

SOUTH AFRICA / JUDGMENT

Road Accident Fund v Krawa
(CA279/2010) [2011] ZAECHGC 61; 2012
(2) SA 346 (ECG) (20 October 2011)
[2011] ZAECHGC 61

COURT

Eastern Cape High Court, Grahamstown

BEFORE

D. Van Zyl, I. Schoeman, N. Dambuza

CASE / FILE NUMBER

CA279/2010

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no: CA279/2010

In the matter between:

Road Accident FundApplicant

and

Ntsikelelo KrawaRespondent

FULL BENCH JUDGMENT

D. VAN ZYL J:

This appeal essentially concerns the correctness and appositeness to the facts of the present matter of the statement in Tolstrup NO v Kwapa NO1 that in an action for damages arising out of the driving of motor vehicle “An agreement or finding on liability (which is the equivalent of ‘the merits’) clearly disposes of everything bar the quantum of damages... Quantum would not include a consideration of defences on the merits, be they defences raised by way of special plea, such as lack of jurisdiction, non locus standi, prescription or the like, or substantive defences such as absence of negligence, mistaken identity, contributory negligence and so on, all of which relate to whether damages are payable. Once that is out of the way, the parties can concern themselves with how much is payable.”²

The background to the appeal may be sketched as follows: The appellant and the respondent in the appeal are respectively cited as the defendant and the plaintiff in the proceedings in the Court a quo. For purposes of convenience I intend to continue to refer to them as such. The defendant is the Road Accident Fund (the Fund), a juristic person created in terms of section 2 of the Road Accident Fund³ (the Act) whose object it is to pay compensation in accordance with the provisions of the Act for loss or damage caused by the driving of motor vehicles.⁴ The plaintiff's wife Ntombentsha Krawa, to whom I shall refer to as "the deceased", was killed in a motor vehicle accident during May 2004 when the vehicle in which she was a passenger left the road and overturned.

The plaintiff thereafter instituted an action for damages against the defendant in terms of the Act in his personal and representative capacity "as the father and natural guardian of his and the deceased's minor children..." The death of the deceased is alleged to have occurred by reason of the negligence of the driver of the aforesaid motor vehicle.⁵ The plaintiff's action is what is sometimes referred to as a "dependant's claim", that is a claim for damages for a loss of support which the plaintiff and his minor children is alleged to have suffered as a result of the wrongful death of the deceased.⁶

Save for admitting the name of the plaintiff, its own locus standi and that it failed to pay the amount claimed in the summons, the defendant placed all the remaining allegations in the plaintiff's

particulars of claim in issue by either denying it or putting the plaintiff to the proof thereof. After the close of pleadings and the allocation of a trial date by the Registrar of the Court, the defendant served a notice on the plaintiff's attorneys which, according to its heading, is purported to be an offer to settle as contemplated in Rule 34(1) of the Uniform Rules of Court. It is stated therein that "the defendant hereby gives notice that it concedes the merits in favour of the Plaintiff and offers to pay the Plaintiff whatever damages he has suffered in consequence of his injuries sustained in the collision which occurred on 2 April 2004 to be proved in due course."

Not only was the acceptance of the offer in dispute, but on a reading of the notice it is evident that it contains a number of inaccuracies if one has regard to the nature of the plaintiff's claim and the allegations made by him in his particulars of claim in support thereof. The Court a quo quite correctly in my view regarded these matters as irrelevant to the issues which it was asked to decide. The reason is that the parties subsequently, and before the trial date, convened a pre-trial conference in terms of Rule 37. In the pre-trial minute signed by the legal representatives of the respective parties, it is recorded that "The Defendant has formally conceded the merits in favour of the Plaintiff and only the aspect of quantum is to be determined." This effectively superseded the defendant's earlier Rule 34(1) notice and eliminated any uncertainties which may have been created by it. At the hearing of the matter in the Court a quo and in this Court, counsel representing the respective parties quite rightly did not attempt to argue otherwise.

On the appointed trial date the matter did not proceed and the matter was postponed sine die. Some time thereafter and before the matter was again set down for trial, the defendant delivered a notice of intention to amend its plea in terms of Rule 28. The effect of the proposed amendments is to substitute, what amounts to a non-admission, with a positive denial.⁷ The first amendment in paragraph 1 of the notice to amend constitutes a denial that the plaintiff is the natural father of one of the minor children and consequently that he does not have locus standi in judicio to represent her in the action. The second amendment relates to what is contained in paragraphs 5 to 8 of the plaintiff's particulars of claim. By reason of the fact that this proposed amendment is of particular importance in deciding the issues raised in this appeal, I shall quote it in its entirety.

"2. By the deletion of paragraph 5 of Defendant's Plea and the substitution therefore with the following paragraph:

"5. AD PARAGRAPH 5, 6, 7 & 8 THEREOF:

5.1 In respect of what is pleaded in paragraph 6, Defendant denies:

5.1.1 that Plaintiff received support from the deceased prior to and at the time of the deceased's death;

5.1.2 that the deceased was obliged to maintain and support the Plaintiff prior to and at the time of the deceased's death;

5.1.3 that the Plaintiff was entitled to receive support, or would in fact have received support from the deceased, had she not died;

5.1.4 that the Plaintiff was dependent on the deceased.

5.2 Defendant pleads that the deceased and the Plaintiff had separated and were living separate lives at the time of the death of the deceased.

5.3 Defendant reiterates that the minor child,... is not a minor child of the Plaintiff, and accordingly Defendant denies that

Plaintiff has locus standi...

5.4 Each and every remaining or conflicting allegation contained in these paragraphs is denied as if specifically traversed."

Paragraph 6 of the plaintiff's particulars of claim, to which reference is made to in paragraph 5.1 of the notice to amend, reads as follows:

"As a result of the death of the deceased, the Plaintiff and the deceased's aforesaid minor children have lost the support, which the deceased was obliged to give, and did give, and would, but for her death, have continued to give them, and upon which they were dependant."

It is evident from a reading of these paragraphs that the defendant's intention with the proposed amendments is to place in issue the assertion that the deceased had a duty during her lifetime to provide support to the plaintiff, and that the plaintiff

has a right to a claim for loss of support in his personal capacity. The denial in paragraph 5.3 relating to the locus standi of the plaintiff is simply a repetition of what is already contained in paragraph 1 of the notice to amend, and is therefore superfluous.

With reliance on the defendant's Rule 34(1) offer to settle, the plaintiff in response filed a notice of objection on the limited basis that "...the Defendant had formally conceded the merits of the Plaintiff's claim..." Nothing further transpired after the filing of the notice of objection until the matter was again set down for trial. Shortly before the trial date the defendant on notice made application for leave to amend its plea in accordance with the proposed amendments in its Rule 28 notice. In support of the application an affidavit was deposed to by an attorney in the firm representing the defendant in the action.

