CHAPTER 10

LOSS OF USE

***Summary**: Interest is the measure of loss for deprivation from the use of money. The loss of use of goods can generally be quantified by interest on the value of the goods subject to an adjustment for the rate at which the goods increase or decrease in value with the passage of time. A court is competent to award damages expressed in terms of a foreign currency. The rate of mora interest should then be adjusted to that appropriate to the relevant foreign economy.*

[10.1] INTRODUCTION

[10.1.1] Money and goods: Within the context of damages for loss of earnings or support the question of loss of use only arises as regards loss of use of money. However, there is a general presumption in law, based on considerations of mitigation, that when goods are destroyed the owner is expected immediately to purchase substitute goods thereby confining his loss to a loss of money.[1] For this reason, and the benefit of comparison, the discussion will not be confined to loss of use of money.

[10.1.2] Inadequacies in the law: The common law tends to deny that the use of goods or money has value.[2] Neither loss of interest nor loss of buying power will be allowed as an addition to past losses.[3] *Furtum usus* is not a common-law crime.[4] Compensation for loss of use of capital has been subjected to an onerous burden of proof.[5] The phenomenon is not confined to South Africa. In England the courts had long been empowered to award interest on damages for personal injury and death[6] but no such awards were made.[7] Legislation was then introduced in 1969 to render

---

[1]See footnote 2.

[2]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B `Dit is natuurlik waar dat indien 'n voertuig wat sê maar R20000 werd is op 'n sekere dag vernietig word en die eienaar daarvan eers drie jaar later by die verhoor daardie bedrag as skadevergoeding toegeken word, hy eintlik nie ten volle vir sy skade vergoed word nie. Hy het immers die gebruik van R20000 vir drie jaar ontbeer, maar hierdie ongelukkige gevolg is daaraan te wyte dat die reg blykbaar aanvaar dat die eienaar op die dag van die delik 'n ander ewe goeie voertuig vir R20000 sou kon gekoop het, of hy dit kon bekostig het of nie, en dat sy skade dus nie meer as R20000 kan wees nie'. Stoll & Visser 1990 *De Jure* 347 349 `The South African law on the loss of use appears, in certain aspects, to be underdeveloped'; see too Neethling Potgieter & Visser `Deliktereg' 2ed 231n232; Reinecke 1988 *De Jure* 221 236-7.

[3]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[4]*R v Sibiya* 1955 4 SA 247 (A). This lacuna in the law was subsequently filled by s1(1) of Act 50 of 1956.

[5]*Broderick Properties v Rood* 1964 2 SA 310 (T) 316A-F.

[6]s3(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

[7]McGregor `Damages' 14ed 338 `Before 1970 it was not the practice to make awards of interest on damages in claims arising out of personal injury and wrongful death'.

compulsory the award of interest on damages.[8]

[10.1.3] Exceptions: On the positive side one can point to a number of judgments which have taken a more progressive view regarding loss of use: `Interest is the lifeblood of finance' it has been said.[9] Interest on past losses has been awarded by agreement between the parties.[10] Compound interest, interest on interest, is no longer prohibited.[11] Past loss of use of a motor car has been compensated[12] as too has the rental value of premises which could not be occupied for a while.[13]

[10.1.4] Loss of utility: A primary theoretical objection to awarding compensation for loss of use is the differencing principle in its classical formulation by Mommsen.[14] A simple comparison of assets before and after deprivation of use reveals no loss because the assets have at all times remained part of the victim's patrimony. This is particularly true of a measure of damages which focuses upon money that actually changes hands. Van der Walt has pointed to the inadequacy of the traditional globular differencing technique.[15] That there can be a substantial loss of utility is illustrated by the example of the spilt mug of beer.[16] If a substitute mug of beer is not immediately purchased then there is a loss of the utility, the pleasure of drinking that beer. If a substitute mug of beer is purchased then the loss of pleasure becomes a loss of money. Deprivation of the use of a motor car can be made good by hiring a substitute motor car. But, just as with the spilt mug of beer, there is a loss of utility even if the monetary expense is not incurred. The problem lies in assigning a monetary value to the use of goods when no expense is explicitly incurred.[17]

[10.2] ASSESSMENT METHODOLOGY

[10.2.1] Cost of hiring a substitute: On the one hand one can argue that the notional cost of hire is a fair measure. On the other hand one may argue that if the claimant was not motivated to incur the expense then the utility to the claimant of the use of the car must be less than the hire cost. This presumes, of course, that the claimant has the means whereby to pay the cost of hire. The assessment of damages usually ignores the personal utility of the claimant in favour of a general communal standard

---

[8] s22 of the Administration of Justice Act 1969 amended s3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. See *Jefford v Gee* [1970] 1 All ER 1202 (CA) for a comprehensive commentary on the new legislation.

[9] *Linton v Corser* 1952 3 SA 685 (A) 695G; *Bellairs v Hodnett* 1978 1 SA 1109 (A).

[10] *Legal Insurance v Botes* 1963 1 SA 608 (A) 622E.

