

**DIFFICULTIES IN CLAIMING PROSPECTIVE LOSSES:
CAN A COMPARATIVE STUDY PROVIDE A SOLUTION?**

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CHAPTER ONE

1.1 Background

Persons often suffer losses that do not manifest immediately upon the occurrence of a damage-causing event. Some consequential and prospective losses only materialise in future and claiming damages for them, poses unique challenges and complications.

The following serves as a practical description of ‘prospective loss’: “[*It*] is damage in the form of patrimonial and non-patrimonial loss which will, with a sufficient degree of probability or possibility, materialize after the date of assessment of damage resulting from an earlier damage-causing event.”¹

As pointed out by Potgieter, “damage is relative to time”.² This fact makes it possible to divide the loss as it is connected to a certain ‘time-aspect’, for example damage suffered from the start of a trial, to the date where the trial comes to an end, or damage suffered due to an injury until the injury has healed.

In a delictual framework, general damage is the damage which is presumed to result from an unlawful act; the term is also used to refer to non-patrimonial loss. In the case of delictual liability for bodily injuries, all non-patrimonial losses, for example pain and suffering, as well as future losses are classified as general damages.³

In contract on the other hand, general damage is the damage that flows logically from a breach of contract and which the law presumes that the parties would consider would result from such breach, whereas special damage refers to a loss which is normally too remote and for which damages may be recovered only if the parties actually or

¹ Potgieter JM in Visser PJ & Potgieter JM *Law of Damages* 3rd ed.(2012) 129.

² Potgieter 130.

³ Potgieter 23.

presumably foresaw⁴ or reached a tacit or express agreement⁵ that it would result in such damage.⁶ In the matter of *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*⁷ the remark was made that the predictability, for purposes of special damage, is determined by taking account of the specific circumstances known to the contracting parties at the conclusion of the contract.

⁴ In accordance with the now abolished contemplation principle - The learned Judge of Appeal, Trollip JA concluded in *Novick v Benjamin* 1972 (2) SA (A) 842 at 860A-B as follows: “A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided (a) that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and (b) that the parties, when contracting, contemplated (actually or presumptively) that that loss or damage would probably result from such a breach of contract. See *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd.* (1915) AD 1 at 22 and also in *Lavery & Co. Ltd. v. Jungheinrich* (1931) AD 156 at 169 where the Court put it as follows: ‘The question whether damage claimed in an action for breach of contract is or is not too remote depends in our view on whether at the time when the contract was made, such damage can fairly be said to have been in the actual contemplation of the parties or may reasonably be supposed to have been in their contemplation, as a probable consequence of a breach of the contract.’ This was followed in the recent matter of *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* (2011) ZASCA 22. The distinction between general damages and special damages as formulated in *Schatz Investments (Pty) Ltd v Kalovyrynas* ‘broadly and without any pretence at precision’ was refined by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D-F as being between: ‘(a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach.’ See also *Transnet Ltd v The Snow Crystal* (2008) 4 SA 111 (SCA) at 35.

⁵ In accordance with the current application of the convention principle - In *Thoroughbred Breeders’ Association v Price Waterhouse* (2001) 4 SA 551 (SCA) at 46 it was stated by Nienaber JA that ‘The traditional approach for determining remoteness in a contractual context was restated in 1977 by Corbett JA in *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687D- 688A in the following terms: “To ensure that undue hardship is not imposed on the defaulting party the defaulting party’s liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach” following *Schatz Investments (Pty) Ltd v Kalovyrynas* 1976 (2) SA 545 (A) at 550. He added “the two limbs, (a) and (b), of the above-stated limitation upon the defaulting party’s liability for damages correspond closely to the well-known two rules, specifically mentioned in the English case of *Hadley v Baxendale* 156 ER 145 at 151, which reads as follows: ‘Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.’ See also (2011) ZASCA 22 at 27.

⁶ Potgieter 23.

⁷ 2008 (4) SA 111 (SCA) 34.

Special damages in a delictual framework would refer to damage which the law does not presume to be the necessary consequence of the act which is complained of and which should be specifically pleaded and established by evidence. As mentioned above, all non-patrimonial loss for example pain and suffering, as well as future loss is classified as general damage, while all pecuniary loss suffered before the trial qualifies as special damage.⁸ Special or consequential damages can be seen as all damages that are not classified as general damages, and cannot therefore be claimed automatically. The question is when special damages can be claimed, and how they are to be assessed⁹ with a specific focus on claims for prospective losses, which form a challenging part of claims for special damages.

According to McGregor,¹⁰ with a claim for prospective loss there must always be a reasonable possibility connected to the suffering of this kind of loss. It has for example been said that a possibility of less than 10% will not be regarded as reasonable.¹¹ This is however a rule of thumb and not necessarily a fixed limit. In my opinion it seems to dictate logically that the reasonable possibility should be connected to the potential occurring of the potential loss as claimed for. One can only ponder on the question then that should the loss not occur at some time in future, if the wrongdoer in the first instance then has a claim against the plaintiff who claimed for such loss. This however is a matter which will not be addressed herein as it entails a completely different nature of work.

The possibility of claiming damages for prospective loss, and the assessment and quantification is a complicated and uncertain science, which deserves further study.

⁸ As distinguished by Potgieter 23.

⁹ Van der Merwe SJ *Kontraktereg Algemene Beginsels* 4th ed. (2012) 390.

¹⁰ McGregor H *McGregor on Damages* 17th ed. (2003) 297.

¹¹ Potgieter 130.

1.2 Purpose of the Study and Delimitations

The purpose of this study is to identify some of the existing problems in our legal system regarding claims for prospective losses that are suffered due to delict or breach of contract. It will not include claims for statutory or constitutional damages. As there are many facets to these problems, this study will focus only on some of the current issues.

The study will focus on the following problematic aspects when claiming prospective losses, with specific reference to the scope of *lucrum cessans* and *damnum emergens*: the effect of prescription; the assessment of damages as to their relation in time; the calculation of prospective losses, and specifically the moment of calculation of prospective loss as well as the legal certainty in respect of the time of calculation; whether a hypothetical approach to calculation is the most effective and fair; the formulation of the statistics; the application of the once and for all rule; and the issue of whether claims are currently being fully quantified.

Each of these aspects will be analysed in detail to create an understanding of their nature and scope, and to determine the current position in law.

The application of the convention principle and the contemplation principle will form a core aspect of this study. A comparative study of the position in other countries and legal systems could offer a valuable perspective on the problem. The position in the United Kingdom has been chosen for this purpose. By hypothetically applying solutions utilised in this foreign jurisdiction potential solutions for South Africa can be recommended.

This study will cover the basic principles of a claim for contractual damages, yet the main focus will be on prospective losses in delictual claims.

CHAPTER TWO

“Prospective Loss” defined

2.1. The General Concept of “Damage”

Even though certain terms in the law of damages, such as *id quod interest*, *damnum emergens* and *lucrum cessans* are derived from Roman law, this particular system of law has made no great contribution to the development of modern South African law on damages.¹² Classic Roman law did not acknowledge the difference between positive and negative *interesse*, and did not regard it as necessary to develop the general principles to address problems regarding the limitation of liability to pay damages.¹³

As put by Erasmus,¹⁴ the influence of English law on the South African law of damages had the following effect:

“The establishment of judicial and procedural institutions along English lines, the adoption of the English law of evidence, the use of English terminology of damages, the application of English rules of assessment: all these factors have created a strange dichotomy in South African law: whereas the existence of liability is determined in accordance with the substantive law which is Roman-Dutch in origin, the quantification of liability is largely governed by rules and concepts derived from English law.”¹⁵

The concept of damage in South African law has developed in the context of delictual and contractual liability, and it should be noted that a wide concept of damage is

¹² Potgieter 10 –11. See Erasmus HJ and Gauntlett JJ (updated by Visser PJ) *Damages* 12th ed. in Joubert WA Vol. 7 *The Law of South Africa* (1995) (hereinafter ‘Erasmus’) where the reason is summarized as “The Romans knew only individual situations from which liability for damages arose, and it was the task of the *iudex* to evaluate the extent of the liability in accordance with the formula of the particular *actio*. Roman law lacked the conceptual structure of the modern law of damages, and concepts such as consequential loss, remoteness of damage, foreseeability and mitigation of loss are foreign to Roman law.”

¹³ Potgieter 11.

¹⁴ Erasmus HJ “Aspects of the history of the South African law of damages” (1975) 38 *THRHR* 280.

¹⁵ Potgieter 13.

therefore accepted in South African law, which includes both patrimonial and non-patrimonial damage.¹⁶

The primary component of damage is patrimonial loss,¹⁷ also described by the terms such as *interesse* and *id quod interest*,¹⁸ as opposed to non-patrimonial loss which could include loss of amenities of life and shortened life expectation of an individual. As defined and explained in the early case of *Edouard v Administrator, Natal*,¹⁹ non-patrimonial damage is defined as “the diminution, as the result of a damage-causing event, in the quality of highly personal (or personality) interests of an individual in satisfying his or her legally recognised needs, but which does not affect his or her patrimony.” This type of damage is also referred to as injury to personality, immaterial damage, ideal loss, damage to feelings, moral damage or incorporeal loss.²⁰

The Appellate Division²¹, not impressed nor persuaded by English cases,²² confirmed that contractual damages shall only and strictly be confined to patrimonial loss. It refused to extend the common law to permit contractual damage to any type of intangible loss, and commented by saying such an extension can only be effected by the legislature.²³ Thus, South African law will remain steadfast on this point and thus incapable of awarding realistic damages against a party who is in breach of a contractual undertaking to provide convenience and comfort, to mention a few, unless and only in the event of the Supreme Court of Appeal is persuaded otherwise.²⁴

¹⁶ Potgieter 30.

¹⁷ Wille G Wille's *Principles of South African Law* 9th ed. (2007):1133 “Patrimonial loss, *damnum*, encompasses both loss already suffered, *damnum emergens*, as well as loss that will emerge in future, *lucrum cessans*, and is calculated by determining the difference between the value of the plaintiff's estate after the happening of the delict and the value it would have had had the delict not had been committed”.

¹⁸ Erasmus 9.

¹⁹ 1989 (2) SA 368 (D) 386.

²⁰ Erasmus 13.

²¹ 1989 (2) SA 368 (A) 46.

²² *Jarvis v Swan Tours Ltd* (1973) 1 All ER 71 (CA) where it was contended and found that a claim for pain and suffering (non-patrimonial loss) can be included in an action for damages in breach of contract. See also the very early case of *Griffiths v Evans* (1953) 1 WLR 1424 (CA).

²³ 1990 (3) SA 581 (A).

²⁴ Christie RH *The Law of Contract in South Africa* 5th ed. (2006) 346.

Unlike damages for delict, damages for breach of contract are in general not intended to compensate the claimant for his loss, but to put him in the position he would have been in had the contract been properly performed.²⁵ The difference was succinctly stated but recognised in *Trotman v Edwick*²⁶ and was put by the learned Van den Heever JA as follows:

“A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues in delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.”²⁷

Our recent case law is not very helpful in offering a proper definition of “damage”. For example, in a leading case on damages, *Oslo Land Co Ltd v The Union Government*,²⁸ the appellate division merely made the following remark: “By the word damage is not meant the injury to the property injured, but the *damnum*, that is the loss suffered by the plaintiff.” As explained by the learned authors, this definition is too vague as it does not state what “loss” actually means, and also incorrectly omits a reference to non-patrimonial damage.²⁹ It would also appear that the assessment of damage, being the method by which damage is determined, is sometimes erroneously regarded as the definition of damage.³⁰

Prospective loss is accepted as part of the concept of damage. This is damage, which at the time of adjudication is manifested only by an expectation that the utility or quality of the patrimony or personality, according to the case, will deteriorate.³¹ The Appeal Court held in *Symmonds v Rhodesia Railways*³² and confirmed that Voet³³ is applicable in our

²⁵ Christie 544.

²⁶ 1951 1 SA 443 (A).

²⁷ Above 449B –C.

²⁸ 1938 AD 584, 590.

²⁹ Erasmus 9.

³⁰ See *SANTAM Versekeringsmpy Bpk v Byleveldt* 1973 2 SA 146 (A) 150.

³¹ Erasmus 9.

³² 1917 AD 582. Also see Boberg *Delict* 483. In *Lampakis v Dimitri* 1937 TPD 138 the liability of an individual is set out and decided that the liability extends to the loss which was foreseen, or reasonably foreseen in breach of contract.

³³ Voet *J Commentarius ad Pandectas* De Hondt Den Haag 1698-1704:5.1.27 in D 5.1.35

law by stating that the once and for all rule could not apply in cases where there is a continuing unlawful conduct.

