, the plaintiff should have taken 'substantial consolation' from the fact that he had to some extent been vindicated in the

eyes of the persons who observed the defamatory matter by the punishment that the wrongdoers had already endured for their conduct.

A court of appeal will interfere with the award of the court a quo only in highly exceptional cases. [229] However, a duty to interfere arises inter alia in the case where

the court a quo, in favour of the plaintiff, has taken into consideration a factor which should not have been taken into account. In such a case the higher court is free to exercise its own discretion. [230]

A plaintiff who wishes to rely on aggravating factors (which can increase the satisfaction) must adduce evidence to prove them. On the other hand, extenuating circumstances must be proved by the defendant who intends to rely upon them. [231]

15.3.2.3 *Circumstances reducing amount of satisfaction ('mitigating' factors)*

(a) Truth of defamatory statements

Publication of true defamatory statements is justified only if such publication is in the public interest. [232] Publication of true statements which are not in the public interest is therefore not a complete defence, but the fact that the statements were wholly or partially true can play a role in reducing the quantum of damages. [233]

(b) Retraction, apology and amende honorable

An appropriate retraction and apology are important factors in reducing an amount of satisfaction. [234] An apology serves as a type of satisfaction which reduces—but according to one view, seldom completely extinguishes [235] —the loss suffered by the plaintiff.

In suitable circumstances the amende honorable (honourable amends or public apology), a Roman-Dutch law remedy which has recently (again) found favour in South African law, [236] can be utilized by a person who defamed another 'to make an appropriate public apology in *lieu* of paying damages' whilst the victim of a

defamation may similarly 'have the opportunity of having a damaged reputation restored by the remedy of a public apology'. [237] There is support for the view that the amende honorable can take three forms: an exclusive remedy; [238] an alternative

remedy to damages (satisfaction); [239] and a cumulative remedy with damage. [240]

Generally an apology, to have a mitigating effect on the amount of compensation, must be timeous [241] and spontaneous, not take place reluctantly, enjoy the same prominence as the defamatory statements, [242] contain an unconditional retraction of all assertions and give expression to a measure of regret that the statements have been made. [243] In addition, an apology carries more weight if it is accompanied by an offer to compensate the loss suffered. [244] The essence of an apology was set out as follows in *Ward-Jackson v Cape Times Ltd*: [245]

> [T]he essence of an apology is that it should not only contain an unreserved withdrawal of all imputations made, but that it should also contain an expression of regret that they were ever made. Where there is no unreserved withdrawal of imputations and no expression of regret, a mere retraction cannot be called a full and free apology.

In view of this, a defendant's statement that he or she withdraws what was said, but that he or she was entitled to say it, does not qualify as an apology. [246]

The precise effect of an apology depends on the circumstances of a particular case. Even a mere offer to retract and apologize can sometimes be taken into consideration. According to Amerasinghe, [247] an apology need not, however, be formulated in such a way that it is humiliating to the defendant. It is not necessary for the defendant in the apology to admit that he or she made the offending remarks; a hypothetical apology is therefore valid. [248] Where the plaintiff prevents the defendant from making an apology, the failure to apologize will not be considered as an aggravating circumstance. [249]

A rectifying report which does not constitute an express apology but which nevertheless neutralizes the defamation to a certain degree can also have a mitigating effect on the amount of satisfaction. [250]

The conduct of the defendant after an apology can neutralize the apology. For example, if the defendant offers an apology but thereafter raises a defence of truth and public benefit, the apology will no longer have any effect. [251] Where the defendant repeats the offending words after the apology, the effect of the apology is also nullified. [252]

(c) Absence of intention (animus iniuriandi)

Intention is a requirement for defamation, except in the case of the media. Burchell [253] submits that the absence of dolus directus and dolus indirectus (that is, where only dolus eventualis is present) should serve to moderate satisfaction. According to this author, a mistake which fails to exclude intention should have a

similar effect. In the case of the media, which are liable for defamation on a negligence basis, the absence of intention may nevertheless serve to reduce the amount of satisfaction. [254]

(d) Absence of improper motive or spite (malice) [255]

Absence of an improper motive (malice) [256] on the part of the defendant may serve to moderate satisfaction. [257] Malice is absent inter alia where the defendant acted with friendly motives or where he or she did not have the motive to harm the plaintiff. [258] Moreover, a defendant who says things in the heat of the moment without reflecting on them acts without malice and will need to pay less satisfaction. [259]

(e) Defendant not originator of defamation [260]

In principle, our law makes no distinction between the liability of the originator of the defamatory material and someone who is merely a conveyor or disseminator of it. [261]Nevertheless, the Appellate Division held in a particular case that the fact that the defendant had merely conveyed the defamation [262] made his conduct less serious—a factor that was taken into account in mitigation of satisfaction. [263] The defendant's conduct was thus not the exclusive cause of the plaintiff's loss, [264] a fact reducing the former's blameworthiness.

(f) Personal circumstances of defendant [265]

The emotional instability, intoxication or youth of the defendant when he or she published the defamation is relevant in assessing satisfaction. [266] Where such circumstances are present, the defendant is considered to be less accountable [267] or

less blameworthy and accordingly he or she should pay less satisfaction. [268] It is a controversial question whether the financial position of the defendant plays a role in the determination of satisfaction. [269]

(g) Provocation, retortio and compensatio [270]

If provocation by the plaintiff fails as a defence against a defamation claim, the defendant may nevertheless rely on it as a factor reducing the quantum of satisfaction. [271] Similarly, the fact that the defamation of the plaintiff took place out of revenge for the plaintiff's conduct (retortio), or where the plaintiff's conduct contributed in instigating the defendant's outburst, [272] plays a role. The principle of compensatio (set-off) means that, where two persons have defamed or insulted each other in such a manner that the one instance of defamation or insult is not out of proportion to the other, the two iniuriae cancel each other out. [273]

According to *Fraser v Hertzog*, [274] the fact that the defendant uttered the defamatory matter in response to a question of the plaintiff or someone else can be considered in mitigation.

(h) Delay on part of plaintiff in bringing action

A deliberate delay on the part of the plaintiff in bringing the action in the hope that the defendant will make more defamatory remarks might serve to reduce the satisfaction. [275] A reasonable explanation for the delay will obviously result in the delay having no detrimental effect on the award. [276]

15.3.2.4 *Circumstances increasing amount of satisfaction ('aggravating' circumstances)* [277]

(a) General conduct of defendant

Various acts by the defendant can lead to an increase in the amount of satisfaction: blameworthy conduct between the publication of the defamation and the trial; [278]persistence in the truth of unfounded defamatory allegations (persistence in the

plea of truth and public benefit); abandoning the defence of truth and public benefit only shortly before the commencement of the trial; [279] failure of the defendant to attempt to prove the truth of the allegations and persistently maintaining that the allegations were not far from the truth; [280] reckless failure, despite sufficient time, to verify the reliability and accuracy of his or her sources before publishing the defamation; [281] repetition of the offending allegations; [282] persistence in publishing defamatory matter in the face of legal proceedings; [283] threats to repeat them or persisting with his or her conduct over a long period of time; [284] failure to rectify matters when he or she had the opportunity to do so; [285] refusal to respond to requests by the plaintiff to try to make good the damage caused by the allegations; [286] failure to apologize after acknowledging the falseness of the allegations [287] or to repent; [288] or any other conduct from which it can be deduced that the defendant did not regret his or her actions. [289]

(b) Gravity of defamation

As stated, [290] the exceptional gravity (crassness or insulting nature) of the defamation is an obvious aggravating circumstance in determining the amount of satisfaction. [291]

(c) Improper motive (malice) [292]

Malicious or improper motive (malice) on the part of the defendant is an important aggravating factor which is expressly taken into consideration by the courts in increasing the amount of satisfaction. [293] Malice will be presumed where the defendant's motive was his or her feeling of enmity and hostility towards the plaintiff, [294] where the defendant's purpose was to injure the plaintiff, [295] and where the allegations were not made in the heat of the moment but were written with a hateful and revengeful disposition towards the plaintiff. [296] Failure to offer an apology can serve as proof of malice. [297]

Geyser v Pont [298] is an example of where the defendant acted with malice. However, the fact that the defamation had not been uttered for selfish reasons but with the purpose of protecting the interests of the defendant's church was nevertheless taken into account in mitigation. [299]

The presence or absence of malice can be deduced from the nature of the publication of the allegation and surrounding factors such as existing hostility between the parties, the occasion on which the allegations were made, the fact that the defendant was aware of the falsity of his or her defamatory utterances [300] and the provocative repetition thereof. [301]

(d) Recklessness of publication [302]

The reckless nature of the publication increases the amount of satisfaction. Recklessness is, for example, present where the defendant had sufficient time to verify

the accuracy and reliability of his or her sources before the publication of exceptionally severe defamation, but failed to do so. [303]

(e) Ruining of plaintiff as result of defamation

If the defendant succeeds in his or her purpose to ruin the plaintiff by means of the defamatory publication, the amount of satisfaction will be higher. Failing in this object will, however, not benefit the defendant:

> A defamation which succeeds in its purpose of ruining a man should attract a higher award than one which fails in such purpose. The defamer cannot know in advance whether his calculated attempt to ruin will succeed or not, and the penal element in the award should not, I think, be affected by consideration of success or failure in the attempt to ruin. Successful ruination would then be an added factor to be taken into account in swelling the award; its absence does not decrease the award in the sense that the defamation is to be regarded as being any the less serious. [304]

(f) 'Penal' function of satisfaction?

There are divergent views on whether the amount of satisfaction should also serve the purpose of *punishing* the defendant for his or her conduct, which purpose would have to be reflected in a larger amount of satisfaction. [305] The more recent approach is that the actio iniuriarum does not have a penal function in instances of defamation since punishment belongs in criminal law and no longer, as in Roman law, [306] in private law, where the object is compensation of loss. [307]

According to another view, satisfaction for defamation contains a punitive element although punishment is not the exclusive object. [308] Especially earlier case law accepted that the object of punishment had to be taken into account by the

court in determining the quantum of satisfaction for defamation. [309] This was known as 'punitive damages' or 'exemplary damages' and were especially awarded where, for example, the defendant acted with a malicious motive, aware of the untruth of his or her remarks, [310] where the defamation was of an exceptionally serious nature, [311]where an unusually important interest was threatened, [312] or where the court sought to deter the defendant and other persons from similar behaviour by making a higher award. [313]

It has also been suggested that 'aggravated compensatory damages' should fulfil the function of punitive damages in the actio iniuriarum. [314]

15.3.3 Insult (contumelia)

The principles discussed in relation to defamation [315] apply mutatis mutandis where a person claims satisfaction for infringement of his or her feelings of dignity or self-respect. [316] Here, too, satisfaction is calculated ex aequo et bono. As the courts do not regard a deliberate attack upon personal dignity as a trivial matter, substantial damages are usually awarded. [317] In general, regard is had to the nature, extent, gravity, seriousness (or triviality) of the insult and the extent to which the plaintiff feels insulted, [318] as well as factors such as the following: [319] the social standing of the

parties, [320] the degree of publicity to outsiders of the insulting behaviour, [321]provocative conduct by the plaintiff, [322] the absence of an apology or regret on the part of the defendant, [323] the truth or untruth of the offending remarks, awards made in other similar cases, [324] the effect of applicable legislation [325] and, where the insult or contumelia flowed from physical assault, factors such as the nature of the assault, the imputation against the plaintiff's manhood, and the effect of that imputation on his or her subordinates. [326] In the case of trivial insult, the court will award only

nominal damages. [327]

15.3.4 Breach of promise to marry [328]

Breach of promise is the unlawful breach by the defendant of an undertaking to marry the plaintiff. It is established law that breach of promise does not merely constitute breach of contract, [329] but can also be an iniuria against the innocent party to an engagement. For many years there was uncertainty on the question whether breach of promise per se constitutes an iniuria (with the result that contractual and delictual damages can be claimed as a single amount) or whether it constitutes an iniuria only if the innocent party actually suffers an actionable personality infringement (in which case contractual and delictual damages have to be separated). [330] In *Van Jaarsveld v Bridges* [331] the Supreme Court of Appeal approved of the approach in *Guggenheim v Rosenbaum (2)* [332] where it was held that breach of promise does not per se constitute an iniuria [333] but that it will be the case only if the plaintiff proves 'not merely that the breach was wrongful, but also that it was injurious or contumelious'. [334] According to *Guggenheim*, two different actions are involved here, viz a contractual action and the actio iniuriarum. Consequently, in order to prevent confusion, the allegations in the pleadings regarding breach of contract on the one hand and personality infringement on the other have to be clearly separated. [335] Although the courts do not always award different sums for the breach of contract and iniuria, or even for accompanying seduction, awards should preferably be separated. [336]

Different personality interests, such as good name, [337] honour, [338] feelings (especially feelings of piety) [339] and even physical integrity [340] can be infringed through breach of promise. [341] Although breach of promise may cause an impairment of dignity, [342] insulting conduct (contumelia) is, contrary to certain judicial pronouncements, [343] not a requirement for every iniuria caused by breach of promise. Personality interests such as fama and feelings enjoy an independent existence and in principle insult (contumelia) plays no role in the question whether there has been an infringement thereof. [344]

In principle, satisfaction in terms of the actio iniuriarum for breach of promise can be recovered by both men and women. [345] The courts have nevertheless been reluctant to award compensation to a man, [346] except where the defendant's behaviour was exceptionally harsh. [347] It was apparently accepted that a woman's feelings when exposed to breach of promise are much more sensitive and delicate than those of a man, with the result that in law a man can complain of injured feelings only in highly exceptional cases. There is, however, particularly in a human rights dispensation, no reason why a man who proves that he has suffered an iniuria as a result of breach of promise, should be treated differently from a woman. [348] The actual experience by the plaintiff of the injury may still be relevant to determine the seriousness of the injury. [349]

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The following factors may play a role in determining the amount of satisfaction claimable with the actio iniuriarum: [350] the extent of the infringement; [351] sums awarded in previous decisions and the falling value of money since then; [352] the social status of the parties; [353] the financial position of the defendant; [354] a long period of engagement and the fact that the breach of promise took place very shortly before the marriage; [355] and the defendant's behaviour in general. The amount will be higher if the defendant acted in a very insensitive or fraudulent manner [356] or continued to behave in a reprehensible way even during the trial. [357] On the other hand the amount is reduced if the reason for the breach of promise has not been dishonest or completely unreasonable, for example where the defendant, after honest soul-searching, decided that he did not care for the plaintiff enough to marry her. [358] Satisfaction was not reduced where the plaintiff secretly married another man during the trial, [359] but was moderated where it appeared that she had had intercourse with other men in the past. [360]

15.3.5 Infringement of religious feelings [361]

Infringement of religious feelings takes place through behaviour which is reprehensible to a person's faith, feelings, views or convictions pertaining to his relationship with a divine being. [362] *Geyser v Pont* [363] provides authority for the judicial recognition of religious feelings as an interest of personality, albeit under the banner of the good name (fama). In this decision a very high amount of satisfaction (R10 000) was awarded, especially considering the fact that the case was decided in the 1960s.

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The amount of satisfaction, which is determined ex aequo et bono, is influenced by the same factors which play a role in the case of defamation and insult and such factors apply here mutatis mutandis. [364]

15.3.6 Seduction

Seduction is the extra-marital defloration of a girl with her consent. [365]Satisfaction [366] can be recovered for the personality infringement associated

with a girl's loss of virginity and the accompanying weakening of her chances to conclude a good marriage. [367]

The satisfaction is determined ex aequo et bono. The following basic principles are taken into account: the age and social status of the girl, the nature of the seduction and the resistance offered by the girl, the methods employed by the man in overcoming such resistance (for example, the fact that he misused a position of trust or responsibility), [368] the fact that the man persists in claiming that the plaintiff was not a virgin and denies paternity, [369] and the financial position of the parties. [370]The fact that the seduction took place after the parties had entered into a religious marriage, favours the defendant. [371]

15.3.7 Adultery

15.3.7.1 *General*

Adultery is voluntary sexual intercourse between a married person and someone other than his or her spouse [372] —'the act of violating the bed of a married person'. [373] It constitutes an iniuria against the innocent spouse, [374] who may claim for personality infringement and loss of consortium against the guilty third party. [375]

The prejudiced person usually bases his or her action on two grounds, iniuria and loss of consortium. [376] Loss of consortium encompasses the 'loss of the comfort, society and services' of the adulterous spouse. [377] It includes compensation for both patrimonial loss (for example, for the loss of supervision over the household and children) and non-material (non-pecuniary) damage occasioned by the loss of love, friendship and moral support of the adulterous spouse. [378] Neethling et al [379]submit that personality damage resulting from the loss of consortium should rather be classified as falling under the actio iniuriarum, since personality interests may unjustifiably be left without protection in cases where the physical aspect of consortium has not been infringed by the adultery (for example, where the spouses still share a common home).

In practice the term 'contumelia' regarding adultery is often incorrectly equated with insult (infringement of dignity or honour). This results in insufficient protection being given to personality interests in respect of the feelings. In reality, the infringed personality interests relevant to this form of iniuria are a person's feelings (especially feelings of piety), [380] honour or dignity, [381] and, in exceptional cases, physical integrity. [382]

15.3.7.2 *Assessment of satisfaction*

The satisfaction recoverable in the case of adultery for infringement of consortium or iniuria is determined by considering inter alia the following factors:

(a)

Particularly in the past, the principle of (private) punishment of the defendant through a monetary award has played an important role. [383] The more recent

view is that the penal element of the actio iniuriarum should be discarded. [384]

(b)

Insensitive and reprehensible behaviour by the defendant is an aggravating factor, for example where he or she misused the friendship or trust of the innocent spouse, or the defendant's position as employer of the innocent spouse, to commit

adultery, [385] or committed the adultery in the home of the plaintiff, [386] or subjected the plaintiff to physical abuse. [387]

(c)

The attitude of the perpetrator after the act is an important factor. If he or she honestly apologizes, it can be considered in mitigation, but if the perpetrator persists in exhibiting a reprehensible attitude (contempt), the satisfaction will necessarily have to be higher. [388]

(d)

If the innocent spouse takes the law into his or her own hands after becoming aware of the adultery (for example, if the innocent spouse assaults the defendant), it will reduce the amount of satisfaction, because he or she has already acquired a measure of satisfaction in another manner. [389]

(e)

The satisfaction can be reduced where the plaintiff condoned the adultery or where the spouses lived apart at such time. [390]

(f)

The financial position of the defendant is taken into account in so far as the amount is reduced if he or she is poor. [391]

(g)

The youth of the defendant may also count in his or her favour. [392]

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(h)

The satisfaction can be reduced as a result of the bad character of the adulterous spouse (for example, where the latter is a drunkard with an unstable disposition or has low morals [393]) or where the plaintiff is a callous person. [394]

(i)

The attitude of the innocent party towards the adulterous spouse before the adultery (for example, neglect or a heartless attitude) is also of importance, since it may afford proof of the extent of his or her personality infringement. [395]

(j)

Exceptional unhappiness suffered by the plaintiff will increase the satisfaction to which he or she is entitled. [396]

(k)

There is a viewpoint that the income of the plaintiff and the defendant must be taken into account [397] as well as any disparity in their social status. [398]

(l)

A court of appeal will interfere with the award of the court a quo only in exceptional circumstances. [399]

15.3.7.3 *Other related delicts*

Essentially the same principles of quantification applicable to adultery are relevant in regard to delicts such as enticement, abduction and harbouring. [400]

15.3.8 Infringement of right to privacy [401]

A number of factors which must be taken into account in determining an appropriate amount of satisfaction came to the fore in *Mhlongo v Bailey*, [402] *Jooste v National*

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Media Ltd, [403] *Jansen van Vuuren v Kruger,* [404] *C v Minister of Correctional Services* [405] and *NM v Smith (Freedom of Expression Institute as Amicus Curiae)*. [406] In general, the court

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should take note of the fact that the right of privacy is a valuable right, [407] the nature, extent and seriousness of the infringement of privacy, the social standing of the parties, the degree in which the plaintiff was affected, the absence or nature of an apology, [408] malice on the part of the defendant, his or her motives, general conduct, attitude after the delict and any benefit derived by the defendant in the process. Many of the principles applicable to defamation [409] are relevant here.

15.3.9 Unlawful and malicious deprivation of liberty or arrest *[410]*

A distinction is made between 'false imprisonment' or 'wrongful arrest' and 'malicious imprisonment' or 'malicious arrest' as forms of infringement of physical freedom. [411]However, in all these delicts the amount of satisfaction is assessed in terms of the same basic factors. [412]

In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated ex aequo et bono. Factors which can play a role [413] are the circumstances under which the deprivation of liberty took place; [414] the presence or

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absence of improper motive or 'malice' on the part of the defendant; [415] the harsh conduct of the defendants; [416] the duration and nature (eg solitary confinement or humiliating nature) of the deprivation of liberty; [417] the status, standing, age, health

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and disability of the plaintiff; [418] the extent of the publicity given to the deprivation of liberty; [419] the presence or absence of an apology or satisfactory explanation of the events by the defendant; [420] awards in previous comparable cases; [421] the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been

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infringed; [422] the high value of the right to physical liberty; [423] the effects of inflation; [424] the fact that the plaintiff contributed to his or her misfortune; [425] the effect an award may have on the public purse; [426] and, according to some, the view that the actio iniuriarum also has a punitive function. [427]

Neethling et al [428] add the following factors with reference to wrongful arrest: [429]the circumstances surrounding the deprivation of liberty; its duration; and the presence or absence of an apology or satisfactory explanation. Naturally, satisfaction is increased if additional personality interests such as dignity and good name are involved.

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15.3.10 Wrongful and malicious attachment of property [430]

The distinction between wrongful and malicious attachment of property as forms of iniuria is basically that, whereas wrongful attachment takes place without any valid judicial authority or justification, malicious attachment is undertaken under the guise of valid judicial process. [431] According to Neethling et al [432] both forms basically involve infringement of good name (in the sense of injury to a plaintiff's financial or credit

reputation) [433] or, otherwise, an impairment of his or her dignity (insult). [434]Often reputation as well feelings of dignity may be infringed. [435]

Uncertainty exists regarding the principles to be used in determining satisfaction in these instances. [436] In certain cases only damages for pecuniary loss were awarded, but in another case 'actual loss and inconvenience' were taken into account. [437]Because in reality certain forms of defamation or insult are involved here, satisfaction in terms of the actio iniuriarum should be available. The principles discussed earlier in connection with defamation and insult should be applicable here mutatis mutandis. [438]

15.3.11 Malicious prosecution and malicious civil proceedings [439]

The non-pecuniary damage caused by malicious prosecution (and malicious civil proceedings) [440] consists primarily in the impairment of the plaintiff's good

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name, [441] physical liberty [442] and feelings of dignity. [443] Satisfaction is assessed ex aequo et bono. Factors influencing the amount are, for example, the seriousness of the crime for which the plaintiff was prosecuted and the severity of the penalties in the case of a conviction; [444] the period of incarceration; [445] the period during which the charge hung over the plaintiffs' heads; [446] despite the plaintiffs' acquittal, persistence by the defendant in the charge originally preferred against the plaintiffs; [447] the fact that the charge had not been withdrawn but proceeded with until the plaintiff was acquitted at the end of the State case; [448] malice on the part of the defendant; [449] 'that plaintiff has the right to be compensated for personal insult, indignity, humiliation and ... inevitable defamation'; [450] the absence of an apology on the part of the defendant; [451] and previous awards in comparable cases (taking inflation into account). [452] However, where, for example, a plaintiff's conduct was provocative and where all the events which occurred arose out of illegal activities conducted by the plaintiff, this may lead to a reduced award. [453]

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15.3.12 Assault (including rape)

Compensation can be claimed with the actio iniuriarum for the personality loss suffered as a result of intentional personality infringement, injustice, humiliation, insult, contempt etc caused by an assault, and with the action for pain and suffering for loss such as pain and suffering, emotional shock, psychological dysfunction, loss of amenities et cetera. [454] In the case of assault both actions are therefore available in principle. [455]

The extent of the satisfaction in terms of the actio iniuriarum is in the discretion of the court [456] and calculated ex aequo et bono. In practice, the injury actionable under the actio iniuriarum is usually referred to as contumelia, [457] but the personality infringement can be wider than mere insult. [458] Allowance should be made for the nature and seriousness of the assault, the fear created in the plaintiff, the extent to which he or she was humiliated by the aggression to his or her personality, the motive of the attacker, the publicity accorded to the event, the status of the plaintiff, [459] possible provocation by the plaintiff, [460] an apology on the part of the defendant, [461] previous awards in comparable cases (allowing for inflation) [462] and any other relevant facts. [463] Where specifically the plaintiff's dignity or reputation has been infringed, this must naturally also be taken into account in increasing the amount of satisfaction. [464]

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Compensation for the bodily or physical pain and suffering experienced as a result of an assault is recovered with the action for pain and suffering and not with the actio iniuriarum. [465] The most important factor which determines the amount of compensation is the extent of the bodily (including psychiatric) injury which, in turn, has to be established with reference to the intensity, nature and duration of the pain and suffering and other sequelae. [466] Considerations which have already been taken into account in determining the intensity of the infringement of the physical feelings are inter alia the age [467] (together with the life expectancy), gender [468] and degree of consciousness [469] of the plaintiff (which indeed play a role), and his or her race, [470] status, culture and way of living [471] (which are usually not relevant). [472]

Case law also distinguishes between satisfaction for contumelia and compensation for physical pain and suffering [473] but sometimes prefer making a single award

for all the different kinds of harm suffered combined. [474]

In *Fose v Minister of Safety and Security* [475] the Constitutional Court refused to sanction 'constitutional' or punitive damages on account of an alleged torture and assault by the police.

The court held in *N v T* [476] that the amount of damages for rape [477] must be 'substantial':

> Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims. Any award of damages in a situation of this kind should be substantial. In this case we have a helpless child who was cruelly abused by a grown man.

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[1] Chap 5.

[2] Chap 9.

[3] See also, eg, the actio de pauperie (para 13.9.1) and the actio de effusis vel deiectis (para 13.9.3; Van der Merwe & Olivier *Onregmatige Daad* 499; *Lentzner v Friedman* 1919 OPD 20) with which also damages for non-pecuniary loss may be recovered.

[4] See Neethling & Potgieter *Delict* 15–16 for an introduction to the action for pain and suffering.

[5] See Neethling & Potgieter *Delict* 12–15 and Neethling et al *Law of Personality* 40 et seq for an introduction to the actio iniuriarum.

[6] See in general Corbett & Buchanan I 40–5; Boberg *Delict* 516–30, 546; Visser 1981 *De Rebus* 438, 476, 523; 1981 *Codicillus* 48; *Kompensasie en Genoegdoening* 309–71; 2004 *THRHR* 312–15; Erasmus & Gauntlett 7 *LAWSA* para 79 et seq; Neethling & Potgieter *Delict* 248 et seq; Loubser & Midgley (eds) *Delict* 403–6; Visser 'Delict' in Du Bois (ed) *Wille's Principles* 1161 et seq; Klopper *Third Party Compensation* 152 et seq; cf *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA).

[7] See para 5.6.1 et seq above for a brief discussion of the different forms of non-patrimonial loss; para 9.5 on the objects of compensation and satisfaction in non-patrimonial loss.

[8] Para 5.6.1.

[9] Para 5.6.1. See Neethling et al *Law of Personality* 25–6, who maintain that the brain and nervous system are just as much part of someone's body as any concrete physical aspect of it: 'In fact, these facets are so closely related that a physical infringement necessarily has an effect on the psyche, while a psychological injury often causes a deterioration in physical health': see *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A) at 779; para 15.2.4.2.

[10] Para 16.1.3.

[11] *Protea Ass Co Ltd v Lamb* 1977 (1) SA 530 (A) at 534–5; *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA)at 169; *AA Mutual Ins Ass Ltd v Maqula* 1978 (1) SA 805 (A) at 809; *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 477; *Road Accident Fund v Van Rhyn* [2007] 3 All SA 659 (E) at 664; *Valentine v Road Accident Fund* [2007] 3 All SA 210 (C) at 220 (the determination of the quantum of general damages 'involves an exercise of a broad

discretion to award what one considers to be a fair and adequate compensation'); *Potgieter v Rangasamy & FNQ Bus Services CC* unreported, case no 1261/2008 (EC), 16 August 2011 at para 54. In terms of this wide discretion the court is not bound by a particular method of calculating compensation (*Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190).

[12] Para 15.2.2.1 et seq.

[13] The extent or seriousness of non-patrimonial loss has a direct effect on the application of the Road Accident Fund Act 56 of 1996. In terms of s 17(1) of the Act the Fund's obligation to compensate a third party for non-patrimonial loss is limited to compensation for 'a serious injury' as contemplated in s 17(1A) of the Act (see Klopper *Third Party Compensation* 93 et seq; para 11.8).

[14] See *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 27: 'General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.'

[15] Except in very serious cases where compensation is impossible (see eg para 5.6.3 on plaintiffs who are permanently unconscious). See Boberg *Delict* 534: '[A]ll the circumstances of the case indicating the magnitude of the individual plaintiff's suffering—the intensity and duration of his pain, the degree of deprivation of life's pleasures and amenities that his disability or disfigurement represents to him personally—must be taken into account, and in this sense the assessment is subjective.'

[16] Para 5.6.1 *(e)*.

[17] See Visser *Kompensasie en Genoegdoening* 315; *Marshall v Southern Ins Ass Ltd* 1950 (2) PH J6 (D); *Radebe v Hough* 1949 (1) SA 380 (A); *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194; *Kontos v General Accident Ins Co SA Ltd* Corbett & Honey A2–7; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 353–4; Neethling et al *Law of Personality* 108–10.

[18] eg *Redelinghuys v Parity Ins Co Ltd* Corbett & Buchanan I 301, 302; *Mtshayi v Roxa* Corbett & Buchanan II 381, 384; *Harmsworth v Smith* 1928 NPD 174 at 182; *Kinnear v Transvaal Provincial Administration* 1928 TPD 133 at 144. See also Visser *Kompensasie en Genoegdoening* 316–20. Life expectancy may give an indication of the duration of loss of the amenities of life.

[19] See *Robinson v Roseman* 1964 (1) SA 710 (T); *Harris v Federated Employer's Ins Co Ltd* Corbett & Buchanan II 817; *Smith v SA Eagle Ins Co* 1986 (2) SA 314 (SE) at 320; Visser *Kompensasie en Genoegdoening* 320–2.

[20] See Visser *Kompensasie en Genoegdoening* 322–8; Buchanan 1959 *SALJ* 462; *Gush v Protea Ass*Corbett & Buchanan II 348, 352. Contra *AA Onderlinge Assuransie Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 141: '[L]ewensgenietinge is nie noodwendig minder werd omdat hulle minder gesofistikeerd is nie' (enjoyment of life is not necessarily less because [a person] is less sophisticated); *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) 27. But see also n 32 below. In the case of iniuria the status of a plaintiff is definitely relevant (para 15.3.2.2 *(b)* and *Radebe v Hough* 1949 (1) SA 380 (A) at 384).

[21] *Deysel v Santam Ins Co Ltd* Corbett & Buchanan I 483; *Mkize v South British Ins Co Ltd* 1948 (4) SA 33 (D); *Radebe v Hough* 1949 (1) SA 380 (A).

[22] Visser *Kompensasie en Genoegdoening* 328–32; 1981 *THRHR* 120; *Gerke v Parity Ins Co Ltd*1966 (3) SA 484 (W) at 494; Boberg *Delict* 567–70; Van der Merwe & Olivier *Onregmatige Daad* 194; *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W).

[23] For example, the defendant's degree of fault should not play a role, since punishment is irrelevant (see n 14 above; Visser *Kompensasie en Genoegdoening* 332–3). Likewise the circumstances under which the non-pecuniary loss has been caused (eg that the plaintiff assaulted the defendant first—cf *Radebe v Hough* 1949 (1) SA 380 (A)).

[24] See also para 9.5.

[25] See, eg, *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 983; *Southern Ins Ass Ltd v Bailey* 1984 (1) SA 98 (A) at 119; *Marsden v NEGI Co* Corbett & Honey A4–62–63.

[26] Para 9.5.4.1; *Reyneke v M & F Ins Co Ltd* Corbett & Honey A4–79 (cf the idea that someone else may apply the money to a plaintiff's advantage).

[27] Para 9.5.4.2.

[28] Para 9.4.5.

[29] See in general *Steenkamp v Minister of Justice* 1961 (1) PH J9 (T) at 26; *Geldenhuys v SAR & H*1964 (2) SA 230 (C); *Marine and Trade v Katz* 1979 (4) SA 961 (A) at 983; *Southern Ass Ass v Bailey*1984 (1) SA 98 (A) at 117–19; *Parity Ins Co Ltd v Hill* Corbett & Buchanan I 680, 688; *Bobape v President Ins Co Ltd* Corbett & Honey A4–55.

[30] See Visser *Kompensasie en Genoegdoening* 333–6; Corbett & Buchanan I 6–7.

[31] A wealthy person presumably attaches less value to a particular sum of money than a less wealthy individual. Thus if money is intended to generate happiness as a counter-balance for unhappiness associated with non-patrimonial loss, an enormous sum would probably be required, since a wealthy person may presumably derive the required happiness only through the receipt of such an amount. The corollary of this theory is that a poor plaintiff will need a much smaller award to achieve a similar level of happiness. However, it appears to be impractical and unfair to allow a plaintiff's patrimonial position to be relevant per se. A different solution must thus be found. One may argue that the non-patrimonial loss of a rich person who attaches little value to money is in fact not compensable, since money cannot serve as an equivalent. In respect of the loss suffered by such a person, a monetary award is not aimed at effecting compensation but mainly at satisfaction for the injustice done to him or her. Because a wealthy person already possesses the financial means to provide him or her with happiness or assist that person to overcome the loss and achieve the aims of compensation (see para 9.5.4.1), this need therefore not be taken into account when assessing an amount of damages.

[32] See, eg, *Strougar v Charlier* 1974 (1) SA 225 (W) at 228: 'I regard this injury, namely the loss of an eye, as a very serious one. I think that it is often true that the higher a particular person in the social hierachy, the more serious this loss becomes to him. Certainly would it be so in the case of a person who drives a motor car; to a person who reads and does not merely listen to radios; a person who enjoys art . . . . ' See also *Jojo v William Bain & Co Ltd* 1941 SR 72; *Mkize v South British Ins Co Ltd*1948 (4) SA 33 (D) at 36; *Witham v Minister of Home Affairs* 1989 (1) SA 116 (Z) at 135. See, however, *AA Onderlinge Assuransie Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 141 (n 20 above); *Capital Ass Co Ltd v Richter* 1963 (4) SA 901 (A) at 905; *Radebe v Hough* 1949 (1) SA 380 (A) at 386; *Sadomba v Unity Ins Co Ltd* 1978 (3) SA 1094 (R) at 1097; *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 27. See further Boberg *Delict* 552.