In the affidavit the attorney stated that during preparation for trial a recommendation was made that an assessor be appointed to investigate the earnings of the plaintiff and the deceased and all other aspects necessary to determine the extent of the plaintiff's claim. When the assessor's report was received it became evident therefrom that the plaintiff may not be the biological father of one of the minor children, that the plaintiff and the deceased were separated at the time of her

death, and that the plaintiff did not receive any financial support from the deceased. The deponent contended that only the issue of negligence was conceded and no admissions were made in respect of quantum. It was further contended that the defendant did not in its plea admit the locus standi of the plaintiff and that the onus remained on the plaintiff to prove that he has the necessary legal standing to represent the minor child concerned.

The plaintiff chose not to respond to the affidavit put up in support of the application to amend the defendant's plea, electing instead to simply make legal submissions at the hearing of the application. The argument put forward on behalf of the plaintiff in the Court a quo was confined to the submission that the application for leave to amend should be dismissed in that, when the defendant conceded the merits, everything, except for the quantum of the plaintiff's damages was disposed off. As in this Court, the plaintiff placed reliance in this regard on the passage in the Tolstrup case quoted earlier,⁸ the submission being that the proposed amendment relate to "whether" damages are payable ie. the merits of the plaintiff's claim, as opposed to quantum where the only issue relates to "how much" is payable.

In Tolstrup the plaintiff in her representative capacity as the mother of her minor son instituted an action for damages arising out of a motor vehicle collision in which the defendant's son was the driver and as a result of which he died. The defendant was the executrix of the deceased driver's estate. At a pre-trial meeting the parties reached agreement that the "merits" and "quantum" were to be separated in terms of Rule 33(4) and the trial was to proceed on the merits only. Subsequently however, and before a formal order to that effect was made by the trial Court,

the defendant conceded the merits. As a consequence the matter was removed from the trial roll and re-enrolled for hearing on “quantum”. The defendant thereafter sought leave to introduce a special plea of *plene administravit*. It is a special defence available to an executor of an estate and amounts to a denial that there are any assets remaining in the hands of the executor.⁹

The Court in *Tolstrup* found that the defendant’s concession of the merits constituted an agreement of compromise once it was accepted by the plaintiff. It rendered the issues *res judicata* and the defendant could as a result not revisit the merits. As the special plea raised related to whether damages were payable and not quantum “... where the parties concern themselves with how much is payable..” the defendant was precluded from raising the intended defence. It was accordingly held that the application to amend had to be dismissed for that reason alone.

In considering whether the issues raised by the plaintiff in the present matter in its notice to amend formed part of the merits or quantum, the Court *a quo* found it necessary to look at the nature of the plaintiff’s cause of action and more particularly the elements of a defendant’s

action for damages for loss of support. To this extent the Court referred to the decision in *Evans v Shield Insurance Co. Ltd*¹⁰ wherein Corbett JA stated that in the case of an action for damages for loss of support, “...the basic ingredients of the plaintiff’s cause of action would be (a) a wrongful act by the defendant causing the death of the deceased,

(b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) *damnum*, in the sense of a real deprivation of anticipated support.”¹¹ It concluded that on the basis of the distinction made in *Tolstrup* the first three ingredients or elements of the plaintiff’s action fell to be determined as part of the merits of the claim and that the fourth element, namely the real deprivation of anticipated support, was an issue properly to be dealt with when the quantum of the plaintiff’s damages was to be determined.

The Court *a quo* held that by conceding the merits in favour of the plaintiff at the pre-trial conference the defendant conceded all aspects of the plaintiff’s claim except for the aspect of quantum. This concession according to the Court “... has all the essential elements of a compromise of the merits of the Plaintiff’s action. Since an agreement of compromise has been reached regarding the merits of the Plaintiff’s claim, the rights of the parties are regulated by that agreement.” As a compromise has the same effect as a judgment, the Court held that the granting of an amendment which is in conflict with the terms of the compromise would result in the reopening of issues already disposed of and be in conflict with the *res judicata* principle. Accordingly, and by reason of the fact that the proposed amendments do not relate to the quantum of the plaintiff’s claim, but rather to the *locus standi* of the plaintiff and the legal right of the plaintiff to be supported by the deceased, which issues were disposed of when the defendant conceded the merits, the defendant’s application for leave to amend its plea had to be dismissed with costs.

The key issue in this appeal is whether the Court a quo was correct in finding that those issues in the plaintiff's particulars of claim which the defendant intend to place in issue by amending its plea, form part of the "merits" of the plaintiff's claim, and if so, whether those issues are no longer in dispute by reason of the concession made by the defendant at the pre-trial conference. Before dealing with the arguments advanced by counsel for the respective parties at the hearing of the appeal, it is necessary, by way of introduction and in order to place the issues raised in the appeal in their proper context, to consider the following matters: The legal effect of the concession made by the defendant at the pre-trial conference, the relevant provisions of the Act which find application to the plaintiff's claims, and lastly, the terminology which is generally employed in dealing with the issues which may arise for determination in actions for loss or damage wrongfully caused by the driving of motor vehicles as contemplated in the Act.

The purpose of a pre-trial conference conducted in terms of Rule 37 is to afford the parties an opportunity "...amongst other matters, to endeavour to find ways of curtailing the duration of the trial by redefining the issues to be tried."¹² In *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another*¹³ Cachalia JA elaborated on this by stating its purpose as "...to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs."¹⁴ One of the methods of narrowing the issues and thereby shorten the trial is to make admissions concerning the issues which are raised on the pleadings.¹⁵ Once a party has elected to limit the ambit of his case or defence that election is usually binding.¹⁶ To this extent any admissions of fact made at a rule 37 conference constitute sufficient proof of those facts. Further, any agreement deliberately reached is binding and "in the absence of any special circumstances a party is not entitled to resile..." therefrom.¹⁷ Applied to the facts of the present matter, if the concession made by the defendant in the present matter at the pre-trial conference is what the plaintiff contends it to be, then in the absence of the admissions inherent thereto having been withdrawn, or if based on an underlying agreement, in the absence of the defendant seeking leave to resile therefrom, it is bound by the terms of its concession.

The legal basis of the defendant's liability to compensate the plaintiff is founded on the provisions of section 17(1)(a) of the Act. It reads as follows:

"(1) The Fund or an agent shall-

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where

the identity of the owner or the driver thereof has been established;

- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the

driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any

bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation

for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.”