In the early case of *Stow, Jooste and Matthews v Chester and Gibb*³⁴ the court held as follows: “*Id quod interest* (or *interesse*) is the *damnum* or loss sustained for which compensation is recoverable. It comprises both the actual loss (*damnum emergens*) and prospective loss (*lucrum cessans*).”³⁵

The distinction between *lucrum cessans* and *damnum emergens* is of analytical as well as practical importance in the concept of patrimonial damage. *Lucrum cessans* means loss of past and future profit and is accordingly employed to indicate the loss or diminution in value of any legally recognized expectation of a patrimonial benefit.³⁶ In a broader sense *lucrum cessans* is sometimes used to denote all prospective damage, that is, damage which manifests itself after the trial or settlement.³⁷

The expression *damnum emergens* refers to all other damage. It is sometimes described as actual losses or expenses suffered up to date of the trial.³⁸ As indicated in chapter one, a practical description of prospective loss is the following: “[It] is loss in the form of patrimonial- and non-patrimonial loss which will probably manifest after the date of calculation of damages as result of an earlier happening which brought about the damage.”³⁹

Prospective loss is therefore damage in the form of patrimonial or non-patrimonial loss which will probably materialise after the date of assessment of damage resulting from an earlier damage-causing event.⁴⁰

³⁴ (1889) 3 SAR 127, 131.

³⁵ Erasmus 9. See also Voet 39.2.1; 45.1.9.

³⁶ Erasmus 12.

³⁷ 1938 AD 584 at 590 – 591.

³⁸ Erasmus 12.

³⁹ Potgieter 129.

⁴⁰ Erasmus 20.

2.2 Scope of *Lucrum Cessans*

Not all prospective losses can be classified as *lucrum cessans*. The precise relationship between prospective loss and *lucrum cessans* needs elaboration. *Lucrum cessans* is usually classified as damages suffered as a result of the frustration of expectations,⁴¹ and is contrasted as profit loss – a deprivation of profit or income as opposed to *damnum emergens* which is loss already suffered. It is not completely accurate to simply assume that prospective loss is always a form of *lucrum cessans*. Future loss also includes future expenses, which is a form of *damnum emergens* and clearly not *lucrum cessans*.⁴²

When viewed differently, profit lost in the past does not constitute a prospective loss, but should be classified as *lucrum cessans*. With loss of profit or income, suffered both in the past or the future, assessment of damages happens in accordance with probabilities and hypothesis, while there is usually no need to apply a hypothetical comparative method with expenditures and loss suffered in the past.⁴³

Van Der Walt⁴⁴ perceives *lucrum cessans*, to be “the result of the impairment of a becoming element of earning.”⁴⁵

2.3 Nature of Prospective Loss

Prospective loss can therefore take the form of both future patrimonial loss and future non-patrimonial loss.⁴⁶

As mentioned before, loss is connected to a certain ratio in time. This fact makes it possible to divide loss into time periods, for example loss before the requirements of

⁴¹ Reinecke MFB “*Die elemente van die begrip skade*” 1976 TSAR 26:30.

⁴² Potgieter 129. Also see Wille 883. *Versveld v South African Citrus Farms Ltd* 1930 AD 452 at 454.

⁴³ Potgieter 129.

⁴⁴ Van der Walt *Die Sommeskadeleer en die “Once and for All”-reël* (LLD thesis 1977 UNISA) 271.

⁴⁵ As quoted with approval by Potgieter 129.

⁴⁶ Potgieter 130. See also *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C).

liability has been met,⁴⁷ loss from date of liability to the commencement of trial,⁴⁸ loss from the commencement of trial until judgment, loss until appeal, and loss expected after this date.⁴⁹ Theoretically one may choose to pause any moment during the above sequence to assess the consequences of an event up to that stage, and thus draw a distinction between “past” and “prospective” loss.⁵⁰

As elaborated on and according to Potgieter,⁵¹ prospective loss rests on two pillars: it has a prospective element, and current element. Thus, prospective loss is not only something that rests in the future when one looks forwards from the time of assessment of damages, but it can also be seen as the current impairment of an expectation in respect of the future. Phrased differently, prospective patrimony is part of one’s current patrimony, but in the form of an expectation, of something that can be realised with some degree of possibility in future.

In illustration an example may be given of an individual who is employed in a position that requires a certain extent of physical labour. As a result of a motor vehicle accident, the individual cannot perform the same amount of physical labour as he could before the accident, and as result thereof cannot retain his position or be promoted to a higher level of employment. The individual thus suffers *inter alia* a loss of earning capacity as he cannot perform in the same manner as prior to the accident, and therefore suffers patrimonial damage. On the other hand, the non-patrimonial loss that the individual suffers is in the form of pain and suffering as a result of the accident and loss of dignity and amenities of life.

In the same sense, future non-patrimonial loss is the object of a present expectation thereof. An individual’s future patrimonial- and non-patrimonial loss is also determined through the nature of his current interest, as the basis for future development. Future damages, as the frustration of a future expectation, are also determined through the

⁴⁷ McGregor H *Damages* (1997) 403 – 4.

⁴⁸ McGregor H *Damages* 405–9.

⁴⁹ McGregor H *Damages* 410 – 9.

⁵⁰ Erasmus 20.

⁵¹ Potgieter 130.

manner in which his current interest is affected by the damage causing event. Although future loss is in reality loss that will only manifest in the future, the footprints thereof are already found in the impairment of the current interest of the prejudiced individual.⁵²

A point of view exists that a loss of earning capacity is not future loss, because there is nothing in the future that completes the damages.⁵³ One could question whether this view is indeed correct.

On this point, Boberg⁵⁴ commented as follows:

“It is obvious that damages cannot literally be assessed ‘as at the date of the wrong’: the plaintiff’s loss depends on what happens to him after the wrong has been committed... And how can the economic *sequelae* of bodily injuries be determined without regard to the plaintiff’s subsequent treatment by his doctors and his employers?”

The correct approach seems to be that with the impairment of earning capacity as a result of the damaging effect on the elements thereof, that it is merely the damage causing event that is completed. These comments should be understood to indicate that the content of an expectation, either a patrimonial expectation or a debt expectation⁵⁵, is established by the correct view and the prediction of possible events. A possible future event which does indeed co-determine the content of the particular expectancy must also be considered, such as possibilities of subsequent illness.⁵⁶

The financial capacity of the plaintiff is thus often influenced when he does not receive an expected amount of money in the future, where a future patrimonial expectation does not realise. The fact that account is taken of future contingencies in establishing quantum in practice and the discount of the amount of damages until the date of trial, also proves

⁵² According to Potgieter 130–131.

⁵³ Potgieter 131.

⁵⁴ Boberg PQR *The Law of Delict I: Aquillian Liability* (1984):487

⁵⁵ This can be described as the legally recognized expectation of a person to acquire certain patrimonial benefits, or the expectation that one’s patrimony won’t diminish, in future. This expectation that a patrimony will not be reduced and/or diminished, which may coincide with the creation of a debt, is merely added to cover matters of liability for pure economic loss. For example *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty)* 1978 (4) SA 901 (N) where the plaintiff suffered financial loss due to theft of a cheque which was not crossed by the sender. As a result of the cheque not being crossed the thief deposited it and stole the money.

⁵⁶ In the opinion and as per the examples given by Potgieter 131.

the future pillar of *lucrum cessans*. Just like the plaintiff wouldn't normally receive his salary in advance, the prejudice that he suffers would in practice only manifest when he in fact does not receive the money that he would have received in the future. The fact that damages are discounted therefore to neutralise the advantage for receiving the payments that would have been made in the future, proves that the plaintiff suffers future losses. This argument can be tested by examining what happens when the plaintiff's earning capacity increases as result of, for example, obtaining a new academic qualification such as a degree. Although the plaintiff's potential to earn more money now exists and his expectations are bigger than what they were, he still does not enjoy the complete advantage thereof.⁵⁷

It seems as if, in practice, too much emphasis is placed on the future pillar of *lucrum cessans*, and that the nature of future loss is misjudged in the process.⁵⁸

One can certainly conclude that in practice a distinction is drawn between the nature of an ongoing loss that continues in the future, and future loss that will occur in future in a completed sense.⁵⁹

In the matter of *General Accident Ins Co of SA Ltd v Summers*⁶⁰ the court contrasts continuing loss with completed damages already suffered. In this case the Appellate Division indicated that in appropriate circumstances, such as when something occurs between the date of the delict and the date of the trial which increases the plaintiff's loss of future earnings, the damages can be discounted up to the date of the trial, rather than the date of the delict.⁶¹

⁵⁷ Potgieter 131.

⁵⁸ In the opinion of Potgieter 131.

⁵⁹ Potgieter 131.

⁶⁰ 1987 (3) SA 577 (A).

⁶¹ 1987 (3) SA 577 (A) at 612 – 3.Wille G *Wille's Principles of South African Law* 9th ed. (2007):1134 where this judgement is supported by the authors.

2.4 Future Patrimonial Loss recognized in South African practice

2.4.1 Right to claim

Although in practice problems arise with the quantification of future losses, no real attempt has to date been made to explain this type of loss theoretically.⁶² It was decided in both *SA Eagle Ins Co Ltd v Hartley*⁶³ and *President Ins Co Ltd v Mathews*⁶⁴ that future loss is merely seen in connection to time as loss that has not yet realised.⁶⁵

The reason why damages have to be awarded for future loss suffered is because of the “once and for all” – rule that applies to South African law. In terms of this rule damages can only be claimed once for a single cause of action, and the claim should include all loss already incurred, including all losses expected in future.⁶⁶

With regard to current law, however, no damages may be recovered for a prospective loss on its own.⁶⁷ In *Coetzee v SA Railways & Harbours*⁶⁸ the court recognized this important principle by stating:

“The cases...go only to this extent that if a person sues for accrued damages, he must also claim prospective damages or forfeit them. But I know of no case which goes so far as to say that a

⁶² Potgieter 133.

⁶³ 1990 (4) SA 833 (A).

⁶⁴ 1992 (1) SA 1 (A).

⁶⁵ Potgieter 133.

⁶⁶ See in this regard Boberg 476, 482-6. See also *Custom Credit Corporation v Shembe* 1972 (3) SA 462 (A) where the court summarised it concisely as follows: “The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords to him upon such cause.” This principle is related to the rule on *res judicata* of which the *ratio* is thus explained by Voet J Commentarius ad Pandectas De Hondt Den Haag 1698-1704: 44.2.1: “To prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different legal proceedings”. Also the discussion in Potgieter 134 on this rule.

⁶⁷ See *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) at 286 wherein this rule was endorsed: “This (abovementioned rule) applies no less to claims arising from pure economic loss than it does to claims arising from bodily injury or damage to property”. Also *Reivelo Leppa Trust Kritzingers* (2007) 4 All SA 794 (SE) at 799: “To make out a cause of action, a plaintiff must plead that the wrongful conduct caused damage or, if appropriate, that it will cause prospective damage, even if only on a contingency basis, and he or she must normally quantify the amount of the loss. In my view, the plaintiff must positively allege the prospective harm even if on the facts it can be foreseen only with a relatively low degree of probability at the time of the issue of summons. It is not a cause of action to allege that one of the elements of the cause of action has not yet eventuated and may or may not occur in future”.

⁶⁸ 1933 CPD 565.

person, who as yet sustained no damage, can sue for damages which may possibly be sustained in the future...Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action.’⁶⁹

2.4.2 Examples of acknowledged future losses

In general the following are accepted and acknowledged as prospective patrimonial damages.

2.4.2.1 Future expenses as result of a damage causing event

An exact example in the context of a delictual claim would be where physical injury causes the plaintiff to incur future medical costs. In practice, it often happens that at the time an individual’s claim is entertained by court or settled, his or her medical treatment has not yet been completed. At this time only an estimation is done for the costs of future medical treatment, for inclusion into the claim. Expert evidence is usually presented in court by medical experts as to the approximate expenses of a plaintiff’s future medical costs.⁷⁰

Breach of contract can also force a plaintiff to incur costs in the future.⁷¹ The unusual matter of *Swart v Van der Vyver*⁷² in which case the fiduciary-lessor’s possible prospective loss as result of the breach of contract by the tenant in not maintaining the premises let is illustrated. This is also illustrated in the matter of *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd*⁷³ wherein it was held that the loss of the managerial time which otherwise might have been engaged in trading activities of a concern and which had to be deployed in managing the consequences of a breach of contract could be claimed as damages if the loss could be quantified. In this instance there had been some evidence that the managers would have expended their time on some income-generating

⁶⁹ Erasmus 21.

