CHAPTER 11

COLLATERAL BENEFITS

***Summary**: Before dealing with the actions for personal injury and death it is useful to examine the impact of collateral-benefit rules upon the distribution of the costs of damage within the community at large. A comprehensive approach to damages requires the deduction of insurance and employment benefits. A court making an award of damages should specify that a claimant should reimburse certain welldoers, including an employer. Benefits provided by the State are not gratuitous and are generally deducted.*

[11.1] INTRODUCTION

I conclude this thesis with chapters on damages for personal injury and damages for loss of support. The subject of collateral benefits cuts across both these concluding chapters[1] and would seem to be best dealt with in a chapter of its own. When a death or injury occurs the event not only brings about losses but also compensating advantages that have the effect of reducing the overall loss suffered. The substantive law requires that a number of these compensating advantages be ignored when assessing the damages. There are three main classes of collateral benefit: `insurance benefits', `gratuitous benefits', and `pigeonholed' benefits.

[11.1.1] Grounds for deduction: In general a claimant who has received from a collateral source money or valuable benefits, or the right to such advantages, cannot complain if the present value thereof is deducted when assessing his damages. He has had the benefit thereof. Money, regardless of its source, has utility, often very high utility. The overall utility of the claimant's life plan is substantially enhanced by the provision of collateral benefits. It follows that as a general rule such benefits should be brought into account when assessing the damages.

The present utility of such benefits may be reduced by reason of uncertainty or by reason of a sense of obligation, moral or legal, to repay such benefits to the welldoer who has provided them. It would not be unfair on a claimant who argues for non-deduction to expect him to provide explicit evidence of those collateral benefits which are subject to a moral or legal obligation to repay, and to confine non-deduction to such benefits. A major criticism of the prevailing approach by the courts to some collateral benefits is that a defendant is denied the right to lead evidence that repayment will not take place, or to cross-examine the claimant in that regard. In cases of doubt it would be appropriate to allow a deduction from the damages for the value of the chance of non-repayment.

[11.1.2] Justifiable non-deduction: Evaluation of the rules governing collateral benefits reveals that some of the rules against deduction are highly desirable. For

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[1]Reinecke 1988 *De Jure* 221 222 `Die probleem van voordeeltoerekening doen hom op die hele terrein van die skadevergoedingsreg voor'.

instance it is clearly desirable that an insurer's right of recourse be protected.[2] The death of a breadwinner transfers liability for support within the extended family unit without giving the substituted breadwinner a right of action for compensation.[3] Justice is achieved by ignoring the fact of the substitute support.[4] Persons who act in terms of a duty of support reflect a special class of welldoers.[5]

[11.1.3] Micro- and macro-economics: The subject of collateral benefits echoes a general tension in society between the needs of the individual and the needs of the community at large.[6] Van der Walt[7] perceives the function of insurance to effect compensation and the function of law to determine which members of the community will bear the cost.[8] He points out[9] that conclusions will differ depending on whether one considers the community at large or the individual. An important function of the courts is to uphold the rights of the individual. These rights are concretized in the form of contracts of insurance; contracts of employment, and acts and regulations governing a statutory insurer such as the MMF. Is it proper for a court to have regard to macro-economic considerations of overall cost to the community at large? The traditional problem solving skills of the lawyers are focused upon analysis of contracts and statutes, not macro-economics. This consideration may explain the prevalence of such reasoning as `The wrongdoer may not benefit from insurance for which the claimant has paid'[10] instead of the macro-economic view which would focuses upon the overall cost to the community at large and says instead `The victim is compensated at the expense of the community at large'.[11] Corbett & Buchanan state that:

> `Awards must take into account the state of economic development of the country, and should tend towards conservatism. In circumstances of doubt and difficulty, defendants are to be regarded with greater favour than plaintiffs. In short the figure of justice carries

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[2] *Ackerman v Loubser* 1918 OPD 31 36; Van der Walt `Sommeskadeleer' 452; Van Niekerk 1976 *Codicillus* 20-4 discusses the right of recourse by the insurer of an employer against an employee who has caused damage. See 187 below.

[3] With personal injury the law does accord such persons a right of action *eo nomine* (*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); see discussion at 193 below).

[4] *Groenwald v Snyders* 1966 3 SA 237 (A) 247A-D. Although this principle is desirable in general its application in *Groenewald v Snyders* to support provided from surplus life insurance money is questionable.

[5] See 193.

[6] Van der Walt `Sommeskadeleer' 230; see too Van der Walt 1980 *THRHR* 1 24.

[7] See previous footnote.

[8] In general see Atiyah `Accidents Compensation & the Law' 3ed 582-613.

[9] Van der Walt `Sommeskadeleer' 215.

[10] *Parry v Cleaver* [1969] 1 All ER 555 (HL). The emphasis upon a denial of benefit to the `wrongdoer' has strong punitive overtones (see in particular at 558C-D).

[11] Perhaps the most colourful exposition of the macro-economic approach has been the reference to the body of policy holders of insurance companies as `the whipping boys of the twentieth century' *Browning v The War Office* [1962] 3 All ER 1089 (CA) 1094I. The macro-economic views of Trollip JA in South Africa (*Bay Passenger Transport v Franzen* 1975 1 SA 269 (A) 274-5; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 173-4) have had remarkably little impact on the substantive law. There are exceptions (*Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1087G-H).

a pair of scales, not a cornucopia'.[12]

There is some doubt that this passage provides an accurate description of prevailing judicial attitudes in South Africa:[13] When faced with doubt and difficulty in the *Byleveldt* matter the appellate division opted for non-deduction[14] whereas adherence to Corbett & Buchanan's directive would have meant deducting the disputed salary payments; In the absence of evidence it has been presumed by the court that a collateral benefit is *res inter alios acta* and that it should not be deducted;[15] a court has refused to make a deduction for the chance that a medical expense will not arise.[16] It seems true to say that there is a growing modern ethic, certainly not universal,[17] that in cases of doubt and difficulty claimants are to be preferred to defendants. This ethic is undoubtedly reinforced by dissatisfaction with the once-and-for-all lump-sum system of compensation.[18] Suffice it to say that the South African judiciary are divided on this important aspect of policy as regards the assessment of damages.

[11.1.4] The role of large institutions: It is rare for an uninsured defendant to be brought before the civil courts. Common sense says that one just does not sue an impecunious wrongdoer, and men of reasonable means will generally seek to protect their patrimony by way of insurance.[19] The modern law of damages for personal injury and death is thus concerned primarily with actions against large financial institutions with substantial financial resources. Such institutions, particularly in South Africa, have monopolistic powers which enable them to recover from customers or taxpayers or policyholders the costs of meeting the claim for damages.[20] **The distributive nature of an active economy can be expected to pass on the cost**

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[12]Corbett & Buchanan 3ed 6.

[13]Visser 1986 *De Jure* 207 216-17 discusses conservatism in relation to awards for general damages.

[14]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153. The prospect of double compensation (`dubbel vergoed sou word') was here perceived to be the lesser of two evils.

[15]*Maroso v SA Eagle Insurance* 1987 3 C&B 638 (W) 642-3.

[16]*Pallas v Lesotho National Insurance* 1987 3 C&B 705 (ECD) 713. A plaintiff will not be denied compensation for a possible loss (*Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6). Even-handed justice would apply the same principle in a defendant's favour if there was a possibility that the loss would not arise.

[17]One may point to many modern judgments in the traditional mould, eg *Dippenaar v Shield Insurance* 1979 2 SA 904 (A); *Southern Insurance v Bailey* 1984 1 SA 98 (A); *Santam Insurance v Ferguson* 1985 4 SA 843 (A).

[18]See, for instance, *Wade v Santam Insurance* 1985 1 PH J3 (C); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 64 `...if defendant were concerned at all about the risks I have mentioned which attach to the insurer in a lump sum situation, defendant could have taken steps to minimise these by resorting to the procedures stipulated in section 8(5) of Act 84 of 1986. This defendant has not done' (payment by instalments). More generally see Van der Walt `Sommeskadeleer' whose principal theme is the abolishment of the once-and-for-all lump-sum system of compensation; Boberg `Delict' 598-9.

[19]Atiyah `Accidents Compensation & the Law' 3ed 260 271.

[20]*Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1087G `The award I propose making comes ultimately from the taxpayer's pocket'; see too *Browning v The War Office* [1962] 3 All ER 1089 (CA) 1094; *Kandalla v BEA* [1980] 1 All ER 341 (QB) 349; 1981 *SALJ* 1 6; *Rowley v London & North Western Railway* [1861-73] All ER Rep 823 (Exch) 829-30 `the defendants most liable to such actions will not be able to carry on their business upon the same terms to the public as now'.

directly or indirectly to all members of society as part of the overall cost of living.[21] The only relief for `society' in this broader sense is a reduction in the overall cost of damages claims. Escalation in awards for damages will influence the rate of inflation which will in turn influence the awards for damages. Damages awards are but one of the many costs of living that drive inflation.[22]

It has been said that the *Lex Aquilia* contemplates the payment of damages by the wrongdoer and no-one else.[23] The conclusion sought to be drawn from this observation was that compensating advantages should be ignored because they would lessen the liability of the wrongdoer by distributing the loss more widely. 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. It is useful to bear in mind in this regard that when the *Lex Aquilia* was first passed over 2000 years ago it had a mixed purpose being both punishment and compensation. The modern Aquilian action is, in theory at any rate, no longer punitive.[24]

[11.1.5] Abdication of judicial responsibility?: It has been argued that it does not matter what decision a court makes, the system will adjust accordingly.[25] One thing is clear, whatever decisions the courts make the large institutions, including government, always have it within their power to stipulate contractually for a right of recovery or to legislate that certain collateral benefits should be deducted.[26] If government and the large institutions are indifferent to taking steps to protect the public purse why should the courts shoulder the burden? The government in South Africa has certainly, to date, shown little interest in keeping down the cost of damages to the public.[27] The primary concern of the courts is surely to protect the rights of the underdog? But is this the limit to judicial responsibility? The underdog includes not only the claimant before the court but also the voiceless mass of the general public who are not represented before the court. Should the courts not have

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[21]Through the pricing mechanisms (premiums, mark-ups on sales, taxation) by which such institutions obtain funds from the public at large: Atiyah `Accidents Compensation & the Law' 3ed 212 533 539 542; *Parry v Cleaver* [1969] 1 All ER 555 (HL) 579D-E; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1087G.

[22]*Moekoena v President Insurance* 1990 2 SA 112 (W) 116A4 116D4. For the financial year ended April 1987 total liability for payments in respect of motor accidents was R291 million (Department of Transport Statistics for 30/04/89). If the cost of claims were to increase roughly in line with inflation this would suggest a cost for claims in the 1990/91 financial year of R500 million. Payments under social pensions for the 1990/91 financial year were budgeted at R7 billion. The cost of motor vehicle accidents is thus only about 7% of total expenditure on social welfare.

[23]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 152E `... eis die *Lex Aquilia* in hierdie verband vergoeding deur die delikpleger en nie deur iemand anders nie'.

[24]See paragraph 11.10.1#.

[25]Atiyah `Accidents Compensation & the Law' 3ed 588-9.

[26]Government has, for example, stipulated for itself a 6-month prescription period: s32 of the Police Act 7 of 1958; s113 of the Defence Act 44 of 1957.

