CHAPTER 13

THE DEPENDANTS' ACTION

***Summary**: The loss of a **right** to support determines who may bring an action for loss of support. The financial loss suffered is, however, not the right to support but the value of the financial benefits expected from the breadwinner in consequence of this right. This financial value will be assessed according the value of the chance of receiving the support. The working wife who earns sufficient to support herself has no right, at that point in time, to claim support from her husband. The loss by the dependants will be assessed without regard for compensating advantages other than inheritance and remarriage. The focus is on the support which would have been provided had there been no death. The widow who takes up employment after the death will be compensated as though she were unemployed. Conversely a widow who ceases employment in consequence of the death has no claim under the dependants' action for this loss of earnings. Loss of inheritance prospects will be compensated to the extent that these would have provided ongoing support. Although dependants have in theory a claim for loss of support during the `lost years' such claims will usually fail due to difficulties with evidence.*

[13.1] THE RIGHT OF ACTION

[13.1.1] Confined to loss of support: The dependants' action `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'.[1] Compensation under the dependants' action is restricted to loss of support and a separate action must be brought to recover any loss of earnings or medical expenses caused by the same wrongful act.[2] General damages are not claimable under the dependants' action.[3] If damages were ever to be awarded for the inconvenience and psychological shock flowing from the death of a breadwinner[4] this would open the way to awards to dependants for general damages arising from death.[5] Such awards would not, however, be made under the dependants' action but under the action for personal injury.

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[1] *Legal Insurance v Botes* 1963 1 SA 608 (A) 614E (emphasis supplied).

[2] *Evins v Shield Insurance* 1980 2 SA 814 (A).

[3] *Jameson's Minors v CSAR* 1908 TS 575 602; *Union Government v Warneke* 1911 AD 657 662 666; *Hulley v Cox* 1923 AD 234 243; Davel `Broodwinner' 442-3. See 258 above.

[4] In *Bourhill v Young* [1942] 2 All ER 396 (HL) compensation was denied for psychological shock resulting from the killing of a cyclist 15 meters away from the claimant. The deceased was not related to the claimant, therefore the court found that there was no duty of care. In *Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A) damages were awarded to a child who suffered a severe psychological neurosis after his brother was run down in front of him and killed. It is not essential to establish a personal apprehension of danger (780-1). In *Boswell v Minister of Police* 1978 3 SA 268 (E) the claimant suffered physical harm from shock by reason of being falsely told of the death of her nephew.

[5] General damages for the death of a breadwinner are permitted in England (s3(1) Administration of Justice Act of 1982).

[13.1.2] Damages for shock: There seems to be little reason why dependants who suffer the agonies of the shock of the death of a breadwinner should not successfully claim compensation for personal injury. If the death of the breadwinner is foreseeable then so too, one would think, is the shock and emotional disturbance of the dependants.[6] In *Boswell*'s case[7] damages were awarded for the emotional consequences of shock caused by a false statement to the victim that her nephew, whom she had brought up, had been shot dead. In *Sebatjane*'s case[8] compensation was awarded for the psychological shock of a miscarriage. In *Masiba*'s case the victim had suffered severe shock from the sight of his stationary car being collided with by another vehicle. In consequence of the shock he died. A right of action for damages for loss of support was granted to his dependants on the basis that had he merely been injured he would have had a personal right of action for damages for the injury suffered.[9] Emotional shock of short duration will, it seems, not be compensated.[10]

[13.1.3] Damages to the deceased's estate: The estate of a deceased victim has a claim for general damages provided *litis contestatio* has been reached before the death occurs.[11] This benefit will only accrue to the dependants if they are heirs. The benefit would have the effect of reducing the damages claimable by the dependants under the dependants' action[12]

[13.1.4] Historical origins: The right of action for damages arising from wrongful killing is said to have its origins in the Germanic law.[13] The right of action of a widow is neither Roman[14] nor Germanic.[15] It reflects the influence of the Church.[16]. The widow, however, was not a blood-relative of her deceased husband and was only admitted as a claimant at a fairly late stage. Grotius,[17] writing about 1620, records the modern form of the dependants' action with damages payable to the widow and children, rather than the heirs. The Council of Trent[18] in 1563 laid the groundwork for the registration of marriages. Prior to this time proof of marriage could be a contentious issue.[19] We may surmise that proper evidence of marriage by

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

[7] *Boswell v Minister of Police* 1978 3 SA 268 (E). General damages of R750 in 1977 equivalent to R5600 in 1992. See too *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 (HL) and *Hevican v Ruane* [1991] 3 All ER 65 (QBD).

[8] *Sebatjane v Federated Employers' Insurance* 1989 4 C&B H2-1 (T).

[9] *Masiba v Constantia Assurance* 1982 4 SA 333 (C) 343.

[10] Neethling Potgieter & Visser `Deliktereg' 2ed 243n333.

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

[12] See 333.

[13] *Jameson's Minors v CSAR* 1908 TS 575 584; *Union Government v Warneke* 1911 AD 657 664; *Union Government v Lee* 1927 AD 202 221; *SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A) 471-2; *Legal Insurance v Botes* 1963 1 SA 608 (A) 614; Davel `Broodwinner' 32-68; Davel `Skadevergoeding' 14-25.

[14] The Roman law did not allow compensation to anyone for the death of a freeman; Davel `Broodwinner' 11-17.

[15] Davel `Broodwinner' 55-6. The widow was not a blood-relative of her deceased husband.

[16] Davel `Broodwinner' 58-9. See too paragraph 3.2.5.

[17] *Inleiding* 3.33.2.

[18] *Decretum tametsi (de reformatio matrimonii)* of 1563 of the Council of Trent became law in Holland through the Political Ordinance of 1580 and introduced civil marriage to the Roman-Dutch law.

[19] Hahlo & Kahn `The SA legal system' 450.

way of registration greatly facilitated the admission of a widow as a claimant for damages arising from wrongful killing. This development would have been encouraged by the Church in keeping with a policy of strengthening the status of a registered holy marriage.

Quantification of the damages by reference to the earnings of the deceased[20] and excluding general damages for emotional distress[21] is typically Roman. The accommodation under the modern Aquilian action of a right of action for damages caused by wrongful killing has been by way of extension of the Roman actions for loss of earnings.[22] The major, if not the sole contribution of the Germanic law has been the ethic that compensation should be awarded in the event of wrongful killing.

[13.1.5] The injured breadwinner: If a breadwinner is severely injured the dependants have no right of action for the loss of support which they suffer.[23] They are obliged to make do with what their breadwinner is awarded, even if the breadwinner's damages are reduced by reason of his contributory negligence.[24] If the breadwinner's expectation of life has been reduced by his injuries, and for this reason less damages awarded, the dependants are obliged to wait until he dies before they can bring an action for damages during the `lost years'.[25]

[13.1.6] Quantum: The quantification of the damages suffered by the dependants is done on much the same basis as for an injury. This means that considerations of capitalize first[26] and difference afterwards and vice-versa alternate in the assessment process. Historically there used to be a comparison of what would have accrued but for the death with what has accrued having regard to the death,[27] but, as I will enlarge upon in due course, this is no longer a generally valid statement. The relevance of living expenses to the assessment process is far more obvious under the dependants' action than under the action for loss of earning capacity. Not the least because a deduction needs to be made from the deceased's projected earnings for the proportion which would have been consumed by his own living expenses. The determination of damages for loss of support may, in theory, proceed entirely by reference to the costs of supporting the family and without regard for the deceased's earnings. Assessments done on this basis are rare for a common household but are done when the dependants lived separately from the deceased.[28]

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[20] `*Operarum quibus caruit aut cariturus est*: D9.3.7 *actio de effusis vel deiectis*; D9.1.3 *actio de pauperie*. When fixed amounts were specified these were in the nature of punitive fines rather than compensation (Davel `Broodwinner' 18-19 21-2). Under Germanic law the *weergeld* was assessed on a tariff basis with little or no regard for lost earnings (Davel `Broodwinner' 37-8).

[21] Davel `Broodwinner' 11-17.

[22] Feenstra 1972 *AJ* 227 229.

[23] *De Vaal v Messing* 1938 TPD 34; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6.

[24] Apportionment of Damages Act 34 of 1956. *De Vaal v Messing* 1938 TPD 34 40-2.

[25] *Lockhat v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6; *Evins* v Shield Insurance 1980 2 SA 814 (A). For further discussion see 227, 347.

[26] See 65 and 68.

[27] *Union Government v Warneke* 1911 AD 657 665; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917; *Santam Insurance v Meredith* 1990 4 SA 265 (Tk) 267C-H.

[28] For black migrant workers evidence as to application of funds is generally unobtainable or flagrantly unreliable (eg support payments of R200 per week alleged for a man earning R600 per month). One then usually relies on a two-parts-one-part apportionment of earnings (see section 13.8).

[13.1.7] Past loss: An award of damages for past loss of support is subject to the same anomalies and problems that attach to an award for past loss of earnings.[29] This is an anomalous state of affairs because while the breadwinner is still alive past support cannot be claimed from him[30] except in so far as debt has been incurred.[31] Dependants who claim damages for loss of support may have their damages reduced if the evidence indicates that their breadwinner would from time to time not have provided them with support notwithstanding his duty to do so.

Utility theory suggests that if a dependant has died prior to receiving compensation then the dependant's estate should have no right to compensation other than for debt that has been incurred. This conclusion follows from the observation that a past loss of earnings or support is more in the nature of general damages than patrimonial loss.[32] In practice the estate of the deceased dependant will probably be made an award for past loss of support.

[13.1.8] Curator bonis: When a person is injured and is incapable of managing the compensation money an additional award will usually be made for the costs of a suitable *curator bonis* or trustee.[33] It is quite common that the compensation money for dependent children requires similar supervision and costs of administration. There is no recorded instance in South Africa where a court has allowed a claim for the costs of a *curator bonis* or trustee for children compensated for loss of support. If it be correct that the claim by the dependants for damages is confined to loss of the support[34] then such additional costs are not claimable in law. It deserves note in this regard, however, that in one instance a court has ordered that a lower discount rate of interest be used to allow for the fact that the awards of damages were to be paid into the guardian's fund.[35]

[13.2] REQUIREMENTS FOR A CLAIM

[13.2.1] Financial value: In order to claim damages for loss of support the dependant must demonstrate not only that he or she would have had a right to claim support from the deceased had he lived but also that the deceased would have provided support in response to that right.[36] The right to support alone is not sufficient to give rise to a right of action for damages. It is also necessary to establish that the benefits to be provided by the breadwinner had a financial value. In other words there may have been a duty of support but a nil or negligible chance that any support would have been provided in response to this duty. Conversely support may have been provided, but if there was no duty to do so then no compensation will be awarded.[37]

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[29] See paragraph 12.3.1.

[30] *Oberholzer v Oberholzer* 1947 3 SA 294 (O) 298; Voet *Ad Pandectas* 2.15.14 `*Non enim quisquam in praeteritum vivit aut alendus est*' (Gane's translation `A person does not live nor have to be maintained in arrear'); Hahlo `Husband & wife' 5ed 137.

[31] *Farrell v Hankey* 1921 TPD 590 596; *Williams v Shub* 1976 4 SA 567 (C) 570G-H.

[32] See paragraph 12.3.1.

[33] See paragraph 12.13.6.

[34] See paragraph 13.1.1.

[35] *Boonzaier v Provincial Insurance* 1954 1 C&B 87 (C).

[36] *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E `Om in haar aksie te kon slaag, moes die appellante bewys… dat die oorledene tot haar onderhoud bygedra het en dat hy dit gedoen het en sou voortgegaan het om dit te doen omdat hy regtens daartoe verplig was'. The existence of a duty of support does not mean that support will be provided (eg *Senior v NEG Insurance* 1989 2 SA 136 (W)). One needs to distinguish between support but for the death and support having regard to the death. The *Senior* case was concerned with the latter.

[37] See, for instance, footnote 45.

The value of the chance of the provision of support will generally be compensated and thus found a right of action.[38] *Van Vuuren v Sam*[39] suggests *obiter* that for a successful action for damages **the right to support must exist at the time of the death**. The somewhat stringent requirements expressed in this judgment may reflect no more than a general tendency by the courts to view with circumspection claims for loss of support by parents.[40] In *Young v Hutton*[41] the claimant's mother was killed on the day he was due for discharge from hospital. Compensation was awarded for the loss of the support which would have been provided **after** discharge from hospital.

For certain family relationships the rules of pleading do not require allegation or proof of the financial requirements necessary to create a duty of support. This does not mean to say that such financial requirements cease to be relevant:[42]

> `...the typical situation in which the husband and father maintains his wife and children finds expression in the rule that the mere existence of one of these relationships **creates a rebuttable presumption of a duty of support**; there is no necessity to allege and prove the need for support and the ability to supply it where a wife or a child claims maintenance' (or damages for loss thereof).

There is evidence that for some lawyers the requirement `duty of support' does not mean an enforceable duty of support having regard to the relative financial standings of the family members, but merely the existence of the relevant family relationship.[43]

[13.2.2] Enforceable duty of support: In order for a duty of support to arise the dependant must firstly be `in need', secondly the breadwinner must have sufficient means, and thirdly the law must impose a duty to provide support in the circumstances.[44] Need and ability to pay, that is to say the fist two requirement may be satisfied, and there may be a factual provision of support, but if the law does not impose a duty then there will be no right of action for damages.[45] The breadwinner may have the ability to pay but if the dependant earns sufficient income the duty to provide support does not arise. Thus, for example, a wife who works reduces or eliminates her right to claim support from her husband.[46] The right of parents to

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[38] Recognition of a right to compensation for the loss of a prospective right to support is to be found in *Jacobs v Cape Town Municipality* 1935 CPD 474 479; *Petersen v South British Insurance* 1964 2 SA 236 (C) 238E-F ; *Manuel v African Guarantee & Indemnity* 1967 2 SA 417 (R) 419.

[39] 1972 2 SA 633 (A) 635D-E.

[40] See *Singh v Santam Insurance* 1974 4 SA 196 (D) 199A.

[41] 1918 WLD 90.

[42] Boberg `Persons & family' 251n9 (emphasis supplied) relying on *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 262. See too Corbett & Buchanan 3ed 81-2.

[43] Loss of support for a widow is sometimes done using `method B' (see paragraph 13.9.10), an approach which proceeds from the premise that a wife has a right to support from her husband even if she earns more than sufficient to support herself. See too footnote 314.

[44] *Senior v NEG Insurance* 1989 2 SA 136 (W) 139.

[45] eg *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E) where granddaughter was supporting grandmother while children of claimant were able to provide the support; *Vaughan v SA National Trust & Assurance* 1954 3 SA 667 (C) concerning uncle and indigent nephews and nieces.

[46] *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13. See 309 below.

claim support from a child is dependent on a `spartan standard' of indigency.[47] Dependency may not exist at the time of the death but there may be a substantial prospect that it will arise in years to come, for example when a father retires without pension.[48]

[13.2.3] Spes of support: The above considerations suggest that it is more appropriate to speak of the loss of a *spes*, or `expectation' of support[49] rather than the loss of a right to support. The right to support determines whether or not a claim may be brought but it does not determine how much the lost right is worth.[50] Compensation is not based upon a consideration of rights and duties.[51] Rights and duties are, however, relevant to the likelihood that support would have been provided.[52]

[13.2.4] Value of prospective support by a child: Parents of a young dependent child may have had hopes of themselves being supported by that child in time to come. If that child is killed the parental prospect of support in the distant future will usually be outweighed by the more immediate saving from being spared the cost of supporting that child.[53]

[13.2.5] Changing circumstances: A married woman who works and earns sufficient income to support herself has no right to claim support from her husband.[54] By the same token a husband who earns sufficient income to support himself has no right to claim support from his working wife. Changed circumstances[55] for example, cessation of employment due to childbirth, would give rise to a right to support for the wife. Conversely an elderly husband may retire and become dependent on his younger wife. A young dependent child will grow

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[47]Boberg `Persons & family' 310-12; *Van Vuuren v Sam* 1972 2 SA 633 (A) 642-3; *Singh v Santam Insurance* 1974 4 SA 196 (D) 199A `The means test as applied to a father's claim for maintenance from a son is a stringent one'. Calculations of poverty datum lines (PDL) include allowance for modest hedonistic expenditure on cigarettes, magazines, film shows, etc (Newall `Living Wage' 29-35; Budlender 1985 (Saldru working paper 63)).

[48]*Young v Hutton* 1918 WLD 90; *Jacobs v Cape Town Municipality* 1935 CPD 474 479; *Petersen v South British Insurance* 1964 2 SA 236 (C) 238; *Manuel v African Guarantee & Indemnity* 1967 2 SA 417 (R) 419 (more generally see chapter 4 at 71).

[49]Grotius *De iure belli ac pacis* 2.17.14 uses the word `*spes*' to describe the claim by dependants for loss of support: `*Dare tantum, quantum illa spes alimentorum, ratione habita aetatis occisi, valebat*'.

[50]The common failure of the courts to distinguish rights from financial loss is evident in *General Accident Insurance v Summers* 1987 3 SA 577 (A) 612C `Wat skade weens verlies van onderhoud betref, is daarop gewys dat al gesê is dat dit om die verlies van 'n reg gaan: kyk *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376C, waar Holmes AR gesê het: "What she has lost is a right - the right of support". Die getuie Koch het… gepraat van die verlies van 'n "expectation" wat vergoed moet word' (but see previous footnote).

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

[52]Van der Walt `Sommeskadeleer' 285sup (`The inadequacy of a classification by rights and duties) beteken nie dat die bestaan van so 'n reg vir die skadeleer irrelevant is nie. Die bestaan van 'n reg op die verwagte vermoënstoename sal naamlik lig werp op die mate van waarskynlikheid waarmee daardie vermoënstoename te verwag was'.

[53]Boberg 1964 *SALJ* 147-50; Spiro 1968 *THRHR* 118-23. This point is sharply emphasised by successful actions for damages for unwanted birth (*Edouard v Administrator Natal* 1989 2 SA 368 (D); 1990 3 SA 581 (A); Lind 1992 *SALJ* 428).

[54]`No maintenance will be awarded to a wife who is able to support herself… In the ordinary course, maintenance awards will be "more lavish to a wife than to an ex-wife"' Hahlo `Husband & wife' 5ed 361. See 309 below.

[55]*Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 262-3; *Oberholzer v Oberholzer* 1947 3 SA 294 (O) 297; *Woodhead v Woodhead* 1955 3 SA 138 (SR) 139-40. It is said that the primary burden falls on the husband but this, it seems, is no more than a reflection of the economic fact that husbands usually earn more than their wives (Boberg `Persons & family' 250).

up and become a breadwinner. An important feature of **an enforceable right to claim support is that it comes and goes with the passage of time**. The family relationship alone is not sufficient. The necessary financial conditions must also be satisfied.

[13.2.6] The posthumous child: The rights of a so-called *nasciturus* are suspended pending its birth as a viable legal subject. Such a child has a right to claim compensation for loss of support.[56] This is an example of the award of compensation for a prospective loss of support notwithstanding that no support was being provided at the time that the breadwinner died.[57]

[13.2.7] Death before a wedding: If a bridegroom is killed on his way to the wedding there is no reason in principle why the bride should not have a claim for compensation for the value of the chance of support had the marriage ceremony been completed.[58] There is no doubt that if the bride were seriously injured on her way to the wedding and the marriage plans thereby aborted she would be entitled to compensation for loss of the financial benefits of marriage.[59]

[13.2.8] Support by parents: Parents are obliged to support their children according to their means.[60] The typical family must `cut its cloth' according to the income available. Under circumstances of a common household whatever income the family has must be given over to the support of all.[61] The duty of support by a child to a parent only arises if the child has more than sufficient income for his own support.[62] There is a reciprocal duty of support between parent and child which suggests that the same principle applies to the duty of a parent to support a child.[63] It follows that a duty of support towards the children only arises if the relevant parent has sufficient income to cover the cost of his own support.[64] A claim by the wife for support from her husband may be resisted or abated on the grounds that she has income of her own.[65] One would expect a similar abatement if the wife had assets, albeit no income.[66] A claim by children for support from their working mother may be resisted on the

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[56] *Chisholm v ERPM* 1909 TH 297 301; *Pinchin v Santam Insurance* 1963 2 SA 254 (W).

[57] cf *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E `Om in haar aksie te kon slaag, moes die appellante bewys… dat die oorledene tot haar onderhoud bygedra het… '; Davel `Skadevergoeding' 59n129.

[58] *Young v Hutton* 1918 WLD 90; *Jacobs v Cape Town Municipality* 1935 CPD 474 479; *Petersen v South British Insurance* 1964 2 SA 236 (C) 238; *Manuel v African Guarantee & Indemnity* 1967 2 SA 417 (R) 419; *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6.

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

[60] *Union Government v Warneke* 1911 AD 657 668-9; *Burns v NEG Insurance* 1988 3 SA 355 (C) 363I-J; Boberg `Persons & family' 254.

[61] *Oosthuizen v Stanley* 1938 AD 322 331 `The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'.

[62] *In re Knoop* (1893) 10 SC 198; *Jacobs v Cape Town Municipality* 1935 CPD 474 479. Regard being had to the general standard of living of the family.

[63] *S v Pitsi* 1964 4 SA 583 (T) 586H `Aangesien dit 'n wederkerige verpligting is behoort dieselfde stelling ook te geld wat betref die verpligting van die vader om sy kind te onderhou'.

[64] *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196; *Burns v NEG Insurance* 1988 3 SA 355 (C) 363-4. See 308 below.

[65] *Karrim v Karrim* 1962 1 PH B4 (D); *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13. Hahlo `Husband & wife' 5ed 361.

[66] *Volkenborn v Volkenborn* 1946 NPD 76; Boberg `Persons & family' 268n73.

grounds that the mother has not sufficient for her own support[67] and the father has more than sufficient to support himself and the children.[68] A working child with limited income may remain partially dependent if the parents assist with maintaining a higher standard of living.[69] Sons undergoing military service may remain dependent but generally at a lower level than when full-time at home.[70]

[13.2.9] Support by children: A parent who is in need may claim support from a child who has the means to pay, that is say income, or assets, in excess of what that child needs for his own living expenses.[71] The need of a father will not be determined by what he needs for himself alone but will have regard to the other members of the household to whom he owes a duty of support.[72] Notwithstanding such considerations the right of a parent to claim support from a child will be viewed with circumspection.[73] The test for indigency is relative to the financial standing and social status of the family.[74] Poverty datum lines[75] (PDL) do not provide a satisfactory test of indigency because they reflect an absolute standard which ignores the financial and social standing of the family. Conservatism is clearly justified under

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[67] *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196. In *Lamb v Sack* 1974 2 SA 670 (T) 674E the court ostensibly apportioned the costs of support 3 to 1, the ratio of the relative incomes. The father's income, however, was taken net of his living costs and without any apparent adjustment for substantial assets; the mother was not working but was deemed to earn one third of the father's net income. The reported judgment is silent as to the living costs of the mother. One presumes that full provision was being made for her own living costs and that none of her income from notional employment was needed for her own support. See too *Mentz v Simpson* 1990 4 SA 455 (A) and 308 et seq below.

[68] *Burns v NEG Insurance* 1988 3 SA 355 (C) 363-4 (by implication); *Zimelka v Zimelka* 1990 4 SA 303 (W) 306H 307J. In *Woodhead v Woodhead* 1955 3 SA 138 (SR) 142-3 the mother earned £50 per month and the father £90 per month. The court allocated liability for past support equally between the parents. The father was also burdened with payments of arrear maintenance and legal costs for his ex-wife, a consideration which may explain the split adopted. Future support for the children was by agreement. In general a court must be `fully informed as to the relative financial position of the parties' (*Buch v Buch* 1967 3 SA 83 (T) 88D). See 308 below.

[69] Boberg `Persons & family' 261n55 262n57.

[70] *Gold v Gold* 1975 4 SA 237 (D).

[71] *In re Knoop* (1893) 10 SC 198; *Jacobs v CT Municipality* 1935 CPD 474 479; *Khan v Padayachy* 1971 3 SA 877 (W).

[72] *Oosthuizen v Stanley* 1938 AD 322 331. This text suggests that the father claims in a representative capacity for himself and the needy siblings of the deceased (see section 11.4#). This conclusion is reinforced by the rule that payment of maintenance must be to the custodian parent and not to the child (Hahlo `Husband & wife' 5ed 409). See too Dendy 1990 *SALJ* 155.

[73] *Singh v Santam Insurance* 1974 4 SA 196 (D) 199A `the means test as applied to a father's claim for maintenance from a son is a stringent one'. This stringent view would seem to derive from the word `necessities' (see *Oosthuizen v Stanley* 1938 AD 322 328). Consideration of poverty datum lines suggests that need includes allowance for modest hedonistic expenditure such as cigarettes, magazines and film shows etc (Newall `Living Wage' 29-35). Some indulgence in hedonism is implicit to the example of rough bread/white bread cited in *Van Vuuren v Sam* 1972 2 SA 633 (A) 643E. The word `necessity' is ambiguous: On one hand it might imply poverty, subsistence on the breadline; on the other hand it implies a compelling need to maintain a quality of lifestyle consistent with the overall status and financial means of the family as a whole. The `stringency' test of *Singh v Santam Insurance* suggests an over-emphasis on the `breadline' interpretation.

[74] *Oosthuizen v Stanley* 1938 AD 322 328 `a state of comparative indigency or destitution'; *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E. In *Van Blerck v Van Blerck* 1972 2 SA 799 (C) the provision of a Mercedes Benz motor car was held to be in accordance with the standard of living of the family. The two-parts-one-part method for apportioning family income (see section 13.8) provides a useful test for relative indigency when there is a common household.

[75] Newall `Living Wage' 29-35.

circumstances where the provision of support, if any, is temporary.[76] The circumstances of a parent/child relationship can suggest permanence.[77] A parent who is in good health and able to go out to work will generally fail to establish indigency.[78] A parent without income must utilise capital.[79]

[13.2.10] The obligation to seek work: This falls most heavily on an able-bodied father of working age. A housewife who has earning capacity is not obliged to go out and seek work, provided her husband's income is sufficient. However, once the parents are divorced she may be expected to seek employment, primarily to support herself but also, in suitable circumstances, to make a contribution to the support of her children. A child at school is usually not expected to seek work and may remain unemployed for purposes of tertiary education, provided he or she will benefit and the parents have the necessary means.[80] A widowed housewife, however, is not expected to seek work in order to mitigate her damages.[81]

It deserves note that although it is said that the duty of support falls primarily on the father[82] this statement reflects no more than that fathers usually earn more than mothers and are thus usually better able to support the child.[83] It is quite conceivable, albeit unusual, that it is the father who stays at home and the wife who goes out to work.[84]

[13.2.11] Temporary unemployment: In a depressed economy it is common that able-bodied persons without capital are unable to obtain employment.[85] Unemployment is as much a cause of need as disability or old age and judicial views that presume employment when jobs are plentiful[86] may need revision in times of depression. The major feature of unemployment due to economic conditions is that the need is temporary, even though it may endure for several years. Any award of compensation should include a substantial deduction for the contingency of finding employment, and would hence reflect the value of the chance of indigency. One

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[76] *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E includes the requirement that the deceased `sou voortgegaan het om dit te doen'.