⁷⁰ *Singh v Abraham* (1) (2010) 3 All SA 187 (D).

⁷¹ Potgieter 134.

⁷² 1970 (1) SA 633 (A) at 647.

⁷³ 2000 (1) SA 639 (SCA).

venture and that managing the consequences of the breach had not simply been dealt with within the ordinary course of their duties.

2.4.2.2 Future loss of income

Where a person, who is incapacitated as result of an accident for example, no longer possesses the capacity to continue with his work and to earn an income in the future. Loss of future earning capacity is thus also classified as future loss.⁷⁴ In recent case law, this type of loss is referred to as ‘loss of employability’.⁷⁵

2.4.2.3 Loss of business-, contractual or professional profit

This type of loss may occur in the event where X is contractually obliged to deliver a certain product to Y in order for X to generate a profit in the future, but X delivers the wrong product, defeating the possibility of profit.⁷⁶ An example in practice hereof would be the matter of *Victoria Falls and Tvl Power Co v Consolidated Langlaagte Mines Ltd.*⁷⁷

In this matter the plaintiff had failed to deliver electricity for the mining of gold. The gold remained in the ground and the damage was assessed as the difference between the immediate value of the production and its value when mined eventually. This case was concerned with deferred profits.

In the matter of *Transnet Ltd v Sechaba Photoscan (Pty) Ltd*⁷⁸ the Appellate Division acknowledged and considered a delictual claim for prospective loss of profit. In the lastmentioned case the primary question in the appeal was whether, on the facts of the case, the loss of prospective profits is compensable in law as delictual damages. Here the appellant called for public tenders for the purchase of one of its divisions, and although

⁷⁴ Potgieter 134.

⁷⁵ See the case of *Mokgara v Road Accident Fund* unreported (65602/2009) [2011] ZAGPPHC 50 (1 April 2011) and also *President Ins Co Ltd v Mathews* 1992 (1) SA 1 (A) at 5.

⁷⁶ Potgieter 134.

⁷⁷ 1915 AD 1 at 28. In *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A) at pars 51-86 where it was held by the Appellate Division that loss of profit before the date of the action is obviously not prospective loss, but the assessment thereof is comparable to the estimation of loss of future profit.

⁷⁸ 2005 (1) SA 299 (SCA).

the appellant gave strong indications to the respondent that the respondent's tender would be successful, it was awarded to a different entity. It was found that the respondent was fraudulently deprived of the tender and should be placed in the position it would have been in had the respondent's tender been accepted.

2.4.2.4 Loss of future maintenance

Dependants, whose breadwinner passes away, can claim for future loss of maintenance.⁷⁹ The general basis for this kind of claim would be to put a dependant of the deceased breadwinner in the same position he would have been in had the breadwinner not had been killed in the damage-causing event.⁸⁰

2.4.2.5 Loss of chance

In the matter of *SDR Investment Holdings Co (Pty) Ltd v Nedcor Bank Ltd*⁸¹ the court identified a loss suffered as a result of income foregone as a result of the failure to sell only one farm instead of three farms in one sale, as a loss of chance.

A loss of chance claim was also successfully awarded in the matter of *De Jager v Grunder*⁸² where it was found that the Respondent would have negotiated a higher cash amount had he not been misled in respect of the farm's value. This opportunity to have received more from the deceiver was a chance that was frustrated by the defrauder.

2.5 Future Non-patrimonial Loss recognised in South Africa

2.5.1 General

As mentioned above, non-patrimonial loss can be defined as “the diminution, as a result of the damage-causing event, in the quality of highly personality interests of an individual

⁷⁹ Potgieter 135.

⁸⁰ See *Legal Ins Co Ltd v Botes* 1963 (1) SA 608 (A) at 614.

⁸¹ 2007 (4) SA 190 (C).

⁸² 1964 (1) SA 446 (A).

in satisfying his legally recognised needs, but which does not affect his patrimony.”⁸³ In this matter damages were awarded for patrimonial loss, however not for discomfort pain and suffering and loss of amenities of life caused by the birth of the child. The action was based thereon that a breach of contract had occurred in the performing of a surgical procedure for sterilisation.⁸⁴

In the words of Potgieter, “Future non-patrimonial loss can be declared as the impairment of an expectation that personality interests will have a certain quality in future.”⁸⁵

Future loss can also exist where there is a future non-patrimonial loss in the form of *iniuria*. The future embarrassment that the plaintiff may need to endure as a result of a defendant’s insulting action serves as an example.⁸⁶

2.5.2 Examples of acknowledged future non-patrimonial losses

The following have been acknowledged as non-patrimonial losses that an individual may claim in South African practice:

2.5.2.1 Pain and Suffering

In *Brown v Bloemfontein Municipality*⁸⁷ it was adopted in our case law that with the impairment of bodily integrity, resulting pain and suffering which could probably be experienced in the future, can be claimed as a compensable loss.⁸⁸

⁸³ *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 386.

⁸⁴ Christie 546.

⁸⁵ Potgieter 136.

⁸⁶ Potgieter 136.

⁸⁷ 1924 OPD 226.

⁸⁸ See also *April v Minister of Safety and Security* (2008) 3 All SA 270 (SE) where the plaintiff was shot twice by the police, and the court held that physical pain and disability, mental pain and disability, and emotional pain and disability are all natural and sometimes inevitable consequences of the physical injury, which result from an assault by the infliction of gunshot wounds.

It is important to note here that it is the pain that the individual actually experiences, irrespective of whether the individual is more or less sensitive than the average person.⁸⁹ Pain can only exist if it is actually experienced, and thus where pain is excluded as a result of unconsciousness or medication, there can be no loss.⁹⁰ However, pain which is experienced but forgotten at a later stage, does qualify as damages.⁹¹

2.5.2.2 Shock (psychiatric injury)

Emotional shock as a result of the damage-causing event is generally associated with pain and suffering, but it may also cause further psychiatric consequences such as insomnia, anxiety and depression which could be compensable.⁹² If however, emotional shock is of a short duration, and it does not have a definite impact on the health of an individual, it is usually disregarded.⁹³

2.5.2.3 Disfigurement

This kind of damage refers to a mutilation of an individual's body physically, such as scarring or loss of a limb.⁹⁴

2.5.2.4 Loss of amenities of life

When a person loses the will and/or ability to participate in the general activities of life and to simply enjoy life as he did prior to the damage-causing event, this specific form of loss can be claimed.⁹⁵

⁸⁹ See *Marshall v Southern Ins Ass Ltd* 1950 (2) PH J6 (D) at 14.

⁹⁰ 1960 (2) SA 552 (A) at 571.

⁹¹ See *Botha v Minister of Transport* 1956 (4) SA 375 (W) at 379 – 8.

⁹² Potgieter 110. See *Jacobs v Chairman, Governing Body Rhodes High School* 2011 (1) SA 160 (WCC) where a teacher at the school suffered post-traumatic stress disorder, major depressive disorder and panic disorder as a result of an attack with a hammer by a pupil in her class in the presence of other learners. In *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) the court remarked that mere nervous shock or trauma is not enough for a claim – there should be detectable psychiatric injury.

⁹³ 2002 (2) SA 55 (SCA).

⁹⁴ Cases pertaining to disfigurement are discussed in greater detail in Potgieter at 111.

2.5.2.5 Shortened life expectation⁹⁶

Loss of full life expectancy is by its nature a type of future loss that a plaintiff will experience for the remainder of his life, unless the unexpected occurs and his earlier longer life expectancy can be restored in some way or the other.⁹⁷

2.6 Conclusion

Damnum, damages or loss, for which compensation may be recovered consists of actual loss suffered as well as prospective loss.

In this dissertation, the main focus lies with prospective loss or future loss in delictual and contractual claims. The loss, actual or prospective as suffered by an individual can be divided into patrimonial and non-patrimonial loss. Prospective patrimonial loss would be *inter alia* a loss of earning capacity, and prospective non-patrimonial loss would be an injury to one's quality of life or amenities of life.

Patrimonial damage is damage to an individual's patrimony or estate, whereas non-patrimonial damage is an injury committed to an individual's personality interests. Therefore, prospective loss can be patrimonial loss or non-patrimonial loss, which will only actually be suffered at a time in the specific victim's future. They will certainly only be suffered after the claimable damages have in fact been assessed.

The very nature of prospective or future loss is then exactly that: although it does not necessarily amount to the impairment of an individual's current position but to an

⁹⁵See *Jacobs v Chairman, Governing Body, Rhodes High School* 2011 (1) SA 160 (WCC). See also *Administrator-General, SWA v Kriel* 1988 (3) SA 275 (A): "The amenities of life may further be described...as those satisfactions in one's everyday existence which flow from the blessings of an unclouded mind, a healthy body and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit and stand unaided; the ability to read and write unaided; the ability to bath and dress and feed oneself unaided; and the ability to exercise control over one's bladder and bowels. Upon all such powers individual human self-efficiency, happiness and dignity are undoubtedly highly dependent."

⁹⁶ See in general *Reyneke v Mutual and Federal Ins Co Ltd* 1991 (3) SA 412 (W) at 420, and at 425 – 6.

⁹⁷ This possibility is recognised by Potgieter at 136.

impairment of a future expectation, the damage-causing event has such far-reaching consequences that the individual will also suffer in his or her future as a result thereof. The loss is not suffered at the time that it is assessed; however, the loss is assessed at the time of the claim as prospective damage.

CHAPTER THREE

Claiming Prospective Loss

3.1 Requirements for claiming Prospective Loss

As early as 1933 it was recognised in the case of *Coetzee v SAR & H*,⁹⁸ that when an individual institutes action in claiming accrued losses, he must claim for the prospective losses as well in the same action, as he cannot claim for them in a later action based on the same cause of action.

Thereafter in 1949, it was held that there is no cause of action if the plaintiff does not suffer a real loss, but only a prospective loss.⁹⁹ Many years later in 1997 it was followed in *Sasfin (Pty) Ltd v Jessop*¹⁰⁰ and the court reiterated this point as follows:

“In some cases the cause of action will depend on the occurrence of a reasonable event causally linked to the negligent conduct, even if that takes place some time after that conduct...Because negligence does not become actionable without proof of damage, it is only after damage has been suffered that the cause of action becomes complete...”

This aforementioned approach was in principle confirmed later in 2000 in the matter of *Jowell v Bramwell-Jones*,¹⁰¹ although the court did not regard it necessary to make a final decision thereon on the facts before it.

In this case the appellant was one of the beneficiaries of a testamentary trust who instituted action for delictual damages for pure economic losses, based on an alleged reduction in the value of his share capital of the trust as a result of advice given by the defendants to the trustee of the trust.

⁹⁸ 1933 CPD 565.

⁹⁹ See for example *Millward v Glaser* 1949 (4) SA 931 (A) at 942.

¹⁰⁰ 1997 (1) SA 675 (W) at 694.

¹⁰¹ 2000 (3) SA 274 (SCA) at 287.

The court highlighted it as follows:

“The advantage of the approach adopted in the *Coetzee* case is of course the certainty it provides.

If an action for loss which is prospective is completed only when the loss actually occurs, prescription will not commence to run until that date and a plaintiff will generally be in a position to quantify his claim. To the extent there may be additional prospective loss the court will make a contingency allowance for it. On the other hand, if the completion of an action for prospective loss entitling a person to sue is to depend not upon the loss occurring but upon whether what will happen in the future can be established on a balance of probabilities, it seems to me that the inevitable uncertainty associated with such an approach is likely to prove impractical and result in hardship to a plaintiff particularly insofar as the running of prescription is concerned.”

It is however trite law that one cannot institute an action for damages in the following circumstances: X is exposed to the AIDS virus as result of the negligence of Y. X suffers no loss or damage at present, however there is a 30% possibility that he may suffer from a serious illness in the future, which can bring about various types of losses. X can only institute his action for damages when the 30% possibility materialises and he becomes ill. Before the illness develops, there is no cause of action and prescription does not start to run.¹⁰²

Boberg¹⁰³ however made the following remark:

“The relevance of the distinction between prospective loss and loss of prospective gains lies not in actionability but in the degree of proof required. Both are actionable, but where prospective loss alone is claimed it must be established as a probability that such loss will occur, for otherwise the plaintiff has failed to prove the *damnum* which is an essential element of his cause of action.”

Corbett and Buchanan¹⁰⁴ on the other hand, accept that the position should be that X would be able to sue if there is a 60% chance that X would in fact suffer an illness by

¹⁰² This example is provided by Potgieter 138.

