

CHAPTER 2

UTILITY

Summary: This chapter examines utility theory and the related concept of value. In its most general form utility is merely descriptive of a vital life force. Its application to the assessment of damages requires objectivization. Money and risk are both subject to utilitarian considerations. Techniques can be developed for the measurement of personal utilities. The statistical concept of an expectation describes the utility of uncertain, usually future events. In suitable circumstances market value provides an objective guide to utility. Abstraction promotes forensic efficiency. Concretization, attention to personal details, ensures for each claimant and defendant a proper hearing. Justice involves a blend of these conflicting goals.

[2.1] DEFINITION

[2.1.1] Human wants rational & irrational: Utility, or 'nuttigheid' as Van der Walt describes it,¹ reflects the capacity of goods or actions or even dreams to satisfy human wants.² The notion is as wide and varied as human want in all its diverse manifestations. This means that utility may be attributed to the most irrational and incomprehensible considerations such as witchcraft. Evaluations of utility will commonly be based upon incomplete information and misunderstood circumstances.³ In its most general form utility provides no guidance as to generally accepted value, no rules for normative behaviour. It is purely descriptive of a vital force fundamental to human nature and the variable relationship of individuals with the environment of people, things and ideas.⁴

The objects of utility are not just tangible goods but also intangibles such as the services of other persons, ideas, hopes, dreams, and, of course, the buying power with which to obtain such of these things as may be acquired with money.

[2.1.2] Disutility: Utility has a positive and a negative aspect.⁵ Bentham refers to the 'disutility' of work.⁶ Pain is undesirable, it has disutility. A person will act to remove pain by, for instance, acquiring pain suppressing pills. For some persons work may have a high utility early in the day.⁷ This utility may decline with the passage of time until later in the day it has acquired a negative utility. Many persons

¹Van der Walt 'Sommeskadeleer' 281 284. At 215 he uses the word 'utiliteit'. This is, it seems, merely a synonym for 'nuttigheid'.

²Page 'Utility Theory' 3-48 55-61 311.

³Page 'Utility Theory' 41-2 127.

⁴Page 'Utility Theory' 47.

⁵Page 'Utility Theory' 3 14-17.

⁶Page 'Utility Theory' 41.

⁷Page 'Utility Theory' 66.

aspire to wealth and freedom from the need to work. For them to work for a living has substantial disutility.⁸

[2.1.3] Summation of utilities: A person's total utility is not obtained by adding up individual utilities.⁹ Thus a certain combination of goods may have a greater utility than the sum total of the combined individual utilities. Van der Walt refers to a matched team of horses.¹⁰ One may also point to sets of stamps, china or chairs. In such circumstances the relative utility of the last item needed to complete the collection may be very high indeed. Alternatively an excessive quantity of bricks, wheat, or puppies has lesser utility to the possessor than the more modest quantity which he needs for his own use. If the surplus is unmarketable, for example puppies, it may acquire a negative utility, a disutility.

[2.1.4] Changing utilities: Utility is not constant in time. Things which have a high utility at one point in time may have a low utility at another point in time. Menger describes how the toys of boyhood are abandoned in favour of the books and sports of the student.¹¹ How these in turn are abandoned in favour of the tools of the trade with which we earn a living and how with old age the tools of our trade lose their utility. As the utility declines the point is reached where the price at which such goods can re-enter the market and be sold comes to have a higher utility than the goods themselves and we sell them to others. Menger here echoes the interaction between utility, the life plan of the individual, and value in exchange which, Van der Walt¹² has emphasised, is the basis for compensation.

[2.1.5] Hedonism: Bentham proposed a principle of hedonism:¹³ Every person may be assumed to seek to maximize the utility of his life plan within the limitations of his available resources. Money is a major resource for achieving this purpose, but health, personality, education, family and associates, are other relevant factors. Economists have developed a theory of marginal utility based on maximizing overall utility within a limited income.¹⁴ The weakness in this theory is its focus upon income and what can be purchased with it.¹⁵ The theory has not so far succeeded in dealing with utility substitution without commercial value. Thus a man may optimize the utility of his life plan by ceasing to work or by working for less than his maximum capacity. The principle of hedonism proposed by Bentham may remain

⁸See paragraph 12.15.4.

⁹Page 'Utility Theory' 35 39 59. Realization as to the non-additivity of utilities led to the mathematical representation of total utility changing from a summation of separate individual utility functions to a single function dependent on individual commodities (see Page 77).

¹⁰Van der Walt 'Sommeskadeeler' 171

¹¹Menger 'Principles of Economics' 232.

¹²Van der Walt 'Sommeskadeeler' 281 284 'planmatig'.

¹³Page 'Utility Theory' 39-44.

¹⁴Page 'Utility Theory' 66-7 71-91.

¹⁵Page 'Utility Theory' 127-8.

valid but not for economists.¹⁶

[2.2] UTILITY OF A LIFE PLAN

[2.2.1] Ideal compensation: Utility is a very personal thing. The same goods or ideas or sensations or money will have different utility values for different persons. Damage may be defined as the disruption of the utility of a person's life plan. The ideal system of compensation would restore the overall utility of the plaintiff's life plan to what it would have been had there been no injury or death. There are two major factors which prevent a court from achieving this goal in practice:

[2.2.2] The limitations of money: A court is confined to awarding compensation in terms of money. Compensation is thus restricted to those aspects of personal utility which can be measured in monetary terms. The measurement of personal utility presents considerable problems which I shall deal with in the next section. Suffice it to note for the moment that Van der Walt restricts compensation for loss of personal utility to those aspects given recognition by our fellow men and to which can be ascribed a monetary value, albeit not a market value.¹⁷ The monetary equivalent serves as a common denominator, 'algemene maatstaf'.

[2.2.3] Irreversible damage: The disruption of the utility of a life plan by way of catastrophic injury or death is usually, like the birth of a child, an irreversible process. No amount of money can ever remove the disruption and restore to the victim the life plan and its associated utility. The event of the injury or death gives birth to a completely different set of circumstances, a new life plan with its own different utility. The award of compensation, be it by lump sum or by instalments, is the stepping stone into a new life with a new set of opportunities and adversities. Van der Walt points out in this regard that compensation is but a monetary equivalent for what has been lost:¹⁸

'Deur middel van die toekenning van geld as skadevergoeding word dus 'n ekwivalent vir die verlore of verminderde nuttigheidswaarde van die eiser se vermoënsgoed vir die bevrediging van sy erkende behoeftes gegee'.

Van der Walt confines the notion of equivalence to past loss, 'afgeslote skade'. He then proposes a system of compensation which reduces compensation for future losses to a series of past losses¹⁹. **It follows that the notion of equivalence applies equally to past and future loss.**²⁰ Only in the most exceptional circumstances will

¹⁶Page 'Utility Theory' 43 refers to 'Bentham's slow discovery that men do not all spontaneously desire "the greatest happiness of the greatest number"'; see too 93-5.

¹⁷Van der Walt 'Sommeskadeleer' 280-1.

¹⁸Van der Walt 'Sommeskadeleer' 280 285 286.

¹⁹Van der Walt 'Sommeskadeleer' 294 'afgeslote toekomstige gevolge'.

²⁰McGregor 'Damages' 14ed 306 notes that there is no fundamental difference between past and future capitalized values; see too Kemp 'Damages' 3ed 63-4. See too paragraph 3.3.3.

money serve as the means to effect restitution.²¹ Bloembergen²² records the important concept of equivalent value in relation to a damaged *res*.

[2.3] UTILITY OF MONEY

[2.3.1] Price elasticity: There is no simple measure for utility. Some idea of the utilities of individuals may be obtained by raising the price of goods. The point at which persons stop buying gives a fair indication in monetary terms as to the upper limit to the utility of the goods. The consumer demand for many classes of goods is what the economists call 'elastic', that is the higher the price the fewer the purchasers. The same goods then have a wide variety of different utilities to different persons, but only one market price. As the market price rises an ever increasing number of potential purchasers cease to become buyers. If the price is raised to very high levels, as with diamonds and gold, the goods may acquire enhanced utility by reason of being expensive, an indicator of social status and a storage medium for wealth. Subsequent price increases may lead to increased purchasers.

[2.3.2] Money as the measure of utility: The price a person is prepared to pay for goods merely indicates that the utility of the money paid is less than or equal to the utility of the goods for that individual. Bentham saw in money a common standard of value by which utility could be measured.²³ He was frustrated in the further development of money as a common denominator by the realization that **the utility of money is not the same for all persons.**

[2.3.3] Social mobility: If I aspire to a modest style of living and have adequate funds to cover the cost thereof then the utility to me of further money may be fairly low. If I have difficulty maintaining my chosen style of living then the utility of further funds will be very high. One might say in general that money has greater utility to a poor man than to a rich man. This is however, an oversimplification. Friedman & Savage²⁴ have demonstrated that money has the highest utility when it enables a person to move up on the social scale, labourer to middle class, middle class to upper class. In practice there may be numerous grades. Some persons may have no desire to move up the social scale even if the money is available. Additional money in this context has low utility for them. The phenomenon of the rich person who watches every cent is not unknown. For such persons additional money has a high utility notwithstanding their wealth.²⁵

[2.3.4] Rich man - poor man: *Prima facie* money has less utility to a rich man than to a poor man because the rich man has so much more of it. This consideration

²¹Van der Walt 'Sommeskadeleer' 285-6.

²²Bloembergen 'Schadevergoeding' 47-8 'De benadeelde had in de toekomst nog van alles met de zaak kunnen doen - gebruiken, verkopen, enz. - maar al die toekomstige mogelijkheden vinden in de maatschappelijke werkelijkheid hun uitdrukking in de waarde... De benadeelde zich bijna altijd met hem aldus toegekende vergoeding in onze op ruilverkeer gebaseerde maatschappij zo niet een soortgelijke zaak, dan toch wel iets gelijkwaardigs kan verschaffen... Die gelijkwaardige zaak zal hem dan ook weer gelijkwaardige mogelijkheden verschaffen.'

²³Page 'Utility Theory' 37-8.

²⁴Friedman & Savage 1948 *JPE* 279.

²⁵Friedman & Savage 1948 *JPE* 279 282-3 note that the fact that a rich man will spend more money to avoid pain than a poor man does not necessarily imply that money has a lower utility to the rich man.

suggests that awards for general damages for pain and suffering should be larger for rich men than for poor men. The appellate division in South Africa has ruled that the money value to be placed on the loss of an amenity of life is to be the same regardless of the financial circumstances of the plaintiff.²⁶ Corbett & Buchanan²⁷ note that the courts have not been astute to abide by this ruling.

[2.4] UTILITY OF RISK

[2.4.1] Risk avertives and risk seekers: A major concern of this text is the utility of risk. As with so many utilities the utility of risk varies widely. Economists have distinguished two important types of person in this regard, the 'risk seeker' and the 'risk avertive'.²⁸ In general the risk averse person will be as heavily insured as his finances permit. He will eliminate all possible sources of risk from his life plan. The risk seeker, on the other hand, will probably carry little insurance and apply all available funds to speculative entrepreneurial ventures which offer the prospect of large gains at long odds.²⁹

[2.4.2] Insurance and lotteries: In general the cost of acquiring insurance exceeds the 'actuarial' value³⁰ of the risk. This is so because the premium includes the administrative costs of the insurer.³¹ It follows that if people buy insurance it must be because their personal perceptions of the risks have a present utility which exceeds the utility of the premiums to be paid. Lotteries generally yield profit to the organizer. It follows that the value of the chance of a prize is less than the cost of a lottery ticket. Nonetheless lotteries are popular. The utility of the prospect of the gain of a large sum of money on small odds thus outweighs the utility of the more certain loss of the cost of a lottery ticket.³²

[2.4.3] Market pricing: Perhaps the most important point to be gleaned from a consideration of personal utilities under conditions of risk is the distinction between the objective actuarial present value of the risk and the individual's subjective assessment thereof. The actuarial value of the risk would be obtained by using statistical averages, taken from observation, in conjunction with the value of the chance. For the purpose of the argument one needs to assume that there is sufficient reliable information available. The individual's subjective assessment is likely to be far more intuitive, probably based on emotion and less-than-full information. He will compare the present outgo, the insurance premium or price of a lottery ticket, with the imagined consequences and likelihood of the gain or loss. The only way one can determine the level of utility is to **raise** the price progressively until it reaches the point where the individual being tested loses interest in taking out insurance or

²⁶*Radebe v Hough* 1949 1 SA 380 (A).

²⁷Corbett & Buchanan 3ed 8n64.

²⁸Levin 'Statistics for Management' 2ed 712-13; Kwon 'Statistical Decision Theory' 245-9.

²⁹Friedman & Savage 1948 *JPE* 279 280 'Young men of an adventurous disposition are more attracted by the prospects of a great success than they are deterred by the fear of failure'.

³⁰Friedman & Savage 1948 *JPE* 279 use the adjective 'actuarial' (see 284 287) to denote 'the statistical average' (see 285-6) which an individual can expect to receive.

³¹Friedman & Savage 1948 *JPE* 279 285.