The object of the Act, like that of its predecessors, is to effectively cause the delictual remedies which exist at common law to be available against the Fund to the exclusion of the actual wrongdoer. The liability of the Fund to compensate, and the concomitant right of the claimant (the third party) to claim compensation arises, not by reason of any wrongful act or omission on the part of the Fund, but only by reason of its statutory obligation to indemnify the third party, provided the requirements of section 17(1) of the Act have been complied with. On a reading of section 17(1), those requirements would, in the context of plaintiff's claim in the present matter be the following: (a) that the plaintiff has suffered loss or damage as a result of the death of the deceased; (b) that the death of the deceased was caused by or arose from the driving of a motor vehicle, and (c) that her death was due to the negligence or other wrongful act of the driver of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.

Although the liability of the Fund arises from statute, its liability is not wider than the common law liability of the driver or the owner of the motor vehicle would have been. The relevant section is section 19(a) of the Act. It reads as follows:

“The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-

for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21; or

...”

The effect of this provision is that the Act does not alter the basic requirements for delictual liability at common law. Negligence in section 17(1) is therefore the culpa of the common law and any defence available to a defendant at common law is also available to the Fund in terms of the Act. It also follows that the common law principles applicable to damages, its existence and the assessment or determination of the extent thereof must equally apply to a claim for compensation in terms of the Act, save where it is expressly stated otherwise.¹⁸ In dealing with the provisions of one the predecessors to the present Act, Corbett JA explained it as follows in *Evans v Shield Insurance Co. Ltd*:¹⁹

“To a great extent the Act represents an embodiment of the common law actions relating to damages for bodily injury and loss of support where the bodily injury or death is caused by or arises out of the driving of a motor vehicle insured under the Act and is due to the negligence of the driver of the vehicle or its owner or his servant. Then in place of, and to the exclusion of, the common liability of such persons is substituted the statutory liability of the authorized insurer. Sections 21, 23 (a) and 27 indicate that the statutory liability of the authorized insurer is no wider than the common law liability of the driver or owner would have

been but for the enactment of the Act (indeed in certain instances it is narrower – see ss 22 and 23 (b)) and that this statutory

liability is dependent upon the existence of a state of affairs which would otherwise have given rise to such a common law liability

(Workmen’s Compensation Commissioner v Santam Bpk 1949

- (4) SA 732 (C) at 740; Rohloff v Ocean Accident and Guarantee Corporation Ltd 1960
- (2) SA 291 (A) at 297 E-G). The negligence upon which liability under s21 hinges is the culpa of the common law and, save in certain specified instances, the compensation claimable under s21 is assessed in accordance with

common law principles relating to the computation of damages.”²⁰

Insofar as the terminology used by the parties in the minute of the pre-trial conference is concerned, the use of the terms “merits” and “quantum” is clearly not without difficulty. They are used interchangeably and without distinction with words such as “liability” and “damages”, sometimes in the same case as in *Blom v Road Accident Fund*²¹ where it is said that “When the trial commenced, the plaintiff made application for separation of liability and damages, i.e separation of merits and quantum in terms of Rule 33(4)...”²² In the extract quoted from *Tolstrup* the Court similarly equated “liability” with “merits”.²³ These expressions and the use thereof to describe the same thing are no doubt examples of the concurrent use of terms which are derived from the English law. Due to the historical development of our law, English practice and manner of pleading in claims for damages led to the introduction of terminology of the English law of damages.²⁴ This is attributed to the influence which the “superimposition of a common law judicial and procedural framework ...” had upon our law²⁵. As a result the statement by Lord Hailsham in *Casell v Broome*²⁶ that the language of English law of damages “is more than usually confused” has rightly been said to apply equally to the terminology used in our law of damages²⁷.

The use of definitions found in standard or legal dictionaries does not provide much assistance in attempting to attribute a “usual” meaning to the words “liability” or “merits” and “quantum” or “damages”. The word “liability” in legal language is said to refer to the condition of “being under an obligation”²⁸ or the “quality or state of being legally obligated or accountable”.²⁹ A determination of “liability” is in the case law usually limited to the issue of negligence in claims for damages arising from the driving of a motor vehicle. In a wider sense it may, in the context of a claim in terms of section 17(1) of the Act, arguably be said to relate to the requirement that the

death or injury was occasioned by or arose from the driving of a motor vehicle, and that the death or injury was due to the negligence or “other wrongful act” of the driver of the motor vehicle or of his employee in the performance of the duties of the employee. The word “merits” on the other hand has a wider import and is defined as meaning “The substantial question in issue in an action or other proceeding”³⁰, or “The substantive considerations to be taken into account in deciding a case as opposed to extraneous or technical points”³¹ such as the issue of mis-joinder or non-joinder of parties.³² Although the words “quantum” and “damages” according to the legal definition thereof in a narrow sense denotes the monetary or pecuniary compensation awarded by a process of law to a person for loss or damage suffered as a result of the actionable wrong of another,³³ it may have an extended meaning in such cases where the issues to be determined at the trial have been separated into merits and quantum. I shall return to this aspect when I deal with the issue of a duty of support.³⁴

It is in my view undesirable to attempt to attribute a “usual” meaning to these terms. A preferable approach is rather to determine their meaning from the context in which they are used. The reason is that words are often controlled by the context and certain terms may as a result have different meanings in different contexts. “The word ‘damages’ and ‘damage’ in law have more than one meaning, and great care has to be exercised in examining the context in which they severally appear”.³⁵ In *Reed and Another v Warren*,³⁶ cited with approval by Rabie JA in *Fairlands (Pty) Ltd v Inter Continental Motors (Pty) Ltd*,³⁷ Selke J recognised this when he said the following:

*“Now a reference to Stroud, Judicial Dictionary, under the heads of ‘liability’ and ‘liable’ served to show that these words are, prima facie, words of very many shades of meaning, the precise meaning to be attributed to them varying with the collocation in which they occur.”*³⁸

The distinction between “merits” and “liability” on the one hand and “quantum” and “damages” on the other, is usually made in the context of an application for the separation of issues in terms of Rule 33(4). This rule authorises the Court to direct the separate trial of any one or more issues and the order in which issues are to be tried³⁹. One or both of the parties may approach the Court for such a direction. As is the position in the present matter, the same result

is also often achieved informally at a pre-trial conference where the parties separate the issues using the familiar terminology

associated with Rule 33(4) and then dispose of some of the issues, thereby confining the trial to either the merits or quantum, or to an even more limited compass. The purpose or motivation is quite clearly convenience, the saving of costs and the expeditious

completion of litigation before the courts⁴⁰. The separation of issues is predominantly a useful and convenient procedural tool in actions for delictual damages, particularly in claims for injury or death arising from the driving of a motor vehicle. In *Botha v AA Mutual Insurance Association Ltd and Another*⁴¹ Holmes JA stated that it is not uncommon practice “...in motor vehicle collision cases in which damages are claimed on the ground of negligence for the parties to ask the trial Court first to hear evidence on the question of liability, i.e negligence, and to decide that

issue. If that decision goes in favour of the plaintiff, the parties endeavour to settle the quantum of damages, or such issue may be tried out in Court.”⁴²

