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TITLE

THE ACTION OF DEPENDANTS FROM A COMPARATIVE AND AN AFRICAN PERSPECTIVE

THE ACTION OF DEPENDANTS FROM A COMPARATIVE AND AN AFRICAN PERSPECTIVE

by

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DECLARATION

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I declare that **THE ACTION OF DEPENDANTS FROM A COMPARATIVE AND AN AFRICAN PERSPECTIVE** is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

_____ **08 October 2018**

SIGNATURE DATE

DEDICATION

They say life does not come with a manual; it comes with a mother.

I remember a beautiful woman, who sacrificed many gracious moments in her life, so that I could have them in mine.

A mother who has lived life joyfully, with generosity, elegance and love;

but most of all;

I celebrate the blessing of being mothered by my dear, devoted, gorgeous mom in heaven,

MAPULA RACHEL MPE~MOKOTONG

Mmetli, sebetla bokamoso bja ditšhaba.

Mmapula, senetša pula, ra lema, tlala ya feta ka tsela.

Ke re yona, nngwedi, seponitšeša gare ga mpa ya bošego.

Mphatlalatsane, naledi ya masa.

Lona, lesedi, sebonegela ba le lapa la gagwe.

Sephaiphai, senoinoi, sephalaphala, mama yo mobotse.

Sekgwari, sethakga, se swara thipa ka bogale.

Ke re, mma wa go itlhompa, wa hlokomelo ye borutho, ya nnete,

mama wa ka!

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SUMMARY

The available sources on the dependency action in South Africa do not mention the presence or absence of traditional values. This study was prompted by a simple curiosity to discover the traditional legal values of the dependency action for loss of support. Accordingly, the study critically examines the action of dependants for loss of support and other related losses in South Africa, Botswana and Lesotho from an African perspective. It then compares this to its application in Australia, a country that is known for its recognition and inclusion of indigenous Australian customary law. The study recommends that traditional values should be preserved in the records of the legal system, as it might stimulate a discussion, which could lead to the culmination of a single dependency action tailored to fit the whole nation and all its different cultures and religions.

KEY TERMS:

African law; *"Banna ba diphiri"*; *"Bjala bja di garafo"*; Cultures; Customary law; Common law; Dependency action; Funeral expenses; *"Go ila"*; *"Go tsoša hlogo"*; Indigenous law; *"Izila" "Kgotla"*; Law of Delict; Loss of future savings or inheritance; Loss of support; "*Molato ga o bole";* Non-patrimonial loss; Post-burial cleansing ceremonies; Prescription; *"Seila";* Tort law; *"Ukuzila"*; Wrongful death.

ABBREVIATIONS AND ACRONYMS

A:	APPEAL COURT
AC:	APPEAL COURT
AD:	APPELLATE DIVISION
AHRLJ:	AFRICAN HUMAN RIGHTS LAW JOURNAL
AJ:	ACTING JUDGE
AJA:	ACTING JUDGE OF APPEAL
AJFL:	AUSTRALIAN JOURNAL OF FAMILY LAW
AJICL:	AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW
ALJ:	AUSTRALIAN LAW JOURNAL
ALR:	AFRICAN LAW REVIEW
ALRC:	AUSTRALIAN LAW REFORM COMMITTEE/COMMISSION
ALRCREFJL:	AUSTRALIAN LAW REFORM COMMITTEE REFORM JOURNAL
ALL SA:	ALL SOUTH AFRICA LAW REPORTS
ALRAEAS:	ASSOCIATION OF LAW REFORM AGENCIES OF EASTERN AND SOUTHERN AFRICA
BAA:	BLACK ADMINISTRATION ACT
BCLR:	BUTTERWORTH CONSTITUTIONAL LAW REPORTS
BJAS:	BOTSWANA JOURNAL OF AFRICAN STUDIES
BLJ:	BOTSWANA LAW JOURNAL
BLR:	BOTSWANA LAW REPORT
BLA:	BLACK LAWYERS ASSOCIATION
C:	CAPE PROVINCIAL DIVISION
CC:	CONSTITUTIONAL COURT
CCIES:	CONTINUUM COMPLETE INTERNATIONAL ENCYCLOPEDIA OF SEXUALITY
CCT:	CONSTITUTIONAL COURT
CILSA:	COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA
CJ:	CHIEF JUSTICE
Ck:	CISKEI HIGH COURT
C&O:	CAPE AND ORANGE FREE STATE
COIDA:	COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT
COIDAA:	COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES AMENDMENT ACT
CPD:	CAPE PROVINCIAL DIVISION
CPI:	CONSUMER PRICE INDEX
CRC:	CONVERSION ON THE RIGHTS OF THE CHILD
D:	DURBAN AND COAST LOCAL DIVISION
DCJ:	DEPUTY CHIEF JUSTICE

DP:	DEPUTY PRESIDENT
DR:	DE REBUS
E:	EASTERN CAPE PROVINCIAL DIVISION
ECB:	EASTERN CAPE HIGH COURT, BISHO
ECG:	EASTERN CAPE HIGH COURT, GRAHAMSTOWN
ECM:	EASTERN CAPE HIGH COURT, MTHATHA
ECP:	EASTERN CAPE HIGH COURT, PORT ELIZABETH
ED(S):	EDITORS(S)
EJCL:	ELECTRONIC JOURNAL OF COMPARATIVE LAW
ET:	AND
ET AL:	AND OTHERS
EX PARTE:	THE ONLY INTERESTED PARTY
FB:	FREE STATE HIGH COURT, BLOEMFONTEIN
FN:	FOOTNOTE
GLD:	GAUTENG LOCAL DIVISION
GNP:	NORTH GAUTENG HIGH COURT, PRETORIA
GSJ:	SOUTH GAUTENG HIGH COURT, JOHANNESBURG
HCA:	HIGH COURT OF AUSTRALIA
HSAG:	HEALTH SOUTH AFRICA GESONDHEID
IBID:	THE SAME AS IMMEDIATELY ABOVE
IDEM:	THE SAME AS ABOVE BUT ON A DIFFERENT PAGE
ILO:	INTERNATIONAL LABOUR ORGANISATION
INTJSSWC:	INTERNATIONAL JOURNAL OF SOCIAL SECURITY AND WORKERS COMPENSATION
IN RE:	IN THE MATTER OF
INS:	INSURANCE
ISW:	INTERNATIONAL SOCIAL WORK
J:	JUDGE
JA:	JUDGE OF APPEAL
JAL:	JOURNAL OF AFRICAN LAW
JDD:	JOURNAL OF DEATH AND DYING
JFE:	JOURNAL OF FINANCE & ECONOMICS
JHSS:	JOURNAL OF HUMANITIES AND SOCIAL SCIENCE
JLE:	JOURNAL OF LAW AND ECONOMICS
JSAL:	JOURNAL OF SOUTH AFRICAN LAW
JHC:	JOHANNESBURG HIGH COURT
KZD:	KWAZULU NATAL HIGH COURT, DURBAN
KZP:	KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
LEGABIBO:	LESBIAN GAY BISEXUALS OF BOTSWANA
LGBT:	LESBIAN, GAY, BISEXUAL, TRANSGENDER
LGBTI:	LESBIAN, GAY, BISEXUAL, TRANS, AND/OR INTERSEX
LLJ:	LESOTHO LAW JOURNAL
LSNP:	LAW SOCIETY OF THE NORTHERN PROVINCES
LSSA:	LAW SOCIETY OF SOUTH AFRICA

LT:	LIMPOPO HIGH COURT, THOHOYANDOU
MEC:	MEMBER OF EXECUTIVE COUNCIL
MLR:	MONTANA LAW REVIEW
MVA:	MOTOR VEHICLE ACCIDENT
N:	NATAL PROVINCIAL DIVISION
NAC:	NATIVE APPEAL COURT
NC:	NORTHERN CAPE PROVINCIAL DIVISION
NCK:	NORTHERN CAPE HIGH COURT, KIMBERLEY
NHC:	NATIVE HIGH COURT
NO:	IN AN OFFICIAL CAPACITY
NPD:	NATAL PROVINCIAL DIVISION
NSW:	NEW SOUTH WALES
NSWLR:	NEW SOUTH WALES LAW REPORT
NT:	NORTHERN TERRITORY
NWM:	NORTH WEST HIGH COURT, MAFIKENG
O:	ORANGE FREE STATE
OBITER:	IN PASSING
OP CIT:	IN THE WORK CITED ABOVE
OPD:	ORANGE FREE STATE PROVINCIAL DIVISION
PAR:	PARAGRAPH
PARAS:	PARAGRAPHS
PER:	BY
PER/PELJ:	POTCHEFSTROOM ELECTRONIC LAW JOURNAL
QLD:	QUEENSLAND
QUTLJJ:	QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW AND JUSTICE JOURNAL
RABS:	ROAD ACCIDENT BENEFIT SCHEME
RAF:	ROAD ACCIDENT FUND
RAFAA:	ROAD ACCIDENT FUND AMENDMENT ACT
RSA:	REPUBLIC OF SOUTH AFRICA
S:	SECTION
SA:	SOUTH AFRICAN LAW REPORTS
SAAJ:	SOUTH AFRICAN ACTUARIAL JOURNAL
SAHO:	SOUTH AFRICAN HISTORY ONLINE
SACLR:	SOUTH AFRICAN CRIMINAL LAW REPORTS
SAHRC:	SOUTH AFRICAN HUMAN RIGHTS COMMISSION
SAJBL:	SOUTH AFRICAN JOURNAL OF BIOETHICS AND LAW
SAJFS:	SOUTHERN AFRICAN JOURNAL OF FOLKLORE STUDIES
SAJHR:	SOUTH AFRICAN JOURNAL OF HUMAN RIGHTS
SALJ:	SOUTH AFRICAN LAW JOURNAL
SAPR/SAPL:	SUID-AFRIKAANSE PUBLIEKREG/SOUTH AFRICAN PUBLIC LAW
SCA:	SUPREME COURT OF APPEAL
SCH:	SCHEDULE
SE:	SOUTH EASTERN CAPE LOCAL DIVISION

SERSAS:	SOUTHEASTERN REGIONAL SEMINAR IN AFRICAN STUDIES
SLR:	SYDNEY LAW REVIEW
SS:	SECTIONS
STELL LR:	STELLENBOSCH LAW REVIEW
SUPRA:	ALREADY CITED MENTIONED ABOVE
T:	TRANSVAAL PROVINCIAL DIVISION
TK:	TRANSKEI HIGH COURT
TKA:	TRANSKEI COURT OF APPEAL
TPD:	TRANSVAAL PROVINCIAL DIVISION
THRHR:	TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG
TSAR:	TYDSKRIF VAN SUID-AFRIKAANSE REG
QUTLJJ:	QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW AND JUSTICE JOURNAL
UCLA:	UNIVERSITY OF CALIFORNIA, LOS ANGELES
UDHR:	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UIF:	UNEMPLOYMENT INSURANCE FUND
UNISA:	UNIVERSITY OF SOUTH AFRICA
V:	VERSUS
VIC:	VICTORIA
VOC:	VEREENIGDE OOST-INDISCHE COMPAGNIE
VOL:	VOLUME
W:	WITWATERSRAND LOCAL DIVISION
WA:	WESTERN AUSTRALIA
WALR:	WESTERN AUSTRALIAN LAW REVIEW
WCA:	WORKMEN’S COMPENSATION ACT
WCC:	WESTERN CAPE HIGH COURT, CAPE TOWN
WHO:	WORLD HEALTH ORGANISATION
WLD:	WITWATERSRAND LOCAL DIVISION
ZACC:	SOUTH AFRICAN CONSTITUTIONAL COURT
ZANWHC:	SOUTH AFRICA NORTH-WEST HIGH COURT
ZAGPHC:	SOUTH AFRICA GAUTENG PROVINCE HIGH COURT

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CHAPTER 1

INTRODUCTION TO THE STUDY

1.1 Introduction

This introductory chapter presents a general overview of the study. It introduces the reader to the topic of the research, helps explain to the reader how the fulfilment of the research aims and objectives will contribute to legal knowledge, discipline and practice. To achieve this, the thesis begins with the objectives[1] of the research by highlighting the importance of and rationale for the research. It then provides a background to the study's comparative perspective,[2] and focuses on the problem statement,[3] by predicting problems and outcomes, suggesting progression, and planning for alternatives and interventions. It also gives a brief description of the study's approach towards the proposed research method.[4] The introductory chapter ends with an exposition of the chapters in the thesis[5] and an explanation of a few terms[6] that are used throughout the study.

1.2 Objectives of the study

This study aims to offer a comparative exploration of the action of dependants for loss of support and other related losses such as funeral expenses and non-patrimonial losses in South Africa, Botswana, Lesotho and Australia. In South Africa, a dependency claim arises when a breadwinner is killed by the wrongful and negligent act of another (the wrongdoer) and, as a result, the deceased's dependants suffer, first

1 See chapter 1 of this thesis, par 1.2 hereunder.
2 See chapter 1 of this thesis, par 1.3 hereunder.
3 See chapter 1 of this thesis, par 1.4 hereunder.
4 See chapter 1 of this thesis, par 1.5 hereunder.
5 See chapter 1 of this thesis, par 1.6 hereunder.
6 See chapter 1 of this thesis, par 1.7 hereunder.

and foremost, loss of support,[7] but there are also other potential losses the dependants could suffer and these would be included under the dependency action.[8] This is also an accurate version of the dependency action under the laws of Botswana,[9] Lesotho[10] and Australia.[11] This study addresses and highlights complicated questions that are associated with the action of dependants for loss of support and other related losses, particularly within an African context. The South African law on dependants' action generally reveals nothing about the presence or absence of traditional values in African/customary/indigenous law pertaining to the dependency action.[12] This is an oversight in our legal system, and adding the customary law perspectives will assist in the fair and consistent application of the dependency action. The correct use of the word "customary law" in this study is important. Juma, a legal author, states that the term "customary law" is used interchangeably with "African law." Both encompass the regimes of law variously described as "indigenous law", "African customary law", "tribal law", "local law", "native law", "primitive law", and "folk law."[13] In *Mabuza v Mbatha,*[14] Hlophe JP referred to this system as "African customary law". In *Bhe v The Magistrate Khayelitsha; Shibi v Sithole; Human Rights Commission v President of Republic of*

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7 Neethling & Potgieter *Law of delict* (2015) 292; Loubser & Midgley (eds) *Delict* (2017) par 3.5.1; Van der Walt & Midgley *Delict* (2016) paras 12 54 96 & 197; *Jameson's Minors v Central South African Railways* 1908 TS 575; *Hulley v Cox* 1923 AD 234; *Millward v Glaser* 1949 4 SA 931 (A); *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A).

8 For example, funeral expenses and non-patrimonial losses.

9 Fombad https://www.saflii.edu.au/au/journals/ (accessed on 12 March 2015).

10 Palmer *Law of delict* (1970) 114; Poulter *Legal dualism* (1979) 70; *R v Monnanyane* 2005 LSHC 130.

11 Barnett & Harder *Remedies* (2014) 184; Civil Law (Wrongs) Act 2002, s 18(1); Law Reform (Miscellaneous Provisions) Act 1941 (WA), s 4(5); Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 2(5); Law Reform (Miscellaneous Provisions) Act 1956 (NT), s 9(1); Succession Act 1981 (Qld), s 66(4); Survival of Causes of Action Act 1940 (SA), s 6(1); Administration and Probate Act 1935 (Tas), s 27(9); Administration and Probate Act 1958 (Vic), s 29(5); Carver 2005 *QUTLJJ* 13.

12 The South African law is still largely dominated by Western laws: Rautenbach "The phenomenon of legal pluralism" in Rautenbach, Bekker & Goolam (eds) *Introduction to legal pluralism* (2015) 6-7.

13 Juma 2007 *Speculum Juris* 88-90.

14 2003 7 BCLR 43 (C).

South Africa,[15] Langa DCJ applies the term "customary law", whilst in the same case, Ngcobo J uses the word "indigenous law." In *Alexkor Ltd and another v Richtersveld Community and others*,[16] the Constitutional Court refers to the expression "indigenous law", but in *Shilubana and others v Nwamitwa*,[17] the court speaks of "customary law". In this study, "customary law" is preferred, but is used interchangeably with "African law" and "indigenous law".

Despite the dependency action being an increasingly topical theme in South Africa, no in-depth research has as yet collectively taken all the observations and critical legal problems into consideration, and delivered a legal structure for effective incorporation and application of traditional value in the dependants' action for loss of support.[18] Essentially, the traditional values under customary law concerning the dependency action have never been published in South Africa. The application of customary law must reflect the legal, political and social cosmology in which it operates within its own indigenous frame of reference.[19] The writing of this thesis is in particular fuelled by a simple curiosity to discover traditional values related to the dependency action under the customary law system. Does customary law possess legal rules to deal with the action of dependants? The determination, knowledge and understanding of these

15 2005 1 BCLR 580 (CC).
16 2003 12 BCLR 1301 (CC).
17 2008 9 BCLR 914 (CC).
18 *Brooks v Minister of Safety & Security* 2009 2 SA 278 (SCA); *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Dlikilili v Federated Insurance Co Ltd* 1983 2 SA 275 (C); *Mokoena v Laub* 1943 WLD 63; *Zulu v Minister of Justice* 1956 2 SA 128 (N); *Pasela v Rondalia Versekeringskorporasie van Suid-Afrika* 1967 1 SA 339 (W); *Fosi v RAF* 2008 4 SA 560 (C); *Langemaat v Minister of Safety & Security* 1998 3 SA 312 (T); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC); Davel *Afhanklikes* (1987) 50-51 available at https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 18 March 2015); Neethling 2009 *THRHR* 297-299.
19 Ndima *Re-imagining and re-interpreting African jurisprudence* (2013) iii.

traditional values would be a valuable addition to our legal knowledge. It would undoubtedly provide insight into the resolution of problems that might be encountered under customary law in respect of the action. It would also be easier to appreciate the incorporation of the traditional values into the existing eccentric dependency action, which may eventually culminate in a single dependency action tailored to suit the whole nation and all its different cultures.

Consequently, the primary focus in this study is on establishing the traditional values in the action of dependants under customary law, and assessing the extent to which the affirmation of indigenous values in the dependency action is being effected by the South African courts and the legislature, thereby providing a basis for the incorporation of traditional values of the action of dependants into our legal system. This study addresses whether or not African traditional legal rules and values, when established, should be integrated with the common law dependency action. In this study, a determination of whether or not there is a need to Africanise this delictual action is made.

Most countries in Africa are still developing, and the Southern African societies researched in this study still adhere to strong traditional values. Some of these values have not yet been adopted or recognised by legislation or judicial decisions, nor have they been recorded in writing.[20] However, they became binding over time through their observation by the communities themselves.[21] Africa prides itself on having a rich cultural diversity, which has to be reflected in the legal system.[22] Therefore, when we

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20 *Ngcobo v Ngcobo* 1929 AD 236; *Fosi v RAF* 2008 4 SA 560 (C); *Seleka v RAF* 2016 4 SA 445 (GP).

21 Gibson *Wille's principles* (1977) 9.

22 Maithufi & Bekker 2009 *OBITER* 170.

develop the law, in particular the dependency action for loss of support, we must incorporate these "traditional values". The aim is to preserve the "traditional values" on the dependency action in customary law within the legal system. Therefore, it is imperative to explore the heart of Africaness in more depth, as well as to determine whether comparative law has anything to offer in this respect. This study seeks to investigate to what extent there is unity and/or diversity amongst African and Westernized countries in the rules concerning the dependency action for loss of support, and compensation for such loss. As an example of a developed, Westernised country, this study investigates whether Australia has successfully managed to incorporate any traditional values into its legislated framework for dependants' claims.

In South Africa, the dependency action is also an area where the influence of constitutional values has been palpable.[23] The South African Constitutions[24] raised the position of African law to the similar status as common law, and had a notable impact on the action of dependants for loss of support. Consequently, reference is made throughout this study to customary law and the provisions of our Constitutions, in order to emphasise significant concepts. Contrary to Australia,[25] South Africa has no

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23 *Langemaat v Minister of Safety & Security* 1998 3 SA 312 (T); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC); 2006 1 SA 524 (CC).

24 The interim Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter, the "interim Constitution") and the final Constitution of the Republic of South Africa 108 of 1996 (hereinafter, the "Constitution").

25 Supreme Court Act 1995 (Queensland); Fatal Accidents Act 1950 (Western Australia); but there are other potential losses they could suffer too and would be included under the dependency action Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1936 (Southern Australia); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); s 83 of the Discrimination Law Amendment Act 2002 (Queensland); s 57 of the Acts Amendment (Equality of Status) Act 2003 (Western Australia); s 60 of the Law Reform (Gender, Sexuality and De facto Relationships Act 2003 (Northern Territory); s 4 of the Wrongs (Dependants) Act 1982 (Victoria); sch 1 of the Relationships (Consequential Amendments) Act 2003 (Tasmania); sch 2.3 of the Property (Relationships) Legislation Amendment Act 1999 (New South Wales); ss 23 & 28(2) of the Civil Law (Wrongs) Act 2002 (Australian Capital Territory).

legislation dedicated to regulating the dependency action. In general, there is no unified legislative approach to dealing with the dependency action. The road thus far has been characterised by piecemeal legislative recognition.[26] The absence of a clear, single, steadfast and all-inclusive legislative policy on the South African dependency action presents some problems, not all of which have been resolved.[27] Although there are cases and studies, which provide some guidance, there is still uncertainty regarding a number of issues, ranging from basic principles to questions of detail.

The practical application of the action of dependants is not without difficulty, and has at times given rise to considerable confusion. This study scrutinises the perplexity of the underlying principles of modern statutes,[28] which contain various sections conferring upon the dependants the rights and action for recovery of loss suffered as a result of the unlawful and negligent killing of their breadwinner, as well as the apparent inability to distinguish between the vested rights thus given[29] by the action. The form in which these legislations have been cast seems to be destined to tax legal writers, academics and judicial minds for some time to come. These provisions have not been expressed in simple and clear terms. The wording of various legislations[30]

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26 For instance, Civil Union Act 17 of 2006; Recognition of Customary Marriages Act 120 of 1998; Marriages Act 25 of 1961; Apportionment of Damages Act 34 of 1956; Black Law Amendment Act 76 of 1963; Assessment of Damages Act 9 of 1969; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Nuclear Energy Act 131 of 1993; Road Accident Fund Act 56 of 1996; Recognition of Customary Marriages Act 120 of 1998; Road Accident Fund Amendment Act 19 of 2005; the proposed Road Accident Benefit Scheme (RABS) Bill, 2017 - Government Gazette No. 36138; Children's Act 38 of 2005.

27 See chapter 1 of this thesis, par 1.4 hereunder for the list of the issues/problems/confusions. Their nature and scope will be discussed in greater detail throughout the study.

28 See fn 26 above.

29 Neethling & Potgieter *Law of delict* (2015) 292; Van der Merwe & Olivier *Die onregmatige daad* (1987) 348; Van Zyl *Law of maintenance* (2005) 19; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837-838; *Jameson's Minors v Central South African Railways* 1908 TS 575 583-585; *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C), 2009 2 SA 94 (SCA) 97-98 100; *Union Government (Minister of Railways) v Lee* 1927 AD 202 220-222; *Santam v Fondo* 1960 2 SA 467 (A) 471-472; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 55; *Lambrakis v Santam* 2000 3 SA 1098 (W) 1113; *De Vaal v Messing* 1938 TPD 34.

30 See fn 26 above.

has, in general, left it to the courts to exercise their judgment. These misperceptions even reign within our case law.[31] It seems as if our courts are still in the dark and base their decisions on the Judge's individual understanding of the dependants' action. Consequently, many critical and complicated questions in respect of this action remain unaddressed,[32] but the state of the dependants' action, which could well be described as unsettled,[33] has also seen development.

If there is one area of the law where courts have to be watchful of the prevalence of legal fees, for fear that, rewards of damages could be reduced by the expense of fruitless attempts to achieve theoretical perfection, it is in the field of the action of dependants for loss of support. As a result, this study attempts to examine, criticise and distinguish these unsettled issues[34] and seemingly conflicting decisions on this subject. It also proposes a way forward for unanswered problems[35] regarding the action, and motivates for a more comprehensive approach in enacting legislation that focuses specifically on the action of dependants for loss of support, expressly providing for the traditional values in respect of the dependency action.

This study also examines the legal issues surrounding the action of dependants as a whole. It looks at the reasons for the action; the legal standing of the action; and the past, present and future application of the dependants' action from an African

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31 *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C); *Groenewald v Snyders* 1966 3 SA 237 (A); *Constantia Versekeringsmaatskappy Bpk v Victor NO* 1986 1 SA 601 (A); *Abbott v Bergman* 1922 AD 53 56; *Plotkin v Western Assurance Co Ltd* 1955 2 SA 385 (W) 394-395; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C); *De Vaal v Messing* 1938 TPD 34; *Brooks v Minister of Safety & Security* 2009 2 SA 94 (SCA).

32 See chapter 1 of this thesis, par 1.4 hereunder.

33 Pont 1940 *THRHR* 164; Price 1952 *THRHR* 61; Boberg 1971 *SALJ* 424; Claasen 1984 *THRHR* 440; Neethling 2003 *TSAR* 783; Carpenter 2003 *SAPL* 258; Dendy 1990 *SALJ* 156; Burchell 1999 *SALJ* 730; Carver 2005 *QUTLJJ* 3; Fombad https://www.saflii.edu.au/au/journals/ (accessed on 12 March 2015).

34 See chapter 1 of this thesis, par 1.4 hereunder.

35 *Ibid*.

perspective. The underlying objectives of this study are fourfold: firstly, it provides a brief historical background to the need for the action for loss of support, thereby creating a powerful tool for understanding the protection of the dependants and the inevitability of the action. Secondly, the study establishes the traditional values in the action of dependants; assesses the extent to which the South African courts and legislature have provided an affirmation of indigenous values in the dependency action; and provides a basis for the incorporation of the traditional African values of the action of dependants into our legal system. Thirdly, it provides a detailed examination of the action for loss of support on a comparative level, as well as the various provisions that regulate this remedy. Finally, the study considers some important principles that South Africa should bear in mind in its development of the action's jurisprudence within a comparative African context.

1.3 Comparative perspective

Since the action of dependants for loss of support does not appear to have been comprehensively researched by a wide judicial and legislative interpretation in South Africa recently,[36] this study provides an opportunity to compare South Africa with two developing countries within the Southern Africa region, namely Botswana and Lesotho, as well as a developed country such as Australia. This is important because it is imperative to note certain principles established in other countries with regard to this action. A comparative analysis is a valuable mechanism for legal harmonisation, in the sense that it provides consistent information to be used in formulating new common solutions that might attest to be effective in practice. It could also assist to promote a

[36] The last comprehensive study was conducted by Boezaart (previously Davel): see Davel *Afhanklikes* (1987) 50 available at https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 15 March 2015).

better understanding of the situation in one's own country and benefit in a proper assessment of the system globally. It could also help in the interpretation and enforcement of the protection of dependants' rights. In addition, whenever there is a troublesome issue[37] within the action for loss of support because of the unlawful and negligent death of the breadwinner, such a problem could be resolved by means of a comparative study.

The experiences in Botswana, Lesotho and Australia may be useful in informing South Africa of the future consequences of dependants' claims for loss of support. For the above reasons, a comparative study of the relevant legal provisions regarding the dependants' action in these three countries is undertaken. The action of dependants for loss of support in Botswana, Lesotho and Australia is investigated because like South Africa, Botswana and Lesotho have a dual legal system that acknowledges the coexistence or simultaneity of both common law and customary law. Akin to South Africa, Botswana and Lesotho have a diversity of ethnic or indigenous groups, and the indigenous people of both countries are in the majority. The manner in which these two systems operate together in Botswana and Lesotho is investigated in this study, in order to determine how they are applied in practice and if there is any lesson the South African legislature can learn from these systems.[38] Similar to South Africa, Australia is a multicultural society, and the socio-economic circumstances in Australia and South Africa are similar in many respects. Customary law also plays a great role in Australia. The study will explore how Australia dealt with the customary law action of dependants

[37] See chapter 1 of this thesis, par 1.4 hereunder.

[38] Quansah https://www.pulapulapula.co.uk/ (accessed on 18 March 2015); Dube https://www.nyulawglobal.org/globalex/lesotho.htm (accessed on 18 March 2015).

and whether the Australian approach could be beneficial to the South African legislature.[39]

1.4 Problem statement

1.4.1 Introduction

This section addresses and highlights the complexities and problematic aspects of the action of dependants for loss of support. It analyses the deficits of the action and suggests progression, alternatives and interventions.

1.4.2 Analysis, rationale and motivation for the research study

This study is motivated by the fact that little in-depth research has recently been conducted on this topic, and it is an increasingly topical theme in South Africa.[40] Professor Trynie Boezaart has done groundbreaking work on the historical research of the action in the eighties.[41] The most recent contributions were made by Professors Johann Neethling[42] and Trynie Boezaart, in the form of a note publication and keynote address.[43] They focused on the background of the action and on obtaining an understanding of the current application of the action for loss of support. These contributions have delivered a very good foundation for moving forward in the 21st century, with a better cognizance or an increased awareness of potential difficulties, particularly in Africanising the action for loss of support. The writing of this thesis is

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39 Multicultural Australia: United in Diversity https://www.immi.gov.au/media/fao (accessed on 18 March 2015).

40 *Brooks v Minister of Safety & Security* 2009 2 SA 278 (SCA); *Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Dlikilili v Federated Insurance Co Ltd* 1983 2 SA 275 (C); *Mokwena v Laub* 1943 WLD 63; *Zulu v Minister of Justice* 1956 2 SA 128 (N); *Pasela v Rondalia Versekeringskorporasie van Suid-Afrika* 1967 1 SA 339 (W); *Fosi v RAF* 2008 4 SA 560 (C).

41 Davel *Afhanklikes* (1987) 50-51 available at https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 18 March 2015).

42 Neethling 2009 *THRHR* 298.

43 See fn 41 above.

also motivated by the following interesting, but sometimes critical, complicated and unsolved observations and legal problems/issues in respect of the action for loss of support, which are addressed in the study:

1.4.2.1 Problem 1: Vested rights

The first dilemma concerns the question as to whether a claim for damages for loss of support arising out of the unlawful and negligent death of the breadwinner is necessarily a dependant's action, or whether, in some circumstances, such a claim must take the form of a breadwinner's action instead. This is a highly debated question within the action of dependants for loss of support. It leads to differences of opinion amongst legal writers, court outcomes and other legal systems. This raises the following questions: Why are the views and legal systems deviating on this question? Can an all-inclusive approach be adopted in this regard? Which possible claimants or dependants are excluded if the approach followed is that it is a breadwinner's action? How is this uncertainty managed under customary law? The question of vested rights given by the action has not been authoritatively decided. The issue is thus whether a claim for damages for loss of support arising out of the unlawful and negligent death of the breadwinner is based on the infringement of the rights of the breadwinner or the rights of the dependants?[44]

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[44] *Jameson's Minors v Central South African Railways* 1908 TS 575; *Union Government (Minister of Railways) v Lee* 1927 AD 202; *Senior NO v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *Ismael v General Accident Insurance Co SA Ltd* 1989 2 SA 468 (D); *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C); *Brooks v Minister of Safety & Security* 2009 2 SA 278 (SCA); Boberg 1971 *SALJ* 425; Pont 1940 *THRHR* 165; Price 1952 *THRHR* 61; Claasen 1984 *THRHR* 441; Neethling 2003 *TSAR* 785; Carpenter 2003 *SAPL* 259.

1.4.2.2 Problem 2: Injured breadwinner

Another very important and interesting uncertainty is the question as to whether the dependants of a breadwinner who is injured (not killed) in a wrongful and culpable manner should be able, as in the case of death, to claim for loss of support with the Aquilian action.[45] There is a strong division with regard to the judicial pronouncements: on the one hand, there are decisions that grant the Aquilian action to the dependants of an injured breadwinner, who has a duty to support them.[46] The decision in *De Vaal v Messing*[47] provides support to the opposite view. The policy reason why the extension of liability is sometimes refused where the breadwinner is injured, but not killed, is that it would impose an additional burden on the defendant (wrongdoer), which would be unwarranted.[48]

The questions that immediately come to mind are the following: Would the refusal to extend the remedy to cases where the breadwinner is injured, but not killed, constitute an unjustified limitation of the actions of dependants for loss of support? Would it not be in the public interest to pursue a more comprehensive approach to the dependants' action? In other words, is all heads of damage caused to a dependant by reason of the unlawful injury of his or her breadwinner actionable by means of the Aquilian action? Furthermore, to what extent can liability extend, without imposing excessive burdens upon the defendant? From a customary law perspective, the idea of unlimited liability is reasonable.[49] Can the African perspective of unlimited liability be authenticated in light of our constitutional outlook?

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45 Neethling & Potgieter *Law of delict* (2015) 299; Van Zyl *Law of maintenance* (2005) 22; *De Vaal v Messing* 1938 TPD 34.

46 *Abbott v Bergman* 1922 AD 53 56; *Plotkin v Wester Assurance Co Ltd* 1955 2 SA 385 (W) 394-395; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C).

47 1938 TPD 34.

48 *RAF v Shabangu* 2005 1 SA 265 (SCA) par 18.

49 Bennett *Customary law* (2004) 121.

1.4.2.3 Problem 3: Classes of dependants

In South Africa, there is an unlimited circle of persons entitled to sue for loss of support where their breadwinner was unlawfully and negligently killed.[50] A claim for loss of support is based upon the maintenance obligation of the deceased breadwinner *in lieu* of a relationship of dependency.[51] Typical examples of such relationships of dependency would include parent and child, husband and wife, grandparents and grandchildren, and brothers and sisters.[52] The law of wrongful death in Botswana, Lesotho and Australia tends to define the class of eligible dependants narrowly.[53] The wrongful death remedy provides for exclusive classes of beneficiaries, thereby limiting recovery to those classes of dependants.[54] The comparative countries vary in terms of who is authorised to be a plaintiff-dependant in the dependants' action.[55] The South African judiciary has recently broadened the class of dependants entitled to bring the

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50 *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2008 4 SA 150 (SCA) 160 par 21.

51 Steynberg 2007 *PER* 1/*PELJ* 122 available at https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015); Davel *Afhanklikes* (1987) 51-53 available at https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 18 March 2015); Potgieter, Steynberg & Floyd *Law of damages* (2012) 278 280.

52 Neethling & Potgieter *Law of delict* (2015) 293 296.

53 Steynberg 2007 *PER* 1/*PELJ* 122 available at https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015); Supreme Court Act 1995 (Queensland); Fatal Accidents Act 1950 (Western Australia); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1936 (Southern Australia); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); s 83 of the Discrimination Law Amendment Act 2002 (Queensland); s 57 of the Acts Amendment (Equality of Status) Act 2003 (Western Australia); s 60 of the Law Reform (Gender, Sexuality and De facto Relationships Act 2003 (Northern Territory); s 4 of the Wrongs (Dependants) Act 1982 (Victoria); sch 1 of the Relationships (Consequential Amendments) Act 2003 (Tasmania); sch 2.3 of the Property (Relationships) Legislation Amendment Act 1999 (New South Wales); s 23 and 28(2) of the Civil Law (Wrongs) Act 2002 (Australian Capital Territory).

54 *Perre v Apand (Pty) Ltd* 1999 164 ALR 606.

55 *Pannel v Fischer* [1959] SASR 77 (FC); Queensland Law Reform Commission, *The Assessment of damages in personal injury & wrongful death litigation: Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867* (Report No 45, October 1983) 68–69; *Jodaiken v Jodaiken* 1978 1 SA 784 (W); *Fourie v Santam Insurance Ltd* 1996 1 SA 63 (T); *Senior v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *Ismael v General Accident Co SA Ltd* 1989 2 SA 468 (D); *Witham v Minister of Home Affairs* 1989 1 SA 116 (ZH); *Union Government v Warneke* 1911 AD 657; *Pike v Minister of Defence* 1996 3 SA 127 (Ck); *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O); *Santam v Henery* 1999 3 SA 421 (SCA); *De Vaal v Messing* 1938 TPD 34; *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A).

action for loss of support.[56] In terms of the Black Law Amendment Act,[57] a partner in a customary union is now entitled to claim damages for loss of support from a person who unlawfully and negligently caused the death of the other partner, or who is legally liable in respect of the death, provided the partner is not, at the time of death, a party to a subsisting marriage. In terms of the Recognition of Customary Marriages Act,[58] a valid customary marriage that existed at the commencement of this Act is, for all purposes, recognised as a marriage. There are, however, some doubts whether a duty of support is owed to a parent by his or her child in customary law.[59]

The question that must be answered is whether the expansion of the eligible class of dependants has reached its final stages, or whether within an African context, the true circle of family spreads so wide that it becomes an open-ended class of persons? On the other hand, would this unlimited circle of persons entitled to sue for loss of support not lead to a widespread abuse of the action?

1.4.2.4 Problem 4: Damages claimable under the dependency action

The fundamental function of the dependants' action for loss of support is compensation – an attempt, as far as money can, to place a claimant-dependant in the position that

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56 *Abbott v Bergman* 1922 AD 53; *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Satchwell v President of the RSA* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare & Population Development* 2003 2 SA 198 (CC); *J v DG, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Robinson v Volks* [2004] 2 All SA 61 (C); *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Santam v Henery* 1999 3 SA 421 (A); *Mlisane v South African Eagle Insurance* 1996 3 SA 36 (C); *Zimnat Insurance v Chawanda* 1991 2 SA 825 (ZS); *Du Plessis v RAF* 2004 1 SA 359 (SCA); Civil Union Act 17 of 2006; *Paixão and another v RAF* 2012 6 SA 377 (SCA).

57 s 31 of Act 76 of 1963.

58 s 2(1) & (2) of Act 120 of 1998.

59 *Fosi v RAF* 2008 3 SA 560 (C); [2007] ZAWCHC 8; *Seleka v RAF* 2016 4 SA 445 (GP). See also *Oosthuizen v Stanley* 1938 AD 322 327-328; *Jacobs v RAF* 2010 3 SA 263 (SE); *JT v RAF* 2015 1 SA 609 (GJ) par 26; *Petersen v South British Insurance Co Ltd* 1967 2 SA 235 (C); *Anthony and Another v Cape Town City Council* 1967 4 SA 445 (A)*; Smith v Mutual & Federal Insurance* Co *Ltd* 1988 4 SA 626 (C) *Wigham v British Traders Insurance* Co *Ltd* 1963 3 SA 151 (W); *Tutubala v RAF* [2015] ZAGPJHC 149; *Osman v RAF* [2015] ZAGPPHC 517; 2015 6 SA 74 (GP); *Gesina v RAF* [2017] ZAGPPHC 188.

he or she would have been in, but for the wrongdoer's unlawful and negligent act.[60] Despite the fact that loss of support includes all the financial contributions that the breadwinner would have made to his or her dependants over his lifetime or that of his/her dependants, whichever is shorter, not all damage caused due to the unlawful and negligent death of the breadwinner can be recoverable by the dependency action for loss of support. Compensation for unlawful deprivation of parental support has remained limited to specific loss of financial contributions (patrimonial/pecuniary interests only), which the breadwinner would have made to the dependants if he or she was alive.[61] However, the disadvantage resulting from the unlawful death of a breadwinner encompasses more than termination of a restricted source of financial maintenance.[62] The South African law does not allow a pecuniary claim for loss of savings or loss of inheritance to be taken into account in dependency claims, whereas Australian law expressly allows loss of savings or inheritance to be taken into account.[63] Whether the South African dependency action should be developed to include loss of savings or inheritance needs to be investigated further.

The awarding of damages covering non-material aspects of parental care is another problem relating to the action of dependency that remains unsolved. The ideal measure of damages[64] is that which leads to the most comprehensive compensation

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60 *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; *Hulley v Cox* 1923 AD 234 244; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614.

61 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 7.5.4.2; Parker & Zaal 2016 *THRHR* 146; *M v Minister of Police* 2013 5 SA 622 (GNP).

62 Parker & Zaal 2016 *THRHR* 146; *M v Minister of Police* 2013 5 SA 622 (GNP).

63 Queensland Law Reform Commission: *Damages in an action for wrongful death* **(**Issues Paper WP No 56 June 2002); *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393.

64 A formula for determining monetary damages or a way to compute damages that are to be awarded to claimants: see Webster's New World Law Dictionary (2010) https://www.yourdictionary.com/measure-of-damage (accessed on 23 July 2017). Quantum of damages appears to be the preferred term in legal circles for the measure of damages, or amount of damages, and measure of damages will be interpreted to refer to the method to quantify the damages in this study.

possible.[65] In other words, when assessing damages, concern should be had to all losses flowing from the death, including both patrimonial and non-patrimonial damage.[66] Non-patrimonial losses as a head of damage under the dependency action are not recognised in South Africa. Australia, which has similar legislation, expressly allows non-pecuniary losses to be taken into account in a dependency claim.[67] Whether there is a need to bring South African law at par with the position in Australia, will be investigated.

Furthermore, compensation in this area is by nature hypothetical, necessitating the courts to evaluate a deceased-breadwinner's capability to provide for his or her dependants if he or she had not died. The extent of ambiguity lies in the extensive variety of possible legitimate opinions about how the future would unfold.[68] For instance, in relation to loss of future support, the deceased breadwinner's prospective health, life expectancy, duration of working life, future income and possibility of promotion or redundancy, personal expenditure and family contributions have to be determined by the courts. The mathematical model for the calculation of the present value of loss of financial support due to wrongful and negligent death is noticeably absent from the statutes (legislative guidelines) for the assessment and calculation of the said compensation, which may result in some dependants being under-compensated.[69]

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65 Van der Walt *Sommeskadeleer en die "once-and-for-all" reël* (1977) 8 46 93 108 125-6 227 242 250 279 301 304.

66 Luntz *Assessment of damages* (2006) par 6.2; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 2.3.2.

67 Queensland Law Reform Commission: *Damages in an action for wrongful death* (Issues Paper WP No 56 June 2002); *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393.

68 Fombad https://www.saflii.edu.au/au/journals/ (accessed on 12 March 2015).

69 Burchell *Delict* (1993) 238; McKerron *Delict* (1971) 151-153; Howroyd & Howroyd 1958 *SALJ* 67; Boberg 1964 *SALJ* 149; *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A); *Waring & Gillow Ltd v Sherborne* 1904 TS 340; *Hulley v Cox* 1923 AD 234; *De Jongh v Gunther* 1975 4 SA 78 (W); *Victor NO v Constantia Insurance Co Ltd* 1985 1 SA 118 (C) 120C.

Heads of damage claimable under the dependency action includes, but is not limited to, past loss of income, pre-death medical expenses, non-patrimonial losses, loss of support and funeral expenses suffered by both the breadwinner and the dependants. For purposes of this study, although the thesis mostly speaks of the dependency action for loss of support, the discussion on damage claimable under the dependency action will be limited to non-patrimonial damage, loss of support and funeral expenses as they are the most commonly occurring damage claimable under the dependency action and it is also where recent legal developments have taken place. Although past loss of income suffered by the breadwinner and medical expenses due to the injury of the breadwinner could sometimes be incurred by the dependants, these heads of damage would not be discussed under this study as they do not easily and squarely fit under claims by dependants.

1.4.2.5 Problem 5: Social security legislative framework

Several statutes provide for the recovery of loss of support where the breadwinner was wrongfully and unlawfully killed. The current leading social security legislative framework covering death claims or dependency action for loss of support in South Africa consists of the Road Accident Fund Act (RAF Act),[70] Road Accident Fund Amendment Act (RAFAA),[71] Compensation of Occupational Injuries and Diseases Act (COIDA or COID Act),[72] and the proposed Road Accident Fund Benefit Scheme (RABS) Bill.[73] While the fault-based Road Accident Fund (RAF or Fund) and

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70 Act 56 of 1996.

71 Act 19 of 2005.

72 Act 130 of 1993 as amended by the Compensation of Occupational Injuries and Diseases Amendment Act 61 of 1997 (COIDAA).

73 Road Accident Benefit Scheme Bill, 2017 - Government Gazette No. 36138. The initial RABS Bill, called the Road Accident Benefit Scheme Bill, 2013 and its Explanatory Memorandum were published for comments in Government Gazette No. 36138 dated 08 February 2013 and revised following consideration of public comments. The revised Bill, Regulations and Rules were published for comment on 9 May 2014. The Minister of Transport intends introducing the Road Accident

Compensation Commissioner share their goal of compensating dependants for the incredible loss of an unlawful and negligent death with the dependants' action for loss of support, the compensation in terms of the RAF Act, RAFAA and COIDA is limited to death as a result of a motor vehicle accident[74] and work-related accidents and/or diseases,[75] respectively.

The methods[76] of calculating the loss of support in terms of the RAF legislations and COIDA differ from those used in the law of delict, as well as amongst the social security legislations and the proposed RABS. The RAF Act was amended by the RAFAA.[77] The constitutionality and legality of the RAFAA were unsuccessfully challenged in the Constitutional Court,[78] especially in light of the fact that the victims are required to waive their right to litigate against the wrongdoer and to have their compensation limited to a prescribed amount. The RAF Act allowed the dependants of the victim of a road accident to claim damages from the RAF in full. The RAF (Fund) was liable for the unlimited actual loss of support. The wrongdoer was still liable for compensation not covered by the RAF compensation system.[79] In terms of the RAFAA, the

Benefit Scheme Bill, 2017 in Parliament during 2017 in terms of National Assembly Rule No.241 (1)(b). RABS is intended to "replace the current fault-based system administered by the Road Accident Fund (RAF), which often results in extensive and costly litigation, prolonged claims finalization and high administrative costs. Under RABS, fault will not be considered on the part of the claimant or other persons involved in the road accident. The focus will essentially be on how the claimant is immediately assisted. A no-fault scheme will create a new era of socio-economic balance and will also remove the unintended negative consequences and financial burden on the families of the wrongdoer." Not much development regarding this Bill has taken place, other than to mention that the National Assembly put the Bill to a vote on Tuesday, 4 December 2018 and many political parties staunchly opposed it. Consequently, the decision on whether the Road Accident Benefit Scheme (RABS) will replace the Road Accident Fund (RAF) was postponed to 2019 – see Meyer 2018 *TimesLive* (online).

74 Klopper *Third party compensation* (2012) 2 16 23.

75 See s 1(1) of the COIDA.

76 See *RAF v Sweatman* [2015] ZASCA 22; [2015] 2 All SA 679 (SCA); 2015 6 SA 186 (SCA).

77 Act 19 of 2005.

78 *Law Society of South Africa and others v Minister for Transport and another* [2010] ZACC 25; 2011 1 SA 400 (CC); 2011 2 BCLR 150 (CC).

79 The wrongdoer could still be sued for the balance of the damages of the claimant and for the costs of the reparation for the damages to the motor vehicle, etc.

wrongdoer is absolved from all liability and the annual loss of support cannot exceed the amount published in the Government Gazette. This amount is currently capped at R273 863[80] per annum per breadwinner,[81] irrespective of the actual loss. Subsequent to the RAF Amendment Act of 2005, the Minister of Transport published a draft bill for RABS,[82] which will replace the RAF in the near future. Unlike the RAF legislations, RABS is a "no-fault benefit system", which means, the guilty parties (wrongdoers), their victims or dependants of their victims, are all entitled to the same benefits. Regardless of who was at fault, if the wrongdoer is injured or killed in a road accident, the wrongdoer and his or her dependants will be able to claim, as well as the victim and his or her dependants.[83]

Social security legislations dealing with the dependency action are fragmented and lack universality, despite their common objective of protecting the dependants of a deceased, who was unlawfully and negligently killed. In South Africa, there is no specific statutory law dealing with the dependants' action for loss of support and funeral expenses. Although there is an interrelationship amongst the legislations and they address similar issues, major differences exist. There is no uniform approach in the assessment of "damage" suffered by the dependants, and the awarding of benefit structures and entitlements, is seen as one of the greatest hurdles to overcome in addressing this matter. A lack of alignment between the legislations may lead to duplication of payments, which could seriously reduce the financial soundness of the respective public insurance systems, thereby putting strain on the revenues from which

80 As at 31 October 2018, see National Government Gazette vol 297 no 41996, board notice 145/2018 dated 26 October 2018.
81 See s 17(4)(c) of the RAFAA 19 of 2005.
82 Notice 98 of 2013 in Government Gazette No. 36138 dated 08 February 2013.
83 See Department of Transport's website: https://www.transport.gov.za/ (accessed on 15 March 2017).

social securities are paid. This study evaluates the effectiveness of all three-road accident legislations for the common law action for loss of support and the action against the Compensation Commissioner. It also examines the impact of the changes in terms of the RAFAA, and the proposed changes in terms of the RABS, Bill on future claims by the dependants of victims of motor vehicle accidents. It is challenges such as those presented above[84] which have perplexed and baffled our courts and given rise to sometimes eccentric and conflicting decisions, which are the basis of this study. This study addresses, in some detail, all of the abovementioned problem questions in respect of the action of dependants for loss of support, along with a review of the literature in this regard. It also refers to the customary law perspective and the influence that the Constitutions[85] of all four countries had on the dependants' action. This study does not seek to provide an exhaustive list of all relevant legal sources, but is undertaken in the hope that in any future unification of the legal systems, the contribution of the customary law of dependency action may be incorporated.

1.5 Limitation underlying the study

This thesis is limited by being pinioned in African jurisprudence, which has scarce written material. Generally, there is little written information available on customary law. The scope is also restricted by the fact that the effect of the judicial and legislative interventions has been the adoption of common law principles as a way of addressing customary law challenges based on the action of dependants and led to the assumption that customary law made no provision for the law on the action of dependants.

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84 See chapter 1 of this thesis, paras 1.4.2-1.4.2.5 above.

85 Constitution; Commonwealth of Australia Constitution, 1900; Constitution of Botswana, 1966; Constitution of Lesotho, 1993.

1.6 Research design and methodology

The methodology followed in this study comprises a comparative, descriptive and exploratory research approach that is used and analysed in order to achieve the objectives of this thesis. This is the approach commonly applied in the human sciences, including law. This study is mainly a literature study based largely on the Constitutions, legislation, legal textbooks, journal articles, court decisions and non-legal literature on customary law, culture or literature. Yet, it is not constrained to this form of research. There is some focus on newspaper articles and information from the *World Wide Web* address. The legal comparative research method sets consistent features of different legal regimes into perspective, and is used to obtain new knowledge and insight.

Literature study

Insofar as the literature study is concerned, a detailed review of the literature on the action of dependants is conducted, in order to be able to outline the existing status of the action. The intention of the literature study is to establish a theoretical framework for the action, discover basic description of the theory, ascertain and learn the primary dimensions of the dependants' action in the literature, and integrate these dimensions into a framework. Literature with reference to foreign countries is also scrutinised for a comprehensive study of various applications of the action. The literature study also provides an orientation to research already piloted within the field of study, as well as a perspective on the most current research pertinent to the dependency action. During the literature study, the ideas, views and perspectives of various legal researchers and authors are compared and evaluated. Other legal researchers will be able to make use of this study due to its investigative, reconnoitre and explanatory nature. The findings, recommendations and conclusions in this study may serve as a guide to legal practitioners and the judiciary on how to apply the action of dependants correctly.

World Wide Web

Furthermore, reliable information from the *World Wide Web* is beneficial to this study, as this is a dynamic topic, with developments that took place that are vital to the study. To ensure the independence of the study and keep in mind that not all information reported by governments may be an accurate reflection of the issues on the ground, their reports are tested with information from established institutions, such as research papers and publications of non-governmental organisations on the action of dependants.

1.7 Exposition of chapters

On completion of the research and collection of the necessary data, the collected material is integrated and coordinated, so that the facts and research can speak for themselves. The thesis is divided into the following chapters:

Chapter 1 of this thesis lays out the contextual, objectives and the research approach used in this study by providing an outline for the action of dependants from a comparative African perspective. It also contains the problem statement, literature review, the assumption raised as well as the research design and methodology. It also summaries the chapters that make up this study. Furthermore, this chapter attempts to identify the contribution of this study to existing knowledge about the action of dependants for loss of support and other related losses from an African perspective.

Chapter 2 discusses the origin and history of the action of dependants for loss of support in general. One way to shed some light on the action of dependants for loss of support is to look at the origin of the rule, as well as how history, legislation and the courts have interpreted it. The injustices of the earlier conceptions and confusions of the action must be well documented, in order for one to understand its present-day

uncertainties. In other words, before one can begin to understand the reasons for the action of dependants for loss of support and its application, it is imperative to understand why different countries have reached a point where there is a need for the action in the first place. The best place to start for an understanding of the action would be with a discussion on the origin and history of the dependants' action. Such a discussion helps the reader to understand why the action has become a necessary tool to redress and protect the rights of dependants whose breadwinner has been wrongfully and negligently killed. This action stems from the Germanic customary law.[86]

In this chapter, a clear understanding of the common law position, how this action found application in Germanic customary law, and its incorporation into the South African, Botswana, Lesotho and Australian laws, is explored. It becomes necessary to provide a brief review of the literature and case law of all four countries, as well as the position of the common law. Therefore, this chapter lays the foundation for the action of dependants for loss of support in common law, Germanic customary law, and the law in South Africa, Botswana, Lesotho and Australia. The action of dependants for loss of support is a complicated mixture of case law and statutes. In addition, this chapter examines in detail a range of legally recognised sources that give rise to the action for loss of support, in particular various sections of the Acts in the different countries. The reason for this is twofold: firstly, it provides the reader with an understanding of various provisions that regulate the dependency action, and secondly, it demonstrates where these countries have explicitly provided for the action

[86] Neethling & Potgieter *Law of delict* (2015) 292; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Saitowitz v Provincial Insurance Co Ltd* 1962 3 SA 443 (W) 446.

in their legislations. Lastly, the influence of the Constitutions of the different countries on the action for loss of support is discussed.

In **Chapter 3,** attention is paid to the principles applicable to the action for loss of support. The reality of the action of dependants for loss of support is very complex, both in theory and in practice. To make this delicate and heart-rending issue more easily applicable, it becomes necessary to distinguish the basic concepts and legal rationale of the action from the common law, as well as many specific laws and practices that have developed under the action of dependency. A balanced analysis of this subject is done using basic knowledge of various aspects relating to the action for loss of support. For instance, what is the action for loss of support? What is the nature of the action of dependants? What is the purpose of the action? How does the purpose of the action intersect with the good of the legal system of the four countries? In other words, what is its place in the legal system? Have we reached the stage where this legal remedy has outgrown its troublesome past to fit into the structure of the modern South African law of delict?[87]

In addition, this chapter discusses the requirements for a claim for loss of support.[88] The chapter also examines some of the problems relating to the action of dependants for loss of support. The language of the action was not well chosen, and its ultimate meaning was left largely in the hands of judicial interpretation. As a result, the action is enshrouded by several uncertainties. For instance, the question of vested rights given by the action has not been authoritatively decided. The issue here is whether a

87 See fn 41 above.

88 *Santam v Henery* 1999 3 SA 421 (SCA) 430; *Amod v Multilateral Motor Vehicle Accidents Funds (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1326; *Du Plessis v RAF* 2004 1 SA 359 (SCA) 370; *Metiso v RAF* 2001 3 SA 1142 (T) 1148-1149.

claim for damages for loss of support arising out of the unlawful and negligent death of the breadwinner is necessarily a dependant's action, or whether, in some circumstances, such a claim must take the form of a breadwinner's action instead.[89] This is a highly debated question within the action of dependants. It leads to differences of opinion amongst legal writers,[90] court outcomes[91] and other legal systems.[92] Some authors and cases believe that a claim for loss of support is based on the wrongful and culpable causing of damage to the dependant himself.[93] Other authors and cases hold that the claim for the action of dependant is based on a delict committed against the breadwinner.[94]

Another issue that is examined in chapter 3 is whether the dependants of a breadwinner who is injured (not killed) in a wrongful and culpable manner should, as in the case of death, be able to claim for loss of support with the Aquilian action.[95]

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89 *Jameson's Minors v Central South African Railways* 1908 TS 575; *Union Government (Minister of Railways) v Lee* 1927 AD 202; *Senior NO v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *Ismael v General Accident Insurance Co SA Ltd* 1989 2 SA 468 (D); *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety & Security* 2008 2 SA 397 (C); Boberg 1971 *SALJ* 423; Pont 1940 *THRHR* 163; Price 1952 *THRHR* 60; Claasen 1984 *THRHR* 439; Neethling 2003 *TSAR* 783; Carpenter 2003 *SAPL* 257.

90 Dendy 1990 *SALJ* 157; Burchell 1999 *SALJ* 731.

91 *Groenewald v Snyders* 1966 3 SA 237 (A); *Constantia Versekeringsmaatskappy Bpk v Victor NO* 1986 1 SA 601 (A); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C); *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA).

92 Carver *QUTLJJ* 7; Fombad https://www.saflii.edu.au/au/journals/ (accessed on 18 March 2015).

93 Neethling 2009 *THRHR* 297-299; Van der Merwe & Olivier *Die onregmatige daad* (1989) 348; Neethling & Potgieter *Law of delict* (2015) 278 292; Van Zyl *Law of maintenance* (2005) 19; Gibson *Wille's principles* (1977) 514; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837-838; *Brooks v Minister of Safety & Security* 2007 4 ALL SA 1389 (C) 1394-1400; *Santam v Henery* 1999 3 SA 421 (SCA) 430; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1326; *Union Government v Lee* 1927 AD 222; s 2(1B) of Apportionment of Damages Act 34 of 1956.

94 Davel *Afhanklikes* (1987) 50-51; Van der Merwe & Olivier *Die onregmatige daad* (1989) 345; Boberg *Delict: Aquilian liability* (1984) 728; Neethling & Potgieter *Law of delict* (2015) 283 299; *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA) 97-98; *Plotkin v Western Assurance Co Ltd* 1955 2 SA 385 (W) 394; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C) 409; *Harde v Protea Assurance Co Ltd* 1974 2 SA 109 (E) 114D.

95 Neethling & Potgieter *Law of delict* (2015) 299-300; Van Zyl *Law of maintenance* (2005) 22.

There is a strong division of judicial pronouncements in this regard: on the one hand, there are decisions that grant the Aquilian action to the dependants of an injured breadwinner who has a duty to support them.[96] The decision in the case of *De Vaal v Messing*[97] provides support, however, for the opposite view. The policy reason why the extension of liability is sometimes refused where the breadwinner is injured, but not killed, is that it would impose an additional burden on the defendant (wrongdoer), which would be unwarranted.[98]

A further issue relates to the different classes of persons (dependants) who qualify to claim under the action for loss of support. Chapter 3 also scrutinises the circle of eligible dependants under the dependency action. The comparative countries vary in terms of who is authorised to be a plaintiff in the dependants' action.[99] In South Africa, there is an unlimited circle of persons entitled to sue for loss of support where their breadwinner was unlawfully and negligently killed.[100] A claim for loss of support is based upon the maintenance obligation of the deceased breadwinner *in lieu* of a relationship of dependency.[101] Typical examples of such relationships of dependency would include parent and child, husband and wife, grandparents and grandchildren, and brothers and sisters.[102] The law of wrongful death in Botswana, Lesotho and

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96 *Abbott v Bergman* 1922 AD 53 56; *Plotkin v Wester Assurance Co Ltd* 1955 2 SA 385 (W) 394-395; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C).

97 1938 TPD 34.

98 *RAF v Shabangu* 2005 1 SA 265 (SCA) par 18.

99 *Pannel v Fischer* [1959] SASR 77 (FC); Queensland Law Reform Commission: *The assessment of damages in personal injury & wrongful death litigation: Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867* (Report No 45, October 1983) 68–69.

100 *Fourways Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2008 4 SA 150 (SCA) 160 par 21; s 31 of the Black Law Amendment Act 76 of 1963; s 2(1) & (2) of the Recognition of Customary Marriages Act 120 of 1998.

101 Neethling & Potgieter *Law of delict* (2015) 299; Potgieter, Steynberg & Floyd *Law of damages* (2012) 278 280; Davel *Afhanklikes* (1987) 51-53; Steynberg 2007 *PER* 1*/PELJ* 123 available at https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015).

102 *Ibid*.

Australia tends to define the class of eligible dependants narrowly.[103] The wrongful death remedy provides for exclusive classes of beneficiaries, thereby limiting recovery to those classes of dependants.[104]

The action of dependants for loss of support has stimulated a continuing discussion regarding the legal, moral and economic questions arising from the protection of dependants within our society.[105] The action is clearly for economic loss as far as it relates to dependency. The goal of the dependant action is to provide the dependants of the deceased, who was unlawfully and negligently killed, with a sum of money sufficient to supply them with material benefits of the same standard and duration that they would have received from the deceased, had he or she not been killed in this manner.[106] The law concerning the recovery of damages occasioned by the death of a

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103 Fombad https://www.saflii.edu.au/au/journals/ (accessed on 18 March 2015); Supreme Court Act 1995 (Queensland); Fatal Accidents Act 1950 (Western Australia); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1936 (Southern Australia); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); s 83 of the Discrimination Law Amendment Act 2002 (Queensland); s 57 of the Acts Amendment (Equality of Status) Act 2003 (Western Australia); s 60 of the Law Reform (Gender, Sexuality and De facto Relationships Act 2003 (Northern Territory); s 4 of the Wrongs (Dependants) Act 1982 (Victoria); s 1 of the Relationships (Consequential Amendments) Act 2003 (Tasmania); s 2.3 of the Property (Relationships) Legislation Amendment Act 1999 (New South Wales); s 23 & 28(2) of the Civil Law (Wrongs) Act 2002 (Australian Capital Territory); Carver *QUTLJJ* 1-27.

104 *Perre v Apand (Pty) Ltd* 1999 164 ALR 606; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Dendy v University of the Witwatersrand, Johannesburg* 2005 5 SA 357 (W) 369.

105 Rautenbach 2008 *EJCL* 1 available at https://www.ejcl.org (accessed on 18 March 2015)*;* Davel *Afhanklikes* (1987) 51 available at https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 18 March 2015); Neethling 2009 *THRHR* 300; Peart 1983 *CILSA* 37; Mqeke 1980 *De Rebus* 597; Mafubelu 1981 *De Rebus* 573; Pienaar 2006 *Stell LR* 314-316; Clark 1999 *SALJ* 21; Dlamini 1984 *SALJ* 347; Kerr 1956 73 *SALJ* 405; Mbodla 1999 *SALJ* 743.

106 *Brooks v Minister of Safety & Security* 2009 2 SA 94 (SCA) 97; *Victor v Constantia Ins Co Ltd* 1985 1 SA 118 (C) 119; *Union Government v Lee* 1927 AD 202 220-222; *Santam Bpk v Fondo* 1960 2 SA 467 (A) 471-472; *Santam Insurance Ltd v Meredith* 1990 4 SA 265 (Tk) 267; *Santam v Henery* 1999 3 SA 421 (SCA) 425-426; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1324-1325; *Lambrakis v Santam Ltd* 2003 3 SA 1098 (W) 1113-1114; *Mankebe v AA Mutual Ins Association Ltd* 1986 2 SA 196 (D) 198-199; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376; *Groenewald v Snyders* 1966 3 SA 237 (A) 246; *Milns v Protea Assurance Co Ltd* 1978 3 SA 1006 (C) 1010; *Kotwane v Unie Nasionaal Suid-Britse Verskeringsmaatskappy Bpk* 1982 4 SA 458 (O) 463; *Witham v Minister of Home Affairs* 1989 1 SA 116 (Z) 131; *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; *Hulley v Cox* 1923 AD 234 244; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614.

breadwinner, whose death was caused by the unlawful and negligent act of the wrongdoer, has progressed with economic problems.[107] Despite the fact that loss of support includes all the financial contributions that the breadwinner would have made to his or her dependants over his lifetime or that of his dependants, whichever is shorter, not all heads of damage caused by the unlawful and negligent death of the breadwinner are recoverable through the action for loss of support. As stated above, the South African law does not allow a claim for loss of savings or loss of inheritance to be taken into account in dependency claims.

This chapter also examines the mathematical model for calculation of the present value of loss of financial support due to the unlawful and negligent death and literature for the assessment and calculation of the said compensation. The compensation is speculative by nature, requires the courts to assess the deceased-breadwinner's capacity to provide for his or her dependants, had he or she not been killed.[108] This degree of uncertainty leads to a wide range of possible legitimate opinions about how the future could unfold[109] and may result in some dependants being under-compensated. Since Roman-Dutch jurists failed to offer sufficient assistance in the general principles of assessment of damage, the South African courts turned to English decisions in this regard.[110] **Chapter 4** of this thesis addresses the assessment and quantification of the proper amount of compensation (damages) in terms of the action of dependants for loss of support, together with a review of the literature on this topic.[111]

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107 *Waring & Gillow Ltd v Sherborne* 1904 TS 340; *Hulley v Cox* 1923 AD 234; *De Jongh v Gunther* 1975 4 SA 78 (W); *Victor NO v Constantia Insurance Co Ltd* 1985 1 SA 118 (C) 120C; McKerron *Delict* (1971) 151-153; Howroyd & Howroyd 1958 *SALJ* 67; Boberg 1964 *SALJ* 149.