³²Friedman & Savage 1948 *JPE* 279 284n13.

buying a lottery ticket. There will also be some risk-averse persons for whom the usual cost of insurance or lotteries is already too high. To measure their personal utility values one would need to **decrease** the price progressively until these people became buyers. The testing process will produce a variety of personal values, both larger and smaller than the objective actuarial value.

[2.4.4] Attraction of large sums: Friedman & Savage have concluded that the prospect of substantial gain at long odds has great attraction for lower income and some middle income groups.³³ The wealthy, it seems, are not generally attracted by the prospect of large gains at long odds.³⁴ After all *ex hypothesi* the wealthy already have substantial sums and their interest in life is more that of conservation of their capital by sound investment and insurance against risks.

Life offices offer immediate life annuities whereby a single lump sum premium acquires the right to a series of future payments contingent on the survival of the life assured. On death the capital is forfeited to the life office. Such plans, once fairly popular, are little sought after today. Conversely, endowment insurance policies which pay out a capital sum after a specified number of years, or on earlier death, are extremely popular and are taken out in large numbers. This observation suggests that the prospect of a series of future payments contingent on human life has less utility for the average person than an actuarially equivalent large lump sum.³⁵

[2.4.5] General contingencies: The deductions made by judges for general contingencies is almost without exception larger than is suggested by unemployment statistics.³⁶ One also finds an exaggeration of the risk of death for a child.³⁷ This is the behaviour one would expect from a judge who is risk averse, that is say a person whose personal present utility for the prospect of future risk attaching to the series of uncertain payments exceeds the actuarial value. One finds similar risk-averse behaviour in the judicial choice of discount rates of interest below the level indicated by prevailing market conditions.³⁸ This scaling down of the discount rate because of investment uncertainty is contrary to the normal behaviour of investors in a market who generally expect an increase to the rate of investment return as compensation for

³³Friedman & Savage 1948 *JPE* 279 287 301

³⁴Friedman & Savage 1948 *JPE* 279 301

³⁵This conclusion is supported from other sources: see quotation in paragraph 3.1.2; see too Luntz 'Damages' 2ed 26.

³⁶Cooper-Stephenson & Saunders 'Damages in Canada' 255-9; Street 'Damages' 120-5; Luntz 'Damages' 2ed 295-306; Boberg 1964 *SALJ* 194 212. In general unemployment statistics should be received with caution: they do not reflect all persons seeking employment (Hofmeyer 'Labour Market Participation' 1985 *HSRC RDS1*). Unemployment is not the only risk leading to reduced earnings, there may be years of increases below the rate of inflation, and tax rates may rise inordinately as they have done in recent years in South Africa.

³⁷... the possibility of the minor's death before age 16. The actuary from an insurance point of view treats that possibility as negligible. It is a factor that from a practical point of view must be taken into consideration' *Paterson v SAR&H* 1931 CPD 289 300-301.

³⁸*Sigournay v Gillbanks* 1960 2 SA 552 (A) 587F-G (4% per year adopted in face of market rates of 5,75% per year); *Kotwane v UNSBIC* 1982 4 SA 458 (O) 466inf (5% per year adopted in face of market rates of some 12% per year); *Oberholzer v NEG Insurance* 1988 4 C&B A3-1 (C) (1% per year net capitalization rate in face of a usual level of 2% to 3% per year).

the prospect of risk. That is to say that such investors expect to pay a lower price because of the risks involved.³⁹ The seemingly anomalous judicial behaviour is to be explained by a perception that the claimant is able to use the award by consuming interest and capital to reproduce the lost income.⁴⁰

[2.5] THE MEASUREMENT OF UTILITY

[2.5.1] Qualitative measures: A *qualitative* or *nominal* guide⁴¹ to a person's utility in respect of something can be gleaned from statements such as 'highly valued', 'of little use', 'good'.

[2.5.2] Quantitative measures: An *ordinal* guide to personal utility⁴² is obtained by ranking a variety of choices with numbers such as choice 1, choice 2, etc. The higher the number the lower the utility. One finds such measurements forming part of consumer surveys for marketing purposes. For our purposes an important type of ordinal measure concerns the utility of risk. We may ask the subject of our inquiry to rate his perception of the risk attaching to a future event on a scale of 0% to 100%. Zero rating means that the event is considered to be impossible, that is to say total indifference, a non-event. A rating of 100% implies absolute certainty that the event will occur, that is to say considerable concern with the outcome. A percentage between 0% and 100% implies a degree of confidence in the outcome of the event which lies somewhere between certainty and impossibility. Ramsey⁴³ described these ordinal values as 'degrees of belief' and demonstrated that they obey the same mathematical rules as the theory of chances, the theory of 'probability' as it is known to the modern statistician. It is a valid mode of thought to consider such degrees of belief to be chances.⁴⁴ Valuable information has been obtained in many fields by observing the degrees of belief attached by experts to uncertain events with which they are familiar.⁴⁵ These beliefs are often remarkably similar. This deserves note in a world where subjective evaluations usually differ widely between individuals.⁴⁶

[2.5.3] Damages assessment: When a medical expert tells a court that the chance of a future operation, *damnum emergens*, is 33% he is giving expression to his degree of belief based on his own experience and, possibly, available statistics. As regards *lucrum cessans* one commonly finds a plaintiff alleging that he would have been

³⁹The higher the discount rate of return the lower the present value.

⁴⁰See 84, 97(.

⁴¹Kwon 'Statistical Decision Theory' 245.

⁴²Kwon 'Statistical Decision Theory' 245.

⁴³Ramsey 'Foundations of Mathematics' 166-84; see too De Finetti 1937 *AI Henri Poincaré* II 6-16; Savage 'Bayesian Econometrics' 112-15.

⁴⁴De Finetti 1937 *AI Henri Poincaré* 1 16 'La notion de probabilité, telle que nous l'avons décrite, est sans doute la plus voisine de celle de "l'homme de la rue"; mieux encore, c'est exactement celle qu'il applique tous le jours dans ses jugements pratiques'.

⁴⁵Kwon 'Statistical Decision Theory' 250-4; Grayson 'Drilling Decisions'; Savage 'Bayesian Econometrics' 155-6 lists numerous publications relating, among other things, to weather forecasts.

⁴⁶De Finetti 1937 *AI Henri Poincaré* II 16 'Cette conception, qui laisse tout à fait libre chaque individu d'évaluer les probabilités comme il le croit'.

promoted had he not been injured. It can be most revealing to ask the employer to state his personal degree of belief that promotion would have occurred. 'Was it a 50% chance?' 'No, less than that' might be the reply. 'Was it a 25% chance?' 'No, more than that.' 'How much more?' 'About 33% I think' might be the conclusive reply. Inquiries of this nature can eliminate endless haggling. The plaintiff is awarded 33% of the value of the promotion as a certainty.⁴⁷ A critic might complain that these are but opinions with no scientific basis. The reply is that no better basis is available to the court. These opinions as to likelihood are the best available evidence from the lips of experts who can be expected to know better than anyone else. Such opinions often relate to a hypothetical state of affairs which can never be tested by actual experience, by waiting, and must often be based on relatively limited overall information. In certain situations it is possible to objectivize the subjective opinions by reference to logic of the situation or statistical data.⁴⁸

The plaintiff in the matter may on similar inquiry reveal his personal assessment of his chances of promotion to be 95%. By reason of the injury he has been deprived of the utility of a 95% expectation of promotion. If compensation is based upon the personal utility of the plaintiff a chance of 95% should be used to assess the loss, the chance of 33% expressed by the employer should be irrelevant. As a general rule a court will accept the assessment of the employer and reject the assessment of the employee.⁴⁹ It is in this sense that awards for damages are objectivized.

[2.5.4] Act of measurement affects result: The measurement of personal utilities is beset with many problems, not the least being that the very circumstances of the inquiry may affect the answer that will be given. This is particularly so of a plaintiff who has a financial interest in the answers given. An employer may paint a rosy picture of the lost opportunities of his injured employee in the knowledge that he will not be called upon to 'put his money where his mouth is'. This is not to suggest that such persons are dishonest, they probably have sincere belief in the correctness of what they say. Savage⁵⁰ mentions in addition to bias:

'all subjects report, or otherwise reveal, that they do not know their own preferences; they experience wavering and indecision that cannot be identified with mere indifference'.⁵¹

Another problem:

'is that once an experimenter satisfies one preference of a subject he may quite

⁴⁷See 71.

⁴⁸De Finetti 1937 *Al Henri Poincaré* II 16 'Deux sont les procédés d'où l'on a cru pouvoir déduire une signification objective de la probabilité: d'une part le schéma des cas également probables, et d'autre part la considération des fréquences'. See 15 below.

⁴⁹*Legal Insurance v Botes* 1963 1 SA 608 (A) 617F the widows personal views of her remarriage prospects were accorded little weight: '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'.

⁵⁰Savage 'Bayesian Econometrics' 115-16. See too Ramsey 'Foundations of Mathematics' 172.

⁵¹Savage 'Bayesian Econometrics' 115.

drastically change the subject's pattern of preferences'.⁵²

This consideration is of particular significance if one seeks to elicit information from a widow or injured plaintiff concerning preferences had the injury or death not occurred. Savage notes as well that:

'actual subjects are of course sometimes blind to their own clear advantage, failing to understand that they can only deprive themselves... Such facts do underline the need for education and training prior to, and even during, the application of elicitation devices'.⁵³

This last consideration confirms the well-established principle of justice that a plaintiff should have legal representation if he is to present his case properly.

[2.5.5] Value amongst fellow men: The difficulties attaching to the measurement of personal utilities are probably the single most important reason why the courts seek out independent evidence concerning the utility of what has been lost. Account will thus be taken of loss of utility only to the extent that this can be corroborated by the opinions of others, that is to say objectivized.⁵⁴ Van der Walt⁵⁵ states in this regard that:

'Die skadevergoedingsregtelike vermoënsbegrip altyd moet gaan om die bevrediging van *erkende* behoeftes... Die nuttigheid van die betrokke goed vir die bevrediging van die vermoëns subjek se behoeftes, en daardie behoeftes as sodanig, 'n verkeerswaarde moet hê.'

Van der Walt has in mind here not market value but rather consensus as to value amongst our fellow men.

[2.6] SUBJECTIVE ASSESSMENTS OF CHANCE

[2.6.1] Intuitive notions of chance: The first formal record of a subjective interpretation of chance was by Ramsey.⁵⁶ Ramsey died shortly after preparing his paper. His line of thinking was then developed by a number of econometricians, notably Savage⁵⁷ and De Finetti.⁵⁸ The theory of subjective chances has its major application in the realm of utility analysis,⁵⁹ a topic which has already been discussed. Statisticians are heatedly divided between Bayesians and classicists.⁶⁰

⁵²Savage 'Bayesian Econometrics' 115.

⁵³Savage 'Bayesian Econometrics' 115.

⁵⁴See too 22.

⁵⁵Van der Walt 'Sommeskadeleer' page 280.

⁵⁶Ramsey 'Foundations of Mathematics' 1931 158-98.

⁵⁷Savage 'Foundations of Statistics'; Savage 'Bayesian Econometrics' 111-56.

⁵⁸De Finetti 1937 *AI (Annales de L'Institut) Henri Poincaré* 1.

⁵⁹Zellner has produced a collection of the important papers on utility under the title 'Basic Issues in Econometrics'. Kurihara 'Post Keynesian Economics' 388-436 includes a paper analysing the propensity of households to save rather than spend. The mathematical model used, hardly surprisingly, closely resembles the actuarial year-by-year method.

⁶⁰Savage 'Bayesian Econometrics' 39-67.

Jurists are essentially Bayesian in their approach to facts: Pre-established notions, such as 'not guilty', are modified in the light of the evidence. The recorded difficulties with communication between statisticians and the courts⁶¹ most likely reflect, apart from disagreement on the meaning of the word 'probability', a classical-statistics bias on the part of many statisticians, particularly actuaries. From the court's point of view classical statistics is non-intuitive and therefore of questionable relevance to matters of the soul, such as justice and fairness.⁶²

[2.6.2] Diverse manifestations: The more intuitive perceptions of chance, or 'probability' as the statisticians call it, may be viewed in a variety of different ways and for this reason the concept has a chameleon-like quality. Ramsey writes of degree of belief.⁶³ Savage in his last paper says that a subjective chance is 'a price, in a manner of speaking'.⁶⁴ Drèze writes that it 'may be interpreted as an insurance premium. Given such a price system...'.⁶⁵

The deduction for general contingencies⁶⁶ and the value of a possibility⁶⁷ are both commonly determined by a process of subjective impression rather than arithmetic calculation. This similarity with the subjective chances described by Ramsey provides a fundamental link to utility theory. Formal statistics and monetary amounts are then merely ways for objectivizing the subjective impression.

Ramsey's concept of degree of belief is not seen in terms of price because we can hold degrees of belief in relation to events without for one moment considering their monetary value. The identification of degree of belief with 'price' arises when we come to deal with value in exchange, the price at which an individual will now exchange the prospect of an uncertain future gain or loss.⁶⁸ Under conditions of a frequent exchange of money for goods the subjective values held by different individuals become objectivized as market values. Bloembergen makes the important observation that the value, the price in exchange, of a tangible *res* such as a motor car, encapsulates in one figure all possible uses and disadvantages attaching

⁶¹Downton 1982 *JRSSA* 395.

