NEETHLING-POTGIETER-VISSER

Law of Delict

Seventh Edition
(Neethling i)

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Law of Delict

Seventh Edition

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Preface

Law of Delict is intended to be a comprehensive introduction to the general principles of delict- ual liability and the most important forms of delict. It is primarily aimed at students in so far as we sought to deal systematically and critically with the most important principles of the law of delict. Although it was not our aim to provide an exhaustive discussion of positive law, practi- tioners should also find the book useful since we cite and discuss the most authoritative sources (case law and legislation).

The seventh edition of Law of Delict, appearing simultaneously with the Afrikaans version thereof, was revised and updated in toto in light of new legal authority and literature which natu- rally necessitated an adaptation of legal principles and theoretical points of view. In particular, special attention was given to the lively debate on delictual principles that has taken place in academic and judicial circles since the appearance of the last edition, especially on the relation- ship between wrongfulness, negligence and legal causation.

Case law was updated to the September 2014 South African law reports. We express our appreciation to Corné Human, Mandy Jonck and Lisa Sandford of LexisNexis

for their efficient and friendly assistance with this edition of Law of Delict.

J NEETHLING JM POTGIETER September 2014
(Neethling v)

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Contents Page

Preface v

PART I

Introduction to the law of delict

1 General introduction

1 Delict: general nature and place in the legal system..... 3

2 Delict and breach of contract.....6

3 Delict and crime..... 7

4 Historical development of delictual liability 8

4.1 Introduction.....8

4.2 *Actio legis Aquiliae* 8

4.3 *Actio iniuriarum* 12

4.4 Action for pain and suffering 16

5 The law of delict, the Constitution and fundamental (human) right..... 17

PART II

General principles of the law of delict

2 Conduct

1 General..... 25

2 Nature and characteristics of conduct 25

Page

3 The defence of automatism..... 26

4 Commission(commissio) and omission(omissio).....30

3 Wrongfulness

1 Introduction 33

2 Act and consequence 34

3 The legal convictions of the community as the basic test for wrongfulness……...36

3.1 The balancing of interests 38

3.2 A delictual criterion 41

3.3 An objective criterion 42

3.4 Practical application of the boni mores criterion 45

4 Wrongfulness as infringement of a right 51

4.1 The doctrine of subjective rights 51

4.2 The nature of a subjective right 52

4.3 Further development of the doctrine of subjective rights 53

4.4 Origin of subjective rights 53

4.5 Infringement of a subjective right: requirements.....54

5 Wrongfulness as breach of a legal duty.....55

5.1 General 55

5.2 Liability for an omission 58

5.2.1 Prior conduct (the omissio per commissionem rule)……...60

5.2.2 Control of a dangerous object……..62

5.2.3 Knowledge and foresight of possible harm…….65

5.2.4 Rules of law…….66

5.2.5 A special relationship between the parties…….....69

Page

5.2.6 A particular office ……..……..71

5.2.7 Contractual undertaking for the safety of a third party…….....71

5.2.8 Creation of the impression that the interests of a 3rd party will be protected…….....72

5.2.9 Interplay of factors…….……..73

5.2.10 The general wrongfulness criterion……....77

5.3 Breach of a statutory duty 78

6 Wrongfulness as the reasonableness of holding a defendant liable.....80

7 Grounds of justification 87

7.1 Introduction.....87

7.2 Private defence.....88

7.2.1 General 88

7.2.2 Requirements for the attack.....89

7.2.3 Requirements for the defence.....92

7.3 Necessity 97

7.3.1 General 97

7.3.2 Requirements for necessity 99

7.3.3 Necessity and impossibility.....103

7.4 Provocation 104

7.4.1 General 104

7.4.2 Provocation in the case of physical assault 105

7.4.3 Provocation in cases of defamation and insult 107

Page

7.5 Consent 108
7.5.1 General 108
7.5.2 Characteristics of consent as a ground of justification....109
7.5.3 Requirements for valid consent 111
7.5.4 *The pactum de non petendo in anticipando* 114
7.6 Statutory authority 114
7.7 Official capacity....119
7.8 Execution of an official command....119
7.9 Power to discipline....121
8 Abuse of right, nuisance and neighbour law 123
8.1 Abuse of right 123
8.2 Nuisance....127

4 Fault (and contributory fault)

1 General....129
2 Accountability....131
3 Intent 132
3.1 Direction of the will 133
3.2 Consciousness (knowledge) of wrongfulness 135
3.3 Motive and mistake concerning the causal chain of events....136
4 Negligence 137
4.1 Definition and nature 137
4.2 Can negligence and intention overlap?....139
4.3 Ordinary and gross negligence 140
4.4 Negligence and an omission 141

Page

4.5 The reasonable person: characteristics....141

4.5.1 General 141

4.5.2 Children 143

4.5.3 Experts....145

4.6 Negligence: foreseeability and preventability of damage....148

4.7 Negligence judged in the light of the surrounding circumstances....154

4.8 Negligence and "duty of care" 158

4.9 Proof of negligence 160

4.10 Relevance of negligence 162

4.11 Distinction between wrongfulness and negligence 163

5 Contributory fault 167

5.1 Introduction....167

5.2 The common law position....167

5.3 The Apportionment of Damages Act 34 of 1956 168

5.3.1 Provisions and meaning of section 1(1)(a) and (b) 168

5.3.2 Meaning of "fault" 169

5.3.3 Meaning of "apportionment of damages" 169

5.3.4 Criteria for the "apportionment of damages"....170

5.3.5 Onus of proof 173

5.3.6 The concept of contributory "negligence" 173

5.3.7 Fault in respect of "damage" or "damage-causing event" ……...173

Page

5.3.8 The provisions and meaning of section 1(3) …….....174

5.3.9 The dependant's action.....175

5.3.10 Joint wrongdoers 175

5.3.11 Breach of contract 176

5.3.12 Legal causation.....176

5.4 Voluntary assumption of risk and contributory fault (intent) 177

5.4.1 Introduction 177

5.4.2 Relevant cases 178

5.4.3 Rescue cases 181

5 Causation

1 General.....183

2 Factual causation 184

2.1 General 184

2.2 *Conditio sine qua non* and causation by positive conduct.....186

2.3 Logical criticism of the *conditio sine qua non* theory 187

2.4 *Conditio sine qua non* and causation by an omission 191

2.5 The flexible application of *conditio sine qua non* 193

2.6 The determination of a factual (causal) nexus 195

3 Legal causation 197

3.1 General 197

3.2 The flexible approach 200

3.3 Adequate causation 203

Page

3.4 Direct consequences 205

3.5 Fault 207

3.5.1 Intent as criterion for legal causation 208

3.5.2 Negligence as criterion for legal causation 211

3.6 Reasonable foreseeability 214

3.7 *Novus actus interveniens* 216

3.8 So-called egg-skull cases (*talem qualem* rule) 219

6 Damage

1 Introduction 221

2 The compensatory function of the law of delict 221

3 The concept of damage 222

3.1 The definition of damage....222

3.2 Extent of the concept of damage....222

3.2.1 General 222

3.2.2 Damage includes patrimonial (pecuniary) as well as non-patrimonial (non-pecuniary) loss 223

3.3 The relationship between patrimonial and non-patrimonial loss....225

3.4 The relationship between damage and wrongfulness (unlawfulness)....226

3.5 The relationship between damage and factual causation....228

4 Patrimonial (pecuniary) loss 229

4.1 Definition of patrimonial loss 229

4.2 A person's patrimony (estate) 229

4.3 The ways in which patrimonial loss is caused 230

4.4 Forms of patrimonial loss....231

4.5 The assessment of patrimonial damage 231

Page

4.6 Prospective patrimonial damage (*lucrum cessans*) 233

4.6.1 General 233

4.6.2 Definition and nature of prospective loss....234

4.6.3 Forms of prospective loss....234

4.6.4 Requirements before damages may be recovered for prospective loss....235

4.7 The "once and for all" rule 235

4.7.1 Formulation and implications of the rule 235

4.7.2 Exceptions to the rule 236

4.7.3 Causes of action 236

4.7.4 Examples of causes of action and the "once and for all" rule....237

4.8 The collateral source rule and compensating advantages (*res inter alios acta*) 238

4.8.1 General 238

4.8.2 Summary of positive law....239

4.8.3 Explanations of the collateral source rule 242

4.9 Mitigation of loss 244

4.10 Nature, object and form of damages 245

4.11 Assessment of the quantum of damages 246

4.11.1 General 246

4.11.2 The assessment of damages in specific instances 246

4.12 Damages for loss of income or support earned illegally....248

4.13 Onus of proof 250

5 Non-patrimonial (non-pecuniary) damage or injury to personality....250

5.1 Definition of non-patrimonial loss....250

5.2 Interests of personality 251

Page

5.3 The general nature of non-patrimonial loss or injury to personality 251

5.4 Assessment of non-patrimonial loss or injury to personality and other general principles 252

5.5 The object of damages (compensation and satisfaction) in the case of non-patrimonial loss or injury to personality 252

5.6 Injury to personality in respect of physical-mental integrity 253

5.6.1 General 253

5.6.2 Theories in regard to the nature of physical-mental injury 256

5.6.3 Cases of unconsciousness and changed personality....256

5.7 Assessment of damages in the case of non-patrimonial loss 260

5.7.1 Introduction 260

5.7.2 Physical-mental integrity....260

5.7.3 Injury to personality in the form of *iniuria* 263

7 Delictual remedies

1 General....267

2 The interdict....269

3 Concurrence of remedies 270

3.1 Introduction....270

3.2 Delictual actions 270

3.3 *Actio iniuriarum* and contractual action 271

3.4 Action for pain and suffering and contractual action....272

3.5 *Actio legis Aquiliae* and contractual action....273

3.6 Exclusion clauses 277

4 Prescription of remedies 278

8 Joint wrongdoers Page

1 General....279

2 Special cases 281

2.1 Prejudice suffered by a spouse as a result of the conduct of the other spouse and a third party 281

2.1.1 Marriage in community of property 281

2.1.2 Marriage out of community of property....283

2.2 Prejudice suffered by a person as a result of the death or injury of another person through the conduct of the deceased or injured person and a third party 283

2.2.1 Prejudice as a result of death 283

2.2.2 Prejudice as a result of injury 284

PART III
Forms of delict

9 Forms of damnum iniuria datum

1 Introduction 289

2 Injury or death of another person....289

2.1 Action of non-dependants 289

2.2 Action of dependants 292

2.2.1 Death of the breadwinner 292

2.2.2 Injury to the breadwinner 299

3 Psychological lesions (emotional shock)....300

4 Pure economic loss 305

5 Negligent misrepresentation....313

6 Interference with a contractual relationship 323

7 Unlawful competition 327

8 Product liability....335

10 Forms of *iniuria* Page

1 Introduction 341

2 Rights relating to physical integrity....345

2.1 Introduction....345

2.2 The right to corpus or body 345

2.2.1 General 345

2.2.2 Seduction 347

2.3 The right to *libertas* or physical liberty 348

2.3.1 General 348

2.3.2 Wrongful deprivation of liberty: wrongful arrest and wrongful detention 349

2.3.3 Malicious deprivation of liberty....350

3 The right to *fama* or good name 351

3.1 Introduction....351

3.2 Defamation....352

3.2.1 Definition 352

3.2.2 Elements 352

3.2.2.1 Publication 352

3.2.2.2 Defamatory effect: wrongfulness 354

3.2.2.3 Ground of justification....357

3.2.2.3.1 Privilege or privileged occasion....358

3.2.2.3.2 Truth and public interest 360

3.2.2.3.3 Media privilege (reasonable publication of untruth)....360

3.2.2.3.4 Political privilege 361

3.2.2.3.5 Fair comment....362

3.2.2.4 Fault 362

3.2.2.4.1 *Animus iniuriandi*....362

3.2.2.4.2 Grounds excluding intent 364

3.2.2.4.3 Negligence....365

Page

3.3 Malicious prosecution 365

3.4 Attachment of property 368

4. Rights relating to *dignitas*.....369

4.1 The right to dignity 369

4.2 The right to privacy.....370

4.3 The right to identity 373

4.4 The right to feelings 374

4.4.1 Breach of promise 375

4.4.2 Adultery.....375

4.4.3 Abduction, enticement and harbouring 377

11 Forms of liability without fault

1 General.....379

1.1 Dominance of the fault theory 379

1.2 Reaction to the fault theory.....379

1.3 Justification for liability without fault 379

1.4 General characteristics of liability without fault.....381

2 South African law 381

2.1 Common law and case law 381

2.1.1 Damage caused by animals 381

2.1.1.1 *Actio de pauperie*..... …….381

2.1.1.2 *Actio de pastu* .....…….384

2.1.1.3 *Actio de feris*..... …….385

2.1.1.4 Conclusion 385

2.1.2 Damage caused by objects thrown, poured or falling out of or from a building 386

2.1.3 Damage caused by loss of a stolen thing.....387

Page

2.1.4 Damage to goods stored during shipping and by inn- and stable-keepers 387

2.1.5 Damage caused by owners of neighbouring property: nuisance.....387

2.1.6 Forms of *iniuria* 388

2.1.7 Vicarious liability 389

2.1.7.1 Introduction 389

2.1.7.2 Employer – employee.....390

2.1.7.3 Principal – agent 397

2.1.7.4 Motor car owner – motor car driver 398

2.1.7.5 State – public school.....398

2.2 Legislation 399

2.2.1 Consumer Protection Act 68 of 2008 (product liability).....399

2.2.2 National Nuclear Regulator Act 47 of 1999.....400

2.2.3 Civil Aviation Act 13 of 2009 401

2.2.4 Post and Telecommunication-Related Matters Act 44 of 1958 401

2.2.5 Genetically Modified Organisms Act 15 of 1997 402

Bibliography 403

Table of Cases 423

Table of Statutes 461

Index.....465

Part I

Introduction to the law of delict

This chapter serves as a general introduction to the law of delict. Topics dealt with are the nature of a delict and its place in the legal system; the distinction between this phenomenon and breach of contract and crime; the historical development of delictual liability; and the influence of the constitutional Bill of Rights on the law of delict.

Home test on
Monday 17th

Chapter 1

General introduction

1 Delict: general nature and place in the legal system

The purpose of the law, and in particular private law, is to regulate relations between individuals in a community. A legal order would be unnecessary if people lived in complete harmony. The reality is, however, that individual interests are continually in a state of real or threatened conflict. Accordingly, it is the function of private law to recognise these interests, delimit them in relation to each other and harmonise those that are in conflict. In particular, it is the role of the law of delict to indicate which interests are recognised by the law, under which circumstances they are protected against infringement (that is, when the impairment of a legally recognised interest constitutes a delict) and how such a disturbance in the harmonious balance of interests may be restored.

The fundamental premise in law is that damage (harm) rests where it falls, that is, each person must bear the damage he suffers (*res perit domino*). If someone drives his car carelessly and collides with a tree, or clumsily drops and breaks his watch, or hail damages his corn crop, or lightning kills his horse, he has, in principle, no legal ground for complaint. However, damage does not always rest where it falls. There are indeed certain legally recognised instances in which the burden of damage is shifted from one individual to another, with the result that the latter incurs an obligation to bear the former's damage or to provide compensation for it. For example, where damage arises from a delict, the wrongdoer is legally obliged to compensate the aggrieved party. In general terms, the law of delict thus determines the circumstances in which a person is obliged to bear the damage he has caused another, ie when he may incur civil liability for such damage.

Because the wrongdoer has an obligation to make compensation for the damage suffered, the person prejudiced has a corresponding right to claim compensation. As a result, an *obligatio* or obligation between the two parties is created. Thus the law of delict belongs to that part of private law known as the law of obligations.

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The mere fact that a person has caused another to suffer damage is, of course, insufficient to constitute a delict for which he may be held liable. To found liability, further requirements must be met. These requirements, otherwise referred to as the different elements which constitute a delict, appear from the following definition: A delict is the act of a person that in a wrongful and culpable way causes harm to another. All five requirements or elements, ie an act, wrongful- ness, fault, causation and harm must be present before the conduct complained of may be classified as a delict. If any one (or more) of these elements is missing, there is no question of a delict and consequently, no liability.

From the above, it follows that the question of delictual liability is governed by a generalising approach. This means that general principles or requirements regulate delictual liability. These principles as a rule apply irrespective of which individual interest (for example, a thing, the human body, honour, privacy, earning capacity, a trade secret, a trademark or the goodwill of a corporation) is impaired, and irrespective of the way in which the impairment is caused. The casuistic approach of the English and Roman law of delict contrasts with the generalising approach. According to the casuistic approach, the law of delict consists of a group or set of separate delicts (torts or *delicta*), each more or less with its own rules. The aggrieved party may thus only render the wrongdoer liable if his conduct satisfies all the requirements of a specific delict.

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It is self-evident that a legal system embracing general principles of delictual liability is able to accommodate changing circumstances and new situations more easily than one that adopts a casuistic approach, since the latter approach requires the constant creation of new delicts (usually a slow legislative process), while general principles, because of their flexibility and pliancy, need only be adapted or applied in a new way (normally a speedy judicial process). The South African law of delict, unlike the English law of torts, has therefore been able to recognise and protect individual interests (such as privacy and the goodwill of a corporation) which have only come to the fore in modern times.

The generalising approach is, however, subject to an important qualification in our law. A distinction is made in principle between delicts that cause patrimonial damage (*damnum iniuria datum*) and those that cause injury to personality (*iniuria*). These distinctions ground the actions which form two of the pillars of the law of delict, ie the *actio legis Aquiliae*, in terms of which damages for the wrongful and culpable (intentional or negligent) causing of patrimonial damage are claimed, and the *actio iniuriarum*, which is directed at satisfaction (solatium or sentimental damages) for the wrongful and intentional injury to personality. These two actions, apart from a few exceptions, comprehensively cover the whole area of delictual liability. The most important remaining action – which may be regarded as the third pillar of the law of delict – is the action for pain and suffering, by which compensation for injury to personality as a result of the wrongful and negligent (or intentional) impairment of bodily or physical-mental integrity is claimed.

Although in terms of the generalising approach, the wrongful culpable causing of patrimonial loss forms the basis for the *Aquilian* action, and the wrongful intentional injury to personality constitutes an *iniuria*, it is nevertheless inevitable that forms of *damnum iniuria* datum and *iniuria* which occur frequently in practice become known as separate delicts under specific names. Thus, inter alia, patrimonial loss caused by another person's death (the dependants' action) or injury, negligent misrepresentation and emotional shock have emerged in practice as forms of *damnum iniuria datum*, whereas assault, defamation, insult, invasion of privacy,

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wrongful deprivation of liberty etc have crystallised into specific forms of *iniuria*. In this process, it has happened that such forms develop their own specific rules within the framework of the general principles of delict. It is therefore useful (and even necessary) to treat the different forms separately. Nevertheless, it must be borne in mind that each is merely a specific form of the broad concept of delict. There is definitely not a series of separate delicts, each with its own principles. At most, the specific forms of delict may be seen as being species of the genus 'delict'.

Furthermore, it is important to note that a delict is not the only form of unwarranted or inadmis- sible conduct of which the law takes cognisance. For the sake of conceptual clarity, it is necessary to distinguish between a delict and two similar legal phenomena, ie breach of contract and crime.

2 Delict and breach of contract

Breach of contract clearly constitutes a different form of wrongful conduct in private law. As with a delict, breach of contract is normally an act by one person (contracting party) which in a wrongful and culpable way causes damage to another (contracting party). Thus there is apparently no material difference between these two legal phenomena.

Nevertheless, breach of contract and a delict are fundamentally different. Breach of contract is only constituted by the non-fulfilment by a contractual party of a contractual personal right (claim) or an obligation to perform. Accordingly, the primary remedy for breach of contract is directed at enforcement, fulfilment or execution of the contract; a claim for damages as a remedy only plays a secondary part. By contrast, a delict is constituted by the infringement of any legally recognised interest of another party, excluding the non-fulfilment of a duty to per- form by a contractual party. Consequently, the delictual remedies are primarily directed at damages (or satisfaction), and not at fulfilment. The fundamental differences between breach of contract and a delict are, for historical, systematic and practical reasons, also supported by the fact that breach of contract is not formally treated as part of the law of delict but is considered to be part of the law of contract. The law of contract, as indicated, therefore provides specific rules

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and remedies for breach of contract that are not applicable to a delict. This distinction is clearly apparent from the fact that one and the same act may render the wrongdoer liable *ex contractu* as well as *ex delicto*.

Thus, despite the apparent similarity between a delict and breach of contract, these concepts may not be treated identically. At most, it can be said that both are species of the genus 'wrongful conduct' in private law.

3 Delict and crime

The law also takes cognisance of wrongful and culpable acts in the sphere of public law, more particularly in criminal law. Despite the apparent similarity between delicts and crimes, there are fundamental differences between them.

The principal difference relates to the distinction between private and public law. Private law is directed at the protection of individual (private) interests, while public law is directed at upholding the public interest. Accordingly, delictual remedies differ substantially from criminal sanctions. Delictual remedies are compensatory in character, compensating or indemnifying the aggrieved party for the harm the wrongdoer has caused. By contrast, criminal sanctions are of a penal nature, and are intended to punish the criminal for his transgression against the public interest. The distinction between a delict and a crime is also apparent from the fact that one and the same act may found delictual, as well as criminal, liability. This does not mean that the two legal phenomena always overlap. On the contrary, their difference is emphasised by the fact that a delict is not necessarily a crime and vice versa.

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4 Historical development of delictual liability

4.1 Introduction

In contrast to the casuistic approach of the Roman law of delict, the South African law of delict is based, as stated, on three pillars: the *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering. Unlike the last-mentioned action, which developed in Roman-Dutch law, the first two remedies had already played an important role in Roman law. The fields of application of all three actions have, over the course of time, extended far beyond their Roman- Dutch law limits. In order to ascertain in detail the significance of these actions in the law of delict, it is necessary to consider their state of development in our law. In this way it can be determined whether these actions have reached their so-called logical end development, that is, whether all patrimonial loss caused wrongfully and culpably is actionable with the *Aquilian* action, whether every wrongful and intentional injury to personality (*iniuria*) grounds the actio iniuriarum, and whether each form of harm that is related to physical-mental integrity and results from a culpable act may be compensated in terms of the action for pain and suffering.

4.2 Actio legis Aquiliae

Roman law One of the most important sections of Roman law that still exists in our law, although time has wrought many changes and extensions to it, relates to liability for patrimonial damage (*damnum iniuria datum*). Roman law in this regard was based on an Act (*plebiscitum*) from 287 BC, and known as the *lex Aquilia*. This Act was divided into three chapters, of which only the first and the third are still of importance. It is noticeable that, according to these two chapters, the *lex Aquilia* was originally only applicable to certain forms of damage to things (corporeal assets). It dealt only with the killing or wounding of a slave or four-footed animal, and the burning, breaking and destroying of other things. *The Aquilian* action was furthermore only available to the owner of the damaged property.

Over the course of time, the field of application of the *Aquilian* action has been extended considerably, as a result of extensive interpretation of the *lex* and the granting of *actiones utiles* and *in factum*. Consequently, *Aquilian* liability could ensue after any kind of physical infringement of a thing, and not only, as was originally the case, after infringements of a specific, defined nature. A further important development was that the wrongdoer had to compensate not only for the damage that had been caused to the thing itself, but also for all patrimonial damage that resulted from his wrongful act (*id quod* interest). In Justinian's time, the extension was such that, apart from the owner, other holders of real rights – and in at least one instance the holder of a personal right in respect of the thing (the *colonus partiarius)* – were also protected against damage to property.

In addition to damage to property, the *actio legis Aquiliae* was made applicable to two further instances of patrimonial loss resulting from bodily injuries: a father could claim for patrimonial loss suffered as a result of the injury of his child, while a free man (*liber homo*) could claim for patrimonial loss resulting from his own personal injuries.

It is, however, not exactly clear what dimensions the extension of *Aquilian* liability had reached in Justinian's time. Nevertheless, the general opinion seems to be that, although interests other than ownership were also protected, a perceptible, physical infringement of a concrete object, ie, a thing or the body of a person, was still required. The reasons for this are probably twofold. Firstly, the *lex Aquilia* was, as already mentioned, initially only applicable to certain physical infringements of corporeal legal interests. It is therefore understandable that the extension by analogy of *Aquilian* liability was still connected to physical infringements. Secondly, the wrongfulness of a physical infringement was readily apparent to the less sophisticated legal mind. The infringement constituted, as it were, a conspicuous peg on which an evaluation of wrongfulness could be hung. However, when a person suffered harm that was not caused by a physical infringement, the Roman jurist had no criterion by which to evaluate the act.

Notwithstanding this restriction, it is clear that the progression, from liability based on damage to property, to a more general liability for patrimonial loss, began to develop in Roman law. This was apparent from the fact that the aggrieved party could claim his id quod interest, and, in certain cases, damages for the patrimonial loss he may have suffered as a result of bodily injuries. Thus the way was prepared for the expansion of the *Aquilian* action into a general remedy for all patrimonial loss caused wrongfully.

Roman-Dutch law In Roman-Dutch law, the dimensions of *Aquilian* liability underwent very important extensions, going beyond the limits of Roman law. Firstly, there were definite indications that the requirement of physical impairment of a thing was no longer insisted upon. Secondly, damages could be claimed with the *Aquilian* action for patrimonial damage resulting from any injury to personality (*iniuria*) and not only, as was the case in Roman law, for an injury to personality in the form of bodily injury. Thirdly, Roman-Dutch law went much further than Roman law in granting an action to the holder of a personal right in respect of a thing. The availability of the *Aquilian* action was extended to the borrower, the *fullo* (or persons in similar relationships to the owner) and the lessee of the services of a slave or servant. Lastly, the *actio legis Aquiliae* in Roman-Dutch law was also available to the dependants of a free person who had been killed, and to parents or employers for patrimonial loss suffered where a child or domestic servant had been injured.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14.

These important developments do not indicate, however, that the *Aquilian* action in Roman- Dutch law had developed into a general remedy for the culpable and wrongful causing of patrimonial damage. Since none of the old authorities makes this point unequivocally, it does not seem as if the law had advanced to this level. There are nevertheless a number of South African decisions in which a different conclusion about the position in Roman-Dutch law was reached. For example, in The Cape of Good Hope Bank v Fischer, De Villiers CJ stated with reference to Voet and Matthaeus:

> It appears from both these authors that in their time the *Aquilian* law had received an extension by analogy to a degree never permitted under the Roman law. The action in factum was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person in consequence of the wrongful acts of another.

South African case law Whatever the end result was in Roman-Dutch law, the abovementioned decisions nevertheless give the impression that, in modern South African law, *Aquilian* liability results from every culpable and wrongful act which causes patrimonial damage. This viewpoint was given prominence by the following remark, made by Watermeyer J in Perlman v Zoutendyk:

> Roman-Dutch law approaches a new problem in the continental rather than the English way, because in general all damage caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).

Nowadays, there is no dearth of decisions underscoring the viewpoint that the *Aquilian* action has in fact reached its logical end development in South African law. In contradistinction to earlier cases, which require physical injury to person or property to found *Aquilian* liability, it is today established law that compensation for so-called "pure" economic loss may in principle be claimed *ex lege Aquilia*. In Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd, Booysen J stated clearly:

> The legal basis of the plaintiff 's claim is the *lex Aquilia.* In essence the *Aquilian* action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably. Although the contrary view had long been held by many authorities, it seems clear that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the *Aquilian* action.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14.

The Appellate Division confirmed this view in respect of delictual liability for negligent misrepresentation and unlawful competition.

The development of the *actio legis Aquiliae* to its logical conclusion is however hampered by Union Government v Ocean Accident and Guarantee Corporation Ltd. As a result of this decision, the courts have (as a rule) refused to extend *Aquilian* liability for negligent interference with a contractual relationship beyond certain historically justified exceptions. Be that as it may, there are indications that the Supreme Court of Appeal has commenced reconsidering its decision in this respect.

It may be concluded that, despite a few decisions to the contrary, there is a very strong tendency in case law to recognise *Aquilian* liability for all patrimonial loss caused wrongfully and culpably. It is in any event apparent that the extent of this liability has increased a great deal in modern law and can still be expanded. Indeed, in Union Government (Minister of Railways and Harbours) v Warneke, Innes JA held:

> The position of our law with regard to negligence to-day is the result of the growth and the regulated expansion of the original provisions of the *Lex Aquilia*. Crude and archaic in some respects, their operation was gradually widened by the application of the *utilis actio*, and by the interpretation of the Roman jurists. The broadening process was continued by Dutch lawyers on the same lines; and there is no reason why our Courts should not similarly adapt the doctrine and reasoning of the law to the conditions of modern life, so far as that can be done without doing violence to its principles.

From this it is apparent that there can be no objection to the extension by analogy of the dimensions of *Aquilian* liability in order to cope with changing circumstances. And, since the Appellate Division in Administrateur, Natal v Trust Bank van Afrika Bpk treated infringements of corporeal objects (such as things) and incorporeal objects (such as the general patrimonial interests that could be at stake in the case of misrepresentations) alike for the purposes of *Aquilian* liability (and thus in principle denied a distinction between the causing of damage by words on the one hand and by deeds on the other), there is no reason why every infringement of any

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incorporeal object should not ground the *actio legis Aquiliae*, provided that all the requirements for the action are met.

This does not mean that a liberal approach should be followed in every case. On the contrary, our courts adopt a conservative approach to the expansion of the *Aquilian* action and will, according to Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd, only permit such an extension if it is justified by policy considerations:

> South African law approaches the matter in a more cautious way . . . and does not extend the scope of the *Aquilian* action to new situations unless there are positive policy considerations which favour such an extension.

4.3 *Actio iniuriarum*

Roman law The Roman law concerning liability for injury to personality (*iniuria*) is of cardinal importance to our law, since it has been adopted almost without change in South Africa. The protection of personality had its origin in the Twelve Tables and was directed mainly at the physical person, ie, bodily integrity as an interest of personality. Penalties in the form of fixed fines were imposed for *os fractum* (the fracturing of a bone) and *membrum ruptum* (the severance of a limb) on the one hand, and for *iniuria* in a specific sense (less serious bodily injuries) on the other.

Over the course of time, the protection of personality has been extended considerably by praetorian reforms. Firstly, the rigid fines of the Twelve Tables have been replaced by a judicial taxation, in accordance with the bodily infringement complained of. Secondly, the protection of personality has also been made applicable to the following non-physical interests: good name, dignity, feelings of chastity and privacy.

These extensions eventually resulted in the *iniuria* concept developing into a general delict in the classical period. One should, however, always bear in mind that the Roman law approach to the field of *iniuria* was casuistic. There was no question of an organised system for the protection of personality rights. Consequently, in order to ascertain the extent of the protection of personality – ie, which interests of personality were legally recognised – it is necessary to classify the casuistry of the sources according to one or other system. The generally acceptable classification of *iniuriae* found in Roman law is that the *actio iniuriarum* was applicable to impairments of *corpus*, *fama* and *dignitas*.

However, although one may identify *corpus* and *fama* as independent interests of personality with more or less fixed meanings, the same cannot be said of *dignitas*. *Dignitas* was in any case not regarded as synonymous with honour or dignity as an interest of personality, but rather as a collective term for all interests of personality other than corpus and *fama*, which in Roman law had not yet been clearly distinguished from each other and independently defined. As a result, the door was left open for further development in the protection of personality by the praetor. In consequence, it is hardly surprising that various interests of personality, although not mentioned *eo nomine*, were included in the concept of *dignitas* in Roman law and as a result were brought under the protection of the *actio iniuriarum*. Apart from dignity, feelings of chastity and privacy that had already been identified as protected interests under the praetorian edicts, feelings of piety and religious and family feelings85 were now also, in certain cases, regarded as worthy of protection.

One may assume with a reasonable measure of certainty that, in addition to the requirement that a legally recognised interest of personality had to be infringed, Roman law required intent (*dolus* or *animus iniuriandi*) on the part of the wrongdoer before an *iniuria* could be said to have been committed. The requirement that the infringement must be accompanied by *contumelia indi- cates* only the intentional contempt (violation) of another's personality, and does not mean, as has sometimes incorrectly been stated, that the intent to insult or to violate a person's honour had to accompany every iniuria.

One may conclude that although the concept of *iniuria* developed into a general delict intended to protect personality interests, it would be unwise to maintain that the *actio iniuriarum* protected the personality in its entirety. At most, it can be said that in principle the action was available for every intentional infringement of a person's corpus, *fama* or *dignitas*. The door was, how- ever, left open for further development in the sphere of personality protection, since the concept of *dignitas* was wide enough to include new facets of the personality deemed worthy of protection.

Roman-Dutch law In essence, the Roman law delict *iniuria* remained unaltered in Roman- Dutch law. Although the field of *iniuria* has been approached differently by various writers, it is apparent that, insofar as the identification of protected interests of personality is concerned, they did not proceed much further than the level reached in Roman law. Apart from the fact that some writers identified *libertas* (freedom) as an additional personality interest, the only other protected interests on which unanimity existed were corpus and *fama*. As was the case in Roman law, *dignitas* (and related concepts such as hoon (used by De Groot) and eer (used by Van der Linden), was not regarded as an independent, clearly defined interest of personality. These concepts may therefore be regarded as collective terms for interests of personality which were neither identified nor clearly delimited in Roman-Dutch law, and which were broad enough to include new interests of personality worthy of protection.

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Similarly, the old writers did not depart in any material way from Roman law with regard to the requirements for liability for an iniuria. It must, however, be emphasised that, unlike Roman law, the old writers expressly required intent (*dolus malus* or *animus iniuriandi*) as an element of liability for an *iniuria*. Although the concept *contumelia* was also used, the writers do not appear to attach a specific meaning to it. All that it probably refers to is conduct that demonstrates contempt for a person's personality. No support can be found in their writings for the view that *contumelia* should be interpreted exclusively to mean insult or injury to a person's honour.

In conclusion, mention should be made of a particular development in the field of personality protection in Roman-Dutch law. The *actio iniuriarum* was replaced by two actions, the *amende* profitable and the *amende* honorable. The former, like the *actio iniuriarum,* was aimed at the recovery of satisfaction. The latter departed completely from the *actio iniuriarum*: an injured person could claim a *palinodia* or *recantatio*, ie, demand that the wrongdoer withdraw his words and deny the truth thereof; as well as a *deprecatio*, ie an admission of guilt and a request for forgiveness.

South African case law The question of whether and to what extent South African case law has built on the common law basis in respect of the identification and recognition of personality interests now arises. Firstly, it should be noted that, apart from certain English law influences regarding *iniuriae*, the common law delict *iniuria* has actually undergone no change in South African law. In fact, the courts (almost without exception) start with Voet's definition of this delict. In R v Umfaan, for example, Innes CJ stated with reference to Voet that an iniuria:

> is a wrongful act designedly done in contempt of another, which infringes his dignity, his person and his reputation. If we look at the essentials of *iniuria* we find . . . that they are three. The act complained of must be wrongful; it must be intentional; and it must violate one or other of those real rights, those rights in rem, related to personality, which every free man is entitled to enjoy.

In short then, an *iniuria* is the wrongful, intentional infringement of or contempt for a person's *corpus*, *fama* or *dignitas*. For present purposes, only the last of these concepts requires discussion.

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The present position is that the courts identify, recognise and protect corpus (physical integrity) and *fama* (good name) as separate interests of personality. However, views about the meaning to be attached to the concept of *dignitas* vary considerably.

On the one hand, certain decisions limit *dignitas* to the personality interest of dignity or honour, and consequently require an "element of degradation, insult or *contumelia*" for an *iniuria* to have been committed against the *dignitas*. The emphasis on *contumelia* in the sense of an insult is furthermore not restricted solely to *iniuria pertinens ad dignitatem*. There are decisions that go so far as to require *contumelia* in this sense for every iniuria. No support can, however, be found for these views in our common law sources. *Contumelia* in the sense of an insult was at no stage a general requirement for the delict *iniuria*. Furthermore, the concept of *dignitas* was never restricted to the personality interest of "dignity". For these reasons, the rejection of these views by the Appellate Division can be wholeheartedly supported.

On the other hand, one encounters decisions that correctly interpret the concept of *dignitas* in its broad common law meaning and refuse to restrict its application to the personality interest of "dignity". The leading decision in this regard is O'Keeffe v Argus Printing and Publishing Co Ltd. Watermeyer AJ accepted that the *actio iniuriarum* is available for "an intentional wrongful act which constitutes an aggression upon [a plaintiff's] person, dignity or reputation". Since in this case there was no question of the infringement of the plaintiff's "person" or "reputation", the only question was whether there was infringement of "dignity" or "those rights relating to . . . dignity". It is evident from the judgment that the judge interpreted dignitas so widely that it encompasses all aspects of the legally protected personality, except *fama* and *corpus*. As such, *dignitas* cannot be considered as a single interest of personality; it is rather a concept encompassing all "those rights relating to . . . dignity". *Dignitas* is thus a collective term for all rights (interests) of personality with the exception of the rights to good name and to physical integrity.

This view of the concept of *dignitas* can be supported as indicated, it accords with the wide common law meaning attached to the concept. Another important point is that this approach offers a good basis for the identification, recognition and delimitation of individual, independent rights of personality in South African law. In this way, the proper scientific classification and practical handling of personality rights (apart from those relating to *corpus* and *fama*) can find application in positive law. At the same time, *dignitas* serves as a basis for the extension of personality protection.

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The question of which rights of personality are accorded independent recognition and protection by our positive law is discussed below. For the moment, it suffices to say that, apart from *fama* and *corpus*, dignity, privacy, identity and to a lesser extent feelings, are accorded protection and recognition in our case law.

4.4 Action for pain and suffering

Unlike the *Aquilian* action and the *actio iniuriarum*, the action for pain and suffering did not originate in Roman law. No compensation could be claimed under Roman law for the negligent causing of bodily injuries.

By contrast, the position in Roman-Dutch law, under the influence of Germanic customary law, was that pain, suffering and bodily disfigurement as a result of physical injuries founded an action. Although this action was dealt with by most of the old writers in the same breath as the *Aquilian* action, the two actions were nevertheless different. In Roman-Dutch law, the *actio legis Aquiliae* was restricted to patrimonial damage, and thus did not include compensation for injury to personality as a result of pain and suffering. However, the action for pain and suffering did not reach its logical end development in Roman-Dutch law. Clearly not every form of harm relating to physical-mental integrity and resulting from a culpable act was actionable, as the old authorities only mention compensation for pain, suffering and bodily disfigurement. No reference was made to other forms of harm related to physical-mental integrity, such as shock, loss of amenities of life and loss of life expectancy.

The action for pain and suffering has been adopted by South African law and is considered by the courts, just as in Roman-Dutch law, to be a unique action that cannot be classified with the *actio legis Aquiliae* or with the *actio iniuriarum*. The courts, however, continued to develop the action, with English law playing an important role, to the extent that it now protects the physical-mental integrity of a person in its entirety. In addition to pain, suffering and disfigurement, which had already been identified at common law, this protection is particularly apparent insofar as psychological or mental injury is equated with physical (bodily) injury in the area of emotional shock, and loss of (or shortened) life expectancy, amenities of life and health are recognised as injuries to personality for which compensation may be claimed. In this regard, one must nevertheless warn that the classification of specific forms of harm related to physical-mental integrity should not be taken too far.

There is no sense in further subdividing such harm to the personality by making subtle distinctions and it may be assumed that all possible forms that should be protected in South African law have probably already been recognised. Further developments may be accommodated through the extension and interpretation of existing forms.

5 The law of delict , the Constitution and fundamental(human) rights

The Constitution of South Africa is the supreme law of this country, and any conduct or law which is inconsistent with it is invalid. Certain fundamental rights, to which juristic persons are also entitled, are entrenched in Chapter 2 (the Bill of Rights) of the Constitution. Chapter 2 is applicable to all law – therefore also to the law of delict – and does not only vertically bind the state (the legislature, the executive, the judiciary and all organs of the state), but also horizontally binds all natural and juristic persons.

The fundamental rights may be limited by a law of general application, but only to the extent that the limitation is both reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The fundamental rights are thus not absolute rights. In judging the lawfulness of a limitation, all relevant factors must be taken into account, including the nature of the fundamental right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means of achieving this purpose.

When interpreting the provisions of Chapter 2, the courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In this process, applicable international law must be taken into account, and the courts have a discretion to have regard to comparable foreign law as well. Furthermore, in the interpretation of any legislation, and when developing both the common and customary law, the courts must promote the spirit, purport and objects of the Bill of Rights. In Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening), the Constitutional Court stated unequivocally that where the common law deviates from the spirit, purport and objects of the Bill, the courts have a general duty to develop the common law to eliminate the deviation.

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However, many of the fundamental rights that are important to the law of delict were already recognised and protected by the law of delict before the constitutional era. Therefore it is accepted as point of departure that, unless the contrary is clearly apparent, the common law principles are in conformity with the spirit, purport and objects of the Bill of Rights, or (as expressed by Langa CJ in respect of unlawful competition), "the Bill of Rights in this respect merely emphasises the . . . principles already at play in the common law".

The vertical and horizontal application of the Constitution can take place in a direct as well as an indirect manner, although (because of unavoidable overlap) a clear-cut distinction cannot be made between them.

(a) Direct application Direct vertical application means that the state must respect the fundamental rights (and may therefore not infringe them) except insofar as such infringement is reasonable and justifiable according to the limitation clause. Direct horizontal application entails that the courts must give effect to an applicable fundamental right by applying, and where necessary, developing the common law insofar as legislation does not give effect to that right, except where it is reasonable and justifiable to develop the common law to limit the right in accordance with the limitation clause. The fundamental rights relevant to the law of delict must find application in this manner. These rights include the following: the right to property, the right to life, the right to freedom and security of the person (including the right to bodily and psychological integrity), the right to privacy, the right to human dignity, the right to equality, the right to freedom of expression, the right to freedom of religion, belief and opinion, the right to assembly, demonstration, picket and petition, the right to freedom of association, and the right to freedom of trade, occupation and profession.

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Situations will inevitably occur where two or more of these fundamental rights are in conflict, for example, the right to privacy (or *fama*) versus the right to freedom of expression, or the right to assembly, demonstration, picket and petition versus the right to freedom of trade, occupation and profession. In such situations, there will have to be a careful and correct balancing or weighing-up of the opposing rights.

The entrenchment of fundamental rights in the Bill of Rights enhances their protection and gives them a higher status, in that all law, state actions (executive or administrative), court decisions and even the conduct of natural and juristic persons may be tested against them, taking into account that any limitation of a fundamental right must be in accordance with the limitation clause of the Constitution. It is submitted that in exercising this value judgment (as well as in the process of weighing-up opposing fundamental rights), the general principles which have already crystallised in our law with regard to the reasonableness or *boni mores* (legal convictions of the community) criterion for delictual wrongfulness may serve as prima facie indications of the reasonableness of a limitation in terms of the Bill of Rights. In the case of an infringement of or threat to a fundamental right, a prejudiced or threatened person is entitled to approach a competent court for appropriate relief. In this respect, mention should be made of the possibility of the development of a so-called "constitutional delict", ie that the infringement of a fundamental right per se constitutes a "delict". It is submitted that a clear distinction should be made between such a constitutional wrong and a delict, even though these two figures may overlap. The requirements for a delict and those for a constitutional wrong differ materially. As a result, not every delict is necessarily also a constitutional wrong, and vice versa. Besides, unlike a delictual remedy which is aimed at compensation, a constitutional remedy (even in the form of damages) is directed at affirming, enforcing, protecting and vindicating fundamental rights and at preventing or deterring future violations of Chapter 2. A constitutional wrong and a delict (or their remedies) should there- fore not be treated alike and for conceptual clarity, the term constitutional "delict" or "tort" should rather be avoided.

(b) Indirect application The term 'the indirect operation of the Bill of Rights' means that all private law rules, principles or norms – including those regulating the law of delict – are subjected to, and must therefore be given content in the light of the basic values of Chapter 2. This promoting of the spirit, purport and objects of the Bill will in all probability deliver the same results as the direct application of the Bill, and applies in particular to the so-called open-ended or flexible delictual principles, ie the boni mores test for wrongfulness, the imputability test for legal causation, and the reasonable person test for negligence, where policy considerations and factors such as reasonableness, fairness and justice may play an important part. The basic values underlying Chapter 2 could, therefore, be implemented with good results as important policy considerations in determining wrongfulness, legal causation and negligence. This approach is already evident from case law.

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Part II

General principles of the law of delict

In the following seven chapters the general principles of the law of delict are discussed. Firstly attention is given to the different elements of a delict, namely the act, wrongfulness, fault, causation and damage. Thereafter the delictual remedies and the position of joint wrongdoers are considered.

Chapter 2

Conduct

1 General

In order to constitute a delict, one person (the doer or actor) must have caused damage or harm to another person (the person suffering the loss) by means of an act or conduct. Conduct may thus be described as a general prerequisite1 for delictual liability. Damage must be caused by something, and in the case of delictual liability it is caused by conduct. Phrased differently, conduct constitutes the damage-causing event in the case of a delict.

2 Nature and characteristics of conduct

For the purposes of the law of delict, conduct may be defined as a voluntary human act or omission. The law itself determines what is regarded as "conduct" and thus, in a sense, a normative approach is followed. For the purpose of delictual liability, conduct displays the following characteristics:

(a) Only an act of a human being (in contrast to that of an animal) is accepted as "conduct". Where a human uses an animal as an instrument in the commission of a delict, a human act is still present. It is accepted that a juristic person (such as a company, university, public school, statutory body and so forth) may act through its organs (humans) and may thus be held delictualy liable for such actions. It is submitted that the following rule may be used to determine whether human conduct may be attributed to a juristic person for delictual liability

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An act performed by or at the order of or with the permission of a director, official or servant of a juristic person in the exercise of his duties or functions in advancing or attempting to advance the interests of the juristic person, is deemed to have been performed by the juristic person.

(b) Human action only constitutes conduct if it is performed voluntarily, ie if it is susceptible to control by the will of the person involved. Voluntariness implies that the person in question has sufficient mental ability to control his muscular movements.

Voluntariness does not mean that a person must have willed or desired his conduct. Where, for example, X forgets to warn other people that an electric current has been switched on and someone is electrocuted as a result, X has clearly not willed or desired this omission; however his conduct is nevertheless voluntary because he was, in principle, able to utter a warning. However, if X, for example, was unconscious as a result of an epileptic fit at the time when he was supposed to warn the others, the omission was clearly involuntary because he lacked the capacity to speak (act).

Moreover, the requirement of voluntariness does not mean that a person's conduct should be rational or explicable. Conduct by an infant or someone suffering from a mental disease is usually voluntary although the doer may escape delictual liability, either because he lacks accountability or because fault is absent.

Where a defendant claims that for some reason he did not act voluntarily, he is in fact raising the defence of automatism, which is discussed in more detail below.

(c) Conduct may be in the form of either a positive act (active conduct – a commissio) or an omission (omissio). The distinction is considered below.

3 The defence of automatism

As stated above, the act of the wrongdoer (usually the defendant) must be voluntary to give rise to delictual liability. In a given situation, a defendant may therefore argue that the conduct complained of does not satisfy the requirement of voluntariness. In other words, he relies on the defence of automatism, ie, that he acted mechanically. It is accepted that the following conditions may cause a person to act involuntarily in that they render him incapable of controlling his bodily movements: absolute compulsion (*vis absolu- ta*), sleep, unconsciousness, a fainting fit, an epileptic fit, serious intoxication, a black- out, reflex movements, strong emotional pressure, mental disease, hypnosis, a heart attack and certain other conditions.

The defence of automatism will not succeed if the defendant intentionally created the situation in which he acts involuntarily in order to harm another. This is known as an *actio libera in causa*. The defendant will be held liable for his culpable conduct in creating the state of automatism which resulted in damage to the plaintiff.

Moreover, the defendant may not successfully rely on the defence of automatism where he was negligent with regard to his automatic "conduct". This will be the case where the reasonable man would have foreseen the possibility of causing harm while in a state of automatism. Examples include drinking alcohol while knowing or reasonably foreseeing that one will later drive a motor vehicle, knowing that harm may be caused during a spell of sleepwalking and failing to take necessary precautions, knowing that one may suffer an epileptic fit and nevertheless driving a motor vehicle and sleeping next to a new-born baby where it is reason- ably foreseeable that the mother may roll on to the child in the course of the night while she is asleep and cause it to die of suffocation.

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In respect of "sane" automatism (ie, where the automatism is not a consequence of mental illness), the onus is on the plaintiff to prove that the defendant has acted voluntarily and, there- fore, not mechanically. However, if a defendant raises automatism resulting from mental illness as a defence, such a defendant will probably bear the onus to prove the absence of con- duct.

A final matter for consideration is the contention of Van der Merwe and Olivier that automatism does not actually exclude the conduct requirement in delict, but that it may exclude wrong- fullness or fault. The authors' view may be illustrated with the following example: X buys a knife which he keeps at his bedside when he retires at night. One night, X dreams that he is being attacked. While still half asleep, X grabs the knife and wounds Y (who sleeps on a bed next to him). According to Van der Merwe and Olivier, it is clear that the stabbing with the knife was not a voluntary act, but that there are indeed other (prior) voluntary acts on X's part which also caused Y's injuries. For example, the mere fact that X went to bed with the knife next to him, is, according to the authors, a voluntary act which caused Y's injuries and it would thus be incorrect to conclude that X did not in any way act voluntarily with regard to such injuries. This voluntary conduct by X was, however, not accompanied by fault and he will thus not be held delictually liable.

Although this view may possibly be correct in theory, it should nevertheless not be accepted, because it takes too narrow a view of automatism as a defence. Automatism does not mean that there is no voluntary act whatsoever by the defendant which caused the damage, but only that the conduct in question (for example, the injuring of Y with a knife in the abovementioned example) was not voluntary. Only the voluntary act closest to the harmful consequence is normally of relevance, and it is therefore unnecessary to consider prior voluntary acts. In the example under discussion, the act of the defendant in going to bed with the knife next to him was indeed voluntary, but the plaintiff should not rely on this, because he will in any event not be able to prove that it was a negligent act. However, if X knew or should reasonably have foreseen that he could cause damage with the knife in his sleep, he would, as explained earlier, not be able to rely on automatism, because his liability would be based on conduct prior to his automatic state.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

4 Commission(*commissio*) and omission(*omissio*)

As previously stated, conduct may be in the form of a commission or an omission. Although the difference between the two concepts should not be overemphasised, there are nevertheless some important distinctions which should be taken into account. One distinction of fundamental importance is that liability for an omission is in general more restricted than liability for a positive act (a commission). For policy considerations, the law is hesitant to find that there was a legal duty on someone to act positively and so to prevent damage to another. However, it is often difficult to draw a distinguishing line between conduct of a positive nature and conduct by way of an omission. Van der Walt and Midgley explain the position as follows:

> In general the legal nature of conduct is determined by the particular context in which it occurs. An 'omission' or failure to take certain measures in the course of some activity is therefore not necessarily a form of conduct, but may well indicate that the action was negligently performed. Inaction as a part or a stage of some positive activity can therefore constitute or indicate negligence on the part of the actor; negligence is by definition a failure to take reasonable precautions. Many 'omissions' are therefore merely indications of legally deficient positive conduct. To drive a car through a stop street into another car constitutes a course of positive conduct, namely the driving of a car. The failure to stop ('omission') indicates negligent or deficient positive conduct – *culpa in faciendo*. The mere fact that linguistic alter- natives enable us to describe the positive occurrence in a negative way (for example 'the driver failed or omitted to stop at the stop street') is legally irrelevant in the determination of the conduct.

In our opinion, this explanation is correct. It also implies that where (for example) X already has control over a dangerous object (such as a fire) and fails to take reasonable steps to prevent harm to others, it is more likely a case of negligent exercise of control (*commissio*) than of an omission.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

However, this must be distinguished from the case where a person fails to take precautions against the occurrence of damage and his failure is not an integral part of positive conduct. Examples include the owner of land failing to exercise any control whatsoever over a fire which has started on his land without his doing; a policeman neglecting to protect someone who is being assaulted by a third person;61 the police failing timeously to disarm a dangerous person who is (according to their information) in lawful possession of fire-arms and who then causes damage; the police failing to prevent a dangerous criminal from escaping and he subsequently rapes a woman; the police failing to take an injured person in a police cell for medical treatment and he subsequently sustains brain damage; the police and prosecutor failing to oppose the bail application of a dangerous criminal who seriously assaults a woman after his release, or a champion swimmer seeing a child drowning in a swimming pool and simply ignoring the incident. These cases constitute omissions in that there is a failure to take any positive steps whatsoever to prevent damage to other people. Whether the omissions in question are wrongful, ie whether there is a legal duty to act positively is, of course, a separate issue.

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Chapter 3

Wrongfulness

1 Introduction

An act which causes harm to another is in itself insufficient to give rise to delictual liability. For liability to follow, the act must be wrongful. Without wrongfulness, a defendant may not be held liable.

In essence, wrongfulness lies in the infringement of a legally protected interest (or an interest worthy of protection) in a legally reprehensible way. As point of departure, wrongfulness should be determined objectively ex post facto (diagnostically), in other words taking into account all the relevant facts and circumstances that were really present and all the consequences that really ensued.

The determination of wrongfulness in principle entails a dual investigation.6 In the first place, one must determine whether a legally recognised interest has been infringed, ie whether such interest has in fact been encroached upon. In other words, the act must have caused a harmful result.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

In the second place, if it is clear that a legally protected interest has been prejudiced, legal norms must be used to determine whether such prejudice occurred in a legally reprehensible manner. Violation of a legal norm must therefore be present; a harmful consequence in itself is insufficient to constitute wrongfulness. The question of whether the factual infringement of an interest occurred in a legally reprehensible manner constitutes the essence of the investigation into the element of wrongfulness. Whether an interest is worthy of protection, as well as whether its infringement is legally unacceptable, is determined by the legal convictions of the community or *boni mores* criterion.

2 Act and consequence

An act may be described as delictually wrongful only when it has as its consequence the infringement of a legally protected interest. Whether such a consequence is present, normally requires a concrete investigation of the relevant facts through an analysis of the available evidence. For example, it may have to be determined, depending on the circumstances, whether the plaintiff's car has been damaged, his dignity impaired, his goodwill infringed, his claim to delivery of a thing prejudiced or his earning capacity detrimentally affected.

Thus an act on its own, ie, without reference to a consequence of the nature described above, can never be held to be delictually wrongful. For example, if X races down Johannesburg's main street at 120 km/h in peak hour traffic, and nothing happens, his act will not be considered wrongful in delict. As a matter of fact, his conduct is irrelevant for the purposes of the law of delict because there is no infringement of an interest.

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In delict, the wrongfulness of an act is, therefore, always determined with reference to its consequence: if such a consequence is lacking, the act cannot be wrongful. An act and its consequence are always separated by time and space. The division or detachment of an act and its consequence may be negligible or significant. Where X slaps Y's face, the consequence (infringement of physical integrity or honour) follows immediately upon the act (the slap). On the other hand, the act of placing a limpet mine in a restaurant and the resultant damage to property or physical injury hours later when the device explodes, are separated to a greater extent. In both instances, the act is only wrongful in delict when harmful consequences ensue.

If one bears in mind that the act and its consequences are separate in time and space, and that an act may be labelled as lawful or unlawful only with reference to its consequences, then seemingly problematic cases such as Pinchin v Santam Insurance Co Ltd will create no difficulties. Briefly, the facts were the following: A pregnant woman was involved in a motor-car accident caused by the defendant's negligence. When the child was born, it was found to suffer from serious brain damage. Compensation was claimed from the defendant on the child's behalf. However, at the time of the defendant's act, the child was in *ventre matris*. As a result, the child had no juristic personality and, consequently, had no legally protected interests that could be infringed. The question was whether the defendant's act was wrongful in relation to the child.

Relying on the *nasciturus* fiction – that an unborn child is deemed born if doing so is in its interest – Hiemstra J held that the child had an action in principle, but that the action had to fail in casu because there was no proof that the brain injuries were caused by the accident.

As Joubert convincingly argues, it was unnecessary to rely on the *nasciturus* fiction to find that in principle this child would have had an action. Because the act and its consequences are separate both in time and space, the child need not have had legal capacity at the time of the act; or, to put it differently, it was not necessary that the act be classified as lawful or unlawful immediately after its completion.

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In casu, the defendant's act (at the time of the accident) resulted in a harmful consequence much later (when the child was born with injuries – we assume, for argument's sake, that a causal connection had been proved). The legal subject came into being at birth, and only then did the erstwhile act bring about a harmful consequence, ie, injury to the legal subject. Only when this harmful consequence takes place may the defendant's act, long since committed, be classified as wrongful. Therefore, if one keeps in mind that the act and its consequence are separate in time and space, it is unnecessary to employ the *nasciturus* fiction in order to grant a delictual action to a child who is born with defects resulting from pre- natal injuries.

In Road Accident Fund v Mtati, the Supreme Court of Appeal followed Joubert's approach. Farlam J pointed out that the *nasciturus* fiction does not offer a solution in certain instances (for example, when a mother is negligently infected with syphilis before she became pregnant, but the child is then born with the disease) and may in other situations lead to unfair results. The court stated clearly that wrongfulness and damage are separate delictual elements that must not be merged, and emphasised that recognition of a child's right to claim for antenatal injuries will, for several reasons, not open the floodgates of litigation, inter alia because the claim depends upon the live birth of the child.

3 The legal convictions of the community (*boni mores*) as the basic test for wrongfulness

The general norm or criterion to be employed in determining whether a particular infringement of interests is unlawful is the legal convictions of the community: the *boni mores*. In Lee v Minister for Correctional Services the Constitutional Court expressed it as follows:

> In [Minister van Polisie v] Ewels it was held that our law had reached the stage of development where an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the legal convictions of the community demand that the omission should be considered wrongful. This open-ended general criterion has since evolved into the general criterion for establishing wrongfulness in all cases, not only omission cases.

The *boni mores* test is an objective test based on the criterion of reasonableness. The basic question is whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in an unreasonable manner.

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3.1 The balancing of interests

Nature of balancing process The application of the *boni mores* criterion essentially entails the ex post facto balancing or weighing-up of, on the one hand, the interests which the defendant promoted by his act, and on the other, those which he infringed. The court must weigh the conflicting interests of the defendant and plaintiff, and the social consequences of imposing liability in similar instances, in light of all the relevant circumstances and in view of all pertinent factors in order to decide whether the infringement of the plaintiff's interests was reasonable or unreasonable.

Factors Various factors may play a role in the process of determining the reasonableness or unreasonableness of the defendant's conduct: these include the nature and extent of the harm; whether the harm was (subjectively) foreseen or (reasonably) foreseeable; the possible value to the defendant or to society of the harmful conduct; the costs and effort of steps which could have been taken to prevent the loss; the degree of probability of the success of preventative measures; the nature of the relationship between the parties; whether the costs of preventing the harm would have been proportional to the harm that the plaintiff could suffer; the motive of the defendant; economic considerations; the legal position in other countries; ethical and moral issues; as well as other considerations of public interest or public policy, including the values and norms underpinning the Constitution, 1996 and the Bill of Rights.

Influence of the Constitution and the Bill of Rights The Constitution and the Bill of Rights influence the *boni mores* criterion, since, as discussed above, the Constitution applies both vertically and horizontally and both directly and indirectly to all law – including the *boni mores* criterion for wrongfulness. This means that the legal convictions of the community must now incorporate the constitutional values and norms and give effect to them. The courts therefore have a duty to develop the *boni mores* as part of the common law in accordance with the spirit, purport and objects of the Bill of Rights; in brief, to develop the boni mores of our constitutional community. Wrongfulness must therefore be interpreted more widely to give better protection to the values underpinning the Bill of Rights. This approach is already followed in case law and in future the values underpinning the Bill of Rights, ie the values underlying an open and democratic society based on human dignity, equality and freedom, must take precedence over existing mores.

Over the course of time, the value system incorporated into the Constitution will enrich, extend and even replace existing wrongfulness norms. The Constitution can nevertheless not be regarded as the exclusive embodiment of the legal convictions of the community. The Constitution's influence on the law of delict is still relatively new; hence the existing principles in respect of the *boni mores* criterion should play a part during this process of development. Existing *boni mores* principles should, for the sake of legal certainty, be prima facie indicators of whether conduct is reasonable or not in light of the Bill of Rights.