[27]Assessment of Damages Act 9 of 1969 terminated the judicial practice of deducting life insurance and pension monies from the claims of dependants (Hansard 17/02/69 842-8). Wassenaar `Squandered Assets' details a number of other examples of government financial wastefulness.

regard to their burden as well? As I have noted above a court which focuses upon the needs of the community at large will favour rules which minimize the cost to society.[28] For this reason there is a general rule against double compensation.[29]

There are a number of other objections to the philosophy of judicial abdication of responsibility, the main one being that the courts already do deduct a number of collateral benefits. If they are to cease deducting just how far is non-deduction to go? With a personal injury is there, for instance, to be no deduction for earnings in alternative employment found after the date of injury?[30] Another problem is that the amount to be recovered sometimes bears no fixed relationship to the amount deducted. Thus an employer might seek to recover from a claimant salary payments gross of taxation whereas the damages will have been assessed by deducting salary payments net of taxation. If the court does not have regard to the nature and amount of the recovery a claimant may find himself paying out to his employer more than he has received by way of damages. For this reason recoveries in terms of the Workmen's Compensation Act are limited to the relevant damages.[31] The prospect of overrecovery is a very real problem when there has been an apportionment of damages but the welldoer seeks to recover without apportioning his claim.[32] Research has indicated that the costs of enforcing a right of recourse often negate the benefits.[33]

The power vested in the courts is substantial. Many of the rules concerning the non-deduction of collateral benefits are not in accordance with common sense or intuitive concepts of damage. To determine rules of law on a haphazard basis comforted by the thought that legal subjects will just rearrange their affairs to accommodate the law is rather like the inconsiderate driver of a motor car who takes the view that other drivers have eyes and brakes and should thus adapt their behaviour to his driving. The philosophy of abdication of responsibility has the ring of an *ex-post* justification for doing nothing about a decision incorrectly made.

[11.2] INSURANCE AND PENSION BENEFITS

[11.2.1] Deduction of pension benefits: Pension benefits payable in terms of the contract of employment are deducted when assessing the damages.[34] This ruling has

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[28]See paragraph 11.1.3.

[29]Van der Walt 1980 *THRHR* 1 16 25. *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F `In making separate awards, the court must of course guard against any overlapping and resulting duplication'; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 289 `an appreciable... improper duplication of damages'; Cooper-Stephenson & Saunders `Damages in Canada' 275-91; Luntz `Damages' 2ed para 5.2.09.

[30]See 52.

[31]s8(1)of Act 30 of 1941. See too Koch 1987 *THRHR* 475-80; 1990 *De Rebus* 343-6.

[32]See, for instance, Koch 1987 *THRHR* 475-80; 1990 *De Rebus* 343-6 concerning the deduction of benefits paid in terms of the Workmen's Compensation Act 30 of 1941.

[33]Bloembergen `*Schadevergoeding*' 382-4; Van der Walt `Sommeskadeleer' 217-20 236. Van Niekerk 1976 *Codicillus* 20-4 describes how an insurer can exercise a right of recourse against an employee of the insured. An employer has substantial control over employees. It seems undesirable that an employee of limited financial means should be deprived of insurance cover enjoyed by the employer.

[34]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A). This has created inconsistency between the employed from whom a deduction is made, and the self-employed from whom no deduction is made. (Pauw 1979 *TSAR* 256 259). It

TABLE 12 - IN-OUT PENSION SAVINGS

	Uninjured **R**	Injured **R**	Difference **R**
Earnings	62250	nil	62250
Pension benefits	87046	111254	(24208)
Totals	**149296**	**111254**	**38042**

Net loss = R149296 - R111254 = R38042

been criticised[35] on the grounds that pension benefits are savings and hence that the *Dippenaar* case rules for the deduction from damages of savings accumulated prior to the injury. A prominent feature of all this criticism has been the absence of any detailed analysis of the damages calculation and the contingent nature of the pension benefits.[36] Table 12 below summarises the method of calculation used in the *Dippenaar* case.

We may note that for the uninjured condition the value of pension savings to date of injury (R87046) was added to the total value of salary earnings (R62250).[37] By reason of the injury the present value of pension benefits, including savings, was increased from R87046 to R111254, an increase of R24208 derived from risk insurance provided by the pension fund. The effect of the *Dippenaar* calculation was thus to treat savings as an in-out item, a matter of calculation convenience. The increase in value of R24208 one might appropriately describe as the `accelerated value' of the expected pension benefits.[38]
An important feature of savings by way of pension benefits provided by an employer is that these only accrue to the employee if that employee satisfies certain conditions

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has also placed the injured employee upon a different footing from the deceased employee (Assessment of Damages Act 9 of 1969). These anomalies attest that something is wrong, not that the *Dippenaar* case is incorrectly decided.

[35]Boberg `Delict' 609-10; Pauw 1979 *TSAR* 256; Claasen & Oelofse 1979 *De Rebus* 588. Boberg motivates the non-deduction of pension benefits on the grounds that the action is specifically for loss of earning capacity as distinct from general financial loss. Boberg's reasoning is clearly unsound for, if applied consistently, it would mean that an injured person has no claim for medical and similar expenses. The practice of `pigeonholing' is discussed under section 11.8.1. Conflict between *obiter dicta* in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) and the *Dippenaar* ruling should, in terms of the rules of precedent, be decided in favour of *Dippenaar* which was handed down by an undivided court.

[36]Reinecke 1988 *De Jure* 221 227-9 discusses the problem having appropriate regard to the mixed insurance and savings nature of a pension fund. He is a notable exception.

[37]This follows the formula stated by the court in which all benefits which would have accrued were capitalized together (*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917E). This methodology is less confusing for complex situations than the more popular approach of differencing first and then capitalizing (see paragraph 12.2.1).

[38]Accelerated inheritance benefits are discussed at 333.

of service as laid down in the pension fund rules. One important condition is that the employee remain in service until retirement age. If the employee leaves service prior to retirement age then he will forfeit a greater or lesser part of the R87046 described above as `savings'.[39] This `savings' element reflects the value of the chance[40] of receiving a pension from normal retirement age. Some pension funds, but not all, provide special benefits on death or disablement. In *Dippenaar*'s case there was provision for a substantial disability pension on early ill-health retirement.

In *Oberholzer v Santam Insurance*[41] the court was presented with the net accelerated value, the capitalized difference (R2200) between the before and after pensions. The savings element had been eliminated in advance.

The *Dippenaar* methodology was followed in *Krugell v Shield Insurance*[42] where pension savings but for the injury were taken to be R76731 with the increased value after injury being R148770, an increase by reason of the injury of R72039.

***[11.2.2] Exceptions to the `Dippenaar' rule***: The approach in *Dippenaar*'s case is appropriate for what are called `defined benefit' pension funds. That is to say pension funds which provide a guaranteed level of pension at retirement **regardless of how little or how much money the particular member has contributed**. A number of funds do not guarantee final benefits, the pension payable being determined by whatever savings have been accumulated by the time that retirement occurs. For such funds it is usual to allow for future pension benefits by adding to the claimant's notional earnings the contribution that the employer would have made. This method has no regard for what has been accumulated in the past. If the claimant has received a lump-sum refund of contributions from the pension fund, that is savings to date of dismissal, it would be wrong to follow the *Dippenaar* ruling and deduct this lump sum when assessing compensation. If justice is to be achieved one must adapt one's rules for collateral benefits to the calculation methodology. This highlights the point that when dealing with collateral benefits an unquestioning application of precedent is to be deplored. It is essential that the relevant financial transactions be properly analyzed.

[11.2.3] Insurance as savings: Many forms of life insurance policy display the same features as pension benefits, there is an accrued savings component, the surrender value,[43] and a contingent element making up the balance of the sum assured. Thus a disability insurance might have paid out R100000 of which R8000 was the surrender value immediately prior to the injury and R92000 is the contingent cover

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[39]This would not happen if pension funds were compelled to provide a transfer value of the member's interest to his new fund. An attempt in South Africa to introduce legislation to provide for compulsory transferability was aborted by the trade unions on the grounds that it deprived a worker of access to his savings.

[40]The value of R87046 discounts only the risk of early death. A further deduction should be applied for the risks of premature termination of service, and below-average salary increases.

[41]1970 1 SA 337 (N) 341A-E.

[42]1982 4 SA 95 (T) 106A-E.

[43]For retirement annuity policies this would be the transfer value.

provided because the injury has taken place. Had there been no injury the policy would have been worth only R8000. Accident benefits[44] and term insurances[45] do not give rise to surrender values[46] and thus involve no savings element at all.

Insurance benefits provided by an employer in terms of the `contract of employment' are deductible in full.[47]

[11.2.4] Privately negotiated insurances: No deduction is made for pension and insurance benefits which the claimant had negotiated privately:

> `If a person makes a decision to insure himself against loss by accidents he does so voluntarily, and his decision, and the fruits thereof, are completely divorced either from his employment, or from the liability of the wrongdoer. Moreover the amount he received from the policy bears, in the normal course, no relationship to the terms of his employment or the amount of his salary, the duration of his employment, or indeed to whether he is employed at all. His payment of premiums to secure a personal indemnity against injury, hardship, or loss are payments from what he has earned, and the fruits of those payments are no more the concern of the wrongdoer than would be the fruits of an investment in a building society or in the stock exchange. He would be entitled to payment of the benefits of the policy irrespective
> of the wrongdoer's negligence and irrespective of the terms of his employment'.[48]

A prominent view discernible here is that the court is not concerned with how a claimant would have spent his earnings. This follows from a view that the action for personal injury is an action for loss of earnings. The ambiguities and problems associated with this view are discussed more fully in the next chapter. Suffice it say for the moment that the courts are divided on the extent to which regard may be had as to how a man would have spent his earnings.[49]

[11.2.5] The insurance principle: When there is injury to a man who is covered under an accident policy is injured he receives payment under the policy far in excess of the premium paid. A large proportion of his benefit is derived from the premiums paid by numerous other policyholders who have not claimed under their policies. The costs of the insurance payment are directly met by the insurer from the pool of funds derived from premiums charged. The insurer fulfils the function of an administrative conduit between the population of policy holders and those who suffer loss by accident. When the time comes to pay damages an insurer, or perhaps a statutory body such as the MMF, will meet the cost from funds derived from the population

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[44]Benefits payable according to a specified tariff, eg R20000 for loss of a leg, if the injury results from a violent accident.

[45]Life insurance policies for specified durations, such as 20 years, which do not provide a payment on expiry are pure insurance contracts without any savings element. These may include benefits payable in the event of injury in addition to the benefits payable on early death.

[46]Cash benefits payable on premature termination of an insurance plan.

[47]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A)

[48]Cited with approval, but *obiter*, in *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920-1. `It is trite law that insurance benefits are not to be set off against a plaintiff's damages' *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 8-9. See too Boberg `Delict' 609-11; *Maroso v SA Eagle Insurance* 1987 3 C&B 638 (W) 642-3.

[49]See 225.

at large by way of premiums or a petrol levy. In terms of this macro-economic view if the insurance benefits were to be ignored when assessing damages the population at large would be paying twice over,[50] and the claimant receiving double compensation.

Pauw[51] refers to the interests of the community that pensions should not be deducted. It is difficult to grasp his reasoning since an important desideratum of society is clearly that costs be contained. Boberg[52] maintains that we should be pleased to pay a small additional charge on the cost of a `dinner for two'. That is fine for the claimant who has pension benefits which can be ignored, but what of the millions of persons without pension rights who also contribute through the petrol levy and other price mechanisms to the cost of meeting damages claims? The rules against deduction of insurance benefits tend to concentrate wealth in the hands of those who can afford the luxury of privately funded pension and insurance benefits.[53]

[11.2.6] Right of subrogation: An insurer who wishes to keep down premium costs may pay the insured, but subject to a right of subrogation.[54] A court would then be fully justified in making no deduction for the insurance payment. The claimant would be receiving the excess payment as a sort of trustee for his insurer and would thus not be receiving double compensation.[55] Alternatively the insurer would take over the claimant's right of action and recover the payment directly. The cost of the incident would be passed on to the public through the wrongdoer's insurer. Rights of recourse, such as subrogation are often administratively expensive to enforce relative to the amounts recovered and should in general be avoided.[56] Following the `knock-for-knock' approach of the motor insurers[57] it is economically more efficient for each institution to recover its outlay through its normal pricing or taxation or premium charges.[58] Life insurance contracts often include a substantial savings

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[50]See 180.