[33] See on this Visser *Kompensasie en Genoegdoening* 339 et seq, 360; *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 200; *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 27. See further para 15.2.3.5 on the 'market value' of non-pecuniary loss. See generally for an evaluation in Canada, Charles *Handbook on Assessment of Damages* 1–11.

[34] In *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 476 the court pointed out that conservatism in awards for non-patrimonial loss has its origin in the need that the defendant should also be treated fairly and not in the parsimoniousness of the community towards the plaintiff. See in general Visser 1986 *De Jure* 214 et seq; 2006 *THRHR* 692 et seq; Okpaluba & Osode *Government Liability* 489.

[35] There are, of course, other general considerations which also play a role in assessing the final amount of damages. See, eg, para 11.4 on contributory fault; para 11.3 on mitigation; para 10.1 on collateral benefits; para 11.5 on remoteness of damage.

[36] See *Hulley v Cox* 1923 AD 234 at 246: 'We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment.' In *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 474–5 the SCA stated that the plaintiff is entitled to fair compensation for his loss but that the court must guard against the human propensity to overcompensate because the amount of compensation must be fair towards the defendant too.

[37] 1957 (3) SA 284 (D) at 287. See *Sandler v Wholesale Coal Suppliers Ltd* 1942 AD 194 at 199; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 352; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 475–6 on the rising incidence of the compensation of 'general loss'; *Ngubane v SA Transport Services* 1991 (1) SA 756 (A), where the court awarded compensation 'which ''is fair in all the circumstances of the case'' '; *Schmidt v Road Accident Fund* [2007] 2 All SA 338 (W) at 352.

[38] See also *Dyssel v Shield Ins Co Ltd* 1982 (3) SA 1084 (C) at 1088: 'I think an award of R45 000 is reasonable; neither generous at the expense of the defendant nor niggardly at the expense of the child.'

[39] See, eg, the incorrect approach by Trollip JA in *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 275 and in *Marine and Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 982. See criticism by Boberg 1975 *Annual Survey* 206–7; *Delict* 598–9. See also Kahn 1953 *SALJ* 81–2 on too-low amounts in respect of damages awarded to injured plaintiffs.

[40] See para 9.4.5.

[41] See, eg, *Davies v Crossling* 1935 WLD 107 at 113; *Greenshields v SAR & H* 1917 CPD 209 at 217; *Clair v Port Elizabeth Harbour Board* 1886 EDC 311 at 315–17; *Rautenbach v Licences and General Ins* Corbett & Buchanan I 221, 222; *Van Oudtshoorn v Northern Ass Co Ltd* 1963 (2) SA 642 (A). See also *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A): 'Awarding damages for the items mentioned [non-patrimonial loss] is, of course, anomalous, since they do not involve any patrimonial loss; moreover, the so-called loss is not susceptible of being measured with any certainty in terms of money ... . The best that a court can do is to decide ''by the broadest general considerations'' on an amount which it considers to be ''fair in all the circumstances of the case'' ... . But, because of that very anomaly and

imponderability, the general rule that should be observed in assessing the amount is ... the well-known, fundamental one that, in such circumstances of difficulty and dubiety, defendants should be regarded with greater favour than plaintiffs ... . In other words, in striving to determine an amount that will be fair in all the circumstances, the Court should act conservatively rather than liberally towards the plaintiff lest some injustice be perpetrated on the defendant.' In this case the court also pointed out that it is irrelevant whether the defendant is a private individual or a large insurance company. If insurance companies are compelled to pay out awards which are too high, it would not only harm the insurance industry but be passed on to the public in the form of exorbitant premiums. (See, however, n 39 and criticism of the undue emphasis placed on the defendant's interests.) Although a high value is placed on human health (cf social health care and preventive medicine), the community accepts that it would be impractical to express this value literally in high awards of compensation. Such an approach would make it very profitable to be injured while having catastrophic implications for a defendant. Some methods of quantification employed in the United States, for instance the 'golden rule' (how much money would someone demand to sustain the plaintiff's injuries voluntarily?— see eg *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 572; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 475) and the per diem approach (the subdivision of the duration of pain and suffering into minutes and making an award in respect of each unit) are thus unacceptable, since it would lead to extraordinarily high awards (see Visser 1986 *De Jure* 217–18; Luntz *Damages* 231–2). See also the (probably unnecessary) remark in *Marine & Trade Ins Co Ltd v Katz* 1979 (4) SA 961 (A) at 982 that the high award in casu was based on the peculiar facts of the case and was not intended to start a new trend of high awards. Cf *Marsden v NEGI Co* Corbett & Honey A4–63. See also Boberg *Delict* 546 on the influence of an award on future claims.

[42] See para 15.2.3; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 477.

[43] *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 477 emphasized that this tendency remains but one of the factors to be taken into account when considering previous awards; cf *Wright v Multilateral Vehicle Accident Fund* Corbett & Buchanan IV (1997) E3–31; *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170 (cf Visser 2004 *THRHR* 314, 2006 *THRHR* 694, 696; Pretorius 2004 *Annual Survey*315–16); *Potgieter v Rangasamy & FNQ Bus Services CC* unreported, case no 1261/2008 (EC), 16 August 2011 at para 55; *Road Accident Fund v Van Rhyn* [2007] 3 All SA 659 (E) at 664–5 where the court stated that one of the factors to be considered is 'the fact that awards have traditionally been lower in this country than in many others'.

[44] Visser 2006 *THRHR* 696, 697.

[45] See, eg, *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 27. As a country becomes more prosperous, higher awards should be considered: *Wright v Multilateral Vehicle Accident Fund* Corbett & Buchanan IV (1997) E3–31; *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170 (cf Visser 2004 *THRHR* 314); *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 477; *Potgieter v Rangasamy & FNQ Bus Services CC* unreported, case no 1261/2008 (EC), 16 August 2011 at para 55). But see *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 326 where the court stated that it 'needs also to be kept in mind when making ... awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection'. See para 15.3.9 for a more detailed discussion and generally Midgley 2006 *Annual Survey* 348 who expresses the wish 'that courts will not over-emphasise this aspect.' See also Okpaluba & Osode *Government Liability* 489 et seq.

[46] See generally Visser 1986 *De Jure* 207–8, 2004 *THRHR* 312–15; Klopper *Third Party Compensation* 154 et seq; Koch 1992 *Quantum Yearbook* 6–38; Potgieter *Quantum Conversion Tables*passim. See for examples in specific instances of personality infringement eg para 15.3.2.2*(h)*(defamation); para 15.3.9 (wrongful arrest and detention); para 15.3.12 (assault, including rape).

[47] Similar works are available in German law (*Schmerzensgeldtabelle* by Hacks is well-known); English law (see Kemp & Kemp *Damages*); Canadian law (Goldsmith *Damages*); and American law (Belli *Damages*).

[48] 2005 (5) SA 457 (SCA) at 477 (cf Visser 2006 *THRHR* 694–5); *Protea Assurance Co Ltd v Lamb*1971 (1) SA 530 (A) at 535–6.

[49] Para 15.2.2.

[50] In other words, it is not obligatory to consider past awards (*Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA)). In *Road Accident Fund v Delport* 2006 (3) SA 172 (SCA) at 179–80 the court cautioned that 'courts should [not] necessarily be wedded to previous awards, particularly those in which circumstances may differ.' See *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 238; cf *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190.

[51] Nevertheless the court's discretion is not unfettered: see paras 15.2.2 and 15.2.3.5; Visser 2006 *THRHR* 696–7.

[52] See Boberg *Delict* 546–7: 'Inasmuch as the overall adequacy of awards cannot be measured by any absolute criterion, it is important to maintain a structure of internal consistency and reasonable interrelation between awards for non-pecuniary losses.'

[53] 1971 (1) SA 530 (A) at 535–6. See also *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 477 on the consistency of awards and the discretion of the court (discussed by Visser 2006 *THRHR* 692); *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 556; *London Ass v Cope* 1963 (1) PH J6 (A); *Capital Ass Co Ltd v Richter* 1963 (4) SA 901 (A) at 907–8; *Marine & Trade Ins Co Ltd v Goliath* 1968 (4) SA 329 (A) at 333; Newdigate 1969 *De Rebus* 9; *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 272; *Protea Ass Co Ltd v Matinise* 1978 (1) SA 963 (A) at 974; *Union and SWA Ins Co Ltd v Humphrey*1979 (3) SA 1 (A) at 5; *Van der Plaats v SA Mutual Fire & General Ins Co Ltd* 1980 (3) SA 105 (A) at 116–17; *AA Onderlinge Ass Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 140–1; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190; *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 33–4; *Murphy v Commercial Union Ass Co* 1983 (3) SA 487 (C); *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–41; *Chikanda v Mukumba* Corbett & Honey E4–3; *Demosthenous v Poulos* Corbett & Honey G3–2.

[54] Boberg *Delict* 573 maintains the following in this regard: 'Varying formulations about the relevance of previous awards reflect differences of emphasis rather than of principle .... No-one would suggest that the proper way to fix quantum is to tinker at previous awards. On the other hand, no-one would deny that each award of compensation for non-pecuniary harm increments a pattern of precedents without which its arbitrariness would be intolerable and its justice suspect. Awards are not made in a vacuum.' In *Krugell v Shield Versekeringsmpy* 1982 (4) SA 95 (T) at 105 the court pointed out that, although previous decisions are a broad guideline, there are complicating factors such as the declining value of money and the fact that no two cases are identical. The court nevertheless added that it could not go outside the parameters provided by previous cases. The following dictum in *Cullinan v Protea Ass Co Ltd* Corbett and Buchanan III 404 gives a fair summary of the legal position: 'I have compared the circumstances of a number of reported cases to which counsel referred with the circumstances of this case .... Such comparison is of limited assistance since no two cases are the same or even similar in all important respects, but the cases do aid in establishing the parameters of what should be regarded as fair and reasonable assessment of damages in comparable though not necessarily similar cases and the comparison does assist in locating the case with which one has to deal upon an approximate scale of severity of injury, pain, discomfort, disability and loss of amenities and a concomitant scale of the amount of damages which is regarded as appropriate. I have also taken into account the depreciating value of money in comparing awards made in the past.' In *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) the court considered 'more or less comparable decisions'; in *Chaza v Commissioner of Police* Corbett & Honey A3–18 the court found 'some similarities' in an earlier case; and in *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–91 the court considered cases 'which bear some resemblance to the instant matter'. See also *Wright v Multilateral Vehicle Accident Fund*Corbett & Buchanan IV (1997) E3–31; *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 169 et seq; *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) at 572–3, 575.

[55] 1990 (4) SA 833 (A) at 841. See also *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 324–5; *Norton v Ginsberg* 1953 (4) SA 537 (A) at 541; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 556 ('[i]f there had been a marked change in the value of money since earlier otherwise comparable, awards were made, this should be taken into account, but not with such an adherence to mathematics as may lead to an unreasonable result'); *Munro v NEGI Co Ltd* Corbett & Honey F2–4; *Du Bois v Motor Vehicle Accident Fund* 1992 (4) SA 368 (T) at 374; *Megalane v Road Accident Fund* [2007] 3 All SA 531 (W) at 549.

[56] [1983] 2 All ER 698 (HL) at 699*j*.

[57] [1965] 1 All ER 563 (CA) at 576E.

[58] Para 11.7, where this issue is discussed in connection with inflation in general. See also Koch 1992 *Quantum Yearbook* 3 et seq; Corbett & Honey lxiii et seq; Potgieter *Quantum Conversion Tables*.

[59] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 324 it was pointed out that while one should not slavishly rely on the Consumer Price Index when adjusting previous awards (see also *AA Onderlinge Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 141), it is still a useful guide for assessing the devaluation of money. Cf also *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–39; *Demosthenous v Poulos* Corbett & Honey G3–3; para 11.7.

[60] See Newdigate & Honey *MVA* 145 et seq; Potgieter *Quantum Conversion Tables*.

[61] Ibid.

[62] Op cit 147–8. See generally Charles *Handbook on Assessment of Damages* 51–72; Luntz *Damages* 215 et seq. See McGregor *Damages* 1299–302 and Exall *Munkman on Damages* 68–76 on

the application of the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases* in England.

[63] See op cit 152–3, where the authors give some useful practical advice. Negotiations on damages for non-pecuniary loss may be conducted successfully only if the parties' legal representatives are informed of comparable awards in previous cases and have a proper understanding of the precise nature of the plaintiff's injuries. A clear medico-legal report by a medical specialist is usually indispensable and a legal representative should ensure that he or she understands all the medical terms contained in such report. There are medical textbooks which have been especially written for the legal profession. See Corbett & Honey xiii et seq; Kemp & Kemp *Quantum* 3 et seq for elementary depictions of the human body.

[64] Although it may be useful to refer to previous awards by South African courts, not much can be gained by referring to awards under foreign systems. Awards in each country are made against the background of its unique economic circumstances. If the South African community becomes more prosperous and legal convictions on damages for non-patrimonial loss change, it may be acceptable to increase awards in actual terms (ie by more than the rate of inflation).

[65] See para 5.6.1 on the nature and determination of these forms of loss; para 9.5 on the object of compensation; para 8.6 on duplication of damages. See further Corbett & Buchanan I 40–5; Klopper *Third Party Compensation* 158 et seq; Boberg 1988 *BML* 240–2; *Collins v Administrator, Cape* 1995 (4) SA 73 (C)—no award in case of permanent unconsciousness.

[66] See, eg, *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 172 (discussed by Visser 2004 *THRHR* 314); Roederer & Grant 2003 *Annual Survey* 365; *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 227; *AA Onderlinge Assuransie Ass Bpk v Sodoms* 1980 (3) SA 134 (A) at 142; *Chetty v Minister of Police* 1976 (2) SA 450 (N) at 456; *Ndhlovu v Swaziland Royal Ins Co* Corbett & Honey E2–11. See, however, the provisions of rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules on the *pleading* of damages (cf para 16.1.3 on this rule).

[67] Para 5.6.1 *(a)*. See, eg, *Lentzner v Friedman* 1919 OPD 20 at 24; *New India Ass Co Ltd v Naidoo*1950 (1) PH J4 (A); *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 569; *Kemp v Santam* 1976 (2) PH J34 (C); *Wolmerans v Lugodlo* 1976 (2) PH J46 (A); *Van der Westhuizen v Du Preez* 1928 TPD 45 at 49; *Bennett v Minister of Police* 1980 (3) SA 24 (C). See further Lee & Honoré *Obligations* 247–8; Loubser & Midgley (eds) *Delict* 404; Luntz *Damages* 228–32; McGregor *Damages* 1289–90; Exall *Munkman on Damages* 45–6; Kemp *Damages* 134–8.

[68] See Corbett & Buchanan I 41; *Sandler v Wholesale Coal Suppliers* 1941 AD 194 at 199; *Hoffa v SA Mutual Fire & General Ins* 1965 (2) SA 944 (C); *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A); *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 379; *Yeko v SA Eagle Ins Co Ltd* Corbett & Honey E3–5.

[69] See, eg, *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T) at 717; *Rondalia v Mavundla* 1969 (2) SA 23 (N) at 29; *Mair v General Accident Fire & Life Ass Corp* 1970 (3) SA 25 (RA) at 28.

[70] *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 227.

[71] *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T).

[72] 1941 AD 194 at 199. See also Boberg *Delict* 599; *Mutual and Federal Ins Co Ltd v Swanepoel*1988 (2) SA 1 (A) at 11; *Demosthenous v Poulos* Corbett & Honey G3–2; *Road Accident Fund v Van Rhyn* [2007] 3 All SA 659 (E) at 664–5; *AA Mutual Ins Ass Ltd v Maqula* 1978 (1) SA 805 (A) at 809; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190.

[73] Para 15.2.3.

[74] Para 15.2.4.1.

[75] Para 15.2.3.

[76] *Marshall v Southern Association Ltd* 1950 (2) PH J6 (D) at 14; *Paton v Santam Ins Co Ltd* Corbett & Buchanan I 637; *Pillai v New Indian Ass* 1961 (2) SA 70 (N); *Van der Westhuizen v Du Preez* 1928 TPD 45 at 49; *Zungu v Auto Protection Ins* Corbett & Buchanan I 459, 461; *Blyth v Van den Heever*1980 (1) SA 191 (A) at 227; *Cullinan v Protea Ass Co Ltd* Corbett & Buchanan III 404.

[77] *Capital Ass Co Ltd v Richter* 1963 (4) SA 901 (A) at 905.

[78] See Corbett & Buchanan I 30, 41.

[79] See *Ehlers v SAR & H* Corbett & Buchanan I 250, 253; *Zinto v SA Mutual and Fire General Ins Co Ltd* Corbett & Buchanan II 79; *Kloppers v Rondalia Ass Corp* Corbett & Buchanan II 289. However, it has also been stated that a child of 4 years forgets pain more easily than an adult (*Redelinghuys v Parity Ins Co Ltd* Corbett & Buchanan I 301).

[80] See Klopper *Third Party Compensation* 160–1 for a summary of the relevant cases. See further *Dusterwald v Santam Ins Ltd* Corbett & Honey A3–90; *Sebatjane v Federated Ins Co Ltd* Corbett & Honey H2–4.

[81] *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 571; *Reyneke v M & F Ins Co Ltd* Corbett & Honey A4–77.

[82] *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 379–80; Boberg *Delict* 536.

[83] 1949 (1) SA 380 (A).

[84] At 385: 'A highly cultured man may be less sensitive to pain than his uneducated neighbour, and a robust society leader may be less sensitive to pain than a frail social nonentity. It is the physical and mental make-up of the person injured which must be considered in assessing his pain and suffering, and that make-up cannot be determined by reference to his social or cultural or financial status.'

In terms of rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules someone who sues for pain and suffering must inter alia state separately how much he or she claims in respect thereof, whether it is temporary or permanent and which injuries caused it.

[85] Para 5.6.1*(b)*. See also Klopper *Third Party Compensation* 162–4; Loubser & Midgley (eds) *Delict*404; Exall *Munkman on Damages* 52–67; *Sebatjane v Federated Ins Co Ltd* Corbett & Honey H2–1 on physical injuries causing mental illness.

[86] In other cases an incident, such as a motor vehicle accident, may cause clearly distinguishable physical and psychological injuries, such as a neck injury and post-traumatic stress disorder, for which compensation may be awarded (cf *Potgieter v Rangasamy & FNQ Bus* Services *CC* unreported, case no 1261/2008 (EC), 16 August 2011 at paras 18, 20–3, 41 and 56 where the court awarded R135 000 for the plaintiff's neck, knees, hand and facial injuries and R75 000 for emotional shock and trauma (eg acute stress disorder, chronic post-traumatic stress disorder and travel phobia)).

[87] 1973 (1) SA 769 (A) at 779; cf *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 208–9; *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA); see in general Neethling & Potgieter *Delict* 242–4, 285–90, 325–6.

[88] See also *Lutzkie v SAR en H* 1974 (4) SA 396 (W).

[89] However, it is not necessary that the psychiatric injury should be specifically named (eg, 'post-traumatic stress disorder'). In *Mokone v Sahara Computers (Pty) Ltd* 2010) 31 ILJ 2827 (GNP) op 2835) Du Plessis J held that '[i]t is the function of the court to determine whether a recognized psychiatric injury has been sustained' and 'if the court ... finds on the evidence that there is a psychiatric injury, the failure to name it does not necessarily lead thereto that the plaintiff must fail'. See in general Neethling & Potgieter *Delict* 242–4, 285–90 325–6 and case law cited there; Visser *Kompensasie en Genoegdoening* 107–13. In the psychiatric illnesses referred to, the actual non-pecuniary loss is 'suffering' (see para 15.2.4.1) or loss of amenities (see para 15.2.4.3) and the principles discussed in that regard apply. (Eg, in *Mokone* supra at 2835 the plaintiff's claim for psychiatric injury was termed as a claim of 'shock, pain and suffering due to a bodily injury').

[90] In *Potgieter v Rangasamy & FNQ Bus Services CC* unreported, case no 1261/2008 (EC), 16 August 2011 at para 40 Sandi J stated that 'the quantum of the plaintiff's damages for emotional shock and trauma are to be assessed in accordance with the degree of trauma suffered by her'. See also *Boswell v Minister of Police* 1978 (3) SA 268 (E) at 275; *Swartz v Minister of Police* Corbett & Buchanan II 353–7; *N v T* 1994 (1) SA 862 (C); *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) at 69–70 'she ... suffered and continues to suffer tremendously' (an account of swapping of babies by hospital); *Venter v Nel* 1997 (4) SA 1015 (D) at 1017 (high damages awarded on account of stress caused by HIV infection); *Grobler v Naspers Bpk* 2004 (4) SA 220 (C) (R150 000 general damages for psychological harm due to sexual harassment causing the plaintiff to change from a sparkling and friendly person to an emotional wreck whose role as woman and mother was almost destroyed). Compensation for so-called 'secondary emotional shock'—ie shock sustained by a person who 'witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle'—can no longer be claimed from the Road Accident Fund but only from the wrongdoer (s 19(*g*) of the RAF Act 56 of 1996). See also paras 5.6.1, 11.2.1 and 11.8.

[91] Para 5.6.1*(d)*; see also Corbett & Buchanan I 43; Klopper *Third Party Compensation* 165–71; Loubser & Midgley (eds) *Delict* 405; *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A); *Goodall v President Ins Co Ltd* 1978 (1) SA 389 (W) at 394; *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 227; *Taylor v SAR & H* 1958 (1) SA 139 (D) at 142–3; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 571; *Union Government v Clay* 1913 AD 385 at 389; *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 924; *Capital Ass Co v Richter* 1963 (4) SA 901 (A) at 908; *Protea Ass Co v Lamb* 1971 (1) SA 530 (A) at 536; *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 (1) SA 769 (A) at 777; *Strougar v Charlier* 1974 (1) SA 225 (W) at 228; *Stephenson v General Accident Fire & Life Ass Corp*1974 (4) SA 503 (RA) at 504. See

also *Motor Vehicle Accidents Fund v Andreano* 1993 (3) SA 227 (T); Luntz *Damages* 233–40; McGregor *Damages* 1290–3; Exall *Munkman on Damages* 46–9.

[92] See *Van den Berg v Motor Union Ins Co Ltd* Corbett & Buchanan I 533; *Oosthuizen v Thompson & Son* 1919 TPD 124 at 129–30; *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 380; *Bennet v Sun Ins Office* Corbett & Buchanan I 391.

[93] I 43: '(1) the nature and extent of the plaintiff's disability and (2) the pleasures, recreations and activities in which he normally engaged prior to his injury.'

[94] *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W); *Kumalo v South British Ins Co Ltd*1963 (2) SA 352 (A); Corbett & Buchanan I 216.

[95] *Pillai v New Indian Ass Co Ltd* 1961 (2) SA 70 (N); Corbett & Buchanan I 213; *Stanley v Commercial Union Ass Co* Corbett & Buchanan II 232.

[96] *Gillbanks v Sigournay* 1959 (2) SA 11 (N); Corbett & Buchanan I 116; *Sigournay v Gillbanks*1960 (2) SA 552 (A).

[97] *Francis v Cape Town Tramways Co Ltd* 1930 CPD 258 at 263–4; *Ford v New Zealand Ins Co Ltd*Corbett & Buchanan I 150; Corbett & Buchanan I 44.

[98] See *Pauw v African Guarantee & Indemnity* 1950 (2) SA 132 (SWA); McKerron 1950 *SALJ* 206; *Button v SA Eagle Ins Co* Corbett & Buchanan III 323. In *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 189-91 a school teacher could no longer continue with her teaching career as a result of the physical and psycholollgical injuries suffered after being attacked with a hammer by a learner in her class. The injuries also had a crippling effect on her emotional and social functioning and quality of life (see para 15.3.12 for more detail).

[99] See, eg, *Taylor v SAR & H* 1958 (1) SA 139 (N); *Singh v Ebrahim (1)* [2010] 3 All SA 187 (D) at 193; Corbett & Buchanan II 348 at 352.

[100] See, eg, *Nel v Sun Ins Co* Corbett & Buchanan I 362, 363; *De Bruyn v Minister van Vervoer*1960 (3) SA 820 (O); *Neuhaus v Bastion Ins* 1968 (1) SA 398 (A); *Yeko v SA Eagle Ins Co Ltd* Corbett & Honey E3–6.

[101] 1988 (3) SA 275 (A) at 288. See also *Kekae v Road Accident Fund* [2001] 2 All SA 41 (W).

[102] See para 5.6.1*(d)* for a quotation.

[103] At 287. See para 8.6 on duplication of damages. See also *Kriel's* case supra at 288, where the court conceded that paramedical aids do not actually neutralize a plaintiff's loss of amenities but added: '[T]he paramedical aids would make life ''less intolerable'' ' to her: It seems to me that whatever renders the uncomfortable and deprived existence of an accident victim less intolerable or more endurable must inevitably have the tendency to restore to the victim of an accident at least some of the pleasure in living once enjoyed by such victim; and likewise to serve as some measure of compensation for the loss of the amenities of life.' This view is correct and applies in all cases of non-patrimonial loss. To the extent that medical treatment neutralizes or diminishes, for example, pain (see para 15.2.4.1), and disfigurement (see para 15.2.4.4), no compensation is recoverable by means of the action for pain and suffering. See also *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 786.

[104] Para 5.6.3; *Reyneke v M & F Ins Co Ltd* Corbett & Honey A4–78.

[105] See, eg, *Ned-Equity Ins Co Ltd v Cloete* 1982 (1) SA 734 (A) at 738. The court here took note of the plaintiff's lifestyle and how he adapted to his circumstances.

[106] See *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W). See also *Reyneke v Mutual & Federal Ins Co Ltd* 1991 (3) SA 412 (W) at 416, where the court had regard to the extent to which an amount of money may improve the position of the plaintiff and to what extent it will be of benefit only to the plaintiff's heirs. See para 5.6.3 on this case.

[107] eg *Minister of Defence v Jackson* 1991 (4) SA 23 (ZS) at 30; *Administrator-General, SWA v Kriel*1988 (3) SA 275 (A) at 289; *Kontos v General Accident Ins Co SA Ltd* Corbett & Honey A2–7; *Chaza v Commissioner of Police* Corbett & Honey A3–18; *Marsden v NEGI Co* Corbett & Honey A4–61, 64.

[108] Para 5.6.1*(c)*. See in general *Pitman v Scrimgeour* 1947 (2) SA 22 (W) at 36; *Eggeling v Law Union & Rock Ins Co Ltd* 1958 (2) SA 592 (D) at 597; *Tonyela v SAR & H* 1960 (2) SA 68 (C) at 73; *Steenkamp v Minister of Justice* 1961 (1) PH J9 (T); *Reid v SAR & H* 1965 (2) SA 181 (D); *Marine & Trade Ins Co Ltd v Goliath* 1968 (4) SA 329 (A) at 334; *Mair v General Accident Fire & Life Ass Corp*1970 (3) SA 25 (RA) at 28; *Protea Ass Corp Ltd v Lamb* 1971 (1) SA 530 (A) at 536; *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 275; *Nanile v Minister of Posts & Telecommunications*Corbett & Honey A4–41; Exall *Munkman on Damages* 49.

[109] See, eg, *Van den Berg v Motor Union Ins Co Ltd* Corbett & Buchanan I 533; *Celliers v SAR & H*1961 (2) SA 131 (W); Corbett & Buchanan I 160; *Redelinghuys v Parity Ins Co Ltd* Corbett & Buchanan I 301; *Solomon v De Waal* 1972 (1) SA 575 (A) at 586.

[110] See *Eggeling v Law Union and Rock Ins* 1958 (3) SA 592 (D), where a high amount was awarded to a young person since his grossly distorted face would result in many further non-patrimonial losses. A person's appearance may be part of his earning capacity (eg a model, film star, television presenter or public relations officer) and then damages for patrimonial loss must also be assessed (para 14.6.1).

[111] eg *Smith v SA Eagle Ins Co Ltd* 1986 (2) SA 314 (SE) at 320.

[112] *Richter v Capital Assurance* Corbett & Buchanan I 101, 103; *Plaatjie v Rondalia Ass Corp*Corbett & Buchanan I 655, 658.

[113] *Eggeling v Law Union and Rock Ins* 1958 (3) SA 592 (D); *Baker v Spielman* Corbett en Buchanan I 286; *Schmidt v Nel* Corbett & Buchanan I 290; *Morris v SAR & H* Corbett & Buchanan I 296; *Reyneke v Parity Ins* Corbett & Buchanan I 313; *Yeko v SA Eagle Ins Co Ltd* Corbett & Honey E3–6 (temporary disfigurement ignored); *Welkom v Minister of Law and Order* Corbett & Honey G3–4 (temporary disfigurement taken into account).

[114] eg *Theron v Shield Ins* Corbett & Buchanan II 329, 330 (children); *Frankcom v North British & Mercantile Ins Co* Corbett & Buchanan I 456.

[115] See further rule 18(10) of the Uniform Rules of Court and rules 6(9) and 6(10) of the Magistrates' Court Rules: a plaintiff has to state the amount he or she claims in respect of disfigurement and whether it is temporary or permanent.

[116] Para 5.6.1*(e)*. See further Luntz *Damages* 241–3; McGregor *Damages* 1293–5; Exall *Munkman on Damages* 49.

[117] See *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W); Corbett & Buchanan I 44–5.

[118] I 45.

[119] See in general *Dickinson v Galante* 1949 (3) SA 1034 (SR) at 1045; 1950 (2) SA 460 (A); Corbett & Buchanan I 192; *Gillbanks v Sigournay* 1959 (2) SA 11 (N); *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W); *Herbst v Minister of Justice* Corbett & Buchanan I 186; *Rautenbach v Licences and General Ins* Corbett & Buchanan I 221; *Cloete v Ned Equity Ins Co Ltd* Corbett & Buchanan III 192; *Britten v Minister of Police* Corbett & Buchanan I 673; *Quntana v UNISWA* Corbett & Buchanan II 680; *Roxa v Mtshayi* Corbett & Buchanan II 381; *Ncapanyi v Santam Ins Co* Corbett & Buchanan III 183.

[120] See n 119 above. See *Du Bois v Motor Vehicle Accident Fund* 1992 (4) SA 368 (T) at 371. See Visser *Kompensasie en Genoegdoening* 368–9 on the problems of assessing the quantum in a logical manner. The larger the loss (ie the more years lost), the shorter the period during which this loss will be experienced. However, emphasis should be placed on the objective part of the loss, viz the number of lost years.

[121] See paras 1.7.2 and 9.4 on the terms satisfaction, solatium, or 'genoegdoening'.

[122] See in general Neethling & Potgieter *Delict* 12–16. The Constitutional Court expressed this as follows in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 258: 'The [actio iniuriarum] is designed to afford personal satisfaction for the impairment of a personality right.' Juristic persons (such as corporations) also possess certain personality rights and may institute the actio iniuriarum for general damages (see, eg, *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 320 (SCA) at 346, 349; but see the well-considered minority judgment of Nugent JA at 350 et seq, 365 who is of the opinion that corporations should avail themselves of alternative remedies and not of the actio iniuriarum; Neethling 2011 *TSAR*62. A political party may institute a defamation action (*Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A)), but a municipality may not (*Bitou Municipality v Booysen* 2011 (5) SA 31 (WCC) at 34-7). Cf also paras 5.5 and 5.8 above.

[123] See paras 9.4.2, 9.4.4 and 15.3.2.4*(f)*.

[124] Para 14.10.3. Cf, eg, *Media 24 Ltd v Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 333 et seq; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 567–74 on patrimonial loss resulting from defaming a corporation (juristic person) and the availability of the actio legis Aquiliae.

[125] 'The court is not bound by one or more method of calculating general damages, but has a wide discretion ....' (*Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190).

[126] *Geyser v Pont* 1968 (4) SA 67 (W) at 79, with reference to De Villiers *Injuries* 153, 156.

[127] In a defamation case, *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468, the court stated: 'A court has a wide discretion to determine an award of general damages which is fair and reasonable having regard to all the circumstances of the case and the prevailing attitudes of the community.' Cf *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190 (an assault case—see para 15.3.12).

[128] In *Skinner v Shapiro (1)* 1924 WLD 157 at 167, eg, the court stated: 'The amount of damages is entirely in the discretion of the Court. *Such discretion, however, is exercised on reasonable and not arbitrary principles*' (our emphasis). The judgment mentioned the factors that should be taken into account in calculating the amount of satisfaction (to be discussed below: para 15.3.2.2); cf *Kyriacou v Minister of Safety and Security* 1999 (3) SA 278 (O) at 291.

[129] This will be considered below in respect of the individual iniuriae. See in general Burchell *Personality Rights* 435 et seq.

[130] Cf *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260. See para 15.2.2.4 on the different elements of the concept of fairness.

[131] See in this connection *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (VS) at 847: 'When researching the case law on the *quantum* of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in Southern African Courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual, especially in group-orientated societies where there appears to be an almost imperceptible but inexorable decline in individual standards and values.' With reference to *Ramakulukusha*, Neethling et al *Law of Personality* 60 opine that courts should place a high premium on personality interests and that this should be reflected in the quantum of damages in order to promote respect for the human personality (cf Visser 2008 *THRHR* 175–6). See also *GQ v Yedwa* 1996 (2) SA 437 (Tk) 438; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 539 (cf Visser 1998 *THRHR* 150); *Masawi v Chabata* 1991 (4) SA 764 (ZH); *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707.

[132] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) (a case involving wrongful arrest and detention—see para 15.3.9) the court reviewed a number of previous cases and noted (at 326) that there was no 'discernible pattern other than that our courts are not extravagant in compensating the loss'(cf Visser 2008 *THRHR* 173; *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) at 91–4 where the court followed a cautious approach to avoid being too liberal in its award). See also the following statement by the Appellate Division in a defamation case, *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590: 'Our Courts have not been generous in their awards of *solatia*. An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches.' In *Van der Berg v Cooper & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260 the court stated: 'Care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of speech or encourages intolerance to it and thereby fosters litigation.'

[133] See para 7.5.11 and the authority referred to there. In *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) (see n 182 below for the facts) the damages of the 12-year-old victim of a defamatory publication could have been considerably higher if the court had taken into account that not only the child's reputation, but also her dignity, privacy and identity had been infringed; an additional amount of solatium for her injured feelings would thus have been appropriate (cf Neethling et al *Law of Personality*59–60; Cornelius 2011(2) *PELJ* 182).

[134] See in general Burchell *Personality Rights* 435 et seq; *Defamation* 289 et seq; Neethling et al *Law of Personality* 168–71; Erasmus & Gauntlett 7 *LAWSA* paras 94–5; Loubser & Midgley (eds) *Delict*408; Visser 'Delict' in Du Bois (ed) *Wille's Principles* 1167 et seq; para 5.8.