108 Burchell *Delict* (1993) 238; *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A).

109 Fombad https://www.saflii.edu.au/au/journals/ (accessed on 18 March 2015).

110 Erasmus 1975 *THRHR* 363.

111 Steynberg 2007 *PER 1/PELJ* 122 available at https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015); Potgieter, Steynberg & Floyd *Law of damages* (2012) 477-490.

Claims for loss of support giving rise to heads of damage have received the attention of the legislature. **Chapter 5** of this study presents a very brief comparative overview of the current leading social security legislative frameworks covering death claims or the dependency action for loss of support in South Africa, Botswana, Lesotho and Australia. Sources on social security policy in South Africa tend to focus on the social security aspect of social assistance to the poor, and often neglect the social security aspect of social insurance in respect of the dependency action for loss of support. This is also an accurate description of the status of discussions on social security policies or laws with regard to the dependency action for loss of support in Botswana, Lesotho and Australia.

In all four jurisdictions studied, it seems that the only two sets of legislation where the dependency action can apply under social security (social insurance) are associated with road and workplace-related accidents. The perspective offered is therefore a relatively limited one, as the discussion focuses only on the important aspects related to a claim for loss of support, as outlined in legislations dealing with road and workplace-related accidents. Consequently, this study deals only with the Road Accident Fund Act 56 of 1996 (RAF Act, as amended) and Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA, as amended), as examples of South African social security legislations that regulate and has had a huge influence on the assessment and quantification of compensation for loss of support in terms of the action of dependants. This includes changes brought about by the RAF Amendment Act (RAFAA),[112] and the proposed Road Accident Benefit Scheme (RABS) Bill,[113] examining the Bill's influence on the future claim by the dependants of

[112] Act 19 of 2005.
[113] See fn 73 above.

the victims of motor vehicle accidents. This study also reviews and discusses the social security systems of Botswana, Lesotho and Australia, to the extent that they specifically relate to the claims for loss of support under the dependency action. Similar to South Africa, in Botswana,[114] Lesotho[115] and Australian law,[116] compensation for death arises in a number of different areas of the law, including worker's compensation and motor vehicle accidents legislation. The legislations provide for payment of compensation for depriving the dependants of support by wrongfully and negligently causing the death of their breadwinner either as a result of a work injury or disease, or motor vehicle accident. A brief overview of the relevant legislations in Botswana, Lesotho and Australia, providing for payment of compensation either as a result of a work injury or disease, or motor vehicle accident, to the extent as they specifically relate to the claim for loss of support, is provided and critical comments on these current systems is also presented.

Findings and recommendations are often considered to be the most important part of a research study. Therefore, **chapter 6** is dedicated exclusively to this topic. Chapter 6 concludes the thesis by summarising the preceding chapters. It also encompasses

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114 Workers' Compensation Act 23 of 1998.

115 Workmen's Compensation Act 13 of 1977; Order 26 of 1989 (motor vehicle compensation legislation); Ailola 1991 *CILSA* 367.

116 See Comparison of workers' compensation arrangements in Australia https://www.safeworkaustralia.gov.au/.../ComparisonWorkersCompensationArrangementsAusNZ2011.doc (accessed on 8 August 2016); Workers Compensation Act 1987 (NSW) (1987 Act); Workplace Injury Management and Workers Compensation Act 1998 (NSW); Workers Compensation Legislation Amendment Act 2012 (NSW); Motor Accidents Compensation Act 1999 (NSW); Motor Accident Insurance Act 1994 (Qld) (MAI Act); s 18 of the Motor Accident Commission Act 1992 (the MAC Act) (SA); Motor Accident Commission https://www.audit.sa.gov.au/Publications/Annual-reports/2015-Reports/Annual-Report-by-agency/Motor-Accident-Commission (accessed on 27 August 2016); Motor Vehicle (Third Party Insurance) Act 1943 (WA) sets out the scheme details; see Motor Injury Insurance https://www.icwa.wa.gov.au/motor-injury-insurance. (accessed on 27 August 2016); Motor Accidents Compensation Scheme (NT) https://www.tiofi.com.au/car-insurance/macc/.(accessed on 27 August 2016); Motor Accidents (Compensation) ("MAC") Act (NT) https://www.ntmacc.com.au/GeneralInformation.pdf (accessed on 27 August 2016); s 4(3)(e)(ii) of Compensation (Fatal Injuries) Act 1974 (NT); s 5 of Compensation (Commonwealth Government Employees) Act 1971 (Cth); Motor Accidents Act 1973 (Vic).

the most important findings and recommendations, as well as conclusions reached in respect of the research questions. In addition, this chapter considers some of the principles that South Africa should take into account for the proper application of the action of dependants for loss of support. The aim of this approach is to provide useful guidelines and information to all persons involved in implementing the action of dependants for loss of support and other related losses.

1.8 Terminology

In order to simplify the text, consistent terms are used throughout the thesis. Some of these terms are explained in more detail below:

- **African law/customary law/indigenous law**: These terms are used interchangeably and refer to the indigenous component of South African law that has survived through a series of adaptations since pre-colonial time. African law or customary law or indigenous law regulates the lives of the majority of African people in South Africa, and bears a close resemblance to its counterparts in other Southern African countries. Customary law is now legally recognised in South Africa.[117]
- **Civil union** is a legally recognised union, similar to a marriage. Civil unions can often be referred to using other terms, such as a registered partnership or civil partnership. Civil unions have been established by law[118] in many developed countries, in order to provide same-sex couples with rights, benefits, and responsibilities similar (or identical in some countries) to opposite-sex civil marriages. In some jurisdictions, such as South Africa, New Zealand, and Uruguay, civil unions are also open to opposite-sex couples.

117 ss 33(2) 33(3) 35(3) of the Interim Constitution; ss 9 30 31 211(3) of the Constitution.
118 ss 1 2(a) & (b) of Act 17 of 2006.

- **Constitution**: The Constitutions of the Republic of South Africa.[119] Reference will be made to the 1993 interim Constitution and the 1996 Constitution.
- **Dependency action:** A dependency claim arises when a breadwinner is killed by the wrongful or negligent act of another (the wrongdoer) and, as a result, the first and most common loss the deceased's dependants suffer is loss of support,[120] but other losses could also occur, namely funeral expenses, non-patrimonial losses, etcetera.
- **Tort Law/law of delict** is a body of rights, obligations, and remedies that is applied by courts in civil proceedings, in order to provide relief for persons who have suffered harm from the wrongful acts of others. The person who sustains injury or suffers pecuniary or non-pecuniary damage as the result of tortuous conduct is known as the plaintiff (dependant/breadwinner), and the person who is responsible for inflicting the injury and incurs liability for the damage is known as the defendant or tortfeasor (wrongdoer). The terms "delict" and "tort" are synonymous and interchangeable, with the only difference being that "delict" is used in European systems and those linked to Roman law (like South Africa, Botswana and Lesotho), while "tort" is used by systems based on English common law.[121]
- **Wrongful death** is a claim in common law jurisdictions against a person who can be held liable for a death.[122] The claim is brought in a civil action, usually by close relatives, as enumerated by statutes. Under common law, a dead person cannot bring a suit, and this created a legal loophole in which activities that resulted in a

119 The interim Constitution; the Constitution.

120 *Jameson's Minors v Central South African Railways* 1908 TS 575; *Hulley v Cox* 1923 AD 234; *Millward v Glaser* 1949 4 SA 931 AD; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A).

121 Stewart & Stuhmacke *Tort law* (2009) 3-6; Neethling & Potgieter *Law of delict* (2015) 3-7.

122 Queensland Law Reform Commission: *Damages in an action for wrongful death* (Issues Paper WP No 56 June 2002).

person's injury would result in civil sanction, but activities that resulted in a person's death would not.

1.9 Chapter conclusion

The observation is that more research still has to be done on the topic, and that this particular research thesis may become a theoretical foundation for further enquiry into the nature of the action of dependants from a comparative African perspective. As indicated above, the determination and addition of traditional values in African/customary/indigenous law pertaining to the dependency action will assist in the fair and consistent application of the dependency action. The knowledge and good understanding of these traditional values would be a valuable addition to our legal knowledge. It would undoubtedly provide insight into the resolution of problems that might be encountered under customary law in respect of the action. It would also be easier to appreciate the incorporation of the traditional values into the existing eccentric dependency action, which may eventually culminate in a single dependency action tailored to suit the whole nation and all its different cultures.

The aim of this chapter was to outline a general overview of the study. It provided the background against which the research was conducted, thereby providing reasons for undertaking the research study, in the form of a problem statement and study objectives. It also discussed the research methodology used, as well as outlining the chapters that make up this study. Additionally, this chapter attempted to identify the contribution of this study to existing knowledge about the action of dependants for loss of support and other related losses from an African perspective. Consequently, the successful understanding of the action of dependants for loss of support is vital, and the best place to start would be with a discussion on the origin and history of the action.

In chapter 2, attention is given to the history of the dependants' action, as well as a range of legally recognised sources that could give rise to the rights and action for loss of support in the comparative countries, namely South Africa, Botswana, Lesotho and Australia, in order to elaborate on the outline created in this chapter.[123]

[123] Chapter 1 of this thesis.

CHAPTER 2

HISTORICAL BASIS FOR THE ACTION OF DEPENDANTS

2.1 Importance of the historical development

The dependency action for recovery of loss of support due to the unlawful and negligent killing of the breadwinner is by no means a twentieth century innovation.[124] Though it is an old legal action, very little can be found in the South African literature on its origin and history. Initially, it was denied,[125] then it took place informally through the years,[126] and later it was regulated by laws.[127] A proper understanding of the history of the action of dependants is essential for the correct approach to problems encountered in the interpretation and modern-day application of this action. Much of its past application forms the basis of the action's current application. This chapter reviews and discusses the historical background and interpretation of the dependants' action. The aim of this chapter is to redress some of the action's uncertainties and set the record straight. It also analyses the changes brought by the statutes providing for compensation in an action for wrongful and negligent death. In the discussion, reference is only made to those facts of historical importance and statutes that are directly relevant to aspects of the dependants' action.

2.2 Roman law

The action of dependants for recovery of loss suffered due to the unlawful and negligent killing of a breadwinner was unknown in Roman law.[128] There was no cause

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124 Du Bois *Wille's principles* (2007) 1095.
125 See chapter 2 of this thesis, par 2.2 hereunder.
126 See chapter 2 of this thesis, par 2.3 hereunder.
127 See chapter 2 of this thesis, par 2.4 hereunder.
128 Neethling & Potgieter *Law of delict* (2015) 292; Van der Walt & Midgley *Delict* (2016) par 12; Van Zyl *Law of maintenance* (2005) 19; Boberg *et al Law of persons and family* (1999) 298; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837-838.

of action by or on behalf of the dependants of the breadwinner to recover for the loss sustained by them because of their breadwinner's death. The deceased's estate was also without a cause of action for the loss resulting from his death.[129] The reason behind the denial of the dependency claim under Roman law is thought to have derived from two old common law maxims, which for centuries prevented any action for bodily injuries wrongfully inflicted on a person, and resulting in his death. These principles have common characteristics in their effect and are often confused in their application, but are not identical. They are *in homine libero nulla corporis aestimatio fiery potest,* meaning that the body of a free man cannot be estimated in money[130] and *actio personalis moritur cum persona,* meaning that a personal action dies with the person (breadwinner or wrongdoer).[131]

According to these principles, when a person dies, either suddenly or after an interval of time, as a consequence of the unlawful and negligent act of another, the wrongdoer could not be held liable by the victim's estate for damage sustained by the victim before death, or for damage to his estate due to loss of life. The wrongdoer could also not be held liable by his or her dependants for loss of support resulting from his death.[132] Therefore, in Roman law, the dependants of a breadwinner who had been unlawfully and negligently killed could not obtain pecuniary or non-pecuniary redress, nor were his heirs or dependants in a better position.[133] The negative consequences of the application of these principles were very broad and, judged by present standards, very

129 Pollack 1931 *SALJ* 191.
130 Feenstra 1972 *Acta Juridica* 227-228.
131 Gibson *Wille's principles* (1977) 513.
132 Van der Walt & Midgley *Delict* (2016) par 12.
133 Wessels *Roman-Dutch law* (2013) 698; Buckland *Roman law* (1966) 588-589; Palmer *Law of delict* (1970) 111.

harsh. In spite of the effect of barring the recovery of compensation for loss of support, neither the origins nor the basis of the maxims could be precisely fixed.[134]

2.3 Roman-Dutch law

However, a dependency claim for the recovery of compensation for loss occasioned by the wrongful and negligent killing of a breadwinner was available to the dependants in Roman-Dutch law.[135] The exact origin of the action is uncertain and difficult to trace,[136] but appears to have evolved under the influence of the customary Germanic law concerning the institution of *zoengeld/manngeld/wergild* and the concept of natural law, as formulated by medieval and sixteenth-century theologians.[137] However, the Dutch writers of the eighteenth century overlooked this origin and regarded it as an Aquilian remedy extended by *actio utiles*, even though in Roman law, no compensation could be claimed for the life of a free human being.[138] It is therefore under the influence of Roman-Dutch law that the present-day dependants' action was developed, as an extension of the *actio legis Aquiliae* in Roman-Dutch law.[139]

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134 Pollack 1931 *SALJ* 191.

135 Van der Merwe & Du Plessis *Law of South Africa* (2004) 275; Neethling & Potgieter *Law of delict* (2015) 293; Rautenbach & Du Plessis 2000 *THRHR* 306-307; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A); *Victor v Constantia Insurance Co Ltd* 1985 1 SA 118 (C).

136 Van der Walt & Midgley *Delict* (2016) paras 12 54 & 96.

137 Hahlo & Kahn *South African legal system* (1968) 353*;* Neethling & Potgieter *Law of delict* (2015) 292; Van Zyl *Law of maintenance* (2005) 19; Boberg *et al Law of persons and family* (1999) 298; Feenstra 1972 *Acta Juridica* 228.

138 Buckland *Roman law* (1966) 588-589; Palmer *Law of delict* (1970) 111; Neethling & Potgieter *Law of delict* (2015) 292.

139 *Jameson's Minors v Central South African Railways* 1908 TS 575 584-5; *Union Government v Warneke* 1911 AD 657 664-5, 671-2; *Victor NO v Constantia Co* 1985 1 SA 118 (C) 119; *Santam Insurance Ltd v Meredith* 1990 4 SA 265 (TkA) 267; *Hulley v Cox* 1923 AD 234; *Millward v Glaser* 1949 4 SA 931 AD.

2.4 South African law

2.4.1 Introduction

Modern law in South Africa recognises a dependant's right and action to claim damages from the person responsible for his/her breadwinner's death.[140] The South African action of dependants consists, broadly speaking, of the system of Roman-Dutch law, as developed by the decisions of our courts and supplemented by our legislatures.[141] This right of the dependants to claim for loss of support is regarded as a form of relief flowing from an extended operation of the *actio legis Aquiliae*.[142] This remedy has continued to evolve in South Africa during the 21st century through judicial pronouncements, and has kept abreast of the times.[143] It was pointed out in *Amod v Multilateral Motor Vehicle Accidents Fund*[144] that the dependants' action is a flexible remedy that needs to be adapted to modern conditions.[145] The action is of a peculiar nature, in that it deviates from normal Aquilian principles,[146] since the dependants' rights are based on the loss that they themselves have suffered due to the death of the deceased-breadwinner, and they do not derive that right from the deceased as heirs.[147] In other words, the action does not derive from the deceased or his estate, instead the dependants institute the action in their own names. The action is based on the wrongful, culpable causing of damage to the dependants themselves.[148] The nature and scope of the action of dependants is discussed in more detail in Chapter 3 of this

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140 Van der Walt & Midgley *Delict* (2016) par 54.
141 Van der Walt & Midgley *Delict* (2016) paras 12 54 & 96.
142 *Union Government v Lee* 1927 AD 221; *Millward v Glaser* 1949 4 SA 931 (A) 941; *Witham v Minister of Home Affairs* 1989 1 SA 116 (ZH); Boberg *et al Law of persons and family* (1999) 303.
143 *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T) 316; *Santam Bpk v Henery* 1999 3 SA 421 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA).
144 1999 4 SA 1319 (SCA) 1325.
145 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) par 58(2).
146 Neethling & Potgieter *Law of delict* (2015) 292.
147 *Union Government v Lee* 1927 AD 221.
148 *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C)/2007 4 All SA 1389 (C) 1394-1400.

thesis. In the next section, an overview of the existing dependency action in South Africa is provided.

2.4.2 Overview of the existing dependency action

2.4.2.1 General

South Africa has a number of dependency action sources[149] in place, but these legal measures are fragmented, scattered and uncoordinated. One has to glean its nature, characteristics, scope and developments from the broad spectrum of legal sources existing in the country. The dependency action measures are governed by various constitutional, statutory and customary law provisions. These various sources of the dependency action are discussed below.

2.4.2.2 Constitutional provisions

The Constitution[150] contains a variety of human rights provisions, and the following three fundamental rights are particularly relevant to the present study:

2.4.2.2.1 The right to life

The South African Constitution provides that everyone has the right to life.[151] This inherent right is a moral principle based on the belief that a human being has the right to live and, in particular, should not be killed by another human being.[152] The right to life is also contained in Article 3 of the Universal Declaration of Human Rights (UDHR),[153] which provides that everyone has the right to life, liberty and security of person. Furthermore, Article 4 of the African Charter on Human and Peoples' Rights reads as follows: “Human beings are inviolable. Every human being shall be entitled

149 For example: case law, customary law, legislation and the Constitution.
150 The Constitution.
151 s 11 of the Constitution.
152 Agadoni https://www.sahistory.org.za/archive/right-life (accessed on 8 August 2016).
153 The UDHR is a milestone document in the history of human rights. It was established in 1958.

to respect for his life and the integrity of his person. No one shall be arbitrarily deprived of life." The framers of these two documents[154] made a noble beginning in providing Africa with a mechanism for ensuring the continental promotion and protection of human rights in Africa, by providing a solid foundation for peaceful and positive co-operation among states and human beings. These two documents are referred to as worthy of due regard to the promotion of international co-operation, which aims at, amongst others, the promotion of respect for humans, especially in South Africa, with its previous repressive government during the era of apartheid.[155] The system of apartheid was introduced in 1948 by the then governing National Party. It implemented a doctrine of separate development through legislation that enforced systems of racial segregation.[156] It also encouraged oppression, hatred and disrespect for the life of an African human being or nation. The right to life incorporates the right to dignity, which provides that everyone has inherent dignity and the right to have their dignity respected and protected.[157] The Constitution seeks to establish a society where the life of each individual member of the community is acknowledged, valued[158] and treated with dignity. Therefore, no person's life should be taken unlawfully and negligently. In other words, the right to life is in one sense antecedent to the dependency action and other rights[159] contained in the Constitution. Without life, there cannot be a dependency action. It would not be possible to exercise the right to claim under the dependency action. Consequently, where a life has been taken wrongfully and unlawfully, the dependants of the deceased-breadwinner should be protected, secured and duly compensated.

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154 Universal Declaration of Human Rights and African Charter on Human and Peoples' Rights.
155 See Acheampong 2001 *AHRLJ* 185 200.
156 Wall https://www.sahistory.org.za (accessed on 8 August 2016).
157 s 10 of the Constitution.
158 Agadoni https://www.sahistory.org.za/archive/right-life (accessed on 8 August 2016).
159 Bill of Rights - Chapter 2 of the Constitution.

2.4.2.2.2 The right to social security

Another important right in the Constitution is the right of access to social security and social services, which is expressly contained and provided for in the Constitution.[160] The principal provision is section 27(1)(c), which states that "everyone has the right of access to social security including if they are not able to support themselves and their dependants, appropriate social assistance". Section 27(2) goes further to state that the government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to social security and social assistance. While the above-mentioned section refers to social security and social assistance for everyone, section 28(1)(c) provides for the right of children to social services.[161]

The Convention on the Elimination of all Forms of Racial Discrimination puts an obligation on the State to afford everyone the right to social security.[162] In the international context, the International Labour Organisation (ILO) Convention Social Security (Minimum Standards) Act[163] defines social security as the protection which society provides for its members through a series of public measures against economic and social distress due to the cessation or substantial reduction of earnings resulting from sickness, maternity leave, occupational injury, unemployment, invalidity, old age and death. These measures include the provision of medical care and subsidies for

160 ss 27 & 28 of the Constitution.

161 See Chapter 2 of the South African Human Rights Commission: Social security, social assistance and social services for children https://www.sahrc.org.za (accessed on 8 August 2016).

162 Article 5(e) (iv) of the *Convention on the Elimination of all Forms of Racial Discrimination,* 1965*.* The Convention commits its members to the elimination of racial discrimination and the promotion of understanding among all races. The Convention was adopted and opened for signature by the United Nations General Assembly on 21 December 1965, and entered into force on 4 January 1969. As of October 2015, it has 88 signatories and 177 parties. South Africa signed it in 1994 and ratified it in 1998.

163 Act 102 of 1952.

families with children. The Convention on the Rights of the Child (CRC)[164] provides that every child has the right to benefit from social security, including social insurance. Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that State parties should recognise the right of everyone to social security, including social insurance.[165] The question here is: Can these provisions be invoked to protect dependants under the dependency action? The provisions on social security relate to the dependency action in the sense that it would be unacceptable for dependants of the deceased, who has been unlawfully and negligently killed, to be discriminated against with respect to benefitting in terms of the social security measures available to persons in the country. The answer is therefore in the affirmative.

The South African Constitution appears to endorse the difference between "social insurance" and "social assistance".[166] Social assistance is the non-contributory and means-tested benefit provided by the State to people with disabilities, elderly people and children.[167] In South Africa, various grants are available and payable in accordance with the Social Assistance Act.[168] These include old-age grants, disability grants, foster care grants, care-dependency grants, and child support grants.[169] Social insurance is the joint contribution made by employers and employees to pension or provident funds. Government may also contribute to social insurance covering

164 The Convention on the Rights of the Child (1989) was ratified in 1995 by South Africa.
165 See Chapter 6 - South African Human Rights Commission: Right to social security https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_6.pdf (accessed on 8 August 2016).
166 Millard 2008 *AHRLJ* 40; Olivier *et al* (eds) *Social security: A legal analysis* (2003) 23.
167 See Chapter 6 - South African Human Rights Commission: Right to social security https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_6.pdf (accessed on 8 August 2016).
168 Act 13 of 2004.
169 Millard 2008 *AHRLJ* 40.

accidents on the road and at work.[170] The South African social insurance system has a fragmented collection of social protection legislation, which consists of retirement schemes,[171] health insurance,[172] workmen's compensation,[173] unemployment insurance (UIF),[174] the Road Accident Fund (RAF)[175] and the proposed Road Accident Benefit Scheme Bill (RABS).[176] The various statutes on social security relevant to this study are discussed in par 2.4.4 below. Apart from the Road Accident Fund, these systems are all employment-based.[177] The entitlement to benefits depends mainly on employee status.[178] As stated, the Road Accident Fund is the only public social security scheme in South Africa that is not employment-based. This feature of the South African social security system is unique.[179] The objective of the Fund, as stated in the Road Accident Fund Act,[180] is to compensate any victim who sustained bodily injuries or loss of support through the negligent and unlawful driving of a motor vehicle. The social security provisions relate to the provisions on equality discussed hereunder.

2.4.2.2.3 The right to equal treatment and freedom from discrimination

Over the past twenty years, our Constitution, in terms of the equality clause,[181] has supported remedies in dependency claims.[182] The action of dependants for loss of support, which has long been a crucial mechanism for ensuring that the wrongdoer

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170 Chapter 6 - South African Human Rights Commission: Right to social security https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_6.pdf (accessed on 8 August 2016).
171 Pension Funds Act 24 of 1956.
172 South Africa is in the process of introducing an innovative system of health care financing designed to pool funds to provide access to quality, affordable personal health for all South Africans – National Health Insurance: https://www.gov.za (accessed on 8 August 2016).
173 Compensation for Occupational Injuries and Diseases Act 130 of 1993.
174 Unemployment Insurance (UIF) Act 63 of 2001.
175 RAF Act 51 of 1996 as amended by the RAF Amendment Act 19 of 2005.
176 Road Accident Benefit Scheme Bill, 2017 - Government Gazette No. 36138.
177 Millard 2008 *AHRLJ* 41.
178 *Ibid.*
179 *Ibid*.
180 RAF Act 51 of 1996 as amended by the RAF Amendment Act 19 of 2005.
181 The equality clause as contained in s 9 of the Constitution.
182 Van der Walt & Midgley *Delict* (2016) 54 & 96.

does not escape accountability when he has violated the rights of dependants and the breadwinner, has been at the forefront of the constitutional equality injunctions.[183] The equality clause in chapter 2 of the Constitution contains strong provisions on legal and social equality.[184] Section 9 is in line with internationally recognised human rights law, but the provision is more detailed than, for example, the Universal Declaration of Human Rights.[185] Section 9(1) provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Equality includes the full and equal enjoyment of all rights and freedoms.[186] Like the Universal Declaration of Human Rights, this section provides for freedom from discrimination. It provides that the enjoyment of the rights and freedoms set forth in the Constitution should be safeguarded without discrimination on any ground, but specifically lists the following grounds: "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".[187] The Constitution prohibits any law from including a discriminatory provision. In order to promote the achievement of equality, the Constitution instructs that legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be adopted,[188] and further that national legislation must be enacted to prevent or prohibit unfair discrimination.[189]

183 *Ibid*.
184 See Chapter 2 of the Constitution.
185 While the UDHR makes references to the expression "fundamental human rights", section 9 in the Bill of Rights gives express details regarding this expression, by describing what constitutes fundamental human rights in general. It stipulates the specific rights that are protected, and that freedom, equality, justice and dignity are essential objectives for humanity. It secures the duty to achieve the total liberation of Africa, as well as the dignity and genuine independence of Africa, through the elimination of colonialism and apartheid, especially in South Africa, which is infamous for its past repressive regime of apartheid.
186 s 9(2) of the Constitution.
187 s 9(3) of the Constitution.
188 *Ibid*.
189 s 9(4) of the Constitution.

Legislation includes any instrument having the force of law, made in exercise of a power conferred by a law, including customary law and any other unwritten rule of law or custom. These provisions relate to the right to life and social security, in the sense that it would be impossible to exercise equality if there was no human life, and it would be unacceptable for persons to be discriminated against by laws with respect to benefitting from the social security measures available to persons in the country. This provision supplements the provisions on the right to life and social security discussed above. In addition, these provisions are of enormous relevance to a large variety of social security benefits, such as those determined by reference to familial relationships, as such benefits may be challenged for treating different classes of parents, spouses and children differently. They may be of importance to widows and widowers' insurance benefits, which entitle a surviving spouse to his or her deceased spouse's primary old-age insurance benefit.[190]

Based on equality of treatment, same-sex unions[191] have been granted a claim for loss of support similar to that arising out of a marriage. The Supreme Court of Appeal has taken an incremental step to extend the action for loss of support to partners of same-sex permanent life relationships, provided that a contractual duty to support the partner exists.[192] The Civil Union Act[193] was enacted to prevent or prohibit unfair discrimination against parties who are in homosexual relationships and wish to marry. The Act gives full recognition, essentially, to homosexual marriages. In *Paixão and another v Road Accident Fund,*[194] the Supreme Court of Appeal extended the dependant's action to

190 Mosito 2014 *PER/PELJ* 1574.
191 *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T) 316; *Du Plessis RAF* 2004 1 SA 359 (SCA).
192 *Du Plessis v RAF* 2004 1 SA 359 (SCA) paras 37 & 42.
193 Act 17 of 2006.
194 2012 6 SA 377 (SCA).

surviving heterosexual domestic partners, and in *Amod v Multilateral Motor Vehicle Accidents Fund,*[195] the Supreme Court of Appeal held that a widow who had been married under Islamic law could claim damages for loss of support. The same applies to widows married in terms of customary law.[196] In terms of section 31(1) and (2) of the Black Laws Amendment Act[197] a claim for damages against a wrongdoer for loss of support suffered by a party to a customary union due to the wrongful death of such party's spouse is enforceable. The Recognition of Customary Marriages Act[198] was enacted to prevent or prohibit unfair discrimination against parties married under customary law. The Act gives full recognition to customary marriages, arguably rendering section 31 of the Amendment Act superfluous.[199]

2.4.3 Customary law

2.4.3.1 Brief history and present status of customary law

Customary law is the oldest non-legislated form of law known to man.[200] It has existed in South Africa for longer than any other law or legislation, hence it was the originally applicable law in this country.[201] People regulated their conduct according to rules that they and their ancestors had been accustomed to observing in the past. These rules were not recorded in writing, but became binding over the course of time through their observation by the communities themselves.[202] Today, some of these rules in South

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195 1999 4 SA 1319 (SCA); 1999 4 All SA 421 (A).

196 Recognition of Customary Marriages Act 120 of 1998; *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS); *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk).

197 Act 76 of 1963.

198 Act 120 of 1998.

199 *Chitima v RAF* 2012 2 All SA 632 (WCC).

200 Du Bois *Wille's principles* (2007) 100.

201 Van Niekerk "Legal pluralism" in Bekker *et al* (eds) *Introduction to legal pluralism* (2015) 5.

202 Gibson *Wille's principles* (1977) 9; Rautenbach "The phenomenon of legal pluralism" in Bekker *et al* (eds) *Introduction to legal pluralism* (2015) 9; Du Plessis "The historical functions of law: developments after 1500" in Humby *et al* (eds) *Law and legal skills* (2012) 110; Bennett *Customary law* (2004) 1-2; Thomas 2004 *Fundamina* 188; Himonga & Nhlapo (eds) *African customary law* (2015) 27; Onyoyo *African customary law* (2013) 31.

Africa have been adopted or adapted and superseded by legislation,[203] or recognised by judicial decisions,[204] and therefore now appear in a different form.[205] In spite of customary law being the law of African people of this country, there was no equality between the common law and customary law.[206]

Prior to 1994, the common law, which originated in the Western world, enjoyed the status of the law of the land in South Africa. On the other hand, customary law, in the manner in which it was studied, administered and applied, was considered inferior to common law and was tolerated on the same level as foreign law, and only in so far as it was not repugnant to Western values and moral standards.[207] The Native Administration Act[208] (later renamed the Bantu Administration Act,[209] and later still the Black Administration Act)[210] placed the African population of South Africa under a separate system of inferior justice, which was dispensed by ill-prepared special courts operated by Native Commissioners.[211] Each of these commissioners had statutory authority to strike down from African law any rule, principle, concept or doctrine that appeared to be inconsistent with Western moral standards, save for the custom of *lobola*/*bogadi.*[212]

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203 s 31 of the Black Laws Amendment Act 76 of 1963; Recognition of Customary Marriages Act 120 of 1998; Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005; Civil Union Act 17 of 2006.

204 *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS); *Finlay v Kutoane* 1993 4 SA 675 (W); *Fosi v RAF* 2008 3 SA 560 (C); *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk); *Gasa NV v RAF* (unreported) (SCA) case no 579/2006; *Zulu v Minister of Justice* 1956 2 SA 128 (N); *Santam v Fondo* 1960 2 SA 467 (A); *Seleka v RAF* 2016 4 SA 445 (GP).

205 Gibson *Wille's principles* (1977) 10.

206 Bennett *Customary law* (2004) 34; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

207 Ndima *Re-imagining and re-interpreting African jurisprudence* (2013) ii.

208 Act 38 of 1927.

209 *Ibid*.

210 Act 76 of 1963.

211 Ndima *Re-imagining and re-interpreting African jurisprudence* (2013) 3.

212 See s 11(1) of the Native Administration Act 38 of 1927, which was superseded by s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

Customary law was initially ignored by the colonials, then tolerated, and eventually recognised,[213] albeit with certain reservations and conditions.[214] The situation did not change much over the years, until the Constitutions of the Republic of South Africa[215] in 1993 finally brought customary law on par with the common law of South Africa, by affording it constitutional recognition, but subject to the Constitution's underlying principles and values.[216] In other words, the South African Constitutions brought radical changes to this unacceptable situation through the recognition of customary law as a distinct and original source of law in its own right.[217] These Constitutions firmly established a place for customary law within the South African legal system. With the adoption of the new Constitution[218] and introduction of constitutional democracy, customary law became a core element of the South African legal system, on par with Roman-Dutch law.[219] Currently, customary law is no longer subject to any legislation other than the rule of constitutional law.[220]

Sections 33(2), 33(3) and 35(3) of the interim Constitution were instrumental to the recognition of customary law. Their significance lay in listing African law alongside common law and legislation as sources of South African law. In particular, these sections acknowledged the impact of the rights conferred by customary law on an equal level with those derived from other sources.[221] Section 33(2) of the interim

213 Native Administration Act 38 of 1927.
214 Rautenbach https://www.ejcl.org (accessed on 8 August 2016)*;* Wall https://www.sahistory.org.za (accessed on 8 August 2016).
215 The interim Constitution; the Constitution.
216 Rautenbach https://www.ejcl.org (accessed on 8 August 2016)*;* Mbodla 1999 *SALJ* 742; Bennett "Legal pluralism and the family in South Africa: lessons from customary law reform" in Bekker *et al Legal pluralism* (2002) 17; *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) 926; Wall https://www.sahistory.org.za (accessed on 8 August 2016).
217 Ndima *Re-imagining and re-interpreting African jurisprudence* (2013) 7.
218 108 of 1996.
219 Bennett *Customary law* (2004) 122.
220 Wall https://www.sahistory.org.za (accessed on 8 August 2016).
221 *Ibid*.

Constitution provided that no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in the Bill of Rights,[222] save as provided for in the general limitation clause[223] or any other provision of the Constitution. This is shown in the case of *Alexkor Ltd v The Richtersveld Community*,[224] in which the court stated the following: "*While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law, it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution."* Section 33 of the interim Constitution is notable for its emphasis on the equality between customary law rights and other entrenched rights. For example, section 33(2) provided that the rights in the Bill of Rights may not be limited by customary law rights. Similarly, in terms of section 33(3), the entrenchment of the rights in the Bill of Rights shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation, to the extent that they are not inconsistent with the entrenched rights. In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the Bill of Rights.[225] Section 35(3) of the interim Constitution sealed the equality requirement between customary law and common law, by demanding that courts interpreting both systems have due regard to the spirit, purport and objects of the Bill of Rights.

In addition to these provisions, section 211(3) of the Constitution[226] expressly obliges the courts to apply customary law when it is applicable, in the sense of an authoritative

222 Chapter 2 of the Constitution.
223 See s 33(1) of the interim Constitution.
224 2004 5 SA 460 (CC) 478.
225 s 35(3) of the interim Constitution.
226 Constitution.

source of South African law.[227] This section makes the application of customary law mandatory in the courts when conflict of laws rules indicate that it is applicable to the facts of a particular case.[228] According to the proviso to section 211(3), however, customary law must be read subject to the Bill of Rights and any other relevant legislation.

Furthermore, the constitutional support for the application of customary law can be found in the protection of culture in sections 30 and 31 of the 1996 Constitution, which respectively enshrine language and cultural rights, and protect cultural, religious and language communities, and the practice of culture and religion.[229] However, section 31 also states that those rights are conditional. This section establishes that the exercising of these rights cannot be inconsistent with any other provision articulated in the Bill of Rights. In other words, the practice of culture cannot undermine any of the basic human rights, as detailed in this Bill. Culture must be practiced in a manner that remains in accordance with the sections concerning rights to equality and dignity.[230] The Constitution as the supreme law[231] applies to all laws[232] and is expressly intended to govern the development of customary law by the courts.[233] This has created the opportunity for adjusting customary law in its official pretext to changing values and practices.[234] Theoretically, the Constitution elevated the status of customary law to the same level as common law. In practice, however, South Africa's legislations are

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227 Du Bois *Wille's principles* (2007) 100; Kerr 1994 *SALJ* 720 725.

228 Under s 1(1) of the still current Law of Evidence Amendment Act 45 of 1988, the courts simply have discretion whether to apply customary law - also see *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T). Courts are now obliged to apply customary law, as acknowledged and endorsed in *Mabuza v Mbatha* 2003 4 SA 218 (C) at 228.

229 *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) par 42; *Thembisile v Thembisile* 2002 2 SA 209 (T); *Mabuza v Mbatha* 2003 4 SA 218 (C).

230 Wall https://www.sahistory.org.za (accessed on 8 August 2016).

231 s 2 of the Constitution.

232 s 8 of the Constitution.

233 s 39(2) of the Constitution.

234 *Mabena v Letsoalo* 1998 2 SA 1068 (T).

struggling to live up to the promise of the Constitution.[235] Nonetheless, the Constitution has had a notable impact on the action of dependants for loss of support under customary law.

2.4.3.2 Action of dependants for loss of support under customary law

The dependency claim is one area of customary law that has received considerable attention from the legal arena.[236] The traditional perception that the enactment of the Black Laws Amendment Act[237] was intended to remedy the potentially unfair position of a widow married in terms of customary law, giving such a widow a dependency claim for loss of support, paints a wholly deceptive picture. It generates the view that the legislature has created *a new cause of action that did not exist in customary law.* From the earliest times, long before the Europeans invaded the Cape,[238] the dependency claim has always been available in terms of customary law.[239] In customary law, it is a civil wrong to bring about, intentionally or negligently, the death of another.[240] This customary action is called *go tsoša hlogo* or *go tsosa hlogo* in Sepedi/Setswana/Sesotho cultures. It is a well-established and recognised practise in customary law and has always been part of the legal system of African people of South Africa.[241] It closely resembles the Roman-Dutch law or common law dependency action. In fact, it is of the same breath as the Aquilian action.

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235 Ndima *Re-imagining and re-interpreting African jurisprudence* (2013) 7.

236 *Sipongomana v Nkulu* 1901 NHC 26; *Suid Afrikaanse Nationale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A); *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (D); *Ismael v Ismael* 1983 1 SA 1006 (A); *Zulu v Minister of Justice* 1956 2 SA 128 (W).

237 s 31 of the Black Laws Amendment Act 76 of 1963.

238 Archive 1 "The Arrival of Jan Van Riebeeck in the Cape - 6 April 1652" https://www.sahistory.org.za/.../arrival-jan-van-riebeeck-cape-6-april-1652 (accessed on 8 August 2016).

239 Kerr 1956 *SALJ* 402; Clark 1999 *SALJ* 20 24; *Mokoena v Laub* 1943 WLD 63; *Mayeki v Shield Insurance Co Ltd* 1975 4 SA 370 (C).

240 Sekese *Mekhoa le Maele a Basotho* (2009) 60; Duncan *Sotho laws and custom* (2006) 105; Palmer *Law of delict* (1970) 114.

241 Bekker *Seymour's customary law* (1989) 379; Clark 1999 *SALJ* 20; Dlamini 1984 *SALJ* 346; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W); *Joel v Zibokwana* 4 NAC 130

The Roman-Dutch law or common law decisions are cited authoritatively in customary law cases, without the perception of a conflict of laws.[242] The variances between the common law and customary law are merely distinctions without legal significance. The validity and application of the action of dependants by a widow married in customary law was overcome by the judicial marginalisation of customary law and practices.[243] The "invented" dispute with regard to a claim by such a widow correlated with an interpersonal conflict of laws involving recognition of a duty of support in a different system of law.[244] The court argued that the duty of support when the husband was alive was in terms of a marriage concluded in accordance with a system of law other than the South African common law,[245] which marriage was potentially polygamous and therefore *contra bonos mores.*[246] It was further disputed that a customary marriage could not bring about a legal duty of maintenance or support *inter partes.*[247] It is submitted that the line of reasoning suggested here was fundamentally unsound. The duty to support was thus inextricably linked to the existence of a valid marriage, which criterion was laid down by common law.[248] The wrongdoer was allowed to escape liability, simply because the breadwinner was married in terms of customary law, not because the action of dependants for loss of support did not exist in customary law.

1919; *Nohele* 6 NAC 1928 19; *Silimo v Vuniwayo* 5 NAC 1953 135; *Sipongomana v Nkulu* 1901 NHC 26.

242 Sekese *Mekhoa le maele a Basotho* (2009) 61; Duncan *Sotho laws and custom* (2006) 105; Palmer *Law of delict* (1970) 111.

243 Clark 1999 *SALJ* 20 26.

244 *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A).

245 *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (D); *Ismael v Ismael* 1983 1 SA 1006 (A); *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A); Clark 1999 *SALJ* 20 24.

246 *Ismael v Ismael* 1983 1 SA 1006 (A); Clark 1999 *SALJ* 20.

247 *Mokoena v Laub* 1943 WLD 63.

248 Pienaar 2006 *Stell LR* 314.

Numerous attempts in case law to eradicate the prohibition were unsuccessful.[249] In *Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappy Bpk v Fondo*,[250] the court held that a claim for damages for loss of support caused by the death of a spouse was not allowed where the marriage was in a system of law that permitted polygamy because, in its view, polygamy was against public policy. Therefore, a widow married according to customary law was not entitled to claim for the loss of support that she suffered as a result of the death of her husband. The court came to the same conclusion in *Ismael v Ismael,*[251] finding that marriage in terms of Islamic rites was a potentially polygamous union, hence unlawful and contrary to public policy. In *Nkabinde v SA Motor & General Insurance Co Ltd,*[252] the widow who was married in terms of customary law argued that the duty of support between her and the deceased arose *ex contractu* (contractually). She alleged that prior to their marriage, the deceased and herself entered into an agreement whereby the deceased (her husband) had agreed to be liable for supporting her, in exchange for marrying him. The court declined to extend the Aquilian action on the ground that it was against public policy to recognise a customary marriage. Research has failed to disclose any South African case effectively disallowing the dependency claim because the action was or is unavailable in terms of customary law. It was accepted that Black African people had "a settled system of law" with regard to dependency claims, except that it was a system the then courts could not take into cognisance.[253]

Closely related to this issue is the then common law rule that a subsequent civil marriage with another woman had the effect of dissolving the subsisting customary

249 *Sipongomana v Nkulu* 1901 NHC 26; *Zulu v Minister of Justice* 1956 2 SA 128 (W).
250 1960 2 SA 467 (A).
251 1983 1 SA 1006 (A).
252 1961 1 SA 302 (D).
253 Dlamini 1984 *SALJ* 34-35.

marriage.[254] A man who was married by civil rites was expressly prohibited from marrying another woman by customary rites.[255] A person could not therefore be a spouse in a civil marriage and a spouse of another person in a customary marriage at the same time, but same parties could enter into both types of marriages. As the customary marriage was dissolved or superseded by a civil marriage, the rights of a widow married by civil rites and her children were safeguarded upon the death of their spouse or father.[256] This was the position until 2 December 1988, when the Marriage and Matrimonial Property Law Amendment Act[257] came into operation. The effect of this Act was that the position was reversed. This legislation held unpleasant surprises for widows in possession of civil/common law marriage certificates.[258]

Finally, customary marriages were given full recognition on 15 November 2000, when the Recognition of Customary Marriages Act[259] came into operation. In terms of this Act, customary marriages were given full recognition in South African law. This included customary marriages contracted in accordance with the provisions of this Act, as well as valid customary marriages that existed at its date of commencement. Section 2 of the Act precludes a spouse married by customary rites from contracting a civil marriage with another person during the subsistence of the customary marriage. Unlike the position before 2 December 1988, that is, before the coming into effect of the Marriage and Matrimonial Property Law Amendment Act of 1988, a civil marriage does not have the effect of dissolving or superseding an existing or previous customary

254 *Nkambula v Linda* 1951 1 SA 377 (A).
255 Mqeke 1980 *De Rebus* 597; Mafubelu 1981 *De Rebus* 573; the repealed s 22 of the Black Administration Act of 1927.
256 Peart 1983 *CILSA* 39-40.
257 Act 3 of 1988.
258 Koch *SAAJ* 2011 111.
259 Act 120 of 1998.

marriage.[260] The result is that a civil marriage contracted during the subsistence of a customary marriage is null and void *ab initio*.[261] The same holds for a customary marriage contracted during the existence of a civil marriage. It is also clear that a spouse in a civil marriage[262] is precluded from contracting a customary marriage with another person during the subsistence of the civil marriage.[263] Polygamy, in the same manner as before 2 December 1988, is only allowed in respect of customary marriages.

The position outlined above applies to the whole of South Africa. Today, in South Africa, customary law is expressly recognised under the Constitution[264] as a distinct and original source of law in its own right. Theoretically, this transformation elevated the status of customary law to the same level as common law.[265] Consequently, there can be no doubt that the dependency action for wrongful death applies under customary law and has become a system of legislation.

2.4.4 Legislative framework

A claim for loss of support as the result of the wrongful and negligent act of another may be established by legislation or may function in terms of legislative provisions. South Africa has a fragmented collection of dependency action legislations. The relevant statutory provisions for dependency claims are briefly explained below (and only some examples of substantial practical importance will be considered here):

260 Sinclair, Heaton & Hahlo *Law of marriage* (1996) 219-220.
261 s 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.
262 Marriage Act 25 of 1961.
263 s 10(4) of the Recognition of Customary Marriages Act 120 of 1998.
264 ss 33 & 35 of the interim Constitution; ss 30 31 39 & 211 of the Constitution.
265 Ndima *Re-imagining and re-interpreting African jurisprudence* (2013) 7.

2.4.4.1 Section 36 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter COIDA or COID Act)

The main legislation covering work-related injury, disease or death is the Compensation for Occupational Injuries and Diseases Act,[266] also known as COIDA.[267] In South Africa, COIDA came into effect on 1 March 1994.[268] It replaced the old Workmen's Compensation Act (WCA).[269] The COID Act is wider in scope than the Workmen's Compensation Act, which it replaced. This Act creates a statutory insurance, which entitles an employee and his dependants[270] to claim compensation from the Director-General for an accident, disease or death that occurred during the course of employment.[271] COIDA is under the control of the Director-General of the Department of Labour, who delegates many of his functions to the Compensation Commissioner.[272] The dependant of an employee who died in the course of employment has the right to claim loss of support through an administrative process which requires the Director-General to adjudicate upon the claim, and to determine the precise amount to which the dependant is entitled. Payment of compensation is not dependant on the employer's negligence or ability to pay, nor is the amount susceptible to reduction based on the employee's contributory negligence.[273] The Act provides what is called a no-fault compensation system for workers.[274] In other words, the

266 Act 130 of 1993.
267 Compensation for Occupational Injuries and Diseases Act 130 of 1993.
268 Moloi https://ww.labourguide.co.za/.../544-perspectives-on-compensation-for-occupational-injuries (accessed on 8 August 2016); Acutt & Hattingh *Occupational health: management and practice for health practitioners* (2004) 68; Myburgh, Smit & Van der Nest https://www.saflii.org/za/journals/LDD/2000/5.pdf (accessed on 8 August 2016).
269 Act 30 of 1941.
270 s 1 of the COID Act 130 of 1993.
271 s 35(1) of the COID Act substitutes the right to compensation provided therein against the Director-General for any other claim which the employee might have against his employer. The employee is deprived of the right to a common-law claim for damages.
272 s 22(1) & (4) of the COID Act 130 of 1993.
273 s 32(1) of the COID Act 130 of 1993.
274 *Ibid*.

dependants of the employee who died because of occupational injuries or disease forfeit the right to sue the wrongdoer for damages, and in return receive some compensation for loss of support, whether or not there was any negligence. The COID Act enjoys a specific relationship with the Road Accident Fund (RAF) Act,[275] as well as the Apportionment of Damages Act.[276]

2.4.4.2 Section 17 of the Road Accident Fund Act 56 of 1996 (hereinafter RAF Act)

Section 17 of the RAF Act imposes an obligation on the RAF (Fund) to compensate any person (the third party) for loss or damage suffered as a result of any bodily injury to himself or herself, or the death of or any bodily injury to any other person, following the driving of a motor vehicle by any person at any place within the Republic of South Africa. The RAF Act entitles the dependants of a breadwinner who was unlawfully and wrongfully killed due to the driving of a motor vehicle to bring an action for loss of support against the Fund for the payment of compensation for loss of support.[277] This Act was recently amended by the RAF Amendment Act (RAFAA),[278] which came into operation on 01 August 2008. The RAFAA did not change the RAF Act in totality, but only amended and deleted certain sections of the Act.[279] The most important changes relevant to this study are the following:

- Funeral or cremation expenses: The limitation of the Fund's liability is to pay only the necessary actual costs of cremation or internment.

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275 Act 56 of 1996.
276 Act 34 of 1956.
277 Klopper *Third party compensation* (2012) 9.
278 Act 19 of 2005.
279 Klopper *Third party compensation* (2012) 9-12.

- Loss of support: Liability was capped, irrespective of the actual loss, at R160000 per year in 2008, and currently stands at R276 928[280] per annum. This amount is increased quarterly in line with inflation.

2.4.4.3 Section 1(1) (a) of the Apportionment of Damages Act 34 of 1956

The legal position regarding contributory negligence and its effect on the recovery of damages is governed by the Apportionment of Damages Act.[281] This Act was established to amend our common law position in respect of contributory negligence.[282] Before the Apportionment of Damages Act came into existence, the "all or nothing" principle was applicable in South Africa.[283] The no-contribution rule was justified by reference to the maxim *ex turpi causa non-oritur actio,* which means that an action does not arise from a wrongful cause.[284] This principle can be briefly explained as follows: Where the negligence of two persons contributed to the causing of a particular result and one or both parties suffered damage as a result, neither party could institute an action unless the negligence of one of the parties was the decisive cause of the accident. In such an 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 courts looked at who had the last opportunity of avoiding the accident.[285]

280 Government Gazette no 41996, board notice 145/2018 dated 26 October 2018.
281 Act 34 of 1956.
282 Du Plooy *Analysis of the Apportionment of Damages Act* (2015) 34; South African Law Reform Commission Project 96: The Apportionment of Damages Act 34 of 1956 Report dated (July 2003), par 1.1.
283 *Pierce v Hau Mon* 1944 AD 175 195; South African Law Reform Commission Project 96: The Apportionment of Damages Act 34 of 1956 Report (July 2003), par 1.24.
284 *Ibid*.
285 See s 1(1)(a) of Apportionment of Damages Act 34 of 1956.

The “all or nothing” principle clearly resulted in unfair decisions being made, and the legislature had no alternative but to intervene and apportion damages in cases of contributory negligence or joint or several liability.[286] In addition, the Apportionment of Damages Act did not originally deal with the situation where the dependants sought to recover for loss of support where the deceased breadwinner had been contributorily negligent. However, the Act was amended in 1971 to deal with this matter.[287] Section 2(1B) of the Act deals with the death of or injury to a breadwinner.[288] It provides that if it is alleged that the plaintiff has suffered damage as a result of an injury to or death of any person, and that such injury or death was caused partly through the fault of such injured or deceased person, and partly through the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person, shall, for the purposes of this section, be regarded as joint wrongdoers.

Section 1(1)(a) provides that where a person suffers damage which is caused partly through his own fault and partly through the fault of any other person, a claim in respect of this damage shall not be defeated by reason of the fault of the claimant. However, damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable, having regard to the degree to which the claimant was at fault in relation to the damage. The Act regulates the manner in which the amount to be awarded to the dependants for loss of support is to be calculated.[289] In terms of this Act, a dependant's claim for loss of support, being the dependant's own

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286 McKerron *Delict* (1971) 309; *Randbond Investment (Pty) Ltd v FPS Ltd* 1992 2 SA 608 (W) 619.
287 Burchell *Delict* (1993) 243-244.
288 Du Plooy *Analysis of the Apportionment of Damages Act* (2015) 34; Klopper 2007 *THRHR* 441; Neethling 1988 *THRHR* 107-108.
289 s 2(6)(a) of the Apportionment of Damages Act 34 of 1956.

action and not one derived from the deceased's estate, cannot be reduced on account of the deceased breadwinner's contributory negligence.[290]

2.4.4.4 Section 31 of Black Laws Amendment Act 76 of 1963

Section 31 provides for the right of a partner to a customary union to claim damages from a person unlawfully causing the death of the other partner:

> "(1) A partner to a customary union as defined in section thirty-five of the Black Administration Act, 1927 (Act 38 of 1927), shall, subject to the provisions of this section, be entitled to claim damages for loss of support from any person who unlawfully causes the death of the other partner to such union or is legally liable in respect thereof, provided such partner or such other partner is not at the time of such death a party to a subsisting marriage.
>
> (2) No such claim for damages shall be enforceable by any person who claims to be a partner to a customary union with such deceased partner, unless-
>
> (a) such person produces a certificate issued by a Commissioner stating the name of the partner, or in the case of a union with more than one woman, the names of the partners, with whom the deceased partner had entered into a customary union which was still in existence at the time of death of the deceased partner; and
>
> (b) such person's name appears on such certificate.
>
> (2A) A certificate referred to in subsection (2) shall be accepted as conclusive proof of the existence of a customary union of the deceased partner and the partner or, in the case of a union with more than one woman, the partners whose name or names appear on such certificate.
>
> (3) Where it appears from the certificate referred to in subsection (2) that the deceased partner was survived by more than one partner to a customary union, all such surviving partners who desire to claim damages for loss of support, shall be joined as plaintiffs in one action.
>
> (4) …
>
> (a) Where any action is instituted under this section against any person by a partner to a customary union and it appears from the certificate referred to in subsection (2) that the deceased partner was survived by a partner to a customary union who has not been joined as a plaintiff, such person may serve a notice on such partner who has not been joined as a plaintiff to intervene in the action as a co-plaintiff within a period of not less than fourteen days nor more than one month specified in such notice, and thereupon the action shall be stayed for the period so specified.
>
> (b) If any partner to a customary union upon whom a notice has been served in terms of paragraph (a), fails to intervene in the action within the period specified in such notice or within such extended period as the court on good cause shown may allow, such partner shall be deemed to have abandoned her claim.
>
> (5) If a deceased partner to a customary union is survived by more than one partner to such a union, the aggregate of the amounts of the damages to be awarded to such partners in terms of this section shall under no circumstances

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290 *Kleinhans v African Guarantee & Indemnity Co Ltd* 1959 2 SA 619 (E); *McDonald v RAF* [2012] ZASCA 69.

> exceed the amount which would have been awarded had the deceased partner been survived by only one partner to a customary union.
>
> (6) A partner to a customary union whose name has been omitted from a certificate issued by a Commissioner in terms of subsection (2) shall not by reason of such omission have any claim against the Government of the Republic or the Commissioner if such omission was made bona fide.
>
> (7) Nothing in this section contained shall be construed as affecting in any manner the procedure prescribed in any other law to be followed in the institution of a claim for damages for loss of support."

The enactment of section 31 of the Black Laws Amendment Act 76 of 1963 has been hailed as an important milestone in law reform.[291] The writer disagrees with this view, however, and reiterates that the traditional perception that the enactment of the Black Laws Amendment Act[292] was intended to remedy the potentially unfair position of a widow married in terms of customary law, where neither of them was a party to a subsisting civil marriage,[293] by granting such widow a dependency claim for loss of support, paints a totally deceptive picture. This is because it encourages the view that the legislature has created *a new cause of action that did not exist in customary law.* From the earliest times, long before the Europeans invaded the Cape, the dependency claim has always been available in terms of customary law.[294]

2.4.4.5 Recognition of Customary Marriages Act 120 of 1998 (RCMA)

The RCMA recognises customary marriages, which were hitherto partially recognised under South African general law.[295] The Act also promotes equality between spouses[296] and thus fundamentally changes the personal and proprietary

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291 Maithufi & Bekker 2009 *OBITER* 164; Dlamini 1984 *SALJ* 346-347.

292 s 31 of the Black Laws Amendment Act 76 of 1963.

293 Maithufi & Bekker 2009 *OBITER* 164; Bekker *Seymour's customary law* (1989) 379; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W).

294 Kerr 1956 *SALJ* 402-403; Clark 1999 *SALJ* 20 24; *Mokoena v Laub* 1943 WLD 63; *Mayeki v Shield Insurance Co Ltd* 1975 4 SA 370 (C); the arguments outlined in chapter 2 of this thesis, par 2.4.3.2 dealing with an action of dependants for loss of support under customary law apply here as well.

295 Dlamini "Family law" in Bekker *et al* (eds) *Introduction to legal pluralism in South Africa* (2002) 27-31; Bekker, Labuschagne & Vorster *Introduction to legal pluralism in South Africa: Customary law* (2002) 35-38.

296 s 7(2) and (3) of the Recognition of Customary Marriages Act 120 of 1998.

consequences of customary marriages. It further states that a customary marriage entered into after its commencement will be in community of property,[297] and provides for the conversion of customary marriages contracted before its operation into civil marriages.[298] Some legal scholars have also hailed this Act as a step in the right direction, while it has been criticised by others. On the one hand, Dlamini[299] argues that the recognition of customary marriages, for all purposes, puts an end to their hitherto dubious status. Mqeke,[300] on the other hand, laments the supplanting of customary law by Roman Dutch law, an equally patriarchal system. He concludes that there is not much customary law left in the Act. Mamashela and Xaba[301] argue that what the framers of the 1998 Act considered a customary marriage was a version of it that had been warped by various processes, such as urbanisation and modernisation, among others. The effect of the enactment of the RCMA was to protect partners in a customary marriage and to put an end to the continuation of unfair treatment of partners in customary marriages whose breadwinner had been killed unlawfully and negligently. The Act confirmed a statutory cause of action for the benefit of partners in a customary marriage of a deceased person, where the death of the deceased was caused by the wrongful act of another person. Where there is more than one spouse eligible to receive compensation, the compensation should be divided between the spouses at the discretion of the court or authority responsible for paying the compensation.[302]

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297 s 7(2) of the Recognition of Customary Marriages Act 120 of 1998.
298 s 7(4) of the Recognition of Customary Marriages Act 120 of 1998.
299 Dlamini *OBITER* 1999 14-15.
300 Mqeke *OBITER* 1999 52-53.
301 Mamashela & Xaba *The practical implications and effects of the Recognition of Customary Marriages Act 120 of 1998* (Law School University of Natal – Pietermaritzburg, School of Development Studies, Research Report No. 59/2003).
302 The arguments outlined in chapter 2 of this thesis, par 2.4.3 dealing with customary law apply here as well.

2.4.4.6 Civil Union Act 17 of 2006

From Biblical times,[303] sexual orientation inequality has been endemic in all jurisdictions, including South Africa. However, in recent years, the constitutional requirement for equality[304] has been instrumental in extending the ambit of the judicial interpretation of the concept of "marriage" to homosexuals. Pursuant to the constitutional requirement that the government provide protection against discrimination based on sexual orientation, the South African parliament promulgated and adopted the Civil Union Act on 1 December 2006. South Africa became one of very few countries to confer legal protection and marriage benefits on partners in same-sex relationships. The Civil Union Act is the main piece of legislation recognising marriage between lesbians and gays. The legislation was adopted as a direct response to the landmark decision of the Constitutional Court in *Minister of Home Affairs v Fourie.*[305] The Court declared the lack of legal recognition of same-sex relationships unconstitutional, and gave Parliament a period of one year in which to develop a remedy that would allow same-sex partners to formalise their relationships.[306] The objectives of the Civil Union Act are to regulate the solemnisation and registration of civil unions by way of either a marriage or a civil partnership; and to provide for the legal consequences of the solemnisation and registration of civil unions.[307] Due to the passing of this Act, homosexuals who have registered their partnerships in accordance

303 1 Corinthians 7:2 – "Nevertheless, [to avoid] fornication, let every man have his own wife, and let every woman have her own husband"; Leviticus 20:13 – "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood [shall be] upon them"; Leviticus 18:22 – "Thou shalt not lie with mankind, as with womankind: it [is] abomination."

304 s 9 of the Constitution guarantees equality before the law and freedom from discrimination to the people of South Africa. This equality right is the first right listed in the Bill of Rights. It prohibits discrimination by the government and by private persons.

305 2006 1 SA 542 (CC).

306 Ntlama http://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015).

307 s 2 of the Civil Union Act 17 of 2006.

with the provisions of this Act now have the right to lodge a claim for loss of support under the dependency action, where their partner was unlawfully killed.

2.4.4.7 Section 1 of the Assessment of Damages Act 9 of 1969

This Act amends the law regarding the assessment of damages for loss of support as a result of a breadwinner's death. The calculation for loss of support claims is directed at the support that would have been provided had there been no death.[308] The broad objective of the Act is to ameliorate the position of dependants whose claims for loss of support against the wrongdoer would otherwise have been reduced due to the application of the rules on compensating advantages.[309] Section 1(1) of this Act prohibits insurance money, pensions or benefits from being considered in calculating loss of support. Before this section came into operation, such benefits were taken into account, but the legislature felt this to be unfair.[310]

2.4.5 Conclusion

The above discussion provided the background to the South African legal position on the action of dependants for loss of support. The following discussion focuses on the status of the dependency action for loss of support in Botswana and Lesotho. Similar to South Africa, Botswana and Lesotho have dual legal systems, which recognise the coexistence of both common law and customary law, and have a great variety of ethnic groups, of which the indigenous people of both countries are in the majority.[311] The genesis of the action of dependants and the way in which these two systems operate

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308 Koch *SAAJ* (2011) 111-133.

309 Boberg 1969 *SALJ* 339 341; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A); *Groenewald v Snyders* 1966 3 SA 237 (A).

310 Potgieter, Steynberg & Floyd *Law of damages* (2012) 247-250.

311 Quansah https://www.pulapulapula.co.uk/ (accessed on 8 August 2016)**;** Dube https://www.nyulawglobal.org/globalex/lesotho.htm (accessed on 8 August 2016)*;* also see https://www.jcl.sagepub.com/content (accessed on 8 August 2016).

together in respect of the action of dependants in Botswana and Lesotho are investigated in the next section, in order to establish if the South African and Australian legislature can learn from these countries in terms of how they apply dependency claims in practice.

2.5 Botswana and Lesotho

2.5.1 Introduction

Throughout the African continent, it is most difficult to discover the written history of the action of dependants for loss of support prior to the arrival of Europeans in Africa. The reason for this is that, with the exception of a few countries such as Egypt, there was no formal written history of laws in most African countries. African customs and laws were passed down from generation to generation through the oral tradition. From the middle of the seventeenth century, with the arrival of Dutch explorers in the Cape of Good Hope, the Roman-Dutch-based legal system spread rapidly, and quickly became the recognised legal system of not only South Africa, but the majority of Southern African countries.[312] South Africa, Botswana and Lesotho thus share a common legal heritage.[313] For political and strategic reasons, the British colonial power imposed the law of the Colony of the Cape of Good Hope on the erstwhile protectorates of Bechuanaland (Botswana) and Basotholand (Lesotho).[314] Similar to South Africa, the Roman-Dutch law formed the contingency that Botswana and Lesotho looked towards to ensure clarity in their law.[315]

312 Du Bois *Wille's principles* (2007) 127; Pain 1978 *CILSA* 137 143.
313 Van Niekerk 2004 *CILSA* 312 317.
314 See generally Tshosa *National law and international human rights law* (2017) 30; Bennett *Customary law* (2004) 57; Pain 1978 *CILSA* 143.
315 Sanders 1985 *LLJ* 51.

2.5.2 Roman-Dutch law

Botswana and Lesotho share with South Africa a mixed general legal system, which resulted from the interaction between Roman-Dutch civilian law and English common law.[316] The reception formula for Botswana or extension of the Roman-Dutch law to Botswana was originally contained in section 19 of the General Administration Proclamation of 1891,[317] and later in section 4 of Proclamation No. 36 of 1909.[318] The latter related to common law and was identical to the Lesotho formula, which was imported by means of the language of section 4 of Proclamation 2B of 1884.[319] Although it is called Roman-Dutch law, all the Proclamations were a mix of the original Roman-Dutch law that was brought by the Dutch, the English law that was progressively introduced by the British, and the principles developed by the South African courts.[320] In other words, what Botswana and Lesotho received during the colonial period under the Proclamations was neither pure Roman-Dutch law nor pure English law, but a mixture of both laws, as developed further in South African courts.[321]

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316 Booi https://www.nyulawglobal.org/globalex/Botswana1.html (accessed on 8 August 2016); Dube https://www.nyulawglobal.org/globalex/Lesotho.html (accessed on 8 August 2016); Fombad *Botswana legal system* (2006) 35.

317 Section 19 of Proclamation of 1891, which stated as follows:

> "Subject to the foregoing provisions of this Proclamation, all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope; Provided that no Act after this date by the Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory."

318 s 4 of Proclamation No. 36 of 1909 made it clear that Cape colonial law was only to apply in Botswana "so far as not inapplicable", the effect of which was to provide for the exclusion or modification of the laws that did not fit the circumstances prevailing in the country.