[51]Pauw 1979 *TSAR* 256-7 (`gemeenskapsbelang').

[52]Boberg `Delict' 599.

[53]As distinct from state social welfare benefits. Luntz `Damages' 2ed 10-11 makes the point that non-deduction of insurances transfers wealth into the hands of the wealthy at the expense of the less fortunate who cannot afford insurance. The Assessment of Damages Act 9 of 1969 thus operates against the wealth redistribution ethic that prevails in South Africa.

[54]*Ackerman v Loubser* 1918 OPD 31 36. Article 47 of MMF agreement ito Act 93 of 1989 (s28 of the Compulsory Motor Vehicle Insurance Act 56 of 1972) provides for a right of recourse against unlicensed or drunken drivers.

[55]Van der Walt 1980 *THRHR* 1 23 `Die benadeelde kan in dergelike gevalle van sy versekeraar en van die dader ontvang totdat sy skade volledig vergoed is, en slegs vir wat hy meer as dit ontvang, is hy in 'n trusteeposisie teenoor sy versekeraar'.

[56]See footnote 33.

[57]An agreement not to recover from one another.

[58]An exception to this general principle is when the allocation of cost serves to reduce the incidence of accidents causing damage as in a factory environment (Atiyah `Accidents Compensation & the Law' 3ed 587).

element and are never subject to subrogation.[59]

[11.2.7] Casual frolic: It can be argued that the spontaneous taking out of insurance does not form part of a life plan and for this reason benefits accruing from that source should be ignored. In one nineteenth-century case the claimant had[60] taken out temporary accident cover from a vending machine at a railway station before embarking on his fateful journey. The court ruled that the cause of the insurance payment was not the accident but the taking out of the insurance.[61] The claimant, it seems, did not take out the insurance cover as part of a general life plan to be insured. His taking of temporary accident cover was an `off-the-cuff' action, a casual frolic outside the framework of his general life plan.[62] The court ruled that no deduction be made.

The taking out of extensive insurance as part of a life plan would indicate a person who was risk averse and thus likely to be a stable earner of income, one not inclined to take risks.[63]

[11.2.8] Durable and ephemeral `investments': It has been noted above that when an insured person is injured the benefit paid is usually substantially in excess of the premium paid. The additional money comes from accumulated savings, that is to say the surrender value, and, more importantly, from other policyholders via the insurer for the contingent component. Analogously one may invest R500 in share market and after a price rise one may then sell for R1000. The profit comes from the fact that other persons are prepared to buy in at R1000 shares that originally cost R500. There is a superficial resemblance between the insurance transaction and the share market transaction. The major difference, however, is that the shares would have increased in value regardless of whether there had been an accident or not.

Without an accident a typical short-term insurance contract has no intrinsic value in exchange.[64] At the end of the insurance year the policy will expire leaving a valueless piece of paper.[65] The benefit gained from paying the premium was the

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[59]Reinecke 1988 *De Jure* 221 232-3 speculates that the reason for non-deduction of life insurance money probably lies in the special nature of these contracts.

[60]*Bradburn v GWR* [1874-80] All ER 195 (Exch D).

[61]Causation does not provide a satisfactory solution to such problems (*Santam v Byleveldt* 1973 2 SA 146 (A) 151F). In *S v Mokgethi* 1990 1 SA 32 (A) the victim was rendered a paraplegic by the wrongdoer's bullet. The victim's subsequent death from infection was held to have been caused by the victim's subsequent failure to follow medical advice as to pressure sores (see Potgieter 1990 *THRHR* 267 for commentary). Similar reasoning in *Bradburn*'s case would have led to deduction of the insurance payment.

[62]Friedman & Savage 1948 *JPE* 279 286n16 `Special life insurance policies purchased to cover a single railroad or airplane trip are probably more nearly comparable to a lottery ticket than a means of achieving certainty'; McGregor 1965 *MLR* 629 636.

[63]See 151.

[64]The discussion here focuses on insurance contracts which never acquire a surrender value, ie which do not involve any savings element.

[65]*Parry v Cleaver* [1969] 1 All ER 555 (HL) 560B-C; see too *Smoker v London Fire & Civil Defence Authority* [1991] 2 All ER 449 (HL).

utility of peace of mind of being covered.[66] In this sense insurance is a consumable like food and drink, not durable savings that increase patrimony. Insurance reduces the risk of a reduction to patrimony.[67] The payment of the premium purchases an entitlement to participate in a loss-sharing scheme. The same wrongful act that causes permanent loss from injury also renders durably valuable the otherwise ephemeral accident policy.[68] The purchase of share-market investments entitles one to share in a profit-and-loss scheme, the difference being that in the normal course of events this is an asset with a marketable value enhancing the value of patrimony, not something that vanishes with the expiry of the period of insurance.

If one examines the uses for life insurance listed by a top life insurance salesman,[69] one finds that pure life cover is not sold as an investment *per se*. Rather life insurance is sold as protection for investments in the sense of ensuring adequate cash liquidity in the event that the purchaser's life plan as regards investment and family support is prematurely terminated. Reinecke[70] records that the purchase of life insurance is directed at ensuring the completion of a life plan.

In terms of utility theory one would say that an insurance policy is a largely unmarketable commodity.[71] Typical of such insurance is `term' life insurance, a form of life cover which provides no savings element, that is to say it never acquires a surrender value. As a general such life insurance has little or no utility for a third party. Any advantage is offset by the cost of the premiums that need to be paid. However, once the insured event has occurred, the utility, the value in exchange of the insurance policy, is vastly enhanced. The utility of bringing about the insured event can be so high that persons will take their own lives.[72]

[11.2.9] Take your victim as you find him: In general a wrongdoer must take his victim as he finds him. If he is so unfortunate as to injure a person with the proverbial

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[66]Friedman & Savage 1948 *JPE* 279 285 `The empirical evidence for the willingness of persons of all income classes to buy insurance is extensive. Since insurance companies have costs of operation that are covered by their premium receipts, the purchaser is obviously paying a larger premium than the average compensation he can expect to receive for the losses against which he carries insurance. That is, he is paying something to escape risk'.

[67]ie reduces the general contingencies deductible if my life plan were to be valued. Due to the incidence of the insurer's expenses the cost of the insurance will usually be greater than or equal to the actuarial value of the risk which it serves to neutralize (Friedman & Savage 1948 *JPE* 279 285-6).

[68]People have been known to take drastic steps to bring about payment under a policy: eg *Beresford v Royal Insurance* [1938] 2 All ER 602 (HL) suicide; *S v Robinson* 1968 1 SA 666 (A) 675A `The deceased wanted to be murdered so that the proceeds of his insurance policies would be paid out to his widow'.

[69]Feldman `The Feldman Way' 131-99. This work discusses the selling of life insurance policies in the United States of America where legislation severely restricts the sale of life policies with a savings (investment) element.

[70]Reinecke 1976 *TSAR* 26 54 `Deur die afsluiting van lewensversekering in sy verskillende vorme maak 'n persoon juis seker dat sy toekomsprojeksies ten opsigte van sy vermoë, sy beoogde spaargeld of selfs verwagte inkomste, nie deur 'n te vroeë dood in die wiele gery word'.

[71]Apart from the surrender value.

[72]See, for instance *Beresford v Royal Insurance* [1938] 2 All ER 602 (HL) suicide; *S v Robinson* 1968 1 SA 666 (A) 675A `The deceased wanted to be murdered so that the proceeds of his insurance policies would be paid out to his widow'. See too 256 below.

`eggshell skull' then the damages will be substantial. If justice were even-handed then the injury of a well-insured victim would likewise require the payment of minimal damages.[73] Certainly the non-working millionaire can expect no compensation for loss of earnings[74] despite having paid for this condition with all his assets. The insured claimant, by way of contrast, has paid only a premium. It has been argued that the damages payable should not be influenced by so fickle an issue as the extent of the victim's insurances.[75] One may likewise argue that the damages should not be influenced by so variable a factor as the rate of pay which a victim receives.[76] The ultimate in such egalitarian arguments would be to pay the same money to all victims regardless of their financial circumstances.[77] This takes us back to the tariff systems of the Germanic *weergeld*.[78]

Foreseeability is commonly invoked by the courts as a test for whether a gain or loss should be ignored. It is usually foreseeable that the victim may be insured.[79]

[11.2.10] Premiums paid by the claimant: In deference to the perception that the claimant has paid for the insurance benefits with his own money,[80] justice would be done if the defendant reimbursed the claimant for the cost of the premium paid. But justice does not require that the claimant retain the benefit of premiums paid by numerous other policyholders.

[11.3] GRATUITOUS BENEFITS

[11.3.1] General: Benefits provided gratuitously to an injured person, or the family of a deceased breadwinner, will not be deducted when assessing the damages.[81] The justification for this rule is that the welldoer has personally borne part of the loss suffered and should for this reason be reimbursed, or at the very least be provided with the opportunity for reimbursement.[82] Little or no value should be placed upon

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[73]This reasoning was rejected in *Parry v Cleaver* [1969] 1 All ER 555 (HL) 575F.

[74]Bloembergen `*Schadevergoeding*' 105-6.

[75]`Surely it is nonsensical that the responsibility of a wrongdoer should be determined on the basis of whether he has hit an insured or an uninsured victim' 17.02.69 Hansard 841 846 (concerning the Assessment of Damages Act 9 of 1969).

[76]`While society might condone the difference in salary scales between an engineer and a clergyman (or value the products of the former more than the latter), it would not necessarily condone a larger award to the former after an accident when both have ceased to be productive in the same way as previously' Luntz `Damages' 2ed 10.

[77]To ignore collateral benefits is to objectivize the damages and to deviate from the fully concretized loss: Bloembergen `*Schadevergoeding*' 360-8 378-84 389; Atiyah `Accidents Compensation & the Law' 3ed 190-193; Luntz `Damages' 2ed 349-51.

[78]See Davel `Broodwinner' 62n193. A more colourful, perhaps less academic, description is to be found in Churchill `History of the English-Speaking Peoples' vol 1 52.

[79]*Smit v Abrahams* 1992 3 SA 158 (C)

[80]Burchell 1978 *AS* 278-9; *Smoker v London Fire & Civil Defence Authority* [1991] 2 All ER 449 (HL).

[81]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

[82]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153.

the prospect of future gratuitous benefits because they are likely to cease.[83] Another reason is that if the payments continue after the payment of compensation then it cannot be said that the payments have been caused by the injury or death.[84]

If it has been pre-arranged that the welldoer will be reimbursed when the award for damages has been made there is no problem in equity. But a problem arises when the claimant retains both the gratuitous benefit and the full damages. When this is done with the full knowledge and consent of the welldoer one is dealing with a donation subsequent to the award of damages. Such a donation is truly *res inter alios acta*.

[11.3.2] Directive by the court: In general, the waiver of a right will not readily be presumed by the courts.[85] With a right to reimbursement one would thus expect a requirement of clear evidence of intention to waive, that is the welldoer is demonstrably aware of his right to reimbursement and has expressly indicated agreement to waiver or has allowed prescription to run.[86] Boberg[87] argues that collateral benefits should be ignored because the persons who pay the collateral benefits do not have a right of action to recover the loss which they suffer by having to pay the benefits. His reasoning has merit if the damages are to be paid out of the pocket of the wrongdoer and there is a strong likelihood of reimbursement. But such wrongdoers are rare, if they exist at all. Claimants and welldoers generally have only a hazy understanding of the reasoning behind a court's award. The maxim *ubi ius ibi remedium* is not of unqualified universal validity.[88] It is thus highly desirable that a court which makes an award should at the same time give an express indication of the amounts which have been included by way of non-deduction to permit the reimbursement of welldoers. Many judgments include a list of the expert witnesses whose fees qualify for payment.[89] An analogous order concerning approved welldoers and the amounts involved would not be misplaced. In general doubt has been expressed as to the courts' capacity to make such an order.[90] If so then a suitable enabling provision should be introduced in South Africa by way of

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[83]*Browning v The War Office* [1962] 3 All ER 1089 (CA) 1092C.