[135] However, the media is liable on a negligence basis for defamation (*National Media Ltd v Bogoshi*1988 (4) SA 1196 (SCA) at 1210–11; see also *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at 415–16; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) at 349–50; Neethling 2005 *THRHR*325–6; Neethling et al *Law of Personality* 167; cf Neethling & Potgieter *Delict* 342).

[136] See in general on defamation Neethling et al *Law of Personality* 168 et seq; and on satisfaction in the case of defamation Burchell *Personality Rights* 435 et seq; *Defamation* 290 et seq; Erasmus & Gauntlett 7 *LAWSA* para 94. Juristic persons may also claim patrimonial and non-patrimonial loss for defamation (cf, eg, *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 348; but see the minority judgment of Nugent JA at 365 who opposes a claim for non-patrimonial loss; cf the sources cited by Neethling & Potgieter *Delict* 322–5); and para 14.10.3 on patrimonial loss).

[137] See *Esselen v Argus Printing and Publishing Company Ltd* 1992 (3) SA 764 (T) at 771; approved in *Mogale v Seima* 2008 (5) SA 637 (SCA) at 641–2; cf *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558.

[138] See paras 9.4.4 and 15.3.2.4*(f)*; cf Burchell *Personality Rights* 454; *Defamation* 290; Erasmus & Gauntlett 7 *LAWSA* para 94.

[139] See paras 9.4.4 and 15.3.2.4*(f)*; cf, eg, *Esselen v Argus Printing and Publishing Co Ltd* 1992 (3) SA 764 (T) at 771; *Collins v Administrator, Cape* 1995 (4) SA 73 (C) at 94; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 263; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 641–2; *Tsedu v Lekota* 2009 (4) SA 372 (SCA)

at 379; *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W) at 500; cf Neethling & Potgieter *Delict* 251 n 386.

[140] These cases held that in instances of defamation the actio iniuriarum (also) has a penal function: cf eg *Salzmann v Holmes* 1914 AD 471 at 480, 483; *Gray v Poutsma* 1914 TPD 203 at 211; *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 615–16, 617, 618; *Pauw v African Guarantee and Indemnity Co Ltd* 1950 (2) SA 132 (SWA) at 135; *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 458; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *Kahn v Kahn* 1971 (2) SA 499 (RA) at 500, 501–2; *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 399–401; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 538–9.

[141] *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468.

[142] *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 (2) SA 373 (O) at 389; *Smith v Die Republikein (Edms) Bpk* 1989 (3) SA 872 (SWA) at 875; cf *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 399–401; Erasmus & Gauntlett 7 *LAWSA* para 94; Neethling et al *Law of Personality* 182. The same conduct that infringes a person's reputation could also injure other personality interests, such as his or her feelings of dignity (para 7.5.11; see *Le Roux v Dey* 2011 (3) SA 274 (CC) at 322, also 319–20; *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 218–19, 231; cf *Kriek v Gunter* 1940 OPD 136 at 140; *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C) at 595; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260; Neethling et al ibid 85–6). Such conduct however does not give rise to more than one action under the actio iniuriarum and an award for damages should compensate the victim for both loss of reputation and wounded feelings (para 7.5.11; *Le Roux* (CC) at 319–20; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 39–40).

[143] 'In estimating the amount of damages to be awarded the Court must have regard to all the circumstances of the case. It must, *inter alia,* have regard to the character and status of the plaintiff, the nature of the words used, the effect that they are calculated to have upon him, the extent of the publication, the subsequent conduct of the defendant and, in particular, his attempts, and the effectiveness thereof, to rectify the harm done' (*Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C) at 595); see also *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468; *Dercksen v Webb* [2008] 2 All SA 68 (W) at 80. See para 15.3.2.2 on the factors to be considered and for a useful exposition thereof, *Smith v Die Republikein (Edms) Bpk* 1989 (3) SA 872 (SWA) at 875–81 and *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 613–16. See also *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 259–60; *Sutter v Brown* 1926 AD 155 at 171; *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 399–400; *Afrika v Metzler* 1997 (4) SA 531 (Nm); Burchell *Defamation* 294 et seq; Neethling et al *Law of Personality* 168 et seq.

In the *Smith* case (supra) at 876–81 the assessment of the amount of satisfaction is discussed extensively under the following heads: nature of the defamation; nature and extent of the publication; the plaintiff's status and esteem; the probable consequences of the defamation; the conduct of the defendants; comparable awards and the falling value of money, and insult.

With regard to the assessment of compensation for the defamation of a juristic person, Brand JA stated as follows in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 348: 'There is no formula for the determination of general damages. It flows from the infinite number of varying factors that may come into play. So, ie, the court will have regard to the character of the corporation's business, the significance of its reputation, the seriousness of the allegations, the likely impact of those allegations on the corporation's reputation, and so forth. But, as was pointed out by Corbett CJ in *Caxton* [*Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A)], the court will also have regard to the fact that the company has no feelings that can be consoled. At the other end, the court will consider that part of the loss could have been recovered as special damages. Finally, the court will have to perform the balancing act between the different interests involved, including the chilling effect of excessive awards on freedom of expression.' The court (at 348-9) rejected the argument that an award of damages for defamation to a juristic person 'is inappropriate because it cannot serve to compensate the wounded feelings of an entity which has none' because the 'only remedy available at present that can serve to protect the reputation worthy of protection, is damages'. But see the minority judgment of Nugent JA at 350 et seq, 365 who argues convincingly that there are indeed alternative remedies to a claim for damages for defamation and that a juristic person, which has no feelings, should not be allowed to avail itself of the actio iniuriarum to claim non-patrimonial damages (see also nn 236–40 below).

[144] *Mogale v Seima* 2008 (5) SA 637 (SCA) at 643. The court also stated (at 640) that the right to human dignity, including reputation, and the right to freedom of expression, as constitutional values, have to be balanced. This also applies to quantum: too high an award of damages may act as an unjustifiable deterrent to exercise freedom of expression and may inappropriately inhibit the exercise of that right. (In view of these pronouncements, the R150 000 awarded by the court in *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 273 appears to be too high; see Neethling & Potgieter 2008 *Annual Survey* 810.) There are other cases where courts have also awarded lower amounts of satisfaction, eg to discourage claims or because of the minor nature of the defamation (eg *Modern Newspapers (Pty) Ltd v Bill* 1978 (4) SA 149

(C) at 156). Although the claim in *Zillie v Johnson* 1984 (2) SA 186 (W) failed, the court examined the matter of satisfaction with a view to a possible appeal and found that 'very nominal damages' (approximately R10) would be appropriate'. See also *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260 where the court warned against large sums of damages, awarded too readily (quotation in n 132 above); cf *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 348, 350.

[145] *Scholtz v Kriel* 1946 GWL 86. In *Pakendorf v De Flamingh* 1982 (3) SA 146 (A) at 158 Rumpff CJ however stated that in the past our courts had not made excessive awards in defamation cases; cf also *Argus Printing & Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590 (quotation in n 132 above).

[146] 'In my view the appropriate way of impressing upon all concerned that attacks of the kind to be found in this case are not to be lightly made is by awarding substantial damages' (*Buthelezi v Poorter*1975 (4) SA 608 (W) at 617); see also *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 539.

[147] Cf *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 537 where the court, with reference to the Namibian Constitution, stated: 'With the new democratic dispensation heralded by the Namibian Constitution entrenching fundamental human rights and fundamental freedoms and the premium to be attached to one's good name and reputation in instances of flagrant violation thereof, the time has come to have a liberal approach in the determination of the *quantum* and award much higher damages, especially instances where aggravating circumstances are present as in the present case.' See Visser 1998 *THRHR* 152–5 for a discussion; Burchell *Personality Rights* 436–7, 446–8.

[148] The classification of these factors is derived from Burchell *Defamation* 294 et seq; *Personality Rights* 435 et seq.

[149] Para 15.3.2.2 *(d)*.

[150] For example, the fact that a person accused of misleading the court is an attorney-general increases the seriousness of the allegation (*SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A)); cf also *Buthelezi v Poorter* 1975 (4) SA 608 (W); Burchell *Defamation* 297; *Personality Rights* 454–5.

[151] Para 15.3.2.2 *(b)*.

[152] *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468.

[153] 'A plaintiff may ... adduce evidence of his good reputation and standing in the community and a defendant may adduce evidence of the plaintiff's bad reputation. Should a plaintiff allege that there are aggravating circumstances the onus would be on him to prove such aggravating circumstances. Conversely should the defendant allege that there are mitigating circumstances the onus would be on him to prove such mitigating circumstances' (*Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468). Cf *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558.

[154] Burchell *Defamation* 294–7. See the English case *Scott v Sampson* (1882) 8 QBD 491, in which the relevant principles are set out; *Sutter v Brown* 1926 AD 155 at 172; *Black v Joseph* 1931 AD 132 at 146; *Geyser v Pont 1968 (4) SA 67 (W) at 77–8; Mogale v Seima* 2008 (5) SA 637 (SCA) at 642; *Naylor v Jansen; Jansen v Naylor* 2006 (3) SA 546 (SCA) at 556.

[155] *Geyser v Pont* 1968 (4) SA 67 (W) at 78.

[156] *Naylor v Jansen; Jansen v Naylor* 2006 (3) SA 546 (SCA) at 556; *Scott v Sampson* (1882) 8 QBD 491. It might be difficult to distinguish between evidence of general bad reputation and specific acts which gave rise to such reputation; see Burchell *Defamation* 294–7 in this regard. Burchell op cit 297 points out that the British *Faulks Committee* (Cmnd 5909 (1975)) has recommended that evidence of 'any matter, general or particular, relevant at the date of the trial to that aspect of the plaintiff's reputation with which the defamation is concerned' should be admissible in mitigation of damages. A similar approach should be followed here. Burchell loc cit further submits that 'evidence of particular incidents which contribute to the plaintiff's general reputation may become relevant and therefore admissible according to the rule that admits similar-fact evidence' (cf *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 457). In *McKay v Editor City Press* [2002] 1 All SA 538 (SE) at 550 the fact that also the plaintiff wrote a defamatory letter about a source in the report which was the subject of the defamation litigation was taken into account as a mitigating factor.

[157] See in general Burchell *Defamation* 295–6; Van Aswegen *Genoegdoeningsbedrag by Laster* 17.

[158] *Klisser v SA Associated Newspapers Ltd* 1964 (3) SA 308 (C).

[159] See in general Amerasinghe *Defamation* 551 et seq.

[160] 1946 WLD 134.

[161] 2006 (3) SA 546 (SCA) at 556.

[162] Thus reducing the amount of satisfaction. In some instances the evidence could show that, although not all of it, at least a portion of the statement was justified (*Sutter v Brown* 1926 AD 155 at 172), while other circumstances might be proved that are directly related to, or 'linked up with', the words complained of (*Naylor v Jansen; Jansen v Naylor* 2006 (3) SA 546 (SCA) at 556; cf Midgley 2006 *Annual Survey* 348). Snyckers 2006 *Annual Survey* 788–9 explains as follows: 'It may appear odd to contend that evidence which fails to establish a justification ought to be relevant to quantum, but it leads to a just result. If someone was said to be a thief, and the facts were such that it was not justifiable to have called him a thief, but he did things which were in some way akin to theft, then it may fairly be said that the injury to his reputation as a result of being called a thief was partly due to his own conduct and partly to the exaggeration in the defamation. Hence it makes sense in such cases to reduce the amount of damages awarded to him for wrongly being called a thief'(cf also the court's explanation in *Naylor* at 556).

[163] 1946 EDL 267.

[164] 1975 (4) SA 608 (W) at 614; cf *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 400; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 536.

[165] See also *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 273 where the plaintiff was a well known political leader with an impeccable reputation.

[166] 2010 (4) SA 210 (SCA) at 225–6.

[167] *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 458; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 43; *Kyriacou v Minister of Safety and Security* 1999 (3) SA 278 (O) at 292; *Smith v Die Republikein (Edms) Bpk* 1989 (3) SA 872 (SWA) at 878; *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379; *Jeftha v Williams* 1981 (3) SA 678 (C) at 684; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 262; *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 272–3; *Raliphaswa v Mugivhi* [2008] 3 All SA 92 (SCA) at 96–7; *Dercksen v Webb* [2008] 2 All SA 68 (W) at 80; cf *McKay v Editor City Press*[2002] 1 All SA 538 (SE) at 550; Burchell Personality Rights 436–7, 446–8, *Defamation* 297; Erasmus & Gauntlett 7 *LAWSA* paras 94–5; Neethling et al *Law of Personality* 169 and the sources referred to there in n 412.

[168] Amerasinghe *Defamation* 541–2; Nathan *Defamation* 177.

[169] See also the references in n 167 above.

[170] 1975 (4) SA 609 (W) at 614.

[171] *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 259; *De Flamingh v Pakendorf* 1979 (3) SA 676 (T) at 686.

[172] *Gelb v Hawkins* 1969 (3) SA 687 (A).

[173] *Wiltshire v Burger* 1916 EDL 257. In *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 225–6 the plaintiff, a teacher (vice-principal), was known to the audience and his position of authority was materially undermined.

[174] *Preston v Luyt* 1911 EDL 298.

[175] *Moolman v Slovo* 1964 (1) SA 760 (W) at 766.

[176] *Maree v De Villiers* 1924 OPD 224

[177] *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A).

[178] *King v Neale* 1936 EDL 236; *Chetcuti v Van der Wilt* 1993 (4) 397 (Tk) at 400 (businessman of good repute).

[179] *Muller v SA Associated Newspapers Ltd* 1972 (2) SA 589 (C).

[180] *Dercksen v Webb* [2008] 2 All SA 68 (W) at 80.

[181] 1910 SC 238.

[182] [2010] 4 All SA 548 (WCC) at 557–9. In this case the defendants published a 'pin-up photo' of a young girl in a surfers' magazine, provocatively taken 'to spice up' the magazine. The girl's mother (plaintiff) instituted a defamation claim on behalf of the child. The court expressed considerable sympathy for the consequences of the publication on the girl (she was later inter alia referred to as a 'slut' and a 'porno star'), particularly because she was a young person whose 'innocence was taken from her'. Reference was also made (at 558) to s 28(2) of the Constitution which provides that a child's best interests are of paramount importance in every matter conderning the child. Davis J (at 559) referred to Harms JA's warning in *Mogale v Seima* 2008 (5) SA 637 (SCA) at 642 against the granting of a generous amount in the form of a solatium in order to teach the errant publisher a 'lesson' and after referring to various factors which generally determine the quantum of compensation concluded that 'the purpose of the award is to vindicate the plaintiff in the eyes of the public. Generosity of amount is perhaps less important than the principle that damages have been awarded because plaintiff has been wronged. I have taken account of this purpose,

particularly because plaintiff correctly seeks an authoritative assertion that her daughter was wronged by defendants' conduct.' An award of R10 000 was made.

[183] Amerasinghe *Defamation* 547; Van Aswegen *Genoegdoeningsbedrag by Laster* 28; *Toerien v Duncan* 1932 OPD 180 at 205; *Clark v Marais* 1908 EDC 311 at 314.

[184] *McKay v Editor City Press* [2002] 1 All SA 538 (SE) at 549.

[185] *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 614; *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558.

[186] Ibid.

[187] *Pont v Geyser* 1968 (2) SA 545 (A) at 553.

[188] *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 43; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 536; *Geyser v Pont* 1968 (4) SA 67 (W) at 75; *Moolman v Slovo* 1964 (1) SA 760 (W) at 763; *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A); *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 (2) SA 373 (O) at 389; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 262, 269; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 642; *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 225–6; *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 272, 273; *McKay v Editor City Press* [2002] 1 All SA 538 (SE) at 550; Burchell *Defamation* 297; *Personality Rights* 449 et seq.

[189] *Defamation* 297.

[190] Cf *Norton v Ginsberg* 1953 (4) SA 537 (A) at 550 in which the words 'blackmailer' and 'liar and thief' appeared in bolder print and according to the court, had played a role in the wide publication of the report; Amerasinghe *Defamation* 546 et seq; Van Aswegen *Genoegdoeningsbedrag by Laster* 25.

[191] Eg, the plaintiff's fellow workers (*Dercksen v Webb* [2008] 2 All SA 68 (W) at 80). See Amerasinghe *Defamation* 546; *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 259; Van Aswegen *Genoegdoeningsbedrag by Laster* 25.

[192] *Channing v SA Financial Gazette* 1966 (3) SA 470 (W) at 478; *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 401; *Couldridge v Eskom* 1994 (1) SA 91 (SE) at 105. See, however, *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 259: 'There was limited publication to a restricted class of persons. The publication, however, was made in the very field in which the appellant's reputation rests.' See also *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468 where the extent of the damage was restricted by the limited publication of the defamation to a restricted class of people.

[193] *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 615.

[194] *Buthelezi* supra, where the court held: 'In the present instance republication in other newspapers and by word of mouth was the natural and probable result of the original defamatory publication. It was doubtless also the intended result. The editorial itself constituted news that was likely to be republished—as indeed it was ...'; see also *Vengtas v Naydoo* 1963 (4) SA 358 (D) 393; *Moolman v Slovo* 1964 (1) SA 760 (W) at 763.

[195] See in general Burchell *Defamation* 297–8; Van Aswegen *Genoegdoeningsbedrag by Laster* 19 et seq; *Pont v Geyser* 1968 (2) SA 545 (A) at 552, 558; *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 458; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 262; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 642; *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379; *Dercksen v Webb* [2008] 2 All SA 68 (W) at 80; *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558. Where, as in *Atoll Media* supra (see n 182 above for the facts) the defendant's conduct infringes not only the plaintiff's reputation but also other personality interests such as dignity, privacy and identity, a higher award is called for— cf also n 130 above; para 7.5.11.

[196] *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A). See on serious defamation also *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 400 (false allegation of sexual abuse of a child); *Kyriacou v Minister of Safety and Security* 1999 (3) SA 278 (O) at 292 (allegations of plaintiff's involvement in criminal activities—aggravated by casting them in form of facts); *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 225–6 (defendants published manipulated pictures of plaintiff and principal of school depicting them naked and with their hands indicative of sexual activity or stimulation); *Afrika v Metzler*1997 (4) SA 531 (Nm) at 536 (cf Visser 1998 *THRHR* 150 at 152) (allegations that plaintiff—with illustrious medical and political careers—was guilty of criminal activities); *Boswell v Union Club of SA (Durban)* 1985 (2) SA 162 (D) at 169.

[197] *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468. The court, however, accepted that the extent of the damage caused would have been restricted by the limited publication of the allegations to a restricted class of people. (The court awarded R30 000.)

[198] 1968 (2) SA 545 (A) at 552, 558.

[199] 1924 OPD 224.

[200] 1975 (4) SA 608 (W).

[201] 1965 (1) PH J3 (T).

[202] 1975 (3) SA 236 (C).

[203] Cf also *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 42, where an allegation was described as less objectionable, deserving a lower award.

[204] 1911 OPD 81.

[205] Burchell *Defamation* 298–9. In *Marais v Groenewald* [2000] 2 All SA 578 (T) at 591 the court stated that it is accepted that a politician is professionally thick-skinned. He or she partakes of a robust pastime and if such a person is eager to dish out punches, he or she must not complain of a glass jaw when being struck himself. A court must not encourage a flood of litigation between politicians by giving too high awards for damages. The fact that the court agreed with the plaintiff, should give him a large degree of satisfaction. See also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 587: 'Even personal criticisms of a political opponent are not readily regarded as defamatory' and (at 588): '[A] wide latitude should be allowed in public debate on political matters'; *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318: 'I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this'. However, in *Beesham v Solidarity Party* 1991 (3) SA 889 (N) at 893 it was pointed out that the expression 'in an election context' should not be 'transmogrified into a general panacea which detoxifies all political comment.' In *Iyman v Natal Witness Printing & Publishing Co (Pty) Ltd* 1991 (4) SA 677 (N) at 687 this consideration was rejected in view of the facts of the case. See also *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 536; *Walter v Powrie* 1877 Buch 35; *Shepstone v Davis and Sons* (1886) 11 AC 187 ((1886) 7 NLR 166 (PC)); *Farrar v Hay* 1907 TS 194; *Botha v Marais* 1974 (1) SA 44 (A); *Greeff v Raubenheimer* 1976 (3) SA 37 (A); *Minister of Justice v SA Associated Newspapers Ltd* 1979 (3) SA 466 (C); *McKay v Editor City Press*[2002] 1 All SA 538 (SE) at 549 (fact that the subject matter was of a public and political nature regarded as a mitigating factor).

[206] *Defamation* 299; cf *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 536 where the court held the view that the fact that the plaintiff was also a politician, made him more vulnerable to the defendant's allegations (cf Visser 1998 *THRHR* 154).

[207] *Defamation* 300.

[208] In *Le Roux v Dey* 2010 (4) SA 210 (SCA) at 225–6 the conduct of the defendants at the trial indicated that they were disrespectful towards the plaintiff, had no remorse and did not wish to apologize. In *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 273 it was found that 'there was an obdurate refusal by the [newspaper] to acknowledge the fact that it had defamed the plaintiff and to apologise for such defamation until it tendered an apology at a stage when it was too little and too late.' See also Burchell *Defamation* 300; *Sachs v Voortrekkerpers Bpk* 1942 WLD 99 at 120; Kuper 1966 *SALJ*477, 478.

[209] *Dercksen v Webb* [2008] 2 All SA 68 (W) at 80.

[210] In *Dercksen v Webb* [2008] 2 All SA 68 (W) at 80 Masipa J stated: 'I regard the failure to produce evidence that the allegations were true as extremely aggravating.'

[211] *Schoeman v Potter* 1949 (2) SA 573 (T) at 575.

[212] *Geyser v Pont* 1968 (4) SA 67 (W) at 76; *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 401; *Couldridge v Eskom* 1994 (1) SA 91 (SE) at 105; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 536–8; *Marais v Groenewald* [2000] 2 All SA 578 (T) at 592.

[213] Para 15.2.3.

[214] *Pont v Geyser* 1968 (2) SA 545 (A) at 557; *Nydoo v Vengtas* 1965 (1) SA 1 (A) at 19; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 555; *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 618; *Kennel Union of Southern Africa v Park* 1981 (1) SA 714 (C) at 732; *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 273. Cf Visser 1986 *De Jure* 207.

[215] However, comparison with previous cases is rarely very useful. In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260 the Court stated: 'We were referred to a number of cases reported over a period of years which were claimed to be comparable or roughly comparable to the present. The inflation factor was applied to some of them to indicate what the current value would be of the amounts awarded. ... Comparisons of the kind suggested serve a very limited purpose. In the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other. Nor will the simple application of an inflationary factor necessarily lead to an acceptable result. The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a Court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess.' See also *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk)

at 401; *Pont v Geyser* 1968 (2) SA 545 (A) at 557; *Kennel Union of SA v Park*1981 (1) SA 714 (C) at 732. In *Buthelezi v Poorter* 1975 (4) SA 608 (W) the facts under consideration were compared to other cases and the court concluded that a high amount of satisfaction should be awarded. On the other hand, a comparison with other cases was regarded as a fruitless process in *Nydoo v Vengtas* 1965 (1) SA 1 (A) at 19 except in so far as it could be deduced from previous cases that the courts in general do not award particularly high amounts of satisfaction for certain forms of iniuria.

[216] In *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379 the court stated that awards made in other cases provide a measure of guidance, but only in a generalized form. In *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 468 the court, with reference to *Van der Berg v Coopers and Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA), noted that 'comparisons can ... serve a very limited purpose.' In *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 28 it was held that the court a quo had incorrectly considered cases which were not really comparable.

[217] 'One factor in particular requires special consideration, and that is the very marked fall in the value of money since 1968. I would be doing an injustice to the plaintiff if I did not give proper weight to this feature' (*Buthelezi v Poorter* 1975 (4) SA 608 (W) at 618). See however, *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260 where doubt was expressed whether 'the simple application of an inflationary factor [would] necessarily lead to an acceptable result.'

[218] Van Aswegen *Genoegdoeningsbedrag by Laster* 48–50; cf *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 616–17.

[219] eg: in *Kyriacou v Minister of Safety and Security* 1999 (3) SA 278 (O) at 291 the court considered the R1 million claimed by the plaintiff to be 'ridiculously high and out of all proportion to the damages suffered by him to his good name and fame' and awarded only R3 500; in *Geyser v Pont* 1968 (4) SA 67 (W) R20 000 was claimed but R10 000 awarded; in *Raubenheimer v Greeff* 1975 (3) SA 236 (C) at 237, 244 R5 000 was claimed and R500 awarded; in *Mavromatis v Douglas* 1971 (2) SA 520 (R) at 520, 522 $2 000 was claimed and $450 awarded; in *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 612, 616–17 initially R30 000 was claimed, later there was an argument for an award of not less than R15 000, while R2 500 was proposed by the defendant and R13 500 awarded by the court. However, in *Coetzee v Nel* 1972 (1) SA 353 (A) at 375 the court on appeal did not even consider adjusting the satisfaction because the defendant failed to question the amount.

[220] *Simpson v Williams* 1975 (4) SA 312 (N) (by the court a quo). See also *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 539 where the court refused to adhere to the *plaintiff's* request to scale down the amount of damages from N$30 000 to N$20 000, stating that it would have been tempted to award a much higher amount if the plaintiff had claimed such. Cf, however, Visser 1998 *THRHR* 154 who argues that a court should not award more than the amount claimed by the plaintiff.

[221] *O'Malley v South African Broadcasting Corporation* 1976 (3) SA 125 (W) at 129.

[222] See in general Burchell *Defamation* 304 et seq; *Personality Rights* 435 et seq.

[223] *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W). In *Geyser v Pont* 1968 (4) SA 67 (W) at 76 it was taken into account that the defamatory allegations referred to the plaintiff merely indirectly and then only as part of a group, but these factors did not carry much weight in view of the fact that the defendant deliberately conducted an elaborate protracted campaign of vilification against the plaintiff.

[224] *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W).

[225] 1968 (4) SA 67 (W).

[226] At 79.

[227] *Gray v Poutsma* 1914 TPD 203 at 207–8.

[228] 2011 (3) SA 274 (CC) at 322.

[229] Para 16.3. 'Dit is by herhaling gesê dat 'n Appèlhof nie ligtelik of sonder gegronde rede die vasstelling van 'n bedrag van skadevergoeding deur 'n Verhoorhof omver sal werp nie. Aan die ander kant, as 'n Appèlhof beskou dat die bedrag buitensporig hoog is, in die lig van al die omstandighede, sal die bedrag verminder word' (court of appeal not to overturn trial court's assessment of damages lightly or without sufficient grounds; however, court of appeal will reduce award if found to be exorbitantly high in light of circumstances) (*Nydoo v Vengtas* 1965 (1) SA 1 (A) at 19). In casu the award was reduced by half to R1 000. See also *Transnet Ltd t/a Metro Rail v Tshabalala* [2006] 2 All SA 583 (SCA) at 586; *Shield Insurance Co Ltd v Theron* 1973 (3) SA 515 (A) at 518; *Minister of Safety and Security v Seymour*2006 (6) SA 320 (SCA) at 323 (SCA reduced trial court's award of R500 000 to R90 000); *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) 585–7; *Road Accident Fund v Delport* 2006 (3) SA 172 (SCA) at 179–80; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 476–8; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 257, 262–3, 268–9; cf Midgley 2006 *Annual Survey* 310–1; *Road Accident Fund v Van Rhyn*[2007] 3 All

SA 659 (E) at 665; *Sutter v Brown* 1926 AD 155 at 171; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 43 (satisfaction reduced from R12 000 to R8 000); *Le Roux v Dey* 2011 (3) SA 274 (CC) at 322 (Constitutional Court reduced lower courts' award of R45 000 to R25 000 inter alia because 'too little was made of the fact that the defendants were schoolchildren, as well as the fact that they had already been subjected to other forms of punishment for the same act in more than one way'); cf Visser 2006 *THRHR* 692 et seq; 2007 *THRHR* 497.

[230] *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 34. See also *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 259 where the court stated: 'As a general rule the determination of damages is a function peculiarly within the province of the trial Court. There are, however, circumstances in which it would be appropriate, and the interests of justice and convenience would best be served, were an appellate tribunal to determine the damages (*Neethling v Du Preez and Others; Neethling v Weekly Mail and Others* 1995 (1) SA 292 (A) at 301B–302D).'

[231] Burchell *Defamation* 306.

[232] See Neethling et al *Law of Personality* 153 et seq.

[233] '[I]n South Africa, assuming that truth apart from the element of public benefit is not in itself a complete defence, it has been held that it may be pleaded in mitigation of damages' (*Sutter v Brown*1926 AD 155 at 172); also *McKay v Editor City Press* [2002] 1 All SA 538 (SE) at 550; Burchell *Defamation* 298; Kuper 1966 *SALJ* 482. In *Feni v Kondzani* [2007] 4 All SA 762 (E) at 771–2 it was held that the fact that one of the two persons to whom publication was made did not believe the statement may be relevant in mitigation of damages.

[234] Neethling et al *Law of Personality* 170 n 421 and authority quoted there; see further *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 260–1, 262; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 643; *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 380–1; *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 272, 273; *Raliphaswa v Mugivhi* [2008] 3 All SA 92 (SCA) at 97; *De Flamingh v Pakendorf* 1979 (3) SA 676 (T) at 686; Loubser & Midgley (eds) *Delict* 414; Burchell *Defamation* 299–300; Kuper 1966 *SALJ* 480; Amerasinghe *Defamation* 563. Erasmus & Gauntlett 7 *LAWSA* para 95 are of opinion that an adequate apology is the most important mitigating factor.

[235] See *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 539: 'It is ... humanly speaking virtually impossible for one to restore another's good name and reputation to its former glory by a mere, at time invariably predestinated, retraction and/or apology. Similarly no one who empties an eiderdown quilt in the wind is able again to gather the eiderdown and restuff the quilt to its previous format with same.' Cf Van Aswegen *Genoegdoeningsbedrag by Laster* 34.

[236] See *Le Roux v Dey* 2011 (3) SA 274 (CC) at 333–6 and the authorities referred to in the next four footnotes for an overview of the historical background and development of the amende honorable. In *Le Roux* at 335 Froneman and Cameron JJ refrained from proposing the reinstatement of this remedy, but did suggest 'the development of the law in accordance with equitable principles also rooted in Roman-Dutch law'. The Constitutional Court (at 335) also noted that similar roots (to those of the amende honorable) are to be found in customary law and tradition. However, the court left the matter for consideration on a future occasion. In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 260–1 the court proposed that 'our law in this area should be developed in the light of the values of ubuntu emphasising restorative rather than retributive justice' (see also Mukheibir 2007 *Obiter* 583 et seq). In view of these pronouncements the courts should be encouraged, in appropriate circumstances, 'to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted' (*Dikoko* supra at 274), thereby advancing the ideal of restorative justice which underpins the concepts ubuntu-botho ('human-ness') and human dignity. See also the minority judgment of Nugent JA in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 365 where he mentions a number of remedies for defamation as alternatives to a claim for damages (see also n 237).

[237] *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at 526, 529. Willis J held that the amende honorable, a Roman-Dutch law remedy whereby a plaintiff could claim, on the one hand, a palinodia or a recantatio—a withdrawal of the words by the defendant with an acknowledgement of its untruth—or, on the other, a deprecatio—a confession of guilt and a request for forgiveness (cf Neethling et al *Law of Personality* 48; para 1.6.2 above), has not fallen into desuetude in South African law, as has generally been accepted (ibid). Willis J also held (at 526) that, even if the amende honorable had not been part of our law, 'the imperatives of our times would have required its invention' because 'it is entirely consonant with "the spirit, purport and objects" of the Bill of Rights in our Constitution ...' (cf Roederer & Grant 2002 *Annual Survey* 461–3). Cf also *Naylor v Jansen; Jansen v Naylor* 2006 (3) SA 546 (SCA) at 556–7 (where Willis J in the court a quo made an order similar to the one he had made in *Mineworkers Investment* supra); *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC); *Young v Shaikh* 2004 (3) SA 46 (C) at 57); *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 258–61, 274–6; *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O) (where

the remedy was applied, albeit not eo nomine). In his minority judgment in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 365 Nugent JA mentions a number of alternative remedies for defamation in addition to a claim for damages: 'Leaving aside the availability of an interdict against anticipated future conduct . any plaintiff in an action for defamation ... is entitled to a declaration of falsity in respect of defamation that has already occurred. If it is warranted by the occasion, in my view a plaintiff is also entitled to an order directing publication of a correction, or publication of a retraction, with or without an apology, or an order directing that the judgment or a summary be published, or directing publication of the correct facts ....' See in general Neethling et al *Law of Personality* 171; Neethling & Potgieter 2003 *THRHR* 329 et seq; Van der Walt & Midgley *Delict*215; Neethling & Potgieter *Delict* 254 n 18; Mukheibir 2004 *Obiter* 455; Mukheibir 2007 *Obiter* 583; Neethling 2009 *De Jure* 292–3; Visser 2011 *SALJ* 327–51 (for an in-depth discussion of the amende honorable in the context of media defamation); cf Roederer & Grant 2002 *Annual Survey* 462–3; Midgley 2006 *Annual Survey* 349–50).

[238] Cf *University of Pretoria v South Africans for the Abolition of Vivisection* 2007 (3) SA 395 (O); Neethling 2009 *De Jure* 292–3. However, the interplay between the amende honorable (or an apology) and an action for damages is not all that clear in view of the pronouncement of the CC in *Le Roux v Dey*2011 (3) SA 274 (CC) at 333 '[t]hat the present position in our Roman-Dutch common law is that the only remedy available to a person who has suffered an infringement of a personality right is a claim for damages. One cannot sue for an apology and courts have been unable to order that an apology be made or published, even where it is the most effective method of restoring dignity [or reputation]. A person who is genuinely contrite about infringing another's right cannot raise an immediate apology and retraction as a defence to a claim for damages. At best it may influence the amount of damages awarded.' However, the court (ibid) commented that this 'is an unacceptable state of affairs.' See also *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 348-9 where the SCA stated that '[t]he only remedy available at present that can serve to protect the reputation worthy of protection, is damages'. The assertions of the CC and SCA that a claim for damages is the only remedy for infringement of a personality right is incorrect in the light of a number of decisions which have recognized remedies similar to the amende honorable (see ia the authorities mentioned in nn 236–40). See also the minority judgment of Nugent JA in *Media 24 Ltd* supra at 365 where the judge alluded to a number of alternative remedies for defamation in addition to a claim for damages (see the quotation in n 237 above). See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 234 et seq.

[239] Cf *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) at 526, 529 where the defendant was given a choice between making a public apology and paying damages; Midgley 1995 *THRHR* 293.