[77] eg circumstances of *Wigham v British Traders Insurance* 1963 3 SA 151 (W) (middle-aged spinster daughter supporting aged mother).

[78] *Oosthuizen v Stanley* 1938 AD 322 328; *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) 456D-E; *Van Vuuren v Sam* 1972 2 SA 633 (A) 638F-G.

[79] See footnote 66.

[80] See footnote 151.

[81] See section 13.10.

[82] Hahlo `Husband & wife' 5ed 135.

[83] Boberg `Persons & family' 250 `Although the duty is usually regarded as burdening the husband in favour of the wife, this is only because in practice it is usually he who has the greater means and ability to fulfil it'. See too Hahlo `Husband & wife' 5ed 135.

[84] Hahlo `Husband & wife' 138n80.

[85] See, for example, Business Day 10.9.90 page 3 `Number of jobless is now dangerous'; 12.6.90 pages 1 2 `And while recent studies have shown a substantial narrowing of the black/white wage gap in the past decade, the SAARF figures suggest no such narrowing and possibly a widening of the racial gap in household income. The paradox, one economist said, was probably because of soaring black unemployment'. These considerations suggest increasing dependency by black households on those members who retain employment.

[86] See, for instance, *Lamb v Sack* 1974 2 SA 670 (T) 674; *Lebona v President Insurance* 1991 3 SA 395 (W) 403B-C.

would need to offset against such a claim the value of the chance that the deceased would have become temporarily dependent on the claimant. Much of the law governing claims for maintenance from living breadwinners centres around ponderous maintenance orders intended to remain in place for fairly extended periods of time. There is no good reason why claims for damages for loss of support should be inhibited by the proceduralism of formal maintenance orders.

[13.2.12] Support by siblings: A duty of support arises between siblings but falls away at age 21 if the dependent sibling is able-bodied.[87] The duty of support between siblings does not arise if either parent is capable of providing the needed support.[88] When there is a common household it can be argued that the siblings have no direct claim for support from the sibling acting as breadwinner because their father has an over-riding right to claim what he needs for himself and those dependent on him.[89] A single group action of this nature may be limited to R25000 in terms of MVA legislation.[90] In order to maximize the coverage provided under the Act it is likely that a court would find in favour of separate claims for the father and each of the siblings.[91] The ruling in *Oosthuizen v Stanley*[92] would then only be relevant to the question of indigency. The judgments reveal substantial confusion as to the proper procedure for claims by siblings and parents.[93] The safe procedure for claimants, and defendants, is to insist on a separate claim for each and every dependant.[94]

Legitimate children are not obliged to support their illegitimate siblings.[95] It seems likely that illegitimate children of the same mother do have a duty of support to one another.

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[87]Boberg `Persons & family' 276; *Seatle v Protea Assurance* 1983 (C) (unreported 6.5.83 case I.77/81).

[88]In *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E) duty between grandmother and granddaughter failed because the grandmother could look to her children for support; see Boberg `Persons & family' 275.

[89]*Oosthuizen v Stanley* 1938 AD 322 331 `In my judgment the fact that an indigent child might have a separate claim for support from a brother is not sufficient reason for testing a father's need for support by the amount that he needs for himself alone. The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'; cf *De Vaal v Messing* 1938 TPD 34. It seems that the claim in *Oosthuizen v Stanley* was brought as a single action by the father of the two deceased children. The marriage was in community of property.

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

[91]*Union & SWA Insurance v Fantiso* 1981 3 SA 293 (A) 300C `The general object of the Act (Compulsory Motor Vehicle Insurance Act 56 of 1972) is intended to afford third parties the widest possible protection against loss'; *Constantia Insurance v Hearne* 1986 3 SA 60 (A); *Ismail v General Accident Insurance* 1989 2 SA 468 (D).

[92]1938 AD 322 331.

[93]*Oosthuizen v Stanley* 1938 AD 322 331; *Jacobs v Cape Town Municipality* 1935 CPD 474; *Smith v President Insurance* 1990 (C) (unreported 31.10.90 case 15283/89 in Wynberg magistrates' court). In *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) husband and wife married in community of property had brought separate actions. s15(30) of Matrimonial Property Act 88 of 1984 mentions only actions for loss of earnings (more generally see section 11.4#).

[94]In *Seatle v Protea Assurance* 1983 (C) (unreported 6.5.83 case I.77/81) separate claims were brought for each dependant. Prescription does not run against a minor but it does run against the mother of the children (eg article 56 of MMF agreement ito Act 93 of 1989).

[95]Spiro `Parent & Child' 3ed 370n94.

[13.2.13] Support for stepchildren: No direct duty of support arises between stepparents and stepchildren.[96] A woman married out of community of property and without resources other than support from her husband has no duty to support her children.[97] Marriage in community of property provides the wife with a resource from which to provide support for her children from a previous marriage. She then has an enforceable duty, a liability which, by reason of the community of property, her husband may have to meet.[98] **Stepchildren are thus, it seems, entitled to compensation on the death of their stepfather.** Such claims are derivative through the marital rights of the mother. For this reason it would be correct to make a deduction from the stepchildren's damages for their mother's prospects of further remarriage in community of property. It can be argued that stepchildren do not have separate claims, but that their mother should claim on a group basis for what she needs for herself and her children.[99] Where there is a common household, stepchildren will usually enjoy *de facto* support whether by right or not.[100]

[13.2.14] In-laws: A son-in-law married out of community of property has no duty to support his parents-in-law.[101] A wife, without financial resources and married out of community of property, has no duty to support her parents. It is otherwise if she is married in community of property. Her husband may then be called upon to meet this obligation to her parents.[102] In the absence of a legal obligation a husband may well feel a moral obligation to provide such support.[103] This might take the form of a contractual undertaking with his wife or her parents. Such an undertaking would not give rise to a claim for damages by the parents-in-law *eo nomine*. It is arguable that the support provided to the wife extends to what she needs to support her parents.[104] This may lead to an increase in her claim. A decision to exclude the parents' contractual support from the wife's claim would then raise the question of a deduction for what would in any event have been provided to the parents. In *Munarin*'s case[105] a deduction was made for the support which the deceased had provided to his mother without

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[96] *Jacobs v Cape Town Municipality* 1935 CPD 474 481-2; *S v MacDonald* 1963 2 SA 431 (C); Spiro `Parent & Child' 3ed 48-9 370n97.

[97] A court might insist that she go out to work in order to provide herself with the necessary means (*Lamb v Sack* 1974 2 SA 670 (T)).

[98] *Ford v Allen* 1925 TPD 5 11; *Hartman v Krogscheepers* 1950 4 SA 421 (W); *S v MacDonald* 1963 2 SA 431 (C) 433C; *Wilkie-Page v Wilkie-Page* 1979 2 SA 258 (R) 259G-H; Spiro `Parent & Child' 3ed 368n74; s17(5) of Matrimonial Property Act 88 of 1984. There is a presumption that a marriage is in community of property (*Brummond v Brummond's Estate* 1993 2 SA 494 (Nm)).

[99] Following *Oosthuizen v Stanley* 1938 AD 322 331. This result seems unlikely under modern conditions: see *Constantia Insurance v Hearne* 1986 3 SA 60 (A) 67I; *Ismail v General Accident Insurance* 1989 2 SA 468 (D).

[100] *S v MacDonald* 1963 2 SA 431 (C) 432E `The accused obviously agreed to treat the three stepchildren as his own, as an inevitable concomitant with the maintenance of the household, while he had the *consortium* of his wife'.

[101] *Ford v Allen* 1925 TPD 5 6; *Jacobs v CT Municipality* 1935 CPD 474 (stepmother). A brother-in-law is not obliged to support an indigent sister-in-law (*Vaughan v Santam Insurance* 1954 3 SA 667 (C) 670-1).

[102] *Ford v Allen* 1925 TPD 5 11 `As her husband is liable for her obligations, by reason of the community, he may conceivably be called upon to carry out his wife's obligations, and thus to support his father-in-law'. See too s17(5) of Matrimonial Property Act 88 of 1984.

[103] *Ford v Allen* 1925 TPD 5 11 `There would clearly be a moral obligation on such a son-in-law to render his father-in-law maintenance'.

[104] By analogy with *Oosthuizen v Stanley* 1938 AD 322 331 `The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'.

[105] *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 556-7; see too Davel `Skadevergoeding' 109.

being legally obliged to do so. Circumstances may suggest that the support was tenuous and should be ignored because it may have terminated at any stage. Alternatively, when the parents share a common household and the continuation of the support is highly likely it might be argued that the provision of support is gratuitous and thus to be ignored.[106] It would be false, however, to suggest that such support was truly gratuitous because it would have been provided in terms of a strong moral duty.[107]

[13.2.15] Support between grandparents and grandchildren: A grandparent owes a duty of support to a grandchild provided the parents of the children have not sufficient income to support themselves.[108] Conversely a grandchild owes a duty of support to a grandparent provided the parent of the grandchild has not the means to support the grandparent.[109] The mere fact that a grandchild has undertaken to support a grandparent, and has provided support in terms of this agreement, is not sufficient to found a right of action for damages for loss of support.[110]

[13.2.16] Uncles nephews and nieces: There is no duty of support between an uncle and his indigent nieces and nephews,[111] and *vice-versa*.

[13.2.17] Support by breadwinner's estate: The common-law duty of mutual support between husband and wife is terminated by the death of one of the spouses.[112] It has been said that a parent's duty of support to the children does not terminate on death but continues as a charge against the estate.[113] The better view, however, is that duty of support by the estate is separate and distinct from the duty owed by the deceased parent.[114] By reason of statute a widow now has similar rights to a child.[115] A dependant is not required to mitigate damages by first excussing the estate of the deceased.[116] In one instance a claim for support had been successfully lodged against the estate prior to finalization of the claim for damages and a deduction against the damages was ordered.[117] It is doubtful that the executor acted in the proper interests of the heirs by admitting claims for support against the estate when there was a damages action pending which would have rendered the children self-supporting.

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[106] *President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A).

[107] See for instance *Van Blerck v Van Blerck* 1972 2 SA 799 (C).

[108] *Gliksman v Talekinsky* 1955 4 SA 468 (W).

[109] *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E).

[110] *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E).

[111] *Vaughan v Santam Insurance* 1954 3 SA 667 (C).

[112] *Glazer v Glazer* 1963 4 SA 694 (A); Boberg `Persons & family' 279-83.

[113] Spiro `Parent & Child' 3ed 365-6; Boberg `Persons & family' 283-9; Reinecke 1976 *TSAR* 26 51-2. See 341 below.

[114] *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D. *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A).

[115] Maintenance of Surviving Spouses Act 27 of 1990.

[116] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A `If the wrongdoer is unable to pay, they (the dependants) may be able to claim support from the estate of the deceased'; *Groenewald v Snyders* 1966 3 SA 237 (A) 247B-C `But it does not seem to me… that the defendant can dictate to them as to the debtor to whom they must look'.

[117] *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86).

The principles for assessing a claim against a deceased estate are materially different from those governing a claim for damages for loss of support.[118]

[13.2.18] Contractual right to support: Voet states that compensation for loss of support may be claimed by reason of a contract to provide support.[119] A similar conclusion has been drawn as regards Grotius.[120] Despite such eminent authority, and the seemingly obvious desirability of protecting agreements to provide support, the modern South African law denies a right of action for damages based on the loss of contractual support: On the basis of this reasoning a divorced woman has no claim for damages for the wrongful killing of her ex-husband from whom she was receiving maintenance even though her right derives from an order of court.[121] Prior to the passing of legislation[122] the widow of a black customary union had no right to compensation.[123] The widow of a Hindu or Moslem marriage remains without a right of action.[124] The overly zealous technical emphasis by South African courts upon the right to support sets South African justice apart from other common-law jurisdictions where a more pragmatic and liberal approach prevails.[125] Common sense suggests that compensation ought to have been awarded to the grandmother in *Barnes v Union & SWA Insurance*,[126] that a divorced woman should be able to claim for loss of her right to maintenance,[127] and that a marriage by customary law, be it Hindu Moslem or black, should found an action for damages for loss of support.[128]

In *Kewana*'s case[129] it was held that the damages claimable under MVA legislation are not restricted by what may be claimed under the Roman-Dutch law. *In casu* damages for loss of support were awarded to a child who had been adopted by the deceased in terms of customary

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[118]See paragraph 6.3.4.

[119]*Ad Pandectas* 25.3.4; Davel `Skadevergoeding' 66-7; Van der Merwe 1961 *THRHR* 133. See too footnote 125 below.

[120]*Inleiding* 3.33.2; *Chawanda v Zimnat Insurance* 1990 1 SA 1019 (ZH) 1025G 1026B (confirmed on appeal reported 1991 2 SA 825 (ZS)).

[121]*SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A) 472-3; *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86). The usual wording of maintenance agreements ensures a continuing right to maintenance from the estate of the deceased, if there is an estate (Boberg `Persons & family' 250n6).

[122]s31 Black Laws Amendment Act 76 of 1963. In the absence of such legislation in Zimbabwe, but having regard to other legislation recognizing a customary union, the High Court has recognized such a union as a proper basis for compensation (*Chawanda v Zimnat Insurance* 1990 1 SA 1019 (Z); 1991 2 SA 825 (ZS)).

[123]*SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A); Francis & Freemantle 1961 *SALJ* 103-5; Boberg 1961 *SALJ* 214-16.

[124]For some Hindu marriages the officiating officer is a designated marriage officer in terms of s3(1) Marriage Act 25 of 1961. Such marriages are monogamous civil marriages. Where the marriage is potentially polygamous it does not enjoy legal force (*Ismail v Ismail* 1983 1 SA 1006 (A)). There are no Moslem marriage officers because the requirement of monogamy is contrary to the Koran.

[125]Davel `Broodwinner' 380-3 records that compensation has been awarded in Holland to the partner of a `gay' relationship. See too Cooper-Stephenson & Saunders `Damages in Canada' 405; Luntz `Damages' 2ed 403n3; McGregor `Damages' 14ed 860-1.

[126]1977 3 SA 502 (E).

[127]Francis & Freemantle 1992 *SALJ* 197 200-203.

[128]Provided the financial requirements of need, and ability to pay, are met.

[129]*Kewana v Santam Insurance Co Ltd* 1993 (Tk) (unreported 28.02.93 case 112/88).

law. The modern Roman-Dutch law would deny such a child a right of action. The reasoning adopted in the *Kewana* case is to be lauded, but some doubt may be expressed that the appellate division in South Africa, as presently constituted, would endorse such a liberal interpretation of MVA legislation.[130]

[13.2.19] Diverse uncompensated obligations to maintain: A contract to provide support which has been made an order of court, has special features which set it apart from other forms of contract.[131] Contractual undertakings to provide support which have not been made an order of court do not enjoy special status. They cannot be varied by the court, and are, it seems, on the same footing as contracts of employment as regards allowance for increases to offset inflation and changing needs. If there is no reciprocal duty on the dependant to render services a contract to provide support has a charitable quality. This will usually fall short of outright donation by reason of the existence of a moral, or even legal obligation to provide the support.[132] Obligations derived from Bantu and other customary law, which do not enjoy the force of law, are probably best classified as contractual by analogy with the *naturalia* of a commercial contract which are determined by commercial custom. The wife under a black customary union has a statutory right to support[133] but not even this, it seems, is sufficient to found an action for damages for loss of support.[134]

[13.2.20] Black Laws Amendment Act: The statutory right[135] of the widow of a black customary union to claim for loss of support is subject to certain limitations:[136] Where there is more than one widow the compensation is limited to what would have been payable had there been only one widow. Where one wife has been married by civil rites then the customary unions with the other wives *ipso facto* are dissolved with a consequent loss of the right to claim compensation.[137] Since 2 December 1988 the situation has been reversed: After that date the pre-existence of one or more customary unions renders any subsequent civil marriage nul and void, save if it has been concluded with the one and only customary-law wife.[138] This well-

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[130]See paragraph 10.4.4 and the unnecessarily conservative approach there adopted by the appellate division towards compensation for `loss of buying power'. On the other hand it has been said that MVA legislation should be interpreted liberally (*Constantia Insurance v Hearne* 1986 3 SA 60 (A) 67I quoted in footnote 347 at 268).

[131]*Strauss v Strauss* 1974 3 SA 79 (A) 93-7; *Levin v Levin* 1984 2 SA 298 (C).

[132]See for instance *Van Blerck v Van Blerck* 1972 2 SA 799 (C).

[133]s5(6) Maintenance Act 23 of 1963.

[134]Or is it? The recent judgment in *Lebona v President Insurance* 1991 3 SA 395 (W) 397G 403B-C suggests otherwise but would seem to have been less than circumspect as to the consequences of its dicta (see Paterson 1992 *SALJ* 18).

[135]s31 Black Laws Amendment Act 76 of 1963. More generally see Van der Vyver 1964 *THRHR* 94-115.

[136]Davel `Skadevergoeding' 60n142 maintains, following Van der Vyver, that `daar selde berekenbare vermoënskade sal wees aangesien die inheemse reg op 'n ander wyse voorsiening maak vir die afhanklikes'. This incorrect conclusion ignores the ruling in *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D which prevents account being taken of alternative sources of support.

[137]*Nkambula v Linda* 1951 1 SA 377 (A); Van der Vyver 1964 *THRHR* 94 108-9. Some protection for black wives by customary union has now been introduced by s1 Marriage and Matrimonial Property Act 3 of 1988 amending s22 Black Administration Act 38 of 1927: a party to a customary union may no longer conclude a civil marriage except with the other party, and then only if the customary-law wife is the husband's only wife.

[138]s1 Marriage and Matrimonial Property Law Amendment Act 3 of 1988. See Maithufi 1992 *THRHR* 628-33.

intended legislation has served only to cause greater confusion in an already difficult area of the law.

Customary union, that is non-civil marriage, is probably the most common matrimonial regime in South Africa. If the Roman-Dutch law is to have relevance for many of the people of South Africa then a potentially polygamous customary union (Black, Hindu or Moslem) should have the same legal status as a civil marriage.[139] In the Transkei[140] and Ciskei[141] civil and customary marriages have equal status in the sense that fact of one does not terminate the other, save that a second civil marriage is bigamous. The state of the law in South Africa would be greatly improved by making statutory provision for a polygamous[142] civil marriage which can be selected at the outset, just as the accrual system or community of property can presently be selected under South African law.[143]

[13.3] PERIOD OF DEPENDENCY

[13.3.1] Between husband and wife: The duty of support between husband and wife may continue throughout their joint lifetimes[144] or until the breadwinner ceases to have an income from which to provide support, or until divorce.[145] If the wife is somewhat younger than her husband she may have the prospect of supporting him in his old age. If the husband has a substantial pension he will be able to continue to provide support despite having ceased to work. For persons without other income the state pension for women commences at age 60 and for men at age 65.[146] The same pension is paid to the husband as to the wife. The payment of this pension is subject to a means test based on the joint incomes of husband and wife.[147] It follows that an unemployed wife cannot get a state pension if her husband works and earns an income.

[13.3.2] Divorce: This terminates the common-law duty of support between spouses. Any maintenance payable thereafter is based on a separate contract and compensation will not be awarded for the loss thereof.[148] The deduction for general contingencies will be increased for

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[139]Maithufi 1986 *De Rebus* 555-8; 1990 *De Jure* 326-33; Francis & Freemantle 1961 *SALJ* 103-110; 1992 *SALJ* 197-203; Boberg 1961 *SALJ* 214-16; `African Customary Law' Dlamini 71-85; Labuschagne 1993 *De Jure* 171-5; *Chawanda v Zimnat Insurance* 1990 1 SA 1019 (Z); 1991 2 SA 825 (ZS).

[140]ss37 38 of Transkei Marriage Act 1978.

[141]ss 2 & 6 of Customary Law Amendment Decree 1991 (Ciskei).

[142]Or potentially polygamous. Dhlamini prefers to describe the black customary union as `polyganous' (see `African customary law' 74-81).

[143]Matrimonial Property Act 88 of 1984.

[144]The joint expectation of life is shorter than the individual expectation of life of either husband or wife. Actuaries do not work with expectations of life but with the chances of the joint survival of both spouses to each and every relevant year. It is false reasoning to suggest that because men have shorter life expectancies than women the calculation should be based on the man's expectation of life. Some wives do predecease their husbands (see paragraph 5.4.8).

[145]See paragraph 13.12.6. Maintenance may be paid after divorce but a divorced woman does not have a right of action for damages for loss of support (see paragraph 13.2.18).

[146]There is draft legislation to consolidate all the welfare acts (see 199) and to increase the retirement age for women to 65.

[147]`Die middeltoets by staatsouderdompensioene' Marais 1980/81 *TASSA* 83-102.

[148]*SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A) 472-3; *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86). See paragraphs 13.2.18 and 13.2.19 .

the contingency of divorce.[149] The determination of the deduction for general contingencies has been assessed with regard to the prospect that maintenance would have been awarded in the event of divorce.[150] This latter approach is difficult to reconcile with an approach which denies compensation for the loss of maintenance paid in terms of a divorce order. What, for instance, of the husband who is killed on the day before the order for divorce is to be given? Does his wife then get compensation for the loss of maintenance? If he had been killed a day later she would have been denied a right of action?

[13.3.3] Children: The duty to support a child continues until the child marries or becomes self-supporting. Some children, such as mongoloids or epileptics, may remain dependent upon the parents throughout the joint lifetimes of parents and child. Children with serious disability are entitled to a state disability grant from age 18. In the lower-income groups this pension will usually render the child self-supporting. Parents who can afford tertiary education for a child are obliged to provide it for those of their children who have the necessary ability.[151] A child below the age of 15 years may not be employed in a factory, shop or office.[152]

[13.3.4] Economic depression: Depressed economic conditions coupled with poor education facilities leads to children in the lower-income groups remaining at school, or at home without employment, until fairly advanced ages such as 30.[153] Regulations permit the authorities to evict pupils who have not attained a certain minimum education by a specified age.[154] Is a child dependent if unemployed but seeking employment? The answer seems to be yes.[155] Clearly a substantial deduction needs to be applied to any compensation for the contingency of obtaining employment. Informal employment can be difficult to prove and some scepticism may be expected when a healthy child of age 30 claims to be continuously dependent on his father.[156]

[13.3.5] Military service: A child undergoing military service is usually not fully self-supporting.[157] Disputes on this issue are best resolved by allocating to such a child a half-share of family income during the period of military service.[158]

[13.3.6] Dependent parents: The duty of support owed by a child to the parents can continue throughout their joint lifetimes. The contingencies attaching to the continued provision of such

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[149]*De Jongh v Gunther* 1975 4 SA 78 (W). For a discussion of divorce rates see paragraph 13.12.6.

[150]*De Jongh v Gunther* 1975 4 SA 78 (W) 83F relying on Boberg 1964 *SALJ* 194 202n42.

[151]*Ex Parte Pienaar* 1964 1 SA 600 (T) 607B-E.

[152]s17(a) of the Basic Conditions of Employment Act 3 of 1983.

[153]Based on evidence of dependency for death claims submitted to my office. See Beckett `No black and white solutions' 1990 *Optima* 112-33 for a description of conditions in black schools.

[154]R1143 of 29.05.81: The director-general may refuse admission to, or continuing attendance at, a standard 5 class for persons over the age of 16. Attendance at a standard 9 or 10 class may be refused for persons over the age of 18.

[155]See paragraph 13.2.11#.

[156]With the adverse economic conditions that prevail in South Africa this situation is not uncommon. Business Day 12.6.90 pages 1 2 notes that while average black wages have increased faster than inflation the average income of black households has not done so. The explanation could be that an increasing number of family members are dependent on those who remain employed.

[157]*Gold v Gold* 1975 4 SA 237 (D).

[158]See section 13.8.

support will usually be high.[159] A long history of bachelorhood and/or a common household with the parents will usually increase the prospect of continuing support. If the parents have provided the family home then this constitutes a major contribution and reduces dependency on the child.[160] A measure of the value of such a contribution might be the rental which the parents could have obtained if paying lodgers had shared the house.

[13.3.7] Siblings: The duty of support between siblings terminates at age 21 if the dependent sibling is of sound mind and body but may continue throughout life for a sibling in poor health.[161]

[13.3.8] Dependency but for the death: The dependants are to be compensated for the support which would have been provided had death not occurred. It is usual that compensation is not paid immediately and delays of 3 to 5 years are not uncommon. The death of a father may force children who would normally have enjoyed the benefit of further education to go out to work. The compensation should, in such circumstances, be based upon the notional period of dependency had the death not occurred, and should assume that further education had been provided. The fact that the child has received earnings in the interim should be ignored for the same reasons that the earnings of a widow will be ignored.[162]

[13.4] FINANCIAL BENEFITS OF DEPENDENCY

[13.4.1] Likely support: Compensation is not restricted to what the dependants could claim from their breadwinner as of a right. The damages will take account of `the station in life of the parties and the comforts, conveniences and advantages to which they had been accustomed'.[163] In like manner damages for loss of earning capacity are assessed having regard to what the victim was likely to receive under the contract of employment, not merely what he had a right to claim under the contract.[164] The fact that a benefit is at the discretion of the breadwinner or his employer does not mean that it will be ignored for compensation purposes, the compensation will include the value of the chance of receiving such a benefit.[165] The value of lost support is usually determined by reference to the earning capacity of the deceased breadwinner after deduction of taxation and that part of his earnings which would have been applied to his own support.

[13.4.2] Benefits in kind: When the deceased has provided accommodation, meals, domestic help, and electricity **over and above his cash income** the value of these benefits will be added to the cash benefits.[166] The value of the use of a car will also be added.[167] These benefits may have been provided by the deceased's employer or from the deceased's own assets or business. If the benefit has derived from the deceased's assets allowance must be made for the cost of maintaining a car or house, if this cost would in the normal course of events have been met from the deceased's cash income. Failure to make this adjustment will lead to an

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[159]McGregor `Damages' 14ed 898; see too footnote 73.

[160]See footnote 66.

[161]*Ex parte Pienaar* 1964 1 SA 600 (T) 607E-F. See paragraph 13.2.12.

[162]See section 13.10.

[163]*Jameson's Minors v CSAR* 1908 TS 575 602.

[164]eg overtime, future promotions and increases to offset the effects of inflation.

[165]See chapter 4.

