# CHAPTER 3

# DAMAGE AND DAMAGES

***Summary***: *Perfect restitution is only possible in extremely rare instances. In general the damages awarded by a court are compensation, a fair substitute for what has been lost. When differencing utility regard must be had for the effect of the award for damages on the overall utility after the wrongful act. The assessment of lump-sum damages is assisted by the concept of a patrimonium which includes as assets the present values of future uncertain incomes and outlays. The assessment of damages requires a comparison between the hypothetical state had there been no wrongful act and the actual state having regard to that act.*

## [3.1] FORM OF PAYMENT OF DAMAGES

***[3.1.1] Rule of procedure***: Damages, including those for personal injury and death, are usually awarded by way of a single once-and-for-all lump sum.[1] This lump sum must take full account, not only of losses which antedate the trial or settlement, but also of every foreseeable loss that will occur in the future, however distant and speculative. Once the lump sum has been paid the claimant is precluded from recovering further losses which were not envisaged at the time of the assessment. Conversely the defendant may not recover surplus funds if the claimant dies early, or the losses prove to be less severe than was originally anticipated.

***[3.1.2] Advantages of a lump sum***: It is not my intention to argue for the abolition of the lump-sum once-and-for-all rule. Many writers have dealt extensively with the subject.[2] Whilst instalment compensation has much to commend it, it certainly is not the juristic panacea that some protagonists would make out.[3] The major pitfall associated with instalment compensation is administrative cost and perpetuation of litigation.[4] The closer we get to the juristic ideal the greater the human effort needed to fulfil the dream. In all societies economic resources are limited to a greater or lesser extent. Lump-sum once-and-for-all compensation, for all its imperfections,

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[1]See, for instance, Boberg `Delict' 475-94; Neethling Potgieter & Visser `Deliktereg' 2ed 215-19.

[2]See, for instance, Atiyah `Accidents Compensation & the Law' 3ed; Hutchison 1985 *THRHR* 24; Pearson Cmnd 7054 1978; Burchell 1981 *BML* 74, 1982 *BML* 107; Davel `Skadevergoeding' 128, 136-7.

[3]Milburn-Pyle 1980/81 *TASSA* 136 145 notes that perfect knowledge of the rate of inflation does not ease the problem of projecting earnings which do not increase in line with inflation. In the *Bray* agreement (reproduced in Koch `Damages' 250-2) future instalments are calculated on the basis of 92,5% of the inflation rate. In France use is made of a wage index (Fleming 1977 (26) *AJCL* 51 57). Atiyah `Accidents Compensation & the Law' 3ed 208 notes the effect on wages of increasing productivity; see too Cooper-Stephenson & Saunders `Damages in Canada' 157; Anderson `Actuarial Evidence' 30; Johnson `Modern World' 223-4.

[4]*Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86) discusses some of the difficulties and ongoing litigation that can attach to an instalment agreement.

persists because it is administratively efficient.[5] This, however, is not the only reason for the continuing use of lump-sum compensation:

> `The lump sum has advantages of immediacy, certainty and flexibility, and the evidence tends to show that people prefer it, and if so they should not be accused of imprudence. The importance of certainty becomes evident if one bears in mind the number and variety of misfortunes which can befall nations as well as individuals'.[6]

An inordinately large proportion of academic energy has been directed at the replacement of the once-and-for-all lump-sum rule with a system of compensation by instalments. I have already stated[7] that this thesis takes it be axiomatic that the once-and-for-all lump-sum rule is a convenient, flexible and desirable system that deserves to be retained, albeit, perhaps, in conjunction with instalment procedures.

***[3.1.3] Instalment compensation***: This is permitted under South African law under limited circumstances.[8] The terms governing the payments are set out by way of an agreement.[9] It is doubtful that a court has the power to order variation of such an agreement should unforeseen circumstances arise. In this sense the once-and-for-all rule continues to apply.[10] In one instance a court has considered itself competent to order compensation by instalments outside the ambit of the statutory provision.[11] The defendant elected not to appeal against this ruling thereby consenting to pay by instalments.[12]

A court may order interim payments once the liability of the defendant has been established.[13] Such a payment will be restricted to losses accrued to that time.

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[5]See Milburn-Pyle 1980/81 *TASSA* 136 152-3; Van der Walt `Sommeskadeleer' 315, 448. `The principle is that immediate certainty and finality are to be preferred above deferred precision' *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T) 420F.

[6]Pearson Report vol 1 155. See too Luntz `Damages' 2ed 26; Atiyah `Accidents Compensation & the Law' 3ed 189.

[7]See paragraph 1.1.

[8]Article 43 of MMF agreement ito Act 93 of 1989 (s8(5) Motor Vehicle Accidents Act 84 of 1986) permits instalment compensation for motor vehicle accident victims but only at the instance of the third-party insurer (*Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 971H). See too Boberg `Delict' 486. *Dladla v Minister of Defence* 1988 3 SA 743 (W) discusses the problems created by an apportionment of damages in terms of the Apportionment of Damages Act 34 of 1956.

[9]For examples of agreements see Koch `Damages' 248-56; *Hartnick v SA Eagle Insurance* 1982 1 PH J10 (C).

[10]`The effect of Mr *Israel*'s argument is that the respondent should be ordered to compensate the appellant for damages which she did not claim in the present action. That argument is contrary to the above quoted common-law rule (once-and-for-all damages). Furthermore the wording of section 8(5)(a) makes it plain that the undertaking is given and can thus be ordered only in respect of such costs as are included in the claim for compensation' *Poo v President Insurance* 1992 4 C&B A3-96 A3-111sup. See too Neethling Potgieter & Visser `Deliktereg' 2ed 216n140; *MVA Fund v Andreano* 1993 3 SA 227 (T).

[11]*Wade v Santam Insurance* 1985 1 PH J3 (C). Van der Walt maintains that the once-and-for-all rule did not apply in Roman-Dutch times (`Sommeskadeleer' 304ff).

[12]See too *Kleinhans v African Guarantee & Indemnity* 1959 2 SA 619 (E); Rein 1961 *SALJ* 102 103.

[13]Rule 34A of the Uniform Rules of Court (GG4152 27.11.87 R2642); *Nel v Federated Versekeringsmpy* 1991 2 SA 422 (T); *Karpakis v Mutual & Federal Insurance* 1991 3 SA 489 (O). See too article 45

General damages and future losses are excluded.[14] There is no restriction on how many times interim payments may be claimed.[15] It is conceivable that for reasons of convenience a court orders that a regular monthly amount be paid over pending finalisation of the matter.[16]

In certain extremely simple situations something approaching perfect restitution may be achieved. Van der Walt[17] points out that perfect restitution cannot be achieved for past loss.[18] He proposes an instalment system for compensating future loss based upon convenient stops (`ruspunte') where accrued past loss is compensated.[19] Bearing in mind the problems with achieving perfect restitution with past loss[20] it is clear that any system for compensating future losses can never do better than an award for past loss alone.

## [3.2] THE AQUILIAN ACTION

Certain aspects of the Aquilian action deserve mention:

***[3.2.1] Multiple causes of action***: The Roman law allowed compensation by way of numerous special *actiones* each with its own formula and directed at a particular type of damage.[21] Our modern law allows compensation on the basis of two general actions, the Aquilian action and the *actio injuriarum*.[22] In its idealised form the Aquilian action compensates in one once-and-for-all action all forms of financial loss flowing from the injury or death.[23] In practice the notion of a single all-embracing Aquilian action is something of an oversimplification.[24] The *facta probanda* for the dependants' action continues to be viewed as separate and distinct from those for the action for personal injury.[25] For statutory reasons damages for personal injury must

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of MMF agreement ito Act 93 of 1989.

[14] *Van Aswegen v General Accident Insurance* 1989 (W) (unreported 16.10.89 case 8420/89).

[15] This gives effect to Van der Walt's concept of a series of actions, each directed at compensating past loss, `afgeslote skade', alone `Sommeskadeleer' 291-485.

[16] The *Karpakis* case states *obiter* (at 501D) that the court order may allow for losses in the immediately foreseeable future.

[17] Van der Walt `Sommeskadeleer' 286.

[18] `There is really only one certainty: the future will prove the award to be either too high or too low' *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 914 c-d. Neethling Potgieter & Visser `Deliktereg' 2ed 210n96 note that the courts do not have as much difficulty with assessing future loss as Van der Walt would like to suggest.

[19] Van der Walt `Sommeskadeleer' 291-304.

[20] See paragraph 2.2.3 .

[21] Kaser `Roman Private Law' 149-50; Erasmus 1975 *THRHR* 104 105-6.

[22] *Matthews v Young* 1922 AD 492.

[23] *Green v Coetzer* 1958 2 SA 697 (W).

[24] Van der Walt `Sommeskadeleer' 151 185-6.

[25] *Evins v Shield Insurance* 1980 2 SA 814 (A). This decision has arrested the development of single right of action for all classes of damage. Loss of support occasioned by death cannot be recovered under the same right of action as damages flowing from a personal injury.

be claimed separately from damages for a motor vehicle.[26] The pauperian action provided for liability without fault and still survives independently.[27] The expression `Aquilian action' is thus best described as a generic term for a variety of separate `actions' each with its own different *facta probanda*. The common thread is that these actions are all directed at the recovery of patrimonial loss.

***[3.2.2] Group actions***: Germanic law, by way of contrast to the Roman law, emphasized the interests of the group rather than the individual. Instances of group actions are to be found in South African law,[28] although it is doubtful that these can be traced to any explicitly Germanic origins. Rather they have their origin in the nature of the compensation problem. The most prominent example is the action for damages by an injured breadwinner. When a breadwinner is catastrophically injured his dependants may suffer financial loss by reason of his loss of earnings. The dependants, however, are denied a right of action because they may still look to their breadwinner who himself has a right to claim compensation.[29] The practice of ignoring gratuitous benefits is directed at enabling the victim to reimburse the welldoer and is thus a form of group action[30] where the victim effectively acts on behalf of himself and those who have assisted him. Under the dependants' action the group action exists concurrently with a separate action by the individual.[31]

***[3.2.3] Multiple measures of damages***: In practice the different actions give rise to different measures for the damages. Damages for breach of contract are subject to a different measure from that applying to delict.[32] Foreseeability is an important factor limiting the defendants' liability under breach of contract and damage to property. With claims for personal injury the `egg-shell skull' rule applies, that is to say that unforeseeable consequences of the injury will be compensated.[33] With the dependant's action the damages are restricted to loss of support.[34] In general the measure of damages to be used is determined by the purpose of the inquiry.[35] Even when the purpose of the inquiry has been identified one may find that more than one measure is used, the one checking the result of the other.[36]

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[26]Article 40 of MMF agreement ito Act 93 of 1989.