[84]*Indrani v African Guarantee & Indemnity* 1968 4 SA 606 (D) 610A-D.

[85]*Mutual Life Insurance (New York) v Ingle* 1910 TS 540 550; *Botha v Finanscredit* 1989 3 SA 773 (A) 791-3.

[86]Prescription Act 68 of 1969. See Loubser 1990 *THRHR* 43-60: weak prescription (claim may be offset against future claims) is to be preferred to strong prescription (set-off not possible) under circumstances when many years may elapse before the welldoer in straitened circumstances himself may need to rely on the beneficence of the assisted victim.

[87]Boberg `Delict' 492.

[88]An appeal to the maxim was unsuccessful in *Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A) 584G. *Ismael v General Accident Insurance* 1989 2 SA 468 (D), on the other hand, is an instance when the maxim was invoked to justify giving a right of action directly to a dependent child in lieu of the traditional group action of the child's father.

[89]See, for instance, *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029-30.

[90]Bloembergen `*Schadevergoeding*' 347; Street `Damages' 76; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151A. Canadian courts have adopted the procedure: Cooper-Stephenson & Saunders `Damages in Canada' 487-8.

legislation.[91]

The recording of names in the judicial record may well enhance the willingness of many to assist needy victims. The procedure would protect the victim from excessive claims by avaricious welldoers. It would also ensure that if the victim does not reimburse the welldoer the resulting double compensation has reduced utility because it has been labelled by the court as due to a person other than the victim.

[11.3.3] A general rule?: In the *Byleveldt* case the court considered the viability of a general rule of reimbursement:[92]

> `'n Oplossing van die hele probleem sou wees om te vereis dat 'n benadeelde... soveel... terugbetaal as wat hy van die ander bron ontvang het, maar nie meer as wat hy van die delikpleger ontvang het nie'.

This general rule was rejected on the grounds that:

> `Gesien die eiesoortige aard van die verskillende bronne waaruit vergoeding ontvang kan word... so 'n eenvoudige oplossing in die praktyk mees ingewikkelde probleme sou skep en in sekere gevalle strydig sou kan wees met wat in die belang van die gemeenskap beskou word'.

It is most unfortunate that the court did not detail the perceived complicated problems and interests of the community. This would have facilitated discussion and solutions.[93] There is little doubt that the general rule as stated would create problems. In the first place it fails to accommodate benefits for which deduction should be made without provision for reimbursement. In the second place it fails to consider the negative utility of an unenforceable court directive that orders certain amounts to be reimbursed on moral rather than legal grounds.[94]

[11.3.4] Inadequate compensation: By failing to highlight that there are welldoers to be compensated the court may fail to make an addition to the damages to permit onward payment to persons who provided benefits in kind. For instance a claimant's otherwise unemployed friend may have assisted with his nursing and thereby saved the expense of hiring a nurse. It would be proper that the award be increased to enable the claimant to give some expression of gratitude. The friend has suffered disutility by reason of the attendances. Bloembergen cites the example of the doctor who attends to his own wounds.[95] A fair measure of the utility loss would be the cost

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[91] *General Accident Insurance v Summers* 1987 3 SA 577 (A) 616C `Verder meen ek nie dat `n onbevredigend bewoorde Hofreël genoegsame rede is om te beslis dat die skadevergoedingsberekeningsmetode wat deur appellante voorgestaan word, aanvaar moet word nie'.

[92] *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153A-B.

[93] One suspects that the major difficulty perceived by *Rumpff JA* was the absence of a recognised legal procedure whereby a compensated victim could be ordered to reimburse welldoers (see *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151A 151D 151H 153C-D).

[94] See 179.

[95] Bloembergen `*Schadevergoeding*' 108.

that the defendant has been spared.[96] If a wife gave up her work and rendered such services in terms of her duty of support she has a right of action *eo nomine* to recover her financial loss.[97] The tendency of the South African courts to reimburse only proven cash disbursements[98] suggests that claims concerning a pure loss of utility may well prove unsuccessful.

[11.4] OVERLAPPING RIGHTS OF ACTION

[11.4.1] `Group action' defined:The modern Roman-Dutch law in South Africa allows more than one person to claim for the same financial loss. In addition to the claim by the individual injured victim, or dependant of a deceased victim, one finds allowance for a claim by the head of the family *eo nomine* in what is best described as a `trustee capacity' flowing from his relationship to the victim. Van der Walt describes the claimant of a benefit subject to subrogation as being a trustee for his insurer.[99] I use the expression `group action' to describe this trusteeship on behalf of others who have suffered loss. The phenomenon is implicit to the to the non-deduction of collateral benefits with a view to enabling the victim to reimburse his welldoers. Perhaps the most common form of such a group action is the injured breadwinner whose action for personal injury precludes a concurrent action by his dependants for the loss of support they have suffered by reason of the loss of their breadwinner's earnings.[100] The concept of a group action is Germanic rather than Roman. For this reason the phenomenon exists uneasily, and poorly analyzed in a legal milieu, such as South Africa, which subscribes to a Civil-law tradition. I do not purport in this thesis to fully analyze `group actions' and their interaction with separate individual rights of action. My purpose is merely to observe that such duplication of actions does exist and to provide examples thereof.

Dendy[101] has noted the mixed group/individual nature of the right that a dependant has to claim for loss of support. This extends through to actions by breadwinners who have been injured and suffered a reduction in life expectancy.[102] This ambiguous state of affairs would seem to be the result of a shift in emphasis over the years: in the nineteenth century the dominant view was that of a head of household, usually the father, who claims in his own name for the losses suffered by family members.[103] The modern law has tended to emphasise the individual,[104] assisted, if

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[96]See *Donnelly v Joyce* [1973] 3 All ER 475 (CA) 479-80 quoted in *Klaas v Union & SWA Insurance* 1981 4 SA 562 (A) 576-7.

[97]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W). In *Bennett v Sun Insurance* 1952 1 C&B 391 (E) 394 compensation was awarded to a wife who gave up her employment to nurse her husband. Had the wife been a full-time housewife without employment it is doubtful that her claim for compensation would have succeeded.

[98]See, for instance, the emphasis placed by the court in *Jones v Santam Insurance* 1976 2 C&B 602 (E) 605-6 on the question of who had paid what.

[99]See footnote 55.

[100]See *De Vaal v Messing* 1938 TPD 34.

[101]1990 SALJ 155. See too 1992 *THRHR* 480 and 283 below.

[102]See 227, 347.

[103]See, for instance, *Abbott v Bergman* 1922 AD 53 56 and its subsequent individualised interpretation in *Erdmann v Santam Insurance* 1985 3 SA 402 (C); *Oosthuizen v Stanley* 1938 AD 322 331 and the emphasis there on the claim by the father having regard to his duty of support to others, a thread that is taken up again in *De Vaal v*

needs be, by the father or husband. Despite its historical association with an all-powerful *paterfamilias* in the Victorian mould, it would be wrong to describe this group action as an anachronism, it still has a useful role to play in achieving a just result in a complex legal environment.

[11.4.2] Single group action is preferable: When a wife or mother provides nursing or accommodation to an injured person this will generally be done in terms of a duty of support, in other words the benefit will not be gratuitous. Such a person has a right of action *eo nomine* to recover his loss.[105] It follows that the damage which he has personally suffered must be deducted from the claim of the injured person lest the defendant be called upon twice to pay the same damages. The creation of multiple rights of action does not simplify the compensation process.[106] The complexity gives rise to problems with prescription and pleading and the courts will, it seems, not be astute to enforce multiple actions: Thus in *Klingman v Lowell*[107] the mother of the victim provided him with free board and lodging, a benefit which the court refused to deduct on the grounds that it was `gratuitous'. The court here seems to have overlooked the fact that the mother was obliged to provide the benefit in terms of her duty of support. In *Mhlawuli*'s case[108] the defendant consented to an approach along the lines of *Klingman v Lowell*. Bloembergen[109] prefers that there be separate rights of action for each individual. **There is much to be said, however, for a group action by the injured person who then receives monies in a trustee capacity for those associates who have suffered loss by reason of the injury.** This group action would ideally be supported by a judicial directive as to the allocation of the award to the various welldoers. Rules of procedure appropriate to commercial law[110] are not necessarily appropriate to the more personal and informal issues that arise with actions for damages for personal injury or death.

An individual right of recovery can arise by reason of *negotiorum gestio*.[111]

[11.4.3] Circumstances where separate actions preferable: It will happen that multiple claimants are unable to work together for one reason or another. This will typically arise when a deceased breadwinner had been divorced and remarried and has left two families. It is thus desirable, as noted by Dendy, that claimants have the option of bringing either a group action or separate individual actions. In order to avoid

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Messing 1938 TPD 34 to deny dependants a right of action for loss of support during the lifetime of the breadwinner.

[104]*Constantia Insurance v Hearne* 1986 3 SA 60 (A); *Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409.

[105]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409.

[106]See, for instance, paragraph 13.2.12.

[107]1913 WLD 186.

[108]*Mhlawuli v SA Mutual Fire & General Insurance* 1976 2 C&B 597 (E) 598mid-page.

[109]Bloembergen `*Schadevergoeding*' 292.

[110]In which a meticulous regard is had for rights of action, prescription, contract wording, limitation of damages to that which was foreseeable, etc.

[111]Assistance provided without the knowledge of the beneficiary and with the intention of obtaining reimbursement: *Standard Bank Financial Services v Taylam* 1979 2 SA 383 (C).

problems with *res iudicata* it is essential that judgment in respect of a group action indicate clearly the separate interests in the damages award of the separate parties.

Motor-vehicle-accident claims are subject to limitation in certain circumstances.[112] This limitation is not applied to the overall group action but to the separate claim of each dependant.[113]

[11.4.4] Collateral support after death: When a breadwinner is killed, only the dependants have a right of action, but only for what they have lost by way of support. This does not account for persons who have supported the dependants prior to the payment of compensation. Such persons do not have a right of action for their damages occasioned by providing support. Because they are compelled to act in terms of a duty of support they are not free to stipulate for reimbursement. The South African solution to this problem has been to rule such alternative sources of support as non-deductible.[114] This transfers the loss to the defendant and makes it feasible for the claimants to reimburse the duty-bound welldoers.[115]

[11.4.5] Expenses of an injured child: The future medical and related costs for an injured child have traditionally been awarded to the parent of the child *eo nomine*. The child himself, however, has a right of action for such expenses.[116]

[11.5] THE `CONTRACT' OF EMPLOYMENT

[11.5.1] Employers as loss bearers: Wages paid gratuitously and out of proportion to the services rendered are not to be taken into account when assessing damages.[117] In general employers are expected to meet from their own resources a greater or lesser part of the loss occasioned by an injury. They have no right of action for the damage or inconvenience which they suffer.[118] Munkman maintains that an employer should not be a bearer of loss.[119] Atiyah, on the other hand, perceives employers and insurers as comparable channels for loss distribution to the community at large.[120] It is of note that an employer is vicariously liable for the wrongful acts of his

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[112]Article 46 of MMF agreement ito Act 93 of 1989.

[113]*Constantia Insurance v Hearne* 1986 3 SA 60 (A).

[114]*Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D. The principle is sound but misplaced in the context of *Groenewald v Snyders* where the defendant only sought to off-set support derived from surplus life insurance money. Later in the same judgment the court, somewhat inconsistently, went on to say that life insurance is generally intended for the provision of ongoing support after the breadwinner's death (248A). In *Pitt v Economic Insurance* 1957 3 SA 284 (D) 286G-inf Holmes J held that one should look at `substance more than form', a directive that he did not follow in *Groenewald v Snyders*.