¹⁰³ Boberg 488.

saying “It is difficult to see why a wrongful act together with prospective damage, which can be established as a matter of reasonable probability, should not be sufficient to constitute a cause of action.” A probable justification could be to distinguish between mere future loss of which the occurrence in the future cannot be proved on a balance of probabilities and mere future loss of which the occurrence in the future can in fact be proved on a balance of probabilities. In the first instance a claim should be rejected and in the latter case possibly allowed.

Should one institute action for damages for loss that has already been caused by a damage causing event, the plaintiff is obliged to claim compensation for all prospective loss that could follow from the damage causing event, in accordance with the ‘once and for all’ - rule. Should one only claim for loss already suffered and future loss develops unexpectedly, one would have no remedy to recover this loss. Thus, it is of great importance in the evaluation of any damage causing event to determine if the possibility of suffering prospective loss exists, in order to include it in a claim.

3.2 Assessment of damage

3.2.1 Time of assessment of losses

According to current law, the date of the commission of a delict is generally the decisive moment for determining damage, including prospective loss.¹⁰⁵ In contract however, because of the fact that the object of damages for the breach of contract is to place the claimant in the position he or she would have been in had the contract been performed, the general rule in this regard is that damages should be calculated as at the time when the performance would have been due in terms of the contract, or at the date of the breach.¹⁰⁶

¹⁰⁴ Corbett MM *The Quantum of Damages in Bodily and Fatal Injury Cases (General Principles)* 3rd ed. Vol I (1985):9.

¹⁰⁵ Potgieter 92.

¹⁰⁶ Christie 556. See also *Rens v Coltman* 1996 1 SA 452 (A) and *Mostert v Old Mutual Life Assurance Co (SA) Ltd* (2001) 4 SA 159 (SCA) 157.

Nevertheless, there are exceptions to this principle.

In *General Accident Insurance Co SA Ltd v Summers*¹⁰⁷ the court viewed loss of income caused by bodily injuries, thus the plaintiff's loss of earning capacity, as damage which continues into the future well after the time of the commission of a delict. This prompted the court to discount damages for loss of earning capacity and loss of support only to date of trial and not the date of delict.¹⁰⁸ This would occur in circumstances where there is a change in the situation as it stands at the date of the delict and at the date of the judgement, which would in turn affect the award made at the date of the judgement.¹⁰⁹

The date of the commission of a delict is the earliest date on which all the elements of a delict are present. As far as damage is concerned, this does not imply that the full extent of the damage should have occurred. If all other requirements of a delict are present the relevant date is the date on which the first damage occurs, if there is a series of harmful results caused by the unlawful conduct.¹¹⁰ In the case of breach of contract the date with reference to which damage is to be assessed is usually the date of the breach of contract,¹¹¹ but there are various other possibilities, namely the date of performance,¹¹² the date at which it would be reasonable to have done repairs or remedial work,¹¹³ the date of cancellation, or even before the cancellation.¹¹⁴

3.2.2 Formula for the assessment of losses

It would appear that prospective damage should be assessed through a comparison of the hypothetical course of events before and after a damage-causing event. The hypothetical

¹⁰⁷ 1987 3 SA 577 (A) at 613.

¹⁰⁸ 1987 3 SA 577 (A) at 613 and 615 – 616 where the court remarked that the plaintiff does not obtain an inappropriate advantage as the plaintiff does not receive more than is necessary to place him in a position he would have been but for the delict. The defendant is also not prejudiced since he had use of the money up to the date he has to pay in terms of the court order.

¹⁰⁹ See in this regard *Whigham v British Traders Ins Co Ltd* 1963 (3) SA 151 where the life expectancy of the claimant dependant was measured at the date of the trial.

¹¹⁰ *Oslo Land Co Ltd v Union Government* 1938 AD 584.

¹¹¹ *Mostert v Old Mutual Life Ass Co (SA) Ltd* 2001 (4) SA 159 (SCA).

¹¹² *Culverwell v Brown* 1990 (1) SA 7 (A).

¹¹³ *Rens v Coltman* 1996 (1) SA 452 (A).

¹¹⁴ See the examples provided by Potgieter 93.

position or expectancy before the damage-causing event has become unreal, it will probably not be realised, and this must be compared with the hypothetical position after the damage-causing event which has become real, which will probably be realised.¹¹⁵

In estimating prospective loss, the court does not merely take account of the most probable prognosis on the available evidence.¹¹⁶ In this regard, in *Burger v Union National South British Ins Co*¹¹⁷ the following was decided:

“A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to the relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called as contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 percent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 percent is less than 50 percent and there is therefore no proved preponderance of probability that there will be an amputation. The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty.”¹¹⁸

As put in *Shield Insurance Co Ltd v Hall*¹¹⁹ our courts make use of evidence concerning events from the damage-causing event to the date of the action in order to reach a more realistic assessment of the damage. In the matter of *Shield Ins Co Ltd v Booysen*¹²⁰ certain events such as the deceased’s illegal activities and bad service record were taken into account with the claim by the deceased’s dependants for maintenance, in respect of the deceased’s possible future income.

¹¹⁵ Erasmus HJ and Gauntlett JJ, “*Damages*” in Joubert WA Vol. 7 *The Law of South Africa* (1995) 20.

¹¹⁶ Potgieter 140.

¹¹⁷ 1975 (4) SA 72 (W).

¹¹⁸ Above 75.

¹¹⁹ 1976 4 SA 431 (A) at 444.

¹²⁰ 1979 (3) SA 953 (A) at 965 – 6.

3.2.3 Contingencies in the assessment of losses

In the matter of *Blyth v Van den Heever*¹²¹ the following was cited:

“When dealing with such claims, however, the courts have not required the plaintiff to prove on a preponderance of probability that such a loss will occur or arise; instead they have made a contingency allowance for the possibility of loss.”

In awarding damages for future loss our courts usually make provision for contingencies.¹²² Contingencies include any possible relevant future event which might cause the damage or a part thereof or which may otherwise influence the extent of the plaintiff’s damage.¹²³ In a wide sense contingencies are described as “the hazards that normally beset the lives and circumstances of ordinary people”.¹²⁴ Common possibilities for which provision may be made in a deduction for contingencies are the following: incorrect assumptions in actuarial calculations; inflation and deflation; loss of pension benefits; possibility of a divorce; and costs of transport to or from work.¹²⁵

All contingencies are taken into account over a reasonable period of time as recognised in the case of *Goodal v President Insurance Co Ltd*.¹²⁶ According to the court in *Van der Plaats v SA Mutual and Fire General Insurance*,¹²⁷ the usual effect of an adjustment based on contingencies is that the amount of damages is reduced by a percentage which may vary between 10% and 50%.¹²⁸ In *Southern Insurance Association Ltd v Bailey*¹²⁹ it was stated that contingencies should logically not always reduce damages since it should also be possible to consider “positive” contingencies which may increase the damage.

¹²¹ 1980 (1) SA 191 (A).

¹²² Corbett 51 – 6.

¹²³ See for example *Versveld v SA Citrus Farms Ltd* 1930 AD 452 at 462.

¹²⁴ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 585 “...unforeseen contingencies – the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors”.

¹²⁵ Corbett 51 – 2.

¹²⁶ 1978 1 SA 389 (W) 393.

¹²⁷ 1980 3 SA 105 (A).

¹²⁸ Joubert 21.

¹²⁹ 1984 1 SA 98 (A) at 117.

Even though expert evidence is lead, it remains in the court's subjective discretion to decide what is a reasonable and fair award and direct evidence on contingencies cannot be given by an expert, such as an actuary.¹³⁰

Pursuant to the calculations of damages for prospective patrimonial loss¹³¹ having been made, the damages are reduced in terms of the rate of discount¹³² to counter the benefit the plaintiff will obtain by receiving compensation in advance.¹³³ During this process of reducing the damages, or adjusting the damages, the present values of the future benefits and losses are calculated and determined. This applies to loss of earning capacity, loss of future support and the creation of an expectation of debt, and the calculation is done by means of tables of capital values and annuity and discount tables.¹³⁴

3.3 General principles for the determination of Prospective Loss

3.3.1 Speculation

The court has to rely on speculation in determining prospective loss and compensation for prospective loss.¹³⁵ The court's approach in the matter of *Road Accident Fund v Guedes*¹³⁶ serves as an example of the practical approach in the determination of damages:

¹³⁰ See *Shield Insurance Co Ltd v Hall* 1976 4 SA 431 (A) 444; *Pringle v Administrateur, Tvl* 1990 2 SA 379 (W) 397-398.

¹³¹ Potgieter 149 fn 140: "Discounting is irrelevant in non-patrimonial loss".

¹³² Koch RJ *Damages for Lost Income* 1984:76-89; De Groot H *Inleiding tot de Hollandsche Rechtsgeleerdheid* 1767 : 3.33.2.

¹³³ See *SA Eagle Ins Co Ltd v Hartley* 1990 (4) SA 833 (A) at 839 where the court explained it as follows: "the purpose of discounting in such cases is to award the plaintiff a sum of money which, if invested at an appropriate rate of interest, would provide him with the amount of R1 000.00 (which we assume to be his loss of earnings) at the time when he would have received it had the injury not been sustained. In this way he would be placed in the same position as that in which he would have been if the delict had not been committed. However, if the loss of R1 000.00 had already been sustained when the award is made, there could be no reason why it should be discounted to an earlier date. Then the plaintiff should be awarded the full amount"

¹³⁴ Joubert 22.

¹³⁵ Potgieter 139.

¹³⁶ 2006 (5) SA 583 (SCA).

“The calculation of the quantum of a future amount, such as loss of earning capacity, is not... a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a rough estimate... Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages. Even then, the trial Court has a wide discretion to award what it believes is just.”¹³⁷

Probable future events and circumstances should be looked at prognostically (which include the probable causal chain) in order to determine the current value of the plaintiff’s future expectation.¹³⁸

The degree of probability of the realization stands in direct relation to the value of the expectation.¹³⁹ From the matter of *Modern Engineering Works v Jacobs*¹⁴⁰ it can clearly be seen that South African courts usually require proof on a balance of probabilities that some patrimonial advantage would have been obtained, had the damage causing event not taken place. As recognised in *Commercial Union Ass Co v Stanley*¹⁴¹ actuarial evidence is regarded with importance, but without the court disregarding its subjective discretion on what should be a reasonable and fair award.

However, the uncertainties are sometimes of such a nature that the court can only award an approximate arbitrary amount.¹⁴²

3.3.2 Probabilities and Possibilities

The onus of proof in this regard should be properly grasped. As per the following example provided for by Boberg¹⁴³ a clear distinction lies between facts to be proven (being the likelihood of the existence of future loss), and the substance of the facts (the

¹³⁷ Above at 586-7.

¹³⁸ Potgieter 139.

¹³⁹ Potgieter 139.

¹⁴⁰ 1949 (3) SA 191 (T).

¹⁴¹ 1973 (1) SA 699 (A).

¹⁴² Above at 705.

¹⁴³ Boberg 602-3.

degree of the possibility of prospective loss). Applying it to a hypothetical situation, a prominent surgeon holds the opinion that a plaintiff has a certain chance of developing an illness, it would mean that it is the surgeon's opinion that must be proven, and not that the plaintiff will indeed develop the illness. This position is indeed different should the claim be based solely on prospective loss.

Where a claim is based solely on prospective loss, where no actual damage has been suffered at the time when the action is instituted, it is submitted that a *probability*¹⁴⁴ that some damage will be sustained in future must be established; otherwise the plaintiff will have failed to prove the requirement of *damnum*.¹⁴⁵

In *De Klerk v ABSA Bank Ltd*¹⁴⁶ the crux of the matter was whether the appellant could claim damages in respect of a fraudulent misrepresentation, which had according to him, induced him into making an investment. The appellant alleged that had he not made such investment, his position would have been different and to his advantage. The court concluded as follows:

“Transposing these dicta to the facts of this case, at the end of the trial De Klerk will have to have proved, on a balance of probability, that he would have invested at least some of the moneys used to make the monthly payments (causation). But if he surmounts to that hurdle, then I think that the court may be entitled, in quantifying the amount of his damages to form an estimate of his chances of earning a particular figure. This figure will not have to be proved on a balance of probability but will be a matter of estimation.”¹⁴⁷

3.3.3 Contingencies in the future

As already discussed in this chapter, the courts make provision for contingencies. The effect of taking contingencies into account is usually that the amount of damages to be

¹⁴⁴ Own emphasis.

¹⁴⁵ *Supra*.

¹⁴⁶ 2003 4 SA 315 (SCA).