The reason for the frequent use of this procedure in actions for delictual damages, besides considerations of convenience and expediency, no doubt lies in the fact that the issues which arise in such claims are easily separable into two distinct enquiries. In the English law, where the procedure in Rule 33(4) is sanctioned by Civil Procedure Rule 3.1 (2) (e), the fundamental principle is that damages cannot be awarded in the absence of a wrong (*damnum sine injuria*)⁴³. As a result “.... the preliminary question to be answered, before any issue of damages can arise, is whether a wrong has been committed”⁴⁴ and that any consideration of the issues relating to damages “... assumes that the logically prior question of the defendant’s liability in tort has already been determined.”⁴⁵ In our law the principle which embodies the distinction between liability and damages is expressed differently. The fundamental premise is that damage rests where it falls, or put differently, “everyone has to bear the loss he or she suffers” (*res perit domino*).⁴⁶ The right of action provided by the *Lex Aquilia* provides an exception to this rule in that it gives an action to anyone who has suffered loss which is due to the *culpa* or *dolus* of another.⁴⁷

Although the distinction between “liability” and “damages” may be necessary for certain procedural rules⁴⁸, it is primarily a convenient one to achieve a separation of issues for trial. Content must accordingly be given to the terms used by the parties in any particular case in the context of their pursuit to achieve a separation of issues for trial. The question or issues in dispute between the parties which are to be decided at the trial are defined in the pleadings, as this is “the nucleus around which the case revolves throughout its stages”.⁴⁹ Although “merits” or “liability” would in most motor vehicle collision cases have crystallised by the time it gets to trial so as to be confined to the single issue of causal negligence, it is unfortunately not always the case. It may therefore be sufficient in some cases, where the issues are well defined by the pleadings or the scope thereof is limited, to achieve a separation of issues for trial by the simple statement that the merits be determined separately from quantum. Where that is not the case, then it is desirable, as stated in the *Tolstrup* case⁵⁰, that the issues be identified with specific reference to the relevant paragraphs in the pleadings.⁵¹ The failure to define the issues for trial may create uncertainty. Some of the issues raised on the pleadings may overlap while other issues (such as the *locus standi* of the parties and the jurisdiction of the court to entertain the action) may arguably be said not to form part of the issues relating to either merits or quantum, and should rather be regarded as matters extraneous to the substantial questions in issue.

Turning then to deal with the arguments advanced by counsel for the respective parties at the hearing of the appeal, in support of his submission that the Court *a quo* erred in finding that the issues which the defendant addressed in its notice to amend are no longer an issue, Mr Schoeman for the defendant sought to place reliance on what has been stated in paragraph 12 of the affidavit filed by the defendant in support of the application to amend its plea. In this paragraph it is said that the defendant has conceded the merits and that “It is the Defendant’s contention that despite having conceded the merits, ie conceding that the insured driver was

negligent, no further admission is made in respect of quantum.” Counsel submitted that as the plaintiff chose not to respond to the affidavit and to place in dispute what has been said therein, it must consequently be accepted that when the defendant conceded the merits, it intended to concede nothing more than that the driver of the vehicle was negligent.

The difficulty with this submission is that the deponent to the affidavit does not state that it was never intended to admit the plaintiff’s locus standi, or that the deceased had a legal duty to support the plaintiff. What is stated in the affidavit is that it is the defendant’s “contention”, which amounts to nothing more than the making of a legal submission. The submission is to the effect that the term “merits” must be given a restricted meaning so as to only include the issue of negligence. The deponent to the affidavit is quite clearly not in a position to state what was intended when the merits were conceded at the pre-trial conference. The reason is no doubt the fact that, as is evident from the minutes of the pre-trial conference, the deponent did not represent the defendant at the

conference. In the absence of an affidavit from the attorney who attended the pre-trial conference and who made the concession on behalf of the defendant, there is nothing to contradict what is recorded in the pre-trial minute and the terms of the concession are as a consequence to be determined from the document itself.

On the reading of the said minute it is evident that although the issues were not defined with reference to the pleadings, it is stated in no uncertain terms that the trial was to be confined only to those issues which relate to “the aspect of quantum”. As in the Tolstrup case, the defendant without any reservation chose to first divide the issues in the pleadings between merits and quantum, and then to proceed to concede the merits and agree that “only the aspect of quantum is to be determined.” Where the issues for trial are not defined but simply divided without reservation into two separate and distinct compartments, then it is, as a matter of logic, simply an exercise of elimination. In other words, what does not form part of the issues which are to be considered in the more limited enquiry relating to damages,⁵² must form part of the issues that were conceded. I accordingly agree with the finding of the Court a quo that in the absence of anything to the contrary, the conclusion is inescapable that all those issues and the factual allegations made in support thereof that have nothing to do with the enquiry relating to damages, were conceded by the defendant and are accordingly no longer in issue.

Mr Schoeman sought to distinguish the present matter from the Tolstrup case by placing reliance on a letter written by the defendant’s attorney wherein the locus standi of the plaintiff was pertinently placed in issue. In this letter, which is dated 5 October 2007, it is said that “In respect of the Rule 37(4) list, the Defendant is not prepared to admit the locus standi of the Plaintiff as the full unabridged birth certificates have not yet been provided.” Mr Budlender, who represented the plaintiff in the appeal, is in my view correct in his submission that the said letter cannot lend any support to the defendant’s contention that only the issue of negligence was conceded at the pre-trial conference. Although the letter may arguably, as in the case of a dispute about the terms of a compromise,⁵³ be relevant to determine the extent of the concession made, the difficulty is that the letter was not relied on, or attached to the affidavit filed in support of the defendant’s

application for leave to amend its plea.

This failure is of particular importance if one has regard to the fact that reference is made therein to an earlier letter dated 2 October and to documents which were attached to that letter. To give the letter of 5 October any meaning and weight in the interpretation of the pre trial minute, it must be looked at in the context of all the correspondence, both which preceded it and that which followed it. More fundamental however is the fact that the pre-trial conference was held, and the minute was signed, subsequent to the writing of the letter on which Mr Schoeman placed reliance. This letter is in my view rather a neutral fact as it may equally lend support to a conclusion that by the time that the Rule 37 conference was held, the defendant no longer harboured any reservation about the locus standi of the plaintiff, and that it may in the interim have been supplied with the documentation to which reference was made to in the letter. In the absence of the issue of the letter having been raised pertinently in the application for leave to amend so that the plaintiff was afforded the opportunity to deal therewith,⁵⁴ I agree with Mr Budlender that the letter cannot assist the defendant.

