



Loss of earning capacity: The difference between the sum-formula approach and the ‘somehow-or-other’ approach

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1 INTRODUCTION

When instituting a delictual claim for loss of earning capacity, an individual needs to submit evidence on a number of matters. The court is called upon to weigh the evidence and make an appropriate award. The purpose of this article is to provide an overview of the terminology employed, to explain the two different ways in which earning capacity is calculated and to illustrate how South African courts not only confuse terms with each other and use them interchangeably, but also that there is no consistent approach to the way in which loss of earning capacity is calculated. Finally it will be argued that it is time to address this matter, possibly by looking at other areas of the law, such as social security law. Although the current social security system can probably not provide solutions to all the problems mentioned in this article, an integrated approach to loss of earning capacity is urgently needed and the new social security system might just add a much needed new dimension to the way in which jurists approach this area of the law.

2 TERMINOLOGY

2.1 The concepts ‘loss of earnings’ and ‘loss of earning capacity’

A lot has been written on loss of earnings and loss of earning capacity. Earnings or income refers to the remuneration received by a person in the exercise of his employment, business or profession.

In South African law, a distinction is made between loss of earnings in the past and loss of earnings in the future.¹ Past loss of earnings, in other words loss of earnings prior to the date of settlement or the date of the court order is usually referred to only as loss of earnings. The calculation of past loss of earnings rarely poses problems. Claimants employed in the formal sector are usually able to produce pay slips, tax returns, banking statements and other documents to prove what they have earned in the past. Claimants informally employed find it more difficult to prove their past loss of income, but the prin-

¹ *Report of the Road Accident Fund Commission (the RAF report) (2002) 999-1000; Klopper H Law of third party compensation (2000) 79-80.*

principle remains the same, namely that a claimant should be compensated for his loss that was caused by an unlawful act.

Where a plaintiff will incur loss of earnings after the date of the settlement or the date of the court order, such earnings are referred to as future loss of earnings. Gough² states:

‘If one were to regard the loss as one of future earnings one may ask the question: “What income will the plaintiff actually lose as a result of the defendant’s wrongful act?”’

The claimant is only entitled to compensation for loss of income that was lawfully obtained.³ Illegal income is any income from any illegal activity such as an unlicensed business or an activity that is legally against the public morals. An example of illegal activity is where a private taxi is operated⁴ or a panel-beating business is operated without a licence.⁵

In *Dhlamini v Protea Assurance Co Ltd*⁶ the court divided illegal income-producing activities into three categories, namely activities which are in themselves immoral, such as prostitution;⁷ activities which are neither immoral nor criminal but which are prohibited for reasons of public policy, such as the protection of the public,⁸ and activities which are neither immoral nor criminal in the sense already described, but are those that traders are prohibited from engaging in without a licence.⁹

Dhlamini has been criticised by academic jurists. Dendy points out that, amongst other things, it is difficult to apply the *Dhlamini* system of classification because it is not certain which activities fall within the second category.¹⁰ Dendy’s main criticism of the *Dhlamini* decision is that it deals with loss of earnings, and not with loss of earning capacity.¹¹ Dendy finds support for his argument in the judgment of Rumpff CJ in *Santam Versekeringsmaatskappy v Byleveldt*.¹² *In casu* the Court found:

‘Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur ’n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar ’n laer inkomste verdien. Die verlies van geskiktheid om ’n inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is ’n verlies van geskiktheid en nie ’n verlies van inkomste nie.’¹³

2 Gough ‘The “lost years”: The claim for loss of earnings’ (1983) *De Rebus* 486.

3 See RAF report (fn 1 above) 999-1000, See Klopper (fn 1 above) 79-80.

4 *Mba v Southern Insurance* 1981 1 SA 122 (Tk). A private taxi is a taxi that is not licensed in accordance with the Road Traffic Act 29 of 1989 or the Road Transportation Act 74 of 1977.

5 *Santam Insurance v Ferguson* 1985 4 SA 843 (A).

6 1974 4 SA 906 (A).

7 Dendy ‘Illegal income and remunerative loss – I: Claims by income-earners in Southern African Law’ (1998) 61 *THRHR* 564.

8 *Ibid.* Here, it may for instance be illegal to sell food on a pavement, as failure to comply with standards of hygiene may cause illness.

9 *Ibid.*

10 See Dendy (fn 7 above) 577.

11 See Dendy (fn 7 above) 579.

12 1973 2 SA 146 (A).

13 At 150 B-D.

According to this reasoning, the legality of a person's earnings becomes irrelevant once one works with loss of earning capacity and not with future loss of earnings. This matter subsequently received the Courts' attention in three similar cases, namely in *Lebona v President Versekeringsmaatskappy Bpk*,¹⁴ *Dhlamini v Multilaterale Motorvoertuigongelukkefonds*¹⁵ and *Nkwenteni v Allianz Insurance Co Ltd*.¹⁶ In *Lebona* the deceased hawked without a licence and in *Dhlamini* the deceased drove a taxi without a licence. In both cases the Courts did not apply the dictum in *Dhlamini v Protea Assurance Co Ltd*¹⁷ and found that the illegality of the deceased's activities constituted no bar to compensation.¹⁸ However, in *Nkwenteni*, absence of a licence to operate a taxi was fatal to the plaintiff's claim.¹⁹ That there is a definite distinction between loss of earnings and loss of earning capacity is evident from *Lebona*,²⁰ *Dhlamini*²¹ and *Nkwenteni*.²²

In addition, the RAF report states:

'The injuries suffered by a road accident victim may be so severe that he or she is temporarily or permanently precluded from earning what he or she earned prior to the accident. This results in what is known as a "loss of earning capacity" and the victim is entitled to claim compensation for all such future loss in a claim calculated on a once-and-for all basis.'²³

However, if one employs the dictum of the Court in *Santam Versekeringsmaatskappy v Byleveldt*,²⁴ it is evident that the Court draws a clear cut distinction between loss of earnings in the future, on the one hand, and loss of earning capacity, on the other. Loss of the capacity to earn an income is a *loss of capacity* and not a *loss of income*, even though the loss is calculated by using expected income as a measure.

