CHAPTER 12

DAMAGES FOR PERSONAL INJURY

***Summary**: The expression `loss of earning capacity' embraces both earnings and living expenses. `Loss of earnings' and `loss of earning capacity' should not be distinguished. Just as increased living expenses, damnum emergens, increase the compensation payable so too saved living expenses reduce damage suffered and thus the defendant's liability. General damages has a patrimonial aspect and awards must have some regard to the cost of goods and services in the community at large. Likely earnings and likely expenses are the criteria by which to measure earning capacity and further spending needs. The earning capacity of business capital should be distinguished from the earning capacity of the victim. Compensation for `loss of earning capacity' includes loss of support for the victim's family. Illegal earnings are best dealt with by basing compensation on what would have been earned had the victim acted legally.*

[12.1] `LOSS OF EARNINGS'

[12.1.1] All-embracing: A claim for damages for personal injury is often loosely described as a claim for `loss of earnings' or `loss of earning capacity'. The usual consequence of a bodily injury is a loss of earnings, past or future, plus a loss by way of *damnum emergens* in the form of medical expenses, equipment costs and, possibly, the need for an attendant.[1] For an injured woman the damage may take the form of a loss of home-making capacity[2] or a loss of the financial benefits of a notional future marriage.[3] The description of damages for bodily injury as a `loss of earning capacity' focuses upon the usual, the most obvious form of the damage. With paraplegic and quadriplegic cases, however, the costs of medication, appliances and attendants will frequently constitute the major component of the claim. For other forms of injury, such as a broken hip, there may be substantial future medical costs by way of hip replacements and analgesics but, due to generous sick pay provisions, no loss of earnings.

***[12.1.2] `Pigeonholing'***: Some legal analysts have interpreted the expressions `loss of earnings' and `loss of earning capacity' in a `pigeonholing'[4] sense to limit the extent of the items which may be brought into account when assessing damages for bodily injury.[5] The rigorous application of such reasoning would preclude a claim

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[1]eg *Administrator-General SWA v Kriel* 1988 3 SA 275 (A); *Dhlamini v Government RSA* 1985 3 C&B 554 (W); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C).

[2]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 406-9.

[3]*Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704 705.

[4]See 200.

[5]See for instance Boberg `Delict' 530-1 538-40 575-7 588 610-11; Van Heerden `Skadevergoeding en Belastingpligtigheid' *JC Noster* 1 8-9; *General Accident Insurance v Summers*

for *damnum emergens*. This is clearly an absurd result. One may thus conclude that the expressions `loss of earnings' and `loss of earning capacity' are just convenient labels for a wide range of losses flowing from a bodily injury and claimable under the Aquilian action. The physical injury is the primary damage, the financial losses are consequential damage. One should not attempt to read too much meaning into the expressions `loss of earnings' and `loss of earning capacity'. It is otherwise with the expression `loss of support' used to describe damages claimable in consequence of a death wrongfully caused. This does reflect limits to the range of losses which may be claimed under the dependants' action.[6]

[12.1.3] The three elements: The expression `earning capacity' embodies a number of different concepts:

> ***[12.1.3.1] Work capacity***: This expression is to be preferred for describing the personality aspect of `earning capacity' because it avoids reference to the patrimonial element of earnings. The capacity to work is not always exercised with a view to generating earnings, as in the case of the unsalaried social worker or the recreational woodworker. The capacity to work is undoubtedly an important amenity of life which is harmed or removed by serious physical injury.[7]
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> ***[12.1.3.2] Earnings***: Work capacity is commonly utilised to generate earnings. Work capacity is not necessarily co-extensive with earning capacity because a variety of personality skills combine to generate earnings.[8] A loss of work capacity may give rise to a loss of earnings. In this sense the loss of work capacity is the primary loss suffered with bodily injury, the loss of earnings is a consequential loss. Earnings usually take the form of weekly or monthly payments of money. This is the measure of the utility of the victim's work capacity to the community at large. Work capacity is also exercised to save on expenditure: For example growing one's own vegetables or repairing one's own car. Such savings are patrimonial in nature and, if proven, will generally be compensated at a level commensurate with what it would have cost to acquire such goods or services in the open market.[9]
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> ***[12.1.3.3] Present value***: The earnings, or savings in expenditure, generated by the use of a capacity to work will usually occur in relatively small amounts over an extended period. For purposes of lump-sum compensation it is necessary to

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1987 3 SA 577 (A) 617. Narrow reasoning of this nature has led to a ruling in Canada that tax should not be deducted when assessing loss of earnings (Cooper-Stephenson & Saunders `Damages in Canada' 181-95).

[6] *Legal Insurance v Botes* 1963 1 SA 608 (A) 614E `It aims at placing them in as good a position, **as regards maintenance**, as they would have been in if the deceased had not been killed' (emphasis supplied). The ruling in *Evins v Shield Insurance* 1980 2 SA 814 (A) implies that if the death of a husband has caused the widow a loss of earnings such loss cannot be claimed under the dependants' action. See 273 below.

[7] Capacity to work is not listed as an amenity of life in *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 288 but is clearly implicit to the factors therein mentioned.

[8] Van der Walt `Sommeskadeleer' 289; 1990 *THRHR* 140 141-2 (`persoonlikheidsaspekte'). See comments by Neethling 1990 *THRHR* 101 104.

[9] See, for example, *Erdmann v Santam Insurance* 1985 3 SA 402 (C).

> agglomerate these amounts into a single lump-sum present value. In certain contexts the expression `earning capacity' includes the notion of the discounted lump-sum present value of expected earnings, the capitalized value.[10]

The above analysis reveals that `earning capacity' is neither personal nor patrimonial but a concurrence of both. Neethling has proposed that earning capacity be included under a fifth class of legal objects.[11] It needs to be borne in mind, however, that the expression `earning capacity' is capable of a diversity of meanings depending on context. Usage of the expression in this text generally contemplates a combination of `work capacity', `earnings' and `present value'.

[12.1.4] Capital and income: The present value of future earnings will take account not only of the sum total of the earnings but also of the remoteness in time of such amounts, the discount for interest, and the uncertainty attaching to such amounts, the discount for risk.[12] The `present value' of such future earnings is then something separate and distinct from the cash flow which it represents:[13]

> `The assessment of damages for loss of earning capacity is in truth an exercise in valuation. It is quite true to say that what that capacity may reasonably be expected to produce is a factor, indeed a major factor, in the process of valuation... If a rental property has to be valued, the rent it might be expected to produce might well be a factor, indeed a prime factor, in assessing its value. But *the value assigned would not in any sense be a replacement of those rents*, though the only utility of the property may be the production of rent. That the property was currently vacant would not deny its value, nor would its current rental income necessarily reflect its maximum productivity'.[14]

> `Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie.'[15]

> `The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate'.[16]

> `The object of the award under the present head is to provide plaintiff with a one-off lump sum representing the assessed present value of his lost future after-tax income stream, *but subject to the qualification that the award is not simply restitution of the lost*

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[10]See, for instance, *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D (see quotation at 215 below). See too paragraph 3.5.5.

[11]Neethling 1990 *THRHR* 101 104-5.

[12]Grotius *Inleiding* 3.32.16 `*dat onzeecker ende toekomend goed niet soo veel waerd en is, als het zekere ende tegenwoordige*'.

[13]A mere shadow of a life plan (see 68).

[14]*Atlas Tiles v Briars* (1978) 21 ALR 129 (HC) 135-6 (emphasis supplied).

[15]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

[16]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917C 920; Boberg `Delict' 610sup.

> *income but a sum of money representing compensation for the actuarially determined chance that the plaintiff would have earned such income*. What is necessitated is an exercise involving the various future possibilities being expressed as percentage chances, or averages, and subject to contingency allowances...'.[17]

General damages will at times include allowance for loss of earning capacity.[18] General damages are valued in the same way as, for example, a farm, by reference to prevailing currency values.[19] It follows that the value of earning capacity and the value of the farm are of a similar nature. They both reflect a price at which a future expectation, the utility of a life plan, is exchanged for a single monetary amount.[20]

The quotations above proceed from the view that earning capacity is an asset in the claimant's patrimonium the value of which is reduced by the injury. The value of that asset is usually determined by reference to expected income.[21] Work capacity is non-patrimonial. It is an amenity of life. The asset in the claimant's patrimonium is not work capacity but the present discounted value of the income expected from the use of work capacity. A major objection to viewing the present value of earnings as a tangible asset in the victim's estate is that in the event of insolvency or divorce, it is not standard commercial practice to treat such an asset as forming a part of the estate. One cannot under normal economic conditions buy or sell an `earning capacity' for a single lump sum.[22] The absence of a commercial market does not mean, however, that a value for the *res* cannot be determined.[23] The capacity to work is a right of personality and thus not transferable. Reinecke[24] has concluded that the absence of transferability does not mean that the *res* cannot be an asset in the estate or have a realistic value.

[12.2] DIFFERENCING METHODOLOGY

[12.2.1] Capitalize first: The view of earning capacity as a capital asset with a value equal to the present value of expected income is consistent with an assessment

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[17] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 61 (emphasis supplied).

[18] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13. See too *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'.

[19] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841 `In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss (just as) a valuer determining the present value of a farm would not use the currency values of the past'.

[20] Bloembergen `*Schadevergoeding*' 47, notes that a market includes allowance for all the possible uses to which the goods may be put (see quotation in footnote 22 at 8).

[21] `Verwagte inkomste' (see quotation above).

[22] One can, however, purchase for a lump sum the right to an increasing series of future payments contingent on human life, ie an immediate increasing life annuity. In *Santam Insurance v Fick* 1982 (A) (unreported 24.5.82 case 282/79/AV) the claimant had contrived a tax avoidance scheme which included selling his earning capacity to one of his companies.

[23] See paragraph 2.10.1 (surrogate markets).

[24] Reinecke 1976 *TSAR* 26 31 `Oordraagbaarheid is dus nie die essensiële eienskap wat vermoënsregte tot vermoënsbestanddele verhef nie. Die gevolgtrekking is daarom onvermydelik dat vermoënsverwagtinge ook as vermoënsbestanddele kwalifiseer... Die eindresultaat is egter elke keer niks anders nie as dat gepoog is om 'n realistiese indien subjektiewe waarde vir die betrokke vermoënsverwagting te vind'.

methodology which capitalizes first and differences afterwards. This methodology hypothesizes a patrimonium in which the present value of expected earnings is a capital asset. So too is the value of the chance of all other past and future gains and outgoes.

[12.2.2] Difference first: The artificiality of a notional patrimonium is avoided by restricting the analysis to the more familiar form of patrimonium which is encountered in deceased and insolvent estates. Such an approach reflects an assessment methodology which differences first and capitalizes afterwards.[25] The notion of a capital value for earning capacity is alien to such a methodology as too is the value of the chance of a loss. The lump sum is viewed as no more than a financial device to generate the payments of loss as and when required. Capitalization is thus not intrinsic to the assessment process but a procedural adjunct thereto dictated by the once-and-for-all lump-sum rule.[26]

[12.2.3] Damages as a series of debts: In *Hartley*'s case[27] the concept of a continuing loss was viewed as a continuing series of debts owing by the wrongdoer. This model may be criticized on a number of grounds: Firstly it implies that prescription should run separately on each individual item of loss as and when it falls due. Prescription for damages for personal injury or death generally runs from the date of the injury or death *in respect of all items of loss, past and future*. The debt that is claimed in the summons is an aggregation of numerous separate items. The itemization making up the overall lump-sum award reflects no more than the court's reasoning in arriving at the relevant lump sum.[28] The concept of separate debts is difficult to reconcile with an award for the value of the chance of an uncertain loss of earnings[29] or a deduction for general contingencies. As a general rule the concept of continuing loss tends to promote injustice. In one instance an injured claimant has been denied a right of action.[30] More recently the notion of separate debts has led to a refusal to allow loss of buying power on past losses.[31] It has been observed that the practice of damages assessment now tries to sit on two different stools.[32]

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[25]eg *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613E-G `voortdurende schade', ie `continuing loss'.

[26]Van der Walt `Sommeskadeleer' 280-315.

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

[28]*Rondalia Assurance v Gonya* 1973 2 SA 550 (A) 557-8; *Van der Plaats v SA Mutual Fire & General Insurance* 1980 3 SA 105 (A) 118G.

[29]*Chaplin v Hicks* [1911-13] All ER 224 (CA); *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 198; more generally see *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6; Neethling Potgieter & Visser `Deliktereg' 2ed 207 208inf.

[30]*Coetzee v SAR&H* 1933 CPD 565 576 `I know of no case which goes so far as to say that a person who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future' (a right of action was denied because the claimant had continued to receive his full salary from the railways); *Coetzee v SAR&H* 1934 CPD 221 (same claimant now dismissed from railways but denied compensation because prescription held to have run from date of injury *when loss arose*).

[31]`The result which I have thus reached is not satisfactory... it seems unfair that he should be paid in depreciated currency' *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841G.

[32]Neethling Potgieter & Visser `Deliktereg' 2ed 233n247 `Dit wil lyk of die praktyk op twee stoele probeer sit en verdienvermoë beide as 'n afsonderlike bate en as toekomstige skade sien'.

[12.2.4] Eclectic methodology: Damages assessment is an eclectic activity characterized by the absence of any one dominant methodology or theory. In practice assessments involve a hotch-potch of capitalize first and difference afterwards, and vice-versa. Once actuaries become involved there is a tendency for the capitalize first methodology to prevail.

[12.2.5] Superficial distinctions: A distinction is often drawn between the expressions `loss of earnings' and `loss of earning capacity'. The expression `loss of earnings' usually arises when assessment is by way of an actuarial calculation whereas `loss of earning capacity' arises when assessment is by way of gut-feel, a robust jury approach.[33] The distinction is more apparent than real. Thus the damages for an injury to a child may be assessed on either an actuarial basis or by using a robust unscientific jury approach.[34] Notwithstanding the different methodologies used for assessment, the resulting lump-sum awards have the same character in the sense of being something akin to the award for general damages.[35]

[12.2.6] Differential contingencies: In its original form the adjustment for general contingencies was something that was applied to the overall assessment after the necessary differencing had been completed. This approach failed to recognise that different risk profiles, that is to say contingencies, may apply to the two different earnings scenarios, injured and uninjured.[36] The technique is illustrated in table 13.

TABLE 13 - DIFFERENTIAL CONTINGENCIES

	Uninjured R	**Injured R**	**Net loss R**
Earnings	548317	466960	81357
Contingencies (10% & 25%)	(54831)	(116740)	61909
Net earning capacities	**493486**	**350220**	**143266**

One is here dealing very much with the reduction in the value of an asset, as distinct from a reduction in the income which that asset represents. It will be noted that the net effect of the differential contingencies is an add-on contingency adjustment of R61909. For this reason the use of differential contingencies is sometimes described as `reverse contingencies. It sometimes happens that an injured victim is provided

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[33] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D3; Boberg 1964 *SALJ* 194 204-5; Koch `Damages' 48.

[34] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D 113-14.

[35] See 68 and 215. See too *Nanile v Minister of Posts & Telegraphs* 1990 4 C&B A4-30 (E) A4-37 `It is a useful safeguard to have regard to both arithmetical and lump sum approaches'.

[36] See, for example, *Brijlall v Naidoo* 1961 1 C&B 266 (D) 271 `These risks which would have attached to the plaintiff in any event are... more likely to affect him in the future because of his disability'; *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 744 (10% and 20%); *Venter v Mutual & Federal Versekeringsmpy* 1988 3 C&B 749 (T) 759 (10% and 25% - see table 13 at 219). Differential contingencies were rejected in *Shield Insurance v Hall* 1976 4 SA 431 (A) 443-5 but due to high risks attaching to pre-injury occupation.

with a guaranteed disability pension by his employer.[37] The contingencies attaching to the pension are usually far less than those attaching to earnings.[38] In such instances the percentage deducted for the uninjured condition may be substantially greater then the deduction for the injured condition.

[12.2.7] Earning capacity as an asset: Under circumstances where a clearly quantifiable loss of earnings cannot be identified it is often appropriate to assess a present value for earning capacity in the uninjured condition, **after a suitable deduction for general contingencies**, and then debate what proportion thereof has been lost.[39] This is a clear case where a standard actuarial calculation is used in the assessment of what is popularly described as a `loss of earning capacity'. The actuarial calculation determines a fair overall lump-sum value for the earning capacity pre-injury, but not for the associated loss. In other words there is no explicit series of monthly or weekly losses that are capitalized by the actuarial calculation.[40]

[12.3] PAST LOSS OF EARNINGS

[12.3.1] Complicating factors: Boberg states that `Past loss of earnings is simply a matter of proof'.[41] This statement rather oversimplifies the realities of assessment:[42]

* When a self-employed person is injured one can only speculate as to subsequent earnings on the basis of past performance. This can be a highly contentious issue when the victim had been self-employed for only a few months.[43]
* During times of economic depression there is a high incidence of injuries to unemployed adults. One is then regularly concerned with assessing the value of the chance of obtaining employment during and after the pre-trial period.
* A variation of the previous problem is the employer who has gone out of business since the time of the injury or has been the subject of strike action and/or retrenchments.

On the whole the analysis of damages has tended to focus on past losses alone[44] with the assessment of future loss being viewed as an awkward, if perhaps embarrassing,

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[37]See 183.

[38]The major uncertainty with a pension is the rate at which it will be escalated in future years (see 155).

[39]See for instance *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 744 where there was virtually no explicit loss of earnings but a substantial loss by way of diminished `earning capacity'.

[40]This point is of relevance if one bears in mind the unduly narrow view of continuing loss that has been taken by the appellate division (see paragraph 12.2.3).

[41]Boberg `Delict' 531. The learned author clearly knows better for he has written in 1963 *SALJ* 538 548 `It is... true that the amount of income which he would have received during the period intervening between the accident and the trial is no more a sum certain and capable of exact arithmetical calculation than the income which he would have received after the trial, for both are subject to contingencies'.

[42]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557-8.

[43]In such circumstances one generally falls back on evidence of what was earned by the victim when last in formal employment.

[44]Bloembergen `*Schadevergoeding*' 18n3 for instance states that he does not deal in his thesis with future loss and the problems of evidence.

judicial duty largely devoid of principles or adequate proof.[45] It is preferable, however, to view past loss as a special case in an overall assessment of hypothetical events.[46] Litigation tends to extend over many years. As the date for assessment is moved forward in time that which was future loss yesterday becomes past loss tomorrow.

Gratuitous payments of salary after the injury will generally be ignored when assessing the damages. The determination of what is `gratuitous' is by no means a simple matter.[47]

If the claimant has been party to a partnership, or a company with several shareholders, then the losses caused by his injury will often not be suffered by him alone, but jointly with his partners or other shareholders. Only the claimant has a right of action for damages. It seems that the claim will be for that part of the loss that affects the claimant's share of the profits. The other partners, or shareholders, will suffer loss but not have a right of action for this loss. In this sense they are loss bearers in the same way that employer bears part of the loss by the payment of sick pay to a disabled employee.[48]

Loss of employment due to an injury will deprive the victim of an income on which to live during the period until which compensation is paid. During such times family members may be obliged to provide support by reason of the duty to do so. The value of such support should be deducted from the past loss because the person providing the support has his own right of action for the cost of providing support during the pre-trial period.[49] This deduction will also arise when a married person is injured and then supported by the other spouse. It will also be appropriate when an injured child, even a married child, returns to the parental home pending the payment of compensation.