[11] *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A) 298H-I.

[12] *Shrog v Valentine* 1949 3 SA 1228 (T); *Castle & Castle v Pritchard* 1975 2 SA 392 (R); *Modimogale v Zweni* 1990 4 SA 122 (B) 135H; 1993 2 SA 192 (BA); *Smit v Abrahams* 1992 3 SA 158 (C).

[13] *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 124A (9 days).

[14] Mommsen `*Obligationenrecht*' (1853) vol 2 3; *Union Government v Warneke* 1911 AD 657. See 58. above.

[15] Van der Walt `Sommeskadeleer' 181 184-5 241-5; Bloembergen `*Schadevergoeding*' 26-7.

[16] Bloembergen `*Schadevergoeding*' 17.

[17] Stoll & Visser 1990 *De Jure* 347 349-53 discuss the German experience in this regard.

of value.[18] This latter consideration suggests that the rental value of the goods is a fair and proper measure of the lost utility of use.[19]

[10.2.2] Unused goods: What of the owner who does not use his asset? By way of analogy loss of earning capacity is compensated by reference to the earnings likely to be generated by the use of the capacity to work.[20] If there was little likelihood that a victim would have worked then there will be no compensation for loss of earning capacity. This suggests that evidence indicating non-use is a ground for denying compensation for loss of use. From the point of view of an employer, however, an employee may be paid a salary merely to be on standby.[21] Similarly a car may be used only intermittently. Its usefulness derives from its availability as and when it is needed. A good deal of money may be paid for availability without use.[22] The true measure of the utility of use is the rate which the owner, in the absence of litigation, would have agreed to part with the availability of the goods. Evidence of such a personal value is seldom, if ever, available.

[10.2.3] Tradeable goods: An injured victim who loses part of his bodily functions will be compensated by an award of general damages. Although such awards are generally viewed as non-patrimonial they do have a patrimonial quality.[23] Deprivation of the use of goods impinges on the quality of life of the owner. Injury and upset relating to commercially tradeable goods such as a car, ship, or a mug of beer, can generally be relieved by acquiring suitable substitute goods either by purchase or by hire. This consideration suggests two things:

* The disutility of loss of use has a patrimonial quality for which a value can be objectively determined.[24]
* The reasonable cost of substitution, even if not explicitly incurred, is a fair measure of the loss suffered.

[10.2.4] Non-tradeable goods: Not all goods are commercially tradeable. Highly

---

[18]Voet `*Ad Pandectas*' 45.1.9 `*Illud extra dubium est, in definiendo eo quod interest, neutiquam affectionem peculiaris rationem habendam esse, sed communem, ut ita dicam, affectionem oportere spectari*'. See too 22. above.

[19]Stoll & Visser 1990 *De Jure* 347 353 record that German courts have been unwilling to award compensation for loss of use except when an expense has actually been incurred and this was necessary to avoid an equally large or even larger pecuniary loss. In *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 124A damages were awarded, by agreement between the parties, for the rental for the damaged premises for 9 days. The claimant had not incurred the expense of alternative premises and the award was thus for wasted rental costs.

[20]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D `verwagte inkomste'.

[21]`They also serve who only stand and wait' from `On his blindness' by John Milton.

[22]McGregor `Damages' 14ed 701-2 cites a number of judgments where damages were awarded for loss of use of ships kept available but not in use. The damages were assessed as interest on the value of goods. This is a fair measure provided the value of the asset remains constant in nominal terms with the passage of time.

[23]Awards for general damages must maintain a sensible relationship with the reasonable costs of partially relieving the victim's condition (see 259).

[24]*Edwards v Hyde* 1903 TS 381 385-6 suggests that provided adequate evidence is led then a claim for patrimonial loss will be allowed. In this instance the wrongful detention of pigs for a brief period would have given rise to a negligibly small value quite apart from the advantage that the pigs were being cared for elsewhere with possible savings in the need to clean pens and to feed the pigs.

specialized equipment cannot be immediately replaced. Family heirlooms may have a low commercial value but high utility for the owner. Sentimental value may become commercialized, as with antiques, or the personal possessions of famous people. Considerations of objectivization and mitigation suggest that a claimant must in general make do with the objective commercial value as the basis for the calculation, the value generally recognized by one's fellow men.[25]

[10.2.5] Investment rates of return: The English courts have calculated the damages for loss of use of unmarketable and unused assets as interest on the depreciated cost of the goods.[26] Interest is the cost of acquiring the use of money. It is the rental value of money. It is a fair measure of the rental value of other goods only if the value of such goods depreciates at the same rate as does money. If the goods increase in value in line with inflation then one should use a real rate of return such as 2,5% per year, not a nominal rate of interest. On the other hand some goods, such as a motor car, will depreciate faster than money.[27] One should then use a nominal rate of interest of, say, 16% per year on the current value *plus* the rate of depreciation.[28] On the other hand if the value of the asset is increasing with the passage of time then the use value would be the nominal rate of 16% per year **less** the rate of increase in value. Where the rate of increase exceeds the rate of inflation the court may be justified in allowing at least a real rate of return. However, if the asset was being held solely as a store of value[29] then there would be no use value at all, the sole consideration being that the asset is safe and undamaged.