[27]*Lawrence v Kondotel* 1989 1 SA 44 (D); Neethling Potgieter & Visser `Deliktereg' 2ed 356-9.

[28]See section 11.4.

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

[30]See paragraph 11.4.2.

[31]See Dendy 1990 *SALJ* 155.

[32]*Lillicrap Wassenaar v Pilkington Brothers* 1985 1 SA 475 (A); Boberg `Delict' 3-16. The law of contract refers to positive *interesse* and negative *interesse*. Reinecke 1976 *TSAR* 26 40 notes that these apparently different measures of the damage reflect two different causes `Positiewe en negatiewe interesse is egter in werklikheid nie twee verskillende berekeningsmetodes nie, maar dit het betrekking op twee verskillende gebeurtenisse'.

[33]Hart & Honoré `Causation' 2ed 173 269 271-5; Neethling Potgieter & Visser `Deliktereg' 2ed 189-91. The prospect of injury to the victim in general must, however, have been foreseen if liability is to arise (*Botes v Van Deventer* 1966 3 SA 182 (A)).

[34]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E `as regards maintenance'.

[35]Reinecke 1976 *TSAR* 26 39-42; see 48 below.

[36]See 54.

***[3.2.4] Punitive damages***: There is evidence to suggest that in the classical Roman-Dutch law the measure of damages was different when liability was derived from *dolus* rather than negligence.[37] In modern law damages are no longer punitive.[38] It follows that, once liability is established, the measure of damages is not affected by whether the wrongdoer acted negligently or with *dolus*.

Historically a clear distinction has not always been maintained between the criminal law and civil liability for damages.[39] Under conditions where there was no effective central government to enforce criminal sanctions the old Germanic law bundled together punitive and compensatory considerations. In the modern South African law section 300 of the Criminal Procedure Act[40] empowers a criminal court to order the payment of damages over and above the punishment for the crime. When making such an order the criminal court will take care that it does not prejudice the complainant's right to claim damages in a civil court.[41]

***[3.2.5] The dependants' action***: The dependants' action for loss of support arising from the wrongful killing of the breadwinner was unknown to the Roman law which subscribed to the ethic that the body of a freeman has no value.[42] The early Germanic customary law allowed a right of action to the sib of the deceased for wrongful killing.[43] The modern dependants' action reflects an *actio utilis*, an extension of the Roman-law action for loss of earnings developed in response to the Germanic ethic that compensation should be awarded for wrongful killing.[44] During its formative stages the action for financial loss consequent to the killing of another was allowed to the heirs of the deceased rather than the dependants.[45]

***[3.2.6] Consequential loss***: The dependants' action displays the enigmatic feature[46] that a right of action is allowed to persons who have not been physically harmed by the wrongful act. In this sense it is an action for pure economic loss.[47] However, if the killing of the breadwinner is viewed as the primary damage then the damage for which compensation is claimed under the dependants' action may be viewed as

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[37] *Mlombo v Fourie* 1964 3 SA 350 (T) 357-8.

[38] Erasmus 1975 *THRHR* 268 271; Munkman `Damages' 4ed 2; Van der Walt `Sommeskadeleer' 223, 226. *Santam v Byleveldt* 1973 2 SA 146 (A).

[39] See Davel `Skadevergoeding' 6 14-25. Matthaeus *De Criminibus* 47.4.3-5, for instance, deals with awards for damages in a text dealing with the criminal law.

[40] 51 of 1977. cf Matthaeus *De Criminibus* 47.4.3-5.

[41] *S v Tlame* 1982 4 SA 319 (B); *S v Vulesangweni* 1980 3 SA 527 (Tk).

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

[43] Davel `Broodwinner' 55-6; see too paragraph 13.1.4.

[44] Feenstra 1972 *AJ* 227 229.

[45] Feenstra 1972 *Acta Juridica* 227. Reinecke 1976 *TSAR* 26 51-6 argues for a reversion to this approach.

[46] Historically the Aquilian action has had the requirement of *damnum corpore corpori datum*. This requirement has been watered down in the course of time. In *Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A) 781A-B it was said that even a personal apprehension of danger is not essential.

[47] Boberg `Delict' 3-16 58-103.

consequential loss. This is also true of damage flowing from personal injury if the physical injuries are viewed as the primary damage. These preliminary observations reflect the important principle that a clear distinction needs to be drawn between the infringement of a right that gives rise to a cause of action and the factual economic loss that flows from the infringement of that right.[48] Confusion in this regard is aggravated by the use of the same word `damage' in English to describe both infringement of a legal right (`regskrenking') and the consequential economic loss (`skade').[49]

***[3.2.7] Lucrum cessans and damnum emergens***: These two expressions occur frequently in the literature on damages. Modern jurists are not entirely in agreement as to their meaning. Some writers maintain that the distinction has ceased to be of any significance.[50] Some perceive *damnum emergens* to be the loss of future accruals to the patrimony of the plaintiff while *lucrum cessans* is viewed as reductions to the patrimony that existed at the time of the delict or breach of contract.[51] Van der Walt identifies *lucrum cessans* with future loss.[52] He does not expressly indicate his own meaning for *damnum emergens* but it may be inferred that he identifies it with past loss.[53] Other writers refer to this same distinction with rather greater clarity.[54] Boberg provides a further variation:[55]

> `Because a delict may diminish an estate not only by reducing its value but also by preventing its value from increasing, damage is not confined to actual losses or expenses (*damnum emergens*), but includes also the deprivation of a financial benefit that would otherwise have accrued (*lucrum cessans*). To the former category belong medical expenses and the depreciation of damaged property; to the latter a loss of earnings or profits'.

An important point here is that the expression *damnum emergens* refers to both past and future loss, the same being true for *lucrum cessans*. I use these expressions in the same sense as Boberg. *Damnum emergens* then has the important quality that all uncertainty can be removed by waiting for the `unfolding reality' whereas with *lucrum cessans* unfolding reality may reduce the degree of uncertainty but can never eliminate it.[56] The difference between *damnum emergens* and *lucrum cessans* is then

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[48]See 47.

[49]See 48 and 64.

[50]Erasmus 1975 *THRHR* 104 108; Van der Walt `Sommeskadeleer' 37 (Fischer) 42 (Werner); Reinecke 1976 *TSAR* 26 32n49.

[51]Van der Walt `Sommeskadeleer' 58-9 (Möller) 75 (Neuner).

[52]Van der Walt `Sommeskadeleer' 274-5. In this respect he follows Larenz (87-9). His general rejection of the principle of valuation of a chance is evidenced by his refusal to accommodate uncertain future losses under the heading of *lucrum cessans*.

[53]Van der Walt `Sommeskadeleer' 293-4 `afgeslote skade'.

[54]Neethling Potgieter & Visser `Deliktereg' 2ed 209; Davel `Broodwinner' 14 `Ten opsigte van die begrip skade (*damnum*) is 'n onderskeid gemaak tussen reeds gelede en toekomstige skade. Hierdie onderskeid tussen *damnum emergens* en *lucrum cessans* is sedert die Middeleeue bekend'.

[55]Boberg `Delict' 476. This is the same view taken by Reinecke 1976 *TSAR* 26 29-30.

[56]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557-8. Munkman `Damages' 4ed 71 cites *Moores v CWS Ltd* (*The Times* 5.9.55) for the example of the disabled policeman who was at risk for early retirement long before the accident

a distinction between two essentially different types of uncertainty. Just as one may refer to the loss of the prospect of an uncertain profit (*lucrum cessans*) so too one may discuss the prospect of incurring an uncertain expense (*damnum emergens*).[57]

## [3.3] DAMAGE - WHAT IS IT?

***[3.3.1] `Damage'***: The dictionary[58] defines `damage' to be `loss or detriment caused by hurt or injury affecting estate, condition or circumstances'. There is general agreement that damage is a concept used extensively by lawyers.[59] Causation is an essential component of this concept.[60] One may discuss causation independently of damage[61] but one may not discuss damage independently of causation.[62] Although damage is a concept used extensively by lawyers this does not mean that one should make the mistake of looking to the substantive law to ascertain what damage is.[63] Damage is an intuitive concept which is shared by lawyer and layman alike.[64] Damage is determined by economic and scientific considerations, not by the law. The law uses the scientific and economic concepts when assessing `damages'. One should take care not to confuse the methods used to ascertain damage with the legal rules governing the assessment of the related damages.[65]

***[3.3.2] Interacting concepts of justice***: The foregoing does not mean that the law does not place restraints on what economic and scientific issues may be taken into account when assessing `damages'. The practice of ignoring collateral benefits such as insurances[66] and non-repayable gratuitous benefits[67] gives rise to damages in excess of the loss suffered in terms of a strictly economic measure. Conversely a policy of currency nominalism gives rise to material undercompensation during times of high inflation.[68] The intuitive concept of damage is best viewed as part of natural justice towards which the substantive law endeavours to develop. By reason of changing economic conditions and scientific knowledge the intuitive concept will change from time to time rendering old assessment principles redundant and introducing the need for new procedures. The advent of high rates of inflation has, for example, required

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terminated his employment.

[57]Reinecke 1976 *TSAR* 26.

[58]Oxford English Dictionary.

[59]Visser 1991 *THRHR* 782; Bloembergen `*Schadevergoeding*' 11-13; Reinecke 1976 *TSAR* 26 26-7.

[60]Bloembergen `*Schadevergoeding*' 14.

[61]For instance `What *causes* the moon to rise'?

[62]See 61 below. Contra Reinecke 1976 *TSAR* 26 41-2. Reinecke advocates a measure of damages which is independent of questions of causation.

[63]*Contra* Visser 1991 *THRHR* 782; Neethling Potgieter & Visser `Deliktereg' 2ed 203-4.