According to Visser and Potgieter loss of future income occurs 'where the injured X suffers from a disability which prevents him from earning income in future'.²⁵ The writers argue that it is more accurate to speak of loss of earning capacity.

14 1991 3 SA 395 (W).

15 1992 1 SA 802 (T).

16 1992 2 SA 713 (Ck).

17 See *Dhlamini v Protea Assurance Co Ltd* (fn 6 above).

18 Boberg 'Damages for loss of earning capacity- New hope for the illegal earner' (1993) 56 *THRHR* 154.

19 *Ibid.*

20 See *Lebona v President Versekeringsmaatskappy Bpk* (fn 14 above).

21 See *Dhlamini v Multilaterale Motorvoertuigongelukkefonds* (fn 15 above).

22 See *Nkwenteni v Allianz Insurance Co Ltd* (fn 16 above). On this issue, Boberg, at para 154 convincingly argues that '[o]nce loss of capacity to earn is recognised as the loss to be compensated ... then it is open even to a breadwinner whose trade was doomed to offend statute, to recover damages. A person, who derives income from an activity that is intrinsically illegal, does not necessarily lack the capacity to earn a living in another legal way. Naturally, it would be up to the plaintiff to prove that capacity, as well as its market value. But if, in spite of proof, compensation were denied to an illegal earner or to his or her dependants, it would be difficult to escape the conclusion that the South African law of delict, as did its Roman-law counterpart, sometimes assumes a penal role.'

23 See RAF report (fn 1 above) 1000.

24 See *Santam Versekeringsmaatskappy v Byleveldt* (fn 12 above)

25 Visser and Potgieter *Law of damages* 121.

It is submitted that this confusion surrounding terminology may be simplified by employing two steps: Firstly, there must be proof of a loss of earning capacity before there can be any future loss of earnings. The actual loss of earnings is then a manifestation of the inability of a person to earn the same income as before, because of the damage-causing event. Secondly, once it has been established that there is, in fact, a definite loss of earning capacity, an amount must be attached to the incapacity. Therefore, for purposes of clarity, it is suggested that earning capacity is a diminution of a claimant's ability to generate an income.

2.2 Compensation

Once it is established that a legal subject has suffered damage in one form or another, it is the task of the court to quantify the damage and to make an award. In practice, the words 'compensation' and 'satisfaction' are often used. For purposes of clarity it is important to determine the meanings of these terms, and also whether the two are mutually exclusive. Different writers have different conceptions of these terms. Munkman for instance states:

'Compensation is derived from a Latin root 'compensare' (weigh together). The fundamental principle of every system of civil law is the principle of justice ... We may think of the traditional picture of justice, holding a pair of scales. Into one scale goes the harm or loss sustained; into the other goes the compensation; and the aim of the law is to make the two balance.'²⁶

Visser criticises this explanation, stating that it does not reflect the general view of English law.²⁷ He argues that compensation and satisfaction in English law should be understood as two distinct and separate forms of restitution.²⁸ According to Visser, it is generally accepted that factual restitution is only possible in exceptional cases of injury to the personality.²⁹

What content then should jurists attach to compensation? Visser argues that compensation is an elementary and basic function in cases of delictual liability and refers to the process in terms of which a monetary equivalent is given for the affected interests. Compensation is not merely an amount of money but an amount which has to achieve a certain purpose, namely to put the injured party in the position he would have been in if he had not sustained the wrong for which compensation is being awarded.³⁰

Therefore, if Visser's argument is brought to a logical conclusion, compensation is usually aimed at financial restitution.³¹ For instance, where a miner was injured in an underground accident and suffered a loss of income during the time he was hospitalised, that loss of income can be compensated by paying him the equivalent of the sum of money he lost.

²⁶ Munkman *Damages for personal injury and death* (1973) 21.

²⁷ Visser 'Kompensatie van nie-vermoënskade' (1983) *THRHR* 45.

²⁸ *Ibid.*

²⁹ *Ibid.* Factual restitution is where a plaintiff receives the exact amount of compensation linked directly to his actual loss, for example: A medical bill of a certain amount is refunded by the defendant.

³⁰ See Visser (fn 27 above) 45.

³¹ See Visser (fn 27 above) 46.

2.3 Satisfaction

Where compensation is the accurate weighing and arriving at a balance between damage and compensation,³² 'satisfaction' is the term used in the South African law to refer to the purpose of two delictual actions:³³ Firstly to the aim of the *actio iniuriarum* and secondly to the aim of the action for pain and suffering.³⁴

Visser elaborates that the term satisfaction has no fixed content.³⁵ He adds that it may be accepted that the basis of satisfaction is found in the principle of vindication of the law through penance, retribution and reconciliation.³⁶ Although the idea of satisfaction is found in Roman law, as is indicated by the concept *satisfactio*,³⁷ Visser and Potgieter hold that the juridical concept of satisfaction derives from Swiss law.³⁸ Moreover, satisfaction has no fixed meaning and many meanings have been attached to it.³⁹ Visser and Potgieter indicate that satisfaction in a wide sense refers to an upholding of the law, while its narrowest meaning relates to the psychological gratification obtained by the victim of a wrongful act. Conversely, the basis of satisfaction is to be found in the function of the law to provide a peaceful resolution to any dispute.⁴⁰