[10.2.6] Running costs: Lee & Honoré[30] states as regards transportation:

> `Damages should be assessed as the difference between the cost of substitute transport and the usual running costs of the damaged vehicle'.

The notional substitute transport may, however, be superior or inferior to what has been lost and its cost thus not necessarily a fair measure of the utility of use of the goods damaged. Where the expense of substitute transport has been incurred this would be measured according to considerations of reasonableness and mitigation. One cannot expect to be compensated for the cost of hiring an expensive mercedes benz motor car if the damaged vehicle was a small cheap city golf. An expense somewhat greater than the basic utility of use of the damaged goods may well be acceptable if this prevented an even greater loss of business profits.[31] The same, it

---

[25]See 22.

[26]McGregor `Damages' 14ed 701-2.

[27]The Automobile Association allows for 4.3% per year depreciation on purchase cost in their tables giving cost per kilometre of running a motor car. Some prestige vehicles may increase in value relative to the original purchase cost but probably below the rate of inflation. Vintage cars on the other hand, may well appreciate faster than the rate of inflation.

[28]See footnote 27.

[29]As with Kruger Rands, undeveloped plots of land, etc.

[30]Lee & Honoré `Obligations' 252; Boberg `Delict' 627.

[31]*Shrog v Valentine* 1949 3 SA 1228 (T) 1229; *Modimogale v Zweni* 1990 4 SA 122 (B) 135H; 1993 2 SA 192 (BA).

seems, would apply to costs incurred to save life and health.[32] Lee & Honoré maintains that `the usual running costs of the damaged vehicle' should be deducted. This deduction would only be appropriate if the `usual running costs' had fallen away as a result of the wrongful act. Licence and insurance costs and depreciation may well continue unabated. Additional depreciation flowing from the damage to the vehicle will be compensated if this is not made good by the repairs.[33]

[10.3] THEORETICAL ANALYSIS

[10.3.1] Anomalous legal principles: In general a claimant is obliged to mitigate his damages. Thus if his motor car has been destroyed he is expected to purchase immediately a substitute vehicle.[34] It then follows, in theory at any rate, that his loss is the cost of replacement, the market value at the date of the delict. His loss ceases to be the loss of a car and becomes a loss of money, the cost of purchasing the replacement car. The loss of the use of the car is substituted by a loss of use of money.[35] The indications are that under South African law compensation will be awarded for the temporary loss of use of goods where substitution is by way of hire.[36] However, when there is total destruction of the goods, the date-of-delict rule would seem to come into play.[37] The rule against interest on damages[38] then denies the claimant compensation for the loss of the use of the money notionally used to acquire the substitute goods.[39] The relevance of interest calculations to the rental value of goods has been discussed above.[40]

[10.3.2] Date-of-delict rule: In general it has been said that a claimant's duty to mitigate does not impose on him `an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business'.[41] One may thus question the existence in South African law of a general rule that damages be

---

[32] In *Castle & Castle v Pritchard* 1975 2 SA 392 (R) the costs of air fares from Rhodesia to Durban were not disputed after the car had been seriously damaged far from home.

[33] *Erasmus v Davis* 1969 2 SA 1 (A); Boberg `Delict' 637.

[34] *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B quoted in footnote 2 above. See earlier discussion of this issue at 24 above.

[35] Bloembergen `*Schadevergoeding*' 55 62 notes that at the date of the delict the damaged goods are replaced by an action for damages. This is, however, a technical tautology that provides little assistance with solving the problem in equity.

[36] *Shrog v Valentine* 1949 3 SA 1228 (T) 1129; *Modimogale v Zweni* 1990 4 SA 122 (B) 135H; 1993 2 SA 192 (BA); *Smit v Abrahams* 1992 3 SA 158 (C).

[37] *Philip Robinson Motors v NM Dada* 1975 2 SA 420 (A) 429F; *Heath v Le Grange* 1974 2 SA 262 (C) 263C/D; *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 118G.

[38] *Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 32; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[39] See footnote 2.

[40] See paragraph 10.2.5!.

[41] *Asamera Oil v Sea Oil & General* (1978) 89 DLR (3d) 1 (SCC) 20. *Novick v Benjamin* 1972 2 SA 842 (A) 858B-C `The duty to mitigate would go no further than to require the innocent party to act reasonably in all the circumstances, the *onus* of proof being on the defaulting party'. See Kerr 1986 *SALJ* 339.

assessed as at the date of the delict. The two main decisions on the subject[42] were concerned with persons who traded in the goods concerned and could reasonably be expected to effect immediate replacement. With depreciating assets such as motor cars[43] it is generally in the claimant's favour to fix the value at the date of the delict.[44] If replacement is to take place at date of trial then this should be with a vehicle of depreciated value comparable to that which the damaged vehicle would have had, had it not been damaged.[45] The problem of fairness to the claimant only arises when the cost of substitution has been increasing during the pre-trial period.[46] Boberg[47] says of the date-of-delict rule that `Since the alleged rule has no meaning (apart from expressing the concept of a collateral source), it is suggested that it be discarded'. However in *Voest Alpine Intertrading v Burwill*[48], an action for breach of contract, the damages were fixed according to exchange rates at the date of breach.[49] In *SA Eagle Insurance v Hartley*[50] damages for past loss of earnings were pegged at the date of the loss without regard for subsequent loss of buying power. Despite what Boberg has said the date-of-delict rule still has a draconian stranglehold on South African concepts of justice.