[64]Bloembergen `*Schadevergoeding*' 11 `*... dat in het dagelijks leven gebruikt word*'. Van der Walt `Sommeskadeleer' 125n1 refers to a `voorjuridiese skadebegrip'. See 56 below.

[65]See paragraph 3.3.3.

[66]See, for example, *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920-1.

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

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

a major rethink of attitudes to this phenomenon.[69]

In *Kewana*'s case[70] the court ruled that the protection provided by MVA legislation was not restricted to losses compensated by the Roman-Dutch law. In this instance a child adopted according to customary law was granted a right of action for loss of support caused by the death of the adopting mother. The modern Roman-Dutch law would deny such a child a right of action for loss of support.[71]

***[3.3.3] `Damages'***: The dictionary[72] defines `damages' to be `the value estimated in money of something lost or withheld; the sum claimed or awarded in compensation for loss or injury sustained'. Damages is a strictly legal issue limited to what the law will allow. The fiction of *restitutio in integrum* makes out that there is a perfect correlation between damage in the economic sense, and the damages awarded. In practice the courts are no more able to effect perfect restitution than they are able to bring the dead back to life or restore a severed limb. This is so regardless of what procedural regime is adopted, be it compensation by instalments or by lump sum.[73] It follows that **damages are not restitution, they are compensation**,[74] a monetary substitute for what has been lost determined according to a set of legally determined rules and conventions.[75] Otherwise stated the damages awarded is the price for which society expects the victim to exchange what would have been for what now is. An inquiry into damages is really an inquiry into the loss of utility suffered by the plaintiff regarding his patrimony and his person.

***[3.3.4] Damage as a legal concept***: Damage is a legal concept in the sense that lawyers are commonly called upon to make decisions about it. The word `damage' is, however, ambiguous and can, depending on usage, encompass a number of different aspects of the damage-creating event:

> ***[3.3.4.1] Damnum corpore corpori datum***: First of all there is damage in the physical sense, the violent damaging of one tangible by another, the early Aquilian requirement of *damnum corpore corpori datum*.
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> ***[3.3.4.2] Infringement of a right***: Secondly there is damage in the abstract legal

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[69]See, for instance, Spandau 1975 *SALJ* 31; *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 190.

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

[71]See footnote 123.

[72]Oxford English Dictionary.

[73]See paragraph 2.2.3 .

[74]See Munkman `Damages' 4ed 1-2; Bloembergen `*Schadevergoeding*' 48 114; Van der Walt `Sommeskadeleer' 65 157 280 285; Neethling Potgieter & Visser `Deliktereg' 2ed 197; 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'.

[75]Neethling Potgieter & Visser `Deliktereg' 2ed 197 `geld dien dus as ekwivalent vir die skade'; see too 227.

sense of infringement of a right, `regskrenking'.[76] This form of damage is essential if there is to be a right of action in law. If the physical damaging of a person's body or goods also constitutes the infringement of a legal right then it is said that it has been done wrongfully. Usually the legal right infringed is that of the person injured or the owner of the goods. The right of action granted to dependants for the wrongful killing of the breadwinner derives from an infringement of the right to support enjoyed by the dependants.[77] With pure economic loss there is no physical damage, only the infringement of an intangible legal right. As a general rule for every right there is a corresponding duty. It follows that infringement of a legal right will may usually be restated as a failure to observe a duty. In this thesis I do not propose to explore the relationship between rights and duties.

***[3.3.4.3] Reduced economic resources***: Thirdly there is damage in the economic sense. The infringement of the abstract legal right brings with it a diminution in the economic resources that the victim would in the normal course of events have been able to command in order to fulfil a life plan comprising not only the necessities of life but also the chosen quality of life. The infringement of a right does not necessarily give rise to damage in the economic sense.

For an action for damages to succeed the claimant must not only prove damage in the sense of an infringement of a legal right, but he must also prove damage in the economic sense of a reduction in the utility of his life plan.[78]

***[3.3.5] Roman law***: The classical Roman law did not award compensation for consequential loss. The focus was on the physical object which had been damaged. Whatever perceptions of damage were harboured by the Romans the damages awarded were based on the market value of the object damaged. It is conceivable that even partial damage was visited with the same award as was total destruction.[79] The Romans were more concerned with composition, buying off public humiliation or physical punishment for the wrongdoer, than restitution for the plaintiff.[80] The concept of differencing has greatly extended the range of damage that will be compensated.[81]

***[3.3.6] Comprehensive compensation***: The ideal measure of damages is that which

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[76]Neethling Potgieter & Visser `Deliktereg' 2ed 204 observe the distinction between `regskrenking' and damage in the economic sense.

[77]See 344.

[78]Reinecke 1976 *TSAR* 26 34. See 56 below.

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

[80]Erasmus 1975 *THRHR* 104 105-9.

[81]See section 3.4. Reinecke 1976 *TSAR* 26 38 considers that the range has been extended too far.

leads to the most comprehensive possible compensation.[82] This means that when assessing damages regard should be had to all financial gains and losses flowing from the injury or death. The word `comprehensive' implies universality.

The concept of the most comprehensive possible compensation does not mean the making to the claimant of as large an award of damages as can be motivated within the evidential framework. In relation to collateral benefits it can mean quite the reverse due to the making of substantial deductions. With damage to property, and with breach of contract, where limitation of damages is common,[83] the concept may, however, imply an extended range of liability due to the wider range of damage viewed as worthy of being compensated.

Van der Walt[84] states as regards the expression `die volledigs moontlike vergoeding':

> `Onder hierdie uitdrukking verstaan ek die volgende: hoewel volledige skadevergoeding teoreties denkbaar is, kan dit prakties nooit deurgevoer word nie; dit kan toegeskryf word èn aan die grense wat ingevolge die bewys- en prosesreg gestel is aan die praktiese doenlike, èn aan die feit dat volledige skadevergoeding in gepaste gevalle op grond van juridiese waardeoordele onwenslik mag wees'.

Van der Walt was particularly concerned in his thesis with the restraints placed on comprehensive compensation by the lump-sum once-and-for-all rule. Bloembergen[85] is somewhat more sanguine as regards this principle and notably emphasises the monetary aspect:

> *`Het is niet voor betwisting vatbaar, dat ten onzent als hoofdregel geldt, dat alle schade vergoed moet worden of zoals men doorgaans zegt, dat de schade volledig vergoed moet worden. Of nog weer iets anders gezegd: behoudens uitzonderingen is de - doorgaans in geld uitgedrukte - schade even groot als de - doorgaans in geld uitgedrukte - schadevergoeding'.*

Elsewhere in his thesis Bloembergen[86] points out in relation to this concept that to ignore collateral benefits is to objectivize the damages and ignore the true state of affairs. That is to say the concept of the most comprehensive possible compensation requires the deduction of insurances not subject to subrogation,[87] and the deduction of gratuitous benefits not subject to reimbursement.[88] One might debate whether these benefits are part and parcel of damage suffered or whether they are to be viewed as part of the compensation along with the award for damages. In other words are they to be deducted when assessing the damage or later when calculating

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[82]`Die volledigs moontlike vergoeding' Van der Walt `Sommeskadeleer' 8 43 46 93 108 115 125-6 189-90 205 227 229 242 250 279 301 304; Bloembergen `*Schadevergoeding*' 117 120 121 317 337.

[83]See paragraph 3.3.7.

[84]Van der Walt `Sommeskadeleer' 8.

[85]Bloembergen `*Schadevergoeding*' 117.

[86]Bloembergen `*Schadevergoeding*' 52.

[87]See 183.

[88]See 190.

the damages? This point is not entirely academic. Thus, for instance, when there is to be an apportionment of damages[89] is the deduction for insurance benefits to be made before or after apportionment?[90]

Erasmus [91] states that `A purely objective standard of assessment does not satisfy a sophisticated sense of justice'. By the words `purely objective standard' he means disregard for the special circumstances of the case. However, excessive demand by the courts for particularity, that is wholesale concretization, can increase the burden of proof to the point that legitimate damages are denied.[92]

***[3.3.7] The `eggshell skull' rule***: Liability for damages for personal injury and death arises provided the bodily harm in a general sense was foreseeable immediately prior to the event causing the harm.[93] The foresight of bodily harm encompasses a wide variety of different types of injury, including those leading to death and mental shock short of actual physical contact.[94] Events subsequent to the injury may reveal unexpected forms of loss outside what might be considered normal. With damages for breach of contract and damage to physical property liability is limited to foreseeable harm, that is to say to damage which is considered normal having regard to the nature of the wrongful act.[95] With damages for personal injury the so-called `eggshell-skull' rule applies whereby the victim may recover for damage which, prior to the event causing the injury, would have been viewed by the reasonable man as unusual and unexpected.[96]

*Hayward v Protea Versekeringsmpy*[97] provides a lone example of foreseeability being invoked to limit damages for personal injury. Damages had been claimed for loss of inheritance prospects for the victim due to the reaction of his father to the injuries. The court declined to apply the `eggshell-skull' reasoning.[98] Foreseeability was not

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[89]In terms of the Apportionment of Damages Act 34 of 1956.

[90]The treatment of benefits payable in terms of the Workmen's Compensation Act 30 of 1941 provides an example of this problem (see Koch 1987 *THRHR* 475-80; 1990 *De Rebus* 343-6).

[91]Erasmus 1975 *THRHR* 104 107.

[92]See, for example *Broderick Properties v Rood* 1964 2 SA 310 (T) 316.

[93]The prospect of injury to the victim in general must, however, have been foreseen if liability is to arise (*Botes v Van Deventer* 1966 3 SA 182 (A)). See too Neethling Potgieter & Visser `Deliktereg' 2ed 186; *Smit v Abrahams* 1992 3 SA 158 (C) 163-4 and discussion thereof by Neethling & Potgieter 1993 *THRHR* 157.

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

[95]Foresight in the sense of a reasonable possibility, or probability, will be based on the knowledge imputable immediately prior to the wrongful act to the reasonable man, coupled with the special knowledge of the wrongdoer (Neethling Potgieter & Visser `Deliktereg' 2ed 186n156).