[240] In *Le Roux v Dey* 2011 (3) SA 274 (CC) at 280 (see also 322, 333, 336–7) the court ordered the defendants, in addition to paying the plaintiff R25 000 in compensation, to tender an unconditional apology to the plaintiff for the injury they caused him. In *Young v Shaikh* 2004 (3) SA 46 (C) the court held that, even if the amende honorable still forms part of our law, it would not serve the interests of justice if the defendant's apology in his plea and a half-hearted apology in evidence would preclude the plaintiff from holding the defendant liable for damages for defamation in this case. The chilling effect of an award of damages on possible future and similarly baseless and selfish attacks on the integrity of others would be an additional reason not to make use of the amende honorable. Cf *Dikoko v Mokhatla*2006 (6) SA 235 (CC) at 276; Midgley 1995 *THRHR* 292. Visser 2011 *SALJ* 327 et seq at 347–8 argues that the amende honorable 'cannot achieve the extended values of vindication of a reputation in the media defamation context' (at 347) and that the amende honorable is inappropriate as a defamation remedy against the media (at 348). See also *The Citizen 1978 (Pty) Ltd v McBride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) at 231–2 where it was found that, in the circumstances, it would not be appropriate to order an apology—the fact that the plaintiff contended that an apology would be inappropriate weighed against ordering it.

[241] Kuper 1966 *SALJ* 480. The author observes that an apology is offered too late if it was done only after the plaintiff had to make a request therefor, or at a stage when the defendant realized that his or her legal position was already hopeless. An apology which has been offered too late loses much of the effectiveness which it otherwise would have had (*Gelb v Hawkins* 1960 (3) SA 687 (A) at 693). Consequently an apology must be published as soon as reasonably possible (*SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 43). In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260 no apology or retraction had been forthcoming from the defendants, who argued that the plaintiff had not sought an apology from them. The court stated that nothing precluded the defendants from apologizing had they so wished and that the choice whether to do so or not was theirs. In *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558 the plaintiff indicated that had an apology been forthcoming from the defendant, the matter would not have proceeded to court.

[242] In *De Flamingh v Pakendorf* 1979 (3) SA 676 (T) at 686–7 the apologies in two newspapers actually received the same prominence as the defamatory reports, but the court stated that not all readers notice a one-time apology and that such an apology, in itself, is therefore not sufficient to set aside a delict.

In *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379 the defendants' retraction and apology, coming as it did on the eve of a trial that was destined to vindicate the plaintiffs, did not carry much weight. In *Young v Shaikh* 2004 (3) SA 46 (C) the defamatory statements about the integrity of the plaintiff was made on national television and had been seen by about half a million people, whereas the defendant only offered an apology in his plea and made a half-hearted apology in evidence. The court (at 57) found that the defendant's apologies were not adequate for the defendant had showed no compunction when attacking the plaintiff's integrity and had been indifferent to any financial harm which his baseless accusations could have caused (cf Pretorius 2004 *Annual Survey* 333–4; *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 272).

[243] The motive of the defendant with his apology should in other words not merely be to improve his legal position (Amerasinghe *Defamation* 564); ie a 'belated product of tactical necessity' (Erasmus & Gauntlett 7 *LAWSA* para 95).

[244] Amerasinghe *Defamation* 564.

[245] 1910 WLD 257 at 263. See Burchell *Defamation* 299.

[246] *Coetzee v Nel* 1972 (1) SA 353 (A) at 375.

[247] *Defamation* 563.

[248] Kuper 1966 *SALJ* 481.

[249] *Norton v Ginsberg* 1953 (4) SA 537 (A) at 550; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 41.

[250] In *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 41 the following was stated: "'n Persoon wat die slagoffer word van laster in 'n nuusblad met 'n wye sirkulasiesyfer kan met reg verwag dat daar binne korte tyd 'n opregte, ondubbelsinnige en openbare belydenis en tekennegewing van spyt teenoor hom op nagenoeg 'n ewe prominente wyse in dieselfde nuusblad gepubliseer word. So iets het nie in hierdie geval gebeur nie. Maar die appellante het wel in drie berigte ... verslag gedoen oor sekere gebeure wat die fout in die gewraakte berig reggestel het alhoewel dit op halfhartige en ietwat teësinnige wyse geskied het. In die lig hiervan sou dit onvanpas wees om die afwesigheid van 'n apologie as 'n erg verswarende omstandigheid aan te merk. Gemelde drie berigte het wel die kwaad tot 'n mate geneutraliseer en die publisiteit wat aldus aan die regstelling verleen is, behoort verligtend in te werk by die vasstelling van die genoegdoeningsbedrag' (the absence of an unconditional apology should not be regarded as an aggravating factor where the harm caused by the defamatory report was neutralized to an extent by the publication of three subsequent reports in which the mistake was corrected). Cf also n 237, 239 above on an appropriate public apology in lieu of paying damages.

[251] Burchell *Defamation* 300.

[252] Amerasinghe *Defamation* 563.

[253] *Defamation* 301.

[254] Cf *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 41–2; Burchell *Defamation*301.

[255] Burchell *Defamation* 301; Kuper 1966 *SALJ* 477, 484.

[256] See *May v Udwin* 1981 (1) SA 1 (A) at 19.

[257] *Fraser v Hertzog* 1911 OPD 81; *Gray v Poutsma* 1914 TPD 203 at 207; *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 321; *Mkhize v Media 24 Ltd* [2008] 4 All SA 267 (N) at 273.

[258] Amerasinghe *Defamation* 558; Van Aswegen *Genoegdoeningsbedrag by Laster* 30.

[259] 'A mitigating factor is that the utterances were made in the heat of the moment and were not pre-planned ... .'(*Dercksen v Webb* [2008] 2 All SA 68 (W) at 80). See also *Pienaar v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W); *Kriel v Johnson* 1922 CPD 483 at 485.

[260] *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 41–2, 47; De Villiers *Injuries*113, 181; Burchell *Defamation* 302.

[261] Cf *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 47.

[262] eg where the owner, printer and publisher of a newspaper publish and circulate a defamatory report which had another source (*SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 41–2, 43, 47).

[263] *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 47.

[264] Cf Van Aswegen *Genoegdoeningsbedrag by Laster* 36.

[265] Burchell *Defamation* 302; Erasmus & Gauntlett 7 *LAWSA* paras 94–5.

[266] Burchell *Defamation* 302; *Vaughan v Ford* 1953 (4) SA 486 (SR). In *Le Roux v Dey* 2011 (3) SA 274 (CC) at 322 the Constitutional Court reduced the lower courts' award of R45 000 to R25 000 inter alia because 'too little was made of the fact that the defendants were schoolchildren'.

[267] Cf the facts of *Vaughn v Ford* 1953 (4) SA 486 (SR), where the defendant, as a result of a nervous condition, exhibited the emotional reactions of an eight year old.

[268] Kuper 1966 *SALJ* 483; Burchell *Defamation* 302; Amerasinghe *Defamation* 565.

[269] *Vorster v Van der Walt* 1914 EDL 303; *Doll v Kaiser* 1939 SWA 5.

[270] See in general Burchell *Defamation* 302–3; Neethling & Potgieter *Delict* 99 et seq; Neethling et al *Law of Personality* 160 et seq.

[271] See in general *Bester v Calitz* 1982 (3) SA 864 (O) at 878–81; *Powell v Jonker* 1959 (4) SA 443 (T) at 446; *Mulvullha v Steenkamp* 1917 CPD 571 at 573; cf *Brenner v Botha* 1956 (3) SA 257 (T) at 262; Neethling & Potgieter *Delict* 99–100, 102.

[272] Cf *Brenner v Botha* 1956 (3) SA 257 (T) at 262, largely a case of insult, where the plaintiff's conduct 'really provoked the situation which arose'.

[273] Neethling & Potgieter *Delict* 103; cf *Strydom v Fenner-Solomon* 1953 (1) SA 519 (E) at 540. However, Van der Walt & Midgley *Delict* 139 state that the principle of compensatio is repugnant to modern legal thought and that in such a case the two parties should rather institute counter-claims against each other.

[274] 1911 OPD 81; see Burchell *Defamation* 303.

[275] *Pienaar v Pretoria Printing Works Ltd* 1906 TS 805 at 816; cf Burchell *Defamation* 303.

[276] Kuper 1966 *SALJ* 484.

[277] See in general Burchell *Defamation* 303; *Personality Rights* 436.

[278] *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 613: 'The Court is ... entitled to take into account the conduct of the defamer from the time the libel was published until judgment to the extent that such conduct is directly connected with the wrong sued on.' See also *Sachs v Voortrekkerpers Bpk* 1942 WLD 99 at 120; Burchell *Defamation* 300; Kuper 1966 *SALJ* 477, 478.

[279] 'As I have pointed out ... the defence of justification was abandoned on the afternoon before trial and the defendants then for the first time admitted that the offending article was false, defamatory and malicious. I would have expected that anyone with any sense of decency who on discovering that he had wrongly cast so grave and hurtful a slur would make haste to apologize or at the very least to explain that he had acted in good faith. No such attempt was made by any one of the defendants and they maintained an unrepentant attitude throughout. I regard their attitude as scandalous and deserving of the gravest censure. An unsuccessful plea of justification seriously aggravates damages. I think that the damages must be even heavier where the defendants, instead of attempting in good faith to prove their plea, abandon it at the last moment without apology' (*Buthelezi v Poorter* 1975 (4) SA 608 (W) at 615–6); cf *Kyriacou v Minister of Safety and Security* 1999 (3) SA 278 (O) at 293: 'The defendants persisted with their justification despite the fact that there was serious doubt with regard to the validity of their defence. They were unrepentant throughout. They showed no remorse.'

[280] *Schoeman v Potter* 1949 (2) SA 573 (T) at 575.

[281] *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 616.

[282] *Pont v Geyser* 1968 (2) SA 545 (A) at 558; *Davis v Jacobs* 1914 TPD 220; Burchell *Defamation*303. Two or more defamatory allegations in one publication will increase the total amount of satisfaction; defamatory allegations in different publications constitute different causes of action (*Pearce v Kevan* 1954 (3) SA 910 (D) at 914).

[283] *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 537–8.

[284] Para 15.3.2.2*(g)*.

[285] *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 401; *Geyser v Pont* 1968 (4) SA 67 (W) at 76.

[286] *Geyser v Pont* 1968 (4) SA 67 (W) at 76; Kuper 1966 *SALJ* 486.

[287] 'The failure of the defendants to apologise after admitting the falsity of the allegations only adds insult to injury' (*Buthelezi v Poorter* 1975 (4) SA 608 (W) at 618); *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 537–8; *Beukes v Raal* 1918 CPD 168 at 172.

[288] *Heyns v Venter* 2004 (3) SA 200 (T) at 213.

[289] *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 401; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693–4.

[290] Para 15.3.2.2*(d)*.

[291] See eg *Pont v Geyser* 1968 (2) SA 545 (A) at 552, 558; *SA Associated Newspapers Ltd v Yutar*1969 (2) SA 442 (A) at 458; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 262; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 642.

[292] *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 400; *Kyriacou v Minister of Safety and Security*1999 (3) SA 278 (O) at 292; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 538; *Geyser v Pont* 1968 (4) SA 67 (W) at 76; Burchell *Defamation* 303.

[293] See inter alia *Salzmann v Holmes* 1914 AD 471 at 481; *Pont v Geyser* 1968 (2) SA 545 (A) 558; *Geyser v Pont* 1968 (4) SA 67 (W) at 76; *Joseph v Black* 1930 WPA 327 at 338; *Parsons v Cooney* 1971 (1) SA 165 (RA) at 170; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; Kuper 1966 *SALJ* 477, 485–6.

[294] See in general Amerasinghe *Defamation* 557; Van Aswegen *Genoegdoeningsbedrag by Laster*29–30.

[295] *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 400 (entirely baseless allegations of sexual abuse of a child made maliciously with the specific intention of injuring plaintiff); *Salzmann v Holmes*1914 AD 471.

[296] *Sahd v Sahd* 1914 CPD 612. Malice, being subjective in nature, would often have to be deduced from extrinsic facts (cf *Tuch v Myerson* 2010 (2) SA 462 (SCA) at 467).

[297] *Geyser v Pont* 1968 (4) SA 67 (W) at 76: 'Die kwaadwilligheid waarmee die laster gepubliseer is, is voldoende bewys... . Afgesien van die erkennings wat deur sy advokaat op die uiteindelike stadium van die verhoor gemaak is, het die verweerder nooit in verband met enige van die lasterlike aantygings skuld erken of spyt uitgespreek of apologie aangebied nie; inteendeel, hy het met sy verweer daarteen volhard en selfs in getuienis sy onskuld aangevoer. Dit is des te meer afkeurenswaardig omdat hy drie ... geleenthede aangebied is en geweier het om die laster reg te stel deur 'n behoorlike apologie te publiseer' (the malice of the publication was sufficiently proved; the defendant never apologized for his defamation but persisted in his defence, despite being offered three opportunities to make right the defamation by publishing an apology).

[298] 1968 (4) SA 67 (W) at 76.

[299] See *Pont v Geyser* 1968 (2) SA 545 (A) at 552–3.

[300] *Geyser v Pont* 1968 (4) SA 67 (W) at 76; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 262; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 642; cf *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379.

[301] Neethling et al *Law of Personality* 179–82.

[302] See in general *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 616; *Boswell v Union Club of SA (Durban)* 1985 (2) SA 162 (D) at 168–9; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 262.

[303] Para 15.3.2.2 *(g)*.

[304] *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 618; *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 400.

[305] See also paras 9.4.2 and 9.4.4.

[306] Para 15.3.1.

[307] Cf para 9.4.4. See eg *Tsedu v Lekota* 2009 (4) SA 372 (SCA) at 379 where the court's premise was that damages for defamation are not to punish the defendant but to console the plaintiff for the harm caused; see *also Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at 263; *Esselen v Argus Printing and Publishing Co Ltd* 1992 (3) SA 764 (T) at 771; *Collins v Administrator, Cape* 1995 (4) SA 73 (C) at 94; *Mogale v Seima* 2008 (5) SA 637 (SCA) at 641–2; *Seymour v Minister of Safety and Security* 2006 (5) SA 495 (W) at 500; cf *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 62 et seq. See also the well-considered minority judgment of Nugent JA in *Media 24 Ltd v SA Taxi Securitisation (Pty) Ltd* 2011 (5) SA 329 (SCA) at 350 et seq. Cf Van der Merwe & Olivier *Onregmatige Daad* 246, 442–3; Neethling et al *Law of Personality* 59–60; Van der Walt & Midgley *Delict* 3; Loubser & Midgley (eds) *Delict*385–8; Midgley 2006 *Annual Survey* 346; Burchell *Defamation* 292 et seq; Amerasinghe *Defamation*553; McKerron *Delict* 207 n 89.

[308] Cf Erasmus & Gauntlett 7 *LAWSA* para 94; Amerasinghe *Defamation* 554. It has also been submitted (Visser 1988 *THRHR* 489) that denial of the punitive element of satisfaction disregards the plaintiff's feeling of injustice in the case of intentional personality infringement, a feeling that can only be neutralized by satisfaction if private punishment plays a role. Cf paras 9.4.2 and 9.4.4. Even the Constitutional Court acknowledges that punishment, albeit not in terms of an award for compensation plays a role in consoling a plaintiff who was defamed: In *Le Roux v Dey* 2011 (3) SA 274 (CC) at 322 the defendants who had defamed the plaintiff were schoolchildren who were punished by the school for their defamatory actions. Brand J lowered the award of the lower courts on the basis of inter alia the following argument: 'I appreciate that we are no dealing with sentencing in a criminal case or with an award of punitive damages. Yet, [the plaintiff] should in my view have taken substantial consolation from the fact that he had to some extent been vindicated in the eys of members of the school community—who observed the [defamatory material]—by the punishment that the wrongdoers had already endured.'

[309] *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 27–8; *Pauw v African Guarantee and Indemnity Co Ltd* 1950 (2) SA 132 (SWA) at 135; *Mecl v Polokowsky* 1946 WLD 539, 547–8; *Moolman v Slovo* 1964 (1) SA 760 (W) at 762, 763; *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 616, 618; *Salzmann v Holmes* 1914 AD 471 at 483; *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 458; *Kahn v Kahn* 1971 (2) SA 499 (RA) at 500, 501–2; *Chetcuti v Van der Wilt* 1993 (4) SA 397 (Tk) at 400; *Afrika vs Metzler* 1997 (4) SA 531 (Nm) at 538; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); Visser 1998 *THRHR* 150 at 152–5.

[310] Cf Neethling et al *Law of Personality* 169 and the authority referred to there in n 407.

[311] *SA Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A) at 458: 'To ascribe such conduct to the respondent [that the respondent, an attorney-general, endeavoured to obtain an improper advantage by misleading the court] was defamatory in the highest degree, and calls for punitive damages'; *Afrika v Metzler* 1997 (4) SA 531 (Nm) at 538; *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC); Visser 1998 *THRHR* 150 at 152–5.

[312] Cf *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 774 (where the right to personal liberty was infringed).

[313] *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 617; but see Burchell *Defamation* 292, who is of the opinion that an 'ordinary' compensatory award should be sufficient to serve as a deterrent.

[314] Neethling 'Bestraffende genoegdoening' 173 et seq; 2008 *Obiter* 238 et seq; cf Neethling & Potgieter *Delict* 7 n 29. See para 9.4.4 for a discussion.

[315] Para 15.3.2 et seq.

[316] See in general *Raliphaswa v Mugivhi* [2008] 3 All SA 92 (SCA) at 97 where the plaintiff was accosted and subjected to a humiliating search in public. In awarding damages of R25 000 to assuage the plaintiff's wounded reputation and feelings, the court took into account past awards, that the plaintiff was a man of standing in the community, that no apology was made, that the defamation and iniuria occurred at the same time, and that he was humiliated in public. See also Neethling & Potgieter 2008 *Annual Survey* 820; Neethling et al *Law of Personality* 198; Erasmus & Gauntlett 7 *LAWSA* para 96; Loubser & Midgley (eds) *Delict* 408; Visser 'Delict' in Du Bois (ed) *Wille's Principles* 1197 et seq; paras 5.9 and 15.3.2.

[317] *Brenner v Botha* 1956 (3) SA 257 (T) at 262; *Matiwane v Cecil Nathan, Beattie and Co* 1972 (1) SA 222 (N); cf *Botha v Pretoria Printing Works Ltd* 1906 TS 710 at 714; Neethling et al *Law of Personality* 198.

[318] *Ryan v Petrus* 2010 (1) SA 169 (ECG) at 177.

[319] See in general Neethling et al *Law of Personality* 198; cf para 15.3.2 et seq.

[320] *Ryan v Petrus* 2010 (1) SA 169 (ECG) at 177. In this case the plaintiff was having an adulterous affair with the defendant's father. The defendant verbally insulted the plaintiff with regard to her adultery. The court held that the fact that the plaintiff was committing adultery did not mean that she had thereby forfeited her right to respect and to be treated with dignity. However, sight could not be lost in the assessment of damages of the fact that she was unrepentently and openly committing adultery: 'In these circumstances the affront to plaintiff's dignity and the sting of the insults, viewed from both a subjective and objective perspective, are less in my view than they would have been had plaintiff's actions been beyond reproach.' Be that as it may, the words uttered by the defendant constituted a serious violation of the plaintiff's dignity and the court awarded damages in the amount of R15 000.

[321] *Brenner v Botha* 1956 (3) SA 257 (T) at 262; *GQ v Yedwa* 1996 (2) SA 437 (Tk) at 438–9 (effect on plaintiff's subordinates of imputation against his manhood brought about by forced circumcision; see n 326 below).

[322] In *Brenner v Botha* 1956 (3) SA 257 (T) at 262 the court in mitigation accepted the fact that it was the plaintiff who evoked the situation in which the insulting words were uttered by the defendant. See also *Ryan v Petrus* 2010 (1) SA 169 (ECG) at 177 where the plaintiff's adulterous affair with the defendant's father that induced the defendant's insulting words played a role in the assessment of compensation (cf n 320 above).

[323] *Tarloff v Olivier* [2004] 1 All SA 563 (C) at 567; *Ryan v Petrus* 2010 (1) SA 169 (ECG) at 177.

[324] *Tarloff v Olivier* [2004] 1 All SA 563 (C) at 566–7. The court however emphasized that caution had to be exercised in this regard because the facts differ from case to case; the devaluation of the rand over the years also had to be borne in mind.

[325] In *Tarloff v Olivier* [2004] 1 All SA 563 (C) at 567 the court noted that it was also relevant that Parliament had, in terms of the Constitution, enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which specifically prohibits the type of hate speech encountered in the case (the defendant had insulted the plaintiff by repeatedly calling him a 'f***ing Jewboy' and a 'bloody Jewboy'). Although the Act had not yet commenced at that time, it was seen as being indicative of the fact that public

opinion disapproves of this type of conduct. The plaintiff (having claimed R50 000) successfully appealed against the magistrate's award of R1 000, and the High Court increased the award to R4 000 (at 567) (cf Pretorius 2004 *Annual Survey* 336).

[326] *GQ v Yedwa* 1996 (2) SA 437 (Tk). In this case the plaintiff, who had been circumcised before, was forcibly circumcised again by the defendants. The court awarded R5 000 for shock, pain and suffering for the assault, and R10 000 for insult or contumelia. White J stated (at 438–9): 'By far the most serious aspect of assault, vis-à-vis damages, is the contumelia (insult) suffered by the plaintiff. Three aspects of the case exacerbated his humiliation. They were the nature of the assault, the imputation against his manhood, and the effect of that imputation on his subordinates. The first aggravating feature was the very nature of the assault. To have his trousers removed, his legs forced open and then to be circumcised, was manifestly an extremely degrading experience. The second aggravating feature was the symbolic imputation of the assault. Circumcision has great significance in Xhosa culture—it signifies the passing from boyhood to manhood, and the conferring on the recipient of the rights and privileges, and more particularly responsibilities, of manhood. A man who has not been circumcised has no standing in, and is denigrated by, their society. Circumcision is therefore a very emotive issue, especially when an uncircumcised man professes to have been circumcised and to be entitled to the privileges of manhood, and from time to time uncircumcised men, who act in this manner, are forcibly circumcised. Against this background it is clear that when the defendants assaulted the plaintiff they implied that he was not a man, but a charlatan and imposter who had not been circumcised. It is therefore not surprising that the plaintiff testified that he found this imputation against his manhood extremely offensive, degrading and humiliating. The third aggravating circumstance was that the imputation that the plaintiff had not been circumcised resulted in his being held in contempt by his subordinates, which caused him further degradation and humiliation. For the reasons set out above the Court must award a substantial amount of damages for contumelia ... .'

[327] *Tiffen v Cilliers* 1925 OPD 23.

[328] See also paras 5.10 and 12.23 and in general Neethling et al *Law of Personality* 204–7; Sinclair & Heaton *Law of Marriage* 324 et seq; Heaton *Family Law* 12–13; Visser 'Delict' in Du Bois (ed) *Wille's Principles* 1207 et seq. See however *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at 561 in which the Supreme Court of Appeal remarked (obiter) that an engagement should not be regarded as a binding contract, but only as an unenforceable pactum de contrahendo (cf para 12.23).

[329] See para 12.23.

[330] Para 5.10; see also Neethling et al *Law of Personality* 204 et seq. This question was left open in *Bull v Taylor* 1965 (4) SA 29 (A).

[331] 2010 (4) SA 558 (SCA) at 561; see Neethling 2011 *THRHR* 328; Sharp & Zaal 2011 *THRHR* 333 for discussions.

[332] 1961 (4) SA 21 (W) at 36. See also *M v M* 1991 (4) SA 587 (D) at 601.

[333] On the other hand the offending conduct can still be an iniuria without constituting breach of promise. Where, eg, a person is entitled to end the engagement but does so in an insulting manner which infringes the other party's feelings, such conduct may amount to an iniuria (Neethling et al *Law of Personality* 207). See also n 338 below.

[334] See also *Van Jaarsveld v Bridges* 2010 (4) SA 561 (SCA) at 561 where the court emphasized that what is important is the manner in which the engagement was brought to an end. See also *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 337.

[335] Neethling et al *Law of Personality* 207 point out that, since the existence of an iniuria is judged independently of breach of promise (breach of contract), the offending conduct can still be an iniuria without constituting breach of promise, and vice versa.

[336] *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 41; *Mymenah v Cassim Rahim* 1943 NPD 229 at 230; *Claassen v Van der Watt* 1969 (3) SA 68 (T) at 71; Bekker 1992 *THRHR* 488. However, in *M v M* 1991 (4) SA 587 (D) the court awarded a single sum of R6 000 for the breach of contract and the iniuria caused by breach of promise and seduction. See also *Maharaj v Amichund* 1952 (4) SA 594 (N). In *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 337 the court awarded contractual damages for breach of promise to marry. As far as damages for iniuria were concerned, the court (at 337) stated that it is settled that the plaintiff is obliged to show that the breach was committed 'in circumstances that were injurious or contumelious'. However, the court did not consider it appropriate to make an award in this respect which 'for all its emotional pyrotechnics was an inevitable consequence of ferocious litigation'. It is uncertain what the court meant by 'injurious or contumelious' conduct, but if it was of the view that breach of promise must be of an insulting nature, this view is subject to criticism. Contumelia in the sense of insult is not an essential requirement for liability on the ground of iniuria for breach of promise to marry. Such an approach would negate the existence of feelings (in this regard, feelings of piety as a separate interest of personality—

see n 339 below) for the infringement of which insult is not a requirement. (See Neethling & Potgieter 2008 *Annual Survey* 839; Neethling et al *Law of Personality* at 28–9, 205–6.)

[337] *McCalman v Thorne* 1934 NPD 86 at 92.

[338] In *McCalman v Thorne* 1934 NPD 86 at 92 it is stated that breach of promise can cause 'an impairment of the personal dignity'.

[339] So case law, in awarding satisfaction, has already taken into consideration the 'wounded feelings of the plaintiff', the 'moral suffering she has undergone' and 'her feelings of wounded pride' (see respectively *McCalman v Thorne* 1934 NPD 86 at 92, *Triegaardt v Van der Vyver* 1910 EDL 44 at 46 and *Bull v Taylor* 1965 (4) SA 29 (A) at 39).

[340] Eg where the innocent party suffers a serious nervous breakdown as a consequence of the breach of promise (cf para 5.10).

[341] See Neethling et al *Law of Personality* 204–7.

[342] See n 338 above.

[343] *Bull v Taylor* 1965 (4) SA 29 (A) at 36, 37, 38; *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 36; cf in this regard Neethling et al *Law of Personality* 204–7.

[344] Neethling et al *Law of Personality* 204–7.

[345] See on this subject in general Neethling et al *Law of Personality* 206.

[346] *Desco v Santich* (1907) 17 CTR 165; *Jooste v Van der Merwe* (1902) 12 CTR 130 at 134.

[347] *Smit v Jacobs* 1918 OPD 30.

[348] Cf Neethling et al *Law of Personality* 206.

[349] See *Van Jaarveld v Bridges* 2010 (4) SA 561 (SCA) at 558: 'In the light of [the plaintiff's] history [she was married four times], her quick recovery in the arms of another, her eagerness to claim damages, [the defendant's] uncertainty about their future, the lack of prospects of a happy marriage on the farm, and the bad relationship with her future in-laws, convince me that any injury or contumacy was de minimis and can be discounted, and that the claim based on iniuria should have been dismissed.'

[350] See in general Neethling et al *Law of Personality* 206–7.

[351] *Radlof v Ralph* 1917 EDL 168 at 174; *McCalman v Thorne* 1934 NPD 86 at 92; *Triegaardt v Van der Vyver* 1910 EDL 44 at 46; *Van Jaarsveld v Bridges* 2010 (4) SA 558 (SCA) at 565.

[352] *M v M* 1991 (4) SA 587 (D) at 602.

[353] *Radlof v Ralph* 1917 EDL 168 at 174; *McCalman v Thorne* 1934 NPD 86 at 92.

[354] *Bull v Taylor* 1965 (4) SA 29 (A) at 39; *Radloff v Ralph* 1917 EDL 168 at 174; *M v M* 1991 (4) SA 587 (D) at 602 (where the defendant's modest financial position and career possibilities were taken into consideration).

[355] *Bull v Taylor* 1965 (4) SA 29 (A) at 39: '[T]he appellant was engaged to the respondent for seven or eight years. These were important years in her life. When the respondent rejected her she was no longer a young woman. By casting her aside after all those years, when she was on the very threshold of marriage, the respondent dealt her pride a shattering blow.' See also *Sepheri v Scanlan*2008 (1) SA 322 (C) at 337.

[356] *M v M* 1991 (4) SA 587 (D) at 602 ('the manner in which he [the defendant] showed his unwillingness to honour his obligation was a cruel one'); *Triegaardt v Van der Vyver* 1910 EDL 44 at 47; *Smit v Jacobs* 1918 OPD 30; *Davel v Swanepoel* 1954 (1) SA 383 (A) at 387.

[357] *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 37; *M v M* 1991 (4) SA 587 (D) at 602: 'The *injuria* was exacerbated by his endeavour during the trial falsely to cast the blame for this conduct upon the minor and her parents.' See also *Sepheri v Scanlan* 2008 (1) SA 322 (C) at 337.

[358] *Mocke v Fourie* 1893 3 CTR 313 at 315.

[359] *Davel v Swanepoel* 1954 (1) SA 383 (A) at 387.

[360] *Combrink v Koch* 1946 NPD 512.

[361] See in general Potgieter *Godsdiensgevoel*; Neethling et al *Law of Personality* 201–4; para 5.10.Cf Malherbe 2007 *TSAR* 332 et seq.

[362] Ibid.

[363] 1968 (4) SA 67 (W); see also *Pont v Geyser* 1968 (2) SA 545 (A).

[364] Para 15.3.2.

[365] See in general Neethling et al *Law of Personality* 88–90; Van den Heever *Breach of Promise and Seduction*; Bekker *Seduksie*; 1992 *THRHR* 488; para 5.7.4.

[366] Damages for pecuniary loss can be recovered for ia maternity and medical costs in connection with the pregnancy and support for a child born as a result of the seduction (Erasmus & Gauntlett 7 *LAWSA* para 97; Neethling et al *Law of Personality* 89–90; para 14.10.2).

[367] *Davel v Swanepoel* 1954 (1) SA 383 (A) at 389; *Arendse v Roode* 1989 (1) SA 763 (C) at 765; *M v M* 1991 (4) SA 587 (D) at 602; *Bull v Taylor* 1965 (4) SA 29 (A) at 38–9; *Bensimon v Barton* 1919 AD 13 at 19; *Card v Sparg* 1984 (4) SA 667 (E) at 670; Neethling et al *Law of Personality* 89–90; McKerron *Delict* 165–6.

[368] *Davel v Swanepoel* 1954 (1) SA 383 (A) at 389; *Scholtemeyer v Potgieter* 1916 TPD 188 at 195; Erasmus & Gauntlett 7 *LAWSA* para 97.

[369] *M v M* 1991 (4) SA 587 (D) at 602: 'The injurious element of this conduct is, to my mind, substantially aggravated by the defendant's persistent denial that she was a virgin at the time when he seduced her and his even more scurrilous and unfounded accusation that the child was that of his father.'

[370] See Neethling et al *Law of Personality* 90; Erasmus & Gauntlett 7 *LAWSA* para 97; Bekker *Seduksie* 454 et seq for a comprehensive discussion of the factors relevant in determining satisfaction.

[371] *M v M* 1991 (4) SA 587 (D) at 602. Cf Bekker 1992 *THRHR* 488 who argues that awards for damages for breach of promise and seduction should be carefully distinguished.

[372] See in general Neethling et al *Law of Personality* 211–12; Neethling & Potgieter *Delict* 351–3; Neethling 2006 *THRHR* 342; para 5.10.

[373] *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C) at 852.

[374] See, eg, *Wiese v Moolman* 2009 (3) SA 122 (T) at 125; *Wassenaar v Jameson* 1969 (2) SA 349 (W) at 352; *Bruwer v Joubert* 1966 (3) SA 334 (A); *Chapman v Chapman* 1977 (4) SA 142 (NC); *Smit v Arthur* 1976 (3) SA 378 (A); *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C); *Godfrey v Campbell* 1997 (1) SA 570 (C); cf Neethling & Potgieter *Delict* 351–3. In *Wiese* supra 126–9 Du Plessis J held that the action for adultery is not in conflict with the spirit, purport and objects of the Bill of Rights and rejected the defendant's argument that the action for adultery no longer has right of existence in our law and that it should be abolished (see Neethling & Potgieter 2009 *Annual Survey* 823–6).

[375] For policy reasons, the remedy against the adulterous spouse is not the the actio iniuriarum but an action for divorce (see para 5.10 of a brief discussion and criticism; cf *Wiese v Moolman* 2009 (3) SA 122 (T) at 128; Neethling 2010 *THRHR* 109; Neethling & Potgieter 2009 *Annual Survey* 825–6; Heaton *Family Law* 44–5).

[376] See eg *Bruwer v Joubert* 1966 (3) SA 334 (A) at 337 and the authority referred to by Neethling et al *Law of Personality* 208; *Diemer v Solomon* 1982 (4) SA 13 (C) at 16. 'Alienation of affection' is sometimes added as an independent cause of action (*Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C) at 852–3; cf n 387 below). Cf para 5.10.

[377] *Viviers v Kilian* 1927 AD 449 at 455; cf Neethling 2006 *THRHR* 344.

[378] Cf *Wiese v Moolman* 2009 (3) SA 122 (T) at 126; Neethling & Potgieter 2009 *Annual Survey*824–5; *Bruwer v Joubert* 1966 (3) SA 334 (A) at 337.

[379] *Law of Personality* 209.

[380] *Wiese v Moolman* 2009 (3) SA 122 (T) at 124–6; Sonnekus *Beskerming van die Huwelik* 238–41; Neethling et al *Law of Personality* 28–9, 208–9; Neethling 2010 *THRHR* 109; Neethling & Potgieter 2009 *Annual Survey* 825–6). Religious feelings could also be infringed by the adultery, eg where adultery is considered to be a serious sin by the plaintiff.

[381] *Wiese v Moolman* 2009 (3) SA 122 (T) at 124–5 and sources listed in n 380 above.

[382] Neethling et al *Law of Personality* 209; Neethling 2006 *THRHR* 344.

[383] *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 772: 'As regards *quantum*, it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings'; *Viviers v Kilian* 1927 AD 449 at 457: 'It is not desirable that actions of this nature should be encouraged; but on the other hand it is only right that profligate men should realise that they cannot commit adultery with married women with impunity'; *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338.

[384] See paras 9.4.4 and 15.3.2.4*(f)*.

[385] Cf *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 772; *Van der Westhuizen v Van der Westhuizen*1996 (2) SA 850 (C) at 852.

[386] *Bruwer v Joubert* 1966 (3) SA 334 (A) at 339; *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C) at 852.