[115]The dependants' action retains vestiges of its origin as a Germanic group action (see *Oosthuizen v Stanley* 1938 AD 322 331).

[116]See section 12.14.

[117]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

[118]*Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A).

[119]Munkman `Damages' 4ed 67n(p).

[120]Atiyah `Accidents Compensation & the Law' 3ed 245.

employee.[121] There seems to be no major objection to expecting an employer of financial substance to meet part of the cost of compensating an injured employee. Munkman's view has validity for the smaller employer of limited financial resources and loss-distribution powers. This consideration is given some, albeit inadequate, recognition by the employer's right of action for injury to a `diensknecht', a private or household servant.[122] The lesser ability of a small employer to pay would also be relevant to the deductibility or otherwise of gratuitous employment benefits.[123] Large institutions will generally have met the problem before and act in accordance with policy or practice.[124] Many small employers may never have encountered the problems of coping with the death or injury of an employee and may well, out of ignorance, act contrary to the best interests of themselves and the claimant. Judicial intervention and guidance is then highly desirable.[125]

[11.5.2] Employment benefits: The employer's liability may be limited to the statutory period of sick pay alone.[126] Other employers may provide a substantial pension, a lump sum accident insurance benefit, and continuing membership of the medical aid fund. When an employer goes beyond the normal contractual framework in order to assist an injured employee there is good reason to facilitate reimbursement. After injury many employers continue to pay salary subject to a stipulation for reimbursement in the event of a successful damages claim. In theory such stipulations are readily brought into account. In practice difficulties arise: The repayable salary payments will normally be compensated net of taxation whereas the employer will seek to recover the cost to himself before deduction of taxation. If care is not taken this can turn out to be more than the claimant has been awarded by way of damages. The solution to this problem is to treat all salary payments as deductible and then to add back to the damages the specific amount that the employer seeks to recover. Most employers provide a certificate in this regard. A similar problem arises when there has been an apportionment of the damages but in this instance the claimant has been the author of part of his own loss and it seems correct that the defendant should not be liable for more than a pro-rata proportion of what the employer seeks to recover.

Apart from the difficulties with quantum just listed there are other problems: The claimant's legal representatives will not always be aware of the contractual arrangement to reimburse the employer. Disputes arise with `gratuitous' salary payments which are not subject to a stipulation for reimbursement. It is not always easy to ascertain just what is gratuitous.[127] Poor understanding by employers and

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[121]See, for instance, *Gibbins v Williams Muller Wright & Mostert* 1987 2 SA 82 (T) 82 90.

[122]*Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A) 586.

[123]Such as were the subject of *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

[124]Levy `Rights at work' 101 `When a practice becomes established, clear and recognized and has continued for a long time it becomes part of the contract of employment'. See too Levy 20.

[125]See paragraph 11.3.2.

[126]s13 Basic Conditions of Employment Act 3 of 1983.

[127]This issue divided the court in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A). Levy `Rights at work' 37 `Many of the additional benefits that management provide are regarded by them as being discretionary -

claimant as to the composition of the award will usually have the consequence that a claimant will often retain his double compensation without the knowledge and consent of the employer. This latter problem is best dealt with, as already discussed,[128] by an express stipulation in the judgment that the value of the gratuitous wages should at least be offered to the employer.[129] The problem of just what constitutes a `gratuitous benefit' becomes entangled with the interpretation of the contract of employment, an issue which also influences the deductibility of insurance and pension benefits.[130]

[11.5.3] Reasonable expectations: The relationship of an employee with his employer is generally defined by a formal contract of employment, what one might conveniently term the contract *stricti iuris*,[131] and an informal understanding based on the reasonable expectations of the employee, the contract in equity.[132] The Basic Conditions of Employment Act[133] ensures that all employees to which it applies are subject to certain minimum entitlements of leave, sick pay and notice. The Transvaal courts have taken the view that if the provision of an employment benefit was likely then it is contractual.[134] This is substantially, although not entirely, what I have designated above to be a contract in equity. Cape courts have generally taken an approach *stricti iuris* to the problem.[135] The approach of the Transvaal courts is to be preferred, not the least because the calculation of future loss of earnings will include allowance for future discretionary benefits such as promotions and increases to offset the effects of inflation. An approach *stricti iuris* to `discretionary benefits' would render such prospects *res inter alios acta* and outside the purview of the court.[136]

[11.5.4] Sick pay and leave pay: The deduction or non-deduction of sick pay also requires careful attention. In general sick pay is properly deductible apart from some

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that is, they may award them or withdraw them as they wish, but in fact this is not always the position'.

[128]See paragraph 11.3.2.

[129]If prior to the trial the employer has expressly indicated that reimbursement is not required (eg *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 170E) then it is appropriate to make a deduction.

[130]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920.

[131]In the genitive because it qualifies the noun `contract'. Levy `Rights at work' 22 details a number of sources which determine the terms of a contract of employment.

[132]*Mokoena v Administrator Transvaal* 1988 4 SA 912 (W); *Ludick v Samca Tiles* 1993 2 SA 197 (B) (legitimate expectations of employees).

[133]3 of 1983 (ss12 13 14).

[134]*Serumela v SA Eagle Insurance* 1981 1 SA 391 (T); *Krugell v Shield Insurance* 1982 4 SA 95 (T) 102-4. Gough 1983 *THRHR* 474 prefers this approach.

[135]*Gehring v UNSBIC* 1983 2 SA 266 (C) 273G. The decision was made without knowledge or consideration of the Transvaal decisions. The *Gehring* decision was concerned with future employment benefits. See too *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) A3-47-8 for a similar finding on past loss in respect of benefits paid in terms of the employer's policy. In *Maroso v SA Eagle Insurance* 1987 3 C&B 638 (W) 642-3 the court refused to deduct accident benefits provided in terms of the contract of employment because it was presumed that the claimant had the option to refuse to take such benefits.

[136]This would be contrary to the ruling in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-16 that explicit allowance may be made for future inflation.

small allowance for the contingency that it may be needed in the future for some other illness.[137] Where the sick pay has been extended in terms of normal company practice it remains deductible although not claimable as of a right.[138] When sick leave is exhausted many claimant's utilise their annual or accumulated long service leave. Such leave pay, although claimable as of a right, should not be deducted. 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.

Gehring's case[139] ruled that no deduction should be made for future sick pay available at the discretion of the employer. This ruling is clearly unsound in that it is not judicial policy to ignore the value of a chance when assessing damages.[140] A general application of a test of `discretionary benefits' would require that no allowance be made for future increases in salary for inflation or promotion, nor for bonuses. The proper approach to uncertain benefits is to allow the value of the chance of those benefits. The *Gehring* decision is the result of a poorly considered *obiter dictum* in *Dippenaar v Shield Insurance*.[141]

[11.5.5] `Gratuitous' benefits: The implications of an equitable approach to the contract of employment is that if salary or wages continue to be paid on a discretionary basis, but in accordance with normal practice, then the benefit is taken to be paid contractually and is deductible. It should be borne in mind that many employers adopt a discretionary approach to sick pay in order to weed out malingerers but with the intention to pay in the majority of cases. The adoption of a generous approach to injured employees is not always as gratuitous as might appear at first sight. Where the employer acts with an ulterior motive it is doubtful that the salary payments are gratuitous in the strict sense of the word.[142] An employer who projects a caring image has much to gain from a stable and contented workforce.[143]

[11.5.6] Contractual discretion: Consistent with the principle discussed above it has been held that the exercise of a discretion within a contractual framework is a benefit in terms of the contract of employment:

> `The fact that the employer in the present instance has a discretion does not mean that he does not have a contractual obligation towards the appellant. The rules of the pension fund are contractual terms to which the employer and the employee are bound. The discretion which the employer has in terms of those rules, therefore is not unfettered. He is contractually bound to exercise it in terms of the contract. He must furthermore exercise it properly, reasonably and in accordance with the rules of natural justice and

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[137]The value of this contingency was actuarially calculated in *Bosch v Parity Insurance* 1964 2 SA 449 (W) 452D/E.

[138]*Serumela v SA Eagle Insurance* 1981 1 SA 391 (T) 392-3.

[139]*Gehring v UNSBIC* 1983 2 SA 266 (C) 273G.

[140]See 71.

[141]1979 2 SA 904 (A) 921D.

[142]See, for instance, *Van Blerck v Van Blerck* 1972 2 SA 799 (C) and the minority judgment of *Trollip JA* in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 169-73).

[143]Van der Walt 1980 *THRHR* 1 10 `'n Werkgewer mag goeie bedryfspolitieke redes vir 'n dergelike voortgesette besoldiging hê'.

> fairness. If therefore the employer, exercising a proper discretion, will probably have to allow the appellant to retire on early pension, such pension must be taken into account'.[144]

[11.6] BENEFITS PAYABLE BY THE STATE

As a general rule benefits paid or provided by the State and related bodies are deducted when assessing compensation, for example: Reduced liability for taxation;[145] accommodation free of charge in a State institution;[146] hospital expenses;[147] and welfare grants.[148] This is in accordance with the macro-economic principle that the financial burden on the population at large should be minimized. It is also undesirable that government bodies should waste public funds by seeking to enforce rights of recovery between various departments.[149] It is highly unlikely that a compensated victim would feel morally bound to reimburse the State for benefits provided. In general, however, Parliament has displayed little concern that public funds may be wasted through double compensation.[150] It is clearly tempting for forensic opportunists to argue that State benefits are discretionary, gratuitous, in the nature of public charity, and should therefore be ignored.[151] Central to such an argument would be the issue of grants to needy dependants and disabled persons without income:

Such grants are subject to a means test and will usually terminate when compensation is paid. The award of such a grant is subject to an administrative discretion[152] exercised within the framework of laid down criteria.[153] Once such criteria are met

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[144] *Poo v President Insurance Co Ltd* 1992 4 C&B A3-96 (T) A3-102.

[145] *Pitt v Economic Insurance* 1957 3 SA 284 (D) 287sup-C; *Dorfling v Bazeley* 1961 1 C&B 128 (E) 132inf; *Oberholzer v Santam Insurance* 1970 1 SA 337 (N) 342E.

[146] *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G.

[147] *Barnard v Union & SWA Insurance* 1971 1 SA 537 (EC) 538G; *Williams v Oosthuizen* 1981 4 SA 182 (C) 185.

[148] *Indrani v African Guarantee & Indemnity Co* 1968 4 SA 606 (D) 609G 610A-D.

[149] Bloembergen `*Schadevergoeding*' 382; Van der Walt `Sommeskadeleer' 217-20 236.

[150] See discussion of Assessment of Damages Act 9 of 1969 reported 17.02.69 Hansard 841 844-6. Also note in particular the comments concerning the non-deduction of benefits under the Workmen's Compensation Act 30 of 1941.

[151] Such opportunism has been rewarded in England. McGregor `Damages' 14ed 828 caustically observes that the English courts when faced with the issue have `predictably' ruled that State welfare benefits are gratuitous and thus non-deductible. With the ruling in *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) South African law moved away from the English approach as recorded in *Parry v Cleaver* [1969] 1 All ER 555 (HL).

[152] See footnote 144 and quotation.

[153] Disability Grants Act 27 of 1968 (coloureds only) s3 lays down conditions for `Persons qualifying for disability grants'. Social Aid Act 37 of 1989 (whites only) s5 lays down conditions for `Persons entitled to social grants'. Social Pensions Act 37 of 1973 (persons other than whites and coloureds) s3 lays down conditions for `Persons entitled to social pensions'. The word `qualifying for' in s3 of Act 27 of 1968 is used in the sense of `entitled to' (s7 of same Act uses words `entitled' and `pension due', s10 uses the word `entitled'). Children's Act 33 of 1960 s90 refers to benefits (in terms of s89) to which beneficiary `was not entitled'; Child Care Act 74 of 1983 refers to benefits in terms of s56 to which

the claimant has a right to such pension[154] and may, it seems, compel payment thereof by legal process. These considerations suggest that disability and dependency grants should be deducted from past loss of earnings or support, but not from future loss. However, if the court has reason to believe that the claimant will rapidly squander the damages award then there may be some justification for making a deduction from future loss for the chance that the grant may revive in years to come.