[12.3.2] Foregone utility: The assessment of past loss takes no cognizance of the reality of the victim's living expenses during the pre-trial period. If the family has been able to come out on a lesser income there will no financial loss by the time of the trial,[50] only the inconvenience of a lower standard of living. **The loss suffered is thus a loss of utility not a loss of money**.[51] For a married man the loss of utility is not

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[45] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 114B-C.

[46] *Sigournay v Gillbanks* 1960 2 SA 552 (A) 557-8.

[47] See paragraph 11.5.1!.

[48] See paragraph 11.5.1!.

[49] See 193".

[50] In the sense that the family will not be any poorer in terms of rands and cents than if the injury had not occurred.

[51] Bloembergen `*Schadevergoeding*' 85 `*Er kan ook schade zijn, al gaat er geen "money out of pocket"*'. See too Bloembergen `*Schadevergoeding*' 17. In general a victim is expected to mitigate his loss of utility by immediately purchasing a substitute mug of beer (*General Accident Insurance v Summers* 1987 3 SA 577 (A) 613C). The loss is then only a loss of money and not utility (see Bloembergen 55). For a financially destitute family the mitigation of living standards from borrowings or capital is not a viable option.

suffered by him alone but also by his family.[52] In terms of utility theory it is quite correct to ignore the fact of the saved living expenses. **The award made is, however, more in the nature of general damages than patrimonial loss**. The award that is ultimately made may be needed to pay off debts, but more importantly there will usually be a saved element that is then available for discretionary spending on a luxury item, something that would not otherwise have been purchased, something hedonistic.[53] Capital expenditure can generally be deferred during the pre-trial period. The adjustment for past loss of buying power provides the victim with the same utility in terms of buying power as has been foregone during the pre-trial period.[54] This is not to say that the victim will now go out and purchase precisely those goods and services which he would have purchased had there been no injury[55]

[12.3.3] Claims by deceased estates: If the victim has died by the time of the trial the estate retains a right to compensation for past loss accrued to the date of death. Such an award will cover past medical and living expenses which have served to decrease the estate in the direct sense, that is to say, have rendered the estate available for distribution less than it would have been had there been no injury. The deceased victim may, of course, have adopted a cheaper style of living during the pre-trial period and thereby prevented any diminution in his estate. If one accepts that the award for past loss may include a hedonistic element, that is the difference between notional net income but for the injury and actual reduced living costs, then it follows that a deceased estate should not benefit from an award of money which would in any event not have been saved.[56] The justification for the award for past loss of utility is that the victim will be able to indulge in additional expenditure with comparable utility to that by which the victim was short during the pre-trial period. If he is dead or permanently unconscious the justification for an award for past loss of utility falls away. If he has benefited by charitable assistance will the heirs be prepared to pass on part of the compensation money to the benefactor?[57] If the heirs are the wife or children of the deceased, as is usually the case, they will have shared with him the hardship and deprivation and it seems right that they should be provided with the full value of their past loss of utility, possibly with a deduction to allow for

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[52]*De Vaal v Messing* 1938 TPD 34 310 ; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305H; Bloembergen `*Schadevergoeding*' 79.

[53]Van der Walt `Sommeskadeleer' 286 `Die gangbare wyse van skadevergoeding is deur die toekenning van geld. Slegs op hierdie wyse kan daar werklik met terugwerkende krag 'n ekwivalent verskaf word vir die eiser se verlore of verminderde vermoënswaarde. Daadwerklike herstel kan hoogstens daartoe dien om die verdere ontwikkeling van skadelike gevolge... te beperk - 'n ekwivalent vir vergane of verlore vermoënswaarde kan dit nooit wees nie'. See too Bloembergen `*Schadevergoeding*' 48. The word `hedonistic' is here used not in the ephemeral sense of `happiness' criticized by Visser 1983 *THRHR* 43 53 but in the sense of freedom of choice of life-plan. The selected life-plan may not lead to happiness but the sorrows will then at least have been self-imposed.

[54]See 171.

[55]Bloembergen `*Schadevergoeding*' 48 `*De benadeelde zich bijna altijd met de hem aldus toegekende vergoeding in onze op ruilverkeer gebaseerde maatschappij zo niet een soortgelijke zaak, dan toch wel iets gelijkwaardigs kan verschaffen... Die gelijkwaardige zaak zal hem dan ook weer gelijkwaardige mogelijkheden verschaffen... Het verschaffen van zulke gelijkwaardige mogelijkheden is een reëel uitgangspunt voor de schadevastestelling*'.

[56]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 304-5.

[57]See 191.

the deceased's share thereof. For the victim who dies without dependants there is much to be said for making no award for the hedonistic element of past loss. It is rare to find account being taken of past savings in living expenses.[58] For the totally unemployed victim it will often be appropriate to make a deduction for the saved costs of work clothes and travelling to and from work.[59]

[12.4] HOME-MAKING CAPACITY

[12.4.1] Who claims what?: Injury to a married woman may impair her ability to perform her household duties. Damages will be awarded for the cost of acquiring suitable substitute services. Historically this loss, both past and future, has been perceived as suffered by the husband.[60] The preferable view, however, is that the wife herself suffers a loss of work capacity and should be compensated for at least the future cost to herself of hiring substitute services.[61] If the husband has met part or all of the cost in the past then he has a right to recover this expense from the defendant.[62] The desirability of allowing the claim for future loss to the wife is particularly evident if one considers the risk of divorce, an event which may well be rendered more likely as a result of her reduced abilities as a marriage partner.

Injury to a husband may give rise not only to a loss of earning capacity but also to his ability to perform valuable duties in and about the home, such as gardening. The cost of replacing these services is a proper subject for compensation.[63]

[12.4.2] Compensation for notional expenditure: The incurred cost of providing substitute services is generally accepted as an adequate measure of the damages suffered. However, if utility is to be the basis for compensation then it would be proper to award compensation for inability to render the services even if the cost of substitute services has not been incurred. However, the services may for instance, have been provided free of charge by another member of the family or the family may just have made do under less-than-satisfactory conditions. Past loss of earnings, as I have observed, is usually assessed without regard for the fact that the family may have lived on very little and/or charity during the pre-trial period. If proper evidence has been provided there seems to be no good reason why an analogous claim for the utility of lost services in the home should not be allowed even if no cash outlay has been incurred.[64] The pre-trial impecuniosity of many victims generally ensures that such expenditure is not a practical proposition.

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[58] In *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) the 50% contingency deduction included allowance for saved living expenses (979inf). This percentage was reduced in respect of past loss of earnings (977G). The court record does not disclose whether savings in past living expenses were brought into account.

[59] See paragraph 12.5.2.

[60] *Abbott v Bergman* 1922 AD 53; *Plotkin v Western Assurance* 1955 2 SA 385 (W) 394E 395D.

[61] *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 406-9.

[62] *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409F-G.

[63] See, for instance, *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 745.

[64] Bloembergen `*Schadevergoeding*' 107-8 maintains that when a medical doctor has treated his own wounds he should be compensated as though he had paid for the services from another. The victim has suffered the disutility of treating his own wounds and there seems to be no good reason why he should not be so compensated.

[12.4.3] Loss of marriage prospects: Inextricably linked with homemaking capacity is the capacity to marry and manage a family. The ability to render services in the home is part of the *quid-pro-quo* that renders a marriage relationship viable. An injured woman is entitled to compensation for loss of the financial benefits of marriage.[65]

Injury to a young unmarried woman may destroy her prospects of marriage. The indications are that about 35% of married women go out to work.[66] Even if a married woman does work her income net of tax will usually be less than that of her husband, quite apart from periods of unemployment while bringing up children. It follows that for most women a loss of marriage prospects will involve a loss of the financial benefits of marriage, in the form of a loss of the support which would have been provided by a notional husband. The chances of marriage may not be eliminated but may be reduced. The likely financial standing of the notional marriage partner may be reduced. The risk of an unstable marriage may be increased. All these factors may be expressed as a loss of the chance of enjoying the financial benefits of marriage.

A woman who has lost all prospects of marriage cannot claim for the value of the services which she would have rendered in the notional home. The award of the value of her services presumes that there is a home in which to render such services. The more seriously injured woman may need an attendant for her personal care.

[12.4.4] Quantifying the loss: The problems of assessing a value for lost marriage prospects are much the same as arise with loss of support claims when a deduction is made for remarriage prospects.[67] One first estimates the likely level of support from a notional husband assuming marriage as a certainty. This calculation would include suitable allowance for notional children[68] and the chance that the claimant would have worked and partially supported herself. One then reduces the capitalized value of this prospect to allow for contingencies such as the chance that having regard to the injury she still has a small chance of marrying.

Where an injured woman has lost both earning capacity and marriage prospects it will generally be appropriate to make awards under both heads, particularly where evidence indicates that the notional husband would have earned more than she would have done.

It is common to reduce an injured woman's loss of earning capacity for the contingency that she would have been unemployed during periods of childbearing. It needs to be borne in mind, however, that while unemployed she would receive

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

[66] HSRC `Marriage & Family Life' 318. The figure of 35% relates to 1980 and is up from the 20% observed in 1960. For graduate women the percentage is much higher, about 70%.

[67] See, for instance, *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 614-15. This is an aspect of damages assessment which is generally unpopular with the judiciary, but it reflects an unambiguous application of the principle of valuation of a chance.

[68] See Kemp `Damages' 3ed 95-6 for a discussion of the calculation of the costs of keeping a notional family.

increased support from her notional husband. For career women[69] and families with relatively low incomes one can expect very short absences from work due to pregnancy.[70]

The are no reported judgments concerning a married woman who by reason of her injuries has lost her husband and the support that he was providing. This probably reflects a general misconception that loss of support cannot be claimed under the action for `loss of earning capacity'.[71] There will also be problems with proving causation and it will at times be necessary to make a deduction for the chance that divorce would have supervened in any event. There would then be the loss of the chance of contracting a subsequent remarriage.

In general the approach to assessing the value of lost marriage prospects is to equate the claimant's earning capacity to the support she would have received from a notional husband.[72] Boberg[73] motivates this approach on the grounds that by reason of being unable to marry the claimant must now go out and work to support herself, but is unable to do so. The danger of this approach is the secretary who can prove that she would probably have married a surgeon. She would assuredly be undercompensated if her claim were based on her earning capacity alone.

For an injured woman the loss of the financial benefits of marriage will generally give rise to an increased award. On the other hand for a man who suffers reduced marriage prospects there is an associated saving in living expenses, the financial benefits that a notional wife and children would have enjoyed. Even handed justice suggests that if one is to make an add-on for the woman one should make a deduction from the man's damages and there are judgments where such a deduction has been made.[74] The one instance where an attempt has been made to use an actuarial calculation to assess the value of future marriage prospects did not get a favourable reception:

> `The various matters assumed are too speculative to allow for any accurate quantification. Whatever statistics are available can at best indicate average figures, and there is no basis upon which to determine how Clive's position would have compared with the statistical average'.[75]

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[69]HSRC Marriage & family life 319-20.

[70]HSRC Marriage & family life (at 328) records the advantages in South Africa of cheap domestic labour and (at 330) the increasing tendency for employers to provide maternity benefits to working women.

[71]The women with the largest claims for loss of support will be those who were unemployed at the time of the injury.

[72]*Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704(H); see too *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 980A-B.

[73]Boberg `Delict' 575-7.

[74]*Reid v SAR&H* 1965 2 SA 181 (D) 190F-H; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024.

[75]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024D-E.

In the circumstances the court merely increased the deduction for general contingencies to allow for the relevant saving.[76] The court's rejection of the statistical average as a basis for assessment is to be regretted. Allowance for future marriage prospects is an everyday occurrence with damages for loss of support.[77] Statistical averages concerning general population mortality for coloureds were used by the court without demur.[78] Family statistics are also population averages and thus indicative of the likelihood of the relevant events such as average number of children and proportion of married women who work.[79] It has been said that an actuarial calculation is to be preferred to the court's `gut feel'.[80] The emphasis by the court on particularity, that is to say concretization, has the effect of creating an insurmountable burden of proof for the defendant.[81] One can only express the hope that in future matters the courts will be less hostile to statistical averages as a means for filling evidential gaps.[82]

[12.5] LIVING EXPENSES

[12.5.1] Savings deducted: The expression `loss of earning capacity', it has been noted, is a convenient label for a wide range of losses flowing from bodily injury. Not only does the award include allowance for loss of earnings but also for the present value of past and future expenditure on medication, appliances, and attendants. Just as increased expenditure will lead to an increase in the damages payable so too will savings in living expenses justify a reduction.[83]

It needs to be borne in mind that although the claimant's damages for patrimonial loss may be reduced by reason of saved living expenses, the same consideration may justify an increase to the award for general damages.

[12.5.2] Saved travel costs: Perhaps one of the most common and obvious of savings is the cost of work clothes and travelling to and from work. This justifies a deduction from both past and future loss of earnings or support of about 8%.[84] Allowance for

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[76]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1027I-J. See too *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 66 69.

[77]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617-18; *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 614-15.

[78]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024-7.

[79]In general see HSRC `Marriage & family life'. More particularly regard could be had to the circumstances of the claimant's family as a guide to what is usual. In *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-15 the court relied on the earnings of the mother of the claimant as evidence of what the child could expect to earn.

[80]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 99D.

[81]See 31.

[82]See 15.

[83]Or as Boberg describes it in 1960 *SALJ* 438 445 `A wrongful act may affect a person's *capacity* to suffer loss'. See too Luntz `Damages' 2ed paras 5.2.09 5.4.04 5.5.02; Cooper-Stephenson & Saunders `Damages in Canada' 283-91; Luntz 1965 *SALJ* 6; Buchanan 1965 *SALJ* 457.

[84]Deductions for travel costs were made in *Sumesur v Dominion Insurance* 1960 1 C&B 228 (D) 232-3 (7,5% deducted); *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 12 (9%). Street `Damages' 110 argues that the deduction should not be made because where one lives reflects a chosen lifestyle rather than a necessity. The fact

this consideration may be included in the overall deduction for general contingencies.[85] The deduction will not be appropriate if the victim lived at his place of work[86] or continues to travel to and from work or, as often happens with domestic servants, was receiving additional payments to cover travelling costs. One may expect persons of higher income to use more expensive forms of transport.

Many employees are provided with a car for business purposes but permitted to use it for private purposes, sometimes subject to restrictions. The determination of a value to be placed on such a benefit is not without difficulties: In the first instance there is the total cost of the vehicle to the employer; in the second instance there is the saving that the employee enjoys by being spared the cost of providing his own vehicle. The cost to the employer is not generally a correct measure of the value of the vehicle to the employee: Quite apart from the question of mileage, an employer may provide a new vehicle whereas the employee may have made do with a second-hand vehicle, or made greater use of a vehicle already owned by him. Where an employee, such as a salesman or managing director, is provided with a status vehicle it would not always be correct to assume that such a status vehicle would have been purchased had the employee been looking to his private needs alone. On the other hand the benefit of a status vehicle would generally have a higher utility value than more economical transport, but the loss of this would seem to be more a question of general damages, the loss of an amenity, than financial loss. The values placed by the Receiver of Revenue on the use of company cars generally seem to provide a fair basis for resolving the issue, provided it is borne in mind that the value used for tax purposes has hitherto been less than full value of the benefit.[87]

The need for medical care and the purchase of household necessities may entail a continuing need to travel. In one instance it was held that the claimant should take care to arrange accommodation close to the necessary facilities.[88] In *Bennie*'s case[89] an award was made for the additional costs of travelling to the family holiday flat.

[12.5.3] Savings in the `lost years': Most prominent amongst allowances for saved living expenses is the rule governing reduced expectation of life. Had the claimant not been injured the value of his earning capacity would have been assessed according to normal mortality rates. However, if the injury has reduced his

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remains that a victim who no longer has to travel to and from work is spared those costs. There may of course be alternative costs with travelling for medical care.

[85]See Corbett & Buchanan 3ed 66 et seq; *Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T).

[86]A lesser deduction may be made for the saved costs of occasional visits to a far-away home.

[87]The income tax values for the 1993/94 tax year would seem to have been about 75% of the true values. A suitable allowance for private use would then be 1,33 times the income tax value.

[88]*Shasha v President Insurance* 1990 4 C&B A2-8 (W) `The provision of a motorised wheelchair goes a long way towards restoring the plaintiff to mobility in situations where previously she had been a pedestrian. Where previously she had walked to the shops or to visit friends now she may do the same by wheelchair, provided the shops and friends are reasonably close to her own proposed home in Umtata. It is her business to select the site of her home with that factor in mind'.

[89]*Bennie v Guardian National Insurance* 1989 4 C&B A3-34 (W) A3-43.

expectation of life, then for compensation purposes the assessment is done on the basis of reduced life expectancy and no allowance is made for earnings foregone during the so-called `lost-years',[90] that is to say the additional years that would notionally have been lived had there been no injury.[91] The rationale for this approach is that once a man is dead he has no further living expenses and his dependants have their own right of action by which to recover the loss.[92] In effect it is assumed that all income is consumed with the cost of living either by way of support for oneself or support for one's dependants.[93] Whatever might have been saved is treated as expenditure. This latter assumption is not all that unreasonable if one bears in mind that earnings tend to stop at about age 65 and living expenses must thereafter be met out of savings. Savings may also be temporary pending some major expense such as overseas trip or a new car.

[12.5.4] Yearly packets of loss: The approach of the courts to the `lost years' appears at first blush to be somewhat anomalous in terms of utility theory. If the court is to restore the present utility of claimant's pre-injury life plan then one would expect the same total life utility to be crammed into a shorter lifespan, a short life but a merry one. This concept implies an increase in the yearly spending capacity over and above what would have been the case but for the injury. This increased discretionary spending probably gives very much greater satisfaction than expenditure on basic necessities and has essentially the same quality as an award for general damages for loss of the amenities of life. The practical effect of limiting compensation for patrimonial loss to the shorter lifespan of the claimant implies that utility is parcelled out in yearly *quanta* at the same level as had there been no injury.

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[90] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306F `When a man is injured and as a result of that injury his expectation of life is shortened, his claim for compensation is... limited to the period during which it is expected that he will continue to live, and he has no claim for loss of savings beyond that date; he is not, notionally, kept alive until the date when but for the accident he would, actuarially, have died'.

[91] I use here the popular terminology whereby the claimant is assumed to die at the expiry of his expectation of life. In practice the standard actuarial calculation would have regard to the increased risk of death in each separate year (see 87).

[92] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306F `A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss that they have sustained. If the wrongdoer is unable to pay, they may be able to claim support from the estate of the deceased, but that does not give the executor a right to claim from the wrongdoer earnings or savings that have been lost through the death of the deceased'. See too *Goldie v City Council of Johannesburg* 1948 2 SA 913 (W) 921-2.