[387] *Van der Westhuizen v Van der Westhuizen* 1996 (2) SA 850 (C) at 851. The court, having set out the facts, stated (at 852–3): '[O]ne can hardly imagine a more callous disregard for the marriage relationship or a more blatant intrusion into a previously happy and fulfilled marriage. Plaintiff's only recourse is to law; in this way she has sought to assuage the pain she has suffered and the indignity she has been subjected to ... The plaintiff has undoubtedly suffered. She has experienced the disintegration of her marriage, the hostility of her husband and the hurt and humiliation of a woman whose marriage has been violated in the most grievous manner. Marriage remains the cornerstone, the basic structure of our society. The law recognises this and the Court must apply the law. I regard this as a disgraceful case of conscious and deliberate desecration of the marriage relationship, necessitating an award of damages (I intend to award one lump sum) which will reflect the serious nature of the second defendant's misconduct.' The court ordered the second defendant to pay the plaintiff R20 000 as damages 'for adultery, alienation of affection, loss of *consortium* and *contumelia*'.

[388] *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338: ''n Eerlik-bedoelde versoek om vergiffenis wat uit 'n boetvaardige hart kom moet as helende salf op die wond beskou word, terwyl volhardende verstoktheid as sout op die wond gereken moet word' (whereas an honest plea for forgiveness is a healing ointment, persistent impenitence rubs salt in the wound). See also *Valken v Berger* 1948 (3) SA 532 (W); *Harris v Harris* 1946 (2) PH B99 (N); *Viviers v Kilian* 1927 AD 449 at 455.

[389] *Potgieter v Potgieter* 1959 (1) SA 194 (W).

[390] *Bevan v Bevan and Ward* 1908 TH 193; cf *Groundland v Groundland and Alger* 1923 WLD 217. Where in such a case neither loss of consortium, nor personality infringement was suffered, the claim falls away (*Michael v Michael and McMahon* 1909 TH 292; *Mason v Mason* 1932 NPD 393).

[391] *Biccard v Biccard and Fryer* 1892 SC 473 at 476.

[392] Cf *Fuller v Viljoen* 1949 (3) SA 852 (GW) at 856.

[393] *Mulock-Bentley v Curtoys* 1935 OPD 8 at 15; *Viviers v Kilian* 1927 AD 449 at 456; *Chapman v Chapman* 1977 (4) SA 142 (NC) at 144.

[394] *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338: 'Nie net verswarende omstandighede nie, maar ook omstandighede wat die skade temper moet in ag geneem word, en hieronder sal veral die moontlike gevoelloosheid van die gehoonde, sowel as 'n swak karakter van die oorspelige eggenoot in oorweging geneem word' (mitigating factors to be taken into account include the possible callousness of the plaintiff and the bad character of the adulterous spouse).

[395] *Biccard v Biccard and Fryer* 1892 SC 473 at 476.

[396] *Fuller v Viljoen* 1949 (3) SA 852 (G).

[397] *Hare v Hare & Fourie* 1945 NPD 93 at 97.

[398] *Fuller v Viljoen* 1949 (3) SA 852 (GW).

[399] Para 16.3.1; *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338 (the Appellate Division reduced the R2 500 awarded by the court a quo to R1 000).

[400] Neethling et al *Law of Personality* 212–15; Erasmus & Gauntlett 7 *LAWSA* para 99; para 5.10.

[401] 'Privacy is an individual condition of life characterised by seclusion from the public and publicity, the extent of which is determined by the individual himself' (Neethling & Potgieter *Delict* 347); see also *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at 269–70; Neethling et al *Law of Personality* 253–4; Erasmus & Gauntlett 7 *LAWSA* para 100; Loubser & Midgley (eds) *Delict* 408. Privacy must be distinguished from *identity*, which is 'that uniqueness which identifies each person as a particular individual and as such distinguishes him from others' (Neethling & Potgieter *Delict* 350). See on infringement of identity, when the attributes of a person are used without consent, Coetser *Identiteit*; Neethling et al *Law of Personality* 255 et seq; *Grütter v Lombard* 2007 (4) SA 89 (SCA) (discussed by Neethling 2007 *TSAR* 834; Roos 2008 *THRHR* 515; Cornelius 2008 *TSAR* 645); *W v Atoll Media (Pty) Ltd* [2010] 4 All SA 548 (WCC) at 558 (discussed by Cornelius 2011(2) *PELJ* 182, 226).

[402] 1958 (1) SA 370 (W) at 371–2. Facts and photographs relating to a private amorous relationship between the plaintiff and a well-known singer were published in a magazine. The court stated (at 371–2): 'The mere unauthorised publication of photographs does not necessarily in itself entitle the aggrieved party to damages, and the question whether such publications constitute an aggression upon a person's *dignitas* will depend upon the circumstances of each case, the nature of the photographs, the personality of the plaintiff, his station in life, his previous habits with reference to publicity and the like... . The remedy should be given only when the words or conduct complained of involve an element of degradation, insult or *contumelia*.' (Neethling et al *Law of Personality* 218–19 correctly criticize the latter requirement: infringement of privacy must not be equated with insult.) The court took the following facts into consideration in determining the amount of satisfaction: the plaintiff had been a teacher and was now a student at the University of South Africa; he never sought publicity and was well known in the area where

he lived; the infringement upon his privacy 'was deliberately designed without any regard to the feelings of the plaintiff'; the publication was circulated throughout the country; and 'in cases such as the present the damages are to some extent punitive'. The plaintiff claimed £500, the defendant offered £50 and the court awarded £150 (at 372–3). See in general also *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 (3) SA 244 (C) at 249.

[403] 1994 (2) SA 634 (C) (confirmed on appeal: *National Media Ltd v Jooste* 1996 (3) SA 262 (A); cf Neethling 1996 *THRHR* 528). The defendants infringed the plaintiff's right to privacy by publishing articles in two magazines concerning the plaintiff's relationship with her alleged former lover, a famous rugby player, and their illegitimate child. As to the quantum of damages (R5 000 were awarded) the court held that the most important considerations were the following (at 647): that the magazines in question enjoyed wide circulation in South Africa; that the article had included photographs of the plaintiff; that intimate details of her life had been put in the limelight; that she had on the other hand not been a stranger to publicity; and that the main facts of the matter had already been public knowledge. (Cf Neethling & Potgieter 1994 *THRHR* 703.)

[404] 1993 (4) SA 842 (A) (cf Van Wyk 1994 *THRHR* 141). The defendant, the plaintiff's medical doctor, disclosed the plaintiff's HIV status to two medical colleagues despite an express undertaking to uphold confidentiality. On the quantum of damages, the court stated (at 857–8): 'It is extremely difficult in this matter to make such an award because there are no obvious signposts. Nevertheless, the right of privacy is a valuable right and the award must reflect that fact. Aggravating factors include the fact that a professional relationship was abused notwithstanding an express undertaking to the contrary. So, too, the breach created the risk of further dissemination by others. The evidence also established that the publication of a person's HIV condition increases mental stress and that the plaintiff was seriously distressed by the disclosure. And stress hastens the onset of AIDS—something which may have occurred in this instance. On the other hand, the disclosure was limited to two medical men who, it was reasonable to assume, would have dealt with the information with some circumspection. The nature of the plaintiff's condition was in any event such that it would inevitably have become known at some stage. He had, to an extent, already severed his links with Brakpan [where he had lived]. There is no evidence that his friends ostracised or avoided him; it was rather a case of his having chosen to withdraw from society, something he would probably in any event have done. In the light of all this I believe that R5 000 will be a just award.'

[405] 1996 (4) SA 292 (T) at 306–7. A blood sample for a HIV test was drawn from the plaintiff, a prisoner serving sentence, without the required pre-test counselling. Although the plaintiff's privacy was infringed, an award of R1 000 was considered adequate in the circumstances. (Cf Strauss 1996 *THRHR*492; Knobel 1997 *THRHR* 533; Van Wyk 1997 *THRHR* 699.)

[406] 2007 (5) SA 250 (CC). The applicants, three HIV-positive women, succeeded with inter alia a claim for damages with the actio iniuriarum against the respondents (an author, biographer and publisher respectively) for violating their rights to privacy, dignity and psychological integrity by publishing their names and HIV status without their consent in a biography. The Constitutional Court increased the amount of damages awarded to the applicants by the trial court (R15 000 each) to R35 000 each. In dealing with the quantum of damages (at 270) the court accepted that the assessment of damages in any case under the actio iniuriarum can never be easy: 'A Court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances.' A range of factors can be considered here, such as 'the nature and extent of the invasion or violation of privacy; malice on the part of the respondent; rank or social standing of the parties; the absence or nature of the apology; the nature and extent of the publication; and the general conduct of the respondent'. The court stated that the 'greater the violation of the privacy, the greater the need to protect the applicants and the greater the award of damages'. The inclusion and publication of the applicants' HIV status (highly personal and confidential material) in the book constituted a grave violation of their privacy (and dignity) and should therefore be compensated. Due to the gravity of the violations of privacy, the court considered a higher award than that awarded by the trial court to be reasonable in the circumstances (cf Neethling & Potgieter 2007 *Annual Survey* 827; Neethling 2008 *SALJ* 36).

[407] *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A) at 857–8.

[408] In *Kidson v SA Associated Newspapers Ltd* 1957 (3) SA 461 (W) the court regarded an apology by the defendants as a factor in mitigation.

[409] Para 15.3.2. In *Independent Newspaper Holdings Ltd v Suliman* [2004] 3 All SA 137 (SCA) at 160 it was pointed out that some, but not all, invasions of privacy may involve publication of defamatory material. In instances where the two are inextricably enmeshed, it will seldom, if ever, be possible to quantify separately the damages to be awarded for the defamation and for the concomitant invasion of privacy, and, generally speaking, no such attempt should be made; the damages, if any, should be merged into a single amount.

[410] 'In general, quantification should reflect the high premium placed by the law on a person's physical liberty. Personality rights are without doubt the most important rights a person has and the right to physical liberty must be near the top of the hierarchy of personality and fundamental rights. There have been judicial warnings that the *actio iniuriarum* is not primarily a road to riches .... And although damage awards are generally, as a matter of legal policy, said to be ''conservative'' in our law, they should not be so conservative (low) that the defendant receives preferential treatment at the expense of the plaintiff ... .' (Visser 2008 *THRHR* 175–6). See in general Neethling et al *Law of Personality* 111–25; Neethling & Potgieter *Delict* 328–30; McQuoid-Mason 15(2) *LAWSA* paras 349–53; Loubser & Midgley (eds) *Delict* 407; Okpaluba & Osode *Government Liability* 482 et seq (who also refer to a number of unreported cases); *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA); *Van Rensburg v The City of Johannesburg* [2008] 1 All SA 645 (W) at 653; *Olivier v Minister of Safety and Security* 2009 (3) SA 432 (W) at 445–6; *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C); *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) at 102–3; *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N); *Manase v Minister of Safety and Security* 2003 (1) SA 567 (Ck) at 577–85*; Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) at 137–8; *Mvu v Minister of Safety and Security*2009 (6) SA 82 (GSJ) at 91–3; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V); *Areff v Minister van Polisie* 1977 (2) SA 900 (A) at 914–15; *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 935; *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 860; *Welkom v Minister of Law and Order* Corbett & Honey G3–6; *Brandon v Minister of Law and Order* 1997 (3) SA 68 (C) (cf Neethling 1997 *THRHR* 705); para 5.7.3.

[411] Neethling et al *Law of Personality* 113 et seq.

[412] Neethling et al *Law of Personality* 121–2, 125.

[413] See Neethling et al *Law of Personality* 121–2; Erasmus & Gauntlett 7 *LAWSA* para 101.

[414] In *Olivier v Minister of Safety and Security* 2009 (3) SA 434 (W) at 445–6 the plaintiff, a police officer, was arrested in the presence of his subordinates and seniors whilst in uniform and on duty, paraded in front of his wife and children and detained for six hours. He also had to appear in court on three occasions as an accused. Damages of R50 000 were awarded for the serious invasion of the plaintiff's rights and dignity. See also *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 849; *Donono v Minister of Prisons* 1973 (4) SA 259 (C) at 265; *Bentley v McPherson* 1999 (3) SA 854 (E) at 866; *Tobani v Minister of Correctional Services* [2002] 2 All SA 318 (SE) at 325–6; *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) at 137–8.

[415] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) at 93 the court took into account that the plaintiff was arrested for an improper motive, so that he could be taken to an accident scene to be identified by a witness. See also *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 849; *Donono v Minister of Prisons* 1973 (4) SA 259 (C) at 265; *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707; *Stapelberg v Afdelingsraad van die Kaap* 1988 (4) SA 875 (C) at 878; *Makhanya v Minister of Justice* 1965 (2) SA 488 (N) at 492; *Birch v Ring* 1914 TPD 106 at 109; *Bentley v McPherson* 1999 (3) SA 854 (E) at 866. In *Winer v Garcia* (1908) 25 SC 576 at 583, 589 (see also *Bhika v Minister of Justice* 1965 (4) SA 399 (W)) the bona fides of the defendant led to a reduction in the amount of satisfaction; cf *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 773, where the actions of the police were described as 'misguided but well-intentioned', and *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) at 132: 'I would mention, because it is relevant to the *quantum* of damages, that it was not suggested by plaintiff that [the] officials acted with malice or vindictiveness towards him. Nor could it have been. It was clear to me that there was no hostility towards plaintiff; on the contrary he was shown courtesy and consideration ... .'

[416] In *Stapelberg v Afdelingsraad van die Kaap* 1988 (4) SA 875 (C) the plaintiff, an attorney on his honeymoon, was wrongfully arrested, assaulted and insulted by a traffic inspector and eventually detained for three hours. The court (at 877–8) inter alia mentioned that the plaintiff felt extremely humiliated, that he was worried about his wife and was very much disturbed because all these things happened on the first day of his honeymoon. He cried three times, once in his wife's presence. The conduct against the plaintiff was cruel and malicious. He was seriously wronged in a manner that he will possibly never forget. The court thereupon awarded R10 000 (the plaintiff argued that satisfaction of between R9 000 and R11 000 would be appropriate; the defendant suggested R2 500 at the most). See also *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 773: 'The police were heavy-handed, abrasive and intimidatory. Therein lies their moral blameworthiness ... . Plaintiff was treated in a high-handed and undignified manner. He was greatly inconvenienced, being denied sleep for over 24 hours in consequence. He experienced a certain amount of mental anguish at the fact of the arrest and implications of the threats. He was generally demeaned and specifically insulted, being labelled a crook and a fraudster. The whole saga had the effect, not unintended, of severely bruising plaintiff's personal feelings and demeaning his personal and professional pride and integrity in the presence of others, including clients'; *Minister of Safety and Security v Tyulu* 2009 (5) SA

85 (SCA) at 93 (plaintiff manhandled and dragged into police vehicle); *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) at 573–6 (police treated plaintiff, a paraplegic, in inhuman and degrading manner by ignoring his disability and transporting him in back of open van handcuffed and seated on the floor, by handcuffing and chaining him to his bed whilst in intensive care unit, and by detaining him in police cells in inhumane conditions); *Tödt v Ipser* 1993 (3) SA 577 (A) at 590 (respondent grossly negligent) (cf Labuschagne 1994 *THRHR* 341); *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E) at 441 (plaintiff assaulted).

[417] *Stapelberg v Afdelingsraad van die Kaap* 1988 (4) SA 875 (C) at 877; *Goldschagg v Minister van Polisie* 1979 (3) SA 1284 (T) at 1303; *Minister van Wet en Orde v Van der Heever* 1982 (4) SA 16 (C) at 22; *Mokomberedze v Minister of State (Security)* 1986 (4) SA 267 (ZH). As to the nature of the deprivation of liberty, the court stated in *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) at 132: 'Clearly the most serious aspect of the unlawful treatment to which plaintiff was subjected was the prolonged period of effective solitary confinement ... . The effects on plaintiff were devastating', and at 136: 'I intend to make an award of one lump sum [R50 000]. By far the major component of plaintiff's damages relates to the fact of his segregation. The other factors in respect whereof I have found in plaintiff's favour really constitute circumstances which aggravated the solitariness of plaintiff's situation ... . I am satisfied that plaintiff has endured ... a deprivation of his rights, impairment of his dignity, mental anguish, discomfort and humiliation and has suffered *contumelia,* all to a substantial degree.' In *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E) at 440 the plaintiffs were wrongfully detained for 144 days. The court awarded each plaintiff R40 000 for wrongful arrest and detention. See further *Tobani v Minister of Correctional Services* [2000] 2 All SA 318 (SE) at 326 (see also [2001] All SA 370 (E) for dismissal of appeal); *Manase v Minister of Safety and Security* 2003 (1) SA 567 (Ck) at 578. In *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) at 102–3 the court stressed that the humiliating conditions to which the plaintiffs were subjected merited substantial damages. During their detention of four nights and three days, they were, inter alia, subjected to extremely unhygienic conditions; their cell was not cleaned and infested with cockroaches; the blankets were dirty and insect-ridden; the shower was broken and they were unable to wash; they had no access to drinking water; the first plaintiff, who suffered from diabetes, was without medication; and they were not allowed to receive any visitors. The first plaintiff suffered additional hardship after his arrest for sedition and detention for a further two nights and one day. For the arrest and detention of the plaintiffs in respect of an alleged illegal gathering, the court awarded R100 000 to each plaintiff (as claimed). In respect of the claim for malicious prosecution (see para 15.3.11) R50 000 damages claimed by each appellant was considered to be appropriate. As regards the first plaintiff's claim for unlawful arrest and detention for sedition, the court awarded R50 000. (Cf Neethling & Potgieter 2009 *Annual Survey* 827–8.) In *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) the plaintiff sustained three gunshot wounds which rendered him a paraplegic and caused urinary and faecal incontinence during a robbery preceding his unlawful arrest. He was unlawfully detained for 125 days in two hospitals and 43 days police cells in humiliating and degrading conditions. He was also deprived of his right to have proper contact with visitors. The court awarded R750 per day for the period in hospital and R5 000 per day for the detention in the police cells (a total of R308 750).

[418] In *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) the plaintiff was a magistrate. The court pointed out (at 93) that he was a man of considerable standing in the community and must have been caused serious embarrassment, humiliation and shock by the wrongful arrest, with concomitant mental anguish and stress (R15 000 awarded). The plaintiff in *Manase v Minister of Safety and Security* 2003 (1) SA 567 (Ck) was a 65-year-old businessman who was detained for 49 days and who lost the esteem of both his village and his business associates. The court pointed out how traumatic the arrest and detention had been to the plaintiff and how damaging to his position in his small village (R90 000 awarded for wrongful arrest and detention and R10 000 for malicious prosecution). In *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) the plaintiff, a paraplegic with urinary and faecal incontinence, was unlawfully detained without any regard to his physical condition (see n 417 for more details). Balton J (at 576) stated: 'Whilst the plaintiff does not fit the profile of a successful businessman or person of recognized status ... I am of the view that the plaintiff's physical condition puts him in an equal if not higher footing than the persons referred to', and: 'The failure of the police to provide special care for a physically disabled person plays a pivotal role in the determination of the award.' See also *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 849; *Minister van Wet en Orde v Van der Heever* 1982 (4) SA 16 (C) at 22; *Makomberedze v Minister of State (Security)* 1986 (4) SA 267 (ZH); *Bentley v McPherson* 1999 (3) SA 854 (E) at 866.

[419] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 847–8; *May v Union Government* 1954 (3) SA 120 (N) at 130.

[420] *Donono v Minister of Prisons* 1973 (4) SA 259 (C) at 265; *Makhanya v Minister of Justice* 1965 (2) SA 488 (N) at 492; *Tödt v Ipser* 1993 (3) SA 577 (A) at 590.

[421] In *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 326 the SCA reviewed a number of previous cases and noted that there was no 'discernable pattern other than that our courts are not extravagant in compensating the loss' (cf Visser 2008 *THRHR* 173). In *Van Rensburg v The City of Johannesburg* [2008] 1 All SA 645 (W) at 653 the court, in assessing damages, took note of the statement in *Seymour* supra at 325 that the assessment of awards in previous cases is 'fraught with difficulty' but 'a useful guide to what other courts have considered to be appropriate in other cases but they have no higher value than that'. See also *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) at 572–3, 575 where many comparable cases were considered; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 847–8; *Thandani v Minister of Law and Order*1991 (1) SA 702 (E) at 707; *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 772–3; *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 860; *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 664–5; *Hofmeyr v Minister of Justice* 1992 (3) SA 108 (C) at 135; cf *Mthimkhulu v Minister of Law and Orde*r 1993 (3) SA 432 (E) at 440–1; *Moses v Minister of Law and Order* 1995 (2) SA 518 at 523–4; *Manase v Minister of Safety and Security* 2003 (1) SA 567 (Ck) at 578; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) at 102–3; *Mvu v Minister of Safety and Security* 2009 (6) SA 82 (GSJ) at 91–3.

[422] See on feelings of honour as additional personality interest, eg, *Donono v Minister of Prisons*1973 (4) SA 259 (C) at 265; *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 664; *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707; *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 860; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 847; *Makhanya v Minister of Justice* 1965 (2) SA 488 (N) at 492; *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 773 (if the contumelia, objectively viewed, forms part of the arrest, it is unnecessary to aver it specifically in the pleadings); and on the good name, eg, *Stapelberg v Afdelingsraad van die Kaap* 1988 (4) SA 875 (C) at 877; *Christie v Minister of Justice* 1958 (2) PH J20 (W); cf inter alia *Pinker v Gill* (1897) 7 CTR 252; *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V); *Manase v Minister of Safety and Security* 2003 (1) SA 567 (Ck) at 578–9. In *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) at 574 the court pointed out that the plaintiff was not afforded certain basic rights relating to dignity, freedom and security of the person and detained persons enshrined in ss 10, 12 and 35 of the Bill of Rights.

[423] *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 774: 'Liberty is a sacrosanct fundamental human right which must be meaningfully protected by the courts. A court must guard against trivialising a human rights breach involving liberty simply because it is categorised as civil. Like the criminal sanction for *plagium* the civil sanction under the *actio injuriarum* is *penal* in nature.' See also *May v Union Government* 1954 (3) SA 120 (N) at 130; *Thandani v Minister of Law and Order* 1991 (1) SA 702 (E) at 707; *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E) at 440; *Sibiya v The Minister of Safety and Security* [2008] 4 All SA 570 (N) at 576.

[424] *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 524.

[425] In *Tobani v Minister of Correctional Services* [2002] 2 All SA 318 (SE) at 326 (see also *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) at 137–8) the infringement of the plaintiff's right to freedom would not have lasted as long as it did if he had acted reasonably by responding to his name being called out in prison. Cf also *Tödt v Ipser* 1993 (3) SA 577 (A) where not only did the nature of the ordeal suffered by the plaintiff play a role, but also the extent to which she was the authoress of her misfortunes.

[426] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) at 326: 'It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection.' Midgley 2006 *Annual Survey*348 comments as follows: 'The need to bear in mind the effect an award would have on the public purse is a sound injunction, but hopefully, like the Supreme Court of Appeal did in *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 32, courts will not over-emphasise this aspect. Also welcome is the court's reminder, albeit obliquely, that a delictual claim is not ''a road to riches'' (see also *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590). A rights-based society, as ours has become, tends to encourage litigation and while it is important that infringements of rights should not go unnoticed, at the same time over-zealous litigation should be discouraged. Unlike the award of the court a quo, the Supreme Court of Appeal's assessment strikes a sound balance between the various interests involved.' See also *Olivier v Minister of Safety and Security*2009 (3) SA 434 (W) at 446.

[427] *Masawi v Chabata* 1991 (4) SA 764 (ZH) at 772: 'As regards *quantum*, it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings.' But see paras 9.4.4 and 15.3.2.4*(f)* for different views on the penal function or otherwise of the actio iniuriarum.

[428] *Law of Personality* 121–2.

[429] See in general Erasmus & Gauntlett 7 *LAWSA* para 101.

[430] See in general Neethling et al *Law of Personality* 184 et seq; Neethling & Potgieter *Delict* 345–6; Erasmus & Gauntlett 7 *LAWSA* para 103; McQuoid-Mason 15(2) *LAWSA* paras 358–60. Cf *Meevis v Sheriff, Pretoria East* 1999 (2) SA 389 (T); Neethling 1999 *THRHR* 636.

[431] Neethling et al *Law of Personality* 184.

[432] *Law of Personality* 187–8.

[433] Cf *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 (2) SA 373 (O) at 383–5.

[434] Cf *Smith and Lardner-Burke v Wonesayi* 1972 (3) SA 289 (RA) at 294; *Hart v Cohen* (1899) 16 SC 363 at 368.

[435] '[M]alicious attachment of property will frequently carry with it an infringement of the plaintiff's reputation or dignity, or both' (*Le Roux v Dey* 2011 (3) SA 274 (CC) at 320).

[436] Neethling et al *Law of Personality* 188 n 612 submit that in the case of wrongful attachment the presence of malice (although it is not a requirement for liability) is a factor which may lead to an increase in the amount of satisfaction. On the other hand, the fact that the plaintiff has acted bona fide can operate in mitigation of satisfaction (*Wade & Co v Union Government* 1938 CPD 84 at 88).

[437] *Van der Merwe v Turton and Juta* (1879) 1 Kotzé 155.

[438] Paras 15.3.2 and 15.3.3.

[439] See in general Neethling et al *Law of Personality* 171 et seq; Neethling & Potgieter *Delict* 343–5; McQuoid-Mason 15(2) *LAWSA* paras 333–6, 354 et seq.

[440] Neethling et al *Law of Personality* 183.

[441] Neethling et al *Law of Personality* 182 n 554 refer to inter alia the following authority: *Benjamin v Keet* (1887) 2 SAR 183 at 184 (infringement 'in his good name and character'); *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 851 ('the inevitable defamation, which was and is suffered as a result of the prosecution'); *Beukes v Raal* 1918 CPD 168 at 171; *Fyne v African Realty Trust Ltd* (1906) 20 EDC 248 at 258. See also *Relyant Trading (Pty) Ltd v Shongwe* [2007] 1 All SA 375 (SCA); *Minister of Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA); *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA). See on malicious civil proceedings *Moaki v Reckitt and Colman (Africa) Ltd* 1968 (3) SA 98 (A) at 104; *Barclays National Bank v Traub and Kalk* 1981 (4) SA 291 (W); *Puffet v Fennel and Austin* 1906 EDC 6; Neethling et al op cit 183–4; McKerron *Delict* 261.

[442] Neethling et al *Law of Personality* 182–3, who refer inter alia to *Law v Kin* 1966 (3) SA 480 (W) at 482, 483 (satisfaction for infringement of 'the liberty of the subject'); *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 860.

[443] Neethling et al *Law of Personality* 182 n 556, referring to inter alia *Fyne v African Realty Trust Ltd* (1906) 20 EDC 248 at 256 (the plaintiff had to suffer 'indignities'); *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 860; *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 851; *Banbury v Watson* 1911 CPD 449; *Mthimkhulu v Minister of Law and Order* 1993 (3) SA 432 (E) at 441 ('humiliation and indignity caused by the malicious prosecution'). See on malicious civil proceedings *Natal Land and Colonization Co Ltd v Schussler and Co Ltd* (1884) NLR 10 at 22–3, cited by Neethling et al op cit 184 n 580.

[444] *Law v Kin* 1966 (3) SA 480 (W) at 482–3 (false charge of robbery); *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 851 (where the court took into account 'that the charge against plaintiff was one for ritual murder for which he could have been sentenced to death'); Neethling et al *Law of Personality* 182–3.

[445] *Law v Kin* 1966 (3) SA 480 (W) at 482–3.

[446] *Law v Kin* 1966 (3) SA 480 (W) at 482.

[447] Ibid.

[448] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 851.

[449] *Ramakulukusha* supra at 845.

[450] *Ramakulukusha* supra at 851.

[451] *Beukes v Raal* 1918 CPD 168 at 172; Neethling et al *Law of Personality* 183.

[452] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 851; *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E) at 860; cf *Rudolph v Minister of Safety and Security*2009 (5) SA 94 (SCA) at 102–3.

[453] *Law v Kin* 1966 (3) SA 480 (W) at 482–3; Neethling et al *Law of Personality* 183 n 562, with reference to *Waterhouse v Shields* 1924 CPD 155 at 169; *Carne v Howe* (1898) 15 SC 232 at 236. However, in *Law v Kin* (supra at 483) the court declared with reference to claims for satisfaction: 'I regard the wrong and evil committed by defendants, in laying this serious charge, as a factor far outweighing the

considerations [inter alia that plaintiffs took the law into their own hands by assaulting the defendants] advanced by Mr. Melamet. In my opinion it is a wicked deed to prefer a false charge of robbery against any one . . . .'

[454] Para 5.6.1. See in general Visser *Kompensasie en Genoegdoening* 290; Neethling & Potgieter *Delict* 325–6; Loubser & Midgley (eds) *Delict* 407; *Raliphaswa v Mugivhi* [2008] 3 All SA 92 (SCA) at 97; *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC); *Brown v Hoffman* 1977 (2) SA 556 (NC); *Boswell v Minister of Police* 1978 (3) SA 268 (E); Neethling 1997 *THRHR* 705; *Mahomed v Silanda* 1993 (1) SA 59 (ZH).

[455] Naturally the actio legis Aquiliae is also available to recover patrimonial loss caused by an assault, eg medical expenses, loss of earnings, etc (see para 14.1 et seq). Sometimes a single amount of damages is awarded that includes damages for both patrimonial and non-patrimonial loss (cf *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP) at 2835–6; cf n 477 below).

[456] Cf para 15.2.2; *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190: 'The court is not bound by one or more method of calculating general damages, but has a wide discretion . . . .'

[457] See *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281–3; *GQ v Yedwa* 1996 (2) SA 437 (Tk) at 438; *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 525; *Radebe v Hough* 1949 (1) SA 380 (A) at 384. Neethling et al *Law of Personality* 108–9 point out that the term 'contumelia' should rather be understood in the sense of a *feeling of injustice* resulting from contempt for the body.

[458] In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 281–3.

[459] Neethling et al *Law of Personality* 109.

[460] Which diminishes the amount of satisfaction: Neethling et al *Law of Personality* 109.

[461] Which also has a diminishing effect: *Magqabi v Mafundityala* 1979 (4) SA 106 (E) at 110.

[462] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 847, 849–50. In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 283 the court took into account 'the tendency of the courts in recent years towards higher awards than in the past, expecially for *contumelia*'. Earlier, in *GQ v Yedwa* 1996 (2) SA 437 (TK) at 438, the judge, having consulted cases in which the plaintiffs were assaulted but did not suffer serious injury for guidance in determining the quantum of damages, remarked: 'When doing so, it once again struck me how small, and often insignificant, are the awards made by our courts for damages arising from personal injury and *contumelia* arising from assault. I can only add my voice to the suggestion, which has been made from time to time, that such awards be increased substantially.'

[463] See in general *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) (see n 466 below for the facts).

[464] *Ramakulukusha v Commander, Venda National Force* 1989 (2) SA 813 (V) at 850; *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 664; *Bennett v Minister of Police* 1980 (3) SA 24 (C) at 37; *Magqabi v Mafundityala* 1979 (4) SA 106 (E) at 110; *M v N* 1981 (1) SA 136 (Tk) at 138–9; *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) at 524–5.

[465] Neethling et al *Law of Personality* 109–10; Dendy 1986 *SALJ* 329–30.

[466] Para 15.2.4.1. In *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 188–91 the plaintiff, a school teacher, was bludgeoned with a hammer by a learner in the class in the presence of other learners. She sustained, inter alia, head wounds, two fractured bones in her wrist, a fracture of a bone between the wrist and the elbow, and a swollen left knee. She spent three days in hospital. She also suffered from chronic headaches. In addition, she suffered from post-traumatic stress disorder (PTSD), major depressive disorder and panic disorder with agoraphobia. The incident left her permanently scarred emotionally and psychologically. It had a crippling effect on her functioning in the social environment and she could no longer continue with her teaching career. As to the award for general damages the court concluded (at 190): 'Taking into consideration the nature, extent and duration of the physical injuries, the emotional, psychological and psychiatric sequelae, the pain, suffering and loss of amenities of life, I am of the view that an award of R350 000 would be eminently fair and equitable'. See also Neethling & Potgieter *Delict* 248; *Marshall v Southern Ins Ass Ltd*1950 (2) PH J6 (D) 14; *Radebe v Hough* 1949 (1) SA 380 (A); *Sandler v Wholesale Coal Suppliers Ltd*1941 AD 194.

[467] eg *Redelinghuys v Parity Ins Co Ltd* Corbett & Buchanan I 301, 302; *Mtshayi v Roxa* Corbett & Buchanan II 381, 384; *Harmsworth v Smith* 1928 NPD 174 at 182; *Kinnear v Transvaal Provincial Administration* 1928 TPD 133 at 144; para 15.2.4.1.

[468] eg *Robinson v Roseman* 1964 (1) SA 710 (T); *Harris v Federated Employers' Ins Co Ltd* Corbett & Buchanan II 817; para 15.2.2.1.

[469] *Gerke v Parity Ins Co Ltd* 1966 (3) SA 484 (W); *Milne v Shield Ins Co Ltd* 1969 (3) SA 352 (A) at 359; Visser *Kompensasie en Genoegdoening* 328–32; 1981 *THRHR* 120 et seq; paras 5.6.3, 15.2.4.1and 15.2.4.3.

[470] *Deysel v Santam Ins Co Ltd* Corbett & Buchanan I 483; *Mkize v South British Ins Co Ltd* 1948 (4) SA 33 (D); *Radebe v Hough* 1949 (1) SA 380 (A); para 15.2.4.1.

[471] *Gush v Pretoria Ass Co Ltd* Corbett & Buchanan II 348, 352; Visser *Kompensasie en Genoegdoening* 322–8; Buchanan 1959 *SALJ* 462; para 15.2.4.1.

[472] See, however, *GQ v Yedwa* 1996 (2) SA 437 (Tk) at 439. The plaintiff, a Xhosa man who had gone through circumcision rites and had been circumcised, was forcibly circumcised again by the defendants. The court awarded damages for pain and suffering as well as for contumelia (or insult). In determining the quantum of damages for insult, the court stated that three aspects exacerbated the plaintiff's humiliation: the nature of the assault (his trousers were removed, his legs forced apart and he was circumcised with a rusty spear), the imputation against his manhood (circumcision has great significance in Xhosa culture—it signifies the passing from boyhood to manhood—and by assaulting the plaintiff in this manner the defendants implied that he was not a man, but a charlatan and imposter who had not been circumcised), and the fact that the imputation that the plaintiff had not been circumcised resulted in his being held in contempt by his subordinates. See also para 15.3.3.