Satisfaction is often referred to as an incomplete form of damages. Legal systems that acknowledge the fact that non-patrimonial loss as well as patrimonial loss should be compensated, also acknowledge that non-patrimonial loss cannot always be compensated in the same way as patrimonial loss. In cases where non-patrimonial loss is incapable of being assessed in a similar manner as is patrimonial loss, satisfaction forms the basis of the compensation. Therefore, satisfaction is in fact a *solatium* to the victim.⁴¹ Visser draws a number of noteworthy conclusions about the nature of satisfaction. Firstly, the basis of satisfaction is the peaceful resolution of disputes through the law. Secondly, the purpose of the process is to regulate society peacefully. Thirdly, as the law developed, satisfaction started paring off some of its functions to other areas of law such as criminal law and the law of damages. In the fourth place, Visser states:

'In die moderne reg het die genoegdoeningsbeginsel 'n resterende (en dus sekondêre) posisie behou as die *ultima ratio* van die deliktereg. Genoegdoening in die betekenis van die psigiese bevrediging van die benadeelde wanneer sy nie-vermoënskade nie kompenseerbaar is nie, gee steeds uiting aan die tradisionele genoegdoeningsgedagte. Dit openbaar ook 'n objektiewe element van regshandhawing.'⁴²

32 *Ibid.*

33 Visser 'Genoegdoening met betrekking tot nie-vermoënskade' (1983) *TSAR* 54.

34 *Ibid.*

35 Visser (fn 33 above) states: 'Onder *genoegdoening* is al verstaan boetedoening of vergelding, "kompensasie" vir die krenkende daad, "salwing" vir die benadeelde, kompensasie vir die krenking, bevrediging van die regsgevoel en vergoeding vir die benadeelde se *Selbstgefühl*.'

36 See Visser (fn 33 above) 55-56.

37 See Visser and Potgieter (fn 25 above) 190.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 Visser (See fn 33 above) 63. The writer explains: 'Genoegdoening in hierdie vorm beteken in werklikheid troosvergoeding of *solatium* soos dit byvoorbeeld in die Skotse reg aangetref word.'

42 *Ibid.*

There is no uniform, general guideline for the compensation of non-patrimonial loss in South African law.⁴³ Each case is decided individually by reference to awards in other comparable cases.⁴⁴

There is no uniform table or index that can be used by the courts in determining the amount that should be awarded in a particular case. Instead, there are several summaries available in the literature. Firstly, there is Koch's guide,⁴⁵ secondly, there is Corbett and Buchanan's *The Quantum of Damage in Bodily and Fatal Injury Cases*⁴⁶ and thirdly, there is the guideline used by the Road Accident Fund.⁴⁷

Although these sources provide guidance to practitioners, the final award for non-pecuniary loss still lies within the discretion of the trial judge and the judge is not compelled to make an award similar to that made in any other in precedent.⁴⁸

There are similarities in the ways in which the courts assess loss of earning capacity and satisfaction for pain and suffering. The next paragraph looks at the two different methods in which loss of earning capacity is approached and how the terms 'compensation' and 'satisfaction' are often confused.

3 ESSENTIALLY TWO METHODS OF CALCULATION: SUM-FORMULA VERSUS 'SOMEHOW-OR-OTHER' APPROACH

When assessing a claimant's loss of earning capacity, the courts employ essentially two methods: The first approach is to establish a reasonable and fair amount based on the proven facts and the prevailing circumstances (hereafter, the 'somehow-or-other approach').⁴⁹ According to this approach, the court exercises its discretion in a manner similar to that in which the court makes an award for pain and suffering. The second approach is to establish an amount by mathematical calculation made from the proven facts of the case (hereafter, the 'mathematical approach').⁵⁰ In the discussion of South African case law, examples of both methods will be used.

Both these approaches have merits. The courts are likely to follow the first approach in circumstances where it is not possible to make a mathematical calculation for example, where the victim is a minor who has not yet embarked on a career path.

43 See RAF report (fn 1 above) 1108.

44 See *Protea Assurance v Lamb* 1971 1 SA 530 (A) at 536A.

45 Koch *The Quantum Yearbook* (published annually).

46 There are two editions of this work published in 1985 and 1992 respectively. This loose-leaf publication contains concise information on awards made in both reported and unreported High Court cases. The publication is sub-divided under specific injuries. The summary of each case contains information on the age and gender of the victim as well as the nature of the injuries, the treatment received as well as any permanent impairment that is expected in future. Apart from an exposition of non-patrimonial damages awarded in each case, a summary of patrimonial damages is also given.

47 The Road Accident Fund is a statutory under specification fund. The primary function of the Fund is to compensate the victims of road accidents. See also Section 19 (a) of the Road Accident Fund Act 56 of 1996.

48 *Ibid.*

49 See Klopper (fn 1 above) 177; Koch *Damages for lost income* (1984) 158. The phrase 'somehow-or-other' was actually coined by Koch to denote the non-mathematical way of calculating loss of earning capacity.

50 *Ibid.*

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Most writers prefer the second approach. Klopper states:

'At least an assessment based on a mathematical calculation has some semblance of logic and science. However, a mathematical calculation can only be as reliable as the facts and assumptions used in arriving at an answer.'⁵¹

According to Corbett and Buchanan, this mathematical calculation should ideally be done in the following way:

- (1) Calculate the present value of the future income which the plaintiff would have earned but for his injuries and consequent disability;
- (2) Calculate the present value of the plaintiff's estimated future income, if any, having regard to his disability;
- (3) subtract the figure obtained under (2) from that obtained under (1);
- (4) adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies.⁵²

The caution raised about the low levels of reliability in assumptions alerts the practitioner and the court to the fact that both approaches involve a fair amount of guesswork. It is submitted that the guesswork is inherent in the process of calculating any form of future damages.