[166]*Laney v Wallem* 1931 CPD 360 361; *Legal Insurance v Botes* 1963 1 SA 608 (A) 616C-F.

[167]*Milns v Protea Assurance* 1978 3 SA 1006 (C) 1011B; *Burns v NEG Insurance* 1988 3 SA 355 (C) 361-2 (the unusual approach adopted in the *Burns* case reflected the manner in which plaintiff had pleaded).

overstatement of the value of the benefits enjoyed by the family. Conversely a farmer's reported income may have been calculated net of the expenses of maintaining home and car. In such cases no further deduction needs to be made.

***[13.4.3] `Social advantages'***: The dependants are entitled to compensation for `loss of social advantages'.[168] Compensation will only be awarded if such losses are of a patrimonial nature.[169] The one recorded instance of an award for `loss of social advantages' was for a breadwinner who had accumulated a considerable fortune notwithstanding a relatively low income.[170] The analysis of business capital above[171] has included capital accumulation as part of earning capacity.[172] Conversely a history of declining net capital resources should give rise to a lower award than that indicated by the immediate income of the deceased.[173] If capital accumulation is to be included under the earning capacity of the breadwinner then there is no need to retain `social advantages' in this sense as a class of loss. Since the expression has no other identifiable meaning it does not add anything of value to the discussion of damages for loss of support.

[13.4.4] `Comforts, conveniences and advantages': These are the financial benefits that are enjoyed by the dependants not as of a right but rather due to the social and financial status of the breadwinner. Such benefits would include such things as transport in a status motor car, or overseas travel as a member of the deceased's family. It would also include benefits provided by way of discretion or goodwill, such as the provision of a motor car for personal use, or an overseas holiday. This does not mean to say that every person who suffers financial loss by reason of the death of a breadwinner has a right of action for compensation.[174] The right to claim support, albeit at a lower level than was being provided, is essential to a successful action for loss of support.[175] The duty of support will usually have regard to the general standard of living of the family.[176] It follows that the benefits described above might well be viewed as part of what the deceased was obliged to contribute in any event. In one instance the donation of an expensive motor car was considered in keeping with the standard of living of the family.[177]

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[168] *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 851 `The wife and children of a person of high or exalted position may reasonably expect tangible advantages to flow from their relationship to such person and no doubt their loss of such advantages could be taken into account in assessing damages'.

[169] *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721sup `In both *Hesselson*'s case and *Roberts*'s case the Court was dealing with a loss of social advantages on the footing of a loss of an actual patrimonial nature'.

[170] *Hesselson v SAR* 1921 (T) (unreported 2.9.21) quoted in *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 851.

[171] See paragraph 12.17.4$.

[172] See too *Roberts v London Assurance* 1948 2 SA 841 (W) 851; *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 488-9; *Santam Insurance v Meredith* 1990 4 SA 265 (Tk) 269-70. Davel `Skadevergoeding' 105 notes that `Daar word verder geen aftrekkings gemaak ten opsigte van verbandlenings nie'.

[173] See paragraph 12.17.2#.

[174] Francis & Freemantle 1961 *SALJ* 103-5 provides an example of the confusion that has been created in the minds of some by the `comforts, conveniences and advantages' criterion. Boberg 1961 *SALJ* 214 points to the errors of the Francis & Freemantle view.

[175] See paragraph 13.2.2.

[176] Hahlo `Husband & wife' 5ed 135 `The scale upon which support must be rendered depends upon the social position, financial means and style of living of the spouses'.

[177] See footnote 132.

Just as the damages will be increased for `comforts, conveniences and advantages' attaching to the provision of support so too will the damages be reduced for liabilities of the breadwinner which he was likely to incur, albeit not in terms of a legal obligation. One has here in mind the provision of additional money to a self-supporting mother[178] or the maintenance of a so-called `common-law wife'[179] or the indulgence in expensive hobbies.[180]

[13.5] USE OF ASSETS

[13.5.1] Real rate of return: The income of the deceased may include income from investments. Fixed interest investments will provide interest income at a nominal rate of, say, 16% per year. It will usually be wrong to add such interest income to the deceased's other income and then project future income by adding inflation. The interest income based on a nominal rate cannot, of its own accord, be expected to grow in future years.[181] For this reason it is preferable to add to the deceased's income from earnings a real rate of return[182] of, say, 2,5% per year on the capital invested. If one then assumes plough back of the inflation component[183] of the interest then it is reasonable to project future investment income by adding inflation. The rate chosen will usually be consistent with the net capitalization rate to be used for capitalizing the award. One does find very low real rates of return being ordered by the courts for capitalization purposes.[184] The use of such very low rates implies that the notional support provided by the deceased from investments, or the use of assets such as the family home, should be assessed at an equally low value in real terms.

[13.5.2] Use value of a home: Over extended periods of time rentals and property values tend, with a good many leads and lags, to move in line with inflation.[185] The value to the family of the use of the family home is usually not equal to the full rental value of the property. Ownership implies expenses,[186] property taxes and maintenance.[187] If the net real return on

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[178]See, for instance, *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 556-7; see too Davel `Skadevergoeding' 109.

[179]See paragraph 13.7.7.

[180]See paragraph 13.7.13.

[181]Although it may go up over short periods of time when interest rates rise, but conversely it will fall when interest rates fall.

[182]For a definition of `real rate of return' see 128.

[183]See paragraph 8.1.7.

[184] *Oberholzer v NEG Insurance* 1988 4 C&B A3-1 (C) (1% py); *Gallie v NEG Insurance* 1992 2 SA 731 (C) (1,5% py); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 60-4 (1% py).

[185]Statistical News Release P0102 `Survey of Flats - May 1990' 11 shows the index for flat rentals to have risen from 36,4 in 1978 to 159,1 in 1990, an average compound rate of increase of 13% py compared to a comparable increase in the CPI of 14,5% py. *TRENDS* September 1991 30 gives an index for house prices which increases from 30,4 in 1978 to 178,7 in 1990, an average compound rate of increase of 15,9% py which was in excess of the rate of inflation. These figures suggest that shortfalls in rent increases are compensated by greater increases in property values. Considering the erratic nature of markets there probably have been periods when both rents and prices have simultaneously dropped behind the rate of inflation, and vice-versa.

[186]The extent to which immovable property is maintained will determine its rate of depreciation. If maintenance expenses are extensively avoided then the property will usually depreciate in value. An older person may deliberately engage in such a strategy in order to maximise income and in the knowledge that he will not live long enough to need worry about the reduced value of the property.

[187]`To this, I think, should be added the value of the right of occupying, jointly with her husband and children, the house, which was his property… its net rental return, after

property exceeded the net capitalization rate used for discounting to present value this would imply that every claimant could invest his or her award in lettable property and thus that a higher rate should be used for discounting. It follows that the use value of ownership of a house should be in conformity with the net rate to be used for capitalizing the award.[188] The yearly value to the family is then that amount in rands which will give a real rate of return on the value of the property equal to, say, 2,5% per year. The property value for this purpose should be taken net of bond indebtedness. This is so because the dependency calculation is usually done without deduction for the repayments which pay for that portion of the value of the family home which is bonded. Bond subsidies by the employer are usually added to the overall income from which the deceased is deemed to have provided support.[189]

[13.5.3] Wife's assets: If a wife has assets her right to claim support from her husband will, in the event of separation, be abated by reason of the support she can draw from such assets. If the wife owns the family home, for instance, she cannot then call upon her husband to provide her with a home, although if she has no cash income she may ask for assistance with the expenses of keeping the home. Where her investments provide a cash income the benefit thereof may be by way of a full nominal rate of return of, say, 16% per year. Alternatively if there is ploughback of income, or limited income such as dividends, then a real rate of return of, say, 2,5% per year might be used. The use of a real rate of return would be a fair approach if the wife owns and provides the family home.

[13.5.4] Donations between spouses: The assets owned by the wife may have been given to her by her husband. In a time when donations between spouses were revocable there was much to be said for treating such assets as belonging to the husband. Donations between spouses are no longer revocable, even donations made prior to the passing of the Act.[190] The wife is rendered self-supporting by the donation and it would seem proper to reduce the value of her right to support from her husband by reason of assets held in her own right. The fact of such donations in the past may justify an increase to the wife's award to allow for the chance of further such donations being made in future years.

[13.5.5] Communal assets: Where husband and wife were married in community of property they were joint owners of the family assets and as such each would have contributed equally by way of assets to the support of the family. The wife would hold such assets in her own right and the value of her right to support from her husband should be abated accordingly.[191] If the community assets included business assets then the deceased's income would have been

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deducting rates and repairs, would probably not be more than £120, and I think £40 would be an ample allowance for her right of occupancy' *Laney v Wallem* 1931 CPD 360 361. In *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 13 the present value of the right of occupancy of a wife without children was taken to be roughly equal to the accelerated value of the inheritance of the property. In *Legal Insurance v Botes* 1963 1 SA 608 (A) 616D-F the *Maasberg* approach was rejected in favour of the approach in *Laney v Wallem*. The *Maasberg* approach is at best a very rough approximation which may hold true under limited circumstances.

[188]There would be a tax advantage for an owner-occupier as compared to rental income. Because expenses are tax-deductible the tax advantage will usually be very small.

[189]This is consistent with the approach in *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) whereby savings are included in the income of the family apportioned to determine the notional level of support (see footnote 172).

[190]s22 of the Matrimonial Property Act 88 of 1984.

[191] In general see *Santam Insurance v Meredith* 1990 4 SA 265 (Tk) 269. The *Meredith* case unfortunately fails to discuss the extent of the right to support had the death not occurred.

provided in part from the assets owned by his wife. It would be appropriate to reduce the deceased's income to allow for this contribution.[192]

[13.5.6] Going concerns: A business may be worth more as a going concern than in liquidation. Sale of the business during the lifetime of the deceased would have produced a higher value than in liquidation after his death. The right to support during the deceased's lifetime would usually have regard to the value of the business as a going concern whereas the deduction for inheritance would have regard to the actual realized value. If the widow successfully takes over the business her earnings from the business must be ignored[193] but her advantage by way of inheritance would be the enhanced value of the business as a going concern.

[13.5.7] Rapidly depreciating assets: The above analysis of assets, both private and business, has presumed that these increase over the years more or less in line with inflation. Not all assets increase in value. Thus a motor car or computer is usually a depreciating asset.[194] One possible solution in assessing such an asset is to depreciate the value over a suitable number of years and add the depreciation in each year to the deceased's notional provision of support in that year.[195] Once fully depreciated the asset will be removed from the calculation. Alternatively one may take the view that the asset could be sold at any time and converted into some other asset, possibly an appreciating one. There may also be other appreciating assets of which the real rate of return is ploughed back and not consumed by the family, thereby offsetting the depreciation. For larger estates the use value of total assets may conveniently be taken as approximately equal to the real return on the total assets.[196]

[13.5.8] Retirement assets: Once a self-employed person, such as a farmer or shopkeeper, retires the income from the business will cease but the assets will become available as a source of support. It will usually be unrealistic to measure post-retirement income on the basis of the real rate of return on the assets. Part of the assets such as the home and furniture will be consumed to the extent that they are allowed to depreciate.[197] Other assets may be invested in high-income interest bearing investments, such as participation mortgage bonds, with an associated ongoing attrition of the real value of the capital. On the other hand the income apportioned prior to retirement may include an element of savings which will not be used to provide support until after retirement.[198] Care should be taken not to double count the savings built into the pre-retirement calculation. The assets observable at date of death will thus reflect only part of those that would in the normal course have been available at retirement. Whatever approach is taken as regards asset consumption after retirement, it should bear some sensible relationship to the standard of living enjoyed prior to the death. As a general rule one would assume consumption of capital. A useful rule-of-thumb would be to assume consumption of

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[192]One has in mind here the notional real rate of return if the assets were sold and invested. The balance of the income is attributable to the efforts of the deceased (see paragraphs 12.17.2# to 12.17.4$) provided the wife did not assist in the business.

[193]*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727-8. See too section 13.10.

[194]In real terms if not in nominal terms.

[195]See paragraph 10.2.5.

[196]A rate of, say, 2,5% py would be applied to the total net assets in the estate. This approach greatly simplifies the calculations and eliminates much speculation on detail whilst achieving some allowance for the use of the assets. See comments by the courts in *Legal Insurance v Botes* 1963 1 SA 608 (A) 617-618.

[197]See paragraph 10.2.5.

[198]*Marine & Trade Insurance v Marimah* 1978 3 SA 480 (A) 488-9.

capital at ½ the rate of inflation. The need for an express opinion in this regard is generally only necessary when the deceased was already approaching retirement age (say within 10 years thereof). There is no general rule that self-employed persons retire fully at 60 or 65, as happens to salaried persons subject to pension fund rules. Even salaried persons may continue employment after retirement, sometimes at a lower rate of pay.

In some cases there may be the prospect that the business or farm would have been sold to a child with provision for regular payments to the parents. Such evidence would obviate the need for rules-of-thumb.

[13.5.9] Adjustment to accelerated benefits:[199] If the widow has inherited and a deduction is to be made for the accelerated benefit[200] then the fact of consumed capital after retirement must be brought into account when calculating the present value of the prospect of inheritance had the death occurred at some other time: The normal calculation assumes that the assets to be inherited will escalate, like future earnings, in line with inflation.[201] If there is reason to believe that after retirement the assets will be consumed in real terms then one must assume a rate of escalation in the future value of the assets at a rate below the rate of inflation. This low escalation rate will give rise to a low present value for the inheritance prospect, and thus an increased deduction for the advantage of acceleration.[202] Conversely her claim for loss of support will have been increased by the assumption of consumed capital.

[13.6] SERVICES IN THE HOME

[13.6.1] Separate claims: If the deceased rendered valuable services to the family, such as car repairs, woodworking, painting, plumbing, the value of these services reflects an addition to the support enjoyed by the family.[203] The most valuable contribution by way of services in the home is usually made by the wife. In the event of her death it is usual to determine compensation on the basis of the cost of replacing her services less the saving from no longer having to provide her with support.[204] This approach reflects a perception of a husband who claims not only what he needs for himself but also what he needs for his children.[205] The modern tendency to allow each dependant a separate claim[206] suggests that the value of services should be apportioned amongst the dependants in the same way that other benefits are apportioned.[207] A major objection to a claim based on expenses actually incurred after the

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[199]This topic is discussed more fully at 333.

[200]See 333.

[201]The calculation follows the same lines as a loss of support calculation but with the yearly support payments being replaced with projected value of the assets in the estate and the chance of the deceased's survival being replaced with the chance of his death in the relevant year (see 92).

[202]See 334.

[203]Luntz `Damages' 2ed 415-16.

[204]`It is possible that the plaintiff may prove that after making allowance for the fact that he no longer has to support his wife, the arrangements necessitated to replace her supervision and assistance in the upbringing of the children entail a pecuniary loss' *Union Government v Warneke* 1911 AD 657 669inf.

[205]*De Vaal v Messing* 1938 TPD 34 38; *Oosthuizen v Stanley* 1938 AD 322 331. Davel `Skadevergoeding' 48n1 138 views the action for loss of services as separate and distinct from the action for loss of support. See section 11.4#.

[206]*Constantia Insurance v Hearne* 1986 3 SA 60 (A); *Ismail v General Accident Insurance* 1989 2 SA 468 (D). See sections 11.4# and 13.6.

[207]eg on a two-parts-one-part basis.

death is that most families cannot afford to incur any expense until after compensation has been paid. There is then no award for past loss of services notwithstanding that the family has been deprived of such services.[208] By adding the value of notional services to the overall support before apportionment the dependants are assured of receiving compensation for the past loss of the utility of the services.[209] A further objection to assessing the loss of the wife's services on the basis of the incurred cost of replacement is that the dedicated attention day and night of a caring mother cannot be compared to the services of a hired help. In England the value of a wife's services has been assessed at greater value than the cost of hiring a replacement.[210] This presumes that the claim for the added value of the wife's services is to be viewed as patrimonial. If the benefit is viewed as a form of general damages then it is not permitted under the dependants' action.[211]

[13.6.2] Utilitarian approach: If loss of services in the home were to be compensated on the same basis as loss of support[212] then the value of the services once rendered by the deceased would be apportioned between the family members.[213] The care of children usually takes up a good deal of the mother's time and energy.[214] It is thus appropriate to allow equal shares to parents and children. The services rendered by a father (car repairs, house repairs) tend to be less related to the needs of the children than to the family as a whole and it would be appropriate to use for a father the more usual two-parts-one-part formula. If there are no children then the value of the services would, in the absence of special circumstances, be apportioned equally between husband and wife.

[13.6.3] Substitute services: It has been ruled that the compensation due to the children should not be abated by reason of additional support received from the surviving parent subsequent to the death.[215] This ruling suggests that when assessing compensation for the children on a utility basis no account should be taken of the fact that a father has hired a substitute housekeeper, or remarried.

[13.6.4] Services of grandparents: A deceased grandmother may have rendered services by way of child-minding and housekeeping. By reason of her services the mother would have been able to go out to work and supplement the cash income of the household. The grandmother's death may have brought about a very real pecuniary loss to the family. Compensation will probably be denied on the grounds that the mother of the children is still

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[208]See paragraph 11.3.4#.

[209]Luntz `Damages' 2ed 417 418 prefers the `loss of utility' approach; so too, it seems, do Cooper-Stephenson & Saunders `Damages in Canada' 434 436 439n48.

[210]McGregor `Damages' 14ed 897; Davel `Skadevergoeding' 140n100; Luntz `Damages' 2ed 418 419 re similar developments in Canada and the USA. Principle approved in *Wood v Santam Insurance* 1976 2 PH J52 (C); see too unreported judgment cited in *Hendricks v President Insurance* 1993 3 SA 158 (C) 160-1.

[211]Luntz `Damages' 2ed 420-1; paragraphs 13.1.1" and 13.1.2".

[212]See section 13.8.

[213]Apportionment of the value of services takes place in Australian law if there is no father at the time of the trial (Luntz `Damages' 2ed 425).

[214]This consideration probably accounts for the traditional limitation of the claim to the period of the children's dependency (*Union Government v Warneke* 1911 AD 657 669inf; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A)).

[215]*Groenewald v Snyders* 1966 3 SA 237 (A) 247.

alive and well and that the grandmother did not provide the services in terms of a duty of support.[216]

[13.6.5] Period of loss: The claim for the loss of a wife's services has traditionally been limited to the period of dependency of the children.[217] This approach overlooks the fact that a wife's services in the home have value to her husband even if there are no children.[218] If the wife did not work, any loss by way of her services will usually be wholly offset by the saving from no longer having to support her. However, where she was working and was largely or wholly self-supporting the husband's loss by way her services in the home may be quite substantial.[219] The assessment of the services rendered in the home by a deceased husband require similar treatment to the services of a wife.

[13.6.6] Deduction for remarriage: The claim for loss of services in the home is subject to a deduction for remarriage if the claim is brought by the surviving spouse.[220] However if the claim for loss of services lies with the children then a deduction for the remarriage prospects of the surviving parent will not be made.[221]

[13.6.7] Anomalous aspects: The value of services in the home needs to be distinguished from cash income and provision of accommodation, transport, food and servants. This arises from the nature of the duty of support: A wife who works and earns sufficient in cash and kind to provide for her own support has no right to claim support from her husband in the event of a separation.[222] A full-time housewife, however, may provide services in the home of substantial value but this, unlike cash earnings, in no way abates her right to claim support from her husband in the event of his leaving home. Davel[223] states that the action for loss of services is separate and distinct from the action for loss of support. There is little doubt that in its traditional form it is anomalous. However one may question Davel's view on the grounds that the claim for both loss of support and for loss of services arises from the wrongful killing of another. What is more the services in issue may be claimed as of a right just as support can be claimed. A plea of *res judicata* may be raised against dependants who seek to claim for loss of services if they have previously finalized a claim for loss of support. Such a plea may not be raised if the loss of services has been caused by an injury to the surviving spouse.[224] The anomaly observed by Davel is more the giving of a right of action to the husband for expenses incurred subsequent to the death. If the value of services were treated on a utility basis as part of the support enjoyed but for the death and apportioned between the dependants then the anomaly disappears.

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[216] See reasoning in *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E).

[217] *Union Government v Warneke* 1911 AD 657 669inf; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A).

[218] McGregor `Damages' 14ed 895n29. *Finance Week* 23-29.10.86. `The work performed by women and men in households is not assigned any economic value; yet this work equals, in monetary terms, a huge proportion of the total amount of wages and salaries paid by all employers in SA'.

[219] Luntz `Damages' 2ed 417 (*Tong v Purdy*).

[220] *Cooke & Cooke v Maxwell* 1942 SR 133 136; McGregor `Damages' 14ed 896n37.

[221] *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D; *Senior v NEG Insurance* 1989 2 SA 136 (W).

[222] The extent of a right to support can as a rule, only be tested under circumstances of a family divided.

[223] `Skadevergoeding' 48n1 138.

[224] *Evins v Shield Insurance* 1980 2 SA 814 (A); *Erdmann v Santam Insurance* 1985 3 SA 402 (C).

[13.7] DEDUCTIONS FROM THE DECEASED'S INCOME

The deductions here discussed are those which serve to reduce the support which the deceased would have provided **but for his death**. Deductions by way of compensating advantages are discussed elsewhere.

[13.7.1] Taxation and travel costs: There seems to be unanimity in all common-law jurisdictions that a deduction should be made from the deceased's notional earnings for the taxation that he would have had to pay had he lived.[225]

If the deceased did not live at his place of work then there would be a saving as regards the costs that would have been incurred with travelling to and from work.[226]

[13.7.2] Deceased's own living expenses: Once a person has died the family is spared the cost of his own support. This needs to be deducted before allocating the balance of his income amongst his dependants. There are a number of family expenses which do not fall away when the breadwinner dies.[227] Thus, for instance: the rent for the family home will remain the same; the cost of the housemaid will not reduce. In South Africa the appellate division and has shown preference for allocating such expenses to the deceased on a somewhat formal basis, usually with two parts to each parent and one part to each child.[228] This South African approach reflects the utility prior to the death of the breadwinner's share of the overall cost of maintaining the family unit, including himself.

[13.7.3] Maintenance provided in absence of duty to do so: In general the extent of the support enjoyed by dependants is a question of fact. It is not enough to establish that the deceased had a duty to provide support and the means to provide it.[229] It must also be established that the deceased would have provided support in pursuance of this duty. **It follows that if the deceased would regularly have applied his income to expenditures not for the benefit of his dependants then the income available for the support of the dependants should be reduced**.[230] An important consideration would be the likely continuance of the expenditure in the future. In one instance the court found that the deceased had been making payments to his mother in Italy without having a duty to do so. The notional income available for the support of the dependants was reduced by these payments.[231] Likewise, it seems, payments of support to an ex-wife should be deducted despite there being

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[225]Even in Canada, where no deduction is made for taxation when assessing loss of earning capacity, tax is deducted when assessing loss of support: Cooper-Stephenson & Saunders `Damages in Canada' 181-95 463-4.

[226]See 152 and 226.

[227]McGregor `Damages' 14ed 890n81 896n41; Luntz `Damages' 2ed 412; Cooper-Stephenson & Saunders `Damages in Canada' 428-9 refer to the `marginal cost of the expenditures to the deceased', ie the extent to which the presence of the deceased in his lifetime had raised the cost of running the household.

[228]*Legal Insurance v Botes* 1963 1 SA 608 (A) 616B-F (rental value of flat); *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 647-9 (suggested that two servants be reduced to one). The finding in *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 15 in favour of allowance for indivisible expenses does not reflect good law in South Africa; see too Davel `Skadevergoeding' 110-11.

[229]See paragraph 13.2.1 .

[230]See paragraph 13.4.4!.

[231] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) (both the mother of the deceased and the mother of the wife had derived benefit from the deceased's income).

no common-law duty to make such payments. The provision of support to stepchildren would also seem to be deductible.[232] Further such deductible items are now discussed:

[13.7.4] More than one wife: For women married by polygamous customary union there is a statutory directive that compensation for two or more wives be limited to what would have been payable had there been only one wife.[233] The proper approach to the children's claims is not quite clear. The one-wife share would be apportioned equitably between the widows. The simplest method is to apportion equally between the two or more widows the two parts of family income normally allocated to a single widow.[234] With three widows this would mean allocating two thirds of a part to each widow. The children would then be allocated one part each. This may well lead to overcompensation for the children, but since the widows are probably undercompensated the defendant has little to complain about.

[13.7.5] Hindu and Moslem marriages: The wife or wives of marriages concluded by Hindu or Moslem rites will have a contractual right to support while the common household lasts.[235] For this reason it seems correct that a deduction be made for the expenses of their keep.

[13.7.6] Further children and further wives: For a young family there will be the prospect of further children and a deduction needs to be made for the notional costs of keeping these children.[236] For potentially polygamous marriages there is the prospect that the deceased may also have taken a further wife, or wives. Allowance for this consideration would be done on the basis of the value of the chance and may well be brought into account under the deduction for general contingencies.[237]

***[13.7.7] `Common-law wife'***: When a man and a woman choose to live together as man and wife but without the sanction of a formal ceremony, civil or sacred, it is usual to speak of a `common-law wife'.[238] The act of setting up a common household and the manner of its management will in the normal course of events give rise to a contract, express or implied, governing the relationship between the parties as to provision of support, services, etc. This contractual right to support from the deceased would justify making a deduction for the expenses of keeping the `common-law wife' notwithstanding that she has no claim for damages for loss of support.[239] The increasing prevalence of such relationships may lead in time to the granting of a right of action to the `widow'.

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[232]See paragraph 13.2.13.

[233]s31 of Black Laws Amendment Act 76 of 1963.

[234]See section 13.8.

[235]See, for example, *Ismail v Ismail* 1983 1 SA 1006 (A).

[236]*Chisholm v ERPM* 1909 TH 297 301inf; *Burns v NEG Insurance* 1988 3 SA 355 (C) 362G; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1010-11; Davel `Skadevergoeding' 91 98 111n753. Roughly 2 children per white woman, 3 per coloured woman, and 5 per black woman (see `Demographic Trends' 81-103). This may be done explicitly in the actuarial calculation.

[237]Black custom frowns upon the remarriage of a widow (Seymour `Customary Law' 5ed 286-94).

[238]The expression is misleading in that the law does not give recognition to such a *de facto* marriage, if marriage it can be called. The `wife' of such a relationship is also known as a `houvrou'.

[239]See 292. McGregor `Damages' 14ed 893-4 discusses an English ruling where the cost of supporting a common-law wife was deducted when assessing the damages for the children. See too Luntz `Damages' 2ed 413n4. The deduction made by the English and Australian courts has regard to indivisible household expenses (see paragraph 13.7.2& above).