⁶²Van Rensburg *Huldigingsbundel Daniël Pont* 384 405.

⁶³Ramsey 'Foundations of Mathematics' 163-84.

⁶⁴Savage 'Bayesian Econometrics' 112inf.

⁶⁵Savage 'Bayesian Econometrics' 22inf.

⁶⁶*Shield Insurance v Booysen* 1979 3 SA 953 (A) 965G 'The determination... for such contingencies involves, by its very nature, a process of subjective impression or estimation rather than objective calculation'; *Sigourney v Gillbanks* 1960 2 SA 552 (A) 569A.

⁶⁷In the present case I do not propose to express the possibility... in terms of a precise percentage. I intend merely to award an amount in respect of the total cost... which will take account of the extent of the possibility and the various imponderables...! *Blyth v Van den Heever* 1980 1 SA 191 (A) 226C.

⁶⁸Cost-benefit analysis of social projects and legislation has been closely analyzed using calculations very similar to those used for damages assessments (see, for instance, Pearce 'Cost-Benefit Analysis' 2ed; Mishan 'Cost-Benefit Analysis').

to that *res.*⁶⁹ It is of course possible to find examples of a barter economy with a highly developed pricing structure but with no money and no statisticians.⁷⁰

[2.7] EXPECTED VALUES

Before proceeding to a discussion of the relationship between utility and value in exchange we need first to explore further the manner in which personal evaluations of uncertainty are expressed in the minds of individuals, and accordingly in common parlance:

TABLE 1 - CALCULATION OF EXPECTED OVERTIME HOURS

A Range hrs	B Midpoint hrs	C Chance	D Value BxC
0	0	0,1	0,0
0-4	2	0,4	0,8
4-8	6	0,3	1,8
8+12	9	0,2	1,8
Total (the weighted average)			4,4 hours

[2.7.1] Averages: A cardinal measure of utility⁷¹ is the 'expected value', or 'point estimate'.⁷² This is expressed in a form that is familiar to most people as an average. For instance one might ask the employer in our example how many hours overtime the employee would have worked. The reply might be '4 to 5 hours per week at time plus one third'. Closer inquiry might reveal that in the past little overtime was worked but now it is usual for employees to work overtime. The figure of '4 to 5 hours' reflects a degree of belief on the part of the employer, perhaps based on some rough mental arithmetic. It would be useless to try to statistically analyze overtime worked in previous years, there was previously no overtime and conditions have changed. Further questioning might reveal a perceived chance of 10% that no overtime would be worked, balanced by a chance of 20% that overtime of 9 hours per week would be worked, with chances of 40% for overtime between 0 and 4 hours per week, and 30% for between 4 and 8 hours per week. The weighted average of

⁶⁹Bloembergen 'Schadevergoeding' 47-8 'De benadeelde had in de toekomst nog van alles met de zaak kunnen doen - gebruiken, verkopen, enz. - maar al die toekomstige mogelijkheden vinden in de maatschappelijke werkelijkheid hun uitdrukking in de waarde... De benadeelde zich bijna altijd met hem aldus toegekende vergoeding in onze op ruilverkeer gebaseerde maatschappij zo niet een soortgelijke zaak, dan toch wel iets gelijkwaardigs kan verschaffen... Die gelijkwaardige zaak zal hem dan ook weer gelijkwaardige mogelijkheden verschaffen'.

⁷⁰eg the use of cattle amongst the Nguni tribes of southern Africa; see too Malinowski 'Argonauts of the Western Pacific' and the use of shell necklaces.

⁷¹Kwon 'Statistical Decision Theory' 245.

⁷²Levin 'Statistics for Management' 2ed (expected value) 188-9 192-4 711-12 (point estimate) 287-92; De Finetti 1937 *AI Henri Poincaré* 1 19 (*l'espérance mathématique de la fréquence*); Savage 'Bayesian Econometrics' 126-9.

these different views is 4,4 hours per week:

When dealing with subjective chances it is preferable to describe such a weighted average as an 'expected value'. This sort of average needs to be distinguished from an average over time which, although very similar, is not quite the same thing. The middle value for each range of hours worked has been multiplied by the associated chance and the resulting values summed to give the expected value. One may recognise here the technique of valuation of a chance⁷³ applied to each separate element. The figure of 4,4 hours multiplied by the rate of pay and discounted for mortality and interest gives the present value of the chance of earning overtime in one particular week.

Care should be taken that a single point estimate in the form of an average or an expected value does not obscure the extent to which the point estimate balances the relevant risks and alternative values:⁷⁴

'What is necessitated is an exercise involving the various future possibilities being expressed as percentage chances, or averages, and subject to contingency allowances... The court makes the best assessment it can on all the evidence. That assessment is not a calculation. It may involve calculation but when calculation has been done the assessment exercise necessitates taking into account and employing devices such as averages, contingency allowances and percentage chances in order that the eventual award does justice by being fair to both sides'.⁷⁵

The assessment of general damages for pain and suffering and loss of the amenities of life involves an averaging process.⁷⁶

[2.7.2] Overlapping scenarios: The overtime calculation is an example of the general principle that the value of the chance of a composite event, the so-called, 'expected value', may be computed by adding the values of the chances for the separate components. This rule of additivity only applies to chances which do not overlap with one another, the chance of earning no overtime does not overlap with the chance of earning between 0 and 4 hours of overtime. The value of a chance is a measure of utility and utilities may be expected to obey similar rules of addition provided they do not interact. Where, however, they do interact then the utility of the group of goods is not equal to the sum of the utilities of the components. Thus the utility of a team of four horses trained to operate together is greater than the sum of the utilities of each horse individually.⁷⁷ That the total utility should exceed the sum of the separate utilities is very much the exception. In the majority of cases the overlap of utilities has the effect that the utility of the total is less than the sum of the utilities

⁷³See 71.

⁷⁴See 97.

⁷⁵*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 61 64.

⁷⁶*Neethling Potgieter & Visser 'Deliktereg'* 2ed 245.

⁷⁷*Van der Walt 'Sommeskadeleer'* 171n91. The same may said of a set of stamps or chairs. Once the set has been completed, however, the acquisition of a further horse or stamp or chair has extremely low utility.

of the components.⁷⁸ Thus a trader will often give a discount for bulk purchases. It is for this reason that the courts warn against overlapping heads of damage giving rise to double compensation.⁷⁹

[2.7.3] Mental processes: The 'expected value' based on the weighted average of a variety of scenarios is a common measure of utility. In practice the person whose utility is being measured will not go through a conscious process of adding up the separate values for different scenarios as we did in table 1 above. The assessment of utility will be done more intuitively with perhaps brief reference to higher and lower values. Thus an employer might express the opinion that a fair average level of earnings is R18000 per year with a possible low of R12000 per year and a possible high of R21000 per year. An expert on family planning might express the opinion that a young widow would have had 3 children had her husband not been killed. In forming this opinion the expert might consider that families from that socio-economic group generally have between 2 and 5 children but that 3 is the most common. The widow might say that she and her husband planned to have two children.⁸⁰ Quite which expectation the court will accept will depend on circumstances.

[2.7.4] Expectation of life: The expectation of life is obtained by adding up the chances of survival to each individual future year.⁸¹ It thus constitutes a **point estimate** of the age at which death is likely to occur.

[2.7.5] Personalized averages: Uncertainty in the form of pure risk and inadequate information, that is to say less than ideal evidence, is an integral and unavoidable component of many forms of damage. Van der Walt notes⁸² in regard to loss of income arising from an injury:

'Alhoewel hiervoor 'n konkrete skadebegrip moet geld is dit bykans onmoontlik om vas te stel of die eiser hoegenaamd sy persoonlike potensiaal om inkomste te verdien sou gebruik het - of hoe suksesvol hy daarin sou gewees het - as hy nie onregmatig beseer is nie. Daarom moet generaliserend (dws met gemiddelde syfers) gewerk word.⁸³ Hierdie "ruwere" konkrete skadebepaling kan mi ewe goed die toepassing van 'n minder

⁷⁸This follows from the observation that subjective chances obey the doctrine of chances which states that the chance of the occurrence of two overlapping sets of events A and B either individually or together is $C(A)+C(B)-C(A) \times C(B)$ where $C(A)$ and $C(B)$ represent the chances of the respective events (see Levin 'Statistics for Management' 2ed 139-40). It follows that for overlapping sets of events $C(A \text{ or } B)$ is less than $C(A)+C(B)$. This highly simplified reasoning is only valid in a very general sense. Friedman & Savage 1948 *JPE* 279 295 have pointed to the multiple S-shape of the utility curve of money and risk.

⁷⁹*Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F. See too Luntz 'Damages' 2ed 243; Cooper-Stephenson & Saunders 'Damages in Canada' 275-91; *Lim Poh Choo v C&IHA* [1979] 2 All ER 910 (HL) 921g-h; *Light v Conroy* 1948 1 C&B 444 (T) 445; *Niblock-Stuart v Protea Assurance* 1973 2 C&B 323 (C); *Kriel v Administrator-General for SWA* 1986 3 C&B 539 (SWA) 548; 1988 3 SA 275 (A).

⁸⁰The statistical average in this case might be 2,75 children. The 0,75 of a child reflects the value of the chance of a third child.

⁸¹See paragraph 5.1.4.

⁸²Van der Walt 'Sommeskadeleer' 200n11.

⁸³See too Bloembergen 'Schadevergoeding' 106.

subjektiewe konkrete skadebegrip genoem word.'

One might paraphrase these words by saying that every inquiry as to damages begins with all the known past and present circumstances of the claimant. Where information is lacking, particularly as regards the future, the gaps are filled by means of averages and expectations which are moulded as closely as possible to the known personal circumstances of the plaintiff.⁸⁴ An expectation in this sense is appropriately described as a 'personalized average'.

[2.7.6] *The relevance of averages:* The cynic would point out that if one has one's head in the fridge and one's feet in the fire then one is on average comfortable. This type of information nihilism destroys the tenuous validity that averages provide for facilitating agreement between men in the face of uncertainty.⁸⁵ Without using averages we cannot deal efficiently with uncertainty. Some information, albeit incomplete, is better than none at all. The cynic destroys but does not propose a better substitute.

[2.7.7] *Average earnings:* One finds numerous references to 'average earnings' in the decided cases.⁸⁶ The word 'average' as used by the courts generally designates 'an average over the years'. An average over different possibilities at one point in time is indicated by the words 'probable', 'likely' and 'expectation'. Average earnings statistics for a population⁸⁷ give guidance in one figure both as to probable expectations and an average in time,⁸⁸ that is to say the sample on which the statistic is based includes persons in numerous possible occupations and at different stages in their careers.

[2.7.8] *Predictions:* Expected values are sometimes erroneously described as

⁸⁴Standard mortality tables will always be adjusted up or down in the light of the particular circumstances of the plaintiff: *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721-2 'the person concerned will live longer than the average'; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1027 'an allowance of 50 per cent extra mortality'. Remarriage statistics are received with caution: *Legal Insurance v Botes* 1963 1 SA 608 (A) 617 'The census statistics... should not be regarded as a starting point, but merely as one of the facts'.

⁸⁵*Van der Walt 'Sommeskadeleer'* 200n11; *Bloembergen 'Schadevergoeding'* 106.

⁸⁶In *Pitman v Scrimgeour* 1947 2 SA 22 (W) 35 it was 'established that he could probably have expected an income averaging £2500 over the years'; *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 115C 'If an average expectancy or projection would be postulated'; *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 848 'a high average figure'; *Botha v Minister of Transport* 1956 4 SA 375 (W) 379C/D 'at an average salary'; *Phoenix Assurance v De Wet* 1963 1 C&B 196 (A) 200 'his average annual earnings'; *Paton v Santam Insurance* 1965 1 C&B 637 (E) 645sup 'at an average over the years'; *Mrwarwaza v Rondalia Assurance* 1978 2 C&B 760 (E) 765 'This judgment must therefore assess Nozive's prospects of employment not entirely as an individual's but as a statistical probability'; *Van Rensburg v President Versekeringsmpy* 1968 2 C&B 62 (W) 64 (Inland Revenue statistics for doctors); *Van Dyk v Mutual & Federal Versekeringsmpy* 1981 3 C&B 226 (T) 228 (average earnings for blind persons).

⁸⁷There are numerous salary surveys which provide earnings data subdivided by type of work and length of experience (for instance the *Peromnes* surveys prepared by FSA and the HSRC surveys of graduate earnings). Such surveys generally provide median and quartile earnings rather than average earnings. It seems highly unlikely that a court would go so far as to distinguish between median and average earnings.

⁸⁸Valid provided earnings scales do not alter in real terms in time.