The Court a quo therefore in my view correctly held that when the defendant conceded the merits of the plaintiff's claim, the only issues which remained in dispute are those which relate to quantum or damages. As the issue of the plaintiff's locus standi to represent the minor child concerned clearly has no relevance to the enquiry relating to damages, it must be concluded that it was one of the issues conceded by the plaintiff at the Rule 37 conference. In the absence of the defendant having sought leave to resile from the agreement reached at the pre-trial conference, if any, or to withdraw this admission which is inherent to the concession made, the Court was correct in refusing to allow the amendment pertaining to the plaintiff's locus standi. Whether it is on the basis that it did not have the power to do so, as the Court a quo concluded, or that the amendment sought would be bad in law as it is at variance with an admission that has not been withdrawn, is not necessary to decide in these proceedings.

That leaves the question whether this conclusion must equally apply to the amendments sought by the defendant in relation to the plaintiff's allegation in his particulars of claim that the deceased had a duty to provide him with support. On a reading of the judgment of the Court a quo, it is clear that its conclusion that it is an issue that does not form part of the issues relevant to damages, is based on the fact that it was listed in the decision in *Evans v Shield Insurance Co Ltd*⁵⁵ as an ingredient of a defendant's action separate from that of damnum. Accordingly, on the basis of the decision in *Tolstrup* this issue was concerned with "whether" damages are payable, as opposed to "how much" is payable, and was therefore similarly held to have been disposed of when the defendant conceded the merits of the plaintiff's claim.

That is in my view an incorrect approach to the question raised in this matter. I say this for two reasons: Firstly, as stated earlier⁵⁶, the meaning that must be attributed to the terms "merits" or "liability" and "quantum" or "damages" is to be determined with reference to the context in which those terms are used. Where they are used by the parties in an attempt to achieve a separation of issues as they arise from the factual allegations made in the pleadings in an action for damages in terms of section 17(1) of the Act, their use is in a procedural context, the aim being the

shortening of proceedings and the avoidance of unnecessary costs. It bears no relation to the enquiry relating to the different elements which constitute a delict or which are necessary to complete a plaintiff's cause of action. To put it differently, the elements or ingredients of a delict or a cause of action are not to be equated with the questions which arise for determination when there is a separation of issues for trial on the pleadings, or with the terminology used to achieve such a separation. For instance, "liability" as that term is used in the context of the law of delict, would only arise when all the elements of a delict, including *damnum* (loss or damage) are present.⁵⁷ Yet, as I shall indicate hereunder,⁵⁸ where the questions of liability and the questions of damages are separated for purposes of trial, those issues which pertain to the existence of loss or damage form part of a separate enquiry.

The question that was considered by the Court in the decision in *Evans v Shield Insurance Co Ltd*⁵⁹, on which the Court *a quo* placed reliance for its reasoning, related to issues of substantive law and not procedure. It was whether, in the context of a plea of prescription, the claim by a plaintiff for damages at common law for bodily injury, and the claim by the same plaintiff for damages for loss of support, where both claims resulted from the same motor vehicle accident, are separate causes of action or simply facets of a single cause of action. It was in that context that the Court then analysed the ingredients of the two causes of action underlying the two claims⁶⁰. It concluded that although two claims may flow from the same accident, the cause of action in each may arise at different times⁶¹. The cause of action in respect of bodily injury normally arises when the injury and the consequent *damnum* is inflicted; in the case of the cause of action for loss of support, it will arise only upon the death of the deceased.

Secondly, the statement in Tolstrup that the issue of "quantum" or

"damages" pertains to "how much" is payable, creates the impression that the enquiry at the trial relating to damages must always be confined to a simple numerical

assessment of the damages in terms of money. To do so is to limit the words "quantum", and its equivalent "damages", as these terms are used interchangeably in the context of a separation of issues, to the narrow legal definition thereof, namely

the monetary equivalent of loss or damage "...awarded to a person with the object of eliminating as fully as possible his past as well as future damage"⁶². This approach loses sight of the fact that where on the pleadings the allegation that the plaintiff has suffered damage or loss is in dispute, the enquiry relating to damages in the context of a separation of issues into merits and quantum consists of two facets, namely the existence of loss or damage, and the assessment of the amount thereof. According to Corbett and Buchanan, "In assessing damages under these different heads of damage it is necessary for the Court to consider two questions:

- (i) what damage, or *damnum*, has been suffered or is to be suffered by the plaintiff under the individual head, and
- (ii) what amount of damages should be accorded to the plaintiff as compensation for such damage."⁶³

As Grosskopf JA in *Santam Insurance Co Ltd v Fourie*⁶⁴ correctly remarked, “... before coming to the computation of loss one must first ascertain whether any loss at all has in fact been suffered.”⁶⁵ The words “damages” and “quantum” would accordingly bear a wider meaning in this context than simply the computation of loss or damage which has been found to exist.

The underlying reason for this is the fact that, as opposed to the English law where, as stated earlier⁶⁶, the emphasis is on liability,⁶⁷ the cornerstone of any action in terms of the *Lex Aquilia* is the existence of loss or damage (*damnum*)⁶⁸. “The essence of *Acquilian* liability being *damnum* it follows as a matter of course that no claim for *acquilian* damages should succeed unless patrimonial loss is proved.”⁶⁹ The position is then that before any quantification or calculation of the amount of damages or compensation, as it is referred to in Section 17 (1) of the Act is made, it must first be determined whether there in law exists patrimonial loss. For this reason Nugent JA in *First National Bank of South Africa Ltd v Duvenhage*,⁷⁰ agreed with the suggestion that on doctrinal grounds “... loss, and its causal connection, might even be the proper starting point for the enquiry.”⁷¹

The patrimony of a person is, according to Innes J in *Union Government v Warneke*,⁷² to be associated with what “In later Roman law property came to mean the *universitas* of the plaintiff’s rights and duties...”⁷³ as opposed to actual *damnum* in the sense of damage to or a loss of property.⁷⁴ Patrimonial loss is therefore defined in terms of someone’s patrimony and “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.”⁷⁵ Patrimonial loss occurs when someone’s patrimony is diminished, or as it is also described “... the reduction in the utility of an element of someone’s patrimony,” or “... the diminution, as a result of a damage causing event, in the utility or quality of a patrimonial or personality interest...”⁷⁶

To determine whether there has been patrimonial loss the value of the plaintiff’s estate as a whole, prior to the damage causing event that precipitated the claim, is compared to the plaintiff’s estate after the event. If there is a negative impact then loss or damage has occurred. Exactly the same approach is used to calculate the extent of the diminution of the estate and the amount of damages to award⁷⁷. The concept of *damnum* (harm or damage) therefore consists of two elements; one is the determination of the patrimony of the plaintiff with reference to the personal and other rights forming part thereof, and the second relates to the diminution thereof.⁷⁸ The quantification of damages on the other hand (“how much is payable”)⁷⁹ is limited to the process whereby damage which the law has found to exist is expressed in monetary terms. This involves the application of principles relevant to that enquiry such as the reduction of the amount of the plaintiff’s damages due to the receipt of compensating benefits, or the discounting of prospective damage and the making of provision for contingencies.⁸⁰