[473] 'It is . . . necessary to emphasise that an award for *contumelia* involving the invasion of bodily integrity is of a different kind from general damages ordinarily awarded in cases of bodily injury' (*April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 282). The court also underlined the differences in the types of loss suffered as a result of an assault by gunshots: 'In a case where a person is wrongfully shot and injured by the police there is a serious invasion of his person, his integrity, his dignity, and his sense of personal worth which is distinct from and in addition to physical, mental and psychological damage and their consequences which arise from bodily injury. It is given its own protection by the law of delict, and must be given its own redress.' See also Visser *Kompensasie en Genoegdoening* 290–1 and, eg, *GQ v Yedwa* 1996 (2) SA 437 (Tk) at 438–9 where the court awarded R5 000 for shock, pain and suffering and R10 000 for contumelia (insult) after the plaintiff had been forcibly circumcised by the defendants; *Radebe v Hough* 1949 (1) SA 380 (A) at 384–5; *Magqabi v Mafundityala*1979 (4) SA 106 (E) at 110; *Mabona v Minister of Law and Order* 1988 (2) SA 654 (SE) at 664; para 5.7.2.

[474] In *April v Minister of Safety and Security* [2008] 3 All SA 270 (SE) at 283 a single award of R110 000 was made for 'the combined effect of the physical, mental and psychological consequences of the plaintiff's injuries, and the need to bring in a substantial amount for a serious assault involving a high degree of *contumelia*' (the plaintiff was shot twice by the police). Although the court (at 281–2) distinguished clearly between the different kinds of loss, it concluded that such loss 'is nevertheless a consequence of one and the same wrongful act. It is perhaps better, therefore, to attempt a holistic process by which a single award of damages is made, provided that the importance of *contumelia* in its own right is not overlooked.' See also *Demosthenous v Poulos* Corbett & Honey G3–2 where a single award was made for contumelia and pain and suffering and *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC) at 190–1 where a single amount of R350 000 was awarded as 'general damages' for physical injuries, emotional, psychological and psychiatric sequelae and the pain, suffering and loss of amenities of life resulting from an assault with a hammer. See also para 5.7.2.

[475] 1997 (3) SA 786 (CC). See also Burchell *Personality Rights* 448, 461–75.

[476] 1994 (1) SA 862 (C) at 864. See further Labuschagne 1999 *Obiter* 427.

[477] With regard to sexual harassment, cf *Grobler v Naspers Bpk* 2004 (4) SA 220 (C) where R150 000 general damages was awarded for psychological harm due to sexual harassment that caused the plaintiff to change from a sparkling and friendly person to an emotional wreck whose role as woman and mother was almost destroyed. In *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 *ILJ* 2827 (GNP) at 2835–6 the plaintiff was awarded a single amount of R60 000 for both future medical expenses and psychiatric injury caused by sexual harassment at work.

PART IV PROCEDURAL MATTERS, COSTS ETC, AND PRIVATE INTERNATIONAL LAW

Chapter 16:
Procedural matters, costs etc, and private international law

Chapter 16 PROCEDURAL MATTERS, COSTS ETC, AND PRIVATE INTERNATIONAL LAW

In this chapter the following issues are discussed: pleadings, onus of proof, appeals, costs, administration of damages awarded to minors, jurisdiction, international law and foreign judgments.

16.1 PLEADINGS [1]

16.1.1 Introduction

A claim for unliquidated damages is normally brought by means of an action and not on application. [2]

A plaintiff has to make the necessary averments in his or her pleadings to found a claim for damages and to prevent a successful exception being raised. [3] For an exception to be sustained, there must be prejudice. [4] A summons must contain

sufficient particulars to enable a defendant reasonably to assess the quantum thereof. [5] The parties may, of course, also reach an agreement on the quantum of damages. [6]

In a claim the actual amount of damages or satisfaction must be stated. [7] A court may not give judgment for an amount in excess of what has been claimed unless the pleadings were amended or the unclaimed amount has been fully canvassed before the court. [8]

If a defendant disputes the amount of a claim for damages, he or she specifically has to put it in issue in the plea. [9] Where a defendant acknowledges liability in his or her plea for a lower amount than that claimed by the plaintiff, the defendant does not have to give particulars in this regard and there is no onus on him or her. [10]

Where a plaintiff's claim rests on more than one cause of action, [11] he or she has to give sufficient particulars in regard to each cause of action. [12] In certain instances, a plaintiff may make an application to the court for the interim payment of damages. [13]

The formal requirements in pleadings should not be over-emphasized at the expense of the material aspects thereof. [14]

16.1.2 Pleading general and special damage [15]

Traditionally, a distinction is made between general and special damage. Since general damage is presumed, it may apparently be pleaded generally without furnishing precise particulars. [16] Furthermore, where there is a recognized measure of damages, particulars of damages claimed need not be given. [17] In the case of a contract between the parties where there is no general legal measure of damages, the plaintiff has to furnish particulars on the manner in which he or she calculates the damages claimed. [18]

Special damage must be specially pleaded and full particulars thereof must be supplied. [19] If delictual compensation is claimed for special damage, it should in appropriate cases be alleged that the damage can be attributed to the defendant

(for example, since it was reasonably foreseeable). [20] Where damages for special damage caused by breach of contract are claimed, it is necessary to allege that the damage was within the contemplation of the parties (or foreseen or foreseeable by them) at the time the contract was entered into and that it was made [21] on the basis of particular circumstances which render the defendant liable for the payment of damages. [22] A claim for damages other than the normal or legal measure constitutes special damages and it must be alleged and proved that it was within the contemplation of the parties (actually foreseen or foreseeable). [23] A failure to make the necessary allegations in a summons where special damages are claimed may lead to a successful exception or an application to have the claim struck out. [24]

A more modern approach to delictual damages is followed in *Bell en Van Niekerk v Oudebaaskraal (Edms) Bpk*. [25] The court interprets rule 18(10) of the Uniform Rules of Court [26] (in terms of which it is required of a plaintiff to set his damages out in a manner which will enable the defendant reasonably to assess the quantum thereof) as referring to general as well as special damage. It may thus now also be expected of a plaintiff to furnish some particulars of general damage. [27] However, it is not required that a plaintiff should reveal every detail of how he or she calculates the loss and places a value on every item—the defendant need only be informed of the value and nature of the claim against him or her. [28] It is expected of a defendant to make its own assessment of the damages [29] and therefore he or she has to be provided with sufficient detail. [30]

16.1.3 Pleading of damage caused by bodily injuries and death [31]

Here there is a combination of general and special damage. [32] Rule 18(10)–(12) of the Uniform Rules of Court contains the relevant provisions:

> (10) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for—
>
> *(a)*

medical costs and hospital and other similar expenses and how these costs and expenses are made up;

(b)

pain and suffering stating whether temporary or permanent and which injuries caused it;

(c)

disability in respect of—

(i)

the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);

(ii)

the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and

(d)

disfigurement, with a full description thereof and stating whether it is temporary or permanent.

(11) A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death.

(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.

It is imperative that the requirements of rule 18(10) be met, [33] particularly where the particulars were within the personal knowledge of the plaintiff, or when they could reasonably be ascertained by the plaintiff. [34]

Some shortcomings in this rule have already been outlined; [35] its predecessor was considered in some cases. [36]

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The wording of rules 6(9), (10) and (13) of the Magistrates' Court Rules is almost exactly the same as rules 18(10)–(12) of the Uniform Rules of Court.

16.1.4 Further principles

In addition to the general principles stated above, there are further rules on the pleading of damage in particular instances. [37] It is, for example, a defendant who has to plead that a plaintiff has not acted in accordance with its duty to mitigate damage, [38] that the principles of legal causation exclude compensation for some damage, [39] that a claim has prescribed, etc. [40]

It is up to a defendant to plead contributory negligence [41] if that is relevant. This does not imply that this defence should be pleaded specifically with an indication of the apportionment in accordance with each party's degree of fault. It must merely be placed in issue on the pleadings that the plaintiff was totally or partially to blame for his or her damage. [42]

Rule 11 of the Uniform Rules of Court makes provision for the consolidation of actions but not for the consolidation of issues. [43]

16.1.5 Amendment of claim for damages

In accordance with the general principles applicable to the amendment of pleadings, [44] a court will allow a plaintiff to increase the amount of his or her claim provided that any prejudice to the defendant can be remedied through appropriate

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orders as to postponement and costs. [45] If the amendment relates to the original cause of action, it is also irrelevant that the period of prescription has apparently expired, since

it concerns only the adjustment of the quantum of a claim in respect of which prescription has been interrupted. [46]

16.2 ONUS OF PROOF OF DAMAGE AND DAMAGES [47]

16.2.1 General

A plaintiff has to prove [48] on a balance of probabilities that he or she suffered damage, the extent of such damage and what amount of compensation he or she should be awarded in respect thereof. [49] Damage and damages are determined through the appropriate measure of loss as well as the particular circumstances of each case. A formalistic approach is eschewed [50] and the Appellate Division has stressed (with regard to certain claims) that a court is not obliged to adopt a particular method of assessment. [51] If a plaintiff has not proved his or her damage, the plaintiff is not entitled to allege that, since the defendant is in possession of the necessary documentation an 'inquiry as to damages' should be held so that the

damages which are found to be due to him or her may be paid. [52] In an application for the interim payment of damages [53] the standard of proof is not as high as it will be during the subsequent trial. [54]

Reference has already been made to the onus of proof in regard to prospective loss, [55] the rule on collateral benefits, [56] the duty to mitigate, [57] contributory negligence, [58] the operation of the market-price rule, [59] the reduction of a penalty stipulated for breach of contract [60] and reasonable cost of repair as a measure of damages. [61]

16.2.2 Proof on balance of probabilities

The normal (civil) standard of proof on a balance (preponderance) of probabilities usually applies in regard to proof of damage and damages. [62] This is, of course, the position in the High Court as well as magistrates' courts. [63] In prospective loss and loss of profit [64] there may be considerable uncertainty and speculation in assessing loss. In *De Klerk v ABSA Bank Ltd* [65] the Supreme Court of Appeal held that factual causation requires the establishment, on a balance of probability, of a causal link between the negligence and the loss, while quantification, where it depended on future uncertain events, is decided not on a balance of probability, but on the court's assessment of the chances of the risk eventuating. [66] To establish causation the plaintiff has to prove a real or substantial chance as opposed to a speculative one, after which the chance has to be evaluated as part of the assessment of the

quantum of damages, the range lying somewhere between what qualified as real or substantial on the one hand, and near certainty on the other. When assessing prospective loss, a court will not take account only of contingencies which have been proved on a balance of probabilities. [67]

Where damages are assessed with reference to the market value of something, [68]the plaintiff has to adduce evidence upon which market value may be determined. [69]

16.2.3 Damage and damages capable of precise calculation

In cases falling into this category, it is incumbent upon a plaintiff to produce sufficient evidence substantiating the exact amount of his or her damage. [70] Where a plaintiff has proved some patrimonial loss but there is insufficient evidence to enable (precise) assessment, the court may in some instances estimate damages on the best available evidence. [71] However, where evidence was in a general sense available to the plaintiff but he or she has failed to produce it, the court will not attempt to assess the plaintiff's loss and will order absolution from the instance. [72] It

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is not the task of a court to award an arbitrary amount of damages where a plaintiff has not produced the best evidence upon which a proper assessment of the loss could have been made. [73]

16.2.4 Patrimonial loss not capable of precise calculation

Patrimonial loss is not always easily quantifiable. This is, for example, the position in (prospective) damage caused by a loss of earning capacity, [74] loss of support, [75]damage as a result of unlawful competition, [76] infringement of copyright or a right to a patent, [77] and loss of management time. [78] If it is clear that patrimonial loss was suffered, the court has to compute damages on the available evidence and a plaintiff should not be non-suited because there is uncertainty on the precise extent of his or her loss. [79] If there is no better way, a court may even base its assessment of

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damages on an 'informed guess' [80] or a 'rough estimate'. [81] Even in this type of case a plaintiff has to produce the best available evidence, even if such evidence does not remove all uncertainties. [82] Where the plaintiff has proved his or her basic claim, it will not be expected of the plaintiff also to prove every conceivable subsidiary aspect not placed in issue. [83] However, the court will not speculate on damages if there is no factual evidence. [84] In some forms of pecuniary loss, for example loss of earning capacity and loss of support [85] exact quantification is in any event impossible and if a plaintiff has failed to produce all available evidence but sufficient evidence upon which an assessment which is not unfair to the defendant may be made, the court will make an estimate on the basis of such evidence. [86] In such cases a plaintiff may find that the court estimates damages conservatively, resulting in the plaintiff being

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under-compensated. [87] In *Singh v Ebrahim (1)* [88] the court held that the provisions of s 28(2) of the Constitution [89] do not call for a more benevolent interpretation of the law because the plaintiffs are minors.

16.2.5 Non-patrimonial loss

In cases of non-patrimonial loss (injury to personality) where satisfaction or damages are claimed with the actio iniuriarum [90] or the action for pain and suffering, [91] the extent of the loss cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification. An award of damages or satisfaction must still, of course, be based on the facts of the particular case and a plaintiff bears the onus of adducing sufficient factual information which will reasonably enable the court to make an appropriate and fair estimate of the loss. [92]

16.3 APPEAL AGAINST AWARD OF DAMAGES OR SATISFACTION

16.3.1 Basic principles

In a possible appeal against an award of damages the fact that actions for damages are often divided into two parts, namely the first part dealing with liability (the 'merits') and, secondly, the quantum of compensation, may be relevant. [93] Where a trial court non-suits a plaintiff on the merits, he or she may, of course, lodge an appeal. [94] Where a court decides on the merits in favour of the plaintiff, the

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defendant may at that stage appeal against such a finding. [95] Where the issues of liability and quantum have been separated [96] and a magistrates' court had made a finding on the issue of liability alone, such a finding is not appealable if the finding does not possess the characteristics of a final order. [97]

In some instances an appeal is unnecessary as regards an incorrect amount of damages since the trial court itself may rectify some errors if certain requirements are met. [98]

Erasmus and Gauntlett [99] provide the following summary of the principles governing an appeal: [100]

(a)

Where the amount of damages is capable of accurate calculation, the court of appeal will interfere if, on the evidence, it differs with the trial court on the exact amount of the award. [101]

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(b)

Where the assessment of the amount of damages is a matter of estimation rather than calculation, the trial court has wide discretion to award what it in the particular circumstances considers to be fair and adequate compensation. [102]

(c)

Where the amount of damages is a matter of estimation and discretion, the appeal court is generally slow to interfere with the award of the trial court—an appellate tribunal cannot simply substitute its own award for that of the trial court. However, once it has concluded that interference is justified in terms of the principles set out in *(d)* below, the appeal court is entitled *and obliged* to interfere. [103]

(d)

The appeal court will interfere with the award of the trial court—

(i)

where there has been an irregularity or a misdirection [by the court]. [104]This will be the case where, for example, the court failed to consider relevant circumstances or took into account irrelevant facts, [105] or where the court based a decision on totally inadequate evidence [106] or where the trial court incorrectly applied a contingency allowance [107] or where the trial court's determination of the amount of general damages was inflated due to court's view that courts regarded infringements on personal liberty

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as less serious in the past [108] or where the court gave incorrect instructions to the actuaries for the calculation of damages due. [109]

(ii)

where the appeal court is of the opinion that no sound basis exists for the award made by the trial court. [110] [This will, for example, be the case where there is some unusual degree of certainty that the estimate of the trial court is wrong. [111]

(iii)

where there is a substantial variation or a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made. [112] [The court of appeal makes its own assessment and compares it with that of the court a quo. If there appears to be a 'substantial variation' or a 'striking disparity', the appeal court will interfere.] [113]

16.3.2 Cross-appeal

Where one of the parties appeals against the quantum of an award of damages, the other party may lodge a cross-appeal and allege that the amount of compensation is too high or too low. The general rule is that a court of appeal may not increase the amount of damages if a plaintiff has not lodged a cross-appeal and that the amount also cannot be reduced unless the defendant has cross-appealed. [114]

Relevant in this regard is whether there the court a quo has made a substantive

order on a certain amount, or merely provided a reason for the court's order. [115] In, for example, *Kakamas Bestuursraad v Louw* [116] the trial court awarded damages under different heads and in an appeal the respondent, despite the absence of a cross-appeal, argued that one of the amounts awarded to him was incorrect. The court held as follows: [117]

> Here ... the trial Judge dealt with a number of items separately and totalled them to reach his award. There was no ground for holding that the itemisation was merely the provision of reasons for reaching the eventual conclusion.

In *Rondalia Ass Corp v Gonya* [118] this approach was confirmed. However, the court added that where a plaintiff asks only for a global amount of damages and the court, in calculating this amount, divides its investigation into separate parts, a court of appeal may, at the request of the respondent and despite the absence of a cross-appeal, interfere with the different amounts in answering the question whether the award is reasonable. [119]

16.3.3 'Apportionment of damages' in case of contributory negligence [120]

The assessment of the extent to which a plaintiff's compensation should be reduced in accordance with his or her negligence is obviously within the equitable discretion of a trial court. [121] A court of appeal will consequently not interfere with the exercise of such a discretion unless there was a misdirection or irregularity or unless the assessment of the court of appeal varies substantially from that of the court a quo. [122]

Where a plaintiff's amount of damages was reduced by a trial court on account of his or her contributory negligence and the defendant has appealed against the

quantum of damages, a plaintiff may, without having lodged a cross-appeal, [123] ask for the net amount awarded by the court a quo to be upheld (but not increase it) by eliminating the reduction. [124]

16.3.4 Contingencies

Since the applying of a contingency allowance is within the discretion of a court, [125] a court of appeal will interfere only if the requirements referred to above are met, for example, in connection with an irregularity. [126] In *AA Mutual Ins Ass Ltd v Van Jaarsveld (1)* [127] the Court of Appeal held that the respondent's working circumstances changed after the decision of the court a quo, and that these changes should be added as a further contingency in respect of his loss of future income. The possibility of promotion was not taken into account in the original calculation and it became relevant after the court a quo's decision. The court then held that these two additional contingencies, one to the advantage of the appellant and the other to the advantage of the respondent, should cancel each other out and therefore the amount awarded for this head of damage was not amended on appeal.

16.3.5 Powers of court of appeal

As a general rule, damages have to be determined by the trial court. [128] There are, however, circumstances in which it would be appropriate, just and convenient were an appellate tribunal to determine the damages. [129] Where a court of appeal is entitled to interfere with the award of the court a quo, the appeal court will

substitute its own calculation of damages. [130] If there was not sufficient evidence at the trial, the court of appeal will normally refuse to remit the matter for further evidence. [131] In exceptional instances the court may order the case to be reopened and remit it for further evidence. [132] If the court a quo has excluded relevant evidence from the process of quantification of damages and the court of appeal is of the opinion that such evidence should have been taken into account, it may remit the case or may itself quantify the loss. The court will follow the latter course only if there are special circumstances present. [133] Where the court of appeal has all the relevant evidence before it, it should not place undue emphasis on the pleadings, but should rather decide the case on the real issues canvassed during the course of the trial in the court a quo. [134] The raising of a new point of law which does not introduce any new matter into the case may be allowed by a court of appeal. [135]

16.4 COSTS

The general rule applies that a successful litigant in a claim for damages is entitled to his or her costs, [136] but a court exercises a judicial discretion in awarding costs. [137]A plaintiff who recovers damages remains entitled to his or her costs even though the plaintiff claimed much more than was actually awarded [138] unless there was an adequate tender or payment into court. [139] A plaintiff who claims an unreasonable or unrealistic amount of damages may find that the court will decline to award him or her costs. [140] However, regard must also be had to the nature of the plaintiff's claim. Where a court has wide discretion (for example, where the actio iniuriarum is instituted) [141] a plaintiff will not readily lose his or her costs due to a plus petitio since it may be difficult to estimate accurately in advance the amount which a court will probably award. [142]

If a plaintiff's claim is reduced because of his or her contributory negligence (where there is no counter-claim), the plaintiff is entitled to all his or her costs if the plaintiff recovers a substantial amount of damages. [143] There are different views on the correct approach where there is also a counter-claim. [144] In *Stolp v Du*

Plessis [145] the costs were apportioned in the same way as the damages. [146] In *Bhyat's Store v Van Rooyen* [147] all the costs were awarded to the party in whose favour a balance was found. However, this judgment has been criticized. [148] The degree of fault of the parties may be used as a yardstick to arrive at a just order as to costs. [149] It is not clear whether a right of recourse between joint wrongdoers [150] also includes the costs of litigation. [151]

It is also uncertain how costs are influenced by the reduction of a penalty amount stipulated in a contract. [152]

In a delictual claim where the issues of liability and quantum have been separated in terms of rule 33(4) of the Uniform Rules of Court, costs may be awarded against the defendant at the stage when the plaintiff succeeds on the issue of liability, and need not be reserved for determination of the court finalising the case. [153] Such an order includes costs relating exclusively to the merits, costs pertaining to both merits and quantum, but not costs relating exclusively to quantum. [154]

In *Carter v Haworth* [155] the court held that the appeal was premature. No order as to costs was made as the issue of appealability had not been anticipated by either party and had been raised mero motu by the court.

Instead of awarding exemplary damages, the courts in South Africa consider in appropriate cases the order of special or punitive costs to mark the courts' disapproval of the manner in which the defendant conducted his or her defence during the trial. [156] In considering a punitive costs order, a court should warn itself against using hindsight in assessing the conduct of a party. [157] Since organs of the state are not free to litigate as they please and have to behave honourably, an order de bonis propriis can even be given against employees of the state who have given instructions to the contrary (such as raising a spurious defence). [158]

Costs are granted on the High Court scale even if the award falls within the jurisdiction of the magistrates' court because of the importance attached to questions of unlawful arrest and detention. [159]

An appeal court will only interfere with a costs order where the trial court acted capriciously or on a wrong principle. [160]

16.5 ADMINISTRATION OF DAMAGES AWARDED TO MINOR PLAINTIFF [161]

Where damages have been awarded to a minor, courts have often made special orders designed to protect the minor's interests and to ensure that the damages are properly and safely administered for the benefit of the minor. [162] Thus damages

thave been frequently paid into the guardian's fund with appropriate directions to the master. [163] The court may also order the creation of a trust fund if it is desirable in the circumstances [164] or may appoint a curator even though a guardian is available. [165]

The court does not have the power to order that the damages of an adult person be paid to the master to be dispensed with under his or her control where the adult is unable to share in its management. [166]

16.6 JURISDICTION [167]

Here it is necessary to refer only briefly to some matters. As far as a magistrates' court is concerned, it should be noted that at present it has jurisdiction only up to an amount of R100 000 unless the parties consent in writing to a larger amount. [168]The jurisdiction of regional courts in this regard is from R100 000 to R300 000. [169]If

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a plaintiff reduces a claim to bring it within the limits of jurisdiction of a magistrates' court, any further reduction thereof on account of his or her contributory negligence is subtracted from the plaintiff's full claim and not from his or her reduced claim. [170]

Regarding jurisdiction in respect of persons, [171] the position is that a court inter alia has jurisdiction over certain persons only if the cause of action [172] arose wholly within the area of jurisdiction of the court. [173] In a delictual claim it means that the delict (act and damage) must have been committed there, [174] while in a claim based on contract the contract must have been entered into in such area and the breach of contract as well as the resultant damage should have occurred there. [175]

The jurisdiction of the High Court is limited territorially, [176] in other words, to persons and causes of action within its area of jurisdiction. The common law determines whether a court has jurisdiction in a particular matter. [177] Where a delict was committed within the court's area of jurisdiction, the court will have jurisdiction regarding such a claim. [178] The same applies where a contract was made within the court's area of jurisdiction or where substantial performance under it has taken place in such an area. [179] There is a difference of opinion on the question whether the court will have jurisdiction merely because breach of contract has occurred within its territory. [180] There is also a question as to the meaning of 'cause of action'. [181] If it refers to conduct which causes damage, breach of contract should be sufficient to found jurisdiction, but if it means the facta probanda of a claim, [182] it would be insufficient for jurisdiction. For High Court jurisdiction it is not required that the whole claim should have arisen within the court's territory. [183] The court in the territory where a contract was concluded will have jurisdiction in a claim for

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damages, irrespective of where the breach occurred. [184] If breach of contract is committed (followed by damage?) within a court's territory, such court should have jurisdiction. [185]

16.7 PRIVATE INTERNATIONAL LAW AND FOREIGN JUDGMENTS

As far as delict is concerned, it has been held in *Burchell v Anglin* [186] the lex loci delicti commissi is only to be used as a factor in a balancing test to decide which jurisdiction will have the most real or significant relationship with the delict and the parties. [187] If a foreign law has the most significant relationship, it can only be applied if it passes constitutional muster. The same legal system should be used to determine both the existence of damage and the quantum of damages. [188] It will, for example, be inappropriate to apply the lex loci delicti commissi to ascertain the merits of a claim while the lex fori is used in calculating the quantum of compensation, since there is usually a particular kind of interrelationship between these two issues.

In contractual damages the lex causae of a contract [189] should determine the existence of a claim for damages as well as its quantum. [190]

A foreign judgment is not directly enforceable in this country, but constitutes a cause of action and will be enforced by South African courts [191] provided that the

court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by South African law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); that the judgment is final and conclusive in its effect and has not become superannuated; that the recognition and enforcement of the judgment by South African courts would not be contrary to public policy; [192] that the judgment was not obtained by fraudulent means; that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978. Apart from the foregoing, South African courts will not go into the merits of the case adjudicated upon by the foreign court and will not attempt to review or set aside its findings of fact or law.

Where a foreign judgment is sought to be enforced locally, the foreign country's legal tender legislation, which determines the composition, denomination and, accordingly, the nominal value of the foreign money concerned (ie as contemplated in the principle of currency nominalism) must be recognized everywhere. As to such questions, therefore, the law of the currency applies. However, issues arising from the disarrangement of the real or functional value of money (ie the increase or reduction of purchasing power) and its effect on the quantum of a debt do not come within the ambit of the law of the currency. In whatever currency a debt is expressed, it is for the law governing the transaction from which the debt arises (for example in the case of a contractual debt for the law applicable to a contract) to determine whether and to what extent the debtor is liable, in the event of a depreciation of the currency, to make an additional payment to the creditor, by way of revalorization. [193]

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[1] See *Beck's Pleading* 64 et seq; Erasmus & Gauntlett 7 *LAWSA* para 106; *Atlas Versekeringsmpy Bpk v Jacobs* 1965 (1) PH F24 (O); *Rondalia Versekeringskorp van SA Bpk v Pretorius* 1967 (2) SA 649 (A); *Du Plessis Diamante v De Bruyn Broers* 1967 (3) SA 255 (GW); *Rondalia Versekeringskorp van SA Bpk v Mavundla* 1969 (2) SA 23 (N); *Cete v Standard & General Ins Co Ltd* 1973 (4) SA 349 (W); 1971 (1) PH F10 (W); *Strougar v Charlier* 1974 (1) SA 225 (W); *Turners Asbestos Products (Pvt) Ltd v G Straw & Son (Pvt) Ltd* 1974 (3) SA 286 (R); *National Union of SA Students v Meyer* 1973 (1) SA 363 (T); *Thonar v Union and SWA Ins Co Ltd* 1981 (3) SA 545 (W); *Sasol Industries v Electrical Repair Engineering* 1992 (4) SA 466 (W).

[2] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T); *Regal Trading Co (Pty) Ltd v Coetzee* 1956 (1) SA 766 (O); *Minister of Safety and Security v Howard* 2009 (5) SA 201 (GSJ) at 211. See also on default judgment for a liquid claim rule 31 of the Uniform Rules of Court; rule 12 of the Magistrates' Court Rules (including any cause of action arising from or based on the National Credit Act 34 of 2005). See further *Keppler v Basmotea* 1951 (2) SA 541 (T). Cf on summary judgment for a liquid amount rule 32 of the Uniform Rules of Court; rule 14 of the Magistrates' Court Rules. On a separate trial to assess the quantum of damages, see *Cape Round Table No 9 v Hammerching* 1989 (2) PH F20 (C); *Cadac (Pty) Ltd v Weber Stephen Products* [2011] 2 All SA 343 (SCA) at 348–50; *Modder East Squatters v Modderklip Boerderye (Pty) Ltd*; *President of the RSA v Modderklip Boerdery (Pty) Ltd*2004 (6) SA 40 (SCA); para 1.2. See also s 300 of the Criminal Procedure Act 51 of 1977 on the award of damages in respect of damage to property in criminal proceedings; Hiemstra *Strafproses* 778 et seq; Van Heerden 1984 De Jure 192; *S v Liberty Shipping and Forwarding (Pty) Ltd* 1982 (4) SA 281 (D); para 13.13. Cf Kelbrick 1998 SA Merc LJ 145 on the procedure to obtain damages for the infringement of intellectual property rights.

[3] See, eg, rule 30 of the Uniform Rules of Court; rule 19 of the Magistrates' Court Rules; *Stephens v Lipener* 1938 WLD 30; *Graham v McGee* 1949 (4) SA 770 (D); *Ndamse v University College of Fort Hare*1966 (4) SA 137 (E); *Palmer v President Ins Co Ltd* 1967 (1) SA 673 (O) at 679; *Reivelo Leppa Trust v Kritzinger* [2007] 4 All SA 794 (SE) at 799: 'It is not a cause of action to allege that one of the elements

of the cause of action has not yet eventuated and may or may not occur in the future. Similarly, its quantification at that time must be estimated even though this may not be easy. When it comes to proof the court must do its best to put a figure to the quantum of the prospective loss once it is proved on a balance of probability, even if the evidence upon which to quantify it is scant. The plaintiff in this case has done no more than raise a possibility that he may suffer some form of undetermined harm, which he may be able to quantify as damages at a later stage. That is insufficient for a cause of action.'

[4] *De Klerk v De Klerk* 1986 (4) SA 424 (W); *SA Metropolitan Lewensversekeringsmpy Bpk v Louw*1981 (4) SA 329 (O); *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T); *Sasol Industries v Electrical Repair Engineering* 1992 (4) SA 466 (W) at 469. In *Sasol Industries* supra the court stated (at 470–1): '[I]f a pleading does not comply with the subrules of Rule 18 requiring specified particulars to be set out, prejudice has, *prima facie*, been established. Cases may well arise where a party would not be prejudiced by the failure to comply with these subrules, or where a pleader would be excused from providing the prescribed particularity because he is unable to do so. But in such cases the onus would in my view be on him to establish the facts excusing his non-compliance .... It is no answer for a plaintiff to say ... that the defendant has sufficient information to plead. If the defendant invokes rule 30 because he has not been given the information which the plaintiff is obliged to give him in terms of Rule 18(6), and if the plaintiff has not excused his non-compliance with the subrule, the Court should come to the defendant's assistance.'

[5] Rule 18 of the Uniform Rules of Court; rule 6 of the Magistrates' Court Rules; para 16.1.3. See *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T) at 717 in terms of which a defendant should be placed in the position to reasonably assess the quantum of damages claimed in that 'there shall be sufficient particularity to convey to the defendant the ground, or where there are more, the grounds upon which the claim is based, so that he may be able to decide whether he has a good defence to a whole or a portion of the claim, and if not whether he ought to make a tender. For the purpose of making a tender he is entitled to "know the true nature of the claim against him" '. See further *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O); *Trope v South African Reserve Bank* 1992 (3) SA 208 (T); *Grindrod (Pty) Ltd v Delport* 1997 (1) SA 342 (W); *Ex parte Hendrikse: In re Louw* 1993 (3) SA 227 (C); *Sasol Industries v Electrical Repair Engineering* 1992 (4) SA 466 (W); *Rondalia Versekeringskorp van SA Bpk v Mavundla* 1969 (2) SA 23 (N) at 25–8; *Coop v Motor Union Ins Co Ltd* 1959 (4) SA 273 (W) at 276. Cf *Harvey Tiling Co v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 328 and para 13.6 on an 'enquiry as to damages'.

[6] Cf, eg, *Sekgota v SAR & H*; *Ramotseo v SAR & H* 1974 (3) SA 309 (A) at 311.

[7] eg *Abdurahaman v Argus Printing Co* 1906 SC 197; *Singh v Vorkel* 1947 (3) SA 400 (C).

[8] *Martin v Zuluzweni* 1907 CTR 425; *New African Ice Co Ltd v Becker* 1906 TS 889; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Middleton v Carr* 1949 (2) SA 374 (A); *Rondalia Versekeringskorp van SA Bpk v Pretorius* 1967 (2) SA 649 (A) at 657. Cf also *Nanile v Minister of Posts & Telecommunications* Corbett & Honey A4–42: 'In view of the Court's findings, plaintiff it seems has underestimated the damages arising from loss of earning capacity (R60 000 claimed as against R90 000 proven) and overestimated the other non-pecuniary damages (R50 000 claimed as against R35 000 proven). Both are components of general damages, in respect of which plaintiff has proven the total amount claimed, viz. R110 000. The fact that the amount was differently compounded in the particulars of claim, does not disentitle plaintiff to judgment in the full amount.' See, however, *Chaza v Commissioner of Police* Corbett & Honey A3–18 where the court was disinclined to award damages in excess of the amount claimed in the absence of an amendment of the plaintiff's pleadings. Cf also *Mayse v Noordhof* 1992 (4) SA 233 (C) at 251.

[9] See, eg, *Hayes v Van Rensburg* 1964 (2) SA 641 (C). Cf also *Botha v Van Zyl* 1955 (3) SA 310 (SWA).

[10] See *Turner's Asbestos Products (Pvt) Ltd v Straw & Son (Pvt) Ltd* 1974 (3) SA 286 (R).

[11] See para 7.4 on a cause of action; para 11.9 on concurrence of actions.

[12] See, eg, *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) on the contractual and delictual elements in an action based on breach of promise. The court (at 36) held: '[A]lthough the modern action for breach of promise is a composite one, combining both contractual and delictual elements, as a general rule these elements should be clearly separated in the pleadings and in the assessment of damages so as to avoid confusion.' See also *Hickman v Cape Jewish Orphanage* 1936 CPD 548; *Jockie v Meyer* 1945 AD 354; *Klopper v Volkskas Bpk* 1964 (2) SA 421 (T); *Ndamse v University College of Fort Hare* 1966 (4) SA 137 (E). Cf further Hosten 1960 *THRHR* 263. A pleading will be excipiable if it is not clear whether the claim is based on delict or on contract: *Brodovsky v Ackerman* 1913 CPD 996; *Wellworths Bazaars v Chandlers Ltd* 1948 (3) SA 348 (W); *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C); *Gerber v Naude* 1971 (3) SA 55 (T); *Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 (4) SA 238 (R).

See *Beck's Pleading* 35 et seq on the joinder of claims based on different causes of action.