Conclusion The *boni mores* or general reasonableness criterion is, therefore, a juridical yard- stick that gives expression to the prevailing convictions of the community regarding right and wrong. It is a criterion which enables the court continuously to adapt the law to reflect the changing values and needs of the community.

3.2 A delictual criterion

In applying the *boni mores* criterion in the law of delict, we are not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful.46 Nevertheless, conduct, which was initially regarded as morally (but not legally) reprehensible, may, over the course of time, also be censured by the law of delict.

Because the law of delict is only concerned with the legal permissibility of infringements of individual interests, the application of the boni mores test in the law of delict is not determined by the question of whether the particular act should be considered wrongful for the purposes of, eg, criminal law (where the public interest is paramount).

3.3 An objective criterion

The role of the adjudicator In Schultz v Butt, Nicholas AJA accepted the viewpoint of Van der Merwe and Olivier that the "legal convictions of the community" must be seen as the legal convictions of the legal policy makers of the community, such as the legislature and judges. In his role as interpreter of the legal convictions of the community, a judge neverthe- less does not elevate his personal viewpoint regarding right and wrong to the sole measure of wrongfulness. A judge who does that, impermissibly makes the law whilst his main task is to apply the law. The idiosyncratic views of an individual judge may furthermore be a conduit for legal uncertainty, and this should be avoided as far as possible.

As stated, the *boni mores* criterion is an objective criterion. The task of the judge is, therefore, to define and interpret the legal convictions of the community in a particular instance, having regard to legal policy, legal rules and court decisions in which the convictions of the community have found expression in the past, supplemented by the evidence before him and all the information he has gathered, and subsequently to apply this interpretation to the problem concerned, taking into consideration the particular circumstances of the case.

Subjective factors normally irrelevant The objective nature of the *boni mores* test appears from the fact that subjective factors, such as the defendant's mental disposition, knowledge and motive, normally do not play a role in determining wrongfulness. The determination of wrongfulness entails an objective, ex post facto weighing-up of interests in order to determine whether the defendant acted reasonably or not in the particular circumstances, and subjective considerations are normally irrelevant in this weighing-up process. A defendant who, eg, violently resists lawful arrest because he incorrectly believes the arrest to be unlawful, acts wrong- fully despite his honest, subjective conviction that the arrest is invalid. Objectively considered, the defendant acted unreasonably in resisting lawful arrest. His honest mistake does not make his conduct lawful and, as indicated later, may at most influence the question of whether he was at fault or not.

The relevance of subjective factors However, in certain cases, subjective factors do play a part in the determination of wrongfulness. For example, improper motive ("malice") may play an important role in this regard. Two examples will suffice. In the area of neighbour law the improper motive of a defendant who, for example, plants deciduous trees along the boundary of his property for the sole purpose of injuring his neighbour by causing leaves to fall onto his nearby threshing-floor, will render his apparently reasonable conduct wrongful.61 Motive also plays an important part in determining the reasonableness and, consequently, the lawfulness of conduct between competitors.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

Furthermore, the fact that the defendant actually knew or subjectively foresaw that the plaintiff would suffer damage as a result of his conduct is taken into consideration in determining wrong- fulness in cases of, for example, the causing of so-called pure economic loss and omissions. Also, the fact that a person directed his will at causing a harmful result may be relevant in finding that he had acted wrongfully.

3.4 Practical application of the *boni mores* criterion

Although the legal convictions or *boni mores* of the community constitute the basic norm for wrongfulness in our law, it is seldom necessary to make direct use of this general and comparatively vague test to determine wrongfulness.

Infringement of interests as indication of wrongfulness In general, if a factual infringement has taken place, this can already be an indication of, or pointer to, the wrongfulness (legal inadmissibility) of the conduct: in other words, it can constitute prima facie wrongfulness, or create a presumption of wrongfulness. This pertains to positive conduct (commission) impacting upon the physical person (bodily integrity), property and freedom of the body, but may also be relevant in respect of, eg, direct infringements of the goodwill of an undertaking.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14.

In other words, from the mere fact that a detrimental consequence has been caused, ie, without using the *boni mores* test, it may provisionally be deduced that the defendant acted *contra bonos mores* and therefore wrongfully. It may be assumed at the outset that, ac- cording to the legal convictions of the community, the actual infringement of interests is prima facie wrongful in the mentioned instances.

As will become apparent, not all factual infringements of interests are prima facie wrongful. Infringements by way of omission, pure economic loss, non-physical personality infringements (such as defamation, infringement of dignity and infringement of privacy) and indirect infringements of the goodwill of an undertaking are examples of factual infringements that do not constitute prima facie wrongfulness. In these instances, prima facie wrongfulness must be determined with reference to the *boni mores* wrongfulness criterion (sometimes embodied in the reasonable person).

An infringement that is prima facie wrongful is not necessarily conclusively wrongful. A further investigation is necessary. It may be that, on closer examination, the apparent wrongfulness is actually not present, because the causing of damage is legally excused or justified in the particular circumstances. After all, the legal convictions of the community do not condemn all actual infringements of another's interests. Certain legal norms permit a person to cause damage: in other words, damage may be caused in a lawful manner. For example, a person is permitted by law to infringe individual interests inter alia where he injures an attacker in self-defence, where he damages an innocent person's interests out of necessity in order to protect more compelling interests, or where he causes harm to a person who consented thereto. Such examples of lawful infringement of interests are known as grounds of justification and are discussed in detail below.

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Consequently, the factual infringement of an interest is provisionally characterised as wrongful until closer investigation reveals that a ground of justification exists, in which case the conduct causing harm will be deemed to be lawful.

Existing legal norms and doctrines In addition, the general *boni mores* test is seldom applied directly to establish wrongfulness because more precise methods have been developed to deter- mine the legal convictions of the community. In other words, the determination of wrongfulness – the investigation into the legal convictions of the community – finds practical application or expression in specific legal norms and doctrines, with the result that it is necessary to investigate the legal convictions of the community directly only in exceptional cases. Two examples of the practical application of the *boni mores* yardstick which have developed into the generally accepted basic tests for wrongfulness, are that wrongfulness lies in the ***infringement of a subjective right*** or the ***non-compliance with a legal duty to act***.

These two approaches are merely practical applications of the general criterion of reasonable- ness, ie they are juridical methods or procedures whereby one determines whether an infringement of interests is in conflict with the legal convictions of the community and therefore wrongful. In other words, deciding whether a subjective right has been infringed or a legal duty has not been complied with, provides a more accurate solution to the basic question of wrongfulness, ie whether the defendant acted in conflict with the legal convictions of the community, than the often vague general investigation into the legal convictions of the community. In short: conduct is in conflict with the legal convictions of the community – wrongful – if it infringes a subjective right or violates a legal duty.

The *boni mores* as supplementary criterion from the above it is clear that the general *boni mores* or reasonableness criterion must not be regarded as the sole criterion for the determination of wrongfulness. Although this criterion provides the basic test for wrongfulness and as such is applied in each and every case, in itself it functions at most at a supplementary level, because the convictions of the community concerning what conduct should be regarded as reasonable or unreasonable for the purposes of the law of delict have, over time, found expression in many common law and statutory norms, grounds of justification and certain theoretical legal methods whereby wrongfulness may be established. Consequently, it is seldom necessary to apply the general *boni mores* test directly.

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There are two main ways in which the general *boni mores* or reasonableness criterion is applied as a supplementary test for wrongfulness – firstly, in novel cases where there is no clear legal norm or ground of justification involved; and secondly for the purposes of refinement, especially in assessing wrongfulness in borderline cases:

(a) Firstly, the boni mores test is applied as a test for wrongfulness in cases where either the wrongfulness of the defendant's conduct does not appear from the violation of an existing delictual norm, or the lawfulness thereof does not appear from the presence of a recognised ground of justification.

For example, in order to establish whether a champion swimmer who failed to rescue a helpless child from drowning, acted wrongfully, one must establish, in the absence of clear legal norms founding liability for this particular type of omission, whether a legal duty to rescue rested upon the swimmer; in other words, whether in the light of all relevant circumstances the swim- mer's omission constitutes conduct which the community regards as wrongful for the purposes of the law of delict. Rumpff CJ stated this idea very clearly in Minister van Polisie v Ewels:

> The stage of development appears to have been reached where an omission is seen as wrongful conduct when the circumstances of the case are such that the omission does not only elicit moral indignation, but the legal convictions of the community also require the omission to be regarded as wrongful, and the resulting harm to be compensated by the person who omitted to act in a positive manner.

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The *boni mores* criterion (as represented by the convictions or feelings of the reasonable per- son) as a supplementary test for wrongfulness likewise finds application where the wrongful- ness of certain personality infringements has to be determined (eg, whether certain words were defamatory or whether certain conduct infringed the plaintiff's right to dignity). Thus a defendant may show eg that his infringement of a sensitive plaintiff's dignity by using an offensive word in his presence (irrespective of the moral reprehensibility of the conduct), was not wrongful because, judged objectively according to the *boni mores* (reasonable person) criterion, his conduct in the particular circumstances could not be seen to be unreasonable for the purposes of delictual liability. The defendant clearly infringes the plaintiff's dignity (in accordance with the first part of the test for wrongfulness set out earlier), but his conduct does not amount to the violation of a norm, because, in accordance with the community's convictions, the norms of the law of delict do not regard the use of that particular word as unreasonable.

A further example of the *boni mores* as independent wrongfulness test is *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*. In this case, the plaintiff claimed damages from the defendant because one of the defendant's organs had wrongly prohibited the publication of two of the plaintiff's advertisements. On exception, the question of whether such a negligent decision, leading to pure economic loss, could be wrongful in a delictual sense was raised. Harms JA expressed the opinion that wrongfulness was not to be deter- mined according to the legal-duty approach in that case. According to him, there was no doubt that the defendant had had a duty towards the plaintiff to act without negligence and in a manner that was fair, justifiable and reasonable when deciding whether publication of the two advertisements had to be prohibited or not. This did not necessarily mean that the defendant had acted wrongfully. According to Harms JA, "[p]ublic or legal policy considerations require that there should be no liability, ie, that the potential defendant should be afforded immunity against a damages claim, even from third parties affected by the judgment." In light of this conclusion, Harms JA found that the defendant had not acted wrongfully by (incorrectly) prohibiting publication of the advertisements, and the claim was dismissed. A wrong decision that was negligently taken during a judicial process aimed at serving the public interest could according to Harms JA not be viewed as wrongful.

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Although the result of this judgment deserves support, the absence of wrongfulness may be explained in two ways. On the one hand, this can be done (as in the judgment of Harms JA) by circumventing the legal-duty approach and relying on the *boni mores* as independent wrongful- ness criterion: although the defendant's conduct certainly elicits moral indignation, to paraphrase the well-known dictum of Rumpff CJ in *Minister van Polisie v Ewels*, the legal convictions of the community do not require the conduct to be regarded as wrongful and the harm to be compensated, in view of clear considerations of public policy militating against this. On the other hand, the absence of wrongfulness can be explained within the context of the legal-duty approach: the apparent breach of a legal duty can be seen as reasonable and thus lawful, precisely because the legal convictions of the community regard the conduct as lawful in view of public policy considerations. By implication this conclusion may even be reached from Telematrix, where the court declared that "there is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not to err negligently"; this does not, however, mean that "a judicial officer who fails in the duty, because of negligence, acted wrongfully" because "[p]ublic or legal policy considerations require that there should be no liability". Viewed in this way, prima facie breach of a legal duty is really lawful from the outset due to considerations of public policy.

(b) Secondly, recourse to the general reasonableness test becomes imperative for the purposes of refinement, especially in assessing wrongfulness in borderline cases, eg in determining whether a defendant transgressed the limits of self-defence by his conduct, whether consent to a particular violation of legally recognised interests (such as consent to serious bodily injury) should be tolerated by the law or not, or whether or not particular conduct complies with the requirements of necessity.

The facts in *S v Goliath* aptly illustrate the last-mentioned example. X, under compulsion from Y and fearing for his own life, helped Y to kill Z. The court had to decide whether X's defence of necessity could be upheld. (In cases of necessity, the defendant infringes the interests of an innocent third party in order to protect his own interests.) Thus the decision entailed weighing the life of the person threatened against the life of the deceased. In view of the fact that it was uncertain whether this particular instance complied with one of the requirements of necessity, namely that the interest infringed should in general not be greater (or more valuable) than the interest protected, recourse was had to the general test of reasonableness. The Appellate Division recognised, at least as far as criminal law is concerned, the community's conviction that the ordinary human being in general does not consider the life of another person to be more important than his own. By applying the general reasonableness criterion, the conclusion was reached that the requirements for necessity had in this instance been satisfied.

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4 Wrongfulness as infringement of a right

4.1 The doctrine of subjective rights

In *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*, the court accepted the doc- trine of subjective rights. The fundamental premise of this doctrine is that wrongfulness consists of the infringement of a subjective right.

All people (legal subjects) are holders of subjective rights. The holder of a subjective right has a right to something enforceable against other people. This indicates the dual relationship that characterises every right: firstly, there is a relationship between the holder of the right (legal subject) and the particular object of the right (legal object); secondly, there is a relationship between the holder of the right (legal subject) and all other persons (legal subjects). The first relationship is known as the subject-object relationship and the latter as the subject-subject relationship. For example, a legal subject has a right to his car (legal object) – the subject- object relationship – enforceable against other persons (legal subjects) – the subject-subject relationship.

The subject-object relationship provides the holder of a right with the power to use, enjoy and alienate the object of his right; in other words, the holding of a right confers powers of enjoyment, use and disposal in respect of a legal object.98 The content and extent of these powers are determined and regulated by the rules and norms of the law. In other words, the law determines how a person may use, enjoy and alienate his legal objects. The limits or boundaries of a per- son's rights are therefore determined by the law.99

The second (subject-subject) relationship implies that the holder of a right can uphold his powers over a legal object against all other legal subjects and, as a corollary, that a duty rests on all other legal subjects not to infringe the relationship between the holder of a right and the object of his right. Thus every right has a correlative duty: if I have a right to a thing, other persons have a duty not to infringe my right.

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4.2 The nature of a subjective right

The nature of a subjective right is largely determined by the nature of the object of the particular right. Thus rights are categorised and named with reference to the different types of legal objects to which the rights relate.

Five classes or categories of rights are distinguished on this basis, ie real rights; personality rights; personal rights; immaterial property rights, and personal immaterial property rights. The objects of these rights are respectively things (tangible objects such as a farm, a car, a pen, a flock of sheep, compressed air in a cylinder); aspects of personality (aspects of human personality such as good name, physical integrity, honour, privacy and identity); acts and performances (human acts or conduct which may juridically be claimed from another, such as delivery by the seller of the thing sold, payment of the amount owing by the debtor, rendering of services by an employee); immaterial property (intangible products of the human mind, intellect and activity which are expressed in one or other outwardly perceptible form, such as an invention, a poem or a work of art); and personal immaterial property (intangible products of the human mind or endeavour which are connected with the personality, such as earning capacity and creditworthiness).

4.3 Further development of the doctrine of subjective rights

Nothing prevents the further development or evolution of the doctrine of subjective rights. The existing subjective rights are not restricted in number, as clearly appears from the fairly recent acknowledgement of "new" personality rights, namely the rights to privacy and to identity105 and of the immaterial property rights to goodwill and to trade secrets.106 In addition, even new categories of rights may be recognised, such as personal immaterial property rights, which were identified and described relatively recently.

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4.4 Origin of subjective rights

Subjective rights arise when the law recognises existing individual interests as being worthy of protection.108 Thus a person's ever-increasing need to be guarded from the public eye – his individual interest in privacy – has over time been recognised by positive law as a legal object requiring legal protection and is now, unlike in the past, explicitly protected by the courts.

However, before the law will accord recognition to an individual interest as a legal object in terms of the doctrine of subjective rights, two conditions must be met: firstly, it must be of value – that is relatively scarce – to the holder of the right; and secondly, it must have such a measure of independence that it is possible to dispose of it and to enjoy it. Once an interest complies with these requirements and is regarded by the law as worthy of protection, it changes from a mere individual interest of which the law does not take notice, into a legally recognised and protected object of a subjective right. The dual relationship, which, as mentioned above, characterises a subjective right, will then come into being.

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4.5 Infringement of a subjective right :requirements

As indicated, the fundamental premise of the doctrine of subjective rights is that the infringement of such a right is wrongful. A dual investigation is necessary to determine whether a right has been infringed. Firstly, one must determine whether the holder of a right was disturbed in the use and enjoyment of his right; ie whether the subject-object relationship has in fact been disturbed. If so, one must establish secondly whether the infringement complained of took place in a legally reprehensible way (in violation of a norm). If this is established, the conduct is wrongful. A subjective right is therefore infringed when the relationship between the holder of a right and the object of the right has been infringed in a legally reprehensible manner.

(a) The first requirement for the infringement of a subjective right (ie violation of the relation- ship between a legal subject and his legal object) is normally present when the defendant in fact violates a legal subject's powers of use, enjoyment and disposal in respect of the object of his right. Such a violation of the subject-object relationship occurs mostly by means of an action impacting directly on the legal object itself: the defendant, eg, crashes into a car belonging to the plaintiff with his own vehicle, or infringes the plaintiff's physical integrity by slapping his face, or injures the plaintiff's dignity by addressing humiliating words to him, or violates the plain- tiff's right to privacy by peeping at him in his bathroom.

However, the violation of the subject-object relationship may also take place in an indirect manner where the defendant, without directly interfering with the object of a right, affects the plaintiff's powers of use and enjoyment of this object: eg, the defendant hides the plaintiff's car keys, with the result that he is unable to use his car, or damages an electrical cable which sup- plies power to the plaintiff's factory, with the result that production is suspended. Whether the subject-object relationship has in fact been violated is determined by means of evidence.

(b) Secondly, as stated above, the mere fact that the subject-object relationship has been violated does not in itself mean that the defendant's conduct was wrongful (in other words, that the right of the plaintiff has been infringed). Although actual violation is a prerequisite for wrongfulness, a right is only infringed when, in addition, the violation of a norm occurs; ie, when the actual interference takes place in a legally impermissible manner. The norm or standard used to determine whether an actual violation of the subject-object relationship is legally impermissible or not remains the general reasonableness criterion, which is established with reference to the legal convictions of the community, ie the boni mores.

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As indicated earlier, application of the *boni mores* criterion essentially entails the weighing of interests in the light of surrounding circumstances. But, as we have also explained, it is seldom necessary to apply the general reasonableness or boni mores test directly. In most cases, proof of an actual infringement of the subject-object relationship is already an indication of wrongfulness. Thereafter, the defendant normally endeavours to show that a ground of justification – such as necessity or consent – applies to his conduct and that in the circumstances his apparently unreasonable conduct is justified by law. If his defence succeeds, he will not be held to have acted in conflict with the law (wrongfully).

5 Wrongfulness as breach of a legal duty

5.1 General

Wrongfulness need not necessarily be determined with reference to the infringement of a subjective right. As indicated, the doctrine of subjective rights merely provides one of several juridical methods for determining whether an actual violation of interests is in conflict with the legal convictions of the community and therefore wrongful. Problems relating to wrongfulness may arise which cannot readily be solved by asking whether a subjective right has been infringed, eg because, as often occurs with misrepresentation, no clearly defined right exists in the particular circumstances.

However, even where a subjective right is identifiable, there are circumstances in which it is more appropriate to determine wrongfulness by asking whether a legal duty has been breached than by asking whether a subjective right has been infringed. Accordingly, in cases of liability for an omission or for causing pure economic loss (with the exception of the infringement of the right to goodwill in the case of unlawful competition) wrongfulness is normally deter- mined not by asking whether the plaintiff's subjective right has been infringed, but rather by asking whether, according to the *boni mores* or reasonableness criterion, the defendant had a legal duty to prevent harm, in other words whether the defendant could reasonably (according to the *boni mores*) have been expected to act positively.

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In Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae) Vivier ADP stated this clearly in respect of omissions:

> The appropriate test for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.

The reason why the existence of a legal duty is sought is probably because, contrary to the rule, the impairment of the legal object is not prima facie wrongful in these cases, but rather prima facie lawful, because, according to the *boni mores* criterion, there is neither a general duty to prevent loss to others by positive conduct, nor a general duty to prevent pure economic loss. The imposition of such duties would probably place too heavy a burden on individuals in the community. Therefore, one must determine in each case whether there is a legal duty to act positively or a duty to avoid pure economic loss. In these cases, it is consequently more appropriate to make use of breach of a legal duty rather than infringement of a subjective right, to establish and express wrongfulness.

If it is found that the defendant indeed had a legal duty, a breach of that duty is, in the absence of a ground of justification, unreasonable, *contra bonos mores* and thus wrongful. The determination of wrongfulness by the use of breach of a legal duty does not entail a new test. Given that in many instances, a legal duty merely constitutes the converse of a subjective right, the test for wrongfulness where breach of a legal duty is involved is in principle clearly the same as the question of whether a subjective right has been infringed.

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The question of whether a legal duty has been breached is also determined with reference to the *boni mores* or general legal convictions of the community.

In this context, it is important to note that several judgments describe the legal duty employed to establish wrongfulness as "a legal duty not to act negligently", or use similar formulations apparently conveying the same idea.135 This creates the impression that the legal duty deals with the question of whether the defendant acted negligently; ie, whether his conduct differed from that of the reasonable person in the circumstances. This approach can lead to the wrongfulness inquiry usurping the negligence test.137 In turn, this can lead to the essence of the wrongfulness inquiry, ie whether a legal duty existed according to the *boni mores* to act positively to prevent an infringement of a legally protected interest, being negated. This formulation furthermore mirrors the classic duty-of-care approach of English law "which straddles both elements of wrongfulness and negligence" and which was expressly rejected by the Supreme Court of Appeal. In view of this, it is unfortunate that the Supreme Court of Appeal continues to formulate the legal duty as a legal duty not to act negligently.

In what follows, only liability for an omission and the breach of a statutory duty receive attention. The position concerning liability for pure economic loss (including misrepresentation) will be discussed at a later stage.

5.2 Liability for an omission

As a general rule, a person does not act wrongfully for the purposes of the law of delict if he omits to prevent harm to another person. Thus, the point of departure is that a person is generally not liable where his omission or omissio – his failure to act positively to prevent loss – factually infringes the interests of another. Omissions are therefore prima facie lawful. Liability follows only if the omission was in fact wrongful, and this will be the case only if (in the particular circumstances) a legal duty rested on the defendant to act positively to prevent harm from occurring and he failed to comply with that duty. The question of whether such a duty existed is answered with reference to the flexible criterion148 of the legal convictions of the community and legal policy.

The test to determine whether the omission was in conflict with the convictions of the community is purely objective, in the sense that all the relevant circumstances of a particular case must be taken into consideration. Consequently, all factors, which, according to the convictions of the community, may be indicative of a legal duty to act positively, must be considered. Although it is not possible to provide a complete list of the factors which may play a part in this respect (there is no *numerus clausus* of such factors), certain factors have come to the fore over a long period of time which may indicate the existence of a legal duty to act positively to prevent harm. In the era of the new constitutional dispensation, these factors must furthermore be applied in light of the "spirit, purport and objects of the Bill of Rights".

5.2.1 Prior conduct (the *omissio per commissionem* rule)

A person acts prima facie wrongfully when he creates a new source of danger by means of positive conduct (*commissio*) and subsequently fails to eliminate that danger (*omissio*), with the result that harm is caused to another person. Prior conduct in the form of a positive act that creates a danger of harm may, in other words, be a strong indication that a legal duty rested upon the defendant to take steps to prevent the damage from materialising. Prior conduct is, however, not a necessary prerequisite for the existence of such a legal duty; other factors may also point to the existence of a legal duty to act positively.

However, the view that "prior conduct" is an indispensable requirement for liability for omissions prevailed in our law for a long time. This viewpoint was introduced by the Appellate Division in *Halliwell v Johannesburg Municipal Council* in 1912, and was followed for decades, especially in the so-called municipality cases where it was often applied in an unsatisfactory manner. However, in 1957, the "prior conduct" requirement was rejected by Steyn JA in a minority decision in Silva's *Fishing Corporation (Pty) Ltd v Maweza* in favour of the preferred view that "prior conduct" was but one of several considerations which might indicate the existence of a legal duty. This more flexible approach was later accepted by the Appellate Division in *Regal v African Superslate (Pty) Ltd*, confirmed in Minister of Forestry v Quath- lamba (Pty) Ltd and eventually expressed by Rumpff CJ in *Minister van Polisie v Ewels* as follows:

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> Certain prior conduct or control of a dangerous object may be a factor in the total matrix of circumstances of a particular case from which a conclusion of wrongfulness may be drawn, but it is not an essential pre- requisite for wrongfulness. The stage of development appears to have been reached where an omission is seen as wrongful conduct when the circumstances of the case are such that the omission does not only elicit moral indignation, but the legal convictions of the community also require the omission to be regarded as wrongful, and the resulting harm to be compensated by the person who omitted to act in a positive manner.

In this judgment, the generally accepted view that wrongfulness is in principle determined by the legal convictions of the community has now been applied to omissions. Different factors (inter alia, prior positive conduct) may contribute to influencing the conviction of the community that there was a legal duty on the defendant to act positively to prevent harm in a particular situation. The defendant acts wrongfully if he fails to perform this duty and loss in fact results.

The emphasis placed on the general reasonableness test does not mean that there is now uncertainty about when liability for an omission will arise. Where a factor such as prior conduct is present, it will normally indicate the existence of a legal duty so clearly that direct application of the general reasonableness test will not even be necessary. Nevertheless, exceptional circumstances could possibly occur where, despite the presence of prior conduct, there is no legal duty.

Any doubt about the applicability of the decision of the Appellate Division in the Ewels case (that prior conduct is not indispensable for the existence of a legal duty) to the "municipality cases", was removed by the Supreme Court of Appeal in *Cape Town Municipality v Bakkerud*. The court held that the legal convictions of the community can even in the absence of "prior conduct" (or a statutory duty) place a legal duty on a municipality to, for instance, repair roads or sidewalks or to warn against danger. Whether this is the case, depends on the circumstances and must be determined ad hoc.

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5.2.2 Control of a dangerous object

Control over a dangerous (or potentially dangerous) object (eg, fire, long grass alongside a road exposing the bordering property to a fire hazard, a broken stairway or a hole in the ground) or person (eg a dangerous criminal) can be a factor in determining whether a legal duty rested on the person in control, to prevent someone from being injured by the particular situation.

Two relevant questions are: firstly, whether there was actual control and, secondly, whether, in light of inter alia such control, a legal duty rested on the defendant to take steps to prevent damage resulting from his or her omission to exercise proper control.

(a) Whether control was present can be deduced from the fact that the defendant had actually taken control over the (potentially) dangerous situation (such as fire), or that the defendant was the owner of the (potentially) dangerous object (for example, property with grass or trees that could help spread fire or of a dangerous staircase), or that a shop owner had factual control over a shop where customers could slip on slippery floors, or that teachers had control over young children sleeping on bunk beds in a bungalow with a cement floor, or from statutory provisions placing control on the defendant.

(b) The fact that the defendant had control of a (potentially) dangerous object is in itself not necessarily sufficient to establish a duty to take precautionary measures, but may be a factor in determining such a duty. It is inappropriate to lay down in advance the degree and measure of control necessary to establish a legal duty. The facts and circumstances of a particular situation will be decisive in determining whether the defendant should have exercised control, ie, should have taken steps to prevent damage.

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It has been held that the occupier of property or a building where (potentially) dangerous conditions exist has a legal duty to prevent injury to persons, even trespassers, who visit the premises. A legal duty may also rest on the owner, occupier or controller of property to control the fire on such property. The same applies to a person in possession of a firearm or dangerous animal, or the police in control of a dangerous prisoner, or a teacher in control of a dangerous learner.

If a legal duty exists, injury resulting from the omission to control the dangerous situation is prima facie wrongful. To avoid liability, it has to be clear either that the defendant's apparent wrongful omission was lawful (eg, as a result of the presence of a ground of justification), or that he had taken reasonable steps to prevent injury (in other words, that he had not acted negligently).

It is sometimes difficult to determine whether prior conduct or control over a dangerous object is present in a particular situation.190 However, it is not essential to make the distinction, because a legal duty can be inferred from either of the two situations.

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5.2.3 Knowledge and foresight of possible harm

The fact that a person had knowledge or foresight that his omission might cause harm, is indicative of the unreasonableness and therefore wrongfulness of his conduct. Where a person was aware of a dangerous situation (for example, a fire or a dangerous hole on his land), this may be a factor in determining whether he had to exercise control over the danger and, consequently, whether a legal duty rested on him to take steps to avert loss. A few examples from case law will suffice: a municipality was conscious of the fact that a storm water pipe could be blocked by debris and that the overflow could damage the plaintiff's property; a municipality knew that a traffic light had not been functioning properly but omitted to repair it, leading to damage arising from an accident that took place at the relevant crossing; a municipality was aware of the rampant theft of inspection covers in a case where the plaintiff, while jogging, fell into an uncovered valve chamber situated on a pavement; and the police knew of a dangerous situation ("taxi war") which threatened the lives of passengers.

In this regard, the minority decision in *Langley Fox Building Partnership (Pty) Ltd v De Valence* deserves mention. A (a builder) was working on a building in central Johannesburg. A obtained the services of a subcontractor, (B), to attach a ceiling to a part of the building over- hanging a public pavement. The plaintiff bumped her head against a beam and suffered serious injuries. B was responsible for erecting the beam and he failed to put up warning boards to alert pedestrians to the danger. The Appellate Division found that A, as mandator, had a duty to ward off the danger because a reasonable person in his position would have taken appropriate steps. A was consequently held liable. In a minority judgment, Botha JA disagreed. In his view, the cardinal question was whether A had been aware of the dangerous situation. Only then would a legal duty have rested on A to prevent the danger (in a reasonable manner). In *casu* A had not been aware of the danger, accordingly a legal duty to act was absent. This approach can be supported because it was first established whether a legal duty to act at all rested on A (the question of wrongfulness), whereafter the question of his negligence (the reasonable person test) was raised.

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5.2.4 Rules of law

In certain instances, the law (either common law or statute) places an obligation upon a person to perform certain acts. For example, common law obliges the owner of lower land to provide lateral support for his neighbour's land, and owners of neighbouring land in local communities who light controlled fires on their property are obliged to obey certain statutory precepts. If the neighbour suffers damage as a result of their failure to perform this duty, their conduct is prima facie wrongful.

A statutory provision can by implication itself grant a delictual action, or it can justify a conclusion that a common law legal duty exists. Interpretation of statutes plays a central part here. The statute as a whole, its objectives and provisions, the circumstances under which it came into existence, and the kind of injustice it is meant to prevent, must be considered. A flexible approach is followed. The question of whether it is equitable and reasonable to award the plainitff a claim for damages or not in view of the non-compliance with a legal provision must still be asked. The conduct will be wrongful, not due to the non-compliance with the statutory legal duty per se, but rather because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his right. Reasonableness is determined with reference to the legal convictions of the community and legal policy.

Taking statutory provisions into account is of particular significance when it must be determined whether governmental bodies and state institutions are under legal duties to prevent damage. If, for instance, a local ordinance compels a divisional council to maintain roads, and the divisional council fails to do this and someone suffers damage as a result of this omission, the non-compliance with the statutory provision will be indicative of the wrongfulness of the omission.

A statutory provision on its own is not necessarily sufficient to ensure the existence of a legal duty, and is usually considered in interaction with other factors to determine the wrongfulness or otherwise of an omission in a given case. Thus, the courts have inter alia taken account of provisions of the former Police Act, the South African Police Service Act, the former Weapons and Ammunition Act (now the Firearms Control Act), the Regulation of Gatherings Act, the Domestic Violence Act, constitutional provisions and other legal provisions as factors in inquiries whether a legal duty rested on the police (or other state institutions, such as state tender boards) to prevent members of public from suffering damage, in other words, the question of whether delictual wrongfulness was present or not.

5.2.5 A special relationship between the parties

In certain instances, the existence of a special relationship between the parties may be an indication that the one party had a legal duty towards the other to prevent harm. The existence of a contractual relationship may indicate such a legal duty. Other examples are the relationship between a policeman and a citizen, an officer of the law or a warden and a prisoner, an employer and an employee, a parent and a child, a doctor and a patient and a municipality and a member of the public. However, a special relationship is not an indispensable requirement for the existence of a legal duty.

There is some doubt whether such a relationship is in itself sufficient to give rise to a legal duty. It is not clear in what circumstances a particular relationship between parties will in fact give rise to a legal duty. A legal duty should, eg, rest upon the owner of a dynamite factory towards his employees who are injured by an explosion, and upon the transport services towards passengers who are injured in a train accident. However, in these examples, the legal duty does not arise merely from the special relationship between the parties concerned, but also from the particular circumstances present (such as the potential seriousness of the damage that may occur). Therefore, to determine whether a legal duty to prevent damage exists, each case must be measured against the *boni mores* criterion in the light of all the circumstances, including the special relationship between the parties.

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5.2.6 A particular office

Sometimes the person's occupation or the office he holds places a legal duty upon him to con- duct himself in a particular manner in relation to the public or certain people. In *Macadamia Finance Ltd v De Wet*, the defendants, who were liquidators, inter alia failed to insure the assets of the first plaintiff, a company under their control. The court stated that "the office held by a person sometimes places a legal duty upon him to act in a certain manner towards the public or specific persons". Such a duty existed in *casu* and the defendants' breach of that duty rendered them liable for the first plaintiff's resultant loss.

5.2.7 Contractual undertaking for the safety of a third party

Where A enters into a contract with B in which A undertakes to take steps to ensure the safety of C, A is placed under a legal duty towards C. If A then fails to take those steps and C suffers damage as a consequence, the legal duty is violated and A acts wrongfully in relation to C. This explains why an appointed life-saver has a legal duty to rescue swimmers at a swimming pool or a beach. Related situations, but where no contractual undertaking existed as to the safety of third parties (clients of a business who may be injured on a slippery floor and the owner of trucks parked on a secured construction site) can be found in *Chartaprops 16 (Pty) Ltd v Silberman* and Viv's *Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a PhaPhama Security* respectively. In the first case, a contractual relationship existed between cleaning services and a retail business, and in the second case between a security firm and a construction company.

The crucial question in both cases was whether, notwithstanding the existence of exclusion of liability clauses as against third parties in the contracts, there was nevertheless a legal duty on the cleaning and security services to protect the interests of the shoppers and the truck owner. In Chartaprops the court answered this question in the affirmative. This view was also supported in *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* where Van Zyl J stated that the "community's sense of justice, equity and reasonableness will undoubtedly be offended by strictures placed on delictual liability towards third persons, simply because the contract limits the contractual liability of the parties inter se". In contradistinction, the court in Viv's Tippers held, incorrectly in our view, that there was no legal duty on the security firm to prevent the theft of the plaintiff's truck, mainly because of the exclusion of liability towards third parties, and also because the imposition of such a duty would lead to limitless liability.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14.

5.2.8 Creation of the impression that the interests of a third party will be protected

Where one party acts in reasonable reliance on the impression created by another party that the latter will protect the person or property of the former, a legal duty rests upon the party creating the impression to prevent prejudice to the party acting in reliance on that impression. This guideline is deduced from *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*. In this case, a security firm was in control of certain premises in performance of a contract to minimise the chances of theft and damage. The question of whether the security firm could be held delictually liable by a third party for the loss of property on the premises arose. The court decided with reference to, inter alia, policy considerations and the *boni mores*, that the defendant had a legal duty towards the plaintiff whose motor-car was lawfully on the premises, but that the defendant escaped liability due to the absence of negligence on his part.

This case cannot really be classified under any of the other categories and, therefore, the general criterion for wrongfulness plays an important part here. It is, however, clear that the fact that third parties knew of the security service, and therefore, like the plaintiff, relied on the defendant's taking reasonable steps to protect his property, strongly points to the existence of a legal duty; and this forms the basis of the guideline formulated above.251 However, perhaps the court went too far in suggesting that a legal duty may be deduced from the mere existence of a business, ie, where people may not even be aware of existing protective measures. The mere existence of a business (such as a shop or motor-car dealership) should not in itself be regarded as creating the impression that safety measures for the protection of the interests of visiting third parties exist. This conclusion may well have to be reconsidered should the high levels of violence and crime in South Africa continue.

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5.2.9 Interplay of factors

It should now be clear that in particular instances the existence of a legal duty may often be ascribed to a single factor, but in other cases several factors play a part. The duty of the police- man to prevent the assault on the plaintiff in *Minister van Polisie v Ewels* may be deduced from the statutory duty to prevent crime, from the special relationship between policeman and citizen, as well as from the public office occupied by the policeman. This emphasises the fact that all the relevant circumstances of a particular case must be considered to determine whether a legal duty to act is present or not.

Furthermore, an interplay of various factors can indicate that a particular type of omission is wrongful. For instance, whereas causing of physical-mental harm by omission is not prima facie wrongful, the courts increasingly consider an interplay of several (constitutional and common law) factors to find that a legal duty existed in a given case and that the omission was accordingly wrongful – particularly in cases of potential state liability.

Thus, the constitutional entrenchment of the right to bodily and psychological integrity is strongly indicative of a legal duty upon the state (especially the police) to take reasonable steps to protect persons from violence perpetrated by third parties. This conclusion is strengthened in given cases by consitutional imperatives such as the duty of the state to respect, protect, promote and fulfil the rights in the Bill of Rights; the duty of the police service to prevent crime and to protect the citizens of the country; the duty of the state-controlled transport service (Transnet) that delivers a public service in the public interest, to afford security to commuters; the duty of the state (especially the police) under international law to protect women and children against violent crime, particularly rape; the duty of the prosecuting authority to perform its functions without fear, favouritism or prejudice and in the interest of the public; the duty of the state (correctional authority and police) to protect prisoners and to provide them with medical treatment; the duty of the state to provide accountable government for the country; and the duty of the courts to promote the spirit, purport and objects of the Bill of Rights when developing the common law.

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Case law nevertheless makes it clear that constitutional imperatives are not indispensable to place a legal duty on the state; common-law and statutory factors may be adequate. Furthermore, while constitutional imperatives are in general indicative of a legal duty, they are not conclusive; common law and statutory factors should in addition concretely point to the existence of a legal duty in a given case. Seen in this light, the following factors may – in addition to the constitutional imperatives which in *abstracto* place a positive duty on the state to protect, for instance, the right to bodily integrity – play an important part in evaluating the existence (or otherwise) of such a duty in a particular case: statutory obligations which are applicable to particular situations; the fact that the violation was observed by employees of the state; knowledge or foreseeability of the prejudice or threatening prejudice by the state; a special relationship (or proximity) between the state and the victim; a contractual undertaking by the state to protect the victim; factual control by the state over a (potentially) dangerous situation; a representation by the state that the victim will be protected; the possible or probable extent of the victim's harm; the preventative measures that could reasonably and practically have been required, the probability of success of the measures, and whether the cost of the measures is in relation to the harm the plaintiff could have suffered; that the public interest would not be served by imposing a legal duty on the state; and that a multiplicity of actions could result from imposing a legal duty on the state.

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5.2.10 The general wrongfulness criterion

Although practice has shown that the factors that we have focussed upon strongly indicate the existence of a legal duty, in the final analysis we are dealing with the determination of the reasonableness of the defendant's failure to act in view of all the circumstances of the case. In other words, it is not imperative that the omission in question falls into one of the crystallised categories.

The well-known example of the champion swimmer may serve as an example. A champion swimmer is walking alongside a river and sees a small child drowning. He fails to rescue the child. As a result of his omission, the child suffers serious brain damage and becomes quadriplegic. In determining whether a duty rested on him to rescue the child, the swimmer's conduct cannot be classified under any of the stereotyped categories that indicate a legal duty. Consequently, recourse must be had to the general test for wrongfulness. By means of the *boni mores* test, a balancing process must take place between, on the one hand, the interests of the swimmer (eg, inconvenience and damage to his clothes) and, on the other hand, the interests of the child (serious violation of his physical integrity) and the child's parent or guardian (great financial cost brought about by the child's handicap). Public interest also plays a part here. In view of all the circumstances, it must be decided whether the swimmer's omission, in the words of the Ewels case, evokes not merely moral indignation but should also be regarded as wrongful according to the legal convictions of the community and that he should consequently render compensation for the damage suffered. In this example, it will probably be decided that a legal duty rested on the swimmer to take steps to rescue the child. However, the scales may favour the defendant-swimmer if, eg, it should appear that there were crocodiles in the vicinity and that he would place his own life in danger were he to rescue the child; the law no longer requires that a person regard another's life as more important than his own.

Nevertheless, it is probably only in exceptional cases that the courts will deviate from the fundamental premise of our law that, in principle, a defendant does not act wrongfully when he fails to act positively in order to prevent harm to another.

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5.3 Breach of a statutory duty

The causing of damage by means of conduct in breach of a statutory duty is prima facie wrongful. In other words, non-compliance with a statutory duty is an indication that the violation of the plaintiff's interests took place wrongfully. The violation of a norm does not in itself constitute wrongfulness; rather it is the infringement of the interests of the plaintiff in a legally reprehensible manner that constitutes wrongfulness.

The facts in *Patz v Greene and Co* provide a good illustration of this principle. A, who traded in the vicinity of a mining compound, applied for an interdict against B, who ran a similar trade on claim land at the entrance of the compound. A based his application, inter alia, on the fact that trading on claim land was prohibited by statute. On appeal it was decided, inter alia, that the infringement of another's goodwill is unlawful if it is caused by conduct expressly prohibited by statute. McKerron deduces from case law that in order to constitute wrongfulness in these circumstances the plaintiff must prove the following:

(a) that the relevant statutory measure provided the plaintiff with a private law remedy;

(b) that the plaintiff is a person for whose benefit and protection the statutory duty was imposed;

(c) that the nature of the harm and the manner in which it occurred are such as are contemplated by the enactment;

(d) that the defendant in fact transgressed the statutory provision; and

(e) that there was a causal nexus between the transgression of the statutory provision and the harm.

6 Wrongfulness as the reasonableness of holding a defendant liable

As seen above, it is generally accepted that wrongfulness is constituted by the infringement of a subjective right or the breach of a legal duty to prevent harm. However, since *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*, the Supreme Court of Appeal has been taking a new direction (especially in respect of pure economic loss). In that judgment, Harms JA declared that "conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant". According to Nugent JA in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*, this test is a recent formulation of one variation of the general test of wrongfulness in our law and entails that wrongfulness is basically concerned with "the reasonableness of imposing liability on the defendant", or "whether, in the circumstances, the law should recognise an action for the recovery of loss caused negligently",or with the question, if the defendant had been negligent, of whether "the law [should] impose on him liability for such negligence". The test was obiter formulated as follows by Brand AJ in *Le Roux v Dey*:

> In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damage flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

This new formulation of the test of wrongfulness in our law is unacceptable for the following reasons:

(a) In the first place, the test is, as formulated in Telematrix, based on a misinterpretation by Fagan of the *locus classicus* on liability for omission in our law, namely Minister van *Polisie v Ewels*. As summarised by Knobel, Fagan's reliance on Ewels is misguided because certain phrases from the judgment are taken out of context. According to Fagan, Ewels provides the clearest authority for the view that wrongfulness is determined by an inquiry into the reasonableness of the defendant's liability for the plaintiff's damage. He submits that Rumpff CJ declared in Ewels that "the wrongfulness of a negligent omission depends on whether 'the legal convictions of the community require . . . the suffered harm to be compensated by the person who omitted to act in a positive manner'". However, if the relevant quotation from Ewels is read in its entirety, ie, without removing a phrase thereof as done by Fagan (and apparently followed by Harms JA in Telematrix316) namely "that the legal convictions of the community require the omission to be regarded as wrongful", a different picture emerges. The wrongfulness of an omission is then indeed determined, contrary to Fagan's opinion, by asking whether the *boni mores* require the omission to be branded wrongful, and only once this has been established, may the omission give rise to delictual liability. This correct interpretation of Ewels is inter alia also apparent in Local Transitional Council of *Delmas v Boshoff*, where Brand JA stated that "a negligent omission will be regarded as wrongful and therefore actionable only when the legal convictions of the community impose a legal duty".

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(b) A second point of criticism against the new approach to wrongfulness is that liability for causing harm does not depend upon wrongfulness alone, but rather upon the existence of a delict (or wrongful act), ie, the presence of all the delictual elements. In Telematrix, Harms JA declared that "in order to be liable for the loss of someone else, the act or omission of the de- fendant must have been wrongful and negligent and have caused the loss"; and in *Van Eeden v Minister of Safety and Security* (Women's Legal Centre Trust, as *amicus curiae*), this was expressed in the following words by Vivier ADP: "Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission". Legally it will only be reasonable to hold a person liable for damage if he has committed a delict. It is therefore incorrect to equate the reasonableness of holding a person liable with wrongfulness; it is unreasonable to hold a person liable if any one of the elements of a delict, namely conduct, causation, wrongfulness, fault or damage is absent. To explain the new approach, Visser cites an example of conduct from an English case that was (in his opinion) clearly unreasonable but nevertheless not wrongful, because it would have been unreasonable to hold the alleged wrongdoer liable; his liability would have extended too far. This view cannot be supported. In our opinion, the dismissal of liability in that case did not turn on the wrongfulness issue. Due to the clearly apparent unreasonableness of the conduct, wrongfulness was undoubtedly present. However, it would nevertheless have been unreasonable to hold the alleged wrongdoer liable on account of the absence of legal causation, because this element is directly relevant to the extent of a wrongdoer's liability that must not exceed the "boundaries of reasonableness, fairness and justice". This indicates clearly that the reasonableness of imposing liability is not dependent on wrongfulness alone. Viewed in this light, the reasonableness of holding a defendant liable is the result of a conclusion that a delict has been commited, instead of a factor determining wrongfulness. In similar vein, Loubser declares with reference to inter alia the new approach to wrongfulness, ie "whether it is reasonable to impose liability on the defendant", that "this general formulation is not very helpful, because it is hardly distinguishable from the general concept of delictual liability". Knobel strongly disagrees with the new approach, which he views as "a kind of final wrap-up after the court has dealt with the other elements . . . Such an approach arguably results in wrongfulness usurping the functions of the other elements, particularly fault and legal causation, and this breeds much confusion". This confusion is already apparent in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* where the formulation of the new test for wrongfulness resembles to a large extent the formulation of the test for legal causation (remoteness) which is concerned with whether it would be reasonable to impute a consequence to the defendant and hold him liable for it.

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(c) In the third place, the wording of the new variation does not make provision for determining wrongfulness when an interdict is sought. The new test deals with the reasonableness of holding an alleged wrongdoer liable for damages, for which fault, usually negligence, is a prerequisite, and for this only such remedies as the *Aquilian* action, the *actio iniuriarum* and the action for pain and suffering are suitable. The function of the interdict, on the other hand, is to prevent wrongful conduct, and not to compensate wrongfulness that has already materialised. For this reason, fault is not required for the interdict. Therefore, the new variation cannot deal with the wrongfulness inquiry when an interdict is sought. For this reason, the courts consistently apply the *boni mores* or reasonableness criterion to establish wrongfulness for purposes of the interdict.

(d) Fourthly, the new test is vague and under-developed in respect of concrete guidelines enabling its application. Probably for this reason even the Supreme Court of Appeal, in spite of expressed lip service to this test, nevertheless often falls back on the two well-worn tests of wrongfulness, ie infringement of a subjective right, and breach of a legal duty. Two examples from case law will suffice. The first is *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*, where Nugent JA pointed out that "[t]o cause bodily injury to another by a positive act is generally wrongful and will be visited with delictual liability if the actor was negligent . . . Expressed in the idiom of one variation of the general test for wrongfulness in our law, it is conduct in relation to which 'public policy considerations demand that . . . the plaintiff has to be compensated for the loss caused by [a] negligent act . . . of the defendant'". It is heartening that Nugent JA referred to the new approach as merely "one variation" of the wrongfulness test that does not, by implication, replace the established variations. However, it is unclear why it was at all necessary to refer to this new variation, since the court in the end applied the established approach, ie that the infringement of the physical person is prima facie wrongful, but that this can be counteracted by the presence of a ground of justification.338 Referring to the new variation of the wrongfulness test in a field where legal certainty reigns can only create confusion. In *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd*, Scott JA declared that "conduct which takes the form of an omission or which results in pure economic loss is not prima facie wrongful. In such cases it becomes necessary to determine whether there is a legal duty owed by the defendant to the plaintiff to act without negligence, or, as the inquiry has more recently been formulated, whether, if the defendant was negligent, it would be reasonable to impose liability on him for such negligence". In this case, the court simply applied the tradition- al legal-duty approach without further reference to the new variation. Again it is hard to understand why the court deemed it at all necessary to enlist the new variation of the wrongful- ness test while in the end it played no part in establishing wrongfulness in casu.342 In the Constitutional Court, Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape* also viewed wrongfulness of an omission purely as "the failure to fulfil a duty to prevent harm to another". From the above it is clear that the two established variations of the wrongfulness test are adequate in virtually all instances. Where this is not the case, the *boni mores* can be employed as (supplementary) criterion to good effect without venturing onto the uncertain terrain of the new variation of the wrongfulness test.

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(e) In the fifth place, it is open to debate that reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct. Such a view is clearly in conflict with large parts of our law of delict and will generally lead to confusion if applied consistently. In particular, it would undermine many of the principles of the traditional grounds of justification where the reasonableness or otherwise of the defendant's conduct almost always plays an important role in determining whether he acted within the bounds of a ground of justification, and thus in determining wrongfulness. For instance, in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* Nugent JA explained that the wrongfulness of an act in necessity requires an examination of whether "a reasonable person in the position in which [the actor] found himself would have acted in the same way". Seen in this light, Brand JA's view that the reasonableness of the defendant's conduct has no relevance in ascertaining wrongfulness, is subject to criticism. As will be explained later, the fact that the reasonableness of conduct can play a role with regard to both wrongfulness and negligence does not mean that the application of these two elements of the law of delict necessarily lead to the same result, or, put otherwise, are necessarily telescoped into one, thus leading to confusion between them.

In conclusion, the question arises whether the new approach to wrongfulness really concerns the delictual element of wrongfulness in all instances, or whether it rather involves the question (as the Supreme Court of Appeal has repeatedly stated) whether, if the defendant has acted negligently, it would be reasonable to allow the Aquilian action in the particular (new) circumstances – therefore not a question about wrongfulness, but rather about the expediency or necessity of recognising (or extending) delictual liability and thus rendering damages recoverable. Here policy considerations naturally play a very important part. An important policy consideration in this regard is that a delictual action will not readily be allowed where the prejudiced person has another adequate or effective remedy at his disposal.

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But this is of course not the only policy consideration that can militate against extending Aquilian liability. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*, which dealt with the liability of dispute adjudicators for their incorrect and negligent decisions, the extension of the *Aquilian* action was turned down because of other policy considerations. In *Stewart v Botha*, the *Aquilian* action by a child for so-called 'wrongful life' was dismissed because the pivotal question of whether the child should have been born at all, "goes so deeply to the heart of what it is to be human that it should not even be asked of the law".

One can agree that, on account of such policy considerations (whether these include existence of another adequate remedy or other relevant policy considerations) it would have been unnecessary or undesirable and hence unreasonable to extend *Aquilian* liability in the mentioned in- stances, but one may wonder whether it is dogmatically sound always to deal with the necessity or expediency of extending the action under the heading of wrongfulness. Indeed, a case can possibly be made that in several of the mentioned instances a delict (wrongfulness included) was present, but that a delictual action was nonetheless not allowed on account of considerations of legal policy.

In view of the above, it is doubtful whether the so-called new variation of the wrongfulness test contributes to a better evaluation of delictual wrongfulness. Indeed, because the established tests of wrongfulness deal satisfactorily with this matter in virtually all cases, the new variation, which clearly creates confusion and legal uncertainty, can safely be left aside.

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7 Grounds of justification

7.1 Introduction

Grounds of justification are special circumstances in which conduct that appears to be wrongful (because an actual violation of interests is present) is rendered lawful (since there is no violation of a norm). The violation of interests is therefore not unreasonable or *contra bonos mores*. A ground of justification therefore excludes wrongfulness by eliminating the apparent wrongfulness of the defendant's conduct. In reality, grounds of justification are nothing more than practical expressions of the *boni mores* or reasonableness criterion with reference to typical factual circumstances that occur regularly in practice.

The legal convictions of the community therefore underpin the grounds of justification that are used as practical aids to facilitate the process of delimiting the interests of different legal subjects. Consequently, grounds of justification are still concerned with the basic question of whether the actor's violation of an individual interest was reasonable in the particular circumstances and therefore lawful. In other words, grounds of justification are simply stereotyped examples of circumstances indicating that an act that at first sight appears to be wrongful is in fact lawful.

Because grounds of justification such as defence, consent and necessity are merely embodiments of the legal convictions of the community, the existing grounds of justification do not constitute a *numerus clausus*. Consequently one may examine "the entire field of the law" to find suitable grounds of justification. In future, the weighing of interests of legal subjects by means of the reasonableness criterion may result in new situations justifying a defendant's apparently wrongful conduct.

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In the final analysis, the grounds of justification indicate that the defendant was exercising his own "right" or "power" (granted to him by law); that he acted within the confines of his own rights. In other words, when a ground of justification is present, the plaintiff's right does not extend so far that the defendant infringes it, even though the defendant in fact violates the interest concerned. The extent of the plaintiff's rights is, therefore, limited by the defendant's exercising his own rights.

In the law of delict, the onus to prove the existence of a ground of justification rests on the defendant.

The traditional grounds of justification which are discussed are defence, necessity, provocation, consent, statutory authority, public authority and official command, and power to discipline.

7.2 Private defence

7.2.1 General

Private defence (or defence; "noodweer") is present when the defendant directs his actions against another person's actual or imminently threatening wrongful act in order to protect his own legitimate (legally recognised) interests or such interests of someone else. For example: A acts in defence if he hits B over the head to prevent B from stabbing A with a knife. If B should institute a delictual action against A for damages caused by his head injury, A, by raising private defence, will be able to show that he acted reasonably and therefore lawfully. As a result A will not be liable in delict for B's injury.

In *Mugwena v Minister of Safety and Security*, the Supreme Court of Appeal held, in the wake of several provincial judgments, that private defence must be determined by asking whether a reasonable person would have been of the opinion that a real risk of death or injury was threatening. From this, Fagan concludes that the test of wrongfulness is not determined ex post facto, with reference to the true state of affairs, but ex ante, with reference to a reasonable belief of the state of affairs. This approach is unacceptable, because an ex ante determination of de- fence as ground of justification blurs the distinction between wrongfulness and negligence (which is indeed determined according to an ex ante reasonable-person test).

Both the *attack* and the *defensive* conduct must meet certain requirements for defence to be applicable.

7.2.2 Requirements for the attack

(a) **The attack must consist of a human act**. This means, firstly, that the act may consist of either a *commissio* or an *omissio*. The attack normally consists of positive conduct (*commissio*). In exceptional cases, even an omission may qualify as an "attack" for the purposes of defence: if a prisoner whose term of imprisonment has expired is not released and assaults the guard in order to escape, he acts in defence against the omission ("attack") of the guard who refuses to release him.

Secondly, it means that aggression by an animal does not qualify as an attack. As an animal cannot act for the purposes of delict, defensive action against attack by an animal does not constitute defence. In such a case, necessity may be an appropriate ground of justification.

One may indeed act in defence against a person who uses his animal merely as an instrument of attack, such as someone who incites his dog to attack another. In such an instance, the act of defence is in reality directed against human conduct (attack).

(b) **The attack must be wrongful; in other words, it must threaten or violate a legally protected interest without justification**. Any legally recognised interest of the defendant or other person may be protected when acting in defence. The law thus determines which interests may justifiably be protected in defence. The courts have recognised defence as a ground of justification against attacks on the following interests: life, bodily integrity, honour, and property or possessions. There is no reason why, in appropriate cases, defence should not serve as a ground of justification where any other legally recognised interest is violated.

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One may not act in defence against a lawful attack. For example, a person may not rely on defence in resisting a policeman who is in the process of arresting him legitimately, because the conduct of the policeman is lawful. Likewise, a person may not act in defence against an attack to which he consented, or which occurred out of necessity or even in defence, be- cause such attacks are lawful. In other words, one may not act in defence against someone who "has the right" to violate one's interests.

Where two people are involved in a duel to which they both agreed, there is no question of defence, because both duellists attack each other unlawfully.

Because the attack has to be wrongful, the test here is objective. If the defending person subjectively believes that he is in danger or that the attack is wrongful, but in reality it is not, his defensive action does not constitute private defence and he acts wrongfully. Putative or imagined defence does not constitute private defence; reasonable grounds for private defence must exist objectively. An objective test deals with the facts as they appear ex post facto and not with the person's subjective impression of the events. Someone who acts wrongfully because he incorrectly believes that he is acting in private defence, can still escape liability if he did not have fault (intent or negligence).

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(c) The attack must already have commenced or be imminently threatening, but must not yet have ceased. Because it is possible to act in defence against a threatened attack, it is not necessary to distinguish between a threatened and an actual attack. However, it is self-evident that one may not act in defence against someone from whom one expects an attack only at some time in the future. On the other hand, one does not have to wait until the attack has actually commenced. Where an attack is imminently threatening, one may act in defence even before the attack commences with the intention of preventing the attack from taking place. It is not possible to act in defence where the attack has already ceased. Such conduct would amount to unjustified revenge. It is, however, not always possible to determine precisely when an attack has ceased.

The following two considerations are not requirements for defence:

(a) Fault on the part of the aggressor is not a requirement. The nature of the attack concerns the question of wrongfulness. Consequently, as has been shown, the test is objective. Therefore, one may act in defence even against someone who is incapable of having a blame- worthy state of mind (who can act wrongfully but not culpably) such as an infans or an insane person; or against someone who is under the wrong impression that he is acting lawfully, such as A who resists B who is under the mistaken impression that he may arrest A.

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(b) It is not a requirement that the attack must be directed at the defender. One may act in defence even where the attack is directed at third parties. A special relationship such as a family tie or a claim to protection need not exist between the defender and the third party. However, where the third party consents to the attack, one cannot legally act in his defence, because in such circumstances the attack against him is not wrongful. But where the third party's consent is invalid (eg, where he consents to be seriously maimed), the attack is indeed wrongful and may be resisted in defence of the victim's interests even against his wishes: his "consent" is not recognised by law.

7.2.3 Requirements for the defence

(a) The defence must be directed against the aggressor.

(b) The defence must be necessary to protect the threatened right. If the interest may reasonably be protected in some other, less detrimental way, the act of defence is wrongful. Therefore, the act of defence must be the only reasonable alternative to protect the threatened interest. For example, a person will be able to set a trap gun to protect his property only when it is clear that all other reasonable steps have failed.

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In this regard, the question of whether a person may defend himself in circumstances where he is able to protect his interests by *taking flight* arises. Case law seems to be of the opinion that a person must flee, unless such flight exposes him to danger, such as a shot in the back, or if such flight would result in a policeman abandoning his duty to arrest a criminal. Perhaps the requirement that there must be danger connected to flight is too narrow. It should also not be expected of him to flee where flight will cause an infringement of the interests of the attacked person, such as an impairment of dignity resulting from the humiliation caused by flight. Why should justice yield to injustice? Nevertheless, it is not possible to lay down hard and fast rules; too much depends on the circumstances surrounding each particular case.

(c) The act of defence must not be more harmful than is necessary to ward off the at- tack. The act of defence must be reasonable: in other words, the means used by the defender must not be out of proportion to the (imminent) attack. The reasonableness of the act of defence must be judged objectively, taking into account all the circumstances of the case. Al- though there should be a reasonable measure of balance or proportionality between the attack and the defending act, the threatened interest and the interest infringed in the process of defence need not be of equal value, nor do the means employed by the defender need to be similar to those of the attacker. Different factors can play a role in determining the reasonableness of the act of defence. In situations where defence is raised, the interests threatened by the attack and those violated in defence are often different in nature and unequal in value, and it is often difficult to undertake a realistic weighing-up of interests.

The fact that the attacker is acting wrongfully counts in favour of the defender if the defender causes greater harm to the attacker than the harm the defender suffered or would have suffered. Steyn CJ expressed this idea as follows:

> He (the attacker) is the one who steps outside the legal order, and if he wishes to risk his life to infringe the right of another, why must the person who acts in defence, for whom it is undoubtedly permissible to protect his right, be branded a transgressor of the law if he kills [the attacker] rather than to forfeit his right?