[96]Hart & Honoré `Causation' 2ed 173 269 271-5; Neethling Potgieter & Visser `Deliktereg' 2ed 189-91. Van der Merwe & Olivier `Die onregmatige daad' 212 are against the `eggshell skull' rule. See *Smit v Abrahams* 1992 3 SA 158 (C).

[97]1985 3 C&B 588 (C) 601.

[98]Neethling Potgieter & Visser `Deliktereg' 2ed 191 suggest that one may allow an exception to the `eggshell-skull' rule when the damage is wildly unforeseeable.

the sole reason for denying compensation for this head of damage.

The above considerations would suggest that foreseeability is not relevant to the assessment of damages for personal injury and death to the same extent that it limits the damages payable for breach of contract, or damage to goods. This is largely true of that which was foreseeable immediately prior to the act or omission which caused the harm. **However, once the full extent and nature of the injuries, or death, are known then the question of the foreseeability by the court of subsequent financial losses having regard to the injury, or death, becomes an all-important consideration**.[99]

***[3.3.8] Modern juristic perceptions***: The modern intuitive perception of damage is that of a reduction to the value of the physical object damaged.[100] The felt need for a damaged object to which to point is evident in the practice whereby personal injury claims are described as actions for `loss of earning capacity' or `loss of earnings'.[101] When a breadwinner is killed the focus falls on the lost right to support.[102] Van der Walt has noted the Roman propensity to hark upon the most obvious aspect of the legal event,[103] that is to say the external manifestation or physical object, rather than the abstract idea or concept. In this regard jurists have not changed very much since Roman times.[104] Financial advantages which serve to reduce the loss suffered are generally perceived not as part of the damage but rather as a separate class of `compensating advantages', factors which serve to compensate the claimant for his damage.[105] Factors which aggravate the loss suffered will in certain cases be ignored on the grounds of `causally unrelated', `too remote', `unforeseeable'.[106]

Neethling Potgieter & Visser define `damage' as follows:

> `Skade is die nadelige inwerking op enige vermoëns- of persoonlikheidsbelang wat die reg as beskermingswaardig ag. Anders gestel, dui skade op die afname in die nuttigheid of kwaliteit van 'n aangetaste vermoëns- of persoonlikheidsbelang wat dien tot bevrediging van die betrokke persoon se regserkende behoeftes'.[107]

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[99]See 20.

[100]Van der Walt `Sommeskadeleer' 284; Bloembergen `*Schadevergoeding*' 9-10; Neethling Potgieter Visser `Deliktereg' 2ed 210-11. This seems to be the essence of the causally independent measure of damage described by Reinecke 1976 *TSAR* 26 as `konkrete skade'.

[101]See 218.

[102]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 612D.

[103]See paragraph 2.12.1!.

[104]Boberg's unnecessary attempts to rationalize an award for loss of the financial benefits of marriage in the `earning capacity' mould rather emphasises this point (see Boberg `Delict' 576-7).

[105]Bloembergen `*Schadevergoeding*' 315. See too 179 below.

[106]Neethling Potgieter Visser `Deliktereg' 2ed 159-95. The perception of causation as a juristic discretion rather than a factual inquiry sometimes gives rise to questionable rulings (see the examples discussed at 207" below).

[107]Neethling Potgieter & Visser `Deliktereg' 2ed 198.

This definition does not confine damage to financial loss but includes harm to personality interests. This conforms with the observation that there is substantial overlap between patrimonial loss and general damages for pain and suffering and loss of the amenities of life.[108] Damage to earning capacity is a prime example of a loss displaying this duality.[109] Neethling has proposed that earning capacity be included under a fifth class of legal objects.[110]

The definition of damage quoted above does not expressly address the issue of whether damage can exist independently of the law. Reinecke[111] and Visser[112] have gone so far as to suggest that the rule against compensation for illegal earnings arises because the victim has suffered no damage. Van der Walt[113] does not agree with this view. Nor, it seems, do Neethling Potgieter & Visser[114] who cite a number of examples of extra-legal damage.[115] That having been said, the definition of damage quoted above conforms with the views expressed in this thesis.

***[3.3.9] Reinecke's formulation***: There is an ongoing conflict, a lack of congruence, between the economic measure of damage which requires the deduction of collateral benefits, and the legal measure of damages which often excludes collateral benefits from the calculation. Reinecke has endeavoured to resolve this conflict by abandoning an explicit process of differencing in favour of an intuitive measure of damages that he calls `concrete damage'.[116] His preference for a concrete approach to damages is also motivated by his perception that a measure of damages based on causal considerations would cast too wide the liability of the defendant.[117] Reinecke unfortunately provides no examples of what he understands by the expression `concrete damage'. One may tentatively surmise that he has in mind concretization in the sense of reliance on the evidence,[118] that is to say the damage that is *prima facie* self-evident from the evidence before the court, without the need for abstract analysis, especially regard for an abstract `*universum*'.

In *De Vos v SA Eagle Insurance*[119] the untimely killing of the deceased before he could

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[108]See 204 and 215.

[109]Loss of earning capacity may be claimed either as part of the general damages or as a separate item (see *Southern Assurance v Bailey* 1984 1 SA 98 (A).

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

[111]1976 *TSAR* 26 32-3.

[112]Visser 1991 *THRHR* 782.

[113]Van der Walt `Sommeskadeleer' 15n24.

[114]Neethling Potgieter & Visser `Deliktereg' 2ed 198-9.

[115]See 56.

[116]Reinecke 1976 *TSAR* 26-56; 1988 *De Jure* 221-38.

[117]Reinecke 1976 *TSAR* 26 38 `Die doel en funksie van die vergelykingmaatstaf was bloot om die deure kousaal gesien wyd oop te gooi'.

[118]See paragraph 2.11.7.

[119]1985 3 SA 447 (A). See discussion of this case by Neethling Potgieter & Visser `Deliktereg' 2ed 199n10.

pay the first premium on a life insurance policy prevented the payment of the death benefits the policy. The refusal by the appellate division to award compensation is clearly correct because the present value of the future premiums payable was at least equal to the actuarial value of the *spes* of a death benefit at a later date.[120] The appellate division based its finding on the simple observation that had there been no death there would have been no insurance payment. The perception by the claimant that damage had in this instance been suffered would seem to be the sort of concrete damage according to first impressions, the absence of abstract analysis that Reinecke has in mind.

Another example of `concrete damage' as perceived by Reinecke would, it seems, be the costs of repairing a damaged motor vehicle. The cost of repairs is, however, but one way of assessing the damages. The preferable view seems to be that one should have regard to more than one measure, the one being used as a check on the conclusions drawn from the other:

> `The measures employed to estimate the money value of anything (including the damage flowing from a breach of contract) are not to be confounded with the value which it is sought to estimate; and the true value may only be found after employing more measures than one - in themselves all legitimate, but none of them necessarily conclusive by itself - and checking one result with another'.[121]

In so far as Reinecke's fears as regards causation and the associated extended liability are concerned, one cannot regard this as a problem if one takes the view that ideal compensation is comprehensive compensation.[122] Where the damage extends over long periods of time the continuing incidence of supervening causal events will increasingly blur the causal connection.[123] There would also be the discounts for interest and uncertainty. The `eggshell skull' rule[124] applies in matters concerning personal injury and death, and also, so it seems, to certain other categories.[125] This has not led to obviously excessive awards. Reinecke's fears as regards unlimited causal extension are, it seems, not a matter of major concern. One does, however, sympathise with Reinecke's groping for a fundamental concept of damage which would explain the substantive law, rather than contradict it. However, some doubt may be expressed that legal rules of assessment are founded on a single unambiguous concept of damages.

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[120]See paragraph 13.13.6.

[121]From *Duke of Portland v Wood's Trustee* 1926 SC 640 651 cited with approval in *Erasmus v Davis* 1969 2 SA 1 (A) 5E.

[122]See paragraph 3.3.6%.

[123]See, for example, 348.

[124]See 51.

[125]1993 *THRHR* 157 161 `Eerstens is van belang dat die *talem qualem*-reël nie (meer) tot persoonlike beserings (`eierskedels') beperk word nie maar ook tot ander gevalle (soos die finansiële onvermoëndheid van die eiser *in casu*) uitgebrei kan word' (discussing *Smit v Abrahams* 1992 3 SA 158 (C)).

***[3.3.10] Van der Walt's formulation***: Van der Walt summarizes his concept of damage as follows:[126]

> `Na my mening moet daar vir doeleindes van die vergelyking aangeknoop word by die eiser se individuele vermoënsbestanddele en hulle nuttigheid vir die bevrediging van sy erkende behoeftes volgens sy eie planmatige vermoënsgestalting. Die vergelyking moet onderneem word deur die pasgenoemde nuttigheid van die te ondersoeke vermoënsbestanddeel soos dit voor die plaasvind van die gewraakte gebeurtenis was... Wat *was* and wat *is* word dus met mekaar vergelyk'.

Van der Walt defines damage in terms of the utility (`nuttigheid') of a life plan (`planmatige vermoënsgestalting') to which the plaintiff's fellow men in the legal sense (`regsgenote') assign a monetary value.[127] The concept of `the utility of a life plan' is a wide one. In the absence of objectivization by reference to the values of our `fellow men' in the sense of a general norm,[128] one strays into the realm of non-patrimonial loss. Even with non-patrimonial loss a general norm exists.[129]

A point that deserves some attention is Van der Walt's statement that `What **was** and what **is** are compared'[130] If this statement had regard to an ongoing series of events over a period of time it would have been phrased `What *would have been* and *what has happened* are compared'. Van der Walt's statement displays no sense of the effect of the passage of time on the value of the loss. His phraseology probably reflects no more than a focus on past loss rather than continuing future loss.

The once-and-for-all award of lump-sum damages serves to top up the victim's lump-sum utility to what it would have been.[131] Van der Walt proposes a system of topping up at intervals rather than once-and-for-all. Both procedures involve the reduction of very personal utilities to objectively determined money.[132]

***[3.3.11] Loss and damage***: The measure of damage is affected by the cause of the damage and the purpose of the inquiry.[133] Consider the arsonist who sets fire to a house, but while the house is burning there is a massive earthquake that causes the house to collapse.[134] If the arsonist is to be sued for damages he has no liability because had there been no fire the house would in any event have been destroyed and had no value. However, the insurer of the house would be liable if the policy

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[126]Van der Walt `Sommeskadeleer' 284.