[13.7.8] Gratuitous support: In *Buthelezi*'s case[240] the support provided to waifs taken in from the street was viewed as charitable and thus to be ignored in assessing the damages for the legitimate children of the deceased. This principle suggests that the support provided to a `common-law wife' should be similarly treated. However, the provision of support to the mother of a man's children is provided in terms of strong moral, if not contractual, obligation. Even without bearing children the `common-law wife' will usually have rendered valuable services in the home for which her support may be viewed as a *quid pro quo*. The relationship between the deceased and his `common-law wife' would not have been without benefits for the deceased. It seems inappropriate to describe support provided under such circumstances as `charitable'.[241]

[13.7.9] Charity: Expenditure on a charitable cause will generally form part of the support provided to the family.[242] Not the least reason for this consideration is that the relevant financial resources could at any time be diverted to other forms of expenditure for the benefit of the family. In *Buthelezi*'s case the family had taken in a number of needy children. The family income was apportioned amongst the natural children of the deceased. Care needs to be exercised when dealing with black family relationships because the relevant customary law may have created a contractual or moral obligation to provide the relevant support under circumstances where the Roman-Dutch law imposes no such obligation.[243]

[13.7.10] Pension deductions and insurance premiums: If the deceased contributed to a pension fund it is usual to deduct the relevant contribution from current income, and then to add back the value of the notional pension which would have accrued on normal retirement.[244] It has been suggested that by reason of the Assessment of Damages Act[245] a like deduction should be made for life insurance premiums.[246] If such a deduction were to be made, by analogy with pension benefits, then there should be added back the present value of the benefits when the policies eventually mature.[247] Prior to the passing of the Assessment of Damages Act it was ruled that no deduction should be made for life insurance premiums.[248] This, it seems, continues to be the practice. Pension-fund deductions from salary are compulsory, a condition of service. Life insurance premiums are discretionary savings which could be diverted to other

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[240] *President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A).

[241] In *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 556 the court deducted gratuitous payments to the deceased's mother and mother-in-law. There seems to have been some sort of contractual undertaking to support the mother-in-law who shared the common household. The deceased's mother in Italy was provided with payments now and again, and such payments seemed likely to continue until her death.

[242] *President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A).

[243] eg the *ukungena* relationship whereby a brother or nearest male relative of the deceased must take over responsibility for the wives of the deceased (Seymour `Customary Law' 286-94). See too *Kewana v Santam Insurance* 1993 (Tk) (unreported 28.02.93 case 112/88) for adoption by customary law.

[244] See, for example, *Dippenaar v Shield Insurance* 1979 2 SA 904 (A).

[245] 9 of 1969.

[246] Newdigate & Honey `MVA Handbook' 180; Davel `Broodwinner' 535-6 575; Reinecke 1976 *TSAR* 26 54.

[247] The majority of policies sold these days are endowments. A life policy or term policy provides no benefit during the lifetime of the breadwinner.

[248] *Groenewald v Snyders* 1966 3 SA 237 (A) 247-8.

purposes at any point in time. When interpreting the Assessment of Damages Act considerations of fairness do not play a major role.[249]

[13.7.11] Savings: It has been suggested that a deduction be made for that part of the deceased's income which would have been saved and thus not applied to the support of the family.[250] Savings, however, reflect discretionary spending capacity. Savings may be used in the long term to finance old age or to provide continued support after the premature death of the breadwinner. In the shorter term savings may be spent at any time by, for example, purchasing a new car or a swimming pool or upgrading the family home. By increasing the family's assets the value of the usufruct of the assets is increased. It is clear that the ability to save may ensure a better standard of living in future years or a greater security for the prevailing standard of living. Savings imply improved inheritance prospects for the dependants. It follows from the above considerations that it will be rare indeed to find a deduction being made for savings.[251]

[13.7.12] Wife's income: It has been suggested that a wife may work and keep her earnings without any obligation to contribute to the support of herself or the family.[252] All support is provided by her husband. The Matrimonial Property Act[253] now makes it compulsory for a wife to contribute to household expenses pro-rata her means.[254] Quite part from this legislation, for the reasons set out in the previous paragraph it would be rare indeed that a wife's earnings were not completely or partially applied to the benefit of the family either by way of savings or by providing luxuries such as overseas travel or a swimming pool or tertiary education for the children, things which would not have been possible on the husband's income alone. In *Yorkshire Insurance v Porobic*[255] it was accepted that the entire combined income of husband and wife had been applied to the support of the family. It is conceivable that a wife may utilise her earnings for the support of her parents or donate her earnings to a charitable cause.[256]

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[249]See, for instance the anomalous result in *Du Toit v General Accident Insurance* 1988 3 SA 75 (D). The widow was compensated for the loss of her husband's pension notwithstanding that as a widow she had become entitled to 80% of that pension from the same source.

[250]Davel `Skadevergoeding' 110n748.

[251]*Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) (compensation based on full income from business notwithstanding drawings at very much lower level). See too McGregor `Damages' 14ed 877; Cooper-Stephenson & Saunders `Damages in Canada' 440-2.

[252]Davel `Skadevergoeding' 138-9; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012. Section 3 of Matrimonial Affairs Act 37 of 1953 reads `A husband and wife married out of community of property shall be liable jointly and severally for all debts incurred by either spouse in respect of necessaries for the joint household: Provided that if the wife pays any such debts or part thereof, she shall have a right of recourse against the husband for the full amount paid by her'. It is unclear whether this section records a pre-existing perception of the law of whether it has created the view expressed by Davel. Suffice it to say that the section has now been repealed (see next footnote).

[253]88 of 1984 s23 as regards marriages out of community of property.

[254]For a wife married in community of property her earnings are pooled with those of her husband.

[255]1957 1 C&B 90 (A) 94 `the fact that the necessity persisted for such a long time rather suggests that this may have been a family, like so many others, in which the whole of the income was consumed by the cost of living'.

[256]See paragraph 13.7.3.

[13.7.13] Expensive hobbies: The evidence may reveal that the deceased engaged in an expensive interest to the exclusion of his family, eg yachting, big-game hunting, irresponsible business speculation, gambling or keeping a mistress. It would be appropriate to exclude such expenditure from the deceased's earnings to the extent that the self-indulgence was likely to persist in the future to the detriment of the family support. The earnings of a wife might likewise be applied to selfish ends such as overseas travel for herself alone.

[13.7.14] Insolvent breadwinner: An insolvent breadwinner, that is to say one whose liabilities exceeded his assets shortly before he died, would, had he lived, have had to apply part of his income to servicing and reducing his debt. It follows that the income available for the support of his dependants should be reduced to allow for this. The extent of the net indebtedness would normally be determined by reference to the deceased's estate after exclusion of life insurance benefits. If insolvency proceedings seem likely then he may be relieved of such obligations and his earnings protected from his creditors because they are entirely needed for the support of his family.

[13.8] APPORTIONMENT OF FAMILY INCOME

[13.8.1] Family income defined: The financial resources available for supporting the family include the combined net earnings of husband and wife plus the yearly value of the use of assets. The assessment of damages for loss of support is concerned with what have been provided had the death **not** occurred. `Family income' is thus not so much a question of what has been provided in the past but rather what would have been provided in the future, had the deceased lived. Where the calculation is to be based on the earnings of the deceased the court may have regard to his earning capacity in lieu of explicit evidence of what was being earned at the time of the death.[257] A similar approach is appropriate as regards the earnings of the wife. In those instances where she was unemployed at the time of the death there may have been a substantial chance that she would have taken up employment in time to come.

The discussion below begins with the situation where only one spouse would have worked during the subsistence of the marriage. The assessment problems created by the earning capacity of the surviving spouse are discussed subsequently.[258]

The value of services in the home are excluded from this part of the calculation because it is subject to different considerations as regards apportionment.[259]

The share of family income to be apportioned to each family member is, in theory, a question of fact to be determined from the evidence. In practice families do not keep meticulous financial records as to the past allocation of resources. The court is often driven to doing the best it can with scanty or non-existent evidence.

[13.8.2] Two-parts-one-part method: In order to fill this evidential void reliance is often placed upon a formalism of calculation whereby two parts are allocated to each parent and one part to each child.[260] As each child becomes self-supporting the available income is reallocated amongst the remaining family members until a time is reached when all children have notionally left home and the husband and wife enjoy the family income in equal shares. Whether this formalism is an actuarial invention or a product of the maintenance courts we

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[257] *Lebona v President Versekeringsmpy* 1991 3 SA 395 (W) 401-2; *Van Staden v President Versekeringsmpy* 1990 4 C&B L2-1 (W). See discussion of earning capacity at 213 and likely earnings at 235.

[258] See 308.

[259] See section 13.6.

[260] Davel `Skadevergoeding' 110-11.

cannot tell. It is, however, in widespread use for purposes of resolving disputes as to the allocation of family income. It is not, however, a rule of law and the courts have no obligation to abide by such an apportionment of family income.[261]

[13.8.3] A convenient approximation: The allocation of two parts for each adult and one part for each child has an intuitive appeal although its correspondence with the realities is questionable. An attempt to introduce a more sophisticated apportionment model has been rejected in favour of maintaining simplicity of calculation.[262] Quite clearly parents will benefit more from savings than their children. Children may well eat as much if not more than adults. Adults, however, will have greater say in the allocation of resources, particularly discretionary spending at an hedonistic level.

[13.8.4] Numerical example 1: Consider a family comprising a father, a mother and two children. Assume for the moment that only the father works and that his earnings, net after deductions, available for the support of the family is R90000 per year. If two parts are allocated to each adult and one part to each child this income will need to be split 6 ways with R30000 per year per adult (two parts) and R15000 per year per child (one part). These amounts would be escalated after the death to allow for the deceased's notional salary increases and reduced for the chance that he may have died in any event.[263] The apportionment calculation would be repeated for each separate year after the death. When the oldest child notionally becomes self-supporting[264] the available income will then need to be split only 5 ways. This means a larger share for each of the remaining family members. If we assume, for sake of the discussion, that there has been no inflation then the deceased's income will still be R90000 per year. Each parent will then be allocated R36000 per year (two parts) and the remaining child R18000 per year (one part). After the second child has become notionally self-supporting, the deceased's notional income of R90000 per year is notionally divided equally between himself and his `wife' with R45000 per year being allocated to the `wife'. The word `wife' is used here rather than the word `widow' because we are here concerned with what support would have been provided had there been no death. This usage will be continued in the pages below.

[13.8.5] Presumption of common household: As a general rule the two-parts-one-part method of apportionment should only be used when the deceased shared a common household with his family. The relevance of the formalism to migrant workers who spend much time away from home is questionable. Nevertheless, the general absence of suitable evidence usually leads to a use of the two-parts-one-part approach.

[13.8.6] Single-parent families: The two-parts-one-part formalism is adaptable to non-standard family relationships: Thus a single divorced parent has been allocated three parts of his income with one part to each child.[265] The increased allocation to the parent may be justified on grounds of possible remarriage or hedonistic excesses at the expense of the children. But there is certainly no fixed rule that a single parent should be allocated three parts. For single parents living close to the breadline an allocation of two parts is usually more appropriate.

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[261] In *Van Heerden v Bethlehem Town Council* 1936 OPD 115 the two-parts-one-part approach is described as being more fair than the other alternative proposed to the court.

[262] *Snyders v Groenewald* 1966 3 SA 785 (C) 789H.

[263] For the widow the calculation would include adjustments for the contingency of her early death.

[264] Or marries or dies.

[265] *Van Aardt v Southern Versekerings-Assosiasie* 1986 (O) (unreported 27.2.86 case 523/82).

[13.8.7] Dependent grandparents: The single-parent family of limited means commonly shares resources with the grandparents of the children in a common household. The grandparents will often enjoy modest incomes from pensions or employment. If the single parent has been killed and damages need to be assessed it is quite often appropriate to aggregate all incomes and then allocate one part of this total to each child and grandparent and two parts to the deceased.[266] Where the mother of the deceased filled the functions of a wife in the home it may be appropriate to allocate to her two parts. The dependency of a grandparent would then be the difference between the one-part, or two-part, share and that grandparent's income. If the grandparent's income exceeded the one-part, or two-part, share this would indicate that there would have been no dependency in the year to which that calculation relates.

[13.8.8] Lower-income household finances: A child who has gone out to work may continue to live at home pending marriage. In communities with limited financial resources it is common that all working members of the family pay over part or all of their pay packets to the mother of the house.[267] She then pays the bills for general overheads such as rent, telephone, food, and gives pocket money to the various family members. Working members of the family will have greater say in extracting pocket money from the mother of the house or may refrain from paying over their full pay packet. Such situations are probably best analyzed by allocating two parts to each working member of the family and the mother of the house and one part to each of the others. Allowance will usually be made for the notional marriage of the deceased at a time a few years after the death, depending on the evidence. The chance of marriage will usually diminish as the child grows older. For a single child over the age of 30 one would probably assume permanent residence with the parents subject to a substantial contingency deduction for the chance of marriage or leaving home. In poorer communities one finds that a younger child will bring his new wife to live at the home of his aging parents who will provide babysitting and housekeeping services.[268] This will permit the new wife to take employment and thereby pay for her own keep.

[13.8.9] Employment benefits not shared with family: The migrant-labour system in South Africa prevents fathers and mothers from working near home.[269] The remuneration package of a migrant labourer frequently includes benefits in kind by way of board and lodging and medical care. The family did not share in these benefits in kind but did gain financially in that the deceased had no major living expenses and was thus, in theory at least, able to send home a substantial proportion of his income.[270] The value of benefits in kind can be a large proportion of the deceased's earnings. The normal two-parts-one-part method of apportionment applied to the total remuneration package can produce absurd results when there are many children. The father's two-part share is then often less than the value of the board and lodging and medical treatment provided to him alone by his employer. To avoid this incongruity one needs to apportion only the cash earnings but allocate to the deceased less than two parts of his cash income to allow for the saving in his living expenses. It would be preferable to have explicit evidence as to the application of the deceased's income. Such evidence is usually extremely difficult to obtain.

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[266]One assumes that aged parents will have little control over the allocation of funds and also be less active socially. In practice there may be extra costs for care and medication.

[267]`The wages of adolescent children are often used to budget for household expenses' HSRC `Marriage & Family Life' 99.

[268]Based on claims handled by my office.

[269]This phenomenon is expected to continue in post-apartheid South Africa (`Land Reform' 42).

[270]Whether he actually did so is generally very difficult to ascertain.

[13.8.10] Lobola money: A young black man, without children and working far from home, may send his money home to his parents.[271] Care needs to be exercised with interpreting such payments for these are not always by way of support. The father, and sometimes the mother, has a moral duty to provide the son with the bride price.[272] The payments may well be directed towards savings for *lobola* rather than parental support. There may also be substantial doubts as to the continuance of such payments over an extended period in the future.

[13.8.11] Support for illegitimate children: For single women with children one will usually assume that they will remain single without further children. Should such a woman be killed her history may suggest the likelihood of further children notwithstanding the absence of a formal husband. For single black mothers it is rare to find a contribution to support by the father of the child.[273]

[13.8.12] Direct evidence of maintenance payments: The use of a two-parts-one-part division is, strictly speaking, only valid when all dependants live together with the breadwinner in a common home. For migrant workers evidence should always be provided as to the extent to which the deceased sent money home for his family. In practice it is extremely difficult to get such evidence and it is usual to rely on a two-parts-one-part division of the deceased's earnings. This is not to say that where evidence is available it need not be adduced. The deceased may have been providing maintenance for illegitimate children or children of a previous marriage. It is then often possible to produce a copy of the divorce order or the order of a maintenance court. Evidence of unofficial payments is usually brought by way of affidavit. It is usual that formal cash payments are supplemented by informal expenditure on food, clothing and recreation.

It is usually reasonable to assume that the earnings of the deceased would in future have escalated more or less in line with inflation. With maintenance payments this presumption is not so obviously valid. The fact of inflation, or an increase in salary, is on its own not sufficient to justify an increase in maintenance payments.[274] The crucial question is `Had there been no death would the maintenance payments have been increased, and if so to what extent?' It is common that after the death an application for increased maintenance is brought against

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[271]Judging by claims submitted to my office this is a fairly common occurrence.

[272]Usually for the first wife only: Seymour `Customary Law' 5ed 160-3. Fairly complex family property arrangements are found for meeting the cost of lobola (Seymour `Customary Law' 5ed 77-80): `A family head is entitled to allot one or more cattle of a house to a son of the house'.

[273]`African Customary Law' Burman 36-51. Under black customary law the child belongs to the house of the mother. The unmarried mother falls under the authority of her father. But since the child does not belong to the house of his father, the father has, under customary law, no claim to the child nor a duty of support. The father of the child may acquire custody of the child, and the duty of support, by paying over the *isondlo* beast (Seymour `Customary Law' 5ed 230-4). This absolves the family of the mother from providing further support. 29 death claims in my office files for single black females revealed not one single instance where support by the father of the children was reported. Non-disclosure is unlikely because in none of these instances were the children assisted by their father with bringing the action for loss of support.

[274]For a divorced wife inflation is but one of the factors to be taken into account (*KBI v Steyn* 1992 1 SA 110 (A); Robinson 1992 *THRHR* 489). In *Levin v Levin* 1984 2 SA 298 (C) the fact of inflation alone was held sufficient grounds for increasing maintenance under circumstances where high rates of inflation had not been in the contemplation of the parties when the original divorce order was negotiated. In *Green v Green* 1976 3 SA 316 (RAD) the court distinguished maintenance orders for children from maintenance orders for divorced wives and allowed an increase in the child's maintenance on the grounds of inflation alone. In *Erasmus v Booyse* 1963 1 PH B4 (C)12 the court ordered the father to pay maintenance at the rate of 11% of his gross monthly income per month per child. This ensured that maintenance payments increased in line with his salary.

the deceased's estate. This, however, does nothing to prove what would have been provided had there been no death. In general escalation in line with inflation would be assumed if there had been an active interest by the deceased in his dependants. On the other hand where the deceased has been irregular with maintenance payments one might assume not only no increases but also a large deduction for the contingency that the irregularity would have continued in future years, even to the point of cessation of payments.

The fact of a right to support does not imply that right has a value. The evidence must indicate at least the value of a chance that maintenance would have been provided in terms of that right.

[13.8.13] Services in the home: The considerations governing the apportionment of services rendered in the home by the deceased have already been discussed.[275]

[13.9] THE WORKING WIFE

[13.9.1] Self-supporting to extent of her own income: There is an increasing tendency for married women to go out to work.[276] The traditional family model of the breadwinner husband at work and the housewife at home is being displaced under pressures to maintain or improve standards of living in the face of taxation, inflation, and increasing job insecurity for husbands. By reason of these earnings the wife becomes partially or wholly self-supporting. If she becomes fully self-supporting then she ceases to have a right to claim support from her husband:

> `No maintenance will be awarded to a wife who is able to support herself'.[277]

If she becomes partly self-supporting then her right to claim support from her husband is restricted to the difference between her net earnings and the cost of her support:

> `If, however, the husband's income is insufficient to provide the necessary support the wife would go out and work in order to supplement his income. In these circumstances if the husband is killed the value of the right lost by the wife through his death would not be the value of one half of his income, but the value of what he contributed towards her support. ... (in other words) how much of the deceased's income would have been devoted to his wife's support had he not been killed'.[278]

If she ceases to earn an income her right to claim support will revive. Conversely a husband may become dependent on his wife when he is unemployed or retired.

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[275]See section 13.6.

[276]HSRC `Marriage & Family Life' 318: In 1960 19,4% of married white women were economically active. In 1980 this proportion had increased to 36,6%. The equivalent figures reported for other racial groups were: Asians 3,6% in 1960 and 19,4% in 1980; coloureds 23,2% in 1960 and 36,2% in 1980; blacks 15,6% in 1960 and 31,8% in 1980. The figures for blacks reflect registered marriages only and do not include the "independent" homelands; the figures thus reflect the norms for a largely urbanized population. HSRC Register of Graduates communication 21 reports that in 1980 60% of married white female graduates were economically active. The equivalent figures for other races were: Asians 74%; coloureds 81%. No figure is reported for blacks.

[277]Hahlo `Husband & wife' 5ed 361. Boberg `Persons & family' 338n44 `This is simply an application of the general principle that no person who can support himself is entitled to claim support from another'.

[278]*Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13. See too *Van der Merwe v Pearl Assurance* 1967 2 PH J31 (A); *Lebona v President Insurance* 1991 3 SA 395 (W) 399-400; Luntz `Damages' 2ed 416 448.

[13.9.2] Numerical example 2: Consider a family comprising a husband and a wife, but no children. Suppose that both husband and wife are employed with the husband earning R60000 per year net of deductions and the wife earning R30000 per year net of deductions. The total income available for their joint support is thus R90000 per year. If this is allocated in equal shares to husband and wife then the total cost of maintaining the wife is R45000 per year. Of this amount she contributes R30000 per year and the husband R15000 per year. If the husband were to be wrongfully killed her claim for damages would be for a loss of support of R15000 per year, this being the support that she would have received had her husband lived. Had she been wrongfully killed her husband would not have had a claim for loss of support.

It deserves note that the calculation focuses upon what she would have earned had the husband not been killed. After the death she may elect to stop work or to take on higher paid employment. These factors will, it seems, be treated as *res inter alios acta* in so far as her loss of support claim is concerned.[279] She may, however, have a separate right of action for loss of earnings due to personal injury.[280]

[13.9.3] The support of children: The general principle observed above is that the income of a wife is applied first to her own support. Only if her own income is insufficient is she entitled to look to her husband for additional support. The same principle applies as regards the income of a child:

> `In accordance with the general principles applicable to all duties of support, no obligation rests upon a parent who, whether by reason of indigence, ill-health or otherwise, is unable to discharge it. Likewise, a child who has the means to support himself cannot require his parents to do so; they are entitled to apply the child's income to his maintenance before using their own resources for this purpose'.[281]

The general principle is that each parent owes a duty of support to the children **in accordance with his or her means**.[282] The incidence of the duty of support is not affected by whether the parties are married in or out of community of property.[283] If one parent has made too large a contribution towards the support of the children then that parent has a right to recover the excess from the other parent.[284]

[13.9.4] Statutory and common-law rights of recourse: The Matrimonial Property Act[285] provides for a right of recovery, in certain circumstances, by one spouse from another for expenditure on household necessaries. For marriages out of community of property after the

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[279]See section 13.10.

[280]See section 13.10.

[281]Boberg `Persons & family' 261. See paragraph 13.2.8.

[282]There is copious authority for this proposition. See, for instance, *Arendse v Maher* 1936 TPD 162; *Plotkin v Western Assurance* 1955 2 SA 385 (W) 394-5; *Senior v NEG Insurance* 1989 2 SA 136 (W) 141F; Hahlo `Husband & wife' 5ed 134; Boberg `Persons & Family' 254 408; Spiro `Parent & child' 3ed 368.

[283]*Plotkin v Western Assurance Co Ltd* 1955 2 SA 385 (W) 395C-D. See too footnote 324.

[284]*Farrell v Hankey* 1921 TPD 590; *Woodhead v Woodhead* 1955 3 SA 138 (SR); Boberg `Persons & family' 257 266; Hahlo `Husband & wife' 414-15.

[285]s23 of Act 88 of 1984 provides for a right of recourse between spouses for household necessaries provided such marriage was out of community of property and concluded before the commencement of the Act (subsection (3)). There is, however, no automatic right of recourse, other than by prior agreement, for marriages concluded after the commencement of the Act. For marriages in community of property there is a pooling of funds and thus an automatic and immediate adjustment for excess contributions.

commencement of the Act a right of recourse is not automatic, but one may have been stipulated in the antenuptial contract. The Matrimonial Property Act[286] does not apply to persons who are divorced. Such persons nonetheless have a common-law right of recourse for excess expenditure on the support of the children.[287] It is doubtful that the common-law right of recourse of a married person as regards excess expenditure on children is co-extensive with the statutory right to recover excess payments as regards household necessaries,[288] although the two rights of action do seem to overlap in many instances.

[13.9.5] Joint and several liability of parents: The primary significance of the right of recourse between the parents is that it reflects their joint and several liability as regards the children.[289] A child may thus look to either parent for support. That parent may then recover a contribution from the other parent. Only if a parent has only sufficient for his or her own support, and is unable to raise the additional funds by work or liquidation of assets, will that parent be relieved[290] of the duty to provide support.[291] A court order that one parent pay maintenance for a child to the other parent operates between the parents and not between the parent and the child.[292] It follows that the direct provision of benefits to the child in cash or in kind do not justify an immediate reduction in maintenance payments for the child, unless such reduction has been sanctioned by the court.[293] The payments of maintenance for a child are, however, to be distinguished from a right of recourse.[294] An agreement to pay maintenance for a child is a *stipulatio alteri* whereas a right of recourse does not have regard

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[286]88 of 1984.

[287]See footnote 284.

[288]Boberg `Persons & family' 276n7 `The fact that a man is not obliged to support his stepchildren does not, however, prevent his being liable for household necessaries purchased by his wife on their behalf, provided they share a joint household with him and his wife'; *Clerk & Co v Lynch* 1963 1 SA 183 (N) 186D-F.

[289]Hahlo `Husband & wife' 5ed 415 `In the absence of an order of court the principles governing joint liabilities apply. A spouse who has contributed more than his or her share has a right of recourse pro tanto against the other spouse'.

[290]Spiro `Parent & child' 3ed 371n2 remarks that `The father is here not relieved of his duty, in the premises he has no duty'.

[291]*Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196B `From all this it is clear that, aside from the bare necessities of life, a parent is not liable to provide any particular aspect of maintenance, even if he is able to afford it, unless the circumstances of *inter alia* the parent justify it. If that is so, then *a fortiori* if the parent is financially unable to provide any aspect of maintenance required by the child, then he is under no obligation to do so. It seems to me that the probable reason why the old writers, and indeed the new, do not say this expressly, is because they assume it to be understood by all'. Spiro `Parent & child' 3ed 368 `If parents do not earn at all **or earn only enough to support themselves** they must resort to any capital they possess' (emphasis supplied). The point of citing this passage is that if the parent has no capital and only sufficient income for his own support, then there is no duty of support. This conclusion follows from the consideration that the duty of support between parent and child is reciprocal. The child's right to claim support from a parent is limited by the parent's reciprocal right to claim support from the child.

[292]Hahlo `Husband & wife' 5ed 414 `A maintenance order determines the liability of the spouses inter se. It is not binding on the child'.

[293]*R v Glasser* 1944 EDL 227. More generally see Hahlo `Husband & wife' 5ed 414-15.