[93] The presumption that all income is consumed with living expenses or savings is the norm for dependency claims: see *Jameson's Minors v CSAR* 1908 TS 575 605; *Smart v SAR&H* 1928 NPD 361 364-5; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A) 93-4; *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 725-6; *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 488-9. Contra *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 849; Davel `Skadevergoeding' 110. The *Roberts* judgment was handed down prior to the *Lockhat* decision at a time when it was thought proper to compensate for loss of savings during the `lost years' (*Goldie v City Council of Johannesburg* 1948 2 SA 913 (W) 922). As a general rule savings may be equated with hedonistic expenditure.

The disutility suffered by reason of the `lost years' is then compensated through the award for general damages.[94] The reported cases in South Africa do not record an explicit separate award for loss of expectation of life.

***[12.5.5] General damages for the `lost years'***: It has been held that the general damages paid for loss of an amenity of life should be the same regardless of the financial standing of the claimant, rich or poor.[95] The same egalitarian reasoning suggests that the general damages awarded for the `lost years' should be determined without regard to the victim's lost earnings,[96] or the savings that would notionally have been accumulated. There is little doubt that blind reliance on an actuarial calculation of savings during the `lost years'[97] will produce absurd results when the claimant is unconscious or with very few years to live, and even more so if the claimant has died.[98] In such cases the award for general damages and for patrimonial loss should include little if anything by way of discretionary spending money. In many instances loss of the capacity to work will commonly be accompanied by loss of the capacity to enjoy discretionary spending to the full. Conversely the injured claimant who has been freed from the burden of working for a living will have far more leisure time to indulge in hedonistic activities, that is to say time to follow personal whims. This latter consideration suggests that in certain instances general damages for the `lost years' should be assessed with some regard for the discretionary spending capacity which would have been available during those `lost years'. The extent of this spending capacity, that is to say earnings not required for the necessaries of living, would give some indication of the degree of pleasure that has been foregone. This is, however, to allow patrimonial considerations to intrude into the assessment.[99]

[12.5.6] Institutionalization: Confinement to an institution at state expense will eliminate many of the usual costs of living. It is then appropriate to reduce the award

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[94] *Venter v Federated Employers Assuransiempy* 1978 2 C&B 756 (T) 759para2; see too Neethling Potgieter & Visser `Deliktereg' 2ed 244.

[95] *Radebe v Hough* 1949 1 SA 380 (A). Corbett & Buchanan 3ed 8n64 `Despite this authoritative pronouncement, a study of awards made since *Radebe v Hough* raises doubts as to whether the courts have in fact adhered to the principle'.

[96] This is the approach in England: *Benham v Gambling* [1941] 1 All ER 7 (CA) (£200); *Oliver v Ashman* [1961] 3 All ER 323 (CA) (£200); *Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) (£750). South African cases on the subject, such as there are, do not identify an explicit amount for loss of expectation of life (see for instance *Venter v Federated Employers Assuransiempy* 1978 2 C&B 756 (T) 759p2).

[97] For an example of the approach to such calculations see Kemp `Damages' 3ed 95-6.

[98] In *Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) the House of Lords awarded `loss of savings' during the `lost years' in addition to general damages, this being a reversal of the earlier ruling in *Oliver v Ashman* [1961] 3 All ER 323 (CA). Subsequent embarrassment for the House of Lords in *Gammell v Wilson* [1981] 1 All ER 557 (HL) led to the House requesting reforming legislation. The Law Reform Act was then amended by the Administration of Justice Act 1982 ss 4(2) 73(3) 73(4) thereby restoring the position as stated in *Oliver v Ashman* (and *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A)).

[99] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-20 rejected the contention that a functional approach should be applied to the determination of conventional damages. 119H `This does not mean, of course, that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances'. See too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9.

for loss of earning capacity to allow for this saving of the `domestic element',[100] that portion of the claimant's income that would have been expended on housing, food, transport, recreation, etc. If the victim is married then the reduction may take account of the saved costs of supporting a wife and children,[101] presumably with due regard for the likelihood of a divorce and maintenance payments and remarriage by the wife. An unmarried unconscious victim will have no need for living costs other than what is provided by the institution. In such cases compensation may be restricted to the value of the costs of accommodation at the relevant institution, if any. If the accommodation costs exceed the victim's `domestic element' then the award might be structured as one for loss of earning capacity plus an additional amount being the value of the costs of institutionalization less the `domestic element' of the earnings.[102] Institutionalization may thus bring about either a deduction or an addition to the value of earning capacity, depending on circumstances.[103] It may even justify no explicit award at all for loss of earning capacity.[104]

[12.5.7] Expensive hobbies: A person with substantial income may have indulged in an expensive hobby, for example yachting or flying. His injury may now prevent him from continuing this hobby. It can be argued that his compensation for loss of earning capacity should be reduced for the savings that he now enjoys from no longer pursuing the expensive hobby.[105] This problem is really much the same as that relating to the problem of the `lost years'. If the claimant retains sufficient work capacity after his injury to beneficially utilise the discretionary spending power in other hedonistic activities then no deduction should be made. However, the severely disabled, unconscious or mentally retarded victim will not be able to take advantage of the discretionary spending power and his compensation for loss of earning capacity may for this reason be reduced by eliminating part or all of the discretionary element. Allowance would probably be made for the contingency that had there been no injury the expensive pastime may have been discontinued in any event.

[12.5.8] Loss of marriage prospects: The injuries may prevent a young man from marrying, or at least greatly reduce his marriage prospects. For a married victim the injury may precipitate divorce proceedings. The victim will then have the prospect

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[100] *Shearman v Folland* [1950] 1 All ER 976 (CA); *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921; *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 979inf (the 50% contingency deduction included allowance for a `domestic element'); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G; *Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T) (50% by agreement between the parties). Contra *Bobape v President Insurance* 1990 4 C&B A4-43 (W) but the substantial 40% deduction for general contingencies (unexplained) gave rise to much the same end result as had explicit allowance been made for saved living expenses.

[101] *Fletcher v Autocar & Transporters* [1968] 1 All ER 726 (CA) 734H-I.

[102] In *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921g it was the estimated cost of future care which was reduced for the `domestic element' and not the award for loss of earnings. Dr Lim was unconscious. There was thus no justification for a hedonistic element to the award. See too *Uijs v General Accident Versekeringsmpy* 1991 4 C&B A4-88 (C); *General Accident Versekeringsmpy v Uijs* 1993 4 SA 228 (A).

[103] An addition was made in *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL).

[104] eg *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G.

[105] *Fletcher v Autocar & Transporters* [1968] 1 All ER 726 (CA) 734.

of being spared in part or whole the expense of supporting a wife and family.[106] The damages payable have, on this account, been reduced by the courts.[107] The general principle here seems to be the same as with reduced expectation of life. A deduction is to be made for the value of the chance of saved living expenses.[108] Allowance for the disutility[109] or utility of being deprived of the joys or tedium of family life is then a factor to be brought into account when assessing general damages.

A serious injury may give rise to the need for an attendant who will provide some of the care and companionship benefits that would otherwise have arisen in marriage. The saving from not having to support a wife and family may then be offset against the cost of the attendant rather than against earnings.

Injury to a married man may well be followed by his divorce and bleak prospects for remarriage. For a compensated victim this will not relieve him of the duty to support his children although it would be unusual for him to be burdened with paying maintenance to his ex-wife.

[12.5.9] Divergent opinions: Judicial views are divided on the proper treatment of saved living expenses.[110] On the one hand one finds typical pigeonhole thinking based on the notion that the claim for personal injury is a claim for loss of earnings.[111] On the other hand one finds a broad approach based on overall impression giving effect to the balance-sheet-of-life form of analysis.[112] In the *Lockhat's Estate* case[113] the appellate division opted for the broad approach and a deduction for saved living expenses. More recently in the *Summers* appeal[114] the court indicated its reluctance to make a deduction for saved living expenses but then declined to upset the finding of the trial court that a deduction should be made.

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[106]HSRC `Marriage & Family Life' 318 indicates that about 35% of married women work and thus partly or wholly support themselves (for graduate wives the percentage is 70%). Children would generally be a financial liability to a husband unless the wife earns unusually well.

[107]*Reid v SAR&H* 1965 2 SA 181 (D) 190F-H; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1023-4 1027I-J confirmed in *General Accident Insurance v Summers* 1987 3 SA 577 (A) 617; *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) `... the strong probability that plaintiff would have married and had a family had he not been injured and, with a family to support,, and even after paying less tax as a married person, would not himself have had the full benefit of his after-tax income' (At 60 the court ordered that the calculation for earnings but for the injury assume that the claimant would have married at age 30. At 69 the court notes that claimant had but a small chance of marriage now that he was injured).

[108]See 224.

[109]In *Bobape v President Insurance* 1990 4 C&B A4-43 (W) A4-54 the wife and family are viewed as a benefit. This benefit may, of course, be substituted by a hired attendant.

[110]*Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T) (deduction approved); *Bobape v President Insurance* 1990 4 C&B A4-43 (W) A4-54 (deduction disapproved).

[111]See, for instance, *Gerke v Parity Insurance* 1966 3 SA 484 (W) 495B `If a man remains unconscious for ten years after the injury his claim for total loss of earnings cannot be disputed'.

[112]*Roberts v Northern Assurance* 1964 4 SA 531 (D) 537B-H; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086 A-G; *Reid v SAR&H* 1965 2 SA 181 (D) 190F-H.

[113]*Lockat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6.

[114]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 617.

[12.6] INCOME TAX

[12.6.1] Tax status of award: The general principle governing taxation in the assessment of loss of earning capacity is that a deduction will be made provided the damages award itself will be free of tax in the hands of the claimant.[115] If the award is to be treated as taxable income in the claimant's hands then no deduction should be made for taxation when assessing the damages.[116]

[12.6.2] Tax on investment income: A corollary of this principle in relation to future loss of earnings is that allowance must be made for the notional tax which may accrue in respect of investment income earned on the award.[117] The cost of medical and prosthetic expenses will generally be tax deductible in the hands of the claimant.[118] Due to the general availability of investments subject to little or no taxation[119] the discount rate of return is in practice not explicitly adjusted for taxation.[120]

[12.6.3] Tax on notional earnings: It has been said that the approach of the courts to taxation in relation to lost earning capacity has not yet been finally settled by the appellate division.[121] In practice notional taxation will usually be deducted when assessing loss of earnings.[122] Discussions of taxation generally omit reference to one early ruling by the appellate division that tax should be deducted.[123]

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[115] A lump-sum award for lost future profits is capital and thus not taxable (*CIR v African Oxygen* 1963 1 SA 681 (A); *Taeuber & Corssen v SIR* 1975 3 SA 649 (A). A lump-sum award for loss of earning capacity is likewise not taxable (Boberg 1981 *BML* 25; Boberg `Delict' 543).

[116] *Omega Africa Plastics v Swisstool Manufacturing* 1978 3 SA 465 (A) 475-6. When compensation is paid by instalments these payments constitute an annuity and are taxable (*KBI & MMF v Hogan* 1993 (A) (unreported 28.5.93 cases 663/91 & 683/91)). It follows that instalment payments should be assessed gross of liability for taxation. Revenue practice is not to tax instalments directed at meeting medical and prosthetic expenditure.

[117] *Pitt v Economic Insurance* 1957 3 SA 284 (D) 287; *Dorfling v Bazeley* 1961 1 C&B 128 (E) 132inf; *Oberholzer v Santam Insurance* 1970 1 SA 337 (N) 342E. This is a consideration more talked about than applied. In practice the diversity of possible investment opportunities, particularly growth investments, dictates an objective approach, the same discount rate of interest is used throughout: See for instance *Todorovic v Waller* (1981) 37 ALR 481 (HC).

[118] s18 Income Tax Act 58 of 1962 as amended.

[119] eg Share market equities, capital growth, owner occupied homes, inter alia.

[120] See 104 and 134.

[121] Van Heerden *J C Noster* 1 6-7; Van der Spuy 1991 *Consultus* 40 41-2 with regard to *Whitfield v Phillips* 1957 3 SA 318 (A) 345-7 and *Sigournay v Gillbanks* 1960 2 SA 552 (A) 568.

[122] Boberg `Delict' 545 mid-page `The preponderance of academic opinion seems to favour the *Gourley* approach (ie basing the award on the plaintiff's net, after-tax earnings)'; at 544inf `Actuaries make a practice of deducting tax from estimates of future earnings, trial courts generally accept this, and the issue is seldom raised on appeal'. *BTC v Gourley* [1955] 3 All ER 796 (HL) was concerned with past loss of earnings only, a consideration that seems of little consequence. In *Oosthuizen v Homegas* 1989 (O) (unreported 13.7.89 case 539/86) the court, citing only Van Heerden *JC Noster* 1, refused to allow a deduction for taxation.

[123] *Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 29 `The defendant cannot be called upon to compensate the plaintiff for the loss of such share of its profits as would in any event have been appropriated by the State'. Such a ruling presumes that the lump-sum award is tax-free in the hands of the claimant. More recently in *Minister of Defence v Jackson* 1991 4 SA 23 (ZS) it has also been ruled that a deduction should be made for taxation.

TABLE 14 - HISTORY OF TAX RATES FOR CONSTANT REAL INCOME

Year	*Nom Earnings Rpy*	*Average Tax %*	*Nom Earnings Rpy*	*Average Tax %*	*Nom Earnings Rpy*	*Average Tax %*	*Max Tax Rate %*
1968	3314	9,0	6628	16,5	13256	35,2	73,5
1969	3423	9,4	6846	17,5	13692	36,2	74,0
1970	3485	7,7	6970	11,1	13940	18,4	64,4
1971	3586	8,1	7172	11,7	14344	19,5	66,6
1972	3762	8,7	7524	13,4	15048	24,4	78,0
1973	4003	8,7	8006	14,8	16012	23,7	72,0
1974	4263	8,2	8526	13,5	17052	22,8	66,0
1975	4668	7,7	9336	13,5	18672	23,4	63,0
1976	5209	8,2	10418	15,0	20836	25,6	63,0
1977	5912	10,3	11824	19,0	23648	27,2	72,0
1978	6574	11,2	13148	20,5	26296	35,7	72,0
1979	7298	11,3	14596	20,3	29192	35,9	66,0
1980	8093	10,1	16186	20,1	32372	35,6	60,5
1981	9161	7,3	18322	15,7	36644	28,0	50,0
1982	10426	8,4	20852	17,8	41704	30,6	50,0
1983	12000	10,3	24000	21,1	48000	34,8	52,5
1984	13481	11,8	26962	23,3	53924	36,8	52,5
1985	15053	12,2	30106	23,7	60212	36,3	50,0
1986	17497	13,1	34994	25,2	69988	38,0	50,0
1987	20777	14,2	41554	25,6	83108	36,1	50,0
1988	24111	15,5	48222	27,2	96444	35,9	45,0
1989	27236	16,2	54472	27,8	108944	37,0	45,0
1990	31251	18,2	62502	29,4	125004	37,0	45,0
1991	35730	16,8	71460	28,0	142920	36,0	44,0
1992	41199	18,3	82398	29,2	164796	36,1	43,0
1993	47379	19,3	94758	30,6	189515	36,8	43,0
Average		**11,5**		**20,4**		**31,6**	

Based on rates for a married person with no dependants.
Source `The Quantum Yearbook' 1993 53

The loss of earning capacity of a victim will sometimes be measured by the cost of employing a suitable assistant. This cost would often be tax deductible and should then be reduced for the associated reduction in tax liability.[124]

[124]In *Muller v Mutual & Federal Insurance* 1993 4 C&B J2-56 (C) the evidence was that the claimant would have had a substantial tax loss even if she had not been injured. The cost of the assistant was thus awarded without deduction for any tax advantage.

[12.6.4] Estimation of future taxation: It has been said that no allowance should be made for notional tax on expected future earnings because any deduction made may be widely wrong.[125] This focus upon remote possibilities is typical of an assessment philosophy which sees its function as being to `predict' the future. The practical effect is an overemphasis on concretization.[126] In general the determination of compensation has regard to the value of the chance of an event.[127] A loss, and presumably a gain, will not be ignored just because of paucity of evidence.[128] Problems of jurisdiction no longer apply,[129] and were in any event of questionable relevance bearing in mind that a court may have regard to the value of the chance. Boberg records the actuarial practice to deduct taxation from estimated future earnings.[130] This is done on the assumption that prevailing tax rates will continue in future, subject to regular revisions to offset the effects of inflation, the so-called `fiscal drag'.[131] An examination of table 14 suggests that this assumption may be unduly optimistic and that the deduction for general contingencies should be adjusted upwards for the risk that tax rates will in future not be regularly adjusted to offset inflation.

***[12.6.5] `Pigeonholing'***: It has been argued that no deduction should be made for taxation because the claim is for `loss of earning capacity' and not for financial loss in general. This reasoning has been adopted in Canada but not without criticism.[132] I have already made the point that the strict application of `pigeonholing' reasoning would require that no compensation be awarded for medical expenses and other *damnum emergens*.[133]

[12.7] THE BALANCE SHEET OF LIFE

[12.7.1] Male victim: It is often useful to analyze a victim's life plan by analogy with a balance sheet reflecting the present capitalized values of each of the relevant financial elements. The schematic in table 15 below contemplates a male victim prior to

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[125] *Sigournay v Gillbanks* 1960 2 SA 552 (A) 568inf `If such an adjustment were made it might well be widely wrong'. However, it has also been said that `But in this world nothing can be said to be certain, except death and taxes' (Benjamin Franklin 1789). To make no adjustment for taxation is to ensure that the allowance is wrong.

[126] See 31.

[127] *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6.

[128] *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198; *Whitfield v Phillips* 1957 3 SA 318 (A) 345inf `At the most, (the court) can endeavour to assess, as best it may, the probabilities of what the decision of the Commissioner or the Special Court will be'.

[129] An appeal to the supreme court is now possible from a decision by the special court (s86 s86A Income Tax Act 58 of 1962). The problem of conflicting jurisdictions which daunted the court in *Whitfield v Phillips* 1957 3 SA 318 (A) 345inf has now fallen away.

[130] Boberg `Delict' 544inf.

[131] Based on inspection of several hundred actuarial reports prepared for purposes of trial and examined by my office.

[132] Cooper-Stephenson & Saunders `Damages in Canada' 181-95.

[133] See 213.

TABLE 15 - MALE VICTIM NOTIONALLY UNINJURED

ASSETS	R1000's	LIABILITIES	R1000's
Gross earnings	900	Taxation	180
Services of wife	150	Own services in home	40
Chance of inheritance	50	Support self	350
House	200	Support for wife	230
Car	30	Support for children	270
		Bond on house	90
		Net patrimonium	**170**
Total	1330	Total	1330

injury. In order to assess the loss suffered the court must then construct a second similar balance sheet having regard to the effect of the injury on each of the individual components. The difference between R170000 and the net patrimonium having regard to the injury gives a first estimate of the damage suffered.[134] The court should then have regard to the effect of the award upon the patrimonium having regard to the injury and consider whether to modify the first estimate.[135]

The support required by the family may remain unchanged. The value of earnings may reduce but so too will the liability for taxation. The reduction in the value of earnings will be replaced by the lump-sum award of damages. A wise first investment would usually be to pay off the mortgage bond on the house. Any amount which is awarded for pain and suffering and loss of the amenities of life will, once compensation has been paid, become part of the victim's patrimony and indistinguishable, for investment purposes, from money paid for patrimonial loss.