319 Proclamation 2B of 1884 states that the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope….

320 Palmer & Potter *Legal system* (1972) 53 59; Pain 1978 *CILSA* 143*;* Fombad *Botswana legal system* (2006) 35; Booi https://www.nyulawglobal.org/globalex/Botswana1.html (accessed on 8 August 2016); Dube https://www.nyulawglobal.org/globalex/Lesotho.html (accessed on 8 August 2016); Maqutu 1979 *CILSA* 177.

321 Sanders *Bechuanaland and the law in politicians' hands* (1992) 5-7; Molokomme 1985 *LLJ* 121-125; Kakuli 1952 *Stell LR* 163.

The various High Commissioners who were appointed administered the territories from their seat in Cape Town and later Pretoria, and often legislated for the territories simply by extending Proclamations designed for what is now South Africa to Botswana and Lesotho.[322] Therefore, calling it Roman-Dutch law may be both inaccurate and possibly perverse. Roman-Dutch law is a neutral term that, provided it is properly understood, serves to underline the uniqueness of this law, and establishes important views for its creative expansion to solve legal problems.[323] Therefore, Roman-Dutch law, as influenced by English law, is the common law of both Botswana and Lesotho, and operates alongside legislation and judicial decisions as a source of law.[324]

Although it is technically correct to say that the common law of Botswana and Lesotho is Roman-Dutch law, this is only true to the extent that it is understood as being the Roman-Dutch law as influenced by English law, and its interpretation in South African courts.[325] References not only to South African judicial decisions, but also to academic works on the law of South Africa abound in the Botswana and Lesotho Law Reports.[326] The development of the legal systems of both Botswana and Lesotho was shaped by South African legal practice through the High Commissioner in the Cape, who retained legislative power over the territories.[327] This is still the situation today in Botswana and Lesotho. Judgments emanating from the High Court or Appeal Court of both countries frequently and extensively express themselves on the authority of South African law.

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322 Booi https://www.nyulawglobal.org/globalex/Botswana1.html (accessed on 8 August 2016); Fombad https://www.nyulawglobal.org/globalex/Lesotho.html (accessed on 8 August 2016).

323 *Ibid.*

324 Pain 1978 *CILSA* 143*;* Booi https://www.nyulawglobal.org/globalex/Botswana1.html; (accessed on 8 August 2016); Fombad https://www.nyulawglobal.org/globalex/Lesotho.html (accessed on 8 August 2016).

325 Van Niekerk 2004 *CILSA* 312 324.

326 Palmer *Law of delict* (1970) 113; Maqutu 1979 *CILSA* 176; Pain 1978 *CILSA* 143; Van Niekerk 2004 *CILSA* 313.

327 Molokomme 1985 *LLJ* 124; Kakuli 1952 *Stell LR* 173 175.

Botswana and Lesotho rely on and follow judgments decided in the Republic of South Africa in the areas of the law where they are applicable, where Roman-Dutch law also constitutes the common law.[328]

Botswana and Lesotho law provide for compensation to be paid by a person who wrongfully and unlawfully kills a breadwinner.[329] It is apparent from the above that the action of dependants for loss of support of Botswana and Lesotho is of the same breath as the South African common law dependency action,[330] although it does not reflect completely, nor has it been adapted to, all the modern developments of the South African dependency action. For instance, in Botswana and Lesotho, the abhorrence of homosexuals is such that there is no recognition of them. Therefore, where a partner to a permanent homosexual relationship claims support due to the unlawful death of his/her partner, the claim will not be approved because such a partner is not deemed to be a spouse or legally obliged to support his/her surviving partner.[331] Their agreement to support each other will not afford the surviving partner a dependant action, unlike partners under customary law.

2.5.3 Customary law

Similar to South Africa, Botswana and Lesotho operate two systems of law – an imported system based on the Roman-Dutch common law, and an indigenous system based on the traditional customs and practices of Batswana (people of Botswana or

328 Booi https://www.nyulawglobal.org/globalex/Botswana1.html (accessed on 8 August 2016); Fombad *Botswana legal system* (2006) 35; Palmer & Potter *Legal system* (1972) 76 92.

329 Palmer *Law of delict* (1970) 114; Poulter *Legal dualism* (1979) 70.

330 Palmer *Law of delict* (1970) 111.

331 Apiko & Palime edited by Alice Mogwe "Customary law and its impact on women's rights, children's rights and LGBTI - people in Southern Africa – the Botswana Example Nr. 14 / 2013" *Ditshwanelo* 2013.

Setswana culture)[332] and Basotho (people of Lesotho and Sesotho culture)[333] from time immemorial.[334] The right of indigenous people to have customary law accommodated within their communities is an integral part of the Botswana and Lesotho legal systems.[335] In contrast to South Africa, the colonists interfered as little as possible with customary law and the internal administration of Botswana and Lesotho.[336] The colonists saw it as the best way of administration to officially recognise and use, as much as possible, the existing indigenous systems of rule and law in both countries.[337] The colonists were able to incorporate the indigenous system fairly easily into the new court structure introduced to deal with disputes involving Africans.[338]

In Botswana, under Article 4 of the General Administration Order in Council of 9 May 1891, the High Commissioner, in issuing Proclamations, was required to "…respect any native laws or customs by which the civil relations of any native chiefs, tribes or populations…".[339] Although the Proclamation of 10 June 1891 limited the jurisdiction of African courts, the Native Tribunals Proclamation of 1934 formally recognised customary courts, and for the first time incorporated them into the court system of the Protectorate.[340] The next significant enactment in Botswana was the Native Courts Proclamation of 1943, which for the first time contained provisions dealing with the

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332 Fombad 2005 *AJICL* 7. Citizens of Botswana are known as Batswana, with 'Ba' meaning 'the people of' & the singular is Motswana: see https://www.our-africa.org/botswana/people-culture (accessed on 8 August 2016).

333 Eldredge *Power in colonial Africa* (2007) xi.

334 Himsworth 1972 *JAL* 4-18; Apiko & Palime http://www.freiheit.org/Hintergrundpapiere/414c25236i1p/pm/index.html (accessed on 12 March 2016).

335 Kumar https://www.du.edu/korbel/hrhw/working/2009/52-kumar-2009.pdf (accessed on 8 August 2016); Palmer & Potter *Legal system* (1972) 63.

336 Booi https://www.nyulawglobal.org/globalex/Botswana1.html (accessed on 8 August 2016); Dube https://www.nyulawglobal.org/globalex/Lesotho.html (accessed on 8 August 2016); Fombad *Botswana legal system* (2013) 35.

337 Fombad *Botswana legal system* (2013) 63.

338 *Ibid.*

339 Booi https://www.nyulawglobal.org/globalex/Botswana1.html (accessed on 8 August 2016).

340 Fombad *Botswana legal system* (2013) 33.

recognition, constitution, powers and jurisdiction of customary courts. No other authority has more influence than customary courts, as custodians of culture and tradition, in terms of mobilising communities. The traditional courts continue to enjoy legitimacy among the people and have played a vital role in the delivery of justice, mainly because it is part of Setswana culture.[341]

Indigenous law continued to receive due recognition, even after independence in 1966, under the Customary Courts Act of 1969.[342] Customary law in Botswana is recognised, first and foremost, in the Constitution of Botswana.[343] Section 10(12)(b) and (e),[344] section 15(4)(d)[345] and section 88(2)[346] allude to customary law in the exception to the discrimination provision. The most comprehensive law that regulates customary law in Botswana is the Customary Law Act.[347] The Act defines customary law in the following terms: "in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law

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341 Kumar https://www.du.edu/korbel/hrhw/working/2009/52-kumar-2009.pdf (accessed on 8 August 2016).

342 Himsworth 1972 *JAL* 4-6.

343 Constitution of Botswana, 1966.

344 s 10 Provisions to secure protection of law
12(b) subsection (2)(d) or (2)(e) of this section to the extent that the law in question prohibits legal representation before a subordinate court in proceedings for an offence under customary law (being proceedings against any person who, under that law, is subject to that law);
(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

345 s 15. Protection from discrimination on the grounds of race, etc.
(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—
(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not.

346 s 88: Introduction of Bills
(2) The National Assembly shall not proceed upon any Bill (including any amendment to a Bill) that, in the opinion of the person presiding, would, if enacted, alter any of the provisions of this Constitution or affect— (a) the designation, recognition, removal of powers of Chiefs, Sub-Chiefs or Headmen; (b) the organization, powers or administration of customary courts; (c) customary law, or the ascertainment or recording of customary law.

347 Laws of Botswana, Cap. 16:01.

or contrary to morality, humanity or natural justice".[348] The Act was enacted in order to "provide for the application of customary law in certain actions before the courts of Botswana, to facilitate the ascertainment of customary law and to provide for matters ancillary thereto".[349] By virtue of the Act, all courts in Botswana are empowered, subject to their jurisdiction, to apply customary law in cases where it is necessary to do so.[350]

In Lesotho, the General Law Proclamation[351] provides for the general application of customary law in Basotho courts where all the parties to the proceedings are Africans.[352] The codification of customary law came about after a council was appointed in 1903 to advise the British Resident Commissioner on what was best for the "Basotho" in terms of laws that would govern them. Until this time, the Basotho customs and laws were transferred from generation to generation by means of oral tradition. The council was then given the task of codifying and writing the laws, and came up with the Laws of Lerotholi which are applied by customary courts today (local courts).[353]

Similar to South Africa, customary law currently stands on an equal footing with the common law and legislation as the general law of Botswana and Lesotho,[354] and is protected further by their Constitutions.[355] The customary law in Botswana and Lesotho recognises a dependant's right and action to claim damages from the person

348 s 2 of the Laws of Botswana.
349 Laws of Botswana, cap. 16:01.
350 s 3 of the Laws of Botswana.
351 Act No 2B of 1884.
352 Palmer & Potter *Legal system* (1972) 99.
353 These Laws were named after Chief Lerotholi, the then Paramount Chief of Basutoland (now Lesotho), to distinguish them from the laws promulgated by his grandfather, Moshoeshoe. See also Poulter *Legal dualism* (1979) 5 6; Dube https://www.nyulawglobal.org/globalex/Lesotho.html (accessed on 8 August 2016).
354 Palmer & Potter *Legal system* (1972) 99 169.
355 Constitution of Botswana, 1966 and the Constitution of Lesotho, 1993.

responsible for his/her breadwinner's death.[356] In Lesotho and Botswana, if a polygamist is killed, each of his wives and minor children could bring a successful action for loss of support, since the laws of Botswana and Lesotho recognise them as legal dependants of the deceased.[357] This is in contrast to the South African law, which previously denied such wives compensation on the ground that customary law marriages were not recognised by common law and the husband was therefore not legally bound to support his wives.[358] The High Court of Lesotho has recognised such a union as a proper basis for compensation.[359] Consequently, in Botswana and Lesotho, disputed matters are brought before the courts to be settled either through the application of customary law or common law, with their Constitutions as the supreme law.

2.5.4 Constitutional provisions

The current situation in Botswana and Lesotho is that the fundamental source of law in both countries is their Constitutions, which were formed by virtue of the Constitution of Botswana (1966) and the Constitution of Lesotho (1993). Any law or action that breaches the provisions of these Constitutions is illegal. Although there are striking similarities between the legal systems of South Africa, Botswana and Lesotho in terms of their common and customary laws, given the tendency of the Botswana and Lesotho courts to engage with South African case law and academic writings,[360] there are still

356 Van der Walt & Midgley *Delict* (2016) par 46.

357 s 42 of the Marriage Act 10 of 1974.

358 *Mokoena v Laub* 1943 WLD 63; *Santam v Fondo* 1960 2 SA 467 (AD).

359 *R v Monnanyane* 2005 LSHC 130; Poulter *Legal dualism* (1979) 70; Palmer *Law of delict* (1970) 112-113; s 42 of the Marriage Act 10 of 1970.

360 In *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* [1996] BLR 190 (CA) 194-195, Tebbutt JA declared that "the courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirements of modern times, to have regard to the approach of the South African courts and the writings of authoritative South African academics."

important differences, especially regarding the recognition, application and ascertainment of customary law.[361]

In the case of South Africa, customary law is explicitly recognised by the South African Constitution,[362] and the courts are compelled to apply customary law where it is applicable.[363] The supremacy of the South African Constitution has certain consequences for customary law, most notably the fact that it is subject to the Constitution. Similar to common law, customary law is thus open to constitutional scrutiny.[364] On the other hand, the Botswana Constitution[365] does not implicitly recognise customary law, but recognises it indirectly by referring to it in connection with the right to a fair trial,[366] the right to equality,[367] and the promulgation of statutes.[368] The application and ascertainment of customary law are regulated in terms of the Botswana Customary Law Act.[369] Of interest here is section 3, which prescribes the application of customary law in "proper cases" and, if improper, states that the common law must be applied.[370] The Lesotho Constitution[371] is analogous to the Botswana Constitution, in that it also does not implicitly recognise customary law, but recognises it indirectly by referring to it in connection with the right to a fair trial,[372] the right to

361 Rautenbach 2016 *AHRLJ* 145-147.
362 ss 9(3) 30 31 39(2) & (3) 211 212 & Schedule 4 (Part A) of the Constitution.
363 Bekker & Rautenbach "Application and ascertainment of customary law" in Bekker *et al* (eds) *Introduction to legal pluralism in South Africa* (2015) 41-44; Nsereko *Constitutional law in Botswana* (2002) xv-xviii.
364 See, eg, *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC); *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC)*; Shilubana v Nwamitwa* 2009 2 SA 66 (CC); *Pilane v Pilane* 2013 4 BCLR 431 (CC); *Sigcau v President of the Republic of South Africa* 2013 9 BCLR 1091 (CC); *MM v MN* 2013 4 SA 415 (CC).
365 LN 83 of 1966, as amended.
366 s 10(12)(b) & (e) Botswana Constitution.
367 s 15(4)(d) Botswana Constitution.
368 s 88(2) Botswana Constitution.
369 Act 51 of 1969.
370 Rautenbach 2016 *AHRLJ* 146; Fombad *Botswana legal system* (2013) 55-92.
371 LN 83 of 1993, as amended.
372 s 12 of Lesotho Constitution.

equality[373] and the promulgation of statutes.[374] The application and ascertainment of customary law are regulated in terms of the Laws of Lerotholi.[375]

2.5.5 Legislative framework

Similar to South Africa, there is no unified, dedicated approach to legislation regulating the dependency action in Botswana and Lesotho. In this regard, neither country has any dedicated dependency action legislation. Like South Africa, the road thus far is characterised by piecemeal legislative recognition,[376] which contains various sections conferring upon the dependants the rights and action for recovery of compensation for loss suffered due to the wrongful and negligent killing of their breadwinner. Several statutes provide for the recovery of loss of support where the breadwinner was wrongfully and unlawfully killed. These statutes will be discussed below.

2.5.5.1 Workers' Compensation Scheme

Similar to South Africa and Australia, a statutory workers' compensation scheme exists in both Botswana and Lesotho. The Lesotho workers' compensation scheme was established in 1977 under the Workmen's Compensation Act,[377] while the Botswana workers' compensation scheme was established in 1998 under the Workers' Compensation Act.[378] In most respects, both Acts are materially identical to the South African Workmen's Compensation Act.[379] Both Acts provide for the compensation of

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373 s 19 of Lesotho Constitution.

374 s 70 of Lesotho Constitution.

375 These Laws were named after Chief Lerotholi, the then Paramount Chief of Basutoland (now Lesotho), to distinguish them from the laws promulgated by his grandfather, Moshoeshoe. See also Poulter *Legal dualism* (1979) 5 6.

376 Apportionment of Damages Act 34 of 1956; Black Law Amendment Act 76 of 1963; Assessment of Damages Act 9 of 1969; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Nuclear Energy Act 131 of 1993; Road Accident Fund Act 56 of 1996; Recognition of Customary Marriages Act 120 of 1998; Road Accident Fund Amendment Act 19 of 2005; the proposed Road Accident Benefit Scheme Bill, 2017; Children's Act 38 of 2005.

377 Workmen's Compensation Act 13 of 1977.

378 Workers' Compensation Act 23 of 1998.

379 Workmen's Compensation Act 30 of 1941.

workers for injuries suffered or occupational diseases contracted in the course of their employment, or for death resulting from such injuries or diseases, and for matters incidental and connected to the foregoing. Should a worker be injured or die as a result of a work injury or disease, any person dependant upon the worker at the time of his or her death may be entitled to workers' compensation benefits. The Acts state that an employer should insure his workers and himself in respect of all liabilities that he may incur under the provisions of the Act.[380] Both Acts further state that an employer who fails to do this will be found guilty of an offence and liable for a fine.[381]

In terms of regulation 2(1) of the Lesotho Workmen's Compensation Regulations of 2014, the amount payable as compensation to a dependant of an employee who died because of an injury occurring at work, leaving the dependant wholly dependant on the worker's earnings, shall not exceed two hundred and forty thousand, five hundred Maloti (M240500).[382] Regulation 2(2) provides that the amount payable by the employer for burial expenses of the deceased shall not exceed sixteen thousand, seven hundred Maloti (M16700).[383]

In terms of the Botswana Workmen's Compensation Act 23 of 1998, where death results from an injury or occupational disease under circumstances in which compensation is payable, the compensation to be paid shall be equal to such number of monthly earnings as may be prescribed by the Minister in terms of subsection (2). In terms of section 13(2), the Minister may prescribe the compensation payable in

380 See s 2(1) of the Workmen's Compensation Act 13 of 1977; s 2(1) of the Workmen's Compensation Act 23 of 1998.

381 See s 2(2) of the Workmen's Compensation Act 13 of 1977; s 2(2) of the Workmen's Compensation Act 23 of 1998.

382 Currency Converter Results: M240500 = R241,165.14 @ 15:50 on the 9th August 2017 https://www.exchange-rates.org/converter/LSL/ZAR/240500.00 (accessed on 9 August 2017).

383 Workmen's Compensation Regulations, 2014, submitted on Thu, 04/16/2015.

terms of subsection (1) in the case (a) where a worker leaves dependants that are wholly dependant upon his earnings; (b) where a worker leaves dependants only partially dependant upon his earnings; and (c) of reasonable expenses for the burial of the deceased worker.[384] According to the Botswana Workmen's Compensation Act 23 of 1998,[385] a "dependant" of a worker means–

> (a) a widow or widower who at the time of the accident was married, in accordance with either the customary or statute law, to the worker; (b) where there is no widow or widower in terms of paragraph (a), a woman or man with whom the worker was at the time of the accident living as wife or husband; (c) a child of the worker or of his spouse and includes a posthumous child, a step child, an adopted child and a child born out of wedlock; (d) a parent of the worker or any person who was acting in the place of a parent; and (e) a brother or sister, grandparent or grandchild; who was at the time of the accident wholly or partly financially dependant upon the worker.

Unlike Botswana, the Lesotho Workmen's Compensation Act does not expressly categorise the dependants. It only states that the dependants eligible to claim are those who are wholly or partially dependant on the deceased worker's earnings.[386]

2.5.5.2 Motor Vehicle Accident Compensation Scheme (MVA)

Botswana and Lesotho are part of the five countries[387] in Southern Africa that administer a fuel levy-funded motor vehicle accident compensation system. These accident compensation systems are administered by statutory bodies established through the respective Acts of Parliament, with the exception of Lesotho, which is outsourced to a private insurance agency for administration purposes. The motor vehicle accident compensation legislations for both Botswana and Lesotho[388] are clearly a repetition of the South African RAF Act 51 of 1996. South African judgments,

384 See s 13 of the Botswana Workmen's Compensation Act 23 of 1998.
385 See s 2 of the Botswana Workmen's Compensation Act 23 of 1998.
386 See s 2 of the Lesotho Workmen's Compensation Act 13 of 1977.
387 The five countries are Botswana, Lesotho, Namibia, South Africa and the kingdom of eSwatini (the old Swaziland – see https://www.bbc.com/news/world-africa/43905628 (accessed on 28 December 2018)).
388 Order 26 of 1989.

which command a persuasive status in the two countries, have also been relied on where necessary.[389] Neither country has yet amended their MVA legislation in accordance with the South African new RAFAA, or the proposed RABS Bill. It is uncertain whether these countries will follow suit or not. Therefore, the claim by the dependants of the deceased is not limited, since both countries apply the law in accordance with the old RAF Act 51 of 1996.

2.5.5.3 Apportionment of Damages Act 32 of 1969

The Botswana Apportionment of Damages Act 32 of 1969 was published on 22 August 1969. The objective of the Act is to amend the law relating to contributory negligence and the law relating to the liability of persons jointly or severally liable in delict for the same damage, and to provide for matters incidental thereto.[390] This Act is materially similar to the 1956 South African Apportionment of Damages Act[391] in most respects. The Apportionment of Damages Act did not deal with situation where the dependants sought to recover for loss of support where the deceased breadwinner had been contributorily negligent. However, the Act was amended in 1998 to deal with this matter.[392] Section 2(1) of the Act provides that if it is alleged that the plaintiff has suffered damage as a result of the death of any person, and that such injury or death was caused partly through the fault of such injured or deceased person and partly through the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person, shall, for the purposes of this section, be regarded as joint wrongdoers. A claim in this respect shall not be defeated by reason of the fault of the deceased, but damages recoverable in respect

389 Ailola 1991 *CILSA* 365-366.
390 Preamble of the Apportionment of Damages Act 32 of 1969.
391 Apportionment of Damages Act 34 of 1956.
392 Apportionment of Damages Act 6 of 1998, Botswana.

thereof shall be reduced by the court to such an 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. In terms of this Act, a dependant's claim for loss of support, being the dependant's own action and not one derived from the deceased's estate, cannot be reduced on account of the deceased breadwinner's contributory negligence.[393]

2.5.5.4 Recognition of customary law marriages

Customary law marriages in Botswana are valid and recognised by the law, with full effect given to their consequences. They are potentially polygamous and in community of property between a husband and wife. The property is the joint property of the spouses. However, the property remains subject to the husband's control as head of the family.[394] Identical to Botswana, the position of *Sesotho* customary law marriages in the legal system of Lesotho has received full judicial recognition.[395] Lesotho's legal history shows that the *Sesotho* customary law marriage has always been treated equally to civil rites marriages by the legislature.[396] *Sesotho* customary law marriage is also recognised in terms of their Marriage Act.[397] This differs from the Marriage Act in South Africa and Australia. The South African and Australian Marriage Acts do not recognise customary marriages, as only civil marriages are acknowledged under the Marriages Acts of South Africa and Australia.

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393 See s 2 of Act 32 of 1969, Botswana.

394 Quansah *Family law* (2006) 36; *Moisakamo v Moisakamo* 1981 2 BLR 126 (CA).

395 See Laws of Lerotholi, which was intended to constitute an authoritative source of Sesotho customary law. The aim of the Laws of Lerotholi was to restate customary legal rules and principles. It attempted to address every conceivable sphere of Basotho customary law and practices.

396 Letsika 2005 *BLJ* 25-29.

397 See s 42 of the Marriage Act 10 of 1974; *Makata v Makata* CIV/T/41/1981 (unreported).

2.5.5.5 Lesbian, Gay, Bisexual and Transgender (LGBT) persons

Despite the constitutional guarantee of equality,[398] blatant discrimination against homosexuals remains rife throughout Botswana. Same-sex couples have no legal recognition, as the law does not address sexual orientation. Homosexuality is a taboo subject in Botswana. It is commonly regarded as a Western disease and un-African.[399] In February 2011, the Deputy Speaker of the Botswana National Assembly, Pono Moatlhodi, responded as follows to a proposal to provide condoms to prison inmates engaging in same-sex sexual acts: if he had the power, he would have those who practice homosexuality killed.[400] Homosexuality has been referred to by some chiefs in Botswana as a "mental illness"[401] and an "alien behaviour that comes with foreigners".[402] There are reports of gay and lesbian children who have been chased away from their families, but are too scared to approach the *kgotla*[403] and ask the chief or headman to deliberate on the issue.[404] This is because they would then have to disclose the reasons why they were chased away from their home, thereby making their sexual orientation known. Since homosexuality is viewed as illegal, many gay and

398 s 15(1) of the Constitution provides that no law shall make any provision that is discriminatory, either in itself or in its effect. The expression "discriminatory" is defined in s 15(3) as: "… affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

399 Mookodi "Botswana" 2004 *CCIES* 92.

400 Kenosi 2011 *Botswana Gazette* 9. See Penal Code of 1964, II Laws of Botswana, Cap. 08:01 (rev. ed. 2012).

401 Lute 2006 *Botswana Gazette* 3.

402 *Ibid.*

403 A *kgotla* is "a public meeting, community council or traditional law court of a Botswana/Lesotho village. It is usually headed by the village chief or headman, and community decisions are always arrived at by consensus" – see Educalingo Dictionary online – https://educalingo.com/en/dic-en/lekgotla.

404 See Botswana Network on Ethics, Law and HIV/AIDS (BONELA) and the Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo), 'The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Botswana: A Shadow Report', March 2008; Personal correspondence with Pilot Mathambo the Coordinator of the Pilot Mathambo Cente for Men's Health.

lesbian people are scared to disclose their sexuality, due to the stigmatisation and discrimination faced by LGBT people.[405]

The country has a law explicitly criminalising consensual same-sex sexual activities.[406] According to the Botswana Penal Code "[a]ny person who … has carnal knowledge of any person against the order of nature ... or permits any other person to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years".[407] An attempt to commit this crime is also an offense and punishable on conviction with up to five years in prison.[408] However, in order for carnal knowledge (sexual intercourse) to be against the "order of nature", there must be anal penetration by a sex organ.[409] Although same-sex sexual acts remain illegal, their prosecution is rare, according to a 2004 publication.[410] In the context of this illegality of sodomy, Botswana has retained its statutory prohibitions on homosexual marriages, despite much criticism from groups[411] and individuals[412] who believe that the law on sodomy[413] is old-fashioned and should be repealed. As a result,

405 Olivier *The reality of being gay in Botswana* (2000) 135.
406 Botswana Penal Code of 1964, II Laws of Botswana, Cap. 08:01 (revised 2012).
407 s 164 of the Penal Code of 1964, II Laws of Botswana, Cap. 08:01 (revised 2012).
408 s 165 Penal Code of 1964 – Attempts to commit unnatural offences: Any person who attempts to commit any of the offences specified in section 164 is guilty of an offence and is liable to imprisonment for a term not exceeding five years.
409 *Gaolete v State* [1991] BLR 325; Nsereko *Criminal law* (2011) 237–238.
410 Mookodi 2004 *CCIES* 89-92.
411 Botswana's primary Lesbians, Gays, Bisexuals and Transgender rights organization is called Lesbians, Gays and Bisexuals of Botswana (LeGaBiBo).
412 See "Sticky sodomy case has Botswana gays flustered", *Sapa-AFP*, reprinted on the Internet by *TimesLive*, 16 March 2011: In 2010 and 2011, former Botswana President Festus Mogae spoke out against sexual discrimination, saying that prejudice was hindering efforts to fight HIV in a country where one in four adults had the disease. "We do not want to discriminate. Our HIV message applies to everybody. If we are fighting stigma associated with sex, let's apply it to sexual discrimination in general." He told the British Broadcasting Company that during his 10 years in office, he had instructed police not to arrest or harass gays. "I could not change the law because that would be unnecessarily stirring up a hornet's nest. I was not willing to lose an election on behalf of the gays. The majority of our people are still opposed [to homosexuality] so I must convince them first before changing the law unilaterally."
413 s 164 of the Penal Code of 1964, II Laws of Botswana, Cap. 08:01 (revised 2012); Mookodi 2004 *CCIES* 92.

same-sex relationships, regardless of their duration, are not legally recognised. Therefore, homosexual partners are denied many of the legal and economic privileges automatically bestowed by marital status. These include employment benefits, surrogacy for gay male couples, joint adoption by same-sex couples, step-child adoption by same-sex couples, intestate inheritance, and perhaps most relevant to this thesis, the rights arising, on the death of a same-sex partner, to claim for loss of support where the deceased partner was wrongfully and unlawfully killed. These benefits are available to heterosexual *de facto* partners, but continue to be unavailable to homosexual partners. Homosexuals in Botswana continue to deal with stigma, discrimination, violence and exclusion due to their real or perceived sexual orientation or gender identity.

Lesotho seems very similar to Botswana. Homosexual conduct is taboo and not openly discussed in Lesotho society.[414] Violence against Lesbian, Gay, Bisexual and Transgender (LGBT) persons was known to occur because of homophobia and transphobia in the country,[415] but often went unreported for fear of being ridiculed. Public officials, the media and religious leaders continuously express their homophobic prejudice, adding to the country's already hostile climate for LGBT persons.[416] In September 2011, representatives from Matrix[417] and the Ministry of Justice and Human Rights participated in a radio programme seeking the views of the public on LGBT issues.[418] There is no specific protection or anti-discrimination provision to protect

414 BTI 2014, Lesotho Country Report http://www.bti-project.de/uploads/tx_itao_download/BTI_2014_Lesotho.pdf (accessed on 8 August 2016).

415 Baseline document on Lesotho, COC Netherlands, 2013 7.

416 *Ibid*.

417 Matrix - a Lesbian, Gay, Bisexual and Transgender support group in Lesotho.

418 Country Reports on Human Rights Practices: Lesotho, Bureau of Democracy, Human Rights and Labor, U.S. Department of State 2011 15.

individuals from being discriminated against based on their sexual orientation and/or gender identity.[419] Sexual activity associated with homosexuals is forbidden in Lesotho under common law.[420] The country's Criminal Procedure and Evidence Act classifies sodomy as one of the offences for which a person may be arrested without a warrant.[421] In addition, same-sex marriage is illegal in Lesotho. Under the common law, Marriage Act and customary law of Lesotho, the definition of marriage is "a union of one man with one woman, to the exclusion, while it lasts, of all others."[422] Consequently, the attainment of equality and non-discrimination is exasperating for homosexuals in Lesotho. In terms of the Child Welfare and Protection Act of 2011, which governs adoptions, only married couples may adopt a child jointly. Single men and same-sex couples are not permitted to adopt children.[423]

Sexual behaviour in Botswana and Lesotho societies is generally still predicated on heterosexuality, and as a result, any exhibition of homosexual tendencies is regarded as deviant behaviour and an affront to morals and decency.[424] However, in recent years, there has been a wave of agitation for reform in many countries with regard to the decriminalisation of homosexual activity, with some measure of success[425] in a

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419 See LGBT Situation in Lesotho, Commonwealth Human Rights Initiative (June 29, 2011) https://chriafrica.blogspot.com/2011/06/lgbt-situation-in-lesotho.html (accessed on 8 August 2016); Motebo Ntabe https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/LS/MSG_UPR_LSO_S08_2010_MatrixSupportGroup.pdf (accessed on 8 August 2016); see also LGBT Situation in Lesotho, Commonwealth Human Rights Initiative (June 29, 2011) https://chriafrica.blogspot.com/2011/06/lgbt-situation-in-lesotho.html (accessed on 8 August 2016).

420 See https://www.loc.gov/law/help/criminal-laws-on-homosexuality/african-nations-laws.php#edn42; Motebo Ntabe, https://lib.ohchr.org/HRBodies/UPR/Documents/Session8/LS/MSG_UPR_LSO_S08_2010_MatrixSupportGroup.pdf; see also LGBT Situation in Lesotho, Commonwealth Human Rights Initiative https://chriafrica.blogspot.com/2011/06/lgbt-situation-in-lesotho.html (accessed on 8 August 2016).

421 Criminal Procedure and Evidence Act No. 67 of 1939, First schedule, pt. II (1 January 1939).

422 s 1 of the Marriage Act 10 of 1974, Lesotho.

423 Child Welfare and Protection Act of 2011.

424 Tafa *Right to sexual orientation: The line of the Botswana government* (2000) 127; Quansah https://www.ahrlj.up.ac.za/quansah-e-k (accessed on 19 July 2017).

425 Steyn 2003 *JSAL* 341; Quansah https://www.ahrlj.up.ac.za/quansah-e-k (accessed on 19 July 2017).

number of similar decisions in neighbouring countries such as South Africa.[426] The agitation has taken the form of attack on the criminalisation of homosexual activity as a denial of the civil rights of those who exhibit this tendency. In Botswana and Lesotho, there has not been any noticeable agitation for such reform.

However, the decision of the Court of Appeal in *Utjiwa Kanane v The State*[427] has brought same-sex relationships into the public domain, which had hitherto been discussed, if at all, by whispers and innuendos in private.[428] In this case, two men were charged with engaging in unnatural acts and indecent practices between males in terms of sections 164 and 167 of the Botswana Penal Code. The appellant, Mr Utjiwa Kanane, was caught in bed with another man, Graham Norrie, and was accused of engaging in illegal homosexual intercourse. He was arrested and brought before the court on charges of unnatural carnal knowledge and indecency. In relation to the first offence, it was alleged that on 26 December 1994, at Maun Village, the appellant permitted Graham Norrie, being male, to have carnal knowledge of him (Utjiwa Kanane), against the order of nature. The particulars of the second offence were that the appellant, a male person, on 26 December 1994 at Maun Village, committed an act of gross indecency with Graham Norrie, a male person. The appellant pleaded not guilty to both charges and averred that the sections of the Penal Code under which he was charged were *ultra vires* section 3 of the Botswana Constitution.[429] The constitutionality of the laws defining these two crimes was questioned. Tebbutt JP gave the lead judgment of the Court of Appeal, with which the other four Justices of Appeal

426 *National Coalition for Gay and Lesbian Equality & another v Minister of Justice* 1999 1 SA 6 (CC); *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC*); J & B v Director General, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Du Plessis v RAF* 2004 1 SA 359 (SCA) 362.

427 Criminal Appeal No 9 of 2003 (30 July 2003) unreported.

428 Quansah https://www.ahrlj.up.ac.za/quansah-e-k (accessed on 19 July 2017).

429 *Ibid*.

concurred. On the question whether sections 164 and 167 violated the Constitution, Tebbutt JP opined that the Court should adopt a broad and generous approach to the construction of the Constitution, and held that discriminatory legislation on the basis of gender, though not expressly mentioned in section 15(3) of the Constitution of Botswana, would not violate section 3 of the Constitution of Botswana. The Appeal Court of Botswana had an opportunity to critically examine and authoritatively lay down and settle the question of the right to equality for homosexuals in Botswana in *Utjiwa Kanane v The State*. This study argues that the Court wrongly ignored this question. Consequently, the Court's misdirection and ignorance in failing to draw on foreign jurisprudence like South Africa in developing the rights of homosexuals resulted in the loss of a great opportunity for the courts of Botswana to make an authoritative ruling on the rights of homosexuals in Botswana.[430] Currently, the dependency claim is unavailable for same-sex partners in Botswana and Lesotho.

2.5.5.6 Assessment of damages legislation

Botswana and Lesotho lack specific legislation for the assessment of damages. No information on legislation regarding assessment of damages was located in any of the two jurisdictions, but it was observed that they both make use of the South African Assessment of Damages Act. [431] The Constitutions of both jurisdictions have opened the doors for the courts, in appropriate circumstances, to apply international instruments relating to assessment of damages, which have not been promulgated yet in order to determine damages. The trend of relying on international or foreign legislations and case law is evident from an analysis of the cases reported in both

430 Bojosi 2004 *SAJHR* 466-468.
431 Assessment of Damages Act 9 of 1969.

countries.[432] The South African Assessment of Damages Act was thus extended to both jurisdictions.

2.5.6 Conclusion

The above discussion provided the background to the Botswana and Lesotho legal position on the action of dependants for loss of support. The following discussion focuses on the status of the dependency action for loss of support in Australia.

2.6 Australian law

2.6.1 Brief background to the historical development of the Australian dependency action

Prior to 1846, the dependants of a deceased person, who had died as a result of another person's wrongful and negligent act, were unable to bring an action for damages for the loss that they suffered as a result of this wrongful death.[433] The most frequently quoted statement upon this subject is that of Lord Ellenborough in *Baker v Bolton*:[434] "*In a civil court, the death of a human being could not be complained of as an injury; and in this case of damages, as to the plaintiff's wife, must stop with the period of her existence."* This common law rule, which was formulated in the early nineteenth century,[435] was probably based on a delusion of preceding English authority.[436] Even so, the rule became firmly established in Australia,[437] with the effect that it was impossible for a plaintiff to sue a defendant for a wrong committed by the wrongdoer against the breadwinner or his dependants, when that wrong consisted in

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432 *Archibald v Attorney-General* 1989 BLR 421 (HC); *R v Monnanyane* 2005 LSHC 130.
433 Queensland Law Reform Commission: *Damages in an action for wrongful death* (report number 57 November 2003).
434 *Baker v Bolton* (1808) 1 Camp 493; 170 ER 1033; *Admiralty Commissioners v SS America* [1917] AC 38.
435 Exall *Damages for personal injuries and death* (2011) 12.
436 Holdsworth *A history of English law* (1972) 333-336, 676-677.
437 *Woolworths Ltd v Crotty* (1942) 66 CLR 603 615 & 622.

damage causing the death of a breadwinner, in the continuance of whose life the dependants had an interest.[438] The dependants were left with the entire economic burden following the breadwinner's death.[439] Moral considerations and shifting public perception necessitated the rectification of what had become an unacceptable position in common law.[440]

This intolerable injustice inherent in the absence of a right of action for wrongful death was remedied by England in 1846, with the enactment of the Fatal Accidents Act, commonly referred to as Lord Campbell's Act, titled "An Act for Compensating the Families of Persons Killed by Accidents."[441] Section 1 of the Act (now the Fatal Accidents Act 1976 (Eng)) provides that where a person's death is caused by any wrongful act, neglect or default, which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable for damages, notwithstanding the death of the person injured. The effect of section 1(1) was concisely explained by Lord Denning MR in *Gray v Barr:*[442] "If [the deceased] had lived, i.e., only been injured and not died, and living would have been entitled to maintain an action and recover damages – then his widow and children can do so. They stand in his shoes." This Act created a statutory cause of action for the benefit of

438 Holdsworth *A history of English law* (1972) 333-334.

439 International Committee of the Red Cross and the Australian Red Cross workshop *"Widowhood and armed conflict: challenges faced and strategies forward"* Workshop on Widowhood organized by the International Committee of the Red Cross and the Australian Red Cross at the 27th International Conference of the Red Cross and Red Crescent, November 1999 https://www.icrc.org (accessed on 8 August 2016).

440 Law Reform Commission of Western Australia, *Report on Fatal Accidents,* Project No 66 (1978) 3; Law Commission of Canada, *Compensation for Relational Harm* (2002) https://www.lcc.gc.ca/en/themes/pr/cpra/vanpraagh/chap04.asp (accessed on 8 August 2016).

441 Bryant *Death and dying* (2003) 952.

442 [1971] 2 QB 554 (CA) 569D.

certain members of a deceased person's family, where the death of the deceased was caused by the wrongful act of another person.

In Australia, there was also an attempt to remedy this situation through the enactment of legislation. In Queensland, the relevant provisions were originally located in section 12 of the Common Law Practice Act of 1867 (Qld). The existing Queensland (Australia) provisions are found in section 17 of the Supreme Court Act of 1995 (Qld). The section provides as follows: "Whenever the death of a person shall be caused by a wrongful, neglect or default act and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to crime."

Today, legislation founded upon Lord Campbell's Act and imitating section 1 of an Act for Compensating the Families of Persons Killed by Accidents exists in all Australian jurisdictions, in order to provide a cause of action against wrongdoers for the benefit of the statutorily defined family of a deceased. Wrongful death statutes vary from state to state, but in general, they define who may sue for wrongful death, and what, if any, limits may be applied to an award of damages.[443] The rights enforced by dependant-

[443] Supreme Court Act 1995 (Queensland); Fatal Accidents Act 1950 (Western Australia); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1936 (Southern Australia); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); s 83 of the Discrimination Law Amendment Act 2002 (Queensland); s 57 of the Acts Amendment (Equality of Status) Act 2003 (Western Australia); s 60 of the Law Reform (Gender, Sexuality and De facto Relationships Act 2003 (Northern Territory); s 4 of the Wrongs (Dependants) Act 1982 (Victoria); s 1 of the Relationships (Consequential Amendments) Act 2003 (Tasmania); s 2.3 of the Property (Relationships) Legislation Amendment Act 1999 (New South Wales); s 23 and 28(2) of the Civil Law (Wrongs) Act 2002 (Australian Capital Territory).

claimants constitute a new cause of action arising by statute, and are not an extension of rights vested in the deceased.[444] *Per se*, the legislation aims not to rectify the deceased's damage, but to compensate those who have been deprived of the breadwinner, upon whom they were financially dependant, for the loss of support suffered as a result of his death.[445]

2.6.2 Overview of the history and present status of Aboriginal customary law

The Aboriginal people of Australia maintain one of the oldest continuous living cultures.[446] Customary law in Australia relates to the systems and practices amongst Aboriginal Australians,[447] which have developed over time from accepted moral norms in Aboriginal societies, and which regulate human behaviour, mandate specific sanctions for non-compliance, and connect people with the land and with each other through a system of relationships.[448] Customary laws are transferred by word of mouth and are not codified (nor can they be easily codified). In addition, they are not singular throughout Australia — different language groups and clans have different concepts of customary law, and what applies within one group or region cannot be assumed to be universal.[449] Historically, customary law has not been recognised as part of the canon of Australian law.[450] The current legal status of the Aboriginal customary law seems to

444 *Pym v The Great Northern Railway Company* (1863) 122 ER 508.

445 *Parker v The Commonwealth* [1965] HCA 12*;* (1965) 112 CLR 295; *De Sales v Ingrilli* ('*De Sales*') [2003] HCA 16; (2002) 212 CLR 338.

446 AG STAFF WITH AAP - Australian Geographic "DNA confirms Aboriginal culture one of Earth's oldest – Australian cultures" https://www.australiangeographic.com.au/.../dna-confirms-aboriginal-culture-one-of-earths-oldest September 23, 2011 (accessed on 8 August 2016).

447 The Australian Law Reform Commission discussed the definition of an 'Aborigine' in its 1986 report, *The Recognition of Aboriginal Customary Laws* Australian Law Reform Commission, Report 31 (1986), Australian Government Publishing Service, Canberra [88]–[95]: Aboriginal Australians are legally defined as people who are members "of the Aboriginal race of Australia."

448 Law Reform Commission of Western Australia (February 2006) - Aboriginal Customary Laws (Project 94) - Discussion Paper Overview, Quality Press 7 ISBN 1-74035-056-1.

449 Australian Law Reform Commission (12 June 1986) "The proof of Aboriginal customary laws" - Recognition of Aboriginal Customary Laws ALRC Report 31 (Retrieved 30 May 2011).

450 The Recognition of Aboriginal Customary Laws, Australian Law Reform Commission, Report 31 (1986), Australian Government Publishing Service.

be very similar to the South African position prior democracy. South Africa initially rejected the recognition of customary law, but has now moved on, with customary law being admitted and recognised in all its aspects.[451] The non-recognition of customary law in Australia is unsurprising, because in both jurisdictions, namely South Africa and Australia, the law was greatly influenced by Europeans. In the words of the following authors:

Ginibi:[452]

> "Aboriginal laws, traditional and customary laws, have never been acknowledged by the colonial invaders of Aboriginal people. They came with their godly marriages and paternalistic ways, and we were forced to assimilate, and give up our languages, and deny our culture and heritage because our traditional practices were classified as 'heathen' and 'vennin' to be cleared off the face of the earth. Three hundred Aboriginal nations were wiped out by the colonising of our lands, and we were forced by governments to become like white people. We were always the ones who had to conform to white ways and white ideas, because we were never allowed to be our selves. We were forced to conform to the laws and standards of the invaders of our country because we were never allowed to be our damn selves, as we are an oppressed people. We had our own laws, and a very democratic society before the Whiteman stuck his nose into our affairs~ and literally stuffed our culture up!"

Clark:[453]

> "The experience of Aboriginal Australians since European settlement is replete with suppression of their cultural practices and knowledge by the dominant cultural group/s in Australia."

and Chisholm and Nettheim:[454]

> "In the first century of settlement, these included land dispossession by force, theft of women, slavery and war, introduced diseases, and the missionary zeal for Aboriginal people to embrace Western religion and reject their own spiritual beliefs such as the dreaming. Moreover, settlement brought with it the assertion of British sovereignty and law, which effectively displaced indigenous customary law."

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451 See ss 33 & 35 of the interim Constitution; ss 30 31 39 & 211 of the Constitution.

452 Ginibi http://www.ro.uow.edu.au/cgi/viewcontent.cgi?article=1124&context=ltc (accessed on 8 August 2016).

453 Clark [2002] *ALRCRefJl* 5.

454 Chisholm & Nettheim *Understanding law*: *an introduction to Australia's legal system* (2012) 85.

The history of indigenous people as a result of European colonisation is one in which they were subject to oppressive suppression of their culture.[455] Nowhere has there ever been any colonial legislation acknowledging the existence and continuation of any part of Aboriginal customary law. The courts and parliaments have defined Aboriginal legal rights within the framework of colonial law as common law native title and discriminatory.

There have been no colonial statutes anywhere that attribute any legal legitimacy to Aboriginal sovereignty, culture, languages, heritage and relationship to land and customary law.[456] There have been some attempts to recognise Aboriginal customary law in the Australian legal system. Since the late twentieth century, the Australian Law Reform Commission (1986) and the Law Reform Commission of Western Australia (2005) have written extensive reports investigating the desirability of recognising the role of customary law in legal situations involving Aboriginal Australians.

The Recognition of Aboriginal Customary Laws report was released by the Australian Law Reform Commission (ALRC) in June 1986, after an intensive nine-year inquiry. It reinforces the power of the Australian legal system to set the terms on which the "customary system" is acknowledged.[457] The 2015 report tackled the difficulties associated with showing evidence of the Aboriginal and Torres Strait Islander peoples' traditional law and custom, and recommended that native title rights for commercial purposes be recognised.[458] It suggested reforms to strengthen the internal governance

455 Halloran *Cultural maintenance and trauma in indigenous Australia* (2004) 2-4.

456 The Federal Government's "Act of Recognition" and Aboriginal customary law. https://unlearningtheproblem.wordpress.com/.../the-federal-governments-act-of-recognition-and-aboriginal-customary-law/ (accessed on 8 August 2016).

457 Clark [2002] *ALRCRefJl* 5.

458 Godden https://theconversation.com/from-little-things-the-role-of-the-aboriginal-customary-law-report-in-mabo-60193 (accessed on 9 August 2017).

capacity of native title groups, while allowing for traditional authority to be exercised.[459] In the Northern Territory, some statutes and courts make explicit reference to customary law, where this is useful in identifying relationships or social expectations.[460] These changes have not been without controversy,[461] especially in cases where customary law is either imprecise or infringes upon human rights.[462] The Australian Law Reform Commission has also produced a paper exploring the relationship between traditional Aboriginal law and Anglo-Australian law.[463]

Currently, it may be said that in an unsystematic, indirect, piecemeal way, Australian law does now allow for the recognition of Aboriginal customary laws and traditions. Such recognition tends to be limited and to represent a specific response to particular situations or needs.[464] There seems to be no reason in principle why Aboriginal customary law should not be given a wider recognition in Australia. The Native Title Act 1993 is a defining piece of legislation in terms of customary law. It is a statute that evolved through common law. It is the ultimate recognition of the fact that indigenous Australian societies possessed, and continue to possess, well-developed systems of law.

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459 *Ibid*.

460 See s 69 of the Community Welfare Act 1983 (NT); s 4 of the Sentencing Amendment (Aboriginal Customary Law) Act 2004 (NT).

461 *Walker v New South Wales* [1994] HCA 64; *Coe v Commonwealth* [1993] HCA 42.

462 Yaxley https://www.abc.net.au/pm/content/2006/s1643178.htm/ (accessed on 8 August 2016).

463 Harris 1994 *Sunday Telegraph* 4.

464 Calma https://www.humanrights.gov.au/.../speeches/integration-customary-law-australian-legal-system-tom-calma (accessed on 8 August 2016).

2.6.3 Legislative framework

2.6.3.1 General

In Australian law, compensation for injury or death arises in a number of different areas of the law, including worker's compensation,[465] motor vehicle accidents legislation,[466] and apportionment of damages legislation.[467] The basis of a claim for loss of support is to be found in statutory law.[468] Legislation exists in all Australian jurisdictions to provide a cause of action against wrongdoers for the benefit of the statutorily defined family of a deceased. The legislation aims to compensate those who have been deprived of one upon whom they were financially dependant, for the loss of pecuniary support suffered because of the death.[469] Compensation benefits are generally payable to the surviving spouse and children. In recent years, this basic principle has been extended in some states and territories to include a surviving *de facto* spouse and other persons who were dependant on the injured or deceased person.[470] A traditional marriage is only specifically recognised in the Northern Territory for the purposes of determining entitlement to compensation. It is necessary to deal separately with each area of the law allowing for compensation for injury or death.

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465 See chapter 2 of this thesis, par 2.6.3.2 hereunder.

466 See chapter 2 of this thesis, par 2.6.3.3 hereunder.

467 See chapter 2 of this thesis, par 2.6.3.4 hereunder.

468 See Supreme Court Act 1995 (Queensland); Fatal Accidents Act 1950 (Western Australia); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1936 (Southern Australia); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015).

469 Carver 2005 *QUTLJJ* 2; Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015).

470 Australian Law Reform Commission: Compensation for Injury or Death https://www.alrc.gov.au/ (accessed on 8 August 2016).

2.6.3.2 Workers' compensation legislation

Statutory workers' compensation schemes have existed in Australia since the turn of the 20th century.[471] They were established by legislation and exist in all the states and territories.[472] For instance, in New South Wales, there are two important legislations: Workers Compensation Act 1987 (NSW) (1987 Act) and Workplace Injury Management and Workers Compensation Act 1998 (NSW) (1998 Act). The most recent amendments to the workers' compensation scheme occurred in 2012 in terms of the Workers Compensation Legislation Amendment Act 2012 (NSW). If a worker is injured or dies as a result of a work injury, any person dependant upon the worker at the time of his or her death may be entitled to workers' compensation benefits.[473] In the Northern Territory, the Workmen's Compensation Act (NT) provides for compensation to be paid to relations "by blood, traditional marriage or custom, and there is specific provision for additional dependant traditional wives aged 16 or older. Dependant traditional wives aged below 16 are only eligible as dependant children.[474] In all other Australian jurisdictions, a traditionally married spouse would only be able to rely on the rights given to *de facto* spouses (e.g. widows) pursuant to workers' compensation legislation, generally using a broad definition of "dependant."[475] For example, section 6(1) of the Workers Compensation Act 1926 (NSW), defines "dependant" as:

> such of the worker's family as were wholly or in part dependant for support upon the worker at the time of his death ... and includes ... a person so dependant who although not legally married to the worker lived with the worker as the worker's husband or wife on a permanent or bona fide domestic basis.

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471 *Ibid*.

472 *Ibid*.

473 The entitlement to workers' compensation benefits is set out in s 9 of the 1987 Workers Compensation Act. S 9 provides that a worker who has received an injury (and in the case of the death of a worker, his or her dependants) shall receive compensation from the worker's employer.

474 ss 6 & 7 of the Workmen's Compensation Act (NT), Second Schedule, especially par (1A)(b)(i), D, E. There has been no Northern Territory experience of claims by traditional wives under the Act: President, Workmen's Compensation Tribunal *Submission* 326 (29 April 1982).

475 Eg s 6(1) of the Workers Compensation Act, 1926 (NSW).

In some jurisdictions, a *de facto* relationship will only be recognised if the parties have lived together for a specified period of time[476] or if there are children born of the relationship. These provisions are no doubt capable of benefitting traditionally married spouses, who would otherwise not qualify under the statutory criteria of dependency, although it is not clear whether they would allow compensation to be paid to more than one wife.[477] It is very hard to justify excluding traditionally married dependants from entitlements to workers' compensation benefits. These benefits are an important form of protection for employees and their dependants.[478]

To deny compensation to Aboriginal dependants because they practice different family traditions would be to deny Aboriginal employees an important aspect of their employment rights, and to shift the burden of dependency from the employer to the State (through the social security system). It would be even less justified, in that the Australian Worker's Compensation Acts pay little regard to the forms or categories, as distinct from the fact, of dependency.[479] A traditional marriage should be recognised as a "marriage" for all workers' compensation purposes. Specific provision for traditional spouses, as in the Northern Territory, is a better way of ensuring that this right of traditional married couples is implemented in practice.[480] Existing provisions entitling putative or *de facto* spouses to workers' compensation vary significantly between the states.[481] Unnecessary time limits are imposed and the position of plural (polygamous) wives (between whom compensation rights on death should be shared)

476 s 4AA of the Family Law Act, 1975 Australia available at https://www.diyfamilylawaustralia.com (accessed on 9 August 2017).
477 cf *In re Fagan* (1980) 23 SASR 464-465 (Jacobs J).
478 Australian Law Reform Commission: Aboriginal traditional marriage: areas of recognition – Compensation for Injury or Death https://www.alrc.gov.au/ (accessed on 8 August 2016).
479 *Ibid*.
480 *Ibid*.
481 *Ibid*.

is not clearly dealt with.[482] In most jurisdictions, the legislation relating to dependants appears to be wide enough to include situations of polygyny (even though it may not have been envisaged by the drafters of the legislation), but specific provision for this situation should be made.[483] In South Africa, although we do not have specific provisions dealing with the sharing of the compensation money, it is common practice that the money will be divided equally amongst the polygamous wives.

2.6.3.3 Motor vehicle accident compensation legislation

The most common claims for loss of support are due to accidents on the road.[484] Each state and territory in Australia has different laws on compensation of claims, with each state having its own third-party compensation policies. A compulsory third party (CTP) insurance policy provides cover for legal liability for personal injuries or death arising from the use of a motor vehicle. The insurance covers the relevant motor vehicle for accidents causing personal injury and/or death anywhere in Australia. The relevant authorities in terms of road accidents in Australia are New South Wales - Motor Accidents Authority; Northern Territory - Territory Insurance Office; Queensland - Motor Accident Insurance Commission; South Australia - Motor Accident Commission; Tasmania - Motor Accidents Insurance Board; and Western Australia - Insurance Commission of Western Australia.

In the New South Wales state, claims for personal injury and death arising out of motor accidents that occurred on or after 5 October 1999 are dealt with under the provisions of the Motor Accidents Compensation Act 1999 (NSW).[485] The relevant Queensland

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482 *Ibid*.

483 *Ibid*.

484 Comparison of Workers' Compensation Arrangements in Australia – https://www.safeworkaustralia.gov.au/.../ComparisonWorkersCompensationArrangementsAusNZ2011.doc (accessed on 8 August 2016).

485 s 4 of the Motor Accidents Compensation Act 1999 (NSW).

legislation is the Motor Accident Insurance Act 1994 (Qld) (MAI Act). This Act does not provide for the payment of statutory or no-fault benefits. The legislation governs an entirely fault-based scheme. No compensation is paid to injured road users, unless they can prove the injury was caused by the negligence of another person.[486]

In South Australia, a government institution that provides third party injury insurance solutions for South Australians is the Motor Accident Commission. The institution offers coverage and compensation for people injured in road crashes, where the owner or driver of a registered motor vehicle, or a passenger, is at fault. The Motor Accident Commission (the Commission) was established pursuant to the Motor Accident Commission Act 1992 (the MAC Act). The main function of the Commission is to provide compulsory third party (CTP) insurance for motor vehicle users in South Australia.[487] The Motor Accidents Insurance Board (MAIB) is a Tasmanian government business enterprise that operates a compulsory third party personal injury insurance scheme.[488] The Insurance Commission of Western Australia (Insurance Commission) is a statutory corporation or government trading enterprise owned by the State Government of Western Australia. The Insurance Commission has, since 1943, ran the Motor Injury Insurance Scheme in Western Australia.[489]

The Motor Accidents Compensation (MAC) Scheme provides personal injury cover for individuals and their families, which is included in their NT motor vehicle registration. The Motor Accidents (Compensation) ("MAC") Act (NT) establishes a compensation

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486 See Motor Accident Insurance Act 1994 (Qld) (MAI Act).

487 s 18 of the Motor Accident Commission Act 1992 (the MAC Act) (SA); Motor Accident Commission https://www.audit.sa.gov.au/Publications/Annual-reports/2015-Reports/Annual-Report-by-agency/Motor-Accident-Commission (accessed on 16 September 2016).

488 Motor Accidents Insurance Board (MAIB) (Tas) https://www.legalaid.tas.gov.au/referral-list/listing/motor-accidents-insurance-board (accessed on 16 September 2016).

489 Motor Vehicle (Third Party Insurance) Act 1943 (WA) sets out the scheme details; see Motor Injury Insurance https://www.icwa.wa.gov.au/motor-injury-insurance (accessed on 16 September 2016).

scheme in respect of people who are injured or killed in motor vehicle accidents in the Northern Territory. MAC can provide benefits such as loss of support, medical, rehabilitation and financial support, in order to help people recover from serious and sometimes permanent injuries caused by a road accident.[490] It is a no-fault scheme, which means that one is covered regardless of who caused the accident. However, some exclusions and reductions in benefits may apply if the driver was under the influence of alcohol or drugs, was unlicensed to drive, or was involved in criminal or reckless conduct. A reduction may apply to some benefits if the injured person failed to wear a seatbelt or safety helmet where required by law.[491] MAC is a government-owned scheme managed by the Motor Accidents Compensation Commission (MACC) and administered on its behalf by the Territory Insurance Office (TIO).[492] The Motor Accidents (Compensation) Act (Northern Territory - NT) [493] specifically provides for benefits to be payable both to a *de facto* spouse and an Aboriginal traditional spouse. A "spouse" is defined in section 4 to include:

> (d) a person who was not legally married to the person but who, for a continuous period of not less than three years immediately preceding the relevant time, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis, and who, in the opinion of the Board, was wholly or substantially dependant upon the person at the time: and
>
> (e) where that person is an aboriginal native of Australia — a person referred to in (a), (b), (c) or (d) or who is, according to the customs of the group or tribe of aboriginal natives of Australia to which he belongs, married to him.

490 Motor Accidents Compensation Scheme (NT) https://www.tiofi.com.au/car-insurance/macc/ (accessed on 16 September 2016).

491 See Motor Accidents (Compensation) ("MAC") Act (NT) - https://www.ntmacc.com.au/GeneralInformation.pdf (accessed on 16 September 2016).

492 Northern Territory Motor Accidents Annual Report 2015-2016 https://parliament.nt.gov.au/ .../152.-Annual-Report-2015-2016 (accessed on 16 September 2016).

493 s 4(d) & (e) of the Motor Accidents (Compensation) Act (NT).

A traditionally married person under paragraph (e) above is in a better position than if he or she was forced to rely on the *de facto* relationship qualifications in paragraph (d).[494]

The Compensation (Fatal Injuries) Act 1974 (NT)[495] applies to claims for loss of support arriving from incidents other than motor vehicle accidents, and has similar recognition provisions for *de facto* relationships and traditional marriages. Section 4(3)(e)(ii) provides that a person who, being an Aboriginal, has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs, shall be treated as the wife or husband, as the case may be, of the deceased person. A similar approach is adopted in the Compensation (Commonwealth Government Employees) Act 1971 (Cth),[496] which provides for compensation to dependants on the death of a Commonwealth employee. "Dependant" is defined to include a lawful spouse, and a woman who, throughout the period of three years immediately before the date of the death of the employee, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis. In addition, an Aboriginal traditional spouse is specifically provided for a "spouse" in relation to an aboriginal native, or a deceased aboriginal native of Australia or of an external Territory. It includes a person who is or was recognized as the husband or wife of that aboriginal native by the custom prevailing in the tribe or group of aboriginal natives of Australia or of such a Territory to which that aboriginal native belongs or belonged.[497] The point of this provision was explained by the

494 According to the Northern Territory Insurance Office, in the first three years of the operation of the Act there had been no claims involving Aboriginal traditional wives *Submission* 330 (13 May 1982).

495 s 4(3)(e)(ii) of Compensation (Fatal Injuries) Act 1974 (NT).

496 This Act applies to an employee who sustained injuries or contracted a disease during the course of his or her employment.

497 s 5 of Compensation (Commonwealth Government Employees) Act 1971 (Cth).

Commonwealth Commissioner for Employees' Compensation as "a special provision required to cover such cases because, unless a tribal wife or wife by native custom could fulfil the requirements that a *de facto* wife had to meet, eg, cohabitation throughout a period of three years, then an incapacitated employee with a tribal wife or wife by native custom would, probably, be ineligible for the additional weekly compensation in respect of such a wife. Moreover, in the case of a compensable death of an Aboriginal employee, the wife or husband would, probably, not have been eligible for compensation although she or he was, in fact, a dependant spouse."[498]

In other Australian jurisdictions, traditionally married spouses would only be entitled to accident compensation benefits if they fell within the provisions covering *de facto* relationships or a qualification based on dependency.[499] For example, in South Australia, the Wrongs Act 1936 enables a "putative spouse" to bring an action in respect of the death of a deceased spouse if caused by the "act, neglect or default" of another person.[500] This legislation is unique in that it also specifically provides for an apportionment of benefits (in such manner as the court thinks fit) if both a lawful spouse and a de facto spouse survive the deceased.[501] There is a five-year qualification requirement for a "putative spouse" under the South Australian Act.

In Victoria, the Motor Accidents Act 1973 (Vic) established a system of no-fault compensation for persons injured in road accidents. A "dependant spouse" is defined

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498 Dwyer "Commissioner for Employees Compensation" *Submission* 327 dated 3 May 1982.

499 Not all States recognize *de facto* spouses. Western Australia does not, despite a recommendation of the WALRC to include *de facto* spouses: WALRC, *Report on Fatal Accidents*, Perth, 1978, par 3.32.

500 s 3a of Wrongs Act 1936 (South Australia): definitions of "spouse" and "putative spouse."

501 Wrongs Act 1936 (SA): s 20(4) & (7) (action for wrongful death), s 23b (action by spouse for solatium). The apportionment provisions are ss 20(3) 23b(2) & (3). Under the Compensation (Commonwealth Government Employees) Act 1971 (Cth) apportionment would be the responsibility of the Commissioner under s 45(3) & (4).

in section 3(1) to include a woman living with a man immediately prior to his death on a permanent and bona fide domestic basis, and wholly or mainly dependant on him for economic support.[502] No time qualification is specified for a *de facto* spouse. The parties to a traditional marriage should be able to claim compensation for death or injury, independantly of whether they fall within the definition of a *de facto* relationship. The House of Representatives Standing Committee on Aboriginal Affairs, in its report on *The Effects of Asbestos Mining on the Baryulgil Community (1984),* recommended that priority be given to legislation under the Commonwealth marriage power, providing recognition to Aboriginal marriages, at least for the purposes of actions for damages for loss of support by surviving dependants in cases of death caused by personal injury.[503] Where there is more than one spouse (whether a traditional spouse or a Marriage Act spouse) eligible to receive compensation, the compensation should be apportioned between them at the discretion of the court or authority responsible for paying the compensation.[504]

2.6.3.4 Apportionment of damages legislation

The apportionment legislation is applicable and virtually uniform in all Australian jurisdictions.[505] This legislation allows the court to reduce the damages recovered where a person suffers damage partly through his own fault, and partly through the fault of another, to such an extent as the court thinks just and equitable, having regard to the plaintiff's share in the responsibility for the damage.[506] Proportionate liability

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502 s 3(1) of the Motor Accidents Act 1973 (Vic).

503 House of Representatives, Standing Committees on Aboriginal Affairs, *Report: The Effects of Asbestos Mining on the Baryulgil Community*, AGPS, Canberra, 1984, 120.

504 The arguments outlined in para 2.6.3.1 dealing with workers' compensation apply here as well.

505 Swanton 1981 *ALJ* 278-279; House of Representatives, Standing Committees on Aboriginal Affairs, *Report: The Effects of Asbestos Mining on the Baryulgil Community*, AGPS, Canberra, 1984, 120 par 1.32.

506 Arthur https://www.coursehero.com/.../Damages-and-Equitable-Compensation-John-Arthur (accessed on 8 August 2016).

legislation is applicable in every state and territory in Australia.[507] Unfortunately, the legislation is almost uniform in every jurisdiction, which means that there are slight differences. Proportionate liability was introduced in response to the 2001-2002 insurance crises, in order to reduce rising liability insurance costs.[508] Proportionate liability enabled liability to be apportioned between wrongdoers according to their assessed proportion of responsibility for the damage suffered. Instead of being liable for the whole amount of a judgment, a defendant would only be liable, to the extent of his or her responsibility, for the loss. It was envisaged that this approach would overcome unfairness to defendants arising from joint and several liabilities, particularly in cases of economic loss or property damage.

With regard to the claim for loss of support, similar to South Africa, a dependant's claim for loss of support, being the dependant's own action and not one derived from the deceased's estate, cannot, in terms of the Act, be reduced on account of the deceased breadwinner's contributory negligence. In other words, the dependency claim will not be defeated due to the fault of the deceased breadwinner. The dependant is thus entitled to his or her full compensation.