A pension will not be awarded to a claimant who does not make application. A claimant who has failed to apply for such a pension during the pre-trial period has, strictly speaking, failed to properly mitigate his damages and should, it may be argued, be compensated as though he has had the benefit of such a grant. In practice grants are sometimes not paid due to inadequate administrative procedures.

[11.7] PUBLIC SUBSCRIPTIONS

It does happen that benefits are provided to accident victims by way of public subscription. The contributing persons may be so widespread and numerous that reimbursement is not a practical proposition.[155] But is it morally desirable that the claimant should retain double compensation? There will usually be no privity between the welldoers and the victim, except if the welldoer is an employer or family member. It would thus be unreasonable to presume that the benefits were provided with a view to subsequent double compensation. The court then has the choice of deducting the benefit as a form of insurance payment or declining to deduct subject to a direction to the claimant to pay the funds to a suitable welfare organization.

[11.8] PIGEONHOLING

[11.8.1] Pigeonholing: Associated with the focus upon a damaged object[156] is the phenomenon of `pigeonholing'. Orderly systematic thought demands that losses are classified according to rules and procedures governing the different types of loss. Past earnings, future earnings, future loss of support, past and future medical expenditure, etc. The phenomenon of `pigeonholing' arises when thought becomes locked into the classification as a closed microcosm. Typical examples of `pigeonholing' are:

> ***[11.8.1.1] Past gains***: Consider an injured victim who loses past and future earnings of R600000 but who, in terms of his contract of employment, is granted a lump sum and a pension worth R700000. In so far as earning capacity is concerned there is a net gain R100000. May this be offset against future medical costs? A universalist would say yes. A `pigeonholer' would say no.
>
> ***[11.8.1.2] Loss of support by reason of personal injury***: The appellate division has

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beneficiary `was not entitled'.

[154]All legislation providing for disability pensions and welfare grants (see previous footnote) is characterized by a ministerial discretion, usually in consultation with another minister, as to availability of funds. This discretion is concerned with needy persons as a group, not individuals. Once the ministerial discretion has been exercised then those qualifying in terms of the laid down conditions become entitled to benefits.

[155]Luntz `Damages' 2ed 384.

[156]See paragraph 3.3.8.

awarded to an injured young woman compensation for loss of the financial benefits of marriage, loss of support from a notional future husband who due to the injury she will never have.[157] Popular juristic perceptions dictate that compensation for injury is for loss of earnings. Loss of support claims are perceived as being restricted to the death of a breadwinner. This `pigeonhole' outlook has given rise to at least one theoretical attempt to rationalize the `loss of financial benefits of marriage' within a `loss-of-earnings' pigeonhole.[158]

[11.8.1.3] Support in old age: A young working woman married to a very much older man will have a substantial prospect of supporting him for 10 to 20 years after he retires, particularly if he has poor pension prospects. Until he retires he is the main breadwinner. Can support lost by the widow during the deceased's pre-retirement years be offset against the support which would have been provided to the deceased after his retirement? A `pigeonholer' would say no and terminate the calculation at the time of the deceased's notional retirement. A universalist would offset the widow's long-term gain against her short-term loss.

[11.8.1.4] Like deducted from like: One finds it said that only like should be deducted from like.[159] The inequity which this application of `pigeonholing' sought to address was the claimant who had failed to claim for medical expenses which had been paid by the workmen's compensation commissioner.[160] The recovery sought by the commissioner included the amounts paid by way of medical expenses. `Pigeonholing' ensured that the commissioner's medical disbursements would only be deducted from the claimant's damages to the extent that such damages included an award for medical expenses. In this circumstance `pigeonholing' achieved an equitable result.

The like-from-like criterion is not a general principle of assessment and if used as such does not always produce justice. Thus, for example, the reduced earnings after an injury have been viewed, not as a deductible compensating advantage, but as the residue of an asset that was previously worth more. In English law such a pigeonholing approach has led to a ruling that a disability pension should not be deducted from the earnings which it replaces.[161]

[11.8.2] Overlapping heads: From a utilitarian point of view the different heads of damage interact and overlap. To arrive at the true net financial effect of the wrongful act, gains from one `pigeonhole' need to be offset against losses from other

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[157] *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A).

[158] Boberg `Delict' 576-7.

[159] *Klaas v Union & SWA Insurance* 1981 4 SA 562 (A) 581B 591-2; *Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A). For commentary see Koch 1987 *THRHR* 475-480.

[160] *Klaas v Union & SWA Insurance* 1981 4 SA 562 (A) 581B 591-2.

[161] *Parry v Cleaver* [1969] 1 All ER 555 (HL) 564A2 582E-G. South African law is different. In *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) it was held that a disability pension should be deducted. For discussion of this latter judgment see 183 below.

`pigeonholes'.[162] The arithmetical sum of the individual heads will usually exceed the true value of the whole loss. The most obvious manifestation of this aspect of the assessment of damages is the deduction made for general contingencies. The courts have cautioned against overlapping heads.[163] The effect of bringing together different heads of gains and losses is to treat the claimant's overall patrimonium, his rights and duties, his past and future prospects good and bad, as a unit, a single asset which is reduced in value by the wrongful act.

Thus, for example, in *Kriel*'s case [164] the trial court held that the assessment of general damages is separate and distinct from what is awarded under patrimonial loss. This approach was subsequently rejected by the appellate division which found `an appreciable... improper duplication of damages'.[165] This latter finding was motivated by the extensive range of devices for which allowance had been made in the award for future expenses. What can be done with the award for general damages is not the sole factor governing its assessment.[166] Van der Walt and Bloembergen are both in agreement that pigeonholing is undesirable.[167] More generally it has been said that:

> `In making separate awards, the Court must of course guard against any overlapping and a resulting duplication'.[168]
>
> ``n Beoordelaar hom by die vasstelling van die eiser se skade aan die konkrete omstandighede moet oriënteer, en nie aan 'n min of meer onbuigbare skematiese onderskeid tussen verskillende skadesoorte nie'.[169]
>
> `One must be careful not to elevate what may be no more than a convenient classification into a source of legal rules'.[170]
>
> `I fear... the rigidity which such classification and labelling may induce. I appreciate the value, in its proper sphere, of a scientific analysis and sub-division under proper nomenclature of the applications in practice of a legal principle. I think, however, it is possible that... an undue limitation may be placed upon its scope by an attempt to define its applicability entirely by means of type or class tests'.[171]

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[162] *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920G (the `contract of employment' criterion here created is effectively a large pigeonhole).

[163] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F.

[164] *Kriel v Administrator-General SWA* 1986 3 C&B 539 (SWA) 548mid-page.

[165] *Administrator-General, SWA v Kriel* 1988 3 SA 275 (A) 289E.

[166] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-20; *Gerke v Parity Insurance* 1966 3 SA 484 (W). See paragraph 12.15.6(.

[167] Van der Walt `Sommeskadeleer' 204-5; Bloembergen `*Schadevergoeding*' 117-22.

[168] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F. See too Cooper-Stephenson & Saunders `Damages in Canada' 275-91; Luntz `Damages' 2ed para 5.2.09.

[169] Van der Walt `Sommeskadeleer' 205n27. This passage read together with 425-48 would suggest that Van der Walt would separate damages for patrimonial and non-patrimonial loss but would nonetheless allow a gain under one head to be offset against a loss under another head. See too 110 204-5 and 1980 *THRHR* 1 16 25.

[170] *Pretoria North Town Council v A1 Electric Ice Cream Factory* 1953 3 SA 1 (A) 11B3.

[171] *SA Defence & Aid Fund v Minister of Justice* 1967 1 SA 263 (A) 278C-D.

The latter two quotes are concerned with the exercise of an administrative decision. The assessment of damages involves the exercise of a wide judicial discretion. These statements of principle would thus seem to be relevant.

[11.8.3] `Pigeonholing' general damages: In *Bezuidenhout*'s case[172] the claimant had suffered no loss by way of earnings but had nonetheless been awarded a pension by the workmen's compensation commissioner. Defendant sought to deduct the value of this pension from the claimant's award for general damages for pain and suffering and loss of the amenities of life. Defendant's approach was rejected on the grounds that benefits under the Workmen's Compensation Act are patrimonial.[173] The court also pointed out that, for the same reason, the commissioner could not recover from the defendant.[174] The fairness of this decision is not all that obvious. Even after deduction the victim would have retained financial benefits with a value at least equal to the common-law damages. The rule against double compensation suggests that the value of the pension should have been offset against the award for general damages. From the claimant's point of view the utility of money, its buying power, is exactly the same regardless of whether the lawyers have labelled it `general damages' or `patrimonial damages'. From the lawyer's point of view there is no clear dividing line between general damages and patrimonial loss.[175] Thus it is common that when no explicit award has been made for loss of earnings, the award for general damages has been increased to allow for the value of the chance of loss of earnings.[176] An award of general damages will also be increased to allow for the prospect of uncertain future expenditure.[177]

[11.8.4] Effect of supervening death: The action for general damages, that is for pain and suffering and loss of the amenities of life, is not Aquilian.[178] The substantive law nonetheless awards as compensation a single undivided lump sum incorporating both patrimonial and non-patrimonial elements.[179] The claim for general damages is not transmissible to the estate of the claimant should he die before *litis contestatio*.[180] Should he die after *litis contestatio* the claim for general damages becomes an asset

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[172]*Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A).

[173]*Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A) 368.

[174]*Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A) 368E.

[175]*Dlamini v Government of RSA* 1985 3 C&B 554 (W) 587 `... there must be some interaction between awards for patrimonial loss on the one hand and the award for non-patrimonial loss on the other... I cannot ignore... what is a different head of damage but forms part of one and the same award'.

[176]*Mashini v Senator Insurance* 1979 3 C&B 82 (W); *Assur v Protea Assurance* 1981 3 C&B 196 (C); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C); *Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13 `A Court is entitled... to award a globular amount in respect of general damages including loss of earning capacity'.

[177]See, for instance, *Celliers v SAR&H* 1961 1 C&B 160 (T) 165; *Mashao v President Insurance* 1993 (T) (unreported 1.6.93 case 8370/92).

[178]*Government of RSA v Ngubane* 1972 2 SA 601 (A) 606-7.

[179]*Casely v Minister of Defence* 1973 1 SA 630 (A) 642D-E. Van der Walt `Sommeskadeleer' 425-48 would rather that a clear division was made between general damages and patrimonial loss.

[180]*Government of RSA v Ngubane* 1972 2 SA 601 (A) 606-8; *Santam Versekeringsmpy v Roux* 1978 2 SA 856 (A) 866.

in the deceased's estate.[181] One would expect that the basis upon which general damages are assessed for a dead victim is much the same as for an unconscious victim.[182] The ability of the claimant to benefit from the award is not the sole criterion governing assessment.[183] These considerations all suggest that general damages has a patrimonial quality in the sense of permanence and transmissibility to one's heirs.

With loss of earnings the claim for past loss will persist even if the victim dies before *litis contestatio*. The claim for future loss of earnings falls away.[184] The rule that no compensation is awarded for earnings foregone during the `lost years' derives from the observation that after a claimant's death there is no more need for the living expenses which would have been met from earnings.[185] This ephemeral aspect of the claim for loss of earnings points to a non-patrimonial quality for this category of loss.