¹⁴⁷ 2003 4 SA 315 (SCA) at 74F-75F.

awarded is reduced by a certain percentage.¹⁴⁸ The provision of contingencies is mostly within the subjective discretion of the court regarding what is fair and reasonable, and direct evidence by an actuary will not suffice on its own.¹⁴⁹

A few practical examples on this point include the matter of *Erdmann v Santam Ins Co Ltd*¹⁵⁰ where the court was concerned with the plaintiff's ability to supervise the household and the possibility that she would in any event in the future have needed a servant as she grew older. In this regard too, the matter of *Burns v National Employers General Ins Co Ltd*¹⁵¹ is relevant, where it was considered in a widow's claim for loss of support that she was an apathetic individual and there was a possibility that the deceased would have divorced her in future.

3.3.4 Occurrences between the date of the damage causing event and the date of the trial

The courts make use of evidence regarding occurrences from the damage causing event to the date of the trial to lend a greater sense of reality to the assessment process.¹⁵² This approach is justified because facts are of much greater use than speculation.¹⁵³

In the matter of *Sigournay v Gillbanks*¹⁵⁴ a similar viewpoint was taken and it was decided: "Where there has been a change in the situation between the date of the delict and the date of the judgment, this may affect the amount of damages."

3.3.5 Discounting, capitalization and annuity calculation

Damages for future patrimonial loss are reduced, after determination according to the discounting rate, to make provision for the advantage that the plaintiff has, to receive

¹⁴⁸Potgieter 144.

¹⁴⁹Potgieter 144 - 145.

¹⁵⁰ 1985 (3) SA 402 (C) at 404 - 5.

¹⁵¹ 1988 (3) SA 355 (C) at 365.

¹⁵²Potgieter 147.

¹⁵³See for example *General Accident Ins Co SA Ltd v Summers* 1987 (3) SA 577 (A) at 615.

¹⁵⁴1960 (2) SA 552 (A) at 557.

money in advance for the specific prejudice.¹⁵⁵ According to the legal practice's view regarding future loss, it is loss that occurs only after the date of assessment of the loss, which is usually after the trial.¹⁵⁶

In the matter of *SA Eagle Ins Co Ltd v Hartley*¹⁵⁷ the court explained it as follows:

“The purpose of discounting in such cases is to award the plaintiff a sum of money which, if invested at an appropriate rate of interest, would provide him with the amount of R1 000.00 (which we assume to be his loss of earnings) at the time when he would have received it had the injury not been sustained.¹⁵⁸ In this way he would be placed in the same position as that in which he would have been if the delict had not been committed. However, if the loss of R1 000.00 had already been sustained when the award is made, there could be no reason why it should be discounted to an earlier date, the plaintiff should then be awarded the full amount.”

It is applied to *inter alia* loss of earning capacity and loss of future maintenance. The assessment is made by making use of tables of capital values and discounting- and annuity tables.¹⁵⁹

In respect of loss of earning capacity (future loss of income) and future loss of maintenance, the Appeal Division decided that damages only needs to be discounted until the date of trial, and not until the date of the delict.¹⁶⁰

With future loss, aspects such as inflation, duty to mitigate your loss, interest, tax and *res inter alios acta*, can also be play an important role, yet are extensive and cannot be examined in detail for purposes of the scope of this dissertation.¹⁶¹

¹⁵⁵Potgieter 149 – 150.

¹⁵⁶Potgieter 150.

¹⁵⁷1990 (4) SA 833 (A).

¹⁵⁸ Own emphasis.

¹⁵⁹Potgieter 150.

¹⁶⁰1987 (3) SA 577(A) at 615 – 616.

¹⁶¹Potgieter 151 – 152.

3.4 Conclusion

The future loss, which has not yet materialised, is claimed for in practice in the same action and simultaneously with the actual accrued damages.

A contingency allowance must be made for the possibility that the specific future loss will not occur, and the plaintiff claiming such, need not prove on a preponderance of probability that it will indeed occur. An individual cannot claim merely and solely for future loss without suffering a real or actual loss.

The “once and for all rule” is the golden thread that forms the basis of the aforementioned. This rule will be elaborated on, and discussed in full in the following chapter of this dissertation.

The mere possibility of suffering future loss needs great inspection and evaluation prior to instituting an action for damages. The general approach in assessing loss as to the exact moment of damage is the date of the delict or damage-causing event. Exceptions to the aforementioned have been formed in practice.

Assessing future damage is determined by comparing the hypothetical position of an individual and what his/her position would have been had the damage-causing event never occurred, with the situation of the individual after the damage-causing event had materialised. Thus, the situation of a person without the specific damage-causing event, and applying the actual situation after the occurrence of the damage-causing event is compared.

The test laid down, that future loss is proved merely on a balance of probabilities, is not the method which a court will take into account when awarding damages. The court is likely, in practice, to award damages as proved by the plaintiff, keeping in mind that it is not too remote.

Contingencies taken into account by the court in awarding damages, reduces the award by a certain percentage. The percentage is based upon the subjective discretion of the court of what is fair and reasonable in respect of the normal life hazards that an individual encounters.

Thus, courts in practice rely greatly on speculation, taking the probabilities and possibilities of certain situations, or the manifestation of such situations, into account.

On such possible manifestations of situations, contingencies are applied to once more provide for the possibility or not of such manifestation.

The basis is to put the plaintiff in the same position he/she would have been in had the damage-causing event never occurred.

CHAPTER FOUR

The Complications in claiming Prospective Loss - A South African Study

4.1 The Once and For All Rule

As confirmed by Boberg¹⁶² one wrongful act gives rise to one cause of action for all damage, past and future, that is caused by it. This entails thus that a plaintiff cannot claim compensation piecemeal for his various losses suffered as they occur, but in fact that he must sue once and for all for the complete damages. He has to seek redress not only for the loss he has in fact suffered, actual- or accrued loss, but also for the loss he expects to suffer in future, his prospective loss.

As found in *Custom Credit Corporation v Shembe*¹⁶³ South African law requires a plaintiff with one cause of action to claim all remedies the law accords to him upon such cause in the same action. This was once again confirmed and the reason for the rule explained in *Symington v Pretoria-Oos Hospitaal Bedryfs (Pty) Ltd*¹⁶⁴ as being to prevent the multiplicity of actions based on a single cause of action. This rule applies to claims for contractual damages as well.¹⁶⁵

Van der Walt¹⁶⁶ subjected the once and for all rule to a comprehensive research in his seminal work on the matter. He came to the conclusion that all attempts to justify the rule with reference to *res judicata*, *ne bis in idem* or *continentia causa* fails because of the fact that a claim based on loss already suffered and a claim for future loss rests on two different and separate causes of action.

¹⁶² Boberg PQR *The Law of Delict I: Acquillian Liability* (1984):476.

¹⁶³ 1972 (3) SA 462 (A) at 472.

¹⁶⁴ 2005 5 SA 550 (SCA)563.

¹⁶⁵ Christie 555.

¹⁶⁶ Van der Walt 425 – 85.

Van der Walt's¹⁶⁷ view can be summarized that there should be no further toleration of the fact that the recoveries of damages for further damage are to be frustrated by the once and for all rule. Courts should be able to freely decide and adjudicate finally over all matters regarding completely developed damage, whilst also indicating the conditions under which, and the period during which, the defendant would too be liable for further damage developing from the challenged event.

His view in respect of future loss, as a pillar of his argument against the once and for all rule, does not enjoy much support.¹⁶⁸ Even more so, his theory that a claim which involves patrimonial as well as non-patrimonial loss cannot be based on a single cause of action because these two forms of damage has nothing in common is insupportable both practically¹⁶⁹ and theoretically.¹⁷⁰

In the matter of *Evins v Shield Ins Co*,¹⁷¹ Jansen JA in a minority judgment took note of Van der Walt's view with more sympathy by stating:

“It may even be desirable to re-examine the “once and for all” rule and inquire whether in our law its application should not, in appropriate circumstances, be restricted... In view of these difficulties I prefer...to leave the whole matter open.”

Because of the support that the Appeal Court gives to the once and for all rule, the court's ability to bring about certain amendments is limited, and it has been suggested by Potgieter that the legislator should probably correct the unwanted implications of this rule.¹⁷²

¹⁶⁷ Van der Walt 20.

¹⁶⁸ Potgieter 140; 154. Voet *Commentarius* 44.2.1: “To prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to th same suit being aired more than once in fiffereent legal proceedings.”

¹⁶⁹ See also *Evins v Shield Ins Co Ltd* 1980 (2) SA 814 (A) at 839 where the learned judge states that the *facta probanda* for a claim based on *the legis Acquiliae* and the action for pain and suffering in a case of bodily injuries are exactly the same. In fact, the learned judge used the words ‘*damnum*’ to refer to both kinds of damage.

¹⁷⁰ Potgieter 154.

¹⁷¹ 1980 (2) SA 814 (A) at 835.

¹⁷² Potgieter 155.

In South African law, the assessment of damages is approached in certain ways. In the law of third-party compensation, provision is made to circumvent certain problems in this regard. Section 17(4)(a) of the Road Accident Fund Act¹⁷³ makes provision for an undertaking to pay all medical costs as is incurred in the future, and for the payment of future loss of maintenance and future loss of income in instalments.

In cases outside the span of the Road Accident Fund Act, these possibilities do not yet exist.

A comment was made in *Cape Town Municipality v Allianz Ins Co Ltd*¹⁷⁴ that this rule “may, it seems, not endure unrestricted forever.”

The main difficulty with this rule lies therein that the plaintiff is only awarded one action in which he is to claim for all loss, including future loss. This means that a plaintiff who has sued successfully or unsuccessfully for a certain part of his loss, may not thereafter claim for another part if both claims are based on the same (and single) cause of action.¹⁷⁵

In the matter mentioned above of *Evins v Shield Insurance Co Ltd*¹⁷⁶ the principle is discussed and can be summarized as follows: The principle of *res judicata* taken in conjunction with the once and for all rule, entails that a claimant for Aquilian damages and who has litigated finally, is barred from then claiming from the same defendant upon the same cause of action for additional damages in respect of further loss suffered by him, being loss not catered for in the award of damages made in the original action, even though such further loss only comes into being or becomes capable of assessment only after the conclusion of the original action.

Van der Walt¹⁷⁷ is of the view that the dilemma forms when the once and for all rule forces one to give judgment on future loss-development. He is of the opinion that only

¹⁷³ Act 56 of 1996

¹⁷⁴ 1990 (1) SA 311 (K) at 332.

¹⁷⁵ *Green v Coetzer* 1958 (2) SA 697 (W).

¹⁷⁶ 1980 (2) SA 814 (A).

¹⁷⁷ Van der Walt 446.

future loss which is absolutely concrete of occurring should be taken into account, and that a decision on all the loss is merely a guessing game.¹⁷⁸

The rule on the one hand relieves a defendant of knowing that he will not be sued again in future for the same cause, but on the other hand places a hardship on a plaintiff of having to decide whether to claim prospective damage or to wait and establish whether prospective damage will occur.¹⁷⁹

As recognised in the early case of *Turkstra Ltd v Richards*¹⁸⁰ South African courts does its best to quantify the losses even though it involves a greater scale of guesswork once the losses are established.

The court found in *Caxton Ltd and Other v Reeva Forman (Pty) Ltd and Another*¹⁸¹ there was no doubt that the plaintiff had suffered losses as a result of the defendant's wrongful conduct, and in consequence supported the view that in such circumstances, a court has no other alternative but to resort to the 'rough and ready method of the proverbial guess and to do the best it can on such material as is placed before the court'.

The difficulty in a situation where damages cannot be determined or assessed with certainty has been the subject of many decisions by South African courts. The general answer given is that the plaintiff will be entitled to judgment upon production of all the evidence that can reasonably be produced to enable the court to assess the *quantum* of the loss.¹⁸²

As explained in *Lambrakis v Santam Ltd*,¹⁸³ actuarial calculations provide an estimated guideline in assisting the court in awarding damages, although the courts are not bound by them.

¹⁷⁸ Van der Walt 448.

¹⁷⁹ Christie 555.

¹⁸⁰ 1926 TPD 276 at 282 – 283.

¹⁸¹ 1990 (3) SA 547 (A) at 573 G – J.

¹⁸² *Hushon SA (Pty) Ltd v Pictech (Pty) Ltd* (1997) 2 All SA 672 (A).

¹⁸³ 2002 (3) SA 710 (SCA).