[10.3.3] Trading costs: What of the claimant who has had to pay commission or a purchase tax in order to acquire substitute goods? Will this cost be allowed in addition to the basic market value of the goods? In *Wikner v TPA*[51] the court refused to add general sales tax to the damages suffered despite the fact that if the claimant had actually purchased substitute goods he would have incurred this cost. The court reached this conclusion having regard to the money value of the claimant's patrimony and ignoring the fact that the claimant was being provided only with money, and not a motor car. Had the court sought to restore the utility of the patrimony by providing a substitute motor car then general sales tax should have been added to the compensation money. It would have been appropriate to apply a deduction for the contingency, if any, that the claimant would have been able to buy a substitute vehicle free of sales tax. The claimant was not compensated for the loss of the use

---

[42]*Philip Robinson Motors v NM Dada* 1975 2 SA 420 (A) 429F; *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 118G.

[43]See footnote 27.

[44]The judgment in *Modimogale v Zweni* 1990 4 SA 122 (B) is somewhat vague as to whether the cost of replacement was taken at the date of the delict or the date of the trial.

[45]Although the prices of new cars increase over the years justice does not require that a claimant should be provided with a new vehicle in substitution for an older vehicle.

[46]See, for instance, *Birmingham City v West Midland Baptist (Trust)* [1969] 3 All ER 172 (HL).

[47]Boberg `Delict' 487inf 625.

[48]1985 2 SA 149 (W).

[49]The court indicated (at 151C) that the additional loss due to currency fluctuations might have been claimable as an additional head of damages had it been argued. This comment would seem to have in mind consideration of fault in the conduct of the proceedings, ie a claim for what is more in the nature of costs of litigation than damages (*Union Government v Jackson* 1956 2 SA 398 (A) 416E 417-18).

[50]1990 4 SA 833 (A).

[51]1992 (T) (unreported 4.6.92 case no 17826/91).

of the vehicle during the pre-trial period. However, he was awarded the value at the date of the delict and thus spared the cost of depreciation, this being part of the use value.[52]

The *Wikner* ruling highlights one of the differences between *damnum emergens* and *lucrum cessans*.[53] The sales tax is *damnum emergens* whereas the loss of the proceeds of the sale is *lucrum cessans*. There is no reason why the claimant should not have been awarded the value of the chance of incurring the expense of sales tax.

[10.3.4] Value encapsulates all use options: The market value at which goods can be purchased includes full allowance for the present value of the utility of the future use of such goods **in all its variety**.[54] This consideration has the important rider that the calculated present value of the use value of goods should not exceed the lump-sum market value of those goods. Otherwise stated the discounted present value of future notional rentals less future notional expenses should not exceed the market value of the goods. If it does then something has gone wrong with the calculations.

[10.4] INTEREST AND DAMAGES

[10.4.1] Single undivided debt: Interest is the rental one pays for the use of money. It has been held that no interest may be claimed on a debt which can only be ascertained after a long and complicated inquiry.[55] This ruling took the view that the damages were a single undivided debt which arose at the date of the delict and for which the claimant then sued. Separate heads of damage are merely the reasoning by which a court arrived at the overall figure.[56] The Roman-Dutch jurists may well have distinguished between a debt and a claim for damages.[57] The modern South African law has, it seems, abandoned any such distinction.[58] For most practical purposes the distinction is not material for damages arising from late payment of damages were not awarded in Roman-Dutch times.[59]

[10.4.2] A series of separate pseudo-debts: The distinction between debt and damages does become apparent, however, if damages for a continuing loss is viewed as a series of separate monthly, or weekly, losses. The appellate division has abandoned the traditional view of damages as an undivided debt and elected instead to view

---

[52]See paragraph 10.2.5.

[53]See 46.

[54]Bloembergen `*Schadevergoeding*' 47.

[55]*Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 32; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[56]*Van der Plaats v SA Mutual Fire & General Insurance* 1980 3 SA 105 (A) 118G.

[57]*Jefford v Gee* [1970] 1 All ER 1202 (CA) 1207d `In Scotland... the courts followed the civil law... (They) drew a distinction between *debt* and *damages*'.