[127]Van der Walt `Sommeskadeleer' 281.

[128]Voet `*Ad Pandectas*' 45.1.9; Erasmus 1975 *THRHR* 104 115 269n111. This may be either legal or commercial (see 22 above).

[129]See 204.

[130]`Wat *was* en wat *is* word dus met mekaar vergelyk' (see quotation).

[131]Bloembergen `*Schadevergoeding*' 115 uses the concept of a bucket of patrimonial items. Van der Walt `Sommeskadeleer' 145n6 describes this as `sy plastiese beeld van "*een emmer vol vermogenbestanddelen*"'.

[132]See 22.

[133]See footnote 32.

[134]This is the example used by Reinecke 1976 *TSAR* 26 39.

covered loss by fire or earthquake. From the point of view of the owner of the house a loss has been suffered. This loss is only described as `damage' if there is an implication that someone is culpably liable to make good the loss.[135] In other words not all financial losses are damage.[136] It follows that when defining `damage' regard must be had to the allocation of responsibility for the loss. That suggests a legal rather than an economic measure of damage. On the other hand consideration of the financial losses suffered by the victim and caused by the wrongdoer may suggest that the legal measure of damage has been cast too narrowly. It is important for the ongoing growth of law and practice that `damage' be defined independently of limitations placed on damages by the prevailing substantive law.[137] The very expression `limitation of damages' implies a concept of damage that extends beyond what will be compensated by the substantive law.[138] The doctrine of *restitutio in integrum* can create the misleading impression that damage and damages are co-extensive.[139]

***[3.3.12] Actionable damage***: The existence of damage is an essential component of Aquilian liability. It has been said that the fact of physical injury or death alone does not found an Aquilian action.[140] However, an injured child who has suffered no past patrimonial loss will be granted a right of action.[141] What `damage' is it then that gives rise to the right of action? Suffice it say that there is some confusion as to precisely what constitutes `damage' sufficient to found a right of action. Notwithstanding one clear ruling to the contrary,[142] the prevailing practice is to accept evidence of the value of the chance of financial loss as proof of damage sufficient to found a right of action.[143] The fact that actual financial loss will not materialize for

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[135]In some instances the victim will have been partly or wholly responsible for causing his own loss.

[136]Reinecke 1976 *TSAR* 26 36 `'n duidelike onderskeid tussen skade en beskadiging gehandhaaf moet word' and at 34 `Vermoënsvermindering as gevolg van "gebeurtenisse" wat seker gaan plaasvind soos slytasie, dood, verbruik van lewensmiddele, ensovoorts, is dus terminologies nie skade nie'. The words `seker gaan plaasvind' are not entirely correct because some unavoidable loss-causing events such as illness cannot be said to be certain. Reinecke here would seem to have in mind rather events which are considered normal in a contingent sense (see 20 above).

[137]See footnote 64.

[138]See too 47.

[139]See paragraph 3.3.3.

[140]Erasmus & Gauntlett *LAWSA* vol 7 39. Contra *Coetzee v SAR&H* 1934 CPD 221 226; *Wieser v Pearson* 109 DLR 3d 63 70.

[141]*Southern Insurance v Bailey* 1984 1 SA 98 (A).

[142]*Coetzee v SAR&H* 1933 CPD 565 576. This judgment has been the subject of much criticism and has caused serious confusion as regards pure prospective loss (see Corbett & Buchanan 3ed 11; Neethling Potgieter & Visser `Deliktereg' 2ed 214n125; Boberg `Delict' 488; Buchanan 1960 *SALJ* 187; Boberg 1964 *SALJ* 147; Buchanan 1960 *SALJ* 143-4). It is notable that the first *Coetzee* decision was not followed in its sequel *Coetzee v SAR&H* 1934 CPD 221 226 (Watermeyer J was a party to both hearings).

[143]An injured child suffers no immediate demonstrable financial loss in the sense of debt incurred or money paid out. It is the parents who suffer the immediate losses by reason of their duty of support. It is unthinkable that a child should be denied a right of action until the age when, but for the injury, the child would have entered employment (see, for instance, *Southern Insurance v Bailey* 1984 1 SA 98 (A); see too *Jacobs v Cape Town Municipality* 1935 CPD 474 479 concerning the death of a child). Reinecke 1976 *TSAR* 26 30 `'n persoon inderdaad regtens skade ly sodra 'n

many years, if at all, is irrelevant providing such loss can be established as a *certa spes*.[144] Perhaps by reason of the action for general damages for pain and suffering and loss of amenities of life, an action for pure future loss is granted by way of convenience? A preferable view is to accept as damage adequate to found the Aquilian action a *certa spes* of future patrimonial loss.[145] Undoubtedly the loss of a chance in the past founds the Aquilian action.[146] There is authority for the proposition that under the dependants' action a *certa spes* of future loss is sufficient.[147] The one possible objection to allowing a *certa spes* of loss to found the Aquilian action is the problem of prescription. With actions involving physical injury to property or person it is difficult to imagine problems. With pure financial loss it would seem a sufficient safeguard that prescription should not run until the victim becomes aware of his prospective loss.[148]

## [3.4] DIFFERENCING METHODOLOGIES

***[3.4.1] Intuitive notions of differencing***:[149] We all have an intuitive notion of damage as a deprivation or diminution occasioned by the wrongful act. Implicit to the notion of damage is a comparison between an existing state of affairs and a hypothetical state of affairs, that which would have been had there been no wrongful act. Because of the hypothetical nature of loss it is always attended by a greater or lesser degree of uncertainty. Very minute degrees of uncertainty will for practical purposes be ignored.

***[3.4.2] `Differenztheorie'***: For juristic purposes intuitive notions need to be reduced to communicable procedures.[150] The *Differenztheorie* of Mommsen reflects an early attempt at defining a generalised approach to damages assessments. Mommsen defined damage to be:

> `The difference between the value of a person's patrimony at a given point in time and the value which this patrimony would, at the same point in time, have had in the absence of the intervention of the particular event causing damage... Today there is a general

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bepaalde vermoënsverwagting in sy geheel of ten dele verydel word. Andersins sou dit tog onmoontlik wees om te verklaar waarom die persoon onmiddelik skadevergoeding kan haal'.

[144]See paragraph 4.1.8.

[145]This seems to be the dominant view of writers on the subject: Boberg `Delict' 488-9; Neethling Potgieter & Visser `Deliktereg' 2ed 208inf; Reinecke 1976 *TSAR* 26 30. In *Coetzee v SAR&H* 1933 CPD 565 576 the court required a demonstrable past loss to found the Aquilian action. In *Coetzee v SAR&H* 1934 CPD 221 226 the physical injury to the plaintiff was taken to be the basis for the Aquilian action (Watermeyer J was a party to both decisions).

[146]*Chaplin v Hicks* [1911-13] All ER 224 (CA); *Trichardt v Van der Linde* 1916 TPD 148.

[147]*Jacobs v Cape Town Municipality* 1935 CPD 474 479 `Patrimonial loss includes prospective gains'. Seemingly contra *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E `Om in haar aksie te kon slaag, moes die appellante bewys dat die oorledene tot haar onderhoud bygedra het en dat hy dit gedoen het en sou voortgegaan het om dit te doen omdat hy regtens daartoe verplig was' (this may have been said with the particular circumstances of the case in mind). English and Australian law is quite clear about allowing an action based on a *certa spes* of future loss (Luntz `Damages' 2ed 406).

[148]Boberg `Delict' 488-9.

[149]See 217 for a further discussion of this central issue.

[150]cf Van der Walt `Sommeskadeleer' 213, 216.

> acceptance of the rule that the time of trial, that is the time when the calculation of *interesse* is done, is the basis of the law'.[151]

This statement of principle, a product of German scholasticism, has found its way into South African law through *Union Government v Warneke*[152]. As a starting point to an inquiry into damages Mommsen's formulation can be useful provided one bears in mind its limitations which include:

***[3.4.2.1] Loss of use***: Mommsen's formulation takes no account of losses occasioned by temporary loss of use. Suppose I am deprived of my sailing yacht for a period of one year. *Differenztheorie* leads to the conclusion that my patrimonium is not reduced because at all relevant times I remain owner of an undamaged yacht. In practice I have been deprived of the utility of unfettered usage as and when I please, a utility to which one may reasonably ascribe a value for compensation purposes. Is such loss patrimonial or non-patrimonial? The problem of loss of use will be discussed in more detail at a later stage.[153]

***[3.4.2.2] Wasted expenses***: Serious injury to a bride shortly before her wedding may lead to substantial wasted expenses if the wedding is then called off. The victim is deprived of the utility of those expenses, the benefit for which they were incurred. If the injuries now ensure that the wedding will not take place at another date, Mommsen's formulation suggests a nil loss whereas considerations of lost utility suggest a substantial loss. Damages for wasted expenses have been awarded by South African courts.[154]

***[3.4.2.3] Past loss of earnings***: Mommsen's formulation fails to disclose a loss under circumstances where the courts would make an award for past loss. For example a breadwinner may be severely injured and reduced to supporting himself and his family on 30% of the income which he would have had in the uninjured condition. Assume that before the injury he was a man of limited means with a nil estate. By the time the matter goes to trial some 3 years later he still has a nil estate and the hypothetical estate but for the injury is also assessed at nil. According to Mommsen he has suffered no loss. The courts, on the other hand, would recognize the past loss of earnings and award 70% of the full notional earnings during the pre-trial period.

***[3.4.2.4] Single universal action for damages***: Mommsen' formulation assumes a single universal damages action for all losses of whatever nature flowing from

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[151]Author's translation of `*Die Differenz zwischen dem Betrage des Vermögens einer Person, wie derselbe in einem gegebenen Zeitpunkte ist, und dem Betrage, welchen dieses vermögen ohne die Daswischenkumst eines bestimmten beschädigenden Ereignisses in dem zur Frage stehenden Zeitpunkte haben würde ... Heutzutage gilt jedoch allgemein die Regel, das die Zeit des Urtheils... die Zeit, zu welcher die Berechnung des Interesse vorgenommen wird, zu Grunde zu legen ist*' (Mommsen `*Beitrage zum Obligationenrecht*' Vol 2 at 3).