In the assessment of general damages it was held by the court in *De Jongh v Du Pisanie NO*¹⁸⁴ that although the plaintiff is entitled to full compensation, the award should also be fair to the defendant. It furthermore held that if the loss cannot be quantified the court has to exercise a discretion taking into account previous awards and the trend towards conservatism.¹⁸⁵

4.2 Particularity of damages

The plaintiff is required to set out the particulars of his claim in instituting action, in such a manner as to enable the defendant to estimate the quantum thereof. Uniform rule 18 of the Uniform Rules of Court provides that a party claiming damages shall provide sufficient information to enable the opposing party to know why the particular amount being claimed as damages is being claimed, irrespective of whether the damages being claimed are special- or general damages.¹⁸⁶

4.3 Breach of contract and contractual exclusion of the Once and For All Rule

In the matter of *Kantor v Welldone Upholsterers*¹⁸⁷ the plaintiff supplied wood to the defendant for the manufacturing of furniture. The plaintiff guaranteed that the wood would be fit for this purpose; however the wood was contaminated by beetle-infestation. The defendant manufactured and sold furniture made from the wood. When a client cancelled his contract with the defendant and claimed the contract price of the furniture from the defendant, the defendant claimed the contract price of the wood from the plaintiff and claimed damages. Subsequently to additional clients claiming from the defendant, the defendant instituted action against the plaintiff again for damages as result of loss of profit. The court decided that no difference can be found between an action such as these based on contract and an action on delict. The cause of action in both cases

¹⁸⁴ 2005 (5) SA 457 (SCA) at par 58 – 65.

¹⁸⁵ Harms LTC *Amler's Precedents of Pleadings* 2009:156

¹⁸⁶ Harms LTC 2009:156.

¹⁸⁷ 1944 CPD 388 at 391.

is the unlawful act of the defendant together with the occurrence of damage suffered by the plaintiff. It is seemingly the idea that the further damage which had been caused to the plaintiffs, by additional customers claiming their money back, leading to the plaintiff losing the profits that they would have made, stems from the original breach of contract, being the wrongful act of the defendant in selling to them the beetle-infested wood. The fact that the plaintiffs were not aware of this further damage when they sued for the initially, does not affect the matter in the sense that they cannot at a later time claim for such damage because it was not included in the action instituted.

In *Mahomed v Mahomed*¹⁸⁸ the court decided that there were as many causes of action as there were contracts of sale, and each contract with its own requirements must be proven separately, and the total of these requirements sets out the specific cause of action.

Visser,¹⁸⁹ in his article on aspects of prospective loss wrote that although the existence of damage is not a requirement for the breach of contract, and correctly so, the existence thereof is by the very nature thereof a requirement for an action for damages based on a breach of a contract. Therefore, the same principles do apply in the sense that the damage-causing event should exist and be proved. Prospective loss cannot be claimed in isolation, and some damage should have appeared.

The application for an interdict is made more often in instances of breach of contract because of the difficulties to prove damages in cases of continuous breach of contract, or delictual claims, also because of the diminishing value in the amount of damages for which no provision can be made with a claim of interest.¹⁹⁰

¹⁸⁸ 1959 (2) SA 688 (T).

¹⁸⁹ Visser PJ "A note on some aspects of prospective damage and factual causation" 2004 (13) *Speculum Iuris* 137: 143-144

¹⁹⁰ See the explanation in *Boiler Efficiency Services CC v Coalcor (Cape) (Pty) Ltd* 1989 (3) SA 460 (K) at 475.

As decided in the matter of *Collins Submarine Pipelines (Pty) Ltd v Durban City Council*,¹⁹¹ it is possible for parties to contractually agree to exclude the application of the once and for all rule.

4.4 Complications regarding Prescription

Generally, prescription is concluded after the period of three years.¹⁹² Thus, where damage had occurred, the plaintiff should institute his claim for the damage within the relevant period of time, and in such claim, include the loss which will occur in future.

A plaintiff should thoroughly investigate the nature of his losses that already exist and carefully examine possible losses that may come into being in the future, as he can only claim once for all the damages, and would be excluded from claiming in another action on the same cause of action, even though it seems that he was reasonably under a incorrect impression regarding the extent and nature of his losses.

Further to this, a plaintiff may not amend his claim if he, in doing so, introduces a new cause of action which has already prescribed.¹⁹³

As to the prescription of claims and the approach to the problems Section 12(3) of the Prescription Act¹⁹⁴ provides that a cause of action exists with the appearance of the first patrimonial- or non-patrimonial damage, together with the existence of all other requirements, even though the Plaintiff is not aware thereof. However, the potential plaintiff is not prejudiced because the debt is regarded as being not due, and therefore prescription does not start to run, until the plaintiff is aware of the identity of the debtor and the facts from which the debt is created, or could have been reasonably expected to be aware thereof.¹⁹⁵

¹⁹¹ 1968 (4) SA 763 (A) at 769.

¹⁹² The period of prescription is dependent upon the type of debt. Section 3 of the Prescription Act, Act 68 of 1969. Section 3(2) of Act 68 of 1969 is applicable to general contractual and delictual claims. There are however different periods applicable in terms of the Road Accident Fund Act, Act 56 of 1996, as amended.

¹⁹³ Potgieter 157.

¹⁹⁴ Act 68 of 1969.

¹⁹⁵ Potgieter 177.

4.5 Conclusion

The “once and for all rule”, firmly established in South African law, has the main effect that all damage suffered as a result of a single cause of action, should be claimed in one action. Thus, damage cannot be claimed piecemeal.

This gives rise to various difficulties for a party claiming damages, such as *inter alia* prescription in respect of a part of claim which was not claimed when the action was instituted. In-depth determination should be done of all the plaintiff’s damages, including the possibility of future loss developing from the cause of action.

The South African legal system has developed over the years, and in doing so, certain provision is now made to circumvent some of these problems such as in the event of claims against the Road Accident Fund.

In light of the fact that the position in other countries might offer some insight into similar issues or possible solutions, the position in the United Kingdom is briefly researched in the next chapter.

CHAPTER FIVE

Claims for Prospective Loss in the United Kingdom

5.1 Background

A comparative study of the position in other countries and legal systems could offer a valuable perspective on the problem. As stated above, whereas the existence of liability is determined in accordance with the substantive law which is Roman-Dutch in origin, the quantification of liability is largely governed by the rules and concepts derived from English law. The position has thus been chosen for this purpose. By hypothetically applying solutions utilised in this foreign jurisdiction potential solutions for South Africa can be recommended.

5.1.1 General Principles in Claims for Damages

A tort is a ‘civil wrong’, in simpler wording, it is a wrong committed against an individual, which includes a legal entity. Any individual has various interests that are protected by law. These interests can be protected by a court, by awarding the payment of a sum of money as damages to compensate for the specific infringement of the protected interest.¹⁹⁶

There are various protected interests, *inter alia*: personal security,¹⁹⁷ interest in property,¹⁹⁸ economic interests¹⁹⁹ and reputation and privacy.²⁰⁰

Infringement on personal security would be where a person’s freedom is unlawfully restricted as in the case of unlawful detention in prison. Interest in an individual’s property is protected by various torts such as nuisance and trespassing, also where a

¹⁹⁶ Cooke *J Law of Tort* (2007) 3.

¹⁹⁷ As discussed by Cooke 5.

¹⁹⁸ As mentioned by Cooke 5.

¹⁹⁹ According to Cooke 6.

²⁰⁰ See Cooke 6.

motor vehicle is negligently damaged in an accident, the individual may have, depending on the circumstances, an action for damages in negligence. Economic interest enjoys limited protection because of the fact that the common law was cautious and specific in drawing a very distinct difference between lawful and unlawful business practices. A controversial area in the UK law is the extent of liability where negligence caused the economic loss. Furthermore, there is a definite distinction between pure economic loss and loss caused by physical damage. In the last instance mentioned above, an individual may have an action in the tort of defamation where for example his or her reputation was damaged as a result of a false speech or writing.

The two main objectives in a claim for damages are compensation and deterrence. The theory for the objective of deterrence is that a possibility of a civil sanction, such as damages, may cause individuals to alter their behaviour and avoid conflict.²⁰¹ The former objective, compensation, shifts the damage from the plaintiff to the defendant once it is proved that the defendant is at fault.²⁰² The focus in this study will be the latter.

The general rule in the United Kingdom is that the cause of action for a claim for damages arises as soon as all the requirements of the cause of action are met, namely inter alia: that the injury has set in.²⁰³

The victims of personal injuries suffer two distinct kind of damage which may be classified as pecuniary and non-pecuniary damage. By pecuniary damage is meant the damage which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while

²⁰¹ Cooke 12 –13.

²⁰² Cooke 13 –14 that “[T]his system is increasingly criticised as being inefficient to compensate accident victims. There are three systems that provide for accident victims being: Public Insurance (This is the largest part of compensation, where an individual who was injured in an accident pay be entitled to payment by the state for example sickness benefits. This is payable on occurrence of an event and according to the need of the claimant.); Tort Law (Here it is payable only on proof that a person caused an injury and was at fault in doing so); and Private Insurance (This is a very small part of compensation, as it is extremely expensive. It is taken out at the possibility of indisposition, and employees take it out only for key employees).”

²⁰³ Van der Walt *Die Sommeskadeleer en die “Once and for All”-reël* (LLD theses 1977 UNISA) 415.

non-pecuniary damage includes such immeasurable elements such as pain and suffering and loss of amenity or enjoyment of life.²⁰⁴

5.1.2 Distinction between general damages and special damages

The fundamental principle of law on the nature of damages was expressly laid down in the matter of *Admiralty Commissioners V S.S. Valeria*²⁰⁵ as follows: “The true method of expression, I think, is that in calculating damages you are to consider what is the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him.”

The distinction between general damages and special damages was made in the matter of *British Transport Commission v Gourley*.²⁰⁶

“In an action for personal injuries, the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specially pleaded and proved. This consists of out of pocket expenses and loss of earnings incurred down to the date of the trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and which is not specifically pleaded. This includes compensation for pain and suffering and the like and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power.”

5.1.3 Assessment of Damages

The fundamental principle underlying the assessment of damages concludes that the claimant should be fully compensated for his loss. The claimant is entitled, as of a right, to be restored in the position he would have been in had the damage-causing event, the tort, never occurred, “insofar as this can be done by the payment in money.”²⁰⁷

²⁰⁴ Armitage AL and Dias RWM *Clerk & Lindsell on Torts* (1975):357.

²⁰⁵ (1922) 2 A.C. 242 at 248.

²⁰⁶ (1956) A.C. 158; (1955) 3 All E.R. 796.

²⁰⁷ *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25, 39. However note the difference in South African Law in Christie 543.

The vast majority of cases are tried by a presiding judge alone and no longer by a jury. It is the judge who on his own has to decide on an adequate amount for the award of damages. However, the decision of the judge may be amended, and the Court of Appeal will also have regard to assessments made in similar cases. Therefore, it can be said that a level of objective standards of adequacy has also been established in the United Kingdom.²⁰⁸

5.2 Nature of Prospective Loss

In the matter of *Chaplin v Hicks*²⁰⁹ the plaintiff entered into a beauty contest and got through to the final stage of the competition where the defendant had to select winners from the remaining contestants. The winners were then to be given a theatrical engagement for a period of three years for remuneration. The defendant, in breach of his contract with the plaintiff prevented her from taking part in the final selection stage, and as result thereof she was excluded from the competition, and had no chance of securing one of the appointments. The court found that the plaintiff, who was wrongly deprived of the chance of being one of the winners in the beauty competition, was awarded damages for loss of a chance. The court did not attempt to decide on balance of probability pertaining to the hypothetical past event of what would have happened if the claimant had been duly notified of her interview.

Lord Scarman made a general observation in the matter of *Lim Poh Choo v Camden and Islington Area Health Authority*²¹⁰ regarding the claiming of prospective loss, which may cause a claimant to be wary of claiming prospective loss : “there is only one certainty: the future will prove the award to be either too high or too low.”²¹¹ In view of the position also in South Africa as discussed in previous chapters, this appears to be a universal conclusion.

²⁰⁸ Munkman J *Damages for Personal Injuries and Death* (1960):4

²⁰⁹ (1911) 2 KB 786.

²¹⁰ (1980) AC 174.

²¹¹ Above 182.