[58]*Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 32 `The civil law did not attribute *mora* to a debtor who did not know and could not ascertain the amount which he had to pay'. *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[59]Voet *Ad Pandectas* 45.1.11; Van Bynkershoek *Obs Tumultuariae* 1478.

damages for loss of earnings or support as a series of separate debts,[60] one for each weekly or monthly loss of earnings, one for each purchase of analgesic pills. This was done, it seems, to avoid a general relaxation of the date-of-delict rule when wanting to discount future loss of earnings and support to date of trial. The `separate debts' approach is highly artificial in that is disregards the effect of contingency deductions and value of a chance in respect of past and future indebtednesses. With true debt the cause of action arises once the due date for payment has passed and payment has not been made.[61] With Aquilian damages for personal injury and death the cause of action usually arises as at the date of the wrongful act. As from that date the claimant has a right of action for all losses flowing from the wrong, albeit the discounted present value thereof.

With a claim for damages prescription runs in respect of the single indivisible sum of the damages. With true debts prescription runs separately for each separate amount that has fallen due and remained unpaid. The appellate division has created a theoretically untenable state of affairs which is likely to cause problems in years to come.

[10.4.3] Liquidated damages: A distinction may be drawn between interest `as' damages and interest `on' damages. *Mora* interest, that is interest `on' damages, is awarded without the need to lead evidence as to the application of the funds.[62] Interest `as' damages will only be allowed if properly claimed and proved.[63] The most common example of interest `as' damages would be interest charges incurred on money factually borrowed during the pre-trial period.

There is no recorded instance where interest `on' or `as' damages has been awarded.[64] This is surprising because there are instances where past damages are ascertainable upon reasonable inquiry.[65] Down the years the original requirement of `reasonable inquiry' has changed into `liquidated damages', a much more stringent test.[66] A claim for interest on past medical or prosthetic costs, if admitted, will only be allowed if the expense has been met and then only from date of payment. A claimant who incurs debt in order to survive during the pre-trial period may, in theory, claim compensation for the associated interest charges. The intellectually smothering

---

[60] *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613-14; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[61] This may be in respect of single sum of money but may also arise with a series of debts such as unpaid rentals or maintenance payments. Each non-payment gives rise to a separate cause of action.

[62] *Bellairs v Hodnett* 1978 1 SA 1109 (A) 1145F `(*Mora*) interest is payable without the creditor having to prove that he has suffered loss'.

[63] *Broderick Properties v Rood* 1964 2 SA 310 (T) 316A-F.

[64] Interest has been awarded by agreement between the parties (see *Legal Insurance v Botes* 1963 1 SA 608 (A) 622E).

[65] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1021I-J.

[66] *Probert v Baker* 1983 3 SA 229 (D) 237A `The amount of the claim is thus capable of prompt and ready ascertainment and of speedy and easy proof; and the Court is not required to inquire into any facts or to exercise an independent judgment on any aspect such as the reasonableness of the amount'.

effect of the ruling in *Hartley*'s case[67] has had the effect that there probably never will be a common-law award for interest `on' or `as' damages.[68]

[10.4.4] Different standards of justice: When damages for future loss have been discounted to date of trial[69] then no further interest should be added to the present value of the future loss because the discounting process includes the necessary allowance for interest.[70] Some foreign legislation for interest on damages has specified that interest is to be added to the **entire** award from the date that the award fell due, that is to say from the date of the delict. In such instances discounting of all losses, past and future, should be done to date of delict.[71]

The normal practice in South Africa is that past losses are accumulated without adjustment for interest for the period between the date when the notional earnings or support would have been received and the date of trial. This accumulation of past losses without adjustment for delay reflects an economy where the disutility of delayed payment is nil. Conversely for future losses a court will assume, without the need for argument or evidence, that the claimant will invest the award profitably,[72] in other words that delay does have disutility. This difference between the treatment of past and future losses is anomalous and undesirable.

Interest on damages is allowed by statute in most western jurisdictions[73] but not in South Africa.

[10.4.5] Loss of buying power: By `loss of buying power' is meant an add-on to past losses so that the award made has the same buying power as the claimant would have enjoyed had the amounts been received timeously. This adjustment is calculated by adding inflation to the nominal amounts that would otherwise have been awarded as damages. The adjustment for loss of buying power is to be distinguished from normal escalations in earnings to offset the effects of inflation.[74] It is made in addition to such estimates of notional nominal earnings, or support.

The rule against interest on damages includes a prohibition on adjusting past losses

---

[67] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[68] In *Muller v Mutual & Federal Insurance* 1993 4 C&B J2-56 (C) the court came to the conclusion that the distinction between interest `as' damages and interest `on' damages was impractical and that a claim for overdraft interest actually paid (R65529) should not be distinguished from a claim for the prohibited interest on damages.

[69] As is the preferred practice in South Africa (*General Accident Insurance v Summers* 1987 3 SA 577 (A)).

[70] *Cookson v Knowles* [1978] 2 All ER 604 (HL) 611f-g; Koch `Damages' 110.

[71] *Ruby v Marsh* (1975) 6 ALR 385 (HC); *Cookson v Knowles* [1978] 2 All ER 604 (HL) 611f-h; Luntz `Damages' 2ed 492-4.