'predictions'.⁸⁹ The dictionary meaning of the word 'predict' is 'foretell', 'prophecy', 'announce beforehand'.⁹⁰ The word 'expectation'⁹¹ implies a degree of uncertainty which is absent from the word 'prediction'. Expected values are present utilities in relation to uncertain future events. A prophecy may give rise to an expectation, but an expectation is not a prophecy.⁹² The present utility of an uncertain future event determines the manner in which I act *now*,⁹³ not how I will act at the time when the event is due to take place in, say, 20 years' time. Present expectations determine present decisions, **including a decision as to the amount to award now by way of damages**. Subsequent events may alter my expectations and thus lead to different decisions. It is for this reason that a court will have regard to subsequent events and make a different award at the time of trial from that which would have been made at the time of the injury or death.⁹⁴ Predictions in the mechanistic sense of 'prophecy' are only possible if the entire future has already been mapped out in one vast clockwork of cause and effect.⁹⁵ Such predestination is, however, a denial of the power of man to choose between right and wrong, it precludes a finding of fault⁹⁶ and the legal basis for an award of damages. The notion of prediction, or prophecy, is in conflict with the fundamentals of our legal heritage. I have emphasised the distinction between a prophecy and an expectation because the word 'prophecy' is sometimes misleadingly used by the courts in relation to the process of assessing damages for future loss.⁹⁷

⁸⁹For example Boberg 'Judge or soothsayer' 1988 *BML* 11 '... our judges in a role essentially no different from that of a prophet or fortune teller'; Boberg 1988 *BML* 55 'The judge must do the best he can to predict the future: hence his need to don the fortune teller's mantle'; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113G 'It involves a prediction as to the future'; *Auty v National Coal Board* 'The Times' 3 April 1984 '... as a method of providing a reliable guide to individual behaviour patterns or to future economic and political events, the predictions of an actuary could be only a little more likely to be accurate (and would almost certainly be less entertaining) than those of an astrologer'.

⁹⁰Oxford English Dictionary.

⁹¹For instance in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D one finds the expression 'verwagte verdienste'. De Finetti used the word 'prévision' in the title to his paper on the subject of the utility of uncertainty. Gasc's French Dictionary defines 'prévision' as 'forecast', 'anticipation', 'expectation', 'estimate'. The Oxford English dictionary definition of the word 'expectation' is 'awaiting', 'anticipation'.

⁹²De Finetti 1937 *Al Henri Poincaré* 1 23 'Il faut remarquer toutefois que cette "prévision de la fréquence" n'est autre chose qu'une évaluation des (chances): elle n'est nullement une prophétie'.

⁹³The primary manifestation of utility is choice between alternatives, ie utility implies a choice, action here and now (Page 'Utility Theory' 3). Do I buy at the present market price or not? Do I abandon my right to compensation for the amount offered or not? In this sense damages are no more than what the judge perceives to be a fair price between plaintiff and defendant. The present utilities of plaintiff and defendant, as perceived by the judge, determine what action, what decision, he will take.

⁹⁴See, for instance, *Wigham v British Traders Insurance* 1963 3 SA 151 (W).

⁹⁵Such as one finds in Greek thought.

⁹⁶Van Rensburg 1970 *Huldigingsbundel Daniël Pont* 384 393 'Slegs die mens kan... verantwoordelik gehou word vir sy dade'.

⁹⁷See, for instance, *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113G 'Any inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss'.

[2.8] EXPECTED NORMAL COURSE OF EVENTS

[2.8.1] Adequate causation: Modern scientific thinking on causation has embraced the concept of prediction, in a contingent sense, according to a probabilistic set of laws.⁹⁸ German legal analysis has gone so far as to define a 'cause' to be an event which increases the risk, that is to say the chance of the result, by a significant amount.⁹⁹ An approach to causation based on the theory of chances, that is to say 'adequate causation', has received judicial recognition in South Africa,¹⁰⁰ although one must hasten to add that this has been done without consideration of the rigorous analysis that has characterised the German approach. The adherence to a test based on a fixed percentage chance (50%) has been harshly and correctly criticised:¹⁰¹ The major objection to defining causation by reference to a fixed percentage chance of harm is that different percentages will apply in different cases, quite apart from the fact that the percentage chances will in most instances have to be determined by intuitive considerations.¹⁰² When assessing damages for personal injury or death a gain or loss would generally be viewed as 'caused' by the injury or death if the chance thereof has been increased to a material extent. The compensation to be awarded is the increase in the value of the chance¹⁰³ for *damnum emergens*, and the decrease in the value of the chance for *lucrum cessans*, eg the chance of earnings.

[2.8.2] Expected normal course of events: Once an injury or death has been caused then there comes into being the expected normal course of events **having regard to the death, or the full known extent of the injuries**. This is compared with the expected normal course of events **had there been no injury or death**. Adverse economic events and notional early death are generally viewed as part of the normal course of events, that is to say causes of loss which will be presumed. Hart & Honoré describe such sequences as 'ongoing states'.¹⁰⁴

We cannot know the precise course of the future, but we can have intimate and immediate knowledge of what we currently expect to be the normal course of events. A court may validly receive evidence as what a witness expects in the future as the normal course of events. The state of mind of the witness is a question of fact.¹⁰⁵

⁹⁸Zellner 'Econometrics' 38-9. Scientific concepts of causation include a prediction of the frequency for occurrence of the result (see Van Rensburg *Huldigingsbundel Daniël Pont* 384 390-1).

⁹⁹The 'adequate cause' theory of Von Kries described in Hart & Honoré 'Causation' 2ed 469 states that in assessing the chances regard should be had to what the wrongdoer knew or should have known. This was considered by the German high court to be too narrow a view (see Joubert 1965 *Codicillus* 6 10). Atiyah 'Accidents compensation & the law' 3ed 594-5 describes a quantitative approach to negligence based on financial considerations alone.

¹⁰⁰In *Smit v Abrahams* 1992 3 SA 158 (C) the court uses the expression 'reasonable possibility' (ie a chance of less than 50%) for the 'real risk, one which would occur to the mind of a reasonable man in the defendant's position and which he would not brush aside as far-fetched' (at 165F - see too *S v Mbambo* 1965 2 SA 845 (A) 857E-F; *S v Daniëls* 1983 3 SA 275 (A) 332-3). At 178C the court notes an instance where 'the test of foreseeability applied was more stringent'. See too Joubert 1965 *Codicillus* 6; Snyman 'Criminal Law' 2ed 60-1 66-9.

¹⁰¹Neethling Potgieter & Visser 'Deliktereg' 2ed 173-4.

¹⁰²ie relevant formal statistics will not be available.

¹⁰³See 71.

¹⁰⁴Hart & Honoré 'Causation' 2ed xlv 2 11 59-61 194-204 374-6.

¹⁰⁵See 19.

[2.8.3] *Supervening events*: For purposes of assessing damages for future loss that which is foreseeable will normally be determined in the light of all information available at the time of the assessment. It is usual that several years elapse before a matter comes to trial. During that time a number of factors influencing the assessment of the damages will change. Inflation is likely to have persisted and prices and salaries increased. The plaintiff may have died or his employer gone out of business or a widow may have remarried. It is not judicial policy to ignore such events. When the matter comes to trial the court will avail itself of all the latest information.¹⁰⁶

'Where there has been a change in the situation between the date of the delict and the date of the judgment this change may affect the amount of damages to be awarded'.¹⁰⁷

'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'.¹⁰⁸

The supervening information may alter the court's perception of what is foreseeable, the expected normal course of events in relation to the relevant life plan. This in turn will give rise to a changed assessment for the damages. The terminology of statistical science describes this as a Bayesian revision,¹⁰⁹ that is to say a prior estimate of an unknown quantity revised, made more accurate, in the light of additional information.

[2.8.4] *Effect of appeal-court ruling*: Once the trial court has given judgment then the court's award becomes frozen in time. If an appeal court alters the award made by a trial court then 'The order of the trial Court is set aside and there is substituted therefore the following...'.¹¹⁰ The date on which the trial court hands down judgment determines a cut-off date after which no further evidence may be brought to bear upon the determination of quantum.¹¹¹ By way of contrast English law is quite unambiguous about admitting before an appeal court evidence of events supervening since date of judgment.¹¹²

¹⁰⁶*Wigham v British Traders Insurance* 1963 3 SA 151 (W) 156C 'The Court is entitled in the case of prospective damages to inform itself of subsequent facts which are known at the date of trial and which if taken into account would enable the Court to determine with a greater degree of certainty or accuracy the actual loss of a plaintiff. By so doing the amount of speculation involved in such an assessment is reduced'. See too *Boberg* 1964 *SALJ* 194 199-200; *Boberg 'Delict'* 487; *Corbett & Buchanan* 3ed 10-11; *Davel 'Broodwinner'* 194-7 509-10. *Scott 'Oorerflikheid van Aksies'* 212 suggests that the cut-off date should be *litis contestatio*.

¹⁰⁷*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557G.

¹⁰⁸*General Accident Insurance v Summers* 1987 3 SA 577 (A) 615C.

¹⁰⁹*Levin 'Statistics for Management'* 2ed 156-62.

¹¹⁰*Southern Insurance v Bailey* 1984 1 SA 98 (A) 121sup. *General Accident Versekeringsmpy v Bailey* 1988 4 SA 353 (A) 360.

¹¹¹*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 915A 'It appears that the plaintiff died before the hearing of this appeal'; in *Legal Insurance v Botes* 1963 1 SA 608 (A) the appeal court was not notified of the plaintiff's prior death and experienced some degree of embarrassment from subsequent press reports; *De Villiers v Maursen Properties (Pty) Ltd* 1983 4 SA 670 (T) 678A 'Evidence not before the Court *a quo* and subsequent to the granting of the order cannot be introduced'. *Contra AA Mutual Insurance v Van Jaarsveld (I)* 1974 2 C&B 360 (A) 'Since the trial a strong possibility has emerged...'

¹¹²*Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 914f-h.

[2.8.5] Causation by facilitation: A supervening event may be a delictual act by a third party. In general the damage suffered by the plaintiff will then be apportioned between the first and the second wrongdoers.¹¹³ Sometimes, however, the original injuries of the victim may be viewed as the cause of the subsequent incident and the associated financial loss becomes an addition to the primary loss.¹¹⁴ In this latter instance one would say that the original injury has facilitated, that is to say increased the risk, of the subsequent incident. In other words the subsequent event was foreseeable in the normal course of events, having regard to the injury or death.¹¹⁵

[2.9] MARKET VALUE

[2.9.1] Communal utility: Personal utility in its most subjective form is generally not measurable with sufficient reliability to satisfy the needs of a court of law. For purposes of justice between man and man, and man, the public nature of the law courts requires a publicly demonstrable standard of value. Voet states in this regard:¹¹⁶

'It is beyond doubt that, when ascertaining the loss suffered, account is taken of the communal value for the patrimonium, not the claimant's personal evaluation.'

Van der Walt¹¹⁷ has expressed this principle in more modern, if perhaps roundabout language:

'Aangesien dit in verband met die skadevergoedingsregtelike vermoënsbegrip altyd moet gaan om die bevrediging van *erkende* behoeftes, moet die betrokke goed se nuttigheid vir die bevrediging van die vermoëns subjek se behoeftes sodanig wees dat daardie goed deur van sy regsgenote aangesien sal word as nuttig vir daardie doel, welke doel ook vir hulle bevredigingswaardig voorkom. Dit kan derhalwe gesê word dat die nuttigheid van die betrokke goed vir bevrediging van die vermoëns subjek se behoeftes, én daardie behoeftes as sodanig, 'n verkeerswaarde moet hê. Só beskou is die vermoëns waarde van iets gelyk aan die verkeerswaarde van die nuttigheid van daardie goed vir bevrediging van die vermoëns subjek se erkende behoeftes in ooreenstemming met die wyse waarop hy sy vermoë vir daardie doel planmatig struktureer. Die vermoëns subjek is dienoooreenkomstig in die posisie dat hy die vermoëns goed ter bevrediging van sy besondere behoeftes planmatig só kan inspan dat aan sy vermoë 'n subjektief - funksioneel gestruktureerde eenheidsgestalte gegee word.'¹¹⁸

¹¹³ *Bekker v Constantia Insurance* 1983 1 PH J13 (E); *Minister of Communications & Public Works v Renown Food Products* 1988 4 SA 151 (C); Cooper-Stephenson & Saunders 'Damages in Canada' 626-635; Hart & Honoré 'Causation' 247n3&4.

¹¹⁴ *Smith-Wright v Van der Linde* 1954 1 C&B 454 (SR); *Mair v General Accident Fire & Life Assurance* 1970 3 SA 25 (RAD) 27A-B; *Oelofsen v Cigna Insurance* 1991 1 SA 74 (T). Medical negligence is commonly occasion for such an inquiry (see Luntz 'Damages' 2ed 127-8 132-4; Neethling Potgieter & Visser 'Deliktereg' 2ed 187-9 concerning *novus actus interveniens*).

¹¹⁵ See too section 11.9.

¹¹⁶ Voet *Ad Pandectas* 45.1.9 'Illud extra dubium est, in definiendo eo quod interest, neququam affectionem peculiaris rationem habendam esse, sed communem, ut ita dicam, affectionem oportere spectari'.

¹¹⁷ Van der Walt 'Sommeskadeleer' 280-1.

¹¹⁸ Neethling Potgieter & Visser 'Deliktereg' 2ed 208n76 criticise this statement by Van der Walt on the grounds that 'Dit is noodwendig 'n kenmerk van vermoënskade dat die betrokke bate en die nadeel direk in geld waardeerbaar moet wees'. This is, of course, what Van der Walt is saying but in a very much more generalised utilitarian way.