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Although absolute proportionality between the threatened interest and the interest infringed in defence cannot be a requirement for defence, extreme imbalance is unacceptable. Thus, if an attacker threatens only goods of little value if, eg, he tries to steal a piece of butter, and the only way of stopping him is to shoot and kill him, such killing will be unreasonable and the bounds of defence consequently exceeded. In the case of an extreme imbalance of interests, the fact that the attacker steps outside the bounds of the law ("buite die regsorde tree"; acts wrongfully), is therefore insufficient to render the defensive act lawful. The central enquiry remains the reason- ableness or otherwise of the defender's conduct in the light of all the circumstances.

In summary, the following criteria may serve as points of departure for assessing the reasonableness or otherwise of an act of defence:

The value of the interests may differ. One may infringe a more valuable interest in order to protect one of lesser value. Nevertheless, the value of the interests attacked and protected may play an important role in determining whether the defender acted reasonably – such as in the case of an extreme imbalance of interests.

The interests need not be similar in character. A woman may defend her chastity by killing her assailant if need be; a person may protect his possessions by assaulting the attacker and even by killing him. Again, the proviso implies that extreme imbalance of interests will negate defence: killing in order to protect a piece of butter obviously exceeds the bounds of legitimate defence; on the other hand, killing an attacker who is threatening to burn down one's house is probably permissible (provided, of course, that killing is the only reasonable way to prevent the harm).436

The means of defence employed by the defender need not be similar to those of the attacker. The method of defence is determined in the first place by the means at the disposal of the de- fender.438 In addition, the weapon of attack, the ferocity of the attack and the persistence of the attacker influence both the defender's choice of his method of defence and the question of whether he applied it in a reasonable manner. The surrounding circumstances will therefore be of decisive importance. In this connection, De Wet and Swanepoel440 state the following:

> If defence is essential, and the attacker is not deterred by moderate weapons of defence, the attacked person may ward off the attack, if necessary with the most powerful instruments.

7.3 Necessity

7.3.1 General

A state of necessity ("noodtoestand") exists when the defendant is placed in such a position by superior force (vis maior) that he is able to protect his legally recognised interests (or those of someone else) only by reasonably violating the interests of an innocent person. For example: A acts out of necessity if he knocks out the window of B's burning house in order to rescue C, who is trapped inside the house. A will not be liable to B for the damage to the window because breaking the window was lawful. Necessity justifies A's conduct; it gives A the power to break the window and simultaneously restricts B's right to his window. In other words, the state of necessity gives A the power to act in a way which, in the absence of necessity, would have infringed B's right and would have been wrongful.

In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*, Nugent JA pointed out that al- though the weight of academic opinion regards necessity as a ground of justification (that cancels the wrongfulness of conduct) and accordingly regards the criterion for its determination as an objective one, the jurisprudential niche of necessity in the scheme of delictual liability has never been authoritatively determined, namely whether it excludes wrongfulness (and is there- fore a ground of justification) or whether it excludes negligence (and is therefore a defence that cancels fault). According to Nugent JA, it was really not necessary to answer the last-mentioned question in *casu* because he regarded both wrongfulness and negligence to be concerned with whether the reasonable person in the position of the alleged wrongdoer would have acted in the same manner.445 The same test was therefore incorrectly employed for both delictual elements and in this manner the distinction between the two elements was blurred.

Necessity must be clearly distinguished from private defence. The distinction is that when acting in defence the actor's conduct is directed at an attack by the wrongdoer; whereas when acting out of necessity, his conduct violates the interests of an innocent third party. (Consequently, a person who defends himself against the attack of an animal acts out of necessity and not in self- defence because an animal cannot "act" (wrongfully).)

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7.3.2 Requirements for necessity

(a) The state of necessity must exist or be imminent. In other words, it must not have terminated or be expected in future. It is also irrelevant whether it has been caused by human action, animals, or forces of nature.

The existence of a state of necessity must be determined objectively, taking into consideration the circumstances which actually prevailed and the consequences which actually ensued. The question is whether, viewed ex post facto, a state of necessity actually existed, not whether the defendant believed it to exist. (*Putative* necessity therefore does not constitute necessity.) The fact that the defendant was in a state of terror is also not relevant. Only actual necessity is important. Although a subjective factor such as terror may indicate the existence of a state of necessity, the fact that a person experiences fear does not necessarily justify the conclusion that a state of necessity in fact exists. Fear may either influence the defendant's accountability ("toerekeningsvatbaarheid") or his fault, as will be illustrated later, but not the wrongfulness of his conduct.

(b) A legally recognised or protected interest of the actor or someone else must have been endangered. The defendant need not only protect his own interests, but may also protect the interests of others. Moreover, the prejudiced and the protected party may be the same person. Not only life or physical integrity,461 but also other interests, such as property may be protected in necessity. (Conversely, any interest, such as honour, privacy, identity, freedom and feelings, may be violated in a state of necessity.)

(c) The act in necessity must have been necessary to protect the threatened interest. In other words, the actor must not have had any other reasonable means of averting the danger. If the defendant can escape from the emergency by fleeing, he must do so.

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(d) The means used for averting the danger must not have been excessive but reasonable in the circumstances. In general, the interest sacrificed must not be more valuable than the interest protected. In contrast with private defence, the so-called principle of commensurability (proportionality) of interests therefore applies in the case of necessity. It is not possible to lay down fixed principles to determine whether the protected interest was more valuable or less valuable than the interest sacrificed, or of similar value to it. The answer will depend on the circumstances of each particular case.

Flowing from this requirement is the difficult question of whether necessity may ever justify homicide. Following English law, our law initially answered this question in the negative. In other words, the killing of an innocent person was viewed as a greater evil than the death of the threatened person; an individual was expected to sacrifice his own life rather than kill another in order to save himself. However, in the criminal case *S v Goliath*, the Appellate Division held by implication that homicide may be justified by necessity. A, under compulsion from B, and fearing for his own life, assisted B in killing C. The court had to decide whether A's defence of necessity could be upheld. This meant that the life of the threatened person had to be weighed against the life of the deceased. Whereas it had been formerly accept- ed that the killing of an innocent person out of necessity was not justified, Rumpff JA now said:

> It is generally accepted, even by moralists, that an ordinary human being regards his own life as more important than that of another person. Only he that is imbued with a quality of heroism, will purposefully sacrifice his own life for someone else. If criminal law provided that compulsion could never be a de- fence to a charge of murder, it would require a person who killed another person under compulsion, irrespective of the circumstances, to comply with a standard higher than that expected of an average human being. Such an exception to the general principle applied in criminal law, does not appear to me to be justified.

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It is clear from this *dictum* that the law recognises the conviction of the community that a person's own life is more important to him than the life of another. Therefore, the majority judgment clearly supports the view that compulsion (a form of necessity) may justify homicide. Such justification will depend entirely on the circumstances and must be judged with the greatest circumspection, particularly in light of the right to life which is entrenched in section 11 of the Constitution.

Note also the following in connection with necessity.

(a) It is not clear whether the defendant may rely on a state of necessity which he himself has created. There is authority for both the view that a state of necessity created by the defendant excludes a plea of necessity, and for the view that a person may rely on necessity even though he has himself created the state of necessity. The last-mentioned view appears to enjoy the most support.

(b) A person may not rely on necessity where he is legally compelled to endure the danger.488 Logically, the fact that the law compels him to endure the state of necessity means that he lacks the power to avoid it. If he does act, he infringes the right of another person. In this connection, for example, a landowner may not alter the natural flow of water on his land so that it causes damage to others, even where his own interests are threatened by flood waters. On the other hand, it has been held that a landowner may drive a swarm of locusts away from his land onto the land of his neighbour.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

7.3.3 Necessity and impossibility

Necessity must be distinguished from impossibility, which may also constitute an emergency situation. The concept impossibility may play a role in excluding liability when applied to different elements of a delict, namely conduct, wrongfulness and fault. Therefore, impossibility is not necessarily a ground of justification that excludes wrongfulness.

Impossibility and conduct A person (A) who causes harm because he found it absolutely or physically impossible to act (eg, A fails to go to work because B locked him up, with resultant loss to A's employer), or to act in a different manner (B grabs the hand of the weaker A and with it breaks an expensive vase), is not liable because he failed to act. Conduct is absent and consequently the question of wrongfulness does not arise. Absolute impossibility is therefore not a ground of justification such as necessity, but a circumstance excluding conduct.

Impossibility and wrongfulness Where impossibility does not amount to an absolute, physical impossibility, it may exclude wrongfulness. *Regal v African Superslate (Pty) Ltd* provides a good example. A, the owner of a piece of land traversed by a stream, requested an interdict forbidding B, the owner of a farm bordering the stream at a higher point, to allow loose slate to wash down onto his (A's) land, because there was a danger that the stones could cause damage to A's property. The court found that while it would have cost B approximately R10 000 to build a wall to prevent the slate washing down, the possible damage to A's land would probably be slight. Under the circumstances, B's failure to build the wall was not wrongful because it was impossible for him to avert the threatening damage. In this sense "impossible" does not mean physically or absolutely impossible (it was indeed physically possible to build the wall), but rather "impossible" according to the legal convictions of the community as to what one could reasonably expect from B. To determine what is reasonably possible, the interests that B would have to sacrifice to avert the danger (R10 000) are weighed against A's interests that would probably be infringed should B fail to act (an interest in his property not being slightly damaged). In accordance with the general test for wrongfulness it was therefore, in light of the circumstances, "impossible" to build the wall. Here impossibility is a ground of justification that excludes wrongfulness.

Impossibility and fault A person who is unable to control his impulses may also, in appropriate circumstances, avoid liability on the basis that he lacks accountability and thus the fault element is absent.

7.4 Provocation

7.4.1 General

Provocation is present when a defendant is provoked or incited by words or actions to cause harm to the plaintiff. Our courts recognise provocation as a complete defence in the sense that the plaintiff who provoked the defendant may have to forfeit any compensation for injury to personality caused by the defendant's conduct.

There is no unanimity regarding the correct legal basis for the defence of provocation. This is particularly evident when one considers the question of whether provocation constitutes a ground of justification, or a ground excluding fault, or whether it merely serves to mitigate (or even reduce to nothing) the damages recoverable by the plaintiff.

We prefer the view that provocation is a ground of justification that renders the defendant's conduct lawful. The defence of provocation is assessed objectively by weighing the provocative conduct against the reaction to it using the criterion of reasonableness – the *boni mores.*

Provocation must be distinguished from private defence. As stated, one acts in self-defence in order to avert an attack that is imminent or has already commenced. Retaliatory conduct after the attack has terminated exceeds the bounds of defence. Conduct as a result of provocation, by contrast, takes place immediately after the provocative conduct has terminated; it is, in other words, "an act of revenge" in contrast with "an act of defence".

Provocation may be raised as a defence against actions for the violation of different aspects of personality, eg honour, reputation and physical integrity

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7.4.2 Provocation in the case of physical assault

As a general rule, provocation is not a complete defence where provocative words preceded a physical attack; and this is so even where the words were gravely insulting and defamatory of the defendant's spouse. However, where the provocation takes the form of a physical assault, such provocation may very well serve as a ground of justification for a subsequent counter-assault of a physical nature (or, in the words of those who prefer not to regard provocation as a ground of justification, as a ground reducing to nil the damages recoverable by the plaintiff); in other words, such provocation may serve as a complete defence against an action based on assault, provided that two requirements are met.

(a) The provocative conduct must be of such a nature that a reaction to it by means of a physical assault is reasonable, and accordingly "excusable". The question is whether, viewed objectively, the reasonable person in the position of the defendant would have acted as the defendant did in light of the provocation.

(b) The conduct of the provoked defendant must be an "immediate and reasonable retaliation" against the body of the plaintiff. Not only must the *retortio* or act of revenge follow immediately on the provocation; it must also, judged objectively, be reasonable. Here "reasonable" means "that the physical assault by the second person is not out of proportion in its nature and degree to the assault by the first aggressor". The violation of interests in *retortio* must, in other words, be commensurate with (ie, not out of proportion to) the preceding violation. Normally this means that the different interests must be of equal value and similar in nature. Whether this is the case is determined objectively with reference to all the surrounding circumstances. If the bounds of the defence are exceeded by unreasonable conduct, provocation as a complete defence fails and the plaintiff will not have to forfeit his right to damages. Nevertheless, in such a case the provocation may lead to a diminution of damages. The defendant who violates the bodily integrity of another person as a result of provocation cannot claim satisfaction for the personality infringement (violation of bodily integrity or insult) which he himself has suffered on account of the provocation.

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7.4.3 Provocation in cases of defamation and insult

Defamatory or insulting allegations made during an argument (*rixa*) in reaction to provocative conduct may be justified in certain circumstances. The requirements for provocation as a defence in the case of infringement of bodily integrity, apply here mutatis mutandis:

(a) Firstly, the provocation itself must be of such a nature that a reasonable person in the position of the defendant would also have reacted by defaming or insulting the plaintiff. The test is thus objective.

(b) Secondly, defamation or insult in *retortio* must stay within prescribed limits. The limits are not exceeded where the defamation or insult (i) immediately or directly follows the provocation and (ii) is not out of proportion to the provocative conduct.

Compensatio The second requirement referred to above concerns the principle of compensa- tio. This principle means that where two persons have defamed or insulted each other in such a manner that the one instance of defamation or insult is not out of proportion to the other, the two *iniuriae* cancel or neutralise each other.

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7.5 Consent

7.5.1 General

Where a person legally capable of expressing his will gives consent to injury or harm, the causing of such harm will be lawful. Consent is a ground of justification: the person suffering harm waives his right to the extent that he permits the defendant to violate his interests; thus, the actor cannot be held liable for the damage caused.

Volenti non fit iniuria The principle that a defendant is not liable where the injured person has consented to injury or the risk thereof, is embodied in the maxim *volenti non fit iniuria* (a willing person is not wronged; he who consents cannot be injured) and was already known in Roman and Roman-Dutch law.

Forms of consent Consent takes two forms: *consent to injury*, and *consent to* (or acceptance of) *the risk of injury*. Since both are forms of the same ground of justification, the same principles apply to each.

In the case of *consent to injury*, the injured party consents to *specific* harm: A, eg, consents to B's removing his appendix; C consents to D's using his pen; the rugby prop-forward consents that his opponent may scrum against him; E consents to his barber, F, cutting his hair.

In the *case of consent to the risk of injury*, the injured party consents to the risk of harm caused by the defendant's conduct: A consents to the risk that the operation, performed by B on him, may have a certain side-effect; a participant in sport consents to the risks involved in such sport: a rugby player accepts the risk that he may be injured in a tackle; a boxer that a blow may paralyse him; a squash player that his opponent's racket may hit him against the head. Should the risk contained in the operation or the sports injuries mentioned earlier in fact ensue, the injured person will not be able to hold the defendant delictually liable, because he has consented to the risk of such harm. It appears that consent to the risk of injury as a ground of justification has been successfully raised in only three reported cases.

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Terminology It is necessary to consider the terminology used in connection with consent and related concepts. The maxim *volenti non fit iniuria*, in short *volenti*, is used as a common concept to describe both forms of consent. *Volenti non fit iniuria* may thus mean either consent to injury, or consent to the risk of injury. The expression "voluntary assumption of risk" is sometimes used to imply consent to the risk of injury (a ground of justification) and sometimes to refer to contributory intent (a ground excluding fault or culpability). In addition, a distinction must be made between contributory negligence, on the one hand, and consent and contributory intent, on the other. These different concepts are frequently confused but should be distinguished as their practical implications may differ.

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7.5.2 Characteristics of consent as a ground of justification

(a) Consent to injury is a unilateral act. Therefore the consent need not necessarily be made known to the defendant. In other words, the existence of an "agreement" or "contract" be- tween the injured party and the actor is unnecessary to relieve the actor of liability. Because consent is a unilateral act, it may be unilaterally revoked by the consenting party at any stage preceding the defendant's conduct. The defendant acts wrongfully if he proceeds to cause harm despite the revocation of consent.

(b) Consent is a legal act that restricts the injured person's rights. To qualify as a legal act, the consent must be apparent, or manifest; in other words, it must be brought to light. Consent will not be held to exist if it is not evident.

(c) Consent may be given either expressly (eg by words), or tacitly (eg by conduct). Incitement, encouragement and invitation to injure normally, but not necessarily, indicate that consent is present; however, mere acquiescence (submission) does not necessarily amount to consent. Neither does the knowledge that prejudice will ensue, in itself, constitute consent.

(d) Consent must be given before the prejudicial conduct; "approval" given after the act is not consent, but may amount to an undertaking not to institute an action against the defendant (*a pactum de non petendo*).

(e) As a rule, the prejudiced person himself must consent; only in exceptional circumstances may consent to prejudice be given on behalf of someone else.

The question of whether consent is present in a given case is one of fact which has to be proved. If the defendant thought that consent had been given while in fact it was absent, no ground of justification existed and he acted wrongfully.

7.5.3 Requirements for valid consent

Apart from the preceding characteristics of consent as a ground of justification, the law sets specific requirements for valid consent. This indicates that the law applies this particular ground of justification with circumspection; it is not readily accepted that a person consented to harm. The requirements for valid consent are as follows:

(a) Consent must be given freely or voluntarily. Should the prejudiced person be forced in some way to "consent" to the prejudice, valid consent is absent.

(b) The person giving the consent must be capable of volition (expressing his will). This does not mean that he must have full legal capacity to act, but that he must be intellectually mature enough to appreciate the implications of his acts565 and that he must not be mentally ill or under the influence of drugs that hamper the functioning of his brain.

(c) The consenting person must have full knowledge of the extent of the (possible) prejudice. It is important that the requisite knowledge is present, especially where consent to the risk of harm is concerned.568 In such cases, the consenting person must have full knowledge of the nature and extent of the risk in order to consent to it.

(d) The consenting party must realise or appreciate fully what the nature and extent of the harm will be. Mere knowledge of the risk or harm concerned is therefore not sufficient; the plaintiff must also comprehend and understand the nature and extent of the harm or risk.

(e) The person consenting must in fact subjectively consent to the prejudicial act.

The last three requirements are expressed as follows by Innes CJ in an often quoted *dictum*:

> [I]t must be clearly shown that the risk (of injury) was known, that it was realized, and that it was voluntarily undertaken. Knowledge, appreciation, consent – these are the essential elements; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.

(f) The consent must be permitted by the legal order; in other words, the consent must not be *contra bonos mores*. Consent to bodily injury or consent to the risk of such injury is normally contra bonos mores unless the contrary is evident. Examples of the latter are cases of participation in lawful sport, medical treatment, or cases where the injury is of a very minor nature.

Finally the impairment must, of course, fall within the limits of the consent.

7.5.4 The pactum de non petendo in anticipando

A *pactum de non petendo* is a contractual undertaking not to institute an action against the actor, ie, not to hold the actor liable. Such a *pactum* must be distinguished from consent to harm. Although the effects of a *pactum de non petendo* and consent are the same – in each case the actor is not held liable – the reasons for the actor not being held liable are different.

In the case of a pactum de non petendo, there is no doubt that the actor committed a delict, but the prejudiced person undertakes not to hold the actor liable. Wrongfulness is thus not excluded in such cases; only the resultant action is. The prejudiced person loses the remedy that he would otherwise have had at his disposal; he waives his action. An example of this can be found in *Jameson's Minors v CSAR*. The deceased was injured in a train accident caused by the defendant's negligence and subsequently died. He was a passenger travelling on a "free pass", issued to him on the condition that the railways would not be liable in the event of injury caused through the negligence of the railways. An action could, therefore, not be instituted against the railways. The court correctly held that such an agreement was no defence to the actions instituted by the deceased's dependants. Nevertheless, it is a fact that, if the deceased had merely been injured, he would, on account of his undertaking, not have been able to institute an action against the railways for his injuries.

7.6 Statutory authority

A person does not act wrongfully if he performs an act (which would otherwise have beenwrongful) while exercising a statutory authority. Harmful conduct authorised by statute is thus reasonable (justified) and consequently lawful. By authorising an infringement of interests, the statute limits the rights of the prejudiced person.

Two obvious principles apply with regard to this ground of justification: Firstly, the statute must authorise the infringement of the particular interest concerned, ie, it must restrict the right on which the injured party relies, and secondly, the conduct must not exceed the bounds of the authority conferred by the statute.

(a) The question of whether the statute authorises the infringement of the interest concerned depends on the intention of the legislature. The intention of the legislature is determined in accordance with the principles regulating the interpretation of statutes. The intention of the legislature obviously appears from the Act itself. To determine whether the legislature intended to authorise an infringement of the interests, the courts apply the following guidelines:

(i) If the statute is directory, it is clear that an infringement of private interests is authorised. The injured person is consequently not entitled to compensation unless the statute specifically provides for it.

(ii) If the statute is not directory but permissive, and if the statute makes no provision for the payment of damages, there is a presumption that the infringement is not authorised. (If provision is made for compensation, it is generally accepted that the injured party is entitled to that compensation only.)

(iii) The presumption referred to in (ii) falls away if the authority is entrusted to a public body acting in the public interest.

(iv) If the authorised act is circumscribed and localised (eg, building a dam in a certain place or constructing a railway line between two specific points), there is a presumption that the infringement is authorised.

(v)If the authorization is permissive and general, not localized and does not necessarily entail an infringement of private interests, the only possible inference is that the legislature did not intend that private interests should be infringed.

(b) To determine whether the permitted act fell within the boundaries of the authorisation, the following are taken into account:

(i) It must not have been possible for the defendant to exercise the powers without infringing the interests of the plaintiff. (The onus is on the defendant.)

(ii) The defendant's conduct must have been reasonable; in other words, it must not have been possible to prevent or limit the damage by other reasonably feasible measures or methods. (Here the onus is on the plaintiff to show that reasonable alternative methods indeed existed and that the defendant had therefore acted unreasonably.)

The application of the reasonableness criterion in this context is well illustrated by the statutory provisions on searching a suspect person, arresting a suspect person and causing bodily injury to a suspect during his arrest: If an arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made,598 and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing.

The arrestor is only justified in using deadly force, in other words force that is intended or is likely to cause death or grievous bodily harm to a suspect, in particular circumstances: If he believes on reasonable grounds that (a) the force is immediately necessary for the purpose of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm; (b) there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or (c) the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-threatening violence or a strong likelihood that it will cause grievous bodily harm.

It appears that four requirements must be met before an arrestor can use lethal force: (i) the arrestor must on reasonable grounds suspect (ii) that lethal force is immediately necessary (iii) to protect any person's life or body (iv) against conduct of a suspect that is immediately threatening or will happen in the future. Although these requirements are a paraphrased summary of (a), it is submitted that they are also applicable to the situations in (b) and (c). Nevertheless, little doubt can exist that a person effecting an arrest can only use lethal force if he is confronted with a situation similar to private defence,604 perhaps with an exception if he acts to prevent future death or serious bodily injury.605 The meaning of these requirements will become clearer when their application in case law generates guidelines.

Finally it is important that where there is an element of discretion inherent in any decision taken by a state official, usually under the cloak of statutory authority or official capacity, certain requirements are relevant for exercising the discretion. The discretion must firstly be exercised bona fide and honestly. If this was done, a court would normally be unable to interfere even if it considered the decision inequitable or wrong.608 Moreover, the Bill of Rights requires that the discretion should not be exercised arbitrarily609 but must be objectively rational, that is, rational- ly related to the purpose for which the power was given. So, as long as state officials exercise their discretion in good faith and rationally, and also within the limits of the authorising statute read in light of the Bill of Rights, they are entitled to exercise the discretion as they see fit. The exercise of a discretion will be clearly unlawful if the official knowingly invokes his power for a purpose not contemplated by the legislator. He then uses his power for an ulterior purpose or with an improper motive.

7.7 Official capacity

Certain public officials, such as law enforcement officers (for example, members of the police force and other security forces) and judicial officers (for example, magistrates, judges and other official adjudicators), are obliged or authorised by law to perform certain acts. Should they cause damage in the process, their conduct will be justified (lawful) and consequently they will not be liable. The decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly, and the threat of an action for damages could unduly hamper the expeditious consideration and disposal of litigation. For this reason litigants are not entitled to a process free from incorrect decisions. An exception from this immunity is granted only when the judicial officer's conduct was malicious or in bad faith (*mala fide*) and he therefore exceeded his official capacity.

7.8 Execution of an official command

Infringement of interests in carrying out a lawful command, eg, where a constable shoots a fleeing murderer at the order of his officer, is obviously not wrongful. This is really an example of the ground of justification of official capacity: the constable (and his officer) act in an official capacity because policemen are compelled or authorised by law to arrest criminals.

However, the question to be considered here is when execution of a wrongful command can constitute a defence. In *S v Banda*, Friedman J laid down the following requirements for such a defence:

> (a) The order must issue from a person in a position of lawful authority over the accused.
>
> (b) There must be a duty on the accused to obey the order given.
>
> (c) The accused must have done no more harm than was necessary to carry out the order.

The second requirement, that a duty must have rested on the subordinate to obey the command, creates the most problems. According to case law, there is no absolute duty – that is, a duty of blind obedience – on subordinates to obey the orders of their superiors and this defence should therefore be limited. In respect of such limitations, two main approaches are followed. On the one hand, there is a view that carrying out a wrongful order is always wrongful. On the other hand, it is argued that obeying a wrongful order is not necessarily wrongful, but that only the execution of "manifestly" or "palpably" illegal orders is wrongful.

The question of whether an order is obviously wrongful is evaluated with reference to the judgment of the reasonable person. This application of the reasonable person criterion for wrongfulness deserves support. In cases where there is a duty to obey wrongful orders (that is, where the execution of a wrongful order is lawful), the applicable ground of justification is, in reality, necessity in the form of compulsion630 and not official command. (Where the order is wrongful, an "official" command is obviously absent.) The compulsion lies in the fact that the order is given by a superior. Thus the principles that are generally applicable to necessity – including the reasonable person criterion632 for wrongfulness – are appropriate here too.

7.9 Power to discipline

In terms of common law, parents and persons in loco parentis (eg, guardians, headmasters of schools, teachers and housemasters) have, by virtue of their authority over children, the power to administer punishment to them for the purpose of education and correction. Discipline and punishment for the purposes of education or correction are justified and therefore lawful. This principle applies to all forms of discipline, and in certain circumstances may include corporal punishment.

The power of persons in loco parentis to discipline is an original authority, not delegated parental authority. A parent or a person in loco parentis may delegate the power to discipline to another person. A person on whom a power to chastise is conferred, has a discretion whether to punish or not, including whether corporal punishment should be administered. The discretion may not be exercised in a capricious manner. A court will interfere with that discretion only if, in the circumstances, the discretion was exercised in an unreasonable manner. A person to whom the power to discipline has been delegated does not possess more or wider powers than those delegated to him or her.

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Section 10 of the South African Schools Act 84 of 1996 prohibits corporal punishment in public as well as independent (private) schools. This form of punishment may therefore not be meted out by school principals, teachers and persons in charge of school hostels. It is submitted that the wording of section 10 makes it clear that a parent may not delegate his or her power to administer corporal punishment to someone in a public or private school.

Objectively viewed, punishment, including corporal punishment, must be exercised moderately and reasonably. The purpose of punishment must be correction – to correct the child. Punishment which fails to have the desired effect must not be inflicted repeatedly. Malice or improper motive is indicative of unreasonable punishment which is wrongful. It is not, how- ever, possible to lay down hard and fast rules about what may and may not be done. What is viewed as moderate will depend on the circumstances of each case. In this regard, section 12(1) of the Constitution, 1996, which confers the right on everyone not to be treated or punished in a cruel, inhuman or degrading way, must be borne in mind.

According to case law, the following factors must be considered when determining whether the punishment was moderate and reasonable:

(a) the nature and seriousness of the transgression;

(b) the degree of punishment or force inflicted;

(c) the physical and mental condition of the person punished;

(d) the gender and age of the child;

(e) the physical disposition of the child;

(f) the means of correction, and

(g) the purpose and motive of the person inflicting the punishment.

There is a presumption that chastisement exercised by virtue of a power to chastise was meted out reasonably and without malice. A person who alleges the opposite must prove either that no power to chastise existed, or that (in the circumstances) the chastisement was exercised in an unreasonable manner.

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8 Abuse of right, nuisance and neighbor law

8.1 Abuse of right

Underlying the so-called doctrine of abuse of right is the notion that the exercise of a right or a power may take place in a manner or in circumstances which render such exercise wrongful; in other words, that the actor may exercise his rights in a legally impermissible manner and thus "abuse" them. The doctrine of abuse of right is not unknown to our common law: one finds references to it in Roman, Roman-Dutch and Dutch law. The question of whether the doctrine forms part of our law has not been expressly considered by our courts. It is, nevertheless, evident that our courts are not negatively disposed towards the existence of this doctrine in our law. The principles underlying the doctrine are unequivocally accepted.

The doctrine of abuse of right entails the basic question of whether the defendant acted wrong- fully or not. In the event of a dispute between neighbours, eg, it must be determined whether the actor exceeded his powers of ownership ("abused" his right) and, therefore, acted wrongfully in relation to his neighbour. This question must be answered objectively with reference to considerations of reasonableness and fairness. Reasonableness remains a relative concept – it implies weighing the benefits that the exercise of his right has for the defendant against the gravity of prejudice suffered by the plaintiff as a result of such conduct. The reasonableness of the conduct thus depends upon the degree of disproportion between the benefit and the prejudice.

Various considerations play a role in determining whether the defendant acted reasonably. This doctrine applies mostly where the property rights of neighbours are concerned. Most of the principles were developed in this field and will now be considered.

(a) As a general rule, the owner of immovable property may use his property as he sees fit, as long as he acts within the bounds placed by the law on his powers of ownership.

(b) Given that an owner is not completely free to utilise his property as he wishes, his interests in exercising his right of ownership must be weighed against the interests of his neighbour.

(c) The basic question is thus still one of wrongfulness; it concerns the reasonable or unreason- able utilisation by the defendant of his property.

In considering the reasonableness of the actor's conduct, his mental disposition plays an important role. Malice (*animo vicino nocendi*) may be a strong indication of the unreasonable- ness of his conduct. Although the reasonable utilisation of one's property cannot be termed unreasonable merely because of an intention to prejudice another, it is in many instances extremely difficult to determine without further assistance to what extent the actor promoted his own reasonable interests. In such a case, the actor's own, subjective view of the reasonableness of his conduct may be an important aid: if he himself does not consider his conduct as being a reasonable advancement of his interests (and this will necessarily be the case where his exclusive aim is to injure the prejudiced person), he cannot complain if his conduct is considered to be unreasonable. For this reason, conduct with the exclusive aim of harming a neighbour (*animus vicino nocendi*) is, as a general rule, wrongful. In other words, improper motive renders an act, which would have been lawful but for such motive, wrongful if it prejudices a neighbour without benefiting the actor in any way.

(d) Where the benefit which the actor derives from his conduct is exceptionally slight but, by contrast, the nature of his conduct is very drastic and the harm caused to his neighbour relatively serious, he exceeds the bounds of reasonableness and acts wrongfully. Such an unreasonable act is wrongful despite the fact that the actor did not intend to harm his neighbour; any use of property which fails to advance reasonable interests is thus wrongful, whatever the motive of the actor may be.

(e) Where the actor harms his neighbour in the process of advancing his own reasonable inter- ests, he does not act wrongfully even if he intends (or has the improper motive of) harming his neighbour in the process.680 Improper motive is in itself insufficient to convert lawful conduct into a wrongful act.

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8.2 Nuisance

The so-called delict nuisance ("oorlas" or "hinder"), that was referred to earlier must be understood in the light of the abovementioned principles. Cases traditionally dealt with under the heading of nuisance also involve forms of unreasonable use of land by one neighbour at the expense of another.

Nuisance usually involves repeated infringements of the plaintiff's property rights. An objective weighing-up of the interests of the various parties, taking into account all the relevant circumstances, is required in these instances. Examples of nuisance include repulsive odours, smoke and gases drifting over the plaintiff's property from the defendant's land; water seeping onto the plaintiff's property; leaves from the defendant's trees falling onto the plaintiff's premises; slate being washed down-river onto the plaintiff's land; a disturbing noise; a blinding light being directed onto a neighbouring property; destabilising a common wall by piling soil against it; an excessive number of golf balls landing on a neighbouring property; overhanging branches and foliage; an electrified fence on top of a communal garden wall; blue wildebeest transmitting disease to cattle on neighbouring ground, and occupants of structures on neighbouring land allegedly causing a nuisance.

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Fault (and contributory fault)

1 General

It is accepted that fault (*culpa* in a wide sense) is a general requirement for delictual liability. There are divergent views on the true nature of fault. In practice, two main forms of fault are recognised: intention (*dolus*) and negligence (*culpa* in the narrow sense). These terms generally refer to the legal blameworthiness or the reprehensible state of mind or conduct of someone who has acted wrongfully. In a sense, fault is a subjective element of a delict, because it is concerned to a large extent with a person's attitude or disposition. Nevertheless, as will be apparent, the test for negligence is objective in nature.

A controversial issue is whether wrongfulness or negligence should be determined first. On the one hand, there is a view that fault can only be present if a person has acted wrongfully since it would be illogical to blame someone (ie, to find fault on his part) who has not acted for the purposes of the law of delict, or who has acted lawfully. On the other hand, it is accepted that the inquiry into negligence can be dealt with before the wrongfulness issue,8 either because the enquiry into negligence is "the logical starting point to any enquiry into the defendant's liability",9 or because it is "convenient" to focus on negligence first – "[i]n the absence of negligence the issue of wrongfulness does not arise". Nowadays the courts seem to follow a more pragmatic approach, accepting that, depending on the circumstances of the case, either of these two elements can be dealt with first. In *First National Bank of South Africa Ltd v Duvenhage* Nugent JA explained this approach as follows: "[W]hatever sequence doctrinal logic dictates, the human mind is sufficiently flexible to be capable of enquiring into each element separately, in any order, with appropriate assumptions being made in relation to the others, and that is often done in practice to avoid prolonging litigation, for though the elements are naturally interrelated, each involves a distinct enquiry."

The existence of either intent or negligence on the part of the defendant is sufficient to blame him, ie, to find that there was a reprehensible attitude or reprehensible conduct on his part. In the discussion that follows, both forms of fault are analysed in detail.

For the purposes of the *actio legis Aquiliae* and the action for pain and suffering, either intention or negligence suffices for liability, but for the purposes of the *actio iniuriarum* based on in- fringement of personality (*iniuria*), intent is generally required and negligence is insufficient.

Prior to determining whether the defendant's wrongful conduct is blameworthy (whether there is fault on his part), it must be established whether he has the capacity to be held accountable (accountability or "toerekeningsvatbaarheid"). This means that the person's mental ability must be such that intent or negligence may be imputed to him.

Any discussion of intent and negligence should therefore be preceded by an examination of accountability.

2 Accountability

A person is accountable (*culpae capax*) if he has the necessary mental ability to distinguish between right and wrong and if he can also act in accordance with such appreciation. He must have the required mental ability at the time of the commission of the act for which the law wants to blame him. If a person lacks accountability at the relevant time, there can be no fault on his part. Accountability can thus be seen as the basis of fault.

According to our law, a person may lack the necessary mental capacity (and he is thus not accountable – *culpae incapax*) where one or more of the following factors are present: youth; mental disease or illness; intoxication or a similar condition induced by a drug; and anger due to provocation.

Youth The Child Justice Act 75 of 200817 changed the common law position with regard to the accountability of children. Our law now distinguishes between three age groups, namely 0–9, 10–13 and 14–18 years. A child who has not completed his ninth year (*an infans*) is always regarded by the law as being *culpae incapax* (lacking capacity).18 The actual mental ability of the child is irrelevant and there is an irrebuttable presumption that he is not accountable. There is a rebuttable presumption that a child over the age of nine and under the age of 14 years (*an impubes*) lacks accountability. This means that it is assumed that he is *culpae incapax* until the contrary is proved.20 After the completion of his ninth year, a child may thus be accountable and held liable in delict if all the requirements for such liability are met. Children between 14 and 18 years of age are considered to be adults for purposes of accountability. Each case must of course be judged on its own merits.

Mental disease or illness Where, because of a mental disease or illness, a person cannot at a given moment distinguish between right and wrong, or where he is able to make such a distinction but cannot act in accordance with his appreciation of the distinction, he is *culpae incapax*. In these circumstances there is no question of fault and thus of delictual liability.

Intoxication Persons who are under the influence of intoxicating liquor or drugs may also be *culpae incapax*. However, the mere consumption of liquor or use of drugs may in a given situation be a negligent act for which the defendant may be held responsible. Where, for example, the driver of a motor vehicle consumes liquor before his journey and the alcohol only takes full effect after he has started his trip, and he then causes damage while in a state where he is no longer able to distinguish between right and wrong or between safe and unsafe conduct or to act in accordance with an appreciation of such distinction, he may nevertheless be liable. The reason for this conclusion is that the consumption of liquor may be seen as a negligent act performed at a time when the driver was accountable.

Provocation Where a person under provocation loses his temper and becomes passionately angry, he may be said to lack accountability and will thus not be blamed for his ("intentional") conduct. However, as already stated, provocation in our law is often regarded as a ground of justification.

Once it has been established that the defendant was accountable at the relevant stage, it must be determined whether he acted intentionally or negligently.

3 Intent

An accountable person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct. From this definition it is clear that intention (*animus iniuriandi, dolus*) has two elements, ie direction of the will and consciousness (knowledge) of wrongfulness.

3.1 Direction of the will

This element refers to the direction of the wrongdoer's will to a result which was either his principal object or one which he foresaw might follow from his conduct. It is possible to identify three forms of intent.

(a) Direct intent (*dolus directus* or "oogmerkopset") This form of intent is present where the wrongdoer actually desires a particular consequence of his conduct. It does not make any difference whether the wrongdoer is certain that the consequence would result or whether it only appears to him to be probable or possible. An example is where X decides to shoot and kill Y in order to take Y's money. The execution of this plan is accompanied by direct intent because it is X's desire or plan that Y should die.

(b) Indirect intent (*dolus indirectus* or "opset by sekerheidsbewussyn") This form of intent is present where a wrongdoer directly intends one consequence of his conduct but at the same time has knowledge that another consequence will unavoidably or inevitably also occur. The causing of the second consequence is accompanied by indirect intent. In law, the wrongdoer is said to have intent in respect of the second consequence which he has not desired or which was not his immediate object. An example is where X desires to shoot and kill Y who is standing behind a closed window. The bullet aimed at Y first shatters a window-pane and then fatally wounds Y. In respect of Y's death, it is clear that X has direct intent; but the same cannot be said about the destruction of the window-pane – X definitely did not desire to break the window. Nevertheless, X realised that it was an inevitable or necessary consequence of his shooting Y and therefore in relation to the breaking of the window, indirect intent is present.

(c) ***Dolus eventualis*** **("opset by moontlikheidsbewussyn")** This form of intent is present where the wrongdoer, while not desiring a particular result, foresees the possibility that he may cause the result and reconciles himself to this fact; ie, he nevertheless performs the act which brings about the consequence in question.

This form of intent is sometimes defined slightly differently, by stating that the wrongdoer foresees a consequence but recklessly carries on with his conduct. The use of the word reckless in this regard should, however, be avoided because recklessness may also refer to a serious degree of negligence. Thus confusion between *dolus eventualis* and (gross) negligence may occur The distinction between these two concepts can be explained as follows: in the case of negligence, the question is whether the consequence, objectively seen, was reasonably foreseeable, while in a case of *dolus eventualis* the question is whether the wrongdoer actually subjectively foresaw the possibility of the consequence. The fact that a particular result was reasonably foreseeable, may clearly be of fundamental importance in deciding whether the actor actually foresaw the result. The implication is that the objective foreseeability test may provide evidentiary material for determining what was actually foreseen by the wrongdoer. Where the wrongdoer alleges that he did not foresee consequences that are reasonably foreseeable, he must demonstrate factual circumstances that make his version reasonably acceptable.

A general example of *dolus eventualis* is the following: X wants to kill his enemy Y. Z is standing next to Y when X takes aim. X actually foresees the possibility that his shot may miss Y and hit Z with fatal consequences. X nevertheless decides to proceed (to shoot Y). The bullet misses Y and hits Z. The conclusion is that X shot Z intentionally, even though he did not desire this consequence or foresee it as a necessary consequence of his conduct. The mere fact that X subjectively foresaw the possibility that he might hit Z is sufficient for concluding that he acted intentionally. If X initially foresaw the possibility that he might hit Z but later for some reason (even an unreasonable one) came to the conclusion that this would not happen, there will not be *dolus eventualis* on his part. In such a case, *luxuria* or conscious negligence may be present (ie, the wrongdoer subjectively foresees the possibility of harm in circumstances where such harm is also reasonably foreseeable but he does not reconcile himself to the possibility of this actually happening).

Although a distinction is made between the different forms of intent, it is generally irrelevant which one is present in a particular case. No specific consequences are attached to a given form of intent. The fact that the law distinguishes between different forms of intent is important in understanding how wide the concept of intent is in law: its meaning is much broader than it is in general usage. This observation is of equal validity when we consider the further division of intent into definite and indefinite intent.

The difference between definite intent (*dolus determinatus*) and indefinite intent (*dolus indeter- minatus*) is as follows: where a wrongdoer's will is directed at a result which he causes while he has a specific person or object in mind, he is said to have definite intent. This form of intent may be present in the case of direct intent, indirect intent and *dolus eventualis*. However, where the wrongdoer's will is directed at the result which he causes while he has no specific person or object in mind, indefinite intent is present. The classic example of this kind of intent is found in the case of a person placing a time-bomb in a busy shop.

He does not know precisely who will be hurt or what damage will be caused, but he nevertheless has intent in respect of the consequences of his conduct. Indefinite intent indicates an indifference or lack of knowledge about the identity or number of victims or the nature and extent of the resulting consequences, but not necessarily indifference about the occurrence of the particular consequence(s). Seen from this perspective, the wrongdoer may be indifferent about who will be injured (which points to indefinite intent) while desiring such consequences (direct intent), or realising the inevitability of such consequences (indirect intent), or merely foreseeing the possibility of such consequences resulting from his conduct (*dolus eventualis*).

3.2 Consciousness (knowledge) of wrongfulness

Knowledge of wrongfulness as a requirement of intent indicates that it is insufficient for the wrongdoer merely to direct his will (as discussed earlier) at causing a particular result; he must also know (realise) or at least foresee the possibility that his conduct is wrongful (ie, contrary to law or constituting an infringement of another's right(s)). A mistake sometimes made, particularly by lay persons, is to describe any desired conduct or willed consequence as "intentional"; intent is actually a technical legal term referring to a willed act which in addition is subjectively known to be wrongful.

It follows that a mistake (error) with regard to any matter which has a bearing on the wrongful- ness of the actor's conduct, will exclude intent on his part. A good example of this is mistake concerning the presence of a ground of justification. Where X takes a motor car belonging to Y while erroneously thinking that Y has given consent, he does not take the car intentionally because his mistake (thinking that Y has given consent) excludes knowledge of wrongfulness on his part – in other words X honestly but wrongly believes that he is acting lawfully because of the supposed consent from Y.

There are conflicting opinions about what form of mistake (error) excludes intent. In certain cases it was held that a reasonable or unreasonable belief on the part of the wrongdoer that his conduct (which is in fact wrongful) is lawful, will exclude intent. However, there are cases which go so far as to suggest that mistake can never be a defence in an action based on intent46 (consciousness of wrongfulness is thus not recognised as an element of intent), while it has also been held that only a reasonable mistake (ie, one which is not due to negligence) negates in- tent. It is submitted that, in accordance with new developments in the field of criminal law, it must be accepted as a general rule that for the purposes of delictual liability any mistake (*error*) with regard either to a relevant fact or to the law excludes intent. Such a principle will be significant where intent (in the form of *animus iniuriandi)* is required for delictual liability in terms of the *actio iniuriarum*. This will mean that where an actor, for any reason, is unaware of the wrongfulness of his conduct (for example, in a defamation action) *animus iniuriandi* (intent) cannot be present and there can be no question of an action for satisfaction (sentimental damages as a *solatium*). As stated above, intent is not required for the *actio legis Aquiliae*, as negligence is sufficient; thus mistake excluding intent will seldom be relevant in this action.

3.3 Motive and mistake concerning the causal chain of events

To conclude the discussion of intent, the meaning of motive and mistake concerning the causal chain of events must be considered.

Motive In general, motive indicates the reason for someone's conduct and must not be con- fused with intent. Intent is a technical legal term that, as stated earlier, denotes willed conduct which the wrongdoer knows is wrongful; motive, on the other hand, refers to the reason why a person acts in a particular way, ie, the object he wishes to achieve, his desire, or the facts behind the formation of his will. A person may thus, despite the fact that in his opinion he has a good motive, still act with intent (for example, where he kills another in order to spare him suffering). By contrast, intent may be absent in the case of a person who has a bad motive but believes his conduct is lawful. Despite the differences between intent and motive, motive is clearly of evi- dentiary value to prove direct intent – it may serve as evidence that someone acted with direct intent. Moreover, motive may serve as proof of consciousness of wrongfulness. It may be accepted that a bad motive (malice or mala fides) usually indicates knowledge of wrongfulness while a good motive (bona fides) usually indicates the opposite.

Mistake concerning the causal chain of events In short, the problem here is whether intent is present where the wrongdoer causes a result in a manner different from that foreseen by him. A distinction must be made between a material and an immaterial deviation from the planned or foreseen causal nexus. In the case of a material deviation, intention is absent, while it is assumed to be present where the deviation is not markedly different from the foreseen causal chain of events. According to the Appellate Division, a marked deviation exists if the actual causal chain is so different from the foreseen one that the former cannot reasonably be regarded as falling within the actor's own perception.

4 Negligence

4.1 Definition and nature

It was previously stated that fault (intent and negligence) refers to the blameworthy attitude or conduct of someone who has acted wrongfully for the purpose of the law of delict. In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently is the objective standard of the reasonable person, the *bonus paterfamilias*. Changed terminology requires use of the expression "reasonable person" in future instead of "reasonable man". The defendant is negligent if the reasonable person in his position would have acted differently; and according to the courts the reasonable person would have acted differently if the unlawful causing of damage was reason- ably foreseeable and preventable. The test for negligence finds its most authoritative and clearest statement in the following dictum of Holmes JA in *Kruger v Coetzee*:

> For the purposes of liability culpa arises if –
>
> (a) a diligens paterfamilias in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
> (b) the defendant failed to take such steps. This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes over- looked. Whether a diligens paterfamilias in the position of the person concerned would take any guard- ing steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast basis can be laid down.

Notwithstanding a few judicial dicta to the contrary, the abovementioned dictum remains authoritative.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

The test for negligence has been described in a more condensed manner without reference to foreseeability and preventability of damage. In Jones NO v Santam Bpk it is stated as follows:

> A person is guilty of culpa if his conduct falls short of that of the standard of the *diligens paterfamilias* – a standard that is always objective and which varies only in regard to the exigencies arising in any particular circumstances. It is a standard which is one and the same for everybody under the same circumstances.

There are numerous matters relating to negligence and the test for negligence which require discussion.

4.2 Can negligence and intention overlap?

While this is primarily a theoretical issue, it may have practical implications. According to Van der Merwe and Olivier's definition of negligence, it would appear that negligence may only exist in respect of a consequence if the wrongdoer has not "intentionally" caused that consequence. In terms of this view, intention and negligence are mutually exclusive concepts in the sense that one cannot be present when the other exists. There are a number of decisions which tend to support the view that a person cannot act intentionally and negligently in respect of the same consequence. However, there are decisions in which it was stated that if intent is present, negligence is included in the intent.

In *S v Ngubane* the Appellate Division held that, for the purposes of criminal law (although it must be accepted that the law of delict will also be influenced by this decision) intent and negligence may be present simultaneously. The court answered the question of whether someone who on the evidence has intentionally killed another may be convicted of culpable homicide (for which negligence is required) and not only of murder, in the affirmative. This view is accept- able. Like Boberg, we consider the conclusion that "where *dolus* is present, so too is culpa" to be logical and justifiable. One may argue here that the intentional causing of harm to another person is contrary to the standard of care which the reasonable person would have exercised and that negligence is thus simultaneously present.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

4.3 Ordinary and gross negligence

Sometimes it is important to differentiate between ordinary and gross negligence. Although it makes no difference for *Aquilian* liability whether the defendant acted with slight or gross negligence, some statutory provisions limit liability to instances of "gross negligence", and some contractual exclusionary clauses also refer to this concept. In respect of malicious prosecution as *iniuria*, it has already been held that liability may be based on gross negligence instead of intent and that it is therefore material to determine whether a wrongdoer has acted with gross negligence.

It is therefore important to formulate a correct definition of gross negligence. In *MV Stella Tingas Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas* the court described gross negligence as follows:

> [T]o qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk- taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.

This exposition may be accepted as correct.

4.4 Negligence and an omission

Negligence as a form of fault (culpability) must not be confused with an omission, which is a form of conduct. An omission can indeed be performed intentionally or negligently; moreover, a positive act can be negligent, proving that negligence is not relevant only in respect of an omission. Furthermore, an omission (failure) to take reasonable steps to prevent foreseeable harm (as part of the test for negligence) should not be confused with an omission as a species of conduct.

4.5 The reasonable person: characteristics

4.5.1 General

From the above it is clear that the criterion of the reasonable person is central to the determination of negligence. The reasonable person is merely a fictitious person, a concept created by the law to have a workable objective norm for conduct in society. Accordingly, the reasonable person is not an exceptionally gifted, careful or developed person; neither is he underdeveloped, nor someone who recklessly takes chances or who has no prudence. The qualities of the reason- able person are found between these two extremes. It must be emphasised that the reasonable person serves as the legal personification of those qualities which the community expects from its members in their daily contact with one another. In *Weber v Santam Versekeringsmaatskappy Bpk* Joubert JA explained this in the following words:

> In my opinion it serves no purpose to ascribe various anthropomorphic characteristics to the *diligens paterfamilias*, because we are not dealing with a physical person, but only with the name of an abstract, objective criterion. We are furthermore not concerned with what the care of a legion of reasonable per- son types would have been, such as a reasonable educated person, a reasonable illiterate person, a reasonable skilled labourer, a reasonable unskilled labourer, a reasonable adult or a reasonable child. There is only one abstract, objective criterion, and that is the Court's judgment of what is reasonable, because the Court places itself in the position of the *diligens paterfamilias*.

It is both fair and realistic to accept that the characteristics of the fictional reasonable person in South Africa must be adapted with changing circumstances. In view of the shocking proliferation of crimes endangering the lives, human dignity and property of innocent persons, it is, for example, unrealistic and wrong to believe that the reasonable person cannot sometimes be nervous and afraid and act accordingly. By contrast, circumstances such as improved technology and improved access to education, training and information may require the reasonable person test to be more stringent in evaluating the degree of care expected of human conduct in particular instances. It is therefore important not to regard the reasonable person test as static.

At this stage, it is necessary to examine more closely certain characteristics of the reasonable person, which are important to the practical application of this standard of care in a given situation.

The reasonable person has a certain minimum knowledge and mental capacity which enable him to appreciate the dangerous potential of certain actions. For example, the reasonable person knows that there are inherent dangers involved in the use of arms, explosives, poison, motor vehicles, electricity, sports equipment, etc. In general, the law makes no provision for the fact that an individual wrongdoer may be stupid, illiterate, inattentive, intellectually retarded or mentally unstable – everyone is required to conform to the objective standard of the reasonable person. Be that as it may, "[t]here is a general consensus ... that the knowledge possessed by the actor is a relevant consideration in the make-up of his counterpart, the hypothetical reasonable [person]". This does not mean that all the subjective beliefs of the actor should be taken into account but only those "that can properly be attributed to a reasonable [person] as 'a concession to the underlying moral basis of negligence'".

Furthermore, there is no authority for the view that the physical characteristics of the wrong- doer play a part in the reasonable person test. This means, for example, that members of both sexes must act like the reasonable person. Our law should, however, as in Anglo-American law, not completely ignore physical handicaps in determining the possible negligence of, for example, a blind person or a cripple. In other words, the question should be how a reasonable person with a particular handicap (for example blindness) would have acted. A person suffering from a physical disability may thus still be negligent where he engages in an activity which the reasonable person in his position would not have regarded as safe (for example, a blind person or a person with poor vision driving a motor car).

4.5.2 Children

A matter which has received considerable attention in our law is the question of whether the fact that the wrongdoer is a child should play a role in the application of the reasonable person test. As stated above, this question only arises in the case of children who are 10 years and older, because the law deems a child under the age of 10 to be *culpae incapax*.

Before 1965, there was a tendency in our courts to take into account the youthfulness of a wrongdoer in determining his negligence; ie, to test for negligence by means of the conduct expected from a reasonable child of the wrongdoer's age and intellectual development.

In 1965, the Appellate Division passed judgment on this matter in *Jones NO v Santam Bpk*. Although the court did not acknowledge it in so many words, it adopted a new approach to the determination of negligence in respect of children. The court implied that the criterion for the determination of negligence is always objective, in the sense that in all situations the test of the reasonable person (*diligens paterfamilias*) is applied. According to this approach, in determining whether a child acted with culpa, it must first be ascertained whether the child concerned met the standard of care required of the reasonable person. Secondly, it must be asked whether the child, if the care shown by him did not meet the requirements of the first test, was *culpae capax* (accountable for his actions).

In order to determine whether a child acted negligently, the question is whether the conduct of the child measures up to the standard of care of the reasonable person. The fact that the conduct in question is that of a child is irrelevant at this stage of the enquiry. Once it has been established that the conduct is negligent, it must be ascertained whether the negligent conduct may be imputed to the wrongdoer, ie, whether he is juridically responsible for his acts. Here one is dealing with accountability, and the inquiry is whether the child-wrongdoer had the required intellect, maturity, experience, insight, etc to distinguish between right and wrong and to act in accordance with such insight. Here all the subjective qualities of the child itself are taken into account.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

This (new) approach has had a critical reception. The following two aspects are noteworthy: firstly, it would seem that the earlier test of the reasonable child is more acceptable than that of the reasonable person, because a child, even though he may be fully accountable, cannot realistically be measured against an adult standard. Secondly, it is clear that the court in Jones placed the cart before the horse by first inquiring into fault and then into accountability. Logically one must first determine whether a person is accountable before there can be any question of fault. In *Roxa v Mtshayi* the Appellate Division correctly accepted this criticism by testing first for accountability and then for negligence. Jansen JA also questioned whether the Jones case really departed from the older decisions and expressed the hope that the whole matter would be reconsidered in future.

In *Weber v Santam Versekeringsmaatskappy Bpk* the Appellate Division had another opportunity to consider the Jones case. The court held that the Jones case did not materially depart from common law and confirmed the approach in this case. Jansen JA substantiated his judgment as follows:

> When the child's conduct is judged according to the criterion of an adult, the enquiry must be whether he was mature enough to comply with that criterion in respect of the specific situation. If this approach is applied with insight, many of the objections of our contemporary writers to the principles of the Jones case should fall away, and it should also not be necessary to plead for the use of a reasonable child of relevant age, as in the Anglo-American legal systems, instead of the criterion of the bonus paterfamilias to reach a fair result.

In Eskom Holdings Ltd v Hendricks the Supreme Court of Appeal again had to deal with this matter in evaluating the alleged contributory negligence of a child of eleven years of age. The court took cognisance of criticism of the reasonable person test for children, but referred to the approach in the abovementioned cases and reiterated that in "each case what had to be determined was whether the child in question had developed the emotional and intellectual maturity to appreciate the particular danger to be avoided and, if so, to act accordingly".

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14.

4.5.3 Experts

It must now be considered whether the fact that the wrongdoer possesses proficiency or expertise in respect of the allegedly negligent conduct, affects the application of the reasonable person test. It is self-evident that the general test for negligence, ie the test of the hypothetical reasonable person in the position of the wrongdoer, cannot be applied when considering the conduct of the defendant where such conduct calls for expertise.

Thus, in the case of an expert such as a dentist, surgeon, attorney, electrician, etc the test for negligence in respect of the exercise of the expert activity is the test of the so-called reasonable expert; in other words, the reasonable dentist, reasonable medical doctor, reasonable attorney, reasonable banker, reasonable police officer, reasonable teacher, reasonable auditor or accountant, reasonable engineer and architect, etc. The negligence of an expert is some- times referred to as professional negligence.

The reasonable expert is identical to the reasonable person in all respects, except that a reason- able measure of the relevant expertise is added. The standard of expertise is described as "reasonable" because regard is had not to the highest degree of expertise in the relevant profession or occupation but to the general or average level of such expertise. In *Van Wyk v Lewis*, for example, reference is made to "the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs". In this case it was held that, as far as the medical profession was concerned, the same expertise cannot be expected from a general practitioner as from a specialist. In *Durr v ABSA Bank Ltd* (a case dealing with an investment broker) the Supreme Court of Appeal approved of the approach in *Van Wyk v Lewis* and emphasised that it is for the court to decide what is reasonable under the circumstances. It will pay much attention to the views of the profession but is not bound to adopt them. In respect of the facts before it, the court held that the appropriate standard was not that of the average typical broker of modest accomplishments since the acceptance of such a standard would allow a definition chosen by a witness (for the defendant) for his own purposes to dictate the result, making the enquiry about what was required of a particular kind of broker pointless. In *casu* the appropriate standard was that of the regional manager of the bro- king division of a financial institution professing investment skills and offering expert investment advice.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

Mention should also be made of the maxim *imperitia culpae adnumeratur*. Taken literally, this maxim means that ignorance or lack of skill is deemed to be negligence. This maxim is, how- ever, misleading because our law does not accept that mere ignorance constitutes negligence. The principle embodied in this maxim applies where a person undertakes an activity for which expert knowledge is required while he knows or should reasonably know that he lacks the requisite expert knowledge and should therefore not undertake the activity in question. An example of this is where X, who has no expertise in piloting an aircraft, flies an aircraft and causes an accident. X's blameworthiness in this example is not to be found in his incompetence in piloting an aircraft, but in the fact that, while he knows or should reasonably know that he is incompetent, he nevertheless attempts to perform the expert activity.

4.6 Negligence: foreseeability and preventability of damage

The test for negligence (as discussed earlier) rests on two legs, ie the reasonable foreseeability and reasonable preventability of damage. It is important to examine the nature and application of both concepts.

(a) Foreseeability Two diverging views exist about the nature of the foreseeability test. *Abstract (or absolute) approach* According to this approach the question of whether someone acted negligently must be answered by determining whether harm to others was in general reasonably foreseeable; in other words, the question of whether his conduct in general created an unreasonable risk of harm to others must be asked. On this approach it is clearly not a requirement for negligence that the extent of the damage or a particular consequence that actually occurred should have been reasonably foreseeable; it suffices if damage in general was reasonably foreseeable. The question of whether a defendant is liable for a specific consequence is, in terms of the abstract approach, answered with reference to legal causation rather than by inquiring whether the defendant was negligent with regard to that specific consequence. However, this view of negligence enjoys little support among academics and is not generally accepted by our courts.

Concrete (or relative) approach This approach to the test of foreseeability is based on the premise that a person's conduct may only be described as negligent in respect of a specific consequence or consequences; therefore, it is a prerequisite for negligence that the occurrence of a particular consequence must be reasonably foreseeable. In other words: a wrongdoer is only negligent with reference to a specific consequence if that consequence, and not merely damage in general, was reasonably foreseeable.144 According to its supporters, a strict application of this approach obviates the need for an enquiry into legal causation.

The question of which approach should be accepted now arises. In our opinion, the concrete (or relative) approach is to be preferred for inter alia the following reasons: Boberg correctly observes that the question of whether the reasonable person in the position of the wrongdoer would have acted differently in order to prevent damage may only be answered in a meaningful way by reference to the consequence or consequences that were indeed reasonably foreseeable (and not merely by reference to damage in general, as required by the abstract approach). It is only when these consequences of an act are considered that one can judiciously decide what steps or precautions (if any) the reasonable person would have taken in order to guard against such consequences. This does not mean that the precise nature and extent of the harmful consequence(s), or the precise manner in which the damage was caused, must be reasonably foreseeable. It is sufficient if the general nature of the consequence(s) and the manner in which it was caused are foreseeable. However, it must be emphasised that acceptance of the concrete or relative approach does not obviate the important role of legal causation as a criterion to limit liability, especially where "remote consequences" are concerned.