[152]*Union Government v Warneke* 1911 AD 657 665 where reference is made to Grueber `The Roman Law of Damage to Property' (1886). See too Van der Walt 1980 *THRHR* 1 3-4; Reinecke 1976 *TSAR* 26 27.

[153]See 163.

[154]*Trichardt v Van der Linde* 1916 TPD 148 (horse racing); *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 2 SA 111 (C) (rent). See too Reinecke 1976 *TSAR* 26 37sup.

the wrongful act. Despite what was said in *Green v Coetzer*[155] modern proceduralism perpetuates separate actions for different heads of patrimonial loss.[156]

***[3.4.2.5] Considerations of equity***: Mommsen's formulation takes no account of equitable considerations excluding the deduction of collateral benefits. *Differenztheorie* dictates that all financial advantages flowing from the injury should be deducted when assessing damages, whereas utility theory is more finely balanced and provides a middle path between *Differenztheorie* and the prevailing forensic practices.[157]

***[3.4.2.6] Utility of damages award***: Mommsen's formulation fails to draw attention to the effect of the damages award itself on the plaintiff's overall utility[158].

***[3.4.3] Classical differencing***: The `*Differenztheorie*' of Mommsen has had a major impact on the methodology used by the courts for assessing lump-sum damages: Damages are these days generally calculated by having regard to all that the plaintiff would have brought into his patrimony, and disbursed therefrom, in the absence of the injury; a like calculation is then performed having regard to the plaintiff's injured condition.[159] The cash flows are capitalized and the resulting difference awarded as compensation. One might write this as a formula:

| Formula A |
| --- |
| **damages** = **value before** less **value after** |

***[3.4.4] Utilitarian differencing***: The classical formulation of the assessment process tends to create the impression that damages are the result of the difference between two numerical sums. This can lead to some incorrect conclusions and for this reason it is preferable to recast the formula as follows:

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[155] *Green v Coetzer* 1958 2 SA 697 (W).

[156] *Evins v Shield Insurance* 1980 2 SA 814 (A) ruled that the actions for loss of support and loss of earning capacity are separate and distinct by reason of different *facta probanda*; see Boberg `Delict' 515-16. The action for bodily injury has become separated from the action for damage to physical goods by reason of the third party insurance legislation (article 40 of MMF agreement ito Act 93 of 1989) which covers only personal injury and death (see too Van der Walt `*Sommeskadeleer*' 374-5; Boberg `Delict' 504-5). General damages for non-patrimonial loss arising from an injury are not Aquilian (*Government of RSA v Ngubane* 1972 2 SA 601 (A) 606) but are generally claimed in the same action as damages for financial loss (*Casely v Minister of Defence* 1973 1 SA 630 (A) 642). See 43 above.

[157] See 35& and 180.

[158] See formula B at 59.

[159] See *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917E; Neethling Potgieter & Visser `Deliktereg' 2ed 210-11.

| Formula B |
| --- |
| **utility after** combined with **utility of award** = **utility before** |

This formulation emphasises that the award of damages is an event that forms part of the plaintiff's reconstituted life plan. It is a disturbing event as was the original injury. Whereas formula A treats the award as something separate and distinct from the plaintiff's life plan, formula B reflects the reality, namely that the award becomes part and parcel of the plaintiff's new life plan. Formula B implies that the court apprised of the matter may have regard to the interaction of the award with plaintiff's life plan and the revised utility that results. Formula A, it deserves note, will generally provide the court with a first cut at the problem, some guidance as to the order of magnitude of the award to be made. In many instances this will be sufficient to finalize the award.

Examples of the interaction of the award with the claimant's lifestyle include:

***[3.4.4.1] Saved finance charges***: One of the more obvious effects of a substantial damages award to an injured victim is that he will be able to pay off the bond on his house and pay cash when he buys a car, thereby being spared finance charges.

***[3.4.4.2] Business opportunities***: For an otherwise impecunious labourer the compensation money may open up lucrative career opportunities such as the purchase of a taxi or a shop. On a labourer's wage it would never have been possible to raise sufficient funds. The injuries may make it necessary to hire a driver.

***[3.4.4.3] Psychological advantages***: The award will bring with it the dignity that goes with being of independent means and free from the need to work. During the period preceding the payment of compensation the victim may well have suffered the humiliation of being cast upon the charity of others. The award will thus provide not only financial advantages but also psychological advantages.[160]

***[3.4.4.4] Remarriage prospects***: Formula A suggests that in an action for damages for loss of support the widow's remarriage prospects should be determined without regard for the fact of the award. Formula B suggests that remarriage prospects should be assessed having regard to the award.[161]

***[3.4.4.5] Loss of insurability***: The contracts of many employees provide for substantial insurance cover against death and disability, at no cost to the employee. The premiums which the employer pays to provide this cover are a measure of the value of this fringe benefit. Formula A suggests that when calculating damages the loss of earnings should include the value of the

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[160]See 60 for further discussion.

[161]*Burns v NEG Insurance* 1988 3 SA 355 (C) 364H-I `a substantial dowry will undoubtedly add to her charms'.

premiums which had been a benefit of employment. Formula B highlights that if substantial lump-sum compensation has been paid the claimant will have substantial assets and his need for insurance cover for death or disability will largely fall away.[162]

***[3.4.4.6] Loss of support during the `lost years'***: When a breadwinner is injured and suffers a reduction to his expectation of life his dependants suffer a prospective loss of support in respect of the `lost years'. The award of a substantial lump sum to the claimant gives rise to a prospect of a substantial inheritance for the dependants in years to come.[163] Except in the case of the most severe reduction to the breadwinner's life expectancy the enhanced *spes* of inheritance will partly or wholly offset the reduced *spes* of support.[164]

***[3.4.4.7] Disability grants***: State disability and welfare grants are subject to a means test. The payment of compensation will usually disqualify the recipient from further payments. It follows that such benefits should be deducted from past loss only, and not from future loss.[165]

***[3.4.5] Causation implies differencing***: A finding as to causation involves an hypothesis of what would have happened had the causal act not occurred. Every causal event takes place against the background of numerous pre-existing conditions and **an expected normal or usual sequence of events**.[166] The causal event interferes with the normal course of events to produce a different sequence of events.[167] It follows that the concept of causation is inseparable from the notion of a hypothetical sequence **but for the causal act** and an actual sequence **having regard to the causal act**. Hypothesis in the sense of an expected normal, or usual, course of events[168] is an essential component of causation.[169] This is particularly clear when one is dealing

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[162]See section 12.10 .

[163]Reduction to the expectation of life means that the chance of early death is greatly increased (see 81#). The prudent victim will not seek to consume all interest and capital over his reduced life expectancy (see 102').

[164]Even without reduction to life expectancy there is a substantial value for the chance that the wife or children will inherit a part of the award for damages (see 92).

[165]See 199.

[166]Hart & Honoré `Causation' 2ed 29 `The notion that a cause is essentially something which interferes with or intervenes in the course of events which would normally take place, is central to the common-sense concept of cause'. See 20 above.

[167]Hart & Honoré `Causation' 33-41 466 `A cause is a condition which *departs* from the ordinary or regular course of events'.

[168]Under the *actio de pauperie* liability arises if the animal has acted *contra naturam sui generis* (*Lawrence v Kondotel* 1989 1 SA 44 (D) 50-2). In other words liability arises if the animal has acted contrary to what the reasonable man would foresee as the normal course of events in the presence of such an animal.

[169]A *conditio sine qua non* implies the hypothesis `What if the condition were removed?'. In general a cause in law must be a *conditio sine qua non* (*Minister of Police v Skosana* 1977 1 SA 31 (A) 35C-D; Hart & Honoré `Causation' 2ed 466). Van der Walt `Sommeskadeleer' 587 refers to `hipotetiese kousaliteit', `causation by omission' (see Hart & Honoré `Causation' 2ed 30n3&4). Prediction, in the contingent sense, ie according to a set of probabilistic laws, implies a theory, an hypothesis about the real world (Zellner `Econometrics' 38-9).

with `hypothetical causation',[170] that is to say causation by omission.[171]

The assessment of damages, because it derives from consideration of what damage has been `caused' by the wrongful act, requires a similar comparison between what has happened, and will happen, **having regard to the wrongful act** and what would have happened **had there been no wrongful act**.[172] The notion of an expected normal, or usual, course of events is vital to the assessment of damages for future losses, and for past hypothetical losses.

## [3.5] PATRIMONIUM - WHAT IS IT?

***[3.5.1] Patrimonial and non-patrimonial***: The courts distinguish between `patrimonial' and `non-patrimonial' loss. Patrimonial losses are those which can be proved with direct evidence of the loss of money or the loss of goods upon which society places a monetary value. Non-patrimonial losses, such as pain and suffering and loss of the amenities of life,[173] are those to which society outside of the courtroom does not ascribe a demonstrable commercial value:

> `What is a reasonable sum for general damages for personal injuries cannot be measured and tested as reasonable price can be, by the experience of the market-place'.[174]

Notwithstanding the sterile validity of this observation there is a general practice by the courts to determine the reasonableness of an award for general damages by having regard to previous awards.[175] The assessment of damages for loss of earning capacity is not without difficulties and the courts will in this instance too often not have the benefit of the experience of the market place.[176] The distinction between a judicially determined `market-place' and a commercially determined one is, however, fundamental to the distinction between patrimonial and non-patrimonial loss. Van der Walt[177] notes that it is possible that money provides a full equivalent for patrimonial loss, but never so for non-patrimonial loss. The point made here is that although there are some instances of patrimonial loss where perfect restitution can be achieved by the payment of money, there are no such instances when compensating for pain and suffering and loss of the amenities of life. What is more important is that there are numerous instances of so-called patrimonial loss for which the payment of money cannot achieve perfect restitution. That is to say the distinction between patrimonial and non-patrimonial is not always as clear as one might like to think. For instance:

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[170]See, for instance, Van der Walt `Sommeskadeleer' 587 (`hipotetiese kousaliteit').

[171]Hart & Honoré `Causation' 2ed 30n3&4.

[172]See 60.

[173]*Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 288.

[174]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 10A.