If the victim will require expensive medical care and equipment the value of the cost of supporting himself would increase. If his wife has left him the value of the cost of supporting her, and perhaps the children, will decrease. Her departure will deprive the victim of, amongst other things, the benefit of her services in the home. These must then be compensated with the value of the cost of employing a housekeeper or attendant.

Modifications to the home necessitated by the injury, such as airconditioning, may enhance the value of the property.[136] The loss is the cost of the airconditioning less the enhanced value of the home. Many victims would have owned a motor car even if they had not been injured. If they now require an automatic car with airconditioning compensation is for the increased capital and running costs. The basic cost of the vehicle is covered by the award for loss of earnings. For young

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[134]See formula A at 60.

[135]Formula B at 60.

[136]Paraplegics, for instance, suffer from poor thermal control and require air-conditioning in their home (*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 87-8.

victims the full cost of the first car might be awarded bearing in mind that but for the injury the first car would not have been purchased until several years later. There may be a deduction for the costs of public transport or a motor cycle. General damages will be reduced to allow for the enhanced status and standard of living which such enhancements provide.[137]

If there has been a reduction to the victim's expectation of life then the value of his earnings will reduce, but so too will the values for the cost to him of keeping himself and his family.

TABLE 16 - FEMALE VICTIM NOTIONALLY UNINJURED

ASSETS	R1000's	LIABILITIES	R1000's
Gross earnings	320	Taxation	70
Services of husband	40	Own services in home	150
Chance of inheritance	5	Support self	350
Support from husband	230	Support for husband	0
Chance of 2nd husband	60	Support for children	30
Car	15	**Net patrimonium**	**70**
Total	670	Total	670

[12.7.2] Female victim: The balance-sheet schematic for a woman's life plan might be as in table 16. Some liabilities for a husband appear as assets for his wife, and vice-versa. The above schematic would be equally relevant for a young unmarried woman with good marriage prospects. The present values shown in the schematic would then be reduced for the chance that marriage may not come about. Most married women are faced with a small but real chance of having to support their children in the event of their husband's untimely death. The death, or a divorce, would give rise to a chance of support from a second notional husband. There might be a chance of inheriting from parents.

[12.8] LIKELY EARNINGS

[12.8.1] Expected earnings: The value of lost earning capacity is generally measured according to the standard of expected earnings.[138] For compensation purposes an `expectation'[139] is best described as a `personalized average',[140] that is to say an average which is modified, usually subjectively, to take account of all known information concerning the individual and **the likely usage of his work capacity**.[141]

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[137] *Administrator General SWA v Kriel* 1988 3 SA 275 (A); *Ngubane v SATS* 1991 1 SA 756 (A) 786.

[138] `Verwagte inkomste', see *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D; Bloembergen `*Schadevergoeding*' 105.

[139] See 15.

[140] Classical statisticians would object to this view of an expectation, but not Bayesians.

[141] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G `In some cases it is proper for the Court to take into account not merely the plaintiff's lost capacity (what he *could* have earned had he not been injured), but rather the

The use of general statistical averages permits the court to fill in gaps where explicit evidence is lacking. The use of averages is consistent with the principle of damages assessment that a court must do the best it can with the information available.[142] The relevance of a statistical average depends on the extent to which it would influence a reasonable man in formulating his expectations of what is likely in the future.[143]

As a rule the best evidence as regards future earnings is that of the erstwhile employer of the victim. This is not always so, however, because some employers refuse to express an opinion as to the victim's future prospects while other employers paint an unduly rosy picture in the knowledge that they will never be called upon to `put their money where their mouth is'. It is often useful to double check the opinion of an employer by reference to an industrial psychologist. The evidence of industrial psychologists, however, needs to be received with some care because their tests indicate potential earnings rather than likely earnings.[144] The more thorough industrial psychologists have close regard for the earnings of the victim's parents, uncles, aunts and siblings. The `family culture' as regards employment will be indicative of the genetic and cultural background of the victim including family and peer-group pressures to succeed or to remain non-competitive.[145] For an injured child it will often be adequate to base compensation upon the earnings of the father[146] or mother[147] or a close mentor figure of the same sex.

In the modern South Africa there will for some years to come be substantial upward social mobility for the non-white classes. That justifies an optimistic approach to rising above the family background. One needs nonetheless to bear in mind that in Europe there is a surfeit of education and a shortage of job opportunities and that in time similar problems can be expected in South Africa. Qualified teachers and lawyers may well in time need to take jobs as bus drivers and bank clerks merely to earn a living. The greatest continuing demand for skills may well be in the trades such as plumbers, motor mechanics, welders, etc.

[12.8.2] Retirement age: The normal retirement age for the civil service in South Africa is age 65 for both men and women. For the armed services the normal

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question of what use he would probably have made of his earning capacity (what he *would probably* have earned)'. See too *Wege v Elphick* (1947) 49 WALR 83.

[142]See footnote 126 at 24.

[143]Evidence may be admissible but its probative value may be reduced by its deficiencies (Hoffman & Zeffert `Evidence' 4ed 116).

[144]See 30 and 152.

[145]It is easy to cite examples of persons who have achieved mightily despite a humble family background, and vice-versa. Such achievements indicate, however, only remote possibilities, not likelihoods. The fact that such achievements stand out for comment is itself indicative of their unusual nature.

[146]*Bopane v President Insurance* 1990 4 C&B A4-43 (W) A4-53 `There seems to me to be every reason to assume that Lawrence in all probability would have been able at least to achieve the level of advancement of his father but subject of course to the numerous hazards that beset the path both in life and education generally of all young persons'.

[147]In *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115 the claim for loss of earnings was based upon the earnings of the mother of the injured child.

retirement age is 60, and for the judiciary age 70. Pension funds generally focus on a `normal retirement age' and then include rules governing the effect on pension benefits of earlier or later retirement. The state pension in South Africa is payable to men from age 65 and to women from age 60.[148] Morbidity rates, absences from work due to illness, have been observed to be higher for older men approaching retirement than for women of the same age.[149] The extent to which a person will continue working after normal retirement age will be strongly influenced by the extent to which there is adequate financial provision for retirement and the pleasantness of available work. Hall records in this regard:[150]

> `The occupational career may be said to terminate with retirement, now mandatory only at age 70 (in the USA) but in fact often voluntary in the mid-sixties. But retirement, like entry, is for many a slow transition involving tapering off before or after official retirement and, in some instances, continuing to work in a more focused or specialized way or on a part-time basis. This is particularly likely to be the case when people have special knowledge or skills, as in the case of higher-level professions such as those of physicist, psychologist, lawyer, historian, and writer. The roles of worker and of pensioner thus also often merge during the retirement transition in a postoccupational career'.

[12.8.3] Loss of capacity to work: The capacity to work is a right of personality. Loss of work capacity is a factor to be taken into account when assessing general damages for loss of the amenities of life.[151] The present value of lost earnings, on the other hand, is a patrimonial loss. A millionaire may have chosen a life-plan of leisure, never to work. If he is seriously injured and suffers a loss of work capacity there is no loss of earnings, he suffers no patrimonial loss by reason of the impairment of his work capacity.[152] This does not mean, however, that his general damages will not be increased to allow for the loss of this amenity. As a rule, however, compensation for loss of work capacity and compensation for loss of earnings tend to be agglomerated without distinction being made.[153]

[12.8.4] Percentage disablements: An employed man may be injured. According to the tables used by the workmen's compensation commissioner[154] he may, for example, be 30% disabled. In practice he may be retained in his job and be 100% employed. Conversely a man with a 30% disability may lose his job and be 100% unemployed. There is no necessary correlation between work capacity and earning

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[148]R4440 per year since August 1993. There are proposals to increase the entitlement age for women to 65.

[149]Courant 1977 *TASSA* 108 112-17.

[150]Hall `Career development in organizations' 98.

[151]`Work capacity' is not listed as an amenity of life in *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 288F. The amenities listed clearly imply work capacity.

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

[153]eg `Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D. Van der Walt 1990 *THRHR* 140 142 emphasises that earning capacity is the product of a variety of personality traits (`persoonlikheidsaspekte').

[154]In terms of the Workmen's Compensation Act 30 of 1941.

capacity.[155] However, in the absence of further information a fair approach to the above situations might be to assume some degree of correlation and allow the employed victim compensation of one half[156] of the degree of disability of, say, 30%, giving 15% of his earning capacity uninjured as the measure of the loss.[157] This recognizes that he is still in employment but that there is a 50% chance that his employer may give him lower increases in future years or that he may lose his job and have to work for 30% less than he is getting. For the victim who has lost his employment one might allow for a residual earning capacity of one half of 70% of earning capacity uninjured, that is to say 35%. This allows for a 50% chance that he will again find employment at a rate of pay 30% less than he would have earned but for the injury. The evidence of medical experts and the employer may permit one to assess chances different from 50% for the alternatives.

The extent of a partial loss of earning capacity may also be proved by evidence as to the cost of hiring an assistant.[158] This cost will usually be tax deductible and should then be reduced for the advantage of paying less tax.

The percentage partial disablement may include allowance for early retirement, although express allowance for this consideration may be made in the actuarial calculation.[159]

[12.8.5] Onus of proof: The claimant bears the onus of proof both as to the general fact of disablement and as to the extent thereof.[160] In *Van Almelo*'s case[161] the court stated that the degree of disablement must be proved by the defendant. In this instance, however, the claimant had already led evidence as to his preferred post-injury career path, that is to say had already discharged his onus. The defendant then had the right to bring evidence to refute claimant's evidence. The reference to onus in the *Van Almelo* case was thus misplaced. The defendant did not so much have an onus to lead evidence but rather a right to do so.[162]

Where suitable evidence is hard to come by the court will not non-suit the claimant.[163] However, a claimant who fails to lead available evidence may be non-

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[155]``n Bepaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie - dit hang o.a. af van die soort werk waarteen die gebrek beoordeel word' *Union & National Insurance v Coetzee* 1970 1 SA 295 (A) 300A; *Jones v Fletcher* 1948 1 C&B 234 (SR) 235; *Pitt v Economic Insurance* 1957 3 SA 284 (D) 288B.

[156]One half, ie 50%, implies that there is no evidence to sway judgment for or against the two alternatives of being 100% employed or 100% unemployed, or something inbetween.

[157]See for instance, *Boshoff v Motor Insurers* 1969 2 C&B 105 (W) 110 111.

[158]*President Insurance v Mathews* 1992 1 SA 1 (A).

[159]See 153.

[160]*Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) 98-9.

[161]*Van Almelo v Shield Insurance* 1980 2 SA 411 (C).

[162]See paragraph 2.11.6.

[163]See footnote 126 at 24.

suited.[164] With loss of earnings there seems to be a heavier burden of proof on the claimant than is required for *damnum emergens*.[165]

[12.8.6] Partially gratuitous earnings: A man may be 30% disabled but continue to work for the same wage as had he not been injured. It is possible to argue that part of the wage he now earns is gratuitous and should thus be ignored for purposes of assessing damages.[166] Such reasoning should be received with caution. It is extremely difficult to establish a fixed relationship between work capacity and earnings. The employer may have been underpaying the employee in the first place. The skill with which one negotiates a contract of employment is an integral part of earning capacity, but not necessarily work capacity in relation to the job to be done. Where there has been a long-standing employer-employee relationship the employee's knowledge of the particular circumstances of his employer enhance his utility to that employer notwithstanding the reduced value of the employee's work capacity in the open market.

[12.8.7] Mitigation of damages: A man who by reason of his injuries loses his job and his family[167] may have little motivation to return to work once he has received lump-sum compensation. The victim's likely earnings now injured may be nil notwithstanding modest injuries which leave him quite capable of gainful employment, albeit at a lower income than had he not been injured.[168] By adopting a cheaper lifestyle the victim is able to come out on less money than had he not been injured. Consideration of likely earnings now injured would suggest that this victim should be compensated for the full value of his earning capacity uninjured. In order to avoid the obvious element of overcompensation the victim is deemed to take up the employment of which he is capable and in this notional manner to mitigate his damages.[169] On a utility level one would say that by reason of choosing a cheaper lifestyle the victim has reduced his capacity to suffer loss, he has elected to forego hedonistic expenditure in favour of a more leisurely but frugal lifestyle. His balance sheet of life after the injury shows a nil value for the asset `earning capacity' but a substantially reduced value for the liability `living expenses'.[170] From a pragmatic point of view the victim who has been awarded 100% of his loss of earnings has little motivation to thereafter seek employment.[171]

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[164]*SA Eagle Insurance v Cilliers* 1987 3 C&B 716 (A) 728.

[165]See 242.

[166]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A). See 190 above.

[167]Usually through divorce but possibly killed in the accident.

[168]eg a successful dental surgeon may be reduced to employment as a university lecturer.

[169]See *De Harde v Protea Assurance* 1974 2 SA 109 (E); *Van Almelo v Shield Insurance* 1980 2 SA 411 (C); Boberg `Delict' 479 622; *LAWSA* vol 7 para 32n2.

[170]See table 15 at 234.

[171]Atiyah `Accidents Compensation & the Law' 3ed 598. For this reason disability-income insurance contracts seldom pay more than 75% of the earnings lost (except for up to 24 months immediately following commencement of payments).

If an injured wife gives up her employment to nurse her injured husband her damages will be limited to the lesser of her loss of earnings or the cost of employing a nurse.[172] If the wife's loss of earnings exceeds the cost of employing a nurse then the excess will not be compensated.[173] This may be rationalized either on the grounds that the damages should have been mitigated by employing a nurse or, alternatively, by observing that by foregoing the wife's additional income the family has elected of its own free will to adopt a cheaper standard of living. The quality of nursing services by a wife will usually be superior to that of a hired stranger.

[12.9] ADDITIONAL LIVING EXPENSES

[12.9.1] Likely expenditure: The previous section has focused on the question of likely earnings, the likely application of the victim's work capacity. The problem of the likely application of a capacity also arises in connection with future *damnum emergens* which is compensated by way of a lump-sum.[174] The victim has the capacity to incur future expense and by reason of the injuries, will in many cases be likely to incur such expense subject, of course, to various contingencies such as supervening death or other developments which may render the expense unnecessary.[175] **An important contingency is that the expense may have been incurred in any event, even if the victim had not been injured**.[176] Only reasonable expenses will be allowed, not every item recommended by the experts.[177] There seems to be a close correlation between `reasonable expenses' and `likely expenses':

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[172]*Bennett v The Sun Insurance* 1952 1 C&B 391 (E) 394 `She took the place of a nurse whose services would have cost at least the amount claimed'.

[173]*De Harde v Protea Assurance* 1974 2 SA 109 (E).

[174]`The claim for future loss of earnings is basically a claim for general damages... Not so, future medical treatment. This is a claim for special damages, which like past treatment, must be exactly quantified **on the basis of what will probably be required**' *Khoza v Minister of Law & Order* 1983 (W) (unreported 19.10.83 case 16967/82) (emphasis supplied). The distinction made here is really one between *lucrum cessans* and *damnum emergens* (see 46' above). With lump-sum compensation the present values of future expenses and future earnings are both in the nature of general damages (see 255 below). Reinecke 1976 *TSAR* 26 36 states that `die verwagting onvermydelik (die feitlike aspek) en regtens geregverdig (die juridiese aspek) moet wees'. This seems to be a rather more strict requirement than the criterion of `likely expenditure'.

[175]*Dlamini v Government of RSA* 1985 3 C&B 554 (W) 581-3 discusses the criteria for an award for future expenditure. The court's analysis fails to take account of the value of the chance that expenditure will be incurred and works instead with the all-or-nothing reasoning of balance of probabilities. The likelihood that expenditure will be incurred is then said to impact upon reasonableness (at 583). It is clear that the court is here labouring under the fallacy that the compensation money if properly invested can actually be utilised to meet the relevant expenditures. There is not the faintest suggestion of a perception of present value in the sense of a present utility modified to take account of the uncertainties.

[176]eg a servant or attendant may be needed in old age: *Page v Rondalia Assurance* 1974 2 C&B 524 (E) 532.

[177]*Ndlovu v Swaziland Royal Insurance* 1989 4 C&B E2-1 (Swazi) E2-6 `Her recommendations concerning the services and appliances required by the plaintiff are, I think, to some extent in the nature of counsels of perfection and I must remind myself that the Court is bound by the test of reasonableness in determining whether a particular type of expenditure is required'; *Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) A3-22 `Ek kon egter nie die gevoel afgeskud kry nie dat mev Thompson ietwat oor-entoesiasties in haar algemene benadering tot hulpmiddels vir eiser is en dat redelikheid by haar aanbevelings vir verskeie sodanige hulpmiddels nie 'n rol gespeel het nie... Dr du Toit is insgelyks 'n deskundige op sy terrein met jarelange ondervinding maar ook hy het my die indruk gelaat dat hy nie altyd suiwer objektief was nie'; *Shasha v President Insurance* 1990 4 C&B A2-8 (W) `...the experts and, in particular, the architect have lost sight of the fact that what is required is reasonable compensation and not indulgence'.

> `(The experts') approach is indeed laudable, but regard should be had to the plaintiff's own evidence and all the surrounding circumstances. I have the distinct impression that it is not the plaintiff's own desire to own and drive a motor-car, he is not a very sociable person. He shops and does other business only occasionally. It has not been proved to my satisfaction that a motor-car is a necessity or reasonably required or that the plaintiff is entitled to a motor car on any other basis. At the best it can probably be said that the use of a motor car adapted to his needs would be commendable. I do not regard that to be the test'.[178]

Reinecke[179] makes the point that one can only have the capacity to incur expenses if one has an adequate patrimony. In general the award of compensation will ensure that there is a patrimony. When damages have been apportioned due to the contributory negligence of the claimant it is conceivable that the patrimony will be inadequate to meet all the hypothesized expenses. The same problem arises with the deduction for general contingencies and the value of the chance of an expense.[180] Damages awarded under these circumstances are very much in the nature of general damages calculated by reference to patrimonial considerations.[181] In *Ncubu*'s case[182] it was held that the mother of an injured child had no right to claim damages because she did not have the means with which to incur the substantial expenses.

[12.9.2] Likely medical costs: It has been said that if adequate medical care is available then a victim is obliged to mitigate his damages by obtaining treatment at a state institution and thereby transferring the cost to the tax-payer.[183] On the other hand it has been said that a claimant is entitled to medical attention from a private practitioner.[184] It is sufficient for claimant to lead evidence of the costs according to private medical tariffs. The defendant then has the onus of leading evidence as to alternative cheaper sources.[185] But what of the victim who is *prima facie* entitled to consult a private practitioner but who prefers to conserve his funds by attending at a state institution? This circumstance would suggest that the services rendered by the state institution are perceived by the claimant as being adequate and thus that compensation should be awarded accordingly. It can be argued that a claimant

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[178] *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86). See too quotations with footnote 196.

[179] Reinecke 1976 *TSAR* 26 36.

[180] See, for instance, *Pallas v Lesotho National Insurance* 1987 3 C&B 705 (ECD) 713.

[181] See 244.

[182] *Ncubu v NEG Insurance* 1988 2 SA 190 (N).

[183] *Williams v Oosthuizen* 1981 4 SA 182 (C) 185D-E `He cannot indulge in expensive private treatment at the expense of defendant, provided he can get as good treatment in a public institution at the taxpayer's expense'.