[11.8.5] Overlap between patrimonial and non-patrimonial: General damages are awarded for loss of utility of bodily function. Patrimonial loss is awarded for goods and services which can be directly valued in monetary terms. The difference between patrimonial and general damages becomes distinctly blurred when one considers that part of earnings which would have been expended on activities promoting physical or psychological well-being, such as travel, eating, drinking, entertainment and medical care. An award of general damages may include allowance for loss of earning capacity[186] and future *damnum emergens*.[187] The availability of comprehensive case reports of past awards for general damages[188] has the consequence that placing a monetary value on pain and suffering and loss of the amenities of life is often easier than assessing the value of lost future earnings or expected future medical costs.[189] Comparable awards are adjusted for inflation to present value[190] subject to a large discretion to award what is considered right.[191] The

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[181] *Potgieter v Rondalia Assurance* 1970 1 SA 705 (N); *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T).

[182] *Gerke v Parity Insurance* 1966 3 SA 484 (W); *Reynecke v Mutual & Federal Insurance* 1991 3 SA 412 (W). More generally see Boberg `Delict' 567-70.

[183] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 119-20; *Gerke v Parity Insurance* 1966 3 SA 484 (W).

[184] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A).

[185] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A.

[186] See footnote 178 at 63.

[187] See footnote 179 at 63.

[188] The creation of the courts by precedent of a pricing system for general damages casts this head of damages increasingly into a patrimonial mould (Visser 1988 *THRHR* 468 484). Boberg `Delict' 573 observes that `Awards are not made in a vacuum'.

[189] `... die reg wel `n tipe markwaarde aan bepaalde nadeel kan toevoeg' Visser 1986 *De Jure* 207 213.

[190] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841E-F.

[191] *Capital Insurance v Richter* 1963 4 SA 901 (A) 906-7 (the Corbett & Buchanan series was then, it seems, not available); *Marine & Trade Insurance v Goliath* 1968 4 SA 329 (A) 334; *Protea Assurance v Lamb* 1971 1 SA 530 (A) 535-6 `Such assistance as could be derived from the general pattern of previous awards, and allowing for the decrease in the value of money... the process (should not) be allowed so to dominate the inquiry as to become a fetter upon the Court's general discretion'. In *AA Onderlinge Assuransie v Sodoms* 1980 3 SA 134 (A) 140-2 the

prevailing practice in South Africa is fairly accurately described by the following statement of English practice:

> `As regards assessment of damages for non-economic loss in personal injury cases, the Court of Appeal creates the guidelines as to the appropriate conventional figure by increasing or reducing awards of damages made by judges in individual cases for various common kinds of injuries. Thus so-called "brackets" are established, broad enough to make allowance for circumstances which make the deprivation suffered by an individual plaintiff in consequence of the particular kind of injury greater or less than in the general run of cases, yet clear enough to reduce the unpredictability of what is likely to be the most important factor in arriving at settlement of claims. "Brackets" may call for alteration not only to take account of inflation, **for which they ought automatically to be raised**, but also it may be to take account of advances in medical science which may make particular kinds of injuries less disabling or advances in medical knowledge which disclose hitherto unsuspected long term effects of some kinds of injuries or industrial diseases'.[192]

The claim for general damages cannot be ceded prior to *litis contestatio*. The practical effect of this restriction is that neither of the claims for general damages nor patrimonial loss can be ceded.[193] This is so because the dividing line between the two classes of damages is by no means clear. A further reason is the interaction between the two classes of damages as in *Kriel*'s case[194] where the award for general damages was reduced by reason of the extensive equipment allowed for under patrimonial loss. A separation of general damages from patrimonial damages by way of cession would render embarrassing, if not impossible, the task of the court if these claims had then to be assessed at different times in different actions. In *Roux*'s case[195] the notional separation of the claim for general damages from the claim for patrimonial damages was feasible within the intimate confines of marriage, although not without risks of judicial embarrassment at having to assess general damages without details of what has, or will, be awarded by way of patrimonial loss.

[11.8.6] Statutory `pigeonholing' of general damages: Notwithstanding the difficulties inherent to a separation of general damages from patrimonial loss, such separation has been given statutory recognition.[196] It has also been suggested that to reduce the cost to the public of damages for personal injury compensation should be restricted to patrimonial loss.[197] Certainly the development of a guideline which clearly separates general damages from patrimonial loss would greatly facilitate the removal of general damages as a head of damages. There is also little doubt that if the courts persistently failed to adjust awards for general damages adequately for inflation they

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remarks concerning the adjustment for inflation are directed at an error in the trial judge's arithmetic and do not mean that no adjustment should be made for inflation.

[192] *Wright v British Railways Board* [1983] 2 All ER 698 (HL) 706a-b (emphasis supplied) referred to with approval in *SA Eagle v Hartley* 1990 4 SA 833 (A) 841. See too *Protea Assurance v Lamb* 1971 1 SA 530 (A) 534-6.

[193] *Government of RSA v Ngubane* 1972 2 SA 601 (A). More generally see Boberg `Delict' 485 530.

[194] *Kriel v Administrator-General, SWA* 1986 3 C&B 539 (SWA) 548mid-page.

[195] *Santam Versekeringsmpy v Roux* 1978 2 SA 856 (A) 867-8.

[196] Matrimonial Property Act 88 of 1984 s17(1)(b); article 47(a) of MMF agreement ito Act 93 of 1989.

[197] Grosskopf Commission Report 1981 14.

would in time reduce such awards to a negligible aspect of claims for personal injury. It has been suggested that this process is already well under way.[198]

[11.8.7] Military pensions: *Swanepoel*'s case[199] considered `pigeonholing' of general damages outside the ambit of the Workmen's Compensation Act.[200] The benefit in question was a pension paid in terms of the Military Pensions Act[201] to a national serviceman injured while undergoing training. The Act specified that when assessing the pension to be paid no regard should be had to the earning capacity of the claimant in any particular occupation.[202] The schedule to the Act then specifies disablement percentages for different types of injury. After consideration of the Act the court came to the conclusion that the benefits provided thereunder were `rather in the nature of a *solatium* for the totality of the consequences of the disablement, and particularly those that cannot readily be measured in monetary terms'.[203] It was accordingly held that the value of the pension should not be deducted from the claim for loss of earning capacity. The court then observed that `there is indeed no norm for determining in monetary terms the extent of such general damages'.[204] It was then ruled that not even the claimant's general damages were to be reduced by reason of the pension.[205]

[11.8.8] Contradicted principles: The *Swanepoel* decision is to be regretted for a number of reasons.[206] Firstly it is difficult to reconcile with an earlier ruling by the appellate division concerning similar legislation.[207] Secondly the classification of the

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[198]Newdigate & Honey `The MVA Handbook' 150 suggest a method for predicting general damages awards from past awards. Their basis is a flat, ie non-compound rate, of 5% per year up to 1972 and 10% per year from 1973 onwards. The average flat rate of inflation between 1947 and 1973 was 6% per year (3,8% per year compound); between 1973 and 1989 the average flat rate has been 42% per year (13,6% per year compound). If the suggested basis is correct then awards for general damages are declining rapidly in terms of real buying power and doubt may be expressed as to the long-term validity of such a scheme.

[199]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A).

[200]Act 30 of 1941.

[201]Act 84 of 1976.

[202]s7(6)(e).

[203]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 11H.

[204]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 11I-J.

[205]The *Swanepoel* judgment makes the distinction urged by Van der Walt `Sommeskadeleer' 425-48 but with consequences which Van der Walt certainly did not contemplate (see `Sommeskadeleer' 204-5 205n27 quoted at 202). Neethling Potgieter & Visser `Deliktereg' 2ed 241n315 express reservations with the proposition that collateral benefits should not be deducted from general damages.

[206]Article 47A of MMF agreement ito Act 93 of 1989 provides for the deduction of the present value of a military pension for all claims made in terms of this Act. For claims under the earlier acts a military pension remains non-deductible.

[207]The same wording in the War Pensions Act 82 of 1967 was held to cover both patrimonial and non-patrimonial loss: *Casely v Minister of Defence* 1973 1 SA 630 (A) 642 `Even though... the claim... 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'.

pension as pure general damages for pain and suffering and loss of amenities of life seems misplaced. The pension[208] was more in the nature of the general damages that one finds awarded to an injured child,[209] a mixture of patrimonial and non-patrimonial.[210] Thirdly to state that there is no norm for the determination of general damages is to deny the normative value of the many reported cases reflecting the considered opinions of the courts in the past as to fair value in this regard.[211] If the awards for general damages which the courts have been making reflect fair compensation for the injuries suffered then any amount significantly out of line with such awards, after due allowance for currency depreciation, must be excessive and unfair.

[11.9] CAUSATION BY FACILITATION

If the chance of an event is increased or decreased by the wrongful act then this increase, or decrease, in the chance of the event is caused by the wrongful act. In other words the wrongful conduct **facilitates** the subsequent event.[212] The courts have not always been astute to take this view of causation:

[11.9.1] Narrow causal reasoning: It has been suggested that remarriage by a widow should be ignored when assessing her damages because it is not `caused' by the original wrongful act.[213] If such causal reasoning is correct then it follows that for personal injury a victim may argue that his prospects of finding alternative employment after the injury should be ignored because the taking of the new employment is not `caused' by the injury. Such an approach to compensation for personal injury or death may be likened to assessing damage to a motor car without regard for the scrap value of the vehicle.[214] The remarriage is `caused' by the wrongful killing in the sense of being facilitated. Remarriage is in this contingent

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[208]s20 of the Military Pensions Act 84 of 1976 states that compensation under the Act shall be in substitution for any claim for damages which may arise against the state.

[209]*Mashini v Senator Insurance* 1979 3 C&B 82 (W); *Assur v Protea Assurance* 1981 3 C&B 196 (C); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1085.

[210]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13 `A Court is entitled... to award a globular amount in respect of general damages including loss of earning capacity'. *Casely v Minister of Defence* 1973 1 SA 630 (A) 642

[211]See the cases reported in Corbett & Buchanan; Visser 1988 *THRHR* 468 484. The medical ability to transplant organs of the body has given rise to a form of market in such parts with prices being paid (*Time Magazine* March 13 1989 88; February 20 1989 16; June 17 1991 52).

[212]See 20.

[213]`Die hertroue van 'n weduwee... is egter nie gevolge wat uit die dood van die betrokke eggenoot... voortvloei nie, en dus nie juis op logiese gronde gesien word as faktore wat by die bepaling van 'n weduwee... se vergoeding in aanmerking geneem moet word nie' *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 614B-C.

[214]It seems that in the classical Roman law partial loss may have been compensated in some cases as though there had been total destruction (Kaser `Roman Private Law' 214; Lee `Roman Law' 4ed 395-6; Leage `Roman Private Law' 3ed 410-11). The last two sources conclude on grounds of common sense that the Roman law could not possibly have been so harsh as to award the full value of the *res* when a residual value remained. If one bears in mind that damages during this period were viewed as composition rather than compensation the conclusions drawn by Lee and Leage are by no means necessary. The modern practice to ignore insurance payments may well be viewed with equal disbelief by a commentator 1000 years from now.

sense a normal foreseeable event[215] that follows upon the death of a spouse.

It has also been ruled that the adoption of a child after the deaths of both parents is not caused by the death and must thus be ignored when assessing the child's damages for loss of support.[216] In general the reasonable man would consider adoption to be a normal consequence of the death of both parents.

Similarly narrow causal reasoning has been used to justify the non-deduction of accident insurance benefits, it being held that the payment of the benefits was not caused by the accident but by the taking out of the insurance.[217] The payment of insurance benefits is a normal and foreseeable consequence of an injury or death. The Assessment of Damages Act[218] states that pension and life insurance benefits `payable as a result of the death' are to be ignored when assessing damages for loss of support. The words `payable as a result of the death' imply payable as a normal and foreseeable consequence of the death.[219] If the taking out of the insurance were to be viewed as the cause of the payments then the intention of the legislature would be subverted.