As far as the application of the foreseeability test is concerned, it must be stressed that it is not possible to lay down hard-and-fast rules, because the circumstances of each case are de- cisive. One may nevertheless accept as a broad guideline that the foreseeability of harm will depend on the degree of probability of the manifestation of the harm (or how great the chance or possibility is that it will occur). Therefore, the greater the possibility that damage will occur, the easier it will be to establish that such damage was (reasonably) foreseeable. (Of course, the contrary is also true).

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(b) **Preventability** Although the question of reasonable foreseeability plays the most prominent role in the determination of negligence, the second leg of the test for negligence, ie whether the reasonable person would have taken precautionary steps to prevent the damage from occurring, may also be very important. Thus the issue of the avoidance of harm should not be neglected. The question is whether, in an instance of reasonably foreseeable damage, the defendant took adequate, reasonable steps to prevent the materialisation of the damage. The mere fact that foreseeable damage materialised does not necessarily mean that steps indeed taken to prevent the damage were unreasonable.

On a more analytical level, Van der Walt and Midgley identify four factors particularly relevant to the preventability leg of the test for negligence that are taken into account in case law:

(i) *The nature and extent of the risk* inherent in the wrongdoer's conduct. The fact that the nature and extent of the risk are not serious, or that the harm foreseen is slight, may have the result that the reasonable person – despite the fact that the harm was reasonably foreseeable – would not have taken steps to prevent it (and consequently the wrongdoer is not negligent where he did not take such steps).

(ii) *The seriousness of the damage* if the risk materialises and damage follows. Where the wrongdoer's conduct creates the possibility that grave and extensive damage may occur, he should take reasonable steps to prevent such damage, even though there is only a slight possibility or chance that the damage will actually materialise.

(iii) Therelativeimportanceandobjectofthewrongdoer'sconduct.Heretheconcernisabout the utility of the wrongdoer's conduct. It may, for example, be that the interest or purpose served by the conduct in question is of such a nature that it is more important than the risk of harm which it involves; in such a case the reasonable person would not have taken steps to prevent the harm.

(iv) The cost and difficulty of taking precautionary measures. Where the risk of harm can be eliminated or reduced without substantial problems, prejudice or costs, it may be accepted that the reasonable person would take precautionary measures. However, where the costs and difficulty of taking precautionary measures are greater than the gravity of the risk involved, the reasonable person would clearly not take such steps to minimise or reduce the risk.

Van der Walt and Midgley provide the following summary of the above factors:

> In general the magnitude of the risk must be balanced against the utility of the conduct and the difficulty, expense or other disadvantage of desisting from the conduct or taking a particular precaution. If the magnitude of the risk outweighs the utility of the conduct, the reasonable person would take measures to prevent the occurrence of harm; if the actor failed to take such measures he or she acted negligently. On the other hand, if the burden of eliminating a risk of harm outweighs the magnitude of the risk, the reasonable person would not take any steps to prevent the occurrence of the foreseeable harm.

4.7 Negligence judged in the light of the surrounding circumstances

It must be self-evident that the negligence (or otherwise) of conduct may only be evaluated in the light of all the relevant circumstances of a particular case. It is a well-known principle of our law that all the relevant circumstances of a case must be considered as a whole when deciding whether a wrongdoer's conduct was negligent. In *Cape Town Municipality v Butters* this was formulated as follows:

> It needs to be emphasised, once again, that in considering issues of negligence what is, or what is not, reasonably foreseeable and what steps, if any, ought to be taken by the reasonable person to avert such foreseeable harm must always depend upon the particular circumstances of each case, that no hard and fast rule can be laid down and that in general it is futile to seek guidance from the facts and results of other cases.

The following are examples of factors which should be taken into account in this investigation. (It must be emphasised, however, that in each and every case one is still concerned with the question of whether the wrongdoer's behaviour was in accordance with the standard of the reasonable person in his position.)

(a) Greater care is required when someone works with things which are inherently dangerous, like a loaded firearm, dynamite, a pressure cooker, a wet shop floor, etc.

(b) Greater care is also expected when a person deals with individuals who suffer from some disability or incapacity, such as deaf-mutes, the blind, children, intoxicated persons, etc. In the situations referred to in (a) and (b), someone who knows or is reasonably expected to be aware of the special circumstances is required to act with exceptional care.

(c) Where a person has to take a decision in a situation of sudden emergency and there is insufficient opportunity to consider all the consequences of his actions, the imminent peril must be taken into account in deciding whether he is negligent. This situation is usually referred to as the so-called "doctrine of sudden emergency". The principle accepted here is that the law cannot expect a person who has to act swiftly in a situation of imminent peril to show the same judgment and skill as a person who is not acting in such urgent circumstances. Therefore, an error of judgment does not necessarily amount to negligence because the reasonable person may also make an error of judgment in certain circumstances.

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According to case law, three requirements must be satisfied in a case of sudden emergency for a wrongdoer's conduct not to amount to negligence, in other words, to meet the standard of the reasonable person:

> (i) The wrongdoer must have faced a situation of imminent peril. Three examples from case law are: a man, armed with a panga, slashes at a motorist who is driving past him; some- one who is fighting with another person in public picks up a brick and aims it at a motorist; a group of people throwing stones at a vehicle damage the windscreen so that the driver cannot see properly. Although the reactions of the motorists in these three examples appeared to amount to negligent driving at first sight, they were held not to be negligent by the courts.
>
> (ii) The wrongdoer must not have caused the perilous situation by his own negligence or imprudence. Where the reasonable person would in any event have evaded or prevented the emergency situation, the wrongdoer's conduct will not be excused because it forms an integral part of the conduct which placed him in the emergency.
>
> (iii) The wrongdoer must not have acted in a grossly unreasonable manner. This means that one must establish whether the reasonable person in the same circumstances would have made the same error of judgment as the wrongdoer. Thus the principle is that although the reasonable person may also make a (justifiable) error of judgement, he will not lose his head or behave completely foolishly.

(d) Generally speaking, a person acts according to the standard of the reasonable person when he relies on the fact that another person will act in a reasonable way (like a reasonable per- son). This implies that he may expect others to obey the law when, for example, a motor car is driven on a public road, or that sidewalks, lifts and floors will be kept in a safe condition. In general, therefore, a person is not negligent where he simply fails to take into consideration the negligent conduct of another driver (who is violating traffic rules) and is involved in a collision with him. But where negligent conduct on the part of another driver is reasonably foreseeable – as is frequently the case nowadays in fast-flowing traffic – a person may not always rely on other road-users acting reasonably. In general, however, a person need not take steps to guard against the recklessness or the gross negligence of others.

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These principles also find application with regard to contributory negligence; they provide guidelines for determining when a person is required to be on his guard against the possible negligence of others. Of particular importance here is that a person is required to act with extreme circumspection when there are clear indications that another is not going to obey traffic rules. Moreover, it must be noted that where a person creates a situation which is not inherently dangerous but which may become dangerous when another person interferes, the former is obliged to take the precautionary steps which a reasonable person in his position would take.

(e) Another factor concerns the customs, usages and opinions of the community; generally a wrongdoer will be able to defend himself successfully against an allegation of negligence by proving that he acted in accordance with normal practices (in, for example, the building industry). This, however, is not always conclusive in determining the absence of fault. A person whose conduct is in fact negligent may not escape liability by relying on common practice. The ultimate question remains whether the reasonable person would have acted in the same way as the defendant.

(f) In certain circumstances, the appropriate standard of care required for conduct is not entirely left to the discretion of the court (by applying the reasonable person test) because there is also a specific statutory provision which applies. It is not clear in our law whether conduct contrary to a statutory provision is per se negligent or whether the provision merely affords proof of negligence. It should probably be accepted that in such a situation it is incorrect to speak of statutory negligence and that the statutory provision at best only provides evidentiary material; the infringement of the provision in question is thus not conclusive proof of negligence and the general criterion of the reasonable person still applies.

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4.8 Negligenceand“dutyofcare”

Negligence is, as stated above, generally determined according to the test of the reasonable per- son. On occasion, our courts have not applied this test and have instead followed English law in applying the so-called “duty of care” doctrine. According to this approach, one must first establish whether the defendant owed the plaintiff a duty of care (the “duty issue”), and there- after whether there was a breach of this duty (the “negligence issue”). If both questions are answered in the affirmative, negligence is said to be present.

In determining firstly whether a duty of care was owed, the criterion was traditionally whether the reasonable person in the position of the defendant would have foreseen that his conduct might cause damage to the plaintiff. At present, it is emphasised that this issue is a policy- based value judgment, in which foreseeability plays no role, as to whether interests should be protected against negligent conduct. In answering the second question, ie whether there was a breach of the duty of care, the court considers whether the wrongdoer exercised the standard of care that the reasonable person would have exercised in order to prevent damage. In other words, would the reasonable person, in contrast to the wrongdoer, have prevented the dam- age? It should be noted that the duty of care is not a general duty; it is a duty towards certain people or classes of people and not towards every person. Unless the plaintiff can prove that he is someone who was owed a duty of care, he has no action; a duty of care is owed only to the so-called foreseeable plaintiff.

The duty of care approach is foreign to the principles of Roman-Dutch law which form the basis of our law of delict. From a historical point of view, the application of these principles must be rejected. An even more important reason to reject the application of the duty of care in our law is that in its traditional form it is an unnecessary and roundabout way of establishing what may be established directly by means of the reasonable person test for negligence, ie whether the reasonable person would have foreseen and guarded against damage. Moreover, the use of the duty of care doctrine may confuse the test for wrongfulness (breach of a legal duty) with the test for negligence. Our courts sometimes use the duty of care concept incorrectly as a synonym for the legal duty used to determine wrongfulness.

To avoid confusion, it would be preferable to describe the duty involved in the test for wrongfulness as a "legal duty". In *McIntosh v Premier, KwaZulu-Natal* Scott JA formulated this as follows:

> [T]he word 'duty' and sometimes even the expression 'legal duty' [in respect of the second leg of the negligence test as formulated by Holmes JA in *Kruger v Coetzee*], must not be confused with the concept of 'legal duty' in the context of wrongfulness which . . . is distinct from the issue of negligence. I mention this because this confusion was not only apparent in the arguments presented to us in this case but is frequently encountered in reported cases. The use of the expression 'duty of care' is similarly a source of confusion. In English law 'duty of care' is used to denote both what in South African law would be the second leg of the inquiry into negligence and legal duty in the context of wrongfulness. As Brand JA observed in . . . [*Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd199*] . . . 'duty of care' in English law 'straddles both elements of wrongfulness and negligence'."

No reason exists why the duty of care approach should be used in determining negligence, and at present it would appear that in most cases our courts simply use the test of the reasonable per- son. Unfortunately, some judgments of the Supreme Court of Appeal contributed to this confusion by an incorrect approach to the "duty of care" doctrine. Although these judgments pay lip-service to the distinction between wrongfulness and negligence, negligence is in effect regarded as a co-determinant for wrongfulness.

In the process, the distinction in our law of delict between fault and wrongfulness is obscured. Where this happens, the theoretical foundations of our law of delict are undermined and legal uncertainty is inevitable. It is to be hoped that the Supreme Court of Appeal will clear up the confusion. If not, the two approaches to the "duty of care" concept – including the incorrect one – will continue to be reflected in the decisions of the courts.

4.9 Proof of negligence

In order to succeed in his claim, the onus is on the plaintiff to prove on a preponderance of probabilities that the defendant was negligent. Where there is a statutory presumption of negligence, the onus rests on the defendant to rebut the presumption of negligence in order to escape liability.

Note should be taken of the maxim *res ipsa loquitur* (the facts speak for themselves). This phrase normally refers to a situation where the facts of the matter are such as to give rise to an inference of negligent conduct and finds application "where the only known facts, relating to negligence, consist of the occurrence itself ". This phrase may thus be applied where, for example, a motor car suddenly swerves to the wrong side of the road or where objects fall from a building, because these events do not usually occur without accompanying negligence.

It has been contended that *res ipsa loquitur* creates a presumption of negligence, but the current legal position is that there is no shift in the onus of proof in such cases and that there is not even a prima facie case in favour of the plaintiff; the phrase is merely an argument on the probabilities that a plaintiff, who may have little evidence at his disposal, may use in order to convince the court that the defendant acted negligently. If the evidence showed that all the crucial facts were exclusively within the defendant's knowledge, the court is permitted to draw an inference of negligence by applying the doctrine of res ipsa loquitur. But the defendant may still submit evidence to show that the occurrence in question bears no relation to any negligent conduct on his part. The maxim is also not applicable if the parties have agreed on

certain facts and no evidence has been led. It has furthermore been pointed out that the maxim could rarely find application in cases based on alleged medical negligence.

4.10 Relevance of negligence

A theoretical issue which has not received attention in our courts is a matter which Van Rensburg describes as "relevance of negligence".

The following example may be used to explain this issue: suppose that, travelling at night at an excessive speed and without a light, A drives his motor-cycle round a sharp corner and collides with B, who is standing in the middle of the road. B dies. There is probably no doubt that A is negligent: the reasonable person would not have ridden his motor-cycle at night without a light at an excessive speed; thus the reasonable person would have foreseen the possibility of damage and taken steps to prevent it even though such steps would have been ineffective. But what if it emerges that even if A had ridden at a reasonable speed, and even if his light had been on, he would not have been able to avoid the collision with B and B would still have been killed? Van Rensburg argues that in these circumstances A's negligence is not related to B's death, because B would have been killed even if A had behaved according to the standard of the reasonable person. Therefore A should not be held delictually liable, because there is no juridical connection (relevance) between the violation of the norm by A (negligence) and the consequence (B's death).

It should be noted that negligence which is usually seen as a (blameworthy) characteristic of an act, cannot itself cause anything. It is only the act which causes the consequences (damage). To classify an act as negligent is simply to pass a juridical judgement on the act, or, in other words, to state that an act has a certain juridical characteristic (ie, negligence). Although negligence as an aspect of an act can thus not in itself bring about a consequence, it may stand in a certain juridical relationship to (be relevant in respect of) the consequence. Liability should not be imposed where this relationship is absent.

4.11 Distinction between wrongfulness and negligence

It is accepted that wrongfulness is determined by means of an objective reasonableness criterion, while the test for negligence is that of the objective reasonable person. Therefore, an objective criterion of reasonableness is used in the determination of both wrongfulness and negligence. The question of what the essential difference between the test for wrongfulness and the test for negligence is, arises. The following factors are important:

(a) In the case of wrongfulness, the reasonableness of the defendant's conduct is determined by weighing the conflicting interests in the light of the legal convictions of the community (*boni mores*); in other words, the inquiry is whether a legally recognised interest was infringed in an unreasonable manner or one that is contra *bonos mores*; whereas in the case of negligence the reasonable person's conduct is determined with reference to the reasonable foreseeability and preventability of damage.

(b) Wrongfulness is concerned with determining the legal reprehensibility of the conduct (wrongfulness thus qualifies conduct); whereas negligence is usually seen as determining the legal blameworthiness of the defendant for his wrongful conduct (negligence thus qualifies the defendant or wrongdoer).

(c) Because wrongfulness concerns the legal reprehensibility of a person's conduct, such con- duct is determined diagnostically (*ex post facto*, by looking back) in light of (or with knowledge of or by taking into account) all the relevant facts and circumstances that are actually present and all the consequences that actually ensued. Because negligence concerns the legal blame- worthiness of the wrongdoer, it is determined prognostically (ex ante, by looking forward) with reference to the position in which the defendant actually found himself: this is achieved by placing the reasonable person in the position of the wrongdoer at the time of the commission of the act and then taking cognisance only of those facts and circumstances which the wrongdoer knew of, amplified by facts about which the reasonable person in his position would have known, to determine what consequences would probably flow from his conduct (reasonable foreseeability of damage) and whether such consequences could reasonably have been prevented. In short, one can say that wrongfulness is determined on the basis of actual facts or realities, and negligence on the basis of probabilities.

(d) Traditionally it was accepted that wrongfulness, for reasons of efficacy and logic, should be determined before negligence. Nowadays, as said, the courts follow a more pragmatic approach and accept that, depending on the circumstances, any of these elements can be dealt with first.

(e) As is clear from the above, wrongfulness and negligence should not be telescoped into one when examining the reasonableness of the defendant's conduct. In *Roux v Hattingh* the court pointed out that the element of wrongfulness introduces a measure of control: "It serves as a 'long-stop' to exclude liability in situations where most right minded people, including judges, will regard the imposition of liability as untenable, despite the presence of all other elements of *Aquilian* action". The court warned against confusing wrongfulness and negligence because, if the tests for these two delictual elements are telescoped into one, the function of wrongfulness as a measure of control is lost completely.

The fact that the reasonableness of conduct can play a role with regard to both wrongfulness and negligence does not mean that these two elements of the law of delict are necessarily telescoped into one, thus leading to confusion between them. This distinction may be explained by reference to the judgment in S v Goliath.234 A's life was threatened by B and under B's compulsion and out of fear of B, he assisted B in killing C. The court held that compulsion may be a defence to the killing of a human being, but was not prepared to express an opinion on the question of whether compulsion is a ground of justification or a ground excluding fault. This approach is correct, because a decision as to whether compulsion will exclude wrongfulness or fault will depend entirely on the relevant facts of each case. If it appears that, in view of all the facts which came to light after the incident, A's life would have been endangered if he did not assist B, necessity as a ground of justification is present; in other words, A's conduct (the protection of his own life) was reasonable in terms of the *boni mores* (legal convictions of the community) and thus lawful. Should it later appear that A's life was not in danger (eg, because B threatened him with a fake weapon) conduct in necessity is absent and the causing of C's death is unreasonable and thus wrongful. The question of whether compulsion may nevertheless exclude fault (negligence in this instance) then arises. Suppose that because of the compulsion, A believed that his life would have been endangered if he did not assist B in killing C (putative necessity). In determining whether A was negligent, the reasonable person must be placed in A's position at the time of the commission of the act and, taking into account A's (incomplete) knowledge and insight, supplemented by the knowledge and insight which he should reasonably have had, one must decide on the probabilities how the reasonable person would have acted. If the reasonable person's conduct would have differed from A's, A's conduct was negligent. But if the reasonable person would – in the case of putative necessity – not have acted differently from A, there is no negligence and A will not be liable.

The conclusion is that because of the differences between the test for wrongfulness and the test for negligence, a defendant may be said to have acted unreasonably for the purposes of wrongfulness but reasonably (like the reasonable person) for the purposes of negligence.

Finally, the distinction between wrongfulness and negligence may be illustrated with reference to liability for an omission. An omission is unreasonable and thus wrongful where, according to the *boni mores* test, a legal duty rested on the defendant to act positively in order to prevent harm and he neglected to comply (fully) with such a duty. However, where a defendant did attempt (albeit unsuccessfully) to comply with such a duty and his attempt coincided with what the reasonable person would have done, his (unreasonable) wrongful act is not accompanied by (unreasonable) negligent conduct (damage could not reasonably be prevented) and he will escape liability.239 The case of *Minister of Forestry v Quathlamba (Pty) Ltd* may be cited as an example. Fire broke out on X's land without any fault on his part. Despite his attempts to extinguish the fire, it spread to Y's land and caused damage. The court held that there is a legal duty on a landowner to control a fire on land under his control. Because the fire caused damage to Y, it may be said that X did not fully comply with his duty and his conduct (omission) was thus wrongful (unreasonable). The court nevertheless correctly held that X acted in accordance with the standard of the reasonable person in attempting to extinguish the fire and that he was thus not liable. Despite the wrongfulness of his conduct in not complying fully with his legal duty, he escaped liability because of the absence of negligence.

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5 Contributory fault

5.1 Introduction

While fault refers to the defendant's conduct, contributory fault refers to the conduct of the plaintiff. Contributory fault is primarily relevant in limiting the extent of the defendant's liability and is thus of considerable importance in legal practice. Contributory fault is currently regulated by the Apportionment of Damages Act 34 of 1956. For a proper understanding of the relevant provisions it is essential to examine the common law position as it existed before its enactment.

5.2 The common law position

The general rule in Roman-Dutch law was that fault on the part of the plaintiff precluded him from claiming damages from the defendant who was also to blame for causing the damage. Thus if two people were at fault, neither could claim damages unless one was more to blame than the other.

The doctrine of contributory negligence as applied initially in our courts was taken over from English law. This rule developed in England from the judgment in the well-known case of *Davies v Mann*. The plaintiff had negligently left his haltered donkey in the road. The defend- ant, driving his wagon, collided with the donkey. There was negligence on both sides. In terms of the "all-or-nothing" rule which was in force in England at that time, the plaintiff would have been unable to claim damages from the defendant. But the court adopted a new approach. Since the defendant had the "last opportunity" to avoid the collision, the plaintiff's negligence was ignored and the defendant incurred full liability for the damage. In 1945, the English legislature intervened, however, and replaced this rule with the principle of proportional division of dam- ages in accordance with each party's degree of fault.

Our courts initially accepted – as in English law – that if the negligence of two persons contributed to the causing of a particular result, and one or both of them suffered damage as a consequence thereof, neither party could institute an action unless the negligence of one of them was the decisive cause of the accident. In that event, the negligence of the other party was completely ignored and he could succeed in full with his claim. In order to determine whose negligence was the decisive cause of the accident, the enquiry was usually – as in English law – directed at determining who had the last opportunity of avoiding the accident. The so-called last opportunity rule did not work well in practice and in time resulted in such an untenable situation that the legislature was compelled to intervene.

Moreover, contributory negligence by a deceased person was no defence to an action instituted by his dependants, unless the negligence of the deceased was the decisive cause of his death (ie, he had the last opportunity to avoid the accident).246 If it was not possible to determine whose negligence was the decisive cause, the dependants could succeed, notwithstanding the fact that the deceased himself would not have succeeded if he had only been injured. This position has now been changed by the Apportionment of Damages Amendment Act 58 of 1971.247 Although a Bill has been prepared to replace the Apportionment of Damages Act, it has not yet been enacted by Parliament.

5.3 The Apportionment of Damages Act 34 of 1956

The Apportionment of Damages Act 34 of 1956 has made considerable changes in the common law position concerning contributory fault (in the form of contributory negligence) on the part of the plaintiff. The provisions of subsections (1)(a), (1)(b) and (3) of section 1 are of particular importance.

5.3.1 Provisions and meaning of section 1(1)(a) and (b)

These provisions read as follows:

Section 1(1)(a):

> Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claim- ant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

Section 1(1)(b):

> Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

The effect of these provisions is to abolish the "all-or-nothing" principle of common law and to allow the court to apportion the damage of each party in accordance with their relative degrees of fault. The interpretation and application of these provisions have resulted in much litigation. Most problems, however, have been resolved and there is now a reasonable measure of clarity.

5.3.2 Meaning of "fault"

In general, the term "fault" encompasses both intent and negligence.248 One of the questions in respect of the Act is thus whether a defendant who has intentionally caused damage to the plaintiff may raise a defence of contributory negligence on the part of the plaintiff. At common law, the position was that such a defence could not be sustained where a defendant acted intentionally and it must be accepted that the statutory provisions under discussion do not change this principle. Consequently, a defendant who has intentionally caused harm to the plaintiff will not be able to ask for a reduction in damages because of contributory negligence.

Another question is whether the section under discussion applies in the case of the so-called defence of contributory intent. A distinction must be made between two situations: the first situation is where a plaintiff intentionally contributed towards his own loss while the defendant was merely negligent. In such circumstances, the law is clear: the plaintiff forfeits his claim. The second situation is where the defendant caused the loss intentionally and the plaintiff's un- reasonable conduct causing loss was also intentional. In light of, inter alia, the wording used in the long title of the Act and the heading of section 1 (where reference is made only to negligence), as well as the historical background to the Act, it would appear that the legislature intended to make provision only for the defence of contributory negligence and not the defence of contributory intent. The Appellate Division has not found it necessary to decide this issue but has on occasion expressed its doubt about whether a defence of contributory intent may be raised in terms of the Act. However, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* it was held that a defence of contributory intention could succeed where both the plaintiff and the defendant acted with intention.

5.3.3 Meaning of "apportionment of damages"

While the term "apportionment of damages" (Afrikaans: "verdeling van skadevergoeding") appears in the short title of the Act, it is not possible literally to apportion damages. Damages cannot be "divided" between a plaintiff and a defendant; the process concerns a reduction of damages received by the plaintiff because of his own fault (negligence) in respect of the damage he sustained.

5.3.4 Criteria for the "apportionment of damages"

The criterion our courts use to apportion the damages is the reasonable person test for negligence. The implication is that, as section 1(1)(a) applies only to damage caused partly by the fault of the plaintiff and partly by that of the defendant, the Act cannot apply where liability does not depend on the defendant's fault. Thus the Act does not apply in the case of strict liability.

The basic principles (or approaches) regarding apportionment of damages on the basis of the test for negligence are illustrated in the cases of *South British Insurance Co Ltd v Smit and Jones v Santam Bpk*.

The following conclusions may be drawn from these two cases: insofar as the objective reason- able person test applies, one is dealing with the deviation from the standard of care which applies to all persons in the community. The Act clearly implies that in the case of the plaintiff as well as the defendant one is concerned with a negligent act or omission that is causally linked to the damage. This causal nexus is determined according to the usual test and not, as was previously the case, in terms of the so-called last opportunity rule. Moreover, the court does not attempt to deal with degrees of causation. In other words, the court does not take into account, for example, that the defendant's conduct has actually contributed to the harm to a greater extent than the plaintiff 's conduct. If the court is satisfied that the negligent acts or omissions of both parties are causally connected to the damage, the question of causation is resolved.

The method of determining who should bear what portion of the damage involves a comparison of the respective degrees of negligence of the parties involved. Each party's degree of negligence is determined by expressing its deviation from the standard of the reasonable person as a percentage; the two percentages are then compared in order to allocate responsibility in respect of the damage in question.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

Prior to the decision in *Jones NO v Santam Bpk*2 the Appellate Division accepted that once the plaintiff's degree of negligence had been established, it was unnecessary to inquire into the extent to which the defendant's conduct had deviated from the standard of the reasonable per- son. If the court had established, for example, that the plaintiff had been 40% negligent (his conduct deviated 40% from the standard of the reasonable person), it was thought to follow automatically that the defendant was 60% negligent. However, in the Jones case a completely new approach to determining the degree of fault shown by the plaintiff and defendant was followed. According to this decision, the fact that the plaintiff was, for example, 30% negligent, does not automatically imply that the defendant was 70% negligent. In order to establish the respective degrees of negligence, the carefulness of the conduct of each party must be measured separately against the standard of the reasonable person. It is, for example, possible that the plaintiff's conduct deviated 70% from this norm while the defendant's conduct deviated 80%. In this case, the ratio between the plaintiff's and the defendant's degree of fault is 70:80 (7:8 (15)). The plaintiff's degree of fault is thus 7/15 × 100/1 = 46,7%, and the defendant's 8/15 × 100/1 = 53,3% (or 100 – 46,7 = 53,3). The plaintiff thus receives compensation for only 53,3% of the damage he has suffered because he is 46,7% to blame for his loss.

Despite the reasonably clear guidelines in the Jones case, it would appear from the decision in *AA Mutual Insurance Association Ltd v Nomeka* that the Appellate Division confirmed the approach followed in the Smit case, ie that the degree of the plaintiff's fault automatically determines the degree of fault of the defendant. How should the decision in the *Nomeka* case be interpreted? There are commentators who argue that the decision was given per incuriam because the court did not even consider the contrary opinion in the Jones case. Although this point is arguable, there are many cases decided subsequent to the *Nomeka* case in which it would appear that the courts, by implication, followed the *Nomeka* case. The view that *Nomeka* does not represent the current legal position therefore appears to be unfounded. It would seem that the Jones case, as well as the *Nomeka* case, represents our positive law and that it should be possible to consider contributory negligence in terms of both approaches. However, this is an unsatisfactory situation and, when an opportunity arises, the Supreme Court of Appeal should, in the interests of legal certainty, reject the one approach and confirm the other. It is submitted that the approach in the Jones case is preferable and that it should be confirmed.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14. VitalBook file.

Another view of this issue is that the decisions in Nomeka and Jones can be reconciled. It may thus be argued that it is hardly likely that the approach in *Nomeka* in fact suggests that establishing the percentage of negligence of the plaintiff is done in total isolation (in other words, without any reference whatsoever to the degree of negligence of the defendant), after which the plaintiff's negligence is without further consideration automatically expressed as the numerical remainder of the defendant's negligence. What probably occurs in these cases is that the courts determine the degree of negligence of each party on the evidence and then through a mental process (without even referring to it in detail as happened in Jones), ascertain each one's deviation from the standard of the reasonable person, the result of which is then without further ado given as a percentage.

A further issue that is relevant is the view of the Appellate Division in *General Accident Versekeringsmaatskappy SA Bpk v Uijs* that the extent of a plaintiff's fault is merely one of a number of factors which the court may take into account in order to reduce the plaintiff's dam- ages in a just and equitable manner. Although it may appear from a first reading of section 1(1)(a) that the plaintiff's fault is the only or exclusive factor which may be taken into account in deciding on a reduction of his damages, the approach by Van Heerden JA may be justified in the light of criteria such as fairness and equity. In order to really achieve fairness and equity, not just the extent of the plaintiff's fault, but also other relevant factors should be considered.

A final point for consideration is the extent to which negligence on the part of a third party may be taken into account in a delictual action. In general, it may not be raised as a defence to a delictual claim278unless the third party is the servant of the plaintiff and acted within the scope of his employment.

Neethling. *Law of Delict 7th edition, 7th Edition*. LexisNexis SA, 12/1/14.

5.3.5 Onus of proof

Where the defendant raises the defence of contributory negligence on the part of the plaintiff, he has to prove such a defence on a balance of probabilities. The defendant usually pleads contributory negligence as an alternative to the complete denial of negligence. However, the Appellate Division has held that contributory negligence may be taken into account even where the defendant has not expressly pleaded such a defence.

5.3.6 The concept of contributory "negligence"

It is terminologically and theoretically incorrect to speak of contributory negligence. Strictly speaking, an act can only be negligent where it is also wrongful and it is clear that a person cannot act wrongfully in respect of himself. "Contributory negligence" is thus the result of an approach used to determine the extent of the defendant's liability by means of a method which is analogous to that for determining negligence; technically, however, the method does not pertain to negligence *stricto sensu* because wrongfulness cannot play a part.

5.3.7 Fault in respect of "damage" or "damage-causing event"

An important question is whether section 1(1)(a) is also applicable where the plaintiff was not negligent in respect of the damage-causing event itself (for example a motor vehicle accident) but where his negligence increased the damage because, for example, he did not wear a seat-belt and in the process sustained more injuries or more serious injuries than would otherwise have been the case.

In *King v Pearl Insurance Co Ltd* *Colman* J ruled on exception that the plaintiff 's failure to wear a crash-helmet while driving a scooter which was involved in a collision with a motor car, did not constitute contributory negligence. The judge based his decision mainly on the argument that only negligence with regard to the damage-causing event, as opposed to negligence with regard to the damage itself, is taken into consideration for the purposes of the Act. However, this approach was criticised in *Bowkers Park Komga Cooperative Ltd v SAR and H.* Addleson J considered the opinion held by Colman J to be "both artificial and unnecessary on the plain wording of section 1(1)(a)". In his opinion, the section leaves no doubt that contributory negligence relates to fault with regard to damage and not fault with regard to the damage-causing event. In principle, therefore, it is always possible that a plaintiff's contributory negligence with regard to his damage can lead to a reduction in damages, even if he cannot be held responsible for the actual damage-causing event. This approach was accepted by the Appellate Division in Union National South British Insur- ance Co Ltd v Vitoria.286 According to the court, the failure to wear a seat-belt constitutes contributory negligence.287 The court was nevertheless of the opinion that the contributory negligence of a plaintiff who deliberately fails to wear a seat-belt will be greater than that of a plaintiff who bona fide forgets to wear it.

In such a case, it must be emphasised that the contributory negligence of the plaintiff is only relevant insofar as it has led to an increase in the damage. For this reason, section 1(1)(a) only applies in respect of that damage for which the plaintiff is indeed also responsible. This is illustrated by the following example: X suffers a loss of R10 000 due to a motor accident which was caused entirely by Y's negligence. It is proved that X's damage would have amounted to only R6 000 had there not been contributory negligence on his part due to his failure to wear a seat-belt. (X's neglect therefore contributed to the R4 000 increase in the damage.) It therefore follows that Y alone is responsible for the R6 000. Due to X's negligence, the remaining R4 000 is subject to apportionment in accordance with section 1(1)(a).

5.3.8 The provisions and meaning of section 1(3)

Section 1(3) reads as follows:

> For the purpose of this section 'fault' includes any act or omission which would, but for the provision of this section, have given rise to the defence of contributory negligence.

The provisions contained in this subsection are obscure; on a literal interpretation, they appear to suggest that the Act has abolished the defence of contributory negligence. In view of the Act as a whole, this is clearly not the case; the legislature apparently confused contributory negligence with the last opportunity rule which has indeed been abolished. The words "but for the provision of this section" are therefore meaningless.

Moreover, the Act erroneously construes fault as an act or omission. Fault is, as explained above, generally the legal blameworthiness of a person for his wrongful conduct. It is incorrect to view fault as a type of conduct. An examination of conduct alone is an insufficient basis on which to determine the fault of the actor. In addition to an act or omission, other relevant factors must also be taken into account in determining fault.

5.3.9 The dependant's action

Initially, the Act was silent on the effect of the contributory negligence of a breadwinner on an action instituted by his dependants. The common law position remained unchanged until 1971 and the last opportunity rule was still applied in these cases. This position was changed by an amendment of the Apportionment of Damages Act in 1971.

5.3.10 Joint wrongdoers

The question in this respect is how damages should be apportioned between a contributorily negligent plaintiff and joint wrongdoers. Two approaches are discernable in our law. In *Santam Insurance Co Ltd v Vorster* it was held that each joint wrongdoer's negligence (blameworthiness) had to be determined separately for the purpose of apportionment.

By contrast, the court in *Harrington NO v Transnet (Ltd)* decided that the plaintiff's negligence had to be measured against the joint blameworthiness of the joint wrongdoers viewed as a unity ("the totality of the tortious conduct of the wrongdoers"). Use of the unity approach in Harrington cannot be faulted, because the two joint wrongdoers had been woven virtually into one and could therefore be viewed as a unity for the purpose of apportionment. However, this does not mean that the unity approach must in principle always apply in our law. One wonders whether the approach in Vorster, where each joint wrongdoer's negligence was determined separately, would not in general produce a more equitable result than the somewhat mechanical "unity approach".

5.3.11 Breach of contract

An interesting question is whether the Apportionment of Damages Act applies to damages for loss suffered as a result of breach of contract. This question was, in line with two provincial decisions, answered in the negative by the Supreme Court of Appeal in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*. The plaintiff sued his auditor for breach of contract. His complaint was that, during the routine annual audit, the auditor failed to discover that the plaintiff's financial director was systematically stealing from him. The auditor's defence was inter alia that the plaintiff was himself negligent in his control of the financial director and that, due to his contributory negligence, his claim was subject to reduction in terms of the Apportionment of Damages Act. The essence of the court's decision was that the Act was historically not intended to apply to claims for breach of contract, but only to amend the law of delict. Nienaber JA formulated this as follows:

> The intention of the legislature as to the scope and range of the Act must be determined in the light of the situation prevailing at the time it was enacted. At that time the concepts of both contributory negligence and 'last opportunity' were unknown to a claim based on breach of contract. That being so, it seems to me to follow that the Act was designed to address and correct a particular mischief that was identified as such within the law of delict; that it was confined to that particular mischief; and that the corresponding problem that might arise within the law of contract was never within the legislature's compass. The express wording used in the Act does not fit a contractual claim.

However, a strong case can be argued in favour of intervention by the legislature to provide for cases, like the one under discussion, where the defendant's breach of contract is described in terms of his negligence, while the plaintiff by his own negligence contributed to the damage.

5.3.12 Legal causation

Contributory negligence and legal causation must be distinguished carefully. In this respect it is important to note that not every negligent act of a plaintiff related to his damage is relevant for the purpose of section 1(1)(a) of the Act. According to Gibson v Berkowitz a clear distinction must be made between a plaintiff's negligent conduct before the damage-causing event and such conduct after the event. Claassen J opined that only the former conduct is relevant for the purposes of apportionment of damages, while the latter must be taken into account when deter- mining legal causation (which may, of course, exclude a defendant's liability for harmful con- sequences that are too remote and in this way reduce the plaintiff's damage and therefore his damages). This distinction appears to be both theoretically sound and practically useful, and may therefore be supported.

5.4 Voluntary assumption of risk and contributory fault(intent)

5.4.1 Introduction

In the discussion of wrongfulness above, reference was made to the meaning of consent to injury and consent to the risk of injury as a ground of justification (*volenti non fit iniuria*) which negates wrongfulness. Such consent is sometimes referred to as voluntary assumption of risk. Voluntary assumption of risk, however, also has a different meaning. In respect of contributory fault, voluntary assumption of risk is a ground that cancels fault310 and is not a ground of justification. Assumption of risk in this sense implies that the requirements for a ground of justification are absent.

When the plaintiff or injured party is well aware of the danger but nevertheless wilfully exposes himself to it, he acts intentionally in respect of the prejudice he suffers, and blame in the form of contributory intent attaches to him. He directs his will towards the achievement of a particular result, ie his own prejudice. However, to fulfil the other requirement of intent, ie consciousness of wrongfulness, his conduct must also be "consciously unreasonable", ie, not directed towards the achievement of a lawful goal. In other words, if, for example, a person wilfully exposes himself to personal danger in order to save a baby's life, he does not act "consciously unreason- ably" and blame in the form of contributory intent will not attach to him.

Where a plaintiff does act with contributory intent, the fault of the defendant (in the form of negligence) is eliminated by the contributory intent of the plaintiff. Although the defendant is also at fault, he is not held liable towards the plaintiff because the plaintiff himself acts intentionally. The contributory intent (at least *dolus eventualis*) or assumption of risk by the plaintiff therefore cancels the defendant's fault. (In what follows, the term "contributory intent" is used in this sense.)

As has been mentioned, there is little authority for the so-called defence of contributory intent in our law where the defendant acted negligently, and it would appear that our courts are not pre- pared to recognise it in terms of the Apportionment of Damages Act. Nevertheless, the principle that the conscious taking of an unreasonable risk by the plaintiff cancels fault on the part of the defendant, is a principle of common law and functions independently of the Act.

5.4.2 Relevant cases

A number of cases may be considered against the background of the above principles.

In *Lampert v Hefer* the plaintiff took her seat as a passenger in the sidecar of the defendant's motor-cycle, well aware that the defendant was so intoxicated that he was incapable of maintaining proper control of it. An accident occurred in which the plaintiff sustained injuries and the defendant was killed. The plaintiff claimed damages from the defendant's estate.

The provisions of the 1956 Act (which at the time of this case had not been promulgated) would today materially affect the legal position in such circumstances if the plaintiff were guilty of contributory negligence (in which event her remedy would not be completely excluded), or if she consented to the injury (a ground of justification) or acted with contributory intent which cancels fault (in which cases she has no action).317 Consent as a ground of justification was absent since consent to serious bodily injury would have been contra *bonos mores*. For our purposes, it is important only to determine whether there was contributory intent. This must be answered in the affirmative, because the plaintiff, well aware of the danger and the possibility of injury, nevertheless decided to expose herself to the risk. The remedy should therefore not be available to her, as was in fact held by the court. However, other aspects of this decision require consideration.

For the purpose of his judgment, Fagan JA discussed voluntary assumption of risk (contributory intent) and contributory negligence, and stated that these two defences may overlap. He based this conclusion on the great confusion which exists among writers and in our case law on the concept "voluntary assumption of risk". However, where there is an actual assumption of risk, the injured party chooses freely, with full knowledge of the danger, to run the risk – which is not a negligent but an intentional exposure to risk. In this sense, there is thus no overlap with contributory negligence. Where, however, the injured party should have been aware of the danger, but was not, there is clearly no assumption of risk, but only contributory negligence. The two defences can therefore be distinguished clearly, provided the concept of risk assumption is properly formulated.

In *Netherlands Insurance Co of SA Ltd v Van der Vyver* the Appellate Division had another opportunity to direct its attention to two forms of *volenti non fit iniuria*, ie, consent to the risk of injury (a ground of justification) and contributory intent or voluntary assumption of the risk (which cancels fault). In this case, O was suspected of infidelity by his wife. She hired a private detective, V, to spy on her husband. V followed O in his car to a lonely spot in the veld. O had a woman with him in his car. When V approached O's car, O started to drive off. V leapt onto the bonnet in order to obscure O's view and to make him stop. O accelerated, however, and began to swerve from side to side, clearly with the object of dislodging V, who was clinging on for dear life. Six kilometres further, O succeeded in dislodging V. V sustained injuries and claimed compensation from the insurer of O's motor car. In the court a quo, Boshoff J found that O was 50% negligent and V 50% negligent. V, therefore, obtained only half his damages.

On appeal it was held that O had acted with intent and not only negligently. The court rejected O's defence that V had consented (as a ground of justification) to the risk of injury. The court then considered O's defence that V had contributory intent. Referring to this defence, Van Blerk JA declared: "No authority from our case law was cited for the statement that contributory intent is an independent defence, nor was reference made to any of the authoritative sources of our law recognising it." The Appellate Division was therefore not prepared in principle to acknowledge such a defence.

However, there are good arguments for supporting the recognition of contributory intent as a defence. While contributory intent is not found as a defence eo nomine in our authorities, the concept has been developed in law in order to explain a form of the well-known defence of *volenti non fit iniuria*. Thus a defendant who relies on contributory intent relies, to use different terminology, on a form of *volenti non fit iniuria*. This particular form is present in a case where the defendant escapes liability because the plaintiff has exposed himself voluntarily and "intentionally" to the risk of injury. In the Lampert case, the plaintiff failed precisely because of the defence of *volenti non fit iniuria*. On closer analysis, her claim failed because of her contributory intent. Therefore, contributory intent is in fact recognised as a defence in our case law, albeit not *eo nomine*. In the sources of our law, the defence is nothing other than the well-known *volenti non fit iniuria*. The Appellate Division's denial of the existence of the defence is therefore open to debate.

In *Malherbe v Eskom* the court accepted the plaintiff's contributory intent (in the form of voluntary assumption of risk) as a ground cancelling the defendant's negligence. The plaintiff, a qualified engineer, worked on the defendant's electrical distribution board knowing that a damaged circuit breaker had been removed by an employee of the defendant. A short-circuit took place, and the plaintiff was injured. Van Rooyen AJ said:

> In my view, the answer lies therein that a plaintiff, who was aware of the fact that a defendant negligently caused a dangerous situation or brought about a risk of harm, voluntarily accepted such a risk by committing an act and consequently suffered damage, cannot rely on a delict committed by the defend- ant. As a result of a rule of fairness that arose and was accepted by the courts, the negligence of the defendant was extinguished by such voluntary acceptance of the risk.

In this light, the judgment in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* appears to be correct. It was held that a defence of contributory intention could succeed where both the plaintiff and the defendant acted with intention. In this case, T, an employee of the Soweto City Council (which was later dissolved and its assets and debts transferred to the plaintiff) stole cheques that had been drawn in favour of his employer and handed them to his accomplice, W, who was an employee of the defendant bank. W fraudulently paid the proceeds from the cheques into other accounts, resulting in the City Council suffering a loss. On a claim for damages being instituted for vicarious liability of the defendant bank, contributory intention was raised as one of the defences, on the strength of the fraud of T, who had been in the employment of the City Council at all relevant times. Goldstein J found in favour of the plaintiff, but ordered a reduction of 50% of the amount of damages on account of the plaintiff's contributory intention. According to the court, section 1(1)(a) is applicable where fault in the form of intention is present on the side of the plaintiff as well as the defendant. The court declared:

> In my view the word 'fault' and its Afrikaans counterpart 'skuld' clearly include dolus . . . It should be noted that I have to do with a situation of dolus on both sides since both the plaintiff 's servant . . . and the defendant's [servant] intentionally caused the harm which befell the plaintiff . . Where there is dolus on both sides there appears to me to be no reason not to give effect to the ordinary meaning of the words 'fault' and 'skuld'.

5.4.3 Rescue cases

Lastly, it is necessary to refer briefly to the connection between the doctrine of voluntary assumption of risk and so-called “rescue cases”. Rescue cases could in principle serve as a defence excluding delictual liability. Take the following example: Defendant X negligently sets a house on fire. Plaintiff Y runs into the burning house to salvage his jacket. Y is injured by the flames. X is not liable for Y’s injuries, because Y’s contributory intent will cancel X’s negligence since his exposure to the flames to save a jacket can be regarded as consciously unreason- able. On the other hand, where Y voluntarily exposed himself to such a risk of harm in order to save a baby, a different picture emerges because Y’s exposure to the risk was then consciously reasonable (acting towards a lawful goal) and he therefore lacked contributory intent. X might be liable because he acted negligently since a reasonable person would have foreseen that someone might go into the house to save the baby, and would have acted differently by not setting the house alight. Similarly, if Y was a fireman who had to enter the house in the course of performing his duties, X might well be liable because of his negligence since he should have foreseen that the fire brigade would have to intervene.

In summary, Ahmed states that the moral and social pressures which induce a person to expose himself to a risk in an effort to rescue another from a danger created by the defendant’s negligent conduct, is sufficient to negate voluntary assumption of risk. But where the danger is so extreme as to be out of proportion to the value of the interest protected, the rescue operation is unreasonable and may constitute contributory intent or negligence on the part of the rescuer.

Causation

1 General

The causing of damage through conduct, or, in other words, a causal nexus between conduct and damage, is required for a delict. A person can thus not be liable if he has not caused any dam- age. The question of whether there is a causal nexus in a particular case is a question of fact that must always be answered in light of the available evidence and relevant probabilities and that may in suitable instances be dealt with first in the course of a trial.4 A causal nexus is simply something which (factually) exists or does not exist and it appears that no amount of theorising can take the matter any further.

Yet one finds that there are few other subjects on which jurists have theorised so much during the last century as they have done on causation. Various so-called theories of causation have been developed and the most important are the *conditio sine qua non* theory, the adequacy theory, the direct consequences theory, the foreseeability theory and the "flexible approach".

It is noteworthy that not all these theories are applied at the same level. This is apparent from the fact that the adherents of virtually all the theories use the *conditio sine qua non* theory as their point of departure in order to determine initially whether a factual causal nexus between the act and the harmful consequence exists; if it does exist, so-called factual causation is present. Such a factual causal nexus may, however, extend a very long way – in fact ad infinitum – because a single act can, in principle, give rise to an endless chain of harmful events. The other side of the coin is that each harmful consequence is produced by an infinite number of contributory factors. The law of delict is usually focused on the influence, relevance and causal effect of the (voluntary) conduct of the defendant (wrongdoer) as damage-causing event. Due to the fact that no legal system can, on the grounds of policy and fairness, allow unlimited liability merely based on causation, the next question is for which of these harmful events flowing from his conduct a defendant should be held liable. All the abovementioned causation theories, with the exception of the *conditio sine qua non* theory, attempt to solve this problem. Causation in this sense is known as legal causation. The distinction between factual causation and legal causation must constantly be borne in mind.7 8 At this stage, it is necessary to concentrate first on factual causation. Then the different theories of legal causation will be discussed.

2 Factual causation

2.1 General

There can be no question of delictual liability if it is not proved that the conduct of the wrong- doer or defendant caused the damage to the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question in this regard is: how should one determine whether such a causal nexus exists, in other words, what is the correct test for determining causation? At the outset it must be emphasised that in most of the cases that occur in practice there is no problem in determining in one way or another whether the conduct of the defendant has caused harm to the plaintiff or not. The courts usually succeed admirably in determining, on the basis of the evidence and the probabilities of the given case, whether a causal link exists between the wrongdoer's conduct and the damage. The method employed by the courts in practice, although frequently expressed in the terminology of the *conditio sine qua non*, is the obvious one, ie to inquire whether one fact follows from another. This is indeed the natural way to determine a causal link.

It is nevertheless noteworthy that frequent attempts have been made to formulate a general and scientifically acceptable test for causation. Apparently, most writers, as well as the Supreme Court of Appeal and other courts, are in favour of the *conditio sine qua non* theory in deter- mining or describing factual causation. However, our courts have also accepted that the *conditio sine qua non* approach is not the only way to determine factual causation. For them, the *conditio sine qua non* is the simplest and most intelligible way to construe or explain the existence of a causal link. Nevertheless, it is not always clear precisely what interpretation the courts give to the *conditio sine qua non* method they employ, which variant of the method is employed, or precisely how the test works. It is in any case not essential to use the "mental elimination" method of the *conditio sine qua non* to determine factual causation correctly. Due to the prominence given to conditio sine qua non terminology in case law, it is nevertheless necessary to examine aspects of this approach critically.

2.2 *Conditio sine qua non* and causation by positive conduct

The *conditio sine qua non* theory, also known as the "but for" test, is explained in the following terms by Van der Merwe and Olivier:

> According to this, an act is the cause of a result if the act cannot be thought away without the result dis- appearing simultaneously. The act must in other words be *conditio sine qua non* of the result.

According to this theory, one should, in order to determine whether X was a cause of Y, eliminate X mentally and consider whether Y still exists or not. If Y falls away when X is eliminated, X is a cause of Y. If Y still exists even when X is eliminated, Y has not been caused by X. Van Oosten asserts that *conditio sine qua non* is not only a factual test for causation but also a legal test, because the law adopts it as a test, and further because the law sometimes approaches causation in a manner different from that followed by medical science. However, the general view is that *conditio sine qua non* is only a factual test for causation.

In *International Shipping Co (Pty) Ltd v Bentley the* court formulated the *conditio sine qua non* approach with regard to positive conduct as follows:

> The first [enquiry] is a factual one and relates to the question whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful con- duct of the defendant . . . If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.

In the case of "positive" conduct or a *commissio* on the part of the defendant, the conduct must thus be "removed" in the mind to determine whether the relevant consequence would still have resulted.

2.3 Logical criticism of the *condition sine qua non* theory

Although the expression *conditio sine qua non* is still widely accepted – in the sense that the courts usually make reference to it in respect of factual causation – its underlying principles have, after a thorough examination, been subjected to convincing logical criticism. It is there- fore meaningful to take cognisance of some of these points of criticism even though they have not yet gained acceptance in case law.

(a) The conditio sine qua non theory is based on a clumsy, indirect process of thought that results in circular logic. Suppose that in a specific instance it must be established whether or not X has caused Y. According to the *conditio sine qua non* formula, the judge must in his mind eliminate X and try to imagine how the events would have progressed had X not existed.

The fact that the judge must eliminate X from his mind obviously does not mean that he must think of nothing, for if he were to do that he would inevitably have to find that Y also would not have arisen because, after all, nothing cannot cause something. The judge must in fact eliminate X with the retention of all other antecedents, ie, with the retention of all other circumstances which accompanied X. The question which he must ask is whether Y would still have taken place if these antecedents had existed without X. He must in fact search for a different possible cause of Y, because Y did in fact take place. For the sake of convenience, we may group all the other antecedents (which may be a possible cause or causes of Y) under the symbol Z. Briefly stated, the question now is whether Z would have caused Y. How can it be determined whether Z caused Y or not? If the *conditio sine qua non* test is also applied here, it means that Z must be eliminated. In such a case the circle has been completed and one is back at X where one started.

It thus appears that *conditio sine qua non* may compel one in certain circumstances to follow a particularly clumsy and indirect approach which ultimately does not provide a solution. The judge is denied the opportunity of trying to establish the causal potency of antecedent X directly and he is compelled to answer the question of causation indirectly by seeking an answer to the question of whether other antecedents have caused Y. Although the influence of other antecedents may well be relevant in determining causation, it is clearly unnecessary to elevate it to the essence of or the only criterion to be used in the inquiry into causation.

(b) The *conditio sine qua non* test fails completely in cases of so-called cumulative causation. Cumulative causation occurs where more than one act actually causes a particular consequence, for example, where X and Y simultaneously, but independently of each other, fire a fatal shot at Z's head. If one eliminates X's shot, Z's death does not fall away; on account of this one may conclude that X did not cause Z's death. Subsequently, when Y's act is eliminated, the same result is achieved, ie that Z's death does not fall away. The application of the *conditio sine qua non* test thus permits one to come to the absurd conclusion that neither X nor Y has in fact caused Z's death. De Wet and Swanepoel, who are adherents of the conditio sine qua non test, concede that this theory has no clear answer to this kind of problem.

What then is the solution to this problem? The answer is comparatively simple: suppose a doctor later gives evidence that the victim was still alive immediately before the two bullets penetrated his head. Suppose further his evidence is that, according to his knowledge, two bullets through the head invariably cause immediate death. What can be simpler than to deduce that the firing of two bullets was the cause of the victim's death? This "direct common-sense approach of the man in the street" – as it was put in *Portwood v Swamvur* – gives a satisfying answer: both X and Y caused Z's death. To theorise about what would have happened if one of the bullets had not struck the victim's head (as required by an application of the *conditio sine qua non* approach) cannot lead to better insight into the problem. It is completely unnecessary to use *conditio sine qua non* in this case.

(c) The *conditio sine qua non* test is in fact not a test of causation, because it is merely an ex post facto way of expressing a predetermined causal *nexus*. This, as a matter of logic, is the most important reason why *conditio sine qua non* is unacceptable as a test for causation. It is interesting to note that neither the courts nor the academics who accept *conditio sine qua non* as a test for causation explain how one knows that if one eliminates a particular act, the alleged result also falls away or not. Apparently it is generally accepted that merely by eliminating in the mind an alleged cause of a consequence, one can establish whether or not it is a cause of the consequence. That this approach is incorrect appears from the following example: X visits Y in order to accuse him of adultery with his (X's) wife. Y is exceptionally friendly and offers X a glass of beer. A few minutes after X has drunk the beer, he suffers convulsions and drops dead. How would one use the *conditio sine qua non* test in order to establish whether Y has poisoned X by means of the beer? Even if one eliminates the giving of the beer to X, one is no closer to an answer because a proper examination is necessary to determine whether X might not have died of a heart attack or whether the beer might have contained poison. It is only after all the relevant facts have been established, and the cause of X's death has been ascertained on this basis that one would know whether giving the beer to X was a *conditio sine qua non* of his death or not. This example clearly proves that one can only "employ" *conditio sine qua non* after one has in some other way already determined the cause of a particular consequence. Without prior knowledge of what actually caused a result, *conditio sine qua non* offers no solution: in other words, only after one has in one way or another determined the causal nexus between an act and a particular result is it possible to express the conclusion in the terminology of the *conditio sine qua non* approach and to state that if one eliminates the act mentally, the particular result will also fall away.

It may therefore be said that *conditio sine qua non* is merely a convenient and known way of expressing an already determined causal link. This is probably how the acceptance and use of *conditio sine qua non* by the courts can be explained. From this it follows that the *conditio sine qua non* approach is no practical test of causation, but rather, as was clearly demonstrated, an expression of a conclusion already made on other grounds.

Furthermore, it should be noted that prominent European jurists reject *conditio sine qua non* as a test to determine a causal link – according to them it is at best a method of controlling the correctness of one's conclusion about a factual causal link on the evidence.43 The courts should consider these views, since the inquiry into factual causation is not something unique to a particular legal stystem, but rather a question with which all legal systems are confronted.

In view of the above, the conclusion is that the *conditio sine qua non* approach cannot really be accepted as a correct test of causation, and the reference to the terminology of *conditio sine qua non* in many cases does not really prove that it is in general a valid test of factual causation, or that its underlying model of thought is really consistently used by the courts.

An overview of reported case law shows that the courts usually determine a factual causal link correctly in light of the evidence and the relevant probabilities of how one fact follows another. The characterisation by many judges of the method employed as *conditio sine qua* non or the "but for" test is usually merely lip-service. Van der Walt and Midgley correctly describe the South African practice in the following words:

> [T]he *conditio sine qua non* theory is in general used only as a means of expressing an a priori conclusion, based on knowledge, regarding the existence of factual causation in terms of the traditional "but for" formula.

2.4 *Conditio sine qua non* and causation by an omission

The general view is that the *conditio sine qua non* test may also be applied where one wishes to determine whether an omission caused a certain consequence. Whereas, in the case of positive conduct, the conduct is mentally removed to determine whether the relevant consequences would still have resulted, in the case of an omission the inquiry involves "the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not". Otherwise stated, in the case of an omission a hypothetical positive act should therefore be "inserted" into the particular set of facts, which, in a sense, amounts to the mental removal of the defendant's omission. If hypothetical positive conduct of the defendant could have prevented the damage, it can be said that the defendant's omission was the cause of the damage. This inquiry requires a retrospective analysis of what would probably have happened, based upon the evidence and what could have been expected in the ordinary course of human endeavour.

The facts of *S v V* an As may serve as an example: in this case policemen neglected to search for children who had fled into the night and later died of exposure. The question was whether the children's death was caused by the omission to search for them. From the judgment it appears that the court attempted to test the causal connection between the omission and the death by asking whether reasonable search would have prevented the children's death; in other words, the court "inserted" positive conduct in the place of the omission. This approach is viewed as an application of *conditio sine qua non* by our courts.

An interesting question is whether the hypothetical positive conduct must be determined objectively or subjectively, ie according to what a reasonable person would have done, or what the relevant person (wrongdoer or defendant) would have done. The Constitutional Court preferred an objective test, but Harms JA was of the opinion that the inquiry should contain both approaches. However, "inserting" reasonable conduct of the wrongdoer into the set of facts appears to have the potential to cause a confusion of factual causation and negligence. First it must be determined whether the wrongdoer could have done anything to prevent the relevant consequence (causation), and only then whether the reasonable person in the position of the wrongdoer would have prevented the consequence (negligence).

It is apparent that in instances of causation by an omission the *conditio sine qua non* test also does not really offer a solution. The apparent success in using *conditio sine qua non* in the case of an omission may be explained by means of the fact that every person knows that he can prevent certain consequences by interrupting a causal chain of events. Thus, a mother knows that by giving her child food, she will be able to prevent the child from starving to death. In such a case, a hypothetical act is notionally inserted into all the facts of a situation and it is usually possible to picture in one's mind what the hypothetical course of events would be. However, this is probably not a true application of *conditio sine qua non* because this test requires one to eliminate something in the mind and not to "add" (or insert) something to the given facts. The argument that *conditio sine qua non* is a true test for causation in cases of omission is thus theoretically incorrect. The "inserting" method used by our courts to determine causation in instances of omission is nevertheless a realistic approach to causation and is logically more well-founded than the "removing" of something that is obviously the cause of a consequence in order to demonstrate the existence of factual causation.

2.5 The flexible application of *conditio sine qua non*

In Lee v Minister of Correctional Services65 the Constitutional Court emphasised that the application of the *conditio sine qua non* approach with regard to both positive conduct and omissions is not inflexible since the strict application of this approach would result in an injustice in certain cases. The court maintained that a flexible approach to factual causation has a long history in our law from which it appears that causation cannot always be answered by strict adherence to logic but that common sense sometimes has to prevail. In *Minister of Finance v Gore* the flexible approach was formulated thus:

> With reference to the onus resting on plaintiff, it is sometimes said that the prospect of avoiding the [damage] through the hypothetical elimination of the wrongful conduct must be more than 50%. This is often followed by the criticism that the resulting all-or-nothing effect of the approach is unsatisfactory and unfair. A plaintiff who can establish a 51% chance, so it is said, gets everything, while a 49% prospect results in total failure. This, however, is not how the process of legal reasoning works. The legal mind enquires: What is more likely? The issue is one of persuasion, which is ill-reflected in formulaic quantification. The question of percentages does not arise ... Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences.

A clear example where strict adherence to logic fails, are instances of so-called cumulative causation where the common-sense approach of the man in the street provides a satisfactory answer. The flexible approach to factual causation is supported because common sense rather than strict logic should prevail and where the question as to what is more probable should not be based on a mathematical thought process but rather, as Nugent JA eloquently stated, "on the practical way in which the ordinary person's mind works against the background of everyday- life experiences".