[184] *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 586 `He is reasonably entitled... to consult medical specialists of his own choice'; *Maja v SA Eagle Insurance* 1987 4 C&B B2-1 (W) held that a claimant is not obliged to accept a certificate guaranteeing free treatment at a state hospital. See too *Munro v NEG Insurance* 1988 4 C&B F2-1 (D).

[185] *Ngubane v SATS* 1991 1 SA 756 (A) 784. See too *Magola v SA Eagle Insurance* 1987 (T) (unreported 10.4.87 case 8584/85). With loss of earnings, by way of contrast, the claimant must prove not only his residual earning capacity but also the reasonableness thereof (see 239 above).

cannot demand private care as a right if in the normal course of events he would have used state institutions.[186]

A victim who no longer has to spend time at work cannot complain if instead he has to spend time waiting for attention at a state hospital, thereby utilising his free time to reduce expenditure. It is, of course, quite different for the victim who continues to hold down some form of employment. The need for regular hospital attendances may greatly reduce the chances that such a victim will remain employed. Such a victim is far more likely to make use of private medical care.

An approach to capitalizing medical expenses, fair to both claimant and defendant, would be to make an actuarial calculation on the basis of the cost of private care and then to make a greater or lesser contingency deduction depending on the perceived likelihood that cheaper services will be obtained.[187]

[12.9.3] Comparable social standing: The injury to a victim disturbs his life plan. Money has greatest utility to persons who aspire to moving up on the social scale.[188] The purpose of compensation money is not to render the victim upwardly mobile in the social sense, although in practice the lure of social status may well lead to the purchase of, for example, a prestigious motor car by a claimant who would otherwise have elected to make do with a purely functional vehicle. The victim is entitled to do with his compensation money as he pleases, and is not obliged to utilise it in the manner envisaged by the court.[189] The nature of a lump sum reduced for contingencies is such that even if the victim did meticulously follow the pattern of expenditure drawn up by the court the mere fact of above-average longevity would ensure inadequate funds. The determination of an award for future expenditure is essentially a costing exercise done in the knowledge that the reality will be substantially different. The costs for which allowance is made in the calculations have to be based on some reasonable model for the victim's life plan as regards expenditure. The victim may personally have grandiose plans as to his future lifestyle once compensated. The court, however, is only obliged to concern itself with a life plan of similar social standing to that which would have prevailed but for the injury:[190]

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[186]Bloembergen `*Schadevergoeding*' 212 records that the standard of medical care after injury should have regard to the type of medical insurance carried by the victim prior to the injury. See discussion in paragraph 12.9.3 of social status.

[187]In *Mitchell v Mulholland (2)* [1971] 2 All ER 1205 (CA) account was taken of the chance that free treatment would in time to come be obtained from a state institution. More generally see *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 918b-d.

[188]Friedman & Savage 1948 *JPE* 279 298-9.

[189]*Malgas v Guardian Assurance* 1960 1 C&B 158 (A); *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 583. See 245.

[190]See footnote 186. See too *Williams v Oosthuizen* 1981 4 SA 182 (C) 185C; *Shasha v President Insurance* 1990 4 C&B A2-8 (W).

> `The choice offered has to be reasonable and realistic but relative to at least that to which the plaintiff was accustomed to and would have chosen, given his other means and limited needs'.[191]

Thus the costs of a motor vehicle for a paraplegic have been refused on the grounds that such person would in the normal course of events not have purchased a motor vehicle.[192] This is consistent with the principle that compensation for loss of earning capacity will have regard to the victim's likely earnings, and accordingly normal standard of living.

[12.9.4] Notional expenditure: The measure of *damnum emergens* is the cost incurred by the victim. Such costs, I have argued, must be reasonable having regard to the victim's injuries, life plan and social standing. It is common that prior to the trial the victim has not the means to incur necessary expenditure such as an attendant. This circumstance is analogous to the victim who has reduced his standard of living in order to come out on the reduced income to which he has been confined by his injury. A saving in living expenses will be ignored by the court when assessing past loss of earnings. However, a similar saving in *damnum emergens* will, as a rule, not be compensated.[193] The award for general damages would justifiably be increased to allow for the additional inconvenience, pain and suffering occasioned by not incurring necessary expenditure.[194] There is a general interaction between *damnum emergens* and general damages.[195] Thus, for instance, where an expense is large and dispensable, such as plastic surgery, compensation may be confined to the lesser amount of the general damages.

> `But if the cost of operative treatment and incidental expenses or loss is such that it considerably exceeds the sum which would otherwise be awarded I do not think that a plaintiff can claim to be awarded the cost of the operation. The disfigurement, or disablement, or disability, might be slight while the cost of undergoing an operation with an incidental loss of earnings might be very considerable. If the cost of the operation and incidental loss were awarded, plaintiff might well abstain from undergoing the operation

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[191] *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

[192] *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 587inf. The personality of the claimant in this matter was such that even if the value of motoring costs had been awarded it was unlikely that he would have acquired a vehicle. In *Ngubane v SATS* 1991 1 SA 756 (A) 782-3 the costs of a car were awarded to a low-income man who lived in remote parts to enable him to obtain medical attention. In *Shasha v President Insurance* 1990 4 C&B A2-8 (W) for an unlettered woman of lowly background the court refused to allow the costs of, inter alia, a computer and an architect designed home `... the experts and, in particular, the architect have lost sight of the fact that what is required is reasonable compensation and not indulgence'. See too *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86) `He has never shown a desire to own or drive a motor-car, and disabled as he is now, I consider him a poor candidate and a poor prospect for a driver's licence'.

[193] Bloembergen `*Schadevergoeding*' 111. However, at 108 Bloembergen states that where a medical doctor has treated his own wounds he should be compensated as though he had paid another for the services. The victim has suffered the disutility of treating his own wounds and there seems to be no good reason why he should not be so compensated, just as compensation should be awarded to the full-time housewife whose household chores have been increased by the burden of caring for her injured husband (provided nursing services were necessary).

[194] A good example of such expenditure is the purchase of medication to prevent the muscular spasms common in spinal injury cases. Anti-spasmodic drugs, such as lioresal, are extraordinarily expensive.

[195] See paragraph 12.15.6!.

> and might in that way recover a much greater sum for loss of amenities of life than he would have done if his condition had not been curable'.[196]
>
> `There is a "reciprocal relationship between patrimonial and non-patrimonial elements in the total award of damages".[197] In determining whether a claimant reasonably requires an adaptive aid, this reciprocal relationship should not be lost sight of. Especially where the cost of the adaptive aid is disproportionately high in relation to the amelioration it would provide'.[198]

[12.9.5] Victim's stated intentions: If a victim indicates a flat refusal to undergo a necessary operation, such as a spinal fusion or amputation of an arm or leg, should the court refuse to award compensation for the cost of the operation or should the court allow for the possibility that the victim may in time change his or her view on the matter? The latter approach seems preferable, subject to a deduction for the value of the chance that the victim will persist in the present attitude.[199] However, what of the victim who insists on receiving treatment from medical experts in the United States of America when adequate treatment is available in South Africa? On one hand one might say he is obliged to mitigate his damages and be content with damages on the basis of South African treatment. On the other hand one might consider that after compensation has been awarded he may be so serious as to his intentions that he is prepared to incur the costs using his own money. It seems likely that South African a court will, in such circumstances, award compensation on the basis of treatment in South Africa.

In *Dusterwald*'s case[200] the claimant had by the time of the trial purchased a fairly expensive motor car. The award for future travelling costs was based on this type of vehicle. Conversely by the time of the trial the claimant had made little effort to take exercise in a swimming pool. The claim for the cost of a private pool was disallowed. In *Khuduge*'s case[201] the experts recommended that allowance be made for 12 visits per year to a general practitioner. The evidence indicated that claimant had been making only 4 visits per year. The court, having regard to the potential for complications, allowed 6 visits per year.

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[196] *Light v Conroy* 1948 1 C&B 444 (T) 445; see too *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 582inf; *Nanile v Minister of Posts & Telecommunications* 1990 4 C&B A4-30 (E) A4-33; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 289G; Visser 1983 *THRHR* 43 52-3.

[197] *Administrator-General of SWA v Kriel* 1988 3 SA 275 (A) 287F.

[198] *Poo v President Insurance* 1992 4 C&B A3-96 (T) A3-107-8. In this matter the parties had agreed that the criterion to be used for allowable expenses was that `the particular item of expenditure is reasonably required to remedy a condition or to ameliorate it' (*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 552).

[199] In England s2(4) Law Reform (Personal Injuries) Act 1948 provides that when deciding upon the reasonableness of expenses the court shall ignore the possibility of free treatment in the national health services. This provision has been narrowly interpreted: *Harris v Brights Asphalt Contractors* [1953] 1 All ER 395 (QB) `I do not understand section 2(4) to enact that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur'; *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 918b-d.

[200] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 78-82.

[201] *Khuduge v Santam Insurance* 1991 (W) (unreported 23.5.91 case 4637/90).

Bobape's case[202] was concerned with whether or not the child victim should be placed in an institution. The parents indicated their wish that the child should remain at home. Both parents were away at work all day. The court ordered that the child be institutionalised.

[12.9.6] Taxation: Medical and prosthetic costs will, in certain circumstances, be allowed as a deduction against taxable income.[203] Allowance for the chance of this advantage would probably be by way of a deduction for general contingencies, or an increase to the discount rate of interest.

[12.9.7] Freedom of action: It is said that a victim is entitled to do what he pleases with the compensation money.[204] That is to say that once compensation has been awarded **a court has no power to interfere** with the manner in which an adult victim, of sound and sober mind, spends or saves his money.[205] This is not to say that when assessing compensation the court may disregard what the victim is likely to do with the money having regard to what a reasonable person from that social and educational background is likely to do. Only reasonable expenses will be allowed, not every item recommended by the experts.[206] The concept of *damnum emergens* has no meaning without a model of expenditure for the future. Such a model, if meaningfully constructed, would include allowance for perceptions as to the likelihood, or otherwise, of various forms of expenditure. Consideration of the balance of probabilities tends to introduce an all-or-nothing approach to compensation. Consideration of the value of the chance of expenditure provides a more flexible and sensitive means for dealing with the issues.[207]

If one were to take the view that a claimant should be compensated for future expenses recommended by the experts, **but without regard for whether the claimant is likely to incur such expenditure**,[208] then the notional expenditure would become the monetary measure of the disutility of the injuries. There is nothing particularly

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[202]*Bobape v President Insurance* 1990 4 C&B A4-43 (W). The court considered a contrary ruling in *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

[203]See footnote 118 .

[204]*Malgas v Guardian Assurance* 1960 1 C&B 158 (A); *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 583; *Bobape v President Insurance* 1990 4 C&B A4-43 (W) A4-54 `How Lawrence would have spent his money when he would have earned it is his choice and decision'; *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921g `The courts in assessing compensation for loss are not concerned either with how the plaintiff would have used the moneys lost or how she (or he) will use the compensation received'. Bearing in mind that the court in *Lim*'s case then made a deduction for the `domestic element' of earnings this passage states no more than that the existence of discretionary expenditure will be recognized.

[205]See *Malgas v Guardian Assurance* 1960 1 C&B 158 (A) where the court refused to make an order for curatorship without an application in proper form (rule 57 of the Uniform Rules of Court). It is otherwise with a minor: see *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1088G-H. Once a minor has attained majority it seems that the requirements of the Rules of Court must be followed if the monies are to remain under the control of a *curator*.

[206]See footnote 177.

[207]See chapter 4.

[208]For example the claimant may choose to use subsidised state hospital services despite having been compensated at the level of the cost of private medical care.

undesirable about such an approach provided it is born in mind that the award of general damages is the primary measure of the disutility of the injuries. Disregard for the likelihood, the chances, that the claimant will actually incur the expenditure may then lead to the claimant being twice compensated for the disutility of his injuries. This would be an improper duplication of damages.[209]

[12.10] INSURANCE COSTS

[12.10.1] Life insurance: Serious injuries often bring about a reduction in the victim's life expectancy, that is to say that the risk of early death is increased.[210] If the victim now wishes to acquire life insurance cover this will cost more because of the increased risk of death. In theory this seems to be a legitimate claim but there are a number of complicating factors:

An important purpose of life insurance is to enable a breadwinner to provide for his dependants should his life be cut short. A victim who has been awarded a large sum of money by way of compensation has no need for life insurance because his dependants have the prospect of inheriting a large sum of money, the damages award, or at least what is left of it, in lieu of life insurance cover.[211] A victim who has no dependants has no need for life insurance in the sense of benefits payable on death. The dependants for their part have their own right of action for loss of support in those instances where the early death of the breadwinner has been caused by the wrongful act.[212] When assessing such damages life insurance and pension benefits are disregarded if they are payable as a result of the death.[213]

A second important function of life insurance is as a means of saving for retirement. Pure savings do not increase in cost because of an increased chance of early death. A victim who has a reduced life expectancy has less chance than a normal person of long life after retirement age, and thus needs to make less provision for retirement.

Quite apart from the availability of the award to reduce the need for life insurance, any extra costs of life cover are substantially offset by the reduced costs of funding retirement. In *Wessels*' case[214] a claim for additional life insurance costs was disallowed on the grounds that it was unduly speculative.

[12.10.2] Disability insurance: The term `life insurance' generally includes insurance against disablement. This benefit is normally provided by employers or life insurance offices along with life cover. Where a victim has been totally disabled from ever working again, and fully compensated, he clearly has no need for disability insurance. Where the victim is subject to partial disablement he will still need insurance cover to protect his residual earning capacity. This will often be provided by the employer who will also meet any additional costs. Where the victim privately

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[209]See quotations with footnote 196.

[210]See 81.

[211]See 60.

[212]See 227, 347.

[213]Assessment of Damages Act 9 of 1969.

[214]*Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) A3-27-28.

insures himself some doubt may be expressed that this can be taken into account by the court, bearing in mind that privately negotiated insurances are generally viewed as *res inter alios acta*.[215] Even if an award is to be made for the additional costs of disability cover this would be subject to a substantial deduction for the contingency that the victim may not keep up paying his premiums. The more usual manner of dealing with this problem would be by way of an increased deduction for general contingencies in respect of earnings in the injured condition.[216]

[12.10.3] Accident insurance: This type of benefit is provided by both life offices and short-term insurers. It is a form of disability benefit popular with blue-collar workers subject to high accident rates. The benefit usually takes the form of a so-called `meat list',[217] that is to say so many rands if there is loss of use of an arm, so much for a leg, etc. The benefits, unlike many white collar disability benefits, are unrelated to earnings and have more the quality of gambling than insurance against loss.[218] Accident benefits issued by life offices often include a `double death benefit', that is to say a double payment if death is caused by accident. Many injuries render a victim more accident prone and thus liable to additional costs for taking out accident benefits. Although the victim may be required to pay more for the benefit, he also has a better prospect than a normal person for being paid out. Considering the complexities it seems unlikely that a court would make an explicit award for the additional costs in this regard. An adjustment by way of general contingencies or general damages might be appropriate, but even this seems unlikely.

[12.10.4] Short-term insurance: It is conceivable that the disabled person who drives a car may be subject to an increased premium to cover the additional risk of damage to others. More likely such a victim, typically an epileptic, will be deprived of a driving licence and compelled to hire a driver. Claims for increased insurance costs arise most commonly for the costs of insuring expensive equipment such as wheelchairs. This additional insurance cost reflects part of the general contingencies, namely that replacement equipment may need to be acquired sooner than anticipated due to theft or accidental damage. These considerations are often built into the replacement frequencies estimated by the experts and care needs to be taken that there is not a double counting of the risk, that is to say shortening of the replacement period and an explicit allowance for insurance costs. Insurance premiums include a substantial component for the commissions and administrative costs of the insurer. Persons with extensive capital, such as a compensated victim, can achieve substantial cost savings by acting as self-insurers, that is to say by meeting the costs of replacing damaged or stolen equipment out of capital. For this reason it will usually be inappropriate to allow the full actuarial value of taking out comprehensive cover.

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[215]See 186.

[216]See table 13 at 219.

[217]Slang expression used by persons frequently engaged in the assessment of damages for personal injury.

[218]See 188.

[12.11] MOTOR-CAR EXPENSES

[12.11.1] Luxury or necessity?: If a person would have owned a car in the normal course of events he may after injury be awarded the additional motoring costs necessitated by the injury.

In *Dusterwald*'s case[219] such costs included the difference between the purchase of a small manual gear-shift Volkswagen and a large automatic gear-shift Toyota Cressida with airconditioning. The larger car was substantially more expensive to run. The value of these additional costs was included in the compensation.

In *Ngubane v SATS*[220] the appellate division confirmed the award of the costs of a microbus to a claimant who lived in remote parts and needed special transport to obtain medical attention. In the normal course of events the claimant would probably never have owned a motor vehicle. No allowance was made for the advantages that family and friends might derive from the vehicle or the possibility that it might be put into service as a taxi with a hired driver. These considerations suggest a substantial deduction for general contingencies quite apart from a downward adjustment to the award for general damages.

By way of contrast in *Dhlamini*'s case[221] the court refused to allow the value of the costs of providing the victim with a motor car because `he lived a simple life' and would not in the normal course of events have owned a motor car. The *Dhlamini* reasoning suggests that in *Dusterwald*'s case the cost of the bigger car should have been refused because the victim was likely never to have enjoyed the status of such a vehicle had he not been injured. Alternatively the fact of the purchase of the bigger vehicle would suggest an increased likelihood that such a vehicle would have been purchased in any event. The questions of peer pressure and family background do not seem to have been investigated.

In *Ndlovu*'s case[222] the victim would in the normal course of events have owned a motor car. The cost of a more expensive vehicle was disallowed.

In *Shasha*'s case[223] the court declined to award extra transport costs on the grounds that compensation was to be awarded for modifying claimant's home and that she was expected to relocate to a position close to the facilities which she needed.

The money expended on a motor car is partly necessary and partly discretionary. A modest functional vehicle is generally quite adequate for most transport purposes. Anything more expensive may reflect considerations of status and/or luxury spending and is *prima facie* hedonistic. On the other hand some may say that to have a car at

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[219] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 78-82. The court curtly distinguished *Dlamini*'s case (at 79) but it is by no means clear why the test of normal lifestyle should not have influenced the type of car which claimant was to be allowed.

[220] 1991 1 SA 756 (A).

[221] *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 587. See too *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

[222] *Ndlovu v Swaziland Royal Insurance* 1989 4 C&B E2-1 (Swazi) E2-9-10.

[223] *Shasha v President Insurance* 1990 4 C&B A2-8 (W).

all is a luxury. Public transport and taxis are not generally available to persons who cannot walk.[224]

If a claimant is to be provided with more luxurious transport facilities then the award for general damages should be adjusted downwards.[225]

The injuries may justify the purchase of a car earlier than might otherwise have been the case.[226]

[12.11.2] Unlikely expenditure: Allowance was made in the *Dhlamini* case for the costs of an attendant notwithstanding that the claimant `could not really grasp anything so remote and, to him undreamt of, as a personal attendant'.[227] This observation suggests that despite the award of compensation an attendant was highly unlikely ever to have been employed. No deduction was made for this contingency. A different set of reasoning might have allowed the cost of an attendant and a motor car and then made a substantial deduction for the substantial probability of non-use. The over-all compensation may then have been substantially the same.