We may here discern the basic elements of a utility value ('nuttigheidswaarde') which must not only be recognized by our fellow men in the legal sense ('regsgenote') but which must also have a communal value ('verkeerswaarde'). Both conditions must be satisfied. Thus prostitution may have a value in exchange ('verkeerswaarde') but this value will not be recognized for compensation purposes.¹¹⁹ Van der Walt seems rather to overstate his point when he says that the utility of the goods, and the need for them, must have a value in exchange.¹²⁰ Needs ('behoefte') give rise to utility ('nuttigheidswaarde') but do not themselves have value independent of their associated utility.¹²¹ The notion of a life plan ('planmatigheid') lends cohesion to the patrimonium in the sense of a 'co-ordinated going concern' rather than a haphazard agglomeration of assets and liabilities, hopes and fears. I will for the moment defer further discussion of just what is a 'patrimonium'. For the moment let us focus upon value in exchange ('verkeerswaarde'), the outward and discernible manifestation of numerous diverse private utility values held by various members of the community.

The most common manifestation of communal utility is the market value of the goods. In an active commercial environment one finds a communal concept of value for exchange of ownership and exchange of use. Transfer of ownership for value is generally effected by means of sale or barter. Exchange of use is effected by means of lease. The use of money is generally exchanged by lending it at interest. The concept of 'market value' requires closer examination:

[2.9.2] Imperfect information: Where goods are actively traded in a market there comes into being a certain degree of consensus as to a fair monetary value for the goods, the 'market value'. I say 'a certain degree of consensus' because it is rare that there is absolute clarity as to the precise market value of any trade goods at any one point in time.¹²² When prices are fixed by monopoly or official decree then one may identify a fixed price. However, where market forces are allowed to operate there tends to be a range of prices at which trading takes place during any one day. One has only to consider stock exchange prices which have the unusual feature that price information is immediately and publicly available. This is not always so.

[2.9.3] Expected prices: If price information is difficult to come by the range of prices at which trading takes place will generally widen. Even in an erratic market, such as residential property, the house brokers, property salesmen, will have fairly clear ideas as to the value of most properties. This concept of value amongst the 'experts' will tend to determine the prices at which trading takes place. It is likely, however, that no two property brokers will fully agree as to the market value of any particular property, but they will probably arrive at values which are broadly similar. Market value in this sense is **the price at which a sale is expected to take place** if the property

¹¹⁹The principle applies to damages for personal injury (*Dhlamini v Protea Assurance* 1974 4 SA 906 (A)) and to damages for loss of support (*Santam Insurance v Ferguson* 1985 4 SA 843 (A)).

¹²⁰'die nuttigheid van die goed, én daardie behoeftes, 'n verkeerswaarde moet hê'.

¹²¹Neethling Potgieter & Visser 'Deliktereg' 2ed 208n76 remark upon Van der Walt's abstract concept of functionality independent of money value.

¹²²Neethling Potgieter & Visser 'Deliktereg' 2ed 230n223 note the difficulty that can be experienced with the determination of market value.

in question was traded at that point in time. If the property has been recently traded, that price may be a true reflection of market value. It is common, however, for an actual price to be described as 'a bargain' or 'excessive'. Such comments reflect a concept of value different from that at which actual sales take place. There is a form of mental averaging in the concept of 'fair market price'.

[2.9.4] Hypothetical value: The main point I make here is that market value reflects the *expected* price at which trading would take place. Market value is for most situations itself hypothetical. This is particularly so in actions for damages where the goods have been used or have aged or have been damaged. The market for such goods will generally be one where price information is difficult to come by. Even when the claimant has sold the goods the price obtained is not necessarily conclusive of market value.¹²³ I emphasise this point because commentators, such as Van der Walt,¹²⁴ have developed theories of compensation based on the notion that certainty is possible, if only we can wait to allow unfolding reality to resolve our doubts. In practice, day-to-day commercial life is fraught with inadequate information and hypotheses as regards prices.¹²⁵ In this sense the trader making a business decision is in very much the same position as a court called upon to assess damages on the basis of inadequate information.¹²⁶

[2.9.5] Immediate replacement of damaged goods: Market value, the price at which goods will be traded, provides a measure of communal utility. If goods have a higher utility to a person than the price at which they can be purchased in the market then he becomes a potential buyer. Conversely if the goods have lower utility than the money for which they can be exchanged then the owner becomes a potential seller. If too many persons seek to sell then, in a free market, the price should decline until buyers and sellers are once again balanced. Actions for damage to goods have the important characteristic that the claimant at the time of the wrongful act preferred to own goods rather than their equivalent in money.¹²⁷ From this we may conclude that, as a general rule, the utility of the goods to the claimant was more than the utility of the money for which those goods could have been exchanged. If market value is taken as the basis for compensation then we can conclude that the claimant gets less utility by way of compensation than he enjoyed when he possessed the goods. This use of market value may be justified if the claimant is provided with sufficient

¹²³See, for instance, *Cowley v Hahn* 1987 1 SA 440 (E) and discussion thereof by Sharrock 1987 *SALJ* 229; see too *Erasmus v Davis* 1969 2 SA 1 (A) 6H 8.

¹²⁴Van der Walt 'Sommeskadeleer' 291 et seq.

¹²⁵See, for instance, comments in *Erasmus v Davies* 1969 2 SA 1 (A) 7G-H; Sharrock 1987 *SALJ* 229-32; McGregor 'Damages' 14ed 193.

¹²⁶A court cannot decline to make an assessment by reason of paucity of evidence (*Arendse v Maher* 1936 TPD 162 165; *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769-70; *Parity Insurance v Van der Merwe* 1967 1 PH J17 (A)). However, a claimant who fails to lead available evidence may be non-suited (*SA Eagle Insurance v Cilliers* 1987 3 C&B 716 (A) 728; *Hendricks v President Insurance* 1993 3 SA 158 (C)).

¹²⁷The effort of selling goods may have substantial disutility. It is possible that the utility of goods to a person is less than the utility of the monetary value of the goods but more than the combined utility of market value less the disutility of selling.

compensation money to buy substitute goods.¹²⁸ If such substitute goods are purchased immediately after the damaging of the original goods then the claimant's loss becomes a loss of money and not a loss of the utility of the goods.¹²⁹ In general a plaintiff is expected to mitigate his damages by purchasing substitute goods as soon as is reasonably possible.¹³⁰ Many claimants do not have the financial resources to acquire substitute goods until after compensation has been paid. Those claimants who do have the financial resources will commonly find that immediate replacement is just not possible at a cost which approximates to the 'market value' of the goods which have been damaged. Replacement cost is not necessarily equal to the price which the claimant could have got for the goods had they been sold immediately prior to the event causing damage. The market for motor vehicles provides a good example of wide differences between acquisition costs and the price obtainable on disposal, the 'trade-in' value. In *Wikner v TPA*¹³¹ the court refused to add general sales tax to the damages suffered despite the fact that if the claimant had actually purchased substitute goods he would have incurred this cost.

[2.9.6] Disutility of effecting replacement: Quite apart from the question of the price payable the acquisition of substitute goods¹³² requires effort on the part of the claimant. It may take days, weeks and even years of diligent effort to acquire substitute goods. Such effort is of the same nature as work. To the extent that such work has disutility the claimant's overall utility has been reduced. Even if the claimant does succeed in replacing the goods shortly after the delict he will suffer a loss of the use of the money spent. With breach of contract the claimant will often have the use of the purchase price that he would otherwise have paid. Such persons suffer little or no loss of use of money. It is otherwise when goods have been so badly damaged as to be unusable. The question of damages for loss of use, particularly of money, is a topic with which I will deal in due course.¹³³

[2.10] SUBSTITUTES FOR MARKET VALUE

[2.10.1] Hypothetical objective values: So far I have emphasised market value as a measure of utility. In damages theory, market value is the cost of replacing the goods damaged. In practice the imperfections of the market compel the court to adopt a notional market value, that is to say the expected, or perhaps 'deemed' cost of replacement. We shall now turn to the problem of establishing a value in exchange for utilities for which there is no direct evidence of market value **in the sense of a present lump-sum value**. Major classes of present utility with which we are here concerned include earning capacity, future expenses (medical and other), entitlement

¹²⁸Bloembergen 'Schadevergoeding' 53. But see discussion at 163 below.

¹²⁹Bloembergen 'Schadevergoeding' 55 mentions the notion that the loss of the goods is replaced as at the date of delict or breach with the sum of money which may be claimed by way of compensation. Such a rule can only be justified on grounds of mitigation. A claimant can only be expected to mitigate his damages in this manner if replacement was reasonably possible. See further discussion at 163 below.

¹³⁰The market-value rule and the associated duty of mitigation are comprehensively discussed in *Asamera Oil Corp Ltd v Sea Oil & General Corp* (1978) 89 DLR (3d) 1 (SCC). See too *Modimogale v Zweni* 1990 4 SA 122 (B).

¹³¹1992 (T) (unreported 4.6.92 case no 17826/91). See 168 below for further discussion.

¹³²And damages in court.

¹³³See 163.

to support, and the *spes* of inheritance.

Reinecke¹³⁴ proposes the use of a realistic, albeit subjective, value and would seem to have in mind the intuitive assessment of value of a chance.¹³⁵ Van der Walt¹³⁶ paraphrases this as a value recognised by our fellow men,¹³⁷ and adds the requirement of legality.¹³⁸ Savage¹³⁹ gives a different perspective when he states that:

'A probability is a price, in a manner of speaking'.

Such prices, as I have observed,¹⁴⁰ can be elicited by a general interrogation, typically by cross examination of experts in court. Alternatively use can be made of surrogate markets,¹⁴¹ such as the prices for life annuities. Van der Walt's primary objection seems to be his perception of insurmountable difficulty of assessment. It is well established, however, that difficulty of assessment does not mean that the court may adopt a *non possumus* attitude and decline to award damages.¹⁴² The fact that the courts have frequently assessed damages in the face of limited information suggests that the problems are not insurmountable. Van der Walt has here clearly overlooked the distinction between restitution and compensation. Restitution implies a perfect reconstruction of what would have been. Compensation requires merely a fair equivalent.¹⁴³

Earning capacity is the ability of a person to exchange his services and skills for money or monetary equivalent. The standard commercial measure of value is earnings, a salary or wage. Earning capacity is only very rarely exchanged for a lump sum.¹⁴⁴ Some persons, such as entrepreneurs or inventors or prospectors, may work for many years to achieve a single substantial capital gain. Such events are too scarce in the marketplace to provide much assistance as to a lump-sum standard of

¹³⁴Reinecke 1976 *TSAR* 26 31 'realistiese indien subjektiewe waarde'.

¹³⁵'In the present case I do not propose to express the possibility... in terms of a precise percentage. I intend merely to award an amount in respect of the total cost... which will take account of the extent of the possibility and the various imponderables...' *Blyth v Van den Heever* 1980 1 SA 191 (A) 226C.

¹³⁶Van der Walt 'Sommeskadeleer' 272-3.

¹³⁷'regsgenote'.

¹³⁸Damages will not be awarded if the earnings were derived from an illegal activity (*Dhamini v Protea Assurance* 1974 4 SA 906 (A) 915B 917E); see 267 below.

¹³⁹Savage 'Bayesian Econometrics' 111 112.

¹⁴⁰See 11.

¹⁴¹Pearce 'Cost-Benefit Analysis' 10-11; *Todd v Administrator, Transvaal* 1972 2 SA 874 (A) 885D (comparable prices for similar lands).

¹⁴²See footnote 126.

¹⁴³See paragraph 3.3.3.

¹⁴⁴The closest that commercial practice comes to a lump-sum payment in exchange for earning capacity is the price of a restraint of trade agreement. One might also cite the 'purchase' of a football player by a football club. Even if such transactions did reflect fair value for a lifetime's earnings they are sufficiently rare that one cannot say that a lump-sum market value for earnings is thereby established.

value for earning capacity. Loss of support claims are concerned with the share of the deceased's earnings expected by the dependant.

[2.10.2] *The forensic exchange:* The courts, with their lump-sum awards for loss of earning capacity, provide the most active commercial exchange where lump sum values are explicitly quoted.¹⁴⁵ The legal procedures by which the lump sums are determined tend to emphasise that evidence of commercial value is drawn from sources extraneous to the courts, particularly of wage levels. This ensures consistency between judicial awards and the commercial environment. A similar reliance on the opinions of experts enables the courts to remain in touch with social and scientific developments. Notwithstanding all this evidence the 'forensic exchange' creates its own standard of value. That is the nature of a specialist market.¹⁴⁶ The most obvious area where the courts create their own standard of value is with conventional damages, general damages for pain and suffering and loss of the amenities of life. These are determined by and large by reference to previous awards.¹⁴⁷ Just as, if I wanted to sell my home, I would seek out information as to the prices paid in recent sales and pitch my asking price accordingly.

[2.10.3] *Rebuttable presumptions:* The conventions of the 'forensic exchange' extend well beyond the customary pricing of damages for pain and suffering and loss of amenities. Some of the conventions are entrenched as rules of law.¹⁴⁸ Most are less rigid in application and serve to fill gaps created by inadequate evidence.¹⁴⁹ This latter class has the quality of rebuttable presumptions which give way to explicit evidence, if plaintiff or defendant chooses to make such available.¹⁵⁰ The rebuttable conventions thus reflect an abstract approach to assessment which may be concretized by more detailed evidence.