It is submitted that a material difference exists between the loss of earnings calculated by means of the sum-formula approach and an award made for loss of earning capacity based on the 'some-how-or-other' approach. The latter is a practical way of compensating a claimant for his loss of earning capacity where it is accepted that the victim did sustain a loss but it is not convenient or possible to use the sum-formula approach.⁵³ What often happens in practice is that the parties agree amongst themselves to settle the claim on a somewhat unconventional basis by awarding more for pain and suffering. By doing this, the defendant accepts that the claimant's loss of earning capacity is but one of the many facets of the claimant's personality that was impaired. Because of insufficient evidence on the claimant's pre- and post-trauma earnings, a higher award is made for pain and suffering, while no award or only a small award is made in respect of the claimant's loss of earnings. It must be re-iterated that this is a practical solution used by practitioners in order to avoid going to trial. Because there are no trials and no subsequent case reports, it is virtually impossible to estimate how many cases are settled in this fashion.

The next paragraph looks at a number of important cases in which these two different approaches are evident.

51 See Klopper (fn 1 above) 177.

52 Corbett M and Buchanan *The quantum of damage in bodily and fatal injury cases* (1992) 62.

53 The sum-formula approach is widely criticised, see Visser and Potgieter (fn 25 above) 64-67. The authors state that although the sum-formula approach is part of the South African law of damages, it seems that the courts only pay 'lip-service' to this method without actually following it, at 66. To substantiate this point, the authors quote *Santam Versekeringsmaatskappy v Byleveldt* 1973 2 SA 146 (A) at 150 where it is stated that: '[D]ie verskil tussen die vermoënsposisie van die benadeelde voor die onregmatige daad en daarna... Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het'. Visser and Potgieter correctly observe that this does not reflect the sum-formula approach as it fails to mention the hypothetical patrimonial position.

4 EXPOSITION OF CASE LAW

1.1 Introduction

As stated above, the courts basically use two methods of calculation when assessing a claimant's loss of earning capacity. The exposition that follows looks at only a few of these earliest precedents and it highlights the most important principles. I shall refer to 'the plaintiff' to denote the injured party throughout the discussion of the cases as it is always the injured party who issues summons against the wrongdoer and/or his insurance company. In appeal court cases, reference will also be made to the plaintiff and the defendant instead of the appellant and the respondent for purposes of clarity.

4.2 *Clair v Port Elizabeth Harbour Boar; Kennedy v The Same*

The plaintiff Clair was a boatman employed at Port Elizabeth and the defendants were the Board of Commissioners for the harbour of Port Elizabeth.⁵⁴ In the court *a quo* (Port Elizabeth Circuit Court), Maasdorp J found that the explosion that caused injuries to the first claimant and the death of the dependants of the second claimant was due to the negligence of the defendants.⁵⁵ The Court on appeal therefore moved to the issue of quantum and in determining the extent of the liability, Barry JP quoted *Hume v The Divisional Council of Cradock*,⁵⁶ a case in which he had presided. In that case Barry JP had stated:

'[I]n assessing damages I cannot go into strict mathematical calculations. Were I to do so, the law tells me I should do wrong. As a juror I have to give damages in a round sum. I must take into consideration the pain and the suffering as well as the pecuniary loss to the plaintiff.'⁵⁷

Barry JP gave effect to the *dictum* in the *Phillips* case⁵⁸ and in his final judgment, he re-iterated the law and stated that:

'It must also be borne in mind that although Clair has become permanently incapacitated as a boatman, yet, broken down as he is, he might earn something in some other occupation. But I shall not enlarge upon possibilities, and bearing in mind that I have to give a fair and reasonable compensation, both for the pecuniary loss and for the pain, the

⁵⁴ 1886 5 EDC 311.

⁵⁵ *In casu* the plaintiff was injured by the explosion of a boiler of a crane that was caused by the collapsing of the shell of a firebox. The firebox was corroded to such an extent that the explosion was a natural consequence of the corrosion. The defendants could have discovered the defect in the firebox if they had exercised ordinary care. However, the defendants did not apply the test to detect such defect.

⁵⁶ 1 Buch. EDC Rep. 117.

⁵⁷ At 315. Barry JP also quotes Lord Justice Bramwell in *Phillips v The London and South Western Railway Company Limited* 5 CPD 280. In the latter case, Bramwell LJ stated as follows: '[T]hat the proper direction to a jury should be – you must give the plaintiff compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give to an injured man what can be strictly called compensation; but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him' at 316. Barry JP then went on to quote Lord Justice Brett's address to the jury in *Phillips v The London and South Western Railway Company Limited*, who had instructed the jury as follows: '[The jury] must not attempt to give an absolutely perfect compensation with respect to the pecuniary loss, the reason being that human ingenuity has not been able to devise a more correct proposition, and that if a Judge tries to make a perfect proposition, he either states something which is wrong, or omits to state something which ought to be stated.'

⁵⁸ See (fn 58 above)



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conclusion I have arrived at is that £800 should be the measure of damages awarded to the plaintiff Clair, together with costs.⁵⁹

It is clear from the decision that Barry JP followed the somehow-or-other approach. It is not clear from the case whether mathematical or actuarial evidence was submitted at all. The judge seems to have relied on what he regarded as perfectly good law by awarding an amount that is fair and reasonable under the circumstances.

4.3 *McKenzie v S.A. Taxi-Cab Co*

In casu the plaintiff was injured in a motor vehicle collision.⁶⁰ He was initially hospitalised and after his discharge, he went to Durban to recover from his injuries. In his judgment, Bristowe J ruled:⁶¹

‘As I intend to allow the plaintiff for wages lost during absence from work, I cannot allow his living expenses in Durban, but the fare to Durban will be allowed. In respect of wages the plaintiff is entitled to £98,15s and for clothes which were damaged a further sum of £6, 6s.6d. Taking into consideration the permanent injury to the plaintiff’s thumb and his disfigurement, I think that an inclusive sum of £200 will be a reasonable compensation.’⁶²

From this passage it transpires that the Judge viewed compensation as a lump sum. This sum included an award for pain and suffering which are actually satisfaction and not compensation, as well as an award for the permanent injury to the plaintiff’s thumb. There was no discussion whatsoever on loss of earning capacity and it seems as though the permanent injury to the thumb was not even considered as a specific impairment that could possibly lead to a loss and ultimately form a separate head of damages. As in the case of *Clair v Port Elizabeth Harbour Board*,⁶³ the Judge followed the somehow-or-other approach.