[294]Hahlo `Husband & wife' 5ed `Where the non-custodian spouse has a right of recourse, he cannot set it off against the maintenance which he has to pay to the custodian spouse, for maintenance is paid in the interests of the children, whereas the right of recourse lies against the custodian spouse personally'. Otherwise stated, an agreement between the father and mother for the payment of maintenance in respect of a child `is an agreement between them for the benefit of a third party, their minor child' (*R v Glasser* 1944 EDL 227 231).

to needs of the child. A court order for maintenance for a child is often expensive and time consuming to obtain.[295] For this reason an order to pay maintenance will be made even though at the time it is made the relevant parent has no means.[296] The order does not mean that a resourceless person has a duty to support a child but rather that the court expects that there will in time be resources from which a contribution may justifiably be expected.

***[13.9.6] In accordance with his or her `means'***: In order that a right of recourse be exercised it is necessary to establish what contribution each parent is obliged to make. The guiding principle is that each must contribute `in accordance with his or her means'.[297] This expression is capable of a variety of interpretations: The most simplistic is that each parent must contribute `pro-rata his or her total income'.[298] Most judgments, however, have regard to surplus income after deduction of various expenses and deductions.[299] In general the allocation of the burden of support for children is not an exact science, that is to say it is subject to the discretion of the judge.[300] It follows that a court will have regard to the equities of the situation when exercising this discretion.

[13.9.7] Pro-rata contributions by spouses: The Matrimonial Property Act[301] lays down that spouses married out of community of property are obliged to contribute to household expenses `pro-rata' their respective `means'. Considerations relevant to the interpretation of this provision are:

* Earlier legislation used the word `income' in lieu of the word `means'.[302] The two words are not synonymous in meaning, although `means' undoubtedly includes `income', or at least what remains after deduction of normal expenses.
* The Act is concerned with the contribution to be made to the overall household expenses, not the particular costs of the children of the marriage. The directive applies equally to childless marriages where the mother's pro-rata contribution is directed entirely at covering her own living expenses. With damages calculations it is usual to assume that the entire net incomes of husband and wife are consumed with supporting the family.[303] This assumption gives full effect to the Act.

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[295]See comments in *Erasmus v Booyse* 1963 1 PH B4 (C).

[296]See, for instance, *Lamb v Sack* 1974 2 SA 670 (T) 673-4 where a mother was ordered to provide maintenance for a child despite a finding by the court that she was `without means'. See too *Lebona v President Insurance* 1991 3 SA 395 (W) 403B-C.

[297]See footnote 282.

[298]This was the approach adopted by the magistrate which was taken on appeal in *Zimelka v Zimelka* 1990 4 SA 303 (W) 305-6.

[299]*Lamb v Sack* 1974 2 SA 670 (T) 674 had regard to the father's income net `after making allowance for his monthly expenses'; the estimated income of the mother, were she to find employment, was presumably determined on the same basis of that of the father, that is to say net after monthly expenses. `Monthly expenses' presumably included the normal costs of each parent's own support (see footnote 67). For a discussion of *Woodhead v Woodhead* 1955 3 SA 138 (SR) see footnote 68. See too *Harwood v Harwood* 1976 4 SA 586 (C).

[300]Just as an award for damages for loss of support is subject to a wide discretion (see 37). In *Bordihn v Bordihn* 1956 2 PH B32 (A) it was held as regards an order for maintenance that the approach of the appeal court, when asked to interfere with the estimate of the trial judge, should be along the lines adopted in compensation cases.

[301]88 of 1984 s23.

[302]Matrimonial Affairs Act 37 of 1953 s3 as amended; see Boberg `Persons & family' 209-10.

[303]See paragraphs 13.7.11" and 13.7.12 .

The `means' of a parent will include assets.[304] That is to say a parent is obliged to use both income and assets in order to provide proper support for the children. If a parent has major financial commitments, such as bond repayments or pension fund contributions, the parent's income will be reduced by these charges.[305] By reason of the reciprocal duty of support between parent and child, a parent should be left with sufficient income for his or her own support.[306] In other words a child cannot expect so high a standard of living at a parent's expense that the parent is rendered destitute. In general the overall standard of living of the family, that is to say of both parents and children, must be reduced to fit within the available income and other means. This last point deserves closer consideration where father and mother are divorced or never married, and live separately:

[13.9.8] Unfair treatment of mothers: Consider a divorced mother who earns a R20000 per year net after tax and other deductions. The father of the child lives separately and earns R80000 per year net after tax and deductions. Neither parent has any assets of consequence. If the cost of supporting the child is R20000 per year to what extent should each parent contribute? A pro-rata approach based on the incomes of each parent would require a contribution of R2000 per year from the mother and R18000 per year from the father. The father is then left with R62000 per year for his own support and the mother R18000 per year for her support. But, one may ask, why in these circumstances should the mother make any contribution at all? Why should she forfeit R2000 per year from her meagre income when her ex-husband has a lifestyle based on R62000 per year? This problem in equity does not seem, as yet, to have been properly addressed by the courts.[307]

[13.9.9] Numerical example 3 (method A): Consider a family comprising a husband, a wife and two dependent children. Suppose that both husband and wife are employed with the husband earning R60000 per year net of deductions and the wife R30000 per year net of deductions. The total income available for the support of the family is thus R90000 per year. If this total is allocated with two parts to each adult and one part to each child, a parent's share is R30000 per year (two parts) and a child's share is R15000 per year (one part).[308] But these are shares of the total. If the father has been wrongfully killed, and damages for loss of support are to be calculated, to what extent is the father's income to be allocated to his wife, and separately to the children? The previous analysis of the right to support of a wife who has no children[309] has indicated that the wife only has a right to claim support from her husband if her own earnings are insufficient to cover the cost of her support. In the present example the cost of the wife's support is *ex hypothesi* R30000 per year. She earns R30000 per year. Her own claim for loss of support for the year in question is thus nil. However, by reason of the death of the father the family has lost R60000 per year of which R30000 per year was

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[304]Spiro `Parent & child' 3ed 368; Boberg `Persons & family' 260n50; Hahlo `Husband & wife' 5ed 135n49.

[305]See, for instance, *Harwood v Harwood* 1976 4 SA 586 (C).

[306]See footnote 291.

[307]In *Zimelka v Zimelka* 1990 4 SA 303 (W), on facts very similar to those used for the example in this paragraph, the father had custody of the children. A magistrate had ordered that the mother make monthly payments of support for the children to the father. This order was negated on appeal (the reported judgment), it being noted that the mother had *de facto* custody of the children for several months in the year and thus incurred substantial costs with their support. The judgment did not investigate whether the mother had a duty to provide the support that she did, nor was the appeal court asked to consider whether the mother was entitled to recover from the father what she had laid out for the support of the children. Considering the widely disparate standards of living there was much to be said for allowing the mother to recover these expenses from the father.

[308]See paragraph 13.8.4 for a more detailed explanation of the calculations.

[309]See paragraph 13.9.2.

applied to the cost of his own support. The balance of R30000 per year is appropriately allocated in equal shares of R15000 per year each to the two children. Once one of the children has become self-supporting the total notional family income of R90000 per year[310] will be allocated 5 ways giving R36000 per year per parent and R18000 per year for the child. The mother's income is still R30000 per year. Her loss of support in that year is thus R36000 per year less her earnings of R30000 per year, that is to say R6000 per year. The child suffers a loss of R18000 per year. Once the second child leaves home the wife's yearly loss becomes the same as had there been no children in the first place.[311] The method of calculation described in this paragraph will hereafter be described as `**method A**'.

If it were the wife who had died then the net loss to the family would be her earnings of R30000 per year less the cost of her support of R30000 per year, that is to say a nil loss.

It deserves note that this method A allocates family resources to the children pro-rata the **surplus** income of each parent, as distinct from pro-rata the **total** income of each parent. By focusing on income surplus to each parent's personal requirements method A gives effect to the limited nature of the wife's right to support from her husband.

[13.9.10] Numerical example 4 (method B): Analysts who focus solely on the pro-rata aspect of the duty of support by a parent to a child prefer a different approach to that described in the previous paragraph. The husband's income of R60000 per year is apportioned with two parts to each parent and one part to each child, that is to say R20000 per year to the husband, R20000 per year to the wife, and R10000 per year to each child. By reason of the pro-rata obligation that the wife has to support the children her income is likewise apportioned with two parts to each parent and one part to each child, that is to say R10000 per year to the father, R10000 per year to herself, and R5000 per year to each child. A notable feature of this approach is that a working wife who earns sufficient to support herself is deemed to have a right to claim support from her husband, and simultaneously to be obliged to contribute to his support while he is working.[312] If the father is wrongfully killed then damages for loss of support by the children are calculated as R10000 per year per child until the oldest child leaves home. The father's income of R60000 per year is then apportioned 5 ways to give a child's share of R12000 per year until the youngest child becomes self-supporting. The widow's loss is calculated as R20000 per year less the R10000 per year that she was contributing to the deceased's support from her own income, that is to say a net loss of support for her at the rate of R10000 per year. After the oldest child leaves home the incomes are apportioned 5 ways and the widow's loss becomes R24000 per year (two parts of the deceased's income) less R12000 per year (two parts of the wife's income) giving a net loss of R12000 per year. Once the youngest child leaves home the widow's net loss becomes R30000 per year (one half of her husband's income) less R15000 per year (one half of her own income) giving a net loss of R15000 per year. The method of calculation described in this paragraph will hereafter be described as `**method B**'.

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[310] See numerical example 1 at 305 for a discussion of the effects of inflation and the approach thereto in these examples.

[311] See numerical example 2 at 309.

[312] *Jodaiken v Jodaiken* 1978 1 SA 784 (W) 788H `One of the legal consequences of marriage, whether in or out of community of property, is that the spouses owe each other a reciprocal duty of maintenance according to their means'. Taken literally this statement supports the seemingly anomalous cross-support provisions of method B. Having regard to the basic requirements for an enforceable duty of support (see 278 above) it is doubtful that this terse statement of principle means any more than that either husband or wife may have a duty of support, depending on circumstances, but not both at the same point in time. It is a contradiction of terms to suggest that a spouse should simultaneously have `adequate means' and also be `in need'.

If it were the wife who had died then the husband would suffer no loss due to his high earnings but each child would suffer a loss of R5000 per year. Once the youngest child had left home the loss of the remaining child would increase to R6000 per year, being one fifth of R30000 per year.

[13.9.11] Method A is to be preferred: Method A has been preferred by a Cape court.[313] Method B has been preferred by a Transvaal court.[314] Other judgments point towards method A as the preferred approach:

* In *Yorkshire Insurance v Porobic*[315] the wife had been wrongfully killed. The damages were calculated by deducting from her income the cost of her support. The calculation was done over the period of dependency of the children. Had the wife's income been less than the cost of her support the damages would have been assessed as nil. With method B there is always a calculable loss for the children regardless of the cost of supporting the deceased.
* In *Milns* case[316] the court makes the point that a husband is only obliged to contribute to the support of his wife to the extent that her earnings fall short of what she requires for her support. Method B, on the other hand, takes the view that whatever a wife earns her husband is obliged to contribute two parts of his income to her support.

[13.9.12] Form of contributions by spouses: One argument raised in support of method B is that a mother will, for instance, buy all the groceries which are then applied for the benefit of all dependants. The father will pay the rent and the instalments for the family car. Each of these benefits is arguably shared pro-rata by all family members. However, if each parent has a right to recover excess payments from the other[317] then there would be a constant state of offset, an overpayment on groceries being offset against an overpayment on the rent, and so on. The fact that a wife buys all the groceries is then no more than the form of her contribution to the overall expenses of the household, just as when one engages in a joint venture, such as a safari trip to the Okavango, each member of the expedition contributes his or her share of the expenses. With a safari trip one does not say that one member one has bought all the groceries and thus contributed to the costs of each of the other members.

[13.9.13] Equity between parents: When reliance is placed on a two-parts-one-part method of apportionment, as in numerical examples 3 and 4 above, the cost of support for the wife is *ex*

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[313] *Burns v NEG Insurance* 1988 3 SA 355 (C) 363-4. The preferred approach, method A, is described as `the customary basis, as Mr Koch suggested'. Method B, `that of Mr Beets', was rejected. The only reason given was that method B was `prejudicial to the interests of the minor child'.

[314] *Bosch v Mutual & Federal Insurance* 1993 (T) (unreported 25.3.93 case no 2090/92). Central to the court's ruling was its finding that the ruling in *Zimelka v Zimelka* 1990 4 SA 303 (W) did not support the conclusions of Mr Koch in 1992 *THRHR* 128-34. The court, however, did not study any of the other judgments listed in the article in support of this conclusion. A series of relevant judgments on damages for loss of support were dismissed on the ground that they were irrelevant divorce matters (see paragraph 13.9.16). The court emphasised that the marriage had been in community of property. The court finds further support for its view in paragraph 46 of Mr Koch's report which it is interpreted to mean that method A does not put the claimants in the position they would have been in had there been no death. Mr Koch's report did not contain a paragraph 46 and the mysterious paragraph is not quoted in the text of the judgment. The court seems to have been unaware that method A required a larger award of damages to the children than did method B (see paragraph 13.9.14). It is notable that in this matter the actuaries did not give evidence before the court, as they did in the *Burns* matter (see footnote 313).

[315] 1957 1 C&B 90 (A); 1957 2 PH J16 (A).

[316] See quotation in paragraph 13.9.1.

[317] See paragraph 13.9.4.

hypothesi equal to that for the husband. This feature distinguishes the family situation from that where the parents live separately. When the parents live separately then each has a standard of living commensurate with his or her separate means. I have noted above[318] that even-handed justice between the parents requires that the parent with the higher standard of living is the one who should reduce his or her standard of living in order to provide for the children. The other parent should not be required to contribute until there is reasonable parity between the respective standards of living of both parents. Method A provides a calculation methodology for achieving this result.

Considerations of equity between the parents must, however, give way, when necessary, to the more important requirement that the children should be assured of proper support, whichever parent is required, in the short term, to reduce his or her standard of living in order to provide it. The question of the relative standards of living of the parents affects the right of one parent to claim a contribution from the other, but not the right of a child to claim support from whichever parent he or she chooses. Normally the children will live with the custodian parent who will personally meet most of the costs of the support of the children, and then claim a contribution from the other parent. The ongoing rate of contribution by the non-custodian parent would normally be formalised in terms of maintenance payments. The fact that the custodian parent buys all the groceries and pays all the rent does not mean that the children are entirely dependent on that one parent.[319] Regard must also be had to the contribution by the other parent.

[13.9.14] Spurious `losses' indicated by method B: Revert now to the family situation where both husband and wife live together with the children and both have the same standard of living. In terms of both numerical examples 3 and 4 above each parent enjoys a standard of living based on R30000 per year. **In terms of method A** the wife's earnings are applied entirely to covering the cost of her own support and her husband meets the full cost of the support of the children at the rate of R15000 per year per child. **In terms of method B** the wife applies only R10000 per year of her earnings to her own support with R10000 per year applied to the support of her husband and R5000 per year to the support of each child. Her husband applies R20000 per year of his earnings to his own support, R20000 per year to the support of his wife, and R10000 per year to the support of each child. **If damages for the death of the father are determined using method B**, then the widow and children will be awarded compensation based on R10000 per year each. Prior to the death the children enjoyed support of R15000 per year each. For the balance of R5000 per year per child they are expected to continue to look to their mother. The mother will have R30000 per year by way of her own earnings. Her own cost of living is R30000 per year *ex hypothesi*. In order that she can provide each child with the additional R5000 per year, for which method B expects them to look to her, she needs a total of R40000 per year. The additional R10000 per year she gets by way of her own damages for loss of support. This R10000 per year that is accorded to the widow, ostensibly as damages for her own loss of support, is, in reality, the balance of the support needed to ensure that the children are able to maintain the same standard of living. Thus method B indirectly compensates the children for their father's death by awarding part of what they need to their mother. This seems to be a thoroughly unnecessary complication, particularly bearing in mind the very much larger deductions for general contingencies and remarriage, that are applied to compensation for a widow as compared to compensation for a child.

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[318]See paragraph 13.9.8.

[319]See paragraph 13.9.12.

In the *Bosch* case,[320] where method B was preferred, the widow was about to remarry and her claim had been agreed to be nil. In such circumstances the additional R5000 per year needed for each child, to ensure continuing support at the same level as prior to the death, would have had to come from the children's stepfather.

In the circumstances of numerical examples 3 and 4 above method A leads to a larger award than does method B when it is the father who has been killed. The reasons have been set out in the previous paragraph. On the other hand, if it had been the wife who had been wrongfully killed method A would have indicated a nil loss for the children whereas method B would have indicated a `loss' by the children based on R5000 per year per child. This `loss', if such it can be called, is at odds with the overall financial position of the family. The family has lost the income of the mother of R30000 per year. The cost of her support was *ex hypothesi* R30000 per year. The net loss to the family is nil. If the children are then awarded compensation based on method B at the rate of R5000 per year each then the family will be better off, in a financial sense, after the death of the mother than before her death. The father will still have his income of R60000 per year. If the cost of his own support continues at R30000 per year then there will be R30000 per year, R15000 per child, available to support the two children. The father's income is thus entirely sufficient to support himself and the children after the death without the need for a contribution by way of damages from the defendant.

[13.9.15] Numerical example 5 (method A): Consider a family comprising a working father, a working mother, and two dependent children. Suppose the father earns R45000 per year, net after deductions, and the mother R30000 per year net after deductions. The total family income is thus R75000 per year.[321] The two-parts-one-part method allocates R25000 per year to each parent and R12500 per year to each child. The mother's income is R30000 per year. The cost of her support is *ex hypothesi* R25000 per year. Her surplus income, that is to say her `means' available for the support of the children, is R5000 per year, that is say R2500 per year per child. The father's income is R45000 per year. The cost of his support is *ex hypothesi* R25000 per year leaving surplus income of R20000 per year. If this is allocated to the children in equal shares then each child is dependent on his or her father to the extent of R10000 per year. Once the oldest child leaves home the R75000 per year is apportioned 5 ways giving R30000 per year per parent and R15000 per year for the one remaining dependent child. The mother's income is R30000 per year. Thus while the family has only one dependent child she makes no contribution to the support of the child, but is also entirely self-supporting and thus not dependent on her husband. Once the youngest child leaves home the income of R75000 per year is divided equally between husband and wife. The wife's dependency on her husband is then R7500 per year, that is to say R37500 per year less R30000 per year.

[13.9.16] Sources of legal authority: In *Lebona*'s case[322] it was said that to determine the incidence of the duty of support one should have regard to the position with a family divided. In *Bosch*'s case[323] it was said that divorce matters are not relevant to the assessment of damages for loss of support from a marriage. In general the writers on family law and the duty of support do not distinguish between damages cases and divorce matters when discussing the

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[320]See footnote 314.

[321]These were the agreed facts before the court in the *Bosch* case (see footnote 314).

[322]*Lebona v President Versekeringsmpy* 1991 3 SA 395 (W) 402-3.

[323]See footnote 314.

incidence of the duty of support.[324] The preferable view seems to be that regard may be had to divorce matters, provided it is borne in mind that after divorce the parents no longer share a common household and thus a common standard of living.

[13.9.17] Redistribution of burden of support: Suppose under numerical example 5 that the father had died under circumstances which did not give rise to an action for damages for loss of support.[325] The mother and the two children would then have had only her income of R30000 per year for their combined support. The two-parts-one-part formula indicates R15000 per year for the support of the mother and R7500 per year per child. Even when damages can be claimed it could be argued that the claims by the dependants for loss of support should be assessed having regard to this redistribution of the burden of support after the death. There seems to be general agreement, however, that the ruling in *Groenewald v Snyders*[326] precludes regard being had for such a redistribution of liability for the support of the children. The assessment of the damages proceeds on the basis that the dependants continue to live at the same standard of living, and with the same application of the contribution by the widow, as had the deceased remained alive. Whatever the family lacks is made good by the damages paid by the wrongdoer who thereby, in a manner of speaking, `steps into the deceased's shoes'.

[13.9.18] Foreign jurisdictions: The assessment of damages for loss of support in England,[327] Canada[328] and Australia[329] generally has regard to the overall loss by the family, that is to say the contribution made by the deceased breadwinner, usually by way of earnings, is reduced for the saved living expenses of the deceased.[330] The loss indicated by this calculation is then apportioned to give the damages to be separately awarded to each dependant in his or her own right. The major objection to this approach is that it fails to have regard to the different contingencies and collateral benefits affecting different claimants. For this reason the overall

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[324]See, for instance, Hahlo `Husband & wife' 5ed 134n46; Boberg `Persons & Family' 255-6 308n28; Spiro `Parent & child' 3ed 369n83.

[325]Assuming as well that there were no life polices nor pension benefits nor assets.

[326]1966 3 SA 237 (A) 248A-D; Milburn-Pyle & van der Linde 1974 *TASSA* 292 333-4; *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A).

[327]McGregor `Damages' 14ed 864 `The practice which is generally followed … is first to assess the loss to the family as a whole and then to apportion the sum between the various dependants. … Nevertheless the court is entitled to consider the case of each dependant separately in the first instance, thus ascertaining the total sum by addition'.

[328]Cooper-Stephenson & Saunders `Damages in Canada' 417 `One mode of assessing damages in a fatal accident claim is to calculate first the loss to the family as a whole and then to divide that sum among the various dependants. The preferable mode, however, is to make a separate calculation for each dependant right from the start. … At the very least, if judges insist on attempting to compute the family loss first, they should be careful to postpone any necessary deductions until after the loss has been apportioned. Deductions on account of matters such as contingencies, collateral benefits and, in some instances, contributory negligence, should not be made against the family as a whole but only against that dependant to whom the particular deduction relates'.

[329]Luntz `Damages' 2ed `If the total damages are arrived at by assessing the loss of each claimant separately and then adding up the amounts, the necessary apportionment is achieved automatically. Where, however, the loss to the family as a whole is calculated, the method of apportionment needs some consideration. … However, provided that in the actual apportioning process, the gross loss is first divided and then the gains of individual claimants are set off, it would generally not matter that at an earlier stage the total damages had been arrived at by setting off the total gains against the gross loss'.

[330]This is much the same procedure as is contemplated by method A (see paragraph 13.9.14).

damages is sometimes assessed, as in South Africa, by first having regard to the damages for each individual dependant.

[13.9.19] Chances of death, divorce or unemployment: The nil loss for the death of the mother calculated under numerical example 3 above is based on the assumption that both parents remain alive, married to one another, and that both retain their employment. There are substantial contingencies attaching to all these considerations which justify a small award to the children for the value of the chance that things may not have turned out as expected, and that the children may have found it necessary in the future to depend entirely on the earnings of their mother.[331] The damages for this consideration would ideally be assessed by taking a percentage of 5% or 10%, say, of the damages that would have been awarded had the deceased mother been the only parent, that is to say ignoring the existence of the father.

[13.9.20] Further children: The discussion thus far has ignored the effect of further children. Suppose that a third child was born to the family discussed under numerical example 3 above. The cost of the support for father and mother would then have reduced to R25714 per year. The mother's earnings of R30000 per year would then have exceeded the cost of her own support by R4286 per year. To this extent she would be contributing to the support of the children. Her contribution of R4286 per year is appropriately apportioned in equal shares between the three children giving R1429 per year per child. If she were to be killed then all three children would, in terms of method A, have claims for loss of support. When a parent has been killed it is sometimes appropriate, having regard to the circumstances of the family, to make explicit allowance in the calculation for further notional children.[332] In terms of numerical example 3 above the children suffer no loss on the death of their mother. However, if a third child were to be hypothesised then method A would indicate a loss of support for the two claimant children, that is to say increases the damages. Usually, however, the allowance for further children decreases the damages.

[13.9.21] Services in the home: The deceased may have rendered valuable services in the home for which a claim may be brought. Traditionally this claim lies with the husband[333] but, as I have noted above,[334] there is much to be said for allowing a claim to the children for a proportion of the value of the services rendered by their mother.[335] This latter approach would cover instances where the father's own claim has prescribed. When the father claims in his own right he must offset what he has saved by reason of no longer supporting his wife. For a working wife this deduction may be very small if not nil.[336] However, working wives will often employ domestic help and this factor needs to be brought into account. It follows that evidence will need to be submitted as to the extent and value of the services which she provided.

[13.9.22] Wife's personal obligations: A working wife may have a duty to support her illegitimate child or her aged mother. Her husband, on the other hand, has no duty to support his wife's mother,[337] and in the absence of community of property no duty to support the

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[331] Considered in *Cooke & Cooke v Maxwell* 1942 SR 133 136 but for technical reasons not awarded.

[332] See footnote 236.

[333] *Union Government v Warneke* 1911 AD 657 669; *Erdmann v Santam Insurance* 1985 3 SA 402 (C).

[334] See paragraph 13.6.2.

[335] McGregor `Damages' 14ed 896-7.

[336] See numerical example 3.

[337] *Ford v Allen* 1925 TPD 5.

child.[338] How then is the wife's dependency to be calculated for loss of support arising from the death of the husband? The approach adopted in *Lebona*'s case[339] was to apply the widow's income first to the support of her personal dependants with only the balance of her income being applied to her own support. To the extent that this balance fell short of her two-part share her husband was then deemed to provide her with support. Otherwise stated the compensation awarded to the widow was the difference between her own earnings and what she needed in total for herself and those dependent on her who do not have claims for loss of support *eo nomine*. This is an application of the general principle that the claim of a father (or mother) should have regard not merely to the personal needs of the claimant but also to what additional amount the claimant needs to support his or her dependants.[340]

[13.10] WIDOW'S EARNING CAPACITY HAVING REGARD TO THE DEATH

[13.10.1] Widow's earnings are ignored: A non-working wife is not required to mitigate her damages after the death of her husband by going out to find employment.[341] Even if she has taken up employment this income must be ignored when assessing her loss.[342] If she had been working prior to the death, or would have gone out to work even if her husband had lived, then her earnings subsequent to the death are relevant, but only as guide to what she would have earned but for the death.[343] The logic of these rules has become plainer with the ruling in *Evins v Shield Insurance*[344] that the action for loss of support and the action for loss of earning capacity are separate and distinct actions. The value of lost support is calculated as though the wife/widow's earnings had continued uninterrupted through the event of her husband's death. Any loss that she experiences by way of earnings must be recovered by way of a separate action for personal injury.[345]

When considering this conclusion the reader should bear in mind that under `method A' the two-parts share of family income that she would have enjoyed had her husband lived is determined by reference to the joint income of her and the deceased. If her reduced earnings after the death are used for the calculation this understates her two-parts share. For example consider a deceased breadwinner who earned R90000 per year and a wife who earned R30000 per year. The total family income was thus R120000 per year. Assume that the wife, now a widow, takes up a half-day job after the death and earns only R18000 per year. Assume that there are two children. The wife's two-parts share of the total family income **while her husband lived** was thus R40000 per year.[346] Her loss of support is the difference between R40000 per year and her earnings of R30000 per year, that is to say R10000 per year. By reason of her changed employment she suffers a further loss of R12000 per year being the difference between R30000 per year and her actual earnings after the death of R18000 per

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[338] *S v MacDonald* 1963 2 SA 431 (C) 433C; Spiro `Parent & Child' 3ed 368n74; s17(5) of Matrimonial Property Act 88 of 1984.