[2.10.4] *The market value of work:* As I have noted the standard communal measure of a man's earning capacity is the wage which he can command. That, of course, is a measure of the utility of a man's earning capacity to the person paying the wage. The utility of the wage to the workman is determined by the extent to which that wage can be used to fulfil needs. As will be discussed later¹⁵¹ this requires that tax be deducted from earnings. One is left with a net income which may then be projected over many years into the future. The projected income provides a measure of the utility of the man's earning capacity, but only in the form of yearly or monthly

¹⁴⁵Strictly speaking it is not earning capacity which is exchanged but the right to bring further claims against the defendant.

¹⁴⁶eg war medals, stamps, vintage cars, etc.

¹⁴⁷Visser 1988 *THRHR* 468 485inf 'Daar het dus onteenseglik 'n kommersialisering van sekere hoogsersoonlike belange plaasgevind'; Munkman 'Damages' 4ed 18-19; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841E.

¹⁴⁸Vide the rules governing collateral benefits: *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A); *Dippenaar v Shield Insurance* 1979 2 SA 904 (A).

¹⁴⁹For example: SA population life tables are used as the basis for mortality and general contingencies are deducted.

¹⁵⁰The convention under the dependants' action to apportion family income with two parts to each adult and one part to each child provides a fine example.

¹⁵¹See 231.

packets of utility. The problem facing a court subject to the once-and-for-all lump-sum rule is the conversion of a time-dependent series of packets of utility into a single lump sum payable immediately which has substantially equivalent present utility.

[2.10.5] Discounting to present value: In performing this capitalization the court needs to bear in mind a number of factors influencing utility. Foremost is the consideration that an amount payable at some future date, say 20 years' time, has substantially less utility than the same amount payable immediately. The difference is measured by the discount for interest.¹⁵² As an offset against this discount for interest is the consideration that wages and prices will increase over the years due to the effects of inflation. The prospect of wage and price increases, inflation, enhances the utility of net earnings 20 years from now. The prospect of death intervening during the 20 years reduces the utility, as too does the prospect of unemployment. Considerations of possible promotions or successful establishment of one's own business may well increase the utility of net earnings 20 years ahead. Each of these different elements needs to be weighed, one against another, in arriving at a fair present value.

[2.10.6] *Quot homines tot sententiae*: One thing is certain, the present utility of a prospective gain or loss 20 years from now will be assessed very differently by different persons. Some will emphasise the risk of intervening death, some will overstate the discount for delay (interest), some will overstate the effects of future inflation. There will be others who will underrate these considerations. Typically the chance of early death will be largely ignored by many persons. If agreement is to be reached as to present value in face of these different perceptions then it is necessary that practical communicable procedures be adopted for the objectivization of present utility. In the absence of rules of assessment all is confusion.

[2.10.7] A general norm: I have already quoted Voet's statement¹⁵³ that for purposes of assessing compensation regard must be had to the '*affectio communem*' and not the '*affectio peculiaris*'. The *affectio peculiaris* is the personal subjective assessment of value, the present utility of the claimant. For Voet the *affectio communem* means not the market value of the *res* in the commercial sense but rather that 'the plaintiff's loss is to be assessed by a general norm'.¹⁵⁴ The first norm which comes to mind is the principle of restitution, to put the plaintiff in the position he would have been in. In general, however, restitution is not possible and the award of damages is no more than compensation, a monetary substitute for the utility which has been lost.¹⁵⁵ This phenomenon is most obvious with general damages for pain and suffering and loss of the amenities of life. The phenomenon arises equally, albeit less obviously, with

¹⁵²See 125".

¹⁵³Voet '*Ad Pandectas*' 45.1.9. See 22.

¹⁵⁴Erasmus 1975 *THRHR* 104 115 269n111.

¹⁵⁵Munkman '*Damages*' 4ed 1-2; Bloembergen '*Schadevergoeding*' 48 114; Van der Walt '*Sommeskadeleer*' 65 157 280 285; Erasmus 1975 *THRHR* 104 106 'Historically, the sum of money of the judgment is probably to be explained as the price of redemption from liability, that is, the monetary composition offered to the victim in order to save the wrongdoer from the harshness of personal execution'.

uncertain financial loss.¹⁵⁶ I discuss at some length below that once a deduction has been made for risk it matters not how diligently the plaintiff invests his money, when the time comes, if it can ever come at all,¹⁵⁷ the award will be either too much or too little.¹⁵⁸

[2.10.8] Insights from expropriation: Bloembergen¹⁵⁹ observes that although the problems of compensation for expropriation of immovable property differ in many ways from the problems of assessing damages, nonetheless a comparative study can be enlightening. Barwick CJ in Australia¹⁶⁰ has likened the assessment of earning capacity to the valuation of rental property. As regards expropriation it has been said that:

`The word "value", as pointed out by writers on Political Economy, has two meanings. It sometimes expresses the utility of some particular object (which is called value in use) and sometimes the power of purchasing other goods, which is its value in exchange'.¹⁶¹

It is important to draw a distinction between the activities of `valuation', the estimation of value in exchange, and `investment analysis', the determination of value in use by the prospective purchaser.¹⁶² The latter value determines whether or not the market value is attractive to a potential purchaser. In order to objectivize the `investment analysis' it is necessary to introduce the concept of multiple potential purchasers to determine a notional value in exchange.¹⁶³ With objectivization the activity becomes a `valuation'. Van der Walt¹⁶⁴ points to the relevance of a group norm. `Investment analysis' will usually take the form of discounting expected future rentals and expenditure to present value.¹⁶⁵

The concept of `potential value' contemplates the highest and best use of the property. A large block of offices might, for instance, be let at below-market rentals thus affording a potential of higher profitability at the expiry of the existing leases. The highest and best use must be probable, not merely possible, as judged by an

¹⁵⁶Van der Walt `Sommeskadeleer' 270 notes that uncertainty is the major obstacle to the assessment of hypothetical events.

¹⁵⁷Some contingencies such as the longevity of a breadwinner had he died or the future promotions of an injured man can never be resolved by waiting.

¹⁵⁸There is really only one certainty: the future will prove the award to be either too high or too low' *Lim Poh Choo v C&LAHA* [1979] 2 All ER 910 (HL) 914 c-d.

¹⁵⁹Bloembergen `Schadevergoeding' 6.

¹⁶⁰*Atlas Tiles v Briers* (1978) 21 ALR 129 (HC) 136 quoted at 215.

¹⁶¹*Pietermaritzburg Corporation v SA Breweries* 1911 AD 501 522.

¹⁶²Jonker `Property Valuation' 5-6.

¹⁶³*Todd v Administrator, Transvaal* 1972 2 SA 874 (A) 882A.

¹⁶⁴Van der Walt `Sommeskadeleer' 280 `... dat daardie goed deur van sy regsgenote aangesien sal word as nuttig vir daardie doel, welke doel ook vir hulle bevredigingswaardig voorkom'.

¹⁶⁵Jonker `Property Valuation' 88-96 99.

informed developer.¹⁶⁶ In like manner 'earning capacity' is determined by reference to 'probable'¹⁶⁷ or 'expected'¹⁶⁸ earnings. 'Potential value' includes the value of the chance of enhanced value.¹⁶⁹

[2.10.9] Expected advantages and disadvantages: The decision to purchase a house implies the foreseeability of the utility of the house to the purchaser including the possibility of a subsequent sale. Foresight as to the lettable property of an office block and the expenses of maintenance will influence the price which a purchaser is prepared to pay. In both cases foresight, that is to say prediction in a contingent sense, is required as to the expected future income and expenses to be generated by the asset. Value in general is determined by foreseeability and the associated perceptions of the buyers and sellers regarding the course of future events.¹⁷⁰

The foresight that a businessman has of the future course of rentals and expenses is the same foresight that is required of a court when assessing compensation for future loss of earnings or support. It has been said that the determination of a lump-sum value for earning capacity is very similar to the determination of the price to pay for lettable property.¹⁷¹ The value of lost earning capacity is usually determined by reference to what the victim 'would probably have earned', as distinct from what he 'could have earned' if earning capacity had been optimally utilised.¹⁷² The expression 'verwagte verdienste',¹⁷³ expected earnings,¹⁷⁴ describes the concept more accurately than does 'probable earnings'. The statistical concept of an expectation implies an average of different possible earning scenarios each weighted with the separate chance of its realization.¹⁷⁵ Foreseeability and the statistical concept of an expectation have much in common. A statistical expectation is defined in terms of frequency ratios, hypothetical or historically observed. That which is expected in the sense of 'foreseeable by the reasonable man' incorporates subjective perceptions of

¹⁶⁶Jonker 'Property Valuation' 49n12 56.

¹⁶⁷*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G.

¹⁶⁸*Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

¹⁶⁹*SBI v Connan* 1974 3 SA 111 (A) 117F (mineral rights).

¹⁷⁰Bloembergen 'Schadevergoeding' 73 'De mogelijkheden, die de zaak voor de toekomst nog bood, hadden zich in die waarde geconcretiseerd'.

¹⁷¹*Atlas Tiles v Briers* (1978) 21 ALR 129 (HC) 136; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917B 'The capacity to earn money is considered to be part of a person's estate'. The significance of this statement is apparent if one appreciates that earning capacity is a right of personality but that the present capitalized value of expected future earnings is an asset in the extended patrimony. The perception of earning capacity as a lump-sum asset is also evident in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150C 'Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' (cited with approval in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D).

¹⁷²*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G.

¹⁷³*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150C.

¹⁷⁴*Southern Insurance v Bailey* 1984 1 SA 98 (A) 115C 'If an average expectancy or projection would be postulated...!'

¹⁷⁵Levin 'Statistics for Management' 2ed 192-4; for a calculated example see Koch 'Damages' 53.

the relevant chances.¹⁷⁶ Both involve a weighing up of the various future possibilities and the choice of a suitable middle path as a basis for decision making.

[2.10.10] *The morality of logic:* Market value, or the cost of repairs, are the most obvious bases for assessing the utility of what has been lost. Less obvious norms of assessment are the rules by which capitalization is effected. Such norms include for example the use of life tables, the apportionment of family income between dependants with one part to each child and two parts to each parent, and the addition of inflation when estimating future amounts. Finetti¹⁷⁷ has pointed out that because of the diversity of personal perceptions of utility agreement between men dictates that use be made of averages and logic, if agreement is to be reached at all. Our perceptions of the future are substantially influenced by our personal experiences of the past and are in a constant state of revision.¹⁷⁸ Ramsey¹⁷⁹ points out that 'logic is concerned not with what men actually believe, but what they ought to believe, or what it would be reasonable to believe'. Logic ensures that our beliefs are consistent. In this sense logic has moral overtones.¹⁸⁰

[2.10.11] *Four elements of assessment:* For the measurement of utility Bentham, the first major exponent of utility theory, identified four key elements: intensity, duration, certainty or uncertainty, and remoteness.¹⁸¹ These echo the key elements of the standard actuarial calculation: Intensity can be identified with the level of earnings or support. Duration corresponds with the period of the loss if uncertainties such as mortality are ignored, that is duration contemplates a period to age 99, the limit of life.¹⁸² Uncertainty is accounted for in the deduction for contingencies and the technique of valuation of a chance. Remoteness finds expression in the discount for interest, the adjustment for the time value of money. It is appropriate to recall in this regard Grotius' statement¹⁸³ that losses which are uncertain and remote in time are worth less than those that are certain and immediate.

[2.11] 'ABSTRACT' AND 'CONCRETE' DAMAGES

[2.11.1] *Definition:* The use of market value at date of delict, or even date of trial, will usually be materially different from the utility that has been lost by reason of the delict or breach. For this reason damages based upon market value are described by

¹⁷⁶Such as are described by Ramsey 'Foundations of Mathematics' 166-84; Savage 'Bayesian Econometrics' 111.

¹⁷⁷De Finetti 1937 *Annales de L'Institut Henri Poincaré* 1 16-24.

¹⁷⁸De Finetti 1937 *Annales de L'Institut Henri Poincaré* 23-4. Supervening events and the associated Bayesian revisions have been dealt with under causation (see 20 above).

¹⁷⁹Ramsey 'Foundations of Mathematics' 193.

¹⁸⁰Ramsey 'Foundations of Mathematics' 184-98.

¹⁸¹Page 'Utility Theory' 17 33.

¹⁸²See paragraph 5.1.1. Visser 1986 *De Jure* 207 217-18 records the *per diem* approach to assessing general damages.

¹⁸³Grotius *Inleiding* 3.32.16.

Bloembergen¹⁸⁴ as 'abstract', as distinct from 'concrete damages'¹⁸⁵ when full account is taken of the detailed circumstances of the claimant.