4.4 *Sandler v Wholesale Coal Suppliers*⁶⁴

In this decision, the appellant was injured in an accident caused by the negligence of the respondent’s servants.⁶⁵ The appellant alleged on appeal that the amount of compensation was insufficient. The Court was faced with the task of assessing the loss of earning capacity of a self-employed person.⁶⁶ The appellant argued that he was hospitalised for four months and thereafter he was only able to be present at his business occasionally.⁶⁷ The trial court found that the appellant’s absence from his business did not cause a loss of business and that the fact that no cars had been sold, may also have been caused by the outbreak of World War II.⁶⁸ On appeal, Watermeyer JA commented as follows:

⁵⁹ At 317.

⁶⁰ 1910 WLD 232.

⁶¹ At 234.

⁶² Own emphasis.

⁶³ See (fn 54 above)

⁶⁴ 1941 AD 194. See also Klopper *Casebook on third party compensation* (2004) 43.

⁶⁵ At 197.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ At 198.





'On this point I take a different view. When the owner of a business of this nature, who works in it in the ordinary way in which the appellant worked, is confined to hospital for four months and unable to do the work which he previously did, the business as a profit-earning concern must necessarily suffer. It seems reasonable to assume that the appellant's skill and energy and his activities in the affairs of the business were a source of some profit to the business.'⁶⁹

The judge awarded a sum of £100 for past loss of earnings, an amount that he found reasonable under the circumstances.⁷⁰ Although this award was in fact made for past loss of earnings, it is interesting to note that the Appeal Court does not base its conclusion on a strict mathematical calculation of damages. The Appeal Court reasoned:

'When these matters are taken into consideration together with plaintiff's statement that his business became disorganised, the extracts from the books showing a diminution in volume of business, a smaller rate of profit and no sales of cars at all while appellant was in hospital, I think that amounts to reasonably sufficient proof that appellant's absence caused some loss to the business.'⁷¹

On future loss of earning capacity, the Court made an even more interesting order. It was accepted that the plaintiff's injuries resulted in a permanent disability.⁷² Instead of dealing with the plaintiff's possible future loss of earnings separately, the Court combined an award for permanent disability with an award for pain and suffering. The Court stated:

'The question now arises whether this Court should increase the amount awarded to the appellant for pain and suffering and permanent disability. In considering that question it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case. For this reason a Court of Appeal does not readily interfere with an estimate made by the Court appealed from.'⁷³

Despite the reluctance of the court to increase an award for damages on appeal, it increased the amount of compensation to £1 000.⁷⁴

This decision is important for a number of reasons. Firstly, the court employed the somehow-or-other approach to calculate past loss of earnings, despite the fact that the plaintiff submitted books to substantiate his claim. Secondly, the court used the term 'permanent disability' without explaining

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² At 199. On the matter of permanent disability, the court analysed the medical evidence and stated: 'There is now much scar tissue around the knee which requires protection because it is liable to break down if it receives a severe blow or if the skin is broken by friction. The knee joint can only bend 90 degrees, instead of 160 degrees as in a normal knee. The knee is still weak and unable to bear the appellant's full weight. In the opinion of the surgeon who performed the operation further improvement cannot be expected.'

⁷³ At 199. On the appeal court's reluctance to interfere in matters concerning damages, the Court quoted the following precedents, namely *Salzman v Holmes* 1914 AD 471 at 480, *Sutter v Brown* 1926 AD 155 at 173; *Versfeld v South African Fruit Farms Ltd.* 1930 AD 452 at 462 and *Black and others v Joseph* 1931 AD 132 at 150.

⁷⁴ At 200.



what this term means. In the final instance, the Court made one award for pain and suffering and permanent disability.

It is submitted that this approach illustrates the fact that the Court accepted that there was a loss of earning capacity that resulted from the plaintiff's permanent disability, but the Court failed to make an award in terms of the *actio legis Aquilia*. Instead, in line with the somehow-or-other approach, the Court awarded a global amount in terms of the action for pain and suffering.⁷⁵

4.5 *Watt v Van der Walt*⁷⁶

Although this is not an appeal court case like *Sandler v Wholesale Coal Suppliers*,⁷⁷ this decision by the Witwatersrand Local Division seems to be technically more correct.⁷⁸ On future loss of earnings, the court stated that:

'What is really required is actuarial evidence which would take into account all the changes which may befall the plaintiff during the rest of his life and lead to a satisfactory assessment of present value of his probable loss of earnings in the future. There is no such evidence. Making the best estimate I can I shall award the plaintiff £800 under this head.'⁷⁹

It is evident from the above *dictum* that the Judge did not choose between the somehow-or-other approach and the mathematical approach, but rather followed the somehow-or-other approach out of necessity because of the lack of actuarial evidence. The lack of actuarial evidence was clearly not fatal to the plaintiff's claim for future loss of earnings and the Court awarded an amount that was fair and reasonable in the circumstances and in the light of all the evidence.

4.6 *Spencer v Barclays Bank*⁸⁰

In considering the award of damages for disability, the Court observed that the plaintiff's injured hand was of no practical use to him as a draughtsman.⁸¹ The Court used the same approach as in *Watt v van der Walt*⁸² and included in the award for pain and suffering and loss of amenities of life an award for permanent disability. Price J commented:

75 The court's *dictum*: 'The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judge's view of what is fair in all the circumstances of the case.' The Courts *dictum* was applied in *Southern Insurance Association Ltd v Bailey NO 1984 1 SA 98 (A)* at 119 G-H.