[339] *Lebona v President Versekeringsmpy* 1991 3 SA 395 (W) 399-400.

[340] *Oosthuizen v Stanley* 1938 AD 322 331.

[341] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376B. Cooper-Stephenson & Saunders `Damages in Canada' 438 446; Luntz `Damages' 2ed 447-8 records this same principle.

[342] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376.

[343] *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13.

[344] 1980 2 SA 814 (A).

[345] The two separate actions may be brought jointly if the necessary formalities have been met.

[346] One third of R120000 per year (R90000+R30000).

year. This, however, is not a loss of support but a loss of earnings. The extent to which she may claim for this loss of earnings will depend on the cause of that loss.

[13.10.2] Widow's changed tax position: If a wife continues working after the death of her husband, with the same earnings as prior to the death, her liability for taxation will reduce: Prior to the death she would have been taxed according to the table for married women; after the death she will be taxed according to the table for single breadwinners.[347] The calculation of damages for loss of support proceeds as though the death had not occurred.[348] For this reason her gain from lesser taxation should be ignored when assessing her damages for loss of support. Her gain from reduced taxation would, however, be relevant to any claim she submits for loss of earnings arising from her personal injury.

[13.10.3] Widows who cease working: It does happen that, due to the shock of the event and/or the needs of the children for closer care, a widow ceases employment after the death of her husband.[349] For certain cultural groups cessation of employment after the death of a spouse is mandatory.[350] The loss of earnings suffered by the widow under these circumstances is patrimonial and to be distinguished from the agony of pure emotional shock.[351] As a general rule compensation will not be awarded for loss of earnings occasioned by the death of a husband.[352]

One exception to this principle would be where the loss has been occasioned by the need to care for the children.[353] The question of loss of services in the home has been discussed above.[354] The earnings foregone by the widow must needs be reasonable having regard to the services that have been lost. In other words a wife who worked full day would, in the absence of the death, have, in any event, had to make arrangements for child care. The need to cease work may be occasioned by a perceived need to attend to the shocked state of the children over the death. South African law is a little bit vague as to whether such a claim lies under the dependants' action or under the action for personal injury. Suffice it say that the need for a widow to stay at home with her shocked children can at best be of fairly short duration.

[13.10.4] Child's loss of earning capacity: The death of a father may well interfere with a child's career. This might happen, for example, if the family business collapses before the child is old enough to take it over; or there may be a lack of funds during the pre-trial period with a consequent delay with the child's qualification in a professional capacity and subsequent entry into the labour market. A delay of this nature will give rise to a loss of earnings.[355] The

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[347]This holds true for the tax tables applicable in South Africa for the 1992/93 tax year.

[348]See paragraph 13.9.17.

[349]Life insurance and pension benefits payable as a result of the death are ignored in terms of the Assessment of Damages Act 9 of 1969. For this reason a widow may cease to need to work and yet still have a claim for damages for loss of support. Her loss of earnings is, however, a loss of her own making.

[350]Notably Moslems.

[351]See footnote 3.

[352]English and Australian law do not compensate under the dependants' action a purely commercial loss such as loss of a contract of employment or partnership (Luntz `Damages' 2ed 409-10).

[353]For instance, the husband may have worked day shifts and the wife night shifts.

[354]See section 13.6.

[355]See, for instance, *Du Preez v AA Mutual Insurance* 1980 3 C&B 206 (E) 223-4; *Protea Assurance v Lamb* 1971 2 C&B 117 (A) 125-6 (relevant text omitted by editors in 1971 1 SA 530 (A)).

ruling in *Evins v Shield Insurance*[356] suggests that compensation for such losses must be claimed under the action for personal injury. This action is not available if the loss is caused by the death of another without psychological or physical injury to the child. It seems that as a rule the loss must go uncompensated.[357]

[13.11] EMPLOYMENT IN THE FAMILY BUSINESS

[13.11.1] The duty of support: Where the wife works for her husband in the family business she thereby saves him the cost of employing an outsider to do the work. Sometimes the wife will receive salary payments from the business. More often she will receive no explicit salary payments but will be provided with money with which to meet family expenses, possibly through a bank account operated jointly with her husband. In order to test the incidence of the duty of support one must consider a breakup of the family by say, divorce. She would probably find herself without employment but her husband would find himself without her services in the business. The skills applied in the family business may enable her to obtain alternative employment. If so then she is in the same position as regards claiming support from her husband as though she had such employment all along. If she cannot find employment then she will have a right to claim support from a husband whose income has in the meanwhile been reduced by the cost of employing a substitute. In the light of these considerations what then is the loss she suffers in the event of her husband's death?

[13.11.2] Earnings after the death are ignored: If she has taken over the family business and is successfully running it for her own account, this fact must be ignored.[358] The underlying principle would seem to be that a gain or loss of earnings should be dealt with strictly under the action for personal injury and not the action for loss of support.[359] This same reasoning suggests that if the family business has ceased with the husband's death and she becomes unemployed and suffers a loss of earnings then this fact cannot be taken into account when assessing her loss of support. The value of her earning capacity for purposes of loss of support must be determined as though the death had not occurred.

[13.11.3] What model now?: The cost of replacing her services in the family business would be the measure of her earning capacity, and she is to that extent notionally capable of supporting herself. This capacity reduces the value of her right to claim support from her husband. In *Mariamah*'s case[360] the court made allowance for the wife's one-third contribution to earnings derived from the family business by deducting one third from the value of her claim. Both models A and B require a deduction of two thirds.[361] This point is mentioned in the heads of argument for the appeal but is not discussed in the appeal court's judgment. The *Mariamah* case provides no real assistance on the basic principles in this regard[362] save perhaps to emphasise that there is no general principle which the courts consistently apply.

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[356] *1980 2 SA 814 (A).*

[357] *Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A). See too footnote 352.

[358] *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727-8.

[359] *Evins v Shield Insurance* 1980 2 SA 814 (A).

[360] *Mariamah v Marine & Trade Insurance* 1977 2 PH J30 (D); *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A).

[361] One third of the total income from the business is two thirds of the wife's half-share thereof. For example R4000 py out of R12000 py of total income is two thirds of R6000 py, the half share.

[362] *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T); this judgment, like the *Mariamah* ruling, is inconclusive. In *Williams v British America Assurance* 1962 2 PH J18 (SR) the damages were assessed without regard for the husband's earnings nor the saved cost of supporting him!

[13.11.4] Savings in expenditure: The distinction between a wife's services in the home and her services in the family business can be a fine one. It has been said that the capacity to render services in the home, ie home-making capacity, is of the same nature as earning capacity.[363] The wife's work capacity applied to home-making does not affect her right to claim support from her husband whereas the wife's work capacity exercised in the family business does affect her right to claim for loss of support.[364] Yet in both circumstances the wife's services give rise to a saving in expenditure. The activities of the wife in the family business increase the cash income of the family by a saving in business expenditure. The activities of the wife in the home improve the quality of family life and increase the family's spending power by a saving in domestic expenditure.

[13.11.5] Taxation: If a wife ceased to assist in the family business her husband would need to hire a substitute.[365] The overall income of the family would be reduced by this cost. This expense would be tax deductible and should be adjusted for the tax saving. The value of the notional contribution by the wife is thus not the full cost but that cost less tax at the husband's marginal rate. The tax tables for married women are such that it may pay the family to have the wife go out to work and to hire an outsider to perform services in the family business. If, despite the tax advantage, a wife does not go out to work away from home, this would suggest that her contribution to the family business is worth as much or more than her potential net income away from home. For this reason it would usually be reasonable to assess the tax adjustment to the value of the wife's services as though she had worked outside the family business.

[13.11.6] Assessment of damages: In *Porobic*'s case[366] the deceased wife had been running a store on her husband's farm. The loss was assessed by deducting from the income she generated the estimated costs of her support. In *Mariamah*'s case[367] allowance for the wife's services was made by reducing her compensation by one third, this being her agreed contribution to the profits of the business. The children's claims were not correspondingly reduced, as one would have expected had the method of calculation been consistently carried through. The *Porobic* and *Mariamah* judgments cannot be reconciled. In practice it seems likely that damages will be assessed as though the wife had earned as income the deemed value of her services in the family business.

[13.12] REMARRIAGE

[13.12.1] Financial value: If a widow remarries, her right to support is reinstated. On the death of her husband the value of her loss of support is reduced for the contingency of such remarriage.[368] The deduction to be made will depend not only on the percentage chance of

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[363] *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 406-7 read together with 409E.

[364] *Mariamah v Marine & Trade Insurance* 1977 2 PH J30 (D); *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A).

[365] See, for instance, *Plotkin v Western Assurance* 1955 2 SA 385 (W). This matter was concerned solely with past loss. *Erdmann v Santam Insurance* 1985 3 SA 402 (C) sets out the principles governing a future loss in the event of injury to the wife.

[366] *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A).

[367] See footnote 418.

[368] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376D; *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A). More generally see Davel `Skadevergoeding' 124-8.

remarriage but also the likely income, age and other characteristics of the second husband.[369] A second marriage may mean further children.

A deduction for remarriage should also be applied to the value of a lost *spes* of inheritance if the evidence suggests that the notional new husband will have assets and will bequeath some or all of these to his new wife.

The deductions made in practice range from 0% to 70%.[370] This corresponds with the range of deductions indicated by remarriage statistics.[371]

[13.12.2] The remarried widow: If the widow has actually remarried prior to the final assessment of compensation the financial circumstances of her new husband will cease to be a matter for speculation. The new husband may provide not only an income but also prospects of inheritance and services in the home. If the value of support expected from this husband is greater than the value of support expected from the deceased then the claim for future loss of support will fall away. In other words the deduction for remarriage is concerned not only with the right to support itself but also with the value of that right to support. If the value of prospective benefits from the new marriage exceed the value for old marriage then the widow has gained. There is no reason why this gain should not be offset against her past loss of support up to the date of remarriage.

In *Glass*'s case[372] it was ruled that if remarriage has taken place then no regard may be had for the lesser value of the right to support from the second husband. The *Glass* case is couched in disturbingly emotive terms and seems to have misinterpreted the earlier judgments. It seems unlikely that the *Glass* ruling will be followed by future courts.

[13.12.3] Period until remarriage: **The deduction for remarriage reflects the value of the chance of remarriage**. This deduction reduces the `multiplier' used in a gross multiplier calculation[373] and for this reason one finds reference in the literature to a `period of widowhood', that is to say the number of years until remarriage.[374] This simplistic interpretation of the multiplier is misleading and should, if at all possible, be avoided. Consider the following example: The tabular remarriage rate at age 50 for a white woman is 10%.[375] Her expectation of life is 27,8 years.[376] The `period until remarriage' calculated according to the remarriage percentage deduction is then 25 years, that is to say until she is

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[369] *Legal Insurance v Botes* 1963 1 SA 608 (A) 617-18; *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 850. In practice one often finds the widow's calculation of loss of support cut off from the date of remarriage on the grounds that her right to support from a different breadwinner has been reinstated. The *Botes* and *Roberts* judgments state by implication that reinstatement of the right to support does not terminate the claim calculation at that point in time and that regard should be had to the financial value of the new right to support.

[370] Davel `Skadevergoeding' 125n914.

[371] See *Quantum Yearbook* 1993 at 84 (0% to 75%).

[372] *Glass v Santam Insurance* 1992 1 SA 901 (W).

[373] The net multipliers used by the English courts are reduced for all general contingencies (see 97).

[374] Boberg 1966 *SALJ* 402 407-9 `Remarriage is relevant because it reduces the period of dependency'; Boberg 1988 *BML* 55 56 `The whole object of reducing damages for remarriage prospects is to ensure that, theoretically, nothing remains of the award by the time the widow remarries' *Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf.

[375] Thomson 1988 *De Rebus* 67 70.

[376] Koch 1986 *De Rebus* 551 552.

about age 75. This is clearly an untenable proposition. She will either to remarry fairly soon after the death or remain single.[377] Compensation by instalments provides no solution because widows will then just refrain from remarriage.[378]

[13.12.4] Increased remarriage rates: Once endowed with a lump sum the widow's chances of remarriage may be enhanced well above average.[379] Many widows will have forestalled remarriage plans pending the finalization of the claim for loss of support. Deferred marriage plans are likely to have the effect that remarriage rates amongst compensated widows are well above the statistical average. For this reason when assessing damages for loss of support the deduction for remarriage should really exceed the population average revealed by statistical tables.[380]

[13.12.5] Death occasions remarriage: The deduction for remarriage reflects the present utility of the prospect of a second husband. As has been noted in the discussion of causation above, the death of the first husband does not cause this remarriage but occasions it in the sense of increasing the likelihood of such an event in the mind of the reasonable man.[381]

[13.12.6] Divorce rates: Population statistics indicate that about 20% of white marriages concluded in 1960 had been dissolved by 1980, a divorce rate of roughly 1% per year.[382] The divorce rate increases markedly for marriages concluded more recently.[383] The risk of divorce is greatest during the first 5 years of marriage.[384] The conclusion to be drawn from these statistics is that the risk of divorce for a white marriage is substantial and of the order of 1% for each year until about age 55. That is to say about 20% for a couple with an average age of 35. The deduction for the contingency of divorce would be roughly half of 20%, that is say 10%, because even if divorce within 20 years were a certainty the time of that divorce remains unknown. A doomed marriage may yet last a further 10 years. A further adjustment would probably be made for the prospect of maintenance and remarriage.

One thing that is clear from these high divorce rates is that a white married woman has a substantial chance, while married, that in her lifetime she will become divorced from one

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[377]With a fairly remote possibility of a marriage late in life.

[378]*De Wet v Odendaal* 1936 CPD 103 107 `She may also be deterred from a further marriage by the consideration that she will lose the usufruct'; for comparative remarriage rates see Koch 1988 *De Rebus* 631 632. Davel `Skadevergoeding' 128n957 displays little sympathy for widows who deliberately defer remarriage for financial gain.

[379]*Roberts v London Assurance (3)* 1948 2 SA 841 (W) 850; *Trimmel v Williams 1952 3 SA 786 (C) 793C-D; Burns v NEG Insurance* 1988 3 SA 355 (C) 364H.

[380]Such as Thomson 1988 *De Rebus* 67 70. These statistics include remarriages by widows who have waited for damages awards. The extent to which the statistical remarriage rates are distorted by the inclusion of late marriages by compensated widows is not clear, but one suspects that the error is of negligible proportions in so far as damages assessments are concerned.

[381]Boberg 1964 *SALJ* 194 204n52. See section 11.9.

[382]Strijdom in HSRC `Marriage & Family Life' 446 462. For the 1960 cohort the proportion divorced rises quite evenly from 4,7% in the first 5 years to 10,3% after 10 years, 15,3% after 15 years and 19,2% after 20 years.

[383]Strijdom in HSRC `Marriage & Family Life' 446 462 records 8,8% divorces in the first 5 years for 1975 marriages compared to 4,7% for 1960 marriages.

[384]Strijdom in HSRC `Marriage & Family Life' 446 464 records that 39,5% of white divorces in 1984 had a duration of less than 5 years. 11% of divorces were for marriages which had endured more than 20 years.

husband and remarried to another.[385] If her present husband dies this chance of remarriage then increases substantially.[386]

[13.12.7] Remarriage by blacks: The remarriage rates for coloureds and asians are very much lower than those for whites.[387] Little is known of the remarriage rates for blacks. The *ukungena* custom[388] amongst tradition-minded blacks reflects a taboo on remarriage. The wife is considered property in the deceased's estate paid for with the bride price, the *lobola*.[389] A designated male, usually a brother of the deceased, acquires the duty to consort with the wives of the deceased. The primary purpose of this custom is to ensure further children for the deceased's house, `the cattle not the man beget the children'.[390] The custom belongs to a culture where children provide labour and are considered a financial advantage. The custom brings with it a duty to provide support for the children.[391] It seems reasonable to anticipate that with education and urbanization the customary taboos and values will lose strength and remarriage will become more common, possibly moving towards the rates observed for the coloured population.[392]

[13.12.8] Remarriage statistics: The appellate division has seriously undermined the usefulness of remarriage statistics as a basis for dispute resolution.[393] It seems likely that this was unintentional, the emphasis being on the diverse factors which should be allowed to supplement the statistics. That remarriage is a fickle subjective issue is beyond doubt. This, it seems, is all the more reason for preferring an objectively determined statistic to the `gut feel' of the court.[394] Reliance on statistics would place the remarriage issue on the same footing as the allowance for mortality and substantially obviate the need for judges to engage in what many perceive to be distasteful speculation.[395] Depending on the evidence the tabular remarriage rate

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[385]Strijdom in HSRC `Marriage & Family Life' 446 450-3 records copious statistics concerning the status of persons contracting marriages. In 1984 32,3% of white marriages included at least one partner who had been previously divorced. In 13,3% of marriages both parties had been previously divorced.

[386]One is here reminded of the `adequate cause' theory proposed by von Kries (Hart & Honoré `Causation' 2ed 469) that there is causation if the wrongful act has increased the chance of the event by a substantial amount. Causation of remarriage by death clearly falls within this definition. See too 207 above.

[387]Thomson 1988 *De Rebus* 67 70.

[388]Seymour `Customary law' 5ed 286-94; Van der Vyver 1964 *THRHR* 94-115.

[389]Hahlo & Kahn `SA Legal System' 344 `Matrimony (under the old Germanic law) had the features of the African *lobola*-marriage'.

[390]Seymour `Bantu Law' 3ed 266.

[391]Seymour `Bantu Law' 228-9.

[392]For practical purposes one would probably have to give equal weight to the customary law and the social realities reflected in the statistics. This would mean using a remarriage deduction of one half of the coloured rate (see Thomson 1988 *De Rebus* 67 70).

[393]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf `The census statistics … should not be regarded as a starting point, but merely as one of the facts, to be considered along with all the other facts - one of which is that Cupid is notoriously incorrigible and unpredictable'.

[394]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D.

[395]Boberg 1976 BML 113 114. Much of the problems experienced by the courts in this regard would be avoided if the average was taken as a starting point to be modified in the light of the evidence before the court.

may then be adjusted for relevant considerations.[396] One must in any event express serious reservations about the subjective judicial assessment of remarriage prospects for widows from unfamiliar cultural backgrounds. White remarriage rates are very high compared to other social groups in South Africa and a white judge should be wary of overstating the remarriage prospects of a black widow.[397]

It is common that the widow is injured in the same accident that killed her husband. Such widows will usually have reduced chances for remarriage. The loss of marriage prospects is caused by her injury and not by the death of her husband. It follows that her claim for loss of support should be assessed as though she had not been injured and had normal remarriage prospects. She then has a separate claim by way of her personal injury for loss of the financial benefits of marriage.[398]

[13.12.9] Effect of children: Due to the effect of a dowry and forestalled marriage plans the tabular rates are probably too low for widows claiming compensation.[399] The opinion of a white widow on her remarriage prospects has been given little weight[400] whereas the opinion of a black widow has been accepted.[401] The presence or absence of children may require an adjustment to the tabular rate.[402] It needs to be borne in mind, however, that the children will be largely self-supporting due to the award to them of damages.[403] The tabular remarriage rates relate to average widows who would have an average number of children, and a downward adjustment is suggested for widows with more than the usual quota of children. Conversely for the widow without children the tabular rate should be increased.

[13.12.10] Case study: Consider the following circumstances: After the death of the breadwinner, a freshly qualified surgeon, the widow, previously a housewife, trains as a teacher and then marries a teacher and herself continues working. How now is the adjustment for remarriage to be assessed?[404] The new husband earns much less than the deceased. The value of her right to support from her new husband is close to nil because she is largely self-supporting. However, no regard may be had for her earnings.[405] In fairness to the defendant it seems that her earnings should be left out of account when determining the value of her right to support from the second husband.

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[396]Such as cultural and physical factors and the likely level of support from remarriage.

[397]The approach of the court in *Masiba v Constantia Insurance* 1982 4 SA 333 (C) 344-5 was to accept the widow's evidence and make no deduction at all. The defendant did not lead evidence on the point. More generally see Burman `African customary law' 74-81.

[398]See paragraph 12.4.3 and section 13.10.

[399]See paragraph 13.12.4.

[400]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617F `Her attitude is that she will not remarry unless it is necessary to do so to support her child. I think little weight should be attached to her attitude'.

[401]*Masiba v Constantia Insurance* 1982 4 SA 333 (C) 344-5 `having regard to her evidence that she did not wish to remarry in the future, which I see no reason to reject…'.

[402]Boberg 1964 *SALJ* 194 218n43 `I devote no time to consideration of the likelihood of a widow with seven children remarrying'; Davel `Skadevergoeding' 125n20.

[403]*Trimmel v Williams* 1952 3 SA 786 (C) 793C-D.

[404]These are the facts of a claim which was eventually settled on the basis that the period for the claim terminated when the new marriage re-established the right to support. No regard was had for the value of the new right to support.

[405]*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).

[13.12.11] Remarriage by a widower: It does happen that a deceased wife was the main breadwinner. One then needs to consider the allowance to be made for the remarriage prospects of the widower.[406] There are no statistics for remarriage rates for men. These rates will be higher than for women if it be true that there is a tendency that a man on second marriage to chooses a wife very much younger than the first.[407]

The claim by a father for the loss of the services of his deceased wife has been reduced for the contingency that he may remarry and thereby replace the services.[408] If the value of the mother's services has been included in the claims for each child[409] then no deduction would be made for the contingency of the father's remarriage.[410] The father's claim would then include only the value of his share of the deceased's services. Such a claim is properly reduced for the contingency of his remarriage and for what he would otherwise have expended on supporting his late wife.

[13.12.12] Adoption of a child: The adoption of a child will be ignored. The adoption of an orphaned child has been likened to the remarriage of a widow.[411]

[13.12.13] Criticism of the remarriage deduction: The deduction for remarriage has been the subject of substantial criticism.[412] Much of this criticism reflects a failure to appreciate the nature of causation in the sense of occasioning an event.[413] The remarriage deduction is entirely reasonable if lump-sum compensation is seen for what it is, a fair price for which to forego the right to bring further litigation against the defendant.

[13.13] LOSS OF INHERITANCE PROSPECTS

Before discussing the deduction for accelerated benefits it is useful to consider more generally the extent to which damages will be awarded for loss of inheritance prospects. The main concern here is with loss of inheritance prospects occasioned by early death, but other causes of loss of inheritance prospects will be canvassed.

[13.13.1] Interference with testator's free will: Damages will not be awarded for loss of inheritance prospects if a testator has been persuaded to change his will by reason of wrongful conduct.[414] If there has been fraud or duress the new will may be declared invalid.[415] The legal mechanism for righting the balance is by way of forfeiture and not damages.

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[406]If the husband was in ill health, or otherwise disabled from working, then his remarriage prospects may be negligible.

[407]I have been unable to find researched authority for this proposition which seems to be true in terms of general experience.

[408]*Cooke & Cooke v Maxwell* 1942 SR 133; Boberg 1964 *SALJ* 194 216n28.

[409]See section 13.6.

[410]*Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

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

[412]*Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A); 123F; Davel `Skadevergoeding' 127-8.

[413]See paragraph 2.8.2 and section 11.9.

[414]*Millward v Glaser* 1949 4 SA 931 (A) 941; *Hayward v Protea Insurance* 1985 3 C&B 588 (C) 598-601.

[415]Corbett Hahlo Hofmeyr & Kahn `Law of Succession' 77.

[13.13.2] Negligence as to procedures: In *Trumpelmann v Barclays Bank*[416] there was a substantial out-of-court settlement for loss of inheritance. The bank, which held itself out to be an expert in such matters had been negligent in the preparation of a will. There was no interference with the exercise by the testator of his freedom of testation. The wrongful act was negligently to fail to follow the procedures legally required to give effect to that intention. It seems highly likely that a South African court apprised with such circumstances would award damages.[417]

[13.13.3] Caused by early death: Damages for loss of inheritance prospects will be awarded under the dependants' action in conjunction with a claim for loss of support.[418] The most common form of such an award is by way of the deduction for accelerated benefits when a value is placed upon the *spes* of inheritance had the death not occurred when it did.[419] Where the deceased would have received a substantial retirement lump sum had he lived so long then his estate would have been swelled after retirement with an associated increase to the value of the inheritance prospects for his heirs.[420] This circumstance can give rise to a calculable loss of inheritance prospects without there having been any material inheritance at the time of the early death.

The award to a dependant, usually the widow, of the value of lost inheritance prospects is an example of the award of the value of the chance.[421] A proper adjustment needs to be made for general contingencies. It needs to be borne in mind, however, that the dependency calculation based on the deceased's earnings includes that part of the earnings which would have been accumulated as further savings.[422] Because the dependants' action is directed at compensating loss of support it is proper to restrict the award for loss of inheritance prospects to such amounts as would be reasonable for providing ongoing support. As a rule the award for loss of inheritance prospects is made in conjunction with a deduction for what has been inherited. *Mariamah*'s case[423] provides an example of an award for loss of inheritance prospects separately from a deduction for accelerated benefits. This suggests that, **in conjunction with a claim for loss of support, a claim for pure loss of inheritance prospects would receive favourable consideration by the courts**.

Consider the following example: The will of the deceased's father provided that the family farm go to his son, now deceased. The deceased's father dies one year after his son leaving the farm to the deceased's brother. Had the son not died he would have inherited the farm from his father, and the deceased son's wife, now a widow, would have had substantial

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[416] *Trumpelmann v Barclay's Bank* reported in *Sunday Times* 04.10.81 pg 7. At the instance of the bank the will had been initialled on each page instead of being signed in full.

[417] In *Ross v Caunters* [1979] 3 All ER 580 (ChD) damages were awarded to a disappointed legatee because the attorneys had failed to warn the testator as to the proper procedures. See further Cilliers 1980 *De Rebus* 388; Erasmus 1980 *De Rebus* 389; Wunsh 1988 *TSAR* 1; Sonnekus 1981 *TSAR* 172.

[418] *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 481 488-9. In this case the family had lived on drawings from the family business. The drawings were somewhat less than the net profit generated by the business. The unconsumed profits were saved by way of ploughback into the business. The court ruled that the damages calculation should be based on the profits and not the drawings.

[419] See paragraph 13.14.1.

[420] See paragraph 5.5.3#.

[421] See chapter 4.

[422] See footnote 418.