2.6.3.5 Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) legislation

Although Australia recognises same-sex relationships, couples were prevented from marrying by the 2004 amendments to the federal Marriage Act of 1961 by the Howard

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507 Queensland – Civil Liability Act 2003 (Qld); New South Wales – Civil Liability Act 2002 (NSW); Victoria - Wrongs Act 1958 (Vic); Western Australia - Civil Liability Act 2002 (WA); Australian Capital Territory - Civil Law (Wrongs) Act 2002 (ACT); Northern Territory – Proportionate Liability Act 2005 (NT); South Australia – Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Tasmania – Civil Liability Act 2002 (Tas); Commonwealth - Corporations Act 2001 (Cth); Trade Practices Act 1974 (Cth) and Australian Securities & Investments Commission (Cth).

508 Commercial notes - Australian Government Solicitor https://www.ags.gov.au/publications/commercial-notes/CN38.pdf (accessed on 8 August 2016).

Government.[509] Section 88EA of the Act stipulated that any foreign marriages of same-sex couples "must not be recognized as a marriage in Australia." However, same-sex couples could enter into civil unions and civil partnerships. Both unions allow couples to have state-sanctioned ceremonies and provide conclusive proof of the existence of the relationship, thereby gaining the same rights afforded to *de facto* couples under state and federal law, without having to prove any further factual evidence of the relationship. In this way, a registered relationship is similar to a registered partnership or civil union in other parts of the world.[510] Recently, a law legalising same-sex marriage was passed by Parliament on 7 December 2017 and received royal assent the following day (8 December 2017).[511]

Same-sex couples can jointly adopt in New South Wales, the Australian Capital Territory, Western Australia, Tasmania and Victoria, whilst Queensland, the Northern Territory and South Australia ban same-sex couples from adopting jointly.[512] Altruistic surrogacy is legal in all Australian states and territories, except Western Australia and South Australia. On 4 May 2012, the New South Wales Supreme Court found, for the first time in Australian history, a same-sex couple to be the parents of a baby who was born through a surrogate, as it was in the child's "best interests".[513] It is clear that same-sex partners are allowed the benefits of a marriage. Therefore, a same-sex partner can institute a claim for loss of support, should his/her partner be unlawfully killed, and

509 s 5(1) of Marriage Amendment Act, 2004 https://www.comlaw.gov.au (accessed on 8 August 2016).

510 Bull, Pinto & Wilson https://www.aic.gov.au/media_library/publications/tandi.../tandi029.pdf (accessed on 8 August 2016).

511 Yaxley http://www.abc.nt.au/news/2017-12-08/same-sex-marriage-legislation (accessed on the 12 December 2017) – see further discussion in chapter 3 of this thesis par 3.5.4.

512 DIY Family Law Australia "Same sex couples: Fostering or adopting children" https://www.diyfamilylawaustralia.com/pages/same-sex-relationships/same-sex-couples-fostering-or-adopting-children/ (accessed on 7 August 2017).

513 *MM v KF re FM* [2012] NSWSC 445.

the same would apply to children legally adopted by same-sex couples, if one of their parents is unlawfully killed.[514]

2.6.4 Conclusion

It is clear from the above discussion that while Australia is a multicultural society like South Africa, and the role of customary law is of great value; Australia still recognizes customary law only in certain circumstances. This corresponds with the law in Botswana and Lesotho where recognition of customary law is also limited in respect of other personal aspects, for example LGBT's rights. The experience in Australia, Botswana and Lesotho confirms the need to broaden the recognition of customary law in all their aspects, such as in South Africa.

2.7 Chapter conclusion

From the above expositions, it is clear that the Roman-Dutch law and English law roots of the action of dependants are strong and palpable in South Africa, Botswana, Lesotho and Australia. The shared civilian ancestry means that many features of the four systems are similar, although South Africa has seen notable modern developments that cannot be traced back to Roman-Dutch or English law.[515] Unlike in South Africa, Botswana and Lesotho, the recognition of customary law is a comparatively slow-

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514 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015); Winter South Australian MPs' conscience vote backs allowing same-sex couples to adopt https://www.abc.net.au/news/2016-11-15/sa-house-of-assembly-mps-vote-for-same-sex-couples-adoption/8026938 (accessed on 12 August 2017); Burke https://www.abc.net.au/news/2016-11-03/queensland-adoption-laws-same-sex-couple-able-to-adopt/7991340?section=qld (accessed on 7 August 2017)**;** Adoption Amendment (Same Sex Couples) Act, 2010 New South Wales; Tasmanian Upper House passes gay adoption bill – updated on the 28 Jun 2013, 1:38am https://www.abc.net.au/news/2013-06-27/gay-adoption-passes/4786102 (accessed on 7 August 2017); Riley Same-Sex Adoption Reform on the Agenda in Victoria 19 May, 2014 Victoria News; Adoption Amendment (Adoption by Same-Sex Couples) Act 2015 (VIC); Acts Amendment (Gay and Lesbian Law Reform) Act 2002 (WA).

515 E.g., Recognition of customary law; full marriage rights granted to the South African LGBT community. Despite the fact much has been achieved under the new constitutional order in South Africa to give customary law and its underlying values a rightful place in South African law, there is still much work ahead, especially in the customary law domain.

moving area of law in Australia. It is questionable whether full recognition of customary law will occur in the near future. Although Australia,[516] contrary to South Africa, Botswana and Lesotho, seems to have a law dedicated to dependency action, the absence of traditional legal values in its law on the action is clear. It will be of the utmost value for our sister jurisdiction, Australia, to learn from South Africa, Botswana and Lesotho, and to keep abreast of developments on this side of the world.

Customary law in South Africa, Botswana and Lesotho recognises a dependant's right and action to claim damages from the person responsible for his or her breadwinner's death. From the earliest times, long before the Europeans invaded the Cape,[517] the dependency claim has always been available in terms of customary law.[518] In line with customary law, it is a civil wrong to bring about, intentionally or negligently, the death of another.[519] This customary law action of dependants is called *go tsoša hlogo* or *go tsosa hlogo* in Sepedi/Setswana/Sesotho cultures. It is a well-established and recognised practise in customary law and has always been part of the legal system of African people of Southern Africa.[520] Many features of this customary law action of

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516 For instance, Supreme Court Act 1995 (Queensland); Fatal Accidents Act 1950 (Western Australia); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 1936 (Southern Australia); Compensation to Relatives Act 1897 (New South Wales); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Fatal Accidents Act 1934 (Tasmania); Wrongs Act 1958 (Victoria); s 83 of the Discrimination Law Amendment Act 2002 (Queensland); s 57 of the Acts Amendment (Equality of Status) Act 2003 (Western Australia); s 60 of the Law Reform (Gender, Sexuality and De facto Relationships Act 2003 (Northern Territory); s 4 of the Wrongs (Dependants) Act 1982 (Victoria); sch 1 of the Relationships (Consequential Amendments) Act 2003 (Tasmania); sch 2.3 of the Property (Relationships) Legislation Amendment Act 1999 (New South Wales); ss 23 & 28(2) of the Civil Law (Wrongs) Act 2002 (Australian Capital Territory).

517 Archive 1 "The Arrival of Jan Van Riebeeck in the Cape - 6 April 1652" https://www.sahistory.org.za/.../arrival-jan-van-riebeeck-cape-6-april-1652 (accessed on 8 August 2016).

518 Kerr 1956 *SALJ* 402; Clark 1999 *SALJ* 20 24; *Mokoena v Laub* 1943 WLD 63; *Mayeki v Shield Insurance Co Ltd* 1975 4 SA 370 (C).

519 Sekese *Mekhoa le maele a Basotho* (2009) 60; Duncan *Sotho laws and custom* (2006) 105; Palmer *Law of delict* (1970) 114.

520 Bekker *Seymour's customary law* (1989) 379; Clark 1999 *SALJ* 20; Dlamini 1984 *SALJ* 346; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 (1) SA 339 (W); *Joel v Zibokwana* 4 NAC 130 1919; *Nohele* 6 NAC 1928 19; *Silimo v Vuniwayo* 5 NAC 1953 135; *Sipongomana v Nkulu* 1901 NHC 26.

dependants, are similar to the Roman-Dutch law and English law roots of the dependency action.[521] The legal recognition of the rights of LGBT[522] societies in Botswana and Lesotho seems unlikely to happen. Australia recognises same-sex relationships, and now even allows the couples to marry. The recognition of LGBT societies is not limited. It will be valuable for Botswana and Lesotho to learn in this respect from South Africa and Australia, and to keep abreast of the shifting public perceptions necessitating the rectification of what has become an unacceptable position in common law.

This chapter dealt with the origin and history of the action of dependants in the four researched jurisdictions. It has set the foundation for the action of dependants for loss of support in terms of customary law and common law in the four researched countries. It is clear that the reality of the action for dependants for loss of support is complex, both in theory and in practice. Therefore, the effective understanding of the nature of the action of dependants for loss of support is imperative. In chapter 3, attention is given to the principles applicable to the action and some of the problems relating to it. Chapter 3 also looks closely at the circle of eligible dependants under the dependency action.

521 See the discussion on the nature and principles of the action in ch 3.
522 LGBT stands for Lesbians, Gays, Bisexuals and Transsexuals.

CHAPTER 3

NATURE OF THE DEPENDANTS' ACTION

3.1 Introduction

In this chapter, an analysis of the claim for loss of support under the dependants' action is placed in context, by emphasising the "loss of support" concept,[523] the nature of the dependency action,[524] in particular the objectives[525] and requirements[526] of this delictual remedy, and the development of delictual and statutory claims for loss of support for different categories of dependants.[527] An issue presenting difficulty relates to the different classes of persons (dependants) who qualify to claim under the action for loss of support. The comparative countries[528] vary in terms of who is authorised to be a plaintiff in the dependants' action.[529] The South African judiciary has recently broadened the class of dependants entitled to bring the action for loss of support.[530] The question to be answered is whether the expansion of the eligible class of dependants has reached its final stages, or whether, within an African customary law

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523 See chapter 3 of this thesis, par 3.3 hereunder.
524 See chapter 3 of this thesis, par 3.4 hereunder.
525 See chapter 3 of this thesis, par 3.4.2 hereunder.
526 See chapter 3 of this thesis, par 3.4.3 hereunder.
527 See chapter 3 of this thesis, par 3.5 hereunder.
528 South Africa, Australia, Botswana and Lesotho.
529 *Pannel v Fischer* [1959] SASR 77 (FC); Queensland Law Reform Commission, *The Assessment of Damages in Personal Injury & Wrongful Death Litigation: Griffiths v Kerkemeyer, Section 15C Common Law Practice Act 1867* (Report No 45, October 1983) 68–69; *Jodaiken v Jodaiken* 1978 1 SA 784 (W); *Fourie v Santam Insurance Ltd* 1996 1 SA 63 (T); *Senior v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *Ismael v General Accident Co SA Ltd* 1989 2 SA 468 (D); *Witham v Minister of Home Affairs* 1989 1 SA 116 (ZH); *Union Government v Warneke* 1911 AD 657; *Pike v Minister of Defence* 1996 3 SA 127 (Ck); *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O); *Santam v Henery* 1999 3 SA 421 (SCA); *De Vaal v Messing* 1938 TPD 34; *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A).
530 *Abbott v Bergman* 1922 AD 53; *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Satchwell v President of the RSA* 2002 6 SA 1 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 2 SA 198 (CC); *J v DG, Department of Home Affairs* 2003 5 BCLR 463 (CC); *Robinson v Volks* 2004 2 All SA 61 (C); *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Santam v Henery* 1999 3 SA 421 (A); *Mlisane v South African Eagle Insurance* 1996 3 SA 36 (C); *Zimnat Insurance v Chawanda* 1991 2 SA 825 (ZS); *Du Plessis v RAF* 2004 1 SA 359 (SCA); Civil Union Act 17 of 2006; *Paixão and another v RAF* 2012 6 SA 377 (SCA).

context, the true circle of family spreads so wide that it will be an open-ended class of persons, and could ultimately lead to a widespread abuse of the action? Can the African perspective of an unlimited class of dependants be authenticated in light of our constitutional outlook? In other words, can the variety of dependants in terms of the claim for loss of support under the dependency action be expanded further, or has the action reached its logical conclusion?

As previously stated, the reality of the claim for loss of support under the action for dependants is much more complex, both in theory and in practice. The language of the action was not well chosen, and its ultimate meaning was left largely in the hands of judicial interpretation. As a result, the action is enshrouded in uncertainties and practical implementation problems regarding the vested rights[531] given by the dependency action. The issue of vested rights given by the action has not been authoritatively decided.[532] The question is whether a claim for damages for loss of support and other related expenses arising out of the unlawful death of the breadwinner is necessarily a dependant's action, or whether, in some circumstances, such a claim must take the form of a breadwinner's action instead?[533] This is a highly debatable issue within the action of dependants for loss of support and related expenses, and has led to differences of opinion amongst legal writers, court decisions, and other legal systems. This raises the following questions: Why are the views and legal systems

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531 See chapter 3 of this thesis, par 3.4.1.1 hereunder.

532 *Mnguni v RAF* 2015 ZAGPPHC 1074 par [14].

533 *Jameson's Minors v Central South African Railways* 1908 TS 575; *Union Government (Minister of Railways) v Lee* 1927 AD 202; *Senior NO v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *Ismael v General Accident Insurance Co SA Ltd* 1989 2 SA 468 (D); *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C); *Brooks v Minister of Safety & Security* 2009 2 SA 278 (SCA); Boberg 1971 *SALJ* 437; Pont 1940 *THRHR* 165; Price 1952 *THRHR* 60; Claasen 1984 *THRHR* 443; Neethling 2003 *TSAR* 786; Carpenter 2003 *SAPL* 257 259.

deviating on this question? Can an all-inclusive approach be adopted in this regard? Which possible claimants or dependants will be excluded if the approach followed is a breadwinner or dependants' action?

Another issue that has not been finally settled is whether the dependants of a breadwinner who is injured (not killed) in a wrongful and culpable manner should, as in the case of death, be able to claim for loss of support with the Aquilian action?[534] There is a strong division of judicial pronouncements on this issue, as well as under the dependency action. The question is whether this inconsistency in the treatment of dependants of the injured breadwinner is justified under the action of dependency, and whether it should be tolerated in the post-constitutional dispensation. Precisely how should this issue be dealt with, and would it not be in the public interest to pursue a more comprehensive approach to such dependants? This chapter will examine these problems and issues in detail.

3.2 Brief background

Australia, Botswana, Lesotho and South Africa have legal systems that evolved from the English common law tradition, which failed to recognise a cause of action for the estate or the dependants of the wrongfully and negligently killed breadwinner.[535] In common law, in accordance with the maxim *actio personalis moritur cum persona,*[536] the death of the breadwinner terminated any cause of action. A death, according to common law, no matter how wrongfully and negligently caused, could not be

534 Neethling & Potgieter *Law of delict* (2015) 299-300; Van Zyl *Law of maintenance* (2005) 22.

535 Barnett & Harder *Remedies* (2014) 184; Neethling & Potgieter *Law of delict* (2015) 9-10 292-3; Quansah https://www.pulapulapula.co.uk/ (accessed on 17 September 2016); Dube https://www.nyulawglobal.org/globalex/lesotho.htm also available at https://www.jcl.sagepub.com/content (accessed on 17 September 2016).

536 This rule literally means that a delictual claim died with the person in whom it vested: no cause of action survived the death of the victim or wrongdoer; *Fitch v Hyde-Cates* (1982) 150 CLR 482 487.

characterised as an injury to another, and was therefore unable to give rise to an action by a third party,[537] for example the representative of the deceased's estate and/or dependants. In other words, delictual rights and liabilities were extinguished on the death of the breadwinner.[538] This doctrine produced substantial partialities, which left the deceased's estate and dependants without any compensation at all.[539] In response, to remedy the severity of the common law system, consideration was given to statutory solutions to reverse this unjust rule. The common law rule was effectively reversed through legislation in England in 1846, with Lord Campbell's Act,[540] and subsequently in all Australian jurisdictions, as well as other common law jurisdictions.[541] This legislation created a statutory cause of action for wrongful death. Though Lord Campbell was writing about English law, the position is generally similar under Botswana,[542] Lesotho[543] and South African[544] civil law. While the exact origins of the action of dependants are unknown in South Africa, the action is commonly regarded as an extension of the *actio legis Aquiliae.*[545] According to positive law, in

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537 *Baker v Bolton* (1801)1 CAMP 493; 170 ER 1033; *Admiralty Commissioner v SS Amerika* [1917] AC 38; *Woolworths v Crotty* (1942) 66 CLR 603 622; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172; Holdsworth *English law* (1972) 333-334.

538 Stewart & Stuhmcke *Tort law* (2017) 405.

539 Stewart & Stuhmcke *Tort law* (2017) 407; Holdsworth *English law* (1972) 333-334.

540 Handford "Lord Campbell and the Fatal Accidents Act" (2013) 129 *LQR* 420; the relevant provisions are now found in the Fatal Accidents Act 1976 (UK). The Act allows claims as stipulated in s 1(1): "If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

541 Civil Law (Wrongs) Act 2002 (ACT), s 15(1)(a); Law Reforms (Miscellaneous Provisions) Act 1944 (NSW), s 2(1); Law Reforms (Miscellaneous Provisions) Act 1956 (NT), s 5(1); Succession Act 1981 (Qld), s 66(1); Survival of Causes of Action Act 1940 (SA), s 2(1)(a); Administration and Probate Act 1935 (Tas), s 27(1)(b); Administration and Probate Act 1958 (Vic), s 29(1); Law Reforms (Miscellaneous Provisions) Act 1941 (WA), s 4(1); Compensation (Fatal Injuries) Act 1968 (ACT); Compensation to Relatives Act 1897 (NSW); Compensation (Fatal Injuries) Act (NT); Supreme Court Act 1995 (Qld); Wrongs Act 1936 (SA); Fatal Accidents Act 1934 (Tas); Wrongs Act 1958 (Vic); Fatal Accidents Act 1959 (WA); *De Sales v Ingrilli* [2002] HCA 52, (2002) 212 CLR 338 [12].

542 *Archibald v Attorney* 1989 BLR 421 (HC).

543 Dube https://www.nyulawglobal.org/globalex/lesotho.htm (accessed on 17 September 2016).

544 Neethling & Potgieter *Law of delict* (2015) 292.

545 Davel https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 17 September 2016); Neethling & Potgieter *Law of delict* (2015) 9-10.

Botswana, Lesotho and South Africa, the dependants of the deceased breadwinner who was wrongfully and negligently killed may claim damages for loss of support from the wrongdoer with the *actio legis Aquiliae.*[546]

Unlike Australia,[547] the other official, applicable law in Botswana, Lesotho and South Africa is customary law, which draws no clear distinction between delicts on the one hand, and crimes on the other.[548] The unlawful causation of the death of another person traditionally gave rise to delictual liability in customary law.[549] Originally, manslaughter and homicide were deemed the exclusive jurisdiction of the tribal chief.[550] Normally, a part of the customary fine imposed by the chief would be allocated to the deceased's relatives.[551] However, the dependants did not institute claims for damages themselves,[552] but this did not mean that they did not have the right to claim for loss of support where their breadwinner was wrongfully and negligently killed. The customary law loss of support action was recorded in 1901 with the *Sipongomana v*

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546 Burchell *Delict* (1993) 233; Van der Walt & Midgley *Delict* (2016) par 9; *Sekale v Minister of health* 2006 1 BLR 438 (HC); *Archibald v Attorney* 1989 BLR 421 (HC).

547 See Chapter 2 of this thesis, par 2.6.2; also see the Recognition of Aboriginal Customary Laws, Australian Law Reform Commission, Report 31 (1986), Australian Government Publishing Service; Ginibi https://www.ro.uow.edu.au/cgi/viewcontent.cgi?article=1124&context=ltc (accessed on 8 August 2016); Clark Geoff [2002] *ALRCRefJl* 5; Chisholm & Nettheim *Understanding law* (2011) 85; Halloran *Cultural maintenance and trauma in Indigenous Australia* (*Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western* Australia 2-4th July, 2004) (unpublished contribution at a conference); The Federal Government's "Act of Recognition" and Aboriginal customary law https://www.unlearningtheproblem.wordpress.com/.../the-federal-governments-act-of-recognition-and-aboriginal-customary-law/ (accessed on 8 August 2016).

548 Pienaar https://www.law2.byu.edu/isfl/saltlakeconference/papers (accessed on 17 September 2015); Olivier 2004 *LAWSA: Indigenous Law* paras 212-217; Palmer & Potter *Legal system* (1972) 53; Poulter *Legal dualism* (1979) 70; Palmer *Law of delict* (1970) 7 16 19 112 113 212; Quansah https://www.pulapulapula.co.uk/ (accessed on 8 August 2016); Dube https://www.nyulawglobal.org/globalex/lesotho.htm (accessed on 8 August 2016)*;* also see https://www.jcl.sagepub.com/content (accessed on 8 August 2016).

548 Maithufi & Bekker 2009 *OBITER* 164; Bekker *Seymour's customary law* (1989) 379; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W).

549 Palmer & Potter *Legal system* (1972) 53.

550 Palmer *Law of delict* (1970) 7 16 19 112 113.

551 Poulter *Legal dualism* (1979) 70.

552 Maithufi & Bekker 2009 *OBITER* 164 167; Bekker *Seymour's customary law* (1989) 379; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W).

Nkuku[553] case, which was decided in KwaZulu-Natal. Here the court found that if a valid customary marriage was concluded, a personal claim for loss of support of the wife and children could be instituted under customary law.[554]

Today, both the estate and dependants of a wrongfully and negligently killed breadwinner have claims, in both civil and customary law, against the wrongdoer where a delict has caused the death.[555] This type of action is commonly known as *go tsoša/tsosa hlogo* under customary law in Sepedi/Sotho/Setswana language, or wrongful death in the English language, and may arise out of a number of circumstances, such as medical malpractice,[556] which results in the breadwinner's death, an automobile or airplane accident, occupational exposure to hazardous conditions or substances, criminal behaviour, etcetera.[557]

Wrongful death gives rise automatically to two different claims in law – a claim under the personal injury (survivorship) action, and a claim under the dependency action.[558] The survivorship action is brought by the executor of the estate of the deceased breadwinner, and is based on the deceased's claim for damages for personal injuries[559] arising from a delict committed by the defendant wrongdoer, which resulted in the deceased's death, and which the deceased would have been able to sustain had he lived. The executor of the estate therefore steps into the deceased's shoes[560] to

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553 1901 NHC 26.
554 Rautenbach & Du Plessis 2000 *THRHR* 302 306-308 314.
555 Barnett & Harder *Remedies* (2014) 184.
556 Maimela 2013 *THRHR* 589; *Sekale v Minister of Health* 2006 1 BLR 438 (HC).
557 *Maimela v Makhado Municipality* [2011] ZASCA 69 (unreported).
558 Barnett & Harder *Remedies* (2014) 184.
559 Possible losses could be: pre-death loss of income, pain and suffering and loss of amenities; ambulance costs; medical and hospital costs; necessary travel costs; funeral expenses, etc.
560 Any claims which existed immediately before the death remain in existence, and must be resolved as part of the process of administering the deceased's estate. In other words, all the rights and liabilities accumulated up to the date of death are transferred to the deceased's estate, to be sorted out by the executors or administrators. The said executor or administrator will lodge a claim for all personal injury losses on behalf of the deceased's estate. However, the *litis contestatio* stage must

preserve this action.[561] On the other hand, the dependency action is brought by the dependants of the deceased breadwinner against the defendant wrongdoer. The dependants of the deceased are entitled to sustain an action against the wrongdoer for the loss of support that the deceased would have provided to them (dependants) if he/she had lived for the period during which they (dependants) would have been reliant on him/her.

The claims by the estate and dependants are coexistent and not alternatives.[562] They are two separate and distinct causes of action. Different losses are involved under each cause of action, and there will not be a duplication of claims. The survivorship cause of action belongs to the estate for the deceased's losses suffered prior to death.[563] The wrongful death cause of action belongs to the dependants of the deceased, who have suffered pecuniary loss because of death. In most situations, the greatest pecuniary loss suffered by the dependants is loss of support, but it is not restricted to this. It also includes funeral expenses and loss of services provided by the deceased.[564] For purposes of this chapter, only the dependency action (wrongful death) is discussed.

Before embarking on a discussion on the nature of the dependants' action, it is important to gain an understanding of the concept "loss of support". This concept is

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have been reached prior to death, particularly in the claim for pain and suffering, and loss of the amenities of life.

561 *Work Cover Queensland v Amaca Pty Ltd* [2010] HCA 34, (2010) 241 CLR 420 [38].

562 Civil Law (Wrongs) Act 2002 (ACT), s 18(1); Law Reforms (Miscellaneous Provisions) Act 1944 (NSW), s 2(5); Law Reforms (Miscellaneous Provisions) Act 1956 (NT), s 9(1); Succession Act 1981 (Qld), s 66(4); Survival of Causes of Action Act 1940 (SA), s 6(1)(a); Administration and Probate Act 1935 (Tas), s 27(9); Administration and Probate Act 1958 (Vic), s 29(5); Law Reforms (Miscellaneous Provisions) Act 1941 (WA), s 4(5).

563 In the modern law, the survivorship cause of action for personal injury falls under these five headings: Pain and suffering, loss of the amenities of life, loss of future earnings/earning capacity, past medical expenses and future medical expenses.

564 *Ketsekele v RAF* [2015] ZAGPPHC 308; 2015 4 SA 178 (GP).

utilised in different legal disciplines, particularly in family law and the law of delict. Therefore, great care has to be exercised in examining and applying the concept. Although these two areas superficially exhibit some common elements with regard to loss of support or maintenance, as it is called in family law, each concept is used to achieve varying objectives in the two areas. The family law concept of loss of maintenance cannot automatically be applied to cases involving delictual claims for loss of support, and vice versa.[565] The family law concept of loss of maintenance warrants further investigation and research for future development and extension of its application in delictual cases. An overlap of the family law concept of "loss of maintenance" and the law of delict concept of "loss of support" does not mean that any culpable conduct under family law will automatically qualify as a delict. The concept "loss of support" will be explained in more detail in the next paragraph.

3.3. Concept of "loss of support" in South Africa

3.3.1 Family law concept

The family law perception of loss of support is known as the duty of support or the duty to maintain. It relates to the legal duty to maintain the well-being of a family member.[566] The duty to maintain a family member is not limited to maintaining a child.[567] Any family member,[568] irrespective of his or her age, can ask another family member to maintain him or her.[569] Generally, the duty to maintain is reciprocal,[570] meaning that such a duty

565 Klopper 2007 *THRHR* 440 445.

566 E.g. parents, spouses and children – see Maintenance Amendment Act 9 of 2015.

567 The duty to support a child rests commonly on both parents and must be shared between them according to their means. S15(3)(iii) of the Maintenance Act 9 of 2015 provides that the duty to support children exists irrespective of whether a child is born in or out of wedlock, or is born of a first or subsequent marriage.

568 The relationship must have been created by birth (blood relation), adoption, or marriage.

569 See Maintenance Amendment Act 9 of 2015 https://www.justice.gov.za/vg/mnt.html#sthash.p375ITJs.dpuf (accessed on 17 September 2016).

570 *Van Vuuren v Sam* 1972 2 SA 633 (A) 642 643F.

may arise in either party. For example, although the parent is usually obliged to maintain his or her child, in certain circumstances, the obligation will fall on the child to maintain a parent,[571] subject to certain requirements. In the case of family law, it is imperative to establish whether a duty to maintain exists, and even determine the extent of the duty of maintenance. In other words, the actual content of the duty to maintain is of paramount importance. The test is whether the following requirements are met:

- The person claiming support must be unable to maintain himself or herself;
- The person from whom support is claimed must be able to maintain the claimant;
- A familial relationship must exist between the parties, for example the relationship must have been created by birth (blood relation), adoption, or marriage.[572]

In *Oosthuizen v Stanley,*[573] which dealt with the legal duty of children to support their parents, the court characterised support as including food, clothing, accommodation, medical care, education, and even payment of legal fees, bail and all other reasonable needs.[574] The extent of this duty to maintain under family law is determined and balanced with reference to the social position, financial means and lifestyle of the parties,[575] and is not necessarily limited to the bare necessities of life in the strict sense

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571 A remarkable exception is a child born out of wedlock, who is entitled to claim maintenance from his father, although he does not owe his father the corresponding duty.

572 The main requirement of the test is whether the person who is liable to pay maintenance has the means to pay maintenance, and the maintenance is reasonable.

573 1938 AD 322.

574 *Caldwell v Erasmus* 1952 4 SA 43 (T) 45; Hahlo & Kahn *South African law of husband and wife* (1975) 135.

575 *Gammon v McCure* 1925 CPD 137.

of the word,[576] but applies only between family members (familial relationships).[577] This interpretation of the duty to maintain is clearly limited in its scope of application.

In *Chisholm v East Rand Proprietary Mines Ltd,*[578] the family law concept of loss of support was applied under the *nasciturus* fiction and extended to the law of delict in an action for loss of support by the dependants. *Chisholm* was the first case in which the *nasciturus* fiction was extended to the law of delict: The plaintiff's husband had died in a mine accident and it was found that the accident had been negligently caused by an employee of the defendant. At the time of death of the breadwinner, the plaintiff was pregnant with their first child. She claimed damages due to the infringement of her and her child's right to maintenance. The court ruled that the unborn child in a claim for damages is in the same position as children already born.[579] The court extended the application of the *nasciturus* fiction to include instances where a delict had been committed against the unborn child. The court held that the unborn child has a right of action against the wrongdoer who caused the death of the breadwinner for loss of support. However, this action has a qualification, namely that the child must be born alive.

In the law of delict, another meaningful development took place in *Pinchin v Santam Insurance Co Ltd*,[580] wherein the *nasciturus* fiction was expanded to cover not only patrimonial loss, but also cases of reparation (recoverability of non-patrimonial

576 *Young v Coleman* 1956 4 SA 213 (D); *Modise v Modise* 2007 1 BLR 622 (HC).
577 Klopper 2007 *THRHR* 440 443 445.
578 1909 TH 297 301.
579 Boezaart (Davel) & Jordaan *Persons* (2016) par 2.3.1.3.2.
580 1963 2 SA 254 (W). *Pinchin's* case has been quoted with approval in judgments in Australia - see *Watt v Rama* [1972] VR 353 (FC), a decision of the Supreme Court of Victoria, at 360. It has also been discussed in leading textbooks published in Australia - see Fleming *The law of torts* (1998) 182.

damages).[581] Here an expectant mother was injured in a motor vehicle accident, and her child was subsequently born with cerebral palsy. As a result of the brain damage, the child would never be able to take care of herself. The accident was caused by the sole negligence of the driver of the other motor vehicle. The claim was unsuccessful, since it was not proven that the cerebral palsy of the foetus had been caused by the injury sustained by the mother. If it had been proven that the child's cerebral palsy was the result of the injuries sustained by the applicant during the accident, the *nasciturus* fiction would have been applicable to this case.

Although the principles of our family law are flexible enough to extend the *nasciturus* fiction to the field of delict, and an unborn child does in fact have a claim for pre-natal injuries,[582] both the *Chisholm* and *Pinchin* cases have been criticised by legal authors. This criticism is, mainly because our law of delict does not require that the wrongful act and damage caused should occur simultaneously. Therefore, it is unnecessary to invoke the *nasciturus* fiction in delict. For example, Joubert[583] is of the opinion that the use of the *nasciturus* fiction is unnecessary when dealing with delictual claims. In his view, the *actio legis Aquiliae* is flexible enough to embrace the challenges presented to it by pre-natal injuries and infringement of the subjective rights of unborn children. Boberg[584] has a contrasting view on the relevance of the *nasciturus* fiction. He states that the *nasciturus* fiction could be implemented with success if its scope could be extended to include actions based on pre-natal injuries, because the child does not only suffer injuries from the time of birth but begins suffering from the time of the commission of the delict.

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581 Boezaart (Davel) & Jordaan *Persons* (2016) par 2.3.1.3.2.
582 Mankga 2007 *Codicillus* 50-51.
583 Joubert 1963 *THRHR* 295 297.
584 Boberg *Persons* (1999) 33.

The *Chisholm* and *Pinchin* cases have now been overruled in respect of the extension and application of the *nasciturus* fiction to the law of delict by the decision in the *RAF v Mtati* case.[585] Here the mother was involved in a collision and the foetus was injured *in utero* and born brain damaged. The court held that the ordinary principles of delict apply, and it is not necessary to extend the *nasciturus* fiction to the law of delict. It is clear from the above discussion that the extension and use of the *nasciturus* fiction to include delictual claims would not provide a solution to a matter with overlapping delictual and family law principles. Furthermore, in the *nasciturus* fiction matter, there was no need to rely on family law in order to expand delictual claims.

3.3.2 Delictual concept

After the exploration of the concept of "support or maintenance" within family law, it is obvious that the acceptance of the limited understanding of this concept as applied in family law into the law of delict may lead to possible partiality. The objective of allowing a maintenance claim in family law also differs from the objective of allowing a claim for delictual damages based on loss of support. An analysis of the approach in the law of delict to the loss of support concept is required to determine whether the family law concept is valid and applicable when dealing with a delictual claim based on the unlawful and negligent killing of a breadwinner.[586] Should the family law concept be acknowledged as a true reflection of the content of "loss of support" for purposes of a delictual claim for loss of support, it could have the potential of limiting recoverable damages. This is the case because the law of delict, although it utilises the duty to support as its principle for a claim for damages based on loss of support,[587] it seeks to

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585 [2005] ZASCA 65; 2005 (3) All SA 340 (SCA).

586 Klopper 2007 *THRHR* 444.

587 *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA).

effect restitution to a position prior to the commission of the delict.[588] This fundamental principle of the law of delict seems to establish a somewhat wider and more liberal approach to the concept of "support" as applied in family law. The objective in awarding delictual damages for loss of support differs somewhat from the objective in awarding a claim for maintenance in family law. In order to be able to fulfil the restitutory function of damages within the law of delict, one may be compelled to include "losses"[589] other than the necessities indicated by the content of support, as found in family law.[590]

As far as the law of delict is concerned, "loss of support" includes considerations that do not strictly fall within the understanding of the same concept as in family law, and rather generically denotes all the negative consequences (losses) suffered by a dependant due to the death of his or her breadwinner. From case law,[591] it appears that the concept of "loss of support" in the law of delict is ostensibly wider than that found in family law.[592] The latter concept in essence only relates to familial relationships with reciprocal duties. In *Jameson's Minors v CSAR,*[593] the court said the following in relation to damages for loss of support:

> "There only remains the question of damages, and it is one of the most difficult points in this case. The general principles which should guide us are plain. I need only refer to Voet, who lays down the rule very clearly. He says (9,2,11): 'According to the modern practice the scope of the action' . . . that is, an action by the widow or children of a man who has been killed through the default of another . . . 'has been extended, in as far as it is now allowed to the wife and children of any husband or father killed through another's default, for such damages as the equity of the judge will determine, account being taken of the maintenance which the deceased would have been able to supply, and had usually supplied, out of his labour, to the wife and children, or to other near relatives.' I do not think that Voet intended to restrict, or that we should restrict the word 'maintenance' victus to the supply of mere necessities of life. It must

588 *Southern Insurance v Bailey* 1984 1 SA 98 (A) 118ff.
589 E.g. pre-death pain and suffering, funeral expenses, loss of services, etc.
590 Anders 1909 *SALJ* 214.
591 *Radebe v RAF* [2013] ZAGPJHC 135; *Keforilwe v RAF* [2015] ZANWHC 74; *M v RAF* [2015] ZAGPPHC 708; *Santam* v *Fourie* 1997 1 SA 611 (A); *Singh* v *Ibrahim* [2010] ZASCA 145; *RAF* v *Monani* 2009 4 SA 327 (SCA); *Makhuvela* v *RAF* 2010 1 SA 29 (GSJ); *RAF* v *Maphiri* 2004 2 SA 258 (SCA).
592 See chapter 3 of this thesis, par 3.3.1 above.
593 1908 TS 575 602.

> include all the material advantages, conveniences, comfort, support, which the father would have afforded the claimants, but for his death. The language used shows that the Court must pay regard to what the deceased had been used to supply in the past – that is, to the station in life of the parties, and the comforts, conveniences and advantages which they had been accustomed."[594]

This interpretation was seemingly not accepted in *Van Vuuren v Sam*.[595] In this case, the mother of a seventeen-year old boy claimed damages for loss of support after her son died because of the unlawful and negligent act of the defendant (respondent). In order to succeed, the plaintiff (appellant) was called upon to prove that the defendant unlawfully and negligently killed her son, and that the deceased son contributed to her support because he was legally obliged to do so. The deceased was employed and received a salary of R250 per month. The plaintiff's husband was clearly in financial difficulties, to the extent that he was hard-pressed to maintain his family, of which the plaintiff was a member. The deceased, during his lifetime, gave some of his salary to his mother. According to the evidence, it was not proven what the exact amount was. The plaintiff's entire case was based on the fact that her deceased son had a duty to support her. According to the principles of family law, parents are owed a duty of support by their children only if they can show that they are indigent and incapable of providing for themselves.[596] In order to determine whether the plaintiff was in fact indigent and consequently owed a duty of support, the court was compelled to determine in what respect the plaintiff should be indigent. The question therefore was not what the plaintiff had lost in the form of support, but what she should lack in order to be found indigent, so that the duty of her deceased son to support her could be established. To establish whether the plaintiff was lacking in terms of basic needs, the court was compelled to investigate the measure that has to be applied in order for the

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594 Klopper 2007 *THRHR* 444.
595 1972 2 SA 633 (A) 642.
596 *Jacobs v Cape Town Municipality* 1935 CPD 474.

support duty of a child to exist. In arriving at the decision that such duty did not exist, the court held that a parent is not entitled to support on the basis that he or she lacks that which he or she was accustomed to, but only when he or she is lacking the necessities of life.[597] The court in this case had thus incorrectly applied the restricted family law concept of support to a delictual claim for damages.

The distinctions between the family law concept of "loss of maintenance" and the delictual law concept of "loss of support" have been clearly explained. The concept of "loss of support" under law of delict is broader, more varied, applies beyond family members, and does not contain the reciprocal duty of maintenance or support. For the reasons highlighted above, it is clear that the family law concept of maintenance is limited in its scope and application to the family law sphere. Therefore, extending the family law concept of the duty to support to the law of delict will not provide any benefits or solutions to the questions posed regarding the application of the dependency action within the sphere of the law of delict.[598] Keeping this theoretical background of the loss of support concept and its applicable principles of family law and law of delict in mind, the next paragraph looks at the nature of the dependency action.

3.4 Nature of the action of dependants

3.4.1 Introduction

The action of dependants is a brilliant example of law in motion, of law not being stagnant but being able to amend and adjust to changing times.[599] This flexible nature appears to be the same throughout the four countries being studied in this research.

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597 *Van Vuuren v Sam* 1972 2 SA 633 (A) 641-643E.

598 The term "loss of support" should not be used interchangeably. For family law, the term "loss of maintenance" should be utilised, while the term "loss of support" should be used for law of delict.

599 Pienaar https://www.law2.byu.edu/isfl/saltlakeconference/papers (accessed on 17 September 2015).

As early as 1911, the South African Appeal Court[600] found that the dependants' claim for loss support was a flexible remedy that needed to be adapted to modern conditions. The dependency action is a statutory[601] delictual remedy, which can be instituted to claim and recover the loss of support that has been suffered by the dependants (plaintiffs) of the deceased (breadwinner), who was wrongfully and negligently killed by the wrongdoer (defendant).[602] This remedy has been described as an anomaly, peculiar or *sui generis* in nature, in that it is based on a delict that is committed against the breadwinner, rather than against the dependant(s).[603] The dependants' action constitutes a departure from the normal delictual principles, and this is why the courts regard the action as an anomaly – and describe it as *sui generis*.[604]

A crucial and uncommon feature of the remedy for loss of support is that although the defendant incurs liability because he or she has acted wrongfully and negligently (or with intention – *dolus)* towards the deceased breadwinner, by causing his or her death, the claimants (dependants) derive their right of action not through the deceased breadwinner, or from his or her estate, but because they have suffered a loss through the death of the deceased breadwinner, for which the defendant is legally responsible.[605] As stated above, the reason for this anomaly or peculiarity is because

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600 *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 668: The Court recognised that no dependant's action at the instance of the husband was mentioned in the old authorities, but this was because it never occurred to the jurists of the seventeenth century to extend this remedy to a husband. It was held that there was no reason why our courts should not adapt the *Lex Aquilia* to the conditions of modern life, in this respect as far as that can be done without doing violence to its principles.

601 A claim for loss of support as the result of the wrongful and negligent act of another may be created by legislation or may function in terms of legislative provisions. For different statutes, see Chapter 2 of this thesis, par 2.4.4 (South Africa), par 2.5.5 (Botswana & Lesotho) & par 2.6.3 (Australia).

602 Van der Walt & Midgley *Delict* (2016) paras 54 & 96; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A).

603 Neethling & Potgieter *Law of delict* (2015) 292.

604 *Mnguni v RAF* [2015] ZAGPPHC 1074 par [15].

605 *Brooks v Minister of Safety and Security* [2008] ZASCA 141; 2009 2 SA 94 (SCA) par 7; *Paixão v RAF* [2012] ZASCA 130 par 12; Neethling 2009 *THRHR* 297-299; *Mnguni v RAF* [2015] ZAGPPHC 1074 paras [7] & [8].

the action is not based on the law of delict as we know it. In a loss of support claim, the delict is not committed against the dependant himself or herself, but against the deceased breadwinner.[606] This delictual claim is based on a delict committed against someone else (the deceased) other than the claimant (the dependant). However, the traditional notion that the dependency action is *sui generis* has provoked strong criticism[607] over the years, which has led to differences of opinion amongst legal writers,[608] court outcomes[609] and other legal systems.[610] The language of the action was not well chosen, and its ultimate meaning was left largely in the hands of judicial interpretation. As a result, the action is enshrouded in several uncertainties regarding the vested rights given by the dependency action.

3.4.1.1 Vested rights

In South Africa, the question of vested rights given by the action has not been authoritatively decided.[611] The dilemma concerns the question as to whether a claim for damages for loss of support arising out of the unlawful and negligent death of the breadwinner is necessarily a dependant's action, or whether, in some circumstances, such a claim must take the form of a breadwinner's action instead.[612] This is a highly

606 *Mnguni v RAF* 2015 ZAGPPHC 1074 par [15]; Neethling 2009 *THRHR* 297.
607 *Mnguni v RAF* [2015] ZAGPPHC 1074 par [9].
608 Dendy 1990 *SALJ* 155 157; Burchell 1999 *SALJ* 729 731.
609 *Groenewald v Snyders* 1966 3 SA 237 (A); *Constantia Versekeringsmaatskappy Bpk v Victor NO* 1986 1 SA 601 (A); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C); *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA).
610 Carver 2005 *QUTLJJ* 17; Fombad https://www.saflii.edu.au/au/journals/ (accessed on 17 September 2016).
611 *Mnguni v RAF* [2015] ZAGPPHC 1074 paras [12] & [14].
612 *Jameson's Minors v Central South African Railways* 1908 TS 575; *Union Government (Minister of Railways) v Lee* 1927 AD 202; *Senior NO v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *Ismael v General Accident Insurance Co SA Ltd* 1989 2 SA 468 (D); *Santam v Fondo* 1960 2 SA 467 (A); *Santam v Henery* 1999 3 SA 421 (SCA); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA); *Du Plessis v RAF* 2004 1 SA 359 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C); Boberg 1971 *SALJ* 429; Pont 1940 *THRHR* 167; Conradie 1943 *THRHR* 148; Price 1952 *THRHR* 60; Claasen 1984 *THRHR* 443; Neethling 2003 *TSAR* 789; Carpenter 2003 *SAPL* 260.

debated question within the action of dependants. Some authors and cases are an authority for the view that a claim for loss of support is based on the wrongful and culpable causing of damage to the dependant himself.[613] Other authors and cases hold that the claim for the action of dependants is based on a delict committed against the breadwinner.[614]

Those who criticise the traditional view support what is referred to as the "theoretically correct approach", on the basis that the traditional view cannot be dogmatically justified. The root of the criticism is that it is completely unsound to base an action for damages on a delict committed against, and therefore damage caused to, another person – almost in the form of a delict *per consequentias.* The dogmatically correct view is that the dependant's claim should be based on the wrongful, culpable causing of damage (loss of support) to the dependant himself or herself.[615] The notion that the dependency action is *sui generis* has subsequently been rejected by Neethling, who argues that it is completely unacceptable to base a delictual claim [indirectly] on a delict committed against someone else.[616] According to Neethling, the correct approach is endorsed by the Apportionment of Damages Act,[617] by recognising that the negligent

613 Neethling 2009 *THRHR* 297 297-299; Van der Merwe & Olivier *Die onregmatige daad* (1989) 348; Neethling & Potgieter *Law of delict* (2015) 292; Van Zyl *Law of maintenance* (2005) 19; Gibson *Wille's principles* (1977) 514; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837-838; *Brooks v Minister of Safety and Security* 2007 4 ALL SA 1389 (C) 1394-1400; *Santam v Henery* 1999 3 SA 421 (SCA) 430; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1326; *Union Government v Lee* 1927 AD 222; Apportionment of Damages Act 34 of 1956, s 2(1B).

614 Davel *Afhanklikes* (1987) 50-51; Van der Merwe & Olivier *Die onregmatige daad* (1989) 345; Boberg *Delict: Aquilian liability* (1984) 728; Neethling & Potgieter *Law of delict* (2015) 293; *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA) 97-98; *Plotkin v Western Assurance Co Ltd* 1955 2 SA 385 (W) 394; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C) 409; *Harde v Protea Assurance Co Ltd* 1974 2 SA 109 (E) 114D.

615 *Mnguni v RAF* [2015] ZAGPPHC 1074 par [9]; Neethling 2009 *THRHR* 297.

616 Neethling 2009 *THRHR* 296 304.

617 s 2(1B) of Act 34 of 1956 as amended by Act 58 of 1971.

wrongdoer and the contributorily negligent breadwinner can be regarded as joint wrongdoers *vis-à-vis* the dependants.

The Apportionment of Damages Act provides that if the negligent conduct of the deceased breadwinner and the third party contributed to the breadwinner's death, and consequently to the dependants' loss of support, they are regarded as joint wrongdoers, and are therefore jointly and severally liable in delict *vis-a-vis* the deceased breadwinner's dependants for the same damage.[618] These provisions acknowledge that the delict is committed directly against the dependants, whose claim is based on a delict committed against them.[619] The “theoretically correct approach” is also said to be endorsed, by implication, by the Supreme Court of Appeal in cases such as *Amod v Multilateral Motor Vehicle Accidents Fund*[620] and *Du Plessis v RAF.*[621] In these cases, the court’s decision that the dependants right to support was worthy of protection against the negligent conduct of a third party (wrongdoer) is a clear indication that the action of dependants is based on a delict against the dependants themselves. However, Boberg[622] contends that the 1971 amendment of the Apportionment of Damages Act, which introduced the provisions of section 2(1B), does not confer rights of action upon dependants, but merely creates a new class of joint wrongdoers, namely the injured person (breadwinner) or the deceased's estate. In addition, Boberg states that the rights of the plaintiff must be sought within the four corners of section 2 of the Apportionment of Damages Act. According to Boberg, the section deals only with joint wrongdoers – it does not cover cases where the plaintiff’s loss has been caused by a single wrongdoer. As such, Boberg is of the opinion that

618 See s 2(1) of the Apportionment of Damages Act.
619 Neethling & Potgieter *Law of delict* (2015) 293.
620 1999 4 SA 1319 (SCA) 1326.
621 2004 1 SA 359 (SCA) 370-378.
622 Boberg 1971 *SALJ* 452.

the inevitable conclusion is that no right of action is conferred upon a dependant whose breadwinner has killed or injured himself or herself through his or her fault alone. He goes on to state the following:

> "Once again the legislature has removed one anomaly only to create another. It appears that the dependant can sue the breadwinner or his estate together with another joint wrongdoer or alone where there *is* another joint wrongdoer (although the latter is not sued), but that no action lies against the breadwinner or his estate in cases where the breadwinner's fault was the *sole* cause of his injury or death."[623]

The acceptance of the "theoretically correct approach" in judgments in cases like *Madyibi v Minister of Safety and Security*[624] and *Brooks v Minister of Safety and Security*[625] could indicate that the time has perhaps come for the position of the dependants' claim for loss of support to be normalised, in order to fit in with the foundations of our law of delict,[626] as the High Court in these two judgments has been courageous enough to accept the "theoretically correct approach." The legislature[627] has also, whether intentionally or not, accepted this approach by regarding the deceased breadwinner and a third party as joint wrongdoers. In such circumstances, it would thus be possible for dependants to hold the estate of a deceased breadwinner liable where he or she has contributed to the negligent conduct which caused the breadwinner's death and dependants' loss of support. In addition, Boberg,[628] though not in support of the "theoretically correct approach", acknowledges the anomaly created by the Apportionment of Damages Act, in allowing the dependants to sue the breadwinner or his or her estate, together with another joint wrongdoer, or alone where there is another joint wrongdoer (although the latter is not sued), whereas no action is brought against the breadwinner or his or her estate in cases where the breadwinner's

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623 *Ibid*.
624 [2008] ZAECHC 30 par 7.
625 2008 2 SA 397 (C).
626 *Mnguni v RAF* [2015] ZAGPPHC 1074 par [16].
627 Apportionment of Damages Act 34 of 1956 as amended by Act 58 of 1971.
628 Boberg 1971 *SALJ* 452.

fault was the *sole* cause of his or her injury or death. Neethling,[629] when dealing with claims for loss of support in relation to a breadwinner who committed a criminal act, which resulted in his or her incarceration, and a breadwinner who committed suicide, opines as follows:

> "Although the Supreme Court of Appeal (in *Amod v Multilateral Motor Vehicle Accidents Fund* above) is still hesitant to declare outright that the dependants' action is based directly on a delict committed against them, there are clear signs that that court has, at least by implication, accepted this position: the wrongfulness of the third party's conduct (that is, causing loss of support via the death of the breadwinner) *vis-a-vis* the dependant is determined by enquiring whether, according to the *boni mores* criterion for wrongfulness, the dependant's right of support is worthy of protection against such conduct. This approach has also been accepted by the legislature, since the deceased breadwinner and the third party are regarded, where appropriate, as joint wrongdoers against the dependant. Furthermore, the approach is supported by most academic commentators as being dogmatically correct because it accords with the foundations of our law of delict, and to this end the opposite, traditional approach is therefore rejected, mainly for the reason that it is completely unacceptable to base a delictual claim (indirectly) on a delict committed against someone else. Recently, especially in *Brooks,* the High Court also strongly favoured the latter approach. For these reasons the Supreme Court of Appeal should accept the direct nature of the dependants' action in South African law, thereby adapting the remedy to modern conditions and legal thought. Finally, unless there are positive legal and policy considerations to the contrary, the proposition that the action of dependants *vis-a-vis* third parties should not be extended to encompass the situation where the breadwinner by his deliberate act renders himself unable to fulfil his duty of support towards his dependants - irrespective of whether this is accomplished by a criminal act or suicide - is sound and should be supported."[630]

It is submitted that the anomaly or *sui generis* nature of the remedy in dependants' claims of loss of support ought to be normalised and cured by the acceptance of the "theoretically correct approach". This will result in the dependants deriving their rights, not through the deceased or his/her estate, but from the fact that the dependants have suffered a loss due to the death of their breadwinner, and that the defendant (wrongdoer) is legally responsible for such death.[631]

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629 Neethling 2009 *THRHR* 299-304.

630 Neethling 2009 *THRHR* 301.

631 *Mnguni v RAF* [2015] ZAGPPHC 1074 par [14]; *Brooks v Minister of Safety and Security* [2008] ZASCA 141; 2009 2 SA 94 (SCA) par 8; *Hlomza v Minister of Safety and Security and another* [2012] ZAECMHC 14; 2013 1 SACR 591 (ECM); *Krawa v RAF* [2010] ZAECGHC 57; 2010 6 SA 550 (ECG).

Wrongfulness in a claim for loss of support will lie directly in the infringement of the dependants' personal right to support from the person who caused the delict.[632] The killing of the deceased breadwinner must be actionable as a wrongful act against the dependants concerned.[633] Since, as the law stands, the loss of support of dependants is said to constitute pure economic loss, the questions that would therefore arise would be whether the deceased breadwinner had a legal duty to support the dependants, and whether such duty was worthy of protection.[634] The protection would be determined by the criterion of the *boni mores* (legal convictions of the community), which is considered a general yardstick for wrongfulness in our law.[635] In considering the *boni mores,* the constitutional norms and values should be taken into account.[636] As a result, the existing South African law in respect of claims of dependants for loss of support is that such claims are available to dependants against a person who unlawfully killed a breadwinner, who was legally liable to support such dependants.[637]

There has been recent developments with regard to the test for wrongfulness, especially in respect of pure economic loss.[638] The "new test for wrongfulness" was formulated in the case of *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,[639] and is explained as the reasonableness of holding the defendant liable.[640] In terms of this new test the "conduct" is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated

632 *Mnguni v RAF* [2015] ZAGPPHC 1074 par 18.
633 *Ibid.*
634 *Ibid*.
635 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) par 17.
636 *Du Plessis v RAF* 2004 1 SA 359 (SCA) par 18.
637 *Brooks v Minister of Safety and Security* [2008] ZASCA 141; 2009 2 SA 94 (SCA) par 6; *Mnguni v RAF* [2015] ZAGPPHC 1074 par 31.
638 Neethling & Potgieter *Law of delict* (2015) 80.
639 2006 1 SA 461 (SCA) 468.
640 Neethling & Potgieter *Law of delict* (2015) 80.

for the loss caused by the negligent act or omission of the defendant.[641] However, academics have raised their concern over the unacceptability of the new test of wrongfulness in our law. Potgieter[642] is of the view that the new test of wrongfulness and the court's approach towards it undermines the substance of the wrongfulness inquiry, denatures the wrongfulness element and violates the sound structure and principles of the law of delict. It is in any event not clear whether the new test for wrongfulness was ever intended to requestion wrongfulness after the parties had already agreed that a legal duty existed and had not been adhered to. Nevertheless, the almost bizarre manner in which the new test for wrongfulness was embraced in the cases referred to, albeit without success, is an example of how this test, in the words of Scott,[643] "is running out of control" and is also an indication of the damage and confusion that this unnecessary approach to wrongfulness can cause to the law of delict. For these reasons the author agrees with Neethling and Potgieter[644] that the new test for wrongfulness do not contribute to a better evaluation of delictual wrongfulness, and that the established tests of wrongfulness deal satisfactorily with the determination of wrongful conduct in the case of the dependency action.

On the question of vested rights in general, Botswana and Lesotho laws provide no direct assistance. This study has found no specific provision or reference to a law that deals with the issue of vested rights. However, the existing case decisions in respect of dependants for loss of support is that Botswana and Lesotho mirror or follow the

641 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Crown Chickens (Pty) Ltd v Rocklands Poultry v Rieck* 2007 2 SA 118 (SCA) 122; *Le Roux v Dey* 2011 3 SA 274 (CC) 315.

642 Potgieter 2017 *Litnet Akademies* 823 https://www.litnet.co.za/new-wrongfulness-test-trojan-horse-endangering-delictual-principles/ (accessed on 5 January 2019).

643 Scott "Delictual liability for adultery – a healthy remedy's road to perdition" in Potgieter et al (reds) *Huldigingsbundel vir Johann Neethling* (2015) 433.

644 Neethling & Potgieter *Law of delict* (2015) 87.

South African law, and therefore their legal position is the same as in South African law.[645]

In contrast, in Australian law, the question of vested rights given by the action is clear-cut. The approach is that the dependants derive their rights not through the deceased or his/her estate, but from the fact that the dependants have suffered due to the death of their breadwinner, and that the defendant (wrongdoer) is in law responsible for such death.[646] The basis of a wrongful death claim is "… for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages[647] suffered not by himself, but by his family after his death …"[648] and the dependants have an action, even in cases of suicide.[649]

Wrongful infringement of the dependant's right to support is a wrongful act committed against the dependant and not the breadwinner – it is an infringement of the rights of the dependant. In other words, the legal duty lies in favour of the dependant and not the breadwinner.[650] The effect of the independant nature of the action is that any defence, which is personal to the deceased, does not operate against the dependant.[651] Consequently, from the above discussion, it is clear that the dependency action for loss of support belongs to the dependants, not to the deceased person, although it is administered through the deceased's estate.[652]

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645 Eg, see *Archibald v Attorney-General* 1989 BLR 421 (HC); *Manyeula v Botswana Motor Vehicle Insurance Fund* 1999 2 BLR 391 (HC); *Sekale v Minister of Health* 2006 1 BLR 438 (HC); Swartz & Itumeleng http://www.iosrjournals.org (accessed on 21 September 2018).

646 Hedley *Death and tort* (2007) 252; Queensland Law Reform Commission: Damages in an action for wrongful death (Issues Paper WP No 56 June 2002).

647 This is the incorrect use of terminology – one cannot suffer damages, but suffers damage.

648 *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 per Lord Wright at 611.

649 Barnett & Harder *Remedies* (2014) 187; *Haber v Walker* [1963] VR 339 350-351 358.

650 *Brooks v Minister of Safety and Security* [2007] ZAWCHC 51; [2007] 4 All SA 1389 (C); 2008 2 SA 397 (C) par [28].

651 See *Jameson's Minors v Central South African Railways* 1908 TS 575.

652 Hedley *Death and tort* (2007) 242 252.

Another very important and interesting uncertainty is regarding the question as to whether the dependants of a breadwinner injured (not killed) in a wrongful and culpable manner should be able to claim for loss of support with the Aquilian action, as in the case of death.[653]

3.4.1.2 Injured breadwinner

In general, the dependants' action caters for loss of support caused by the wrongful and unlawful killing of a breadwinner in all four jurisdictions being researched in this study. However, at times, an injury to a breadwinner that was caused in a wrongful and culpable manner may also result in an actionable claim for loss of support under the dependants' action.[654] According to Neethling and Potgieter,[655] the dependants of a person injured in this way should be able to claim loss of support with the *Lex Aquilia* action, as in the case of death. However, uncertainty exists in this regard in South African positive law. There is a strong division of judicial pronouncements:[656] On the one hand, there are decisions that grant the Aquilian action to the dependants of an injured breadwinner who has a duty to support them. In *Abbott v Bergman,*[657] a man married in community of property was allowed to claim damages *inter alia* for the loss of his wife's services in the running of the boarding house. De Villiers JA said:

> "If he is allowed to recover the loss sustained by him through the death of his wife, he must also be allowed to recover when the injuries are not fatal. For in principle, no distinction can be drawn between the two cases."[658]

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653 Neethling & Potgieter *Law of delict* (2015) 299; Van Zyl *Law of maintenance* (2005) 22; *De Vaal v Messing* 1938 TPD 34.

654 Neethling & Potgieter *Law of delict* (2015) 299; see also *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) par 8.

655 Neethling & Potgieter *Law of delict* (2015) 299.

656 *Abbott v Bergman* 1922 AD 53 56; *Plotkin v Wester Assurance Co Ltd* 1955 2 SA 385 (W) 394-395; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C); *Mnguni v RAF* (1090/2014) [2015] ZAGPPHC 1074; *De Vries NO v RAF* [2011] ZAWCHC 215; *Verheem v RAF* [2010] ZAGPPHC 282; 2012 2 SA 409 (GNP); *RAF v Sweatman* [2015] ZASCA 22; [2015] 2 All SA 679 (SCA); 2015 6 SA 186 (SCA); *Brooks v Minister of Safety and Security* [2008] ZASCA 141; 2009 2 SA 94 (SCA), [2009] 2 All SA 17 (SCA).

657 1922 AD 53 56.

658 *Abbott v Bergman* 1922 AD 53 56.

Similarly, in *Plotkin v Western Assurance Co Ltd,*[659] the court granted the husband damages in circumstances where his injured wife was legally liable to contribute to the common household, where the parties were married out of community of property. In *Erdmann v Santam Insurance Co Ltd,*[660] the court granted the husband an action for loss of support due to his wife's injuries, in accordance with modern social ideas. However, the decision in *De Vaal v Messing*[661] provides support for the opposite view. The policy reason why the extension of liability is sometimes refused where the breadwinner is injured, but not killed, is that it would impose an additional burden on the defendant, which would be unwarranted.[662] In this case, the court refused a claim for loss of support by the wife and children because of injury to the husband (breadwinner). The court reasoned that the dependants could not claim where the breadwinner was injured, because the injured breadwinner himself could institute an action for loss of future income, which could then be utilised to support the dependants. Neethling and Potgieter are of the view that the court's argument cannot survive in all cases. They provide the following practical example: the breadwinner was 80% negligent with regard to his own injuries, which means 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 wishes to support his dependants as in the past. Therefore, the dependants definitely suffer loss of support.[663] The Apportionment of Damages Act recognises Neethling and Potgieter's view.[664] According to the Act, the dependants are granted an action for loss of support if the injured breadwinner and a third party acted

659 1955 2 SA 385 (W) 394-395.
660 1985 3 SA 402 (C) 406 408-409.
661 1938 TPD 34.
662 *RAF v Shabangu* 2005 1 SA 265 (SCA) par 18.
663 Neethling & Potgieter *Law of delict* (2015) 285.
664 Neethling & Potgieter *Law of delict* (2015) 300.

negligently and are regarded as joint wrongdoers against the dependants.[665] The Act speaks of "injury to or death of any breadwinner". For these reasons, and also due to the fact that the wording of the Apportionment of Damages Act now covers this issue, the dependants should have a claim, irrespective of whether the breadwinner has died or is injured.[666] The decision in *De Vaal NO v Messing* should not be seen as an obstacle in extending an action of dependants where the breadwinner is injured.[667]

As stated above, Botswana and Lesotho are very reliant on South African law in all their legal areas. Though the provisions of the Apportionment of Damages Act were written for South African law, the position is generally similar under Botswana,[668] Lesotho[669] and Australian[670] law. It is clear that the inconsistency in the treatment of dependants of the injured breadwinner is unjustifiable under the action of dependency and should not be tolerated in the post-constitutional dispensation, as it would be in the public interest to pursue a more comprehensive approach to such dependants.

3.4.1.3 Customary law

In the four countries being studied, the dependants' action for loss of support has traditionally only been acknowledged to have its foundation in legislation.[671] In the true sense, the remedy has its foundation beyond statutory law, including customary and delictual law. The dependants must prove that the death of their deceased breadwinner was negligently and wrongfully caused.[672] In this sense, the remedy has a purely

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665 *Ibid*.
666 Neethling & Potgieter *Law of delict* (2015) 285.
667 Burchell *Delict* (1993) 236.
668 See Apportionment of Damages Act 32 of 1969 – Botswana.
669 See chapter 2 of this thesis, par 2.6.5.3 - the arguments outlined there dealing with Apportionment of Damages legislation apply here as well.
670 See chapter 2 of this thesis, par 2.5.3.4 - the arguments outlined there dealing with Apportionment of Damages legislation apply here as well.
671 Queensland Law Reform Commission: Damages in an action for Wrongful Death (Issues Paper WP no 56 June 2002); Neethling & Potgieter *Law of delict* (2015) 285.
672 *Ibid*

delictual point of departure.[673] Although customary law generally draws no clear distinctions between the law of delict on the one hand and crimes on the other,[674] the duty to support is a well-established principle under customary law.[675] The dependency action is recognised by customary law[676] and is known as *go tsoša/tsosa hlogo* in the Sepedi/Sotho/Setswana languages. The question is whether, although there is such an action under customary law, it is legally enforceable? The death of a breadwinner who had a duty to support the dependants undoubtedly causes loss to such dependants, irrespective of whether it is under customary law or civil law. In all fairness, the dependants, under customary law, should be able to recover such loss from a party who has unlawfully and negligently caused the death of their breadwinner by any act of negligence or other wrongful conduct. This is the rationale for the dependants' action, even under customary law. There are no reasons why such an action, which accords with customs, would not be enforceable. The dependants' action to claim for loss of support against the person responsible for their breadwinner's death is not contrary to public policy or opposed to the principles of natural justice. The dependency action under customary law does not even differ significantly[677] from the dependency action under civil law. Accordingly, it is legally competent to equate it to the present remedy applicable under civil law. When one observes the aim of the customary law dependant claim for loss of support due to the unlawful and negligent killing of the breadwinner, it is also to place the dependants under customary law in the same

673 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equity Intervening)* 1999 4 SA 1319 (SCA) par [6].

674 Olivier 2004 *LAWSA* paras 212-217.

675 Bennett *Customary law* (2004) ch 8; Mqeke & Church "Law of Persons & Family" in *LAWSA: Indigenous law* (2003) 106-107; Dlamini "Family Law" in Bekker *et al* (eds) *Introduction to legal pluralism in South Africa: Customary law* (2002) ch 3; Palmer *Law of delict* (1970) 7 16 19 112 113 212 213.