76 1947 2 SA 1216.

77 See (fn 64 above).

78 See (fn 75 above). *In casu* the plaintiff suffered a dislocation of the left hip joint and a fracture of the tibia and fibula at the junction between the middle and the lower third of the left leg. The dislocation was immediately reduced. The leg was amputated the next day at the site of the fracture. The Court found on the evidence that the plaintiff would be able to return to his employment after the fitment of an artificial limb. It was also accepted that there was still some disability, although not as high as the 30% awarded in terms of the Workmen's Compensation Act.

79 At 273.

80 1947 3 SA 230 (T). *In casu* the plaintiff was hurt when he slipped on the polished step of the block of flats where he rented a flat. The plaintiff severely injured his left arm when his arm broke through the pane of a glass window next to the staircase (on 230). The cut to the plaintiff's left arm was deep and long. Immediately after the accident, the plaintiff had no sensation in his hand and suffered a lack of free movement of his hand. The plaintiff, who worked as a draughtsman for the Forestry Department, recovered gradually from his injury, but experienced a permanent disability.

81 At 245.

82 See (fn 77 above). See also Corbett and Buchanan *Quantum* 56.

'In his capacity as a draughtsman he has to use various instruments ... and he says that some of these instruments have to be manipulated or placed by means of his left hand, and that in some cases both hands have to be used, that his work is not so quick or as efficient as it was, and that he is inconvenienced in his ordinary work and his efficiency has suffered. I suppose that in many of the ordinary things he has to do, such as putting on his collars and tying his ties, and all those things for which one uses two hands – he will suffer some disability.'⁸³

The Judge proceeded to award an amount of £750 for pain and suffering and loss of amenities of life. There was also an award of £125 for special damages. The Court did not make a separate award for future loss of earnings, and this leads one to conclude that the Judge regarded loss of earning capacity, or at the very least permanent disability, as part and parcel of the award for pain and suffering and loss of the amenities of life.

In a case such as this, a testing model for disability would have assisted the Court in determining the extent of the plaintiff's disability, thus enabling the Court to make a more accurate and better reasoned award.

4.7 *Goldie v City Council of Johannesburg*⁸⁴

In casu the court was confronted with a plaintiff who sustained severe injuries in a tram accident.⁸⁵ It was common cause that the plaintiff would never be able to return to work.⁸⁶ In arriving at an appropriate award for future loss of earnings, Ettliger AJ stated:

'From this point proper allowance must be made for various contingencies, but if the fundamental principle of an award of damages under the *Lex Aquilia* is compensation for patrimonial loss, then it seems to me that one must try to ascertain the value of what was lost on some logical basis and not on impulse or by guesswork.'⁸⁷

The Judge continued to base his award for loss of earning capacity partly on the evidence and report of an actuary and partly on estimations and calculations he made himself.⁸⁸ Even though this calculation of future damages is not a mere acceptance of the actuarial evidence and although the Judge was still using his own discretion and assumptions, this judgment is definitely an example of the mathematical method as opposed to the somehow-or-other-method.

⁸³ At 245.

⁸⁴ 1948 2 SA 913 (W). See also Klopper *Casebook* 27.

⁸⁵ Ettliger AJ remarked: 'The plaintiff sustained a fractured spine, fractured ribs, a fractured pelvis and an injured knee and various lacerations, bruises and abrasions. According to the evidence these occasioned considerable pain, and the possibility of future arthritic pains is ever present. He also underwent an operation to his knee under a general anaesthetic. He is now suffering from headaches, insomnia and impotence. He is over 47 years of age now and whereas he had been bright and cheerful he is now dull, depressed and apathetic ... None of his symptoms are likely to disappear or improve. On the contrary the great probability is that he will within a few years become bedridden and gradually die' at 924.

⁸⁶ At 920.

⁸⁷ At 920.

⁸⁸ At 922.

4.8 *Mkhize v The South British Insurance Co Ltd*⁸⁹

The plaintiff's disability resulted from a broken upper left arm. After two operations the plaintiff was left without an elbow joint.⁹⁰ The arm was completely useless and the only question before the Court was what would constitute an appropriate amount for pain and suffering, loss of amenities and disfigurement.⁹¹

In this case, as in all the cases already discussed, except for *Goldie v City Council of Johannesburg*,⁹² the Court once again made an award for pain and suffering that included the plaintiff's disability. Hathorn J P stated that:

'I have mentioned work and employment, not as indicating loss of earning power, with which I am not concerned, but as indicating the loss of one of the important amenities of life.'⁹³

Once again, the Court considers loss of earning capacity as one of the amenities of life, and not of a separate head of damages recoverable with the *actio legis Aquilia*. The Court followed *Sandler v Wholesale Coal Suppliers Ltd*⁹⁴ and awarded an amount which it considered to be fair in all the circumstances of the case. This is clearly an example of the some-how-or-other approach.

4.9 *Botha v Minister of Transport*⁹⁵

This case presented nothing new in terms of definitions or the calculation of a plaintiff's disability,⁹⁶ but what is of significance here is that the Court accepted figures presented by a witness in arriving at an award. The Court ruled:

'It is largely a matter of guess-work on the evidence to arrive at a percentage figure of disability but after weighing all the evidence and bearing in mind the points made in the valuable argument addressed by both counsel. I have come to the conclusion that a fair figure to take as the percentage of the plaintiff's disability would be 55 per cent in respect of both the loss of his one leg and of the serious changes brought about in his mental and personality condition. This on the figures of Mr Eriksen, which were quite uncontroverted, results in a present value of the plaintiff's estimated future loss of earnings of £5,325.'⁹⁷

It is not clear from the case in what capacity Mr Eriksen testified. It does seem that figures were in fact presented as evidence and one is led to believe that the Court *in casu* employed a mathematical approach in arriving at an award.