[13] Rule 34A of the Uniform Rules of Court. In terms of rule 34A(4) a court has a discretion to direct an interim payment of damages (*Karpakis v Mutual & Federal Insurance Co Ltd* 1991 (3) SA 489 (O) at 498). See *Van Wyk v Santam* 1997 (2) SA 544 (O) at 547 on the documentation to be annexed to an application for interim payment of damages in terms of rule 34A(2), the standard of proof and the quantum of evidence required; cf para 16.2.1. See also the equivalent rule 18A of the Magistrates' Court Rules.

[14] See, eg, *SA Onderlinge Brand- en Algemene Versekeringsmpy Bpk v Van den Berg* 1976 (1) SA 602 (A) at 607 (on the right of recourse of a joint wrongdoer).

[15] See on this para 3.4.4. See also Norman *Sale* 247–56 on general damage and 256–62 on special damage. See *Van Gool v Guardian National Ins Co Ltd* 1992 (4) SA 61 (A).

[16] See, eg, *Oosthuizen v Thompson & Son* 1919 TPD 124 at 131; *Brown v Bloemfontein Municipality*1924 OPD 226; *Israel v Louverdis* 1942 WLD 160 at 166; *Graaff v Speedy Transport* 1944 TPD 236; *Getz v Pahlavi* 1943 WLD 142; *Reid v Royal Ins Co Ltd* 1951 (1) SA 713 (T); *The Citizen (Pvt) Ltd v The Art Printing Works Ltd* 1957 (3) SA 382 (SR); *Coop v Motor Union Ins Co Ltd* 1959 (4) SA 273 (W); *Du Plessis Diamante v De Bruyn Bros* 1967 (3) SA 255 (GW); *Durban Picture Frame Co (Pty) Ltd v Jeena*1976 (1) SA 329 (D) (on loss of profit caused by breach of a contract of lease). However, in a claim for delictual damages for personal injuries, the plaintiff has to indicate how much is being claimed in respect of each of the various categories of damage (see para 16.1.3).

[17] *Margau v King* 1948 (1) SA 124 (W); *Barnett v Cameron* 1930 WLD 7.

[18] *Thompson v Barclays Bank DCO* 1969 (2) SA 160 (W); *Margau v King* 1948 (1) SA 124 (W).

[19] See on delictual damages: *Philip v Metropolitan and Suburban Railway Co* 1893 SC 52; *Davis v Johnson* 1902 NLR 319; *New African Ice Co v Becker* 1906 TS 889; *Trust Bank v Marques* 1968 (2) SA 796 (T). See on contractual damages: *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 at 162; *Bower v Sparks, Young and Farmer's Meat Industries Ltd* 1936 NPD 1 at 13; *Whitfield v Phillips* 1957 (3) SA 318 (A) at 329; *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 (1) SA 816 (W) at 819; *North and Son v Albertyn* 1962 (2) SA 212 (A) at 215; *Thompson v Barclays Bank DCO* 1969 (2) SA 160 (W). See further *Beck's Pleading* 63.

[20] See para 11.5.3 on legal causation.

[21] See para 11.5.5.2 on the convention principle, which may in future be abolished.

[22] See para 11.5.5.2; *Lavery & Co v Jungheinrich* 1931 AD 156 at 172; *North and Son v Albertyn*1962 (2) SA 212 (A) at 215; *Saffer Clothing Industries (Pty) Ltd v Worcester Textiles (Pty) Ltd* 1965 (2) SA 424 (C) at 429–30.

[23] Erasmus & Gauntlett 7 *LAWSA* para 107; *Desmond Isaac Agencies (Pty) Ltd v Contemporary Displays* 1971 (3) SA 286 (T).

[24] See Erasmus & Gauntlett 7 *LAWSA* para 107; *Saffer Clothing Industries (Pty) Ltd v Worcester Textiles (Pty) Ltd* 1965 (2) SA 424 (C) at 429.

[25] 1985 (1) SA 127 (C).

[26] See also para 16.1.3; rule 6(9) of the Magistrates' Court Rules.

[27] See *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 957–8 (plaintiff required, in terms of rule 18(10) of the Uniform Rules of Court, to state how much was being claimed for each of the various categories of damage (eg loss of earning capacity, pain and suffering, disfigurement, loss of amenities of life and permanent disability); *Ex parte Hendrikse: In re Louw* 1993 (3) SA 227 (C) at 229; cf para 16.1.3.

[28] *Bell en Van Niekerk v Oudebaaskraal (Edms) Bpk* 1985 (1) SA 127 (C) at 130. See also *SA Mutual Fire and General Ins Co Ltd v Alberts* 1976 (3) SA 612 (SE) at 614: 'As appears from the case of *Cete v Standard and General Insurance Co. Ltd*. 1973 (4) SA 349 (T), a defendant cannot expect in all cases to be placed in the position where it will be enabled to assess the plaintiff's damages with meticulous accuracy nor is it entitled to a preview of the evidence which the plaintiff intends to lead.' See further *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 952–3; *Simmonds v White* 1980 (1) SA 755 (C).

[29] See, eg, *Cete v Standard and General Ins Co Ltd* 1973 (4) SA 349 (T) at 354: 'Although these Rules require the plaintiff to plead the details of his claim ... that does not mean that a defendant is entitled to sit back and say to a plaintiff, "I want to assess your damage, therefore you must supply me with all the information I need. I am not going to make any enquiries, everything must be supplied by you." That is not the intention of the Rules. A defendant himself has to prepare his case and undertake his own investigation.'

[30] *Bell en Van Niekerk v Oudebaaskraal (Edms) Bpk* 1985 (1) SA 127 (C) at 131; *Rondalia Versekeringskorp van SA Bpk v Mavundla* 1969 (2) SA 23 (N) at 28–9; *Thompson v Barclays Bank DCO*1965 (1) SA 365 (W); *SA Mutual Fire & General Ins Co Ltd v Alberts* 1976 (3) SA 612 (SE) at 613–14. See also *Selepe v Santam* 1977 (2) SA 1025 (D); *Motaung v Federated Employer's Ins Co Ltd* 1980 (4) SA 274

(W) on an application for further particulars (which may at present be requested only for purposes of trial) in order to make a tender. See further *Cape Diving and Salvage (Pty) Ltd v Viljoen*1979 (1) SA 871 (C); *SAR & H v Deal Enterprises (Pty) Ltd* 1975 (3) SA 944 (W).

[31] See on this para 14.2 et seq.

[32] See Boberg *Delict* 536–7; cf the cases in n 30 above.

[33] *Minister van Wet en Orde v Jacobs* 1999 (1) SA 944 (O) at 954, 957–8. The provisions of rules 18(12) and 30 enable the defendant to apply for a pleading to be set aside if the required particulars were not furnished. The necessity of meeting the requirements of Rule 18(10) is further supported by the fact that it is no longer possible to supplement an incomplete or defective statement by a request for and supply of further particulars (ibid 954).

[34] Ibid.

[35] Para 14.2 et seq.

[36] Cf, eg, *Du Plessis Diamante v De Bruyn Bros* 1967 (3) SA 255 (GW); *Rondalia Versekeringskorp van SA Bpk v Mavundla* 1969 (2) SA 23 (N); *Cete v Standard & General Ins Co Ltd* 1973 (4) SA 349 (W); *Van Tonder v Western Credit Ltd* 1966 (1) SA 189 (C); *Rondalia Versekeringskorp van SA Bpk v Ongevallekommissaris* 1968 (4) SA 755 (N); *Thonar v Union and SWA Ins Co Ltd* 1981 (3) SA 545 (W); *Strougar v Charlier* 1974 (1) SA 225 (W) (where it was held that there could be no damages for loss of income up to the time of the trial where this was not been specially pleaded—damages for future loss of income could, however, be awarded).

[37] See, eg, on misrepresentation inducing contract *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T), on what a plaintiff has to allege initially on the assessment of his damage and what the defendant has to plead. See also s 2 of the Apportionment of Damages Act 34 of 1956 on recourse against a joint wrongdoer. See with regard to the enforcement of a credit agreement in terms of the National Credit Act 34 of 2005, Harms *Amler's Pleadings* 150–1; Boraine & Renke 2008 *De Jure* 9–11; rule 5(7) of the Magistrates' Court Rules. With regard to a claim for damages or loss in terms of the Consumer Protection Act 68 of 2008, see s 115(2) of the Act.

[38] Para 11.3; cf *Sentrachem v Wenhold* 1995 (4) SA 312 (A) at 327.

[39] Para 11.5.

[40] Para 11.11.

[41] Para 11.4.

[42] *AA Mutual Ins Ass Ltd v Nomeka* 1976 (3) SA 45 (A) at 55–6. See also *Sklar v Eagle Star Ins Co Ltd* 1958 (4) SA 460 (E); *Van Niekerk v Labuschagne* 1959 (3) SA 562 (E) (see also Swanepoel 1959 *THRHR* 271); *Van der Merwe v Fourie* 1959 (3) SA 568 (E); *Tonyela v SAR & H* 1960 (2) SA 68 (C); *Logiotis v Van Eyck* 1968 (3) SA 429 (E); *Bata Shoe Co Ltd (SA) v Moss* 1977 (4) SA 16 (W); *Van der Merwe & Olivier Onregmatige Daad* 166–7; Boberg *Delict* 672. See further *Ndaba v Purchase* 1991 (3) SA 640 (N) (here a plaintiff's contributory negligence was not sufficiently pleaded).

[43] In *Jacobs v Deetlefs Transport BK* 1994 (2) SA 313 (O) at 317, 320–1 the court found that, in two actions for damages based on the negligent causing of the same collision between two motor vehicles, the issues as to the cause of the collision and the apportionment of negligence, if any, could not be consolidated in terms of rule 11 of the Uniform Rules of Court, but that there was no objection to an order that the two actions be consolidated and that in terms of rule 33(4) it be ordered that the aforementioned issues be heard separately from the issue of the quantum of damages in the respective claims. See the corresponding rule 28 of the Magistrates' Court Rules. There is no similar rule for rule 33(4) in the Magistrates' Court Rules.

[44] 'It is trite law that the court has a discretion to allow or refuse an application for an amendment to the pleadings, but that it should generally allow an amendment unless it can be shown that such an amendment would cause such prejudice to the opposite party as cannot be remedied by an adjournment or an appropriate order as to costs' (*Arendse v RAF* [2002] 1 All SA 436 (C) at 440); see also *Zarug v Parvathie* 1962 (3) SA 872 (N); *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 (1) SA 398 (D) at 403 et seq.

[45] See, eg, *Swart v Provincial Ins Co Ltd* 1962 (1) SA 446 (E); 1963 (2) SA 630 (A); *Nonkwali v RAF*2009 (4) SA 333 (SCA) at 336–7; *Mntambo v RAF* 2008 (1) SA 313 (W) at 321; *Oosthuizen v RAF*unreported (258/2010) [2011] SASCA 118 (6 July 2011).

[46] See *Wigham v British Traders Ins Co Ltd* 1963 (3) SA 151 (W) at 152–3; *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 (1) SA 517 (W); para 7.5.4.4. See, however, *Richter v Capital Ass Co Ltd* 1963 (4) SA 901 (A): R claimed damages because of an accident in which he, his wife and children were involved. After completion of the period of prescription, R sought to amend his claim to sue on behalf of his youngest child. The court refused the application, since R attempted to introduce a new (prescribed) cause of action. See also *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A).

[47] See in general Erasmus & Gauntlett 7 *LAWSA* paras 110–16; Corbett & Buchanan I 98–100.

[48] See *Sekgota v SAR & H*; *Ramotseo v SAR & H* 1974 (3) SA 309 (A) regarding an agreement on the quantum of damages.

[49] *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 325–6; *Southern Sun Hotel Corporation (Pty) Ltd v G & W Leases CC* [1999] 1 All SA 497 (SCA) at 499; *Steenkamp v Juriaanse* 1907 TS 980 at 986; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 146; *Erasmus v Davis* 1969 (2) SA 1 (A) at 9; *Edwards v Hyde* 1903 TS 381 at 385–6; *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 446, 456–8; *Nochomowitz v Santam* 1972 (1) SA 718 (T) at 720–1; *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W); *Krugell v Shield Versekeringsmpy Bpk* 1982 (4) SA 95 (T) at 98–9; *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 916–17; *Nayende v Santam Ins Co* 1988 (1) PH J14 (SWA); *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 785; *Hersman v Shapiro & Co*1926 TPD 367 at 379–80; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 631–2; *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA); *Bid Financial Services (Pty) Ltd v Isaac* [2007] JOL 19125 (T) at 6–7, 9; *Prinsloo v RAF* 2009 (5) SA 406 (SE) at 413–16, 419. In *Terminus Centre CC v Henry Mansell (Pty) Ltd* [2007] 3 All SA 668 (C) at 673–4 it was held that the raising of the issue of mitigation implied a recognition that the other party did actually suffer loss.

[50] See, eg, *Monumental Art Co (Pty) Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C); *Bowman v Stanford* 1950 (2) SA 210 (D) at 222.

[51] See on claims by dependants (para 14.7.2) *General Accident Ins Co of SA Ltd v Summers* etc 1987 (3) SA 577 (A) at 609.

[52] Para 13.6; *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W). Cf *Sasol Industries v Electrical Repair Engineering* 1992 (4) SA 466 (W) at 470–1.

[53] In terms of rule 34A of the Uniform Rules of Court; para 16.1.1. See also rule 18A of the Magistrates' Court Rules.

[54] *Woolfson's Import and Export Enterprises CC v Uxolo Farms* 1995 (2) PH A–29 (A); *Van Wyk v Santam Bpk* 1997 (2) SA 544 (O) at 547. The court at this stage only has to make an interim assessment which can be amended at a later stage. The quantum of evidence required by the court will vary from case to case and according to the circumstances of each case. One of the considerations which will be weighty is the extent of facts in dispute as well as the nature of these facts.

[55] Para 6.7.2.

[56] Para 10.16.

[57] Para 11.3.5.

[58] Para 11.4.6.

[59] Para 12.7.2.1.

[60] Para 12.18.5.2 (also on proof of damage where there is a penalty stipulation).

[61] Para 13.1. See also Sharrock 1985 SALJ 620–1 on the proof of some issues in contractual damages; para 13.4.2 on damages in a case of misrepresentation inducing a contract.

[62] See *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 916; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 726. See further *Van der Westhuizen v Du Preez* 1928 TPD 45 at 49; *Ocean Accident & Guarantee Corp v Koch* 1963 (4) SA 147 (A); *Bonheim v South British Ins Co* Corbett & Buchanan I 544, 547; *Naidoo v Auto Protection Ins Co Ltd* 1963 (4) SA 798 (D); Corbett & Buchanan I 237, 239–40; *Faivelowitz v Auto Protection Ins Co Ltd* Corbett & Buchanan I 523; *Maasberg v Hunt*, Leuchars & Hepburn 1944 WLD 2 at 9.

[63] See *De la Rey's Transport (Edms) Bpk v Lewis* 1978 (1) SA 797 (A). See, however, *Paola v Hughes (Pty) Ltd* 1956 (2) SA 587 (N) at 596: '[I]t is notorious that, in the inferior courts, it is not expected that a party will prove such things as the quantum of damages with the same precision as is expected of a party in the Superior Courts.'

[64] Paras 4.4.2 and 6.4.

[65] 2003 (4) SA 315 (SCA) at 328–30.

[66] See also *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 535–6; *Schoombee v Marais* [2010] 2 All SA 184 (SCA); Combined *Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS* [2011] 1 All SA 10 (SCA) (no loss of future profit on breach of contract proved).

[67] Para 6.7.2. From *Burger v Union National South British Ins* 1975 (4) SA 72 (W) at 74 it appears that a court will not, where the evidence is incapable of removing all uncertainties on the quantum of damage, select from the range of possibilities presented by the evidence the possibility which is least favourable to the plaintiff because he or she bears the onus. Where, eg, a plaintiff who was injured may suffer from

osteoarthritis within 10 years, it is not practice to assume against him or her because the plaintiff bears the onus that he or she will be free of symptoms until 10 years have elapsed.

[68] Para 12.7.2.

[69] See *Monumental Art Co (Pty) Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 119; *Bid Financial Services (Pty) Ltd v Isaac* [2007] JOL 19125 (T) at 7. Mere proof of the cost of something without evidence linking it to the market price is never prima facie proof of market value. When quantifying damages for breach of contract, it is unnecessary to insist on expert evidence to establish market value in a foreign market where it would impose a prohibitively expensive burden of proof on the plaintiff (*Woolfson's Import and Export Enterprises CC v Uxolo Farms* 1995 (2) PH A29 (A)).

[70] See Erasmus & Gauntlett 7 *LAWSA* para 112; *Hersman v Shapiro* 1926 TPD 367 at 369; *Versveld v SA Citrus Farms Ltd* 1930 AD 452; *Erasmus v Davis* 1969 (2) SA 1 (A) at 22; *Aaron's Whale Rock Trust v Murray & Roberts Ltd* 1992 (1) SA 652 (C) at 655.

[71] See, eg, *Hersman v Shapiro* 1926 TPD 367 at 396; (cf, however, Morris Litigation 97, who warns: 'But this case should not induce a state of euphoria or a sense of security which may well turn out to be misplaced.') See further *Davies v Crossling* 1935 WLD 107; *Conradie v General Accident Co* 1951 (1) PH J4 (A); *Arendse v Maher* 1936 TPD 162; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 615; *Bhayroo v Van Aswegen* 1915 TPD 195 at 200; *Turkstra Ltd v Richards* 1926 TPD 276 at 282–3; *Prinsloo v Luipaardsvlei Estates & GM Co Ltd* 1933 WLD 6 at 23; *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 198; *Phil Morkel Ltd v Lawson & Kirk* 1955 (3) SA 249 (A) at 257–8; *Stolzenberg v Lurie* 1959 (2) SA 67 (W) at 75; *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451; *Ocean Lodge Estate (Pty) Ltd v Bodasing* 1967 (1) PH J17 (A); *Parity Ins Co Ltd v Van der Merwe* 1967 (1) PH J17 (A); *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A) at 113–14; *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 333.

[72] For the correct approach to an application for absolution from the instance, see *Gordon Lloyd Page & Associates v Rivera* 2001 (1) SA 88 (SCA) at 92–3; cf *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 323. See also *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 630; *Hersman v Shapiro*1926 TPD 367 at 369; *Heneke v Royal Ins Co Ltd* 1954 (4) SA 606 (A); *Kwele v Rondalia Ass Corp*Corbett & Buchanan II 555 at 559–61; *Monumental Art Co (Pty) Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118; *Enslin v Meyer* 1960 (4) SA 520 (T) at 523–4. See further *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 460; *Matyeka v Stoltz* 1983 (1) PH J9 (A); *Fordred (Pty) Ltd v Suidwes Lugdiens* 1983 (1) SA PH J21 (SWA). However, where the plaintiff has failed to produce all the evidence available to him or her, it remains the duty of the court, where the best available evidence has been produced, even if it is not entirely of a conclusive character, to assess damages in the best way possible on such evidence. Difficulty in determining what the sum should be should not tempt the court into granting absolution unless the difficulty is absolutely insurmountable (*Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) at 986–7). See, however, *Mqolomba v RAF* [2002] 4 All SA 214 (Tk) and the critical discussion thereof by Roederer & Grant 2002 Annual Survey 457–60.

[73] See the cases in n 72 above and also *Prinsloo v Luipaardsvlei Estates and GM Co Ltd* 1933 WLD 6 at 23; *Lazarus v Rand Steam Laundries* (1946) (Pty) Ltd 1952 (3) SA 49 (T) at 52: 'It may be said that the damage must be at least [R20] or [R10] or some lesser amount, and therefore there was a case for the defendant to meet, and absolution from the instance was not competent. In my view, however, if such a haphazard guess is permissible in the present case, it would be tantamount to saying that if a plaintiff proves that he has suffered damage but produces no evidence of the quantum at all, a Court would be bound to award an amount within the minimum quantum. Such a contention would in my judgment not be tenable, and is against authority.' See further *Odendaalsrust Gold, General Investments & Extensions Ltd v Naude* 1958 (1) SA 381 (T); *Lazarus v Rand Steam Laundries (1946) (Pty) Ltd* 1952 (3) SA 49 (T); *Enslin v Meyer* 1960 (4) SA 520 (T); *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W); *Monumental Art Co (Pty) Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118.

[74] Para 14.6. See also *Nayende v Santam* 1988 (1) PH J14 (SWA).

[75] Para 14.7.2.

[76] Para 13.6.

[77] Para 13.7. Cf *Kelbrick* 1998 SA Merc LJ 145.

[78] In *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 646 it was held that, in order to quantify the damages for loss of management time, 'there must be at least some evidence that the managers would have expended their time on one or other income-generating venture and that managing the consequences of the wrong was not simply dealt with within the ordinary course of their duties'.

[79] See, eg, *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 165 ('The principle applicable to the assessment of damages has as its ratio the policy that the wrongdoer should not escape liability merely because the damages he caused cannot be quantified readily or accurately. The underlying premise

upon which the principle rests is that the victim has, in fact, suffered damages and that the wrongdoer is liable to pay compensation or a solatium'); *Bhayroo v Van Aswegen* 1915 TPD 195 at 200; *Turkstra Ltd v Richards* 1926 TPD 276; *Rawles v Barnard* 1936 CPD 74; *Lampakis v Dimitri* 1937 TPD 138; *Pennefather v Gokul* 1960 (4) SA 42 (N); *Burger v Union National South British Ins* 1975 (4) SA 72 (W); *Mathee v Schietekat* 1959 (1) SA 344 (C) at 348; *Broderick Properties v Rood* 1964 (2) SA 310 (T) at 317; *Boyce v Bloem* 1960 (3) SA 855 (T) at 523; *Mtlane v SA Mutual Fire and General Ins Co Ltd* 1975 (1) PH J16 (N); *Wood v Santam* 1976 (2) PH J52 (C); *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451; *CCP Record Co (Pty) Ltd v Avalon Record Centre* 1989 (1) SA 445 (C) at 449; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 689–91; *Aaron's Whale Rock Trust v Murray & Roberts Ltd* 1992 (1) SA 652 (C) at 655: 'The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss'; *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 (SCA) at 330; *RAF v Maasdorp* [2004] 2 All SA 242 (NC) at 246–7; *Reivelo Leppa Trust v Kritzinger*[2007] 4 All SA 794 (SE) at 799.

[80] 'In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damages has been suffered, make an award of an arbitrary, globular amount of what seems to be fair and reasonable, even though the result may be no more than an informed guess' (*Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) at 546). See also *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A) at 113–14); *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd* 1997 (4) SA 399 (SCA) at 412 ('rough and ready method of the proverbial educated guess'); *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 724; *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A); *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 301–2; *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W).

[81] See *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 573: 'It has not been suggested that there is other evidence which first respondent should reasonably have placed before the Court. In my view, this is the type of case where the Court must do the best it can on the material available . . . . And in the nature of things the Court's assessment of the loss here cannot be more than a rough estimate.' See also *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 646–7: 'Due recognition must be given to the fact that it is extremely difficult to prove damages such as these [loss of management time] and that in assessing the sufficiency of evidence ''a fairly robust approach'' may be adopted (*Thompson v Scholtz* 1991 (1) SA 232 (SCA) at 249B).'

[82] *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 326; *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 333–5 '[O]ne should not be doctrinaire about what constitutes ''best evidence'' '(at 334); *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451; *Enslin v Meyer* 1960 (4) SA 520 (T) at 523–4; *Hersman v Shapiro & Co* 1926 TPD 367 at 379; *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 163–4; *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (A) at 631–2; *Arendse v Maher* 1936 TPD 162 at 165; *Odendaalsrust Gold General Investments and Extensions Ltd v Naude* 1958 (1) SA 381 (T); *Burger v Union National South British Ins Co* 1975 (4) SA 72 (W); *Esso Standard SA (Pty) Ltd v Katz*1981 (1) SA 964 (A) at 969–70. In the latter case it was said (at 970): 'Whether or not a plaintiff should be non-suited depends on whether he has adduced all the evidence reasonably available to him at the trial.' In casu the court was concerned with damages for petrol which had leaked from underground tanks. The plaintiff could not precisely prove when the leaking started, how much had leaked and at what price it could have been sold (due to fluctuations in the petrol price). The evidence which was produced was vague and contradictory in some respects but damages could be assessed according to a schedule of petrol sales and the average petrol price. If a plaintiff adduces more evidence, it may serve as the basis for a greater award of damages (*Strougar v Charlier* 1974 (1) SA 225 (W) at 229). See also *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 688–9.

[83] *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 327.

[84] *Monumental Art Co (Pty) Ltd v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118; *Revelas v Tobias* 1999 (2) SA 440 (W) at 444 (damages for past hospital expenses can be awarded only if there is adequate proof of the need for medical treatment and of the fairness of the amount claimed therefor; evidence not under oath or only in the form of a report not adequate).

[85] Paras 14.6 and 14.7.7.2.

[86] Erasmus & Gauntlett 7 *LAWSA* para 113; *Naidoo v Auto Protection Ins Co Ltd* 1963 (4) SA 798 (D); Corbett & Buchanan I 244–5; *Bondcrete (Pty) Ltd v City View Investments (Pty) Ltd* 1969 (1) SA 134 (N); *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274–5; *Marine and Trade Ins Co Ltd v Katz* Corbett & Buchanan III 1, 5; *Southern Ins Ass v Bailey* 1984 (1) SA 98 (A); *Kruger v Shield Ins Co* Corbett & Buchanan III 287, 294; *Mqolomba v RAF* [2002] 4 All SA 214 (Tk) at 224. Cf, eg, Corbett & Buchanan I 86 at 89, 99 for awards of damages in the absence of actuarial evidence.

[87] See *Arendse v Maher* 1936 TPD 162 at 165–6; *Strougar v Charlier* 1974 (1) SA 225 (W) at 229. On the other hand, in *De Klerk v ABSA Bank Ltd* 2003 (4) SA 315 (SCA) at 335 the court stated that if in the case of an unlawful negligent misstatement the court has to assess, 'with all the difficulties inherent in the exercise, the value of [the plaintiff's] lost opportunity to invest elsewhere, the Court should not be too astute to entertain dire and pessimistic speculations emanating from the defendants that the plaintiff may have been even worse off if he had not been culpably misled into making the investment which he did.' See also *Davies v Crossling* 1935 WLD 107 at 113–14, where, in a claim for loss of earning capacity, a plaintiff failed to produce satisfactory evidence on various issues. With the consent of the defendant, the matter was referred to arbitration in order for damages to be quantified. Cf *Singh v Ebrahim* (1) [2010] 3 All SA 187 (D) at 192: 'Even where it may be difficult to determine an appropriate amount of damages, it is still required of any court to attempt to determine a reasonable amount on the available evidence, not necessarily one which is less favourable to the plaintiff because the plaintiff carries the onus and did not prove that a more favourable possibility should find application .... Nevertheless, traditionally claims for damages in the past inclined towards conservatism and where there is doubt whether an amount has been proved on a balance, to favour the defendant.'

[88] [2010] 3 All SA 187 (D) at 196.

[89] Section 28(2): 'A child's best interests are of paramount importance in every matter concerning the child.'

[90] Para 15.3.

[91] Para 15.2.1.

[92] See, eg, *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199; *De Jongh v Du Pisanie* 2005 (5) SA 457 (SCA) at 474–5.

[93] See also rule 33(4) of the Uniform Rules of Court; *Braaf v Fedgen Insurance Ltd* 1995 (3) SA 938 (C) at 941 (despite the wording of rule 33(4), it remains axiomatic that the 'interests of expedition and finality' are better served by the disposal of the whole matter in one hearing). Application for post-judgment separation is not possible (see *Cooper v Syfrets Trust Ltd* 2001 (1) SA122 (SCA) at 134–5. There is no rule in the Magistrates' Court Rules that is similar to rule 33(4) of the Uniform Rules of Court.

[94] See, eg, *Benson v Robinson & Co (Pty) Ltd* 1967 (1) SA 420 (A); *Van der Linde v Calitz* 1967 (2) SA 239 (A). If, in such a case, the court a quo makes statements on the quantum of damages, the defendant cannot lodge a cross-appeal, since there is no order by the court (see *Ngubane v SA Transport Services* 1991 (1) SA 756 (A)).

[95] *SA Eagle Versekeringsmpy Bpk v Harford* 1992 (2) SA 786 (A).

[96] For example, in terms of rule 29(4) of the Magistrates' Court Rules: cf *Steenkamp v SA Broadcasting Corporation* 2002 (1) SA 625 (SCA) at 631.

[97] Ibid. See also *Durban Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (A); *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A); *Santam Bpk v Van Niekerk* 1998 (2) SA 342 (C); *Keet v De Klerk* 2000 (1) SA 927 (T). Cf, however, *Raubex Construction h/a Raumix v Armist Wholesalers (Pty) Ltd* 1998 (3) SA 116 (O).

[98] Rule 42 of the Uniform Rules of Court; *Goodal v President Ins Co Ltd* 1978 (1) SA 389 (W) at 395; *Seattle v Protea Ass Co Ltd* 1984 (2) SA 537 (C) at 541; *Firestone SA (Pty) Ltd v Gentiruco AG*1977 (4) SA 298 (A) at 307; *Rondalia Ass Corp of SA Ltd v Gonya* 1973 (2) SA 550 (A) at 556. See also *Koch Lost Income* 64–5. Where a lower court had pronounced itself finally of a substantial portion of the relief sought by the plaintiff in the main action, it would not be possible for such court to correct, alter or set aside its own order; only a court of appeal could do so (see *Molotlegi v Mokwalase* [2010] 4 All SA 258 (SCA) at 261–2). See also s 36(1) of the Magistrates' Court Act 32 of 1944.

[99] 7 *LAWSA* para 117. See also *Koch Lost Income* 66–8; Lee & Honoré Obligations 256–7.

[100] They base it on the following authorities: *Salzmann v Holmes* 1914 AD 471; *Hulley v Cox* 1923 AD 234 at 246; *Sutter v Brown* 1926 AD 155 at 171; *Black v Joseph* 1931 AD 132 at 145; *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 200; *Norton v Ginsberg* 1953 (4) SA 537 (A) at 551–2; *Els v Messenger of the Court, Durban* 1955 (4) SA 406 (N) at 409; *Doyle v Salgo* (2) 1958 (1) SA 41 (FC) at 42; *Frodsham v Aetna Ins Co* 1959 (2) SA 271 (A) at 282; *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 555; *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693; *Norwich Union Fire Ins Soc Ltd v Tutt* 1960 (4) SA 851 (A) at 853; *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 618; *Swart v Provincial Ins Co Ltd* 1963 (2) SA 630 (A) at 633; *Bruwer v Joubert* 1966 (3) SA 334 (A) at 338; *Parity Ins Co Ltd v Van den Bergh*1966 (4) SA 463 (A) at 479; *Marine and Trade Ins Co Ltd v Goliath* 1968 (4) SA 329 (A) at 334; *Union and National Ins Co Ltd v Coetzee* 1970 (1) SA 295 (A) at 299; *Legal and General Ass Society Ltd v Krause* 1970 (2) SA 545 (A) at 549; *Mair v General Accident Fire and Life Ass Corp Ltd* 1970 (3) SA 25 (RA) at 29; *Protea Ass Co Ltd v Lamb* 1971 (1) SA 530 (A) at 534; *Parsons v Cooney* 1971 (1) SA 165 (RA) at 171; *Khan v Khan* 1971

(2) SA 499 (RA); *Sekgota v SAR & H; Ramotseo v SAR & H* 1974 (3) SA 309 (A) at 314; *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 273; *AA Mutual Ins Ass Ltd v Maqula* 1978 (1) SA 805 (A) at 809; *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A); *Southern Insurance Association v Bailey* 1984 (1) SA 98 (A); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A); Administrator-General SWA v Kriel 1988 (3) SA 275 (A); Ngubane v SA Transport Services 1991 (1) SA 756 (A); President Insurance Co Ltd v Mathews 1992 (1) SA 1 (A); Jones v Krok 1995 (1) SA 677 (A); Zweni v Minister of Law & Order 1993 (1) SA 523 (A); Santam Bpk v Van Niekerk 1998 (2) SA 342 (C); Keet v De Klerk 2000 (1) SA 927 (T). See also Steenkamp v SA Broadcasting Corporation 2002 (1) SA 625 (SCA) at 631; Durban Water Wonderland (Pty) Ltd v Botha 1999 (1) SA 982 (A).

[101] See, eg, Administrator-General, SWA v Kriel 1988 (3) SA 275 (A) at 289; Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199; Doyle v Salgo 1958 (1) SA 41 (FC).

[102] See Commercial Union Ass Co of SA v Stanley 1973 (1) SA 699 (A) at 703, where the Appellate Division was of the opinion that the award by the trial court was on the high side but nevertheless declined to interfere. See also AA Onderlinge Assuransie Ass Bpk v Sodoms 1980 (3) SA 134 (A) at 142, where the trial court committed an error in using the consumer price index (see para 11.7.5) but it would have made a difference of only R300 and the Appellate Division left it at as it stood. See further Ned-Equity Ins v Cloete 1982 (1) SA 734 (A) at 739; President Ins Co Ltd v Mathews 1992 (1) SA 1 (A) at 8; Ngubane v SA Transport Services 1991 (1) SA 756 (A); RAF v Maasdorp [2004] 2 All SA 242 (NC) at 246–7; RAF v Delport 2006 (3) SA 172 (SCA).

[103] See, eg, Hulley v Cox 1923 AD 234 at 246; Gelb v Hawkins 1960 (3) SA 687 (A) at 693; Legal Ins v Botes 1963 (1) SA 608 (A) at 618; Swart v Provincial Ins Co Ltd 1963 (2) SA 630 (A) at 633; Legal and General Ins Society Ltd v Krause 1970 (2) SA 545 (A) at 549; Transnet Ltd t/a Metro Rail v Tshabalala [2006] 2 All SA 583 (SCA) at 586; Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 323; RAF v Van Rhyn [2007] 3 All SA 659 (E) at 665; RAF v Guedes 2006 (5) SA 583 (SCA) at 587; RAF v Delport 2006 (3) SA 172 (SCA) at 179–80; De Jongh v Du Pisanie 2005 (5) SA 457 (SCA) at 476–8. Dikoko v Mokhatla 2006 (6) SA 235 (CC) at 257, 262–3, 268; Visser 2006 THRHR 692 et seq; Midgley 2006 Annual Survey 310–11; Neethling & Potgieter 2007 Annual Survey 796–7.

[104] Mogale v Seima 2008 (5) SA 637 (SCA) at 640: 'A court of appeal may also interfere if the court of first instance materially misdirected itself and in this regard it is important for a court of second instance to know what factors a trial court took into account in determining the award, something conspicuously lacking in this case.' See also Administrator-General, SWA v Kriel 1988 (3) SA 275 (A) at 289: '[T]he trial Court materially misdirected itself'; RAF v Maasdorp [2004] 2 All SA 242 (NC) at 246–7; RAF v Delport 2006 (3) SA 172 (SCA) at 179; Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA); Tsedu v Lekota 2009 (4) SA 372 (SCA) at 379.