676 *Ibid*.

677 The principles of the customary law dependant action are the same as those under civil law. The customary law principles or requirements do not cause any damage to the principles of the civil law dependency action.

financial position they would have been if their breadwinner had not been killed.[678] In this sense, the customary law remedy of *go tsoša hlogo/go tsosa hlogo* has a purely delictual point of departure, namely damages in the case of wrongful conduct.[679]

The aborigines of Australia seem to have the same claim where their breadwinner was wrongfully and unlawfully killed. The Recognition of Aboriginal Customary Laws report was released by the Australian Law Reform Commission (ALRC) in June 1986, after an intensive, nine-year inquiry.[680] The report examined the interaction between two legal systems – one based in British law "received" through colonisation, and the other in the customary laws of the Aboriginal peoples of Australia.[681] The common law, largely through the judgments of the High Court, has furthered the recognition of customary law in Australia. The High Court in *Wik Peoples v Queensland* (1996) and *Yanner v Eaton* (1999) further developed the principles of native title in relation to the common law and the Native Title Act 1993 (Cth). At the Federal Centenary Convention, held in April 1997, participants resolved, by clear majority, that the Australian Constitution should recognise the particular rights of indigenous peoples and give appropriate recognition to their customary law.[682] It was resolved that indigenous customary law should be recognised and considered within the rule of law. At the Australian Reconciliation Convention in May 1997, there was strong support among participants for the recognition and application of Aboriginal and Torres Strait Islander customary law and traditions within Australia's written statutes and common law, as

678 Palmer *Law of delict* (1970) 112-113.
679 *Ibid*.
680 Godden https://theconversation.com/from-little-things-the-role-of-the-aboriginal-customary-law-report-in-mabo-60193 (accessed on 13 July 2017).
681 *Ibid.*
682 See Australian Law Reform Commission: Aboriginal Customary Laws https://alrc.gov.au/inquiries/aboriginal-customary-laws (accessed on 25 September 2017).

well as in court procedures.[683] Although the comprehensive recognition of indigenous law remains controversial,[684] the ALRC report made recommendations to the recognition of traditional Aboriginal marriages for accident compensation, including workers' compensation, compensation on death, criminal injuries compensation, and repatriation benefits.[685]

3.4.2 Objectives of the delictual claim for loss of support

The objective of the dependency action is the same in South Africa,[686] Botswana,[687] Lesotho[688] and Australia.[689] This is unsurprising, because in all four jurisdictions, the law on dependency action is greatly influenced by English law. In South African law, the aim of the claim for loss of support is to place the dependants of the deceased breadwinner who was wrongfully and negligently killed in as good a position with regard to support as they would have been if the deceased or injured breadwinner had not been killed or injured, whatever the case may be.[690] Where the death was not caused negligently and wrongfully,[691] the dependants of the deceased breadwinner have no claim against the person who caused the death.[692]

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683 *Ibid.*

684 Aboriginal Customary Law ALRC report 31 Published on 12 June 1986. Last modified on 23 March 2017 https://alrc.gov.au/inquiries/aboriginal-customary-laws (accessed on 13 July 2017).

685 *Ibid*.

686 Clark & Kerr 1999 *SALJ* 20-22; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equity Intervening)* 1999 4 SA 1319 (SCA) par [6].

687 *Archibald v Attorney-General* 1989 BLR 421 (HC).

688 Workmen's Compensation Act 13 of 1977; also see chapter 2 of this thesis, par 2.6.5.2 – the arguments outlined there, apply here as well.

689 Barnett & Harder *Remedies* (2014) 187.

690 *Mnguni v RAF* [2015] ZAPPHC 1074 par [7]; Clark & Kerr 1999 *SALJ* 20 23; *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TkA) 776; *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

691 E.g. self-defence, lawful medical procedure, etc.

692 *Maimela v Makhado Municipality* [2011] ZASCA 69 (unreported); Barnett& Harder *Remedies* (2014) 185.

The action is clearly for economic loss in so far as it relates to dependency in all four jurisdictions. The goal of the dependant action is to provide the dependants of the deceased with a sum of money, which will be sufficient to supply them with material benefits of the same standard and duration as they would have received out of the earnings of the deceased, had he not been killed by the wrongful and culpable act of the wrongdoer.[693] In order to successfully employ the dependency action remedy, the essential delictual requirements discussed hereunder must be met.

3.4.3 Requirements for the delictual claim for loss of support under the dependency action

The South African Supreme Court of Appeal has repeatedly dealt with the requirements for a claim for loss of support under the action of dependants.[694] A claim for loss of support under the action of dependants was only possible if instituted in accordance with the common law principles.[695] The dependants must prove all the basic requirements for delictual liability at common law, namely conduct, wrongfulness or unlawfulness, fault, causality and damage.[696] These common law elements are a prerequisite for a claim for loss of support by a dependant.

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693 *Brooks v Minister of Safety & Security* 2009 2 SA 94 (SCA) 97; *Victor v Constantia Ins Co Ltd* 1985 1 SA 118 (C) 119; *Union Government v Lee* 1927 AD 202 220-222; *Santam Bpk v Fondo* 1960 2 SA 467 (A) 471-472; *Santam Ins Ltd v Meredith* 1990 4 SA 265 (Tk) 267; *Santam v Henery* 1999 3 SA 421 (SCA) 425-426; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1324-1325; *Lambrakis v Santam Ltd* 2003 3 SA 1098 (W) 1113-1114; *Mankebe v AA Mutual Ins Association Ltd* 1986 2 SA 196 (D) 198-199; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376; *Groenewald v Snyders* 1966 3 SA 237 (A) 246; *Milns v Protea Ass Co Ltd* 1978 3 SA 1006 (C) 1010; *Kotwane v Unie Nasionaal Suid-Britse Versmpy Bpk* 1982 4 SA 458 (O) 463; *Witham v Minister of Home Affairs* 1989 1 SA 116 (Z) 131; *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; *Hulley v Cox* 1923 AD 234 244; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614.

694 Neethling & Potgieter *Law of delict* (2015) 293-4 296; Davel https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 17 September 2016).

695 *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Mankebe v AA Mutual Insurance Association Ltd* 1986 2 SA 196 (D) 198-199; *Sanlam Insurance Ltd v Meedith* 1990 4 SA 265 (TK) 267.

696 *RAF v Krawa* [2011] ZAECGHC 61; 2012 2 SA 346 (ECG) par 21.

In Australia, the provisions of Lord Campbell's Act lay down only two prerequisites for a wrongful death action to succeed: firstly, it must be shown that the death of the deceased was caused (causation)[697] by the defendant's wrongful act,[698] and secondly, it must be shown that the deceased, if he or she had not died, would have been able to bring an action against the defendant.[699] Botswana and Lesotho are mirroring the South African law. In addition to the common law delictual elements, the dependants must comply with the following most important requirements for the loss of support under the dependants' action:

3.4.3.1 Duty to support[700]

A claim for loss of support is based upon the maintenance obligation of the deceased breadwinner *in lieu* of a relationship of dependency.[701] Typical examples of such relationships of dependency would include parent and child, husband and wife, grandparents and grandchildren, and brothers and sisters.[702] The breadwinner must have been under an obligation to support the dependants. This duty must have been legally enforceable *inter partes,* which means a reciprocal duty of support.[703] This first requirement is qualified by the condition that the dependant must need support, and the breadwinner should have been capable of providing such support.[704]

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697 *Fitzgerald v Penn* (1954) 91 CLR 268 per Dixon CJ, Fullagar and Kitto JJ 277; *March v E & M H Stramare (Pty Ltd)* (1991) 171 CLR 506 per Mason CJ (with whom Toohey and Gaudron JJ agreed) 515; *March v E & M H Stramare (Pty Ltd)* (1991) 171 CLR 506 per Deane J 522.

698 *Supreme Court Act 1995* (Qld) s 17; *Woolworths Ltd v Crotty* (1942) 66 CLR 603 per Latham CJ 603, 619, 620; Supreme Court Act 1995 (Qld) s 17; Queensland Law Reform Commission: Damages in an action for Wrongful Death (Issues Paper WP no 56 June 2002) 4; Barnett & Harder *Remedies* (2014) 187.

699 Barnett & Harder *Remedies* (2014) 187.

700 See chapter 3 of this thesis, par 3.3.1 *supra.*

701 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015); Neethling & Potgieter *Law of delict* (2015) 299; Davel *Afhanklikes* (1987) 53; Potgieter, Steynberg & Floyd *Law of damages* (2012) 278 280.

702 *Ibid*.

703 *Groenewald v Swanepoel* 2002 6 SA 724 (E); *Pike v Minister of Defence* 1963 3 SA 127 (Ck).

704 *Constantia Versekeringsmaatskappy Bpk v Victor* 1986 1 SA 601 (A) 612-613; *Senior v National Employers General Insurance Co Ltd* 1989 2 SA 136 (W); *RAF v Kwara* 2012 2 SA 346 (ECG) 367-

3.4.3.2 Right to support

The second requirement is that the dependant must have had a right to such support, which is worthy of legal protection against third parties.[705] The existence of the right to support is determined in light of the *boni mores,* the delictual criterion of wrongfulness,[706] by enquiring whether, according to the *boni mores*, the dependants had a right to support worthy of protection against third parties.[707] In its original form, during the pre-constitutional era, the dependency action gave a claim to only the surviving spouse, parents and children of the deceased.[708] The requirements for the action of dependants to claim for loss of support were generally linked to a valid civil marriage, in accordance with the *boni mores* at that point in time.[709] However, over the years, the principles underpinning the dependant's action have been adapted and widened to afford relief to classes of persons not mentioned in the traditional Act[710] and authorities.[711] Currently, the scope for the recognition of a duty of support, premised on factors other than the traditional grounds, for example parenthood or marriage, has received considerable judicial attention, and requires further discussion.[712]

8; *Fosi v RAF* 2008 3 SA 560 (C); *Jacobs v RAF* 2010 3 SA 263 (SE) 265; *Seleka v RAF* 2016 4 SA 445 (GP).

705 Neethling & Potgieter *Law of delict* (2015) 294.

706 For general information and criticism on the new test of wrongfulness, see Neethling & Potgieter *Law of delict* (2015) 81-87; also see chapter 3 of this thesis, par 3.4.1.1.

707 *Santam Bpk v Henery* 1999 3 SA 421 (SCA) 430; *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1326; *Du Plessis v RAF* 2004 1 SA 359 (SCA) 370.

708 *Baker v Bolton* (1801)1 CAMP 493; 170 ER 1033; *Work Cover Queensland v Amaca Pty Ltd* [2010] HCA 34, (2010) 241 CLR 420 [38].

709 Pienaar https://www.law2.byu.edu/isfl/saltlakeconference/papers (acessed on 17 September 2015).

710 Lord Campbell's Act.

711 *Union Government v Lee* 1927 AD 202 222; *Amod v Multilateral Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) par 9.

712 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *Paixão v RAF* [2012] ZASCA 130; *Taljaard v RAF* [2014] ZAGPJHC 229; 2015 1 SA 609 (GJ).

3.5 Development of the delictual claim for loss of support for specific dependants

The dependency action for loss of support can only be claimed by an eligible person who, because of the death of the breadwinner, is deprived of the financial support that the deceased had actually been personally providing or required by a court order to provide at the time of his death.

A number of developments, especially in South Africa, were witnessed with the extension of the action for loss of support to unusual dependants. Presently, it is not only the surviving spouses in terms of the Marriage Act, or the deceased's biological children or surviving parents who can be considered for a dependency claim for loss of support, but any other individual who is eligible, provided that he or she can prove that the deceased gave him or her financial support during his/her lifetime. In the next section, different categories of eligible dependants who can institute an action for loss of support will be discussed.

3.5.1 Civil marriages

Under the common law[713] in South Africa, the duty to support was traditionally only acknowledged if it arose in a valid marriage or resulted from a blood relationship[714] or in terms of adoption.[715] Only surviving spouses from civil marriages were able to successfully claim for loss of support under the action of dependants. From early case law,[716] a so-called common law duty of support, which was rooted in a legal marriage

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713 Du Plessis *Introduction to law* (1999) 18-21.

714 Burchell *Delict* (1993) 235-237; *Young v Hutton* 1918 WLD 90; *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TK).

715 Children's Act 38 of 2005, chapter 15; *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (TK); *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T).

716 *Union Government v Warneke* 1911 AD 657; *Waterson v Mayberry* 1934 TPD 210; *Mokoena v Laub* 1943 WLD 63.

according to common law, was required. The courts refused to allow a dependant action in cases where such a marriage was absent.[717]

Valid marriages only included civil marriages entered into in terms of the Marriage Act,[718] which allows for the solemnisation of a civil or religious marriage between a man and a woman. Black South Africans could also enter into common law marriages governed by the Marriage Act.[719] In the case of the wrongful and negligent death of a spouse, in the instance where Blacks were married in terms of the Marriage Act, the surviving spouse and the dependants of the deceased had no problems instituting claims based on a recognised duty to support, irrespective of their racial and cultural background.

The situation in Botswana, Lesotho and Australia is similar to South Africa, in that heterosexual couples could also enter into common law marriages governed by the Marriage Act.[720] African Blacks in Botswana[721] and Lesotho[722] and Aboriginal people in Australia[723] could also enter into common law marriages governed by the Marriage Act. In the case of the wrongful and negligent death of a spouse, in the instance where Blacks were married in terms of the Marriage Act, the surviving spouse and the dependants of the deceased had no problems instituting claims based on a recognised duty to support, irrespective of their racial and cultural background. In Lesotho, marriage is a complex issue, as the African marriage has had to co-exist with civil or

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717 *Zulu v Minister of Justice* 1956 2 SA 128 (W); *Santam Bpk v Fondo* 1960 2 SA 467 (A); *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (N).

718 Act 25 of 1961, South Africa.

719 *Ibid*.

720 Marriage Act 18 of 2001, Botswana; Marriage Act 10 of 1974, Lesotho; Marriage Act, 1961 Australia.

721 Quansah https://www.pulapulapula.co.uk/ (accessed on 17 September 2016).

722 Dube https://www.nyulawglobal.org/globalex/lesotho.htm; https://www.jcl.sagepub.com/content (accessed on 17 September 2016)

723 Ginibi https://www.ro.uow.edu.au/cgi/viewcontent.cgi?article=1124&context=ltc (accessed on 8 August 2016).

Christian marriage imported to Southern Africa by settlers.[724] Botswana is of the same breath as Lesotho.[725] In Botswana and Lesotho, there is no legislation that specifically gives rise to a duty of support to a spouse in a customary marriage. Such spouses were granted the right to claim for loss of support through case law,[726] with reference to South African judicial decisions. South African case law and academic authorities still feature prominently in reported loss of support claims related to motor vehicle accidents in Botswana and Lesotho.[727]

Customary law marriages in Botswana are valid and recognised by the law, with full effect given to their consequences. They are potentially polygamous and in community of property between a husband and wife. The property is the joint property of the spouses. However, the property remains subject to the husband's control as head of the family.[728] Like Botswana, the position of *Sesotho* customary law marriages in the legal system of Lesotho has received full judicial recognition.[729] Lesotho's legal history shows that the *Sesotho* customary law marriage has always been treated in the same way by the legislature as civil rites marriages.[730] *Sesotho* customary law marriage is also recognised in terms of their Marriage Act.[731] This differs from the Marriage Act in South Africa and Australia. The South African and Australian Marriage Acts do not recognise customary marriages – only a civil marriage is acknowledged under the

724 Maqutu 1983 *CILSA* 374-382.
725 Quansah *Family law* (2006) 36; *Moisakamo v Moisakamo* 1981 2 BLR 126 (CA).
726 *Moletlanyi v Botswana Motor Vehicle Insurance Fund* 1997 4 BLR 1298; *Sekale v Minister of Health* 2006 1 BLR 438 (HC).
727 See *Manyeula v Botswana Motor Vehicle Insurance Fund* 1999 2 BLR 391 (HC); *Setumo v Motor Vehicle Insurance Fund* 2002 1 BLR 405 (HC); *Rebeetsweng v Botswana Motor Vehicle Insurance Fund* 1999 1 BLR 105; *Sebate v RAF* 2011 ZANWHC 77.
728 Quansah *Family law* (2006) 36; *Moisakamo v Moisakamo* 1981 2 BLR 126 (CA).
729 See Laws of Lerotholi, which was intended to constitute an authoritative source of Sesotho customary law. The aim of the Laws of Lerotholi was to restate customary legal rules and principles. It attempted to address every conceivable sphere of Basotho customary law and practices.
730 Letsika 2005 *BLJ* 25-29.
731 See s 42 of the Marriage Act 10 of 1974; *Makata v Makata* CIV/T/41/1981 (unreported).

Marriages Acts of South Africa and Australia. Today, legal marriages are not restricted to only civil marriages entered into according to the Marriage Act, but include any solemn marriage in accordance with the principles of a recognised and accepted faith,[732] and marriages entered into according to recognised customary law principles.[733]

3.5.2 Customary marriages

Customary marriages are those marriages concluded in accordance with customary law, which is, for purposes of South African customary law, defined in the Recognition of Customary Marriages Act[734] as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".[735] Prior to the year 2000, customary marriages enjoyed only limited recognition in South Africa, as polygamy and payment of *lobola,* which are the essential elements of customary marriages, were regarded as *contra bonos mores*.[736] Since 2000, customary marriages have enjoyed full recognition under the Recognition of Customary Marriages Act. This is in line with the provision in the Constitution[737] for "marriages concluded under any tradition, or a system of religious, personal or family law". Consequently, customary marriages are now valid and, in all respects, equal in status to civil marriages.[738] Therefore, the status of a customary marriage in terms of

732 O'Sullivan 2004 *ESR Review* 10-13; Clark & Kerr 1999 *SALJ* 20 24; Freedman 1998 *THRHR* 532-533.
733 Recognition of Customary Marriages Act 120 of 1998.
734 Act 120 of 1998.
735 s 1 of Act 120 of 1998.
736 Bennet *Customary law* (2004) 239-240; *Nkabula v Linda* 1951 1 SA 377 (A); Maithufi 2015 *THRHR* 307.
737 s 9(3) of the Constitution.
738 Marriage in terms of Marriage Act 25 of 1961.

the Recognition of Customary Marriages Act is equal to that of a civil marriage in terms of the Marriage Act.[739]

Although the comprehensive recognition of customary marriages only came into operation on 15 November 2000, and the Recognition of Customary Marriages Act does not expressly refer to the duty of support, this duty has already been recognised and enforced.[740] The surviving customary spouses were already being accommodated by way of legislative intervention as early as 1963[741] in relation to wrongful and negligent death actions. The main objective of the enactment was to grant the widow of a customary marriage the right to claim damages for loss of support from any person who unlawfully causes the death of her husband or is legally liable in respect thereof.[742] At the time of the enactment, a customary marriage was not regarded by South African law as bringing about a legal duty of maintenance or support *inter partes*.[743] This was because South African law did not recognise it as a valid marriage, and the claim for loss of support by a widow was held to disclose no cause of action.[744] Section 31 of the Black Laws Amendment Act 76 of 1963 specifically provides for the institution of a claim for loss of support by a surviving customary spouse if all of the requirements in terms of the action of dependants were met. As late as 2003, in *RAF v Mongalo,*[745] it was confirmed that the Black Laws Amendment Act 76 of 1963, which originated from a period when legal measures were racially based, still provides a relevant tool to effect

739 Recognition of Customary Marriages Act 120 of 1998; Maithufi & Moloi 2002 *TSAR* 599-561; Pienaar https://www.law2.byu.edu/isfl/saltlakeconference/papers (accessed on 17 September 2015).
740 Boezaart *Child law* (2017) par 9.4.
741 s 31 of the Black Laws Amendment Act 76 of 1963.
742 Maithufi & Bekker 2009 *OBITER* 164; Bekker *Seymour's customary law* (1989) 379; also see *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W).
743 *Mokoena v Laub* 1943 WLD 63.
744 See *Zulu v Minister of Justice* 1952 2 SA 128 (N); *Santam v Fondo* 1960 2 SA 467 (A).
745 2003 1 All SA 72 (SCA).

claims by customary widows for customary marriages that were entered into prior to 2000, even though the action arose after the year 2000.

In Australia, customary law has not been recognised as part of the canon of Australian law. However, since the late twentieth century, the Australian Law Reform Commission in 1986 and the Law Reform Commission of Western Australia in 2005 have written extensive reports investigating the desirability of recognising the role of customary law in legal situations involving Aboriginal Australians. In the Northern Territory, some statutes and courts make explicit reference to customary law, where such is useful in identifying relationships or social expectations.[746] Nonetheless, marriage and the duty to support was a central feature of traditional Aboriginal societies.[747] Therefore, the Aboriginal dependants would have a claim for loss of support if their breadwinner was unlawfully and wrongfully killed.[748]

3.5.3 Muslim marriage

A Muslim marriage is a marriage concluded in terms of Islamic religious law or rites. Muslim marriages are not recognised as having the same legal status as civil marriages in terms of the Marriage Act 25 of 1961, mainly because they are polygamous unions, and on the grounds of public policy, such unions are contrary to the accepted norms that are morally binding on our society. These are the same reasons advanced for refusing to recognise customary marriages. The status of Muslim marriages in South Africa has, since 1990, been the subject of ongoing

746 Community Welfare Act 1983 (NT), s 69; *Walker v New South Wales* [1994] HCA 64; *Coe v Commonwealth* [1993] HCA 42.

747 Bell & Ditton *The old and the new law* (1980) 91-92.

748 The arguments outlined in chapter 2 of this research study, par 2.6.2, dealing with the background to Aboriginal customary law, apply here as well.

investigation and discussion[749] by the South African Law Reform Commission.[750] The Muslim Marriages Bill was published in 2000,[751] but is still subject to intense debate in the Muslim community, and has not yet been passed, which means that our law does not yet formally recognise Muslim marriages.[752] As such, spouses in these types of unions do not fully enjoy the rights afforded to other spouses married in accordance with South African civil or customary law.[753]

However, there has been some progress in this field, insofar as our government and the courts have been taking steps towards the recognition thereof. The government has enacted the Muslim Marriages Bill,[754] even though it has not seen the light of day yet.[755] The South African courts have also furthered the recognition of Muslim marriages in their decisions. In the 1983, Natal Division case of *Moola and Others v Aulsebrook NO and Others,*[756] it was decided that Muslim marriages are putative marriages, namely marriages that are not automatically invalid, which meant that the children born from such marriages were no longer seen as being illegitimate. This has obviously changed with the advent of the Children's Act 38 of 2005, in terms whereof the concept of "illegitimate children" has been done away with.[757]

749 Harrington-Johnson 2015 *De Rebus* 93.
750 South African Law Reform Commission Project 59 Islamic Marriages and Related Matters Report July 2003.
751 Muslim Marriages Bill 2010 https://www.justice.gov.za/legislation/bills/ (accessed on 13 October 2016).
752 Pienaar https://www.law2.byu.edu/isfl/saltlakeconference/papers (accessed on 17 September 2015).
753 Harrington-Johnson 2015 *De Rebus* 95.
754 The government has enacted the Muslim Marriages Bill Government Gazette No 33946 Notice 37 of 2011 20 January 2011, even though to date it has not seen the light of day.
755 Van der Merwe 2016 *Daily Maverick* 6.
756 1983 1 SA 687 (N).
757 Harrington-Johnson 2015 *De Rebus* 93.

In 1997, the Constitutional Court in *Ryland v Edros*[758] decided that, as a Muslim marriage is a contract from which certain proprietary obligations flow, this was reason enough to impose some of the consequences of a civil marriage on a Muslim marriage, chiefly the obligation of maintenance. In 1999, in *Amod v Multilateral Vehicle Accident Fund,*[759] the Supreme Court of Appeal confirmed that the widow's right had to be protected if there was a legal duty to support in terms of Muslim law, irrespective of whether the Muslim marriage was valid according to South African family law or not. By correctly applying the common law principles, the Supreme Court of Appeal simply extended the common law to include a claim for maintenance for Muslim widows who were partners in a *de facto* monogamous marriage. The consequence of this case is, however, limited, since it only provides for the recognition of the duty to support claims in relation to *de facto* monogamous Muslim marriages.[760]

In 2004, the Constitutional Court went one step further in *Daniels v Campbell NO and Others*[761] and decided that a Muslim spouse in a monogamous Muslim marriage had the right to inherit and to claim maintenance from their deceased spouse in terms of the Intestate Succession Act,[762] as well as the Maintenance of Surviving Spouses Act.[763] This naturally led to the 2005 decision in *Khan v Kahn,*[764] where the Transvaal Division held that partners in Muslim marriages also owe each other a duty of support, just as in civil marriages, and therefore have the right to claim maintenance from one another in terms of the Maintenance Act.[765] Finally, in 2009, the Constitutional Court,

758 1997 2 SA 690 (CC).
759 1999 4 SA 119 (SCA).
760 Harrington-Johnson 2015 *De Rebus* 93.
761 [2004] ZACC 14; 2004 5 SA 331 (CC).
762 Act 81 of 1987.
763 Act 27 of 1990.
764 2005 2 SA 272 (T).
765 Act 99 of 1998.

in the case of *Hassam v Jacobs NO and Others,*[766] held that the right to claim maintenance from a deceased spouse, as decided in the *Daniels* case, was also to be extended to polygamous Muslim marriages.

The religious polygamous Muslim marriage was upheld in the succession-inheritance case of *Hassim v Jacobs*[767] in South Africa. In this case, the applicant was married to the deceased in accordance with Muslim rites. The deceased married a second wife, Mrs Mariam Hassam, also according to Muslim rites, without the applicant's knowledge or consent. The deceased died intestate in August 2001. His death certificate shows that he was "never married". The first respondent refused to regard the applicant as a spouse and wife to the deceased, or to recognise her claim against the estate of the deceased, because the applicant's marriage was polygamous, and she could therefore not be treated as a survivor or a spouse. The applicant would be entitled to the relief if her marriage had been a monogamous one. The court stated that denying the applicant a claim would amount to unfair discrimination, and effectively ruled that all the wives of the deceased should be treated equally, and their rights be recognised for purposes of inheritance where the husband has not left a will. This judgment extends the right to inherit from a deceased husband's estate to women in Muslim marriages, where there is more than one wife. In 2010, the court in *Verheem v RAF*[768] recognised a claim for loss of support arising out of a marriage in terms of Islamic law, where the claimant was legally dependant on the deceased for maintenance.

766 [2009] ZACC 19; 2009 11 BCLR 1148 (CC); 2009 5 SA 572 (CC).
767 *Ibid*.
768 2012 2 SA 409 (GNP).

Notwithstanding these legal developments, the comprehensive recognition of a Muslim marriage has not been legally acknowledged in South Africa yet.[769] Muslim marriages experienced a lengthy piece-meal development in case law, in which certain aspects of these relationships were recognised over a period of time.[770] The traditional polygynous nature of Muslim marriages is the main reason why such marriages are still not recognised. The reality is that, in principle, there is no difference between a polygynous marriage according to customary law and a polygynous Muslim marriage. Since polygynous customary marriages are recognised in South African law, the dependants in *de facto* polygynous Muslim marriages could argue that they should also receive protection, in order to succeed in their claims for loss of support.[771] The correct approach is not to ask whether the Muslim marriage was polygynous and unlawful according to common law, but rather whether or not the deceased was under a legal duty, according to Muslim law, to support the dependants during the subsistence of the polygynous Muslim marriage. If so, it needs to be determined whether the right of the widows was one that deserved protection for purposes of the dependant's claim. The duty to support in *de facto* polygynous Muslim marriages also deserves recognition and protection by law, as is the case with the duty to support in polygynous customary law marriages. This protection could be afforded either by the judiciary extending the application of the common law principles even further to include polygynous Muslim marriages, or by the legislature providing the required protection through a statute, as was done in the case of customary law.

769 Pienaar https://www.law2.byu.edu/isfl/saltlakeconference/papers (accessed on 17 September 2015).

770 Maithufi 2000 *De Jure* 383-284; Bonthuys 2002 *SALJ* 748 752; *Ryland v Edros* 1997 2 SA 690 (CC).

771 Neethling & Potgieter *Law of delict* (2015) 294.

The preferred way to protect dependants in Muslim marriages is for the legislature to take the lead through the transformation of the Muslim Marriages Bill into an Act.[772] In this way, Muslim dependants would automatically have a right to claim for loss of support, without first having to exercise the recourse of lengthy and expensive High Court litigations, which are not always successful. In the absence of full legal recognition of Muslim marriages and legislation that clearly spells out the legal consequences, Muslim dependants will remain vulnerable.[773] The Act is an essential ingredient for the confirmation and endorsement of the protection of Muslim dependants. However, legal expertise should be sought in order to rectify the unfair elements of the Shariah law prior to it being passed as an official law, especially with regard to its effects on women.[774] The non-recognition of *de facto* polygynous Muslim marriages categorically ignores the constitutional provisions on equality, human dignity and the right to religious freedom.[775]

The legal position of *de facto* polygynous Muslim marriages in Botswana, Lesotho and Australia is similar to that in South Africa. Religious polygamous marriages do not seem to be legally recognised in Botswana. While the Constitution of Botswana provides a degree of protection in terms of religion,[776] Justice Moses Chinhengo is reported to have instructed the Attorney General to bring an end to religious

772 De Waal, Paleker & Bradfield *Law of succession & trust* (2014) 189.

773 Morata https://www.insurancegateway.co.za/17.8.131.Irn=2109#.WWiEmWdDGUk (accessed on 14 July 2017).

774 E.g., “a man can beat his wife for insubordination or unilaterally divorce his wife; but a wife needs her husband's consent to divorce” - see Quran 4:34; “a female heir inherits half of what a male heir inherits” - see Mathematics in Quran.

775 ss 9 & 15(3)(a) of the Constitution.

776 s 3 of the Constitution declares that every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, to enjoy these rights and freedoms regardless of his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others, and for the public interest to the rights and freedoms set out under the Constitution; Quansah 2008 *AHRLJ* 486-504.

polygamous practices in Botswana.[777] In a case that involved religious polygamous marriages, *Mabuaaeme v Mokgweetsi,*[778] the appellant contracted a civil marriage with Joseph Mabuaaeme. While they were still so married, Joseph married the respondent, as was permitted by the church to which he and the appellant belonged. He did so without the appellant's knowledge or consent. He subsequently left the appellant and began cohabiting with the respondent. The appellant claimed damages from the respondent for wrecking her marriage. The court granted the applicant damages and annulled the second marriage of a member of the church, because religious polygamous marriages are not legal in Botswana.

Another case was reported in *The Voice*, a newspaper report,[779] wherein the plans of an ex-mayor, Christopher Ramolemane, to marry a second wife were stopped by the Lobatse High Court of Justice, following an urgent application by his wife, Bontle Ramolemane. It is reported that the ex-mayor had paid lobola for his church mate, Mary Tebogo Kojane, and was in the process of solemnising the polygamous religious marriage when the court intervened. The High Court ruled against the intended union and contended that it would have been an illegal matrimony, as the laws of Botswana prohibit polygamous religious marriages. The court interdicted the two lovebirds and stopped them from proceeding with the intended marriage. The research yielded no reported case regarding *de facto* polygamous religious marriages in Lesotho.

Although it is claimed that the mono-cultural nature of Australian law might be presenting religious difficulties for Muslims in Australia regarding the recognition of their personal law in matters including wills, inheritance and divorce, Jamila Hussain

777 Kgalemang https://www.mmegi.bw/index.php?sid=1&aid=261&dir (accessed on 14 July 2017).
778 2011 1 BLR 365 HC.
779 Baaitse https://thevoicebw.com/no-marriage/ (accessed on 14 July 2017).

rightly notes that there are very few areas where Muslim personal law conflicts directly with the Australian secular legal system.[780] In Australia, Muslims apply Shariah[781] principles in their personal relationships as part of their religious observance.[782] For example, in *Wold v Kleppir*[783] and *Oltman v Harper*,[784] the issue of the validity of the marriage of Muslim couples according to Shariah law was raised. In both cases, the court found the marriages to be valid under Australian law.[785] Indeed, Islamic law formalities in marriage were accepted for the purpose of the Marriage Act 1961 (Cth), insofar as they were consistent with Australian family law. The realisation that the Australian legal system can accommodate certain Shariah practices by Muslims could mean that Muslim dependants will have a claim for loss of support under the dependency action.[786]

3.5.4 Civil unions

In the pre-democratic era in South Africa, not only were individual gays and lesbians denied any protection, but their relationships were neither acknowledged nor respected.[787] South Africa became the first country ever to include sexual orientation

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780 Jamila Hussain *Islam: Its law and society* (2011) 256.

781 Also spelled Shari'a or Shariah*:* As a legal system, Sharia law is exceptionally broad. Its other legal codes regulate public behaviour, Sharia law regulates public behaviour, private behaviour, and even private beliefs. Of all legal systems in the world today, Sharia law is the most intrusive and restrictive, especially against women https://www.billionbibles.org/sharia/sharia-law.html (accessed on 14 July 2017). Due to its discriminatory nature against women and old primitive approach to legal and private issues (e.g. Theft is punishable by amputation of the hands (Quran 5:38),criticizing or denying any part of the Quran is punishable by death; a woman or girl who has been raped cannot testify in court against her rapist(s); testimonies of 4 male witnesses are required to prove rape of a female (Quran 24:13), it is, in many ways, inconsistent with human rights, which are the cornerstone of the Constitutions of all four countries being studied, and cannot be altered. The present theoretical contents of Shariah principles are oppressive and contrary to the laws of these four countries and therefore affect the potential legality of the marriage. If passed as a law, at its present status, it would perpetuate the oppression of Muslim females.

782 Esmaeili 2015 *FLinLawJI* 75; *Omari and Omari v Omari* [2012] ACTSC 33.

783 [2009] Famm CA 178.

784 [2009] Famm CA 1360.

785 See generally Richards & Esmaeili (2012) 26 *AJFL* 142.

786 This is only an observation, as the research could not find any Australian authority on this issue.

787 Jivan 2007 *Law, democracy & development* 19 44.

in its anti-discriminatory constitutional provisions.[788] These provisions have led to the legal rights of lesbians and gay men becoming the subject of considerable judicial and legislative activity. Same-sex partners were not considered as "dependants" for the purposes of compensatory rewards. The Medical Schemes Act defined a "dependant" as a "spouse"[789] while the Military Pensions Act referred to "wife" (or "child"),[790] and the Compensation for Occupational Injuries and Diseases Act included as a dependant a "widow/widower married to an employee by civil law, indigenous law or customary law, as well as any person with whom the employee was, in the opinion of the commissioner, at the time of the accident, living as *husband and wife* but not including gays and lesbians".[791]

Several judicial decisions dealing with legal challenges against allegedly discriminatory laws have clarified the legal position of lesbians and gay men.[792] In *Farr v Mutual and Federal Insurance Company Ltd,*[793] the court held that two gay men living together in a domestic relationship constituted a family. In *Dawood v Minister of Home Affairs,*[794] the Constitutional Court recognised that the family is a social institution of vital importance, and that families come in many shapes and sizes. The court ruled in this case that the right to dignity encompasses and protects the rights of individuals to enter into and sustain permanent intimate relationships. In other words, the right to family life is protected by the right to dignity.

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788 s 9(3) of the Constitution.
789 Act 72 of 1967, s 1(a).
790 Act 84 of 1976, s 1(1).
791 Act 130 of 1993, s 1(c).
792 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *Harksen v Lane* 1998 1 SA 300 (CC); *Prinsloo v Van der Linde & another* 1997 3 SA 1012 (CC); *President of the Republic of South Africa & another v Hugo* 1997 4 SA 1 (CC); *Langemaat v Minister of Safety and Security* 1998 3 SA 312 (T).
793 2000 3 SA 684 (C).
794 2000 3 SA 936 (CC).

In *Du Plessis v RAF,*[795] the Supreme Court of Appeal extended the common law dependant's action to the surviving partner in a same-sex permanent life partnership, similar to a marriage, in circumstances where the deceased had contractually undertaken a duty of support towards the survivor. In this case, the appellant and the deceased had lived together continuously for approximately eleven years, until the deceased was killed in a motor vehicle accident. Their relationship was in all respects similar to a marriage. Some five years into the relationship, the appellant was medically boarded. From this time on, the deceased contributed towards the appellant's financial support and undertook to continue doing so for as long as the appellant needed it. After the deceased's death, which was largely attributable to the negligence of the driver of a vehicle insured by the Road Accident Fund, the appellant instituted a dependant's claim for loss of support against the Fund. He also sought to recover the deceased's burial expenses. By consent, the matter proceeded to trial only on the issue of whether the appellant's right to such compensation was recognised by law. The court *a quo*[796] dismissed the appellant's claim for support on the grounds that a stable, long-standing relationship of cohabitation between same-sex partners does not give rise to the legally enforceable duty of support necessary to find such a claim. To hold otherwise, the court held[797] that it would create legal uncertainty and open the floodgates of litigation. The Supreme Court of Appeal, however, took a different view. In a unanimous judgment delivered by Cloete JA, the court found that the appellant was entitled to compensation for the loss of the deceased's financial support. In coming to this conclusion, the court held that to extend the action in this case "would be an incremental step to ensure that the common law accords with the dynamic and evolving

795 2003 11 BCLR 1220 (SCA), 2004 1 SA 359 (SCA).
796 *Du Plessis v Motorvoertuigongelukkefonds* 2002 4 SA 596 (T).
797 *Idem* 598.

fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements".[798]

This pronouncement denotes a significant step in the direction of recognising and defending persons involved in same-sex partnerships, in that it advanced the common law dependant's action to accord with the realities of modern family life and social conditions. The outcomes of the above decisions have addressed some of the concerns that lie at the heart of the equality debate surrounding the rights of same-sex partners. However, the form of full equality was only achieved through the passing of the Civil Union Act.[799] As of 30 November 2006, same-sex partnerships enjoy statutory recognition in South Africa under the Civil Union Act.[800] The Civil Union Act, allows for the solemnisation of a civil or religious marriage, or a civil partnership between two people, regardless of gender. The legal consequences of a marriage under the Civil Union Act are the same as those of a marriage under the Marriage Act. This Act has conferred a new distinct status upon gays and lesbians in cohabiting relationships. Today, 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, just as common law spouses can claim from one another's estates.

In Botswana and Lesotho,[801] sexual behaviour in society is generally predicated on heterosexuality, unlike in South Africa and Australia. As a result, any exhibition of homosexual tendencies is regarded as deviant behaviour and an affront to morals and

798 See *Du Plessis v RAF* 2003 1 BCLR 1220 (SCA), 2004 1 SA 359 (SCA) paras [34]-[41].
799 Act 17 of 2006.
800 *Ibid*.
801 The arguments outlined in chapter 2 of this research study, par 2.5.5.5, dealing with the legal position of Lesbian, bisexual, gay and transgender (LBGT) persons, apply here as well.

decency.[802] The law performs the function of prohibition through the criminalisation of homosexual activity, and attempts to organise relationships in the public and private sphere.[803] This implies that a surviving homosexual partner cannot institute a claim for loss of support in the circumstances where his/her partner was wrongfully and negligently killed, as these relationships do not legally "exist" in Botswana.[804] The Botswana Constitution does not refer to a right or protection from discrimination on the ground of sexual orientation.[805]

Until recently, in Australia, as in South Africa, civil unions and domestic partnerships were available to same-sex couples in most states and territories, but not the institution of marriage. As mentioned in chapter 2 of this thesis,[806] same-sex couples were prevented from marrying by the 2004 amendments to the federal Marriage Act of 1961.[807] In 1961, though the concept of modern marriage was a heterosexual union where the parties pledged monogamy and permanency in their relationship,[808] the Marriage Act as originally enacted that year did not contain a definition of marriage.[809]

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802 Tafa "Right to sexual orientation: The line of the Botswana government" in *Ditshwanelo* Conference on Human Rights and Democracy, 17-19 November 1998, Gaborone*, Ditshwanelo*, 2000 127 (published contribution at a conference); Quansah 2004 4 *AHRLJ* 201; Baseline document on Lesotho, COC Netherlands, 2013, p. 7; BTI 2014, Lesotho Country Report https://www.bti-project.de/uploads/tx_itao_download/BTI_2014_Lesotho.pdf (accessed on 8 August 2016).

803 Penal Code Act 1998 ss 21 & 33; *Utjiwa Kanane v the State* Criminal Appeal No 9 of 2003 (unreported) Botswana; Criminal Procedure and Evidence Act No. 67 of 1939, First schedule, pt. II (1 January 1939), Lesotho.

804 Olivier "The reality of being gay in Botswana" in *Ditshwanelo* 135; Motebo Ntabe https://www.lib.ohchr.org/HRBodies/UPR/Documents/Session8/LS/MSG_UPR_LSO_S08_2010_MatrixSupportGroup.pdf (accessed on 8 August 2016); see also LGBT Situation in Lesotho, Commonwealth Human Rights Initiative (June 29, 2011) https://www.chriafrica.blogspot.com/2011/06/lgbt-situation-in-lesotho.html (accessed on 8 August 2016).

805 Quansah 2004 *AHRLJ* 201 209; Sander 1984 *CILJSA* 350; Criminal Procedure and Evidence Act 67 of 1939, First schedule, pt. II (1 January 1939), Lesotho.

806 See chapter 2 of this thesis, par 2.6.3.5 above.

807 Marriage Amendment Act, 2004.

808 Rundle 2011 *AJFL* 126.

809 Neilsen https://www.aph.gov.au/About_Parliament/Parliamentary...Library/.../SameSexMarriage (accessed on 14 July 2017).

The 2004 amendments to the Marriage Act of 1961 inserted the definition of a marriage. Presently, marriage is defined as follows:

> "Marriage, according to law in Australia, is the union of a man and woman to the exclusion of all others, voluntarily entered into for life."[810]

These words expressly exclude any union where the parties are not a male and a female, for example same-sex unions. Same-sex marriage-related bills have been introduced in the Parliament of Australia, none of which have passed and become law. In December 2013, the Australian Capital Territory (ACT) passed legislation which briefly legalised same-sex unions within the territory,[811] prompting the Federal Government to launch a constitutional challenge in the High Court. The High Court struck down the Australian Capital Territory legislation on the basis that the law was inconsistent with federal legislation, which defines marriage as between a man and a woman.[812] A law legalising same-sex marriage was passed by Parliament on 7 December 2017 and received royal assent the following day (8 December 2017).[813] In this sense, Australia has progressed from its history of express prohibition of same-sex marriage by the Howard Government in 2004. The current position is that same-sex couples in Australia can enter into a marriage union.

3.5.5 Unmarried heterosexual partners

Common law does not recognise and never has recognised the rights of an unmarried heterosexual woman who merely lives with a man.[814] As it was briefly put by Lord Devlin: "A man and woman who live together outside marriage are not prosecuted

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810 See s 46(5)(1) of the Marriage Act, 1961.
811 Marriage Equality (Same sex) Act, 2013.
812 *The Commonwealth v Australian Capital Territory* [2013] HCA 55; Alastair [2005] *MelbULawRw* 17.
813 Yaxley http://www.abc.nt.au/news/2017-12-08/same-sex-marriage-legislation (accessed on the 12 December 2017).
814 Otlhogile 1994 *BJAS* 2.

under the law, but they are not protected by it."[815] They live outside the law. This union is not recognised, hence no legal obligation is implicit in it, and an express obligation will not be enforced by law.[816] Though Lord Devlin was writing about English law, the position is generally the same under Australian,[817] Botswana,[818] Lesotho and South African[819] common law. Hahlo stated the following:

> "…a man and woman who, for good reason or bad elect to live in concubine rather than marry, make a deliberate choice and cannot complain if the consequences of marriage do not attach to their union…"[820]

The social judgements of today on matters of unmarried heterosexual partners living together as husband and wife are different from those of common law.[821] In Australia, Botswana, Lesotho and South Africa, many couples live in this type of arrangement, and openly so. Cohabitation has become commonplace, accepted, or at least tolerated by society, and to some extent even recognised by our courts, by extending the law applicable to married couples to unmarried heterosexual partners.[822] The introduction and enactment of the Workmen's Compensation Act[823] has certainly granted surviving unmarried heterosexual partners a right to claim for loss of support from their deceased partner's estate. It conferred certain rights on the unmarried heterosexual partner. In its definition of a dependant for the purposes of claiming compensation for the death of a workman, the unmarried heterosexual partner is explicitly included. In the English case of *Dyson Holdings v Fox,*[824] protection was given to a woman who had lived with

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815 Lord Devlin *Enforcement of morals* (1965) 77.
816 *Ibid*.
817 *Andrews v Parker* 1973 Qd R93 104.
818 Otlhogile 1994 *BJAS* 3.
819 Van der Vyver "Human rights aspects of the dual system applying to Blacks in South Africa" in Takirambudde (ed) *The individual under African law* (1982) 130.
820 Hahlo 1972 *SALJ* 321.
821 Otlhogile 1994 *BJAS* 1 3; *Andrew v Parker* (1973) Qd R93 104.
822 Otlhogile 1994 *BJAS* 2; *Dyson Holdings v Fox* 1975 3 All E R 1030; *Andrews v Parker* 1973 Qd R93 104; *Thompson v Model Steam Laundry* 1926 TPD 674; *Paixão v RAF* [2012] ZASCA 130.
823 s 1 of the COID Act 130 of 1993. See s 1(xv)(c): "…a person with whom the employee was at the time of the employee's death living as husband and wife".
824 1975 3 All ER 1030.

a man for 40 years, without being formally married. It would therefore seem that in England, the action is available where the relationship was long and durable.

In a 1926 South African case, *Thompson v Model Steam Laundry*,[825] Mr and Mrs Thompson were married with two children. On their divorce, Mrs Thompson was awarded custody of the daughter, and custody of the son was awarded to Mr Thompson. Mr Thompson kept the son in the house occupied by the mother and fed him there. He also had meals there and occupied the house during the daytime but took no part in the management of the house. Mrs Thompson performed all the functions of a manageress. For all outward appearances, (Mr Thompson) comported himself in the same manner as an ordinary married man who lived with his wife and children in this house. Mrs Thompson took laundry to the respondents and pledged the defendant's credit. In an action to claim payment for the laundry services, Mr Thompson pleaded that Mrs Thompson had no authority – actual or implied – to bind his credit. Mr Schreiner for the respondent argued that where a man employed his or any woman with whom he cohabitated to manage the joint household, there is a rebuttable presumption of implied agency. Though the court rejected this argument, it nonetheless held Mr Thompson liable for the payment of laundry services. It was held that since he kept his son in the house and Mrs Thompson maintained the house, as well as the children to whom he owed a duty of support, he was liable for all expenses (household necessaries) incurred in this regard.

Recently, the court in South Africa adjudicated on a matter concerning the dependant action instituted by an unmarried heterosexual partner and her daughter. In *Paixiăo v*

825 1926 TPD 674.

RAF,[826] the plaintiff, Ms Paixião, and her daughter sued the Road Accident Fund for loss of maintenance and support as a result of the wrongful and negligent death of Mr Gomes. They contended that Mr Gomes had contractually undertaken to maintain and support them, was legally obliged to do so, and would have done so for the remainder of Ms Paixião's life and until her daughter became self-supporting, if not for his ultimately death. Ms Paixião and Mr Gomes had been living together and had planned to marry. Mr Gomes supported Ms Paixião and her children financially, had formed a strong bond with the children, and they had a joint will wherein they referred to "our daughters. For her part, Ms Paixião nursed and supported Mr Gomes when he was unable to work. Their relatives, community and friends accepted them as a family unit. The Supreme Court of Appeal recognised that a dependant must have a right which is worthy of the law's protection in order to claim support. Whether this is the case is determined by the legal convictions of the community, which is in turn determined by, among other things, society's history, its ideas of morals and justice, its perception of where the loss should fall, and the convenience of administering the rule.[827] The court found that as the legal convictions of the community is the decisive factor in the determination; the dependants' action always has the flexibility to adapt to social changes and modern conditions.[828] It held that there is no reason to restrict the action to traditional family and blood relationships when social change does not require it.[829] The Supreme Court of Appeal recognised that the nuclear family has, for a long time, not been the norm in South Africa and millions of South Africans live together without

826 [2012] ZASCA 130.
827 See *Paixão v RAF* [2012] ZASCA 130 paras [23]-[24].
828 See *Paixão v RAF* [2012] ZASCA 130 par [30].
829 See *Paixão v RAF* [2012] ZASCA 130 par [14]; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) par [7].

entering into formal marriages. This is because of religious, legal, social, cultural and financial reasons.[830]

Although the cases discussed here are on South African law, illustrating that the institution of marriage has long been on a slippery slope, the position is generally the same in Australia,[831] Botswana,[832] and Lesotho.[833] What was once a holy estate enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will[834] and concubines or relationships outside marriage are a reality that we can no longer afford to ignore.

3.5.6 Blood relations: grandparents, parents and children (step-siblings)

Blood relation was also a source of the common law duty of support.[835] Nonetheless, in *M v Minister of Police,*[836] the court held that the duty of a parent to support his/her child arises out of and is now governed by statute,[837] and no longer by common law, and that constitutional damages may be claimed. A duty of support between family members is one of those areas in which the law gives expression to the moral views of society.[838] A child (even unborn[839] and an adult child) has the right to claim for support from both his parents.[840] Likewise, a parent has a right to support from his own child (also a minor).[841] Grandparents also have a right to institute a claim for support

830 See *Paixão v RAF* [2012] ZASCA 130 par [32].
831 *Andrews v Parker* 1973 Qd R93 104.
832 See Otlhogile 1994 *BJAS* 3.
833 In Lesotho, there was no case that dealt specifically with heterosexual partners.
834 *Fender v John-Mildway* 1938 A.C 34-5.
835 Mohapi 2016 *De Rebus* 28; Burchell *Delict* (1993) 236-237.
836 2013 5 SA 622 (GNP) 635.
837 s 28 of the Constitution; Children's Act 38 of 2005.
838 *Taljaard v RAF* [2014] ZAGPJHC 229; 2015 1 SA 609 (GJ).
839 *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297 301.
840 *Young v Hutton* 1918 WLD 90; *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk.); *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T); *Kramer v Port Elizabert Municipality* 1986 1 SA 441.
841 *Anthony v Cape Town Municipality* 1967 4 SA 443; *Manuel v African Guarantee Ltd* 1967 2 SA 417; *Constantia Versekeringsmaatskappy v Victor* 1986 1 SA 601 (A); *Moletlanye v BMVAF* 1997 BLR 1298; *Fosi v RAF* 2008 3 SA 560 (C); *Seleka v RAF* 2016 4 SA 445 (GP).

from grandchildren,[842] but only where their own children are dead or unable to provide support.[843] In addition, a brother (or sister) may claim support from brothers and sisters if his or her parents are unable to support him or her.[844] The duty of support with regard to collateral consanguinity does not, however, extend beyond brothers and sisters.[845] Since they are not related by blood, a stepparent and stepchild or persons related by affinity (such as brothers-in-law and sisters-in-law) have no mutual right to support vis-à-vis one another.[846]

Despite this clear common law rule, the issue to be decided by the court in *Heystek v Heystek*[847] was whether there is any obligation on a stepfather to maintain his stepchildren. In this case, the applicant was a widow with three minor children. She married the respondent in community of property in 1997. There were no children born of the marriage. The respondent initiated divorce action against the applicant, which the applicant defended. The applicant claimed for maintenance *pendent lite*. Although the applicant claimed maintenance for herself, it was clear that some of the items included in her claim related to her minor children, for example school fees. The court held that the inevitable concomitant of a marriage in community of property is the shared responsibility for the maintenance duty in respect of his or her spouse's children from a previous marriage.[848] The court also held that the right to parental care in section 28(1)(b) of the Constitution extends to stepparents,[849] meaning that the stepparent would be held liable for the maintenance of his stepchildren. In addition,

842 *Ford v Allen* 1925 TPD 57; *Motan v Joosub* 1930 AD 61 70.
843 *Barnes v Union & SWA Insurance Co Ltd* 1977 3 SA 502 (E) 510.
844 *Oosthuizen v Stanley* 1938 AD 322 331.
845 *Vaughan v SA National Trust and Assurance Co Ltd* 1954 3 SA 667 (C).
846 *Ibid.*
847 2002 2 SA 754 (T).
848 *Idem* 754A-C; also see Boezaart *Child law* (2017) par 2.4.3.4.
849 Boezaart *Child law* (2017) par 2.4.3.4.

that parental care includes the right to basic nutrition, shelter, basic health care and social services, and the right to basic education.[850]

According to Boezaart,[851] the nature of the universal community of property is that all debts and assets of both spouses fall into the joint estate, from which the obligations of one of the natural parents in respect of the support of his/her children from the previous marriage fall into and have to be paid from. Contrast to a marriage out of community of property where the maintenance is paid out of the natural parent's estate. Boezaart further states that this does not mean that different rules apply to a stepparent who is married in community of property. The common law rule remains the same[852] although, parenthetically and inescapably, stepparents provide a share of what would otherwise have been part of their community property to the maintenance of their stepchildren. The marriage in community of property does not in and of itself impose any obligation of support between the stepparent and stepchild. The base for the existence of this indirect stepparent support in cases of a stepparent who is married in community of property, is the source from which the maintenance has to be paid – the joint estate, which is the assets of both the natural parent and stepparent.[853] It is submitted that the *Heystek* case did not change the common law rule, although a stepparent who is married in community of property may attract a legal duty to maintain his/her stepchild.

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850 s 29(1)(a) of the Constitution.
851 *Child law* (2017) par 2.4.3.4.
852 The rule is that there is no obligation on a stepparent to provide maintenance for his or her stepchild even in cases where the stepparent is married in community of property to the natural parent. See Boezaart *Child law* (2017) par 2.4.3.4.
853 See Boezaart *Child law* (2017) par 2.4.3.4.

The common law rule that there is no obligation on a step-parent to provide maintenance for his or her step-child[854] stands in contrast to customary law, within an African context, where the true circle of family spreads so wide that it could include step-children[855] and a brother-in-law under certain circumstances. For instance, in a case of levirate marriage or *ukungenwa* in Zulu, the brother of a deceased man is obliged to marry his brother's widow, and the widow is obliged to marry her deceased husband's brother.[856] This institution of marriage obliges the oldest surviving brother of a man who dies childless to marry the widow of his childless deceased brother, with the firstborn child being treated as that of the deceased brother.[857] Although the child will be treated as the deceased's child, the surviving brother will be responsible for the child's maintenance, and the child will therefore qualify as a dependant in an action for loss of support against the wrongdoer who is responsible for the wrongful and unlawful death of the surviving brother. Levirate marriage was also practiced by the Australian Aborigines.[858] This marriage practice has declined to a level of non-existence in all four jurisdictions, but it is clear from the above discussion that the parties mentioned will have a lawful action against the wrongdoer who unlawfully and negligently caused the death of their breadwinner.

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854 *S v MacDonald* 1963 2 SA 431 (C) 432F; *Mentz v Simpson* 1990 4 SA 455 (A) 460B.

855 A stepchild may have a claim under customary law – see Nkala "Stepchildren and the duty of support on the death of the breadwinner in customary law and common law" 2004 *De Rebus* 23.

856 A levirate marriage is mandated in/by Deuteronomy 25:5-6.

857 See Genesis 38:8.

858 See Levirate Marriage – New World Encyclopedia https://www.newworldencyclopedia.org/entry/Levirate_Marriage (accessed on 25 September 2017); Marriage - IPFS https://www.ipfs.io/ipfs/.../wiki/Marriage.htm (accessed on 25 September 2017).

3.5.7 Adoption

Adoption is regulated either by statute[859] or by customary law.[860] Over a century, South African courts have had to adjudicate on and listen to cultural evidence dealing with adoptions under customary law in a number of cases.[861] Customary law recognises many different arrangements, forms or methods of adoption of children.[862] The natural father of a child born out of wedlock can adopt the child and have the child affiliated to his family group. This is known as *ukulobola ingani* in Zulu/Xhosa; *nwana ukhou leliwa nga khotsi awe* in Venda; *kolobola n'wana* in Shangane; or *go nyala ngwana* in Sepedi/Setswana/Sesotho. It literally means "to marry a child".[863] Other adoption practices are based on the principle that a father may allot one of his daughters to a younger son;[864] or the father's brother can adopt the child after the death of the father;[865] or a sister may adopt her deceased sister's child;[866] or a childless couple can adopt a child whose parents have passed on.[867] Adoption also takes place where a groom marries the bride and adopts her children from her previous relationship(s).[868]

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859 Chapter 15 of the Children's Act 38 of 2005.

860 *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk).

861 See e.g. *Mpeti v Nkumanda* 2 NAC 43 1910; *Mbulawa v Manziwa* 1936 NAC (C&O) 76); *Dlula Zibongile* 1938 NAC (C & O) 64; *Sonqishe v Sonqishe* 1943 NAC (C&O) 6); *Nongqayi v Mdose* 1942 NAC NAC (C & O) 34; *Tokwe v Mkencele* 3 NAC 118; *Siqcau v Siqcau* 1944 AD 67; *Salmani v Salmani* 14 1948 1 NAC (5) 33*; Mkazelwa v Rona* 1950 NAC (S) 219; *Xolilwe v Dabula* 4 NAC 148; *Mokoatle v Plaki* 1951 NAC (S) 283; *Mbese v Lumanyo* 1957 NAC (S) 25; *Myaki v Qutu* 1961 NAC 10 (S); *Gujulwa v Bacela* 1982 AC 168 (S); *Kewana v Santam Insurance* 1993 4 SA 771 (TkA); *Metiso v Padongelukfonds* 2001 3 SA 1142 (T); *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T); *Maneli v Maneli* 2010 7 BCLR 703 (GSJ); *MRL v KMG* [2013] ZAGPJHC 87.

862 Mqeke *Customary law* (2003) 79; Du Bois *Wille's principles* (2007) 198; Bekker *Seymour's customary law* (1989) 236; Bennet *Customary law* (2004) 375; Maithufi 2001 *De Jure* 390.

863 Mofokeng *Legal pluralism in South Africa: Aspects of African customary, Muslim and Hindu family law* (2009) 106; Mqeke *Customary law* (2003) 82; Poulter *Family law and litigation* (1976) 237-239; Bennett *Customary law* (2004) 359; *Mpeti v Nkumanda* 2 NAC 43 1910; *Mkazelwa v Rona* 1950 NAC (S) 219; *Xolilwe v Dabula* 4 NAC 148; *Mbulawa v Manziwa* 1936 NAC (C&O) 76); *Myaki v Qutu* 1961 NAC 10 (S); *Gujulwa v Bacela* 1982 AC 168 (S); s 21(1)(b)(i) of Children's Act 38 of 2005.

864 Mqeke *Customary law* (2003) 80; *Mokoatle v Plaki* 1951 NAC (S) 283; *Sonqishe v Sonqishe* 1943 NAC (C&O) 6.

865 *Metiso v Padongelukfonds* 2001 3 SA 1142 (T).

866 *Kewana v Santam Insurance* 1993 4 SA 771 (TkA).

867 *Maneli v Maneli* 2010 7 BCLR 703 (GSJ).

868 *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T).

This form of customary law adoption practice is known as *ukuthatha inkomo ne konyana* in Zulu/Xhosa; *u tshi kokodza luranga na mafhuri a a tevhela* in Venda; *ku koka rhanga na vana va rona* in Tsonga; or *oe gapa le namane* in Sepedi/Setswana/Sesotho.[869]

Section 242 of the Children's Act addresses the effects of an adoption order. It provides that:

> "(1) Except when provided otherwise in the order or in a post-adoption agreement confirmed by the court an adoption order terminates-
> (a) all parental responsibilities and rights any person, including a parent, step-parent or partner in a domestic life partnership, had in respect of the child immediately before the adoption;
> (b) all claims to contact with the child by any family member of a person referred to in paragraph (a);
> (c) all rights and responsibilities the child had in respect of a person referred to in paragraph (a) or (b) immediately before the adoption; and
> (d) any previous order made in respect of the placement of the child."[870]

Adoption, both in terms of the Children's Act or under customary law, confers full parental responsibilities and rights in respect of the adopted child upon the adoptive parent; and confers the surname of the adoptive parent on the adopted child, except when otherwise provided in the order. An adopted child must essentially be regarded as the child of the adoptive parent, and an adoptive parent must likewise be regarded as the parent of the adopted child.[871] The right to support does not arise because it is a "spousal benefit", but rather because the obligation to support was assumed in a relationship similar to a family relationship. Bertelsmann J in *Metiso v Padongelukkefonds*[872] addressed a claim against the RAF arising from the death of an uncle of certain children whom he had supported: After their father had died, their mother had deserted them. A formal adoption according to the custom of the community had not occurred because the consent of the absent mother was a

869 Mokotong 2015 *THRHR* 344-345.
870 s 242(1)(a)-(d) of the Children's Act 38 of 2005.
871 *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T); s 242(3) of the Children's Act 38 of 2005.
872 2001 3 SA 1142 (T).

prerequisite, and she was unreachable. It was contended on behalf of the children that the uncle had agreed to maintain them. The court resolved the problem by two findings. Firstly, that a *de facto* adoption should be acknowledged and that the formal defects be overlooked, and secondly, that a binding offer to support the children was sufficient to ground a duty of support, because to do so was consistent with the morality of society.[873] In *MB v NB*, [874] Brassey AJ dealt with whether or not an ex-husband had a duty of support towards the children of his former wife, who had been widowed. During the marriage, the ex-husband had related to the children as a father. The issue was whether he was obliged to continue to contribute to the payment of the school fees of the children. Brassey AJ took the view that it was unnecessary to construe a quasi-adoption because it was sufficient that by making the promise to pay, which was regarded as a contractual undertaking,[875] the husband was bound.

Adoption in Botswana is governed by the Adoption of Children Act of 1952.[876] Section 4 of the Botswana Adoption Act provides that the adoption of a child shall be effected by the order of the court of the district in which the adopted child resides, granted on the application of the adoptive parent or parents.[877] A court to which application for an order of adoption is made shall not grant the application unless it is satisfied that the applicant is or that both applicants are qualified to adopt the child; are of good repute, fit and proper to be entrusted with the custody of the child; and possessed of adequate means to maintain and educate the child.[878] The proposed adoption should serve the interests and conduce to the welfare of the child.[879] The consent to the adoption must

873 *Metiso v Padongelukkefonds* 2001 3 SA 1142 (T) 1150G-H.
874 2010 3 SA 220 (GSJ).
875 See chapter 3 of this thesis, par 3.5.9 hereunder.
876 See s 4(1) & (2) of the Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.
877 See s 4(1) of the Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.
878 See s 4(2) (a) & (b) of the Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.
879 See s 4(2) (c) of the Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.

have been given by both parents of the child or, if the child is born to an unmarried parent, by the mother of the child, whether or not such mother is a minor or married woman, and whether or not she is assisted by her parent, guardian or husband, as the case may be. If both parents are dead, or in the case of a child born to unmarried parents and the mother is dead, by the guardian of the child; if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent; if one parent has deserted the child, by the other parent; or by a guardian specially appointed under section 5.[880] If the child is over the age of 10 years, the child must consent to the adoption.[881]

In Lesotho, the Child Welfare and Protection Act of 2011 governs adoptions. In terms of the Act, only married couples may adopt a child jointly. Single men and same-sex couples are not permitted to adopt children. Similar to Botswana, there is no anti-discrimination provision to protect individuals from being discriminated against based on their sexual orientation and/or gender identity.[882] Since homosexuality in Botswana and Lesotho is viewed as illegal, adoption by partners in a same-sex union is not allowed and is therefore null and void. This implies that adopted dependants or children of same-sex couples will be excluded from claiming damages for loss of support, even where their adopted breadwinner was wrongfully and unlawfully killed. The exclusion of these types of classes of dependants limits the recovery of these classes of dependants.[883]

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880 See s 4(2) (d) of the Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.

881 See s 4(2) (e) of the Adoption of Children Act 1952, [Cap 28:01] Law of Botswana.

882 Botswana Panel code of 1964, s164, II Laws of Botswana, Cap. 08:01 (rev. ed. 2012); Quansah http://www.loc.gov/law/help/criminal-laws-on-homosexuality/african-nations-laws.php#_edn7 (accessed on 17 September 2016).

883 The arguments outlined in chapter 2 of this thesis, par 2.5.5.5 dealing with the legal position of LGBT persons apply here as well.