[72] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[73] For England and Scotland see *Jefford v Gee* [1970] 1 All ER 1202 (CA); for Australia see Luntz `Damages' 2ed 493-8; for Canada see Cooper-Stephenson & Saunders `Damages in Canada' 413-4; for France Germany and Switzerland see Mann (1985) LQR 30.

[74] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 840-41.

for loss of buying power between date of loss and date of trial.[75] This rule flows from the principle of currency nominalism. The rule is unsatisfactory and is presently under consideration by the Law Commission.[76]

The Roman-Dutch law did not allow a claim for damages arising from the late payment of damages.[77]. Voet links this prohibition to the prohibition on compound interest because in Roman-Dutch times *mora* interest was viewed as a form of damages. With little evidence of debate or deep reflection the prohibition on compound interest has been revoked by judicial decree.[78] The appellate division has, however, since withdrawn from this liberal approach to judicial law making to one of extreme conservatism.[79]

[10.4.6] Use of collateral benefits: A claim for interest on damages has been refused by an English court on the grounds that the claimant had the benefit of insurance money which had not been deducted in assessing the claim.[80] The extent to which South African courts will have regard to such considerations remains to be seen, if and when legislation for interest on damages is ever passed.

[10.4.7] Fault in conduct of proceedings: If *mora* interest may be viewed as a form of damages for delayed payment then liability for such interest would depend on the wrongfulness of the conduct that gave rise to the delay.[81] Reasoning of this nature suggests that *mora* interest should not run from a date earlier than the date of the issue of summons and may be denied altogether if the court finds that the delay until date of trial is attributable entirely to the fault of the claimant. In *Muller v Mutual & Federal Insurance*[82] the delay until trial was viewed as a *novus actus interveniens*, in other words overdraft interest incurred on the debt created by the loss was viewed as not `caused' by the wrongful act. In *Smit v Abrahams*[83] delay and impecuniosity were regarded as foreseeable. This judgment was distinguished in the *Muller* case.

[10.4.8] Interest or inflation?: Frequently a past loss of earnings or support represents an income which, had it been received timeously, would have been expended entirely on living expenses such as food, clothing or equipment. This point is well illustrated by the example of the spilt mug of beer.[84] The money would not have been invested and there can thus be no question of a loss of investment returns. Fair compensation

---

[75] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[76] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841-2.

[77] Voet *Ad Pandectas* 45.1.11.

[78] *Davehill v Community Development Board* 1988 1 SA 290 (A) 298H-I.

[79] See *SA Eagle v Hartley* 1990 4 SA 833 (A) (past loss of buying power will not be compensated); *LTA Construction v Administrateur, Tvl* 1992 1 SA 473 (A) (interest may not accumulate to more than the original capital).

[80] *Harbutt's Plasticine v Wayne Tank & Pump* [1970] 1 All ER 225 (CA) 228-9.

[81] *Union Government v Jackson* 1956 2 SA 398 (A) 416E 417-18.

[82] 1993 4 C&B J2-56 (C).

[83] 1992 3 SA 158 (C) wherein it was held that the impecuniosity of a victim is foreseeable.

[84] Bloembergen `*Schadevergoeding*' 17.

for a mug of beer spilt three years ago is *prima facie* the price today of a mug of beer. The price at the date of the loss should be adjusted for inflation to the date of the award. This presumes, of course, that the claimant did not immediately purchase a substitute mug of beer at the time and thereby convert his loss of utility into a loss of money. Many of the claims for past loss of earnings or support have the characteristic that the victims have no assets to consume nor the creditworthiness to borrow. Their past loss is pure utility comparable to the unreplaced mug of beer. One measure for compensating such a loss is the amount of money that would have been expended, usually earnings net of tax, adjusted for price escalation to the date of the award. In the absence of explicit evidence as to what would have been purchased the rate of inflation as measured by the consumer price index for all classes will usually be a fair basis for escalating the original monetary amount.

It can be argued that interest is the reward for deferring expenditure on goods and services. It then follows that proper compensation for past loss of utility is not merely the present cost of acquiring the goods or services but also the addition of a real rate of return to compensate for the disutility of being kept out of spending the money on real goods and services. This is the same thing as saying that interest, not just inflation, should be added to past losses. It deserves note that in England awards for general damages are increased by a real rate of return in addition to an adjustment for inflation.[85] I have also noted that the English measure for the loss of use of goods is notional interest on the value of those goods.[86] The same consideration, it seems, holds good for the loss of the use of money.[87]

[10.4.9] Notional borrowings: If there has been a loss of investment opportunity then the expected investment rate of return is the proper basis for adjustment. If the claimant has borrowed money in order to maintain his standard of living then the cost of borrowing such money would be the proper measure. But what of the claimant who has been lent money interest free? Should the defendant's liability not be determined as though the money had been formally borrowed in an `arms-length' transaction? And what of the claimant who has dispensed with borrowing altogether by adopting a cheaper standard of living during the pre-trial period? Should the defendant's liability not be determined as though the normal standard of living had been maintained by full borrowing at interest? The prevailing practice for calculating past loss of earnings[88] or support presumes that the full standard of living has been maintained throughout the pre-trial period but without allowance for interest on the money notionally expended.