[2.11.2] Sentimental value: Bloembergen's terminology is to be preferred to the more confusing terminology of 'objective' damages and 'subjective' damages. Subjectivity is a relative concept. As a general rule damages preclude the subjectivity of the claimant, his personal utilities, but are strongly influenced by the subjectivity of the presiding judicial officer. The subjective condition of the claimant is only recognised to the extent that it is outwardly discernible and verifiable by others. The Roman jurists cited the example of the slave who was the natural son of the owner. If the slave were injured or killed the damages were assessed according to the market value for such slaves in general without regard for the higher price which the father/owner would have been prepared to pay for that slave in the open market.¹⁸⁶ This focus upon market value, to the exclusion of the true utility of the goods to the plaintiff, has ostensibly persisted into the modern South African law: 'Any element of attachment or affection for the thing damaged was rigorously excluded'.¹⁸⁷ The question of sentimental loss affects, if anything, the assessment of general damages for pain and suffering and loss of the amenities of life. Patrimonial loss is essentially concerned with financial loss. The associated emphasis upon provable market values tends to preclude consideration of personal utilities, sentimental and similar forms of added value, except where such sentimentality is generally recognised as affecting value. One may cite the examples of a vintage car, or a pop singer's personal possessions, as examples of a communal sentimentality creating economic value. The sources of economic value are deeply seated in the human psyche and its effect on human need, with all attendant irrationality and unpredictability.

[2.11.3] Judicial ambivalence: It has been said that 'abstract' damages do not satisfy a refined sense of justice.¹⁸⁸ Concretization, however, requires time-consuming interpretation of complex and subtle facts.¹⁸⁹ An abstract measure of damages fulfils the needs of practice better than a concrete measure. That is to say that an abstract approach permits greater efficiency of claims handling than does a concrete approach.¹⁹⁰ It has also been said that practitioners prefer to work with rough

¹⁸⁴Bloembergen 'Schadevergoeding' 10 36 45-6 48-52 54 58-9 69 75-7 79 83 86 105 108 113; Van der Walt 'Sommeskadeleer' 188 198 202 205 214 216.

¹⁸⁵Reinecke (1976 *TSAR* 26-56; 1988 *De Jure* 221-38) uses the expression 'konkrete skade' in a very different sense from that used by Bloembergen. Bloembergen's concept of 'abstract damage', reduction in market value, would seem to come closest to what Reinecke has in mind with 'konkrete skade', an ideal measure free of considerations of causation.

¹⁸⁶D9.2.33.

¹⁸⁷*Union Government v Warneke* 1911 AD 657 665; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917. Most writers would exclude an addition for sentimental value: Van der Walt 'Sommeskadeleer' 60 74 132.

¹⁸⁸Erasmus 1975 *THRHR* 104 107; Bloembergen 'Schadevergoeding' 38.

¹⁸⁹Bloembergen 'Schadevergoeding' 39.

¹⁹⁰In *Todorovic v Waller* (1981) 37 ALR 481 (HC) the high court of Australia laid down a 3% net capitalization rate for all future compensation matters and prohibited the leading of evidence concerning interest, inflation and taxation. This resort to an abstract measure was clearly motivated by considerations of forensic efficiency.

well-defined measures rather than sophisticated rules which are difficult to apply.¹⁹¹ The date-of-delict rule¹⁹² and the collateral benefit rules¹⁹³ provide examples of this preference. When a court insists on a concrete approach to damages this can have the effect of denying reasonable compensation: By way of example one may observe the general reluctance of the courts to award compensation for the temporary loss of the use of money.¹⁹⁴ In such circumstances excessive zeal for a concrete measure has the effect of increasing the burden of proof, sometimes insurmountably. An emphasis upon concretization stands in sharp contrast to the general principle that compensation will not be denied for lack of evidence if it may reasonably be inferred that damage has been suffered.¹⁹⁵ In general the burden of proof required for damages for personal injury and death will be less stringent than for purely commercial claims such as breach of contract and damage to motor vehicles.¹⁹⁶

[2.11.4] Abstraction of future loss: When Bloembergen writes of abstract damages¹⁹⁷ he has in mind the market value of damage to the *res* as at date of delict or breach, to the exclusion of consequential loss. A concrete approach to damages implies an award for consequential loss and the assessment of value as at the date of the trial. Bloembergen's text is concerned with the simplest situations where uncertainty is largely excluded and full evidence is available, if required. When dealing with future loss, and, for that matter, uncertain past loss, it is convenient to extend the concepts of abstract and concrete. The use of a statistical average, such as a life table, is essentially an abstract approach to damages necessitated by the lack of knowledge as to the precise date that the claimant will die. If one knows the actual date of death then one is able to concretize the damages for future loss with considerably more accuracy. This is but one example of the compromise in the assessment of damages between concretization and abstraction, dictated by the availability of suitable evidence. Abstraction is avoided as far as possible by 'personalizing' the averages

¹⁹¹Bloembergen `Schadevergoeding' 48.

¹⁹²*Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 2 SA 420 (A) 429F 428G-H; *Voest Alpine Intertrading Gesellschaft MBH v Burwill & Co* 1985 2 SA 149 (W); *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B-D. Bloembergen `Schadevergoeding' 55 62 motivates the date-of-delict rule on the grounds that from that date the claimant has a claim for damages in lieu of what has been lost.

¹⁹³*Klingman v Lowell* 1913 WLD 186 (gratuitous board and lodging provided by parents); *McKenzie v SA Taxi-Cab Co* 1910 WLD 232 (insurance benefits ignored); *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) (gratuitous benefits); *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) (military pensions); see 179 below. An abstract measure of damages dictates that collateral benefits be ignored (Bloembergen `Schadevergoeding' 52).

¹⁹⁴See, for instance, *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) 316A-F (evidence of likely application of funds not led); *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) (interest on damages prohibited). A discount for interest will, however, be applied to future losses without the need to lead evidence (see, for instance, *New India Assurance v Naidoo* 1950 (A) (unreported 19.5.50); *Protea Assurance v Matinise* 1978 1 SA 963 (A) 975E-F).

¹⁹⁵See footnote 126.

¹⁹⁶Bloembergen `Schadevergoeding' 39. Similar considerations lead to a relaxation of the foreseeability test and the award of compensation to the man with the so-called 'egg-shell skull' (Neethling Potgieter & Visser `Deliktereg' 2ed 189-91. Boberg `Delict' 278-9 283 303-8 445 459 464; McGregor `Damages' 14ed 105-115; Munkman `Damages' 4ed 38-9).

¹⁹⁷Bloembergen `Schadevergoeding' 10 36 45-6 48-52 54 58-9 69 75-7 79 83 86 105 108 113; Van der Walt `Sommeskadeleer' 188 198 202 205 214 216.

into 'expectations'.¹⁹⁸

[2.11.5] Formalisms of assessment: The practical administration of justice requires recognition of an abstract measure of damages. For Bloembergen this means adopting the market value as at date of delict.¹⁹⁹ For personal injury and death this means partial abstraction through the use of life tables, salary averages, expected investment returns, remarriage statistics and division of family income between dependants with two parts to each adult and one part to each child. All these measures are but abstractions, formalistic substitutes for the true facts. Unlike the South African courts the English courts give explicit recognition to abstract guidelines of this nature:²⁰⁰

'A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach. But though guidelines should be altered if circumstances relevant to the particular guideline change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial'.

The purpose of guidelines is thus to create predictability, to facilitate settlements, to shorten trials and reduce costs.²⁰¹ These are the practical justifications for an abstract approach to damages.²⁰²

[2.11.6] A right to concretize: On the other hand it is equally clear that every plaintiff should have the right to a proper hearing, that is to damages based on a concrete measure. Conversely it seems to follow that every defendant should also be entitled to a full hearing should he feel dissatisfied with a purely abstract approach to assessment. Under the ideal system of justice the abstract measure would provide *prima facie* evidence of loss. Both plaintiff and defendant would then be entitled, should they so wish, to challenge the abstract measure and introduce a greater or lesser degree of concretization by way of explicit evidence. A failure to invoke this right would constitute a tacit acceptance of the abstract measure. The abstract measure provides a starting point for negotiations.²⁰³

¹⁹⁸Thus, for example statistics from the standard life table may be adjusted in the light of special circumstances (*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721-2 - evidence of unusual longevity; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024-7 - evidence of increased risk of early death).

¹⁹⁹The rationale being that at date of delict the plaintiff loses the goods but obtains a right of action for the value of those goods at the moment of destruction; see *Summers v General Accident Insurance* 1985 3 SA 418 (C) 420B-D for an indication that a similar abstract measure prevails in South African law.

²⁰⁰*Wright v British Railways Board* [1983] 2 All ER 698 (HL) 705j.

²⁰¹In *Todorovic v Waller* (1981) 37 ALR 481 (HC) the high court of Australia for reasons of forensic efficiency laid down that 3% per year was to be used as the net capitalization rate in all future compensation matters. With this ruling the courts were prohibited from receiving evidence as to interest, inflation and taxation.

²⁰²Bloembergen 'Schadevergoeding' 48.

²⁰³In *Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf it is said that 'the census statistics... should not be regarded as a starting point, but merely as one of the facts to be considered along with the other facts'. This high-minded appeal to a concretization ignores the realities of settlement mechanics and undermines the credibility of the one and only piece of solid evidence that is generally available concerning remarriage prospects. Remarriage statistics are

[2.11.7] The high cost of concretization: The once-and-for-all lump-sum rule prevents a court from waiting for unfolding reality to reveal the future. For this reason courts are compelled to adopt an abstract approach to matters such as mortality, inflation and future salaries. Fuller concretization can be achieved if compensation is paid by instalments. The price of such concretization is the perpetuation of litigation and the expenses of collecting and processing the latest evidence. Notwithstanding access to unfolding reality many issues, such as promotions and the longevity of a deceased breadwinner, remain abstract hypotheses. The passage of time will also increasingly blur the causal relationship between the original injury, or death, and subsequent events.

[2.11.8] The burden of proof:²⁰⁴ Once liability has been established, the so-called 'merits' of the case, then a plaintiff who seeks to claim damages carries the onus of proving that he has suffered loss.²⁰⁵ It would, however, produce great injustice if the burden of proof were unduly exacting, after all it is the defendant, not the plaintiff, who is responsible for the wrongful act giving rise to the cause of action and the need to go to court. Conversely innocent defendants need to be protected against unfounded and perhaps malicious actions. The burden of proof that falls on the plaintiff should be such as to justify the invocation by the court of at least an abstract measure of damages.²⁰⁶ To demand full concretization may well produce injustice. The defendant is then entitled to demand concretization, greater attention to detail, but the burden of proof for such concretization should then fall on his shoulders to demonstrate that the abstract measure is unreasonable. It does arise that it is just not feasible within the constraints of time and money to concretize the damages. The court itself is then justified in adopting an abstract measure rather than refusing to award damages.²⁰⁷ When collateral benefits are treated as *res inter alios acta* the court is driven by a rule of law to adopt an abstract measure, that is to ignore the realities. Justice would be best served if the defendant were then permitted to prove that the plaintiff will beneficially retain the proceeds of insurance or donation, that is to demand concretization and deduction.

[2.11.9] Privileged claimants: Bloembergen²⁰⁸ states that a plaintiff may elect whether

today very much more refined than when this dictum was handed down (see 1988 *De Rebus* 67 70 631-2).

²⁰⁴This procedural topic is conveniently discussed at this point because of its relevance to abstract damages.

²⁰⁵See Corbett & Buchanan 3ed 13.

²⁰⁶By this I mean that sufficient evidence should be led to permit a provisional, albeit crude, quantification of the damages (*Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) 98-9). The ruling in *Van Almelo v Shield Insurance* 1980 2 SA 411 (C) 413D has proved contentious (Corbett & Buchanan 3ed 13). Greater leniency is appropriate to actions for damages for personal injury and death than to other actions (Bloembergen 'Schadevergoeding' 39; see too the 'egg-shell skull' claimant Neethling Potgieter & Visser 'Deliktereg' 2ed 189-91; Boberg 'Delict' 278-9 283 303-8 445 459 464; McGregor 'Damages' 14ed 105-115; Munkman 'Damages' 4ed 38-9).

²⁰⁷*Arendse v Maher* 1936 TPD 162 165; *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769-70. In general a court will, in defendant's favour, make a discount for interest in respect of future loss without any evidence being led (*New India Assurance v Naidoo* 1950 (A) (unreported case 19.5.50) 'no foundation had been laid in evidence... in the absence of any evidence to the contrary that rate [4% py] is a reasonable rate').

²⁰⁸Bloembergen 'Schadevergoeding' 50-1 71 76 91.

to bring his action on an abstract basis or a concrete basis. He here has in mind claims brought on the basis of cost of repairs,²⁰⁹ or reduction in value at date of delict,²¹⁰ or with allowance for consequential loss.²¹¹ One would think that the availability of such an election is only justified if the defendant has the right to decline to agree to an abstract basis and to invoke a concrete basis, to bring the matter to court and to lead relevant evidence.²¹² Damages in excess of the market value of the damaged *res* at date of delict will arise when there is no duty to mitigate by immediate replacement.²¹³ On the other hand it is conceivable that the damage suffered is less than the abstract measure. Thus Bloembergen²¹⁴ gives the example of the person for whom minor damage to the motor vehicle has no disutility notwithstanding that the market value has been reduced. Such a person will clearly be awarded damages for the reduced market value. I have already observed²¹⁵ that the collateral-benefit rules create a class of actions where the defendant is by law prevented from proving lesser damage.²¹⁶

[2.12] FORENSIC DYNAMICS

[2.12.1] The most obvious juristic fact: Van der Walt notes the tendency of the Roman jurists to focus upon the most obvious aspect of a situation before the court,²¹⁷ that is to say on the external or physical manifestation rather than the abstract idea. Similar juristic psychology prevails today. Thus, for instance, the right to compensation for loss of support is made to hang on the existence of a right to support as distinct from the factual receipt of support.²¹⁸ The earnings of an injured man are given undue prominence²¹⁹ when his true loss is the utility of his life plan in

²⁰⁹See, for instance, *Erasmus v Davis* 1969 2 SA 1 (A).