⁸⁹ 1948 4 SA 33 (D).

⁹⁰ At 35.

⁹¹ At 34.

⁹² See (fn 84 above).

⁹³ At 37.

⁹⁴ See (fn 65 above).

⁹⁵ 1956 4 SA 375 (W).

⁹⁶ *In casu* the plaintiff's left leg was amputated below the knee (see 376 E). Williamson J stated: 'If this leg injury stood alone it would have carried compensation for a marked diminution in his future earning capacity, probably up to 25 per cent and in addition the award of a substantial sum for pain and suffering and loss of amenities.' The plaintiff also sustained a head injury. This injury led to depression and a change of personality (see 377A-H).

⁹⁷ At 379 D-E.

4.10 *Gillbanks v Sigournay*⁹⁸

In casu Henochsberg J made a particularly interesting observation about the calculation of future loss of earnings. The Judge stated that a court was not required to give an absolutely perfect compensation and that exact mathematical compensation was impossible.⁹⁹ On the matter of actuarial evidence, the Judge stated:

‘Actuarial expert evidence is in such cases always of considerable assistance, but the Court is not bound by such evidence; it retains its discretion and its assessment of contingencies is still necessary, but in a fundamental question such as assessing how much capital must be paid to a person at this stage in order to enable that person to have a fixed sum per week or per month for a stated period the evidence of an expert is invaluable.’¹⁰⁰

The court here still favoured the mathematical approach above the somehow-or-other approach, even though neither can result in awarding perfect compensation.

This case was taken on appeal, which appeal was reported as *Sigournay v Gillbanks*.¹⁰¹ On appeal, Van Wyk AJA ruled:

‘The amount of £10,000 awarded is undoubtedly very high – possibly higher than I would have awarded; but if one has regard to all the facts, and particularly if one compares the healthy young man before the accident with the wreck of to-day, one cannot say that the award is either extravagant or unreasonable. The appeal should accordingly be dismissed with costs.’¹⁰²

Consequently, the appellate division endorsed the manner in which the trial court had awarded compensation.

4.11 *Brijlall v Naidoo and Naidoo (Second Defendants)*¹⁰³

On the pleadings of this case, the Court was faced with a claim for ‘general damages in respect of all the consequences described in paragraph 9 above’.¹⁰⁴ One of these consequences was the plaintiff’s loss of earning capacity as well as his damages for pain, suffering and discomfort, for disfigurement and for permanent disability and loss of amenities.¹⁰⁵ It is interesting that the plaintiff claimed for loss of earning capacity as well as for disability. In awarding damages, the Court made a calculation, taking into account that the plaintiff was disabled and that the plaintiff had been gainfully employed before the accident. Caney J stated that:

‘I arrive at a figure of £4,400 as the present value of the plaintiff’s loss of future earnings from the time I estimate he will be able to re-commence work ... No actuarial evidence was led, nor any evidence of other employment (and its rewards) open to one disabled as the plaintiff is. I have done the best I can with the information placed before me.’¹⁰⁶

⁹⁸ 1959 2 SA 11 (N). *In casu* the plaintiff sustained several minor injuries as well as compound comminuted fractures of the left tibia and fibula. It was apparent from the evidence that an amputation above the knee would render the plaintiff more mobile and comfortable. See also Corbett and Buchanan *Quantum* 56.

⁹⁹ At 14H-15A.

¹⁰⁰ At 15B.

¹⁰¹ 1960 2 SA 552 (A).

¹⁰² At 590B-C.

¹⁰³ 1961 Corbett and Buchanan *Quantum* 266 (D).

¹⁰⁴ At 269.

¹⁰⁵ At 270.

¹⁰⁶ At 271.

The court in fact employed the mathematical approach, although the finer details usually incorporated in a mathematical calculation such as tax deductions were not taken into account.¹⁰⁷ The award for pain and suffering included a component for permanent disability, although it seems that disability in this context refers more to a general disability and not necessarily the inability to generate an income.¹⁰⁸

4.12 Comment and suggestions

Although numerous decisions have been made on this point, courts still use either of the two approaches and a discussion of each case is not possible, given the large volume of decided cases.¹⁰⁹ The above exposition of the positive law illustrates the prevailing principle that the courts attempt to compensate a victim as fully as possible. However, it seems that loss of earning capacity remains problematic, regardless of the endless attempts to unravel and explain the matter. In this regard, Spier comments:

'But in the courts, single points of law are placed under a microscope; the broader view tends to be forgotten.'¹¹⁰

The uncertainty that surrounds loss of earning capacity creates a situation in which a prospective plaintiff takes pot luck when lodging a claim, not being sure exactly how to prepare evidence and what the court may do with such evidence. Probably, if such a claimant were to benefit from social protection measures such as income replacement following an accident, pension bene-

107 *Ibid.*

108 *Ibid.* In this regard, the Court stated: 'For pain, suffering and discomfort, for disfigurement (including his bent nose) and for the permanence of his disabilities (apart from their effect on his earning capacity) and loss of amenities, I consider the plaintiff is entitled to receive a substantial sum. In my view a sum of £1,500 would be fair and reasonable.'