5.3 Assessing Prospective Loss

An estimate of prospective loss must be based on a foundation of facts. Therefore evidence should be given to the court of as many facts as possible. When it is shown that the plaintiff was earning money at a specified rate at the time of an injury, the ordinary presumption of law is that he would have continued to earn money at the same rate. If the plaintiff claims that he would have earned more had it not been for the injury, he must prove the relevant facts for example that he was on a regular ladder for promotion, or in a trade where rates of pay are increased from time to time, alternatively that he had special merits or qualifications or opportunities which would have led to an improvement.²¹²

In the matter of *Charles v Hugh James Jones & Jenkins (a firm)*²¹³ the claimant in the matter had suffered serious injuries in a road traffic accident. The matter was struck off the roll because the solicitors failed to apply for a trial date within the prescribed period. The claimant then instituted an action of negligence against the solicitors. The notional trial date would have been in January 1996, and the subsequent action for negligence was before court in August 1998. It was held that where a valuable personal injury claim never came to trial because of negligence by the claimant's solicitor, the court, in assessing damages for that negligence, was not necessarily obliged to disregard changes in the claimant's condition which had occurred after the notional trial date of the personal injury action.

Furthermore, the court held that although the judge had to assess the damages that would have been recovered at the notional trial date, he might well, in appropriate circumstances, be assisted in coming to a view on that matter by knowledge of what had in fact occurred.

“Where a condition had manifested itself before the notional trial date but the prognosis was somewhat uncertain at that date, the judge should take into account what had in fact occurred, for example, where the medical evidence at the notional trial date indicated that there was a strong

²¹² Munkman 27.

²¹³ [2000] 1 All ER 289.

probability that the claimant would in future suffer some adverse medical consequence as a result of his injuries, it would be absurd to award him damages under that head if it was shown that there was no such risk at the date of the actual trial. Similarly, where there was evidence at the notional trial date that the claimant would probably never work again, it would be wrong not to take into account the fact that he had obtained work at the actual trial date. Equally, if the evidence about the claimant's prospect of obtaining employment was less certain at the notional trial date, it would be wrong to disregard evidence at the actual trial that it was certain that the claimant would never work again."²¹⁴

Damages in the UK are also assessed once and for all, and compensation is given not only for the loss and injury which has already accrued, but also for loss and injury which may develop at a future date. If injuries supervene unexpectedly, a second action cannot be brought.²¹⁵

The rule in *Henderson v Henderson*,²¹⁶ requires the parties to bring the whole case before the court to all aspects may be finally, and decided upon once and for all. As a first exception to the Henderson-rule, the Court of Appeal in *Talbot v Berkshire CC*²¹⁷ decided that there are three circumstances in which this once and for all rule does not apply:

- a) Where the claimant is unaware of the existence of the claim;
- b) In the event that an agreement was reached between the parties to keep the action in abeyance; and
- c) Where the claimant had not brought the case earlier, as a result of the reliance the claimant had placed on a representation made by the Defendant.

The second exception is in the case where there is a continuing injury present, for example the continuance trespassing of land or continuance nuisance. In *See Darley Main Colliery v Mitchell*²¹⁸ it was decided that in the case of continuant trespassing, a

²¹⁴[2000] 1 All ER 289 –290.

²¹⁵ See fn 163. Also see the very early matter of *British Transport Commission v Gourley* (1955) 3 All E.R. 796 at 808 where this rule was established: "...damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss."

²¹⁶ (1843) 3 Hare 100.

²¹⁷ (1994) QB 290.

²¹⁸ (1886) 11 App Cas 127

fresh cause of action arises from day to day, and in the event of a continuant nuisance, a fresh cause of action arises whenever further damage occurs.

The third exception, as decided in a foreign judgement and included in the UK law, is where a single wrong produces succeeding and different damage – in that event, and only in respect of torts actionable on proof of damage, a separate and distinct cause of action occurs.²¹⁹

A claimant is only entitled to bring one action in respect of a single wrong - a second action cannot be instituted based on the same facts and cause of action because the damage actually suffered came to be much more excessive than anticipated.²²⁰

There are however exceptions to the aforementioned once and for all rule, as discussed hereinabove. Those may shed light on future developments in our law where there are no exceptions to claim for further damages arising from the same cause of action.

In actions for personal injuries, the courts are constantly required to establish an estimate of chances and risks which cannot be determined with precision, for example the possibility of improved earnings if the accident had never occurred.²²¹

The necessity that damages awarded should be full and adequate has been stressed. The courts will ensure that the damages awarded are sufficient for the injury sustained, and will assist the relevant parties in order to arrive at a ‘just and fair’ figure.²²²

However, certain judicial opinions seem to suggest that where a claim is for personal injuries, the damages should be something less than adequate compensation. The most

²¹⁹ See *Mount Albert BC v Johnson* (1979) 2 NZLR 234.

²²⁰ As seen in the extremely old case of *Fetter v Beale* (1701) 1 Ld Raym 339,692.

²²¹ See for example *Fair v London and North Western Rail Co.* (1869) 21 L.T. 326.

²²² *Rushton v National Coal Board* (1953) 1 All E.R. 314 at 316.

comprehensive remark in this regard is one made by Field J in the matter of *Phillips v South Western Rail Co*²²³ in the course of his summary presented to the jury:

“Perfect compensation is hardly possible and would be unjust... You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. The plaintiff can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full fair compensation for that which he has suffered.”

As pointed out, prospective loss can only be estimated with more or less probability. An example of prospective loss becoming actual loss is where the prospective injury depends upon the happening or non-happening of a specific event, and such event had in fact occurred. Then it is unnecessary to speculate on the happening of the event.²²⁴

Although the admissibility of actuarial evidence and of actuarial tables has never been denied in the UK, and although the courts have not infrequently agreed that the use of actuarial techniques may be useful as a guide to the present value of future losses the courts continue to insist that actuarial techniques should not be used as the primary basis of assessment.²²⁵

The main reason for the view as mentioned above is that of the courts often expressed that “actuarial tables do not allow for all the chances and changes of this mortal life”²²⁶ and that the assessment of future pecuniary loss depends on so many conjectural decisions and involves consideration of so many variables that their use would give a false appearance of accuracy and precision where accuracy and precision are impossible.²²⁷ There is said to be no real alternative to reliance upon the experience of the

²²³ (1879) 4 Q.B.D. 406.

²²⁴ See (1989) 82 ALR 598 –599.

²²⁵ See for example *Watson v Powels* (1968) 1 Q.B. 596.

²²⁶ See *Fletcher v Autocar and Transporters Ltd.* (1968) 2 Q.B. 322, 346.

²²⁷ See *Taylor v O'Connor* (1971) A.C. 115,140.

judges themselves.²²⁸ This is the approach adopted in South African courts as well if one has regard to the general position regarding contingencies when awards are made.

Lord Morris found that courts could, in matters where high figures are involved, derive assistance from skilled evidence; however that such evidence should afford a guide to courts.²²⁹ This is exactly the approach in the South African courts, where evidence given by actuaries are a guide to courts, and the courts have the subjective discretion.

In the matter of *Mallett v McMonagle*²³⁰ the learned Lord Diplock decided that a court's role in assessing the damages is similar to the court's view of "what will be and what would have been" contrasted by a court's ordinary function in civil actions of "determining what was."²³¹ What had occurred in the past is decided on a balance of probabilities. Should a specific aspect be more than probable, it should be treated as being certain. However, in assessing damages based on what might occur in future, the courts should establish an estimate "as to what the chances are that a particular thing will or would have happened and reflect those chances in the amount of damages it awards."²³²

It was, for example, held in the matter of *Kitchen v Royal Air Force Association*²³³ that where a solicitor had failed to issue a writ within the prescribed period, and consequently the claimant had been deprived of an opportunity to institute court proceedings, damages are not assessed on what would have been the outcome of the proceedings had it been instituted in time. In the judgement it is set out that the court will assess what the claimant's prospects of success would have been in the proceedings that were not instituted as a result of the solicitor's negligence.

²²⁸ Armitage 365.

²²⁹ *Taylor v O'Connor* (1971) A.C. 115, 134.

²³⁰ (1970) AC 166.

²³¹ Own emphasis.

²³² (1970) AC 176.

²³³ (1958) 1 WLR 563.

In the matter of *Spring v Guardian*²³⁴ the question regarding the assessment of damages turned around the facts where an employer negligently supplied inaccurate character reference to a former employee's prospective employers. It was found that the employee need not prove that, but for the negligence, he would have been employed with the prospective employer. He merely need prove that he had lost a reasonable chance of employment, which the court would in turn evaluate.

A matter from which regard was had to the dicta regarding future damage and causation, and with specific reference was made to the questions of quantification of a plaintiff's loss, the court said the following:

“Questions of quantification of the plaintiff's loss, however, may depend upon future uncertain events. For example, whether and to what extent he will suffer osteoarthritis, whether he will continue to earn at the same rate until retirement, whether, but for the accident, he might have been promoted. It is trite law that these questions are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least, on the hypothetical acts of a third party, namely the plaintiff's employer.”²³⁵

The once and for all rule, applied in both jurisdictions gives rise to various problems, especially where the medical prognosis is not available. However, in the United Kingdom, Section 32A of the Supreme Court Act, Act 1981 makes provision for the possibility that in actions based on personal injury claims, where the possibility exists that the claimant might develop some serious disease or deterioration in his or her condition in future, he may be awarded provision damages, which damages are assessed on the basis that specific disease or deterioration will not occur. If the disease or deterioration in condition does materialise, the claimant may make application to court for the award of further damages, which will then more accurately compensate for the loss suffered by the claimant.²³⁶ In South African law, provision to circumvent this

²³⁴(1995) 2 AC 296,327.

²³⁵ *Allied Maples Group Ltd v Simmons & Simmons (A Firm)* (1995) 1 WLR 1602 (CA) 1609-1610.

²³⁶ A claimant, however, may only make such application once for the injury as specified in the main action for damages.

problem, future medical expenses, can only be found in Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, where an undertaking is issued to pay all medical costs incurred in the future and for the payment of future loss of maintenance and future loss of income in instalments. There are no other remedies available for this specific difficulty for general delictual claims.²³⁷ In terms of Section 17(6) of the Road Accident Fund Act and Rule 34A of the Uniform Rules of Court, interim payments of damages may be made.²³⁸

While South Africa does not enjoy the same position, Section 5 of the Administration of Justice Act, Act 1982 makes provision, that in the United Kingdom, any saving to an injured individual attributable to his or her maintenance, either in whole or in part, which is at public expense, for example hospital expenses, must be set off against any income the individual has lost as a result of his or her injuries.

In assessing future loss of earnings and the consequent determination of the period a plaintiff would have earned an income if it was not for the injuries sustained, if it be found that a plaintiff's life expectancy has been shortened as a result of the injury, the shorter period is used in the calculation of loss of earning capacity.²³⁹

The aforementioned used to be the position in the United Kingdom, however it was decided by the UK Court of Appeal that damages for future loss of earnings should be awarded at the rate of the plaintiff's pre-accident life expectancy.²⁴⁰

²³⁷ See 1975 (4) SA 72 (W): "A contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure."

²³⁸ In an action for damages for personal injuries or the death of a person, a plaintiff may at any time after delivery of the notice of intention to defend, apply to court for an order requiring the defendant to make interim payment in respect of his or her claim for medical cost and loss of income. The court will only allow this once the defendant has admitted liability or the plaintiff has obtained judgement for damages yet to be determined. See *Karpakis v Mutual and Federal Ins Co Ltd* 1991 (3) SA 489 (O).

²³⁹ See *Singh v Ebrahim* (1) (2010) 3 All SA 187 (D) at 201, 215. The reason underlying this position was firmly established in the matter of *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 259 at 306-8 where it was explained: "A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss they have sustained."

²⁴⁰ See *Pickett v British Rail* (1980) AC 136.

it appears from the judgement in *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd*²⁴¹ that under English Chancery practice, in which this aforementioned enquiry originates from, the court itself does not assess the damage, but orders an enquiry, which enquiry is done by a master or official referee.

5.1.5.1 Contingencies

The ordinary chances and uncertainties of life should be taken into account; however it does not mean that any deduction ought to be made for this reason. The proved facts of a particular case are the primary guide.²⁴² As mentioned in the South African position, contingencies does not mean that a deduction will be made from the award, however, it is a subjective discretion for the allowance of certain happenings.

In the early case of *Rowley v London and North Western Rail Co*,²⁴³ where allowance was made for future risks, the deceased had been paying an annuity to his mother under a covenant contained in a partnership deed. The court held that it would be wrong to assess the mother's loss at a sum required to purchase an annuity of the same amount. The judge in the court *a quo* had overlooked the fact that the annuity was for joint lives, so it would have stopped if the son had died from natural causes in his mother's lifetime. This was the main ground on which the judge's decision was held to be wrong by the court. It was also pointed out that the annuity was payable under a personal covenant. Naturally it was of less value than a secured annuity, and contingencies might have arisen which would have rendered the son unable to keep up the payments, for example bankruptcy.