[105] In Le Roux v Dey 2011 (3) SA 274 (CC) at 322 the Constitutional Court reduced the lower courts' award of R45 000 for defamation and insult to R25 000 inter alia because the plaintiff's wounded feelings outweighed the loss of reputation, too little was made of the fact that the defendants were school children as well as the fact that they had already been subjected to other forms of punishment. See also Bruwer v Joubert 1966 (3) SA 334 (A) at 338.

[106] See Legal Ins Co Ltd v Botes 1963 (1) SA 608 (A) at 618 (differences on the marriage prospects of a widow); Swart v Provincial Ins Co Ltd 1963 (2) SA 630 (A) at 633 (unreasonable finding regarding the duty to mitigate loss); Minister van Veiligheid en Sekuriteit v Geldenhuys 2004 (1) SA 515 (SCA) at 536–7.

[107] See, eg, AA Mutual Ins Ass Ltd v Maqula 1978 (1) SA 805 (A) at 809; Southern Ins Ass v Bailey 1984 (1) SA 98 (A) at 117; Saayman v RAF [2011] 1 All SA 581 (SCA) at 584; RAF v Guedes 2006 (5) 583 (SCA) at 588.

[108] See, eg, Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 324.

[109] See, eg, Saayman v RAF [2011] 1 All SA 581 (SCA) at 584–5.

[110] Erasmus & Gauntlett 7 *LAWSA* para 117; see also RAF v Marunga 2003 (5) SA 164 (SCA) at 172 (the trial court failed to give adequate reasons or justification for its award); Visser 2004 THRHR 313–4; Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA) at 324 (the manner in which the trial court arrived at the present-day estimate of general damages was not expressed and it was difficult to see how the estimate was arrived at).

[111] See, eg, Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 200; Parity Ins Co Ltd v Van den Berg 1966 (4) SA 463 (A) at 479. See also Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A).

[112] Erasmus & Gauntlett 7 *LAWSA* para 117.

[113] See, eg, Mogale v Seima 2008 (5) SA 637 (SCA) at 640: 'The court of appeal usually considers what it would have awarded and if there is a palpable or manifest discrepancy between that amount and

that awarded by the trial court, it will interfere ... .' (R70 000 reduced to R12 000 by the SCA). See also Caxton Ltd v Reeva Forman (Pty) Ltd 1990 (3) SA 547 (A) at 575, where the court a quo awarded R250 000 and the Appellate Division only R150 000: 'The disparity between that figure and the amount awarded by the trial Judge is sufficient, in my view, to warrant interference by this Court.' In RAF v Marunga 2003 (5) SA 164 (SCA) the SCA reduced the trial court's award of R375 000 to R175 000 on the basis that there was a striking disparity between what it would award and what the trial court awarded (cf Roederer & Grant 2003 Annual Survey 363–4). See also Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 200; Parity Ins Co Ltd v Van den Berg 1966 (4) SA 463 (A) at 478; Southern Ins Ass v Bailey 1984 (1) SA 98 (A) at 120; Protea Ass Co Ltd v Lamb 1971 (1) SA 530 (A) at 535, 536–7; Van der Plaats v SA Mutual Fire and General Ins Co Ltd 1980 (3) SA 105 (A); De Jongh v Du Pisanie 2005 (5) SA 457 (SCA); RAF v Guedes 2006 (5) 583 (SCA) at 587; RAF v Delport 2006 (3) SA 172 (SCA) at 179–80; Dikoko v Mokhatla 2006 (6) SA 234 (CC); Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA); Mogale v Seima 2008 (5) SA 637 (SCA); Minister of Safety and Security v Tyulu 2009 (5) SA 85 (SCA); Saayman v RAF [2011] 1 All SA 581 (SCA) at 585.

[114] See in general Mufamadi v Dorbyl Finance (Pty) Ltd 1996 (1) SA 799 (A) at 803 (had plaintiffs cross-appealed, they would have been entitled to damages far in excess of the amount actually awarded by court a quo); Southern Sun Hotel Corporation (Pty) Ltd v G & W Leases CC [1999] 1 All SA 497 (SCA) at 501; South African Railways and Harbours v Sceuble 1976 (3) SA 791 (A) at 794; Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) at 692; Giliomee v Cilliers 1958 (3) SA 97 (A) at 100; Kakamas Bestuursraad v Louw 1960 (2) SA 202 (A) at 223; Van der Plaats v SA Mutual Fire and General Ins Co Ltd 1980 (3) SA 105 (A) at 117–8; Solomon v De Waal 1972 (1) SA 575 (A) at 586; Rondalia Ass Corp of SA Ltd v Gonya 1973 (2) SA 550 (A) at 557–8. See also Koch Lost Income 66. See further Ngubane v SA Transport Services 1991 (1) SA 756 (A).

[115] See, eg, Giliomee v Cilliers 1958 (3) SA 97 (A) at 100.

[116] 1960 (2) SA 202 (A) at 223.

[117] Supra at 223.

[118] 1973 (2) SA 550 (A) at 558.

[119] In casu it meant that, although the court could not increase the award of damages, it did not have to reduce it in view of some errors which had been made. See also Bay Passenger Transport Ltd v Franzen 1975 (1) SA 269 (A) at 278. In Van der Plaats v SA Mutual Fire and General Ins Co Ltd 1980 (3) SA 105 (A) at 118 the plaintiff claimed and received damages under various heads. The decision of the court on each of these heads served as a final order (and not merely as reasons for an order) and the court could not interfere in the absence of a cross-appeal. See also AA Onderlinge Ass Ass Bpk v Sodoms 1980 (3) SA 134 (A) at 142.

[120] Para 11.4.

[121] See, eg, South British Ins Co Ltd v Smit 1962 (3) SA 826 (A) at 837; Shield Ins Co Ltd v Theron 1973 (3) SA 515 (A) at 518.

[122] Frodsham v Aetna Ins Co 1959 (2) SA 271 (A) at 281; South British Ins Co Ltd v Smit 1962 (3) SA 826 (A) at 837; Prinsloo v Girardin 1962 (4) SA 391 (T); James v Fletcher 1973 (1) SA 687 (RA) at 691; Shield Ins Co Ltd v Theron 1973 (3) SA 515 (A) at 518; AA Mutual Ins Ass Ltd v Mallinick 1973 (4) SA 727 (A) at 733–4; Hoffman v SAS & H 1966 (1) SA 842 (A) at 854; Motor Insurer's Ass of SA v Boshoff 1970 (1) SA 489 (A) at 503; Santam v Swart 1987 (4) SA 816 (A) at 820; Transnet Ltd v Witter [2009] 1 All SA 164 (SCA) at 169. See further Boberg Delict 671.

[123] Para 16.3.2.

[124] Bay Passenger Transport Ltd v Franzen 1975 (1) SA 269 (A) at 278. See also Corbett & Buchanan I 101; Roxa v Mtshayi 1975 (3) SA 761 (A) at 770. A court can thus balance a too high reduction of a plaintiff's damages against another factor which tends to decrease the quantum of damages.

[125] Para 6.7.3.

[126] Para 16.3.1 See Steynberg Gebeurlikhede 341–50; Shield Ins Co Ltd v Booysen 1979 (3) SA 953 (A) at 965: '[T]his Court will not interfere with such determination by a trial Court and substitute its own estimates, unless the learned trial Judge misdirected himself in some material respect, or our own estimates and his are strikingly disparate, or we are otherwise firmly convinced that his estimates are wrong'; General Accident Ins Co SA Ltd v Summers 1987 (3) SA 577 (A) at 618; Van der Plaats v South African Mutual Fire and General Ins Co Ltd 1980 (3) SA 105 (A) at 114; De Jongh v Du Pisanie 2005 (5) SA 457 (SCA) at 472–3; Saayman v RAF [2011] 1 All SA 581 (SCA) at 584–5.

[127] Corbett & Buchanan II 367–8.

[128] Van der Berg v Coopers & Lybrand Trust (Pty) Ltd 2001 (2) SA 242 (SCA) at 259; Neethling v Du Preez; Neethling v Weekly Mail 1995 (1) SA 292 (A) at 301 where it was held that 'in the absence of special

circumstances [an appeal court] would be slow to depart from the general rule that damages should be left to the determination of the trial Court' (cf Van Heerden 1995 TSAR 580–90). See Urquhart v Compensation Commissioner 2006 (1) SA 75 (E) on an appeal against a special costs order in terms of the COID Act 130 of 1993.

[129] For example, where the appellate tribunal concludes that the trial court wrongly found against the plaintiff on the merits, that the plaintiff is accordingly entitled to damages, and that, in the circumstances, remittal to the trial court to determine the damages would simply involve needless delay and additional costs (Neethling v Du Preez; Neethling v Weekly Mail 1995 (1) SA 292 (A) at 297–8; cf Van Heerden 1995 TSAR 580–90). In Neethling's case (where it was held that it would be appropriate to remit the matter to the trial court to fix damages) the court stated (at 301–2) that the following factors may weigh with an appeal court in its decision itself to fix damages rather than to remit the matter to the court below: '(a) the fact that the damages should be minimal; (b) the fact that the trial Court has omitted to make its own assessment of expert testimony which has been adduced in relation to the issue of damages; (c) the fact that the proceedings before the trial Court have been protracted and very costly; (d) the fact that before the trial Court no evidence in regard to the quantum of damages has been led; (e) the fact that counsel on both sides in the appeal have requested this Court to so deal with the matter. It is impossible to attempt a complete list of those factors which, either individually or cumulatively, would be regarded as circumstances special enough to warrant a departure from the general rule that it is the trial Court and not the appellate tribunal which must fix the damages. Each case must be dealt with on its own particular facts. On the other hand it seems to me that a factor operating powerfully against any departure from the general rule would be an objection to the fixing of damages by the appellate tribunal voiced by the one or other (or both) parties to the appeal. Since the determination of damages falls particularly within the domain of the trial Court great weight must be given to a demand by either party to the appeal that damages be fixed by the forum in which the action was heard.' See also Crawford v Albu 1917 AD 102 at 121–2; Botes v Van Deventer 1966 (3) SA 182 (A) at 191–2; Pogrund v Yutar 1967 (2) SA 564 (A) at 574; Areff v Minister van Polisie 1977 (2) SA 900 (A) at 915; Ramsay v Minister van Polisie 1981 (4) SA 802 (A) at 815; Botha v Lues 1983 (4) SA 496 (A) at 506; Jansen van Vuuren v Kruger 1993 (4) SA 842 (A) at 847; Van der Berg v Coopers & Lybrand Trust (Pty) Ltd 2001 (2) SA 242 (SCA) at 259.

[130] Erasmus & Gauntlett 7 *LAWSA* para 119; Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 200; Protea Ass Co Ltd v Lamb 1971 (1) SA 530 (A) at 535; Paoloa v Hughes (Pty) Ltd 1956 (2) SA 587 (N); Caxton Ltd v Reeva Forman (Pty) Ltd 1990 (3) SA 547 (A) at 573.

[131] Erasmus & Gauntlett 7 *LAWSA* para 119; Koch Lost Income 67–8. See further Union and National Ins Co Ltd v Coetzee 1970 (1) SA 295 (A) at 301; Odendaalsrust Gold, General Investments & Extensions Ltd v Naude 1958 (1) SA 381 (T).

[132] See Scrooby v Engelbrecht 1940 TPD 100 at 106; Odendaalsrust Gold, General Investments & Extensions Ltd v Naude 1958 (1) SA 381 (T) at 384–5; Marks v Model Hire Motor Service Ltd 1928 CPD 476 at 481; West v Hanreck 1928 NLR 484 at 491; Mossel Bay Divisional Council v Oosthuizen 1933 CPD 509 at 512; De Witt v Heneck 1947 (2) SA 423 (C); Modern Engineering Works v Jacobs 1949 (3) SA 191 (T); Coetzee v Jansen 1954 (3) SA 173 (T); Botes v Van Deventer 1966 (3) SA 182 (A) at 191–2.

[133] Erasmus & Gauntlett 7 *LAWSA* para 119. This was the position in Botes v Van Deventer 1966 (3) SA 182 (A) at 191–2 (the parties had already incurred high costs as a result of the prolonged trial and requested the Appellate Division to assess the damages).

[134] Sentrachem Bpk v Wenhold 1995 (4) SA 312 (A) at 320. See, however, Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning 2000 (1) SA 981 (C) at 987 (only where all relevant evidence is placed before court is court entitled to place less emphasis on pleadings).

[135] Paddock Motors (Pty) Ltd v Igesund 1976 (3) SA 16 (A) at 23–4; Nissan Zimbabwe (Pvt) Ltd v Hopitt (Pvt) Ltd 1998 (1) SA 657 (Z) at 660–1.

[136] See, eg, Fripp v Gibbon 1913 AD 354; Sackville West v Nourse 1925 AD 516; Kathrada v Arbitration Tribunal 1975 (2) SA 673 (A) at 679; Griffiths v Mutual & Federal Insurance Co Ltd 1994 (1) SA 535 (A) at 549. Legal costs necessary to enforce a plaintiff's claim do not qualify as damage—Norman Sale 259; Sutter v Brown 1926 AD 155 at 171; Nel v Waterberg Landbouwers 1946 AD 597 at 607; Mediterranean Shipping Co Ltd v Speedwell Shipping Co Ltd 1989 (1) SA 164 (D) at 170: '[I]t is unheard of, for instance, in third-party claims that what is taxed off in costs qualifies as damages.' See also Behm v Ord 1953 (4) SA 96 (C). Legal costs may, however, in some cases constitute damage: for example, in the case of eviction (Mostert et al Koopkontrak 174; Scott v Du Plessis 1919 OPD 111); where it is thus agreed (para 12.18.3.1); where legal costs have been wasted due to the negligence of an attorney (Midgley Lawyers' Liability 171; para 12.24.3.1). See Sebatjane v Federal Ins Co Ltd Corbett & Honey H2–14 on costs in the case of a tender.

[137] Dercksen v Webb [2008] 2 All SA 68 (W) at 80; McDonald t/a Sport Helicopter v Huey Extreme Club 2008 (4) SA 20 (C) at 22 (this involves considering the facts of each case and being fair to both sides).

[138] Erasmus & Gauntlett 7 *LAWSA* para 121; Jonker v Schultz 2002 (2) SA 360 (O) at 367 (principles of costs orders set out; plaintiff entitled to costs despite trial court awarding only R1 000 of R100 000 claim); Strougar v Charlier 1974 (1) SA 225 (W) at 229; Senkge v Bredenkamp 1948 (1) SA 1145 (O).

[139] Corbett & Buchanan I 102. See Radell v Multilateral Motor Vehicle Accidents Fund 1995 (4) SA 24 (A) at 28–30 (to decide, in order to determine issue of costs, whether defendant's tender exceeded award which court had made partly in dollars, dollar portion to be converted to rand on date of judgment and not date of tender, in accordance with principle of nominalism: see para 8.4); Griffiths v Mutual & Federal Insurance Co Ltd 1994 (1) SA 535 (A) at 549 (plaintiff achieving substantial success on appeal entitled to costs despite fact that award as altered by appeal court still substantially lower than offer of settlement made prior to trial). See also Singh v Ebrahim (3) [2010] 3 All SA 249 (D); Dumbe Transport CC v Alex Carriers 2011 (3) SA 664 (KZP) at 666–9.

[140] Naidoo v Auto Protection Ins Co Ltd 1963 (4) SA 798 (D); Palmer v SA Mutual Life and General Ins Co Ltd 1964 (3) SA 434 (D); but see Jonker v Schultz 2002 (2) SA 360 (O) (n 138 above). In Matiwane v Cecil Nathan, Beattie & Co 1972 (1) SA 222 (N) the plaintiff, who claimed R2 500 and was awarded R150, received his costs on the scale of the magistrates' court.

[141] Para 15.3.

[142] Jonker v Schultz 2002 (2) SA 360 (O) at 367; Kriek v Gunter 1940 OPD 136 at 144; Pogrund v Yutar 1968 (1) SA 395 (A) at 397; Greeff v Raubenheimer 1976 (3) SA 37 (A) at 44.

[143] Norwich Union Fire Ins Soc Ltd v Tutt 1960 (4) SA 851 (A) at 854; Ruiters v African Guarantee & Indemnity Co Ltd 1958 (1) SA 97 (E) at 99; Van der Merwe v Fourie 1959 (3) SA 568 (E) at 573. See on costs where the reduced amount falls within the jurisdiction of the magistrates' court 1965 Annual Survey 186–7; 1966 Annual Survey 169; 1973 Annual Survey 159–60.

[144] See Cilliers Costs para 9.1 et seq; Corbett & Buchanan I 102. According to Ihlenfeldt v Rieseberg 1960 (2) SA 455 (T) at 456–7, a plaintiff has to pay the costs of the defendant and vice versa. There are cases where no order as to costs was made where both parties were equally at fault (see Glatt v Evans 1962 (3) SA 959 (T) at 960–1; Manni v Bekker 1964 (1) PH J5 (O); Boberg 1964 Annual Survey 158–60). See also Basson v Pietersen 1960 (1) SA 837 (C), where the parties were held equally blameworthy and the court ordered the defendant to pay the general costs of the action and that he would be entitled only to the additional costs attributable to his counter-claim. See also Dumbe Transport CC v Alex Carriers 2011 (3) SA 664 (KZP) at 666–9. See the remark at 668: 'Each of these approaches has weaknesses, and each can, in a particular situation, result in unfairness. It is for that reason that no hard-and-fast rule can be laid down.'

[145] 1960 (2) SA 661 (T).

[146] See also Venter v Dickson 1965 (4) SA 22 (E) at 26; Wright v Santam 1971 (4) SA 105 (NC).

[147] 1961 (4) SA 59 (T). See also Fripp v Gibbon & Co 1913 AD 354. Norwich Union Fire Ins Soc Ltd v Tutt 1960 (4) SA 851 (A); Prinsloo v Girardin 1962 (4) SA 391 (T) at 394; Bell v Minister of Economic Affairs 1966 (1) SA 251 (N) at 258; Pauley v Marine and Trade Ins Co Ltd 1964 (3) SA 370 (W); Duffey's Transport (Pty) Ltd v Steenkamp's Transport 1974 (4) SA 777 (T).

[148] In Slomowitz v Uncini 1963 (1) SA 457 (T) the court drew attention to the inequitable results this case may have. Should a plaintiff who in casu recovered only R3 more than the defendant and was 75% to blame for the accident recover his or her full costs? See also Dada v Fourie (unreported, 1 June 1964—see Cilliers Costs para 9.18): 'Maar ek aanvaar nie dat Bhyat's Store se saak enige algemene beginsel neerlê en sodoende die diskresie van die Hof beperk nie ... . Skadevergoeding-verdeling [is] 'n nuwe ontwikkeling in ons regspleging ... wat nou dikwels eis en teeneis in 'n voertuigongeluk-saak laat opwerp; en uit die aard van hierdie soort sake kan die feite en regverdighede wat koste betref so veel onder sake verskil dat dit onprakties en onwenslik is om enige reëls te probeer neerlê.' Cf further General Tyre and Rubber Co (SA) Ltd v Kleynhans 1963 (1) SA 533 (N); Pretorius v Herbert 1966 (3) SA 298 (T); Venter v Dickson 1965 (4) SA 22 (E); Minister van Vervoer v Bekker 1975 (3) SA 128 (O). See, however, also Corbett & Buchanan I (1985) 103–4, who stress the importance of a judicial discretion in such cases and submit that the Bhyat case provides the best solution: 'It should, however, be emphasized that this is so only where a substantial balance is found to be due. In cases where no substantial balance is found due to either party the fairest approach would seem to be an award awarding the plaintiff his costs in the claim in convention and the defendant his costs in the claim in reconvention.'

[149] Venter v Dickson 1965 (4) SA 22 (E); Minister of Transport v Bekker 1975 (3) SA 128 (O); Manni v Bekker 1964 (1) PH J5 (O); Wright v Santam Versekeringsmpy Bpk 1971 (4) SA 105 (NC). See, however, also Falango v Phoenix Ass Co Ltd 1964 (1) SA 131 (C).

See Boberg 1962 SALJ 166, who disputes the relevance of the distinction between a case where there is a counter-claim and one where there is no such claim: 'Why, then, should a plaintiff whose contributory blameworthiness is assessed at 60 per cent have all his costs in a case where there is no counterclaim but

only 40 per cent of those costs if there is a counterclaim?' See, however, Cilliers Costs para 9.20, who correctly submits that this distinction is tenable: where a defendant does not succeed on his or her counter-claim, the defendant has had no success and should pay all the costs. Aliter where the defendant's counter-claim has succeeded, since it is then unfair if the plaintiff recovers all his or her costs. Boberg loc cit also asks if where a defendant's counter-claim fails, a plaintiff who is 60 per cent to blame may recover all his or her costs or merely 40 per cent thereof. Boberg suggests that costs should always be inversely proportional to someone's blameworthiness regardless of whether there is a counter-claim. Contra Cilliers loc cit, who correctly argues that the issue of the apportionment of costs can be relevant only where both the plaintiff and the defendant have had a measure of success in the recovery of damages.

[150] See s 2(6) of the Apportionment of Damages Act 34 of 1956.

[151] In Abrahamse v Danek 1962 (1) SA 171 (C) the court held this to be the case, but in Commercial Union Ass Co Ltd v Pearl Ass Co Ltd 1962 (3) SA 856 (E) this view was rejected, since the wording of the Act refers only to damage and this does not include legal costs. The latter decision receives the most support: Boberg 1962 SALJ 126; 1964 Annual Survey 164; McKerron 1963 SALJ 1–3. This nevertheless reveals a lacuna in the Act. See further Van der Merwe & Olivier Onregmatige Daad 305–6 on other issues relating to costs regarding the liability of joint wrongdoers. See also ss 2(8)(a)(iv) and (11)(a) and (b) of Act 34 of 1956.

[152] See para 12.18.5 on this. See Bamford 1972 SALJ 235: 'The courts, while wary not to compromise their discretion, will probably tend to follow the principle set in apportionment cases—that a claimant substantially successful will be awarded costs.' However, this proposal does not throw much light on the problem.

[153] Grootboom v Graaff-Reinet Municipality 2001 (3) SA 373 (E) at 381–2; cf Faiga v Body Corporate of Dumbarton Oaks 1997 (2) SA 651 (W) at 669. There is no similar rule in the Magistrates' Court Rules.

[154] See Fulane v RAF 2003 (3) SA 461 (W).

[155] 2009 (5) SA 446 (SCA).

[156] Okpaluba & Osode Government Liability 402. See Nyathi v MEC for Department of Health, Gauteng 2008 (5) SA 94 (CC) at 123; Madzunye v Road Accident Fund 2007 (1) SA 165 (SCA).

[157] AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd 2000 (1) SA 639 (SCA) at 648.

[158] See Mlatsheni v RAF 2009 (2) SA 401 (E); Bovungana v RAF 2009 (4) SA 123 (E); Mngomezulu v Road Accident Fund unreported, case no 4643/2010 (GSJ), 8 September 2011 at paras 116–23.

[159] See MVU v Minister of Safety and Security 2009 (6) SA 82 (GSJ) at 93.

[160] See eg Protea Assurance Co Ltd v Matinise 1978 (1) SA 963 (A) at 976; AG Eastern Cape v Blom 1988 (4) SA 645 (A) at 670; RAF v Van Rhyn [2007] 3 All SA 659 (E) at 666–7; McDonald t/a Sport Helicopter v Huey Extreme Club 2008 (4) SA 20 (C) at 22 (did the court a quo commit a misdirection or irregularity or would no reasonable court have made the order of costs?)

[161] See Corbett & Buchanan I 104; Koch Lost Income 163–4.

[162] See also Burns v National Employers General Ins Co Ltd 1988 (3) SA 355 (C) at 365–6.

[163] See, eg, Paterson v SAR & H 1931 CPD 289 at 301; Boonzaaier v Provincial Ins Co Ltd Corbett & Buchanan I 87; Ehlers v SAR & H Corbett & Buchanan I (1985) 250; Constantia Versekeringsmpy Bpk v Victor 1986 (1) SA 601 (A) at 613.

[164] Singh v Ebrahim (1) [2010] 3 All SA 187 (D) at 238; Ehlers v SAR & H Corbett & Buchanan I 250; Van Rij v Employer's Liability Ass Corp Ltd 1964 (4) SA 737 (W); Administrator-General, SWA v Kriel 1988 (3) SA 275 (A) at 281 (agreement by the parties on a trust subject to approval by the court). Cf also Kgomo v Road Accident Fund unreported (25846/2010) [2011] ZAGPJHC 103 (2 September 2011) at para 12; Maja v SA Eagle Ins Co Ltd 1990 (2) SA 701 (W); Ncubu v National Employers General Ins Co Ltd 1988 (2) SA 190 (N) at 200.

[165] Southern Ins Ass v Bailey 1984 (1) SA 98 (A) at 120. See further Roxa v Mtshayi 1975 (3) SA 761 (A) at 770; Dyssel v Shield Ins Co Ltd 1982 (3) SA 1084 (C) at 1088; Corbett & Buchanan III 300; Paton v Santam Ins Co Ltd Corbett & Buchanan I 637; Manewel v AA Onderling Assuransie Ass Corbett & Buchanan I 765, 767; Mashini v Senator Ins Co Ltd 1981 (1) SA 313 (W); Woji v Santam 1981 (1) SA 1020 (A) at 1031; Hartnick v SA Eagle Ins Co Ltd 1982 (1) PH J10 (C); Oppel v Federated Ins Co Ltd 1983 (2) PH J47 (C); Reyneke v Mutual & Federal Ins Co Ltd 1992 (2) SA 417 (T) at 420.

[166] See Malgas v Guardian Ass Co Ltd Corbett & Buchanan I 158.

[167] See in general Jones & Buckle Civil Practice I 23–59; Ellis 3(2) *LAWSA* paras 26–47; Dendy 11 *LAWSA* para 525 et seq; Forsyth Private International Law 156 et seq; ss 26–9 of the Magistrates' Courts Act 32 of 1944. See also Van Aswegen Sameloop 373–7 for a summary of some principles. The Labour Court has exclusive jurisdiction in all matters in which the cause of action is covered by the Labour Relations

Act 66 of 1995 and has concurrent jurisdiction with the High Court and other civil courts to hear claims for damages arising from breach of employment contracts (see Chirwa v Transnet Ltd 2008 (4) SA 367 (CC) at 380; Tsika v Buffalo City Municipality 2009 (2) SA 628 (E) at 653–4). See ss 76 and 115 of the Consumer Protection Act 68 of 2008 in regard to the jurisdiction of civil courts on claims for damages. Damages or loss suffered as the result of prohibited conduct or dereliction of required conduct may be claimed if the requirement set by s 115(2)(a) is complied with, but no claim may be instituted for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order (see s 115(2)(a)). The right to recover interest and special damages are undiminished (see s 76(2)(a)).

[168] See s 29(1)(g) and s 45 of the Magistrates' Courts Act 32 of 1944 read with Government Notice 1411 of 30 October 1998; Truck and Car Co (Pty) Ltd v Ewart 1949 (4) SA 295 (T); Skead v Swanepoel 1949 (4) SA 763 (T). A magistrates' court has the same monetary jurisdiction in all actions on or arising out of any credit agreement in terms of the National Credit Act 34 of 2005 (see s 29(1)(f) of the Magistrates' Court Act 32 of 1944). In ABSA Bank Ltd v Myburgh 2009 (3) SA 340 (T) at 345 the court held that to issue summons in the High Court for a debt that could be recovered in the magistrates' court runs counter to the express purposes of the National Credit Act 34 of 2005. Furthermore, (at 346) it is clear that the legislature intended to prevent the institution of an action in the High Court when a magistrates' court has concurrent jurisdiction with the High Court. A claim instituted in the magistrates' court cannot be transferred to the High Court if it is later found to exceed the monetary jurisdiction of the magistrates' court (see Oosthuizen v RAF unreported (258/10) [2011] ZASCA 118 (6 July 2011)).

[169] See s 29(1)(f)–(g) of the Magistrates' Courts Act 32 of 1944 read with GN 670 of 29 July 2010.

[170] See Hornaman v Guldenhuys 1962 (2) PH O21 (O); Santam v Brown 1973 (2) SA 326 (C).

[171] Section 28 of the Magistrates' Courts Act 34 of 1944.

[172] See on causes of action para 7.4.

[173] Section 28(1)(d) of the Magistrates' Court Act 32 of 1944. See Hulme & Pete 2011 Obiter 304-21.

[174] See, eg, Wright v Stuttaford & Co 1929 EDL 10; Owners of SS 'Humber' v Owners of SS 'Anwald' 1912 AD 546 at 554; G & M Building Supplies (Pty) Ltd v SAR & H 1942 TPD 120 at 121; Ramphele v Minister of Police 1979 (4) SA 902 (W).

[175] Dusheiko v Milburn 1964 (4) SA 648 (A) at 660; Patel v Desai 1928 TPD 443 at 446–7; Erasmus v Unieversekeringsadviseurs (Edms) Bpk 1962 (4) SA 646 (T).

[176] See s 19(1)(a) of the Supreme Court Act 59 of 1959; Forsyth Private International Law 156 et seq.

[177] See Sciacero v CSAR 1910 TS 119 at 121 regarding actor sequitur forum rei. See also on jurisdiction based on ratione res gestae (cause of action has arisen within the court's area of jurisdiction).

[178] See, eg, Wright v Stuttaford & Co 1929 EDL 10; Ex parte Masters 1935 CPD 438; Ramphele v Minister of Police 1979 (4) SA 902 (W); Thomas v BMW South Africa (Pty) Ltd 1996 (2) SA (C). In Thomas supra (at 116 et seq) it was held that in the case of the High Court, by contrast with the magistrates' court, it is not necessary for all the elements of a delict to have occurred within its area of jurisdiction for it to assume jurisdiction. For jurisdictional purposes, the place where the delict was committed is to be determined with reference to the materiality of as well as the number of the ingredients of the delict occurring in the court's area of jurisdiction.

[179] Cape Explosives Works Ltd v SA Oil and Fat Industries Ltd 1921 CPD 224 at 226–7; Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd 1962 (4) SA 326 (A).

[180] See, eg, Roberts Construction Co Ltd v Wilcox Bros (Pty) Ltd 1962 (4) SA 326 (A) (no jurisdiction). But see also, eg, American Cotton Products v Felt & Tweeds Ltd 1953 (2) SA 753 (N).

[181] See Van Aswegen Sameloop 376.

[182] Para 7.4.1.

[183] Section 19(1)(a) of the Supreme Court Act 59 of 1959; Dendy 11 *LAWSA* para 550 n 1.

[184] See n 182 above.

[185] See the arguments by Van Aswegen Sameloop 377.

[186] 2010 (3) SA 48 (ECG) at 77 (defamation).

[187] For an overview of the different views held before this case, see Edwards 1979 SALJ 48; Kahn 1950 SALJ 316; Crawford 1968 SALJ 314; Forsyth Private International Law 325 et seq (in favour of lex loci delicti commissi as a starting point with exceptions if necessary); Edwards 1979 SALJ 78–9 (lex fori is the general rule but leaves room for exceptions). See also Burchell v Anglin 2010 (3) SA 48 (ECG) at 62 et seq.

[188] The court left this question open in Burchell v Anglin 2010 (3) SA 48 (ECG) at 78.

[189] See Forsyth Private International Law 73–4; Neels 1991 TSAR 694.

[190] See, however, Parker, Wood & Co v Bullard, Kind & Co 1876 NLR 18, where English law was used to determine whether there was a breach of contract, while damages were assessed in terms of the lex fori. See also Hahlo & Kahn 1961 SALJ 357. Spiro Conflict of Laws 82 sees questions on damage as matters regulated by substantive law, while the calculation of damages is performed in terms of the lex fori. However, it seems impractical to use two legal systems, viz one for the assessment of damage and another in calculating damages and, furthermore, the quantification of loss is not of a procedural nature. In Stewart v Ryall 1887 SC 146 one of the judges said obiter that the quantum of damages is a matter of substantive law determined by the lex causae. From Guggenheim v Rosenbaum 1961 (4) SA 21 (W) one may conclude that the quantum of damages is a substantive matter to which the lex fori (if it should differ from the lex causae) could not be applied. Van Rooyen Kontrak 201 submits that the lex fori should be used only where the court experiences particular problems in applying foreign legal principles. Possibly the lex loci solutionis should also be considered in such cases. See further para 8.4on the award of damages in foreign currency. See on insurance Reinecke et al 12 *LAWSA* (reissue) para 535.

[191] Jones v Krok 1995 (1) SA 677 (A) at 685; Eden v Pienaar 2001 (1) SA 158 (W) at 161. The general principles and rules which a South African court should apply to proceedings for the enforcement of a foreign judgment which is subject to appeal, are as follows (Jones v Krok supra at 692; see headnote 678): '(1) The fact that the judgment is subject to appeal or even that an appeal is pending in the foreign jurisdiction does not affect the finality of the judgment, provided that in all other respects it is final and conclusive. (2) Where, however, it is shown that the judgment is subject to such an appeal or that such an appeal is pending, the Court in South Africa which is asked to enforce the judgment enjoys a discretion and, in the exercise thereof, may, instead of giving judgment in favour of the plaintiff, stay the proceedings pending the final determination of the appeal or appeals in the foreign jurisdiction. (3) Although the onus of proving that a foreign judgment is final and conclusive rests on the party seeking to enforce it, it seems that where this onus is discharged, it is up to the defendant to place before the Court the facts relating to the impending appeal and such other relevant facts as may persuade the Court to exercise its discretion in favour of granting a stay of proceedings. (4) In exercising this discretion the Court may take into account all relevant circumstances, including (but not confined to) whether an appeal is actually pending, the consequences to the defendant if judgment be given in favour of the plaintiff and thereafter (possibly after the judgment has been satisfied) the appeal succeeds in the foreign jurisdiction and whether the defendant is pursuing the right of appeal genuinely and with due diligence. As a rule, however, the Court will refuse to assess the merits and demerits of the appeal and its prospects of success in the foreign court.'

[192] Cf Eden v Pienaar 2001 (1) SA 158 (W) at 161–7. At present, public policy is primarily informed by constitutional values. See eg, Barkhuizen v Napier 2007 (5) SA 323 (CC) at 333.

[193] Cf Eden v Pienaar 2001 (1) SA 158 (W) at 165–6 (cited from headnote). The law of Israel provides for revalorization by what is known in that system as 'linkage'. Accordingly, when an Israeli court awards damages against a defendant in respect of a contractual cause which is entirely governed by the law of Israel, and directs that an amount of linkage must be added to the quantum thereof, the order accords with the policy of South African law and our courts will recognize and enforce the judgment (ibid at 167). Cf Katz 1995 De Rebus 633 on the recognition and enforcement of South African money judgments in England.

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