[10.4.10] Penalty interest: The reasoning of the previous paragraph suggests that an

---

[85]*Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) 799-800; *Birkett v Hayes* [1982] 2 All ER 710 (CA) 715a 716a 717a. The rate applied is presently 2% per year but this rate may be amended from time to time by judicial decree (*Wright v British Railways Board* [1983] 2 All ER 698 (HL) 704-5). The real rate of return in England is generally considered to be about 4% to 5% per year (see *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 190-1). The rate of 2% per year may thus reflect a typical past loss calculation based on half the rate for the whole period (see 175).

[86]See 166.

[87]The same considerations apply to services gratuitously rendered (see 192 and 297).

[88]See 219.

unqualified award of interest on past loss of earnings or support is the proper measure. It is clear that any such development must be by way of reforming legislation and not judicial decree.[89] However, if one bears in mind the role of interest as a penalty in the `snakes and ladders' of litigation[90] then the preferable approach may be to use the rate of inflation as the fundamental basis for adjustment. The penalty is then limited to the real rate of return. In addition the court should be free to use any higher or lower rate that is established in evidence. This gives effect to the need for an objective measure for purposes of forensic efficiency coupled with a provision to enable the claimant to concretize the issues, if so desired.[91]

[10.4.11] Prescribed rate of interest: The Prescribed Rate of Interest Act[92] governs the rate of *mora* interest applicable to liquidated debts where no explicit rate otherwise applies. This statutory rate is that generally applicable to judgment debts.[93] A variety of rates have been laid down from time to time.[94] The rate applicable for the entire period of delay is that `prescribed as at the time when such interest begins to run'. During times of widely varying rates, such as have in recent times prevailed in South Africa, this leads to rates of 12% being applied to debts long after the commercial rate has risen to 20% and more, and vice versa. The solution to this problem is the publication of an interest index[95] for each year in the same manner as is done for the consumer price index.[96] The adjustment for delay is then done in the same way as an adjustment for inflation; that is to say by increasing the debt by the ratio of the index now to the index at the time that interest commenced to run.[97]

Mora interest is, in theory, taxable income. It is doubtful that, in practice, claimants declare such income.

The Act[98] provides for simple interest. Compound interest is now permitted in terms of the common law.[99] However the rule that interest may not accumulate to more

---

[89] *SA Eagle Insurance v Hartley* 1990 4 SA 827 (A) 842A-B.

[90] *Union Government v Jackson* 1956 2 SA 398 (A) 416E 417-18.

[91] See 31.

[92] 55 of 1975.

[93] In *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841H passing reference is made to this legislation.

[94] 11% per year for period 16.7.75 to 8.2.85; 20% to 1.8.86; 15% to 1.9.87; 12% to 1.7.89; thereafter 18,5% per year simple interest (cf rates in table 10B at 123).

[95] Ideally based on the prime bank overdraft rate, perhaps increased by about 1% per year. The index would show the cumulative effect of compound interest (compounded monthly) at the bank rate on an initial debt of R100 at the time that the index commences.

[96] The Johannesburg Stock Exchange jointly with the Actuarial Society of South Africa already publishes interest indices in the financial press on a daily basis. This procedure could readily be adapted to provide the necessary data for mora interest.

[97] Suppose the index was 100 in 1987 when interest commenced to run and has increased to 229 by 1992 (an average 18% per year compound) this would mean increasing the debt by a factor of 2,29 with 1,29 times the debt reflecting interest.

[98] Prescribed Rate of Interest Act 55 of 1975.

[99] *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A) 298-9.

than the original debt, the *duplum*, continues to apply in the modern South African law.[100]

[10.4.12] Date from which interest runs: When a civil debt remains unpaid the cause of action arises at the due date for the debt. It is appropriate that *mora* interest commences to run at that date. With damages for personal injury and death the right of action is available from immediately after the injury or death has occurred. The claim lies for the discounted present value of all future *lucrum cessans* and *damnum emergens*.[101]

Mora interest on a judgment debt runs from the date that the trial court gives judgment and not from the date that the appeal court varies the award made by the trial court.[102] When there has been a split trial with liability determined at a separate and earlier hearing from the damages then *mora* interest runs from the date that the damages are determined.[103]

The fact of a payment into court does not relieve the defendant of liability for *mora* interest, and the payment should include a tender to pay interest.[104]

When calculating interest on a continuing past loss of monthly or weekly earnings or support the arithmetic may be simplified by applying the rate to the total past loss for half the period or half the rate for the whole period.[105] This short-cut method is only valid if there has been an unbroken series of losses.[106] If the past loss of earnings was for only a short period after the injury then the full rate of interest should be applied for the full period.[107]

[10.4.13] Indexation: If the parties to the action had the opportunity to contract prior to the commission of the delict they would have had the opportunity to stipulate for interest in the event of wrongful conduct. It can be argued for such claimants that a statutory provision allowing an adjustment for interest, or loss of buying power, constitutes unjustified interference with freedom of contract. Conversely one may argue that if there is freedom of contract the parties may readily agree to exclude an adjustment for inflation, should they wish to do so.[108] The South African authorities

---

[100] *LTA Construction v Administrateur, Tvl* 1992 1 SA 473 (A); Otto 1992 *THRHR* 472-80.