Generally, while future risks must always be taken into account, it seems possible to overrate their importance. Where the injured man has been in good health and had excellent prospects, it would be legitimate for the court to conclude that the risks were slight and must be disregarded. The court is not obliged to exercise its imagination for the benefit of the wrongdoer. On the other side of the coin, there are occasions when

²⁴¹ 1977 (1) SA 316 (T) at 328.

²⁴² Munkman 29.

²⁴³ (1873) L.R. 8 Exch. 221.

substantial allowance must be made for future risks. However, in all cases, the contingencies which have to be allowed for are the contingencies likely to occur in the circumstances of the particular case, as disclosed by the evidence.²⁴⁴

In the matter of *Williamson v John I. Thornycroft & Co. Ltd*²⁴⁵ a widow claimed damages for loss of support due to her husband's death. In such a claim, two uncertain factors come to light: firstly, how long would the deceased have been able to provide support, and secondly, how long would the widow be alive to receive the support? The court held that it is legitimate to call evidence to prove that the widow is an elderly person and cannot be expected to live much longer, or that she is suffering from a fatal disease. The widow in this matter died before the date of the trial, and the Court of Appeal held that the damages must be calculated accordingly.

5.4 Summary

A distinction is drawn between special damages, and general damages, as in the case of South African law. Special damages need to be specifically pleaded, and proved, for example out of pocket expenses and loss of earnings up to the date of the trial. Special damages are, in general, mostly capable of precise calculation. General damages include damages for pain and suffering and loss of earning capacity and cannot be precisely calculated.²⁴⁶

In the assessment of damages, the award eventually granted should be full and adequate, and put the claimant as far as possible in the position he or she would have been in had the damage-causing event never occurred. Damages are assessed once and for all, and no second action lies based on the same cause of action and same facts. This includes prospective loss, and concludes that all loss should be assessed and claimed for in a single action.²⁴⁷

²⁴⁴ Munkman 29.

²⁴⁵ (1940) 2 K.B. 658.

²⁴⁶ (1956) A.C. 158; (1955) 3 All E.R. 796.

²⁴⁷ (1955) 3 All E.R. 796 at 808.

Damages of any kind is awarded in money, thus, a monetary value should be attached to the injury suffered by the claimant.²⁴⁸ A claimant should prove these damages on a balance of probabilities.²⁴⁹

Courts in the UK do make use of actuarial calculations as a guide to the present value of future loss, although it is insisted that it should not be used as the primary basis of assessment. The reasons given mainly come down to the fact that these calculations cannot allow for the chances inevitable to an individual's life.²⁵⁰

Where precise evidence is given as to the specific interest rate in the cost of a specific item the claimant will have to obtain in future, it has been conceded that evidence as inflation may be admissible.²⁵¹ Contingencies, in assessing prospective loss, are taken into account to make provision for the uncertainties of life, those likely to occur in the circumstances of a particular case.²⁵²

If South African courts were to adopt the objective approach at all times, as English courts do, and not only in exceptional circumstances, in determining the damages to be awarded, more emphasis would be placed on the factual position, and not the personal circumstances of each particular matter.

Provisional damages as awarded in the UK may assist in the problematic area and awards made where not all damages are fully compensated due to the application of the once and for all rule in South Africa. In the UK an application may be made for the award of further damages should it materialise at a later stage.

²⁴⁸ Munkman 6.

²⁴⁹ (1974) AC 207, 212.

²⁵⁰ See (1968) 1 QB 596 and (1968) 2 QB 322, 346.

²⁵¹ (1972) 1 QB 65.

²⁵² See Munkman 29.

CHAPTER 6

CONCLUSION

South African law is composed of elements of both Roman-Dutch law, and the English common law.²⁵³ In some cases South African courts very hastily adopted decisions of the United Kingdom on the assessment of damage.²⁵⁴ However, South African law, although formed in part by English law, consist greatly of Roman-Dutch law, especially since the Appellate Division in South Africa placed more emphasis on the latter since the year 1910. This being so, it cannot be denied that South African courts have more often than not, sought guidance from English courts decisions in respect of the rules to assessment of damages.²⁵⁵ Main problems in South African law of damages are *inter alia* the correct definition of the concept ‘damage, patrimonial and non-patrimonial loss’, the operation of the ‘once and for all rule’ and the definition and assessment of prospective loss. It is also for this reason that a comparative study with the United Kingdom can provide meaningful use and contribution to the law of damages.

Both jurisdictions draw distinction between general damages and special damages. In assessing both forms of damages, it is clear that both countries experience difficulties in the calculation, and subsequent assessment and award of general damages, especially regarding claims for prospective loss. Future expenses in the United Kingdom and in South Africa are estimated and awarded as general damages, more specifically, future patrimonial damages.

It is seemingly troublesome and problematic in both jurisdictions that courts, in assessing future loss of earnings, need to guess and form judgement on hypothetical facts in

²⁵³ Potgieter 9.

²⁵⁴ See for example *Phillips v London and South Western Rail Co* (1879) 5 QBD 78 and *Hume v Divisional Council of Cradock* 1880 EDC 104 at 134.

²⁵⁵ Erasmus HJ and Gauntlett JJ (updated by Visser PJ), “Damages” in Joubert WA Vol. 7 *The Law of South Africa* (2005) par6.

establishing what will happen to a claimant in future, and what would have happened to the claimant in the future had the damage-causing event never occurred.

Both jurisdictions make use of the rule that a plaintiff should be placed in the same position he would have been in, had it not been for the damage-causing event. In South African law, damage is “the negative difference between a person’s current patrimonial position (after the occurrence of the damage-causing event) and his or her patrimonial position which would hypothetically have existed if the damage causing event never had occurred”.²⁵⁶ Elements of the aforementioned approach are also clearly visible in English case law.²⁵⁷

A main distinction lies therein that South African courts, at times, adopt a subjective approach to the determination of damage, where English law seem to prefer the objective approach.²⁵⁸ The subjective approach suggest that the *interesse* if the specific individual is judged on how it personally affects the individual’s patrimonial position. However, more generally, South African courts do adopt the objective approach with subjective qualifications only in exceptional circumstances.²⁵⁹

The once and for all rule, applied in both jurisdictions gives rise to various problems, especially where the medical prognosis is not available. However, in the United Kingdom, Section 32A of the Supreme Court Act, Act 1981 makes provision for the possibility that in actions based on personal injury claims, where the possibility exists that the claimant might develop some serious disease or deterioration in his or her condition in future, he may be awarded provision damages, which damages are assessed on the basis that specific disease or deterioration will not occur. If the disease or

²⁵⁶ Van der Walt *Die voordeeltorekeningsreël – Knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding* (1980) THRHR 4. Also see *Dippenaar v Shield Ins Co Ltd* 1979 (2) SA 904 at 917: “In our law, under the *lex Aquilla*, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed.”

²⁵⁷ See 1880 App Cas 25-39.

²⁵⁸ See 1970 (1) SA 633 (A) as well as in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration* 1981 (4) SA 1 (A) at 8 – 9.

²⁵⁹ Potgieter 69.

deterioration in condition does materialise, the claimant may make application to court for the award of further damages, which will then more accurately compensate for the loss suffered by the claimant.²⁶⁰ In South African law, provision to circumvent this problem, future medical expenses, can only be found in Section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, where an undertaking is issued to pay all medical costs incurred in the future and for the payment of future loss of maintenance and future loss of income in instalments. There are no other remedies available for this specific difficulty for general delictual claims.²⁶¹ In terms of Section 17(6) of the Road Accident Fund Act and Rule 34A of the Uniform Rules of Court, interim payments of damages may be made.²⁶²

In South African law, a cause of action accrues when the first patrimonial or non-patrimonial damage occurs, even if the plaintiff may be unaware of such at that time.²⁶³ The general rule in English law is that the cause for damages arises only when all the requirements of compliance are in place, including the occurrence of damage.²⁶⁴

Both in South African courts and in the United Kingdom, presiding judges take previous cases of a similar nature into account when assessing the damages to be awarded. This creates legal certainty in actions for damages.²⁶⁵

While South Africa does not enjoy the same position, Section 5 of the Administration of Justice Act, Act 1982 makes provision therefore that in the United Kingdom, any saving

²⁶⁰ A claimant, however, may only make such application once for the injury as specified in the main action for damages.

²⁶¹ See 1975 (4) SA 72 (W): “A contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty. That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure.”

²⁶² In an action for damages for personal injuries or the death of a person, a plaintiff may at any time after delivery of the notice of intention to defend, apply to court for an order requiring the defendant to make interim payment in respect of his or her claim for medical cost and loss of income. The court will only allow this once the defendant has admitted liability or the plaintiff has obtained judgement for damages yet to be determined. See *Karpakis v Mutual and Federal Ins Co Ltd* 1991 (3) SA 489 (O).

²⁶³ Potgieter 177.

²⁶⁴ Van der Walt *Die Sommeskadeleer en die “Once and for All”-reël* (LLD theses 1977 UNISA) 402.

²⁶⁵ See Munkman : 4 compared to Harms : 156.

to an injured individual attributable to his or her maintenance, which is at public expense, must be set off against any income the individual has lost as a result of his or her injuries.

In assessing future loss of earnings and the consequent determination of the period a plaintiff would have earned an income if it was not for the injuries sustained, if it be found that a plaintiff's life expectancy has been shortened as a result of the injury, the shorter period is used in the calculation of loss of earning capacity.²⁶⁶

The aforementioned used to be the position in the United Kingdom, however it was decided by the UK Court of Appeal that damages for future loss of earnings should be awarded at the rate of the plaintiff's pre-accident life expectancy.²⁶⁷

Both jurisdictions make use of actuarial calculations as a guideline in awarding damages, although the courts are not bound by it.²⁶⁸

Damages in South African law are awarded in the form of a lump sum for damage already sustained as well as for prospective loss.²⁶⁹ However, the Appellate Division had held that a court should normally at the end of a case decide on the amount of money to be paid by the defendant to the plaintiff.²⁷⁰

There seems doubt as to the applicability of the English law remedy of an 'enquiry as to damages' in, for example an action for the passing-off. In the United Kingdom however, it appears from the judgement in *Harvey Tiling Co (Pty) Ltd v Rodomac (Pty) Ltd*²⁷¹ that under English Chancery practice, in which this aforementioned enquiry originates from, the court itself does not assess the damage, but orders an enquiry, which enquiry is done

²⁶⁶ See *Singh v Ebrahim* (1) (2010) 3 All SA 187 (D) at 201, 215. The reason underlying this position was firmly established in the matter of *Lockhat's Estate v North British & Mercantile Ins Co Ltd* 1959 (3) SA 259 at 306-8 where it was explained: "A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss they have sustained."

²⁶⁷ See *Pickett v British Rail* (1980) AC 136.

²⁶⁸ See (1968) 1 QB 596 in English law compared to the South African position in 2002 (3) SA 710 SCA.

²⁶⁹ Potgieter 190. See also *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) at 451 where the court commented as follows: "No better system has yet been devised for assessing general damages for future loss."

²⁷⁰ *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A).

²⁷¹ 1977 (1) SA 316 (T) at 328.

by a master or official referee. In South African courts, the presiding judge alone presides upon all the issues in the action. Thus it seems as if an order for an enquiry into damages is not part of South African procedure.

It would seem that in some aspects, the UK position could add to the benefit of these actions in South Africa, specifically in respect of the application of the once and for all rule. Moreover in this regard, is the objective approach followed in the UK. Should South African courts implement a complete objective approach in the assessment of awards, based on the facts and observed on such facts alone, a more general and consistent approach could be laid down. However, this too has its own challenges, and disadvantages, as there is merit in the argument that each case should be adjudicated based upon the special circumstances thereof. To universalise all matters would seem unfair in most cases.

South African law could gain tremendously from the application in the UK of the provisional damages, where should such damage materialise in future, a claimant may make a further application to court for such damages. In such an instance, there is most definitely a more accurate compensation for losses. The only instance where this may occur in South African law is the undertaking in terms of the Road Accident Fund Act for future medical cost. In general delictual claims, there is no such alternative remedy.

In the United Kingdom the court itself does not assess the damage, but the assessment is done by a master or official referee who tends to an enquiry, whereas this task is placed solely on the presiding judge in South Africa. Should an enquiry be ordered in South Africa, fewer burdens would be placed on South African courts, however, this would impact again on the subjective approach South African courts follows, and would cause difficulties on its own.

Although there seems to be room for improvement in certain aspects, it does seem that the approach followed in South African courts is more favourable, and personal.

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