[175]See 204.

[176]See, for instance, *Union National Insurance v Coetzee* 1970 1 SA 295 (A) 301-2; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769-70. Even past loss of earnings can be a matter of extreme subjectivity, eg *Chaplin v Hicks* [1911-13] All ER 224 (CA); *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198.

[177]`Geld as skadevergoeding kan dus moontlik vir skade 'n egte ekwivalent bied, maar nie vir nie-vermoënskade nie' Van der Walt `Sommeskadeleer' 185-6.

***[3.5.1.1] Earning capacity***: Earning capacity is obviously patrimonial in the sense that evidence of earnings may be available. Nonetheless an award of general damages, particularly for children, may include allowance for earning capacity[178] and possible future medical costs.[179] The anomalous dual nature of earning capacity has led Neethling to suggest that there should be recognition of a third class of personal immaterial rights.[180]

***[3.5.1.2] Organ transplants***: Modern medicine permits the transplanting of human organs and these days one finds market values being placed upon such organs.[181] One suspects that trading of this nature would generally be viewed by the courts as *contra bonos mores* and thus to be disregarded. The main point, however, is that in certain instances a court may have regard to the prices in such a market when determining the level of an award for general damages for an injury such as the loss of a kidney.

***[3.5.1.3] Services of wife and mother***: The services rendered by a wife and mother in running the family home may be lost by reason of her death or injury. Such services do not have a commercial value[182] except in the rather inadequate sense of the cost of hiring a substitute housekeeper. It has been recognised that a wife's services in the home are something better and worth more than that of a hired housekeeper.[183]

***[3.5.1.4] Overlapping heads of damage***: A substantial award for patrimonial loss may affect the award for general damages in the sense that goods and services which can notionally be purchased with the funds will substantially relieve the pain and suffering or loss of amenities.[184]

***[3.5.2] Assets less liabilities***: In classical Roman times `patrimonium' meant assets without deduction for liabilities.[185] In later Roman law the law of bankruptcy changed to confine the creditors to the assets for satisfaction of their debts and the modern concept of `insolvent' came into being. The perception of `patrimonium' changed to assets less liabilities. From a utility point of view liabilities have

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[178]*MacDonald v Parity Insurance* 1967 1 C&B 748 (D); *Assur v Protea Assurance* 1981 3 C&B 196 (C); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C); *Roxa v Mtshayi* 1975 3 SA 761 (A); *Mashini v Senator Insurance* 1979 3 C&B 82 (W).

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

[180]Neethling 1987 *THRHR* 316.

[181]Time Magazine March 13 1989 88; February 20 1989 16; June 17 1991.

[182]`The work performed by women and men in households is not assigned any economic value; yet this work equals, in monetary terms, a huge proportion of the total amount of wages and salaries paid by all employers in SA'. *Finance Week* October 23-29, 1986 272.

[183]*Regan v Williamson* [1976] 1 WLR 305; McGregor `Damages' 14ed 897; *Wood v Santam Insurance* 1976 2 PH J52 (C).

[184]*Light v Conroy* 1948 1 C&B 444 (T) 445; *Celliers v SAR&H* 1961 1 C&B 160 (T) 164; *Niblock-Stuart v Protea Assurance* 1973 2 C&B 323 (C) 327; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A).

[185]Van der Walt `Sommeskadeleer' 166-73.

disutility.[186] This disutility offsets the utility of the assets. The perception of the patrimonium with regard to bankruptcy is essentially the same concept as the estate which a person leaves on death.

***[3.5.3] Inappropriate analysis***: The spectacular success of scientific method in the natural sciences, particularly physics, led to attempts during the nineteenth century to apply the same scientific techniques to the human sciences. Bentham[187] set out to develop utility theory as the science of social behaviour. Others sought to establish a science of law based on rights and duties.[188] One thus finds the commercial problem of the value of a patrimonium restated in the terminology of legal science: `In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties'.[189] Pursuant to this type of analysis it has been said that the value of a chance does not form part of a person's patrimonium.[190] The classification by rights and duties may be appropriate for purely legal problems but is inappropriate for problems requiring the determination of economic value,[191] that is to say for the assessment of damages. Thus for example:

> ***[3.5.3.1] Value of a chance***: In *Chaplin v Hicks*[192] the plaintiff suffered a past loss, the loss of the chance of an acting contract. No legally enforceable rights or duties came into existence other than the right to sue for damages.
>
> ***[3.5.3.2] Injury to a child***: When a child is injured the notional future earnings would have been derived from an hypothetical contract which does not exist in legal terms, and never will.[193]

The above examples have regard to `legal rights and duties' in a very narrow sense. There are also `legal rights and duties' in the more general sense, such as the right to physical integrity, and the right to work. It is the infringement of these general rights that gives rise to a child's right to claim damages for personal injury. The

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[186]The disutility of debt varies widely between different persons. There are some who will avoid debt and pay cash for everything. There are others for whom the possession of assets is everything and debt a minor irritation to be largely ignored.

[187]Jeremy Bentham `An Introduction to the Principles of Morals and Legislation' 1823.

[188]eg Grueber `The Roman Law of Damage to Property' (Oxford 1886) 269 `Accordingly, it is the whole loss which the plaintiff has sustained in his property (the word "property" being taken in the sense of a universitas or complex of legal relations, rights as well as duties), or, in other words, the *difference* of plaintiff's property, as it was after the act of damage and as it would have been if the act had not been committed, this so-called *interesse*... which has become the object of the Aquilian action in the course of time'.

[189]*Union Government v Warneke* 1911 AD 657 665.

[190]Erasmus 1980 *De Rebus* 389 391 `... the intended beneficiary (under a will) has nothing but an unstable *spes* to inherit which cannot be regarded as forming part of his patrimony'. The same, of course, may be said of the future earnings of a young child.

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

[192][1911-13] All ER 224 (CA).

[193]Reinecke 1976 *TSAR* 26 29 `... 'n persoon... wat verhoed word om inkomste te verkry wat hy deur die beoefening van sy beroep sou gekry het, op vergoeding geregtig is, ten spyte daarvan dat geen bestaande vermoënsreg uitgewis of aangetas is'.

inadequacy, for assessing damages, of a classification by rights and duties does not mean that such a classification is irrelevant to the law of damages. The fact that there is a right, or duty, attaching to a financial prospect affects the likelihood that the prospect will materialise.[194] Much, for example, has been made of the so-called `contract of employment' as a basis for assessing damages for loss of earning capacity.[195] Close analysis of this `contract' reveals that it includes a substantial contingent element subject to the employer's discretion, notably salary increases, bonuses, promotions, overtime work and leave pay.[196] The fact that a victim had a `contract of employment' at the time of his injury will lead to a much larger award for damages than if the victim were a child or unemployed adult.

***[3.5.4] Patrimonium in the broadest sense***: For purposes of the assessment of damages the concept of `patrimonium' needs to be extended beyond not only legal rights and duties but also beyond the familiar notion of the deceased and/or bankrupt estate.[197] This leads one to question whether the word `patrimonium' should be used at all in relation to damages? Today the word `estate' tends to be used to designate `patrimonium' in the narrow sense (deceased estate, insolvent estate). Regardless of its inadequacies the word `patrimonium' is generally included in discussions of damages. For this reason in the context of damages I use the word `patrimonium' in its broadest sense to include the present value of all future indeterminate gains and losses,[198] whether these be protected or enforced by the law or not. It is helpful to represent the concept using the schematics of a balance sheet as in table 2:

**TABLE 2 - THE BALANCE SHEET OF A LIFE PLAN**

| **ASSETS** | **R1000** | **LIABILITIES** | **R1000** |
|---|---|---|---|
| Gross earnings | 250 | Support self | 90 |
| Inheritance | 5 | wife | 90 |
| Services of wife | 100 | children | 135 |
| House | 110 | Taxation | 55 |
| Car | 12 | Bond on house | 20 |
| | | **Net patrimonium** | **87** |
| Totals | 477 | | 477 |

[194]Dit `beteken nie dat die bestaan van so 'n reg vir die skadeleer irrelevant is nie. Die bestaan van 'n reg op die verwagte vermoënstoename sal naamlik lig werp op die mate van waarskynlikheid waarmee daardie vermoënstoename te verwag was' Van der Walt `Sommeskadeleer' 285. See too Reinecke 1976 *TSAR* 26 31.

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

[196]See 195.

[197]Reinecke 1976 *TSAR* 26 29-31 argues that financial expectations (`vermoënsverwagtinge') do form part of a patrimony.

[198]For damages assessment at a time after the injury or death it is convenient to have regard to both past and future gains and losses, certain and uncertain.

Apart from house, car and bond the values in this `balance sheet of life', this `extended patrimonium', reflect the present capitalized values, the present utility, or disutility, for the prospect of the future benefit or outlay. This schematic helps to put earnings in perspective in relation to the other items which impact upon the utility of a life plan. Thus if earnings are removed from the balance sheet by reason of the injury of the breadwinner, taxation will be removed on the liability side, but nothing else. The loss suffered is earnings less taxation.

***[3.5.5] Capitalization***: Table 2 above contemplates the use of `capitalized values'. `Capitalization' means to establish a present here-and-now lump-sum equivalent for one or more future payments, usually periodical.[199] This process involves not only adding up the individual past and future amounts **and applying discounts for interest, but also applying discounts for risk and uncertainty**, that is to say for mortality and other `general contingencies'.[200] It is important to note that **the capitalization process is not complete until the deduction for general contingencies has been established and applied**.

Damages are usually assessed several years after the event causing the damage. For this reason the concept of `capitalized value' needs to include the value of past losses accumulated to date of assessment. Ideally this `capitalization' of past losses would include allowance for past delay by the adding on of interest,[201] just as a discount for interest is applied when capitalizing future items.[202] Past hypothetical items are as much subject to a discount for risk as are future items.[203] The percentage deduction for past risk and uncertainty is usually less than for the future, due to the benefit of hindsight.[204]

The formulation of classical differencing by Mommsen[205] contemplates a mere adding up of items (`betrage'), as with the bill at a restaurant. This is something of an oversimplication because it ignores the discounting considerations which arise in the more complex problems associated with the evaluation of a life plan. The process of capitalization is a process of valuation comparable to that of putting a price on a block of flats[206] or a share-market investment. The capitalized value of a life plan is the present utility of the expected income and outgo associated with the ups and downs of life.