[101] But see footnote 71.

[102] *General Accident Versekeringsmpy v Bailey* 1988 4 SA 353 (A).

[103] *Thomas v Bunn* [1991] 1 All ER 193 (HL).

[104] *Government of RSA v Midkon (Pty) Ltd* 1984 3 SA 552 (T) 567.

[105] *Jefford v Gee* [1970] 1 All ER 1202 (CA) 1208g-inf.

[106] The method also presupposes fairly even increases over the relevant period, a condition that is generally satisfied.

[107] In *Dexter v Courtaulds* [1984] 1 All ER 70 (CA) the court failed to grasp this principle and ordered that interest on such a loss be calculated according to the `half-the-period' principle.

[108] Spandau 1975 *SALJ* 31 35-6 lists a number of deficiencies in this reasoning.

would seem to have generally discouraged the indexation of monetary liabilities.[109] This is unfortunate because indexation of liabilities does not cause inflation, it merely determines who will bear the cost of inflation. Those who hold real assets which increase in value with the passage of time, such as shares or immovable property, will profit at the expense of investors who maintain fixed deposits in building societies and banks at inadequate rates of return.[110]

[10.5] FOREIGN CURRENCIES

This topic is included under the discussion of loss of use because it involves an adjustment for the change in currency values with the effluction of time. In other words it reflects a form of `loss of buying power'.[111]

[10.5.1] Judgment in a foreign currency: The loss of earning capacity or support suffered by a foreign visitor to South Africa is a loss of financial benefits in another country. The damages should be determined in accordance with the inflation rates and investment opportunities prevailing in that foreign economy.[112] This implies that judgment for damages should be given in a foreign currency and that the rate of exchange for converting the currency is that prevailing on the date that payment is made.[113] A contrary view has been expressed in the *Voest Alpine* case[114] but this seems to be an isolated instance. The *Hartley* case[115] has emphasised currency nominalism and the principle that a debt owing is not adjusted for subsequent changes in `currency values', notably inflation. It remains arguable that a debt in a foreign currency is fixed in terms of that currency. It then follows that conversion at the date of trial does not offend against a rule of currency nominalism.[116]

[10.5.2] Mora interest: Foreign economies have different rates of interest from South Africa. Strictly speaking the appropriate `legal rate of interest' for such claims is that prevailing in the foreign economy. The differential between South African and foreign interest rates will often reflect the yearly rate of decline of the South African rand relative to the other currency. In the absence of express evidence as to the foreign `legal rate' some degree of equity will generally be achieved by applying the

---

[109]The indexation provision in s4 of the Matrimonial Property Act 88 of 1984 is a rare exception to the general emphasis upon currency nominalism.

[110]Particularly after payment of income tax.

[111]See paragraph 10.4.4 .

[112]The high cost of living in many foreign countries, such as Japan, coupled with a weak South African rand can give rise to awards which, after conversion, are staggeringly high by South African standards.

[113]As was done for a claim for loss of support in *Infolsdottir v Mutual & Federal Insurance* 1988 (SWAZI) (unreported 27.5.88 case 1054/86). See too *Murata Machinery v Capelon Yarns* 1986 4 SA 671 (C); *Elgin Brown & Hamer v Dampskibsselskabet* 1988 4 SA 671 (N) (3 judges); *Makwindi Oil Procurement v National Oil* 1989 3 SA 191 (Z). See too Neethling Potgieter & Visser `Deliktereg' 2ed 228n206.

[114]*Voest Alpine Intertrading Gesellschaft v Burwill* 1985 2 SA 149 (W). Discussed by Radesich 1987 *THRHR* 233-7.

[115]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[116]The reference in *SA Eagle v Hartley* (at 839F) to *Voest Alpine Intertrading Gesellschaft v Burwill* 1985 2 SA 149 (W) would seem to directed purely at the statement that the quantum of a debt should not be altered by the date at which one chooses to exact it, and not by any intention to confirm the decision made by the court.

South African `legal rate' to the debt converted to South African rands using the rate of exchange that prevailed at the time that interest commenced to run. If the foreign `legal rate' is to be used then this should be applied to the debt expressed in the foreign currency.

[10.6] CONCLUSION

Interest is the measure of loss for deprivation from the use of money. The loss of use of goods can generally be quantified by interest on the value of the goods subject to an adjustment for the rate at which the goods increase or decrease in value with the passage of time. Interest `on' damages and interest `as' damages are not permitted under South African law.

A court is competent to award damages expressed in terms of a foreign currency. The rate of mora interest should then be adjusted to that appropriate to the relevant foreign economy.