[12.12] MODIFICATIONS TO THE HOME

[12.12.1] Leased premises: In *Dusterwald*'s case[228] a substantial sum was awarded for the costs of modifying the claimant's future residence to accommodate his disability and the installation and running of airconditioning. The costs of a heated swimming pool would also have been awarded save that the evidence indicated that claimant had by the time of the trial not engaged much in swimming. In *Dhlamini*'s case[229] the court refused to award compensation for the costs of modifying the claimant's residence. The reason given was that claimant would not in the normal course of events have owned a home of his own. This reasoning is most unfortunate. The primary benefit of ownership is a right of occupation. That same right can be obtained by leasing premises. It is difficult to appreciate why a tenant should not be compensated for the costs of adapting the leased premises to his disability.[230] It would be going too far, however, to suggest that the costs should be allowed again and again every time the victim changed address. It is not unreasonable to expect a tenant who wishes to make expensive modifications to negotiate a lease which

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[224]Amongst the lower-income groups where one taxi carries a number of persons the disabled are generally unwelcome due to the extra space and trouble required for their transport, particularly if they have a wheelchair. A telephone taxi service for disabled persons has been introduced in certain areas.

[225]*Ngubane v SATS* 1991 1 SA 756 (A) 786; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A).

[226]*Hutchings v General Accident Insurance* 1986 3 C&B 737 (C); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 79.

[227]*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 578.

[228]*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 86-9; in *Ndlovu v Swazi Royal Insurance* 1989 4 C&B E2-1 (Swazi) modifications were restricted to the bathroom only; in *Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) a number of recommended modifications were disallowed; in *Bennie v Guardian National Insurance* 1989 4 C&B A3-34 (W) the costs of altering the family holiday flat were allowed.

[229]*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 587.

[230]This was done in *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

ensures a reasonably long-term tenure.[231] Alternatively one may observe that once endowed with lump-sum compensation money the victim is well able, and well advised, to purchase a home of his own, even if in the uninjured condition such ownership was unlikely. This latter consideration reflects an approach to assessment whereby regard is had for the effect of the award on the claimant's life plan.[232]

[12.12.2] Investment of award in a home: The application of compensation money to the purchase of a home may be criticised by those who insist that the victim must entirely consume interest and capital over a certain number of years. Such persons will point out that at the end of the victim's life the value of the home will not have been consumed. Such a view ignores the fact that the victim's actual date of demise is in no way determined by actuarial tables and that the prudent victim should save for a ripe old age just like every other prudent person.[233] For those who would in the normal course of events have applied earnings to purchase a home the application of compensation money to that purpose is merely fulfilling the normal life plan without the expense of bond repayments. For the victim who would not normally have purchased such a home one may point to the present value of that part of his earnings which would otherwise have been applied to paying rent. Ownership of a home, particularly for the more gregarious members of our society, can provide income from letting out rooms or retaining importance and a sense of belonging within the family group by providing a home for himself and other family members who would normally have rented.

[12.12.3] Compensating advantages: The claimant who effects expensive modifications to a home will usually at the same time enhance the value of his estate. Improvements such as large toilet areas and extra-wide passages are unlikely to enhance value, but airconditioning, tiling, electric garage doors, intercoms, security fences, flatlets for attendants, etc are of general value. For the higher-income victim such features may have been acquired even if there had been no injury. The enhanced value of the estate is a gain which is appropriately deducted from the overall cost. In *Shasha*'s case[234] the court dealt with this problem by awarding the cost of renting suitable premises rather than the capital cost of outright purchase. In general the present capitalized value of a right of use is less than the cost of outright purchase. This relationship can be upset by the incidence of running and maintenance expenses. Electrical devices, particularly airconditioning, consume substantial amounts of electricity apart from maintenance costs and the costs of replacement. It is usual that running and maintenance costs are claimed separately from the initial capital outlay for providing suitable accommodation.

[12.13] ATTENDANTS

[12.13.1] Remuneration: More than one attendant may be needed, one to attend to the victim's person and the other to perform domestic chores. The cost of a fulltime attendant will be allowed even though the claimant can make do without one from

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[231]See Kerr 1991 *SALJ* 9-13.

[232]See formula B at 60.

[233]Persons of low income are unlikely to be able to save and must thus rely on the State pension which from September 1993 has been R4440 per year regardless of race.

[234]*Shasha v President Insurance* 1990 4 C&B A2-8 (W).

time to time.[235] For live-in attendants free board and lodging is a valuable fringe benefit. It follows that where board and lodging is provided the cash benefits for the attendant should be reduced. For higher paid attendants it may be appropriate to provide pension and medical aid benefits. For lower paid attendants it would usually be adequate to rely on the state pension scheme and state hospital services. Where round-the-clock attendance is needed provision must be made for substitute attendants during holidays and periods of illness. The rates of pay for free-lance nurse-aids will usually include full allowance for board and lodging, pension and medical aid, benefits which self-employed persons normally have to provide for themselves.

[12.13.2] Regional and social diversity: Some reservations must be expressed that a victim who was earning R8000 per year would employ an attendant charging R18000 per year. It is more likely that a cheaper attendant would be employed fulltime with the more advanced skills being provided by district nurses and social workers subsidised by government. The allowance for expenses should be consistent with the social status and expected normal income level and lifestyle of the victim. Employment bureaus will tend to cater for affluent urban communities. Cash starved townships and rural communities, black and white, will be able to command domestic services at very much lower rates, particularly if travelling time to and from work is minimized.[236]

The costs of employing an assistant in the work environment is of similar nature to the employment of an attendant[237] save that the need will usually cease upon normal retirement and may be subject to a deduction for taxation[238] because the expense is tax deductible.

[12.13.3] Accommodation and travel: If the victim were to go on holiday there would be additional transport and accommodation costs for the attendant. By not going on holiday the victim would save these costs. The compensation may thus be limited to the lesser of the costs and the general damages appropriate to not being able to go on holiday.[239] If the victim is to be awarded the costs of modifying his home to provide accommodation for the attendant then a deduction should be made for the associated enhancement to the value of the home.[240]

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[235]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 555sup-C; *Van Rensburg v AA Mutual Insurance* 1969 2 C&B 40 (E) 44-5. In *Ndlovu v Swazi Royal Insurance* 1989 4 C&B E2-1 (Swazi) the claim for the costs of an attendant was reduced because the attendant would only be needed on those occasions when claimant travelled away from his home.

[236]A survey of the cost of fulltime attendants for quadriplegics done by the occupational therapist Mrs M Fourie of Cape Town in August 1989 produced 15 replies. These indicated levels of remuneration ranging from R3360 per year to R9600 per year (R5000 to R15000 per year in 1992). These figures include benefits in kind such as board and lodging. It would be useful to have such statistics reported on a yearly basis.

[237]See, for instance, *Blyth v Van den Heever* 1980 1 SA 191 (A) 226; *President Insurance v Mathews* 1992 1 SA 1 (A).

[238]See 232.

[239]See footnote 196.

[240]See paragraph 12.12.3".

[12.13.4] General contingencies: Compensation will not be denied because the victim can manage from time to time without assistance.[241] The costs of an attendant will be allowed even if the wife and children are able to provide the necessary assistance.[242] This is correct in terms of utility theory. Even-handed justice then suggests that a contingency deduction should be made if the attendant will be doing work that would otherwise have been done by a part-time maid or family members. The victim may have required an attendant in later years in any event.[243] If the victim will now not marry and be spared the costs of supporting a wife then the value of this advantage, or the chance thereof, should be offset against the cost of an attendant. If the costs of the attendant will rank as a business expense then a deduction should be made for the tax advantage. In one instance the court allowed for the uncertainty attaching to the needed `care person' by making no deduction for general contingencies from the actuarial value of loss of earnings, but otherwise making no explicit award.[244]

[12.13.5] Cars and wheelchairs: A driver-attendant may render unnecessary a specially modified car or a power attachment for a wheelchair.[245] Considerations of the victim's self-respect arising from maximum independence may suggest that he should nonetheless be awarded the cost of a special car and a power wheelchair. The general damages should then be suitably reduced and consideration should be given to whether the victim will refrain from incurring the expense. If the expense will not be incurred then it may be better to increase the general damages and abstain from explicitly awarding the costs.[246]

[12.13.6] Curator bonis: Brain damage may render a victim incapable of attending to his own financial affairs. For an adult victim the requirements of rule 57 of the Uniform Rules of Court must be satisfied. In such circumstances the ongoing costs of a *curator bonis* form part of the damages suffered.[247] The fees for a *curator bonis* are 6% of income collected and 2% of capital released.[248] If the award is assumed to be invested in interest-bearing rather than growth assets then the allowance for a *curator bonis* can be quite substantial, of the order of 10% to 20% of the award. In times of high inflation, however, it is reasonable to assume substantial investment in

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[241] *Sigournay v Gillbanks* 1960 2 SA 552 (A) 555B; *Van Rensburg v AA Mutual Insurance* 1969 2 C&B 40 (E) 44-5.

[242] *Fredericks v Union & SWA Insurance* 1972 2 C&B 335 (E).

[243] *Page v Rondalia Assurance* 1974 2 C&B 524 (E) 532. Contra *Mostert v Shield Insurance* 1978 2 C&B 751 (E) 752.

[244] *Nkomo v President Insurance* 1992 4 C&B A4-82 (W) A4-86inf.

[245] *Ndlovu v Swazi Royal Insurance* 1989 4 C&B E2-1 (Swazi).

[246] See footnote 196.

[247] *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 985; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G; *Arnold v Teno* (1978) 83 DLR (3d) 609 (SCC) 635-6; *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T).

[248] Prior to 1 July 1991 the rate on release of capital was ½%. Since that date the rate on release of capital has been increased to 2% (s3(b) of R1602 of 1 July 1991 promulgated in terms of s103 of the Administration of Estates Act 66 of 1965).

growth assets with little or no income accruals.[249] With growth assets the fees for a *curator* can amount to as little as 1% of the award. In *Carstens*' case[250] the award, including general damages, was increased by 5,63%. This judgment was handed down in the days when the fee on capital was still ½%. A modern court would probably award a higher percentage of the order of 7% to 7,5%.

It can be argued that allowance should also be made for the costs of providing security.[251] This expense can normally be avoided by appointing a reputable organisation as *curator*.[252] In some jurisdictions the master's office insists on the provision of security by all *curatores*. One may seriously question the reasonableness of such a procedure for *curatores* who have substantial assets of their own. The issue affects not only the direct cost of security but also the freedom with which the claimant can invest his funds and the resultant investment returns thereon. A low prospective investment return implies a substantial increase to the present capitalized value of future losses.[253] The combination of low rates of investment return coupled with costs for security and administration can increase an award by as much as 50% or more. A claim for the costs of security has been rejected.[254]

The formal appointment of a *curator bonis* is not something to be lightly undertaken. The *curator* will be subject to the scrutiny of the master's office with all the attendant frustrations[255] and potential restraints on investment. It is usually preferable that by agreement between the parties the money is paid into a trust *inter vivos* with an increase of 6% to the overall damages to allow for the present value of the future costs of administration. This procedure will also avert the need to provide expensive security. It can be argued that a claimant who refuses to agree to a trust and insists on the formal appointment of a *curator bonis* has failed to take reasonable steps to mitigate the damages.

[12.14] EXPENSES FOR A CHILD

[12.14.1] Future costs awarded to parent: When a father has paid for the medical or other expenses occasioned by an injury to his child he has his own right of action to

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[249]For example investment in a home for the victim would attract no income on which the *curator* may charge a fee. See 139#.

[250]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G.

[251]A security bond normally insures against dishonesty and negligence but not against bad investment advice.

[252]A life policy with a large investment component is acceptable to certain masters without the need for the provision of security, provided it is underwritten by an acceptable life office.

[253]See 127.

[254]*Nkomo v President Insurance* 1992 4 C&B A4-82 (W) A4-87 `He is a senior and respected accountant and is clearly qualified for the task. The plaintiff has asked that the defendant be ordered to pay the costs relating to the furnishing of security by the curator. In the absence of the defendant's consent to such an order I am not prepared to grant it as I do not believe it proper and I can find no clear precedent for it'.

[255]Such as quotations in triplicate before money will be released and restrictions on the range of permissible investments.

recover these costs.[256] This is to be distinguished from the claim whereby he assists his child in bringing the child's right of action for damages.[257] The general practice in South Africa has been to award to the father in his own right not only past costs that he has met but also the present value of future *damnum emergens*. In some cases the award to the parent has been for the entire life of the child.[258] In other cases the award covers only the period until the child would otherwise have become self-supporting.[259] In one matter the court made the award directly to the child on the grounds that the parent did not have the means to incur the expenditure.[260] In *Kloppers*' case[261] the court expressed concern as to what would happen if the father died. In practice, provided there are assets, the child will have a right to claim support from the parent's estate.[262]

[12.14.2] Unjustifiable practice: The practice to make an award for future expenses to the parent is, strictly speaking, without justification. Once the child has received compensation the parent's duty to incur the expenses falls away.[263] In general a child cannot be called upon to apply capital to meet the cost of support. This rule, however, does not apply to compensation money.[264] In *Van Gool*'s case[265] it was emphasised that there is no rule that only the parent may claim for such expenses. It is to be hoped that in future there will be an increasing tendency to claim all future expenses in the child's name alone.

[12.14.3] Apportionment of damages: If the child has been contributorily negligent and the award is for this reason reduced a parent will, in theory, need to meet the balance of the cost himself. There is some justification in such circumstances for allowing a claim to the parent for the future expenses of the child to the extent that these have been apportioned against the child.[266]

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[256] *Schnellen v Rondalia Assurance* 1969 1 SA 31 (W).

[257] McKerron `Delict' 7ed 83sup.

[258] *Rondalia Assurance v Gonya* 1973 2 SA 550 (A) 553E-F 555-6.

[259] *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 295-6.

[260] *Ncubu v NEG Insurance* 1988 2 SA 190 (N) (quite apart from low earnings the parent's claim had prescribed); see too *Mashini v Senator Insurance* 1979 3 C&B 82 (W) 91.

[261] *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 295-6.

[262] *Glazer v Glazer* 1963 4 SA 694 (A) 699; Spiro `Parent & Child' 3ed 365-6; Boberg `Persons & family' 279-89.

[263] *Mashini v Senator Insurance* 1979 3 C&B 82 (W) 91 `It will be in the interests of the child to award the damages in respect of such items to the plaintiff in his capacity as father and natural guardian of the child. No injustice will be done to the father by such a course, because the expenses concerned will not have to be paid out of the father's pocket, but will be payable out of the child's funds - a child who has the means to support himself cannot require his parents to do so'.

[264] *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 612-13; *Mashini v Senator Insurance* 1979 3 C&B 82 (W) 91. In *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 296 the court indicated that R5000 of the child's general damages should be applied to relieving the burden of blindness during the years of dependency. See too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9.

[265] *Van Gool v Guardian National Insurance* 1992 1 SA 191 (W); 1992 *THRHR* 480.

[266] In *South British Insurance v Smit* 1962 3 SA 826 (A) 838B the child's damages had been reduced for contributory negligence. The damages awarded to the father included allowance for future expenditure and were not reduced for contributory negligence.

[12.15] GENERAL DAMAGES

[12.15.1] Balancing item: Medical treatment, assisting devices and attendants serve to relieve the effects of a disability, to restore to some degree the lost bodily functions. Perfect restoration is not possible and it is thus appropriate to make an award for such pain and suffering and loss of the amenities of life which cannot be made good by the award for necessary expenditure. The award of general damages is, in this sense, a balancing item which serves to top up the victim's present utility to its pre-injury level.[267] The notion of `topping up' calls to mind a bucket the contents of which have been diminished by the wrongful act.[268] The contents are not legal rights and duties, nor assets, nor money, but a bucket of utility. This topping up is done on an objective basis[269] having regard to previous awards[270] and sometimes to the overall state of the country's economy.[271] Nonetheless it follows from the notion of topping up that the more comprehensive the range of devices and services for which explicit allowance has been made, the smaller should be the award for general damages.[272]

[12.15.2] Core element: General damages comprise a core element related to the nature of the injuries in general and a more subjective discretionary portion which serves to increase the victim's hedonistic spending capacity. One would expect that the discretionary element will not be awarded to persons who have not the capacity to take advantage of increased discretionary expenditure.[273] Where explicit allowance has been made for an extremely wide range of compensatory devices and services it is conceivable that the general damages will contain little or no hedonistic element, that is to say will be at much the same level as for an unconscious[274] or dead[275] victim.

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[267]Visser 1983 *THRHR* 43 49 `Die kern van skadevergoeding is tog die invloed wat 'n geldbedrag op die skade het sodat die skade beperk of uitgewis word. Alhoewel dit nie dikwels so gestel word nie, is dit 'n logiese oogmerk van kompensasie dat die geld wat die eiser ontvang hom teoreties in staat moet stel om die aangetaste belang weer in sy oorspronklike potensiaal te herstel of te vervang'.

[268]Bloembergen `*Schadevergoeding*' 115 uses the analogy of topping up a bucket of water. Van der Walt `Sommeskadeleer' 145n61 `sy plastiese beeld'.

[269]Boberg `Delict' 552; Corbett & Buchanan 3ed 8-9.

[270]Corbett & Buchanan 3ed 7; Boberg `Delict' 572-3; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[271]Visser 1986 *De Jure* 207 216-17; Corbett & Buchanan 3ed 6; *Shephard v Zimnat Insurance* 1984 3 C&B 532 (Z) 535.

[272]See footnote 196.

[273]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6; *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G. Contra *Gerke v Parity Insurance* 1966 3 SA 484 (W) 495B `If a man remains unconscious for ten years after the injury his claim for total loss of earnings cannot be disputed. The fact that he is unaware of his loss is irrelevant and, by the same standard, unawareness of the loss of amenities should not be a bar to compensation' (the victim in the *Gerke* case was a married man who owed a duty of support to his family). In *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9 the court considered what use could be made of general damages to alleviate the unconscious victim's condition.

[274]*Gerke v Parity Insurance* 1966 3 SA 484 (W); *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W).

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

[12.15.3] Functional approach: If general damages were concerned solely with what the victim can do with the money, the so-called `functional approach', then the award for general damages would be wholly displaced by a comprehensive award for the future costs of devices and services. We know that general damages are awarded to the unconscious[276] and to the estate of the dead.[277] It follows that the level of general damages is not determined solely by functional considerations.[278] However, the court should at least have in mind a purpose when making the award.[279] In *Du Bois*'s case[280] the damages payable to the estate of a paraplegic claimant who died 5½ years after the accident had regard to the period that she had lived and borne her discomfort but not to her expectation of life. The award was conservatively assessed bearing in mind that only her heirs would actually benefit from the award.

[12.15.4] Freedom from the need to work: A man who has chosen not to work or who works for no salary cannot expect to be compensated for a loss of earnings. His general damages may include a substantial amount for loss of work capacity, but that is not compensation for patrimonial loss. Typical of the non-worker would be the millionaire who has no need to work. Typical of the non-salaried worker would be a housewife who provides her services free of charge as a social-welfare worker. Many people in receipt of a lump sum provided by insurance or damages would be tempted to become non-workers or workers without financial gain. Wealth[281] relieves the possessor from the drudgery of earning a living.