It is however clear that the application of *conditio sine qua non*, even in its flexible form, would in certain cases lead to a denial of liability in our law because it had been more probable than not that the defendants did not cause the harmful result. This consequence may be unacceptable in certain circumstances since justice would be denied. In our law such an unfair outcome of the but-for test could perhaps be circumvented by means of the element of legal causation where the basic question is whether there was a sufficiently close relationship between the defendant's negligent conduct and the victim's damage that the damage should be attributed to the defend- ant, taking into account policy considerations based on fairness, reasonableness and justice. To ascertain whether such a relationship existed, the negligent exposure to a risk of harm may play a significant part.

2.6 The determination of a factual (causal) *nexus*

Since *conditio sine qua non* cannot really function as a valid test for causation on the grounds of logic and comparative law referred to above, the question of what test or method should then be used in this regard arises. The point of departure is to have clarity on what factual causation is. Factual causation concerns a particular kind of link or connection between at least two facts or sets of facts, ie the link existing when, stated succinctly, one fact arises out of another. In other words, if fact X is a reason why fact Y exists, or exists in a particular form, or has come into existence at a particular time, it may be said that X is a factual cause of Y. It stands to reason that due to the dynamic and complex nature of reality it is neither possible, nor necessary, to find a general "test" by means of which causation in general may be determined. In a particular set of facts, by contrast, it is necessary to indicate on what grounds a conclusion is based that fact X, for example, the relevant act of the wrongdoer, caused the relevant fact Y, for example, the damage suffered by the plaintiff. The existence of a factual causal chain must therefore be demonstrated in view of the proved relevant facts. A test for factual causation therefore depends on the facts of each case and is not something of a general nature that can be applicable to all factual complexes. In other words, there are probably as many "tests" for causation as there are causal links. An overview of the case law dealing with factual causation confirms this conclusion.

It is incorrect to state that a test for factual causation also contains "normative" elements or policy considerations. As stated, factual causation is something that either exists or does not exist, and no legal rules, other norms or theorising can make any difference to this; therefore factual causation is in itself not a policy matter, but rather a pure question of fact. Of course the position differs in respect of legal causation, where normative imputability of particular remote consequences is dealt with.

The fact that determination of a factual causal nexus in the reported case law produces relatively few problems proves that no need for a general and all-encompassing "test" of causation exists. The courts usually determine (or test) on the basis of the evidence and probabilities whether a factual causal link between the act and the harmful consequence exists without really employing the method of the *conditio sine qua non* – although lip-service is paid to this "test" to affirm the conclusion of a factual causal link.

It stands to reason that knowledge and experience, as well as reliable evidence, are required to determine a causal link. This knowledge may be of a simple nature (for example, that a match may cause petrol to ignite) or it may be of an expert nature (for example, that the eating of cheese when a certain medicine is used, may cause a stroke).79 Without knowledge that a certain antecedent may in principle cause a certain result, it is impossible in an actual case to establish whether an act has in fact caused a result.80 Since there is no magic formula by which one can generally establish a causal nexus, the existence of such a nexus will be dependent on the facts of a particular case, and a characteristic of a causal nexus is that one fact arises out of another. Whether one fact originated from another must be established according to human experience in general and that of the judge of the facts in particular. In practice, a causal nexus is, just like other legally relevant facts, determined by the court (with as much ease or difficulty as any other fact) on the basis of the evidence. A causal *nexus* like the one referred to above can, of course, exist only between actual (and not hypothetical) events.

It must further be noted that the law approaches factual causation differently from, for example, medical science. If, for instance, X stabs Y with a knife and Y is then taken to hospital where, as a result of the negligent conduct of a nurse, he falls off his bed, suffers a fractured skull and dies, medical science will probably identify the fractured skull as the cause of death while the law will view the initial stabbing as well as the negligent conduct of the nurse as causes of death. It must be clear that the causes of a certain consequence, or the consequences of a cause, can be practically unlimited. This is the reason why our law does not merely accept liability based on the factual causing of a harmful consequence and uses the criteria of legal causation to limit liability.

As explained above, in determining factual causation in a case of omission, the court must in general determine what the alleged wrongdoer could have done in the circumstances to prevent the relevant consequence – for instance, would the opposition by the state of a bail application have prevented the subsequent assault of the plaintiff by a criminal who was released after the state had failed to oppose the bail application? Or would searching for children have saved their lives? It must be clear that only if the defendant could in the circumstances have done something (in the form of positive conduct) to change the factual course of events to a meaningful extent, do the questions concerning a legal duty and reasonable conduct (wrongfulness and negligence) arise.88

In conclusion, it should be noted that it is usually sufficient for the purposes of factual causation if a defendant's conduct has in any way contributed to the damage sustained by the plaintiff; for causation it is unnecessary that his conduct should be the only cause, or the main cause, or a direct cause.

3 Legal causation

3.1 General

As has been explained earlier, no legal system holds a wrongdoer liable without some limitation for the endless chain of harmful consequences which his act may have caused. There is general agreement that some means must be found of limiting the wrongdoer's liability. The question of legal causation arises when determining which harmful consequences actually caused by the wrongdoer's wrongful, culpable act he should be held liable for; in other words, which consequences should be imputed to him. It is sometimes stated in general terms that the wrongdoer is not liable for harm which is "too remote" from the conduct; hence the term "remoteness of damage" for legal causation or the problem of imputability of harm.

In most cases of delict, the harm for which the wrongdoer is to be held liable clearly falls within the limits of his liability, so that it is unnecessary to examine legal causation or the imputability of harm in express terms. In such cases, it is normally quite evident that the harm should be imputed to him. In a sense, the question of legal causation is tacitly dealt with within the frame- work of the investigation into the other elements of delict – especially wrongfulness and fault. Normally, legal causation is only problematic where a chain of consecutive or remote consequences ("ulterior harm") results from the wrongdoer's conduct, and where it is alleged that he should not be held legally responsible for all the consequences. Nevertheless, the limits of liability should, in principle, be determined in respect of every delictual claim, and the fact that this determination in most cases need not be made expressly, should not lead one to believe that legal causation is relevant only in exceptional cases.98

It would be incorrect to describe legal causation as the only mechanism for the limitation of liability in delict. In a sense, the limitless liability which could have been brought about by factual causation in itself, is "limited" by those elements of a delict which establish liability. For example, the liability of an actor who in fact causes damage, but who does not act wrong- fully, or who acts wrongfully but not negligently, is "limited" by (the absence of) the elements of wrongfulness and fault respectively. However, legal causation as an independent element arises specifically where it appears that the wrongdoer's conduct was wrongful and culpable with reference to at least certain consequences (and that the consequences concerned should, in addition, be imputed to him), but where additional consequences ("ulterior harm") result and the question arises whether he should be liable for those additional consequences.

The question is, therefore, what criterion should be applied to determine legal causation. Until recently, opinions differed in this regard. Although the courts acknowledged the existence of the problem of legal causation, they were in the past either hesitant to lay down a single, inflexible criterion by which the imputability of harm is to be determined, or they took a neutral stance in respect of the test to be applied. The best-known theories for determining legal causation are the flexible approach, based on policy considerations, reasonableness, fairness and justice, the theory of adequate causation, the "direct consequences" criterion; the theory of fault and the reasonable foreseeability criterion. Until recently, it has generally been accepted that the reasonable foreseeability criterion is preferred by the courts. However, the Appellate Division has now expressed itself in favour of a flexible approach, in terms of which there is no single criterion which can be applied to all situations. The different approaches to legal causation will be discussed next.

3.2 The flexible approach

The present approach of the courts to legal causation has been set out fairly extensively by the Appellate Division in a criminal case, *S v Mokgethi*, and was thereafter confirmed in several cases dealing with private law.

In *S v Mokgethi* Van Heerden JA held that there is no single and general criterion for legal causation which is applicable in all instances. A flexible approach is accordingly suggested. The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice. However, the existing criteria for legal causation (such as direct consequences and reasonable foreseeability) may play a subsidiary role in determining legal causation within the framework of this elastic approach. Van Heerden JA commented on this approach as follows:

> I doubt whether a legal system can do without a dominant elastic criterion for determining legal causation. As is clear from the passages quoted above, policy considerations are relevant, and [the Court must guard] against the alleged wrongdoer's liability exceeding the boundaries of reasonableness, fairness and justice. The various criteria [for legal causation] seem to me not to be significantly more exact than a criterion (the flexible criterion) according to which [the Court determines] whether a sufficiently close link exists between an act and a consequence with reference to policy considerations. I am not saying that one, or even more than one, of the criteria may not be employed on a subsidiary level in the application of the flexible criterion to a specific type of factual situation; but merely that none of the criteria can be used [exclusively] as a more concrete measure of limitation in all types of factual situations, and for the purpose of any form of legal liability.

Whether one regards reasonable foreseeability (or any other test for legal causation – such as direct consequences) as a subsidiary test, or simply as a factor in determining legal causation, the Appellate Division's formulation and application of the flexible approach makes it clear that these tests or factors merely function as aids in answering the basic question of imputability of harm. Consequently, differences in emphasis found in court decisions on the role of, eg, reasonable foreseeability, are quite acceptable as long as justice prevails in the end.

In terms of the flexible approach, the theories of legal causation are at the service of the imputability question and not vice versa. This means that the theories should be regarded as pointers or criteria reflecting legal policy and legal convictions about when damage should be imputed to a person: damage is imputable when, depending on the circumstances, it is a direct consequence of the conduct, or reasonably foreseeable, or if it is in an adequate relationship to the conduct, or for a combination of such reasons, or simply for reasons of legal policy. A court is not bound beforehand to a single, specific theory, but has the freedom in each case to apply the theory which serves reasonableness and justice best in the light of the circumstances, taking into ac- count considerations of policy. However, this does not mean that a test for imputability may be chosen at random and that a court may simply express its decision in the terminology of the test which suits its decision best. Most of the principles which may be of assistance in solving the problem of imputability in a satisfactory manner have been expressed in the different theories and the court must determine which of those principles serve the problem of imputability best in a particular case, and should then apply that theory. Justice will not be served if a court commits itself dogmatically to a single theory; such an approach would subordinate the demands of practice and justice to legal theory in an unacceptable manner.

The dominance of the flexible approach and the subsidiary nature of the other tests for legal causation, have however been weakened in certain judgments of the Supreme Court of Appeal. In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* the court opined that the flexible approach is not an independent criterion that can be applied even in the absence of the traditional criteria, but requires at most that the traditional measures are not applied dogmatic- ally, but rather in a flexible manner. In this way the subsidiary role of the traditional criteria was denied, the dominating role of the flexible approach undermined and its flexibility impaired. It is to be hoped that our courts will strongly resist future attempts to dilute the dominating and supple nature of the flexible approach. Fortunately, in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* the court appeared to understand flexibility to also have the effect that "if the application of any or all of the known criteria should lead to a result which is untenable, legal causation will not be found". This seems to mean that even where a consequence is found to be foreseeable and a direct consequence of the act, flexibility would enable a court to deny liability should the result appear to be so unjust or unfair that it can be regarded as untenable. This possibly amounts to a recognition (and therefore confirmation) of the flexible approach as an independent and even decisive test for legal causation.

The flexible approach can accommodate the divergent needs for legal causation in different legal fields, such as the law of delict, criminal law and insurance law.

3.3 Adequate causation

According to this theory, a consequence which has in fact been caused by the wrongdoer is imputed to him if the consequence is "adequately" connected to the conduct. The connection is termed "adequate" if, according to human experience, in the normal course of events the act has the tendency of bringing about that type of consequence. In order to determine whether the act has such a tendency, the following questions are, for example, asked: was the damage the reasonably-to-be-expected consequence of the act?; did the damage fall within the expected field of protection envisaged by the legal norm that was infringed?; were the consequences "juridically relevant" with reference to the cause?

Seen in this light, there are probably no substantial differences between the theory of adequate causation and the test of reasonable foreseeability, which is in most cases applied by the courts, and, therefore, the application of these two approaches will usually have the same result. Generally speaking, one would be able to say that a result normally to be expected is also a reasonably foreseeable result, and vice versa. One possible advantage of the adequacy theory as it is formulated by, for example, Jansen JA in *S v Daniëls and Snyman*, is that as a criterion for legal causation, it can be more easily distinguished from negligence (where a reasonable foreseeability criterion is also applied) than the criterion of reasonable foreseeability.

Although the theory of adequate causation, especially as it was formulated originally, has been subjected to sharp criticism, it nevertheless enjoys the support of certain writers and has also been recognised in decisions in the field of criminal law.

3.4 Direct consequences

According to this theory, which stems from English law, an actor is liable for all the "direct consequences" of his negligent conduct. In other words, liability is not necessarily limited to the foreseeable consequences of his conduct. A consequence need not follow the cause immediately in time and space to be a "direct consequence" thereof. For a finding that a direct nexus exists, it is furthermore not required that the exact course of events must have been forseeable.

Since the direct consequences theory may in principle lead to exceptionally wide liability, the effect thereof has, in English law, been limited to direct physical consequences. In addition, it was required that the immediate nature of the nexus between cause and consequence must not have been broken by a so-called *novus actus interveniens* (independent intervening conduct or event). The possibly wide effect of the direct consequences test has also been limited by the "foreseeable plaintiff" doctrine. According to the latter theory, an actor does not act negligently towards a plaintiff unless it is reasonably foreseeable that the particular plaintiff will be injured. Accordingly, the actor is not liable to an unforeseeable plaintiff, even though the harm has flowed directly from the actor's conduct, and despite the fact that it is foreseeable that other persons may have been injured.

However, in 1961, the direct consequences theory was rejected by the Privy Council in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound No 1)* in favour of the principle that only foreseeable damage was recoverable.

In the South African law of delict, the direct consequences theory has been accepted by the Supreme Court of Appeal in a number of cases. In the past, the theory, particularly as a result of its mechanical nature has been subjected to severe criticism. Nowadays, in light of the viewpoint that the direct consequences test should not be applied dogmatically but in a flexible manner, much of this criticism can probably no longer be sustained. It is however clear that the theory does not serve as a general or independent test for the imputability of harm but, like the other tests (such as reasonable foreseeability), fulfils a subsidiary role in establishing legal causation in terms of the prevailing flexible approach.

3.5 Fault

According to this approach, the wrongdoer is liable only for those consequences in respect of which he had fault; in other words, those consequences covered by his fault are imputed to him. Van der Merwe and Olivier explain it as follows:

Liability must therefore be limited to the consequences willed by a person whilst aware of their wrong- fulness, and the wrongful consequences that he reasonably should have foreseen and prevented.

Supporters of the fault-in-relation-to-the-loss approach declare that legal causation as an independent element of delict is unnecessary; and that the questions of fault and imputability of loss are disposed of simultaneously. In particular, this would apply where the so-called concrete approach to negligence is followed. As stated, according to this approach, negligence is determined by inquiring whether the wrongdoer should reasonably have foreseen and prevented loss of the nature experienced in the particular case. It is then argued that negligence contains all the elements necessary for limiting liability.

Although the view that legal causation has no independent right of existence, because the question of limitation of liability may be disposed of during the investigation to determine fault (and wrongfulness) appears to be an attractive solution, especially given its simplicity, closer examination reveals that it is probably too simplistic. It is a fact that in most cases of delictual liability, legal causation is not expressly raised, because it is evident that the consequence caused wrong- fully and culpably must be imputed to the actor. In other words, the question of limitation of liability is in most cases disposed of tacitly within the framework of the investigation into the other elements of delict. However, this does not imply that legal causation is denied its separate right of existence, just as, for example, wrongfulness is not irrelevant merely because in many cases where wrongfulness is clearly present the courts find it unnecessary to investigate it separately and, consequently, only investigate the question of fault. The fact remains that the question of whether liability for a particular consequence should be imputed to a wrongdoer, differs fundamentally from the question of whether that consequence has been caused in conflict with the legal convictions of the community (wrongfully), or whether the law should blame the wrongdoer for his wrongful conduct (in other words, whether he had fault).

3.5.1 Intent as criterion for legal causation

Van der Merwe and Olivier are of the opinion that a wrongdoer is liable for those consequences covered by his intent. In addition, it is traditionally accepted that consequences caused intentionally can never fall outside the limits of liability: "intended consequences . . . can never be too remote". The fact that both these approaches are too simplistic is evident from the case where a foreseen consequence occurs exactly as foreseen by the defendant but where intent fails to keep liability within acceptable limits. The following example illustrates this view: X, a young man, knows that his aunt (aged 75 years) has nominated him as her sole heir in her will. He becomes impatient with waiting for her to die a natural death so that he can acquire her assets. He, therefore, cunningly persuades her to undertake a journey by motor-car from Durban to Johannesburg, in the expectation that she might die in an accident on Van Reenen's pass. As suggested by X, Y drives her own car. During bad weather in the mountain pass in question, Y loses control over her car and she dies when the vehicle tumbles down the mountain, as X had envisaged.

There is without any doubt a factual causal nexus between X's conduct and Y's death. Wrongfulness is also present as a result of the infringement of Y's bodily integrity without a ground of justification, as well as X's evil motive. In other words, the law will hardly consider X's causing of Y's death as lawful. Intent, in addition, is present if (i) the wrongdoer (X) actually foresaw that his conduct would (possibly) lead to the consequence involved (Y's death), and (ii) actually foresaw that the consequence in the circumstances would (possibly) be wrongful (and, in addition, reconciled himself with these possibilities). The view that a wrong- doer is liable for the consequences which are covered by his intent and that "intended consequences can never be too remote", now necessitates the conclusion that X, in the absence of a ground of justification, will be liable for Y's death. Nevertheless, the vast majority of jurists would probably be of the opinion that it would be unreasonable to hold X liable for Y's death under these circumstances.

By contrast, an example from case law demonstrates how intent as a criterion for legal causation excludes liability for consequences which should reasonably be imputed to the wrongdoer. In *Brown v Hoffman* the defendant punched the plaintiff three times at a political meeting. As a result of this assault, the plaintiff suffered severe physical injury, in particular injuries to the brain, head, face and neck. In addition to a claim for damages for considerable medical and related expenses, satisfaction was also claimed for shock, pain, suffering, discomfort, loss of amenities of life, and infringement of dignity suffered by the plaintiff.

It was argued on behalf of the defendant that liability was limited to the extent of the defendant's intent. As the defendant had not intended to cause the serious injuries he had in fact caused, it was argued that he could not be held liable for damages falling outside his intent and compensation for "general damages" such as pain and suffering could not be claimed from him. In addition, it was argued on behalf of the defendant that, although an actor who has caused dam- age to another in a negligent manner may be held liable for those consequences of his conduct which were reasonably foreseeable, the defendant in this case should not incur such a wide liability, because the plaintiff had limited his action to the actio iniuriarum (for which negligence is not sufficient).

Van Rhyn J rejected this argument, stating:

> I cannot agree with an interpretation which upon analysis, in circumstances like those in casu, results in our law attaching a lesser responsibility to one who injures someone intentionally (by assaulting him), than one who causes the same injuries negligently.

The court came to the conclusion that the criterion of reasonable foreseeability should deter- mine for which consequences the defendant should be held liable, and held that, on the merits, the plaintiff had sufficiently proved his case and that he was entitled to damages and satisfaction for the "specific and general damages" he could prove he had suffered.

The decision of the court justifies the deduction that intent cannot serve as a criterion for legal causation. In this particular case, the consequences for which the wrongdoer should reason- ably be held liable fell outside his intent; in other words, it was considered reasonable that the wrongdoer in the particular circumstances should be held liable even for consequences which were not covered by his intent. The court determined the limits of the defendant's liability with reference to the reasonable foreseeability test,186 but it must be borne in mind that the last- mentioned test is subordinate to the flexible criterion, whereby legal causation is presently established.

Van der Merwe and Olivier, who adhere strictly to the approach whereby imputability is deter- mined in accordance with fault, explain the liability of a defendant in an example similar to the Brown case188 on the basis of the argument that the intentional defendant acted negligently with reference to those consequences which he did not intend:

> A person can have intent in respect of some of the wrongful consequences of his act, while being negligent or even innocent in respect of others. If, for instance, I intentionally injure someone's body, but in so doing also break his precious watch of which I was not aware, I can sustain *Aquilian* liability in respect of the latter on the basis of the negligent causing of damage. From the fact that intent and negligence cannot overlap conceptually, it must not be concluded that an alleged wrongdoer who caused consequences A and B intentionally, cannot be negligent in respect of consequences C and D, which he had not willed.

However, in our view, in each of the three examples discussed – X who caused his aunt Y's death, the defendant in *Brown v Hoffman* who assaulted the plaintiff, and Van der Merwe and Olivier's assailant who also broke his victim's watch – it would be illogical to apply a negligence test to determine whether the wrongdoer should or should not be held liable for the death, the serious additional injury and the broken watch. In each of these cases, it is clear that the wrongdoer had intent (at least with reference to some of the consequences) and at the same time it is clear that the wrongdoer should reasonably have refrained from his conduct. The question of fault – juridical blameworthiness – has thus been disposed of. The question is no longer whether the wrongdoer has to be blamed for causing the consequences concerned (as a result of his intent this is an established fact), but rather whether the consequences of his intentional (blameworthy) conduct can be imputed to him; whether he should be held liable for them. In other words, it is pointless at this stage to inquire whether an intentional wrongdoer must be blamed for further consequences which a reasonable man would have foreseen and prevented. Blameworthiness (fault) is no longer relevant at this stage. The questions are whether liability for the consequences concerned should be imputed to the wrongdoer, and which criterion should serve to establish this fact.

3.5.2 Negligence as criterion for legal causation

It is already partly evident that the criterion for negligence cannot, as in the case of intent, serve as a test for determining the imputability of damage. The test for negligence is whether the reasonable person, in the same position as the wrongdoer, would have foreseen and prevented either injury to another in general (abstract approach) or the consequence concerned (concrete approach).

Boberg distinguishes two approaches to the imputability of damage in the case of negligence. Depending on whether one prefers the abstract or the concrete approach to negligence, the question of legal causation is answered differently. Since it is sufficient, according to the abstract approach, if damage in general is reasonably foreseeable, the question of whether a wrongdoer is liable for a specific consequence has to be determined separately by applying one or other of the different criteria for legal causation and not with reference to the question of whether the wrongdoer had been negligent with reference to that specific consequence. However, according to Boberg, the concrete ("relative") approach renders an investigation into legal causation unnecessary, because wrongfulness and negligence are determined with reference to a specific consequence. According to this approach, it is unnecessary to undertake an independent investigation into imputability of damage, because the concrete test for wrongfulness and negligence supposedly contains all the elements necessary to keep liability within acceptable limits.

It is true that the question of limitation of liability or legal causation is (tacitly) answered in most cases during the investigation into wrongfulness and negligence. Even those who prefer the abstract approach to negligence seldom need to apply legal causation expressly, because in most cases it is apparent that the damage that has been caused by the conduct of the actor, who acted wrongfully and negligently, must be imputed to him, with the result that it is unnecessary to enter into the matter separately. This applies especially where the concrete approach to negligence is followed.

Nevertheless, sight must not be lost of the fundamental distinction between, on the one hand, the question of wrongfulness and fault and, on the other hand, imputability of harm or legal causation merely because, in most cases, the latter question is disposed of within the framework of the former question. It appears from the discussion of intent as a possible limiting criterion that where it is already clear that the wrongdoer has acted intentionally in respect of certain consequences, the question is no longer whether he is blameworthy with regard to further consequences, but whether liability for those consequences should be imputed to him. Where intent has been established, it is illogical, for the purposes of legal causation, to inquire whether the wrongdoer acted negligently with reference to further consequences which flowed from his intentional conduct. Likewise, it is illogical after it was found that the wrongdoer had acted negligently (because in light of the foreseeable consequences he should have acted differently), to inquire with reference to further consequences whether the wrongdoer should have acted differently. After all, it has already been decided that he should have acted differently. In the event of further consequences (where legal causation is specifically relevant), the wrongdoer's blameworthiness is no longer at issue (at that stage its existence is a fact) and the pertinent question is whether he should be held liable for the further consequences of his blameworthy conduct.

In determining whether a specific consequence should be imputed to the wrongdoer, it is there- fore pointless, once it has been established that a reasonable person in the wrongdoer's position would have foreseen and prevented damage in general (abstract approach), or damage of a specific nature (concrete approach), to ask again whether the wrongdoer should have refrained from acting because the specific remote consequence could ensue. In other words, in the event of further consequences it is unnecessary once again to apply the "second leg" of the negligence test (whether the wrongdoer should have acted differently). Hart and Honoré express it as follows:

[T]here is a logical absurdity in asking whether the risk of further harm, arising from a harmful situation which a reasonable man would not have created, would itself have deterred a reasonable man from acting.

The fact remains that the question of whether a wrongdoer should be held liable for a "remote consequence", is completely different from the question of whether the wrongdoer's conduct was unreasonable according to the legal convictions of the community (the question of wrongfulness), from the question of whether the wrongdoer should be legally blamed because he foresaw and reconciled himself with the consequence and the possible wrongfulness thereof (the question of intent), and from the question of whether injury was foreseeable with such a degree of probability that the reasonable man would have taken steps to avoid injury (the question of negligence). Wrongfulness, fault, factual causation and legal causation (imputability of harm) should be clearly distinguished. A delict is a complex juristic fact which is traditionally divided into a number of different elements. This classification is based on considerations of fairness, efficacy and logic and should not lightly be disregarded. Anyone who, for example, without due consideration, drags an element of wrongfulness into the requirement of fault or damage, or an element of wrongfulness or fault into the requirement of legal causation, could be caught up in a web of confusion of ideas.

Strict liability The fact that legal causation entails considerations of a nature completely different from that of fault is emphasised by the necessity of its application in the case of strict liability. Suppose that in an example such as that of A, who eventually became paralysed, A was not injured by a blow from B, but by being bitten by B's vicious dog, and that the subsequent events took place as in the given example. While it is clear that B, although he was not negligent in any way, will be liable without fault on the basis of the *actio de pauperie* at least for the damage resulting from the initial bite-wound, it still has to be established whether B should also be liable for A's eventual invalidism. How should the limits of B's liability be determined where he acted completely without fault but is liable for at least certain consequences? The fact that it would be absurd to attempt to establish B's liability for the invalidism with reference to fault once again illustrates that the imputability of harm entails a question completely different from the question of fault.

Further authority for these views can be found in *Thandani v Minister of Law and Order* where it was confirmed that legal causation – quite apart from fault on the part of the wrongdoer – is a separate requirement for delictual liability. This case dealt with the possible liability of the defendant for wrongful arrest and detention, a delict for which fault is not required – in other words, an example of strict liability. According to the court, a solution to the problem of liability in *casu* depended on whether the requirement of causation was satisfied. Since this was a case of strict liability, the question of fault apparently played no part with regard to the limitation of liability. In *casu* Van Rensburg J employed both the direct-consequences and the reasonable-foreseeability approaches – but obviously not the basis of fault – to find that legal causation was present in the facts considered by him.

3.6 Reasonable foreseeability

Reasonable foreseeability has been used in a number of decisions as a criterion for legal causation, but in terms of the prevailing flexible approach, it plays a subsidiary role, just like all the other traditional tests for legal causation. This implies, inter alia, that reasonable foreseeability should not be seen as the single, decisive criterion for establishing liability. Therefore, it would be possible in a given matter, merely on the basis of legal policy, to impute liability in terms of the flexible approach, even where the damage was so exceptional that it could not be described as reasonably foreseeable.

However, the case law does not provide a clear picture of the content of the reasonableness criterion. Normally the foreseeability test is not exactly defined, the decision simply being that a specific result was foreseeable or not and that is the end of the matter. There is no complete clarity on the question as to what should be foreseeable to found liability. Van der Walt and Midgley interpret the approach of the courts as follows:

> It is not necessary that all the consequences of the defendant's conduct should have been foreseen: only the general nature or the kind of harm which actually occurred must have been reasonably foreseeable. The exact extent or precise manner of occurrence need not have been reasonably foreseeable. However, the risk of harm must have been a real risk, which a reasonable person would not have brushed aside as being far-fetched.

Van Rensburg suggests as a general test the following criterion, until such time as the courts lay down concrete rules for the determination of legal causation according to this approach:

> [W]as the consequence, as well as the causal progression between the act and the consequence, at the time of the act foreseeable with such a degree of probability that the consequence can, in light of the circumstances, reasonably be imputed to the alleged wrongdoer?

According to Van Rensburg, in the application of this criterion, the general rule should apply that "an alleged wrongdoer is normally liable for all the consequences of his culpable, wrongful act, except for the consequences that were highly improbable".

In the discussion of fault as a possible criterion for legal causation, the reasonable foresee- ability and preventability test, which is applied to determine negligence, cannot be applied unchanged as a criterion for the imputability of harm. Furthermore, the nature of the respective enquiries into fault and the imputability of harm differ so fundamentally that it is not expedient to attempt to answer the question about the imputability of harm with reference to the question of whether the wrongdoer had fault with regard to the remote consequence concerned. The fact that the question of the imputability of harm in most cases may be deemed to be settled as soon as it has been found that the actor has acted wrongfully and culpably does not detract from the difference in principle between fault and legal causation.

Reasonable foreseeability may also serve as a (subsidiary) criterion for the imputability of harm in cases of intentional wrongful conduct and liability without fault.

3.7 Novusactusinterveniens

A *novus actus interveniens* (new intervening cause) is an independent event which, after the wrongdoer's act has been concluded, either caused or contributed to the consequence concerned. The question of to what extent such an event influences the possible liability of the wrongdoer now arises. Where a *novus actus interveniens* completely extinguishes the causal connection between the conduct of the wrongdoer and the consequence, with the result that the wrongdoer's act can no longer be considered to be a factual cause of the consequence, the actor obviously goes free. It is, however, more difficult to determine when a *novus actus interveniens* influences the result to such an extent that the result should no longer be imputed to the actor, although his conduct remains a factual cause of the result.

In the latter instance, the effect of a *novus actus interveniens* is obviously to limit the liability of the wrongdoer and, thus, it plays an important role in legal causation. In each case, it will have to be determined within the framework of the relevant imputability test, whether the *novus actus* has had the effect of severing the legal nexus with the result that the consequence should not be imputed to the actor. When applying the flexible approach, the question is, therefore, whether the *novus actus* between the defendant's conduct and the relevant consequence has been such that the consequence cannot be imputed to the defendant on the basis of policy, reasonability, fairness and justice. In applying the direct consequences test, the question therefore is whether the *novus actus* breaks the "directness" of the consequence which is required for liability; and when applying foreseeability, the question is whether the *novus actus* influences the degree of foreseeability to such an extent that it may be said that the consequence was not reasonably foreseeable as a result of the *novus actus*.

A *novus actus interveniens* may be brought about by the (culpable) conduct of the plaintiff himself, by the (culpable) conduct of a third party, or by natural factors such as wind and rain. It is important to note that an event will qualify as a *novus actus interveniens* only if the event was not reasonably foreseeable. If the intervening cause was indeed reasonably foreseeable at the moment of the act (or if it reasonably formed part of the risks inherent in the conduct of the defendant) such an event may not be considered to be a *novus actus interveniens* that may influence the imputability of harm to the actor.

3.8 So-called egg-skull cases(*talem qualem* rule)

"Egg-skull cases" arise where the plaintiff, because of one or other physical, psychological or financial weakness, suffers more serious injury or loss as a result of the wrongdoer's conduct than would have been the case if the plaintiff had not suffered from such a weakness. Most jurists agree that, in such a case, the wrongdoer should also be liable for the harm which may be ascribed to the existence of the weakness concerned – this principle is reflected in the maxim "you must take your victim as you find him", and is also identified as the *talem qualem* rule. However, there is no agreement about how the liability of the actor for such harm should be justified, or which criterion for legal causation should be used to express liability in ideal terms.

According to Van Rensburg, in these cases, liability may still be explained with reference to the reasonable foreseeability norm. He is of the opinion that, as a result of the particular circumstances present in these cases, the precise manner in which the consequences occur need not be foreseeable with the same degree of probability that applies in normal cases. According to Van Rensburg, the particular circumstances which bring about this deviation from the normal are

> derived from the fact that in typical egg-skull cases the alleged wrongdoer endangered a fellow human being's most precious legal interest, namely his physical-mental integrity, and that it was merely 'coincidental' that the serious consequence did not occur directly but in an indirect way which was closely linked to a weakness in the victim's physical-psychological disposition.

Van der Walt and Midgley link the egg-skull rule to the "direct consequences" theory:

> The doctrine of direct consequences has exerted its strongest influence on the question of liability for personal injuries. Once a defendant has been proved to have acted wrongfully and negligently, his or her responsibility embraces any harm flowing from a latent physical condition of the plaintiff, however unforeseeable or abnormal. This principle, inherent in the theory of direct consequences, is usually expressed by stating that the tortfeasor 'must take his victim as he finds him'.

Van der Merwe and Olivier, who strictly adhere to fault as a criterion for the imputability of harm, contend that "the reasonable man cannot be expected to foresee the unforeseeable", and declare that the notion that "you must take your victim as you find him" should be rejected insofar as the reasonable person would not have foreseen the consequence concerned and that the injured party should bear the loss himself. In this instance, Van der Merwe and Olivier prefer their own dogmatic starting point to the demands of legal practice.

The most acceptable approach to the so-called "egg-skull cases" is made possible by the flexible criterion for legal causation and illustrated by the judgment of Botha JA in *Smit v Abrahams*. In terms of this criterion, the fact that the plaintiff was an "egg-skull case" was

> just another fact to be considered, with all the other facts of each particular case, when applying the 'dominant elastic criterion', according to which [on the basis of policy considerations based on reasonableness, fairness and justice] the imputability of the particular damage to the defendant must be determined.

In other words, the basic question is not whether the damage was a direct consequence or reasonably foreseeable, but whether, in light of all the circumstances of the case, amongst others the egg-skull situation, the damage should reasonably be imputed to the defendant.

Damage

1 Introduction

A delict is a wrongful and culpable act which has a harmful consequence. The element of damage is fundamental to a delictual action for damages The general compensatory function of the law of delict implies that there must be some loss or damage for which the law makes compensation available The object of this chapter is to discuss in general some basic principles of the assessment of damage, as well as the quantification of the proper amount of compensation (damages) or satisfaction in respect thereof.

2 The compensatory function of the law of delict

The law of delict has a compensatory function. This general function of compensation may take the following specific forms:

(a) **Compensation for damage** (or, briefly, damages – "skadevergoeding") "Damages" is a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as future patrimonial and, where applicable, non-patrimonial damage. Money is thus intended as the equivalent of damage.

(b) **Satisfaction** ("genoegdoening") If damage or loss is incapable of being compensated because money cannot be a true equivalent of the impaired interest(s), satisfaction ("genoegdoening") becomes relevant as a function of the law of delict. Satisfaction implies the reparation of damage in the form of injury to personality ("persoonlikheidsnadeel") by inter alia effecting retribution for the wrong suffered by the plaintiff and by satisfying the plaintiff's and/or the community's sense of justice. Usually, satisfaction operates through the mechanism of the defendant being ordered to pay a sum of money to the plaintiff in proportion to the wrong inflicted on him.

3 The concept of damage

3.1 The definition of damage

Damage (*damnum*) is an ancient concept in legal terminology. Although it is not absolutely clear how damage should be defined, the following definition is acceptable:

Damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.

3.2 Extent of the concept of damage

3.2.1 General

The question of whether "damage" indicates any form of harm whatsoever or whether some forms of harm are excluded arises The concept of damage does, of course, include more than harm for which compensation is recoverable, since satisfaction may be awarded for some forms of damage. As indicated by the definition above, only harm in respect of legally recognised patrimonial and non-patrimonial interests of a person qualifies as damage. This may be the reason why losses and harm such as inconvenience, disappointment, fear or frustration are not compensable in terms of the *Aquilian* action, or why a husband may not claim for the loss of the comfort and society of his wife who has been killed, or why the frustration of an expectation of inheriting something does not constitute damage. One may, of course, also argue that the losses referred to are damage but that the law refuses compensation for policy reasons.

Reinecke's argument that the frustration of income from an unlawful activity does not amount to damage in the legal sense appears to be correct, although it has been subjected to criticism.

Damage is only that reduction in the utility of interests which has been brought about by an uncertain event. A reduction in utility which is sure to take place because of, for example, wear-and-tear, illness due to natural causes, death and consumption cannot be regarded as damage.

Prospective loss (the expectation that the utility of someone's patrimony or personality will be reduced or will not increase in value) is regarded as part of the concept of damage.

3.2.2 Damage includes patrimonial (pecuniary) as well as non-patrimonial (non-pecuniary) loss

In terms of the definition of damage offered earlier, damage is a broad concept which consists of patrimonial as well as non-patrimonial loss (injury to personality). Thus damage is a compre- hensive concept with patrimonial and non-patrimonial loss as its two mutually exclusive compo- nents.

Given that in a primary sense, damage denotes "patrimonial loss", there are authors such as Van der Walt, Reinecke, Boberg and Van der Merwe and Olivier who define damage only as patrimonial loss. This approach is based on the assumption that patrimonial damage and injury to personality do not share any meaningful common denominator. Other authors, such as McKerron, Pauw and Pont, accept a wider concept of damage which includes non- patrimonial loss.

There are compelling arguments which prove beyond doubt that damage is a broad concept which consists of patrimonial as well as non-patrimonial loss:

(a) Patrimonial and non-patrimonial loss have a common denominator, namely the diminution in the utility of any (patrimonial or personality) interest which the law deems worthy of protection. The true nature of damage reflects its real nature (Afrikaans: "reële aard"), implying that it need not be measurable in monetary terms. It is incorrect to insist on measurability in money (which is a characteristic of patrimonial loss) as a requirement for every form of damage. The fact that patrimonial and non-patrimonial damage both form part of a comprehensive concept of damage, does not, of course, imply that certain important differences between these two concepts disappear, or that compensation in regard to both functions is provided in exactly the same manner. It is simply a realistic view of damage that includes all forms of harm that are relevant in the field of delictual liability.

(b) Legal practice uses a wide concept of damage. In interpreting phrases such as "damage" or "loss" in legislation where these concepts are not defined, it is correctly accepted that damage refers to patrimonial as well as non-patrimonial loss. Any other interpretation in terms of a restricted view of damage would obviously have unjust results.

(c) The action for pain and suffering, which provides compensation for injury to personality in cases of physical injuries, has developed in conjunction with the *Aquilian* action as an action which is primarily intended to provide compensation (in contrast to satisfaction in terms of the *actio iniuriarum*). The action for pain and suffering has made it possible to recover a form of imperfect compensation on account of physical injuries (non-patrimonial loss).

The word "imperfect" is used since full and actual restitution is impossible in a case of physical injuries, although the law nevertheless attempts to achieve a compensatory object. The conclusion to be drawn from the development of the action for pain and suffering is that since certain forms of injury to personality have become the object of (imperfect) compensation (in the sense of "skadevergoeding"), injury to personality must necessarily be seen as damage.

Once it is accepted that injury to personality may be compensable damage, there is no justification for why all forms of *iniuria* which are actionable in terms of the *actio iniuriarum* should not be classified as non-patrimonial loss in terms of a comprehensive concept of damage. The action for pain and suffering clearly demonstrates that natural (direct) compensability or commensurability in money should not be a requirement for damage. Damage and compensable damage are simply not the same. One should therefore accept a wide concept of damage as a starting-point and thereafter consider which forms of damage are capable of compensation and in which forms satisfaction plays the dominant role.

3.3 The relationship between patrimonial and non-patrimonial loss

As stated previously, the concept of damage refers to harm in connection with someone's patrimony as well as his personality. The major point of agreement between patrimonial and non-patrimonial damage is that, in both instances, the utility or quality of an interest protected by law is infringed (the plaintiff loses something for which he receives money as compensation). There are nevertheless important differences between these two forms of damage. However, qualifications of these differences demonstrate that there is no clearly defined line between patrimonial and non-patrimonial damage.

The most important differences usually referred to are the following:

(a) Patrimonial loss can be directly or naturally expressed in money while non-pecuniary loss is at most only indirectly measurable in this way.

(b) The extent of patrimonial loss can be ascertained with greater precision than the extent of non-patrimonial loss. The amount of damages for patrimonial loss can be determined by using objective criteria (for example, "market value", "reasonable cost of repairs", etc). However, damages for non-patrimonial loss relate to injury to subjective feelings, and can only be assessed by means of an equitable estimate.

(c) Damages for patrimonial loss are of the same nature as the impaired patrimonial interest and are thus a genuine equivalent for such damage. In non-patrimonial loss, there is no true relationship between money and the injury to personality.

(d) Patrimonial loss implies that the utility of a patrimonial interest is reduced, while an interest of personality is the subject of reduction in non-pecuniary damage.

3.4 The relationship between damage and wrongfulness (unlawfulness)

Wrongfulnes and damage are two separate elements of a delict. The question of how their relationship to each other should be defined nevertheless arises. The answer to this question has both theoretical value and practical implications, for example, in the case of income earned illegally.

It is generally accepted that in the law of delict an act is usually only wrongful if it has caused a harmful consequence. If X drives his car at 120 kilometres per hour in an urban area but causes no accident, his conduct is not wrongful for the purposes of the law of delict. There are, however, instances where conduct will be unlawful despite the absence of damage. Examples are where X steals a valueless object belonging to Y or where X trespasses on Y's property without causing damage.

By contrast, there are instances where damage is caused without any wrongful act. Where lightning causes X's house to burn down, X suffers damage for which he would probably have a claim against an insurer. Similarly, where X breaks the windscreen of his own car, he sustains damage, but there is no wrongfulness as a person cannot, for the purposes of private law, act unlawfully in respect of his own interests. From these examples it may be concluded that one should not attempt to define damage in terms of delictual wrongfulness. The custom of referring to patrimonial loss as damage which flows from a wrongdoer's unlawful and culpable conduct does not mean that wrongfulness or culpability qualifies damage: it is simply a reference to damage for which damages may be recovered ex delicto, in contrast to damage for which delictual damages are not available (but in respect of which compensation may, for example, be recovered in terms of an insurance policy).

Van der Merwe and Olivier advocate too close a connection between wrongfulness and dam- age. They give an example of A breaking B's window in a situation of necessity. B cannot claim damages from A since the situation of necessity implies that B has suffered no damage in a legal sense.

This argument has been the subject of considerable criticism,57 to the effect that Van der Merwe and Olivier incorporate wrongfulness into the concept of damage. This criticism is justified. It is not clear from their example why breaking the window does not constitute damage. Harm resulting from a lawful act performed in necessity obviously constitutes damage, although no- one can be held liable in respect thereof, as the other requirements of delictual liability are not met. If it is argued that harm does not constitute damage, this conclusion should not be based on the fact that certain other requirements of delictual liability are not present, but because the definition of damage itself compels this view. If, for example, it is submitted that inconvenience does not amount to damage or patrimonial damage, this may be understandable since the law may define damage in such a manner that certain types of loss are excluded.

However, it is pointless to argue that, because there is no wrongfulness, damage must necessarily be absent, as this represents an attempt to define damage in terms of criteria which have nothing to do with the concept of damage. It would amount to the same kind of mistake if, with reference to the example of Van der Merwe and Olivier, one argues that conduct in necessity does not constitute conduct since no-one can be held liable in respect thereof. The fact of lawfulness or unlawful- ness does not determine whether someone has acted. Similarly, lawfulness or unlawfulness does not indicate whether damage has been suffered or not.

There is indeed an indirect connection between damage and wrongfulness in terms of the juridical concept of patrimony: X does not suffer damage if an object of Y (to which X has no claim) is damaged, since the legally protected interests of X have not been impaired. Reinecke correctly argues that the existence of damage does not depend on wrongfulness, but adds that the frustration of an expectancy to earn income from an illegal activity (caused by bodily injuries) cannot be seen as damage, since an expectation of a benefit which is contrary to law is not recognised. Although criticism has been expressed that his approach implies that wrongfulness is elevated to a prerequisite for damage, Reinecke's theory appears to be sound. In this kind of situation, it is not only damage that is absent, but also wrongfulness, as the plaintiff had no right to earn the lost income. However, the reason for the absence of damage is not because wrongfulness has not been proved; it is because no asset of the plaintiff's patrimony (estate) has been impaired.

3.5 The relationship between damage and factual causation

Damage and factual causation are two separate delictual elements, but they have a particular relationship with each other, as causation is necessarily determined with reference to a consequence (damage). Furthermore, there can also be an overlap between the tests employed to establish causation and damage: Suppose X throws a stone through a shop window. At exactly the same time, a bomb explodes which terrorist Y has previously set, causing all the windows in the building to be destroyed. If X had not broken the window in question, it would in any event have been shattered by the explosion. If the sum-formula is used to establish damage, the present position of the plaintiff is compared with the hypothetical position he would have enjoyed if the damage-causing event had not taken place. In *casu* such a comparison indicates that the owner of the shop did not suffer damage (as a result of X's conduct) as the window would in any event have been broken. This test may coincide with the comparative "test" of the *conditio sine qua non* approach, which is used to determine the existence of a causal nexus. In terms of this test, an antecedent (the alleged cause of damage) is notionally eliminated and the hypothetical course of events without such antecedent is construed. If the damage in question still occurs, the alleged antecedent is not a cause of such damage (and vice versa). In *casu* this test shows that X did not cause the damage, ie the broken window, as the window would have been broken independently of his conduct.

Van der Walt contends that the two tests of comparison referred to above are clearly distinguishable, since the test for damage is aimed at identifying a reduction of interests, while the test of causation tries to establish the reason for such reduction. This argument is rejected by Reinecke, who refers to an alleged incorporation of the test for causation into the criterion for damage. He submits that once damage has been established by means of a comparative method (a comparison between a plaintiff's actual and hypothetical position had the damage causing event not taken place), it has also been demonstrated that the alleged damage-causing event is a cause (*conditio sine qua non*) of the damage.

It should be remembered that both the sum-formula and the *conditio sine qua non* "test" are unacceptable. But even if the correct approach to causation and assessment of damage is employed, the problem does not disappear. If, for example, the value of X's property before and after a delict (negligent injury to property) is compared, this process does not merely demonstrate damage in the form of a diminution of value, but also the reason for the change, namely that the delict of the defendant has caused such damage. Moreover, in order to determine causation, the alleged damage-causing event must be connected with a particular consequence (damage – the reduction in value of X's motor car). This proves that the determination of dam- age and causation will necessarily coincide in some respects.

4 Patrimonial (pecuniary)loss

4.1 Definition of patrimonial loss

Patrimonial loss is the detrimental impact on any patrimonial interest deemed worthy of protection by the law. Patrimonial loss may also be seen as the loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of such patrimony (a patrimonial debt).

4.2 Aperson'spatrimony(estate)

Patrimonial loss is defined in terms of someone's patrimony; therefore it is important to have an accurate idea of the concept of "patrimony". There is no generally accepted definition of a person's patrimony. In terms of the juridical concept of patrimony, it consists of all his patrimonial rights (namely subjective rights with a monetary value), his expectations to acquire patrimonial rights and all legally enforceable obligations (or expectations) with a monetary value. According to a different approach, patrimony is seen as a factual and economic concept in the sense of everything a person possesses which has a monetary value.

In *Union Government (Minister of Railways and Harbours) v Warneke* patrimony was defined as a universitas of rights and duties. This definition is in accordance with the juridical concept of patrimony. For the purposes of the assessment of patrimonial damage, the juridical doctrine of patrimony is to be preferred. Reinecke identifies the following patrimonial elements:

(a) **Positive elements of someone's patrimony** This refers to all a person's patrimonial rights such as real rights, immaterial property rights and personal rights (for example to a contractual performance). The monetary value of such rights is determined by the market value of the object in question, as well as any limitation on such rights. Expectations of patrimonial benefits are also part of a person's estate and this is the legally accepted expectation to acquire patrimonial rights in future. This refers to a chance or possibility which is of such a nature that the law affords it protection.

(b) **Negative elements of someone's patrimony** An obvious example is a debt which someone incurs. Someone's patrimony is burdened or reduced by the creation, acceleration or increase of a monetary debt or liability. A debt constitutes damage even though the debtor has no assets to pay such debt.85 An expectation of debt (ie, the opposite of an expectation of benefit) is also part of a person's patrimony. This refers to the situation where a person will reasonably have to incur a debt as a result of a delict.86

The utility or quality of these patrimonial elements is always measured in money by using the correct criterion of value at the proper time.

4.3 The ways in which patrimonial loss is caused

Patrimonial loss is described as the reduction in the utility of an element of someone's patrimony. This implies that the utility value (expressed in monetary terms) of a positive element of an estate is reduced, or that an increase does not take place or is delayed, or that a negative element (a debt) comes into existence or is increased.

Generally damage is caused in one of the following ways:

(a) **Loss of a patrimonial element** When property is destroyed, a patrimonial right in respect thereof (example, ownership) is lost and a person's patrimony diminishes in value. Loss of possession of something also means that the power to use this object is lost.89 Loss of an expec- tancy occurs when the expectation can no longer be realised (for example, X's vehicle which he uses in his taxi business is damaged and his expectation of profit cannot materialise).

(b) **Reduction in value of a patrimonial element** Where the object of a patrimonial right (like a thing or someone's earning capacity) is infringed, the utility value of such right is also reduced. The reduction in value of an expectancy of a benefit takes place when the expectation to make profit is partially frustrated (for example, the machinery in X's factory is damaged and he is likely to make less profit than before).

(c) **The creation or increase of a debt (expense) and the creation or acceleration of an expectation of debt** If a delict causes an injured person to incur reasonable medical expenses, such expenses constitute damage. The increase of an existing debt (in other words, the "positive" value of such debt decreases) constitutes damage. An example is where X's duty of support vis- à-vis his child is increased when the child is injured – in this case the child needs more support in the form of medical expenses. The mere creation of a debt immediately constitutes damage even before the debt has to be satisfied. The creation or acceleration of an expectation of debt similarly amounts to damage. An example is where, after having been injured, there is a 50% possibility that X will have to undergo an operation and thus incur medical expenses. Damage is also caused if an existing debt or expenses already incurred are rendered useless, but it is not clear how this should be explained.

4.4 Forms of patrimonial loss

It is, from a practical point of view, useful to take note of the different forms of patrimonial loss

recognised in practice:

(a) ***Damnum emergens and lucrum cessans*** The expression *lucrum cessans* means loss of profit, but is also used to describe prospective loss and the loss of a patrimonial expectancy. *Damnum emergens* refers to all other forms of damage. It is used in particular to refer to damage suffered up to the date of trial.

(b) **Damage to property and pure economic (financial) loss** There is a clear distinction between damage and physical damage to property. The latter refers to the impairment of the physical object of a real right while "damage" is a much broader concept. Damage to property is but one way in which damage is caused. In Afrikaans, damage caused by injury to property is described as "saakskade" which is contrasted with financial or economic loss. The latter refers to damage which does not result from damage to property or injury to personality, or where it does, it is either not the plaintiff's property or personality which has been harmed, or it is not the defendant who caused such damage or injury.

(c) **Direct and consequential loss** The distinction between direct and consequential damage is made for the purposes of limitation of liability (legal causation or remoteness of damage).96 Direct loss indicates the immediate or direct result of a damage-causing event, while consequen- tial damage is that loss which flows from direct loss. Where X's motor car which he uses as a taxi is damaged, the reasonable cost of repairs is direct damage, but the loss of profit from the taxi business constitutes consequential loss.

(d) **General (intrinsic) and special (extrinsic) damage** These terms are derived from English law and have various meanings. General damage often refers to damage which is presumed to flow from an unlawful act and which need only be pleaded generally, while special damage means loss in respect of which such a presumption does not apply and which has to be specially pleaded and proved.98 The term general damage is also used to describe non-patrimonial loss and even sometimes patrimonial loss. In the field of delictual liability for bodily injuries, all non-patrimonial loss (pain, suffering, etc), as well as prospective patrimonial damage (such as future medical expenses, loss of earning capacity and support) amounts to general damage. On the other hand, monetary losses sustained up to the date of trial (medical expenses already incurred, loss of past income and support) are seen as special damage. It is submitted that use of the concepts "general" and "special" damages should be avoided. Confusion and uncertainty are created by using these concepts to mean different things in different situations. The relevant concepts are in any case so meaningless that it is surprising that they are regarded as useful by some.

4.5 The assessment of patrimonial damage

There are different views about how the existence and extent of damage may be determined in a given situation. It is, however, clear that a comparative method is necessary to determine damage.

4.5.1 The sum-formula approach

This comparative test may be defined as follows:

> According to the sum-formula doctrine damage consists in the negative difference between the relevant person's current patrimonial position (after the event complained of) and his hypothetical patrimonial position that would have been the current position if the event had not taken place. It therefore entails a comparison of an actual current patrimonial sum with a hypothetical current patrimonial sum – and hence the name: sum formula doctrine.

This test is recognised by the Supreme Court of Appeal. The reason why a hypothetical (potential) patrimonial position of the plaintiff is used is to provide for prospective damage, loss of profit and certain other forms of damage. Criticism has been expressed of various aspects of the sum-formula (or method of differentiation).

4.5.2 A concrete concept of damage

It would appear that our case law does not always accept the sum-formula exactly as stated above. The Appellate Division has used the following method of differentiation:

> The difference between the patrimonial position of the prejudiced person before the wrongful act and thereafter . . . [d]amage is the unfavourable difference caused by the wrongful act.

This is probably not the classic formulation of the sum-formula, since there is no mention of a hypothetical patrimonial position. This, in fact, is more in accordance with the concept of damage suggested by Van der Walt.1 He observes that the concept of damage logically relates to a comparative method – the real question is what is compared and how the comparison takes place. He argues that what was (the position before the delict) must be compared with what is (the position after the commission of the delict) and that the current position is not to be com- pared with the hypothetical position which would have existed had the delict not been committed. This is in accordance with actual legal practice. It is suggested that our law should adopt and follow the concrete concept of damage, except in instances of prospective loss, liability for misrepresentation and loss of profit (in other words, all instances where the use of a test with a hypothetical element is necessary).

4.5.3 Time for the assessment of damage

An important practical question is the time with reference to which the proper comparative method of assessing damage should be used. According to current authority, the date of commission of a delict is generally the decisive moment for assessing damage (and this includes future loss). The date of 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 mean that the full extent of the damage should have occurred: if all the other requirements of a delict are present, the date on which the first damage is manifested is used (if there is a series of harmful consequences caused by the delict).

Although the date of delict is the relevant time, events between this date and the date of trial are also considered in the assessment of damage.

4.6 Prospective patrimonial damage (*lucrum cessans*)

4.6.1 General

Prospective damage plays an important role in legal practice, but gives rise to many theoretical and practical problems. The practical problems concern the speculative processes which are necessary to quantify such loss, since there is no empirical knowledge available about future events. The theoretical issues pertain to the correct definition of prospective loss and the question of whether such loss is only concerned with future events or the frustration of current expectations.

The most important reason why assessment of damage and damages in regard to prospective loss is relevant relates to the “once and for all” rule. In terms of this rule, a plaintiff who claims damages on a specific cause of action has only one chance to claim damages for all damage already suffered as well as all prospective loss.

4.6.2 Definition and nature of prospective loss

From a practical point of view, prospective damage is damage in the form of patrimonial (or non-patrimonial) loss which will, with a sufficient degree of probability, materialise after the date of assessment of damage resulting from an earlier damage-causing event.

A more theoretical definition is the following: It is the total or partial frustration of an expectation that a patrimonial asset will accrue (or that a personality interest will exist), or it is the creation of an expectation of a debt.

Agreement has not been reached on the true nature of prospective damage. In terms of one view, it is simply seen as damage which has not yet been suffered at the time of assessment. According to another theory, prospective damage should only be explained as the frustration of an expectancy of a benefit or the creation (or increase) of an expectation of debt. There is also a third theory which accepts that prospective loss rests on two pillars: it has a prospective dimension as well as a present one. Even though prospective damage literally only manifests itself in money or otherwise in future, its basis is to be found in the impairment of the plaintiff's present interests.

4.6.3 Forms of prospective loss

The following forms of prospective loss are recognised in practice:

(a) Future expenses on account of a damage-causing event.

(b) Loss of future income.

(c) Loss of business profit and professional profit.

(d) Loss of prospective support.

(e) Loss of a chance to gain a benefit.

4.6.4 Requirements before damages may be recovered for prospective loss

A claim cannot be instituted merely to recover damages for prospective loss, since a cause of action only exists if some damage has already been caused. In such a case, damages are awarded for damage already sustained, as well as loss that is expected to occur in future. Although this principle has been criticised, it is certain that an action for damages will not be available in the following situation: X is exposed to radiation through Y's negligent conduct. X does not suffer any immediate harm but there is a 30% chance that he may become seriously ill within four years. X only has an action once the illness (and damage) manifests itself.

4.7 The "once and for all" rule

4.7.1 Formulation and implications of the rule

In claims for compensation and satisfaction arising out of a delict (including instances of strict liability) the plaintiff must claim damages for all damage already sustained or expected in future insofar as it is based on a single cause of action.

This rule has the following important practical implications:

(a) Prescription in respect of a claim for damages commences as soon as a cause of action accrues and the debt in respect of the payment of damages is claimable. This means that all the elements of a delict are present (some damage must have occurred) and that the plaintiff is aware of or should reasonably be aware of the identity of the debtor and the facts of the cause of action. Generally speaking, prescription is concluded after three years.

This implies that where some damage has already occurred, the plaintiff must, generally within three years, institute an action in which he claims damages for all damage already sustained as well as that expected in future.

(b) A plaintiff who has sued with or without success for a part of his damage may not thereafter sue for another part if both claims are based on a single cause of action.

4.7.2 Exceptions to the rule

(a) Where an act causes nuisance, a claim may be instituted each time such nuisance causes damage. The fact that a plaintiff has claimed before does not bar a subsequent action. A plaintiff can obviously not be expected to claim in advance for future damage caused by the repetition or continuation of the original nuisance.

(b) In subsidence cases where a person causes damage through unlawful excavation, there is a cause of action every time that damage occurs and a plaintiff is not expected to claim once and for all in respect of all such damage.

(c) In the case of a continuing wrong which causes damage, there is a series of rights of action as damage manifests itself and the plaintiff need not claim once and for all.

(d) When the provisions of third party liability in terms of the Road Accident Fund Act 56 of 1996 are applicable, there are qualifications to the "once and for all" rule, as this Act does not apply to damage associated with injury to property. Moreover, the Act provides for an undertak- ing by the Fund to pay future medical expenses as they are incurred.

4.7.3 Causes of action

In the application of the "once and for all" rule, the concept of a cause of action is of crucial importance. There are two approaches to this concept. Firstly, in terms of the "single cause" theory, every damage-causing event constitutes only one cause of action. Here the emphasis falls on the conduct which causes damage and not on the damage itself. According to the second approach, a cause of action exists if all its requirements (*facta probanda*) are present. These requirements are the elements necessary before there can be delictual liability. While the single cause approach is well-entrenched in certain typical situations, the most recent cases accept the *facta probanda* theory, and the latter theory is also supported by the majority of authors.

A cause of action arises at the earliest date when all the requirements for delictual liability are present. Although a cause of action does not arise before damage has been caused, this does not imply that all the damage should have occurred. If all the other elements are present, a cause of action accrues at the earliest stage, ie when the first damage is caused.

When are different claims based on a single cause of action? In terms of the single cause theory, it is accepted that all the different claims consequent upon an unlawful act fall within one cause of action. In accordance with the *facta probanda* approach, the requisites of two or more claims are compared to establish whether there is a substantial difference despite possible overlapping. If there is no substantial difference, the two claims are regarded as falling within a single cause of action.

4.7.4 Examples of causes of action and the "once and for all" rule

(a) X is assaulted by Y and suffers pain and suffering, feels humiliated and has to incur medical costs. According to our law, there is only one cause of action in this example, despite the fact that X has three delictual actions at his disposal to claim damages.

(b) While X is riding his bicycle, pedestrian Y negligently runs into him. X suffers bodily injuries and his bicycle is also damaged. According to current law, there is only one cause of action in respect of X's bodily injuries as well as the damage to his bicycle. Thus X only has one chance of claiming for all his damage.

(c) Because of Y's negligent driving of his motor-car, another motorist X is injured and his car damaged. At common law, there was only one cause of action as a result of the accident. In terms of legislation providing for so-called third party liability (currently the Road Accident Fund Act 56 of 1996) the position has been changed and there are now two causes of action: the first deals with the damage to X's car. Damage to property does not fall under third party liabil- ity and X must claim this from Y. The second cause of action is concerned with all X's damage as a result of his bodily injuries (medical expenses, loss of income, loss of earning capacity, pain and suffering) and is instituted against the Fund or its agent.