In Australia, similar to South Africa, Botswana and Lesotho, adoption is governed by legislation. Each state and territory has its own legislation.[884] The current State and Territory Adoption Acts are: Australian Capital Territory: Adoption Act of 1993; New South Wales: Adoption Act of 2000; Northern Territory: Adoption of Children Act of 1994; Queensland: Adoption Act of 2009 & Adoption Regulation of 2009; South Australia: Adoption Act of 1988 & Adoption Regulations of 2004; Tasmania: Adoption Act of 1988; Victoria: Adoption Act of 1984; and Western Australia: Adoption Act of 1994. Adoption was restricted to married couples.[885] The Family Law Act of 1975 (amended 1995) allowed the adoption of a child only in a heterosexual relationship. Since February 2017, adoption by same-sex couples is legally available in all jurisdictions of Australia, except for the Northern Territory.[886] Only Northern Territory same-sex couples cannot legally adopt a child, but can become foster parents.[887] With the recent law legalizing same-sex marriage, married gay and lesbian couples will jointly be allowed to adopt children even in Northern Territory State. Therefore, children legally adopted by same-sex couples in a civil union or civil partnership can institute a claim for loss of support should one or both of the adopted parent(s) be unlawfully and negligently killed.[888]

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884 Swain & Rice *In the shadow of the law* (2009) 208.

885 *Idem* 213.

886 Family Law Australia "Same sex couples: Fostering or adopting children" https://www.diyfamilylawaustralia.com/pages/same-sex-relationships/same-sex-couples-fostering-or-adopting-children/ (accessed on 7 August 2017).

887 *Ibid*.

888 Steynberg http://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2015); Winter South Australian MPs' conscience vote backs allowing same-sex couples to adopt https://www.abc.net.au/news/2016-11-15/sa-house-of-assembly-mps-vote-for-same-sex-couples-adoption/8026938 (accessed on 12 August 2017); Burke (3 November 2016) "Adoption laws in Queensland changed to allow same-sex couples to become parents" *ABC News* https://www.abc.net.au/news/2016-11-03/queensland-adoption-laws-same-sex-couple-able-to-adopt/7991340?section=qld (accessed on 12 August 2017)**;** Adoption Amendment (Same Sex Couples) Act, 2010 (New South Wales); Tasmanian Upper House passes gay adoption bill – updated on the 28 Jun 2013, 1:38am https://www.abc.net.au/news/2013-06-27/gay-adoption-passes/4786102 (accessed on 12 August 2017); Riley Same-Sex Adoption Reform on the Agenda in Victoria 19 May, 2014 *Victoria News*; Adoption Amendment (Adoption by Same-Sex Couples) Act 2015 (VIC); Acts Amendment (Gay and Lesbian Law Reform) Act 2002 (WA).

In all four jurisdictions, the introduction of legislation on adoption did not replace adoptions under customary law – instead, they have continuously operated alongside each other within a dual legal system.[889]

3.5.8 Court order

A divorced woman who is entitled to support from her former husband in terms of a court order may institute a dependant's action upon his negligent and wrongful death.[890] In the South African case of *Santam v Henery*[891] the court held that in accordance with a court order, a divorced woman was entitled to a certain amount for support from her previous husband in terms of section 7(2) of the Divorce Act.[892] Her previous husband had been negligently killed and the question was whether she was entitled to damages for loss of support. The Supreme Court of Appeal acknowledged her claim by extending the *sui generis* action of the dependant for support to include the claim of a divorced woman. The court held that the interests of the community determine that the divorced woman's rights need protection. The fear of multiplicity of actions is not relevant here.[893] The court also held that her claim for loss of support is not restricted to the amount in terms of the court order, and that whatever amount she would in fact have received from the deceased if he were still alive is a factual question.

This study has found no reported cases of authority relating to claims for loss of support by a divorced wife in Botswana and Lesotho. Nonetheless, based on the tendency of the two jurisdictions to follow the South African law, an inference might be drawn to the effect that a duty of support will arise where there is a court order. With regard to

889 Roberts *Tswana family law* (1972) 13*; Marman v Marman and others* [2003] 1 BLR 97; *Montshiwa v Montshiwa* 1999 2 BLR 216 (HC); Molokomme *Children of the fence* (1991) 27.
890 Neethling & Potgieter *Law of delict* (2015) 296.
891 1999 3 SA 421 (SCA).
892 Act 70 of 1979.
893 *Santam v Henery* 1999 3 SA 421 (SCA) par [44].

Botswana and Lesotho, it is accepted that their legal positions would be similar to the South African position, since both jurisdictions mirror South African legal judicial decisions, and no contrary legislation or case law could be found.[894]

The Australian law relating to a divorced wife claiming for loss of support under the dependency action seems very similar to the South African law.[895] Consequently, in all these jurisdictions, a divorced woman who is entitled to support from her former husband in terms of a court order may institute a dependant's action upon his negligent and wrongful death.

3.5.9 Contract

In common law, 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 contractual duty of support.[896] Such a right to support is in principle deemed not to be enforceable against third parties, but only enforceable *inter partes*. The nature of the contractual relationship founding the duty or right to support fulfils an important role in determining the responsibility.[897] However, certain types of relationships out of which contractual duties of support may arise should be approached with caution.

In *Paixão v RAF,*[898] the court developed the common law to deal with the duty of support between unmarried heterosexual couples and held that a dependant's action

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894 This study has failed to find any Botswana and Lesotho case effectively dealing with a divorced wife or husband who is entitled to support from his or her former spouse in terms of a court order.

895 Queensland Law Reform Commission, Report *De Facto Relationships: Claims by surviving de facto partners under the Common Law Practice Act 1867 for damages for wrongful death* (Report 48, 1994); Common Law and Workers' Compensation Amendment Act 1994 (Qld) s 5, which inserted the amended definition into s 13 of the Common Law Practice Act 1867 (Qld).

896 Smith & Heaton 2012 *THRHR* 472-473.

897 Neethling & Potgieter *Law of delict* (2015) 294; Neethling & Potgieter 2001 *THRHR* 488.

898 2012 6 SA 377 (SCA).

existed where a contractual duty of support had been established. The effect of the decision in *Paixão v RAF* is that the unmarried dependant in a permanent heterosexual life partnership will now be able to claim damages for his or her loss of support from the wrongdoer who caused the death of the dependant's breadwinner.[899] It seems that courts will find in favour of a partner who was in a domestic partnership if the agreement between such partners amounted to more than a mere undertaking to support each other. There must be a binding contract, with the intention by both parties to be legally bound by such contract. This seems to be the only exception to the rule, which is welcomed because it recognises that some people do not wish to marry, or there are circumstances that prevent marriage.[900] This case once again shows the ever-evolving nature of South Africa's common law. It follows a line of previous judgments, where the highest courts in South Africa have moved away from only allowing a dependant's action for persons married in accordance with the Marriage Act 25 of 1961.[901]

In *MB v NB,*[902] the facts of the case were essentially that after a ten-year period of marriage, the relationship between the parties had deteriorated to such an extent that the wife instituted divorce proceedings against her husband. The main issue of care of the minor child born of the marriage was not in dispute, but what was in dispute was the issue of the defendant's alleged obligation to provide maintenance for the private school education of a step-child whom the husband had intended to adopt, though the

899 Ismail & Marias https://www.mondaq.com/southafrica/x/200552/Insurance/Loss+Of+Support+Extended+To+Permanent+Heterosexual+Life+Partnership (accessed on 5 September 2017); Didishe 2012 *De Rebus* 27.

900 Didishe 2012 *De Rebus* 26.

901 Smith 2016 *De Rebus* 37; Ismail & Marias https://www.mondaq.com/southafrica/x/200552/Insurance/Loss+Of+Support+Extended+To+Permanent+Heterosexual+Life+Partnership (accessed on 5 September 2017).

902 [2009] ZAGPJHC 76; 2010 3 SA 220 (GSJ).

process of adoption was not pursued. Even though the husband never formally adopted his wife's son, by promising to pay the boy's expensive private school fees, and agreeing to give the boy his surname, the defendant implicitly represented to the boy, to his wife, and to the world at large, that he proposed to stand in relation to the boy as a father to a son. Confirmation of this was found in the documents pertaining to the boy's schooling, including but not confined to the school's application form, to which the husband appended his signature as "father" without reservation or qualification. The court held that by making the promise, the husband assumed a duty to support and maintain the boy. The court thus created a duty of support between a person and an unrelated benefactor.[903]

In *Seleka v RAF,*[904] there was a verbal contract between the plaintiff and her deceased daughter that the daughter would support the plaintiff by contributing an amount of R1300 per month towards household expenses, until such time as the mother would turn 60 years of age and thus be eligible to receive a government old-age pension. The daughter was killed due to the unlawful and negligent driving of a motor vehicle. At the time of her death the deceased lived with her mother and stepfather according to (Tswana) African customary law. She was working and contributing to the family income. The plaintiff brought a claim for loss of support against the RAF. The issue before the court was whether in terms of customary law (Tswana) a child has an obligation to support an indigent parent. The court held that customary law place a duty on a child who is financially able to provide maintenance for his/her needy parents. As far as Tswana law and customs were concerned, the principle has developed from not only a duty on a son to maintain his parents, but also to such duty on a daughter.

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903 Smith & Heaton 2012 *THRHR* 472.
904 2016 4 SA 445 (GP).

With regard to Botswana and Lesotho, it is accepted that their legal positions will be similar to the South African position, since both jurisdictions mirror the South African legal judicial decisions, and no contrary legislation or case law could be found. The writer, having extensively researched this issue under Australian law, found no judgment, legislation, or case wherein contractual rights pertaining to the duty to maintain or support were discussed.

3.6 Chapter conclusion

This chapter dealt with the review of the development of the categories of dependants who are suitable to be recognised as having a claim for loss of support against the wrongdoer responsible for the wrongful and negligent death or injury of their breadwinner, as well as some of the problems[905] relating to the action of dependants for loss of support. It emerged that the scope for the recognition of a duty of support is premised on factors other than inflexible common law principles. The discussion has demonstrated that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship, which shows that a binding duty of support is assumed by one person in favour of another. Moreover, a culturally embedded notion of "family", defined as being a network of relationships of reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support by persons who are in relationships akin to that of a family.[906] This norm is not narrow-minded, but is instead likely to be universal. It certainly is consonant both with the norms derived from the Roman-Dutch tradition, as

905 E.g., vested rights; injured breadwinner and classes of dependants: see chapter 3 of this thesis, paras 3.3.1.1 3.4.1.2 & 3.5 above.

906 *Taljaard v RAF* [2014] ZAGPJHC 229; 2015 1 SA 609 (GJ).

alluded to by Cachalia JA in *Paixão v RAF,*[907] and the norms derived from African tradition, as exemplified by the spirit of Ubuntu mentioned by Dlodlo J in *Fosi v RAF*.[908]

These important developments do not, however, indicate that the action of dependency in South Africa has developed into a general remedy for the wrongful and negligent killing of the breadwinner. It has not advanced to this level yet.[909] The discussion will help the reader to understand that this list of categories of dependants may expand further in the future, owing to South Africa's constitutional democracy, which promotes a culture of respect for basic human rights[910] and the norm of public accountability.[911]

A brief investigation of the literature and case law of South Africa, Australia, Botswana and Lesotho was explored in this chapter. This chapter has set the foundation for the different categories of legally recognised dependants and problematic aspects relating to the dependency action. In the next chapter, this study will address the assessment of compensation (damages) in respect of the action of dependants for loss of support, along with a review of the literature that has discussed related problems.[912]

907 [2012] ZASCA 130.
908 2008 3 SA 560 (C).
909 *Brooks v Minister of Safety and Security* 2009 2 SA 94 (SCA).
910 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) par [11].
911 Davel https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 17 September 2016).
912 See Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on 18 March 2016); Potgieter, Steynberg & Floyd *Law of damages* (2012) 477-490.

CHAPTER 4

ASSESSMENT AND QUANTIFICATION OF COMPENSATION (DAMAGES) IN TERMS OF THE ACTION OF DEPENDANTS

4.1 Introduction

This chapter provides an overview of the general principles relating to the assessment and quantification of compensation (damages) for loss of support due to the death of a breadwinner under the dependency action. Assessment of damages is a very "technical" and "complex" area of the law,[913] both in theory and in practice. It is a process to determine the severity and magnitude of the damage or loss caused to the dependants as a result of the unlawful and negligent death of their breadwinner. According to Neethling and Potgieter,[914] it is a 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. Consequently, it involves fact-finding in line with legal principles[915] and forms an integral part of the dependency action for loss of support.

The assessment and quantification of damages is often the principal issue in litigation, because the primary objective of the dependant-plaintiff is usually to collect as much damages as possible, while that of the defendant-wrongdoer is to pay as little damages as possible.[916] Accordingly, litigants frequently devote substantial time and effort to attempting to establish the level of harm.[917] In fact, assessment and quantification of

913 Appau https://jtighana.org/new/links/papers/ASSESSMENT%20OF%20DAMAGES%20-Justice%20Yaw%20 Appau.pdf (accessed on 30 March 2017); Gillies *Business law* (2004) 346; *Mogale v Seima* [2005] ZASCA 101; 2008 5 SA 637 (SCA) par [8].

914 Neethling & Potgieter *Law of delict* (2015) 246; V*an der Merwe v RAF (Women's Legal Centre Trust as amicus curiae)* 2006 4 SA 230 (CC) 252.

915 Gillies *Business law* (2004) 346; Barnett & Harder *Remedies* (2014) 22.

916 *Ketsekele v RAF* [2015] ZAGPPHC 308; 2015 4 SA 178 (GP).

917 Kaplow & Shavell 1996 *JLE* 191.

damages is an area of the law in which many attorneys or advocates in South Africa specialise.[918] A large percentage of the cases currently before our High Courts are negligence cases involving assessment and quantification of damages, either in a claim for personal injury or for loss of support.[919]

This chapter critically examines the principles and methods according to which the loss of support is assessed and compensated.[920] The major controversy in loss of support claims today is not so much in terms of the establishment of liability, but more in determining claimable damages under the dependency action.[921] This chapter unsympathetically explores the narrow list of heads of damage (losses) under the dependency action,[922] as well as the blanket denial of non-financial damages under the dependency action[923] in South Africa, Botswana and Lesotho.

The courts in South Africa, Botswana, Lesotho and Australia place a lot of emphasis on actuarial expert evidence.[924] It is rare for a claim for compensation for death to be settled in or out of court, without the benefit of an actuarial report.[925] Furthermore, this chapter considers the role of the guiding principles, evidential framework and

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918 See in general Mkhwanazi 2015 *South African Health News Service Health E-news* 9: according to Stellenbosch University Professor Ethelwynn Stellenberg, multi-million-rand negligence claims against the Department of Health have increased nine-fold since 2013.

919 See Dereymaeker https://dx.doi.org/10.4314/sacq.v54il3 (accessed on 30 March 2017): In recent years, reports have increasingly pointed to the mounting quantum of claims for civil damages faced by the South African Police Service (SAPS). A close analysis of the publicly available data shows that a large number of claims are increasingly being filed against the SAPS. The South African Police Service (SAPS) has, in recent years, reported a substantial annual increase in civil claims filed for damages as a result of actions or omissions by its officials, and an even larger increase in pending claims. The 2014/15 SAPS annual report showed that pending claims stood at over R26 billion, which is equivalent to over a third of the SAPS budget.

920 See chapter 4 of this thesis, par 4.7 hereunder.

921 Jaffe https://scholarship.law.duke.edu/lcp/vol18/iss2/5 (accessed on 30 October 2017).

922 See chapter 4 of this thesis, par 4.4.1 hereunder.

923 See chapter 4 of this thesis, par 4.4.2 hereunder.

924 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017).

925 Koch 2011 *SAAJ* 125.

discrepancies in assessments of dependants' claims by actuarial experts,[926] and the proof or lack thereof for the assessment and quantification of awards for loss of support. Moreover, a mathematical model to calculate the present value of loss of financial support due to wrongful and negligent death is noticeably absent from the statutes (legislative guidelines), which may result in inconsistency in terms of how it is calculated, thereby resulting in over- or under-compensation.[927]

In addition, there are remarkably broad similarities between all four countries, with a lively replication of legal concepts in the area of assessment of damages. However, there are also noteworthy differences in this regard. This chapter highlights the similarities and differences in the context in which assessment of damages under the dependency action functions, with the aim of ensuring that comparative law is appropriately understood. Lastly, this chapter identifies solutions to some of the problems in the assessment of compensation for loss of support in respect of the action of dependants. The next section provides an explanation of the concepts of "damage", "damages" and "compensation".

4.2. Concepts of "damage", "damages" and "compensation"

"Damage", "damages" and "compensation" are words that we hear very often in connection with personal injury and death cases in courts of law in South Africa, Australia, Botswana and Lesotho. For purposes of clarity and perspective, it is important to reflect briefly on the legal meaning of the concepts of "damage", "damages" and "compensation" within the dependency action. The definition of and

926 See chapter 4 of this thesis, par 4.7.2 hereunder.

927 Burchell *Delict* (1993) 238; *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A); *Waring & Gillow Ltd v Sherborne* 1904 TS 340; *Hulley v Cox* 1923 AD 234; *De Jongh v Gunther* 1975 4 SA 78 (W); *Victor NO v Constantia Insurance Co Ltd* 1985 1 SA 118 (C) 120C; McKerron *Delict* (1971) 151-153; Howroyd & Howroyd 1958 *SALJ* 65 68; Boberg 1964 *SALJ* 147 153.

distinction between the concepts of “damages” and “compensation” is nothing new in the legal arena. In the case of *South African Airways v Van Vuuren,*[928] the distinction between “damages” and “compensation” was deliberated on in the judgment of the Labour Appeal Court. According to the Labour Appeal Court, the two words were often used interchangeably because of their ambiguous meaning, and as a result, this would naturally affect the discretion of the court in awarding claims for damages and compensation in labour matters. The terms “damages” and “compensation” have also been used interchangeably, for the most part, in death matters. From this, the question arises as to whether the terms mean the same, or whether there is any difference between the two. Furthermore, the question is whether their meaning could also be regarded as rather ambiguous under the dependency action for loss of support.

“Damage” and “damages” as legal terms had their origins and development in the context of delictual and contractual liability[929] within the broader concepts of liability and compensation. According to Potgieter, Steynberg and Floyd,[930] the term “damage” or *damnum* is an ancient concept that became part of the legal terminology with the *lex Aquilia* in 287 B.C. The term “harm” also denotes “damage”.[931] In South African law, the word “damage” plays a role in many branches of law, such as the law of delict, contract, insurance, enrichment, expropriation, hire purchase, estoppel, criminal law, and the law of procedure.[932] Nonetheless, there is no commonly accepted definition of the term “damage”.

928 [2012] ZALCCT 52; (2013) 34 ILJ 1749 (LC); [2013] 10 BLLR 1004 (LC).
929 Le Roux *Difficulties in claiming prospective losses* (2013) 8; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.5.1.
930 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 2.2; Neethling & Potgieter *Law of delict* (2015) 222.
931 Loubser & Midgley (eds) *Delict* (2017) par 4.1; Reinecke 1976 *TSAR* 26-27.
932 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 2.2.

One of the leading cases on damage, *Oslo Land Co Ltd v Union Government,*[933] was not very helpful in offering a proper definition of the concept "damage". The Appellate Division simply remarked that the word "damage" does not mean injury to property, but rather the *"damnum"*, which is the "loss" suffered by the plaintiff.[934] This definition is not specific or clear enough, as it does not explain the meaning of the word "loss",[935] or at best, provide examples of "loss". The term "damage" is an uncountable singular noun and has no plural form.[936] The word "damages" has a completely different meaning and is not the plural of "damage". Most sources define "damage" as simply connoting the harm, loss, injury or detriment suffered or presumed to have been suffered by a person, property or right, thereby impairing the usefulness of the person, property or right, as the result of a wrongful act, omission, or negligence of another. For example, Potgieter, Steynberg and Floyd described the word "damage" as the diminution, as a result of a damage-causing event, of the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved.[937] The authors stated that the term "damage" is a broad concept, which includes patrimonial as well as non-patrimonial loss as its two mutually exclusive components.[938]

The difference between general and special damages has been described by Potgieter, Steynberg and Floyd[939] as follows: (a) "general damage" (also referred to as intrinsic damage) often refers to damage which is legally presumed to flow from an

933 1938 AD 584.
934 1938 AD 584 590.
935 Erasmus & Guantlett *Damages* (updated by Visser PJ) (1995) 9.
936 South African Concise Oxford Dictionary (2011).
937 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.7.2.
938 *Idem* par 2.3.2.
939 *Idem* par 3.4.4.

unlawful act, and which only needs to be generally pleaded,[940] while (b) "special damage" (also referred to as extrinsic damage) usually means damage which is not presumed to be the consequence of a damage-causing event, and must be specially pleaded and proved.[941] In other words, special damage is legally considered to be all present pecuniary expenses and losses up to the time of trial,[942] and may be calculated precisely, while general damages includes all non-patrimonial loss[943] as well as prospective loss of support, and requires the court's assessment.

Boberg refers to the term "damage" as "loss suffered by the plaintiff".[944] Van der Merwe and Olivier state that the term "damage" is only a diminution of patrimony (estate) which flow from the infringement of a right.[945] Cooper,[946] Van der Walt[947] and Reinecke[948] also define "damage" in terms of the reduction of someone's patrimony. Neethling and Potgieter denote an acceptable definition of the term "damage" as the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.[949] It is a reduction in the utility of interests, which has been brought about by an uncertain event.[950] Authors such as McKerron,[951] Pauw[952] and Pont[953] also regard damage as a broad concept, which comprises both pecuniary and non-pecuniary losses. The dictionary meaning of the term "damage" is harm impairing the value,

940 *Reid v Royal Insurance* 1951 1 SA 713 (T) 718.
941 See *Dhlomo v Natal Newspaper* 1989 1 SA 945 (A) 952-3; *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A) 574-5; Du Bois *Wille's principles* (2007) 883.
942 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 3.4.4.
943 Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 3.4.4 & 5.5.
944 Boberg *Delict: Aquilian liability* (1984) 75.
945 See Van der Merwe & Olivier *Die onregmatige daad* (1989) 179-80.
946 Cooper *Liability for patrimonial loss* (1982) 387.
947 Van der Walt 1980 *THRHR* 3.
948 Reinecke 1976 *TSAR* 56.
949 Neethling & Potgieter *Law of delict* (2015) 222.
950 *Idem* 223.
951 McKerron *Delict* (1971) 51 53.
952 Pauw 1977 *TSAR* 248.
953 Pont 1942 *THRHR* 12.

usefulness, or normal function of something with unwelcome and detrimental effects.[954]

Similar to civil law, the word "damage"[955] under customary law also refers to the harm, loss, injury or detriment suffered or presumed to have been suffered by a person, property or right, thereby impairing the usefulness of the person, property or right, as the result of a wrongful act, omission or negligence of another.[956] The word "damage" in customary law can also refer to compensation or a fine paid for the delict or wrong committed against another person or family.[957] It is important to note that customary law lacks the conceptual structure of modern law of damages concepts, since they are foreign to customary law. In addition, the judicial process in the customary courts has its own shortcomings. For instance, the courts do not distinguish clearly between civil and criminal cases. Thus, in a case from the *Umzimkhulu* district, the offence charged was that the accused's dogs injured the complainant's child. The accused entered a plea of guilty and was sentenced to pay a fine of R150, which he promptly paid. The complainant and the community were satisfied that justice had been served, yet the

954 South African Concise Oxford Dictionary (2011).

955 The term "damage" is also used under customary law.

956 *R v Monnanyane* 2005 LSHC 130; Olivier *et al Indigenous law* (1995) paras 10 & 119; Bekker *Law of delict* in Joubert, Faris & Church (eds) *LAWSA* vol 32 (2009) paras 180-181; Bekker *Seymour's customary law* (1989) 98 121 242; Bennett *Customary law* (2004) 310 312 314; Boezaart https://repository.up.ac.za/bitstream/handle/2263/32934/Boezaart_Building_2013.pdf (accessed on 25 March 2017).

957 Bekker *Seymour's customary law* (1989) 342. Different types of damages are recognised under customary law, e.g.: *Ukuthwala* gives rise to delictual liability only in some communities and *inkomo yokuthwala* or a *thwala* or *bopha* beast, being the beast paid as damages; the *inkomo yokhona* is payable for defloration and the *inkomo yesisu* for impregnating a girl; damages of a *vimba* (or *nquthu*) beast as an admission of paternity; *go tsoša hlogo* damages are payable, according to the *Sesotho* custom and tradition, by the accused to raise the head of the breadwinner if he is responsible for his/her death. The deceased's dependants have a right to sue such an accused to raise his head (loss of support); section 321(1) of the Criminal Procedure and Evidence Act No 9 of 1981 (Lesotho): When any person is convicted of an offence, which has caused personal injury to some other person, or damage to or loss to property belonging to some other person, the court trying the case may after recording the conviction and upon application made by or on behalf of the injured party, award him compensation for the injury, damage or loss provided that the compensation claimed does not exceed the civil jurisdiction of the court.

finer points of the *actio de pauperie* and the circumstances under which it applies, as well as the decided cases by which the court should be guided in arriving at a decision, were not investigated, as would have happened in a South African civil court. The case was concluded within 18 days of the occurrence, and there were no pleadings.[958]

Another example is the case of *R v Monnanyane*,[959] wherein the accused was charged with the murder of his uncle.[960] The proprietary of the assessment of loss of support was considered, without any evidence to submit to the court regarding the economic and financial standing of the deceased, and therefore the amount of the loss to be awarded to the widow.[961] The principles of assessment of damages for loss of support were not tested, as would have happened in a Western court.

Therefore, in determining delictual liability and compensation in customary law, it must be borne in mind that in contrast to Western law, the general elements and principles for delictual liability and assessment of damages in terms of customary law are not as clear as in South African common law.[962] This can be attributed to the fact that traditional customary dispute resolution emphasises the goals of reconciliation and reintegration. Remedies tend to look forward, with the goal of re-establishing harmony within the community.[963] Thus, customary law does not draw a clear distinction between the law of delict and criminal law, as it is in its nature to generalise, as opposed to the nature of common law, which is to contain specialised rules and (often) subtle distinctions between the two systems.[964] Nonetheless, the customary law of delict

958 Koyana 1997 *Consultus* 128.
959 2005 LSHC 50.
960 *R v Monnanyane* 2005 LSHC 130 par [1].
961 *Idem* par [9].
962 Knoetze 2012 *Speculum Juris* 43-44.
963 Boege "Traditional approaches to conflict transformation" in Fischer, Giebmann & Schmelzle (eds) *Berghof handbook for conflict transformation* (2006) 7.
964 *Ibid*.

gives redress for the violation of any right representing material value, which is capable of being acquired by a family head.[965] This implies redress for damage (harm) to the property, as well as for the injury to a woman or dependants of the deceased, who was unlawfully and negligently killed.[966] A chief or queen mother is not merely a representative of the government tasked with applying the rules of law, but the instantiation of the community, tasked with upholding community norms and standards. The norms are rooted in a range of values, from community and sanctity to autonomy.[967]

Traditionally, murder or homicide constituted a delict, as well as a crime committed against the family and the chief.[968] It is thus considered actionable in customary law.[969] The customary law principle on the loss of support action was recorded in 1901, with the *Sipongomana v Nkuku* case[970] decided in KwaZulu-Natal. The court found that if a valid customary marriage was concluded, a personal claim for loss of support of the wife and children could be instituted under customary law.[971] Later, in 1963, the South African statutory law documented the delict of the negligent causation of the death of a breadwinner, through the promulgation of section 31 of the Black Laws Amendment Act.[972] Today, both the estate and dependants of a wrongfully and negligently killed breadwinner have claims against the wrongdoer, where a delict has caused the death,

965 *R v Monnanyane* 2005 LSHC 130 par [4]; Palmer *Law of delict* (1970) 112.
966 See *R v Monnanyane* 2005 LSHC 130; Bekker "Law of delict" in Joubert *LAWSA* (2009) par 141; Bekker, Rautenbach & Goolam (eds) *Legal pluralism in South Africa* (2015) 88-89.
967 Palmer *Law of delict* (1970) 46.
968 Palmer *Law of delict* (1970) 112-113; *R v Monnanyane* 2005 LSHC 130.
969 Poulter *Legal dualism* (1979) 70; Maithufi 2009 *Obiter* 164; Bekker *Seymour's customary law* (1989) 379; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W).
970 1901 NHC 26.
971 Rautenbach & Du Plessis 2000 *THRHR* 302 306-308 314.
972 Act 76 of 1963; see Maithufi & Bekker 2009 *Obiter* 164 for a contemporary viewpoint on the applicability of s 31 after the promulgation of the Recognition of Customary Marriages Act 120 of 1998.

in both civil and customary law.[973] Botswana and Lesotho inherited their law from South Africa, and still follow the South African law and cases; hence, the definition of the term "damage" in Botswana and Lesotho is the same as in South Africa.[974]

Similar to South Africa, the term "damage" generally refers to loss, harm or injury in Australia.[975] In this regard, the Australian legal author, Luntz,[976] states that the term "damage" generally refers to loss, harm or injury.[977] The civil liability statutes throughout Australia define "harm" as harm of any kind, including personal injury or death, damage to property, or loss.[978]

On the other hand, the term "damages" is not the plural of the term "damage", but is rather an uncountable plural noun with no singular form.[979] It refers to a sum of money claimed as compensation, or awarded by a court to the dependant-claimant as compensation for harm, loss, injury or detriment suffered by the dependant-claimant because of a delictual act committed by the defendant or his agent.[980] In the South African textbook *Visser & Potgieter Law of Damages,*[981] the word "damages" is defined as the monetary equivalent of damage awarded to a person, with the object of eliminating, as fully as possible, the person's past and future damage.[982] It is further

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973 See s 31 of Black Law Amendment Act 76 of 1963; s 2(1) & (2) of Recognition of Customary Marriages Act 120 of 1998; Marriage Act 25 of 1961.

974 See *Archibald v Attorney General* 1991 BLR 169 (CA); *Sekale v Minister of Health* 2006 1 BLR 438 (HC); *R v Monnanyane* 2005 LSHC 130; Formbad 1999 *AJIC* 245 249; Palmer *Mixed jurisdictions worldwide* (2012) 507.

975 Luntz *Assessment of damages* (2006) 1; Tettenborn *Damages* (2010) 11.

976 Luntz *Assessment of damages* (2006) 1.

977 *Harriton v Stephens* (2004) 59 NSWLR 694 (CA) [6]; *Kenny v MGICA* (1992) Ltd (1999) 199 CLR 413 [79].

978 Civil Liability Act 22 of 2002 (NSW), s 5; Personal Injuries (Liabilities and Damages) Act 2003 (NT); s 4; Civil Liability Act 22 of 2002 (Qld), s 5; Civil Liability Act 22 of 2002 (WA), s 3.

979 South African Concise Oxford Dictionary (2011).

980 Van der Merwe & Olivier *Die onregmatige daad* (1989) 179; *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (SCA).

981 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.7.2.

982 *Van der Merwe v RAF* 2006 4 SA 230 (CC) 253.

stated that “damages” also refers to the process whereby an impaired interest may be restored through money.[983] Erasmus explains the term “damages” as follows: “the sum of money of the judgment is probably to be explained as the price of redemption from liability, that is, the monetary composition offered to the victim in order to save the wrongdoer from the harshness of personal execution”.[984] The dictionary meaning of the term “damages” is “a sum of money claimed or awarded in compensation for loss or injury”.[985]

According to Luntz, the word “damages” is used to describe a sum of money that a court may award to a successful plaintiff in an action in tort, or for breach of contract, or under the jurisdiction conferred by the successors to Lord Cairns’ Act, in aid of equitable remedies.[986] In the legal book *McGregor on Damages*, the word “damages” is defined as “the pecuniary compensation obtainable by success in an action, for a wrong, which is either a tort or a breach of contract, the compensation being in the form of a lump sum, which is awarded unconditionally”.[987]

The notion of “damages” is best understood by its purpose. Damages are the monetary equivalent of loss awarded to a person, with the object of eliminating, as fully as possible, the claimant’s loss for past as well as future damage.[988] Therefore, the primary purpose of awarding damages is to place the dependant in the same position, as far as possible, that she or he would have been in, but for the wrongful conduct. To achieve this purpose, the law, in all four countries being studied, generally recognises

983 *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146; *Van der Merwe v RAF (Women’s Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC) 253; *Van der Merwe v RAF* 2006 4 SA 230 (CC) 253; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.7.2.
984 Erasmus 1975 *THRHR* 104 106.
985 South African Concise Oxford Dictionary (2011).
986 Luntz *Assessment of damages* (2006) par 1.1.
987 McGregor *McGregor on damages* (2016) 3.
988 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.7.2.

two heads of damages, namely non-patrimonial damages or non-pecuniary damages, and patrimonial damages or pecuniary damages.[989] Corresponding terms, such as economic or non-economic damages[990] and tangible or intangible damages[991] are sometimes used. The damages seek to restore the diminution in the value and efficacy of a legally protected interest.

Patrimonial damages aim to compensate, to the extent that money can, the actual or probable reduction of a person's patrimony as a result of the delict.[992] Patrimonial damages are a "true equivalent"[993] of the patrimonial loss suffered, and are calculable in monetary terms. Well-settled examples of patrimonial loss in terms of dependency claims are past medical expenses until the date of death, funeral or cremation expenses, and loss of support, of which the two last-mentioned are relevant to this study.

On the other hand, non-patrimonial damages are utilised to redress the deterioration of highly personal legal interests that attach to the body and personality of the claimant, and is also called non-patrimonial loss. Non-patrimonial damages do not have a readily determinable or direct monetary value,[994] and do not serve a compensatory function, because such loss does not have an economic or pecuniary value, unlike patrimonial loss. The emphasis is on providing satisfaction and solace, and aims to appease the wounded feelings of the claimants, in so far as it is possible for an award of money to

989 Luntz *Assessment of damages* (2006) par 1.1; Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 1.7.2 & 3.4.4.
990 Howarth 2014 *SAJBL* 2; Tilbury https://www.australii.edu.au (accessed on 15 April 2017).
991 *Fourie v Santam Insurance Ltd* 1996 1 SA 63 (T).
992 See Hutchison 2004 *SALJ* 51 53; Erasmus & Gauntlett "Damages" *LAWSA* (updated by Vissser) (1995) par 25.
993 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 3.1.
994 See *Rudman v RAF* 2003 2 SA 234 (SCA); *Versfeld v South African Citrus Farms Ltd* 1930 AD 452; *Coetzee v SA Railways & Harbours* 1934 CPD 221.

do so.[995] Therefore, non-patrimonial losses are illiquid and are not instantly sounding in money.[996] The court exercises its own judgment in the matter and strives to determine awards that will be fair to the plaintiff[997] and the defendant, as well as to the public at large, since such awards also serve to guide future awards.[998] Well-established variants of non-patrimonial losses include pain and suffering, disfigurement, and loss of amenities of life. Besides bodily integrity, our law recognises and protects other personality interests, such as dignity,[999] mental integrity,[1000] bodily freedom,[1001] reputation,[1002] privacy,[1003] feeling,[1004] and identity,[1005] of which none are relevant to this study. Nevertheless, the study will focus on the existing problematic aspect in our legal system regarding the blanket denial of non-patrimonial damages under the dependency action.[1006] However, in general, a wrongful reduction in the quality of these personality interests or rights entitles the victim to non-patrimonial damages.[1007] The primary object of non-patrimonial damages is also to make good the

995 *Delange v Costa* 1989 2 SA 857 (A); Potgieter, Steynberg & Floyd *Law of damages* (2012) par 9.5.4.1.

996 See *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (AD) 838; *Solomon and another, NNO v De Waal* 1972 1 SA 575 (AD); *Eggeling v Law Union & Rock Insurance Co. Ltd* 1958 3 SA 592 (D); *Administrator-General, South West Africa v Kriel* 1988 3 SA 275 (A); *Gillbanks v Sigournay* 1959 2 SA 11 (N); *Botha v Minister of Transport* 1956 4 SA 375 (W) at 380.

997 *De Jongh v Du Pisanie* 2005 5 SA 457 (SCA); *Van der Merwe v RAF* [2006] ZACC 4; 2006 4 SA 230 (CC); 2006 6 BCLR 682 (CC) par [40].

998 Ŵanda 2005 *CILSA* 113 117.

999 See *Brenner v Botha* 1956 3 SA 257 (T).

1000 See generally *Christian Lawyers' Association v National Minister of Health* 2004 1) BCLR 1086 (T); 2004 4 All SA 31 (T); *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 BCLR 1 (CC); 1996 1 SA 984 (CC); *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 3 BCLR 80 (SE); 1994 4 SA 899 (SE); *Coetzee v Government of the RSA* 1995 10 BCLR 1382 (CC); 1995 4 SA 631 (CC).

1001 See *In Rail Commuters Action Group v Transnet t/a Metrorail* 2005 4 BCLR 301 (CC); 2005 2 SA 359 (CC).

1002 *National Media Ltd v Bogoshi* 1999 1 BCLR 1 (SCA); 1998 4 SA 1196 (SCA) 1216G-H; *O v O* 1995 4 SA 482 (W) 490H-J; *Gardener v Whitaker* 1994 5 BCLR 19 (E); 1995 2 SA 672 (E) 690G-691A; *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W); 1996 2 SA 588 (W) 606F; *Potgieter v Kilian* 1995 11 BCLR 1498 (N), 1996 2 SA 276 (N).

1003 See *Jansen van Vuuren NNO v Kruger* 1993 4 SA 842 (A).

1004 See *S v Makwanyane* 1995 6 BCLR 665 (CC); 1995 3 SA 391 (CC).

1005 See *Kidson and others v SA Associated Newspapers Ltd* 1957 3 SA 461 (W).

1006 See chapter 4 of this thesis, par 4.4.1 hereunder.

1007 General damages will be awarded if, at the time of death, the proceedings would have reached a stage of *litis contenstatio* – see chapter 4 of this thesis, par 4.5.1 hereunder.

loss – to amend the injury.[1008] Furthermore, its aim is to place the plaintiff in the same position that she or he would have been in, but for the wrongdoing.[1009]

The term "compensation" in the narrow sense denotes "damages", and in a general sense means the process of reparation of any patrimonial or non-patrimonial loss.[1010] In the case of *Minister of Defence and Military Veterans v Thomas,*[1011] it was stated that "compensation" comes in two forms. The first is for prescribed benefits in legislation payable for injuries sustained as a result of an accident, and the second is for damages assessed by a court of law.[1012] Therefore, the difference between these two forms of compensation lies in the way in which the award is determined – one is prescribed by legislation and the other is assessed by a court of law, based on evidence presented. When one goes through the contents of the Road Accident Fund Act[1013] and Compensation for Occupational Injuries and Diseases Act,[1014] one finds the word "compensation", but not the term "damages". Accordingly, any financial claim presented and awarded to the victim in a court of law is considered compensation. Consequently, compensation is a concept that attempts to redress, in monetary terms, any wrongdoing against an individual or any losses (patrimonial and non-patrimonial) suffered because of the delict committed by any other person. It is an attempt to make amends or to express sorrow to the victim.

1008 *Ibid*.

1009 *Van der Merwe v RAF* [2006] ZACC 4; 2006 4 SA 230 (CC); 2006 6 BCLR 682 (CC) par [41].

1010 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.7.2.

1011 [2015] ZACC 26.

1012 [2015] ZACC 26 par [2]: Compensation under the Act may come in two guises. The first is for prescribed benefits payable under the Act for occupational injuries sustained as a result of a work accident (occupational injury benefits). It is payable irrespective of any negligence on the part of the employer. The second is for damages, beyond those benefits, that were caused by a third party at the workplace (workplace damages). This is an ordinary delictual claim, dependant on proof of wrongful and negligent conduct by the third party. In contrast, the common law delictual claim against an employer for workplace damages is precluded.

1013 Act 56 of 1996; RAF Amendment Act 19 of 2005.

1014 Act 130 of 1993.

In light of the above discussion, the concept “compensation” may also include the fine or damages payable in terms of customary law, where a breadwinner has been unlawfully and negligently killed. From the above discussion, what emerges from the language of the definitions of the concepts “damages” and “compensation” is that the scope of the word “compensation”, as it is used under the dependency action, rightly appears to be interpreted to be wider and more comprehensive in its context than the term “damages.” Nonetheless, what is significant is the fact that both concepts are the principal remedy that provides monetary compensation, by law, to an individual who has suffered loss, including personal injury or loss due to the death of a breadwinner. Both seek to redress injustice or wrongdoing by providing the victim with monetary assistance for the loss suffered. It is clear that both concepts attempt to measure, in financial terms, the extent of the harm suffered because of the wrongdoer's actions.

Damages or compensation is distinguishable from “costs”, which are the expenses incurred as a result of bringing a lawsuit, and which the court may order the losing party to pay.[1015] These concepts also differ from the “verdict”, which is “the final decision issued by a court of law”.[1016] The terms “damages” and “compensation” seem to have the same connotation for purposes of the dependency action, although the latter is more comprehensive. Therefore, the two concepts will be used interchangeably throughout this thesis. The difference between damages and compensation, at least in the context of the dependency action, seems to be a distinction without a difference.

[1015] Mlambo 2012 *Advocate* 22 26 32.
[1016] See legal definition of damage - https://legal-dictionary.thefreedictionary.com/damages.

Having reflected on these terminologies, the objectives of assessing compensation (damages) will be discussed in the next section.

4.3 Basic principles of assessing damages for loss of support in terms of the dependency action

There is no dispute amongst the four jurisdictions regarding the fundamental principle which underlies an award of damages to the dependants-claimants under the dependency action. The overriding compensatory principle applied to the assessment of an award of damages for loss of support is that the dependants-claimants should be fully compensated for their loss.[1017] This principle is also known as the principle of *restitutio in integrum*.[1018] It has been held to be applicable to death claims, so that the dependants should be awarded a sum of money that will restore them to the positions they would have been in, had there been no wrongdoing committed against their breadwinner. The following statement by the Australian Judge, Windeyer, has been widely quoted: "The one principle which is absolutely firm, and which must control all else, is that damages for the consequences of mere negligence are compensatory."[1019] An accurate expression of the award of damages comes from the case of *Walker v Floyd*,[1020] wherein it was held that the plaintiff's remedy remains damages designed to restore him, as far as money is able, to his pre-accident condition, and to satisfy, again insofar as money can, the needs arising from his

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1017 Luntz *Assessment of damages* (2006) paras 1.5 & 1.6; Barnett & Harder *Remedies* (2014) 21; Neethling & Potgieter *Law of delict* (2015) 292; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 1.7.2; Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 5 October 2017); *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 39; *McCrohon v Harith* [2010] NSWCA 67 [52] [60].

1018 Meaning restoration to the original position; see *Liesbosch, Dredger v Edison SS* [1933] AC 449 (HL) 463.

1019 See *Skelton v Collins* (1966) 115 CLR 94 128; *Todorovic v Waller* (1981) 150 CLR 402 412 427 442 463; *Harriton v Stephens* (2004) 59 NSWLR 694 (CA) 216-230; Luntz *Assessment of damages* (2006) par 1.6.

1020 [1995] 2 Qd. R 447 452.

injuries or the death of the breadwinner. Therefore, the general objective of an award of damages in Australia, and indeed in most common law countries, such as South Africa, Botswana and Lesotho, is to place the claimant in the financial position he/she would have been in "but for" the delict, to the extent that money can,[1021] without the claimants landing a windfall. This is simultaneously the function of any award of damages.[1022]

From this, it follows that if an assessment is done on a basis, which negates this fundamental principle, such assessment is potentially flawed, inequitable and unjustifiable.[1023] It is therefore important to first determine the damage or loss flowing from the untimely demise of a breadwinner. The classic formulation of the compensatory principle is the recoverable damages in monetary terms, not more, nor less, than the plaintiff's actual loss.[1024] Consequently, the dependants-claimants are entitled to be restored to the position they would have been in, had the delict not occurred, in so far as this can be done through the payment of money.[1025] The aim is to make the dependants "whole" through the award of money, in order to compensate them for all the losses suffered.

In the assessment of damages, the real question to ask should always be the following: What damage or loss has the dependant really suffered from the death of his or her breadwinner? Therefore, the calculation of the quantum of damages focuses on the full support which would have been provided if there had been no

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1021 Luntz *Assessment of damages* (2006) par 1.4.

1022 Klopper 2007 *THRHR* 442.

1023 *Collins v Administrator, Cape* 1995 4 SA 83 (C); *Geldenhuys v SAR & H* 1964 2 SA 230 (C); *Parity v Hill* C and B I 680; *Marine & Trade v Katz* 1979 4 SA 961 (A) 983; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 118.

1024 Monyamane *The nature, assessment and quantification of medical expenses* (2013) 87.

1025 *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386, 393; *Hulley v Cox* 1923 AD 234 244; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614.

death.[1026] The ideal measure of damages[1027] is that which leads to the most comprehensive compensation possible.[1028] This means that when assessing damages, regard should be had to all losses flowing from the death, including both patrimonial and non-patrimonial damage,[1029] even though non-patrimonial losses as a head of damages under the dependency action are not recognised in South Africa. As a result, the aim of the assessment of damages for loss of support is to provide the dependants of the deceased with damages or compensation in the form of a sum of money, which will be sufficient to supply them with all the benefits of the same standard and duration as would have been provided for them by the deceased breadwinner, had he not been killed through the wrongful and culpable act of the wrongdoer.[1030] It is an attempt by our legal system, via a compensation payment, to place the dependants in the same financial position as they would have been, but for the wrongdoer's unlawful and negligent act.[1031]

1026 Koch 2011 *SAAJ* 111 125; *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; *Hulley v Cox* 1923 AD 234 244; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614.

1027 A formula for determining monetary damages or a way to compute damages that are to be awarded to claimants – see Webster's New World Law Dictionary (2010) https://www.yourdictionary.com/measure-of-damages#iQ75KQqTWqZvQxLS.99 (accessed on 23 July 2017). Quantum of damages appears to be the preferred term in legal circles for the amount of damages, and measure of damages will be interpreted by this study to refer to the method used to quantify the amount of damages.

1028 Van der Walt *Sommeskadeleer en die "once-and-for-all"* reël (1977) 8 46 93 108 125-6 227 242 250 279 301 304.

1029 Luntz *Assessment of damages* (2006) par 6.2; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 2.3.2.

1030 *Brooks v Minister of Safety & Security* 2009 2 SA 94 (SCA) 97; *Victor v Constantia Ins Co Ltd* 1985 1 SA 118 (C) 119; *Union Government v Lee* 1927 AD 202 220-222; *Santam Bpk v Fondo* 1960 2 SA 467 (A) 471-472; *Santam Ins Ltd v Meredith* 1990 4 SA 265 (Tk) 267; *Santam v Henery* 1999 3 SA 421 (SCA) 425-426; *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) 1324-1325; *Lambrakis v Santam Ltd* 2003 3 SA 1098 (W) 1113-1114; *Mankebe v AA Mutual Ins Association Ltd* 1986 2 SA 196 (D) 198-199; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376; *Groenewald v Snyders* 1966 3 SA 237 (A) 246; *Milns v Protea Ass Co Ltd* 1978 3 SA 1006 (C) 1010; *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O) 463; *Witham v Minister of Home Affairs* 1989 1 SA 116 (Z) 131; *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; *Hulley v Cox* 1923 AD 234 244.

1031 *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; *Hulley v Cox* 1923 AD 234 244; *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614.

Common law damages are thus designed to compensate the plaintiff, and not to punish the wrongdoer. This stands in contrast to the moralistic view of customary law damages, which are more focused on how the wrongdoer should be appropriately punished,[1032] as stated above,[1033] while simultaneously emphasising the traditional goals of reconciliation and reintegration in dispute resolution, rather than on what the dependants may need in order to be restored to their pre-loss position. Therefore, customary law damages are more geared towards the payment of fines, in accordance with a criminal law framework, and are therefore regarded as punitive in nature. The award of damages under customary law, as previously stated, does not adhere to the fundamental principles of assessment of damages for loss of support, as would have been applied in a Western court. Therefore, it can be said that customary law damages are considered an inadequate and even unjust remedy for the loss of support, because it could lead to under-compensation of the dependants.

Customary law damages can also be regarded as being in contrast to common law punitive damages,[1034] which are awarded to a plaintiff in addition to compensatory damages.[1035] The award for damages under customary law is limited to punitive

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1032 Palmer *Law of delict* (1970) 112; Poulter *Legal dualism* (1979) 70.

1033 See chapter 4 of this thesis, par 4.2 above.

1034 Punitive damages are also known as "exemplary damages, and may be awarded in addition to actual damage suffered. The purpose is to punish the wrongdoer in a civil lawsuit and to deter others from similar misconduct in the future. Punitive damages are based on the theory that the interests of society and the victim can be met by imposing additional damages on the wrongdoer. They are regarded as non-compensatory, as they have some of the characteristics of a criminal fine, and have been characterised as 'quasi-criminal' because they stand halfway between criminal and civil law" – see Legal dictionary (online): https://www.legaldictionary.net/punitive-damages/.

1035 Joubert & Prinsloo *Law of South Africa* (2009) 76.

damages.[1036] As previously stated,[1037] customary law lacks the conceptual structure of the modern law of assessment of damages.[1038] Concepts such as compensatory damages are foreign to customary law. For this reason, customary law falls short of the fundamental principle discussed here, namely that the law entitles the dependants to be awarded damages for the full measure of their losses, as best as it can be calculated in monetary terms. Common law, to some extent, also fails to satisfy the requirement of full compensation for the damage flowing from the death of a breadwinner, as will be discussed below.

1036 It should be noted that the continued existence or availability of punitive damages is questionable in the South African law of delict. The accompanying risk of receiving no compensation in respect of damage suffered, may justify the consideration of an alternative type of damages in the event that punitive damages are no longer awarded. The particular alternative type of damages suggested is aggravated compensatory damages. Aggravated compensatory damages are the special and highly exceptional damages awarded on a wrongdoer/defendant by a court, when his/her conduct amounts to tortious conduct subjecting the dependant/plaintiff to humiliating and malicious circumstances, where a dependant/plaintiff is subjected to distress, embarrassment, or humiliation. Aggravated damages are basically compensatory in nature and are determined on the basis of the intangible injury inflicted on a plaintiff. Intangible injury includes the pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of a defendant. When compared to punitive damages, aggravated damages require proof of injury. Aggravated damages can be attained as additional compensation if the injured dependant establishes that the unlawful and negligent killing of his/her breadwinner caused mental distress, grief, pain (non-patrimonial damage). It is obvious that the dependants of the deceased who was unlawfully and negligently killed may suffer extensive non-patrimonial damage. For instance, it is conceivable that a dependant who has witnessed the brutal assault of his/her breadwinner may suffer pain, mental and emotional distress, shock, grief, shortened life expectancy caused by the conduct of the wrongdoer. He/she may incur extensive medical costs and continue to incur related financial costs as medical treatment is likely to continue well after the date of death of his/her breadwinner. If the victim fails to obtain compensation for such damage, the dependant will bear the burden by him/herself, thereby adding further depression to the already unfortunate state of affairs brought about by the unlawful and negligent death of his/her breadwinner. However, if the victim is compensated, it will alleviate the financial consequences and provide satisfaction in respect of the non-patrimonial damage. In this regard, aggravated damages will respond to the precise gap that will be left open by the anticipated future absence of punitive damages. The concept of aggravated compensatory damages will thus fulfil to a certain extent the function of punitive damages. See Neethling and Potgieter *Law of delict* 7 fn 30.

1037 See chapter 4 of this thesis, par 4.2 above.

1038 Knoetze 2012 *Speculum Juris* 47-48.

4.4 Irrecoverable damages for loss of support and other related losses in terms of the dependency action

Notwithstanding the fact that a claim for loss of support should include all the financial contributions that the breadwinner would have made to his or her dependants over the lifetime of the breadwinner or the dependants, whichever is shorter, not all financial losses suffered due to the unlawful and negligent death of the breadwinner are recoverable under the dependency action for loss of support. A claim for loss of support in the law of South Africa, Botswana and Lesotho only comprises itemised tangible losses,[1039] unlike in Australia, where the relevant legislative provision does not explicitly limit the damages recoverable for loss of support to itemised tangible losses.[1040] Damages recoverable are limited to the loss of that dependant which arose from the loss of the expectation of the deceased's financial support.[1041] The general principle applied by the South African courts is that a dependant-plaintiff, when entitled to damages for loss of support, should be awarded damages only for the "material loss" caused by the death of the breadwinner.[1042] Claims by dependants are thus available solely for pecuniary or patrimonial loss.[1043] Practically, no

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1039 Although for purposes of this study, only loss of support and funeral or cremation expenses will be discussed, claimable heads of damages that have been acknowledged as losses under a dependency action in the South African practice are loss of financial support, funeral expenses, medical and hospital expenses that occurred prior to death, and pain and suffering caused to the deceased if proceedings had already been instituted prior to the death.

1040 Compensation to Relatives Act 1897 (NSW) s 3(1): An action to be maintainable against any person causing death through neglect, despite the death of the person injured
(1) Whensoever, the death of a person is caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to a serious indictable offence.

1041 *De Sales v Ingrilli* (2002) 212 CLR 338 [91].

1042 *Jameson's Minor v CSAR* 1908 TS 575 602; *Union Government v Warneke* 1911 AD 657 662 665 667; *Hulley v Cox* 1923 AD 234 at 243; *Indrani v African Guarantee and Indemnity Co Ltd* 1968 4 SA 606 (D) 607F-G.

1043 Boberg 1972 *SALJ* 147-148; *Nochomovitz v Santam Insurance Co Ltd* 1972 1 SA 718 (T).

compensation is available for non-pecuniary losses,[1044] as well as pecuniary loss of future savings or inheritance.[1045] In the next section, the loss of consortium (non-pecuniary loss) and the loss of future savings or inheritance (pecuniary loss) as losses suffered by dependants due to the death of the breadwinner will be discussed.

4.4.1 Loss of consortium (non-pecuniary loss)

4.4.1.1 General

Consortium consists of several elements, encompassing not only tangible services provided by a family member, but also intangible benefits that each family member receives from the continued existence of other family members. Such benefits include attention, guidance, care, protection, training, companionship, cooperation, affection, love, and in the case of a spouse, sexual relations, comfort and society.[1046] Damages for the loss of consortium are not limited to the loss of a spouse. The loss of consortium may be claimed by close family members other than a spouse, including children and parents. In this study, special attention will be given to the loss of spousal consortium, as well as a child's loss of parental consortium. However, before discussing them, it is important to first briefly reflect on the history of the loss of consortium.

4.4.1.2 Loss of spousal consortium

The original common law action for loss of consortium was only available to the husband for loss of consortium of the wife.[1047] The right was initially centred on the

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1044 Boberg *et al Law of persons and family law* (1999) 298.

1045 Joubert & Prinsloo *Law of South Africa* (2009) 76; Boberg *Delict: Aquilian liability* (1984) 298.

1046 *Hitaffer v Argonne* (DC Circ. 1950). 183 F. 2d 81 1; Best, Barnes & Kahn-Fogel *Basic tort law: Cases, statutes & problems* (2014) chapter 12: *Union Government v Warneke* 1911 A.D. 657; *Abbott v Bergman* 1922 AD 53; *Peter v Minister of Law & Order* 1990 4 SA 6 (E) 9; Carpenter, Zuckerman & Rowley https://www.czrlaw.com/damages-arising-out-of-loss-of-consortium (accessed on 9 October 2017); Potgieter, Steynberg & Floyd *Law of damages* (2012) par 5.10.

1047 See Barnett & Harder *Remedies* (2014) 183; Brett 1959 *ALJ* 321 389 428; Riseley 1981 *Adelaide Law Report* 421 432 453; Thornton https://www.austlii.edu.au/au/journals/SydLawRw/1984/2.pdf (accessed on October 2017); The Law relating to Loss of Consortium and Loss of Services of a Child https://www.lawreform.ie/_fileupload/consultation%20papers/wpLossOfConsortium.htm

husband's position as master[1048] of the household, although the element of consortium was gradually stressed more than that of *servitium.*[1049] In South Africa, a husband whose wife has been wrongfully injured may recover damages from the wrongdoer for the hospital and medical expenses that he has incurred, but he may not recover for non-pecuniary damage to the consortium of his wife. The right to recover pecuniary damage is based on an extension of the *actio legis Aquiliae*. In 1911, a South African court first recognised the right of a husband to claim damages in respect of pecuniary loss sustained by him due to the death of his wife,[1050] and in 1921,[1051] a similar right on the part of the husband was recognised in relation to injuries sustained by his wife. Mr Justice Villiers stated the following in the 1921 case:

> "As in the case of the death of a wife, our law is, however, silent whether a husband can recover from a person who has through culpa injured his wife, though not fatally. But no reason can be suggested why the husband should not be allowed to recover when the injuries are not fatal. For, in principle, no distinction can be drawn between the two cases."[1052]

The extent of entitlement to recover for loss of consortium in South Africa is quite limited. Non-pecuniary injury to consortium is in general not recoverable.[1053] In *Union Government v Warneke,*[1054] the plaintiff's claim for the loss of comfort and society of his wife, for whose death in a railway accident the defendant was responsible, was disallowed. Lord De Villiers CJ said:[1055] "the plaintiff's claim for loss of comfort and society of his wife does not appear to me to be a pecuniary loss at all". Therefore, a

(accessed on 5 October 2017); *Toohey v Hollier* (1955) 92 CLR 618; *Harris v Grigg* [1988] 1 Qd R 514 522; *Nguyen v Nguyen* (1990) 169 CLR 245 251; *Foulds v Smith* 1950 1 SA 1 (A).

1048 The action for loss of consortium was entitled by *actio per quod servitium amisit*.

1049 The term servitium refers to the duty of obedience and performance which a tenant was bound to render to his lord, by reason of his fee https://www.thelaw.com/lawdictionary& black's law dictionary (accessed on 19 July 2017).

1050 *Union Government v Warneke* 1911 AD 657.

1051 *Abbott v Bergman* 1922 AD 53.

1052 *Abbott v Bergman* 1922 AD 53 56.

1053 Hardford 1982 *UNSWLJ* 291 297; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.5.3(b).

1054 1911 AD 657.

1055 *Union Government v Warneke* 1911 AD 657 662.

dependant could not claim for loss of social comfort and society resulting from the death of a spouse.[1056] Furthermore, the pecuniary damages are limited to the domestic context. Injury suffered by the husband in the form of diminished happiness or lessened spiritual enjoyment of his home life or his wife's society is not recoverable. Thus, it would appear that only the part of the wife's earnings that is used to defray household expenses may be taken into account by the court in determining the husband's loss of consortium of his wife.[1057] The contributory negligence of the wife will not reduce the amount of damages awarded to the husband, but the defendant will have a right to claim for a contribution from her estate.[1058] While there is no precedent in favour of recognising this right of action to the wife for the loss of consortium of her husband, there appears to be, in principle, no objection in South African law to the recognition of such a right. The law relating to loss of consortium in Botswana and Lesotho appears to be substantially the same as that in South Africa.

The leading decision on the loss of consortium in Australia is *Toohey v Hollier*.[1059] The facts, briefly, were that “the plaintiff's wife was seriously injured in a traffic accident caused by the defendant's negligence. She was unable to carry out her domestic duties and the plaintiff was obliged to employ a housekeeper. The plaintiff was awarded a sum of money by the trial judge in respect of his financial loss, together with the sum of £1,000 as “general damages”. The defendant appealed against this latter award. The High Court of Australia dismissed the appeal. In *Birch v Taubmans Ltd,*[1060] the court permitted the recovery of pecuniary damages for impairment of consortium, as

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1056 Also see *Abbott v Bergman* 1922 AD 53; *Plotkin v Western Assurance Co Ltd* 1955 2 SA 388 (W); *Nochomovitz v Santam* 1972 1 SA 718 (T); Church 1979 *THRHR* 376 384; Boberg 1972 *SALJ* 147 149.

1057 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.5.3(a).

1058 ss 2(1A) & (6) (a) of the Apportionment of Damages Act 34 of 1956; McKerron 1963 *SALJ* 15 17.

1059 (1955) 92 C.L.R. 618 (High Ct of Australia), analysed by Parsons (1955) *MLR* 514.

1060 (1956) 57 S.R. (N.S.W.) 93.

well as for its total destruction. In this case, the plaintiff's wife had been injured in a traffic accident caused by the negligence of the defendant. Her injuries were of such a nature as to make her unable to have sexual relations. The plaintiff was held to be entitled to recover in respect of financial impairment of consortium. The court stated:

> "We are unable to agree that nothing more than the actual pecuniary loss suffered is recoverable, and we think that in any event the decision in *Toohey v Hollier* would require us so to hold... [o]nce it is accepted that consortium is not one and indiscerptible, and that damages may be recovered for any impairment thereof, the essential matter for consideration appears to us to be the extent to which the right to recover is limited. The terms of the limitation placed upon the husband's right to recover by the decision in *Toohey v Hollier* is that the damage must be confined to the 'material or temporal loss capable of estimation in money'.... We think that the meaning of this limitation is plain. Injury suffered by the husband in the nature of diminished happiness or lessened spiritual enjoyment of his home life or his wife's society is not recoverable. Indeed, elements of this kind, including also such matters as mental distress suffered by the husband, are not in a true sense impairments of consortium at all. But if a consequence is that, in his domestic establishment, there are rendered to the husband fewer or inferior comforts, conveniences or assistance, of a temporal as distinct from a spiritual kind, then he may recover in respect thereof without it being necessary for him to incur expenditure in replacing or improving what is done for him."[1061]

Similar to the position in South Africa, the contributory negligence of the plaintiff's wife will not affect the defendant's liability to the plaintiff. It was so held by the final court of appeal in Australia in *Curran v Young*.[1062] From the above discussion, it is clear that the law in Australia currently recognises loss of consortium claims[1063] brought by either the husband or wife,[1064] and both pecuniary and non-pecuniary damages can be claimed under the loss of consortium.[1065] The question presented here is whether South Africa, Botswana and Lesotho should now recognise non-pecuniary damages

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1061 *Birch v Taubmans Ltd* (1956) 57 S.R. (NSW) 93 99.

1062 (1965) 112 C.L.R. 99.

1063 Barnett & Harder *Remedies* (2014) 184; *Kealley v Jones* [1979] 1 NSWLR 723 729 744-46 751-2; Thornton 1984 *SLR* 259 269.

1064 *Kealley v Jones* [1979] 1 NSWLR 723; *Johnson v Kelemic* [1979] F.L.C. 78, 487; *Bugius v Smith* [1979] F.L.C. 78.497; Wrongs Act, 1936 (Tas), s 33.

1065 Barnett & Harder *Remedies* (2014) 184; regulation 6 of the Civil Liability Regulation 2014 (Qld); regulation 128 of the Workers' Compensation and Rehabilitation Regulation 2014 (Qld).

of a spouse emanating from loss of consortium as well. In the next section, attention will be given to the child's loss of parental consortium.[1066]

4.4.1.3 Legal position regarding a child's loss of parental consortium

Parental consortium is usually defined as the child's right to the parent-child relationship.[1067] In order for damages to be granted in a claim for loss of parental consortium, a child-claimant must prove the loss of parental support, protection, affection, society, discipline, guidance and training.[1068] The action for loss of parental consortium recognises that children suffer a similar loss of emotional support, companionship, love and other emotional benefits when a parent dies to married adult couples whose spouse is killed, because when children are in their maturing years, the parents' guidance is critical and comforting.[1069] The recognition of the action for loss of parental consortium in Australian law is a recent development, having its genesis in the tort of loss of consortium. It is a logical evolution of the common law consortium claim, because of changes in modern society regarding childrens' rights.[1070]

In South Africa, Botswana and Lesotho, there is no compensation for unlawful deprivation of parental consortium.[1071] Such a cause of action does not exist. The South African law, and by implication, that of Botswana and Lesotho, adhere strictly to the principle that only itemised pecuniary losses are claimable upon death. It therefore precludes claims for bereavement, grief or loss of comfort and society on the part of

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1066 See *Marx v Attorney-General* (1974) 1 NZLR 164; *Berger* v *Weber* (1978) 267 NW 2d 124.
1067 Vannatta 1993 *MLR* 154.
1068 *Ibid*.
1069 Jaffe http://www.bpslawyers.com/Articles/Loss-of-Parental-Consortium.shtml (accessed on 5 October 2017).
1070 *Marx v Attorney-General* (1974) 1 NZLR 164; *Berger* v *Weber* (1978) 267 NW 2d 124.
1071 Neethling & Potgieter *Law of delict* (2015) 172; Parker & Zaal 2016 *THRHR* 146; *M v Minister of Police* 2013 5 SA 622 (GNP), 2014 6 SA 256 (SCA); Robinson & Prinsloo http://www.scielo.org.za/scielo.php?pid=S1727-37812015000500015&script=sci (accessed on the 27 August 2017).

the deceased's relatives, including that of a child.[1072] In South Africa, a short-lived development has recently occurred in respect of a child's claim for loss of parental consortium in the decision of *M v Minister of Police,*[1073] which was reversed by the Appeal Court in *Minister of Police v Mboweni*.[1074]

In *M v Minister of Police*, the issue before the court was whether a child whose parent has died as a result of the wrongful and unlawful conduct of the South African Police Services may sue for damages arising from the child's constitutional right to parental care in terms of section 28(1)(b) of the Constitution.[1075] The question that the High Court had to answer was whether a claim for damages may be instituted on the grounds that children are, as a result of the wrongful death of their father, deprived of their constitutionally entrenched right to parental care.[1076] The Gauteng North High Court substantially expanded the claim for damages for loss of parental care. It found that a child's claim following the wrongful death of his or her parent is not restricted to the common law claim for loss of support, but certainly encompasses claims for constitutional damages, since the notion of the right to parental care is entrenched in section 28(1)(b) of the Constitution.[1077]

This extension of the claim of children was unequivocally overruled by the Supreme Court of Appeal in *Minister of Police v Mboweni*.[1078] The basis of this decision was that the procedure adopted by the High Court was incorrect. The parties had failed to place

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1072 Joubert & Prinsloo *Law of South Africa* (2009) 68.
1073 *M v Minister of Police* 2013 5 SA 622 (GNP).
1074 2014 6 SA 256 (SCA).
1075 s 28(1)(b) of the Constitution provides as follows: (1) Every child has the right - (a) ... (b) to family care or parental care, or to appropriate alternative care when removed from the family environment…
1076 Robinson & Prinsloo http://www.scielo.org.za/scielo.php?pid=S1727-37812015000500015&script=sci (accessed on the 27 August 2017).
1077 *M v Minister of Police* 2013 5 SA 622 (GNP) par 43.
1078 *Minister of Police v Mboweni* 2014 6 SA 256 (SCA).

the relevant facts concerning the nature of the relationship between the deceased and his daughters before the judge, and it was accordingly impossible to say whether and to what extent there had been a loss of parental care, in the sense given to this by the Constitution. The Supreme Court of Appeal also pointed out that the proper interpretation of the constitutional right in section 28(1)(b) of the Constitution is a matter of some difficulty, as the right embodied in the section is expressed as being a right to family or parental care, or appropriate alternative care outside the family environment. The court also lamented that the existence of such a remedy could have a substantial impact on public funds, such as those of the Road Accident Fund, which were not represented before the High Court. Therefore, an opportunity ought to have been given for such bodies to participate in the proceedings. The judgment of the High Court was accordingly set aside and the matter referred back for trial, where the issues could be fully and properly canvassed.