The South African courts are remarkably silent about the non-patrimonial advantages of a lump-sum award. The financial advantage is introduced by way of the discounts for interest and for risk. But what of the elimination of the need to work? A large award is the ultimate insurance against the hazards and stresses of earning a living.[282] The tragic condition of the victim cannot be overlooked. It is the price he pays for the lump-sum. But sudden wealth and all its attendant opportunities in terms of

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[276]*Gerke v Parity Insurance* 1966 3 SA 484 (W); *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W). Reinecke 1976 *TSAR* 26 28n26 is critical of the ruling in *Gerke*'s case.

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

[278]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-20 rejected the contention that a functional approach should be applied to the determination of general damages `This does not mean, of course, that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances'.

[279]Visser 1986 *De Jure* 207 212 `Veral van belang is die doel waarmee 'n bepaalde bedrag toegeken word, byvoorbeeld die feit dat die bedrag as teenwig vir die ongelukkigheid wat die eiser ervaar het, moet dien, of dat dit... as psigiese bevrediging (genoegdoening) moet dien vir die onreg wat hom aangedoen is'; Visser 1988 *THRHR* 468 490inf `Uit die praktyk in verband met die aksie weens pyn en lyding is dit baie duidelik dat dit geen primêre genoegdoeningsfunksie het of behoort te hê nie'; see too Visser 1983 *THRHR* 43 46 59-60. See too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9.

[280]*Du Bois v Motor Vehicle Accident Fund* 1992 4 SA 368 (T).

[281]Including compensation for a total loss of earnings (Atiyah `Accidents Compensation & the Law' 3ed 190).

[282]The utility of a lump sum will vary widely for different claimants, depending on the previous wealth of the victim and his desire to change social status. See Friedman & Savage 1948 *JPE* 279 299.

lifestyle cannot be ignored if the award is to be fair to both plaintiff and defendant. The matter has received judicial consideration in Australia in the following terms:[283]

> `The psychic gain, if any, from being relieved of the anxiety of obtaining and retaining employment is more than offset by the plaintiff's frustration at being unable to support himself by his own exertions and the loss of enjoyment of being a useful member of society'.

Hall records that:[284]

> `In a society that values work and that uses occupation as a source of identity as well as of support, not having a job is a stigma that symbolizes a loss of role, purpose and meaning. ... Even when unemployment insurance or old-age pensions provide material security, as in some countries, this meeting of material needs has been found to be insufficient for self-esteem and public recognition'

Luntz,[285] however, remains of the view that some allowance should be made for the advantages of no longer having to work for a living. The following passage, unrelated to the assessment of damages, puts the case for the disutility of work:

> `Work, in more ways than one, is central to our existence. Very few people work for work's sake. It is only the fortunate few who find that the job is its own reward, and few who derive real satisfaction and pleasure from what they do. For many people, work is dull, repetitive, exhausting or downright unpleasant'.[286]

The crucial issue is the extent to which the award of a large sum of money will enable the victim to establish a new identity, a new and meaningful role in society. A relevant question in this regard is the extent to which uninjured persons continue to work after winning a large lottery prize, or inheriting a vast estate.

The adjustments made for general contingencies tend to be deductions.[287] The psychic advantages of a lump sum are arguably one of the factors giving rise to this phenomenon.[288]

[12.15.5] Retributive awards: The award of general damages to the unconscious and the dead is difficult to distinguish from punitive damages.[289] The main beneficiaries

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[283]Luntz `Damages' 2ed 53-4.

[284]Hall `Career development in organisations' 107 113.

[285]See previous footnote.

[286]Levy `Rights at work' 1. Hahlo `Husband & wife' 5ed `Unless he happens to be one of the fortunate few who can support their families adequately out of capital he has to submit to the painful necessity of having to work for a living'.

[287]See 157.

[288]Boberg `Delict' 599 quotes Fleming's observation as to the `unspecified extra satisfaction' that derives from receiving a large sum of money.

[289]Boberg `Delict' 570 echoes the punitive tone when he writes `This solution... enables the law to express society's sympathy with the victim and its sense of outrage at his grievous loss'. The `solution', however, does nothing to relieve the victim's condition'.

will be the victim's family and heirs,[290] what in the old germanic law were known as the *sib*.[291] In older times the *sib* had the right to take revenge for the injury or the death.[292] The wrongdoer could `buy off the spear or bear it'.[293] The award for damages, general and patrimonial, served to buy off the spear. In modern times the *sib* no longer has this right, the criminal law now fulfils this function.[294] The award of general damages to the unconscious or deceased victim is thus today something of an anachronism, a legal dinosaur that has survived despite the demise of its original purpose.[295] To describe it as punitive is generally incorrect because it will only effect punishment if the wrongdoer is not insured and is personally liable for the damages. If the award achieves anything at all it enriches the victim's *sib* and makes good their sense of a need for revenge. In this sense the award is neither compensation nor punishment but retribution. It is difficult to reconcile such awards, based on a technical point of law, with the non-award of general damages to the family of a victim who is killed instantly.[296]

[12.15.6] Financially relevant awards: The victim is always free to refrain from incurring an expenditure for which the court has made allowance in its calculations. If the compensation related to that expenditure has exceeded the general damages which would otherwise be awarded then by avoiding the expenditure the victim will succeed in increasing his compensation above that which would have been awarded had there been an award for general damages alone.[297] The lower amount by way of general damages is appropriately viewed as the value of the chance that the expense will be incurred. Where expenses are so necessary that the victim is unlikely to forego the benefit thereof then this problem does not arise and it remains appropriate to award to the victim the value of the expected expenditure even if this does exceed the general damages otherwise payable.[298] An example of the former is when a man chooses to live with his scarring and keeps the money allowed for the cost of a plastic

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[290]*Gerke v Parity Insurance* 1966 3 SA 484 (W) 495H `The artificial nature of such a claim, which bestows a benefit upon an heir for something which could never have belonged to him even by inheritance, and that is the enjoyment of his personal life by another'. The court is here clearly uneasy about the award to be made. The unsoundness of the English line of reasoning was subsequently demonstrated when the House of Lords requested legislation to remedy an impasse of their own making (*Gammell v Wilson* [1981] 1 All ER 557 (HL) 574).

[291]The *sib* comprised the victim's close family as well as more distant blood relatives. Up to seven divisions were recognized (Davel `Skadevergoeding' 17-18).

[292]The *sib* also had the right to receive compensation. This right was matched with an obligation to meet the cost of compensation for the wrong of a fellow sibling (Davel `Skadevergoeding' 16-17).

[293]Hahlo & Kahn `SA Legal System' 352-3; Davel `Broodwinner' 46-55.

[294]Davel `Skadevergoeding' 19.

[295]Visser 1986 *De Jure* 207 208 `Toekennings vir pyn en leed is aanvanklik as geldboetes ingeklee'.

[296]See 273. Modern concepts of justice would seem to favour the introduction of a statutory dependants' solatium (see footnote 5 at 274). There is much to be said for replacing the Assessment of Damages Act 9 of 1969 with a Dependants' Solatium Act (see footnote 5 at 345").

[297]*Light v Conroy* 1948 1 C&B 444 (T) 445 (quoted in footnote 196). With loss of earnings compensation for the `lost years' is likewise limited to general damages (*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A); *Venter v Federated Employers Assuransiempy* 1978 2 C&B 756 (T) 759p2).

[298]Van der Walt `Sommeskadeleer' 158 `Die BGB skryf naamlik geld as skadevergoeding voor waar daadwerklike herstel buitensporig duur sal wees'.

surgeon.[299] Likewise, a victim may take advantage of low-cost state medical services and keep the money allowed for private medical care. Should the damages be limited to the relevant general damages?[300] Reasoning along these lines will not produce workable results if the awards for general damages are too low.[301] This consideration suggests that awards for general damages cannot be determined without some regard for general price levels and available skills and technology. This double-check on the level of awards would be additional to that of comparing awards in comparable earlier cases, if such can be found. However imprecise such bench-marks might be they are not wholly indeterminate. Awards of general damages `are not made in a vacuum'.[302]

In certain circumstances the award for general damages will include allowance not only for discretionary expenditure but also the value of lost earning capacity.[303] Earning capacity will only be compensated to the extent that the victim has the prospect, now injured, of incurring living expenses, either necessary or hedonistic.[304]

[12.15.7] Objectively observed subjectivity: It has been said that `subjective considerations' influence the award for general damages.[305] Awards are not made in a vacuum.[306] The judge does not act in an entirely arbitrary manner when making an award for general damages. There is nonetheless an element of judicial subjectivity, in the sense of the exercise of judgment, but that feature is not peculiar to awards for general damages alone. The `subjective considerations' which are peculiar to the award of general damages are the mental and physical responses of the victim to his injuries. These are, however, substantially objectivized in the sense that the subjective element is only taken into account in so far as it is observed by the court and allowed recognition by our fellow men. The fact that a victim personally considers his award inadequate is not relevant.[307] The award will be determined

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[299] *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 582.

[300] Despite an earlier reference to *Light v Conroy* 1948 1 C&B 444 (T) the court in *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 586 went on to rule that the victim could have compensation for medical expenses on the basis of private treatment. See footnote 196.

[301] 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 thereafter. The average flat rate of inflation between 1947 and 1972 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.

[302] Boberg `Delict' 573. *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A). Contra *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 11-12.

[303] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13. See too footnotes 178 and 179 at 63.

[304] *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6.

[305] Visser 1981 *De Rebus* 438 438-9; Visser 1983 *THRHR* 43 58-9.

[306] See footnote 302.

[307] Visser 1983 *THRHR* 43 56.

without regard for the utility of money to the victim,[308] a consideration that substantially depersonalises the award and lends to it an objective quality. The award will have regard to the intensity of deprivation or suffering and the duration thereof.[309]

[12.15.8] Enrichment of the life plan: The hedonistic element of general damages is directed at providing the victim with unallocated discretionary expenditure by which to offset his condition. This does not mean to say that the expenditure is to be applied explicitly to relieving the disability.[310] It is also to be utilised for enriching the victim's life plan in some way chosen by the victim. Such enrichment may take the form of overseas travel, a new car, savings, or any other pleasurable application of spending power in the fulfilment of a life plan. Buying power is fundamental to the adequacy of the award. It follows that the hedonistic element of general damages should have regard to the general cost of goods and services in the community at large.[311]

[12.15.9] Eclectic assessment criteria: The assessment of general damages is eclectic as regards its theoretical basis. The award will usually comprise a core element of a non-patrimonial retributive character supplemented by a flexible hedonistic component of patrimonial character.[312] This patrimonial character is to be distinguished from patrimonial loss in its more usual sense in that it is awarded with little or no regard for any explicit income or expenditure. The dividing line between patrimonial and non-patrimonial is ill-defined save that the non-patrimonial core element may be clearly distinguished. Visser defines non-patrimonial loss as an interference with personal rights that do not affect his economic position.[313] This seems incorrect because the loss of a leg or damage to a head will usually affect both earnings (patrimonial) and quality of life (non-patrimonial). A satisfactory definition of non-patrimonial loss is difficult to devise because of the general overlap and interaction between patrimonial and non-patrimonial.

[12.16] FLUCTUATING EARNINGS

The earnings of self-employed persons and those earning commission or overtime may fluctuate quite widely. In order to project subsequent notional earnings it is necessary to take out an average of earnings prior to the injury. This would ideally

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[308] *Radebe v Hough* 1949 1 SA 380 (A). Corbett & Buchanan 3ed 8n64 note that the courts have not been astute to abide by this directive. More generally see Visser 1986 *De Jure* 207 211-12.

[309] Visser 1986 *De Jure* 207 210. Bentham's first 2 measures of utility are intensity and duration to which he adds certainty, propinquity, fecundity, purity and extent (Page `Utility Theory' 33; see 31 above). The English courts determine loss of earning capacity or support by reference to annual loss, the multiplicand (intensity), and duration, the multiplier which includes allowance for contingencies (see Koch `Damages' 48 49).

[310] As was suggested by the court in *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 295-6 (R5000 to be applied during childhood to ameliorate the effects of blindness); see too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9. For further examples see Visser 1983 *THRHR* 43 56.

[311] Awards `are not made in a vacuum' (see 259). See too *Beverley v Mutual & Federal Insurance* 1988 2 SA 267 (D) 271; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A). The ruling in *Everson v Allianz Insurance* 1989 2 SA 173 (C) was, from a utility point of view, the same principle as in the *Beverley* case.

[312] See paragraph 12.15.2.

[313] Visser 1983 *THRHR* 43 52-3; 1986 *De Jure* 207 209n7 `wat nie sy ekonomiese posisie raak nie'.

be done over a period of 3 or more years. Under conditions of high inflation an adjustment must be made to the average to allow for the fact that the buying power of a rand earned say 3 years ago is not the same as that of the rand earned today. The procedure is illustrated by the following example:[314]

TABLE 17 - FLUCTUATING EARNINGS

Year Ending February	Nominal Income R py	Inflation Factor	Real Income 1990 rand values
1987	75000	1,509	113175
1988	66000	1,300	85800
1989	95000	1,155	109725
1990	101000	1,000	101000
Average	**84250**		**102425**

If averaging were done without allowance for inflation then the level of earnings used for input to the actuarial calculation would be too low, R84250 per year compared to the properly adjusted figure of R102425 per year.

[12.17] BUSINESS CAPITAL

[12.17.1] Earning capacity of capital: The self-employed businessman commonly uses business capital in conjunction with his work capacity in order to generate earnings. When such a person is seriously injured he may immediately sell off the business assets and invest the proceeds. Capital properly invested will generate income independently of the work capacity of the owner. The loss of earnings is the difference between earnings but for the injury and the investment income. If the business is making losses the duty to mitigate may require that he sell or close down the business. Business profits, we may observe, derive only partly from work capacity, the balance being attributable to the ongoing `earning capacity' of the business capital.[315] The earning capacity of the man is, in this sense, a major capital asset in the business which will be damaged if the man is seriously injured.

[12.17.2] Declining real values (table 18): Consider a business where nothing is ploughed back towards maintaining business capital reserves. Although nominal asset values may be maintained analysis of the financial statements will reveal an ongoing decline in the real value of business assets. Such a business will in due course consume all capital. The contribution of business capital to profits can be analyzed in the manner shown in table 18.

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[314]Levin `Statistics' 2ed 612-43 (note example at 633 and elimination from calculation of the highest and lowest values to minimize the effect of aberrant events). See too Koch `Damages' 146; *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 645-6; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1011C-D.

[315]Passing reference to the distinction between capital and labour is to be found in *Van Staden v President Versekeringsmpy* 1990 4 C&B L2-1 (W) L2-13.

TABLE 18 - BUSINESS CAPITAL DECLINES AT 4% PER YEAR

YrEnd Feb	Nominal Rands Capital A	Income B	1990 Rands Capital C	Reduction D	2,5%py E	1990 Rands Income F	F-D-E G
1986	124800	-	202925	-	-	-	-
1987	120000	75000	167760	35165	4634	113175	73376
1988	115384	66000	141577	26183	3867	85800	55750
1989	110946	95000	119933	21644	3269	109725	84812
1990	106679	101000	100385	19548	2754	101000	78698
Average		**84250**				**102425**	**73159**

TABLE 19 - BUSINESS CAPITAL MAINTAINED IN REAL TERMS

YrEnd Feb	Nominal Rands Capital A	Income B	1990 Rands Capital C	Reduction D	2,5%py E	1990 Rands Income F	F-D-E G
1986	103173	-	167760	-	-	-	-
1987	120000	75000	167760	-	4194	113175	108981
1988	136724	66000	167760	-	4194	85800	81606
1989	155190	95000	167760	-	4194	109725	105531
1990	178278	101000	167760	-	4194	101000	96806
Average		**84250**				**102425**	**98231**

TABLE 20 - BUSINESS CAPITAL INCREASING IN REAL TERMS

YrEnd Feb	Nominal Rands Capital A	Income B	1990 Rands Capital C	Increase D	2,5%py E	1990 Rands Income F	F+D-E G
1986	97333	-	158263	-	-	-	-
1987	120000	75000	167760	9497	4194	113175	118478
1988	144927	66000	177825	10065	4446	85800	91419
1989	174371	95000	188495	10670	4712	109725	115683
1990	212332	101000	199804	11309	4995	101000	107314
Average		**84250**				**102425**	**108224**

Column A reflects actual asset values at the end of each financial year. Column B shows accounting profits taken from the financial statements. Columns C and F show earnings and capital adjusted to common rand values as at August 1989. Different inflation factors have been applied to profits as to assets since the assets reflect rand values at the end of each financial year whereas profits are assumed to have been earned continuously through the year and are on average relevant to a time half-way through the financial year.[316] Column D shows the reduction in value of capital in real terms in each year. Column E shows the notional investment return

[316]The assumption is not generally appropriate to farming income from crops which is concentrated just after the harvest.

at 2,5% per year on average capital utilised during the year.[317] The last column G shows that part of profits which is attributable to the work capacity of the proprietor of the business. It is noticeable that the average earnings from this column (R73159 per year) is substantially lower than for the averages from columns B (R84250 per year) and F (R102425 per year).

[12.17.3] Real values maintained (table 19): An alternative business scenario would be one where the value of business assets increases in line with inflation. The contribution by capital to business profits is the real rate of return, eg 2,5% per year, on business assets used during the financial year. In order to maintain the real value of capital assets it will usually be necessary to plough back part of business profits. Because the underlying asset values increase in line with inflation the same will happen to the earning capacity of such assets measured by a real rate of return of say 2,5% per year. Table 19 illustrates such a scenario. The features to be noted in table 19 are nil values under column D for reductions in capital values, and under column E a constant real contribution of R4194 per year by capital towards business profits. This analysis indicates that a proper basis for assessing loss of earnings is R98231 per year.

[12.17.4] Increasing real capital (table 20): In many businesses the value of capital will increase at rates above the rate of inflation. This may arise due to a judicious choice of assets, for example business-owned office premises or a farm, or by reason of a high rate of plough-back of profits and re-investment of capital. Increases in capital values above the normal earning capacity of the capital are properly attributed to the skill, the earning capacity of the man in the choice and care of the assets. The earning capacity of the assets, measured at 2,5% per year, say, will increase faster than the rate of inflation. Table 20 illustrates this point.

The capital values in table 20 increase in real terms by the amounts indicated under column D. The scenario illustrates a business in which a substantial proportion of profits is being ploughed back, ie saved.[318] Under column E the notional real rate of return on capital grows faster than the rate of inflation, that is to say increases in real terms. The proper basis for assessing a loss of earnings in this instance is R108224 per year.

[12.17.5] Wealth reduces need to work: Once the profits of a man's work capacity have been capitalized by plough-back they then become part of the business capital available to cushion his loss of income should he be severely injured. For many persons who consistently increase their capital, that is generate savings, there will come a time when the accumulated assets are sufficient to remove the need to work. If work has a negative utility and will thus be avoided if circumstances permit then this reduced need may be manifested by reduced work effort or total retirement. Conversely one finds persons for whom the accumulation of money, and the associated power, is an end in itself. Such persons will probably not reduce work effort when wealth increases.