(d) X drives his motor-car and is accompanied by his child Y. Z drives his car in a negligent manner and collides with X's vehicle. X and Y are injured. The claim in respect of medical expenses already incurred as a result of X and Y's injuries depends on one cause of action.

(e) X and his wife Y are travelling in X's car. Z drives his vehicle negligently and collides with X's vehicle. X is seriously injured and dies after three months. Y suffers bodily injuries and the vehicle is damaged. There are at least three causes of action in this set of facts: firstly in respect of the damage to the motor-car; secondly all Y's damage as a result of her bodily injuries; and thirdly Y's claim for damages on account of the death of her breadwinner X.

(f) X sprays poison against locusts on Y's cattle farm during June 1980. X uses the poison in a negligent manner and the first of Y's cattle die during July 1980. The last of the cattle die in December 1980. Y institutes a claim for damages against X in November 1983 (more than three years after the death of the first cattle but within three years of the deaths in December 1980). Y's claim against X rests on a single cause of action for all damage already suffered and all prospective loss. The cause of action accrues in July 1980 when the first cattle died. Our law does not recognise a separate cause of action in respect of the death of each head of cattle. Consequently, Y's action against X has become prescribed; he should have instituted his claim before July 1983 in order to overcome the prescription bar.

(g) X is injured through Y's negligent conduct and recovers damages from Y. After X's claim has been finalised there are further unforeseen complications as a result of the initial injuries. X has no further claim against Y and will have to bear the expenses personally, in spite of the fact that he could not have anticipated them.

(h) X is unlawfully detained and assaulted by Y. The detention and assault form separate causes of action and each act of assault creates a new cause of action.

4.8 The collateral source rule and compensating advantages (*res inter alios acta*)

4.8.1 General

A damage-causing event often not only causes loss, but also results in the plaintiff receiving some benefit. Suppose X is negligently injured by Y and has to incur R1 000 as medical expenses. However, X's aunt Z feels sorry for him and donates R1 000 to him. What role, if any, does the receipt of R1 000 from Z play in the assessment of X's damage and the damages that Y has to pay? Is the R1 000 to be seen as a compensating advantage which neutralises X's loss ("voor- deeltoerekening" takes place) or is it to be ignored as originating from a collateral source (Z) that does not concern Y?

This problem may be approached in two ways: Firstly, the law may hold Y liable for all the damage he has caused. In terms of this approach, Y will have to pay R1 000 to X. Adopting this approach also has the consequence that X suffers damage in the amount of R1 000 but receives compensation of R2 000. Secondly, it may be argued that Y is only liable to compen- sate X for damage actually sustained by him. This means that Y does not have to pay anything to X as the receipt of R1 000 from Z has already compensated X. This implies that Z has in fact donated the R 1000 to Y and not to X!

After a survey of current legal principles, possible theoretical solutions to the problem of collateral benefits will be considered.

4.8.2 Summary of positive law

There are practical guidelines on which benefits may be taken into account in particular circum- stances in reducing the amount of damages to which the plaintiff is entitled or which benefits are to be ignored.

The following benefits which a plaintiff receives on account of his loss are seen as res *inter alios acta* (they are not taken into account in reducing his damages):

(a) Benefits in terms of indemnity insurance and non-indemnity insurance (life assurance).

(b) Benefits from a medical fund and sick leave where the medical scheme or the employer (according to the case) has a discretion in respect of the payment of the benefit.

(c) Benefits received by the owner of a damaged vehicle because the person who bought the vehicle from him on hire-purchase is contractually bound to repair the vehicle.

(d) Insurance money and a pension payable to dependants whose breadwinner has been killed, unless another legal provision requires the deduction thereof.

(e) Benefits paid to an injured person in terms of a medical scheme that is in essence a form of insurance.

(f) Discretionary payment of pension benefits to a person who has been injured.

(g) Donations (*ex gratia* benefits).

(h) In certain cases, savings on income tax where the delict has caused loss of income.

(i) Pension payments to a member of the citizen force in terms of the Military Pensions Act 84 of 1976.

(j) The benefit of concluding a beneficial contract on account of a delict.

(k) The earning capacity of a widow who claims for loss of support caused by the death of her husband.

(l) The re-marriage of a widow insofar as it does not restore her financial position.

(m) The adoption of a child who claims for loss of support on account of the death of his parents.

(n) An award which is received as *solatium* (solace money).

The following benefits which a plaintiff has received or may receive must be taken into account in reducing his damages (they are not regarded as *res inter alios acta*):

(a) Medical benefits or sick leave where the medical scheme or employer is contractually or statutorily obliged to allow such benefits.

(b) A pension paid out to an injured person if the beneficiary had a contractual or statutory right to such a pension, as well as a disability pension and child-support grants in terms of the Social Assistance Act 13 of 2004 and foster-child grants.

(c) The amount of damages someone receives from the Compensation Commissioner.

(d) The benefit to an injured person of receiving medical treatment free of charge in a provincial hospital.

(e) The marriage prospects of a widow who claims for loss of support due to the death of a breadwinner.

(f) Savings on income tax due to lost income.

(g) The amount which a plaintiff has received from the liability insurer of the defendant and, naturally, the amount the plaintiff has received from the wrongdoer himself.

(h) A plaintiff's possible saving on living expenses on account of his injuries.

(i) Accelerated benefits from the estate of a deceased breadwinner.

4.8.3 Explanations of the collateral source rule

A generally acceptable explanation for the problem of deducting certain benefits from compensation and disregarding others has not yet been found. The maxim *res inter alios acta* is frequently used in connection with the disregarding of certain benefits. This "rule" means that in a dispute between X and Y, a transaction between X and Z is irrelevant. However, it should be clear that this expression provides no solution to the basic problem of collateral benefits; at best it is only a way of expressing a conclusion that an advantage should be disregarded.

Disregarding a benefit in a claim with the *actio legis Aquiliae* should not be based on the idea of punishing the defendant, since this action has no penalty function in a primary sense. Furthermore, Van der Walt has convincingly demonstrated that the problem of collateral benefits is not concerned with causation or the assessment of damage. His conclusion is that the problems regarding collateral benefits have to be solved in terms of the basic philosophy of compensation (which requires the fullest possible compensation in the circumstances) and has to take account of the realities of the insurance industry as well as measures aimed at social care. Reinecke has attempted to develop some general principles to explain the collateral source rule, but it appears that one will necessarily have to employ vague and general principles of equity, reasonableness and the public benefit. It appears that Corbett and Buchanan erroneously regard the problem of collateral benefits as an issue of the assessment of damage, and argue for the taking into account of all benefits except *ex gratia* benefits and those based on insurance. The views of Van der Merwe and Olivier are too simplistic, as they intend to take all the beneficial consequences of a delict into account so that the plaintiff does not show any "profit". Koch furnishes certain practical reasons why some advantages should be seen as *res inter alios acta.*

Questions regarding collateral benefits are normative in nature: they have to be approached and solved in terms of policy principles and equity. It would appear that the Appellate Division employs general concepts of fairness and justice. These principles are obviously relevant, but do not provide any magic formula for solving all problems directly.

Generally, it may be concluded that just as it would be unfair to deduct all benefits made possible by a damage-causing event from a plaintiff's damages, it would also be unjustifiable to regard all such benefits *ab initio* as irrelevant. The general principle should be that a plaintiff cannot be allowed to recover damages in excess of his actual loss. In the long term, the recovery of damages beyond the actual compensatory mark may place unacceptable pressure on the community, the economy and the insurance industry. Thus there should always be a weighing- up of the interests of the plaintiff, the defendant, the source of the benefit, as well as the com- munity, in establishing how benefits resulting from a damage-causing event should be treated.

4.9 Mitigation of loss

It is a principle of the law of delict that a plaintiff may not recover damages for a loss which is the factual result of the defendant's conduct but which could have been prevented if the plaintiff had taken reasonable steps. A failure to ensure that damage does not accumulate can be seen as a failure by the plaintiff to take reasonable steps to limit the initial loss or an omission to prevent further damage. The basic principles are as follows:

(a) The plaintiff is obliged to take all reasonable steps to limit the damage caused by the defendant's delict. This duty arises as soon as the plaintiff in fact suffers loss and knows or should reasonably know that he has to mitigate his damage. A plaintiff who fails to mitigate his loss in this manner cannot recover damages in respect of a loss that he could reasonably have prevented. The standard of reasonableness is not very high, since the defendant is a blameworthy person.

(b) A plaintiff who has taken reasonable steps to mitigate his loss may also recover damages for any loss caused by such reasonable steps.

(c) Where the plaintiff has reduced his damages by taking reasonable steps in mitigation, the defendant is only liable to compensate him for the actual loss he sustained, even if the plaintiff did more than the law required of him.

(d) The onus of proving that the plaintiff did not properly fulfil his duty to mitigate rests on the defendant. However, if the defendant has proved an unreasonable failure on the part of the plaintiff to mitigate his loss, the plaintiff has to prove what his loss would have been had he taken reasonable steps.

4.10 Nature,object and form of damages

Damages are a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as future damage.

The object of damages is evident from this definition. In delict, damages (compensation) are the primary remedy, not restitution in kind or specific performance, as in the case of breach of contract. Damages for patrimonial loss are never intended to punish the defendant or to provide satisfaction to the plaintiff or the community. Consequently, damages cannot be recovered with the Aquilian action for injury to feelings (affective loss). Nominal damages ought not to be awarded where the plaintiff has only proved the invasion of a right but no damage.

Damages must be expressed in money. Damages are awarded as a lump sum for damage already suffered as well as loss expected in future.

4.11 Assessment of the quantum of damages

4.11.1 General

The assessment of damages (quantification) is the process whereby damage which the law has found to exist and for which compensation may be awarded is expressed in monetary terms, in order to reach a specific amount of damages. Quantifying damages is not the same as assess- ment of damage. Damage is assessed by comparison of the utility value of a plaintiff's patrimony before and after a damage-causing event. The utility value is directly expressed in money during assessment of damage, but assessment of the quantum entails further steps. After damage has been expressed in money with reference to the correct time and standard of value, this amount must be adjusted in terms of other principles to obtain the final sum of compensation. For instance, damages cannot be calculated in respect of damage which is too remote; a plaintiff's damages are reduced in proportion to his contributory negligence; damages are reduced when regard is had to compensating benefits and failure to take reasona- ble steps in mitigation. Furthermore, damages for prospective damage are discounted or capitalised and provision is made for contingencies. There are also special rules in connection with the disregarding of income from illegal activities, as well as statutory limitations on the amount of recoverable damages.

4.11.2 The assessment of damages in specific instances

There are numerous specialised principles in respect of the assessment of the quantum of dam- ages in specific cases of patrimonial loss (referred to as the different measures of damage). Obviously, there is no room in an introductory work on the law of delict to discuss all these rules, which properly belong to the law of damages. However, because the delict of damage to property is instructive of certain principles in the assessment of damages, it will be discussed here as a general example while reference will only be made to other forms of delict.

The owner of property is entitled to damages which are (theoretically) calculated on the basis of the reduction in market value of such property at the time of the inflicting of damage; this measure of damage is referred to as the criterion of difference in value. In order to prove market value, a plaintiff is required to demonstrate the original value of the property and the decline in value which has taken place up to the time of the damage-causing event. Since there are often practical problems in proving the market value of property before and after the damage-causing event, the reasonable cost of necessary repairs is usually used as a measure of damages. However, reasonable cost of repairs cannot serve as a measure of damages where the cost of repairs exceeds the pre-accident market value of the property, or where it exceeds the diminution in market value as a result of the delict.

In such cases, only the actual diminution in value can be claimed. A plaintiff should also not base his damages merely on reasonable cost of repairs where the repairs, though restoring the property to its pre-accident condition, do not restore its pre-accident market value. Here, additional damages must be claimed for the diminution in value. No damages may be claimed for inconvenience or frustration caused by damage to property, unless it causes patrimonial loss. Damages may, however, be claimed for the transport of a damaged article as well as the loss of profit where the article was used to generate income.

There are also specific principles regarding the measure of damages for patrimonial loss in cases of, for example, the destruction or alienation of property, fraud and negligent misrepresentation, duress (*metus*), unlawful competition, infringement of immaterial property rights (copyright, patents, etc), nuisance, certain common law and statutory causes of action, medical expenses as a result of bodily injuries, loss of income already suffered, loss of earning capacity, funeral costs, loss of support on account of a breadwinner's death, loss of someone's services, unlawful or malicious imprisonment, defamation and adultery.

4.12 Damages for loss of income or support earned illegally

Patrimonial loss caused, in the case of bodily injury, by loss of income or earnings originating from unlawful activities cannot form the basis of a delictual claim. The question of whether an activity is unlawful must be answered with reference to public policy. It has accordingly been held that an activity which is contrary to good morals, or criminal or even only statutorily prohibited (but morally colourless) in circumstances where the income in question is unenforceable due to invalidity is considered to be unlawful.

According to Van der Merwe and Olivier the refusal of damages in such cases must be ex- plained in terms of the absence of the element of wrongfulness which is required for delictual liability: the person suffering the loss has no right to the income in question. Reinecke, by contrast, argues that the frustration of an expectation of income from an unlawful activity cannot legally be seen as damage. Both these views are correct, since unlawfulness, as well as damage, is absent.

In our opinion, a careful distinction should be made in these cases between loss of income and loss of earning capacity. If a plaintiff, in the type of case under discussion, bases his claim for damages on a loss of (or impairment of) his earning capacity, the fact that he has previously earned income through an unlawful activity should not be a stumbling block and he should still be able to recover damages. This approach is evident in *Ferguson v Santam Insurance Ltd*, where it was said:

> Whereas a plaintiff who personally has lost 'illegal' income may be frowned upon by the Court and non- suited on that account, non constat that a plaintiff who has lost earning capacity, ie future loss of income, must be frowned upon. He has been injured and, if the injuries are permanent, his earning capacity is affected.

The principle that loss of income from an unlawful activity is not recoverable has been extended to the action of dependants. Dependants whose breadwinner was killed wrongfully and culpably may accordingly not claim damages from the defendant if the breadwinner supported them with income from an unlawful activity. There are, however, exceptions to this principle. In any event, we are of the opinion that the claim of the dependants must also be based on the deceased's earning capacity and not on his actual earnings. In the cases in question, the dependant should in principle thus be able to recover damages for loss of support.

4.13 Onus of proof

In general, the plaintiff must prove on a balance of probabilities that he has suffered damage and what the extent of such damage is. Because it may sometimes be very difficult to determine the exact extent of the loss there are practical guidelines (for example, in the case of future loss, the taking into consideration of certain probable events) which are of assistance in estimating the damage in question. In general, the plaintiff is required to tender the best possible evidence in respect of the extent of his loss, even though calculating the loss on such evidence may in fact be a difficult task. Where the plaintiff fails to present the best available evidence of his damage, he runs the risk of his claim being rejected.

5 Non-patrimonial (non-pecuniary)damage or injury to personality

5.1 Definition of non-patrimonial loss

Non-patrimonial damage is the detrimental impact (change in or factual disturbance of) person- ality interests deemed worthy of protection by the law and which does not affect the patrimony.

5.2 Interests of personality

Just as patrimonial damage is defined as a reduction in the utility of patrimonial interests, non-patrimonial loss is described with reference to interests of personality. The different rights to personality provide an indication of the relevant personality interests and thus also of non- patrimonial loss. There are rights of personality in regard to the following: physical-mental integrity, liberty, reputation, dignity, privacy, identity and feelings.

5.3 The general nature of non-patrimonial loss or injury to personality

In the case of non-patrimonial loss, there is an impairment or disturbance of interests of person- ality that causes a reduction in their quality or utility. This implies that the affected interests can no longer fulfil the legally justified expectations of the person in question. Non-patrimonial loss has objective as well as subjective elements.

The objective element refers to the external or generally recognisable manifestation of the impairment, for example, where X is defamed and his reputation in the community is actually lowered; where X's privacy is violated because Y enters his home; or where X lies in an unconscious state in hospital and lacks the ability to enjoy the amenities of life he used to (even though he does not realise it). The losses in these examples do not exist in the mind of the person in question.

The subjective element of non-patrimonial loss exists in a person's mind or consciousness and is inter alia formed by his reaction to the objective impairment of his interests of personality. Such reaction (unhappy feelings) may be of a physical or an affective nature. Pain is a good example of a physical feeling of unhappiness. An affective impairment of feelings or sentimental loss is X's feeling of having suffered an injustice, his bitterness and despondency. Since these feelings are to be found in a person's consciousness, they are not readily predictable or capable of being assessed objectively.

In some instances of non-patrimonial loss (for example, shortened expectation of life, inva- sion of privacy and defamation) the emphasis is placed on the objective element and the plaintiff's emotional reaction (affective loss) is of secondary importance. In other cases (for example, pain and suffering and insult) the emotional reaction of an individual is of primary importance and constitutes the complete non-patrimonial loss. In a third category, objective and subjective elements are more in balance (for example, disfigurement and loss of the amenities of life), but the emotional reaction is nevertheless an important factor in the assessment of the quantum of damages.

Non-patrimonial loss (which is often referred to as "general damage") may take the form of loss already sustained, as well as prospective loss. Prospective injury to personality can be seen as the frustration of a justified expectation that the quality or utility of personality interests will increase or not diminish.

5.4 Assessment of non-patrimonial loss or injury to personality and other general principles

Theoretically, non-patrimonial loss is (like patrimonial damage) determined by means of the comparative method. The utility or quality of the personality interests in question before and after the delict are compared in order to establish the existence and extent of the loss. In this way, information is obtained on the nature, seriousness, extent, intensity and duration of the objective part of the loss as well as the impairment of the plaintiff's feelings.

Many principles applicable to patrimonial loss are also valid in respect of non-patrimonial damage. Thus the rules in connection with the "once and for all" rule, the proper time for the assessment of damage, the duty to mitigate loss, the form of the amount of damages (in- cluding satisfaction), and proof of damage are mutatis mutandis applicable to non- patrimonial damage. A court of appeal will only in exceptional instances interfere with the quantum of damages determined by the trial court.

5.5 The object of damages (compensation and satisfaction) in the case of non-patrimonial loss or injury to personality

There is a view that damages in the sense of equivalent compensation are only applicable in respect of patrimonial loss and that satisfaction is the only relevant function in the case of injury to personality. It is true that money can usually only provide a true equivalent of the loss in the case of patrimonial damage; but even in the case of such damage, one has to reckon with cases where damage and damages can only be assessed by a process of equitable estimation, or where money cannot serve as a real or full equivalent of the damage. In non-patrimonial loss, the affected interests do not have a direct or natural monetary equivalent but there are nevertheless sound reasons why a kind of imperfect compensation is viable. Satisfaction (Afrikaans: "genoegdoening") is appropriate in the case of the actio iniuriarum but the object of the action for pain and suffering is to provide imperfect compensation and not satisfaction in the sense mentioned above. The custom of describing the action for pain and suffering as a "genoegdoeningsaksie" without indicating that this is not satisfaction in the sense of the actio iniuriarum, may lead to confusion and should be discontinued.

5.6 Injury to personality in respect of physical-mental integrity

5.6.1 General

For practical reasons, a distinction is made between the physical and psychological (mental) aspects of the human body. The distinction should, however, not be taken too far, as the physical body and the psyche (feelings and consciousness) are connected through the brain and nervous system. The personality interests covered by "physical-mental integrity" can be ascertained by examining the different forms of related injury to personality recognised in practice.

Pain and suffering A plaintiff may claim compensation for all pain, suffering and discomfort flowing from the injury, as well as the consequent medical treatment. This includes both physical and mental pain and suffering in the past and in the future.

Shock (psychological injury/lesion) The consequences of emotional shock are usually identified with pain and suffering but may also cause further harm through conditions such as, for instance, insomnia, anxiety neuroses, hysteria or other mental illnesses. Only emotional shock of a relatively serious nature is actionable, whereas shock of short duration which has no substantial effect on the health of a person is usually ignored.

Disfigurement All forms of facial and bodily disfigurement, including scars, loss of limbs, a limp caused by a leg injury, or facial or bodily distortion are included under this heading.

Loss of the amenities of life This refers to any disability – physical or mental, temporary or permanent – which diminishes the victim's enjoyment of life, thus preventing him from participating in and enjoying life as he previously could. Compensation can be claimed for past as well as future loss of amenities.

Shortened life expectancy The fact that a plaintiff's life expectancy has been reduced by his injuries is also in some cases considered to be a form of harm for which damages may be awarded.

A review of these forms of injury to personality reveals that the following interests in respect of physical-mental integrity exist: freedom from pain and suffering which follows physical injury to the body; freedom from serious emotional shock and accompanying mental illness; freedom from dismay and unhappiness caused by disfigurement of the body; having the physical and mental capacity to enjoy general as well as particular amenities of life; and fulfilment of a natural life-span. A brief inquiry into these interests indicates that, depending on whether the emphasis is placed on its objective or subjective components, impairment of physical-mental integrity may take the following forms:

A physical impairment of feelings or infringement of the emotions and consciousness through pain caused by physical injury and through nervous (emotional) shock. The non-patrimonial loss in such cases only exists in the mind where it is experienced. It is almost impossible to im- agine that affective or sentimental loss (feelings of injustice or unhappiness) can exist inde- pendently of emotional disturbance caused by physical injury.

An affective impairment (impairment of feelings) or disturbance of emotions in cases of disfig- urement, loss of amenities of life and loss of life expectancy. The interests involved in this case, in contrast with the position in the case of pain and shock, are partly objective, because they do not consist only of an emotional experience. The consciousness of the injured person indeed plays a secondary role insofar as it is only the mechanism through which he experiences the harm in question. Affective (sentimental) loss consists here of the fact that the injured person reflects on and reacts to the physical injury he has suffered. In disfigurement, for example, a facial scar constitutes the objective part of the loss and the reaction of the injured person (his/her feelings of unhappiness) is the affective part of such loss. In other words, the objective aspect of the loss is the origin of the affective loss. In the case of a loss of amenities of life and reduced life expectancy as well, the loss in question also does not primarily exist in the emotions or consciousness of the injured person because the loss is objectively ascertainable without regard to his emotions.

The difference between physical injury causing emotional harm and a purely emotional disturb- ance appears from the fact that in the case of pain and suffering, the real subjective experience of the plaintiff (depending of course also on the plaintiff's ability to afford the necessary proof and the other requirements for liability) is decisive for determining the existence and extent of the loss, while in the case of affective loss, the plaintiff may obviously not be allowed to determine the extent of the loss himself by his reaction to the injury; an average criterion must be used.

5.6.2 Theories in regard to the nature of physical-mental injury

It is instructive to briefly consider certain theories in respect of the nature of physical-mental injury in the light of the above discussion. These theories attracted the attention of the Appellate Division in *Southern Insurance Association Ltd v Bailey* and have important practical implica- tions. The theories are the abstract or objective theory; the personal theory, and the personal functional theory. The differences between these three theories are summarised as follows by Ogus:

> In short, the differences between these approaches may be summarized by asserting that the award is measured in (a) by the extent of the injury, in (b) by the extent of the loss of happiness and in (c) by the extent to which money can provide the plaintiff reasonable solace.

Which of these three theories should be accepted? In our opinion, none of them is completely satisfactory. We suggest the following compromise: as far as injury to personality in the case of a physical impairment of one's feelings through pain, suffering and shock is concerned, the personal theory provides the only logical explanation for the existence of such loss. In such cases, the essence of the harm is to be found in the conscious experience thereof and a subjective approach is correct. As far as the other forms of injury to personality are concerned (loss of the amenities of life, disfigurement and shortened life expectancy), it is clear that the essence of the harm is not to be found in the mind or consciousness of the injured person. The harm is not, for example, like pain, which exists only if it is subjectively experienced. Loss of amenities of life is objectively identifiable and consciousness only comes into the picture in respect of affective loss caused by the loss of amenities.

5.6.3 Cases of unconsciousness and changed personality

Attention will now be given to injury to personality in respect of physical-mental integrity in cases of unconsciousness and, in connection therewith, of changed personality. These matters have received considerable attention in our case law. In this regard, a distinction must be made between the so-called "twilight" cases, and the so-called "cabbage" cases.

There is no actual problem with regard to pain and unconsciousness, as it is accepted that pain does not exist if it is not consciously experienced. The cases which pose problems are those where the consciousness of the plaintiff is totally or partially reduced through brain injury and a decision must be made regarding damages for loss of, for example, amenities of life.

An important case in this regard is *Gerke v Parity Insurance Co Ltd*. In this case, the plaintiff suffered brain injuries which were of such a nature that he would never regain consciousness. He was accordingly totally unaware of his condition. The court researched English law and came to the conclusion that, in that system, a predominantly abstract (objective) approach is followed, but that subjective considerations do play a role in determining the quantum of damages. Ludorf J enunciated the following principles as far as our law is concerned:

> In my judgment a similar approach is appropriate in a case like the one before me. I would say that the test (a) is objective in that something falls to be awarded for what has been called loss of happiness even in a case where the victim has been reduced to a state in which he has never realised and will never real- ise that he has suffered this loss; (b) is, however, subjective, in the sense that the Court, in fixing quan- tum, will have regard to any relevant data about the individual characteristics and circumstances of the plaintiff which tend to show the extent and degree of the deprivation; (c) is subjective, also, in the sense that any realisation which the plaintiff has, or did have or will have, of what he has lost, is most material and important. This is the true compensable suffering (as distinct from pain) which will carry far heavier damages than the somewhat artificial and notional award referred to in (a) above.

Although this decision has been strongly criticised, (and correctly so in some respects) it has generally been followed in other cases. It was, however, recently rejected in *Collins v Admin- istrator*, Cape where the court stated:

> There are, I think, two principal objections to what is essentially the English approach, involving, as it does, a notional distinction between a subjective and an objective element of the loss of amenities of life and the award of non-pecuniary damages in respect of the objective loss or, as it has been described, the actuality of the loss. As previously indicated, there would appear to be unanimity that an unconscious person is not entitled to damages for pain and suffering or anguish, that is to say the subjective element of loss of amenities, since he or she suffers no pain and experiences no anguish. The objections to the English approach are the following. First, the award of non-pecuniary damages in respect of the actuality of the loss serves no purpose as the money awarded cannot be used for the benefit of the unconscious plaintiff. Second, it can provide no consolation to an unconscious plaintiff, as consolation presupposes consciousness and some capacity of intellectual appreciation. A conscious person who, by reason of his injuries, is incapable of deriving any advantage from a monetary award can notionally obtain some con- solation from the receipt of money and from being able, if he pleases, to give it away. An unconscious person cannot even have this consolation.

The court thus refused to award any damages whatsoever for non-patrimonial loss where the young plaintiff was, because of the negligence of the defendant, in a permanent state of uncon- sciousness and would probably die within a few years. According to the court, any award of damages would merely amount to a (private) penalty.

In analysing the problem under discussion, it is important to note that the existence of injury to personality should not be confused with its compensability. There is clear agreement that injury to the personality of a person whose consciousness has been reduced to such a level that he has no or little insight into his own condition cannot be compensated by an award of damages. The solution under German law in such a case is to make an award of objective satisfaction, which signifies a symbolic redress of the harm by effecting retribution for the wrong done to the plaintiff. Bober1 also seems to favour this approach.

In summarising the legal position in respect of the problem of injury to personality in the case of an unconscious plaintiff, the following points must be made:

Injury to personality in cases of interests which are directly related to consciousness consists only of an injury to feelings. The operation of the conscious mind is thus a prerequisite for the existence of harm such as pain and (physical) suffering. The other forms of personal loss are only indirectly related to consciousness. Where there is, for example, an impairment of one's reputation, or a loss of the amenities of life, the loss is not only to be found in the feelings or consciousness of the plaintiff: in cases of defamation and loss of amenities, one is able to ascer- tain objectively, without reference to the feelings of the plaintiff, whether his esteem in society has been lowered or to what extent his capacity to enjoy a normal life has been negatively influenced. The connection with consciousness is only created through affective (sentimental) loss, ie, the reaction of the injured person to his loss, or, in other words, his personal unhap- piness. In such a case, injury to personality has an objective as well as a subjective element. Unconsciousness only excludes the subjective element (affective loss) but not the objective part of the loss. An unconscious person with brain injuries does not have a normal life and does not take part in normal activities as he used to: how can it then be correct to say that there is no loss? Where a person is only temporarily unconscious and later regains his consciousness, there is no doubt that the period during which he was unconscious must also be taken into account in assessing his damages. From this, it appears that the existence of consciousness is not a prerequisite for the existence of injury to personality. With regard to affective loss, the lack of consciousness only implies that the experience of the loss as such is eliminated and nothing more.

The common mistake which is made in the evaluation of personal loss where the plaintiff is unconscious is to equate the existence of loss with its compensability. From a comparative law analysis, it is clear that no one believes that personal loss can really be compensated through damages where the injured person is permanently unconscious, insane, etc. In such cases, the objective function of satisfaction ("genoegdoening") becomes relevant in German law and also in some decisions in South Africa. The fact that the loss cannot be compensated does not mean that it is non-existent or that the law should ignore it. The unconsciousness of the plaintiff is of course relevant in fixing the quantum of damages because the objective satisfac- tion awarded should not be nearly as much as "full" compensation.

5.7 Assessment of damages in the case of non-patrimonial loss

5.7.1 Introduction

In what follows, reference will be made to a number of principles regulating quantification in cases of non-patrimonial loss. "Quantification" or assessment of damages refers to the process whereby an amount of money is arrived at which is to be awarded to someone who has suffered injury to personality. As with the discussion of the assessment of damages for patrimonial loss, the subject will only be dealt with briefly.

5.7.2 Physical-mental integrity

The following four aspects are relevant in this regard:

(a) The quantum (amount) of damages recoverable with the action for pain and suffering must obviously bear some relation to the extent of the loss suffered. Irrespective of how the loss is in theory or in practice expressed in money (we refer here to a loss which by definition cannot directly or naturally be measured in money) the amount awarded should be in direct proportion to the extent of the loss. From a survey of our law, it would appear that the extent of physical- mental harm may usually be said to equal the product of the intensity of the physical or affective impairment of feelings, and the nature and the duration thereof. The medical and other evidence in the case of bodily injuries should thus be considered in terms of this formula in order to assess the full extent of the injury to personality. Such injury cannot be expressed in money by means of purely arithmetical techniques, as is the case with pecuniary loss.

In considering the intensity of the impairment of the plaintiff's feelings in order to determine the extent of the non-patrimonial loss, particular attention is paid inter alia to the following factors which are capable of objective assessment: the age (including the life expectancy) and sex of the prejudiced person, his status, culture and lifestyle and his degree of conscious awareness.

(b) In addition to the extent of the loss, the object of an award in a particular case is also of importance, for example, the fact that the damages are to counterbalance the unhappiness caused to the plaintiff, or that they must enable him to overcome the setback, or that they must provide (psychological) satisfaction for the injustice done to him. The court must have one or other object (even an implied object) in mind when awarding damages, otherwise the award will be based on arbitrary speculation. This does not mean that the court must go into detail in each and every case in order to determine how the damages will enable the plaintiff to achieve the object of compensation or satisfaction, but the tribunal must at least always keep this factor in mind. Neither the court nor the law has any control over what the plaintiff does with the money he receives, but the function of the law is at least to enable the plaintiff theoretically to receive proper compensation or satisfaction which does not burden the defendant unnecessarily. There are indications in South African cases that a court must have an object when awarding damages in a particular case.

(c) Fairness and conservatism are further important guidelines to which a court should adhere in the process of quantification. In general, this means that one should not, merely out of sympa- thy with a plaintiff, award a large amount of money at the expense of the defendant. In *Pitt v Economic Insurance Co Ltd* Holmes J used the following words which are quoted often:

> I have only to add that the Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense.

"Fairness" (or equity) is of course a rather vague concept, but in this regard it is usually a phrase summarising the following principles:

The court must take all relevant circumstances into account which disclose the extent of the injury to personality and it must ignore irrelevant factors such as undue sympathy towards the plaintiff; the basic object of compensating the plaintiff must be emphasised; the court must exercise its discretion carefully and conservatively and rather award too little than too much and the amount awarded must not unnecessarily burden the defendant in the plaintiff's favour. If these principles are applied, it may safely be said that a "fair" approach has been followed.

(d) An important instrument in the quantification process is the consideration of previous awards in comparable cases. The locus classicus of the method of taking previous cases into consideration is *Protea Assurance Co Ltd v Lamb*. The court stated:

> It should be emphasised, however, that this process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are con- sidered to be relevant in the assessment of general damages. At the same time it may be permissible . . . to test any assessment arrived upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.

In conclusion, it must be pointed out that when dealing with an impairment of physical-mental integrity, an award may be made for each of the particular forms of injury to personality recog- nised by law. There are also specific principles in respect of each of these forms. The forms are pain and suffering, shock, loss of the amenities of life, shortened life expectancy and disfigurement.

5.7.3 Injury to personality in the form of *iniuria*

(a) **General** In addition to the recovery of damages by way of the action for pain and suffering for the (negligent) impairment of physical-mental integrity, damages (satisfaction) may be claimed with the actio iniuriarum for an intentional infringement of a personality right. The actio iniuriarum is an action which really has satisfaction as its object and is primarily con- cerned with providing personal (psychological) satisfaction to a plaintiff by compelling the defendant to pay a certain amount of money as solatium (solace money) to him. Compensation (in the form of giving one or other equivalent for the impaired personality interest) is completely in the background. The actio iniuriarum generally has the object of effecting retribution for the injustice sustained by the plaintiff and of satisfying him for the feeling of injustice, injury and suffering which he (actually or presumably) sustained as a result of defendant's conduct. There is no fixed formula in terms of which awards are made. Awards are assessed ex aequo et bono (according to what is right and fair). Erasmus, Gauntlett and Visser provide the following summary of the legal position in general:

There can be no basic formula for the assessment of damages under the actio iniuriarum, the award being entirely in arbitrio iudicis. It has been described variously as an assessment of imponderables which is so discretionary as to be almost arbitrary, and as a conjectural estimate. There are no limits beyond which damages cannot be awarded. Earlier cases of a similar nature may serve as an approximate guide, but they must be applied with circumspection.

(b) **Defamation** Defamation is a well-known form of iniuria. Reference may be made, by way of general example, to certain principles which are taken into account when making an award of damages as satisfaction. The court determines an amount of money ex bono et aequo in order to (attempt to) effect reparation for the lowering of the plaintiff's esteem in the community.

Certain divergent factors may be taken into account. In considering these and other factors, reference is usually made to "aggravating" and "extenuating" circumstances.

In general, an improper motive or malice on the part of the defendant, for example, where he is aware of the falsity of his defamatory allegations, constitutes an aggravating circumstance. Other factors which may have a similar effect are the exceptional gravity (crassness or insulting nature) of the defamation; reckless or irresponsible conduct on the part of the defendant; extensive distribution of a defamatory publication; the position and status of the plaintiff, and repetition of the defamatory allegations.

Circumstances which may be taken into account in mitigation are the bad reputation, character or conduct of the plaintiff; the truth of the defamatory allegations; provocation on the part of the plaintiff; the restricted extent of publication; an apology by the defendant; unnecessary delay by the plaintiff in instituting the action, and the fact that the defamation has been circulating for a long time.

(c) **Other *iniuriae*** It is unnecessary to discuss an award of satisfaction in other cases of iniuria here. The relevant principles are more or less related to those recorded in respect of defamation. The award generally entails an assessment *ex bono et aequo* while considering the factors that are indicative of the extent of the loss and the injustice suffered by the plaintiff.

Delictual remedies

1 General

The South African law of delict rests on three pillars: the actio legis Aquiliae, the *actio iniuriarum* and the action for pain and suffering. The requirements for and field of application of these three actions have already been discussed above. All that still briefly requires attention in respect of these actions is the question of their transmissibility (ie, whether they are heritable and cedable). The *Aquilian* action is actively as well as passively heritable; similarly, a claim under this action is freely cedable. Unlike the position in respect of the *actio iniuriarum* and the action for pain and suffering, litis contestatio (closing of the pleadings) has no effect in this regard. By contrast, the actio iniuriarum and the action for pain and suffering are actively as well as passively heritable only after *litis contestatio*. The claim, therefore, lapses if the plaintiff or the defendant dies before litis contestatio. Claims under these actions are also not cedable, in any case not before *litis contestatio*.

Notwithstanding the fact that the *actio legis Aquiliae*, the actio iniuriarum and the action for pain and suffering are based on general delictual principles, and as such cover almost the whole area of delictual liability, there are still a few other actions which originated in Roman-Dutch law and are applicable to specific situations. These actions are, on the one hand, those that are based on liability without fault, inter alia the actions for damage caused by animals (the *actio de pauperie*; the *actio de pastu* and the *actio de feris*); those for damage caused by objects poured, or thrown out of, or falling from a building (the *actio de effusis vel deiectis* and the *actio positi vel suspensi*); the action for damage caused by the loss of a stolen thing (the *condictio furtiva*); the actions for damage caused to goods stored during shipping or by innkeepers and stable-keepers; and for damage caused by owners of neighbouring property (the action for the disturbance of the lateral support; the *actio aquae pluviae arcendae* and the *interdictum quod vi aut clam*). On the other hand, the a*ctio doli*, the *actio quod metus causa*,14 and the *actio ad exhibendum* are also classified as delictual remedies. Whether all of these actions should still be recognised today is, however, questionable. Insofar as any of them is concerned with the wrongful and culpable (mostly intentional) causing of patrimonial damage, they may quite easily be subsumed under the Aquilian action. Lastly, it must be mentioned that the Roman-Dutch amende honorable has been resurrected in our law.

2 The interdict

The delictual actions are directed at compensation for patrimonial damage or impairment of personality. There is, however, also another important legal remedy that does not aim at com- pensation, but with which a person can avert an impending wrongful act or prevent the continuation of a wrongful act that has already commenced: the interdict. The interdict can be take one of two forms, ie, prohibitory or mandatory. The former prohibits the wrongdoer from commit- ting a wrongful act at all or from continuing with a wrongful act, while the latter requires positive conduct on the part of the wrongdoer to terminate the continuing wrongfulness of an act that has already been committed. On close examination, however, each is directed at preventing a person from acting wrongfully. The interdict thus has a preventative function. Since the interdict is directed at the prevention of a wrongful act, and not at retribution for wrongfulness already committed, there is no reason why fault on the part of the wrongdoer should be a re- quirement for the granting of an interdict. Fault is, therefore, correctly not stated as a require- ment in this regard in either our common law or case law.

The courts state three requirements for the granting of an interdict:

(a) **There must be an act by the respondent**. The act, which could already have commenced or be merely threatening, may be a *commissio* or an *omissio*.

(b) **The act must be wrongful**. Wrongfulness in this regard means that there must be a threat to or an infringement of a so-called "clear right" or a "*liquide regt*" of the applicant. This viewpoint is acceptable if a "clear right" means a recognised subjective right. This does not imply, however, that in cases where such a right is absent, wrongfulness in respect of the inter- dict cannot also lie in the breach of a legal duty.

(c) **No other ordinary remedy which would prevent the (continued) wrongful conduct must be available to the applicant**. An interdict may either be final or (temporary). In the former instance, a permanent prohibition is placed on the (threatening) wrongful act. In the latter case, the prohibition only applies pending the outcome of the trial action.

3 Concurrence of remedies

3.1 Introduction

One and the same act may in principle result in several – different or alternative – remedies. An act from which various claims arise, each of which places a distinctive action at the plaintiff's disposal, gives rise to different remedies. These remedies may be similar (for example, only delictual actions) or dissimilar (for example, delictual as well as contractual actions). By contrast, an act from which only one or more claims arise but which offers a choice between different remedies, results in alternative remedies (for example, a choice between a contractual and a delictual action).

It is important to have a closer look at the concurrence of the three most important delictual actions amongst themselves, the concurrence of the actio iniuriarum and the contractual action, that of the action for pain and suffering and the contractual action, as well as the choice between the actio legis Aquiliae and the contractual action.

3.2 Delictual actions

The *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering concur in the following ways:

The *actio legis Aquiliae* and the *actio iniuriarum* concur in circumstances where an iniuria also causes patrimonial damage, for example, an assault which brings about hospital and medical expenses, or a doctor or an attorney losing patients or clients as a result of defamation. In principle, the plaintiff must then institute the *actio iniuriarum* for satisfaction and the *Aquilian* action for patrimonial damages. He must, therefore, clearly set out in his pleadings the facts that are necessary to found both actions.

The concurrence of the *actio legis Aquiliae* and the action for pain and suffering takes place where a culpable infringement of physical-mental integrity causes patrimonial damage, for example, bodily injuries (as a result of, for example, a motor-car accident) which brings about medical expenses. Obviously, this type of concurrence is the one most often encountered in practice. The plaintiff must then claim damages for patrimonial loss under the Aquilian action and compensation under the action for pain and suffering. Consequently, he must clearly set out in his pleadings the facts necessary to found both actions.

Lastly, attention must be given to the concurrence of the actio iniuriarum and the action for pain and suffering. According to Van der Merwe and Olivier, these two actions cannot concur. They argue that in the case of assault (intentional bodily infringement), the action for pain and suffering loses its meaning and is replaced by the actio iniuriarum, with which full compensation (also for pain, suffering, etcetera) may be claimed.

This view cannot, however, be accepted. Since the object or function of the actio iniuriarum (satisfaction) differs from that of the action for pain and suffering (compensation), the actions cannot be treated similarly in respect of assault. Both actions are thus in principle available for a wrongful and intentional infringement of physical-mental integrity. This view is by implication also apparent from the case law, where in principle, a distinction is made between satisfaction for contumelia (*iniuria*) and compensa- tion for physical pain and suffering.

3.3 *Actio iniuriarum* and contractual action

The *actio iniuriarum* and the contractual action concur in circumstances where breach of contract also constitutes an iniuria against the wronged contracting party. In the first place, this type of concurrence of remedies can be illustrated by reference to breach of promise (ie, breach of the contract of engagement). It is settled law that breach of promise may be an *iniuria* against the innocent party. There is, however, uncertainty on the question of whether breach of promise is per se an *iniuria*, or whether it only becomes one if the innocent party in fact suffers an actionable infringement of his personality. Case law, under the influence of English law, initially adopted the former approach. According to this view, breach of promise not only results in patrimonial damage as a result of the breach of contract, but of necessity also constitutes an *iniuria*. In *Guggenheim v Rosenbaum* (2) this approach was, however, not supported. According to Trollip J, breach of promise is not per se an *iniuria*. It will only consti- tute an *iniuria* if the plaintiff proves "not merely that the breach was wrongful, but also that it was injurious or contumelious". This approach is preferable. Not only does it emphasise the fact that breach of promise does not necessarily result in an *iniuria*, but also that one is con- cerned with two materially different actions, each with its own requirements and object. A concurrence of actions can therefore occur only if the plaintiff clearly avers in his pleadings the requirements necessary for both the contractual action and the *actio iniuriarum*. Be that as it may, there are strong indications in case law that the contractual action will probably not be available in future.

The breach of an ordinary commercial contract can nevertheless still be the basis of the *actio iniuriarum*. The concurrence of this action with the contractual action occurred, for example, in cases such as the breach of a contract of employment; the dishonouring of a client's cheque by his banker, and the disregard of a place reservation agreement by the owner of a hotel. The correct approach that should be followed in this regard appears from *Ndamse v University College of Fort Hare*. The court stated that a wrongful dismissal from employment (breach of contract) is not in itself an *iniuria*, but that "the manner of a wrongful dismissal may constitute an iniuria"; in which case "the plaintiff must set out facts, other than the mere fact of dismissal, which constitute an *iniuria*".

3.4 Action for pain and suffering and contractual action

The action for pain and suffering and the contractual action concur in circumstances where breach of contract also results in a wrongful and culpable infringement of the physical-mental integrity of the wronged contracting party. An example of this situation is where a patient is operated on, in terms of a contract, by a surgeon who performs the operation negligently and the patient's health suffers a setback. The patient then has a contractual action for damages, as well as the action for pain and suffering for compensation.

With regard to this type of concurrence, the reasoning of Van der Merwe and Olivier appears to be correct. Since two independent actions are involved, each with its own requirements and purpose, they may co-exist and be instituted simultaneously. This viewpoint is also apparent from the decision in Administrator, *Natal v Edouard*. The court held that compensation for pain and suffering experienced as a result of breach of contract cannot be claimed with the contractual action; for this purpose the delictual action for pain and suffering must be employed.

3.5 Actio legis Aquiliae and contractual action

The *actio legis Aquilia*e and the contractual action concur in circumstances where breach of contract simultaneously also constitutes the delict damnum *iniuria* datum – ie, a wrongful culpable causing of patrimonial damage – against the wronged contracting party. The injured person can then choose whether he wants to claim *ex contractu* or *ex lege Aquilia*, or he can institute the remedies in the alternative.

In this regard, it must be emphasised that the *actio legis Aquiliae* is only available alongside the contractual action if the conduct complained of, apart from breach of contract, also wrongfully and culpably infringes a legally recognised interest which exists independently of the contract, such as a thing or a personality interest. The example of the surgeon who performs an operation negligently and thus does not perform properly in accordance with the agreement with his patient, can serve as an illustration again. If the patient suffers patrimonial damage as a result of the conduct complained of, the patient also has the *Aquilian* action at his disposal, because the surgeon, irrespective of the contract, also infringed the patient's personality interest in his physical-mental integrity in a wrongful and culpable manner. The leading judgment is *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*. Although the court acknowledged the possibility of a concursus actionum (concurrence of actions), no concurrence was present in *casu* because the plaintiff had forfeited his contractual claim after transferring his contractual rights and duties to a third party. The plaintiff could accordingly only rely on a delictual action based on negligent misrepresentation, and here the pivotal question was "whether the breach of a contractual duty to perform professional work with due diligence is per se a wrongful act for the purposes of Aquilian liability, with the corollary that if the breach were negligent damages could be claimed *ex delicto*".

The court answered this question in the negative and held that delictual liability had to be established independently of the contract. It was of particular importance here that delictual wrongfulness (or the presence of a legal duty) had to be clearly apparent according to the reasonableness criterion. The court found that Aquilian liability should not be extended to the relevant situation, primarily on account of the policy consideration "that the position of the parties had been deter- mined by contractual provisions that the parties themselves had preferred and which they had expected to be applicable". It was emphasised that extension of liability in terms of the actio legis Aquiliae would not readily be allowed in the field of contract law if the prejudiced party had had adequate contractual remedies, and according to the court this had indeed been the case here.

In respect of the present concursus actionum, the position appeared to be – contrary to instances where breach of contract accompanied damage to property or personality infringement – that the courts would not readily construe an interest that could exist independently of the contract in instances of pure economic loss. Where professional services were negligently supplied pursu- ant to an agreement (for example, with attorneys, auditors and architects) the prejudiced person would as a rule only have the contractual action at his disposal. In *Pinshaw v Nexus Securities (Pty) Ltd* a different approach was followed. The court held that the Lillicrap judgment was not applicable to quasi-professional contracts (for example, contracts with persons providing finan- cial services and presenting themselves as experts), and that the Aquilian action for pure economic loss may be concurrent with the contractual action in such instances. Van der Walt and Midgley agree with the approach in Pinshaw, but go one step further. They are of the opinion that independent delictual liability is possible in instances of pure economic loss where the delictual claim is (unlike the scenario in Lillicrap) not based solely on breach of contract. In *Holtzhausen v ABSA Bank Ltd*, the Supreme Court of Appeal agreed with this approach. The court found that the plaintiff's delictual claim did not depend upon a breach of a contractual duty but rather upon general delictual principles concerning negligent misrepresentation (resulting in pure economic loss) that could, according to the court, found a cause of action.

This judgment deserves support. It is clear from the case that a plaintiff may succeed with a delictual claim for pure economic loss due to negligent misrepresentation if all the normal delictual requirements are complied with. This holds good even where the misrepresentation also resulted in breach of contract, with the proviso that the delictual claim does not depend upon the breach of the contractual provision, but rather upon the infringement of an interest that exists independently of the contract. In instances of pure economic loss, the usual inquiry in this respect will be whether the defendant had a legal duty (according to the boni mores or reasona- bleness criterion and outside of contractual obligations) to prevent the loss. The conclusion that was made earlier, that a concursus actionum is recognised in instances of breach of contract accompanied by damage to property or injury to personality interests, but that it is not readily accepted where the breach of contract only results in pure economic loss (for instance where a professional service is performed in terms of an agreement), was thus swept from the table, and a new course was established.

Different factors may play a role in determining the prejudiced party's choice of whether to claim *ex contractu* or *ex lege Aquilia*. On this basis, he may then choose the action which will be the most advantageous to him. Van Aswegen summarises the factors as follows:

(a) The extent of damages recoverable may differ because different measures limiting liability apply.

(b) The time for the computation of damages in the two instances differs.

(c) The requirements for the capacity of persons for the two types of liability are such that, in a given case, a person may "qualify" for delictual liability but not for liability for breach of con- tract.

(d) The liability of joint delictual wrongdoers differs from that of joint parties to a contract.

(e) Vicarious liability differs in the two instances insofar as it may be more extensive in the case of delict than for breach of contract.

(f) Unilateral waiver of his rights by a prejudiced party may extinguish the (possible) liability of a delictual wrongdoer, as is the case with consent, whereas unilateral waiver of a contractual right to performance cannot extinguish the other contracting party's obligation to perform.

(g) A contractual term excluding or limiting liability may, depending on the interpretation thereof, apply only to contractual liability. A penalty clause will also probably not apply to delictual liability.

(h) Contributory negligence may only be raised against a delictual claim.

(i) The onus of proof may differ in respect of contractual and delictual claims.

(j) Different courts may have jurisdiction in claims for delict and breach of contract respectively.

(k) The rules of private international law or conflict of laws differ in respect of these two types of claims.

3.6 Exclusion clauses

As far as the above is concerned, parties to a contract may restrict their liability – contractual as well as delictual – through a so-called exclusion (exemption) clause. The precise restriction on the wrongdoer's liability will depend on the interpretation of the clause concerned, and such interpretation will influence the question of what remedies the prejudiced party has at his disposal.

4 Prescription of remedies

According to the Prescription Act 68 of 1969, a delictual debt prescribes (and the delictual action is thus also extinguished) three years after it originated. Prescription commences to run as soon as the debt is due and this occurs from the moment all the elements of a delict are present, provided also that the creditor has knowledge (or ought reasonably to know) of the identity of the wrongdoer and the facts from which the debt arises. But a creditor shall be deemed to have such knowledge if he could have acquired it by reasonable care. The ending of prescription may be suspended or interrupted.

Joint wrongdoers

1 General

It goes without saying that damage can be caused not only by a single wrongdoer, but also by more than one wrongdoer, ie joint wrongdoers. At common law, a distinction was made between joint wrongdoers and independent or separate wrongdoers (concurrent wrongdoers). Where persons co-operated consciously to commit a delict, they were joint wrongdoers; where more than one person by independent wrongful conduct contributed causally to the same harmful consequence, they were considered to be concurrent wrongdoers. In accordance with this distinction, the liability of the two kinds of joint wrongdoers was treated differently at common law.

Presently the position is regulated by the Apportionment of Damages Act 34 of 1956. The Act abolishes the common law distinction between joint wrongdoers and concurrent wrongdoers. Joint wrongdoers are now defined as persons who are jointly or severally liable in delict for the same damage. A person may thus only be sued as a joint wrongdoer if he was indeed delictually "liable" as against the plaintiff. If joint wrongdoers comply with this requirement, the Act is applicable irrespective of whether they acted negligently or intentionally. Joint wrongdoers are in solidum liable for the full damage. The plaintiff therefore has the right to sue whichever joint wrongdoer he chooses for the full amount of damages. Joint wrongdoers may also be sued in the same action. If so, the court may order that the joint wrongdoers shall be jointly or severally liable, and that payment by one of them shall absolve the others from any liability to the plaintiff. If the court is satisfied that all the joint wrongdoers are before it, it may apportion the damages among them on the basis of their relative degrees of fault, and may give judgment against every wrongdoer for his part of the damages.

Where a plaintiff or a defendant in an action notifies a joint wrongdoer of the action before *litis contestatio*, the defendant may claim recourse (contribution) from that joint wrongdoer if he (the defendant) has paid the full amount of damages to the plaintiff as a result of a judgment against him. The right of recourse or recovery of such a defendant is directed at claiming an amount which, taking into account the respective degrees of fault of the joint wrongdoers, is considered to be fair. If the plaintiff recovers only part of his damages from a joint wrongdoer, he may sue any other wrongdoer for the balance. If a joint wrongdoer pays more than is justified by the degree of his fault, he may exercise his right of recourse against any of the other joint wrongdoers.

2 Special cases

Two instances of joint wrongdoers require closer scrutiny as a result of the drastic departure from the existing legal position brought about by the Apportionment of Damages Amendment Act18 and the Matrimonial Property Act. These instances involve the prejudice suffered by a spouse as a result of the conduct of the other spouse and a third party, and the prejudice suffered by a person as a result of the death or injury of another person in circumstances where the deceased or injured person and a third party both contributed to such death or injury.

2.1 Prejudice suffered by a spouse as a result of the conduct of the other spouse and a third party

2.1.1 Marriage in community of property

Prior to 1971, a spouse married in community of property could not be regarded as a joint wrongdoer with a third party against the prejudiced (innocent) spouse. This state of affairs resulted from the rule that a spouse married in community of property could not commit a delict against the other spouse and hence such spouses could not sue one another *ex delicto*. The reason for this was the existence of the joint (common) estate – liability would be senseless, because the innocent spouse would have to be compensated from the single joint estate with assets which would then merely be returned to it; a case therefore of taking out of one pocket only to fill the other.

In accordance with this earlier position, the courts ruled that the innocent spouse, whether the husband as controller of the joint estate, or the husband or the wife with a claim for compensation for bodily injury, could claim the full amount of damages from the third party. The third party could not afterwards exercise a right of recourse against the guilty spouse, because the latter was not regarded as being a joint wrongdoer. This was the case whether the husband as administrator of the joint estate claimed patrimonial damages, or the husband or wife claimed compensation (non-patrimonial damages) for bodily injuries. Furthermore, most decisions correctly took the view that the third party could also not claim a reduction of damages in accordance with section 1(1)(a) of the Apportionment of Damages Act, simply because the plaintiff had no "fault in relation to the damage" (as the section requires) and also because the other spouse's contributory fault could not be imputed to him.

The amendment of the Apportionment of Damages Act in 1971 brought about a change to this unsatisfactory state of affairs for the third party. A spouse married in community of property may now be deemed to be a joint wrongdoer with a third party against the other spouse. Accordingly, the prejudiced (innocent) spouse may recover his or her full claim for patrimonial or non-patrimonial damages from the third party, while the latter then has a right of recourse against the joint estate through the guilty spouse as joint wrongdoer. However, despite the fact that this spouse is now regarded as a joint wrongdoer with the third party, the innocent spouse may still not – because of the existence of the joint estate – institute an action against the former.

Since 1984, the position has been further regulated by the Matrimonial Property Act. The Act draws a definite distinction in respect of delictual damages between patrimonial damage and non-patrimonial damage. Compensation for non-patrimonial damage becomes the separate property of the spouse to whom it was awarded. The third party may thus not recover any part thereof when exercising his right of recourse, because it does not form part of the joint estate. Damages recovered for patrimonial damage, on the other hand, fall into the joint estate, and are therefore subject to the third party's right of recourse. In addition, the Act,as amended by Van der Merwe v Road Accident Fund (Women's Legal Centre Trust as amicus curiae), allows the innocent spouse to institute an action for compensation of patrimonial and non-patrimonial loss, flowing from personal (bodily) injuries, against the other spouse. This is possible because this compensation is now the separate property of the innocent spouse, and the objection that the existence of the joint estate made such a claim senseless, has therefore disappeared. The innocent spouse may thus sue the other spouse, or the third party, or both. Finally, the Act provides that if a spouse married in community of property is delictually liable damages, such compensation (and any costs awarded against him) is to be recovered from his separate estate, if any, before the plaintiff has recourse to the joint estate. If the joint estate is indeed utilised for this purpose, an adjustment in favour of the innocent spouse (or his estate) must take place upon dissolution of the joint estate.

2.1.2 Marriage out of community of property

Since spouses married out of community of property each have their own estate, there is no joint estate which may prevent them from suing one another *ex delicto*. There is, therefore, no reason why one spouse may not be a joint wrongdoer with a third party against the other spouse. The Apportionment of Damages Amendment Act 58 of 1971 and the Matrimonial Property Act 88 of 1984 do not change this position.

2.2 Prejudice suffered by a person as a result of the death or injury of another person through the conduct of the deceased or injured person and a third party

2.2.1 Prejudice as a result of death

The focus is on the situation where a dependant suffers loss of support as a result of the conduct of both the deceased breadwinner and a third party. Prior to the amendment of the Apportionment of Damages Act, the third party and the deceased estate could not be considered to be joint wrongdoers, as the so-called last opportunity rule of the common law was still applicable. This meant that if the breadwinner had the last opportunity to avoid his death, his dependants had no claim against the third party, but if the third party had the last opportunity their claim was satisfied in full.

This state of affairs was changed drastically by the amendment. The last opportunity rule was abolished and the third party and the deceased estate are considered to be joint wrongdoers with regard to the loss of support. In principle, this means that the dependant may now claim the full amount of damages from either the third party or the deceased estate, and that there is a right of recourse between the two joint wrongdoers. If one of the joint wrongdoers pays the damages in full, he may claim a contribution from the other.

The Act further regulates the way in which the court must handle the dependant's claim for loss of support. The court may calculate the amount to be awarded in damages in respect of the loss of support by subtracting any benefit derived by the plaintiff (under the law of testate or intestate succession) from the deceased estate, from the estimated value of the support which the plaintiff has lost. If the third party has paid this amount to the plaintiff in full, he naturally still retains his right of recourse against the deceased estate. However, in respect of this right of recourse, the Act further provides that if the court deducts such benefit from the estimated loss of support, the prejudiced party may not be deprived of this benefit.

2.2.2 Prejudice as a result of injury

The first situation to be considered is where the duty of support of a breadwinner (for example, a father or husband) has been increased as a result of an injury to a dependant in circumstances where the dependant and a third party contributed to the injuries. Prior to the amendment of the Apportionment of Damages Act in 1971, the courts refused to consider a child to be a joint wrongdoer with a third party as against his breadwinner (father). According to the Act, the child and the third party are now deemed to be joint wrongdoers as against the father. He, as plaintiff, may in principle sue any joint wrongdoer and the wrongdoer who pays out has a right of recourse against the other. In practice, he will probably sue the third party, rather than his own child.

A further example of persons who suffer damage as a result of injury to another person, is the case of a master being harmed as a result of an injury to his domestic servant. If the conduct of both the domestic servant and the third party caused the injuries, they are deemed to be joint wrongdoers against the master in terms of the Apportionment of Damages Act.

A problematic case, however, is where a dependant suffers loss of support through the conduct of the injured breadwinner and a third party. Prior to 1971, the decision in *De Vaal v Messing* declared that the dependant had no claim in such a case. The court argued that the dependant simply did not suffer damage because the breadwinner himself could institute an action for loss of future income as a result of his injuries. This argument, however, is not relevant in all cases. If, for example, the breadwinner was 80% negligent with regard to his own injuries, it follows that he will be able to claim only 20% of his loss of future income, and in all probability this amount will be inadequate if he is to support his dependant as in the past. Therefore, the dependant definitely suffers loss of support. For this reason, and also due to the fact that the wording of the Apportionment of Damages Act now covers the present situation,57 the dependant should have an action and the breadwinner and the third party should be deemed to be joint wrongdoers.

Part III

Forms of delict

In the following three chapters some specific forms of delict are discussed. Firstly, attention is given to forms of delict involving patrimonial loss (*damnum iniuria datum*), thereafter to forms of impairment of personality *(iniuria*) and finally to some instances of delictual liability without fault.

Forms of *damnum iniuria datum*

1 Introduction

As stated earlier, it is useful and even necessary to deal separately with some of the specific forms of *damnum iniuria datum* (ie, delicts involving patrimonial damage). These forms require discussion either because distinctive rules within the framework of the general principles of delict have been developed in respect of them, or, where they have recently crystallised and consequently have no such rules, because the existing general principles need to be adapted or applied in a particular way.