In light of this decision in South Africa, the position at present is that there is no compensation for a child's loss of parental consortium. Although such a right does not exist in the Republic of South Africa, there seems to be little reason why dependant-children who suffer emotional shock due to the death of a breadwinner should not successfully claim compensation for personal injury on that basis.[1079] In *Bester v Commercial Union Versekeringsmaatskappy van SA Ltd*[1080] a child, Deon Bester, had suffered nervous shock as a result of witnessing the death of his younger brother, who had been run over by a car while the two boys were crossing the road together. The shock sustained by Deon manifested itself in a personality change. From a child who was happy and carefree, and who did well at school, Deon changed into a child with

[1079] Luntz *Assessment of damages* (2006) 22.
[1080] 1972 3 SA 68 (D).

an anxiety neurosis. He had nightmares and screamed in his sleep; he became withdrawn and his schoolwork suffered. It eventually became necessary for him to consult a psychiatrist, who gave him psychotherapy under drug analysis. The court a quo refused to allow a claim for damages for mental illness arising from the nervous shock sustained as a result of an accident, on the ground that mental illness was not an injury to a physical organism, and was therefore not actionable. The Appellate Division reversed this decision.[1081] The decision of the Appellate Division was most welcome and encouraging, and showed that our law, while keeping to its Roman-Dutch foundations, is flexible and therefore capable of keeping abreast with modern developments, by bringing our law into line with modern medicine, which has for many years recognised the existence of psychological illness. However, it has also brought it into line with the law of other jurisdictions, such as England and Australia.[1082]

Even though the case law cited hereunder in support of the argument in favour of compensation for a child's loss of parental consortium does not directly relate to the emotional shock suffered by children due to the death of their breadwinner, these decisions could provide the basis for the extension of such damages under those circumstances. In the *Boswell v Minister of Police* case,[1083] damages were awarded for the emotional consequences of the shock caused by a false statement to the victim that her nephew, whom she had brought up, had been shot dead. In *Sebatjane v Federated Employers' Insurance,*[1084] compensation was awarded for the psychological shock of a miscarriage. In *Masiba v Constantia Assurance,*[1085] the victim had suffered severe shock from the sight of his stationary car being crashed into by another vehicle.

1081 1973 1 SA 769 (AD).
1082 Tager 1973 *SALJ* 123.
1083 1978 3 SA 268 (E).
1084 1989 4 C&B H2-1 (T).
1085 1982 4 SA 333 (C) 343.

He died as a result of the shock. A right of action for damages for loss of support was granted to his dependants, on the basis that had he merely been injured, he would have had a personal right of action for damages for the injury suffered. It is argued that the disadvantage resulting from the unlawful and negligent death of a breadwinner encompasses more than the termination of sources of financial support.[1086] The unlawful and negligent death of a breadwinner also leads to a child suffering a loss of emotional support, companionship, love and other emotional benefits (non-financial damages).

A breadwinner-parent has several duties that he or she must perform, where money is not a factor. Above and beyond the dependant-children's right to the needs that money can meet, the dependant-children also have the right to parental care, love, affection, comfort, protection and guidance (parental consortium). It is submitted that the loss of a parent's love and affection is devastating to any child. Children should also be able to bring a loss of parental consortium claim against the wrongdoer, whose negligent act has resulted in the loss of a parent. Such a cause of action does not currently exist in the three Southern African countries investigated in this study. The courts in South Africa, Botswana and Lesotho have the power and duty to modify and conform to the changing conditions of our society. Development of the common law is a judicial function, and when the common law does not keep up with the times, our courts have a responsibility to change this law.[1087] The blanket denial by the South African courts of any non-financial damages under the dependency action is a major shortcoming relating to the assessment of damages under the action of dependency. It is contended

[1086] Parker & Zaal 2016 *THRHR* 146 147 152; *M v Minister of Police* 2013 5 SA 622 (GNP).
[1087] ss 8(3) 39(2) 173 of the Constitution.

that it should no longer be supported, as it leads to unjust consequences for the dependants, including the dependant children.

4.4.2 Loss of future savings or inheritance (pecuniary loss)

According to the current law in South Africa, Botswana and Lesotho, a dependant has no claim for loss of inheritance.[1088] When a person's life expectancy is shortened, his or her claim for compensation is limited to the period during which it is expected that he would continue to live, and he has no claim for loss of savings beyond that date. In the same manner, the deceased is not, theoretically, kept alive until the date when, but for the accident, he would probably have died. If this is so, no claim for loss of savings after death can pass to the executors of the deceased's estate.

In the case of *Lockhat's Estate v North British and Mercantile Insurance Co Ltd*,[1089] the appellants, the executors of the estate of the deceased, alleged that the deceased had died as the result of injuries he sustained when he was knocked down by a motor car negligently driven by one N. The appellants sued the insurer of N, the respondent, for an amount representing the value of the amount that the deceased would have saved between the date of his premature death and the date up to which he would have lived, in accordance with his normal life expectancy, if he had not been killed. The respondent had successfully objected to the declaration as being bad in law, or alternatively as being insufficient in law to sustain the action in whole or in part. In an appeal, the court held that the deceased was not an asset in his estate, which had suffered destruction, and the executor had no claim, on behalf of the estate, to recover his value as the earner of money. Therefore, the heirs and legatees had no right to claim against N or

1088 *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 304.
1089 *Ibid*.

the respondent, and an executor could not claim future earnings or savings from the wrongdoer that had been lost through the death of the deceased.

Potgieter, Steynberg and Floyd are of the view that in a proper case, a court may increase an amount of annuity[1090] if it appears that a breadwinner would have amassed further assets, and that his or her dependants would probably have benefited from this by receiving a larger inheritance.[1091] They further state that a claim for loss of support is not confined to that which a dependant could legally claim, but extends to all the material advantages, comfort and support which, as a matter of reasonable probability, the dependant would have enjoyed but for the death of his or her breadwinner.[1092] According to the current law, a person has no claim on account of the frustration of his or her expectation to an inheritance.[1093] There is only a limited protection where the heir is also a dependant.[1094] The expectation of an inheritance is an uncertain future event, which cannot be proven, but which is a possibility and would have resulted in a benefit to the dependant if realised. Therefore, where a dependant's inheritance has been compromised, it constitutes a loss if it deteriorates the inheritance. The breadwinner's capacity to earn money forms part of the breadwinner's estate, which could later be inherited by his or her dependants. The unlawful killing of the breadwinner leads to the impairement of the breadwinner's capacity and constitutes a loss on the part of both the breadwinner and his or her dependants. The expectation of receiving an inheritance should be recognised and protected by awarding damages.

1090 By increasing the amount of an annuity, the dependant will be paid a large fixed sum of money each year, typically for the rest of their life, as opposed to receiving a lump sum payment upon the death of the breadwinner.

1091 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.5.3(c).

1092 *Ibid.*

1093 *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 304.

1094 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 3.2.4.2(b).

This could perhaps be included as a positive contingency[1095] for increasing the award for loss of support.

It is suggested that denial of the loss of future potential savings or inheritance is unfair to the dependant, as the value of the dependency does not include only that part of the deceased's earnings which the deceased would have expended annually in maintaining his or her dependants, but also that part of the deceased's earnings which he or she would have saved, and which would have come, partially or wholly, to the dependants through inheritance upon his or her natural death. It is further suggested that a sum in respect of loss attributable to the cessation of contributions which the deceased had made to a retirement or other fund, of which the dependants were the nominated beneficiaries, should also be included[1096] as a positive contingency.

Unlike in South Africa, Botswana and Lesotho, where the loss of future savings or inheritance is not awarded in a dependency claim, in Australia, a sum reflecting what the dependants could have expected to inherit or benefited from the deceased's savings, had the deceased lived his natural life, namely the loss of savings or inheritance, is awarded as part of the dependency claim.[1097] A solatium is allowed for by including in the damages a figure representing a percentage amount, which the

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1095 Contigencies may be described as uncertain circumstances of a positive or negative nature which, indepenedent of the defendant's conduct and if it should realise, would probably influence a person's health, income, earning capacity, quality of life, life expectancy or dependency on support in future, or could have done so in the past, and which must consequently be taken into account in a fair and realistic manner, by increasing or decreasing the plaintff's damages during the quantification process – see Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 1.7.2 4.6.3.5 & 4.6.3.6; Luntz *Assessment of damages* (2006) paras 2.10 4.3 & 9.7.

1096 Hwang & Fong https://www.sal.org.sg/ (accessed on 14 April 2017).

1097 Luntz *Assessment of damages* (2006) par 5.2; also see Civil Liability Act 1936, s 55: Lump sum compensation for future losses: If—(a) an injured person is to be compensated by way of lump sum for loss of future earnings or other future losses; and (b) an actuarial multiplier is used for the purpose of calculating the present value of the future losses, then, in determining the actuarial multiplier, a prescribed discount rate is to be applied; also see *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; Eaton *International encyclopaedia of comparative law* (1983) 18.

dependant would have inherited had his or her breadwinner not been unlawfully and negligently killed. Examples of Australian cases which took into account the loss of savings or inheritance in dependency claims are the following: In *Clements Estate v Central Valley Taxi,*[1098] the deceased husband had, just before his death, changed his career to sales training and set up his own company. The court allowed the wife of the deceased a recovery or entitlement to compensation for the value of the loss of potential savings. Another case is *Roads and Traffic Authority v Cremona,*[1099] where a larger component of the deceased's income would have been applied to savings or investments, and the plaintiff and her children were entitled to claim what the deceased would have saved and ultimately left to them.[1100]

The non-awarding of loss of future savings or inheritance in South Africa, Botswana and Lesotho means that if a deceased, who was killed in an accident in South Africa, earned, for example, R10,000 a month and spent only R1,000 on his dependant, but saved R4,000 per month of his income for rainy days, or for bequeathing this sum to his family, the dependant's loss of support would be based on only R1,000 per month, even though the dependant might reasonably have expected to receive part of the R4,000 per month saved in the future, had the deceased-breadwinner not been unlawfully and negligently killed. The present position in South Africa, Botswana and Lesotho is unsatisfactory, as it creates a gap which benefits wrongdoers and their insurers, at the expense of dependants. There is a need to bring the laws of these three countries in line with the more persuasive and forward-thinking position taken by

1098 (1992) ACWSJ Lexis 36193; SCBC New Westminster Registry No A910185, 26 November 1992.
1099 [2001] NSWCA 338.
1100 *Davies v Powell Duffryn Associated Collieries Limited* [1942] AC 601; *Nance v British Railway* [1951] AC 601.

Australia's judiciary, which has legal decisions expressly allowing loss of future savings or inheritance to be taken into account in a dependency claim.

The present political situation in South Africa,[1101] and our inadequate system of social welfare,[1102] as well as an aging population, has resulted in South Africans saving more to provide for various contingencies. When an actively saving breadwinner is prematurely killed, the failure to recognise the loss of future savings or inheritance as a head of claimable pecuniary damages means that the dependants are not fully compensated for the complete extent of their financial losses as a result of the untimely death of their breadwinner. The driving principle behind the law of dependency claims is to compensate dependants for the loss of all reasonable expectation of pecuniary benefits. Australia has held that such reasonable expectation should include the dependant's expectation of benefiting from the future savings of the deceased breadwinner. There is no reason why South Africa, Botswana and Lesotho should fail to award the loss of future savings or inheritance to the dependants. This pecuniary loss should be awarded in the same way as other patrimonial losses[1103] under the dependency action, minus of course the necessary discounts for acceleration due to early receipt of a capital sum, tax and other contingencies.[1104]

1101 For example, over the last few years, our media has been saturated with reports of corruption and misuse of government monies by top government officials. Recently, there has been a report on News24 by Dr Eugene Brink that "a report by trade union Solidarity details nine corruption scandals that, over the past few years, have cost the taxpayer much more than the R246m spent on President Jacob Zuma's home in Nkandla".

1102 Du Toit "The real risks behind SA's social grant payment crisis" Business Day Newspaper report dated 21 February 2017: Recently, there have been disputes arising over SA's social grant system, and millions of vulnerable beneficiaries have been threatened with non-payment, which creates risks that go far beyond interrupting poor people's access to desperately needed grants. The failure of the South African Social Security Agency (SASSA), which is responsible for the payment and administration of social grants, to act timeously has created a crisis that threatens to deliver grant recipients, on a silver platter, into the hands of unscrupulous financial services companies.

1103 Eg, loss of support.

1104 McGregor *McGregor on damages* (2016) ch 17.

Australia takes future loss of savings into account as part of the value of the dependency, by either including the savings when calculating the annual value of the dependency, or by way of an additional sum.[1105] Similarly, South Africa, Botswana and Lesotho should not deprive dependants of the amount of lost future savings or inheritance, which they would have been given by or inherited from the deceased if he had not died prematurely. The fact that Australia has been explicitly awarding sums as accumulation of wealth or loss of inheritance for at least the past decade demonstrates clearly that such awards reflect a calculable and estimable pecuniary loss, which dependants can demonstrate would have accrued to them, and which they have therefore lost as a result of their breadwinner having been prematurely killed.

Cleaners and construction workers, to name two groups from the workforce in South Africa, are capable of establishing a savings pattern from which a loss of future savings or inheritance can be actuarially calculated. It is therefore submitted that the loss of future savings or inheritance is indeed a calculable and estimable pecuniary loss. The denial of the loss of future savings or inheritance as a head of damages suggests an unfair treatment of dependency claims. There is a need for such a loss to be recognised and fully compensated through the medium of the law in South Africa, Botswana and Lesotho, as has been done in Australia.

4.4.3 Conclusion

From the above discussion, the comparative analysis reveals that non-pecuniary damages for loss of spousal consortium and a child's parental consortium, as well as pecuniary damages for loss of future savings or inheritance, are treated differently by South African, Botswana, Lesotho and Australian courts. Australian law has been

[1105] Civil Liability Act 1936, s 55.

accepting of the notion of compensation for patrimonial loss of future savings or inheritance, and non-patrimonial loss accruing to the relatives and children of a deceased person,[1106] unlike the law in South Africa, Botswana and Lesotho. Death represents the deprivation of a number of possible and even probable future enjoyments, yet the wrongful death action in South Africa, Botswana and Lesotho does not attempt to redress all these losses. No good explanations have been provided as to why non-patrimonial losses and patrimonial losses of future savings or inheritance are not compensated. Indeed, the fact that the dependants have been deprived of these types of losses seems to have escaped the notice of our legislature. The current denial of compensation for non-patrimonial loss and patrimonial damages for loss of future savings or inheritance is unacceptable and prejudicial to the larger group of dependants.[1107]

It is recommended that an award should be made in South African law to acknowledge the non-patrimonial loss and patrimonial loss of future savings or inheritance suffered by the claimant in respect of the death of the deceased. An award of damages for the non-patrimonial loss suffered, even if it is small, can provide some consolation where a child loses a parent or a parent loses an infant child, or a partner loses his or her spouse. The amount of compensation could be fixed at a conventional sum, and the right to such compensation can also, for example, be limited to a child whose parent(s) was killed in an accident (unnatural death). Some might oppose the suggested fixed conventional award as inadequate, as it could be perceived to be an insult to a grieving

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1106 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; Eaton *International encyclopaedia of comparative Law* (1983) 18.

1107 Queensland Law Reform Commission: *Damages in an action for wrongful death* **(**Issues Paper WP No 56 June 2002); *De Sales v Ingrilli* 2002 [2003] HCA 16; 212 CLR 338 383 388-9; *Dominish v Astill* [1979] 2 NSWLR 386 393; Neethling & Potgieter *Law of Delict* (2015) 284; Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 14.7.5.3(b) & 14.7.5.3(c); *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 304.

child, and be treated scornfully by a child suffering the greatest grief. On the other hand, a large award could be seen as a gratuitous payment to a child who did not in fact suffer much grief, or it could be seen as an unfair distribution of limited resources for social welfare. The award may be sought as a way to penalise the wrongdoer, rather than as any real consolation for the grief suffered. If a fixed sum is set, unfairness could arise, as the same award would be payable to a child whose much-loved parent was killed as to one who had no close relationship with his or her parent. However, if the sum awarded was at the discretion of the court, the court would be required to investigate every family relationship, in an attempt to place a value on the complex personal relationship between parents and their children, which could turn out to be even more difficult to do in a fair and consistent manner. The present position is unsatisfactory, as it creates a gap that benefits the wrongdoers (defendants) or their insurers, at the expense of the dependants. Consequently, there is a need to bring the South African law in line with the more persuasive position taken by Australia, which has similar legislation and expressly allows for loss of savings or inheritance to be taken into account in a dependency claim.

An award for bereavement is appropriate in South Africa, Botswana and Lesotho. It is submitted that a monetary award would be accepted by the children in these three countries as a partial mitigation of their grief, and that the consolation afforded to the majority of the population would outweigh the problem of the occasional over-compensation to non-grieving, vindictive or greedy family members. The support and guidance provided by family members to each other is of great value, and confirms that when a family member is killed, there is a real personal loss suffered by the other family members, apart from material and economic loss.

A claim for a child's bereavement should be allowed in all three jurisdictions, with the aim of providing compensation to a child for grief, loss of society, comfort, love and guidance upon the loss of his or her parent. There is no sufficient reason for the law to protect the blanket denial of a claim for the loss of consortium by the child. It is old-fashioned and inconsistent to believe that only a husband[1108] should be entitled to claim for loss of consortium. Based on the above discussion, there is a strong case to be made for extending the remedy to other persons who had a close relationship with the deceased, such as a child. Damages for loss of the companionship, society and comfort of a parent or child should not be overlooked. In the next section, the recoverable damages in terms of the dependency action are explored.

4.5 Recoverable damages for loss of support and other related losses in terms of the dependency action

4.5.1 Non-patrimonial damages

Non-patrimonial or non-pecuniary damages cater for all losses which are intangible and non-financial in nature, or that seek to compensate the claimant for losses, which are immeasurable. South African common law does not entitle a dependant of a deceased person, or an estate (through the executor) of a deceased person to pursue a claim for non-patrimonial damages on behalf of the deceased.[1109] There is, however, an exception to the rule, namely where the deceased had already commenced action,

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[1108] Barnett & Harder *Remedies* (2014) 183; The Law relating to Loss of Consortium and Loss of Services of a Child http://www.lawreform.ie/_fileupload/consultation%20papers/wpLossOfConsortium.htm (accessed on 5 October 2017); Brett 1959 *ALJ* 29 321 389 428; Riseley 1981 *ALR* 421; Thornton http://www.austlii.edu.au/au/journals/SydLawRw/1984/2.pdf (accessed on 5 October 2017); *Toohey v Hollier* (1955) 92 CLR 618; *Harris v Grigg* [1988] 1 Qd R 514 522; *Nguyen v Nguyen* (1990) 169 CLR 245 251; *Foulds v Smith* 1950 1 SA 1 (A); *Seroot v Pieterse* [2005] ZAGPHC 67.

[1109] *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) par 187; Barnett & Harder *Remedies* (2014) 116; *Hamlin v Great Northern Railway Co* (1856) 1 H & N 408 411; *Fink v Fink* (1946) 74 CLR 127; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344.

and the claim had reached the stage of *litis contestatio* before his or her death,[1110] which means that the claim for non-pecuniary damages does not abate and may be continued by the executor of his or her estate.[1111] In such a case, the law allows the claim for general damages to be actively transferred to the estate of the deceased. In a court case, the stage of *litis contestatio* is usually reached when the court pleadings have closed, namely once the issues in dispute have been identified by the parties through the exchange of the required court documents.[1112] The basis for the exception is exactly the same as that under the early Roman law, namely that the rights of the plaintiff were defined and *frozen* at the very moment that the stage of *litis contestatio* was reached. In such a case, according to logic, the executor of the estate has merely stepped into the shoes of the deceased. The executor has not acquired a claim in his or her own right.[1113]

However, the issue regarding when the stage of *litis contestatio* is reached in modern-day law is a complicated one. It is said to have been reached when pleadings are closed. However, this is no simple matter. Guidance as to when pleadings are closed is provided in Rule 29 of the Uniform Rules of Court.[1114] It advises that pleadings are closed if all parties to the case have joined issue and there are no longer any new or further pleadings, or the time period for the filing of a replication has expired, or the parties have agreed in writing that the pleadings have closed and have filed their agreement with the Registrar of the Court, or the court, on application, has declared

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1110 See *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) paras [182]-[184], as an exception in the Gauteng local division to be discussed hereunder.

1111 *Potgieter v Rondalia Assurance* 1970 1 SA 705 (N); *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T).

1112 *Hoffa v SA Mutual Fire and General Insurance Co Ltd* 1965 2 SA 944 (C) 950 955; *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T) 21-22; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295; Neethling & Potgieter *Law of delict* (2015) 267.

1113 *Booysen v Booysen* 2012 2 SA 38 (GSJ).

1114 Act 115 of 1998.

that the pleadings are closed. At this point, the pleadings are treated as being closed and the proceedings are said to have reached the stage of *litis contestatio.* In everyday practice, they are normally closed as soon as the period for the filing of the replication has expired, since the issues have then been identified and parties are able to commence preparation for the ensuing battle. However, it is important to bear in mind that, as annoying as it can be, the law often places a *caveat* on its pronouncements. In this regard, it is the following: pleadings, though closed, will be re-opened if an amendment is effected, or if the parties agree to alter the pleadings. Amendments to pleadings can be brought by any party at any time before judgment is delivered.[1115]

Thus, a claim for non-patrimonial loss can be transmitted to the estate of the deceased claimant if his or her death occurs after pleadings are closed. In such a case, the executor of the estate will take his or her place as the plaintiff. However, if any party re-opens the pleadings by amending its case, or if the parties agree to alter the pleadings, the claim for non-patrimonial loss cannot be transmitted, even if by that time, his or her place has already been taken by the estate, because *the initial situation of litis contestatio falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner.*[1116] The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1117] stated that the procedural developments that have taken place in our modern law have ensured that our legal process is significantly distinct from that which prevailed during the Roman times. A significant difference is that in our law, pleadings can be re-opened

[1115] Rule 28 of the Uniform Rules of Court. Courts have, over the years, identified the principles underlying the granting of an application for an amendment to a pleading. These have been succinctly summarised in *Commercial Union Assurance Co Ltd v Waymark NO* 1995 2 SA 73 (Tk) 77F-I. See also *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 3 SA 247 (CC) par [9].

[1116] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) par [15].

[1117] *Idem* par [17]-[21].

at any stage before judgment. This means that it can never be said with absolute certainty in any case that the stage of *litis contestatio* has been reached at a specific time.[1118] Unsurprisingly, under these circumstances, in *Government of the Republic of South Africa v Ngubane,*[1119] Holmes JA was prompted to refer to it as the *alchemy of litis contestatio.*

In a refreshing recent case, the High Court of South Africa (Gauteng Local Division) in *Nkala and Others v Harmony Gold Mining Company Limited and Others*[1120] considered various foreign legal positions in the UK, the USA and Australia, and held that the South African common law had failed to keep up with procedural developments in the law. In these jurisdictions, the legislatures intervened to put an end to the injustices caused by the common law, holding that general damages[1121] can only be transmitted post *litis contestatio*.[1122] It was stated in the legislature[1123] of these jurisdictions that it was necessary to intervene in order to avert the injustice that prevailed, and that many had previously been forced to endure because of this rule precluding the transmissibility of general damages pre-*litis contestatio*.[1124] It was highlighted that this failing was most acute in cases involving claims for pain and suffering endured by plaintiffs who had contracted dust-related diseases.[1125] The failing of the common law

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1118 *Ibid.*

1119 *Government of the Republic of South Africa v Ngubane* 1972 2 SA 601 (A) 606B-C.

1120 2016 7 BCLR 881 (GJ).

1121 Though the *Nkala* case was based on general damages, the principle of *litis contestatio* is applicable to both special and general damages. Therefore, the decision of this case will be binding on all future cases in the Gauteng Local Division, irrespective of whether they are based on special or general damages, unless the decision is overturned on appeal.

1122 *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) par [205].

1123 See South Australia, Parliamentary Debates, House of Assembly, 4 October 2001, 2385.

1124 *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) par [207].

1125 *Ibid*.

was eloquently captured in a speech delivered during a South Australia Parliamentary debate, where it was said:

> "The way the current legislation exists, if litigation has commenced but the applicant passes away before it has been completed, that individual is not able to have that case proceeded with on their behalf for the non-economic loss. That is an absurdity. There is clearly no justice, equity or fairness in a system such as this when we are talking about a totally unique disease of this nature. This puts enormous pressure on the sick and the dying plaintiffs to press ahead as quickly as possible with their litigation, the pressure of which may greatly increase the plaintiff's distress. Sometimes they may succeed in doing that, and sometimes they may not. It is simply a lottery: sometimes it may happen, and sometimes it may not work."[1126]

The court further stated that all fifty states in the United States of America have enacted statutes to address the issue of wrongful death and the claim for non-patrimonial damages for injuries sustained by the deceased. The majority of them allow the estate of the deceased to receive the amount due to the deceased. There is no restriction in any of the statutes against the deceased having launched his or her case for the claim prior to his or her death, and the case having reached the stage of *litis contestatio,* in order for the claim to remain valid.[1127] These legislative interventions demonstrate that the law which prohibits the transmissibility of general damages pre-*litis contestatio* fails to reflect the *boni mores* of a modern society organised according to the principle of the rule of law.[1128]

In September 2016, six of the defendant companies were granted the right to appeal the decision of the High Court, which was handed down on the 13 May 2016, in which the High Court decided to develop and alter the South African common law as it applies to the transmissibility of claims for non-patrimonial (general) damages, in order for it to

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1126 *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) par [208]; South Australia, Parliamentary Debates, House of Assembly, 4 October 2001, 2385.

1127 *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) par [208].

1128 *Idem* par [209].

include the fact that a claim for non-patrimonial (general) damages is actively transmissible to a deceased person's estate, provided that the deceased person had merely commenced with the legal action.[1129]

In December 2017, both parties requested the Supreme Court of Appeal to postpone the hearing, while they were attempting to reach a settlement. On the 3 May 2018, the parties announced that they had reached an agreement. The settlement provided compensation to all workers who had been employed at the companies' mines at any time since March 1965, and who were suffering from silicosis, as well to the families of deceased miners. The class action will continue against three smaller companies that did not participate in the settlement.[1130]

The High Court removed the requirement that the court proceedings must have reached a stage of *litis contestatio.* The practical effect of this judgement is that the estate of a deceased person can now continue with a claim for non-patrimonial (general) damage suffered by the deceased, provided that the legal action was instituted before his or her death. If a claimant dies after instituting legal action, but before the issues in dispute have been fully identified by the parties through the exchange of the required court documents, otherwise known as the close of pleadings or *litis contestatio*, the claim is no longer closed and the claimant's estate may proceed to recover both the patrimonial and non-patrimonial (general) damage that was suffered. It must, however, be noted that the parties to this case have stated their intention to appeal the High Court's judgment, which means that this might not be the final position on the transmissibility of non-patrimonial claims.

1129 *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ); 2016 5 SA 240 (GJ) par [243].

1130 Davenport https://www.business-humanrights.org (accessed on the 16 June 2018).

The decision in this case will also apply only to the Gauteng Local Division, and not to all the jurisdictions in South Africa. From the above discussion, it is clear that modern South African case law rejects the stage of *litis contestatio.* The issue of whether or not non-patrimonial damages may be claimed depends on whether or not the deceased person had simply began with the legal action. Be that as it may, the requirement that the legal action must have commenced is a complicated and uncertain requirement, which deserves further judicial consideration of dismissal and removal as well. There is no reason in our law why somebody who, as the result of the unlawful and negligent act of another, has suffered shock,[1131] disfigurement,[1132] pain,[1133] loss of amenities of life,[1134] and shortened life expectation,[1135] should only be entitled to claim for non-patrimonial damages, provided the deceased person had commenced with the legal action prior to his or her death.

The next section will deal with patrimonial damage following the death of a breadwinner, who was killed due to the wrongful and negligent act of another, resulting in the payment of patrimonial damages to the third-party dependants.

1131 The quantification of shock usually takes place together with that of pain and suffering, and no separate principles exist.

1132 Disfigurement refers to all forms of facial and bodily disfigurement, including scars, loss of limbs, a limp caused by a leg injury, and facial or bodily distortion.

1133 Pain and suffering includes all pain, discomfort, physical and mental suffering on account of a physical impairment of the body, or the causing of emotional shock, which the deceased endured and for which he was conscious of during the period from injury to death. Unconsciousness or a comatose condition precludes a claim under this head, as it is assumed that in these conditions, the claimant does not feel pain – see *Hoffa v Mutual Fire & General Insurance* 1965 2 SA 944 (C). In the assessment of a fair compensation for pain and suffering, the subjective experience of the deceased plaintiff is of paramount importance, while awards in previous cases should also be taken into account. The deceased-plaintiff's actual experience is decisive.

1134 Loss of amenities of life refers to the loss of the ability or will of someone to participate in general or specific activities of life and to enjoy life as he/she did previously. If a claimant is unconscious, damages are only recoverable (potentially) for loss of amenity" – see *Botha v Minister of Transport* 1956 4 SA 375 (W) 380.

1135 Shortened expectation of life is classified with loss of the amenities of life for purposes of compensation. The test to determine compensation is not the length of time of life of which a person has been deprived, but should be the prospect of a predominantly happy life. The test is an objective one. The economic and social position of the deceased has to be ignored in the assessment of this damage.

4.5.2 Patrimonial damages

4.5.2.1 General

The main claimable form of patrimonial damages that have been acknowledged as a loss under a dependency action in the South African, Botswana and Lesotho practice is the loss of support. However, should the dependants be responsible for expenses, such as medical and hospital expenses that the breadwinner incurred prior to his or her death, and funeral or cremation expenses, these losses will be included under the dependency action. This is in contrast to Australia, which, in addition to the mentioned patrimonial damages, acknowledges loss of prospective savings or inheritance.[1136] Although loss of support and funeral or cremation expenses are established heads of damage under a dependency action, they have not received any attention within the African context by distinguished authors[1137] in the law of damages. In essence, there are only a limited number of post-graduate studies on the assessment and quantification of these heads of damage. With this in mind, the next section explores the nature and assessment of dependency claims for loss of support and funeral expenses, since these two are the most important heads of patrimonial damage relevant to this study.

4.5.2.2 Loss of support

A dependant of a deceased who was unlawfully and negligently killed can institute an action for loss of support. As noted above, the purpose of an award of damages for loss of support is to compensate the dependants, in as far as money can, for the financial loss occasioned by the death of their breadwinner. This is also an accurate

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1136 See chapter 4 of this thesis, par 4.4.2 above.

1137 See Potgieter, Steynberg & Floyd *Law of damages* par 14.7.3; Luntz *Assessment of damages* par 5.2.

version of the compensation principle for loss of support in terms of the dependency action under the laws of Botswana,[1138] Lesotho[1139] and Australia.[1140] The dependant must prove that he or she had a right to support by the deceased[1141] and that the death has caused damage to him or her.[1142] The measure of damages for loss of support is usually the difference between the current position of the dependant as a result of the loss of support, and the position that he or she could reasonably have expected to have been in had the deceased not died.[1143] This is also called the comparative method or the sum-formula approach.[1144] Loss of support arises at the time of death, and continues until the time that the dependants would normally have become self-supporting, or when the deceased would have stopped supporting the dependants due to lack of income or death, whichever would have happened first.

In *Hulley v Cox,*[1145] the court referred to the calculation of an annuity, as well as a fair and general estimation, as methods for calculating damages for the loss of support of a dependant. Although our courts are not bound by some fixed method of calculating damages, the loss of support is commonly assessed by means of an annuity

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1138 Fombad http://www.saflii.edu.au/au/journals/ (accessed on 12 March 2015).

1139 *R v Monnanyane* 2005 LSHC 130.

1140 Luntz *Assessment of damages* (2006) par 1.5; Barnett & Harder *Remedies* (2014) 184; Civil Law (Wrongs) Act 2002, s 18(1); Law Reform (Miscellaneous Provisions) Act 1941 (WA), s 4(5); Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 2(5); Law Reform (Miscellaneous Provisions) Act 1956 (NT), s 9(1); Succession Act 1981 (Qld), s 66(4); Survival of Causes of Action Act 1940 (SA), s 6(1); Administration and Probate Act 1935 (Tas), s 27(9); Administration and Probate Act 1958 (Vic), s 29(5); Tilbury 1982 *WALR* 469; Carver 2005 *QUTLJJ* 1-27.

1141 See chapter 3 for classes of eligible dependants under the action of dependant for loss of support.

1142 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.2.

1143 See Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.3; *Lambrakis v Santam Ltd* [2002] ZASCA 714 par 12; *RAF v Monani and another* 2009 4 SA 327 (SCA); *Legal Insurance Company Ltd v Botes* 1963 1 SA 608 (A) 614E; *Wigham v British Traders Insurance Company Ltd* 1963 3 SA 151 (W) 154; *Nochomowitz v Santam Insurance Co Ltd* 1972 1 SA 718 (T) 725; *Hulley v Cox* 1923 AD 234 243-244; *Zaayman v RAF* [2016] ZAGPPHC 124 par [19]; *Matthew v Flood* (1939) SASR 389 at 392-393; *Watson v Dennis* (1968) 88WN (PT1) (NSW) 491 at 495; *Nguyen v Nguyen* (1990) 169 CLR 245 at 263.

1144 Tilbury 1982 *WALR* 469; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 4.2; see also par 4.6 hereunder.

1145 1923 AD 234 243-244.

method,[1146] while a comparative method is necessary to determine damage.[1147] This comparative test is concerned with subtracting the current patrimonial position of the dependant from the hypothetical patrimonial position the dependant would have occupied if his or her breadwinner had not been killed.[1148] The loss of support relates to the monetary amount that the deceased would have contributed to the support of each dependant for the period that he would normally have supported each of them. It includes all actual sums that he had spent on them, all costs which he absorbed by virtue of providing services to them, which now have to be paid on their behalf, and any activity which he would have normally undertaken. The loss is always divided between the pre-trial and post-trial period, because the pre-trial loss represents monies, which the dependants have already been deprived of, and which may have had to be taken out of the dependants' pockets. The pre-trial loss is called past loss of support, and the post-trial loss is called future loss of support.[1149] The post-trial award will earn interest in the hands of the dependants, hence the amount is reduced. The pre-trial award is lost money for the dependant, hence interest lost by the dependant during the time he was out-of-pocket is added. The measure of damage is referred to as *negative interesse,* and as applied in South African law,[1150] it is also applied in Australia, where it means that the dependant should be awarded such sums of money as would restore him or her to the position he or she would have been in if there had been no negligence.[1151]

1146 See chapter 4 of this thesis, par 4.6 hereunder.
1147 Neethling & Potgieter *Law of delict* (2015) 231-232.
1148 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.3; Neethling & Potgieter *Law of delict* (2015) 232.
1149 Potgieter, Steynberg and Floyd *Law of damages* (2012) par 14.7.7.3; *Matthew v Flood* (1939) SASR 389; *Watson v Dennis* (1968) 88WN (PT1) (NSW) 491; *Nguyen v Nguyen* (1990) 169 CLR 245.
1150 Potgieter, Steynberg and Floyd *Law of damages* (2012) par 4.3.
1151 Luntz *Assessment of damages* (2006) 5; Trindade & Cane *Torts in Australia* (2007) 511; Stewart & Stuhmcke *Australian principles of tort law* (2005) 587.

In South Africa, if a breadwinner is killed in a motor vehicle accident, the dependant of the breadwinner may claim his or her proven past and future loss of support from the Road Accident Fund (RAF). If the third party claim arose on or after 1 August 2008 (the loss of support claim arises on the date of death of the breadwinner), the RAF's liability to compensate the loss is limited to a prescribed cap, adjusted quarterly for inflation since 2008, regardless of the actual loss incurred. The cap is adjusted quarterly to take inflation into account. If the third party's claim arose prior to the aforementioned date, no cap applies to the claim for loss of support.[1152] In South Africa, if a breadwinner dies as a result of a workplace-related accident, illness or disease, the dependant of the breadwinner may claim his or her proven past and future loss of support from the Compensation Commissioner.[1153]

Customary law draws no distinctions in terms of the manner in which the breadwinner died. As discussed in chapter 2 of this thesis, customary law recognises a dependant's right and action to claim for loss of support from the person responsible for his/her breadwinner's death.[1154] The study has revealed that this customary law action is called *go tsoša hlogo* or *go tsosa hlogo* in Sepedi/Setswana/Sesotho cultures. It is a well-established and recognised practise in customary law, and has always been part of the legal system of the African people in South Africa.[1155] Furthermore, it closely resembles the Roman-Dutch law or common law dependency action. The difficulty

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1152 RAF matters will be fully dealt with in ch 5 of this thesis.

1153 COIDA matters will be fully dealt with in ch 5 of this thesis.

1154 Sekese *Mekhoa le maele a Basotho* (2009) 60; Duncan *Sotho laws and custom* (2006) 105; Palmer *Law of delict* (1970) 114; *Sipongomana v Nkulu* 1901 NHC 26; *Suid Afrikaanse Nationale Trust en Assuransie Maatskappy Bpk v Fondo* 1960 2 SA 467 (A); *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 1 SA 302 (D); *Ismael v Ismael* 1983 1 SA 1006 (A); *Zulu v Minister of Justice* 1956 2 SA 128 (W).

1155 *Sipongomana v Nkulu* 1901 NHC 26; *Joel v Zibokwana* 4 NAC 130 1919; *Nohele* 6 NAC 1928 19; *Silimo v Vuniwayo* 5 NAC 1953 135; Dlamini 1984 *SALJ* 346; *Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 1 SA 339 (W); Bekker *Seymour's customary law* (1989) 379; Clark 1999 *SALJ* 20.

arises with the lack of methods of assessment and quantification of the claim, which appear to be more inclined towards criminal fines. Customary law generally draws no clear distinctions between the law of delict, on the one hand, and crimes on the other.[1156] As stated above, South African customary law lacks the conceptual structure of concepts or principles of modern law assessment and quantification of damages for loss of support. These principles are foreign to customary law, which means that the judicial process in the customary courts has its own shortcomings in this regard.

The aborigines of Australia seem to have the same claim where their breadwinner was wrongfully and unlawfully killed. This study has found no specific provision or reference to a law that deals with the claim for loss of support under the law of aborigines. However, the Recognition of Aboriginal Customary Laws report that was released by the Australian Law Reform Commission (ALRC) in June 1986, after an intensive nine-year inquiry,[1157] examined the interaction between two legal systems – one based on the British law "received" through colonisation, and the other on the customary laws of the Aboriginal peoples of Australia,[1158] and acknowledged that the Australian Constitution should recognise the particular rights of indigenous peoples, and give appropriate recognition to their customary law.[1159] Although the comprehensive recognition of indigenous law remains controversial,[1160] the ALRC report made recommendations regarding the recognition of traditional Aboriginal marriages for

1156 Olivier 2004 *LAWSA* paras 212-217; Knoetze 2012 *Speculum Juris* 43-44.
1157 Godden https://theconversation.com/from-little-things-the-role-of-the-aboriginal-customary-law-report-in-mabo-60193 (accessed on 13 July 2017).
1158 *Ibid.*
1159 See ALRC: Aboriginal Customary Laws https://www.alrc.gov.au/inquiries/aboriginal-customary-laws (accessed on 25 September 2017).
1160 Aboriginal Customary Law ALRC report 31 Published on 12 June 1986. Last modified on 23 March 2017 https://www.alrc.gov.au/inquiries/aboriginal-customary-laws (accessed on 13 July 2017).

accident compensation, including workers' compensation, compensation on death, criminal injuries compensation, and repatriation benefits.[1161]

4.5.2.3 Funeral or cremation expenses

Under the dependency action, the recovery of funeral or cremation expenses is confronted by the limitation of "reasonableness". The expenses are limited to the reasonable actual costs of preparing the body for interment or cremation. Funeral expenses are the bare minimum, and only specified items are recoverable. The itemised expenses are the costs of a hearse, travelling costs to attend the funeral/cremation, telephone calls, reasonable costs of refreshments, and expenses for erecting a tombstone.[1162] The same principle applies under social security legislations.[1163]

The difficulty arises in terms of what can be regarded as funeral expenses or funeral costs, especially in South Africa, which has contrasting views, attitudes, cultures and traditional practices with regard to funeral expenses. A review of the existing research on African bereavement rituals highlights the assumption that African societies turn their funerals into extravagant ceremonies.[1164] In African societies and cultures, meticulous care is taken to fulfil the funeral rites.[1165] Unlike in western cultures, death

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1161 Aboriginal Customary Law ALRC report 31 Published on 12 June 1986 last modified on 23 March 2017 https://www.alrc.gov.au/inquiries/aboriginal-customary-laws (accessed on 13 July 2017); ALRC: Aboriginal Customary Laws https://www.alrc.gov.au/inquiries/aboriginal-customary-laws (accessed on 25 September 2017).

1162 *Finlay v Kutoane* 1993 4 SA 675 (W); Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 11.8 & 14.7.1; Klopper *Third party compensation* (2012) 68.

1163 eg s 18(4) of the RAF Act 56 of 1996 limits the liability of the Fund in respect of funeral expenses to necessary actual costs to cremate or inter him/her in the grave; s 54 of the COIDA 130 of 1993 determines the compensation award following the death of an employee in a work-related accident, or as a result of an occupational injury or disease, and payment is a fixed reasonable funeral benefit, as is annually gazetted by the Minister of Labour, which is currently a maximum of R16398.00.

1164 Boateng & Anngela-Cole 2012 *JDD* 296 298; Arhin 1994 *CILSA* 318 321; Jindra *et al Funerals in Africa* (2013) 209.

1165 Mbiti *African religion* (1990) 113.

and mourning in African cultures do not end with a funeral. According to Mbiti,[1166] Africans do not view death as an event which simply occurs, is handled, and then forgotten about. When a person dies, there is a series of events, which usually take place. These include a period of at least one week of mourning before the actual funeral, and the feasting and gatherings associated with the funeral. Evening prayers may also be held in some families, depending on their family traditions. Family members usually prepare food for friends and neighbours, and inform visiting mourners about the cause of death of the deceased.

There are also specific rituals and ceremonies observed and performed by the deceased's family members after the deceased has been buried.[1167] Traditional bereavement rituals for indigenous Africans have been a constant phenomenon throughout history. Most of the rituals have their bases in the people's traditional and religious belief systems. In most African cultures, these rituals include, among others, cleansing, funeral ceremony, removal of hair, slaughtering of a cow, wearing of mourning clothes, and restriction of the mourners' participation in social activities for a stipulated time.[1168] The current recoverable funeral expenses are set within, arguably, a western-dominated construct mind-set, which has adopted a cold and emotionless approach to African burial rites issues. Unfortunately, the colonial implication here is that African funeral expenses remain ignored, and are labelled as problematic.

Western worldviews or assumptions divide the world and life into one of two categories: sacred or secular. Those African rites and practices that did not fit into a "sacred" western worldview were assigned to the "secular", which was understood to be

1166 *Idem* 115.
1167 Setsiba *Mourning rituals and practices in contemporary South African townships* (2012) 42.
1168 *Ibid* 2-3.

essentially non-Christian, even anti-Christian. In this paradigm, these practices had to be denied.[1169] An ancillary problem, which arose out of a western mind-set, led to the categorisation of the rites and practices associated with the ancestors being referred to as worship and, therefore, idolatrous.[1170] This classification of Africans' relationship with their ancestors still persists[1171] and is reflected now in the blanket denial or ignorance of expenses related to African funerary rites and cleansing ceremonies under the assessment of damages with regard to the dependency action, or under social security legislations.

The observance of post-burial cleansing ceremonies forms an important part of African customs and has a special historical legitimacy. The adoption of a new western lifestyle by African societies did not lead or encourage Africans to abandon their traditional lifestyles. These traditional lifestyles include the performance of various rituals and customs, which have a special meaning for African people, in particular funerary rites and post-burial cleansing ceremonies. These funeral practices and post-burial cleansing ceremonies are deeply ingrained in culture, beliefs, and values, and are regarded as important costs related to the death of a beloved family member. Even though the funeral rites and post-burial cleansing ceremonies are costly, and could easily overwhelm and negatively impact on the dependants of the deceased, who was unlawfully and negligently killed, they have been observed to be maintained in both rural and urban environments.[1172]

1169 Olupona *African spirituality: Forms, meanings and expressions* (2001) 49.
1170 Becken *Beware of the ancestor cult!* (1993) 335.
1171 Pobee 1976 *Sociological analysis* 1 6-7.
1172 Rosenblatt *et al* 2007 *Death Studies* 31 67-85.

There are public rituals in which the community will participate such as the funeral and the services that are offered to the bereaved family during the process of the preparation for burial. There are also private rituals, which are mostly performed by the family and close relatives of the deceased.[1173] This refers to the cleansing ceremonies that take place after the burial.[1174] Whenever a member of the family dies, the remaining members, regardless of their financial status, have to perform the funeral rites and cleansing ceremonies. Consequently, expenses will be incurred before the funeral takes place, on the day of the funeral, and after the funeral. All these expenses are linked to customs and rituals that have to be performed during the mourning period.[1175] All traditions follow a fairly uniform pattern, with variations according to region, caste and family tradition. In most African societies, the death of a person is symbolised by a tradition called *ukuzila* in Zulu[1176] or *go ila* in Sepedi/Northern Sotho,[1177] which is defined as showing respect to the deceased by avoidance of certain behaviour and places like clubs/shebeens/parties.[1178] If the deceased is a man, the widow has to wear mourning clothes, called *izila* or *ukuzila* in Zulu, before and after the funeral, which are sewn at a price.[1179] The attire is primarily formal blackclothing.

In addition to the specified recoverable funeral expenses under the dependency action, African communities encounter the following expenses related to the burial and culture of the deceased: It is typical of African people to mourn collectively.[1180] Social support

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1173 Romanoff *et al* 1998 *Death studies* 22 697-711.

1174 Ngubane 2004 *Indilinga: African Journal of Indigenous Knowledge Systems* 3(2) 171-177; Hutchings 2007 *Alternation* 14(2) 189-218; Mkhize "Psychology: An African perspective" in Ratele *et al Self, community & psychology* (2004) 24 37.

1175 Chaza 2013 *De Rebus* 5.

1176 Ngubane 2000 *SAJFS* 46-53.

1177 Maloka https://www.jstor.org/stable/4392848 (accessed on 27 March 2017); Magudu 2004 *AGENDA* 141; Manyedi *et al* 2004 *HSAG* 8(4) 69-87.

1178 Ngubane 2000 *SAJFS* 49.

1179 Chaza 2013 *De Rebus* 5.

1180 Baloyi https://www.dx.doi.org/10.4102/ve.v35i1.1248 (accessed on 27 March 2017).

is very important in African cultures, especially when a death has occurred in the community. According to Shange,[1181] not only the availability, but also the extent and quality of social support, are important determinants of the resolution of grief. Before the funeral takes place, family members, friends, community members and church members will visit the home of the deceased to comfort and help them with the preparations for the funeral. Therefore, meals have to be prepared for all of them. This period usually lasts a week or two. A sheep has to be slaughtered in preparation for the men who come to dig the grave[1182] (these men are called *banna ba diphiri* in Sepedi), and for those who help with the preparations for the funeral. A day prior to the funeral or in the early morning of the day of the funeral, an ox has to be slaughtered, in order to accompany the deceased into his or her ancestral home.[1183] After the burial, cleansing of the remaining family members has to take place. After 10 days from the date of the funeral (burial), a small feast is held, whereby a traditional beer *bjala bja di garafo* has to be brewed in order to cleanse the picks and spades that were used to dig the grave.[1184]

When the period of one year has passed, the first death anniversary will signal the end of mourning and restoration back to normal life in society, and this is also celebrated by a feast.[1185] The mourning clothes will be removed during a ritual called *ukukhulula izila* in Zulu or *go tlhobola kobo e ntsho/sefifi* in Sepedi. For the major purification ceremony after a year, the widow is expected to return to the home where she was born. This involves slaughtering a cow/sheep, brewing traditional beer, buying new

1181 Shange *Bereaved employees in organisations* (2009) 29.
1182 Chaza 2013 *De Rebus* 5.
1183 *Ibid.*
1184 *Ibid.*
1185 Manyedi *et al* 2004 *HSAG* 69-87; Maloka https://www.jstor.org/stable/4392848 (accessed on 27 March 2017).

clothes, including a blanket for the widow, and the ceremony is concluded by a group of women accompanying her back to her in-laws. This group of four to five women carry food such as half the cow, African beer, home-made bread, sugar, tea and many other items, which will be eaten on their arrival. The in-laws also prepare for this occasion.[1186] These cleansing ceremonies are costly and can exacerbate the poverty of the mourners and their children,[1187] especially if unplanned for, as in the case where the breadwinner was unexpectedly, unlawfully and negligently killed.

It is argued that the blanket ignorance or denial of African funerary rites and cleansing ceremonies by the dependency action and social security legislations is discriminatory, symbolises the legislator's failure to respect and recognise African burial rights and cleansing ceremonies, and forces African communities to follow the rules regarding funeral expenses that are laid down for them in terms of western views. This blanket denial or ignorance of funerary rite expenses needs to be revised, so that it recognises cultural practices, treats all cultures equally, and is in line with the current legal developments in a democratic South Africa. It is suggested that the dependants are entitled to receive a certain sum of money from the wrongdoer under the dependency action, in order to help them recover most, if not all, of the expenses related to cultural burial rites and cleansing rituals associated with the wrongful and unlawful death of their breadwinner. There is no way that a grieving African family can bypass these ritual burial expenses. Therefore, the expenses related to the cultural rites of mourning and cleansing ceremonies should be expressly included in the assessment and quantification of damages under the dependency action, as well as in related social security legislations. Had it not been for the unlawful and negligent death of the

1186 Magudu 2014 *AGENDA* 143.
1187 *Ibid*.

breadwinner, the families of the deceased would not have incurred all these funeral expenses.

It appears that there is a perception that the expenses associated with the cultural rites of mourning and cleansing ceremonies are not necessary funeral expenses under the dependency action. These kinds of perceptions could be seen as disrespectful of other people's culture.[1188] Are these perceptions a result of lack of information, as well as the spread of misinformation about African burial issues, or are the burial expenses ignored, simply because they differ from the western view of what burial expenses should include? The very limited compensation for funeral expenses in South African social security legislations remains a perplexing phenomenon, and shows that the legislature has failed to adequately compensate the dependants for this necessary expense.

In addition, South Africa has a Constitution that is founded on human dignity, guarantees respect for all cultures, religions and linguistic communities, and rejects discrimination and oppression. Furthermore, the Constitution provides that everyone has inherent dignity and the right to have his or her dignity respected and protected. Despite all these provisions and assurances, to date, expenses related to funeral rites and cleansing ceremonies are still denied. The question therefore remains: Does the non-payment of cultural funeral expenses symbolise the legislator's failure to respect and recognise African burial rights and cleansing ceremonies?[1189]

Other expenses which are also not considered under this head of damage include the printing of a programme or obituary, post-burial costs related to the administration of

[1188] Chaza 2013 *De Rebus* 5.
[1189] *Ibid*.

the deceased's estate at the Masters offices, transportation costs to attend the criminal proceedings of the wrongdoer, the attorney's costs to attend to the administration of the deceased's estate, or the conveyancer's fees for the transfer and registration of the deceased's properties into the names of his or her dependants. It is argued that all these expenses should also be expressly included in the assessment and quantification of damages under the dependency action and related social security acts.

In Australia, the head of damage for funeral or cremation expenses also does not include Aboriginal burial rights and cleansing ceremonies. The costs include, for example, cemetery or crematorium fees, celebrant or clergy, musician or vocalist, venue hire, funeral expenses, death and funeral notices, catering, registered death certificate, cremation certificate, tombstone, etc.[1190] The same comment as above can be made regarding the inclusion of Aboriginal burial rights and cleansing ceremonies into Australian law.

The next section will deal with principles applicable to the assessment of damages for loss of support in terms of the dependency action

4.6 Principles applicable to the assessment of damages for loss of support and related losses in terms of the dependency action

4.6.1 General

South African, Botswana, Lesotho and Australian laws contain a number of rules on the acknowledgment of accountability for loss of support. This section discusses how the rules on balance of probabilities, causation, remoteness, once-and-for-all rule

[1190] Colin https://www.gatheredhere.com.au/understanding-funeral-costs-in-australia/ (accessed on 8 March 2018).

(lump sum payments), prescription, contributory negligence, inflation, and mitigation of losses affect delictual liability in a claim for loss of support. It is reiterated that South African customary law lacks the conceptual structure of concepts or principles of modern law of damages. These principles are foreign to customary law, which means that the judicial process in the customary courts has its own shortcomings in this respect. In the next section, the relevance of these principles to the assessment of damages for loss of support under the dependency action is discussed.

4.6.2 Balance of probabilities, causation and remoteness

The dependant must establish that the death of his or her breadwinner occurred, on a balance (preponderance) of probabilities,[1191] as a result of the cause of action which gave rise to the claim. The Australian law relating to the principle of balance of probabilities appears to be substantially the same as that in South Africa.[1192] The wrongdoer's conduct must be the cause of the harm or loss that the dependant has suffered. The causing of damage through conduct, or the causal nexus between conduct and damage, is required for a delict.[1193] A delictual duty to pay damages can arise only if the wrongdoer's conduct factually and legally caused the harm suffered by the claimant.[1194] The dependant is burdened with the evidentiary duty to prove all the loss he or she has suffered, including the uncertain future loss, which might not

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1191 Steynberg http://www.sayas.org.za/PERJ/journal/view (accessed on 12 October 2017); *Mlenzana v Goodrick and Franklin Inc* [2011] ZAFSHC 111; 2012 2 SA 433 (FB); *Goldie v City Council of Johannesburg* 1948 2 SA 913 (W) 916; *Naidoo v Auto Protection Insurance Co Ltd* 1963 4 SA 798 (D); Luntz *Assessment of damages* (2006) par 9.3.

1192 *Ibid*.

1193 Neethling & Potgieter *Law of delict* (2015) 183; Luntz *Assessment of damages* (2006) paras 9.3 & 9.14; Civil Liability Act 2002 (NSW), s 5E; Civil Liability Act 2002 (Tas), s 14; Civil Liability Act 2002 (WA), s 5D; Civil Liability Act 1936 (SA), s 35; Civil Liability Act 2003 (Qld), s 12; Wrongs Act 1958 (Vic) s 52; Civil Law (Wrongs) Act 2002 (ACT) s 45.

1194 *First National Bank of South Africa v Duvenhage* 2006 5 SA 319 (SCA) 320; Evidence Act 1995 (Cth) s 140(2).

yet have transpired at the time that the claim is lodged,[1195] and the exact amount of damages that should be awarded to compensate for this loss.[1196] A dependant may claim if death is caused by any wrongful act, neglect or default, which is such as would (if death had not ensued) have entitled the person injured to maintain an action.

It is important to note, however, that recovery of damages is limited by the rules of limitation of liability or remoteness of damage.[1197] Limitation of liability refers to the fact that the loss must not be too remote from, but must be proximate to, the delictual act.[1198] In determining which consequences of the delictual conduct are proximate and recoverable, and which are too remote and therefore unrecoverable, two tests need to be applied. Firstly, it must be determined whether the damage does in fact arise from the wrongful act and was a *causa sine qua non* of the loss. This is also known as the "but-for" test. Secondly, it must be determined whether the wrongful act can be linked sufficiently closely or directly to the loss, in order for legal liability to ensue. In other words, is there legal liability, or is the loss "too remote"?[1199] This is basically a juridical problem. However, the court has now expressed itself in favour of the flexible approach.[1200] In terms of this approach, there is no single criterion that can be applied to all situations.[1201] 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

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1195 Steynberg http://www.sayas.org.za/PERJ/journal/view (accessed on 12 October 2017); Evidence Act 1995 (Cth) s 140(2).

1196 *Ibid*.

1197 Luntz *Assessment of damages* (2006) par 1.4; *Livingstone v Rauyards Coal Co* (1880) 5 App Cas 25 (HL) 39.

1198 Potgieter, Steynberg and Floyd *Law of damages* (2012) par 11.5.1; *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 (CA).

1199 See in general, Bennett https://www.austlii.edu.au/au/journals/SydLRev/1963/12.pdf (accessed on 12 October 2017); Bennett 1963 *SLR* 293.

1200 Potgieter, Steynberg and Floyd *Law of damages* (2012) par 11.5.4.

1201 *Ibid*.

on reasonableness, fairness and justice.[1202] Should the answer to the two questions posed above be in the affirmative, then the damage caused is not too remote, and therefore recoverable.

A final aspect of remoteness of damage is the eggshell or thin skull rule, which means that wrongdoers must take their victims as they find them.[1203] For instance, if the victim has a pre-existing condition, resulting in him or her suffering greater injury than would be expected in an ordinary person, the wrongdoer remains responsible for the full extent of the loss.[1204] The fact that the victim was more prone to injury can therefore not be used as a justification to limit or exclude liability. The principle of remoteness of damage in Australia is the same as in South Africa.[1205]

4.6.3 Once-and-for-all rule (lump sum payments)

There is no doubt that the once-and-for-all rule is a well-established principle, which applies in South African,[1206] Botswana,[1207] Lesotho,[1208] and Australian laws.[1209] Damages, including those for death, are assessed "once and for all".[1210] The once-and-for-all rule is an old common law rule derived from English law.[1211] The rule

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1202 *S v Mokgethi* 1990 1 SA 32 (A).

1203 Potgieter, Steynberg and Floyd *Law of damages* (2012) par 11.5.4.7; Neethling & Potgieter *Law of delict* (2015) 208.

1204 *Potgieter v Rondalia* 1970 1 SA 705 (N); *Boswell v Minister of Police* 1978 3 SA 268 (E); *Masiba v Constatia Insurance Co Ltd* 1982 4 SA 333 (C).

1205 See in general, Bennett https://www.austlii.edu.au/au/journals/SydLRev/1963/12.pdf (accessed on 12 October 2017); Bennett 1963 *SLR* 292; Potgieter, Steynberg and Floyd *Law of damages* (2012) par 11.5.4.7.

1206 See Potgieter, Steynberg & Floyd *Law of damages* (2012) par 7.1.

1207 As stated earlier, Botswana applies the South African law.

1208 Similar to Botswana, Lesotho also applies the South African law.

1209 See Luntz *Assessment of damages* (2006) par 2.2; *James Hardie & Co Pty Ltd v Newton* (1997) 42 NSWLR 729 (CA) 731.

1210 Boberg *Delict: Aquillian liability* (1984) 475 481; Neethling & Potgieter *Law of delict* (2015) 215-219; Davel *Afhanklikes* (1987) 128, 136-137; Luntz *Assessment of damages* (2006) paras 2.1 & 2.8.

1211 Potgieter, Steynberg & Floyd *Law of damages* (2006) par 7.1; *Cape Town Council v Jacobs* 1917 AD 615; *Evins v Shield Insurance Co* 1980 2 SA 814 835; *Coetzee v SAR & H* 1933 CPD 565 574; *Lim v Camden & Islington Area Health Authority* [1980] AC 174 183.

requires that all claims generated from the same cause of action be instituted in one action.[1212] In other words, the dependants' claim for loss of support sustained as a result of the wrongful and unlawful death of their breadwinner at the hands of the wrongdoer has a single, indivisible cause of action, and they must sue for all damages in one claim.[1213] In *Coetzee v South African Railways & Harbours,*[1214] it was held that a person cannot sue solely for prospective damages. Gardiner JP, with whom Watermeyer J concurred, expressed himself as follows:

> "The cases, as far as I have ascertained, go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages, or forfeit them. But I know of no case which goes so far as to say that a person, who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may be awarded as ancillary to accrued damages, but they have no separate, independant force as ground of action."[1215]

The rule was introduced in consideration of public policy, which requires that there should be a term set for litigation, and in order to prevent multiplicity of actions for damage caused by the same unlawful, culpable act or omission, as well as to ensure that a single judgment on the issues is rendered. Furthermore, it carries the advantage of bringing both certainty and finality to disputes brought to court for resolution. Certainty and finality are two important principles upon which the edifice of the rule of law is constructed.[1216] Lastly, it is important for the protection of the rights of

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1212 See Luntz *Assessment of damages* (2006) par 2.1, where the author refers to cases from as far back as 1701 (e.g. *Fitter v Veal*); Trindade & Cane *Torts in Australia* (2007) 509; Stewart & Stuhmcke *Principles of tort law* (2012) 588; Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 7.1-7.5.11 for an exposition of the once-and-for-all rule; *Schnellen v Rondalia Ass Corp of SA Ltd* 1969 1 SA 517 521; *Green v Coetzee* 1958 2 SA 697 (W); Neethling & Potgieter *Law of delict* (2015) 225-227; Potgieter, Steynberg & Floyd *Law of damages* (2012) 154-184; Boberg *Delict: Acquillian liability* (1984) 476.

1213 Steynberg http://www.sayas.org.za/PERJ/journal/view (accessed on 12 October 2017); Luntz *Assessment of damages* par 2.2; Mendelson *New law of torts* (2014) 40; *Brandi v Mingot* (1976) 12 ALR 551 563.

1214 1933 CPD 565.

1215 *Coetzee v South African Railways & Harbours* 1933 CPD 565 576; *Talbot v Berkshire Country Council* [1994] QB 290 (CA).

1216 *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T) 420F; *Doherty v Liverpool District Council* (1991) 22 NSWLR 284 (CA) 295; Luntz *Assessment of damages* (2006) par 2.4 2.19.

dependants to claim the benefits they could reasonably have expected to receive from the breadwinner, if the breadwinner's life had not been shortened,[1217] to avoid the running of prescription[1218] and the congestion of cases coming to court on numerous reviews, and in order to be administratively efficient.[1219]

The once and-for-all rule implies that damages are awarded in one collective sum, normally referred to as a lump sum representing all the heads of damages.[1220] Therefore, damages for death are awarded as a lump sum. The award, which covers past, present, and future loss must, under the law of South Africa, Botswana, Lesotho and Australia, be paid as a lump sum and assessed at the conclusion of the legal process. The award is final – it is not susceptible to review as the future unfolds, substituting fact for estimate or speculation,[1221] regardless of how uncertain the future loss is.