[423] See footnote 418.

prospects of inheritance. This seems to be an instance where an award for the value of the chance of lost inheritance prospects could and should be made.[424]

[13.13.4] Ongoing support from inheritance: The dependants' action is directed at compensation for what has been lost by way of support.[425] The dependants are compensated for loss of inheritance prospects because an inheritance would have provided for the continuation of support.[426] Consistent with this principle a self-supporting child has no right of action for loss of inheritance prospects in the event of the premature death of his father.[427] It follows that any award for loss of inheritance prospects should be limited to what is needed to provide ongoing support. This is particularly relevant when assessing compensation for a dependent child because the chance, the *spes*, of inheritance during the period of dependency will usually be so small that it may be ignored.[428] It also is relevant in this regard that a child is not required to apply inherited capital to meeting the costs of support.[429] It follows that only the income from the inheritance may be brought into account as a deduction.[430] Where the child has inherited cash the interest earned on that money will be deducted. Where the child has inherited real assets, such as a share in the family home, it is by no means clear to what extent the value may be brought into account. In practice one usually assumes that the real asset has been converted to cash shortly after the death.

[13.13.5] Incongruous ruling: In *Burns v NEG Insurance*[431] the deceased's employer had improved the pension fund benefits between date of death and date of trial such that had the employee died at a later date his widow would have received a substantial pension. Because the death was premature the widow did not receive a pension. Compensation was claimed for the value of the loss of this *spes*.[432] The interpretation of the Assessment of Damages Act[433]

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[424]A surviving wife would usually be left the usufruct of the family farm. In the event of marriage in community of property she will often become a half-owner of the farm immediately her husband acquires it.

[425]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E; *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376B; *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[426]*Millward v Glaser* 1949 4 SA 931 (A) 940. Reinecke 1976 *TSAR* 26 50-56 states that there is no good reason for protecting inheritance prospects *per se* (at 55).

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

[428]Davel `Skadevergoeding' 132n2 maintains that a child should be compensated for inheritance prospects falling outside the period of dependency. Reinecke 1976 *TSAR* 26 55 writes as regards this anomaly `Hoekom sou 'n kind wat 'n afhanklike is, maar skadeloos gestel is, se aanspraak sterker wees as 'n kind wat nie 'n afhanklike is nie?'

[429]*Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 612-13; Boberg `Persons & family' 261n56 (footnote continued on page 262).

[430]This was the approach in *Pym v Great Northern Railway Co* (l863) 4 B&S 396 (Ex Ch); 122 ER 508 (Ex Ch).

[431]1988 3 SA 355 (C) 364C.

[432]The Assessment of Damages Act 9 of 1969 precludes a court from taking account of `benefits payable as a result of the death'. The words `the death' seem to confine the application of the Act to benefits payable as a result of the death giving rise to the action for damages. Notional death at some other time does not seem to fall within the ambit of the Act. If the Act was intended to extend to later notional death the word `the' should have been omitted.

[433]9 of 1969.

is not governed by considerations of fairness.[434] Compensation was denied on the grounds that had the deceased died at some later date the widow would then have had no action for damages.[435] The reasoning here is difficult to grasp. If valid it implies that no claim may ever be brought for loss of inheritance prospects. One must conclude that the *Burns* ruling is wrong.

[13.13.6] Loss of life cover: In *De Vos v SA Eagle Versekeringsmpy*[436] the death had prevented the payment of the premium which would have brought life cover into effect under a new life policy. The loss of the benefits under the policy were claimed as damages. Compensation was denied on the grounds that had there been no death the deceased would have been alive and without a right to claim under the policy. This was hardly a good reason for denying compensation because had the deceased still been alive he would have been at risk for dying at some other time at which stage the policy benefit would have been payable. One may observe, however, that the present value of premiums payable under the policy was at least equal to, and cancelled out by, the present value of the chance of benefits payable in the event of death at some later date. The *De Vos* ruling would seem to be correct, but for the wrong reasons.

In the *Burns* matter, it deserves note, the earnings of the deceased had already been reduced for the contribution that he would personally have made to the pension fund, quite apart from the fact that the calculation had ignored all additional contributions that would have been made by the employer towards pension benefits. There was, in the *Burns* case, no question of the offset of gains and losses that validates the *De Vos* ruling.

[13.14] ACCELERATED BENEFITS - GENERAL PRINCIPLES

[13.14.1] Inheritances: On death the assets of the deceased pass to the heirs. The death may also give rise to the payment to the estate of life insurance and pension benefits. The Assessment of Damages Act[437] requires that when assessing damages for loss of support no regard shall be had, inter alia, to life insurance and pension benefits payable as a result of the death. The balance of the estate constitutes a deductible benefit.[438] The appropriate deduction to be made for the gain from an inheritance is a complex issue. For analysis purposes one needs to identify three separate components:

The usufruct: The value of the use of the assets by the family had there been no death.

The inheritance: The value of the assets which have accrued as a result of the death.[439]

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[434] *Du Toit v General Accident Insurance* 1988 3 SA 75 (D) 75inf.

[435] *Burns v NEG Insurance* 1988 3 SA 355 (C) 364F-G `The widow's pension could only have benefited her if he had *not* died in *this* collision but some four or five years later: as a result of some other collision? from cancer? - in which event defendant would have incurred no liability and she would have had only that pension and no damages claim against it'.

[436] 1985 3 SA 447 (A).

[437] 9 of 1969. Discussed at 345".

[438] In England the exclusion now extends to inheritances as well (s3(1) Administration of Justice Act 1982).

[439] *Groenewald v Snyders* 1966 3 SA 237 (A) 248E-F item (a).

The *spes*: The present value of the prospect, that is the *spes*, of inheriting at a later date had the death not occurred prematurely.[440]

[13.14.2] Use of assets: I have already dealt with this topic. Suffice it to say by way of recapitulation that if the breadwinner provided, for instance, the family home it follows that he provided support not only directly by way of a share of his earnings but also by way of a share of the use of the family home. The annual amount provided by way of support should thus be increased to allow for the use of facilities such as the family home.[441] Investments held by the deceased in, for instance the stock exchange, would not have been directly available for use by the family but the associated investment returns would have augmented the income available for the support of the family. It will usually be appropriate to add to the deceased's notional income available for support a real rate of return on the invested assets. The use value of business assets will usually be included in the deceased's reported earnings.[442]

[13.14.3] Changing values: The value of the inheritance will be taken from the liquidation and distribution account after exclusion of life insurance benefits.[443] By the time of the trial the values of the inherited assets will have changed and it becomes necessary to revalue these assets in the light of supervening events.[444] In the absence of explicit evidence it is usually reasonable to assume that growth asset values, like earnings, increase in line with inflation.[445] For depreciating assets, such as a motor car, one might allow for a decline in value.[446]

There is some uncertainty as to whether the deduction for inheritance is subject to currency nominalism,[447] that is to say should not be adjusted for subsequent increases in value, or whether regard should be had to changes in asset values during the pre-trial period. The *Hartley* decision distinguished adjustments for inflation in order to estimate earnings levels during the years following the injury or death, and the additional adjustment for loss of buying power.[448] In *Santam Insurance v Meredith*[449] the value of the business inherited by the widow had decreased substantially during the pre-trial period. The court had regard to this supervening event. The technique of adding inflation to estimate current asset values is not a prohibited adjustment for loss of buying power, but rather an estimate of the current value of the inherited assets. This estimate must of necessity give way to explicit evidence as to the

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[440] *Groenewald v Snyders* 1966 3 SA 237 (A) 248E-F item (b). Reinecke 1976 *TSAR* 26 31 55 points out that the value of the chance of inheritance, the *spes*, forms part of the claimant's patrimony.

[441] See section 13.5.

[442] See analysis in table 19 at 263.

[443] The calculation of the notional estate and distribution is not without difficulties. Not the least of the complicating factors is the Assessment of Damages Act 9 of 1969 (see section 13.17$).

[444] *Legal Insurance v Botes* 1963 1 SA 608 (A) 617; *Santam Insurance v Meredith* 1990 4 SA 265 (Tk). In the latter case the value of the deceased' businesses inherited by the widow had declined substantially after the deceased's death. See too Davel `Skadevergoeding' 122-3; Boberg 1988 *BML* 11 18 55 56n16.

[445] See paragraph 13.5.2!.

[446] See paragraph 13.5.7'.

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

[448] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 840-1. See too paragraph 10.4.4 .

[449] 1990 4 SA 265 (Tk).

TABLE 21 - YEAR-BY-YEAR CALCULATION OF *SPES* OF INHERITANCE

	Life-table chances		Year-by-year method			
Age	Chances of life *A*	Chances of death *B*	Estimated inheritance 13,2%py C	Interest Discount 16%py D	Present Value R AxBxCxD	Age
75	1.000	0.0755	100000	1.0000	8033	75
76	1.000	0.0753	113200	1.0000	9069	76
77	1.000	0.0741	128142	1.0000	10103	77
78	0.972	0.0718	145057	0.9285	9999	78
79	0.915	0.0684	164205	0.8004	8750	79
80	0.857	0.0649	185880	0.6900	7586	80
81	0.797	0.0615	210416	0.5948	6529	81
82	0.737	0.0587	238191	0.5128	5620	82
83	0.674	0.0574	269632	0.4421	4909	83
84	0.610	0.0551	305223	0.3811	4159	84
85	0.544	0.0525	345512	0.3285	3451	85
86	0.478	0.0492	391120	0.2832	2773	86
87	0.413	0.0450	442748	0.2441	2137	87
88	0.350	0.0400	501191	0.2105	1571	88
89	0.290	0.0344	567348	0.1814	1093	89
90	0.236	0.0285	642238	0.1564	717	90
91	0.187	0.0231	727013	0.1348	450	91
92	0.144	0.0182	822979	0.1162	267	92
93	0.108	0.0141	931612	0.1002	152	93
94	0.079	0.0105	1054585	0.0864	80	94
95	0.055	0.0077	1193790	0.0745	40	95
96	0.037	0.0055	1351370	0.0642	19	96
97	0.023	0.0038	1529751	0.0553	8	97
98	0.012	0.0025	1731678	0.0477	3	98
99	0.005	0.0016	1960259	0.0411	1	99
Σ			Total		87521	Σ

actual value of the relevant assets.[450] It will be seen from table 21 below, column C, that the usual calculation of an accelerated benefit includes the assumption that the assets inherited will increase in future on average in line with inflation. In certain circumstances one might assume increases at a rate below the rate of inflation.

[13.14.4] Discussion of table 21: This table shows the detail of the calculation of the present value of the *spes* of inheritance had the deceased not been wrongfully killed when he was. The calculation contemplates a husband and wife both of the same age; it has been assumed that it is the husband who has died and that his widow now claims damages for loss of support. Column A shows the chance in each year that the wife, now a widow, would have been alive to inherit.[451] Column B shows the chance that her husband, had he not died when he did, would have died in some later year.[452] Column C shows the estimated value of the future

[450]This task is greatly complicated by the Assessment of Damages Act 9 of 1969 (see section 13.17$).

[451]Based on life table 2 per *Quantum Yearbook* 1993.

[452]The chances of death shown in this column decrease with advancing age when one would have thought that they should increase. The reason for this anomaly is that the chances of death are calculated taking a stand at age 75. The death rate at age 75 is so high that there are very few persons left to die off at the older ages.

inheritance based on the assumption that the value of the inheritable assets would have increased in line with inflation.[453] Column D shows the discount for investment returns, and the column headed AxBxCxD shows the present value of the loss for each separate future year. These separate losses total R87521, this being the value of the chance of inheritance, that is to say the value of the *spes*.[454] This value may need to be adjusted for general contingencies.[455] Important points to be noted in respect of this calculation are:

[13.14.5] Past loss of inheritance prospects: If the claim is settled some time, say, 3 years after the death then there will be a past loss of inheritance prospects.[456] The total of R87521 in table 12 comprises R27205 by way of past loss of the chance of inheritance, plus R60316 by way of future loss of inheritance prospects.

[13.14.6] Date for discounting: It is settled law that discounting should be done to the date of trial or settlement.[457] It follows that the present value of the *spes* of inheritance should also be calculated by discounting to date of trial or settlement. This needs to stated here because many actuaries continue to discount to date of death for this part of the calculation.[458]

[13.14.7] Projection of future value of inheritance: In table 21 this has been done in line with inflation (column C). This assumption presumes that real assets will increase in value in line with inflation. Some actuaries do the projection using the discount rate of interest instead of inflation.[459] Their reasoning is that all investment returns are ploughed back into increasing the value of the estate. In certain limited circumstances this may be a correct assumption. More usually, however, the family will be using assets such as the family home or a holiday cottage. The assumption that all returns are ploughed back thus ignores the fact that all family members shared in the benefit. For this reason it is preferable to reduce the rate of escalation of assets to the rate of inflation, and sometimes less, and then to add to the family income for apportionment between the dependants the use value of the assets. In certain instances it may even be appropriate to assume that the assets would all have been cash invested at interest, and that the entire interest receipts were being consumed with the support of the family. In this instance the prospective inheritance would be estimated without allowance for any increase in the nominal value of the assets. The discussion thus far has ignored savings from the deceased's income. These will usually be brought into account by apportioning between the

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[453]13,2% per year compound has been used by way of example for expected future inflation. Some actuaries add the full rate of the expected investment return: see Milburn-Pyle & Van der Linde 1974 *TASSA* 292 315. This latter procedure is not generally appropriate (see discussion under paragraph 13.14.7).

[454]For further worked examples see Koch `Damages' 207 289-90 303.

[455]*Groenewald v Snyders* 1966 3 SA 237 (A) 248E `The better way is to value the benefit as the excess of (a) the sum received, over (b) the value of the prospect, which the dependant had, of receiving it eventually. The latter value will take into account any contingencies, such as the possibility that the bread-winner might have altered his testament…'; see too *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 726A. A deduction will generally not be made for remarriage prospects due to the accumulated uncertainty of whether the notional husband on re-marriage will have assets and, if he does, the further uncertainty of whether or not he will bequeath any of them to his wife.

[456]See section 13.13(.

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

[458]Observation based on numerous actuarial reports analyzed by my office up to 1993. The formulation of the deduction for accelerated benefits by Milburn-Pyle & Van der Linde 1974 *TASSA* 292 315 as (1-A). This oversimplification suggests that they too contemplated discounting to date of delict.

[459]See footnote 453.

dependants the deceased's total earnings without adjustment for that part of the earnings which would have been saved.[460]

[13.14.8] Complex contingencies: The year-by-year technique illustrated in table 21 permits the analysis of extremely complex inheritance situations involving 3 lives and more, an important consideration when allowance needs to be made for inheritances which the deceased, had he lived, may have received from his parents. For a civil servant the year-by-year technique provides a properly discounted value for the retirement gratuity which would have swelled his estate had he lived to normal retirement age.[461] There is a simpler, but less accurate, method of calculation based on the expectation of life.[462]

[13.14.9] Inheritance of family business: If the widow has taken over the family business the income she generates will be ignored when assessing her compensation. Only the value of the inherited business will be brought into account.[463]

[13.14.10] The `Maasberg' approach: The view has been expressed that the deduction for inheritance should be assessed without regard for assets which were available for the use of the family prior to the death.[464] Typical of such assets would be the family home and furniture. This view relies on the judgment in *Maasberg v Hunt Leuchars & Hepburn*[465] where in the absence of dependent children the combined add-on value of usufruct and inheritance prospects were assessed as being equal to the deduction of what was inherited with a resulting nil adjustment to the award. The court did not profess to lay down a general rule in this regard. The *Maasberg* approach does not stand up to close analysis[466] and in *Snyders v Groenewald*[467] the court expressed the opinion that some deduction should be made for the advantage of the accelerated receipt of full *dominium* of the family home.[468] For a healthy husband and wife of

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[460] *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 481. See footnote 418.

[461] The rough and ready approach using life expectancies would overstate the relevant value (see paragraph 5.5.3#).

[462] Howroyd 1958 *SALJ* 65 77. See too paragraph 5.5.1#.

[463] *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727-8.

[464] Milburn-Pyle & Van der Linde 1974 *TASSA* 292 316; Newdigate & Honey `MVA Handbook' 180(c). This approach reflects English law (McGregor `Damages' 14ed 913). It is most appropriate in jurisdictions where the dependants claim as a group (see section 11.4#). Under South African law each dependant has a separate claim (*Constantia Insurance v Hearne* 1986 3 SA 60 (A)). What is more, South African law does not acknowledge the existence of indivisible household expenses (see Davel `Broodwinner' 111; footnote 187 above).

[465] 1944 WLD 2 13-14.

[466] See discussion in paragraphs below.

[467] *1966 3 SA 785 (C) 791D `It seems to me that the dominium* acquired by plaintiff under the will is a benefit over and above that enjoyed by her before her husband's death, and that some deduction must be made for this'. See too Milburn-Pyle & Van der Linde 1974 *TASSA* 292 316-19.

[468] Consider a childless married couple both aged 40 and a family home valued at R100000. The *Quantum Yearbook* 1993 at 74 shows the value of the *spes* of inheriting R100000 to be 0,3410xR100000=R34100. The yearly value of the use of one half of the house may be estimated as half of 2,5% py on R100000, ie R1250 per year; this has a present value of R25580 if one discounts at 2,5% per year over the 27,52 years which is the joint life expectancy of the couple. The net gain for the widow immediately after the death is R40320 (100000 - R34100 - R25580). This is significantly different from the nil deduction adopted in *Maasberg*'s case. The use value of R1250 per year may seem very low but one must bear in mind that this is the rental value net of all maintenance and running expenses which would have been met out of the deceased's earnings (see section 13.5).

equal age the value of the spes is generally less than one half of the value of the relevant asset.[469]

Central to the treatment of the family home is the question of indivisible household expenses. In *Legal Insurance v Botes*[470] the widow was awarded only 50% of the rental cost of the flat occupied by herself and her husband jointly. The court dismissed the argument that the cost of providing her with alternative accommodation would probably have been a good deal more than the figure awarded. It seems that no express evidence had been led as to the cost of alternative accommodation. The allocation of one half seems to reflect an extension of the two-parts-one part formalism. If so then evidence as to the actual cost of alternative accommodation may well be admissible. There is authority for allowing the widow's relocation costs as part of the damages for loss of support.[471] The use of the two-parts-one-part formalism reflects a focus on the utility of what would have been provided had there been no death, rather than the need of the dependant having regard to the death.

[13.14.11] Family home out of community: If the marriage was out of community of property the wife would have shared the use of the family home with her husband, that is a one-half share of the usufruct.[472] Suppose that on the death of her husband she inherits the entire family home. The value of a usufruct, any usufruct, is always less than the value of unencumbered ownership, particularly when the usufruct is over a limited period such as a lifetime. This means that the value of what has been lost by way of one half of the use of the family home is less, often considerably less, than one half of the value of the family home.[473] The widow has, on the other hand, gained by way of the full ownership of a home which she only occupied prior to the death. Even if one then brings into account the value of the *spes* she had of inheriting this home at some other time she still has a net financial gain.

For an aged or sickly breadwinner and a youthful wife it is conceivable that the value of the *spes* of inheritance in the event of the death of the breadwinner substantially exceeds one half of the value of the asset. However, the same factors that swell the value of the *spes* will markedly reduce the value of use during the breadwinner's lifetime.

[13.14.12] Family home in community: If the marriage was in community of property the wife would have owned one half of the family home in her own right. The benefit of one half of the use of the house which she enjoyed would have been derived, not from her inheritance but from her own half share. She was thus fully self-supporting as regards her own occupation of the family home. Her future inheritance of her husband's half share would thus be a deductible

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[469]See table of values for inheritance prospects published in *Quantum Yearbook* 1993 at 72-83. For a couple both aged 40 and subject to table 2 mortality the value of the *spes* of inheriting a home worth R100000 is R34100. From this should be deducted contingencies of about 15% giving a net value for the *spes* of R30000 in round figures.

[470]1963 1 SA 608 (A) 616D-F. More generally see 293 and 299#.

[471]*Laney v Wallem* 1931 CPD 360 364 `Then also the reduction in expenditure, which the death of the head of the household warrants, cannot at once be put into force when he is taken away suddenly. The house cannot be let immediately, servants cannot at once be dismissed'.

[472]*Legal Insurance v Botes* 1963 1 SA 608 (A) 616B-F makes it clear that the widow's compensation must be based on one half of the value of the use of the family home. In this matter it had been argued that after the death she still required the entire home. See too *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 647-9; Davel `Skadevergoeding' 111.

[473]See footnote 468.

gain[474] adjusted only for the *spes* of notional later inheritance.[475] It could be argued that her half-share derives entirely from the past earnings of the deceased and thus that the fact of her half ownership should be ignored. This reasoning, however, overlooks the fact that the asset had accrued to her by the time of the death, it was hers whatever its source.[476] The calculation of future loss of support, because it includes allowance for savings, would include the value of such future accruals.

[13.14.13] Deprived children: When assets used by the family are ignored as in the *Maasberg* case, then nothing is added to the claims of the children for what they have lost by way of use of such assets. *Groenewald v Snyders*[477] requires that when assessing the claims of the children no regard should be had to the support which they may now claim from their mother. This would include a right to occupy the family home which now belongs entirely to their mother. If there had been divorce and remarriage prior to the death, some of the children of the deceased may, after his death, be sent back to their mother, the wife of the first marriage. There is then no question of them continuing to share the family home.

[13.14.14] Right of recourse: The Apportionment of Damages Act[478] gives the defendant a right of recourse against the estate of the deceased if the deceased was contributorily negligent in bringing about his own death. This issue has already been discussed.[479]

[13.15] ACCELERATED BENEFITS - SELECTED PROBLEMS

[13.15.1] Funeral expenses: The person who pays the funeral expenses may recover them from the wrongdoer.[480] The loss suffered is the accelerated value of the funeral expenses, that is the cost actually incurred less the prospect of incurring the expense in years to come.[481] The practice in this regard is to award the full cost incurred without any abatement for the chance that the expense would have been incurred in any event at some later date. In practice the overstatement of the loss is largely offset by the non-award of interest on the damages and a rough justice is thereby achieved.

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[474] *Botes v SAR* 1937 2 PH J18 (C). In this matter the court erred by failing to make an adjustment for the *spes* of later inheritance. Because the wife had provided her own half share of the accommodation there should be no adjustment for loss of use. See too *Legal Insurance v Botes* 1963 1 SA 608 (A) 621E-G.

[475] The figures in footnote 468 contemplate a marriage out of community of property. If the marriage had been in community of property the widow would have inherited one half of the family home worth R50000, the other half would have been hers by right, by reason of the community of property. The present value of her *spes* of inheriting this half share at a later date is one half of the value calculated under footnote 468, that is to say R17050 (half of R34100). Her half share of the use of the house was the half share she owned; her husband thus contributed nothing to her support by way of the use of half of a house. She has thus inherited R50000 and lost a *spes* worth R17050, a net gain of R32950 at the time of the death, assuming that a nil deduction for general contingencies is appropriate.

[476] See paragraph 13.5.4%.

[477] 1966 3 SA 237 (A) 247A-D.

[478] 34 of 1956 ss2(1B) 2(6)(a); Boberg 1971 *SALJ* 423 441-58.

[479] See section 13.16".

[480] *Rondalia Assurance v Britz* 1976 3 SA 243 (T); *Commercial Union Assurance v Mirkin* 1989 2 SA 584 (C). This will include the cost of a tombstone *Commercial Union Assurance v Mirkin* 1989 2 SA 584 (C). The costs of a wake would also seem to be recoverable.

[481] Reinecke 1976 *TSAR* 26 34-5.

[13.15.2] Testamentary support: The claims by children will not be abated if, after the deduction for accelerated benefits, the widow has a financial gain.[482] This principle ensures that the widow is able to treat her inheritance as though the children were all self-supporting, as would have been the case had the death occurred in later life. However, if the will explicitly directs the widow to use her inheritance for the support of the children it is difficult to avoid the conclusion that this is a testamentary disposition in favour of the children which must be brought into account against their claims.

[13.15.3] Gratuitous transfer of inheritance: A mother may gratuitously transfer her right to inheritance to the children. This could be achieved by donation, sale on favourable terms, or a refusal to adiate. It seems that the damages for both her and the children should be assessed as though the disposition had not been made. Her gratuitous act is *res inter alios acta*.

[13.15.4] Loss of benefits of divorce: When husband and wife divorce the court is empowered to order a redistribution of assets.[483] In the event of death prior to divorce there is no provision for such redistribution but the widow does have a right to claim maintenance from the deceased's estate.[484] A widow is not obliged to mitigate her damages by claiming such maintenance.[485] It is appropriate to make a deduction for the contingency of divorce.[486] An untimely death of the husband prior to the divorce would deprive the widow of the prospect of a substantial transfer of assets on divorce, a consideration which may well offset any deduction which might otherwise have been made for the contingency of divorce. This consideration would be particularly relevant if divorce proceedings were in progress at the time of the death. A divorced woman has no claim for damages for loss of support.[487] The position of a woman who is about to divorce is unclear, but one may speculate that the court will take a generous view.

[13.15.5] Support claimed from estate: The children have a right to claim support from the estate of their deceased breadwinner.[488] A wrongdoer cannot demand that the children mitigate their loss by exercising this right.[489] In *Heyns* case it was held, however, that if the children have exercised their right against the estate before finalizing their claim for damages then the value of support from the estate is deductible.[490] The claim against the estate is for future support and is granted on the understanding that the child will be in need in future years. An award for damages would render the child self-supporting without any payment from the estate being necessary. The executor of an estate who admits a claim for support by children who have a right to damages would seem to be acting contrary to the interests of the heirs and may well incur personal liability for such an oversight. The provision of support from an estate is

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[482] *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[483] s7 Divorce Act 70 of 1979.

[484] Maintenance of Surviving Spouses Act 27 of 1990.

[485] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A; *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[486] *De Jongh v Gunther* 1975 4 SA 78 (W).

[487] See paragraphs 13.2.19" and 13.2.20".

[488] See paragraphs 6.4.4) and 13.2.17).

[489] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A; *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D. Contra Reinecke 1976 *TSAR* 26 50-56. See too 285 above.

[490] *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86). To the extent that such support derives from life insurance money it must be ignored.

claimed not as an inheritance but as a debt owing by the estate.[491] The *Heyns* ruling offends against the principle that alternative sources of support after the death should be ignored.[492] The proper approach seems to be that the payments of support by the estate should be ignored. If any payments have been made the estate should be entitled to recover these from the child by way of the *condictio indebiti*, after damages have been awarded.[493]

[13.15.6] Usufruct: It is common with large estates that the widow is left a lifetime usufruct of the entire estate while the children inherit the *nudum dominium*. Alternatively, this may be structured as a trust with the children as reversionary beneficiaries. The yearly value of a usufruct over real assets, ie immovable property or shares, will usually increase over the years, probably more or less in line with inflation.[494] The value of the *nudum dominium* will usually increase similarly. The value accorded to the use of immovable property is the open-market rental value reduced for running costs and maintenance.