By way of an example, in a claim for damages for personal injury,

where damage or loss is claimed under the head of past medical expenses, the plaintiff is entitled to recover compensation in respect of such expenses which have been reasonably incurred by him or her and are fairly attributable to the bodily injuries sustained in the accident⁸¹. Whether or not the expenses were in fact incurred, thereby reducing the economic value of plaintiff's estate and rendering him or her poorer, is to be established first before the amount to be awarded as compensation is calculated. Where the claim is for future loss of earnings or loss of earning capacity, the enquiry is whether the plaintiff's capacity to earn money, which is considered to be part of his or her estate, has been impaired in the sense that the plaintiff's estate has been diminished, and if so, whether he or she "... is entitled to be compensated to the extent that his patrimony has been diminished."⁸² These are clearly not matters which are considered as forming part of the issues that arise in the context of "liability" or the "merits". They rather form part of those issues which are for purposes of convenience assumed to exist when the issues have been separated and the trial is confined to the merits.

To sum up: In giving content to the terminology used by the parties in order to achieve a separation of issues for trial, it is important to recognise that those terms are used in a procedural context. Further, the enquiry relating to damages or quantum is not always limited to what would amount to a mere calculation of the amount of damages to be awarded to the plaintiff. Accordingly, the danger that lies in the suggestion in the Tolstrup case, namely that the question of damages or quantum is confined to a mere calculation of the amount in damages to be awarded, is that it fails to recognise that in the context of a separation of issues for trial: (a) the issues between the parties are in the first place to be determined from the pleadings, and (b) unless admitted by the defendant, the enquiry relating to damages or quantum would also include issues relevant to the existence of patrimonial loss or damage.

The question is then whether the position is any different in a dependant's action? Although the origin of the dependant's action for loss of support lies elsewhere, in our law it is regarded as an action for damages under an extension of the Lex Aquilia based on the *dolus* or *culpa* of another⁸³. An essential feature of this action, as in any other Aquilian action, must therefore be the existence of *damnum*, i.e. "the dependant must establish actual patrimonial loss..."⁸⁴ The scope of the action was extended in *Union Government v Warneke*⁸⁵ so as to also give an action to a husband who had suffered patrimonial loss through the death of his wife.⁸⁶

While the relationship between the deceased and the plaintiff created by their marriage may itself, at least *prima facie*, create a duty of support that is sufficient to give the plaintiff title to sue, it is the existence of a duty of support that is legally enforceable that is essential to the success of the plaintiff's claim.⁸⁷ Although there rests a reciprocal duty on both a husband and wife to contribute according to their means towards the maintenance of the joint household⁸⁸, the law regards the wife's duty as subsidiary. The primary duty of providing money required for the common household rests upon the husband.⁸⁹ The wife's duty of support would as a result only arise *ex lege* if the husband is unable to provide support, or if it is necessary for the maintenance of a common household.⁹⁰ In the absence thereof no duty of support can be said to exist. These requirements are questions of fact depending on the circumstances of each case.

With the deceased's duty of support comes the defendant's concomitant right to receive and demand such support. It is that right which forms part of the plaintiff's patrimony. As stated in the Warneke, case, "...the right of the claimant to demand assistance was a right of property, the deprivation of which by the culpa of the defendant would quite naturally found a claim for patrimonial damages."⁹¹ In *Waterson v Maybery*⁹² Greenberg J, with reference to the decision in Warneke explained it as follows:

"If I read these passages aright, they establish that the existence of a legal duty by the deceased to the claimant is an essential to a claim of this kind. And this view seems to follow from the fact referred to by Innes, J., at p. 665 that the action was based on the Lex Aquilia which requires that there should have been 'actual damnum in the sense of loss to the property of the injured person by the act complained of' and that 'in later Roman law property came to mean the universitas of the plaintiff's rights and duties and the object of the action was to recover the difference between that universitas as it was after the act of damage and as it would had been if the act have been not committed.'" (Ibid.) The 'rights' which go towards making up the universitas must be legal rights, based on a reciprocal legal duty on some other person.⁹³

The right to support is therefore considered to be a right of property forming part of a person's estate and the loss of that right constitutes patrimonial loss, if such loss diminishes the estate.⁹⁴ It is expressed as "...the difference between the position of the dependant as a result of the loss of support and the position he or she could reasonably have expected to be in had the deceased not died"⁹⁵. If the person's estate is diminished in this way, then he or she is entitled to be compensated to the extent of such diminution.

The failure to prove the existence of a legal duty of support would therefore mean that there has not been an infringement of any of the property rights of the plaintiff forming part of his or her patrimony, and consequently that the plaintiff's patrimony could not have been reduced. "But since patrimonial loss was a sine qua non of any action founded upon the lex Aquilia, the action for loss of maintenance and support was necessarily confined to cases where the deceased had been under such a legal

duty to maintain and support the plaintiff."⁹⁶ The existence of a legal duty and the concomitant right to support is therefore inextricably part of the issues relevant to the question of damages, as that word is to be understood in the context of a separation of the issues on the pleadings for purposes of trial.

Applied to the present matter, the question is then whether the defendant, by having divided the issues into merits and quantum, and thereafter conceding the merits, also conceded that the plaintiff had suffered patrimonial loss. If not, then it follows

that the question whether the deceased during her lifetime was under a legal duty to provide support to the plaintiff, remained in dispute. There exists in my view no reason to give the terminology employed by the defendant in the present matter a meaning other than the meaning that it has in the context in which it was used, namely that the plaintiff must prove that he has suffered loss or damage, and if so, the amount to be awarded to him as compensation. An

admission of factual allegations has serious and important consequences and must as a result appear clearly and unequivocally.⁹⁷ “An admission does not entail the admission of anything which cannot fairly be regarded as an inevitable consequence or a necessary implication.”⁹⁸ If the defendant’s concession of the merits amounted to a compromise, as the Court a quo concluded, it is to be strictly interpreted and must not be understood to include anything which was not likely to have been contemplated by the parties at the time they reached the compromise.⁹⁹ Further, where a compromise is raised as a defence, the onus is upon him or her who relies on it to prove its existence and the terms thereof.¹⁰⁰

I accordingly conclude that the issues pertaining to the deceased’s duty of support remained in issue. The only remaining question is then whether the defendant should be granted leave to amend its plea in this regard. The general rule for the amendment of pleadings is that leave to amend will not be refused unless the application has not been made in good faith or where it would cause an injustice to the other side which cannot be compensated by an award of costs.¹⁰¹ To this extent the onus rests on the defendant to establish that the plaintiff will not be prejudiced by it.¹⁰² An amendment will inter alia be allowed where, as in the present matter, a new ground of defence comes to a defendant’s knowledge for the first time after he or she has filed a plea.¹⁰³ In the circumstances of the present matter the defendant should in my view, in the exercise of the Court’s discretion, be given leave to amend its plea insofar as those amendments relate to the plaintiff’s allegation that the deceased was under a legal duty to provide him with support in his personal capacity.