The forms discussed are patrimonial loss suffered by a person as a result of the death or injury of another person (a distinction is made between the action of dependants of the injured or de- ceased person and action of non-dependants); emotional shock; pure economic loss; negligent misrepresentation; interference with a contractual relationship; unlawful competition; and product liability. These forms, some of which overlap to a certain extent, are not exhaustive.

2 Injury or death of an other person

2.1 Action of non-dependants

The Aquilian action is not at the disposal of every person who suffers patrimonial damage as a result of the wrongful and culpable injury to or death of another person. Our courts have held that loss suffered by the following persons is not recoverable:

(a) **Contracting parties** Persons who stand or stood in a contractual relationship to the injured or deceased person cannot claim for the loss they suffered where the injury or death constituted a negligent interference with the contractual relationship. This is dictated by legal policy. According to the Appellate Division in *Union Government v Ocean Accident and Guarantee Corporation Ltd*, the opposite view may lead to an "unmanageable situation":

> It is easy to imagine the absurdities that would arise if all persons contractually linked to the injured [or deceased] person could sue the careless injurer for the loss suffered by them. The case was put to us of the injured building contractor who in consequence of his injury has to discontinue his contract, so that his employees and the building owner and the architect and his sub-contractors and their employees are all put to some loss. Insurance companies would also be a wide class of plaintiffs who could bring ac- tions when persons insured by them were negligently injured or, presumably, killed, if the extension of liability contended for were recognised. In fact it would be a rare accident that did not give occasion for a crop of actions at the suit of persons who had made contracts with the injured party.

In accordance with this view, it was decided that an employer cannot institute the Aquilian action for loss suffered as a result of injury to an employee. Similarly, a person who has a contractual (personal) right of support cannot in principle claim for loss of support as a result of the death or injury of the person who was under a duty to support him or her.

(b) **Heirs and legatees** An heir or legatee has no claim for damages on the ground that the premature death of the deceased had probably prevented his future estate from being larger. In Lockhat's *Estate v North British and Mercantile Insurance Co Ltd* the court stated clearly that

heirs and legatees of the deceased . . . have no claim upon the wrongdoer. They may have inherited less than they might have done had the deceased lived longer, but that gives them no right against the wrongdoer.

The most important reason for refusing an action is probably the fact that the fortune of an estate is unpredictable and that an heir will consequently not be in a position to prove his loss. Instead of growing larger, the estate might become appreciably smaller in the future. Any attempt to determine the future value of the estate would amount to pure speculation.

In contrast with the previous two instances, the Aquilian action is available to the following persons for loss suffered as a result of the death of or injury to another person:

(a) **Executor** The executor of the estate of the deceased, whose death was caused in a wrongful and culpable manner, may in certain cases claim damages from the wrongdoer on behalf of the estate. This includes compensation for medical expenses (that were incurred to treat the eventu- ally fatal injuries of the deceased), loss of income (from the time of the injury of the deceased until his death) and funeral expenses. Except where litis contestatio occurred before the death of the deceased, the executor cannot, however, claim compensation for the loss of the deceased's future income or earnings. The reason is that the deceased is not regarded as an asset in his own estate which can be destroyed. Thus his death does not in itself bring about an actionable finan- cial loss.

(b) **Heirs and immediate family: funeral expenses** Should an heir or a member of the de- ceased's immediate family (such as his spouse, parent or child) instead of the executor of the estate meet the funeral expenses, the former may recover his expenses from the wrongdoer. The claim for compensation in this regard is based on the duty to bury the deceased.

(c) **Persons having a duty of support** In principle, a person who bears a duty of support (such as a father or a husband) may institute the Aquilian action against a wrongdoer who wrongfully and negligently injures the former's dependant (such as a child or a wife) and thereby adds additional liabilities to his duty (for example, medical costs or household expenses). This claim for compensation flows from the duty of the person involved to support his dependants. Strangely enough, however, according to our courts the action is not based on a delict committed against the person who has the duty of support, but on non-compliance with a duty of care towards the dependant.

This view is unacceptable. One may assume – in accordance with general legal convictions – that there is a legal duty not to increase the scope of a person's duty of support in an unreason- able manner. It is self-evident that causing injury to the dependant and the resultant expenses in principle constitute a breach of this duty, and consequently a delict against the provider. By implication, this view is also evident since 1971 from the Apportionment of Damages Act. Where the patrimonial loss was caused by the negligent behaviour of both the third party and the dependant, they are considered to be joint wrongdoers, and thus each has committed a delict against the provider. Seen in this light, the latter's claim is undoubtedly based on a delict committed against himself.

(d) **Master-domestic servant** The position at common law that the *actio legis Aquiliae* was available to a master if he suffered patrimonial damage as a result of wrongful and culpable injury to his domestic servant was confirmed obiter in *Union Government v Ocean Accident* and *Guarantee Corporation Ltd. However, in Pike v Minister of Defence*, the court held that this rule has been abrogated by disuse and is therefore no longer part of our law.

2.2 Action of dependants

2.2.1 Death of the breadwinner

The dependants of a person killed in a wrongful and culpable manner may claim damages for loss of support from the wrongdoer with the *actio legis Aquiliae*. As stated earlier, the action did not originate in Roman law, but developed from Germanic customary law and was accepted by the old writers as an actio utilis in terms of the *lex Aquilia*.

According to positive law, however, the dependants' action deviates from normal Aquilian principles. The courts regard the action as an anomaly because it is not based on a delict committed against the dependant himself, but on a delict committed against the breadwinner. The dependant thus has to prove that the death of the breadwinner was caused wrongfully and culpably. However, the dependant institutes the action in his own name, since the courts have held that the action does not derive from the deceased or his estate, but that the dependant is directly entitled thereto as a result of his loss of support.

The view that the dependant's action is based on a delict committed against the breadwinnercannot be accepted – not only because it cannot be justified theoretically, but also because it can lead to undesirable practical consequences. Dogmatically, the most important objection is that it is illogical to base an action for damages upon a delict, and thus the causing of harm, committed against another person – almost in the form of a delict *per consequentias*. The theoretically correct view is that the dependant's claim is based on the wrongful, culpable causing of damage to him, the dependant himself. Wrongfulness lies in the infringement of the dependant's personal right of support from the breadwinner. The theoretically correct approach is by implication endorsed by the Apportionment of Damages Act and the Supreme Court of Appeal.

Requirements for a claim for loss of support According to the Supreme Court of Appeal, the most important requirements for the dependant's action are the following: (i) The deceased, while he was still alive, must have been under a duty to support the dependant (which duty must have been legally enforceable *inter partes*). The existence of a duty of support is subject to the qualifications that the dependant must be in need of support and the breadwinner must be capable of providing such support. (ii) The dependant must have had a right to (such) support (which right must be capable of legal protection against third parties). The existence of a right to support must be determined with reference to the *boni mores* criterion of wrongful- ness. These requirements may be supported in principle, because for each legal duty of support, there is a concomitant personal right to support, the infringement of which points to wrongful conduct against the dependant. Of course, the legal duty of support (the correllate right of which can also be protected against third parties) can arise from any legally recognised source. The following sources have received recognition:

(a) **Legal marriage** Contrary to earlier opinion, legal marriages are not restricted to civil marriages entered into according to the Marriage Act 25 of 1961, but also include any "solemn marriage in accordance with the tenets of recognised and accepted faith"46 and marriages accord- ing to indigenous law.

There is a reciprocal duty of support between spouses. The wife's duty, however, is subsidiary in the sense that it only comes into operation if the husband is unable to provide support, or if it is necessary for the maintenance of the common household.48 If in such a case the husband's right to support is infringed by the death of his wife, he may, in principle, claim compensation.

(b) **Civil union** Surviving partners in civil unions concluded in terms of the Civil Union Act 17 of 2006 are entitled to claim maintenance from their deceased civil union partner's estate.

(c) **Blood relations** A child (even a major) has a right to support from both his father and his mother. Similarly, a parent has a right to support from his own child (also a minor). Even grandparents have a right to support from grandchildren, but only where their own children are dead or unable to provide support. Furthermore, a brother (or sister) may claim support from brothers or sisters if his parents are unable to support him. The duty of support with regard to collateral consanguinity does not, however, extend beyond brothers and sisters. Since they are not related by blood, a step-parent and step-child or persons related by affinity (such as brothers and sisters-in-law) have no mutual right to support vis-à-vis one another.

(d) **Adoption** Adopted children are in the same position as blood relatives. (e) Statute A black woman married according to an indigenous-law customary union has a statutory delictual claim for loss of support as a result of her husband's death.

(f) **Court order** A divorced woman who is entitled to support from her former husband in terms of a court order may insitute a dependant's action upon his death.

(g) **Contract** As noted, a person who has a mere contractual claim to support, has no claim for loss of support resulting from the death of the person bearing the duty of support. Such a right to support is in principle deemed not to be enforceable against third parties, lest the liability of wrongdoers according to dependants' actions grow too wide. This does not mean, however, that an interference with a contractual relationship of support will never be *contra bonos mores* and accordingly wrongful. The nature of the contractual relationship founding the duty/right to support fulfils an important role in determining this. Accordingly, the fact that a Muslim marriage does not constitute a "normal" contractual relationship but flows from a "solemn marriage in accordance with the tenets of recognised and accepted faith", and the fact that the customary union of black people is the product of a practice recognised by indigenous law, were deciding factors in favour of the protection of dependants' rights of support against infringement by third parties. Likewise, the promise to support an adopted child, which is a contract giving rise to obligations under indigenous law, is deemed worthy of protection according to the *boni mores*, even though the promise is not a valid adoption due to non-compliance with formalities. Furthermore, if same-sex partners had a permanent life relationship similar to a marriage, during which the now deceased person undertook a contractual duty of support, the action of dependants is available to the surviving partner. This approach now also applies to a heterosexual life partnership akin to marriage, for example where the life partners agreed to get mar- ried, had already undertaken reciprocal duties of support and had executed a family will as evidence of their commitment to each other. Extension of the action of dependants to other relationships out of which contractual duties of support may arise, such as betrothed parties according to a cohabitation agreement, or a foster-care relationship between a father and his foster-child, should be approached with caution.

Defences against a claim for support Attention must now be given to the defences which may successfully be raised against the dependants' action. It is self-evident that, if the traditional basis of the action as one finds it in positive law (ie, that the delict is committed against the breadwinner) is accepted, any defence which could have been raised successfully against a claim by the breadwinner were he alive should also succeed against the dependant's claim. This result, however, does not always follow if one accepts the theoretically correct approach, ie that the delict is committed against the dependant. In this regard, the effect of a ground of justification raised with regard to the breadwinner's death, a *pactum de non petendo in anticipando* concluded by him, and contributory intent and contributory negligence on his part must be considered.

With regard to grounds of justification, it will make no difference whether one accepts the positive law basis or the theoretically correct approach to the dependants' action. If, for exam- ple, the wrongdoer acted in accordance with the valid consent of the breadwinner, or caused his death in self-defence or in necessity, his act will not be wrongful either against the breadwinner or the dependant. As against the breadwinner, the presence of consent or self-defence excludes wrongfulness. As against the dependant, these grounds of justification naturally have no direct operation, since they are *res inter alios acta* as far as he is concerned. Nevertheless, the infringement of the dependant's interest in receiving support is also lawful because in the circumstances the infringement cannot be regarded as unreasonable or *contra bonos mores*.

The position is different where the breadwinner concluded a *pactum de non petendo in antici- pando* with the defendant. In these circumstances it should make a difference whether the dependant's action is based on a delict against the breadwinner or against the dependant. If the former approach is followed, the pactum, to be logically consistent, should be a complete defence against the action of dependants. Strangely enough, this view is not followed by the courts. In Jameson's *Minors v CSAR* the breadwinner was killed in a train accident caused by the negligent conduct of the railways. The breadwinner was a passenger in possession of what is known as a "free pass" that excluded liability of the railways in the specific circumstances. The court decided that such a pactum was no defence against the dependants' action. This view can be accepted, on the one hand, because it accords with the theoretically correct approach to the dependants' action (according to which the pactum is res inter alios acta with regard to the dependants' action), and on the other hand, because a breadwinner should in any case not be able to conclude a *pactum de non petendo* which burdens his dependants, since such conduct would be *contra bonos mores*.

In the case of contributory intent (voluntary assumption of risk) on the part of the breadwinner, it should also make a difference which of the two approaches is followed. Suppose that the plaintiff in *Lampert v Hefer* had died and that her dependant had instituted a claim: if one regards the dependant's claim as based on a delict against the breadwinner, and if one accepts that the defence of contributory intent, although not eo nomine, is recognised in positive law, it should constitute a complete defence against the action of the dependants – the breadwinner's intent in fact cancels the negligence of the third party. If, on the other hand, one were to apply the theoretically correct approach, the position would be completely different.

The defence of contributory intent could then not be raised against the dependant because, as far as he is concerned, this fact would be *res inter alios acta*. The defence of contributory intent is only of academic interest in this regard since the Apportionment of Damages Act, which endorses the theoretically correct approach, by implication treats the breadwinner and the third party as joint wrongdoers as against the dependant. The dependant can thus recover in full for his loss of support.

Finally, attention must be given to the effect of contributory negligence on the part of the breadwinner. As in the case of contributory intent, it should also make a difference in this case whether the positive law or the theoretically correct approach is followed. In the former case, the position before 1971 was as follows: The Apportionment of Damages Act 34 of 1956 left the common law principles concerning the dependants' action unchanged. Accordingly, the so-called last opportunity rule still applied. This means that if the breadwinner had the last opportunity to avoid the accident, this constituted a complete defence against the dependant's action. However, the dependant could succeed with his full claim if the third party had the last opportunity of avoiding the harm. If, by contrast, the dependant's claim is regarded as being based on a delict committed against the dependant himself, the fact that the breadwinner had the last opportunity (or was contributorily negligent) could clearly not be raised against the dependant (*res inter alios acta*). However, the position is presently regulated by the Apportionment of Damages Act. The effect is that the breadwinner and the third party are regarded as joint wrongdoers as against the dependant and he can, therefore, claim his compensation in full.

2.2.2 Injury to the breadwinner

The dependants of a person injured in a wrongful and culpable manner should, as in the case of death, be able to claim loss of support with the Aquilian action. In principle there is no distinction between the two cases. Accordingly, the principles that have been stated with regard to the death of the breadwinner should also apply here *mutatis mutandis*. There is, however, uncertainty in this regard in positive law.

On the one hand, there are decisions that grant the Aquilian action to the dependants of an injured married woman who has a duty to support them. In *Abbott v Bergman* a man, married in community of property, was allowed to claim damages inter alia for the "loss of his wife's services in running the boarding-house". Similarly, in *Plotkin v Western Assurance Co Ltd*, where the parties were married out of community of property, the court granted the husband damages in circumstances where his injured wife was legally liable to contribute to the common household. In *Erdmann v Santam Insurance Co Ltd* the court was not unwilling to grant the husband an action for loss of support as a result of injuries to his wife, but nevertheless reached the conclusion97 "that the primary claim for the loss of her housekeeping ability should be the wife's and that that is in accord with modern social ideas"

On the other hand, the decision in *De Vaal v Messing* lends support to the opposite view. The court refused a claim for loss of support by the wife and children as a result of injury to the husband. According to Greenberg J, dependants cannot claim in these circumstances because the injured breadwinner himself must institute an action for loss of future income which can then be utilised to support the dependants. He argued that "any claim by his [the injured person's] dependants against the wrongdoer would be met by the simple answer that they have suffered no damage". As stated,1 this argument cannot always be supported. Consequently, the dependant should in principle have an action if he can prove loss of support. This approach is endorsed by the Apportionment of Damages Act since 1971: The dependant is granted an action if the injured breadwinner and the third party acted negligently and are regarded as joint wrongdoers as against the dependant.

3 Psychological lesions (emotional shock)

A psychological lesion (psychiatric injury or psychological disturbance) may be described as any recognisable harmful infringement of the brain and nervous system of a person. The existence of such a lesion, should, as a rule, be proved by supporting psychiatric evidence. Psychological injury may naturally be sustained in various ways, such as through nervous shock, fright or other mental suffering. The fact that up to now South African courts have, in by far the majority of instances, been faced with delictual liability for emotional shock, therefore does not exclude the possibility that psychological lesions not caused by emotional shock may also be actionable. In fact, in *Barnard v Santam Bpk*, Van Heerden DCJ opined that "there is undoubtedly much to be said for the viewpoint that 'nervous shock' is not only an obsolete term without any specific psychiatric meaning, but it may also be misleading, and that the only relevant question is whether the plaintiff sustained a recognisable psychological lesion".

The decision of the Appeal Court in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* is the *locus classicus* for the viewpoint that impairment of personality and patrimonial loss resulting from psychiatric injury or emotional shock caused wrongfully and negligently (or intentionally), founds the action for pain and suffering and the *actio legis Aquiliae* in principle. Prior to Bester, the South African law of delict lacked clear principles in this field. Since Ro- man-Dutch authority was scant, the courts consistently sought guidance from English law. This resulted in the imposition of two artificial restrictions on liability for emotional shock: (a) the shock (or psychological disturbance) must have originated from a physical injury or resulted in harm to the physical constitution; and (b) the aggrieved party himself must have been in personal danger of being physically injured. The first restriction concerns the element of wrongfulness, while the second constitutes negligence or legal causation.

(a) **Wrongfulness** The requirement of physical harm indicates an infringement of the right to physical integrity which is per se wrongful. This requirement was rejected in Bester. The artificial attempt to distinguish between physical and psychological harm necessitated by this requirement was also dismissed. According to Bester, the brain and nervous system are as much a part of the physical body as an arm or a leg. As a result, a physical injury is not absolute- ly necessary to found liability. Botha JA stated that "to deny a prejudiced person damages or satisfaction merely because nervous shock and consequent suffering are not accompanied by a purely physical injury, can scarcely be defended on logical grounds".

The effect of equating physical and psychological harm is that even a slight emotional shock will in principle also infringe the personality right to physical integrity and consequently be wrongful. This does not, however, mean that "insignificant emotional shock of brief duration and with no material impact on the well-being of the person", will be actionable. This is simply an application of the *maxim de minimis non curat lex*. To be actionable, the harm caused by the shock must be reasonably serious.

(b) **Negligence and legal causation** The requirement of personal danger was similarly rejected in Bester and replaced by the yardstick of reasonable foreseeability of harm. One is dealing here with the question of either negligence or legal causation with regard to the emotional shock.

It is submitted that the question of negligence arises where the shock or psychiatric injury is the only or at least (one of) the first harmful consequence(s) of the wrongdoer's conduct; in other words, in order to establish negligence, the reasonable foreseeability and preventability of the psychological lesion(s) must be ascertained. However, where the emotional shock is a further (subsequent or more remote) consequence of the wrongdoer's already established negligent act (ie, his negligence has already been determined with regard to another, pre-shock harmful consequence), the question of legal causation is at hand, ie whether the wrongdoer's negligent act can be regarded as the legal cause of the psychological lesion.

The view that the reasonable foreseeability of remote psychological lesions is concerned with legal causation is, however, not supported by Barnard. According to both the court *a quo* and the Supreme Court of Appeal, one is still concerned with the question of negligence. This view is subject to criticism, on the one hand because the question (in the court *a quo*) of the preventability of the psychological lesion involved does not make any sense in light of the wrongdoer's already established negligence, and, on the other, because the determination of negligence with regard to the nervous shock through application of the foreseeability test only (in the Supreme Court of Appeal) incorrectly reduces negligence to reasonable foreseeability and consequently wrongly equates the two concepts. The conclusion is that the test for negligence is not appropriate to ascertain liability for remote consequences.

In the application of the foreseeability test – and here, from a practical point of view, it does not make a difference whether the test serves to establish negligence or legal causation – this must be deter- mined in every case, taking account of all relevant circumstances, whether the psychiatric injury was reasonably (or as a reasonable possibility) foreseeable. The following factors may play a role in this regard: the fact that the psychological lesion resulted from physical injury, was connected with such injury or sustained together with it; the fact that the plaintiff was in personal danger of being physically injured; the fact that the plaintiff was informed of the death or injury of a close relative; and the fact that the plaintiff personally witnessed the death or injury of someone with whom the plaintiff had a close relationship.

Finally, in connection with the foreseeability criterion, it must be noted that once the court has found that reasonably serious emotional shock was reasonably foreseeable, the wrongdoer is then liable for any detrimental physical or mental consequences ensuing from the emotional shock, regardless of whether such consequences were foreseeable as well. The so-called "thin skull" or talem qualem rule, ie that "the wrongdoer takes his victim as he finds him", thus applies here. According to this rule, a defendant cannot escape liability by proving that the plaintiff was particularly susceptible to the prejudicial consequences of the shock and that the consequences were therefore not reasonably foreseeable.

4 Pure economic loss

As pointed out, the Aquilian action is in principle available to claim damages for pure economic loss. For conceptual clarification, it is necessary at the outset to describe clearly what is meant by the concept "pure economic loss". On the one hand, pure economic loss may comprise patrimonial loss that does not result from damage to property or impairment of personality. On the other hand, pure economic loss may refer to financial loss that does flow from damage to property or impairment of personality, but which does not involve the plaintiff's property or person; or if it does, the defendant did not cause such damage or injury. To found liability for pure economic loss, the obvious qualification is that the wrongdoer's conduct must comply with the general delictual requirements. For present purposes, only the element of wrongfulness requires special attention.

It is an accepted premise in our law that wrongfulness lies either in the infringement of a subjective right, or in the breach of a legal duty to avoid damage (norm or duty violation). This also applies to liability for pure economic loss. Infringement of a subjective right occurs fairly often in this regard, as in the case of unlawful competition, where the right to goodwill is involved, or the interference with another's contractual relationship, where a personal right is frequently at stake. Nevertheless, according to the courts, the wrongfulness of an act causing pure econ- omic loss almost always lies in the breach of a legal duty. This approach is acceptable, as long as one bears in mind that, where a subjective right is in fact involved, wrongfulness may just as well lie in the infringement of this right, being the converse of the legal duty.

It must be borne in mind that a general duty to prevent pure economic loss for other persons does not exist; or, in other words, that the factual causing of pure economic loss is not prima facie wrongful. Consequently, it must be determined in each case whether, according to the circumstances, there was a legal duty to avoid pure economic loss. The yardstick that must be applied in this determination is the general criterion of reasonableness or *boni mores*. As indicated, this criterion requires the court to exercise "a value judgment embracing all relevant facts and involving considerations of policy". This is usually described as the "policy based aspect of the 'duty of care' concept, by means of which the scope of delictual liability is judicially controlled". The *boni mores* criterion implies a careful weighing up of the interests of the parties involved, taking into account the public interest.

In applying the boni mores criterion to determine the legal duty with regard to pure economic loss, the courts attach importance to the following factors, which should not be considered to be a *numerus clausus*:

(i) *Knowledge* – the fact that the defendant knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff. This factor plays a very important and perhaps even a decisive role in the determination of the legal duty.

(ii) *Reasonable foreseeability* – the fact that the defendant should have foreseen that negligent conduct on his part would harm the plaintiff. The general rule is that the greater the foreseeability of damage, the greater the possibility that a legal duty to prevent damage exists.

(iii) *Practical measures* – whether practical steps could have been taken by the defendant to prevent the economic loss. In this regard, the probable success of such steps, the reason- ableness of expenses involved in taking such steps in proportion to the damage the plain- tiff suffered, and the relative ease with which the steps could have been taken, are also taken into account.

(iv) *Professional knowledge and competence* – the fact that the defendant exercises a certain calling and thereby possesses or professes to possess special skill, competence and knowledge. This means that where the defendant is rendering professional services, he has a duty not to cause financial loss to others.

(v) *Extent of risk* – the degree or extent of the risk of economic loss being suffered by the plaintiff. This factor is indicative of the need for protection in a particular situation.

(vi) *Extent of loss* – the fact that the situation can lead to indeterminate liability or is "one fraught with an overwhelming potential liability". This applies, for example, where the act complained of would probably result in a "multiplicity of actions" which could be "socially calamitous". Where these circumstances are present, the view is held that the defend- ant does not have a legal duty to avoid damage.

(vii) *Statutory provision* – the fact that a statutory provision expressly or by implication pre- scribes that the defendant must prevent (economic) loss. Whether such a duty exists will depend on the intention of the legislature, as determined from the Act, according to the principles of interpretation of statutes.

(viii) *Miscellaneous* – other factors which have also been taken into account by the courts are, *inter alia*, that the plaintiff is unable to protect himself from the economic loss in- volved; that the plaintiff can protect himself against such loss, for example by obtaining insurance cover, or, in a contractual "setting", by contractual provisions, or by other reasonable means avoid making himself "vulnerable" to the risk of loss; the extent of the duty which would be placed on other persons who find themselves in the position of the defendant; an unacceptable additional burden that would be placed on the defend- ant, or that his activities would be restrained unfairly; and that the non-recognition of a legal duty will leave a serious lacuna in the law.

In respect of pure economic loss, mention must finally be made of the so-called action of the disappointed beneficiary. In *Boe Bank Ltd v Ries* the court declared that, in principle, it was in favour of a delictual claim in this kind of case. A prejudiced beneficiary will therefore succeed if his claim complies with all the ordinary requirements of a delict.189 As in other cases of pure economic loss, the requirement of wrongfulness is of particular importance. Apart from what was said in that case, the following factors are strongly indicative of a legal duty to prevent prejudice to the beneficiary: The existence of a valid (professional) contract between the defendant and the testator placing a duty on the defendant to act with the necessary care (profes- sional skill) to ensure that a particular (testamentary) benefit will accrue to the beneficiary; and the existence of a delictual legal duty on the defendant to refrain from wrongful conduct (such as misrepresentation) against the testator which could deprive the beneficiary of a particu- lar benefit.

5 Negligent misrepresentation

Misrepresentation, as a form of *damnum iniuria datum*, occurs when the wrongdoer makes an incorrect or misleading representation in a wrongful and culpable manner to another person who acts on it to his detriment. Since no specific problems attach to Aquilian liability for a misrepresentation causing damage to property or the impairment of personality, this discussion is restricted to misrepresentations causing pure economic loss In Roman and Roman-Dutch law, the actio doli was available in the case of an intentional misrepresentation. The common law, however, gives no clear indication about the existence of liability for pure economic loss on the ground of a negligent misrepresentation. In case law, negligent misrepresentation was not recognised as a delictual ground of action, either under the influence of English law, which recognises only an intentional misrepresentation as a ground of action (deceit), or as a result of the fear that the granting of the *actio legis Aquiliae* would lead to unlimited liability.

However, in Administrateur, *Natal v Trust Bank van Afrika Bpk* the Appellate Division (in 1979) confirmed the attitude reflected in cases immediately preceding that date, and based Aquilian liability on a negligent misrepresentation. According to the court, the correct application of delictual principles will keep liability within limits. Rumpff CJ declared:

> In my opinion the cause of action in the current case can and should be placed in the extended field of application of the *lex Aquilia*. From this it would follow that, according to our current prevalent norms, wrongfulness is required, and fault. The fear of unlimited liability can only be allayed, if, in any given case, it is the Court's function to decide whether, in the particular circumstances, a legal duty rested upon the defendant not to make a misstatement to the plaintiff, and also whether the defendant in light of all the circumstances, exercised reasonable care, inter alia by checking the truth of his representation. In the absence of a legal duty, there is no wrongfulness.

It is clear that the elements of wrongfulness and negligence are of particular importance in determining liability for negligent misrepresentation. The question of whether there was a misrepresentation involves the act as delictual element and is, of course, the first requirement for liability on the ground of negligent misrepresentation. The existence of a misrepresenta- tion, which can take place in the form of an omission or a commission, is clearly a question of fact which depends upon the circumstances of each case.

(a) **Wrongfulness** Wrongfulness lies either in the infringement of a subjective right, or the breach of a legal duty. Where a negligent misrepresentation causes pure economic loss, an identifiable subjective right is usually absent. Therefore, wrongfulness is determined by deciding whether there was a breach of a legal duty. This approach is already followed in case law. The crucial question in the case of negligent misrepresentation is thus whether the defendant was under a legal duty to furnish the correct information in the particular circum- stances.

As in all cases concerning the question of wrongfulness, the reasonableness or boni mores criterion (comprising a weighing-up of interests in the light of the public interest) should be employed to ascertain the existence of such a legal duty. The flexible *boni mores* criterion thus enables the courts to develop a predictable blueprint in a new and developing field; concrete guidelines are developed by which the practical handling of this legal field is facilitated. It is possible to deduce a number of guidelines (which should not be regarded as a *numerus clausus*) from case law and other authority, indicating whether a legal duty to furnish correct information exists in a particular case:

Firstly, there is in principle no legal duty to give the correct information where such informa- tion is merely furnished informally. Nevertheless, a malicious or improper motive may still make a *prima facie* lawful misrepresentation unreasonable and thus wrongful.

Negligence, or even gross negligence, plays no part in determining the wrongfulness of a mis- representation.

Secondly, there is, in principle, a legal duty to furnish the correct information in the following instances:

> (i) Where a person has a statutory duty to furnish the correct information.
>
> (ii) Where there is a contractual undertaking to furnish the correct information. Such a con- tractual duty also arises where the correctness of the information, explicitly or tacitly, is guaranteed.
>
> (iii) Where there is a contractual relationship between the parties (without a contractual under- taking to furnish the correct information). Such persons have a duty inter partes to furnish the correct information concerning a matter arising from the contract and relating to its implementation.
>
> (iv) Where a person, who by reason of a specific public office which he holds (such as a notary, a sworn appraiser or an auditor) has "a kind of patent of credibility and efficiency conferred upon him by public authority", furnishes information in his official capacity. The reason is that "[m]embers of the public are invited and entitled to repose confidence and trust in the acts of such persons performed in their respective capacities"
>
> (v) Where a person has specific information in his exclusive possession by reason of his particular occupation, and this information cannot therefore be obtained in another manner than from that person (or an associate).
>
> (vi) Where a person, who by reason of his particular occupation claims to command profes- sional knowledge and competence, furnishes information in a professional capacity.

The fact that the presence of one of these factors indicates a legal duty to provide the correct information in general does not mean that breach thereof amounts to wrongful conduct as against a particular person. For this to ensue, it must be established that the legal duty in fact existed as against that person. According to the courts – as pointed out with regard to pure economic loss – this will be the case if the person responsible for the misrepresentation knew or subjectively foresaw, at the moment of furnishing the information, who the person or persons were who would respond to or rely on it. The defendant's legal duty, and consequently his liability, are thus restricted to plaintiffs of whose identity he was certain at that time.

It furthermore appears sensible to require in respect of wrongfulness that the misrepresentation must, judged objectively, be "material" in the sense that it would have influenced a reasonable person to react to or rely on it. The reasonable person here embodies the *boni mores* or the legal convictions of the community.

Finally, with regard to wrongfulness, it is important to bear in mind that despite the presence of these factors, the court may still refuse to construe a legal duty for considerations of legal policy, where liability could lead to "a multiplicity of actions" that could be "socially calamitous".

(b) **Negligence** If it is established that the defendant had a legal duty to furnish the correct information, non-fulfilment of which caused patrimonial loss to a specific person or persons, then he acted wrongfully. However, to establish liability, the wrongdoer must also have acted negligently; in other words, he must have acted differently from the way in which a reasonable man would have acted in the particular circumstances. The reasonable foreseeability and preventability of damage is being dealt with. If the wrongdoer in fact showed the necessary care in spite of the non-fulfilment of his legal duty, he ought not to be liable, on account of the absence of fault. However, if it is found that the wrongdoer acted negligently, the possibility of contributory negligence on the part of the prejudiced party must be borne in mind.

(c) **Causation** In *Administrateur, Natal v Trust Bank van Afrika Bpk* Rumpff CJ pointed out that apart from wrongfulness and fault, causation may also be instrumental in keeping the present action within reasonable limits. Factual and legal causation are of vital importance in this regard:

> (i) *Factual causation* The courts adhere in this regard to the *conditio sine qua non* or "but for" test. As stated above, this "test" should for valid reasons not be supported. The correct manner to determine a factual causal nexus is to ascertain from the facts of a par- ticular case (or the evidence concerning it) whether one fact arises out of another. With regard to the present cause of action, it must be established that there is a factual causal link between the misrepresentation, the misunderstanding and the damage. This means, firstly, that the plaintiff must have been misled by the misrepresentation; in other words, he must in fact have believed that the misrepresentation was true. Secondly, it means that the plaintiff must have acted to his detriment as a result of the misrepresentation. If consid- erations other than the defendant's misrepresentation thus caused the misunderstanding and prejudice, factual causation is absent.
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> (ii) *Legal causation* In *International Shipping Co (Pty) Ltd v Bentley* Corbett CJ supported the flexible approach to legal causation, where the crucial question is whether there is a sufficiently close nexus between the wrongdoer's act and the harmful consequence that the consequence can be imputed to him – taking into account "policy considerations" based on "reasonableness, equity (fairness) and justice". The existing criteria for legal causation (such as reasonable forseeability) may play a subsidiary role in implementing the flexible criterion.

In connection with negligent misrepresentation as a delictual ground of action, the following three matters also require attention:

Firstly, it was stated in *Alliance Building Society v Deretitch* that the plaintiff himself must be the person who acted to his detriment as a result of the misrepresentation. If third parties acted to the detriment of the plaintiff as a result of the misrepresentation, the plaintiff does not have an action on the ground of negligent misrepresentation.

Secondly, the delictual liability of auditors and public accountants to third parties for negligent misrepresentation – including misrepresentation leading to conclusion of a contract246 – has been regulated since 1982 by legislation and can therefore differ from the common law position. The legislation provides in essence that an auditor can only incur liablity against a client or third party for a report if he has acted with malice, fraudulently, or negligently in respect of his auditor's duties. In respect of negligent conduct, the auditor can only incur liability against third parties for financial loss that they themselves have suffered because they have relied upon the auditor's report, if he at the stage when he performed his duties firstly knew (or could rea- sonably have been expected to know) (i) that the report would be used by his client to induce a third party to act in a certain manner or to enter into a transaction with the client or another person, and (ii) that the third party would rely on the report to act in such a manner; and second- ly, if he at any time after the report has been delivered, in any manner represented to the third party that the report was correct while he knew or could reasonably have been expected to know that a third person would rely on the report to act in a certain manner or to enter into a transac- tion with the client or another person.

Although this statutory provision agrees with common law liability for negligent misrepresenta- tion on face value, important differences exist. This is reflected particularly in the prescripts of section 46(3)(b) of the Auditing Profession Act 26 of 2005. This may be explained as follows: Although the negligent breach of an auditor's duty is in principle wrongful, the wrongfulness must be clear towards an identified third person. In this respect, section 46(3)(b) of the Act provides "a clear pointer that a negligent misrepresentation falling within its terms is indeed wrongful". As evidenced above, the section creates two requirements that must be complied with: Firstly, the representation to the third person that the report is correct, and secondly, the presence of knowledge (real or constructive) on the part of the auditor that the third person would rely on the report. Whereas the last-mentioned requirement is clear, the requirement of representation needs closer scrutiny. Clearly, the incorrect report does not on its own comply with this requirement. After the report has been made available, a representation must be made in some or other manner to the third person that the report is correct. Silence per se on the part of the auditor can therefore not constitute "representation" for this purpose. Thus, some contact must take place between the third person and the auditor after the release of the report, during which a representation is in some manner, either expressly or impliclity, made that the report is correct, or, as stated by Cloete JA in *Axiam Holdings Ltd v Deloitte & Touche*, "the auditor must, subsequent to the audit, take responsibility to the third party for its accuracy".

Because the liability of auditors against third persons is exhaustively regulated by the Act, the courts must be very cautious not to apply common law principles in respect of negligent misrep- resentation without further ado when interpreting the Act. It is clear that the legislature, to prevent liability of auditors from growing too wide, promulgated these statutory provisions to limit liability, rather than to leave this field to be developed by the courts. For this reason, it is important, expecially when interpreting "representation" in section 46(3)(b), to follow a con- servative approach.

Thirdly, the courts were traditionally opposed to the granting of a delictual action for damages that result from a negligent misrepresentation which induces a contract. A change in the attitude of the courts was, however, confirmed by the Appellate Division in *Bayer South Africa (Pty) Ltd v Frost*. Corbett CJ found that there is, in principle, no good reason why in the recognition of a delictual action for negligent misrepresentation any distinction should be made between a misrepresentation which induces a contract and one made outside the contractu- al sphere. A negligent misrepresentation may, therefore, depending on the circumstances and provided that all the requirements for delictual liability are present, give rise to a delictual claim for damages, even though the misrepresentation induced the plaintiff to conclude a con- tract with the party who made it. However, if the misrepresentation was incorporated as a provision in a contract, no need for a delictual remedy exists and the prejudiced party to the contract must rely on his contractual remedies.

6 Interference with a contractual relationship

Interference with a contractual relationship is present where a third party's conduct is such that a contracting party does not obtain the performance to which he is entitled ex contractu, or where a contracting party's contractual obligations are increased. Although there are few indications in our common law for the protection of a contractual relationship against interference by a third party, there are indications in case law that in certain circumstances a delictual action will be granted to the prejudiced contracting party. The following instances have crystallised in case law:

> (i) Most of the decisions deal with intentional interference causing one of the contracting parties to commit a breach of contract (inducement to breach of contract). Examples are enticing another person's employees to breach of contract, or instigating such persons to terminate their contracts of service unlawfully, or even conduct designed to frustrate the conclusion of a contract.
>
> (ii) Interference with a contractual relationship is also present where a contracting party does not obtain the performance to which he is entitled ex contractu, but without breach of con- tract taking place or the conduct amounting to enticement (inducement).
>
> (iii) Interference with a contractual relationship may furthermore occur in circumstances where there is indeed an act of inducement, but the inducement causes a lawful termina- tion of the contract and not a breach of contract.

(iv) Lastly, interference with a contractual relationship may take place where a contracting party's contractual obligations are increased.

This exposition is, however, subject to the general rule in South African law that only the inten- tional interference with the contractual relationship of another in principle constitutes an inde- pendent delictual cause of action. Following the Appellate Division decision in *Union Government v Ocean Accident and Guarantee Corporation Ltd*, the courts have as a rule refused to extend delictual liability for negligent interference with a contractual relationship beyond the historically justified instances. These instances include, firstly, the delictual action of the master for injury to his domestic servant. Secondly, a person who is in possession of property in terms of a contract with the owner may, to the extent that he has a direct interest in the economic value of such a thing, institute the actio legis Aquiliae against a third party who damages it. As indicated above, at common law the Aquilian action was granted to such a holder of a personal right with regard to property in the case of the colonus partiarius, the borrower, the *fullo* (or persons in similar relationships to the owner) and the lessee of the services of a slave or servant. Later, the courts extended this capacity to institute an action to the hire-purchaser and the long-term lessee of a thing.

In this regard, it can be mentioned that case law correctly emphasised that, apart from the hire- purchaser, the seller as owner of the damaged thing may also institute the actio legis Aquiliae. Although this fact does not mean that a defendant will be obliged to make good the same damage twice, it nevertheless creates an interesting situation in the application of the Apportionment of Damages Act. If the hire-purchaser was contributorily negligent in respect of damage done to the thing and institutes his own action, his claim is reduced in accordance with the degree of his negligence. However, should the hire-purchaser under the same circumstances obtain a cession of action from the owner of the thing, he may recover the full amount of damages, since the owner himself was not contributorily negligent.

It is necessary to return to the decision in *Union Government v Ocean Accident and Guarantee Corporation Ltd*. As stated, the court based its view that negligent interference with a contractual relationship is not actionable on the fact that the granting of the action may lead to an "unmanageable situation" because the door will then be opened to unlimited liability. In our opinion, however, any negligent conduct by a third party which causes the infringement of a contractual personal right or the increase of a contractual obligation ought, in principle, to found the Aquilian action. The fear of unlimited liability may be allayed by the correct application of all the elements of a delict. The requirement of wrongfulness, especially, plays an important part in this context, as in the case of pure economic loss. As a matter of fact, owing to the pure financial nature of the interests concerned in cases of interference with a contractual relation- ship, prejudice almost always takes the form of pure economic loss. What was said in the case of pure economic loss therefore applies, mutatis mutandis, here as well.

One must emphasise, however, that not every factual interference with a contractual relationship by a third party is wrongful in principle. It would be wrongful only if such interference was also contra bonos mores or unreasonable. As stated, the wrongdoer's subjective knowledge that the plaintiff will be prejudiced, as well as (other) considerations of legal policy, plays an important part in establishing wrongfulness. In *Minister for Safety and Security v Scott*. the court followed this approach with regard to the negligent interference with a contractual relationship and came to the conclusion that as a result of policy considerations wrongfulness was absent, mainly because it would create liability for an indeterminate group of plaintiffs.

In the foregoing discussion, the courts had to deal with the interference with a contractual relationship by a third party. In *Country Cloud Trading CC v MEC, Department of Infrastruc- ture Development*, however, the court was confronted with a novel situation, namely whether delictual liability should be extended to a contracting party for damage suffered by a stranger to the contract (third party plaintiff) resulting from the intentional repudiation of the contract by that contracting party. The court held that the plaintiff's claim could not succeed, mainly for the following reasons: imposition of liability could lead to indeterminate liability, and the plaintiff was not "vulnerable to the risk of harm", which signifies that the plaintiff could reasonably have avoided the harm suffered by other means.

7 Unlawful competition

In general, the concept of competition denotes the striving by several persons towards the same purpose. In the area of unlawful competition, which in general concerns competition between business enterprises, it denotes the pursuit of the custom of the same clients. The competitive relationship accordingly brings about a struggle for the favour of the client; a struggle in which the benefit that the one competitor gains, finds its correlate in the prejudice or potential prejudice that the other competitor suffers. Where the interests of the different competitors in this struggle directly oppose each other, it is self-evident that a conflict of interests will constantly be present.

In South Africa, the law relating to the conflict between competitors is placed within the extended field of application of the *lex Aquilia*. Accordingly, the courts applied the general principles of Aquilian liability to many of the forms of unlawful competition that occurred in our law. A very important implication of the recognition of Aquilian liability in this field is, however, that the wide basis of the *actio legis Aquiliae* is now available to help a prejudiced competitor, even in the absence of a direct precedent in case law. Accordingly, a prejudiced competitor who is the victim of another's novel wrongful act need not endeavour to bring his action within the framework of one of the recognised forms of unlawful competition or another particular form of delict.

Insofar as the area of conflict between competitors is governed by the general principles of Aquilian liability, it follows that all the delictual elements must be present to found liability. However, it is especially the question of the wrongfulness of a competitive act which is of cardinal importance – a question that is not always easy to answer.

As a point of departure it is accepted, also by the courts, that wrongfulness in unlawful competition lies basically in the infringement of a competitor's right to the goodwill ("werfkrag") of his undertaking. As stated, the question of the infringement of a subjective right can only arise if there is at least an infringement of the object of the right, or if the holder of the right has otherwise been disturbed in the enjoyment and use of his legal object. This factual disturbance of the relation between subject and object does not, however, necessarily imply the infringement of a subjective right. The dynamic character of competition, which in essence amounts to a sphere of conflict, entails that the majority of competitive acts by an entrepreneur factually infringe the goodwill of his competitors without being wrongful. Thus it was correctly stated in A *Becker and Co (Pty) Ltd v Becker*:

> To a far greater extent than other legal objects, the goodwill of a business is exposed to factual interfer- ences about which the right-holder may not complain. In a capitalist system where free competition is permitted by the legal order, it is axiomatic that the mere existence of two or more competing businesses may be prejudicial to the respective business leaders.

Although it is a requirement for liability, such factual disturbance is thus in itself insufficient to constitute an infringement of the right. An infringement of a right must necessarily also be accompanied by the violation of a legal norm. Accordingly, to constitute an infringement of the right to goodwill or a wrongful violation of goodwill, the competitive act must not only factually infringe the goodwill of a competitor, but must simultaneously also violate a legal norm.

Initially, the courts ascertained the limits of the right to goodwill with reference to the norm or yardstick of honesty and fairness in trade and competition. At present, wrongfulness in the competition struggle is determined by reference to the general criterion for wrongfulness in our law, ie the boni mores or reasonableness criterion ("public policy" or "the general sense of justice of the community"). In *Schultz v Butt* Nicholas AJA succeeded in reconciling the boni mores yardstick with the criteria of fairness and honesty:

> In judging of fairness and honesty, regard is had to boni mores and the general sense of justice of the community . . . Van der Merwe and Olivier . . . rightly emphasise that 'die regsgevoel van die gemeen- skap opgevat moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter'.

In applying this yardstick, the following factors may play a role: the honesty and fairness of the conduct involved ("fairplay"); the morals and business ethics of the economic trade sector involved; the protection that positive law already extends to the area concerned; statutory provi- sions allowing the competitor's conduct; the importance of a free market and strong competition in our economic system; the question of whether the parties are competitors; conventions with other countries; and the motive of the actor.

Contrary to what Boberg suggests, intent or dolus is not a necessary qualification to colour a competitive act *contra bonos mores* and thus unlawful.

One cannot find fault with the *boni mores* as a general criterion for wrongfulness. This criterion is, however, so vague that it does not in itself provide a rational yardstick for the delimitation of the right to goodwill in the area of conflicting interests of competitors. A particular concretisation of the *boni mores* yardstick in the competition struggle is thus necessary. In this regard, Van Heerden convincingly demonstrates that the so-called competition principle can serve as such a yardstick. This principle implies that the competitor who delivers the best and/or fairest performance, must be victorious in the competitive struggle; the one who offers the worst performance, must suffer defeat. Performance or merit competition must thus be decisive with regard to the question of whether the conduct of one competitor is wrongful as against another. Conduct not based on the merits of the performance of the perpetrator is accordingly, in principle, regarded as wrongful. This does not, however, mean that the boni mores or reasonableness criterion no longer has a role to play with regard to the determination of the dividing line between lawful and unlawful acts of competition. In fact, in certain instances, the general criterion is supplementary to the competition principle.

An entrepreneur may infringe the goodwill of a competitor directly or indirectly.

(a) **Indirect infringement** An infringement of the goodwill of a competitor is indirect where it occurs as a result of the use that the perpetrator makes of his own goodwill: such infringement is in principle lawful if it can be placed under the genus of performance competition. If not, the prejudiced person's right to goodwill is violated. It is important to note that an act which amounts to performance competition may nevertheless be wrongful in certain circumstances. This is the case where the perpetrator uses his own legal object (goodwill) in an unreasonable manner; and an act is unreasonable if, in weighing-up the interests of the two competitors, it is found that there is too great an imbalance between the benefit that one gains and the prejudice that the other suffers. In this weighing-up process, the motive (purpose) of the perpetrator may be a strong indication of the (un)reasonableness of the use of his goodwill.

The most important forms of wrongful indirect infringements of the goodwill of a competitor are the following:

(i) Misleading the public about the quality, extent, character or price of one's own performance.

(ii) Passing off ("aanklamping"), ie, adopting or copying a competitor's distinguishing signs (ie, his trade name328 in the case of an undertaking; his trade mark or get-up ("aankleding" or "verpakking") in the case of goods, and his service mark in the case of services).

(iii) Leaning on ("aanleuning"), ie, openly exploiting the reputation of a competitor's perform- ance by means of the use of his advertising signs, such as his trade name, trade mark or service mark.

(iv) Undue influencing of the public with regard to one's own performance.

(v) Bribery of a (potential) client's employee or agent.

(vi) Obtaining and using the trade secrets or confidential business information of a competitor.

(vii) The misappropriation of a competitor's performance, ie, the direct (immediate) adoption or identical (or almost identical) copying of his performance ("prestasieaanklamping").

(viii) Interference with the contractual relationships of a competitor.

(ix) Competition in breach of a statutory duty.

(b) **Direct infringement** An infringement of the goodwill of a competitor is direct where it occurs without the perpetrator making use of his own goodwill. A direct infringement thus implies a direct attack on a competitor. There can be no doubt that, as a rule, direct infringe- ments are in conflict with the competition principle. There is absolutely no question of perfor- mance or merit competition taking place. Such conduct by an entrepreneur is in fact normally perpetrated in order to prevent the merits of a competitor's performance from gaining the edge. Therefore, direct infringements are in principle wrongful. The only further question concerns the grounds of justification available to the perpetrator.

The most important forms of wrongful direct infringement of the goodwill of a competitor are the following:

(i) Statements that disparage a competitor's undertaking, goods or services in a false (injurious falsehood) or truthful manner.

(ii) Instigatingaboycottagainstacompetitor.

(iii) Exercising physical or psychological pressure on potential clients, employees or suppliers of a competitor.

(iv) Direct attacks that primarily infringe an independent subjective right of a competitor, other than his right to goodwill.

8 Productliability

A particularly problematic area of the Aquilian action (and also of the action for pain and suffering) is the liability of the manufacturer for patrimonial loss (and the impairment of personality) caused by a defective product ("product liability"). This problem is inherent in modern highly industrialised communities. Increasing industrialisation and mechanisation have brought about a constant and daily potential of prejudice in the form of the unavoidable risk which defective consumer products create for the individual.

This potential prejudice is evident from instances arising in other legal systems: A pregnant woman takes a tranquilliser called Thalidomide – this causes nerve injury and she gives birth to a deformed baby; a woman enjoys a ginger ale in a café – she suffers shock and contracts gastro- enteritis as a result of the remains of a decomposed snail poured from the dregs of the bottle; a person buys a new Corvair motor-car – he is seriously injured when a defective wheel breaks off while he is turning a corner, and the motor-car overturns; a woman buys pre-packaged medicinal salt from the chemist – fine splinters of glass in the salt cause internal injuries; and a woman uses a well-known hair remedy which causes serious physical lesions.

The courts regard manufacturer's liability as being within the field of application of the Aquilian action. Accordingly, all the elements of a delict must be present for liability of the manufacturer to ensue. The requirements of wrongfulness and negligence require particular attention. In this regard, it must, however, be pointed out that South African law is still in its infancy. In developing legal principles in this new field, much can be learnt from comparative law. Such a comparative approach can already be discerned in case law.

(a) **Wrongfulness** It has repeatedly been stated that wrongfulness in our law lies either in the infringement of a subjective right or in the breach of a legal duty. De Jager gives convincing reasons why the wrongfulness of the manufacturer's conduct lies in the violation of a legal duty. The manufacturer has a duty, according to the legal convictions of the community (*boni mores*), reasonably to prevent defective products from reaching the market, or staying in the market, and infringing the interests of consumers. Hence the causing of damage by a defective product is in principle wrongful, being a violation of this legal duty. This view has been upheld by the Supreme Court of Appeal. In *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd* the court formulated it as follows:

> It is actually self-evident that, according to the legal convictions of the community, a manufacturer acts incorrectly and therefore wrongfully if he makes a product commercially available which in the course of its designated use, and due to a defect, causes damage to the consumer thereof.

The presence of a defect in a product is accordingly a necessary prerequisite for wrongful conduct on the part of the manufacturer. If there is no defect, damage arising from a product cannot, as far as the manufacturer is concerned, be considered contra bonos mores or wrongful.

Consequently, the crux of the matter is to determine when a product is defective or deficient. In general, one has to rely on the feelings, convictions and experience of society. As a general rule, a product may be considered as being defective if it is unreasonably dangerous; and a product is unreasonably dangerous if, in the circumstances, it does not meet the expectations of the reasonable consumer with regard to its safety. Seen in this light, products that are inevitably dangerous according to their form (such as a knife, blade or saw) or content (such as ciga- rettes or alcohol), cannot be regarded as defective. However, even shortcomings in the design of a product (such as a motor-car ashtray, designed with a sharp edge, that injures a passenger's eye during an emergency stop) or insufficient warnings or information on products may be regarded as defects. Furthermore,

> in determining what qualifies as defective, the state of human science and technology and the need for experimentation must not be lost sight of. Many human products are inevitably dangerous at a certain stage, for instance new drugs with unknown side-effects.

(b) **Negligence** Once wrongfulness has been established, there must also (at least) be negligence on the part of the manufacturer in order to found liability. In other words, the manufac- turer's conduct must be tested against the care that the reasonable person would have exercised in the particular circumstances. Here one is concerned with the reasonable foreseeability and preventability of damage. In this regard, damage arising from the abnormal use of a product will probably, as a rule, not be reasonably foreseeable. Otherwise the manufacturer ought to be liable to any person (both consumer and innocent bystander) who suffers damage on account of the defective product, provided, of course, that the prejudice to such a person was reasonably foreseeable.

It is, as a rule, very difficult to prove fault on the part of the manufacturer – either because fault (intent or negligence) is simply not present in the production process or the prejudiced party cannot obtain proof of fault as the technological production process is complicated and a closed book as far as he is concerned. Consequently, the difficulty the prejudiced party has in prov- ing fault should be alleviated, as is the case in Anglo-American law, by a specific application of the doctrine of res ipsa loquitur (the facts speak for themselves). In *Bayer South Africa (Pty) Ltd v Viljoen* the Appellate Division was not in principle opposed to the application of the doctrine where policy considerations justify it. However, Milne JA, unlike Anglo-American law, wanted to restrict the doctrine to its "normal" application, ie, that it is only applicable in instances where the facts of the case give rise to an inference of negligence. It is suggested that the res ipsa loquitur inference of negligence should at least be made where a consumer proves that he was prejudiced by a defective (unreasonably dangerous) product and that the product was in this state when the manufacturer abandoned his control over it.

In light of the difficulty to prove fault on the part of the manufacturer, as well as for various other reasons, it was advocated that product liability should, as in the member states of the EU and the USA, be strict, ie, fault should not be required for liability.

The willingness of the Supreme Court of Appeal to investigate this matter was tested in *Wagener and Cuttings v Pharmacare Ltd*. After thorough consideration, the court was not prepared to recognise strict product liability in principle and thus to become involved "in the function of trying to 'legislate' judicially in this complex field (whether in this case or in other cases)". The plaintiff's remedy was therefore limited to the Aquilian action, which adequately protects the physical integrity according to the court, with the possibility of gradual develop- ment of the approach to the res ipsa loquitur maxim and a reversal of the onus of proof. If strict liability had to be introduced, it was a task of the legislature.

The legislature has now intervened and introduced strict liability for damage caused by a defec- tive product in section 61(1) of the Consumer Protection Act 68 of 2008 ("CPA").386 However, the common law position, as set out above, also remains in force in terms of section 2(10) of the CPA. This applies especially where a defective product causes pure economic loss, and where certain juristic persons do not qualify as consumers in terms of the CPA.

Forms of iniuria

1 Introduction

It is necessary for theoretical and practical purposes to examine separately each of the species of personality infringement that may be found within the *genus iniuria*. These forms may be classified according to the different rights of personality that are already recognised and protect- ed in our law; ie, the rights relating to the physical integrity (the rights to corpus or body and *libertas* or physical liberty), the right to *fama* (good name), and those with regard to dignitas, which serves as a collective term for the rights to dignity, privacy, feelings and identity.

Prior to a discussion of these rights, consideration must be given to the following three issues, proceeding on the assumption that an iniuria in principle consists of the intentional infringement of a personality right: *iniuria per consequentias*; personality infringement and patrimonial damage; and the personality rights of juristic persons.

(a) *Iniuria per consequentias* At common law, the position was that an iniuria could not only affect a person directly, but also indirectly through other people. This indirect *iniuria* arose in connection with three relationships, ie between husband and wife, father and child, and testator and heir. The actio iniuriarum was granted to the husband or father in respect of an iniuria committed against his wife or child and to the heir in respect of an iniuria committed against the testator's mortal remains.

It is questionable whether this concept, which simply presumes that an *iniuria* against the wife, child or testator automatically affects the husband, father or heir, should still be recognised today. Since there is no examination of whether these three people have in fact suffered personality infringement (which is essential for the existence of an iniuria), our courts are reluctant to recognise this concept. One may therefore conclude that insofar as iniuria per consequentias still finds application in our positive law, it bears a meaning completely different from that accorded to it in common law. Unlike the position at common law, the person involved in a particular relationship is not automatically affected by the "indirect" *iniuria*. He will only be able to succeed with an action if his personality has in fact been infringed. Consequently, all the traditional requirements for an *iniuria* also apply in this case. Particular attention should be given to the requirement of *animus iniuriandi*. Where a person is unaware of the relationship between the plaintiff and the person against whom the injurious action was originally aimed, he should be able to avoid liability on the ground of lack of intent.

(b) **Personality infringement and patrimonial damage** An *iniuria* primarily infringes a personality interest of another, but it often causes patrimonial damage as well. In principle, the prejudiced person must then institute two actions: the *actio iniuriarum* for satisfaction (*solatium*) and the *actio legis Aquiliae* for patrimonial damages. Although there was uncertainty in the past regarding this matter, it has now been confirmed in *Media 24 Ltd v SA Taxi Securitisation* that in instances of the defamation of a corporation, patrimonial (special) damages must be claimed with the Aquilian action whilst non-patrimonial (general) damages must be claimed with the *actio iniuriarum*.

(c) **Personality rights of juristic persons** Before the decision of the Appellate Division in *Dhlomo v Natal Newspapers (Pty) Ltd*, various decisions supported the view that, unlike a natural person, a juristic person or *universitas* (for example, a company, undertaking or university) has no personality rights (including the right to good name). By contrast, there were numerous decisions that recognised that a trading corporation may sue on the ground of defamation (infringement of its reputation, good name or fama) if the allegations objected to "[were] calculated to injure its business reputation, or to affect the trade or business which it was formed to carry on". In such cases, damages are awarded without proof of actual loss. This view, which was stated obiter for the first time by the Appellate Division in *GA Fichardt Ltd v The Friend Newspapers Ltd*, was unequivocally confirmed by this court in the Dhlomo case, mainly on the ground "that it would be unrealistic not to hold that the law as stated by this Court in Fichardt's case more than seventy years ago has become the law of South Africa. I accordingly so hold".

Before the Dhlomo case, it was also uncertain whether a non-trading juristic person could sue for defamation. Now, this case also accepted "that a non-trading corporation can sue for defamation if a defamatory statement concerning the way it conducts its affairs is calculated to cause it financial loss" (irrespective of whether such loss actually occurred).

This view, generally accepted by the courts, implies that juristic persons have a personality right to fama worthy of protection. The question of whether this view is justified in light of the common law basis of the actio *iniuriarum*, may be asked. Traditionally, it is accepted that the function of the actio iniuriarum lies in the provision of solatium (solace money) or satisfaction (sentimental damages) for the salving of the injured personality (sentimental loss or injured feelings). Strictly speaking, this point of departure means that the *actio iniuriarum* is not available to the juristic person, which has "no feelings to outrage or offend". In reality, however, exceptions to this general principle have already occurred in common law. Furthermore, it seems that the fact that an injury to personality can exist without injured feelings, and that there is already a trend in case law to award compensation for such an injury to natural persons in certain instances,31 seemingly provide a good basis for making the actio iniuriarum available in the case of the defamation of a juristic person.32 However, alternative remedies for the defa- mation of a corporation may be more appropriate than an award of (sentimental) damages. Alternative remedies (for example, retraction of and an apology for the defamation) are indeed available or could be developed in our law. The fact that the actio iniuriarum, aimed at solatium for injured feelings, is not a suitable remedy to address the infringement of the reputation of corporations (including non-trading corporations, such as trade unions), provides a good reason for changing the status quo by discarding the *actio iniuriarum* in respect of corporations. Naturally, this does not imply that corporations do not possess a personality right to reputation which is worthy of protection by alternative remedies. This is also justified by policy considerations. Consequently, the recognition by the courts of the juristic person's personality right to *fama* can be fully supported.

The question of whether this protection of the personality of the juristic person can be extended to the other recognised interests of personality of the natural person, ie, body, physical liberty, feelings, honour, privacy and identity, arises. It stands to reason that a juristic person lacks a body (and therefore also physical liberty). The opposite view would be in direct conflict with reality. As a result of the fact that an infringement of honour (dignity) and feelings lies exclusively in injury to the feelings, and a juristic person does not have feelings that can be hurt, the recognition and protection of these interests of personality are likewise impossible in the case of the juristic person. This is also evident from case law.

However, the personality injury or harm in cases of invasion of the rights to privacy and identity may be analysed in the same way as the infringement of the right to the good name and it would lead to the same conclusion as in the case of defamation. This means that in the cases of privacy and identity, an injury to personality can exist without an injury to feelings. Privacy and identity can indeed also be violated without the injured person being conscious thereof. A remedy should therefore also be available for infringement of the privacy or identity of the juristic person. This view was indeed adopted by the Appellate Division in *Financial Mail (Pty) Ltd v Sage Holdings Ltd4.* with regard to the right to privacy, and confirmed by the Constitution- al Court.