Popular usage of the word `capitalize' often contemplates the use of compound interest only, without any thought for a discount for risk. For actuaries the word

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[199]Funk & Wagnalls Standard Dictionary.

[200]See 149.

[201]See 163.

[202]See 125.

[203]See 72.

[204]See discussion of supervening events at 20.

[205]See 58.

[206]See 215.

`capitalize' implies the application of a discount for interest, **and also a discount for mortality in the sense of the risk or early death**, but without allowance for other general contingencies.

***[3.5.6] Ever changing life plans***: The patrimonium in its narrow as well as its extended sense is always changing.[207] As the breadwinner grows older the value of prospective earnings will decline as too will his capitalized liability for support. The bond will be reduced, the car replaced and the family home increase in value. If there is a divorce then the burden of support will change: a man may lose the services of his wife and half the house but still find himself burdened with the cost of providing his ex-wife with support.

***[3.5.7] Present and future patrimonies***: Reinecke[208] distinguishes between a here-and-now and a future patrimony.[209] His here-and-now patrimony corresponds with the concept of an insolvent or deceased estate. His future patrimony contemplates prospective gains and losses of a contingent nature. Reinecke expressly refrains from consideration of past losses[210] and the associated problems of the chance of a past gain, as in *Chaplin v Hicks*[211], and the value of past loss of buying power, as was awarded in the *Everson* case.[212]

The schematics of the balance sheet of a life plan illustrated under table 2 above bring Reinecke's divided patrimony together as a single undivided whole. For assessing damages some time after injury or death one needs to include in the patrimonium past income and outgo adjusted for inflation, or interest, to give present value at date of trial.[213] Inevitably the needs of a particular analysis will lead to divisions of the patrimonium in different ways.

***[3.5.8] Past and future loss***: If damage is viewed as the lump-sum present value at the date of the delict of the chance of all subsequent losses then all damage is suffered once-and-for-all immediately the wrongful act is committed. In this sense there is no such thing as future loss.[214] The practice of damages assessment has, however, focused on the individual monthly, or weekly, items of loss of earnings or support which form the basis of the present-value calculation, the so-called `continuing losses'. The assessment is usually done several years after the wrongful act with the result that some of the `continuing losses' lie in the past and others in the future

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[207]Reinecke 1976 *TSAR* 26 29: `Die vermoë, soos 'n lewende organisme, deur 'n voortdurende proses van groei en afsterwing gekenmerk word. Bestaande vermoënsbestanddele raak vir die persoon verlore, terwyl nuwe bestanddele deurlopend bygevoeg word'; Van der Walt `Sommeskadeleer' 291.

[208]Reinecke 1976 *TSAR* 26 28.

[209]`die huidige en die toekomstige vermoë'.

[210]Reinecke 1976 *TSAR* 26 26.

[211][1911-13] ALL ER 224 (CA).

[212]*Everson v Allianz Insurance* 1989 2 SA 173 (C). Although there is a very real loss of utility suffered the legal measure of damages does not extend that far (*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A)).

[213]In this sense the upward adjustment of past loss for loss of buying power is of the same nature as discounting future items to present value. See paragraph 10.4.4 .

[214]See, for instance, the reasoning of the court in *Ruby v Marsh* 1975 ALR 385 (HC).

relative to the date at which the assessment if made. The distinction between past and future loss is a procedural matter reflecting the manner in which the calculations are done.[215] The same is true of a separate award for general damages. In the end a single undivided lump sum is awarded representing the agglomerated present utility of all the various considerations that have gone into its making.

## [3.6] UTILITARIAN NATURE OF DAMAGES

***[3.6.1] The shadow of future events***: I will demonstrate[216] that when damage is compensated by the award of a lump sum which has been discounted for risk and for interest the lump sum cannot be used by consuming interest and capital to reproduce what has been lost by way of future instalments of earnings or support. **The lump sum is thus something separate and distinct from the series of future payments that it represents.**[217] It has equivalent value but only in the sense of being the shadow cast by the future upon the present. One cannot use a two-dimensional shadow to reproduce the three dimensional object that casts the shadow. With future financial losses the discounting process irreversibly eliminates the dimension of time.

A shadow is always larger than the object that casts the shadow. Not so with damages. The shadow of future financial events behaves like perspective in a picture. The further away is the three-dimensional object the smaller is its representation in the two-dimensional picture. Thus remoteness in time leads to a shrinkage in value, the discount for interest which I will discuss further below under the heading of `The time value of money'.[218] The lump sum awarded as damages for future loss is best viewed as a single dimension monetary representation, a present-value shadow, of a complex series of future financial events from which the dimensions of time and risk have been eliminated by the discounting process.

***[3.6.2] General damages***: The lump-sum present value of future loss of earnings or support has an enigmatic quality. For this reason the rules of court[219] specify that the amount claimed in this regard should be stated separately from special damages. The value of the chance of loss of earnings may be claimed either explicitly or as part of general damages.[220] This suggests that the lump-sum present value of lost earnings is of the same nature as general damages, a loss of utility rather than a loss of money. If the observation is true for loss of earnings then it is also true for the lump-sum present value of loss of support, and for future necessary expenses, *damnum emergens*. Because damages for loss of earnings, future expenses, and loss of support are measured according to the standard of what is expected[221] they have a patrimonial

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[215]See r18(10) of the Uniform rules of court.

[216]See paragraphs 5.3.1 and 6.1.1.

[217]See too paragraph 12.1.4.

[218]See chapter 8.

[219]See r18(10) of the Uniform Rules of Court.

[220]Neethling Potgieter & Visser `Deliktereg' 2ed 210 `Algemene skade sluit dus vermoënskade en nie-vermoënskade in'. See paragraph 11.8.3!.

[221]`Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey*

quality. This is not to say, however, that the related lump-sum present values provide the means for perfect restitution.

***[3.6.3] Capital and income***: The concept of a capital asset separate and distinct from the income which the asset produces is a well established feature of tax law.[222] The same distinction is appropriate between a lump-sum award for damages and the complex pattern of past and future contingent losses which that lump sum represents. For reasons which are by no means clear the appellate division has in recent times resisted giving recognition to this distinction in the field of damages.[223] There are older dicta from the appellate division which point to a more realistic view of the nature of a lump-sum award.[224] The modern trend nonetheless raises the interesting question as to whether the doctrine of consuming interest and capital to effect perfect restitution is a question of law or a question of fact. If it is a question of law then how does one reconcile the technique of value of a chance[225] with a doctrine that every future item of loss can be reproduced by dutifully investing the lump-sum award at interest? It has been commented that modern practice is trying to sit on two stools at the same time.[226]

***[3.6.4] The meaning of `value'***: Closely linked with the distinction between capital and income is the ambiguity inherent to the word `value'. In one sense `value means market value',[227] that is to say the expected cost of replacement. In another sense `value' means merely the sum total of a series of debits.[228] With damages for personal injury or death the word value takes on a different connotation still, dictated by the fact that present value is determined according to an objectivized standard recognized by our fellow men. Whereas for goods the value of the goods implies the cost of replacing those goods, for personal injury and death such replacement is generally not possible. The word `value' in this latter context implies no more than a fair price measured according to an objective standard. Although for personal injury and death there is an adding up of items as envisaged by Mommsen, restitution, the notion of a perfect one-to-one match between loss and damages, is prevented by the necessary discounts for risk.

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1984 1 SA 98 (A) 111D.

[222]*CIR v African Oxygen* 1963 1 SA 681 (A); *Taeuber & Corssen v SIR* 1975 3 SA 649 (A).

[223]See, for instance, *General Accident Insurance v Summers* 1987 3 SA 577 (A) 614; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[224]`Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

[225]See 71.

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

[227]*Monumental Art v Kenston Pharmacy* 1976 2 SA 111 (C) 118G.

[228]See quotation at 58 above. The word `*betrage*' implies an adding up process such as one finds with the bill at a hotel or a restaurant.

***[3.6.5] The pricing formula***: When a court determines the value of lost support or earnings by discounting over the period of the loss, it is effectively using a formula by which to determine the price to be paid for what has been lost. The courts might prefer to describe their pricing activity in terms of a victim who in consuming interest and capital replaces what has been lost.[229] Such descriptions of the process do not alter the fact that **lump-sum compensation for uncertain continuing loss is necessarily contingent and compensatory, as distinct from deterministic and restitutory**. `Compensation' implies a payment in substitution for what has been lost, to make amends, to give as recompense, to weigh against.[230] It does not mean to replace or restore. The lump-sum paid as compensation is essentially a fair price for forgiveness. Thus the formula or method used to calculate this price may be described as a `pricing formula'. A change in the lump-sum value of an ongoing loss by reason of an event that supervenes between date of delict and date of trial[231] may be described, using the above terminology, as a `Bayesian revision of the pricing formula'.

The thesis of these last paragraphs is explored at a technical level in the chapters that now follow.

## [3.7] CONCLUSIONS

Damage is the adverse effect on a patrimonial or personality interest regardless of whether or not the law regards it as worthy of protection. Otherwise stated damage is the reduction in the utility or quality of the affected patrimonial or personality interest that serve to satisfy the relevant person' needs. In practice lawyers will only have regard to those aspects of damage for which compensation may be claimed. In other words damages are circumscribed by the law, but not damage.

Damages are the monetary compensation, the price that the law allows, for the diminution in the utility of the plaintiff's extended patrimony, including quality of life. By payment of this price as a lump sum the wrongdoer is released from all further obligation to the person who suffers loss. In its ideal form the award of damages would be equal in value to the damage that has been suffered.

Due to the limitations of our human condition restitution for uncertain past and future loss can only be achieved in the abstract sense of topping up the present utility of the victim's life plan, having regard to the wrongful act, to the same level as that of the notional life plan that has been lost. The compensation payable for this purpose should have regard to the effect of the award itself on the overall utility of the person's life plan.

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[229] *Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A; *General Accident Insurance v Summers* 1987 3 SA 577 (A) 614; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[230] The Shorter Oxford English Dictionary. See too paragraph 3.3.3.

[231] See section 2.8.