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[317] ie on the average of capital at the beginning and end of each year.

[318] A rate of ploughback of 6% per year over and above the rate of inflation.

[12.17.6] The entrepreneur: The investment expert or entrepreneur may generate very little earnings by way of income in the general sense. The application of his work capacity will instead generate substantial capital gains, generally tax-free. The earning capacity of such persons should be measured by the extent to which the increase in asset values in a year exceeds the basic potential investment return of say 16% per year.[319] Earnings of this nature are probably subject to a very much higher risk of fluctuation, including loss situations, and should be subject to a suitably increased deduction for general contingencies. If the accumulation of capital is unusually rapid a further increase in the deduction may be appropriate to allow for reduction in future work effort and/or total retirement many years before age 65. The claimant's background may indicate, however, a likelihood of continuing accumulation of wealth throughout life to well beyond age 65.

[12.17.7] Investment capacity of victim: A victim who has received compensation may have the skill to generate investment returns well in excess of the average returns generally available.[320] The rates of investment return generally available should be understood to be net of the costs of managing the investment and obtaining investment advice. The excess returns are a form of residual earning capacity which serves to reduce the overall loss suffered.[321] Conversely a victim's condition may be such that he cannot manage even the simplest finances. In such cases he will be compensated for the costs of a *curator bonis*.[322]

[12.18] SERVICES OF WIFE IN A FAMILY BUSINESS

[12.18.1] Cost of substitute services: In many family businesses the husband is assisted by his wife who receives little or no wage for her services. If she ceases to assist in the business it is then necessary to employ someone and pay a salary at the full commercial rate for the services. The income attributable to the husband's work capacity is the total income from the business less the value of the wife's contribution and, if appropriate, less a further adjustment for the use of assets.

[12.18.2] Who claims for what?: The traditional view is that if the wife is injured and prevented by her injuries from working in the family business then the husband is entitled to claim for the cost of replacing her services[323] notwithstanding that it is the wife who has suffered the loss of work capacity.[324] If the husband has replaced the wife's services by himself working harder and longer hours it is unlikely that he will receive compensation. This unsatisfactory result flows from the judicial tendency to focus on actual cash outlay or shortfalls. Considerations of utility suggest, however,

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[319]See paragraph 8.1.9'.

[320]Opportunities may be better in capital starved communities such as the black townships where excellent returns seem to be possible from owning a taxi or home-based grocery store (`spasa' shop).

[321]In practice it may be extremely difficult to prove the existence of an above-average ability to generate earnings from the use of capital. This is particularly true of a salaried person who has not previously had the benefit of substantial capital and therefore has no track record.

[322]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G.

[323]or the profits lost through not having her services available.

[324]*Plotkin v Western Assurance* 1955 2 SA 385 (W).

that the husband has suffered a loss of utility by reason of his efforts and should be compensated for the value of this loss.[325] A husband who has not suffered physical or psychological injury cannot claim general damages for inconvenience.[326] If the wife's injuries will in future prevent her from assisting in the business then it can be argued that she is to be compensated in her own right for the cost of providing substitute services. On the other hand it is the husband who must meet the cost of substitute services. Provided he has a right to demand that his wife provides substitute services there can be no major objection to compensating the wife for the future loss.[327] After all it is she who has suffered the injury. In years to come she may in any event have ceased to render her services in the family business and gone out to take employment for a cash income.[328]

[12.18.3] Adjustment for income tax: The cost of providing substitute services will be tax deductible. The compensation should thus be reduced for the saving by way of tax liability. This is a benefit which is *prima facie* enjoyed by the husband but not the wife. However, if we look at the problem from the collective viewpoint of the family unit the benefit of the income *net after tax* from the family business is enjoyed by all. If the wife were to be compensated for the gross cost of hiring a substitute without a deduction for taxation the family as a whole would be better off. By reason of the tax advantage the husband will be able to provide a higher level of support to his wife. In this sense the wife does indirectly benefit from the tax advantage. If the wife were to go out to work outside the family business her income would be subject to taxation. It seems correct that an adjustment is made for taxation. The rate of tax to be applied will depend on the manner in which the wife was expected to utilise her work capacity.

[12.18.4] Injury to the husband: If the husband is injured, but not his wife, then his loss of earnings is the full income from the business suitably abated for the value of the wife's services and the contribution from business capital, if any. Such an approach presumes that the family business is immediately closed down or sold as a result of his injury and that the wife immediately takes alternative employment elsewhere.

There are instances where the wife has successfully taken over the running of the family business.[329] The support she provides to her husband and children from such income would be rendered in terms of her duty to do so. The support she provides is not gratuitous and should thus be deducted from the husband's loss of earnings. The wife has a claim in her own right for the increased cost to herself of supporting the family during her husband's disability.[330] In practice a court will probably ignore

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[325]Bloembergen `*Schadevergoeding*' 107-8 writes of the surgeon who has treated his own wounds.

[326]*Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A).

[327]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409E.

[328]See, for instance, *Williams v British America Assurance* 1962 2 PH J18 (SR).

[329]*Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) pages 272-3 of the bundle for appeal; *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727A.

[330]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W).

such fine points of law and treat the wife's increased contribution as *res inter alios acta*.[331]

But what if the wife cannot find employment elsewhere? The family then loses the income of both husband and wife. We know that dependants cannot claim for loss of support while their breadwinner is alive because his action is not for what he needs for himself alone but extends to his dependants as well.[332] This suggests that the injured husband may claim for the total loss of support suffered by the family.[333] A deduction should then be made for the value of the chance that the uninjured wife may find employment. A further deduction would be made for the chance that the injured husband finds alternative employment.

Popular notions that compensation is for `loss of earning capacity' in the narrow sense do not permit a solution for the permutations described in the previous paragraph. The above analysis suggests that the action for personal injury is best viewed as a group action[334] whereby the breadwinner acts not only for himself but also for those dependent on him.

[12.19] ILLEGAL EARNINGS

[12.19.1] Compensation denied: A victim will be denied compensation if the earnings which he claims to have lost would have been derived from an illegal or immoral activity.[335] The illegality taints not only the earnings but also support derived from those earnings.[336] Dependants will thus be denied compensation by reason of the illegal conduct whereby their breadwinner earned his living.[337]

[12.19.2] Inadmissible evidence: One possible explanation for the illegality rule is that the wrongful manner in which income was earned renders evidence thereof inadmissible in court. Such an explanation must, however, be rejected if one bears in mind that evidence of illegal earnings may be led to establish earning capacity under conditions of legality.[338] This means that the entire claim need not be defeated

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[331]As happens with death claims (*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A)).

[332]*De Vaal v Messing* 1938 TPD 34; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305; Bloembergen `*Schadevergoeding*' 79. In *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) compensation was awarded for loss of the financial benefits of marriage, ie loss of support occasioned by an injury.

[333]Bearing in mind that the income from the family business generally accrues to the husband there would probably be little difficulty with persuading a court to award compensation on this basis.

[334]See section 11.4.

[335]*Dhlamini v Protea Assurance* 1974 4 SA 906 (A); Boberg `Delict' 588-94; Davel `Skadevergoeding' 53-8.

[336]*Santam Insurance v Ferguson* 1985 4 SA 843 (A) 851F-G. See too 342! below.

[337]When interpreting judgments concerning illegality it should be borne in mind that a number of the anomalies are due more to poor trial preparation rather than deficiencies in the law. See, for instance, *Santam Insurance v Ferguson* 1985 4 SA 843 (A) 851-2 where the appeal court refused to admit belated evidence that the deceased had done most of his work away from the illegal premises at his home.

[338]*Shield Insurance v Booysen* 1979 3 SA 953 (A) 964D-E `Even though some of the activities mentioned... had ceased before his death and others were found by the Court *a quo* to be illegal, they can nevertheless be relied upon as some indication of his earning capacity'. Visser 1991 *THRHR* 782 792 and Reinecke 1988 *De Jure* 221

because at the time of the injury or death there was involvement in an illegal activity. The defendant who wishes to avoid liability must establish not only that the earnings were illegal at the time of the injury or death but also that such illegality would have persisted throughout the period of the claim. A court is competent to make an award for the value of the chance of legality.[339]

[12.19.3] Tenuous earnings: The nature of an illegal activity may suggest that it could not have continued for very long and that for this reason compensation should be denied. This would certainly not explain the illegality rule. In the first place there are many illegal activities which continue for many years. Secondly a person who is prevented from earning his living illegally is likely to turn to some other activity, legal or illegal. The illegality rule is clearly directed at denying compensation for the loss of earnings or support derived from an illegal activity. The prospect of legitimate earnings in the foreseeable future will limit the application of the illegality rule.[340]

[12.19.4] Punishment to match the crime: The Criminal Procedure Act[341] provides for forfeiture by a convicted person of money or goods associated with the offence. The courts have adopted a strict interpretation of these provisions which limits forfeiture to things intimately associated with the crime for which the charge has been made. Thus a drug dealer was permitted to retain money received from a previous drug transaction for which she had not been charged.[342] In another matter money accumulated from illicit diamond dealing was returned to a person accused of stealing funds from the police.[343] The reluctance of the courts to order forfeiture in these criminal matters provides a startling contrast to the willingness with which compensation has been denied in civil matters[344] for earnings or support derived from mildly illegal activities. The crimes which come for consideration by the courts apprised with the assessment of damages are generally of a commercial licensing nature for persons of low income and poor education.[345] The penalty which the

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erroneously suggest that illegal earnings cannot serve as evidence of earning capacity.

[339]See Davel `Broodwinner' 416 for comments upon *Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C). The value of the chance of legality was awarded in *Dhlamini v MMF* 1992 1 SA 802 (T). In *Nkwenteni v Allianz Insurance* 1992 2 SA 713 (Ck) compensation was denied for a period of temporary illegality. See *Xatula v Minister of Police, Transkei* 1993 4 SA 344 (Tk).

[340]*Shield Insurance v Booysen* 1979 3 SA 953 (A); *Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C).

[341]s35 of Act 51 of 1977. See comment thereon in *S v Dlova* 1986 3 SA 248 (NC) concerning the `drakoniese bepalings in art 190' of the Liquor Act 87 of 1977.

[342]*S v Tsoai* 1981 1 SA 348 (O).

[343]*S v Campbell* 1985 2 SA 612 (SWA).

[344]*Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C) goes some way to achieve this. *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 203C-D states that `A Court will not readily deprive a dependant of his right to recover damages resulting from the death of the deceased... unless the prohibition against his activities of necessity indicates that it was the intention of the legislation to regard such activities as being both illegal and invalid'. The court (at 201) distinguished itself from the ruling in *Santam Insurance v Ferguson* 1985 4 SA 843 (A). It seems that the potentially draconian ruling in *Ferguson*'s case has been substantially mitigated by the *Mankebe* decision.

[345]Unlicensed hawker *Dhamini v Protea Assurance* 1974 4 SA 906 (A); unlicensed weekly cinema and dances with unlicensed sale of liquor *Shield Insurance v Booysen* 1979 3 SA 953 (A); unlicensed taxi driver *Mba v Southern Insurance* 1981 1 SA 122 (Tk); unlicensed panelbeating premises *Santam Insurance v Ferguson* 1985 4 SA 843 (A).

victim or the deceased's family is required to bear is usually out of all proportion to the severity of the criminal or immoral conduct in question.[346] This point is all the more relevant when the compensation is to be paid from a public fund, such as the MMF, to which the victim may himself have contributed. The effect of denying compensation is to deprive the victim or his family of a public insurance benefit.[347]

[12.19.5] Versari in re illicita: The law requires a person to wear a safety belt or crash helmet when travelling by motor vehicle. A person may be severely injured whilst breaking the law by failing to wear the required safety equipment. The courts will only reduce the damages payable if the absence of the crash helmet or safety belt was causally related to the damage suffered.[348] The attitude of the appellate division to the problem of seat belts and crash helmets stands in sharp contrast to the largely draconian approach to illegal earnings.[349] When earnings are tainted with illegality a test of causal relevance may reveal that compliance with the relevant regulation would have been a simple formality[350] and that the earnings would have been the same had they been earned legally.

[12.19.6] Hypothetical legality: There seems little doubt that where the illegality of the conduct has permitted far greater earnings than would otherwise have been possible the court would be acting correctly if it assessed compensation on the basis of the lower earnings to which the victim would have been restricted had he acted legally.[351] The illegality rule has been handed down to us from a previous era when the range of criminal offences was far less complex than today.[352] An inquiry into what the victim could have earned had he acted legally may, of course, reveal that he would have been unemployed. Boberg has suggested that when the earnings are illegal then compensation may still be awarded for loss of `earning capacity' as distinct from `loss of earnings'.[353] This is essentially the same approach to that suggested above provided that one substitutes for the words `earning capacity' the `probable

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[346]If punishment is to be meted out to the victim or his family it should be limited to the relevant criminal penalty: Atiyah `Accidents Compensation & the Law' 3ed 565. See too *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 203B-E.

[347]`This Court has repeatedly held that the general object of the Act is "to afford third parties the widest possible protection against loss sustained through the negligent or unlawful driving of a motor vehicle"' *Constantia Insurance v Hearne* 1986 3 SA 60 (A) 67I. See too footnote 129.

[348]Boberg `Delict' 400-39.

[349]*Dhlamini v Protea Assurance* 1974 4 SA 906 (A); *Santam Insurance v Ferguson* 1985 4 SA 843 (A). *Shield Insurance v Booysen* 1979 3 SA 953 (A) does not follow the pattern of the other two judgments and reflects a welcome compassionate approach to the problem.

[350]Or at least achievable on due compliance with certain requirements (see *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 203E).

[351]See *Lebona v President Insurance* 1991 3 SA 395 (W) 402-3 and paragraph concerning tax evasion. See too Visser 1991 *THRHR* 782 793; Dendy 1987 *SALJ* 243-52.

[352]`It would be artificial in the extreme and reminiscent of mid-Victorian hypocrisy to deny him the aid of the law' *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 201I-J.

[353]Boberg `Delict' 594(d). See too Blommaert 1981 *TSAR* 176; Dendy 1987 *SALJ* 243 248-51. The ambiguities inherent to the expressions `loss of earnings' and `loss of earning capacity' are dealt with at 218 above.

earnings[354] of the victim *had he acted legally*'. Visser[355] states this principle in the form that regard should only be had to the `legal' components of the damaged patrimonium.[356]

[12.19.7] Tax evasion: Tax evasion is the most common form of `white-collar' illegal activity one encounters when assessing damages for personal injury or death. In *Santam Insurance v Fick*[357] the injured claimant was compensated for lost earnings which derived from a questionable scheme apparently designed to evade tax. The court ordered that a copy of the record be sent to the tax authorities.[358] Where there are assets which can be attached[359] the threat of arrear and penalty taxes usually ensures an out-of-court settlement. The *Fick* ruling suggests that if a history of successful tax evasion were to be proved, for example cash takings from the till, the court would nonetheless assess compensation as though such income had been properly subject to taxation. In other words damages would be assessed on the basis of what would have happened if the victim had acted legally.

[12.19.8] Enforceability of illegal contracts: One finds mention in the judgments of an inquiry into the enforceability of contracts concluded during the immoral or illegal activity.[360] All the illegal or immoral business activities which have come before the courts in South Africa would seem to have been conducted in cash.[361] It follows that for practical purposes the enforceability of the contracts is irrelevant.[362] Cash receipts will generally be retained regardless of questions of illegality. The principle of *in pari delicto potior est condicio defendentis* is likely to apply to most circumstances.[363] In terms of the Criminal Procedure Act[364] forfeiture will only be ordered in respect of the particular act for which there has been a successful prosecution[365] and then only to a very limited extent.[366]

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[354]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G. See too 235 above.

[355]Visser 1991 *THRHR* 782.

[356]See too Davel 1992 *De Jure* 83-95 and 48 above.

[357]1982 (A) (unreported 24.5.82 case 282/79/AV).

[358]The damages award had not been reduced for notional taxation. The order was probably with a view to the levying of tax on the damages award but would also have brought the tax-evasion activities to the attention of the authorities.

[359]For dependants this would mean that the deceased has left an estate. The prospect of a tax claw-back with penalties is only relevant to the dependants who have inherited, usually the widow.

[360]*Mba v Southern Insurance* 1981 1 SA 122 (Tk) 125D; *Ferguson v Santam Insurance* 1985 1 SA 207 (C) 208G.

[361]See footnote 345.

[362]*Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 194-5.

[363]The rule will be applied circumspectly with a view to maintaining justice between man and man: *Jajbhay v Cassim* 1939 AD 537 544; *Osman v Reis* 1976 3 SA 710 (C) 712G-713B.

[364]s35 Act 51 of 1977.

[365]*S v Tsoai* 1981 1 SA 348 (O).

[366]*S v Mudau* 1980 3 SA 1079 (V); *S v Marais* 1982 3 SA 988 (A); *S v Campbell* 1985 2 SA 612 (SWA).

[12.19.9] Post-injury illegality: The courts have not yet expressed an opinion on how to deal with the claimant who was acting legally prior to his injury but who after the injury takes to an illegal activity.[367] The likely solution is to have regard to what he could earn now injured if he acts within the law.

[12.19.10] Immorality: There is no recorded instance in South African law where compensation has been denied for an activity which is immoral but not illegal.[368] It could be argued that by reason of disuse immorality on its own is no longer a ground for refusing compensation. A suitable test case for this point would be injury to the kept mistress of a married man. May such a woman claim for the loss of the financial benefits of her relationship? Apart from the high deduction required for general contingencies one suspects that explicit compensation would be denied on moral grounds but that an award would be made for the chance that she might in time have married the man[369]or provided for herself through some other legal activity.[370]

[12.20] CONCLUSIONS

The action for damages for personal injury is undoubtedly the most comprehensive of all rights of action available under the Aquilian action. The damages payable are not limited by considerations of foreseeability[371] to the same extent as with negligent misstatements or damage to goods. The action compensates losses not only by way of earnings and necessary expenditure but also loss of support and general damages by way of pain and suffering and loss of the amenities of life. The action has been extended to those who suffer loss by reason of their duty to support the victim during the pre-trial period.[372] For injury to a child the parent may claim for expected expenditure even after the pre-trial period.[373] These alternative actions complicate claims procedures and can lead to a loss going uncompensated.[374] It would be preferable to have one single action by the victim with a procedure whereby the court can order that part of the damages awarded be used to re-imburse those who have assisted the victim.[375]

When a breadwinner is killed the family loses the benefit of his or her earnings. For this reason many issues relevant to assessing damages for personal injury are equally relevant to the assessment of damages for loss of support. In this regard one might

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[367]For instance the victim who has become an epileptic by reason of his injuries and then takes to driving a taxi.

[368]*Dhlamini v Protea Assurance* 1974 4 SA 906 (A) makes reference to immoral activities (`*contra bonos mores*' at 912F and `teen goeie sedes' at 915C). Considering the cultural diversity of South Africa, notably the polygamy issue, the courts will in future need to tread warily in this area.

[369]After he had divorced his present wife. Loss of marriage prospects will be compensated (see 223).

[370]See, for instance, *Dhlamini v MMF* 1992 1 SA 802 (T).

[371]See 51.

[372]See 193.

[373]See 254.

[374]See, for instance, *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409H.

[375]See paragraph 11.3.2.