The question of causation by death also arises in a non-damages context. An estate duty statute rendered dutiable `Any lump sum benefit which becomes recoverable in consequence of or following upon the death of a member'.[220] The rules of a pension fund provided that `The committee may in its discretion commute the whole or any part of any pension... for a single lump sum'.[221] The court ruled that:

> `Upon the grant of a pension to the dependant, the death of the member ceases to have any operative effect. The decision of the committee is "the intervention of an independent, unconnected and extraneous causative factor or event" which isolates the death from the final result'.[222]

The statute clearly seeks to define causation in the broad sense of the normal foreseeable consequences of the state of death. The court does not seem to have considered this interpretation at all and busied itself with a choice between the patent absurdities of the *conditio sine qua non* test and a narrow interpretation of causation. It is notable that the court did not investigate what decision the committee *usually* made following a death. Such an inquiry would have revealed that the committee almost invariably exercised its discretion in favour of the payment of a lump sum. The reasonable man would certainly have viewed the resulting payment to be one of

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[215] In the sense of a `reasonable possibility' (see *Smit v Abrahams* 1992 3 SA 158 (C) 165F).

[216] *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A).

[217] *Bradburn v Great Western Railway Co* [1874-80] All ER 195 (Exch D).

[218] 9 of 1969.

[219] In *Du Toit v General Accident Insurance* 1988 3 SA 75 (D) the court did not consider whether the payment of the widow's pension had been caused by the deceased's original contract of employment.

[220] *CIR v Shell SA Pension Fund* 1984 1 SA 672 (A) 676C-D.

[221] *CIR v Shell SA Pension Fund* 1984 1 SA 672 (A) 676H.

[222] *CIR v Shell SA Pension Fund* 1984 1 SA 672 (A) 679G.

the normal and foreseeable consequences of the death.[223]

[11.10] SUBLIMINAL WRATH

[11.10.1] Damages are not punishment: An award for `punitive damages' is contrary to the Roman-Dutch law.[224] Modern jurisprudence has rationalized the award for general damages as compensatory, but one may speculate with some confidence that subliminal punitive considerations of revenge or punishment attended the introduction of this aspect of compensation for personal injury.[225] It is notable that some of the Roman-Dutch texts state that the award for general damages is only to be ordered **if expressly demanded**.[226] This suggests an ethic that general damages for pain and suffering and loss of amenities was a form of palliative (`troosgeld') directed at satisfying a felt need by the claimant for revenge or punishment.

[11.10.2] Indications of irrationality: It has been said of the prevailing collateral-benefit rules that: With collateral benefits logic is conspicuous by its absence.[227] The complexity of collateral benefits cannot be resolved by a general concept of damages.[228] Such an analysis serves only to highlight the irrationality of ignoring certain benefits in the assessment process.[229] The subject is characterized by *ex post* rationalisations[230] and primitive thoughts of revenge.[231] The expression *res inter alios acta* suggests that some guidance may be found in the rules of evidence, but this is not necessarily so.[232] Causation is a popular but fallacious *ex post* rationalization.[233]

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[223]In this instance the chances of payment would have been better than a mere `reasonable possibility' (see *Smit v Abrahams* 1992 3 SA 158 (C) 165F 178C).

[224]Erasmus 1975 *THRHR* 362 364-6; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 171E-F `The claim under the *Lex Aquilia* for economic loss... is wholly compensatory... and it embodies no punitive element'. See too *LAWSA* vol 7 paras 5 13.

[225]The Roman-law rule that the body of a free man has no patrimonial value (Davel `Skadevergoeding' 7-9) prevails in our modern law with the prohibition on an award for general damages in the event of death (*Union Government v Warneke* 1911 AD 657 667; *Hulley v Cox* 1923 AD 234 243). The fact of the no-value rule renders it highly likely that the award for general damages has its origin in considerations of punishment and solace rather than notions of a commercial value for pain and suffering and the loss of amenities, as we find in our modern law (*Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-18; *Gerke v Parity Insurance* 1966 3 SA 484 (W)).

[226]Grotius *Inleiding* 3.34.2 `*De smert ende ontciering van't lichaem... werden op geld geschat, soo wanneer sulcks versocht werd*'. The same proviso is recorded by Voet *Ad Pandectas* 9.2.11.

[227]Van der Walt 1980 *THRHR* 1 2 `logika glo skitter deur sy afwesigheid'; Boberg `Delict' 491 `None of the explanations is entirely satisfactory'; Reinecke 1988 *De Jure* 221 223.

[228]Van der Walt 1980 *THRHR* 1 4.

[229]There has been general criticism of the paradox of double compensation: *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150-1.

[230]Van der Walt 1980 *THRHR* 1 5.

[231]Van der Walt 1980 *THRHR* 1 26 `Allerlei primitiewe wraakgedagtes agter 'n eenvoudige billikheidsoordeel mag skuil'. Boberg `Delict' 570 writes of `society's sense of outrage' in relation to general damages. Mundell 1987 *THRHR* 379 384 writes of `legalised vengeance'. The punitive overtone is notable. Group feelings, the feelings of the *sib*, were markedly relevant under the Germanic law. Their relevance today is not quite so obvious with State managed criminal sanctions and a judiciary of sufficient independence to stand above mob justice.

[232]Van der Walt 1980 *THRHR* 1 9.

[233]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151F; Van der Walt 1980 *THRHR* 1 21.

Van der Walt finds a common thread in an irrational desire for punishment and revenge.[234] Judicial suspicions of a *possible*[235] popular sense of public outrage[236] may be allowed to override reason.[237] McKerron[238] justifies the non-deduction of collateral benefits on the ground that `the law of delict plays an important part in supplementing the criminal law in enforcing adherence to standards of conduct'.

[11.10.3] Judicial discretion: Under circumstances of catastrophic injury or death it is by no means clear to what extent the courts are able to maintain an objective attitude towards patrimonial loss. On one hand it has been said that `We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment'.[239] On the other hand `the trial judge has a large discretion to award what under the circumstances he considers right'.[240] An objective standard of value for general damages has been encouraged.[241] Corbett & Buchanan, however, express doubts that such an objective standard has been maintained by the courts.[242] Although a judicial discretion is undoubtedly desirable it does leave the way open to decisions based upon prejudice or an intuitive sense of outrage, rather than objective and rational considerations.[243] The shadow of *versari in re illicita* may be detected in some dicta concerning collateral benefits.[244]

[11.10.4] Policy decisions: There is little doubt that a court is not obliged to rely on logic and reason if there are sound policy considerations for taking a different

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[234]Van der Walt 1980 *THRHR* 1 12 23 24 25 26; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151F 152E.

[235]Luntz `Damages' 2ed para 8.1.02 `In the United States, where the collateral source rule applies even more widely than in Anglo-Australian law, juries are said to be as much opposed to it as academic writers; their notorious sympathy for plaintiffs does not extend to compensating for losses already made good'; (see too Cooper-Stephenson & Saunders `Damages in Canada' 498-500). Atiyah `Accidents Compensation & the Law' 3ed 215 notes that a jury verdict is as close as one can hope to come to a deed poll. These considerations suggest that judicial presumptions as to popular opinion may not be borne out by proper inquiry.

[236]For instance `It would not be in the public interest to allow a wrongdoer to benefit' *Victor v Constantia Insurance* 1985 1 SA 118 (C) 125A3; `It would be revolting to the ordinary man's sense of justice... that the only gainer would be the wrongdoer' *Parry v Cleaver* [1969] 1 All ER 555 (HL) 558C-D.

[237]Van der Walt 1980 *THRHR* 1 24n65 `Die gevoel van onbehaaglikheid wat soms spontaan ervaar word moet dus buitengewoon noukeurig getoets word'; Mundell 1987 *THRHR* 379 384 `The fault system reveals... a marked failure to correlate the fault and the punishment'.

[238]McKerron 1951 *SALJ* 373.

[239]*Hulley v Cox* 1923 AD 234 246. Atiyah `Accidents compensation & the law' 3ed 550 states that punitive desires are to be resisted.

[240]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E-G.

[241]*Radebe v Hough* 1949 1 SA 380 (A) `The amount of damages to be awarded for pain and suffering should not vary according to the standing of the person injured'.

[242]Corbett & Buchanan 3ed 8n64.

[243]Van der Walt 1980 *THRHR* 1 24n65 26; Mundell 1987 *THRHR* 379 384; Atiyah `Accidents Compensation & the Law' 3ed 550; Hahlo & Kahn `The SA Legal System' 65 `The notion that legal problems can be solved by an unaided enlightened discretion is "a horrible abomination, more to be feared than a dog or a serpent"'.

[244]See footnote 236.

view.[245] One may question, however, whether a judge's unconfirmed suspicion[246] of a popular sense of outrage[247] really justifies an irrational policy decision.[248] Logic and reason provide safeguards against errors of judgment prompted by emotional considerations.[249]

The opinion has been expressed that policy decisions by the courts `are rather vague and unspecific, not pertinently indicating or fully discussing the actual policy considerations motivating the decision'.[250] The forensic mysticism that so often attaches to the treatment of collateral benefits provides further evidence in support of this opinion.

[11.10.5] The morality of logic: It has been said of a rule for the non-deduction of collateral benefits that because it is a rule of law it must be fair.[251] Such an argument is clearly fallacious[252] The assessment of damages for financial loss lends itself to the structured, as distinct from intuitive, reasoning. As I have noted previously there is a morality in logic and reason.[253] The greatest danger with the doctrine of the non-punitive nature of damages is that vengeful elements in the assessment process may be denied their true nature in order to render the doctrine valid.

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[245]Friedmann `Legal Theory' 342-44 describes the `free law theories' which reflect the extreme effect of providing a judge with a wide discretion to award what he considers right. Boberg Nov 1981 BML 25 27 states that `Our courts... are entitled to prefer equity and convenience to the dictates of logic'.

[246]The courts do not rely on objective public opinion surveys when handing down decisions based on what is thought to be offensive to the public. In general a court will take judicial notice of what is perceived by the public to be good morals (see, for instance, Van Zyl 1988 *SALJ* 272 284-7).

[247]See footnote 243.

[248]Friedmann `Legal Theory' 477-8.

[249]See, inter alia, Mullineux 1993 *De Rebus* 721.

[250]Van Aswegen `Policy considerations in the law of delict' 1993 *THRHR* 171 191.

[251]There is a presumption that if it is law then it must be fair: `There is nothing punitive in calling on a defendant to pay that which the law says is a just recompense for the injury the plaintiff has caused' *Parry v Cleaver* [1969] 1 All ER 555 (HL) 574H-I; see too Munkman `Damages' 4ed 85n(a); *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 152H. It would be most disturbing, however, if such an attitude were to place rules of law above criticism or revision (see McGregor Nov 1965 *MLR* 629-41).

[252]One may point, for instance, to the ruling in *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) where the court recorded that its finding on the law produced an unfair result.

[253]`Logic... is concerned not with what men actually believe, but with what they ought to believe, or what it would be reasonable to believe' provided the underlying premises are valid: Ramsey `Foundations of Mathematics' 193. By this one must understand sound logic, not clumsy dabbling (`'n Mens kan met syfers goël' *AA Onderlinge Assuransie v Sodoms* 1980 3 SA 134 (A) 142C). There is logic in consistency; Ramsey 184-6. `While the result of a actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis' *Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D.

[11.11] CONCLUSIONS

Considerations of comprehensive compensation[254] and macro-economics suggest that there should be a general rule that all collateral benefits be deducted save where a third party has stipulated for reimbursement, or is otherwise entitled thereto. In those instances where the court has had regard to the interests of third parties the amounts involved should be listed in the judgment together with the overall award. The practice of allowing separate rights of action introduces procedural difficulties which are best avoided by allowing a single group action. The expression `contract of employment' should be interpreted equitably to include all benefits for which the employee had a reasonable expectation.

[254]See 50.