²¹⁰*General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B-D.

²¹¹See, for instance, *Modimogale v Zweni* 1990 4 SA 122 (B).

²¹²Van der Walt 'Sommeskadeleer' 196n1.

²¹³Van der Walt 'Sommeskadeleer' 99 'Waar die betrokke goedere egter geen markprys het nie, is per definisie geen dekkingskoop moontlik nie, sodat die *lucrum cessans* as sommeskade bepaal moet word'. The criterion of existence of a market price is a poor guide. It is preferable to base the duty to mitigate on what a prudent businessman would have done (*Asamera Oil Corp Ltd v Sea Oil & General Corp* (1978) 89 DLR (3d) 1 (SCC) 20; see too 10-11 'A plaintiff need not take all possible steps to reduce his loss').

²¹⁴Bloembergen 'Schadevergoeding' 66-7.

²¹⁵See 35&.

²¹⁶If collateral benefits were generally deductible this would greatly increase the litigation risk for a plaintiff that the assessed damages are reduced to a negligible amount or nil.

²¹⁷Van der Walt 'Sommeskadeleer' 172-3 'Die neiging van die Romeinse juris om aan die uiterlik waarneembare aspekte van 'n regsfeit vas te hou, verklaar ook waarom hulle gewoonlik na die regsobjek verwys het in plaas van na die eiendomsreg wat daarop betrekking het'.

²¹⁸Davel 'Skadevergoeding' 44 66-7 notes that Voet 25.3.4 allowed a right of action for a right to support derived from contract. The South African courts would seem to have strayed from the Roman-Dutch principle when they refuse compensation for loss of support provided under a customary union or order of divorce (*Santam v Fondo* 1960 2 SA 467 (A)).

²¹⁹See, for instance, *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) and the emphasis upon a 'contract of employment'.

terms of living expenses.²²⁰ One may speculate that the reason for such juristic distortion is the need for agreement between man and man and a focus upon that aspect of the situation that is most readily communicated to other persons.

[2.12.2] Judicial discretion: I have noted that the utility perceptions of an individual are, as a rule, too elusive, too personalized and too varied to serve on their own as a basis for compensation. Abstraction in the form of rules of assessment is a necessary adjunct to an efficient system of compensation.²²¹ Such abstraction will always be subject to the consideration that concretization will prevail if this can be achieved efficiently and conclusively.²²² I add the *caveat* that excessive adherence to concretization may lead to as great an injustice²²³ as does excessive abstraction.²²⁴ The middle way is always the most difficult to follow as is evident from the following quotations:

'In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations'.²²⁵

Boberg²²⁶ interprets these words to mean that the courts 'are entitled to prefer equity and convenience to the dictates of logic'. On the other hand it has been said that:

'While the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" ... as to what is fair and reasonable is nothing more than a blind guess'.²²⁷

'"Billikheid" is natuurlik 'n baie vae begrip sonder 'n konstante betekenis maar daar kan in hierdie verband gesê word dat dit 'n versamelbegrip vir die volgende beginsels is: Die hof moet alle relevante omstandighede in ag neem wat op die skadeomvang dui en irrelevante oorwegings, soos besondere simpatie met die eiser, ignoreer; die basiese kompensasië gedagte moet voorop gestel word; die hof moet sy diskresie versigtig en konserwatief uitoeven en eerder te min as te veel toeken; die bedrag wat toegeken moet word, moet nie die verweerder onnodig beswaar ten gunste van die eiser nie. Indien hierdie beginsels toegepas word, kan met 'n groot mate van sekerheid verklaar word dat 'n "billike" benadering gevolg is'.²²⁸

²²⁰This is a complex topic which is discussed more fully under loss of earning capacity (see 225). Suffice it to note for the moment that income and living expenses are closely correlated (see Page 'Utility Theory' 75; Friedman & Savage 1948 *JPE* 279 298-9). See too balance sheet of a life plan at 234.

²²¹See paragraph 2.11.3.

²²²Van der Walt 'Sommeskadeleer' 278.

²²³Concretization will produce injustice when an appeal thereto increases the burden of proof to the point of denying compensation for a loss genuinely suffered (see, for instance, *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) 316A-F).

²²⁴Van der Walt 'Sommeskadeleer' 94 'vir die eiser begunstigende objektiewe skadebegrip'.

²²⁵*Legal Insurance v Botes* 1963 1 SA 608 (A) at 614F. See too Voet *Ad Pandectas* 45.1.9.

²²⁶1981 *BML* 25 27.

²²⁷*Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D; see too 113A-F.

²²⁸Neethling Potgieter & Visser 'Deliktereg' 2ed 252.

We may note as well that a court vested with a wide discretion is not thereby relieved of paying consideration to principles and previous decisions:

‘Like all discretions vested in judges by statute or at common law, it must be exercised judicially, or in a selective... and discriminating manner, not arbitrarily or idiosyncratically, for otherwise the rights of parties to litigation would become dependent on judicial whim’.²²⁹

‘Cardozo said, "the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case". Certainty, predictability, reliability, equality, uniformity, convenience: these are the principle advantages to be gained by a legal system from the principle of *stare decisis*’.²³⁰

However, the process of formulating guidelines is subject to the *caveat* that:

‘There is a danger that the unfettered discretion will be superseded by the rule of thumb’.²³¹

[2.12.3] Adapting the law to changing conditions: Emphasis upon a need for rules or guidelines does not mean that there is not a continuing need for the courts, acting in concert with the legislature, to adapt the law to changing social and economic conditions.²³² As a general rule judicial adaptation will be achieved interstitially,²³³ that is by filling in *lacunae* in the law rather than by substituting new rules for old.²³⁴

[2.12.4] Juries: When damages are determined by a jury they are ‘a question of fact’ because the jury and not the judge decides what the damages are to be.²³⁵ The judge decides questions of law:

²²⁹ *Cookson v Knowles* [1978] 2 All ER 604 (HL) 606H. See 210. *Financial Mail* 28 September 1992 31.

²³⁰ Hahlo & Kahn ‘The South African Legal System’ 215. See too *Financial Mail* 2 October 1992 31 concerning a South African judgment that ruled a surety agreement invalid on grounds of public policy: ‘The situation now amounts to legal chaos. The casualty is commercial certainty. (Other) judges have managed to find a fair and pragmatic answer by distinguishing the facts before them from those in the case which created the precedent. While this can work well in a particular case, it is not a panacea. Each case will have to be decided on its own set of facts and no generally applicable rule can be formulated’.

²³¹ *Cloverbay v Bank of Credit & Commerce International* [1991] 1 All ER 894 902.

²³² *Blower v Van Noorden* 1909 TS 890 905 ‘There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature’.

²³³ Hahlo & Kahn ‘The South African Legal System’ 306 quoting Mr Justice Oliver Wendell Holmes. See further Hahlo & Kahn 304-6, 311-12; Forsyth ‘In Danger for Their Talents’ 197-207.

²³⁴ ‘*Fiat Iustitia*’ 290 ‘The need for judicial enterprise and wisdom to accommodate developments in the social, economic and financial order, where the existing law does not provide for such, is not to be confused with judicial ‘legislation’ whereby the existing law is discarded or changed in the face of binding precedent or statutory provisions. If the judge is to be free to reform the law as he thinks fit, the overall result might well be worse than the ills they are intended to cure’.

²³⁵ McGregor ‘Damages’ 14ed 1029-30.

'So long as the award of damages remained the function of the jury precise rules of quantification could not be evolved'.²³⁶

The jury system was unknown to the classical Roman-Dutch law and was introduced into South Africa by the English. It never found acceptance and was abolished some 60 years ago, 'unwept, unhonoured and unsung'.²³⁷ South African law now has a substantial number of reported judgments concerned with the assessment of quantum by a judge. One might thus expect that fairly sophisticated and detailed rules of assessment had by now evolved and become established. This has not proved to be the case either locally or overseas.²³⁸

[2.12.5] Sources of normative rules: The major obstacle to the development of detailed rules within the South African sphere has been the repeated emphasis by the judiciary upon retaining a large discretion to award what the court considers right²³⁹ coupled with a philosophy that every problem can be resolved by bringing sufficient evidence. In other words each case is decided on its own facts.²⁴⁰ There is a view that there are few regular patterns or general principles to be extracted.²⁴¹ This 'hands-off' approach of the South African courts, although by no means ideal, has, for various reasons, proved workable:²⁴²

- * An emphasis upon fact generally indicates the application of a differencing methodology.²⁴³ That is to say that the need for, and effect of, differencing is apparent from the evidence before the court.
- * Amongst practitioners concerned with the day-to-day settlement of the vast majority of claims that never reach the courts there is a substantial body of generally accepted rules of assessment.
- * There is a heavy reliance by the courts upon actuarial evidence. Actuarial methodology promotes adherence to sound rules of assessment in many areas

²³⁶Erasmus 1975 *THRHR* 268 274; Munkman 'Damages' 4ed 54.

²³⁷Hahlo & Kahn (Union of SA) 257; Rood 1990 *De Rebus* 749.

²³⁸Street 'Damages' (v of preface) 'Hitherto the law of damages has been quite remarkable for the lack of interest shown by jurists in its fundamental rules'; Erasmus 1975 *THRHR* 268 'The Roman-Dutch jurists of the seventeenth and eighteenth centuries displayed a considerable lack of interest'; Reinecke 1988 *De Jure* 221 'Die Suid-Afrikaanse skadeleer verkeer nog in sy kinderskoene'.

²³⁹*Hulley v Cox* 1923 AD 234 244; *Legal Insurance v Botes* 1963 1 SA 608 (A) 614F 'In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations'. See 37.

²⁴⁰See footnote 230 for difficulties created by a reliance upon the facts of each case to the exclusion of general rules.

²⁴¹*De Jager v Grunder* 1964 1 SA 446 (A) 451C; Morris 'Technique in Litigation' 2ed 90 'It is a complex concept; it is a fundamental issue of fact'; Corbett & Buchanan (C&B) vol I xxv 'Because of the basis on which damages are computed in fatal injury cases little guidance is given by the quantum of previous awards. For this reason no fatal injury cases are included'.

²⁴²Such as happened in Australia before the ruling *Todorovic v Waller* (1981) 37 ALR 481 (HC) that a net capitalization rate of 3% per year was to be used in all cases. A little more practical guidance from the courts in South Africa for practitioners responsible for settling damages claims would not be misplaced.

²⁴³*Erasmus v Davis* 1969 2 SA 1 (A) 5F-G 17D-F; *Union Government v Warneke* 1911 AD 657 665; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917. See section 3.4.

where the courts have declined to provide guidance.

In addition to these informal sources of judicial rules of assessment there are a number of rules which may truly be said to be rules of the common law.²⁴⁴ They are not questions of fact.

[2.12.6] Relevance of reported judgments: In general one looks to the decided cases on damages not for authority as to rules of law but for guidance as to the prevailing norms of practitioners and actuaries which are acceptable to the courts. The fact that a particular approach has been adopted by a court in the past does not establish a rule of law but it does establish that a litigant may adduce such a methodology in a subsequent matter without undue fear of rejection. The decided cases identify what methodologies have been accepted in the past, and can be safely used in the future.²⁴⁵ The English courts speak of 'guidelines' which fill the gap created by inadequate evidence,²⁴⁶ and have been active in monitoring these 'guidelines'.

[2.13] CONCLUSIONS

This chapter has explored the concept of utility in general, and more particularly techniques for the objectivization thereof for purposes of agreement between man and man. Important objectivizing techniques include direct reference to market prices, reference to relevant surrogate markets, statistical averages and derived expected values, logic and mathematical formulae, and the rules of precedent suitably modified to maintain relevance in changing times.

The assessment of damages for future losses, and past hypothetical losses, is determined by reference to that which is foreseeable by the reasonable man at the time of the assessment as being the normal consequences of the injury or death. Regard will be had to all information available at the time of assessment. Compensation is for the increased chance that an expense will be incurred, or the decreased chance that earnings will be received.

²⁴⁴Inter alia *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) (loss of earnings must be calculated over reduced expectation of life despite fact that but for the injury the victim would have lived a normal lifespan - see 227, 347); *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) (widow who takes up employment after her husband's death is not required to reduce her claim for loss of support by the earnings that she now receives - see 320); *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) (pension benefits paid in terms of contract of employment are to be deducted when assessing damages for loss of earnings - see 183).

²⁴⁵Munkman 'Damages' 4ed x 177. 'There is no doctrine of precedent in fixing the quantum of damages'. Munkman has in mind general damages.

²⁴⁶*Wright v British Railways Board* [1983] 2 All ER 698 (HL) 705j; *Cookson v Knowles* [1978] 2 All ER 604 (HL) 606-7; *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 915a-c.