A usufruct over money usually implies the right to take the full nominal rate of interest. The value of the *nudum dominium* will then not increase but remain constant in nominal terms.

The usufruct over assets in general will usually include the right to switch assets between, for example, growth assets and cash deposits, although there may be restrictions on the disposal of immovable property, such as a farm. Due to the complications created by insurance pay-outs the mix of assets at the date of death is often a decisive factor when valuing the usufruct.

[13.15.7] Fideicommissum: The value of a *fideicommissum* would probably be assessed on the same basis as a usufruct. A *fideicommissum residui* would have a larger value to the holder than a *fideicommissum* which requires onward transmission of undiminished assets.

[13.15.8] Massing: This gives a rise to a usufruct for the surviving spouse over the combined assets of husband and wife. The children become owners of the *nudum dominium* of the entire joint estate. The death thus deprives the widow of the ownership of her own assets. The accelerated value of this loss should be offset against the gain by way of the accelerated value of an unshared usufruct over the deceased's assets.

[13.15.9] Inheritances by children: A child who inherits the *nudum dominium* of an asset cannot in any way utilise this to meet the costs of his support.[495] It seems correct that a child's claim should not be reduced by reason of such an inheritance. This same consideration suggests that a deduction should also not be made from the child's compensation for the value of the *spes* of receiving full ownership in the distant future when self-supporting. A child who inherits full ownership, usually in trust, is not required to utilise capital to meet the costs of support unless ordered to do so by a court.[496] It follows that the deduction for such an inheritance should be limited to the income derived from the inheritance during the period of

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[491] See paragraph

[492] *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[493] See Visser 1988 *THRHR* 492-507; *Van Zyl v Serfontein* 1992 2 SA 450 (C); *Muller v The Master* 1992 4 SA 277 (T) for the requirements for bringing the *condictio indebiti*.

[494] See section 13.5.

[495] Amongst Indian families the *nudum dominium* is commonly left to the oldest son with a usufruct to his mother. Under black customary law the entire estate goes to the eldest son of the deceased (Seymour `Customary law' 5ed 274-9).

[496] *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 612-13. In *Ex parte Jacobs* 1950 2 PH M26 (O) in a claim for maintenance from a deceased estate the court ordered that a deduction be made for the full amount of the child's capital.

dependency. If the inheritance is a cash sum the income is the nominal interest return on the capital. For real assets such as lettable property the income may be the rental income net of expenses. If the rule against consumption of capital views capital as the nominal value inherited at death then the child may be compelled, notionally at least, to convert growth assets into fixed interest assets. The value of the *spes* of receiving this income had death not occurred when it did is generally so small that it can be ignored.[497]

[13.16] APPORTIONMENT OF DAMAGES

[13.16.1] Contributory negligence of deceased: The Apportionment of Damages Act[498] provides that if the deceased was contributorily negligent in bringing about his own death then the wrongdoer and the estate of the victim are to be joint wrongdoers.[499] The wrongdoer is obliged to pay in full but has a right of recourse against the estate assets to the extent that such assets have not been brought into account in assessing the damages. When the estate has no assets, as happens with the vast majority of deceased victims in South Africa, the wrongdoer is without recourse.[500] The so-called `1% rule' then applies[501] whereby the wrongdoer incurs liability for 100% of the damages notwithstanding contributory negligence of only 1%. The dividing line between this and absolute no-fault liability is extremely fine. A defendant may no longer avoid liability by reason of the so-called `last chance' rule.[502]

[13.16.2] Assets protected against recourse: The wrongdoer who seeks a contribution from the estate of the deceased may only proceed against assets which were not brought into account in assessing the damages.[503] The widow who has inherited will have her damages reduced by the accelerated value of her inheritance. The accelerated value is calculated as the amount actually inherited less the value of the chance of inheritance at some later date.[504] It has been suggested that a defendant may recover from the excess of the inheritance over the amount actually deducted.[505] The better view is that protection extends to the full amount inherited.[506] To the extent that persons other than dependants have inherited[507] the assets are available to

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[497]See footnote 428.

[498]34 of 1956 ss2(1B) 2(6)(a); Boberg 1971 *SALJ* 423 441-58.

[499]ss2(1B) 2(6)(a) of the Apportionment of Damages Act 34 of 1956; Boberg 1971 *SALJ* 423 441-58; Davel `Skadevergoeding' 82-4.

[500]With small estates it is usual that the widow takes over the assets and signs an undertaking to pay all debts of the estate (s18(3) of the Administration of Estates Act 66 of 1965). It is conceivable that a wrongdoer may exercise a right of recourse against such a widow. It is doubtful, though, that the Master would require the widow to meet such a claim. An executor could then be appointed and the estate wound up as insolvent.

[501]*Union Government v Lee* 1927 AD 202.

[502]Davel `Skadevergoeding' 85-6.

[503]s2(6)(a) of the Apportionment of Damages Act 34 of 1956.

[504]*Groenewald v Snyders* 1966 3 SA 237 (A) 248E-F `The better way is to value the benefit as the excess of (a) the sum received, over (b) the value of the prospect which the dependant had of receiving it eventually'. See section 13.14.

[505]Davel `Skadevergoeding' 84; Newdigate & Honey `MVA Handbook' 189(c).

[506]The expression `accelerated benefits' lumps together as one net amount a deduction for the full amount inherited with an add back for the *spes* of inheritance at some later date had the death not occurred when it did (see section 13.14). If one has regard to the separate components of the deduction then it is clear that the entire inheritance is brought into account when assessing the damages (Corbett & Buchanan 3ed 95).

[507]A house or farm or business may be left to an older self-supporting son.

satisfy a right of recourse. If the assets have been distributed the wrongdoer who has paid may recover by way of the *condictio indebiti*.[508]

[13.16.3] Recourse against life insurance payments: The Assessment of Damages Act[509] precludes a court from making a deduction for the accelerated value of life insurance payments made to the estate. It follows that such life insurance monies are not taken into account by the court when assessing damages. The proceeds of the policies are thus available to satisfy the defendant's right of recourse. The first R10000 of policies which have been in force for longer than three years is protected under the Insurance Act.[510] If it is the widow who has inherited then the right of recourse may be effected by an offset against her claim for damages. She will then have to bear the burden of apportionment not only for her own claim but also for the claims of the children.

[13.16.4] Assets used by the family are protected: In order to allow for the value of the use but for the death it is common to make no deduction for the accelerated value of the family home, furniture and car.[511] The reasoning underlying this approach is that the gain of these effects offsets a loss suffered of equal value.[512] It follows that the family home, furniture and car, have, in an in-out sense,[513] been taken into account in assessing the damages and are thus not available as assets to satisfy the wrongdoer's right of recourse.[514]

[13.16.5] Two schools of thought: The prevailing state of the law governing the effect of the contributory negligence of a deceased breadwinner reflects a compromise[515] between two different viewpoints:

* The first school points out that the dependants' right of action arises by reason of the death and lies directly between the dependants and the killer. The wrongful conduct of the breadwinner in bringing about his own death is a matter between the wrongdoer and the deceased. Because the dependants did not act negligently in bringing about their loss they are accordingly entitled to damages without reduction for the contributory negligence of their breadwinner.

* The second school takes the view that value of the right to support which has been lost is only as good as the breadwinner himself. This school does not deny that the right of action of the dependants is separate and distinct from that of their breadwinner. It does

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[508]See Visser 1988 *THRHR* 492-507; *Van Zyl v Serfontein* 1992 2 SA 450 (C); *Muller v The Master* 1992 4 SA 277 (T) for a discussions of the requirements for bringing the *condictio indebiti*.

[509]9 of 1969. For a fuller discussion of this Act see 345".

[510]ss39 40 of the Insurance Act 27 of 1943. Newdigate & Honey `The MVA Handbook' 189 take this to mean `R10000 of life cover'. An alternative interpretation is `R10000 of surrender value immediately prior to the death'. The death claim values for such policies may amount to several hundred thousand rand. s45 states that the judgement creditor or executor may choose which policies are available for satisfaction of the claim.

[511]Newdigate & Honey `MVA Handbook' 180(c) (the relevant case is *Maasberg v Hunt Leuchars & Hepburn Ltd* 1944 WLD 2 and not the one cited). It is doubtful that this rough and ready approach is generally valid: see Koch `Damages' 194-5 207-11; Davel `Skadevergoeding' 123.

[512]*Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 13-14. See 333 below.

[513]See 183 for the in-out adjustment for pension benefits received by an injured victim.

[514]Newdigate & Honey `MVA Handbook' 189(A) express the contrary opinion but seem to have failed to appreciate the reasoning behind ignoring the assets.

[515]Boberg 1971 *SALJ* 423 446-59.

maintain, however, that the economic value of what may be claimed in terms of that right is intimately affected by the conduct of the breadwinner.

It deserves note that the contract of employment of the deceased lies between himself and his employer. The dependants are not party to this contract and yet they may rely thereon for purposes of proving the quantum of their damages. If the evidence reveals that the deceased was an irresponsible or reckless person this will lead to a substantial deduction for general contingencies. In other words the past and anticipated future negligence of the breadwinner in the conduct of his financial affairs will affect the damages claimable by the dependants. If a breadwinner had been dismissed from his job shortly before his death this would be taken into account when assessing the damages. If he chooses to commit suicide the dependants have no right of action. If he chooses to drive recklessly and is then killed it seems perfectly reasonable that the dependants should carry that part of their loss attributable to the conduct of their breadwinner.[516]

A major criticism of the logic of the first school is that it is unduly legalistic.[517] It ignores the economic realities.[518] The major argument in its favour is that, whatever the failings of the breadwinner, society should ensure adequate support for needy dependants. However, if this is to be the guiding factor then all needy dependants should be compensated regardless of considerations of fault.[519] It would be wrong when distributing public funds to create a privileged class.[520]

[13.17] INSURANCE AND PENSION BENEFITS

[13.17.1] Unfair legislation: An important function of insurance and pension benefits it to ensure adequate funds for the support of dependants after the death of the breadwinner.[521] The support lost by dependants will include the value of savings,[522] including savings through the medium of insurance policies and pension funds. Such considerations notwithstanding legislation has been passed which precludes a court from taking account of pension and insurance benefits payable as a result of the death.[523] The effect of this Act is that a dependant

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[516]This problem has been resolved in English, Canadian and Australian law by giving to the dependants no better right after the death than the breadwinner would have had in the event of his being injured and personally suing for loss of earnings. (Davel `Broodwinner' 160-1; Cooper-Stephenson & Saunders `Damages in Canada' 406-7; Luntz `Damages' 2ed 109-15).

[517]Van der Walt `Sommeskadeleer' 59 66 86 165 241 282 285 has criticized the analysis of damages assessment in terms of the legal science of rights and obligations; see too Bloembergen `*Schadevergoeding*' 22 26-7; 48 above.

[518]`Dit klink waarskynlik logies… Daar by die verhoor gekyk moet word na al die gebeure wat dit voorafgegaan het en om skadevergoeding in die lig van al die bekende feite en die werklikhede te bepaal' *General Accident v Summers* 1987 3 SA 577 (A) 612G 615B.

[519]The modern dependants' action in South Africa compensates on the basis of loss not need. For instance life insurance and pension payments to widows will be ignored in terms of the Assessment of Damages Act 9 of 1969.

[520]`We see no reason why victims of traffic accidents must be favoured above others' Grosskopf Commission report (1981) 14.

[521]*Groenewald v Snyders* 1966 3 SA 237 (A) 247 248sup `Buying insurance cover is a recognised feature of family protection in modern times'; *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704H `Her husband would probably have secured her future, if he were to predecease her, by insurance or suitable investments'.

[522]*Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 488-9.

[523]Assessment of Damages Act 9 of 1969.

may claim compensation for the loss of savings whilst at the same time enjoying the benefit of those same savings.[524] There are numerous objections to this legislation, most notably that it creates a privileged class of claimants.[525] Certain points governing its application deserve mention:

[13.17.2] Benefits deemed non-existent: The Act states that insurance and pension benefits payable as a result of the death shall not be taken into account when assessing damages for loss of support. This means that compensation is to be assessed as though the benefits do not exist.[526] It follows that estate duty should be recalculated on the reduced value of the estate.[527] The executor's fees should similarly be recalculated. If the widow has inherited shares in a company the value of which has been enhanced by the payment of an insurance benefit on the life of the deceased then the shares must be revalued as though the insurance payment did not exist.[528]

[13.17.3] Not all benefits are payable as a result of the death:[529] The pension under a retirement annuity plan, for instance, may continue to be payable for a total of 10 years by reason of the original contract concluded by the deceased. The rules of some pension funds may provide for a continuation of part or all of the deceased's pension.[530] Such pension benefits do not fall within the definition of the Act[531] and are thus deductible when assessing damages for loss of support, subject to an adjustment for acceleration.

[13.17.4] Deductible life insurances: The deceased may have been owner of policies on the lives of his children or his business partners or his wife. The surrender values of such policies will be included as assets in the estate accounts. These are not benefits payable as a result of the death and should be included in the deductible value of the deceased's estate. Sometimes the death occurs shortly after the maturity date of an endowment policy. The benefit paid to the estate is then not payable as a result of the death but as a result of the maturity. One also encounters instances where a woman has been twice widowed. The pension and life insurance

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[524] *Du Toit v General Accident Insurance* 1988 3 SA 75 (D): The deceased had been a pensioner. The provision of a pension from the same pension fund but under a different paragraph in the rules was held to be non-deductible in terms of the Act. I have under paragraph 13.7.10 discussed the inclusion of life insurance premiums in the income apportioned between dependants.

[525] Koch 1989 *THRHR* 203 214-15. Contra Van der Walt `Sommeskadeleer' 229; 1980 *THRHR* 1 19. Van der Walt views the Act as an example where public policy justifiably overrides logic. The Act undoubtedly echoes the irrational sentimentality with which many view the phenomenon of death. At a more mundane level it reflects successful opportunism by life insurance offices with a view to promoting sales (Boberg 1964 *SALJ* 346 353-4 records the early history of this legislation). The major criticism of the legislation is that it favours those who can afford life and pension benefits.

[526] *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86).

[527] In England the courts have refused to adjust estate duty on the grounds that the duty was a debt owing by the estate which could not be apportioned to individual assets (*Baker v Hopkins* [1958] 3 All ER 147 (QBD); Boberg 1964 *SALJ* 346 357-8). In South Africa s13(2) of the Estate Duty Act 45 of 1955 prescribes a formula for apportioning the duty between assets. This formula has regard to the life insurance benefits paid. The better view is to exclude life insurances from the estate altogether and then to re-assess the estate's notional liability for duty, if any.

[528] *Malyon v Plummer* [1963] 2 All ER 344 (CA); *Pitt v Economic Insurance* 1957 3 SA 284 (D) 286F-inf; Boberg 1964 *SALJ* 346 359n52.

[529] *CIR v Nolan's Estate* 1962 1 SA 785 (A).

[530] *Du Toit v General Accident Insurance* 1988 3 SA 75 (D). In this matter the court found that in terms of the fund rules the widow's pension was not a continuation of the deceased's pension but a new and separate entity.

[531] Assessment of Damages Act 9 of 1969.

benefits provided as a result of the death of the first husband do not fall within the ambit of the Act[532] and should thus be brought into account when assessing the damages for loss of support from the second husband.

[13.18] THE `LOST YEARS'

[13.18.1] Dependants' right of action: When a breadwinner is seriously injured his loss is shared by his family in the sense of a reduced value for their right to support. The compensation awarded to the breadwinner for his personal injury notionally restores the value of the dependants' right to support.[533] However, if the breadwinner has suffered a reduction to his expectation of life he will receive no compensation for the `lost years'.[534] The dependants have then *prima facie* suffered a loss of support in respect of the `lost years'. There are three main methods for dealing with this problem in equity:

Method 1: Wait until death: The dependants could wait until the breadwinner eventually dies before they bring their claim.[535]

Method 2: Immediate increase to breadwinner's claim: The breadwinner could include in his claim the value of the support lost by the dependants during the `lost years'.

Method 3: Immediate separate right of action for dependants: Allow the dependants to bring their own actions for loss of support concurrently with the action by their breadwinner for loss of earnings.[536]

The position in South African law is that the dependants must wait for their right of action for loss of support until their breadwinner eventually dies,[537] that is to say that method 1 applies.

[13.18.2] Difficulties with evidence: The requirement that the dependants must wait until death actually occurs presumes that proof of cause of death, when it occurs, will be a straightforward matter. This is to be doubted. Proof of cause of death 10 or 20 years after the date of the original injury is likely to be a highly contentious matter. The absence of reported judgments on this subject[538] suggests that it is so contentious that litigation is considered unduly risky and dependants go uncompensated for a loss genuinely suffered, albeit in a contingent sense.

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[532]Assessment of Damages Act 9 of 1969.

[533]*De Vaal v Messing* 1938 TPD 34 38; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 303-4. Under the dependants' action itself there is some overlapping of rights of action (Dendy 1990 *SALJ* 155-167) but this only arises once death has occurred.

[534]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306F-G. See 227 above for further discussion.

[535]This is the approach proposed by Reinecke 1976 *TSAR* 26 50-56 coupled with a claim by the breadwinner during his lifetime for what he would have earned during the `lost years'.

[536]See footnotes 551 and 552.

[537]*Ex parte Oliphant* 1940 CPD 537 543-4; *Evins v Shield Insurance* 1980 2 SA 814 (A) 839E-F `The cause of action for loss of support …will arise only upon the death of the deceased, which may occur some considerable time after the accident'. This statement is clearly *obiter*, but, considering the history of the dependants' action, would probably be decisively persuasive. See too *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 303-4. English law on this subject needs to be received with considerable caution on this topic because under English law the award of compensation to the breadwinner precludes the dependants from thereafter bringing an action for loss of support (McGregor `Damages' 14ed 861 862; Cooper-Stephenson & Saunders `Damages in Canada' 240; Luntz `Damages' 2ed 399-400).

[538]*Ex parte Oliphant* 1940 CPD 537 was concerned with death within 12 months after the injury.

Consider the following list of causes of death for paraplegics: renal failure (15,3% of deaths); cardiovascular failure (19,6% of deaths); respiratory failure (13,9% of deaths); and suicide (10,8% of deaths).[539] In many instances it will be extremely difficult many years after the original injury to establish a causal link between the original injury and the eventual death.[540] Not the least problem will be an ever-increasing list of supervening events. Thus, for instance, the death of a paraplegic who fails to obtain medical assistance for pressure sores cannot be imputed to the person who caused the paraplegia.[541] And yet numerous deaths of this nature are included in the normal average mortality statistics for paraplegics.[542] Is it fair to burden a defendant with damages for a death where the proximate cause is the deceased's own negligence? One may note that the early death of a paraplegic due to his own negligence with handling his condition is a foreseeable event. What is more the condition of paraplegia increases the degree of health care needed in order to stay alive. If one bears in mind that legal causation is largely a question of judicial policy then there is much to be said for ignoring the deceased's own negligence, and even *dolus*, as regards his health care. However, even if the deceased had not been injured he would have been at risk for dying early at some other time due to the normal hazards of life. It would not be fair to burden a defendant with the cost of the chance of loss of support in the normal uninjured course of events. The defendant's liability is for the increased risk of such loss. The problem with waiting until death actually occurs many years later is that the health consequences of paraplegia will be a contributory factor in most instances. The court will then be faced with a complex web of supervening causes which will complicate, rather than facilitate, the problem of allocating responsibility for the loss suffered by the dependants. **One solution to this problem of allocating responsibility for the loss would be to apportion the loss of support on the basis of the increased statistical risk of death occasioned by the original injury.** Such an allocation is best done while the breadwinner is still alive, and concurrently with assessing his own damages for personal injury.

Quite apart from the problems with cause of death it is quite conceivable that 10 or 20 years after the event the defendant is untraceable. The injury would have interrupted the breadwinner's career 10 or 20 years earlier. The dependants' loss should be measured in terms of that notional career path. The employer may be untraceable or so changed in character that a career path cannot be identified. Interpreting extensive facts can be a daunting and inconclusive task. The employer and the insurer will often, after 5 to 10 years, have destroyed all records relating to the deceased.

The above considerations suggest that the rights of the dependants, and the defendant, are not adequately protected by granting a right of action when a compensated breadwinner eventually

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[539]Geisler *et al* 1983 *Paraplegia* 364 369.

[540]Alternative consider the deleterious effects of liver failure caused by injury which will impede a breadwinner's judgment resulting in his dying by, for example, a fall down a staircase or carelessly stepping into a lane of fast traffic. The same may happen to a person with a brain injury.

[541]*S v Mokgethi* 1990 1 SA 32 (A).

[542]The statistic for suicides probably excludes those who wilfully induce their death by drinking, smoking, or otherwise failing to follow medical advice.

dies. The case law is such that reform needs to be introduced by legislation.[543] But what form should it take?

[13.18.3] Reform: Whatever method is adopted, the dependants should receive immediate rather than deferred compensation for the prospect of loss of support during the `lost years'. The advantage of processing the dependants' claims at the same time as that of the breadwinner is that all the relevant evidence will be on hand. This will ensure, inter alia, that the dependants are informed that they have an action in law. Compensation for dependants at the time of the breadwinner's claim would be achieved both by method 2 and method 3 above. Method 3 is to be preferred in that it removes from the discretion of the breadwinner the disposition of funds relating to events notionally after his death.[544] Bearing in mind that dependants, both widow and children, have a right to support from their breadwinner's estate[545] this consideration is not a weighty one. Adoption of method 2 has the disadvantage that a breadwinner who settles his claim for damages thereby contractually deprives his dependants of their rights of action under the dependants' action. This would be contrary to one of the fundamentals of the dependants' action.[546] Burchell records that the Law Commission in England[547] has rejected as too complicated the granting to the dependants of a separate right of action during the `lost years', that is to say a solution according to method 3.[548] South African lawyers on the other hand are familiar with the logistics of separate rights of action for each dependant.[549] The objection recorded by Burchell probably has much less force in South Africa than in England. The granting of separate rights of action to the dependants at the time of the injury ensures that a plea of *res iudicata* may be raised against the same dependants if the breadwinner subsequently dies under circumstances which can be directly imputed to the injury, that is to say circumstances which would give rise to claims for damages by the dependants for loss of support, if they had not already received compensation.

It perhaps deserves note that when a dependant is injured the breadwinner who incurs expenditure, by reason of his duty of support, has an immediate right of action for the loss

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[543]It is conceivable, but unlikely, that the courts would view the *dictum* in *Evins v Shield Insurance* 1980 2 SA 814 (A) 839E-F as *obiter* and initiate such reform judicially. The problem of reduced expectation of life was unknown to the Roman-Dutch jurists who dealt with all claims using the tables from the Digest (D35.2.68) (see 83). Such an extension of the dependants' action would be an appropriate response to changing circumstances.

[544]In England where method 1 prevails it has been said that `The law can make no distinction between the plaintiff who looks after dependants and the plaintiff who does not… On his death those damages will pass to whosoever benefits under his will or on an intestacy' *Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) 784e.

[545]See 285%.

[546]*Jameson's Minors v CSAR* 1908 TS 575 588 589; Davel `Broodwinner' 488.

[547]No 56 of 1973.

[548]1976 *SALJ* 365-7.

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

suffered.[550] Potgieter Neethling & Visser are in favour of allowing an immediate right to action to the dependants[551] as too is Boberg.[552]

[13.18.4] Prescription: The only real difficulty with adopting method 3 is the question of prescription. Death is readily proved, but not so easily a reduction in life expectancy. It is quite likely that evidence as to reduced life expectancy only becomes available at the time the breadwinner's claim for damages for personal injury goes to trial. Even then it may be hotly disputed by the breadwinner. A satisfactory solution to the prescription problem would be to suspend its running against the dependants until the eventual death of the breadwinner. Defendants cannot complain about such an arrangement which would place them in no a worse position than they are at present.[553] By allowing the dependants a right of action concurrently with the breadwinner, defendants would be able to finalize at an early stage all aspects of liability arising from the injury.

[13.19] CONCLUSIONS

[13.19.1] Registration of marriages: The action for damages for loss of support has its origins with popular Germanic dissatisfaction with the Roman-law ethic that the body of a freeman has no value. It is perhaps no accident that the modern form of the dependants' action crystallized after the Council of Trent[554] and the introduction of formal procedures for proving the existence of a marriage. Modern South Africa faces a similar crisis with the need to accommodate the social values of blacks, values that echo those of the early Germanic law of Europe.

The first major step in the right direction would be to elevate the status of black customary marriages to the same level as civil marriages. This might be by way of legislation enabling the registration of a civil polygamous marriage.

A second step would be to allow claims for dependants whose right to support derives from contract. The limiting factor to the size of such claims would be the general contingencies attaching to the continued provision of support. The value of the chance of durability may be very small indeed. The fact of a registered marriage would enhance the prospects of permanence.

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[550] *Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); see discussion at 193 above and Neethling Potgieter & Visser `Deliktereg' 2ed 288.

[551] Neethling Potgieter & Visser `Deliktereg' 2ed 289 `Gevolglik behoort die afhanklike in beginsel 'n aksie te hê vir sover hy verlies van onderhoud kan bewys'.

[552] Boberg 1960 *SALJ* 438 447 writes `It is submitted that in this situation the dependants may recover damages for loss of support which they would probably have received during the period by which the breadwinner's life has been shortened. When a man has been killed his dependants have an action for loss of support: surely killing may be regarded for this purpose as no more than a shortening of a man's expectation of life to the limit. Can it be logically relevant that he survives an hour, a day, a year or a decade, as long as his life has been shortened? The fact that the injured man is not yet dead when the dependants sue can make no difference in view of the recognition of a dependants' action for bodily harm short of death'. This was written before the handing down of the ruling in *Evins v Shield Insurance* (see footnote 25). See Howroyd 1960 *SALJ* 448 450 for a similar opinion to that of Boberg.

[553] At present they have the prospect of an action by the dependants at some undetermined future date. They may argue that in practice they are at present never called upon to meet such a claim, but that with solution 3 they would be called upon to meet many claims by dependants. Such an objection to reforming legislation would only serve to highlight the need for such reform.

[554] See paragraph 13.1.4.

[13.19.2] Formalisms: The dependants' action, more so than the action for personal injury, has become highly formalised. The assessment of damages for loss of support is based increasingly on formulas such as the two-parts-one-part apportionment of family income.[555] A number of compensating advantages, notably life insurance and pension benefits[556] and the revived earnings prospects of a widow after the death,[557] are left out of account. These are not necessarily undesirable developments provided it is accepted that the dependants' action is becoming less and less compensatory and increasingly like an extended life insurance policy with benefits defined by common-law rules of assessment. The difficulties, particularly in the South African context, of adducing adequate evidence render an abstract approach to assessment something of a necessity.

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[555]See 304.

[556]See 345".

[557]See 320.