To summarise, the confirmation by the Appellate Division of the principle that a juristic person can be defamed and is entitled to a remedy, is not only realistic but is also in conformity with the practical demands of a modern society; furthermore it is also theoretically and constitutionally justified. Apart from this recognition of the personality right to a good name and also of the right to privacy, personality rights of juristic persons should for obvious reasons only be extended to the right to identity.

2 Rights relating to physical integrity

2.1 Introduction

It is trite that physical integrity is recognised in our law as worthy of protection. A distinction is made between two aspects of physical integrity which have developed into independent interests of personality, ie the body itself and physical liberty.

2.2 The right to *corpus* or body

2.2.1 General

The *corpus* (bodily and psychological integrity) is protected against every factual infringement of a person's physique or psyche. Physical infringements may occur with or without violence and with or without pain. Even an infringement of the senses, whereby a physical feeling of disgust, discomfort or repugnance is caused, is included. Psychological harm, by contrast, occurs mostly as a result of fear or emotional shock. In order to establish liability under the *actio iniuriarum*, the bodily infringement need not be accompanied by contumelia in the sense of insult. The following requirements must, however, be present: the infringement must not be of a trivial character (*de minimis non curat lex*); it must be wrongful; and it must be committed animo iniuriandi. In connection with wrongfulness, the following may be stated: given that the *corpus* is regarded as being one of man's most valuable legal interests, every factual infringement of the physical-mental body is in principle *per se contra bonos mores* or wrongful. There are, however, exceptions: factual infringements of the corpus by means of conduct that corresponds to the demands of modern society, or by means of omission are, for example, not per se wrongful. Moreover, a justified violation of the body is naturally also lawful.

2.2.2 Seduction

Seduction is the extra-marital defloration of a girl with her consent. This form of infringement of physical integrity has crystallised in practice into a separate form of iniuria.

Positive law stipulates two requirements which must be met in order for an action for seduction to succeed. Firstly, there must be a physical defloration of the girl. Secondly, the defloration must have occurred as a result of the man's seductive conduct; this implies that he must have overcome the girl's opposition to his sexual advances. The manner in which he does this, for example by making promises of marriage or by deceitfully inducing the girl to enter into a bigamous marriage, or by abusing a relationship of dependency, is irrelevant. Where seductive conduct is, however, absent, for example, where the girl was the seducing party, the man will not incur liability.

The girl loses her right to claim if she continues her intimate relationship with the man after the seduction. She may, however, still institute an action even if she had sexual intercourse with or married someone other than the seducer after the seduction, or if, at the time of the seduc- tion, she was aware of the man's married status, or if she received money or gifts from the man.

At common law, the man had the choice either of paying the girl compensation or marrying her. Presently, it is uncertain whether the man may defend himself against a claim for compen- sation by making a *bona fide* offer to marry the girl.

An element of seduction is that the seduced girl gave her consent to sexual intercourse. Consent, therefore, does not exclude the wrongfulness of the man's act. This state of affairs perplexes writers. McKerron is of the opinion that the action for seduction is sui generis since an iniuria is lacking as a result of the girl's consent. Van der Merwe and Olivier see the action as an anomaly that is not only in conflict with the principles of consent to injury, but for which there is also, viewed from a legal policy point of view, no justification in modern law. De Groot (followed by Van den Heever) and Joubert hold the view that the virgin's consent is invalid, either "om der vrouwen zwakheid", or as a result of the man's seductive behaviour. Our view with regard to seduction is that one is dealing neither with an action sui generis, nor with an anomaly. Seduction is a form of *iniuria* where all the normal principles apply. The consent of the girl is invalid in the circumstances, not because of her "weakness" or the seductive conduct of the man, but simply because such consent is regarded as invalid according to the legal convic- tions of the community (*boni mores*).

There is a difference of opinion as to whether animus iniuriandi is a requirement for liability for this action. Ignorance of the girl's virginity, which would in itself exclude intent, does not seem to constitute a defence. This is probably an example of liability without fault.

2.3 The right to *libertas* or physical liberty

2.3.1 General

The libertas (bodily freedom) is protected not only against the total deprivation of liberty but also against any limitation of a person's freedom of movement or action. With regard to such limitation it must be certain that there was a "physical means of obstruction" or at least that "a person was being subjected to physical control" (even if only verbally).

As in the case of bodily integrity, any unjustified interference with physical liberty is as a rule wrongful89 and an actionable iniuria, provided that it was committed animo iniuriandi and was not of a trivial nature. The influence of English law has, however, led to the development of two forms of infringement of physical liberty which have come to be recognised as separate forms of iniuria. These are wrongful deprivation of liberty (constituted either by false imprison- ment or wrongful arrest) and malicious deprivation of liberty (malicious imprisonment or malicious arrest).

2.3.2 Wrongful deprivation of liberty: wrongful arrest and wrongful detention

As a form of *iniuria*, wrongful deprivation of liberty consists in a person being deprived of his physical freedom without justification. The existence of such deprivation must be judged objectively. Where a person thinks or believes that he is being held captive while this is not in fact the case, infringement of his physical liberty does not occur. However, a person need not be aware of the fact that he is being deprived of his liberty for the personality infringement to be present. The deprivation of liberty is in itself an independent infringement and in principle, therefore, constitutes an iniuria.

To succeed in an action based on wrongful deprivation of liberty, the plaintiff must prove that the defendant himself, or a person acting as his agent or servant, deprived him of his liberty. For example, where the defendant furnishes a policeman with information on the strength of which the latter himself decides to arrest the plaintiff, the defendant will not be liable on the ground of wrongful deprivation of liberty.

As a rule, every interference with physical liberty is prima facie (in the absence of a ground of justification) wrongful. The exceptions are those forms of deprivation of liberty which are normal in contemporary society and therefore cannot be considered as contra bonos mores. However, a prima facie lawful arrest (for example, in terms of a valid warrant) can be wrongful if the wrongdoer acted with an improper motive; and such a motive is present if the arrest was executed with a purpose other than bringing the arrested person properly to trial.

Although the wrongful deprivation of liberty is an iniuria for which animus iniuriandi (intent) should be a requirement, the courts, under the influence of English law, have simply ignored this requirement, and neither intent nor negligence is necessary to found liability. Therefore, one is dealing with a form of liability without fault. Since consciousness of wrongfulness (as a necessary element of intent) is not required for liability, the defendant cannot plead mistake as a ground excluding fault.

2.3.3 Malicious deprivation of liberty

Unlike the wrongful deprivation of liberty, where the result complained of must have been caused without justification by the defendant himself or some person acting as his agent or servant, the conduct in the case of malicious deprivation of liberty takes place under the guise of a valid judicial process. The defendant makes improper use of the legal machinery of the state, either through a policeman acting on his own discretion or through a valid warrant, in depriving the plaintiff of his liberty. The actual deprivation of liberty is consequently not carried out by the defendant himself or by his servant or agent, but by the machinery of the state through a valid judicial process.

As a result, the plaintiff will have to prove the following in order to succeed in an action based on the malicious deprivation of liberty: that the defendant instigated the deprivation of liberty; that the instigation was without reasonable and probable cause; and that the defendant acted animo iniuriandi. These requirements are similar to those for malicious prosecution. Note that if a criminal prosecution results from the deprivation of liberty, the plaintiff will also have to prove that the prosecution failed before he will be able to succeed in an action based on the malicious deprivation of liberty.

3 The right to *fama* or good name

3.1 Introduction

Like the rights to corpus and libertas, the right to fama is recognised and protected as an independent personality right in our law. This is the well-known field of defamation law. A person's fama or good name is the respect and status he enjoys in society. Any action which has the effect of reducing his status in the community (ie is defamatory to him), conse- quently infringes his fama and is in principle an iniuria. A distinction is made between defa- mation in general as iniuria, and those forms of infringement of good name which have in practice already crystallised into specific forms of iniuria under different names, ie, malicious prosecution and wrongful and malicious attachment of property.

3.2 Defamation

3.2.1 Definition

Defamation is the intentional infringement of another person's right to his good name. To elaborate, defamation is the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation. From this definition the elements of this iniuria are apparent, ie the act (the publication of words or behaviour), an injury to personality (the defamatory effect of words or behaviour), wrongfulness (the infringement of the personality right to good name) and intent (*animus iniuriandi*). It is not an element of defamation that the defamatory allegation must be false. True defamatory words can also be actionable.

3.2.2 Elements

3.2.2.1 Publication

Since the good name, respect or status which a person enjoys in society relates to the opinion of others concerning him, and defamation consists in the infringement of his good name, it is self-evident that defamation will arise only if the defamatory statement or behaviour has been published or disclosed to a third person. Without such publication, the opinion of others with regard to the person involved cannot be lowered. Thus, publication is a necessary requirement for defamation.

In general, this requirement is satisfied if the words or conduct are made known or disclosed to at least one person other than the plaintiff himself. This general principle is, however, subject to important qualifications. One of them is that the courts do not consider the disclosure of defamatory words or behaviour to an outsider who is unaware of the defamatory character or meaning thereof in relation to the plaintiff as publication. A second is that the communi- cation of defamatory words concerning a third party by one spouse to the other does not constitute publication according to the decision in *Whittington v Bowles*.

Once publication is established, the plaintiff must prove that the defendant was responsible for the publication. In this regard it may be stated as a general rule that publication is attributed to the defendant if he was aware or could reasonably have expected that an outsider would take cognisance of the defamation. The question is therefore whether the result objected to was foreseen or was at least reasonably foreseeable. Note that not only the person from whom the defamatory remark originated, but also any other person who repeats, confirms, or even draws attention to it, is in principle responsible for its publication.

3.2.2.2 Defamatory effect: wrongfulness

Wrongfulness with regard to defamation lies in the infringement of a person's right to his good name. When determining wrongfulness, the question of whether the good name of the person involved has in fact (factually) been infringed is irrelevant. For example, a witness may as a rule not be asked how he understood the words or behaviour in question. According to *Le Roux v Dey* a two-stage enquiry must be followed to establish prima facie wrongfulness. The first is to establish the ordinary meaning of the statement. The inquiry is an objective one conducted through the lens of the ordinary reasonable reader of the particular statement. The second is whether that meaning is defamatory. Here the question is whether, in the opinion of the reasonable person with normal intelligence and development, the reputation of the person concerned has been injured (thus also an objective approach). If so, the words or behaviour are defamatory to, and in principle (prima facie) wrongful as against that person. The objective reasonable person test is thus of decisive importance with regard to the question of wrongfulness in cases of defamation. This test must be seen as a particular embodiment of the boni mores or reasonable- ness criterion, which is the general yardstick for wrongfulness (and must not be confused with the reasonable person test for negligence). The following principles have crystallised in practice with regard to the application of this test:

(a) The reasonable person is the fictional, normal, well-balanced and right-thinking person, who is neither hypercritical nor oversensitive, but someone with normal emotional reactions.

(b) The reasonable person is someone who subscribes to the norms and values of the Constitution that must inform all law. The constitutional principles must therefore be the basis upon which the values and views of reasonable members of the community must be determined.

(c) The reasonable person is a member of society in general and not only of a certain group. The alleged defamation must thus have the effect of harming the plaintiff's good name in the eyes of all reasonable persons in society.

(d) The reaction of the reasonable person is dependent on the circumstances of the particular case. The alleged defamation must therefore be interpreted in the context in which it is pub- lished.

(e) Verbal abuse is in most cases not defamatory because it normally does not have the effect of injuring a person's good name.

(f) Words (or behaviour) are prima facie or according to their primary meaning, either defama- tory or non-defamatory. Words may, however, also have a secondary meaning, which is an extraordinary meaning attached to them by a person with knowledge of special circumstances. It follows that the plaintiff may show that words which are in their primary sense non- defamatory have a secondary defamatory meaning (the so-called innuendo). Vice versa, the defendant may prove that prima facie defamatory words are in fact non-defamatory. In both cases, the party concerned must allege and prove the circumstances on which the innuendo is based. Both the primary and secondary meaning is ascertained objectively by means of the reasonable person test.

(g) Where words or conduct are capable of more than one meaning, the courts apply the normal standard of proof in civil cases, that is a balance of probabilities. Where an allegedly defamatory statement is equally capable of bearing more than one meaning, one that is innocent and another that is defamatory, the court must adopt the non-defamatory meaning.

(h) The law requires of public figures, politicians and public officers (by virtue of their chosen professions) to be robust and thick-skinned in relation to negative comments made against them.

The plaintiff who proves that words or behaviour are defamatory in the judgment of the reason- able person does not thereby prove that a wrongful act has been committed against him. He may of course only institute an action on the ground of defamation if the defamatory publication concerns him or refers to him. The plaintiff must therefore expressly aver and prove that the defamation pertains to his good name. The test to ascertain this connection is again that of the reasonable person, ie whether the defamatory publication can be linked to the plaintiff accord- ing to the judgment of the reasonable person.

3.2.2.3 Grounds of justification

The plaintiff who proves that the publication is defamatory and that it refers to him, provides only prima facie proof of wrongfulness. A presumption of wrongfulness then arises, which places the onus on the defendant to rebut it. He may do this by proving the existence of a ground of justification (for example, privilege, truth and public interest, and fair comment) for his conduct. There is no *numerus clausus* of grounds of justification. Apart from the traditional grounds of justification in defamation cases, new grounds of justification may develop in accordance with the boni mores of our (constitutional) community.

3.2.2.3.1 Privilege or privileged occasion

Privilege exists where someone has a right, duty or interest to make specific defamatory asser- tions and the person or people to whom the assertions are published have a corresponding right, duty or interest to learn of such assertions. Privilege thus grants a person the legal right to injure another's good name and in so doing sets aside the prima facie wrongfulness of his conduct.

A distinction must be made between absolute and relative privilege. In the case of absolute privilege, the defendant is protected absolutely in the sense that liability for defamation is completely excluded. These instances are regulated by statute. Thus, for example, in terms of the Constitution, 1996 members of parliament (National Assembly and National Council of Prov- inces) are given complete freedom of speech during the debates or other proceedings of parlia- ment.

By contrast, in the case of relative privilege, the defendant enjoys only provisional or condition- al protection. This protection falls away as soon as the plaintiff proves that the defendant ex- ceeded the bounds of the privileged occasion. A few categories of this privilege have developed in our law. They are the following:

(a) **Discharge of a duty or furtherance of an interest** This category is present where a person has a legal, moral or social duty or a legitimate interest in making defamatory assertions to another person who has a corresponding duty or interest to learn of the assertions. The question of whether such a duty or interest exists causes no problems in the case of a legal duty. The existence of a social or moral duty or interest must, however, be ascertained objectively, by means of the reasonable person test If it is proved that both parties had a corresponding duty or interest (ie, that a privileged occasion existed), then the defendant must further prove that he acted within the scope or limits of the privilege. To do this, he must prove that the defamatory assertions were relevant to, or reasona- bly connected with the discharge of the duty or the furtherance of the interest. However, even when the defendant has proved this, he still only enjoys provisional, in contrast to complete, protection. The plaintiff may still show that the defendant in fact exceeded the limits of the privilege because he acted with an improper motive (malice).

(b) **Judicial or quasi-judicial proceedings** This category concerns defamatory statements made during the course of judicial or quasi-judicial proceedings and applies to all partici- pants therein. To enjoy provisional protection, the defendant need only prove that the state- ments were relevant to the matter at issue. The plaintiff may then prove that, notwithstanding their relevance, the statements were not supported by reasonable grounds. In the absence of relevance or reasonable grounds, the defendant exceeds the limits of this privilege and acts wrongfully. If, however, it is found that the defendant's assertions conform to these two requirements, the plaintiff may nevertheless show that the defendant exceeded the limits because he acted with an improper motive.

(c) **Privileged reports** This category relates to defamation contained in the publication of the proceedings of the courts, parliament and certain public bodies. To enjoy provisional protec- tion, the defendant must prove that the reporting was a fair and substantially accurate account of the proceedings.181 However, as in the case of the previous two categories of privilege, the provisional protection will fall away in this case if the plaintiff proves that the defendant acted with an improper motive.

3.2.2.3.2 Truth and public interest

The *prima facie* wrongfulness of the defendant's conduct will be cancelled if he proves that the defamatory remarks were true and in the public interest. The defendant need only prove that the remarks are substantially – and not literally – true, ie, that the sting of the charge is true. What is in the public interest will depend on the convictions of the community (*boni mores*), and in this regard "the time, the manner and the occasion of the publication" play an important role. Past transgressions should, for example, not be raked up after a long lapse of time. Character assassination should also not be committed for the mere sake of making a profit. Whether members of the public have an interest in the publication of defamatory facts of which they are already aware will depend on the time, manner and occasion of publication. Unlike the case of privilege, the limits of this defence are not exceeded if the defendant acted with malice.

3.2.2.3.3 Media privilege (reasonable publication of untruth)

This ground of justification concerns the reasonable publication of false or untrue defamatory statements by the media. Because media privilege deals with the publication of untruths, this defence must be applied with caution. When determining the reasonableness of publica- tion, the legal convictions (*boni mores*) of the community of our country must be applied. Several factors, that are not meant to be complete or decisive, can be considered in this regard.

The public interest, and not merely public interestedness (or inquisitiveness) in the matter; the nature, extent and tone of the allegations; the nature of the information upon which the allegations were based; the nature of the mass medium used – television is usually more far- reaching than the written word; the extent of distribution and the sector of the public at which the publication is aimed; the reliability of the information; steps taken to verify the information; the extent to which other material supports the allegations at the time of publication; the oppor- tunity given to the relevant person to react to the allegations; the necessity or urgency to publish before the truth can be positively verified; the possibility that the same objective could be reached in a less harmful manner; and, it must be added, the presence of a malicious motive.

3.2.2.3.4 Political privilege

This defence is analogous to media privilege and entails the reasonable publication of (false or untrue) defamatory allegations on the political terrain. The factors that can play a part here in determining the reasonableness (or otherwise) of publication agree with those applicable to media privilege, with one exception, ie that the publication must be made "with the reasonable belief that the statements made are true".

3.2.2.3.5 Fair comment

The prima facie wrongfulness of a defamatory publication may further be set aside if the de- fendant proves that the defamation forms part of a fair comment on facts that are true and in the public interest. Thus there are four requirements:

(a) The defamation must amount to comment and not to the assertion of an independent fact. The test is that of the reasonable person.

(b) The comment must be fair. What is fair is in general ascertained by reference to the convictions of the community (*boni mores*). In particular, the comment must be relevant to the facts involved and convey the honest and *bona fide* opinion of the defendant, no matter how critical, exaggerated, biased, ill-considered or unbalanced it is, provided that the facts commented upon are not false. If relevance and honesty are present, the plaintiff may nevertheless prove that the defendant exceeded the limits of the defence by reason of his improper motives.

(c) The facts on which the comment is based must be true.

(d) These facts must be in the public interest.

3.2.2.4 Fault

3.2.2.4.1 Animus iniuriandi

Initially, through the infiltration and acceptance of English law terminology at first, and later also the principles of the English law of defamation, our courts incorrectly undermined *animus iniuriandi* as a material requirement for defamation. However, from the beginning of the 1960s, the attitude of the courts began to change. The process started with the decision in *Maisel v Van Naeren* and in its footsteps followed the well-known trilogy of the Appellate Division. Today *animus iniuriandi* is, with a few exceptions, accepted as an essential requirement for defamation. Negligence is as a rule therefore insufficient to render the wrongdoer liable.

Animus iniuriandi or the intent to defame means "the mental disposition to will the relevant consequences, with the knowledge that the consequence will be wrongful". If one of these elements, ie direction of the will and consciousness of wrongfulness, is absent, there is no question of intent to defame. It is important to note that although the plaintiff must expressly aver the existence of animus iniuriandi in his pleadings, he need not prove intent on the part of the defendant. If it is certain that the publication is defamatory and that it relates to the plaintiff, there is, apart from the presumption of wrongfulness, also a presumption that the defamation was committed intentionally. Thus the burden of rebutting the presumption is placed on the defendant. This he may do by producing evidence which shows that either direction of the will or consciousness of wrongfulness, or both, as essential elements of intent, are lacking on his part; in other words that a ground excluding intent is present. Two of these grounds merit closer attention: mistake and jest.

3.2.2.4.2 Ground sex cluding intent

(a) Mistake If a person is unaware of the wrongfulness of his defamatory publication because, for whatever reason, he *bona fide* thinks or believes that his conduct is lawful, consciousness of wrongfulness, which is an essential element of intent, and therefore also intent, are absent as a result of his mistake. His mistake therefore rebuts the presumption of *animus iniuriandi* and in this way becomes a ground excluding intent.

The question of whether the defendant erred must, as in all cases where intent is required, be determined subjectively. This means that the decisions which require absence of negligence or reasonableness as a qualification for the defence of mistake to succeed are incorrect. In the case of an unreasonable mistake, the defendant is held liable on the ground of his negligence.

(b) Jest If the defendant proves that he published the defamatory words in jest, in circumstances where his will was not directed at the infringement of the prejudiced person's right to good name, directing of the will as essential requirement of intent is absent and he should be able to rebut the presumption of *animus iniuriandi.*

The courts, however, do not follow this approach. For a successful plea of jest, the courts require that the (reasonable) bystander should also have regarded the words as a joke. If that is indeed the case, the defendant is not liable; if not, the defendant is held liable, evidently irrespective of the actual absence or presence of *animus iniuriandi*.

3.2.2.4.3 Negligence

Although animus iniuriandi is traditionally required for defamation, negligence has, over the course of time, been accepted as the fault requirement for certain forms of defamation. In the first place, liability based upon negligence has been recognised for distributors and sellers of printed matter (for example, newpapers and magazines) containing defamatory matter. Secondly, there are judgments on the liability of the press for defamation recognising non- intentional but negligent mistake as ground for liability. Thirdly, a general principle was introduced in *National Media Ltd v Bogoshi* that negligence is sufficient for defamation by the mass media. Finally, there is case law that wants negligence recognised for all instances of actionable defamation, and not only in respect of the mass media.

3.3 Malicious prosecution

In Roman law it was regarded an *iniuria* to summon someone before the courts *vexandi causa*. The *actio iniuriarum* was available to a person acquitted of a criminal charge instituted by someone with an improper motive. As a result of the influence of Germanic views, uncertainty arose in Roman-Dutch law with regard to the nature and requirements for malicious prosecu- tion as an *iniuria*. As a result of this uncertainty, our case law initially took over the English law of malicious prosecution almost holus-bolus. At present, the following requirements must be met before a plaintiff may succeed with an action on the ground of malicious prosecution: (a) the defendant must have instigated the proceedings; (b) the defendant must have acted without reasonable and probable cause; (c) the defendant must have acted animo iniuriandi; and (d) the prosecution must have failed.

(a) **Instigation** Since criminal proceedings are instituted mainly by the state, it is extremely difficult to determine whether a defendant's conduct complies with the requirement of instiga- tion. There are, however, practical criteria which have been developed by the courts to assist in determining the content of this requirement. As a starting point, it may be stated that instiga- tion is present only if the prosecution in fact resulted from the defendant's actions. Whether this is the case, will depend on the circumstances. The defendant will, however, have to do more than simply comply with his general obligation to give bona fide information to the police. If he in addition gives active assistance and identifies himself personally with the prosecution, or lays a definite charge against the plaintiff, or even withholds essential relevant facts when furnishing information to the police, there will be strong indications of instigation.

(b) **Without reasonable and probable cause** There is an absence of reasonable and probable cause for the prosecution either (i) if there are, from an objective viewpoint, no reasonable grounds for the prosecution, or (ii) if, where such grounds are in fact present, the defendant does not, viewed subjectively, believe in the plaintiff's guilt. The defendant will thus be acquitted if, on the one hand, there existed reasonable grounds for the prosecution and, on the other hand, he also believed in the plaintiff's guilt.

(i) The question of whether reasonable grounds exist may only be answered by reference to the facts of each particular case. The facts must then reasonably, or according to the reasonable person, indicate that the plaintiff probably committed the crime. This requirement, which was adopted from English law, may be reconciled with our own legal principles on the following basis: firstly, the requirement is sensible from a policy point of view; secondly, it is not unique to English law, since Roman-Dutch writers also mention it; and, thirdly, it is connected with the element of wrongfulness for iniuria as a delict. The criterion of reasonableness, which is used in determining the wrongfulness of an act, is being dealt with here. The factual infringement of the interests of personality (especially good name and dignity) of a person as a result of his criminal prosecution is justified – and thus reasonable – because of the public interest in prosecutions for which reasonable grounds exist (even if the accused is found not guilty).

(ii) The subjective belief of the defendant in the guilt of the plaintiff is a necessary element for the existence of reasonable and probable cause. This means that even if the defendant clearly acted on reasonable grounds, but nonetheless did not honestly believe in the plaintiff's guilt, reasonable and probable cause will still be absent. At first glance, this view would appear to be incorrect. If, viewed objectively, there are in fact reasonable grounds, the defendant's belief or disbelief in the guilt of the plaintiff cannot affect this fact. Yet, from a theoretical perspective, the result of this view may be justified. The fact that, despite the existence of reasonable grounds justifying the prosecution, the defendant did not believe in the plaintiff's guilt necessitates the conclusion that he in fact knew or realised that the plaintiff was innocent. On what other grounds could he not believe in the guilt of the plaintiff? The existence of reasonable grounds indicates precisely that the plaintiff in all probability committed the offence. The defendant's knowledge or realisation of the plaintiff's innocence inevitably leads to the conclusion that, seen from the defendant's point of view, there were in fact no grounds for prosecution and that he instigated the prosecution solely on the ground of an improper motive or animo nocendi. Seen in this light, the defendant's action is indeed unreasonable and consequently unlawful. Hence, the approach adopted by the courts may be fully supported.

(c) ***Animus iniuriandi*** Although, under the influence of English law, most cases initially required that the defendant should have acted with malice, it may be accepted in light of authoritative dicta of the Appellate Division that *animus iniuriandi*, and not malice, is required for malicious prosecution in our law. There is nevertheless case law in which animus iniuriandi was replaced with gross negligence.

(d) **Failure** The requirement that the prosecution must have failed is self-evident. A refusal of the attorney-general to prosecute is also considered a failure of the prosecution.

3.4 Attachment of property

Attachment of a person's property is, strictly speaking, a form of defamation, as it primarily infringes the good name of the person involved. Even in Roman law the attachment of property *dolo malo* was regarded as an iniuria. Under the influence of English law a distinction is, however, made between wrongful (illegal) and malicious attachment of property. This distinction essentially lies in the fact that while the former takes place without any justification, the latter is undertaken under the guise of a valid judicial process.

(a) **Malicious attachment** Given that malicious attachment is undertaken under the guise of a valid judicial process, the defendant prima facie acts lawfully. Thus, the defendant may only be liable if he instigated the legal process *animo iniuriandi* and without reasonable and probable cause.

(b) **Wrongful attachment** A defendant who, without any justification or judicial authority whatsoever, attaches the plaintiff's property, is liable without further ado. Fault (intent or negligence) is unnecessary to found liability – thus this is a case of liability without fault under the *actio iniuriarum.* A causal link must nevertheless exist between the attachment of the plaintiff's property and his damage.

4 Rights relating to *dignitas*

4.1 The right to dignity

The right to dignity is recognised in our law as an independent personality right within the concept of *dignitas*.

A person's dignity embraces his subjective feelings of dignity or self-respect. Infringement of a person's dignity accordingly consists of insulting that person. There are an infinite number of ways in which a person may be insulted. Any insulting words or belittling or contemptuous behaviour may be included here. Since one is concerned with a person's opinion of himself and not with the opinion of others, as is the case with defamation, publication of the insulting behaviour to third persons is unnecessary to constitute an iniuria; publication to the plaintiff alone is sufficient.

To be classified as wrongful (or as an infringement of the right to dignity), the behaviour must not only infringe the subjective feelings of dignity (factual infringement of a legal object), but must at the same time also be contra bonos mores (violation of a legal norm). Regarding the latter, "the notional understanding and reaction of a person of ordinary intelligence and sensibili- ties" are of paramount importance. If the plaintiff proves that he feels insulted in circum- stances where the reasonable person would also have felt insulted, a presumption of wrong- fulness arises, which the defendant may rebut by proving the existence of a ground of justifica- tion for his conduct.

If he does not succeed in doing this, wrongfulness is certain and a presumption of animus iniuriandi arises. The onus is then on the defendant to rebut this presumption by proving a ground excluding intent. If he fails to do this, an iniuria is proved.

4.2 The right to privacy

The right to privacy is recognised as an independent personality right which the courts have included within the concept of *dignitas*.

Privacy is an individual condition of life characterised by seclusion from the public and publicity, the extent of which is determined by the individual himself. This implies an absence of acquaintance with the individual or his personal affairs in this state. Accordingly, privacy can only be infringed by unauthorised acquaintance by outsiders with the individual or his personal affairs.

There are two ways in which such acquaintance may occur: firstly, when an outsider himself becomes acquainted with the individual or his personal affairs (which may be described as an instance of acquaintance or intrusion), and secondly, where the outsider acquaints third parties with the individual or his personal affairs which, although they are known to the outsider, remain private (which may be termed an instance of disclosure or revelation). Moreover, recording of private facts constitutes a threatening wrongful infringement of privacy. The wrongfulness of a (factual) infringement of privacy is determined by means of the general test, ie, the *boni mores* or reasonableness criterion. As in the case of other *iniuriae*, the presence of a ground of justification excludes the wrongfulness of an invasion of privacy.

Examples of wrongful invasions of privacy by intrusion which have been considered by our courts are: entry into a private residence; secretly watching a person in closed quarters; reading private documents; listening in to private conversations; shadowing a person; taking unauthorised blood tests; searching a person; and the improper interrogation of a person by the police.

Examples of violating the right to privacy by disclosure are the following: the disclosure of private facts which have been acquired by a wrongful act of intrusion; the disclosure of private facts contrary to the existence of a confidential relationship; and the publication of private facts by the mass media, including the social media such as Facebook.

If wrongfulness has been established, as in the case of insult, a presumption of animus iniuriandi arises, which may be rebutted by the defendant. If he fails to do this, the actio iniuriarum is available to the plaintiff.

4.3 The right to identity

The right to identity was recognised as an independent right of personality in *Grutter v Lombard*.

Identity is that uniqueness which identifies each person as a particular individual and as such distinguishes him from others. Identity manifests itself in various *indicia* by which the person involved can be recognised: ie, facets of his personality which are distinctive of or peculiar to him, for example, his life history, his character, his name, his creditworthiness, his voice, his handwriting, his outward shape, etc. Identity is thus infringed if *indicia* thereof are used in a way that does not reflect the person's true (own) personality image.

Two forms of wrongful identity infringement, which have developed into two independent "torts" in American law, are the public falsification of the personality image ("false light tort") and the economic misappropriation of identity *indicia* (especially for advertising purposes) ("appropriation tort"). These "torts" can serve as guidelines for the development of infringement of identity as an *iniuria* and, as a matter of fact, have been considered by our courts, although sometimes under the guise of protection of privacy. As a general criterion for the determination of the wrong- fulness of (factual) infringement of identity, the boni mores are, however, still of prime im- portance. Naturally, wrongfulness is excluded if a ground of justification is present.

The element of animus iniuriandi must be dealt with in the same manner as in the cases of infringement of dignity and invasion of privacy.

4.4 The right to feelings

Apart from feelings of dignity, a person has a wide variety of other spiritual-moral feelings or inner perceptions on matters such as love, faith, sentiment and chastity. There are few indications at common law and in case law of the protection of feelings316 as an independent personality interest.317 It is nevertheless important to examine specific forms of infringement of the right to feelings, ie breach of promise, adultery and abduction, harbouring and enticement, more closely. As will however become apparent, the Supreme Court of Appeal in RH v DE318 abolished adultery as ground of action in our law.

4.4.1 Breach of promise

It is established law that breach of promise (ie, the unlawful breach of the promise to marry) may constitute an iniuria against the innocent party to the engagement contract. Breach of promise does not per se constitute an *iniuria*. An *iniuria* only arises if the innocent party indeed suffers an actionable impairment of personality. It is self-evident that not every breach of promise results in an impairment of personality and consequently in an *iniuria*. The plaintiff should therefore only succeed in a claim based on *iniuria* if he can prove the requirements necessary for the *actio iniuriarum*, especially wrongfulness and *animus iniuriandi*.

The personality interests that may be infringed by breach of promise are, apart from good name and dignity, particularly feelings of piety.

4.4.2 Adultery

Adultery, ie, voluntary sexual intercourse between a married person and someone other than his or her spouse, was already regarded as an iniuria against the innocent spouse in Roman-Dutch law. This view had been confirmed by our courts before it was dismissed by the Supreme Court of Appeal in *RH v DE*. The *actio iniuriarum* could, however, only be instituted against the third party and not against the adulterous spouse.

The infringed interests of personality which featured most prominently with regard to adultery were feelings (in particular feelings of piety) and dignity. The prejudiced person usually based his or her action on two grounds, ie iniuria on the one hand and, on the other, loss of consor- tium. Since *iniuria* in the case of adultery was equated with the contumelia or insult suffered by the plaintiff, there was no scope under this head for the protection of feelings. The feelings of the innocent spouse were nevertheless protected on the basis of loss of consortium.

This head, which encompasses the "loss of the comfort, society, and services" of the adulterous spouse, could give rise not only to compensation for patrimonial harm occasioned by the loss of, for example, supervision over the household and children, but also to compensation for so-called ideal (immaterial or non-pecuniary) damage occasioned by loss of love, friendship and moral support. As this loss (immaterial damage) undoubtedly infringed the feelings (particularly feelings of piety) of the innocent spouse, one was actually concerned with the awarding of satisfaction for an impairment of personality. Consequently it would have been more appro- priate to classify the non-pecuniary damage arising from a loss of consortium as falling within the scope of the *actio iniuriarum*.

In order to succeed with the actio iniuriarum, all the requirements had to be met. In addition, in *Wassenaar v Jameson* the court mentioned the possibility of an interdict to prevent the third party from committing adultery.

Be that as it may, in *RH v DE* the Supreme Court of Appeal made a radical turnabout. On the basis that the court has a duty to develop the law in accordance with the contemporary boni mores or legal convictions of the community as delictual criterion for wrongfulness, Brand JA, in a well-considered judgment, came to the conclusion that, in the light of the boni mores, adultery can no longer be regarded as wrongful, and that it may accordingly no longer ground the actio iniuriarum. He stated:

> The conclusion I arrive at is that in the light of the changing mores of our society, the delictual action based on adultery of the innocent spouse is outdated and can no longer be sustained; that the time for its abolition has come . . . My finding is that the action derived from the actio iniuriarum and based on adultery, which afforded the innocent spouse a claim for both contumelia and loss of consortium, is no longer wrongful in the sense that it attracts liability and is thus no longer available as part of our law.

This conclusion is supported by the position in most Western countries and the conviction of the majority of South African authors. One can accept that since adultery is no longer wrongful, the interdict would also not be at the disposal of the innocent spouse, as wrongfulness is a requirement for the interdict. What has however been retained, is that the innocent spouse should be able to institute the Aquilian action against the third party for patrimonial loss, for example for the loss of supervision over the household and children.

4.4.3 Abduction, enticement and harbouring

Unless spouses are separated, judicially or voluntarily, each is entitled to the consortium of the other. In principle, an outsider who disrupts consortium renders himself liable to the innocent spouse. Nowadays, the abduction, enticement and harbouring of someone's spouse are still regarded as an actionable loss of consortium.

Abduction is the taking away or kidnapping of a spouse by a third party without his or her consent. Harbouring means giving accommodation to a spouse who has left the matrimonial home against the will of the other spouse. Enticement, by contrast, occurs if a third person, by persuasion or inducement alienates one spouse from the other, and convinces him or her to leave the matrimonial home.

Although it is firmly established that abduction, enticement and harbouring are delicts, the courts have seldom expressed themselves on the question of whether they constitute iniuriae. The actions are generally based on loss of consortium and nothing more. It is nonetheless evident that, as had been the position in the case of adultery, the immaterial (non-pecuniary) damage as a result of loss of consortium is the infringement of the feelings of the innocent spouse. Therefore, all three delicts are in principle iniuriae and the requirements for the actio iniuriarum – especially the requirements of wrongfulness and *animus iniuriandi* – also apply here.

Forms of liability without fault

1 General

1.1 Dominance of the fault theory

In the legal dogma of the previous century it was accepted as axiomatic that a wrongdoer who caused damage could be delictually liable only if there was fault (intent or negligence) on his part. This view of the basis of delictual liability is briefly referred to as the fault theory. According to the proponents of this theory, it is inconceivable that a wrongdoer should be held delict- ually liable in the absence of fault. The absolute acceptance of fault as the only basis for delictual liability culminated in the famous German jurist Von Jhering's statement that the fault theory is a "perpetual truth". This view has traditionally also been accepted in South African law where the law of delict is still firmly based on the principle of fault.

1.2 Reaction to the fault theory

The phenomenal industrial and technological development which commenced in the middle of the last century brought about radical social and economic changes, and gave rise to a need to re- evaluate the traditional basis of delictual liability. Increased mechanisation and expanding technology in almost every facet of life, together with a corresponding and unprecedented exposure of individuals to the risk of harm, drew attention to the inadequacy of the fault theory. Electricity, nuclear power, motor vehicles, aeroplanes and the like have created potentially dangerous situations for the individual in which he is virtually defenceless. The growing need to protect the individual caused the development, in Continental and Anglo-American legal sys- tems, of a field of liability without fault (risk, absolute or strict liability). Likewise in South African law, certain instances of strict liability were imposed by legislation, while a growing number of judges and other jurists8 began to stress the need for the development of a field of delictual liability without fault over and above the traditional area of liability based on fault.

1.3 Justification for liability without fault

The increased liability which liability without fault entails for the defendant, is justified by widely divergent factors such as the creation of a high risk of damage; the advantages which the creator of the risk draws from his products; the greater degree of care occasioned by an increased liability; the possibility of transferring the risk by way of insurance to an insurer; the fact that the wrongdoer exercises control over his enterprise, and thus also the risk it creates; and considerations of fairness in general.

Jurists concentrated particularly on the first two of these factors, in providing a more detailed and theoretical basis for instances of strict liability.

(a) **Interest or profit theory** According to this theory, where a person acts in his own interest, and causes harm to another, he bears the burdens and disadvantages which his activities bring about. Thus the proprietor of a factory – someone who is active in his own economic interests – must, as a corollary of furthering his own interests, also bear responsibility for the harm that this may cause to others. Therefore, he who reaps the benefits of an activity must also bear its losses.

This justification of strict liability is, as Van der Walt contends, unacceptable. In the first place, there is almost no human activity which cannot in one way or another be interpreted as being in the interests of the actor. This would mean that almost any conduct giving rise to damage could form the basis of liability without fault. Secondly, if "interest" and "benefit" are restrictively defined as economic advantage only, it would mean in practice that the victim's claim for compensation is dependent on whether the perpetrator's activity, such as a railway undertaking, is a profitable one or not – an absurd state of affairs.

(b) **Risk or danger theory** This means that where a person's activities create a considerable increase in the risk or danger of causing damage, ie, an increased potential for harm, there is sufficient justification for holding him liable for damage even in the absence of fault. Whether an increase in risk is "considerable" enough in a specific case is difficult to ascertain. For this reason, the danger theory has been subject to much criticism. Van der Walt, however, points out that the question of whether the potential of risk has been increased enough will depend largely on the legal convictions of the community, as reflected in legislation or case law. This theory provides a satisfactory explanation for most of the instances of strict liability which are recognised in our law. Moreover, the utility and practical value of risk liability are emphasised by the Supreme Court of Appeal in relevant cases.

Nonetheless, a satisfactory and universally accepted scientific basis for every instance of liabil- ity without fault has not yet been found, and will probably never be found. A flexible approach is therefore necessary so that each specific case may be valued on its own merits and judged accordingly.

1.4 General characteristics of liability without fault

The most obvious characteristics, which are present in most instances of strict liability, are briefly mentioned here:

(a) Fault is not required for liability in claims for compensation.

(b) *Vis maior* (act of God) and fault on the part of the prejudiced person are generally recognised as defences.

(c) Strict liability is usually imposed – either by legislation or judicial pronouncement – in cases involving activities which as a rule create extraordinary increases in the risk of harm to the community.

(d) In instances where strict liability has been imposed by legislation, the extent of the liability is usually curtailed by fixing maximum amounts of compensation.

(e) Liability without fault is restricted in most cases to damage to life, limb and property (and therefore does not include pure economic loss).

In Continental systems, liability without fault originated primarily from legislation, while in Anglo-American law, case law played the dominant role. In South Africa, both the legislature and the courts have contributed to the development of liability without fault.

2 South African law

There are significant indications of the establishment and development of instances of strict liability in our law, even though our law of delict remains largely dominated by the fault princi- ple. South African law still recognises some common law instances of strict liability; in addition, new instances are being created by the legislature,23 as well as by the courts.

2.1 Common law and case law

2.1.1 Damage caused by animals

2.1.1.1 Actio depauperie

With this action, which originated in the Twelve Tables, the prejudiced person may claim damages from the owner of a domestic animal which has caused damage. The most important characteristic of the actio is that fault on the part of the owner is not a requirement for liability. In other words, this action entails strict liability.

After initial doubt about whether this action had fallen into disuse, the Appellate Division in *O'Callaghan v Chaplin* decided that it is still part of our law. To succeed in bringing the actio de pauperie, the following requirements must be met:

(a) **The defendant must be the owner of the animal when the damage is inflicted**. Mere control over the animal is thus insufficient for a successful claim under the *actio de pauperie*.

(b) **The animal must be a domestic animal**. The concept "domestic animal" must not be in- terpreted too strictly, because it may also include stock, horses, mules and even bees and meer- kats. Other wild animals are, however, excluded.

(c) **The animal must act contra naturam sui generis when inflicting the damage**. This means that the animal involved must have acted, objectively seen, contrary to what may be expected of a decent and well-behaved animal of its kind. A dog that bites, a horse that jumps and an ox that butts, therefore, in principle, act *contra naturam*. However, this is qualified by the requirement that the animal must have caused the damage spontaneously from "inward excitement or vice" or *sponte feritate commota*. Therefore, as a rule, the animal does not act *contra naturam* if it is reacting to external stimuli. This rule is, however, not consistently applied by the courts.

Defences Important defences against the actio de pauperie have developed from the require- ment of spontaneous conduct. They are *vis maior*, culpable or provocative conduct on the part of the prejudiced person, culpable conduct on the part of an outsider and provocation by another animal. All these cases have the effect of excluding liability, because the animal did not act from "inward excitement or vice" and consequently did not act *contra naturam sui generis*. Apart from these defences, the defence of *volenti non fit iniuria* in the form of voluntary assumption of risk is also available to the defendant.48

(d) **The prejudiced person or his property must be lawfully present at the location where the damage is inflicted**. The courts differ in their interpretation of this requirement. Some cases require a "lawful purpose" and others a "legal right" on the part of the prejudiced person in order to establish a lawful presence at the location involved. The latter test is narrower than the former, since a person who has a legitimate purpose may not necessarily have a right to be at the place. The "legal right" approach is nevertheless preferable, because one cannot always determine what the aim or purpose of property, being a lifeless object, is.

Both patrimonial damages and satisfaction may be claimed with the actio de pauperie. The extent of the defendant's liability should be limited in accordance with the flexible criterion for legal causation.

2.1.1.2 Actio de pastu

With this action, which also originated in the Twelve Tables, damages are claimed from the owner of an animal which caused loss by eating plants. As in the case of the actio de pauper- ie, one is concerned with strict liability on the part of the owner.

After initial doubt about whether the *actio de pastu* had fallen into disuse, it may now be accepted that it is still part of our law. It appears that there are three requirements for a successful claim under the *actio de pastu*:

(a) The defendant must be the owner of the animal when the damage is caused.

(b) The animal must cause damage by eating plants.

(c) The animal must act of its own volition when causing the damage.

As in the case of the actio de pauperie, vis maior and fault on the part of the prejudiced person constitute complete defences against the actio de pastu. However, culpable conduct on the part of an outsider does not exclude the actio de pastu.

The field of application of this action may overlap with that of the so-called pound statutes.

2.1.1.3 Actio de feris

In terms of an edict of the *aediles curules*, the bringing of wild or dangerous animals onto or into a public place was prohibited. If a person broke this rule and the animal caused damage to someone, the offender – who need not have been the owner – was liable. As in the case of the previous two actions, liability is not based on the fault of the person who is in control of the animal.

It is uncertain whether this action is still part of our law.

2.1.1.4 Conclusion

The question of whether there is any merit in retaining three separate actions in South African law (the *actio de pauperie*, the *actio de pastu* and the *actio de feris*), each with its own requirements for damage caused by animals, arises. In fact, it is only the *contra naturam sui generis* requirement of the *actio de pauperie* that stands in the way of a single general action based on strict liability for all damage caused by any animal. If this requirement were set aside, the *actio de pauperie* would apply to those cases where damage is caused by wild animals or where an animal eats or depastures vegetation; the fact that these cases are not considered as *contra naturam sui generis*, therefore, would then not preclude the application of the *actio de pauperie*.

Such an adaptation of the law would be justified, because the abolition of the *contra naturam* requirement is desirable for two reasons: In the first place, the requirement points to a personification or humanisation of the animal by means of the objective "reasonable animal" test – a line of reasoning that is artificial and thus undesirable. Secondly, the requirement may be inter- preted in such a wide variety of ways that it not only leads to legal uncertainty, but in the final instance has the effect of classifying as contra naturam any harmful conduct by an animal which for policy reasons, it is felt, should found an action for damages. This requirement should therefore be abolished.

Van der Merwe and Van der Walt further suggest that the basis of strict liability for damage caused by animals is (and should be) the risk principle. In terms of the risk principle, a person who keeps or controls an animal in his own interest is liable without fault, because he creates an increased risk of harm to the community. Liability should thus be based on possession or physical control, not on ownership, as is presently the position with the actio de pauperie and the *actio de pastu*.

2.1.2 Damage caused by objects thrown, poured or falling out of or from a building

In Roman law, the *actio de effusis vel deiectis* was available against the occupier of a building for damage caused by throwing or pouring an object out of or from a building. Similarly, the *actio positi vel suspensi* could be instituted against the occupier of a building to claim a criminal fine if an object was placed in or hung from a building in such a way that it constituted a danger. In Roman-Dutch law, the latter action lost its criminal character, but damages could be claimed under it if the object fell, causing damage or personal injuries. Both actions were characterised by the fact that fault on the part of the occupier was not a requirement for liability.

These actions still apply in South African law. Their existence in modern law is, however, open to doubt.

2.1.3 Damage caused by loss of a stolen thing

If a stolen thing went missing, even in circumstances not attributable to the fault of the thief, the owner, or any other person who had an interest in the thing, could in Roman-Dutch law institute the condictio furtiva against the thief to claim damages. The thief simply bore the risk of loss of the thing and was therefore strictly liable. This action applies unchanged in our law. Theft has a wide meaning and includes *furtum usus* (the appropriation of the use of another's thing). The intention to appropriate a thing permanently is not a requirement of the condictioin instances of furtum usus. The condictio will be available where, for example, the defendant withdraws the thing from the possession of another or takes it and uses it while intending to restore possession after use.

2.1.4 Damage to goods stored during shipping and by inn- and stable-keepers

In terms of the Praetorian Edict de nautis, cauponibus et stabularis, still applicable in our law, professional maritime carriers, innkeepers and stable-keepers are strictly liable for damage caused to goods stored by them. The only defences against this action are *vis maior*, *casus fortuitus* and damnum *fatale*.

2.1.5 Damage caused by owners of neighbouring property: nuisance

Nuisance involves the unreasonable use of property – in any way whatsoever – by one neigh- bour to the detriment of another. The basis of liability for damage caused by nuisance is a moot point in our law.

On the one hand, there is the contention, as stated in the leading case of *Bloemfontein Town Council v Richter*, that actions for damages caused by nuisance are based on the fault principle, although there is a presumption of fault. On the other hand, there are decisions (based on English law) as well as common law authority that indicate that liability for nuisance is strict.

This ambivalence towards the basis of the liability for damage caused by the owners of neigh- bouring property may nevertheless be justified. Although the fault principle of the actio legis Aquiliae should be accepted as the starting point, there are certain acts which can be committed by the owner of neighbouring property which create such an unusually high risk of harm that they justify the imposition of strict liability.

2.1.6 Forms of *iniuria*

Liability without fault is the basis of two forms of *iniuria*, ie wrongful deprivation of liberty and wrongful attachment of property. The positive law position concerning these two forms has already been discussed above. All that remains to be considered is the rationale for their strict liability. At the outset, it must be stated that the disregard for the requirement of intent must be attributed to the influence of English law; it is definitely not in accordance with the common law basis of the actio iniuriarum. There is nevertheless a particular consideration in these cases that justifies a deviation from the common law position. In most cases, public servants are involved in unlawful attachment and deprivation of liberty. The relationship between the parties involved is thus one of complete inequality: On the one hand, there is the powerful, faceless state organisation with its overpowering compulsive measures and virtually unlimited financial resources and, on the other hand, the almost defenceless individual – the unfortunate victim of conduct which is undoubtedly wrongful on the part of the representatives of the state. Equity and justice thus demand that the state, or the person who made use of the state machinery with- out a valid judicial process, should be held liable, even if, as a result of a bona fide mistake, there is no conscious wrongfulness (and thus no *animus iniuriandi*) on his part.

2.1.7 Vicarious liability

2.1.7.1 Introduction

Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. This liability applies where there is a particular relationship between two persons. Four such relationships are important, ie that of employer – employee, principal – agent, motor-car owner – motor-car driver and state – public school.

2.1.7.2 Employer–employee

Where an employee (servant) acting within the scope of his employment, commits a delict, his employer (master) is fully liable for the damage. Fault is not required on the part of the employer, and therefore this is a form of strict liability. This principle did not generally apply in our common law but was received from English law.

The rationale for, or basis of, the employer's liability is controversial. Various theories have been advanced. The best-known explanation is that the employer's liability is founded on his own fault (*culpa in eligendo*). Other theories are the interest or profit theory according to which the employer must also bear the burden of the employee's services as a corollary to the benefits or potential benefits thereof; the identification theory according to which the employee is merely the employer's arm (if the employee acts, the employer, in fact, is acting); and the solvency theory according to which the employer is liable because he is normally in a better position financially than the employee. Although all these theories contain elements of truth, Scott argues convincingly that the risk or danger theory furnishes the true rationale for the employer's liability. The work entrusted to the employee creates certain risks of harm (the commission of delicts) for which the employer should be held liable on the grounds of fairness and justice as against injured third parties.

There are three requirements for an employer's vicarious liability for the delict of his employee:

(a) **There must be an employer – employee relationship at the time when the delict is committed**. Normally, such a relationship is present when one person, in terms of an agreement, makes his working capacity or energy available to another for remuneration in such a way that the latter may exercise control (authority) over the former. Thus a contract of service (*locatio conductio operarum)* must exist. The contract of mandate (*locatio conductio operis*) by contrast, concerns an agreement in terms of which one person also undertakes to render services to another for remuneration without, however, being subject to the control of the other. The contract of mandate, involving an independent contractor, therefore does not found vicarious liability.

The question of control (or authority), which does not mean factual control but the capacity (power) or right of control, was considered to be the most important and therefore decisive factor or indicium (test) in determining whether the wrongdoer is an employee or an independent contractor. However, as a result of valid criticism of this test, it was in the course of time eroded to an important, but no longer decisive, factor to be taken into account. First the Appellate Division employed the "dominant-impression" test, ie whether the dominant impres- sion is that of a contract of service or a contract of mandate, in *Smit v Workmen's Compensation Commissioner*. Later, in *Midway Two Engineering & Construction Services v Transnet Bpk* it was held that in determining the relationship between the parties, a multi-faceted test should be utilised, taking account of all relevant factors and the circumstances of the specific case.

The state is in the same position as other employers. The state may therefore only escape liability by showing that the official involved was not pro hac vice (for this particular case) an employee of the state at the time of the delict, and that will be so if the state did not have the power to control the employee at that particular time.

(b) **The employee must commit a delict**. This requirement implies that the employer may raise any defence which is available to the employee. Given that the employee is also delictually liable, the employer and employee are in principle regarded as joint wrongdoers as against the prejudiced party. Clearly, however, a right of recourse is only available to the employer.

(c) **The employee must act within the scope of his employment when the delict is committed.** The employee acts within the scope of his employment if he acts in the execution or fulfilment of his duties in terms of the employment contract. However, he acts outside such scope if he disengages himself completely from his employment and promotes his own objectives or interests exclusively. The determination of whether he acts within the scope of his employ- ment is on the one hand, subjective, and on the other, objective. In Minister of Police v Rabie the court explained this so-called standard test as follows:

> It seems clear that an act done by a servant solely for his own interests and purposes, although occa- sioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention . . . The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that '. . . a master . . . is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them . . .

The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but, viewed objectively, has also completely disengaged himself from the duties of his contract of employment. In this respect, it is particularly important that a sufficiently close connection did not exist between the employee's conduct and his employment. The commission of a delict during the performance of a forbidden act should also be seen in this light. If the forbidden act is connected to the general character of the employee's work and thus falls within the scope of his employment, the em- ployer will still be vicariously liable.

Whether or not a sufficiently close connection exists between the servant's acts for his own purposes and the business of his master, is particularly problematic in instances of an employ- ee's intentional wrongdoing, since such conduct is the very antithesis of an act in the course and scope of employment and therefore cannot be brought under the standard test. Consequently, apart from a few exceptions, the traditional view was that vicarious liability for intentional wrongdoing is excluded. However, a complete turnabout has been introduced by the trend-setting judgment of the Constitutional Court in *K v Minister of Safety and Security* where the court found the state vicariously liable for police rape. It is submitted that if a need exists in future to extend vicarious liability for intentional wrongdoing, the basis upon which this was done by the Constitutional Court in K, must in analogous cases receive due consideration.

Apart from the foregoing, there are indications in case law that the question of whether the employee has acted within the scope of his employment, may be decided on the basis of the creation of risk by the employer. It must be remembered that employers, to a greater or lesser extent, create a risk that their employees may not be trustworthy (dishonest, criminal) and may exploit the employment situation for their own benefit. The pioneering judgment was *Minister of Police v Rabie* where Jansen JA declared:

> By approaching the problem whether [an employee's] acts were done 'within the course or scope of his employment' from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and [his] work, to the dominant question of whether those acts fall within the risk created by [his employer].

Jansen JA declined to express an opinion on the limits of liability based on the creation of risk. However, in later judgments the Appellate Division was unwilling to develop risk creation as an independent basis of vicarious liability. Instead, the courts emphasise that risk creation is directly relevant to the inquiry whether the employee acted within the scope of employment, and is therefore a factor to be taken into account there. Therefore it does not replace the standard test. In *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* the court goes even further, by declaring that the risk theory is merely an explanation of the principle of vicarious liability and not the formulation of the principle itself.

The judgment of Nel J in *Grobler v Naspers Bpk* is in direct contrast to this approach. In respect of sexual harassment in the workplace, the court correctly took risk-creation into account in finding that the employee acted within the scope of his employment and that the employer was vicariously liable. It is submitted that risk creation must at least be considered as a factor in answering the question of whether the employee acted in the scope of his employment.

2.1.7.3 Principal–agent

When an agent (ie, someone who is authorised to perform a legal act – usually concluding a contract – on behalf of his principal) acting in the execution of his authority commits a delict, his principal is fully liable for the damage. As with an employer, the risk theory provides the most acceptable explanation for the principal's liability, and analogous to the position of an employer, there are also three requirements for the vicarious liability of a principal for the delict of his agent: there must be a principal – agent relationship when the delict is committed; the agent must commit a delict; and the agent must act within the scope of his authority when the delict is committed. Since the authority, mandate or power (capacity) to represent is normally granted for the purposes of concluding a contract, the delict generally consists of a misrepresentation to a third party made by the agent.

2.1.7.4 Motor-carowner–motor-car driver

Where a motor-car owner allows someone else (who is not his employee) to drive his car and the driver negligently causes an accident, the owner is fully liable for the loss, provided that the following three requirements are met: (a) the owner must request the driver to drive the vehicle or supervise his driving; (b) the vehicle must be driven in the interest of the owner; and (c) the owner must retain a right (power) of control over the manner in which the vehicle is driven. As in the previous two cases, vicarious liability may be explained with reference to the risk theory.

2.1.7.5 State–public school

Statutory vicarious liability is created by section 60(1) of the South African Schools Act 84 of 1996, which provides that the state is "liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such public school would have been liable but for the provisions of this section". The state is therefore exclusively liable for damage caused by any delict (for example, by teachers or learners) that is associated with an educational activity of a public school. However, the state is not in terms of section 60(1) liable for claims based on breach of contract against the school. Section 60(1) does not exclude claims a person may have against the state on other grounds, such as because of the negligence of the state.

2.2 Legislation

2.2.1 Consumer Protection Act 68 of 2008 (product liability)

As stated, liability for damage caused by defective products was restricted to the fault-based Aquilian action until the commencement of the Consumer Protection Act ("CPA"). The CPA introduces radical and comprehensive law reform, since, among others, the manufacturer of goods is held liable for harm caused to consumers by unsafe or defective goods, irrespective of the presence or absence of negligence. Strict liability is thus introduced.

The following defences may be raised by a person against liability in terms of the CPA: (i) the defect in a product that results in harm, is wholly attributable to compliance with a public regulation; (ii) the alleged defect was not present in the product at the time it was supplied by the defendant to another person alleged to be held liable; or if the alleged defect is wholly attributa- ble to compliance of the defendant with instructions given to him by the supplier of the goods, in which case the defence just mentioned is not applicable; (iii) it is unreasonable to expect the distributor or retailer (defendants) to have discovered the defect in the product, having regard to another person's role in marketing the goods to consumers; or (iv) a claim for damages for death, injury, illness, damage to property or resultant economic loss188 caused by a defective product, is brought more than three years after the death or injury of a person, or more than three years after the earliest time at which a person had knowledge of the material facts about his illness or the damage to his property, or more than three years after the last date on which a person suffered resultant economic loss.

If, in a particular case, more than one person is liable in terms of the CPA, their liability is joint and several – they are thus regarded as joint wrongdoers. A court has the authority to assess whether any harm has been proved and adequately mitigated; to determine the extent and monetary value of the damages, including economic loss; and to apportion liability among persons who are jointly and severally liable.

2.2.2 National Nuclear Regulator Act 47 of 1999

Liability for nuclear damage has been regulated by legislation since 1963 and is currently regulated by the National Nuclear Regulator Act. In terms of this Act the holder of a nucle- ar installation licence is strictly liable for all nuclear damage caused during his period of responsibility. Although the licence-holder may not raise fault (intent or negligence) on the part of a third party or the negligence of the plaintiff as a defence, the following defences are nevertheless at his disposal: that the damage is attributable to the unauthorised presence of the plaintiff or his property at or in the nuclear installation, or on the site of that installation, or close to radioactive nuclear material; and intent on the part of the prejudiced person.

2.2.3 Civil Aviation Act 13 of 2009

In 1923, the legislature introduced strict liability for damage caused by aircraft. This position is confirmed in the present Civil Aviation Act in almost identical words. However, the owner may raise the fault (intent or negligence) of the prejudiced person as a defence.

2.2.4 Post and Telecommunication-Related Matters Act 44 of 1958

This Act creates strict liability for any person who directly or indirectly injures or destroys telecommunications lines or call-office cabinets. The telecommunications company has a discre- tion, in instances where the company considers it justified, to release the wrongdoer wholly or partially from his liability. If the wrongdoer also acts negligently in causing the damage, he is, in addition, guilty of a criminal offence.

2.2.5 Genetically Modified Organisms Act 15 of 1997

In terms of section 17(2) of this Act, the liability for damage caused by activities relating to a genetically modified organism is borne by the user concerned. Since the Act does not make provision for fault on the part of the user as a requirement for liability for damages, liability appears to be strict. But when such an organism was in the possession of an inspector, the user concerned shall not be held liable for any damage unless he foresaw or should have foreseen the damage and could or should have prevented it, but failed to take reasonable preventive steps.