109 In the following cases, the Court used the some-how-or-other approach: *Wessels v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1962 Corbett and Buchanan Vol IV 562 (T); *Reid v South African Railways and Harbours* 1965 2 SA 181 (D); *Roberts NO v Northern Assurance Co Ltd* 1964 4 SA 531 (D); *Commercial Union Assurance Co of SA Ltd and Another v Stanley* 1973 1 SA 699 (A); *Stephenson NO v General Accident Fire and Life Assurance Corporation Ltd* 1974 4 SA 503 (RAD); *Roxa v Mtshayi* 1975 3 SA 761 (A); *AA Onderlinge Assuransie Assosiasie v Sodoms* 1980 3 SA 134 (A); *Blyth v Van den Heever* 1980 1 SA 191 (A); *Dyssel NO v Shield Insurance Co Ltd* 1982 3 SA 1084 (C); *Carstens NO v Southern Insurance Association Ltd* 1985 3 SA 1010; *General Accident Insurance Co SA Ltd v Summers*; *Southern Versekeringsassosiasie Bpk v Carstens NO*; *General Accident Insurance Co Ltd v Nhlumayo* 1987 3 SA 577 (A); *Gallie NO v National Employers General Insurance Co Ltd* 1992 2 SA 731 (C); *Du Bois v Motor Vehicle Accident Fund* 1992 4 SA 368 (T); *Kommissaris van Binnelandse Inkomste en 'n ander v Hogan* 1993 4 SA 150 (A); *Griffiths v Mutual and Federal Insurance Co Ltd* 1994 1 SA 535 (A) and *Muller v Mutual and Federal Insurance Co Ltd and Another* 1994 2 SA 425 (C). On the other hand, the mathematical approach seems to have been used in the following cases: *De Wet v Phoenix Assurance Co Ltd* 1963 Corbett and Buchanan *Quantum* 196 (T); *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A); *Shield Insurance Co Ltd v Hall* 1976 4 SA 431 (A); *AA Mutual Insurance Association Ltd v Maquila* 1978 1 SA 805 (A); *Goodall v President Insurance Co Ltd* 1978 1 SA 389 (W); *Dippenaar v Shield Insurance Co. Ltd* 1979 2 SA 904 (AD); *Marine & Trade Insurance Co Ltd v Katz* NO 1979 4 SA 961 (A); *Van der Plaats v SA Mutual Fire and General Insurance Co* 1980 3 SA 105 (A); *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 4 SA 95 (T); *Southern Insurance Association Ltd v Bailey* NO 1984 1 SA 98 (A); *Minister of Defence and Another v Jackson* 1991 4 SA 23 ZSC; *President Insurance Co Ltd v Matthews* 1992 1 SA 1 (A) and *Motor Vehicle Accident Fund v Andreano* 1993 3 SA 227 (T).

110 'Apocalypse Scenario's: De prijs van de onzekerheid na de aanslagen in de Verenigde Staten op 11 September 2001 en de daarop volgende economische ellende' in Faure and Neethling (ed) *Aansprakelijkheid, risiko en onderneming: Europese en Zuid-Afrikaanse perspectieven* (2003) 3.

efits for loss of earnings or even welfare benefits, the problem of his earning capacity would have been significantly reduced. An important development in the field of social protection in South Africa is the announcement made by the Minister of Finance, Trevor Manuel, on the introduction of a brand new system of social protection. In the 2007 Budget speech (that was delivered on 21 February 2007), Manuel made the following announcement:

'The time has come to put in place a new arrangement in which all South Africans will share, and that provides a basic saving and social protection system that meets the needs of low-income employees. We are therefore proposing a mandatory, earnings-related social security scheme to provide improved unemployment insurance, disability and death benefits targeted at the income needs of dependants and a standard retirement savings arrangement. This will be financed by a social security tax administered by the South African Revenue Service, and collected in individual accounts in the name of every contributor.'¹¹¹

The focus of this new proposed social protection system is on equity, pooling of risk, mandatory participation, administrative efficiency and solidarity.¹¹² If properly administered, this new system will have far reaching consequences, not only for social security in South Africa, but also for loss of earning capacity. There are a number of problems in the area of loss of earning capacity that may be solved by this new system. First, it will be possible, for the first time, to keep track of the income of the whole population. Sufficient evidence of past earnings will make it easier to predict future earnings. Secondly, lower income earners and those with an erratic employment history will for the first time be forced to become self-reliant and will not have all their eggs in one basket when faced with a traumatic event that negatively impacts on their earning capacity. Finally, it is possible that loss of earning capacity will be sufficiently dealt with in this new comprehensive social security system, with the result that it will not be necessary to deal with this aspect in a private law claim based on delict. It will be interesting to see whether the new proposed social security system will usurp some of the functions of the law of damages, as loss of earning capacity in private law is essentially the same as income replacement for disability in social security law.

To say that the proposed social protection measures will totally overcome this problem is speculative in the extreme. However, it is submitted that these measures have the potential to address the crucial issue of loss of earning capacity under social security instead of private law, reducing the significance of the confusion that currently prevails.

5 CONCLUSION

It is submitted that the award for loss of earning capacity on the basis of the somehow-or-other approach where the judge awards an amount that is deemed fair and reasonable in the circumstances, based on the evidence placed before the court, is in essence the same as a *solatium* and does not differ essentially from general damages awarded for pain and suffering.

¹¹¹ 2007 Budget Speech, accessed at www.treasury.gov.za 29.

¹¹² *Ibid.*



LOSS OF EARNING CAPACITY

Even where the mathematical approach is employed, the judge still exercises a wide discretion in the calculation of the so-called imponderables like contingencies and the application of these contingencies still depends on what is fair and reasonable, based on the evidence presented to the court.

Although these inconsistencies may be said to be an inevitable consequence of the 'once and for all rule', it is submitted that the development of the law of damages has been stifled on this point. Each of the claimants in the cases discussed in paragraph 4 could possibly have been in an altogether different situation, were they entitled to extensive social protection benefits, notably income replacement for permanent disability. Unfortunately, an integrated social security system will not do much to solve the problem of the loss of earning capacity of young children, unless the system is also designed to protect the interests of disabled children to provide future income replacement benefits.

The new social security system is still at the conception stage and the exact workings of the system have not been announced. It is suggested however that the next logical step in the development of the law pertaining to loss of earning capacity may be to recognise the role of this form of damages in the socio-economic context and to explore the ways in which integrate the law of damages and social protection such as envisaged by the South African government. Such an integrated approach may solve the seemingly insurmountable problem of loss of earning capacity.

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