The costs occasioned by the amendment should be borne by the defendant. It is seeking an indulgence and in my view the plaintiff’s opposition to the application cannot, in the circumstances, be said to have been unreasonable.¹⁰⁴ Insofar as the costs of the appeal are concerned, the defendant was substantially successful and there exists no reason to depart from the usual rule that costs should follow the result.

[47] For these reasons the following order is made:

1. The appeal is allowed with costs.
2. The order of the Court a quo is set aside and substituted with the following order:
 - “(a) The defendant is given leave to amend its plea in accordance with the proposed amendments numbered 5.1, 5.2 and 5.4 in the notice to amend dated 5 December 2005.
 - (b) The defendant is ordered to pay the costs occasioned by the amendment including the costs of opposition thereto”

D. VAN ZYL

JUDGE OF THE HIGH COURT

Schoeman J : I agree.

I. SCHOEMAN

Dambuza J : I agree.

N. DAMBUZA

Matter heard on : 19th April 2011

Judgment delivered on : 20th October 2011

Counsel for Applicant : Mr A.D. Schoeman

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GRAHAMSTOWN

Counsel for Respondent : Mr. G.M. Budlender SC

Instructed by : Whitesides

53 African Street

1 2002

(5) SA 73 (W).

2At 77 F-H.

3Act 56 of 1996.

4Section 3.

5

6The nature and scope of this action will be dealt with in more detail later in this judgment when the plaintiff`s “loss or damage” as contemplated in section 17(1) of the Act is considered.

7What the effect of a non-admission is was dealt with in N Goodwin Design (Pty) Ltd v Moscak 1992

(1) SA 154 (C) at 162.

8See paragraph [1] above.

9The nature of this defence is dealt with in some detail in the Tolstrup case at 79D to 80D.

10 1980

(2) SA 814 (A).

11At 839 B.

12Per van Winsen AJA in *Price NO v Allied – JBS Building Society* 1980 (3) SA 874 (A) at 882E. See also Harms Civil Procedure in the Superior Courts Issue 43 at B37.2.

13 2010

(4) SA 122 (SCA).

14At 126 E-F.

15Rule 37 (6)(g).

16Filta-Matix (Pty) Ltd v Freudenberg and Others [1997] ZASCA 110; 1998 (1) SA 606 (SCA) at 614D.

17MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga supra at 126G.

18Section 18 for instance limits the amount payable as compensation where the third party is also entitled to compensation under the Compensation for Occupational Injuries and Disease Act 130 of 1993.

19Supra.

20At 841 E-G.

21Unreported decision cited as case no 7274/08(2010) ZAGPPHC 93(3 August 2010).

22At page 2. See also *Steenkamp v South African Broadcasting Corporation* 2002(1) SA 625(SCA) at 628B and *Internatio (Pty) Ltd v Lovemore Brothers Transport CC* 2000(2) SA 408 (SECLD) at 412A and 413A. These terms are similarly used interchangeably in this judgment.

23Supra at 77F.

24Harms op cit at para A2.4. See also Schreiner *The Contribution of English Law to South African Law; and the Rule of Law in South Africa; The Hamlyn Lectures (19th Series)* at page 10 and Erasmus “The Interaction of Substantive and Procedural Law: The Southern African Experience in Historical and Comparative Perspective” 1990

(1) Stellenbosch Law Review 348.

24Harms op cit at para A2.4. See also Schreiner *The Contribution of English Law to South African Law; and the Rule of Law in South Africa; The Hamlyn Lectures (19th Series)* at page 10 and Erasmus “The Interaction of Substantive and Procedural Law: The Southern African Experience in Historical and Comparative Perspective” 1990

(1) Stellenbosch Law Review 348.

25Zimmermann and Visser *Southern Cross Civil Law and Common Law in South Africa* at page 155. See also Erasmus ‘Aspects of the History of the South African Law of Damages’ (1975) 38 THRHR 104.

26[1972] UKHL 3; (1972) 1 All ER 801 (HL) at 825. Also *McCarey v Associated News papers Ltd* [1964] 3 ALL ER 947 CA at 957.

27Joubert (ed) *The Law of South Africa (LAWSA)* Vol 7 at para 9.

28Mozley & Whiteley's *Law Dictionary* 11th ed and *Black's Law Dictionary* 8th ed.

29Ibid.

30Ibid. See also *Hiemstra Trilingual Legal Dictionary* 3rd ed at page 78.

31Ibid.

32Sweet A *Dictionary of English Law*.

33See Visser & Potgieter *The Law of Damages* 2nd ed at page 19 to 20.

34See para [37] sqq.

35Saunders (ed) *Words and Phrases legally defined* Vol 2 at page 2.

361955(2) SA 370 (N).

371972(2) SA 270(A) at 276A-B.

38At 373H – 374A.

39It reads: “ If in any pending action, it appears to the court mero motu there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of , and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.”

40See Erasmus *Superior Court Practice* at B 1-235 sqq.

411968(4) SA 485(A).

42At 489 A-B.

43*Bourhill v Young* [1943] AC 92 where Lord Wright said the following at 106: “Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is *damnum absque injuria*. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff”.

44*McGregor Damages* at para 1-019.

45Clerk and Lindsell *Torts* at para 29-01.

46Per Harms JA in *Telematrix (Pty) Ltd t/a v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 468 A-B. See also Neethling, Potgieter and Visser *Law of Delict* 5th ed at page 3 and Van der Walt and Midgley *Principles of Delict*

(2005) at page 31.

47Telematrix (Pty) Ltd v Advertising Standards Authority supra at 468 B.

48For example under Rule 34 A which allows for interim payments in an action for damages for personal injuries or death. In Karpakis v Mutual & Federal Insurance Co Ltd 1991 (3) SA 489 (O). The Court found the content of this Rule his procedural and by no means substantive in character.

49Jacob “The Present Importance of Pleadings” 1960 Current Legal Problems 171 at page 175 to 176.

50Supra at 77C.

51See also Internatio 10 (Pty) Ltd v Lovemore Brother Transport CC 2000

(2) SA 408 (SECLD).

52See paragraph [37] hereunder with regard to the nature of the enquiry relating to damages.

53In dealing with an objection raised by the defendant in an action to the tendering into evidence of correspondence which preceeded a compromise, the terms of which were recorded in a consent paper, de Villiers CJ said the following in Petree Diamond Mining Co (Ltd) v Dreyfus (1885) 2 Buch AC 98 at 101: “The question whether or not the objection was properly sustained has not been raised on appeal, but it is by no means clear to me that the correspondence was not admissible, in the same way as the evidence upon which any other judgment is founded would be admissible as evidence in a case in which such judgment is relied upon in support of a plea of res judicata.”

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54See National Council of Societies for the Prevention of Cruelty to Animals v Openshaw [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at 349 A-C.

55Supra.

56See para [24] above.

57“All five requirements or elements, namely an act, wrongfulness, fault, harm and causation 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.” Neethling, Potgieter & Visser op cit a page 3 to 4.

58See para [37] to [39] of this judgment.

59Supra.

60At 838 H – 839 E.

61At 839 E.

62Visser and Potgieter op cit at page 19.

63The Quantum of Damages in Bodily and Fatal Injury Cases Vol.1 at page 47.

64[1996] ZASCA 122; 1997

(1) SA 611 (A).

65At 614 F.

66See para [26] above.

67McGregor Damages at para 1-019.

68See *Edwards v Hyde* 1903 TS 381 at 385; *Steenkamp v Juriaanse* 1907 TS 980 at 986; *Union Government v Warneke* 1911 AD 657 at 665; *Hulley v Cox* 1923 AD 234 at 243 and 244; *Union Government v Ocean Accident & Guarantee Corp Ltd* 1956

(1) SA 577 (A) at 588 A-C; *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA) and Price “Patrimonial loss and Aquilian Liability” 1950 (13) THRHR at page 87.

69Price “Patrimonial loss and Aquilian Liability” supra at page 97. Accordingly, if the plaintiff proves a wrongful act, in the absence of damnum he or she has no cause of complaint or a right to compensation. *Nochomowitz v Santam Insurance Co Ltd* 1972 (1) SA 718 (T) at 720B. See also Erasmus “Aspects of the History of the South African Law of Damages” supra at page 271.

70 2006

(5) SA 319 (SCA).

71At 320 F-G.

72Supra.

73At 665.

74*Edwards v Hyde* supra at 385.

75Neethling Potgieter and Visser op cit at page 202.

76Ibid at page 202 to 203. Also Visser and Potgieter op cit at page 30.

77Loubser et al The Law of Delict in South Africa at page 47.

78See Reinecke “Die Elemente van die Begrip Skade” 1976 TSAR 26 at page 28.

79Tolstrup supra at 77 F-H.

80Neethling Potgieter & Visser op cit at page 205 and 217 to 218, and Visser and Potgieter op cit at page 149.

81Visser & Potgieter op cit at page 359 and Corbett & Buchanan op cit at page 47.

82Smalberger JA in President Insurance Co Ltd v Mathews 1992 (a) SA 1 (A) at 5 C-D. See also Santam Verserings Maatskappy Bpk v Byleveldt 1973 (2) SA 146 (A) at 150 B-D; Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A) at 917 B-D and Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) at 241 F-G.

83With regard to the historical development of the action see inter alia Jameson’s Minors v CSAR 1908 TS 575; Union Government v Lee 1927 AD 202; Legal Insurance Company Ltd v Botes 1963 (1) SA 608 (A); Suid Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo 1960 (2) SA 467 AD.

84Corbett JA in Evans v Shield Insurance Co Ltd supra at 838 A. See also Legal Insurance Company Ltd v Botes supra at 614 E; Hulley v Cox supra at 243 and Union Government v Lee supra at 222.

85Supra.

86In Du Plessis v Road Accident Fund 2004

(1) SA 359 (SCA) the action for loss of support was further extended to partners in a same-sex permanent life relationship similar in other respects to marriage, who had a contractual duty to support one another. The action should also be extended to a relationship created by the provisions of the Civil Union Act 17 of 2006.

87Gildenhuys v Transvaal Hindu Educational Council 1938 WLD 260 at 262. See further Neethling Potgieter & Visser op cit at page 258 and Van Heerden et al Boberg’s Law of Persons and Family 2nd ed at page 301 and 305 and Neethling op cit at page 257 to 258.

88Shanahan v Shanahan 1907 NLR 15.; Rousseau NO v Cloete 1952 (3) SA 703 (C) at 709 F-G and Plotkin v Western Assurance Co Ltd and Another 1955 (2) SA 385 (W) at 395A.

88Shanahan v Shanahan 1907 NLR 15.; Rousseau NO v Cloete 1952 (3) SA 703 (C) at 709 F-G and Plotkin v Western Assurance Co Ltd and Another 1955 (2) SA 385 (W) at 395A.

89Edelstein v Edelstein NO and Others 1952 (3) SA 1 (A) at 15 and Milne v Protea Assurance Co Ltd 1978 (3) SA 1006 (C) at 1011 H to 1012 A.

90See Neethling Potgieter & Visser op cit at page 258 and Van Heerden et al op cit at page 305 and the authorities referred to. With regard to the relevance in this context of the actual existence of a common household, see Excell v Douglass 1924 CPD 472 at 475.

91Supra at 666. See also Oslo Land Co Ltd v The Union Government 1938 AD 584 at 590.

92 1934 TPD 210.

93At 214.

94Mankebe NO v AA Mutual Insurance Association Ltd 1986 (2) 196 (D) at 199 C-D. See also Corbett and Buchanan op cit at page 77.

95Per Lewis JA in Lambrakis v Santam Ltd 2002 (3) SA 710 (SCA) at 714 I-J.

96Corbett and Buchanan op cit at page 77.

97AA Mutual Insurance Association Ltd v Biddulph 1976 (1) SA 725 (A) at 735.

98Daniels Beck's Theory & Principles of Pleading in Civil Actions 6th ed at page 80, quoted with approval in AA Mutual Insurance Association Ltd v Biddulph supra at 735 E. See also Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd 1990 (1) SA 347 (A).

99Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing 2006 (6) SA 379 (C) at 386 F-G and Roberts ed Wessels Law of Contract in South Africa 2nd ed Vol.2 at para 2460.

100See Caney A Treatise on the Law of Novation 2nd ed at page 62 and the authorities referred to. Also Fed Trade CC v Estcort Ltd [2011] JOL 27407 (KZP) at para [14].

101Erasmus op cit at B1-178A.

102Erasmus op cit at B1-179.

103Flemmer v Ainsworth 1910 TPD 81; Combrinck v Strasburger 1914 CPD 314 and Frenkel, Wise & Co Ltd v Cuthbert 1947 (4) SA 715 (C).

104Rule 28 (9). See also Grindrod (Pty) Ltd v Delport 1997 (1) SA 342 (W) at 347 C-D.

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