Thus, the South African, Botswana, Lesotho and Australian laws, by virtue of the once-and-for-all rule, requires the dependants to bring the claim for loss of support simultaneously for all damage, past, present and future, caused by the same unlawful, culpable conduct or omission, in order for them to be raised in a single action.[1222] This principle is criticised because it leads to grave difficulties and injustices, in that as soon as the lump sum has been paid, the claimant is precluded from recovering further losses, which were not envisaged at the time of the assessment. The knowledge of the future is denied to manhood. Accordingly, ample of the award, as is to be attributed to

1217 Luntz *Assessment of damages* (2006) par 2.26.
1218 *Kingdom Films v Harry Kaplan NO* [2016] ZAGPJHC 37.
1219 See Van der Walt *Sommeskadeleer* (1977) 315 448.
1220 Luntz *Assessment of damages* (2006) par 2.8; *R v Monnanyana* [2005] LSHC 130; Neethling & Potgieter *Law of delict* (2015) 245.
1221 *Todorovic and Another v Waller* (1981) 150 CLR 402 at 412-413.
1222 *Kingdom Films v Harry Kaplan NO NO* [2016] ZAGPJHC 37 par 24.

future loss, will almost confidently be incorrect.[1223] There is a certainty that the future will prove the award to be either too high or too low.

The once-and-for-all principle is unknown in customary law. Under customary law, there is a principle called *molato ga o bole,* which means that the once-and-for-all rule is unsustainable in terms of the African understanding of law. If the African principle is applied in the assessment of damages, it will mean that the dependants will be able to sue solely for prospective loss as it develops in the future.[1224] With the *molato ga o bole* principle in mind, it is permissible under customary law to order the wrongdoer to pay the dependants a non-fixed allowance, determined in accordance with the needs of the dependants at a particular moment, until death, either of the dependants or wrongdoer, whichever comes first. This allowance does not correlate with the periodic payments in terms of the RAF Act.[1225] As a result, the lump sum payment will not be applicable under customary law. This stands in contrast to the once-and-for-all rule, which prevents the payment of future loss of support expenses, as and when the losses accrue.[1226]

The once-and-for-all principle has also been criticised by academic writers, but did receive the endorsement of the Supreme Court of Appeal in *Jowell v Bramwell-Jones and others:*[1227] *"*It is, in any event, a rule of the common law and unless it can be shown that it is in conflict with a right in the Bill of Rights, and therefore requires to be developed in order to be consistent with or, to put it differently, in order that it *promotes the spirit, purport and objects of the Bill of Rights,*[1228] it should be applied. In this case

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1223 *Todorovic and Another v Waller* (1981) 150 CLR 402 at 412-413.
1224 Moroke *Molato ga o bole* (1979) 5.
1225 See s 17(6) of the RAF Act 56 of 1996.
1226 *Botha v RAF* [2013] ZAGPJHC 400; 2015 2 SA 108 (GP) par [33].
1227 2000 3 SA 274 (SCA) par [22].
1228 s 9(2) of the Constitution.

there is no suggestion that this common law rule conflicts with any right in the Bill of Rights."[1229] Luntz,[1230] Boberg[1231] and Corbett[1232] raised the same criticism and contended that there is no reason why a person cannot sue solely for prospective loss, provided that he can establish the future loss on a balance of probabilities, although it is not necessarily the quantum of his claim. The advantage of the approach adopted in the *Coetzee*[1233] case is the certainty that it provides. If an action for prospective loss is completed only when the loss actually occurs, prescription will not commence to run until that date, and a plaintiff will generally be in a position to quantify his claim. To the extent that there may be additional prospective loss, the court will make a contingency allowance for it.

On the other hand, if the completion of an action for prospective loss for which a person is entitled to sue, is to depend not upon the loss occurring, but upon whether or not what will happen in the future can be established on a balance of probabilities, it seems, according to the legal author Corbett, that the inevitable uncertainty associated with such an approach is likely to prove impractical, and result in hardship to a plaintiff, particularly in so far as the running of prescription is concerned.[1234] Van der Walt[1235] states that any attempt to justify the rule with principles concerning *res iudicata, ne bis in idem or continetia causa*[1236] fails, because a claim for loss already sustained, and a claim for prospective loss, are necessarily based on two causes of action. He adds that it is incorrect to describe the once-and-for-all rule as a principle of law, since it is merely

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1229 2000 3 SA 274 (SCA) par [22] - the sources of the criticism are listed in this paragraph.
1230 See Luntz *Assessment of damages* (2006) par 2.9-2.17.
1231 Boberg *Delict*: *Acquillian liability* (1984) 488.
1232 Corbett & Honey *Quantum of damages* (2014) 9.
1233 *Coetzee v South African Railways & Harbours* 1933 CPD 565.
1234 Corbett & Honey *Quantum of damages* (2014) 9.
1235 See Van der Walt *Sommeskadeleer* (1977) 425-485; also see Potgieter, Steynberg & Floyd *Law of damages* (2012) par 7.2.
1236 See Potgieter, Steynberg & Floyd *Law of damages* (2012) par 7.2.

based on convenience and may be departed from whenever necessary.[1237] He further mentions that it should no longer be tolerated that recovery of damages for further damage is frustrated by the once-and-for-all rule. According to Van der Walt, it should no longer be tolerated that recovery of damages for further damage can be frustrated by the once-and-for-all rule. Courts should be free to decide finally over all matters regarding completely developed damage, whilst indicating the circumstances under which, and the period during which, the defendant will also be liable for further damage developing from the challenged event.[1238] This viewpoint is not generally accepted in South African jurisprudence.

It is clear from the above discussion that the once-and-for-all rule has been a point of dispute, not only in South Africa, but in Australia as well, which led to legislative exceptions to the rule being formulated in the various jurisdictions. It was held in *Hodsoll v Stallebrass*[1239] that damages had to be awarded once-and-for-all in respect of both past and future loss. The consequence of the rule is that where a claim for loss of support resulting from the death of the breadwinner has been successfully litigated or compromised, the dependants of the deceased breadwinner are prevented from bringing an action in respect of any manifestation of future losses. Although there is no doubt that the once-and-for-all rule applies in Australia, it has frequently been regretted.[1240] There have been arguments in favour of dispensing with the rule.[1241] Many of the difficulties associated with the assessment of damages in cases of serious personal injury and death can be blamed on the once-and-for-all rule.[1242] The rule, for

1237 See Van der Walt *Sommeskadeleer* (1977) 523.
1238 *Ibid*; also see Potgieter, Steynberg & Floyd *Law of damages* (2012) par 7.2.
1239 (1840) 11 Ad & E 301.
1240 Luntz *Assessment of damages* (2006) par 2.2.
1241 Hutley 1954 *ALJ* 74 77.
1242 Luntz *Assessment of damages* (2006) par 2.9.

example, poses difficulties in the assessment of future contingencies. Speculations as to what would happen if not for the death of the breadwinner are inevitable. In general, no one knows what would have happened to the breadwinner if he had not died.[1243] Associated with the difficulty of future contingencies is the impossibility of forecasting the effect of inflation on a lump sum,[1244] and the distasteful assessment of remarriage prospects.[1245] Whether the dependants can invest a lump to provide a hedge against inflation, or to provide sufficient support, is controversial. A significant portion of the lump sum paid to dependants is spent on discharging debts that were accumulated between the accident or death and payment.[1246] The fact that a dependant is young, attractive and has prospects of re-marrying should be ignored. This is a personal choice and a surviving spouse should not be coerced into remarriage.

In South Africa, an exception to the once-and-for-all rule is found in section 17(4) of the RAF Act.[1247] Normally, damage for future loss of support is paid in a lump sum. However, this section allows the RAF, at its discretion, to tender an undertaking to pay such damage in instalments in arrears, as agreed upon or ordered by the court.[1248] This section was enacted for the benefit of the RAF in order to ameliorate the detrimental consequences of the once-and-for-all rule.[1249]

Western Australia enacted section 16 in terms of the Motor Vehicle (Third Party Insurance) Act of 1943[1250] to counter the speculation that is inherent in the lump sum

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1243 *Idem* par 2.10.
1244 *Idem* par 2.16.
1245 *Idem* par 2.17.
1246 *Idem* par 2.15
1247 Act 56 of 1996.
1248 See s 17(4)(b) of the RAF Act, 1996 (as amended).
1249 Klopper *Third party compensation* (2012) 207.
1250 The section provides as follows in subsection 4P: (4) On the hearing and determination of any action or proceedings a Court shall, without in any way limiting its usual powers in relation thereto, have the following further powers: (a) to award by way of general damages either a lump sum or periodical payments, or a lump sum and periodical payments, such periodical payments to be for

awarding of damages that are ordered at once. The section vests the court with the power to order periodical payments, either as an alternative to the lump sum damages, or cumulatively therewith, and further allows for a review of awards of damages if the situation warrants such, or on application by a party to the initial litigation. It is respectively submitted that the periodical payment of loss of support would not only be benefcial to the dependants, but also to the fund, by ameliorating the detrimental consequences of the once-and-for-all rule, and the dependants would be paid compensation for as long as they would reasonably have expected support. In South Australia, section 30B of the Supreme Court Act of 1935[1251] empowers the court with the authority to order interim payments as a departure from the accepted once-and-for-all rule of damages. The purpose of this section is to encourage early hearings on liability and to defer the assessment of damages, in order to do more precise justice to the litigants. The application of this section is a matter of the court's unconstrained discretion.[1252]

Closely related to the once-and-for-all rule is the principle of prescription. In the next section, the relevance of the principle of prescription to the assessment of damages for loss of support under the dependency action will be explored.

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such period and upon such terms as the Court determines; and (b) at any time either of its own motion or on the application of any party to the action or proceedings: (i) to review any periodical payment and either continue, vary, reduce, increase, suspend, or determine it, or on the review to order payment to the claimant of a further lump sum; or (ii) to order that any such periodical payments be redeemed by payment of a lump sum.

1251 The relevant provision of the section provides as follows: (1) Where in any action the court determines that a party is entitled to recover damages from another party, it shall be lawful for the court to enter declaratory judgment finally determining the question of liability between the parties, in favour of the party who is entitled to recover damages as aforesaid, and to adjourn the final assessment thereof. (2) It shall be lawful for the court when entering declaratory judgment and for any judge of the court at any time or times thereafter— (a) to make orders that the party held liable make such payment or payments on account of the damages to be assessed as to the court seems just; and (b) in addition to any such order or in lieu thereof, to order that the party held liable make periodic payments to the other party on account of the damages to be assessed during a stated period or until further order.

1252 *Revesz v Orchard* [1969] SASR 336.

4.6.4 Prescription

Prescription is another important rule applicable to the assessment of damages,[1253] and is found in virtually all legal systems,[1254] particularly in all the comparative jurisdictions relevant to this study.[1255] Prescription is the extinction of a debt through the passing of time.[1256] It serves a valuable social purpose[1257] because its underlying idea is to bring about legal certainty,[1258] and it is governed by legislation.[1259] The Prescription Act lays down periods of prescription, which apply to various categories of debts.[1260] South Africa, Botswana, Lesotho and Australia follow much the same principle of prescription.[1261] In terms of the Prescription Acts of all Southern African comparative jurisdictions,[1262] a delictual debt prescribes after three years,[1263] except where stipulated otherwise by another Act of Parliament, and commences to run as soon as a cause of action accrues, and the debt in regard to the payment of damages is claimable.[1264] The combined application of the rule of prescription and the once-and-

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1253 Steynberg http://www.sayas.org.za/PERJ/journal/view (accessed on 12 October 2017).

1254 Van der Bank 2014 *JFE* 28 31.

1255 See Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.11; Luntz *Assessment of damages* (2006) paras 2.3 & 2.4.

1256 Vrancken & Brettenny *Tourism and the law* (2015) 56.

1257 Jackson https://www.scl.org.uk/sites/default/files/Concurrent%20Liability0.pdf (accessed on 23 October 2017).

1258 Havenga *et al Commercial law* (2015) 9.

1259 See Prescription Act 68 of 1969 (South Africa); Prescription Act (Proc)76 of 1959, 30 of 1962, L.N. 84 of 1984 (Botswana); Prescription Act 6 of 1861 (Lesotho); Prescription Act 1832 (Australia); New South Wales, the Limitation Act, 1969 (NSW); Capital Territory, the Limitation Act. 1985 (CT); Northern Territory, the Limitation Act, 1981 (NT); Queensland, the Limitation Act, 1974 (Qld); South Australia, the Limitation Act, 1936 (SA); Tasmania, the Limitation Act, 1974 (Tas); Victoria, the Limitation Act, 1958 (Vic); Wrongs Act 1958 (Vic) s 20(1); Western Australia, the Limitation Act, 1935 (WA).

1260 Van der Bank 2014 *JFE* 28; Prescription Act 68 of 1969 (South Africa); Prescription Act (Proc) 76 of 1959, 30 of 1962, L.N. 84 of 1984 (Botswana); Prescription Act 6 of 1861 (Lesotho); Prescription Act 1832 (Australia); Limitation of Action Act.

1261 Prescription Act 68 of 1969 (South Africa); Prescription Act (Proc) 76 of 1959, 30 of 1962, L.N. 84 of 1984 (Botswana); Prescription Act 6 of 1861 (Lesotho); Prescription Act 1832 (Australia).

1262 *Ibid*.

1263 s 3(2) Prescription Act, 1969 (South Africa); s 4(2)*(b)*(vi) of the Prescriptions Act, 1984 (Botswana); *Matere v Attorney-General* 2003 2 BLR 385 (HC); Neethling & Potgieter *Law of delict* (2015) 235 278.

1264 *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 842; s 17 of the RAF Act 56 of 1996; Klopper *Third party compensation* (2012) 148; Neethling & Potgieter *Law of delict* (2015) 235 278; Luntz *Assessment of damages* (2006) par 2.3.

for-all rule burdens the dependant with the almost impossible task of proving uncertain future loss, which might not yet have transpired by the cut-off date of three years after the damage-causing event, when the claim has to be lodged.[1265]

Apart from the Prescription Act, a variety of statutes deal with the claim for loss of support and stipulate their own specific prescriptive periods. The Prescription Act does not affect the provisions of any other Act stipulating its own specific prescriptive periods, but leaves prescription to be governed by whatever relevant law applied to the prescription of that particular debt.[1266] The prescription of delictual debts incurred under the Road Accident Fund Act[1267] is governed by the provisions of section 23 thereof, and provides that where the death of the breadwinner was a result of the driving of a motor vehicle, and the identity of either the owner or driver of the vehicle concerned is known, the claim of the dependant will prescribe after 3 years from the date of the death of the breadwinner.[1268] This implies that when the breadwinner is not killed on impact, but dies of his or her injuries at a later date, the cause of action arises on the date of death of the breadwinner, and not on the date of the accident.[1269] It further indicates that the plaintiff-dependant must within three years[1270] institute an action against the wrongdoer. However, if the dependant-claimant is a minor,[1271] prescription against such a minor-dependant is suspended until the minor dependant attains majority.[1272] In practice, prescription will only commence on the attainment of

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1265 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017); Luntz *Assessment of damages* (2006) par 2.3.
1266 Van der Bank 2014 *JFE* 32.
1267 Act 56 of 1996, as amended.
1268 ss 17(1)(a) & 23(1) of the RAF Act 56 of 1996, as amended.
1269 Klopper *Third party compensation* (2012) 253; Neethling & Potgieter *Law of delict* (2015) 235 278.
1270 For exceptions to this rule, see s 23 of the RAF Act 56 of 1996; Klopper *Third party compensation* (2012) 271-284.
1271 A minor is any person under the age of 18 years – see s 17 of the Children's Act 38 of 2005.
1272 Klopper *Third party compensation* (2012) 250; s 23(2) of the RAF Act 56 of 1996, as amended.

majority, and will be completed three years after majority has been achieved.[1273] In the case of an unidentified motor vehicle,[1274] prescription commences to run on the date of death of the breadwinner, irrespective of the minority status or any other form of disability of the dependant, and will be completed two years after the death.[1275]

The prescription of delictual debts incurred under the Compensation for Occupational Injuries and Diseases Act,[1276] is governed by the provisions of section 44 thereof, and provides that a right to benefits in terms of the COID Act will lapse if the accident or death[1277] in question is not brought to the attention of the commissioner, employer or mutual association concerned, as the case may be, within 12 months after the date of such accident or death. In practice, prescription will only commence on the date of death of the breadwinner and will be completed 12 months after the breadwinner's death. There are thus four different prescriptive periods for loss of support claims in terms of the three different South African statutes mentioned above: 3 years in terms of the Prescription Act; 3 years for identified claims and 2 years for unidentified claims in terms of the RAF Act; and 1 year in terms of the COID Act.

Similar to South Africa, throughout Australia, there are legislations in force that provide for the various prescriptive periods of limitation of action for claims for delictual debts. Each state in Australia, except for the Capital Territory, has a prescriptive period of 6 years for claims for damage debts emanating from tort (a delict), while the prescriptive

1273 Klopper *Third party compensation* (2012) 250.
1274 For example, hit-and-run claims.
1275 s 17(1)(b) of the RAF Act, as amended; regulations 2(1)(a) & 2(1)(b) of the RAF regulations published in Government Gazette 31249 of 21 July 2008; Klopper *Third party compensation* (2012) 252.
1276 Act 130 of 1993, as amended.
1277 See definition of accident in s 1(i) of the COIDA 130 of 1993, as amended.

period of the Capital Territory is similar to South Africa, namely 3 years.[1278] In Australia, there are thus four different prescriptive periods for loss of support claims, depending on which statute is applicable: either 6 years, 3 years, 2 years, or 12 months. For example, in the state of Victoria the prescriptive period for claims for compensation for the death of a worker is 2 years after the date of death of the relevant worker.[1279] If the injured person is a minor at the time of the accident, the minor, or a person on his or her behalf, has 12 months from the minor attaining 18 years of age within which to make a claim.[1280]

It is clear from the above discussion that there is no uniform prescription period in all the comparative jurisdictions for claims for delictual debts for loss of support in terms of the dependency action. The problem of having different prescription periods designed for the same type of claim (loss of support), as contained in various statutes, creates inequalities amongst dependants. The prescription rule may have a significant impact on the collectability of a debt, and in respect of any claim that a dependant may have against a wrongdoer. However, dependant-claimants should be wary of leaving claims on the back burner, where they run the real risk of such claims prescribing on the basis set out in the various statutes.[1281] Many dependants who sustain loss of support and are entitled to financial compensation are either unaware of, or poorly

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1278 New South Wales, the Limitation Act, 1969 (NSW); Capital Territory, the Limitation Act, 1985 (CT); Northern Territory, the Limitation Act, 1981 (NT); Queensland, the Limitation Act, 1974 (Qld); South Australia, the Limitation Act, 1936 (SA); Tasmania, the Limitation Act, 1974 (Tas); Victoria, the Limitation Act, 1958 (Vic); Wrongs Act 1958 (Vic) s 20(1); Western Australia, the Limitation Act, 1935 (WA).

1279 Accident Compensation Act 1985 (Vic).

1280 Transport Accident Act 1986 (Vic).

1281 E.g., see Prescription Act 68 of 1969 (South Africa); Prescription Act (Proc) 76 of 1959, 30 of 1962, L.N. 84 of 1984 (Botswana); Prescription Act 6 of 1861 (Lesotho); Prescription Act 1832 (Australia); RAF Act, 1996; Accident Compensation Act 1985 (Vic); COIDA, 1993; New South Wales, the Limitation Act, 1969 (NSW); Capital Territory, the Limitation Act. 1985 (CT); Northern Territory, the Limitation Act, 1981 (NT); Queensland, the Limitation Act, 1974 (Qld); South Australia, the Limitation Act, 1936 (SA); Tasmania, the Limitation Act, 1974 (Tas); Victoria, the Limitation Act, 1958 (Vic); Wrongs Act 1958 (Vic) s 20(1); Western Australia, the Limitation Act, 1935 (WA).

informed about, the different prescriptive periods. Currently, in South Africa, there is no condonation in terms of the Prescription Act where there is late filing of a claim.[1282] Claimants with genuine claims may not have the opportunity to institute their cases, even where there is a just cause for failure to institute such claim.[1283]

The harmonisation of the provisions of existing laws providing for different prescription periods regarding the delictual debts for loss of support should be abolished and replaced by one uniform prescription period. In addition to the uniform prescription period, the courts should be granted the power to condone, on good cause shown, the late institution of a claim, where the delictual debt has prescribed in terms of the proposed uniform prescription period.[1284]

Customary law has no rules allowing acquisitive or extinctive prescription. Statutory provisions in this regard do not supersede customary law, because the Prescription Act expressly states that it does not apply "in so far as any right or obligation of any person against any other person is governed by Black Law".[1285] Under customary law, there is a principle called *molato ga o bole,* which means that prescription is unprotected in terms of the African understanding of law. This means that the wrongdoer will be liable to the dependants of the deceased until the death of the wrongdoer or the dependants, whichever comes first. This African principle benefits the dependants one-sidedly, and if applied in the assessment of damages, it could lead to grave difficulties and injustices to the wrongdoer, in that the certainty and finality of

1282 Van der Bank 2014 *JFE* 34.
1283 South African Law Reform Commission "Investigation on Prescription periods (Project 125)" https://www.justice.gov.za/salrc/media/2011-prj125-prescription-periods.pdf (accessed on 27 October 2017); Van der Bank 2014 *JFE* 35.
1284 s 44 of the COIDA 130 of 1993; s 23 of the RAF Act 56 of 1996.
1285 s 20 of Prescription Act 68 of 1969; Van der Bank 2014 *JFE* 30.

the matter will never be achieved.[1286] It is suggested that this African principle should not be followed in order to avoid this danger. In contrast, the commonly accepted principle in all litigation matters is that immediate certainty and finality are to be preferred.[1287]

Another important principle relevant to the assessment of damages is contributory negligence, which will be discussed in the next section.

4.6.5 Contributory negligence

Contributory negligence refers to when a claimant suffers damage as a result, partly, of his or her own fault, and partly of the fault of another person(s).[1288] Historically, contributory negligence was an absolute or complete defence under common law.[1289] The victim's recovery of damages was barred if his or her negligence contributed, even minimally, to causing the injury or loss. However, this harsh rule has been departed from in most jurisdictions, and a more flexible approach has been adopted.[1290] In South Africa, Botswana and Lesotho, under the Apportionment of Damages Act,[1291] if a claimant suffers damage as a result, partly, of his own fault, and partly of the fault of another person(s), his or her claim is no longer defeated. Instead, his or her damages are reduced to reflect his or her share of the responsibility for the harm sustained.

1286 Moroke *Molato ga o bole* (2009) 5.
1287 *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T) 420F4.
1288 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.4.1; Barnett & Harder *Remedies* (2014) 80 154.
1289 Neethling & Potgieter *Law of delict* (2015) 284; Barnett & Harder *Remedies* (2014) 80 154.
1290 Barnett & Harder *Remedies* (2014) 78.
1291 See s 2(1B) of Act 34 of 1956 (South Africa); Apportionment of Damages Act 32, 1969 (Botswana); Apportionment of Damages Order No 53 of 1970 (Lesotho).

Similarly, throughout Australia, there is legislation in force providing for the reduction of damages where the victim is guilty of contributory negligence.[1292] Therefore, where any person dies, partly as the result of his or her own fault, and partly due to the fault of another person(s) or third party, the damages recoverable will be reduced under the Apportionment of Damages Act in South Africa, Botswana and Lesotho,[1293] and under several law reform legislations in Australia,[1294] to a proportionate extent. The third party and deceased's estate will be considered as joint wrongdoers with regard to the loss of support suffered by the dependants.[1295] In principle, this means that the dependant may now claim the full amount of damages from either the third party or the deceased's estate, and that there is a right of recourse between the two joint wrongdoers.[1296]

The defence of contributory negligence is one of the most frequently pleaded defences; hence the impact which a finding of contributory negligence has on the damages award is significant. The rationale behind the doctrine is that by denying recovery, in whole or in part, to a victim who has contributed negligently to his or her loss, the law can deter

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1292 Law Reform (Miscellaneous Provisions) Act 1965 (NSW) Pt 3; Law Reform Act 1995 (Qld) Pt3 Div 3; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA) s7; Wrongs Act 1954 (Tas) ss 4 and 5; Wrongs Act 1954 (Vic) Pt V; Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA) ss 3A and 4; Civil Law (Wrongs) Act 2002 (ACT) Pt7.3; Law Reform (Miscellaneous Provisions) Act 1956 (NT) Pt V.

1293 See Apportionment of Damages Act 34 of 1956 (South Africa); Apportionment of Damages Act 32 of 1969 (Botswana); Apportionment of Damages Act 6 of 1998 (Botswana).

1294 See Repatriation Act 1920 (Cth); Repatriation (Far East Strategic Reserve) Act 1956 (Cth); Repatriation (Special Overseas Service) Act 1962 (Cth); Repatriation (Torres Strait Islanders) Act 1972 (Cth); Swanton 1981 *ALJ* 278; House of Representatives, Standing Committees on Aboriginal Affairs, *Report: The effects of asbestos mining on the Baryulgil community*, AGPS, Canberra, 1984, 120 Par 1.32; Arthur https://www.coursehero.com/.../Damages-and-Equitable-Compensation-John-Arthur (accessed on 8 August 2016); Queensland – Civil Liability Act 2003 (Qld); New South Wales – Civil Liability Act 2002 (NSW); Victoria - Wrongs Act 1958 (Vic); Western Australia - Civil Liability Act 2002 (WA); Australian Capital Territory - Civil Law (Wrongs) Act 2002 (ACT); Northern Territory – Proportionate Liability Act 2005 (NT); South Australia – Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA); Tasmania – Civil Liability Act 2002 (Tas); Commonwealth - Corporations Act 2001 (Cth); Trade Practices Act 1974 (Cth) and Australian Securities & Investments Commission (Cth); Commercial notes - Australian Government Solicitor https://www.ags.gov.au/publications/commercial-notes/CN38.pdf (accessed on 8 August 2016).

1295 Potgieter, Steynberg & Floyd *Law of damages* (2012) 284.

1296 *Ibid*.

people from engaging in conduct, which involves an unreasonable risk to their own lives. In assessing the relevance of the contributory negligence theory, it seems that the principle is fairest and accords best with the compensatory principle under the assessment of damages, since it treats both the victim and the defendant equally, and compensates the damaged party in proportion to the harm caused to the victim by the other party. It also harmonises with the concept of corrective justice. The essence of corrective justice is that the party who injures another must correct the wrong, in order to restore the moral balance between them.[1297]

The anticipated move in South African third party motor vehicle accident compensation towards a no-fault based compensation system,[1298] or at least a system in which the plaintiff's fault plays a minimal role, will have the effect of cancelling the application of the contributory negligence principle in this area of the law. However, it is doubtful whether the costs of accidents will in fact be lessened under the comprehensive no-fault compensation scheme. On paper, the scheme seems to prove to be too expensive to run and maintain. It appears that the scheme will place pressure on the government to substantially increase other income maintenance programmes. Moreover, the concept of corrective justice is foreign to such a scheme, and in practice, the deterrence function may not be served as well as was the case under the various fault-based systems.

1297 Devaney 2009 *EJCL* 7.

1298 Road Accident Benefit Scheme is intended to replace the current fault-based system administered by the Road Accident Fund (RAF), which often results in extensive and costly litigation, prolonged claims finalisation, and high administrative costs. Under RABS, fault will not be considered on the part of the claimant or other persons involved in the road accident. The focus will essentially be on how the claimant can be immediately assisted. A no-fault scheme will create a new era of socio-economic balance and will also remove the unintended negative consequences and financial burden on the families of the wrongdoer.

4.6.6 Mitigation of losses

The concept of mitigation of loss under the dependency action applies to, or is concerned with the conduct of the dependant after the damage-causing event.[1299] It is a compensation principle that the dependant should take reasonable steps, either to avoid the increase of the original loss, or to avert further loss, as the dependant would run the risk of his or her compensation being reduced.[1300] The South African, Botswana, Lesotho and Australian law of damages follows much the same principle of mitigation of losses,[1301] and applies to all common law wrongs.[1302] Under the mitigation of loss doctrine, a person who has suffered an injury or loss should take reasonable action, where possible, to avoid additional loss.[1303] The claimants should not unreasonably burden the defendant's duty to pay damages.[1304] This principle is equally applicable to patrimonial and non-patrimonial loss, and applies to damage already suffered up to the date of trial, as well as to future loss.[1305] In all comparative countries, the onus of proving that the dependant did not properly fulfil his or her duty to mitigate loss rests with the defendant.[1306]

1299 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.3; Tilbury 1980 *WALR* 282; Barnett & Harder *Remedies* (2014) 80.

1300 Burchell *Delict* (1993) 126; Luntz *Assessment of damages* (2006) par 1.9; Tilbury 1980 *WALR* 282 available at http://www.austlii.edu.au/au/journals/UWALawRw/1980/4.pdf (accessed on 19 July 2017).

1301 See Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 10.8.5 & 11.3.1; *Mogomotsi v Pudologong Rehabilitation and Development Trust for the Blind* 2008 2 BLR 340 HC; *Standard Lesotho Bank v Masechaba Anna Ntsihlele* [2013] LSLC 58 par [23]; *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 (HL) 688-689.

1302 Barnett & Harder *Remedies* (2014) 80.

1303 Neethling & Potgieter *Law of delict* (2015) 244; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.3.1; Luntz *Assessment of damages* (2006) par 10.5; *Cattanah v Melchior* (2003) 215 CLR 1; *Butler v Durban Corporation* 1936 NPD 139.

1304 Neethling & Potgieter *Law of delict* (2015) 233.

1305 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.3.1.

1306 Neethling & Potgieter *Law of delict* (2015) 245; Tilbury 1980 *WALR* 282; Luntz *Assessment of damages* (2006) par 10.1.

Stewart and Stuhmcke[1307] state that the objective of mitigation is to ensure that the compensation awarded is reasonable for both claimant and defendant. The same view is endorsed in Australia in the Motor Accident Insurance Act,[1308] which provides that if an insurer is not satisfied with the action taken by a claimant to mitigate damage, the insurer may give the claimant written notice, suggesting a specified action that the claimant should take to mitigate damage.[1309] Furthermore, in assessing damages arising out of a motor vehicle accident, the court must consider whether the claimant has failed to take reasonable steps to mitigate damage, by not following the suggestions made under subsection 2 of this section. In addition, if it appears that the claimant has failed to take reasonable steps to mitigate the losses, by not following the suggestions, the court may reduce the dependant's damages to an appropriate extent, in order to reflect the failure.[1310] This section highlights the significance of mitigation of losses and the insurer's role in assisting the court to assess the award of damages.

Failure on the part of a dependant to take reasonable preventative steps after suffering loss of support could lead to a reduction in the amount of his or her recovery.[1311] The dependant cannot recover for loss which could have been reasonably avoided.[1312] In following the mitigation of losses doctrine, does it mean that there is a duty on a widow to marry a healthy, wealthy second man to reduce her loss of support,[1313] or a duty on

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1307 Stewart & Stuhmcke *Tort law* (2017) 591.

1308 s 54 of the Motor Accident Insurance Act 9 of 1994.

1309 s 54(1) & (2) of the Motor Accident Insurance Act 9 of 1994.

1310 s 54(3) of the Motor Accident Insurance Act 9 of 1994.

1311 *Swart v Provincial Insurance Co Ltd* 1963 2 SA 630 (A); *Shrog v Valentine* 1949 3 SA 1228 (T); *Modimogale v Zweni* 1990 4 SA 122 (B).

1312 McGregory *McGregory on damages* (2014) 599.

1313 See in general, on the prospect of remarriage – *Esterhuizen RAF* case number 26180/2014 (reportable) 2016 ZAGPPHC 1221 2017 4 SA 461 (GP); *Snyders v Groenewald* 1966 3 SA 785 (C); *Legal Insurance Company Limited v Botes* 1963 1 SA 608 (AD). *Peri-Urban Areas Health board v Munarian* 1955 3 SA 367 (A). These judgements do not suggest that the dependants should remarry in order to mitigate the loss of support, but that the possibility of remarriage must be taken into account in the calculation of loss of support. The writer hereof disagrees. The writer is of the view that the prospect of remarriage should not be taken into account at all. The second marriage

dependant-children to drop out of their studies in order to decrease their dependency, and to prove that they have taken reasonable steps to mitigate their losses? Will it be reasonable to expect dependants to take such drastic steps in order to mitigate their losses? Surely, these are examples of unreasonable steps, as it is submitted that the duty on the dependants cannot be expected to be this heavy.

Where a dependant and a deceased breadwinner were married under the Marriages Act,[1314] or Recognition of Customary Law Marriages Act,[1315] or in a civil partnership,[1316] the dependant acquires the competence to remarry or re-partner upon the death of the breadwinner.[1317] In South Africa, such a remarriage or re-partnership creates a new right of support[1318] and is taken into account in the assessment of loss of support.[1319] There is no obligation or duty on the surviving spouse or partner to re-enter into a permanent relationship, but if they do, any benefits received will be taken into account in calculating their damages for loss of support. In contrast, in three territories of Australia, re-partnership may not be taken into account in a claim for loss of support, and all benefits derived from re-partnering will be ignored in the assessment of damages.[1320]

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may not result in financial support and might not even last, and therefore the financial support would be lost. Taking the prospect of remarriage into account in the calculation of loss of support is offensive and should not be part of the law, given the modern attitude towards marriage. If remarriage has indeed taken place by the time the court has to assess damages, of course then it should be taken into account.

1314 Act 25 of 1961.

1315 Act 120 of 1998.

1316 Civil Union Act 17 of 2006.

1317 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017).

1318 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 10.8.5.

1319 See *R v RAF* [2004] ZAGPPHC 987.

1320 Compensation (Fatal Injuries) Act 1794, s 10(4)(h) (NT); Wrong Act 1958, s 19(2) (Vic); Supreme Court Act 1995, s 23A (2) (Qld); Luntz *Assessment of damages* (2006) par 2.17; *Willis v The Commonwealth* (1946) 73 CLR 105; *R v RAF* [2014] ZAGPPHC 987.

Mitigation of losses is an unknown doctrine under customary law, and is therefore not considered in arriving at an appropriate fine for the killing of a breadwinner. Although customary law allows levirate marriages, it is not for the purpose of mitigating losses under the *go tsoša/tsosa hlogo* action (dependency action). Levirate marriage is an ancient African institution, in response to the dilemma posed by the death of a deceased breadwinner, who is childless or has no male heir, and the plight of his widow.[1321] It is consistent with biblical ethos.[1322] Ordinarily, a man could not marry his brother's wife (divorced or widowed), so there had to be conditions necessitating the marriage, which would only apply when the deceased brother had no son or children at all.[1323] This practice is optional, and both parties (the dependant-widow and the brother to the deceased breadwinner) must agree to enter into this marriage. Should a dependant widow of a deceased breadwinner who was unlawfully and negligently killed enter into a levirate marriage, the benefits of such a marriage would probably be taken into account to mitigate her losses under the general law.

4.6.7 Inflation

Inflation is not only a matter of economic reality, but a legal factor as well.[1324] Therefore, it must be considered by the court[1325] in arriving at an award for damages, particularly awards paid in a lump sum, such as an award for loss of support.[1326] Monetary awards are affected by economic changes over time, as well as by tax policies. Consequently,

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1321 Meek 1929 *Tribal Studies* 542-543; Weisberg https://www.bibleodyssey.org/en/people/related-articles/levirate-marriage (accessed on 19 July 2017).

1322 See Good News Biblical verses: Deuteronomy 25: 5-10; Ruth 1: 11-13.

1323 See Robison https://www.blainerorison.com/hebroots/levirate.htm (accessed on 19 July 2017); Good News Biblical verse: Leviticus 18:16; Leviticus 20:21.

1324 Monyamane *Nature, assessment and quantification of medical expenses* (2013) 84; *Everson v Allianz Insurance Co Ltd* 1989 2 SA 173 (C).

1325 Erasmus & Gauntlett "Damages" in *LAWSA* (1995) par 29; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 556.

1326 Burchell *Delict* (1993) 126.

the courts make an effort to ensure that awards are protected from loss of value due to the passage of time.[1327] Loss of support is one of the important awards of damages in wrongful death cases.[1328] An award for loss of support should accurately compensate the dependant for what he would have received if his breadwinner had not died – it should not place him or her in a better monetary position. In calculating the loss of support, the amount of support which the dependant would have received during his or her dependency is based on speculation, and part of this speculation is to determine to what extent inflation will influence this award.[1329]

There is a general uncertainty with regard to the correct manner in which to determine inflation, whether in the past or in the future.[1330] Predicting future losses without considering the effect of inflation produces an unrealistically low estimate of the dependant's total future loss of support.[1331] Since inflation cannot be determined with accuracy, the court should follow a reasonably conservative approach.[1332] Therefore, the courts have, in calculating such losses, recognised the investment potential of a sum of money awarded now for future damages.[1333] The courts have required the reduction of lump-sum awards for loss of support to their present value by an appropriate discount factor.[1334] The need to adjust damages to allow for future inflation is sharpened by the impact of the technique, termed reducing to "present value", which is often used by the courts to calculate future damages.[1335] The present-value rule

1327 *De Vries NO and others v RAF* [2011] ZAWCHC 215.
1328 Stein *Damages and recovery* (1972) par 6.
1329 *Nanile v Minister of Posts and Telecommunications* 1990 4 QOD A4-30 (E); Corbett & Honey *Quantum of damages* (2002) A4 -39.
1330 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.7.5.
1331 Burchell *Delict* (1993) 126; Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.7.
1332 *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A); Potgieter, Steynberg & Floyd *Law of damages* (2012) par 11.7.5.
1333 *Ibid*.
1334 Klopper *Third party compensation* (2012) 156-157.
1335 Koch *Damages for lost income* (1984) 295.

states that all damages awards for lost future support must be discounted to reflect their investment potential.

If the dependant is presently given the total amount of damages that the Consumer Price Index (CPI) has determined he is entitled to, he has been overcompensated to the extent of the "earning power" of the sum he receives. A sum of money available at present is worth more than an identical sum of money received at any time in the future, because the recipient may invest the entire amount and gather interest.[1336] Therefore, since the plaintiff is awarded his damages in a lump sum and not over a period of time, the aggregate of the periodic payments must be reduced.[1337] The award is discounted to the present value, that is, it is reduced to the amount, which, if safely invested, would grow to an amount equal to the total lost support. In order to discount an amount to present value, the court has to consider and choose interest rates, depending on expert evidence, and often using actuarial tables.[1338] The award also saves on paying income tax,[1339] hence the court will deduct this saving from the amount of damages. In this sense, the inflation principle is consistent with the objective of the compensation principle, which is to fully compensate the dependant when measuring damages, and unless inflation is accounted for, the dependant of the deceased person is unlikely to be returned to the position he or she occupied before the death of the breadwinner.

The Australian principle of inflation is substantially the same as the South African principle.[1340] Similarly, in Australia, the application of the once-and-for-all rule was

1336 *Sigournay v Gillbanks* 1960 2 SA 552 (A) 556.
1337 *Ibid*.
1338 Loubser & Midgley (eds) *Delict* (2017) par 34.2.6.4.
1339 Loubser & Midgley (eds) *Delict* (2017) par 34.2.6.4; *Minister of Defence v Jackson* 1991 4 SA 23 (ZS).
1340 See in general Luntz *Assessment of damages* (2006) par 2.16.

noted in *Todorovic and Another v Waller*[1341] as a remedy to provide compensation for losses that might arise in the future due to the prevalence of a claimant's loss, particularly in the area of inflation. In this case, a majority in the High Court of Australia held that at common law, the advantage of receiving the investable lump sum must be taken into account, and that this is to be done by way of a discount rate (uniform across Australia) that also takes future inflation, increases in the price of goods, services and tax into account. The rate was set at 3% per annum.[1342]

4.6.8 Contingencies

Potgieter, Steynberg and Floyd[1343] state that contingencies may be described as uncertain circumstances of a positive or negative nature which, independant of the defendant's conduct, and if it should realise, would probably influence a person's health, income, earning capacity, quality of life, life expectancy, or dependency on support in future, or could have done so in the past, and which must consequently be taken into account in a fair and realistic manner, by increasing or decreasing the plaintiff's damages during the quantification process.[1344] In other words, contingencies include any uncertain future possibilities of some degree of probability, which have an influence on the assessment of the dependant's loss of support or the future benefits to which the dependant may be entitled or would have received from the deceased.[1345]

Contingencies are an important control mechanism to adjust the damages to be awarded for the loss suffered to the circumstances of the individual case, in order to

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1341 *Todorovic and another v Waller* (1981) 150 CLR 402 439.
1342 Barnett & Harder *Remedies* (2014) 47.
1343 Potgieter, Steynberg & Floyd *Law of damages* (2012) 25.
1344 *Ibid*; also see Steynberg 2007 *THRHR* 36.
1345 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 6.7.3; Loubser & Midgley (eds) *Delict* (2017) par 34.2.6.6; Luntz *Assessment of damages* (2006) par 4.3.

achieve equity and fairness for the parties,[1346] and fall squarely within the subjective discretion of the court.[1347] Contingencies cover a wide range of considerations, which may vary from case to case. The list of contingencies can never be exhaustive.[1348]

In a claim for damages for loss of support by dependants, there are different types of contingencies, which may be taken into account.[1349] These contingencies can be divided into two main categories, namely general and specific contingencies.[1350] General contingencies can be relevant at any stage in people's lives, to the extent that the court could take judicial notice thereof, without the need for proof – for example, early death of the breadwinner or dependant, illnesses or accidents that could have occurred to the breadwinner, retrenchment, which could have influenced the breadwinner's income stream, etc.[1351] Adjustments of general contingencies are on the low side, no more than 20 per cent,[1352] and are taken into account if it is found that the actuary based the calculations on wrong assumptions, or if relevant contingencies were not taken into account.

On the other hand, specific contingencies are primarily relevant at certain stages in specific individuals' lives,[1353] and should be substantiated by evidence, although not necessarily proven on a preponderance of probabilities[1354] – for example, expectation of an inheritance, the chances of early employment of the dependants or remarriage

1346 *Labuschagne v RAF* [2016] ZAFSHC 109 par [19].
1347 Steynberg 2008 *De Jure* 115.
1348 *Gwaxula v RAF* [2013] ZAGPJHC 240 par [25].
1349 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 6.7.3.
1350 Steynberg 2011 *THRHR* 389.
1351 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 6.7.3; Steynberg 2011 *THRHR* 389; Nienaber & Van der Nest 2005 *THRHR* 546-547.
1352 See *RAF v Guedes* 2006 5 SA 583 (SCA).
1353 E.g. re-partnering, divorce, promotion, etc.
1354 See Steynberg 2007 *PELJ* 144-52, Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017); Steynberg 2007 *De Jure* 36.

of the widow, etcetera. Remarriage contingency is an issue and topic of debate that has been the subject of news headlines in recent months.[1355] The discussion on contingencies will be incomplete without a brief explanation on the recentl developments on the remarriage contingency.

In South African law, when determining the amount to be paid to the wife/widow of the deceased breadwinner, the possible remarriage of the surviving wife/widow plays a persuasive role in the final calculation of the amount to be paid in a claim for loss of support.[1356] In the past, apart from the number of children and attitude of the widow to the idea of remarriage, the courts would consider appearance and personality as essential factors when determining possibility of remarriage.[1357] In *Legal Insurance Company Ltd v Botes*, the court a quo took the following into consideration: "… adjustments must be made according to the appearance, personality, nature and attitude to remarriage of the person concerned, and indeed other factors such as the number and ages of the widow's children".[1358] This approach was repeated in the matter of *Snyders v Groenewald*, where the court found the following: "In determining the percentage deduction to be made, the Court has regard to such matters as the age, health, appearance and nature of the widow, as well as such other factors as the age and number and financial dependence of her children."[1359]

1355 See Rickard https://www.pressreader.com/south-africa/financial-mail/20180222 (accessed on the 5 January 2019); De Lange https://www.thecitizen.co.za/news/south-africa/1373509 (accessed on 5 January 2019).

1356 Wiers https://www.adamsadams.com/insights/being-beautiful-and-widowed/ (accessed on 4 January 2019); *Members of the Executive Council Responsible for the Department of Road and Public Works, North West Province v Oosthuizen* (A671/07) [2009] ZAGPPHC 16 par [5].

1357 See *Legal Insurance Company Ltd v Botes* 1963 1 SA 608 (A); *Snyders v Groenewald* 1966 3 SA (E) 785.

1358 1963 1 SA 608 (A) par [4].

1359 1966 3 SA 785 (E) par [6].

This attitude was challenged in the case of *Members of the Executive Council Responsible for the Department of Road and Public Works, North West Province v Oosthuizen*.[1360] The appellants appealled against the award of damages to the respondent in her personal capacity and in her capacity as mother and natural guardian of her child for loss of support arising out of the death of the respondent's husband in a collision. It was argued that a remarriage contingency should be struck down as unconstitutional as reliance on appearance offends the equality provisions of the Constitution.[1361] After considering the facts of that particular case, the Court ultimately pointed out that no reference had been made to the respondent's appearance and found that remarriage contingencies are not unconstitutional.

Recently, this ancient interpretation of determining re-marriage contingencies was addressed in the case of *Esterhuizen v RAF*.[1362] In this matter, the husband died in a car accident. He was the sole breadwinner and his wife and two children depended on him for financial support, so the surviving widow claimed maintenance from the Road Accident Fund for herself as mother to look after the two children. The RAF was found to be 100% liable for all damage she could prove she had suffered due to her husband's death and the loss of financial support. The court commented that the possibility of remarrying was usually taken into account when the claim for loss of support was considered in law. The courts calculate the percentage it deemed possible for remarriage, and then subtracted that amount from the total amount that the wrongdoer would pay. The process of remarriage contingency makes provision for the possibility of another breadwinner stepping into the shoes of the deceased. Previously,

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1360 [2009] ZAGPPHC 16.

1361 *Members of the Executive Council Responsible for the Department of Road and Public Works, North West Province v Oosthuizen* [2009] ZAGPPHC 16 par [45].

1362 [2016] ZAGPPHC 1221; 2017 4 SA 461 (GP).

the younger and prettier the widow was, the higher the remarriage contingency deduction. So prettier widows received less. However, the more children the wife had, the prospect of her remarrying became less, as did the remarriage contingency deduction. The court found that reliance on a woman's appearance and nature to be an outdated and offensive approach towards women. It remarked that to take appearance and nature in consideration is not in accordance with the constitutional values of dignity and equality enshrined in our constitution.[1363] The court stated that an award of damages should be fair, and to allow for the possibility of remarriage is appropriate, but no reliance should be placed on factors such as appearance.[1364] In this case, the applicant argued that a 20% contingency should apply. But the RAF/respondent asked for 39%. An actuary report stated that a 39% deduction was the average for a "35-year-old female with two children". The judge ordered a contingency deduction of 27%.

One of the most recent cases to address the issue of remarriage contingencies directly is the case of *LD v RAF*.[1365] The plaintiff brought an action for damages for loss of support arising out of the death of her late husband as a result of injuries sustained by him in a motor vehicle collision. The action was brought against the RAF, the party responsible to pay such claims in terms of the Road Accident Fund Act 56 of 1996. In this case the remarriage contingency was re-visited. In conclusion, the court referred to Steynberg's article titled "Re-partnering as a contingency deduction in claims for loss of support comparing South Africa and Australian law": "Re-partnering is merely another of the many vicissitudes of life, namely that the claimant may enter an

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1363 *Idem* par [10].
1364 *Idem* par [12].
1365 *LD v RAF* unreported judgement of the North Gauteng Division, case no 14606/2016 on 5/2/2018 https://www.saflii.org/za/cases/ZAGPPHC/2018/181.pdf (accessed on 5 January 2019).

economically beneficial or detrimental relationship after the trial. It is therefore to be given no more weight than any of the other vicissitudes that go to make up the general discount. The 'standard' adjustment should not be increased to reintroduce the 'remarriage' discount by the back door."[1366] The court agreed with Steynberg's approach and held that unless special circumstances ensue, no higher than normal contingency ought to be deducted. It is clear that while the principle of a re-marriage contingency continues to have relevance and applicability, one must be cautious in how it is applied. If there is evidence to justify its application, then the courts should apply it with due regard to the facts of each matter. Where there is no evidence, simply to include such a contingency on the broad assertion that the possibility of re-partnering must always exist, would offend the principles of fairness and justice. In this case the parties agreed to the deduction of a 5 and 15 percent contingency for the general hazards of life in respect of the past and future loss respectively. This is the usual deduction applied in our courts for this type of contingency. On the established facts of the present case, the court was of the view that there are no circumstances that warrant the deduction of any further contingency and it was satisfied that the agreed deduction appropriately provides for the possibility of the remarriage of the plaintiff such as it may be.[1367]

Specific contingency adjustments should preferably not be made in the actuarial calculations, but should be left to the discretion of the court, and can vary from small to large, depending on the specific circumstances of the plaintiff. The effect of an adjustment based on contingencies is that the court always reduces the calculated

[1366] Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017).
[1367] *LD v RAF* unreported judgement of the North Gauteng Division, case no 14606/2016 par [38] https://www.saflii.org/za/cases/ZAGPPHC/2018/181.pdf (accessed on 5 January 2019).

compensation by a percentage, which may range from 5 to 80 per cent. The adjustment percentage is determined on a case-by-case basis, and depends upon what is considered to be fair and reasonable in the circumstances.

In many matters in Australia, the courts have adopted a general contingency deduction of approximately 15%.[1368] According to the Australian author, Luntz,[1369] the following contingencies have in the past been taken into account in wrongful death actions, similar to South Africa: remarriage or re-partnering of a dependant,[1370] level of support given by the new spouse,[1371] failure of a second marriage,[1372] and pension schemes.[1373] Steynberg[1374] deals authoritatively with the role played by contingencies, particularly the contingency of remarriage or re-partnering of a dependant under Australian law. Besides Northern Territory, Victoria and Queensland,[1375] the legal position in Australian law on re-partnering as a possible contingency deduction is to be found in case law, as is the case in South Africa. Steynberg explains that in a case where a claim is submitted for loss of support by the spouse of the deceased breadwinner, the claim will be influenced by the probable remarriage of the surviving spouse.[1376] The reason for this is that remarriage gives rise to a new maintenance relationship between the surviving spouse and his or her new marriage partner.[1377]

1368 Lee *Assessment of damages* (2017) 7.
1369 Luntz *Assessment of damages* (2006) par 4.3.
1370 Except for the Northern Territory, Victoria and Queensland; *Willis v The Commonwealth* (1946) 73 CLR 105.
1371 *AA Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591 (CA).
1372 *Hollebone v Greenwood* (1968) 71 SR (NSW) 424 (CA).
1373 *Quinlivan v Robinson* [1968] 2 NSWR 786 (CA).
1374 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017).
1375 *Ibid*.
1376 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017); also see *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 978-980.
1377 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017); also see Carver 2005 *QUTLJJ* 2-3; *De Sales v Ingrilli* [2002] 212 CLR 338 (HC); *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376D; *Constantia Versekeringsmaatskappy v Victor* 1986 1 SA 601 (A) 614C-D.

In Australian law, the courts usually refer to the "marriageability" of the surviving spouse when determining the chances of remarriage or re-partnering.[1378] Comparable to South Africa, age and conventional good looks have traditionally been used as markers of the marriageability of women.[1379] Steynberg states that a man who is economically dependant on his deceased wife could find himself in the same position, but such a case is much more uncommon, and a man's physical attractiveness has never, according to the author's knowledge, been considered in South African or Australian case law.[1380] Steynberg observes that the financial benefit that the widow receives through re-partnering is taken into account in calculating damages according to the theory on compensating advantages.[1381] The new relationship does not necessarily mean that the widow automatically loses her right to a claim for loss of support.[1382] The income of the new partner and his life expectancy will be taken into account in the calculation of the extent of her claim.[1383] If the new partner is not able to support the widow at the same level as the deceased, the loss to the widow is deemed to continue beyond the date of the new relationship, though it is reduced by whatever support is likely to be obtained from the second or subsequent partner.[1384]

In *Dominish v Astill,*[1385] Reynolds AJ declares that the remarriage did not automatically exclude the right to support.[1386] Where remarriage had not yet occurred, a double

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1378 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017).
1379 See *De Sales v Ingrilli* [2002] 212 CLR 338 (HC) 365.
1380 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017); Atkinson 2003 *QUTLJJ* 7.
1381 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017); also see Koch *Reduced utility* (1993) 325; *AA Tegel v Madden* [1985] 2 NSWLR 591 (SC) 604-605.
1382 Steynberg https://www.saflii.org/za/journals/PER/2007/14.html (accessed on the 27 August 2017); *Glass v Santam Insurance* 1992 1 SA 901 (W).
1383 Davel *Afhanklikes* (1987) 126; *Legal Insurance Company v Botes* 1963 1 SA 608 (A) 618; *De Sales v Ingrilli* [2002] 21 2 CLR 338 (HC) 352.
1384 Luntz & Hambly *Torts* (2013) 632; *Hollebone v Greenwood* (1968) 71 SR (NSW) 424 (CA).
1385 [1979] 2 NSWLR 368 (CA) 378F-G.
1386 Steynberg 2007 *PER/PELJ* 123.

contingency had to be addressed: firstly, the probability that the claimant would remarry, and secondly, the probability that financial advantage would flow from this union. Chief Justice Gleeson was of the opinion that "the court's subjective adjudication of both these contingencies would be speculative in nature, and that even statistics would not sufficiently assist the court".[1387] It is clear from this discussion that the Australian legal position concerning remarriage or re-partnering as a contingency is substantially the same as in South Africa, except in the Northern Territory, Victoria and Queensland.

In Australia, the loss of future savings or inheritance is regarded as establishing an enforceable claim by the dependants.[1388] It is a positive contingency which is taken into account in the calculation of loss of support. Our law is quite different, as the loss of the capacity to save during the lost years or inheritance is not regarded as establishing an enforceable claim by the victim of a wrongdoing.[1389] Ramsbottom JA makes this clear when he says:[1390]

> "But I think that it is clear that the only right which the injured man had was to claim loss of earnings up to the date of this death, and nothing more could pass to his executors. A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss that they have sustained. If the wrongdoer is unable to pay, they may be able to claim support from the estate of the deceased, but that does not give the executor the right to claim from the wrongdoer earnings or savings that have been lost through the death of the deceased. If it did, the dependants would have no claim against the wrongdoer; their claim for maintenance would be against the estate of the deceased. That is not the law."[1391]

1387 See *De Sales v Ingrilli* [2002] 212 CLR 338 (HC) 36.

1388 *Oliver v Ashman* [1962] 2 QB 210.

1389 *Singh v Ebrahim* [2010] ZASCA 145 par [10].

1390 *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 304 at 305H-306B.

1391 No one has, since *Lockhat*'s *Estate,* suggested that it is not good law. The cases which have dealt, if only in passing, with lost years' claims, have accepted it as sound – *Singh v Ebrahim* [2010] ZASCA 145 par [11]. Academic opinion has been unwaveringly in support of its correctness - see Scholtens 1959 *SALJ* 373; Boberg 1960 *SALJ* 438*;* Boberg 1962 *SALJ* 43 ; Boberg *Delict*: *Aquilian liability* (1984) 542; Howroyd 1960 77 *SALJ* 448.

Botswana and Lesotho are both common law countries, and as such, follow the system of judicial precedents. Given their similar legal systems, decisions from South African courts are highly persuasive, and courts from both jurisdictions refer to and follow South African cases in formulating their decisions.[1392] Therefore, the legal position in Botswana and Lesotho regarding contingencies is the same as in South Africa.

In contrast to the general law, contingencies are unknown under customary law, and are therefore not considered in determining the appropriate fine where the breadwinner was unlawfully and negligently killed.

4.6.9 Collateral benefits

The basic principle of compensation in delictual actions is to place the plaintiff in the position he or she would have been if the delict had not occurred. When death occurs, the event not only brings about losses, but could also result in advantages that have the effect of reducing the overall loss suffered.[1393] Consequently, when a third party intervenes and makes payments to the plaintiff out of generosity, benevolence or charity, the collateral source rule comes into play. This rule states that such payments are *res inter alios acta* and must be disregarded when quantifying the damages. One of the reasons behind this is the reluctance on the part of the law to allow the wrongdoer to benefit from the acts of kindness of another unrelated party.[1394] The collateral source rule forms part of South African law, as well as Australian law.[1395] In all jurisdictions where it is recognised, the collateral source rule has been fraught with difficulties and

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1392 *Archibald v Attorney-General* 1989 BLR 421 (HC); Shale https://www.nyulawglobal.org/globalex/Lesotho1.html (accessed on 19 July 2017).

1393 Koch *Collateral benefits* (1993) chapter 11 par 11.1; Tilbury 1980 *WALR* 280 available at https://www.austlii.edu.au/au/journals/UWALawRw/1980/4.pdf (accessed on 19 July 2017); Klopper *Third party compensation* (2012) 141.

1394 *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [60].

1395 See Compensation to Relatives Act 31 of 1897 (as amended); Luntz *Assessment of damages* (2006) par 5.11.

diversely applied. As a result, over the years, there has been a distinction between non-deductible and deductible collateral benefits,[1396] and specific benefits have been expressly listed as non-deductible collaterals in some legislation,[1397] with the hope that there would be little room to argue about which benefits are subject to deduction, and which are not.

In South African law, the Assessment of Damages Act[1398] specifically provides for the non-deduction of insurance money or pension, which had been or was expected to be paid out as a result of the death. Boberg[1399] states that the existence of the collateral source rule cannot be doubted, and it must be determined casuistically to what benefits it applies. In addition, where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit. The rule must also be seen in the context of being partially corrective of our "once and for all" rule, which of course carries the danger of under-compensation.[1400]

In Australia, Luntz comments on the uncertainty of the law with regard to the collateral benefits rule,[1401] and quotes *Browning v War Office,*[1402] where Donovan LJ said that: "…in this field logic is conspicuous by its absence". In the same case, Lord Denning MR said the following about the plaintiff's duty to mitigate his losses:

> "He should, therefore, give credit for all sums which he receives in diminution of his loss, save in so far as it would not be fair or just to require him to do so.

1396 See Potgieter, Steynberg & Floyd *Law of damages* (2012) paras 4.7.2 & 4.7.3.
1397 See Assessment of Damages Act 9 of 1969.
1398 s 4 of the Assessment of Damages Act 9 of 1969.
1399 Boberg *Delict: Acquilian liability* (1984) 479; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [61].
1400 *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [62].
1401 Luntz *Assessment of damages* (2006) par 5.11; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [64].
1402 *Browning v War Office* [1962] 3 All E. R. 1089 (CA) 1093E-F; also see *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [64].

> The difficulty is to say when it is or not fair or just, to take the receipts into account."[1403]

However, in criticising a haphazard approach, Dixon CJ in *National Insurance Co of NZ v Espagne*[1404] said the following:

> "Intuitive feelings for justice seem a poor substitute for a rule antecedent known, more particularly where all do not have the same intuitions."

Subsequent decisions have done little, if anything, to clarify the issue. Luntz[1405] states that the courts have tended to confuse the issues further by using Latin tags such as *res inter alios acta,* which do no more than state conclusions, without offering guidance as to how these conclusions are reached.[1406] In *Griffiths v Kerkemeyer*,[1407] the court held that the plaintiff was entitled to recover damages, though the loss was actually borne not by the plaintiff himself, but by a third party who had no direct right of action. In *Francis v Brackstone,*[1408] it was held that neither payments made by an employer who is contractually bound to do so, nor payments made on a voluntary basis, were to be set off. The former was likened to insurance benefits, whilst the latter were likened to charitable gifts. The Court in *Hobbelen v Nunn*[1409] held that if a benevolent employer chose not to terminate a plaintiff's contract of employment after he became disabled from working, the payments are still wages and not gifts, and the plaintiff may not claim for loss of earning capacity during the period he received such wages. This appears to have been based on the rationale that the voluntary aspect is that of the employer not terminating the employment contract, and if he does not do so, there is a contractual right on the part of the plaintiff to receive his wages. Luntz says that the reasoning is

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1403 *Browning v War Office* [1962] 3 All E. R. 1089 (CA) 1091D-E; also see *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [65].
1404 (1961) 105 CLR 569, 572.
1405 Luntz *Assessment of damages* (2006) par 5.11
1406 *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [65].
1407 [1977] HCA 45; (1977) 139 CLR 161; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [66].
1408 (1955) SASR 270; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [67].
1409 (1965) Qd R 105, 124; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [69].

doubtful. In *Volpato v Zachory,*[1410] Bray CJ held that the plaintiff could not recover damages for loss of earning capacity if he had received his wages by contractual right. The onus was on the defendant to show the true nature of the payments. If, however, the employer had paid the money voluntarily, there was to be no deduction. According to Luntz, the best that can be said for this approach can be found in the words of Sholl J in *Johns v Prunell,*[1411] who states the following:

> "In general, the law seems…to have endeavoured to form a kind of moral judgment as to whether it is fair and reasonable that the defendant should have the advantage of something which has accrued to the plaintiff by way of recoupment, or other benefit as a result of the defendant's infringement of the plaintiff's rights."

The study has not brought forth any information relating to collateral benefits in terms of damages for loss of support in both Botswana and Lesotho.[1412] Customary law does not provide for collateral benefits. While collateral benefits are taken into account in the assessment of damages in general law, they are unknown in customary law.

4.7 Measurement of damages for loss of support in terms of the dependency action

4.7.1 General

In all comparative jurisdictions, the death of a breadwinner causes damage to his or her dependants,[1413] and the damages for loss of support must be expressed in monetary terms.[1414] The assessment of the amount of damages (compensation) is a very complicated process. This section deals with the various methods which are utilised to quantify the damages for loss of support which arise in dependency claims,

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1410 (1971) SASR 166; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) par [70].
1411 (1960) VR 208, 211; *Fulton v RAF* [2012] ZAGPJHC 3; 2012 3 SA 255 (GSJ) [71].
1412 For general application of collateral benefits, see *Mamojaki v Klass* [2007] LSHC 122; *Mzwinila v Cbet Pty Ltd* t/a *Midweek Sun* 2010 3 BLR 736 HC.
1413 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7; Barnett & Harder *Remedies* (2014) 184.
1414 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 8.4.

the justification of the existing rules, and the possibility of introducing any future enhancements.

The general principle in the calculation of damages is that the dependant, under the dependency action as far as support is concerned, should be placed in the position he or she would have occupied if the breadwinner had not been killed, in so far as can be done through the payment of money, and without undue hardship to the wrongdoer.[1415] Under the dependency action, there are various claims.[1416] Some of these claims are typically assessed based on the concrete approach,[1417] while others are assessed based on the comparative method.[1418] In this section, attention is devoted to only the quantification of claims for loss of support, as is relevant to this study.

4.7.2 Quantification of loss of support

The most important instance where damages are payable upon the death of a person is where the dependants institute an action for loss of support resulting from the unlawful and negligent killing of their breadwinner.[1419] The calculation of loss of support is not simply a straight-forward total of the monthly loss multiplied by the number of months of lost support. Instead, it requires careful consideration of what would have occurred in the future. Certain formulae have been laid down to ascertain the quantum of damages to be awarded for loss of support. The figures are referred to an actuary, who factors in inflation, discounting and various other contingencies, in order to arrive at a figure which, if invested at a market-related return, will provide support (out of both capital and interest) until the dependants are self-supporting. The process of assessing

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1415 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.2; Barnett & Harder *Remedies* (2014) 186.
1416 Eg, medical expenses, funeral or cremation expenses, past loss of income; loss of support.
1417 Eg, medical expenses, funeral or cremation expenses, past loss of income, etc.
1418 Eg, loss of support.
1419 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.2.

loss of support is concerned with subtracting the current patrimonial position of a dependant[1420] from the hypothetical patrimonial position the dependant would have occupied if the breadwinner had not been killed.[1421] The court, in the calculation of the loss of support, is directed by the deceased's expected income. The standard formula applied by the courts[1422] to calculate and determine the loss of support is as follows:

Period of support[1423]

The court will first determine the period during which the dependant has been deprived of support.[1424] The period of support depends on the joint expectation of life[1425] of the dependant and the breadwinner, the period within this joint expectation of life during which the breadwinner would have continued to earn an income[1426] and during which the breadwinner, but for his or her death, would have devoted a portion of his or her income to the dependant.[1427]

Income which the breadwinner would have earned[1428]

The court will determine the breadwinner's net annual income over the period of support, based on the actual earnings at the time of death,[1429] nature of work,[1430]

1420 *Idem* par 14.7.3.
1421 *Ibid*.
1422 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4; Fombad https://www.saflii.edu.au/au/journals/ (accessed on 12 March 2015).
1423 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4.1.
1424 *Idem* par 14.7.4(a).
1425 Expectation of life is established through actuarial evidence if the health and circumstances of the person in question were normal, and otherwise by means of medical evidence – *Nochomovitz v Santam Insurance Co Ltd* 1792 1 SA 718 (T) 722-724.
1426 This period depends upon factors such as the person's general state of health, nature of employment and expected retirement age, etc.
1427 This period depends on the relationship between the dependant and the deceased-breadwinner. If the dependant is a spouse, the possibility of divorce or separation must be taken into account, as this could shorten this period. If the dependant is a child, the period of support ends as soon as the child becomes self-supporting.
1428 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4.2.
1429 *Shield Insurance v Booysen* 1979 3 SA 953 (A) 962-964.
1430 *Chisholm v ERPM* 1909 TH 297.

capabilities and prospects,[1431] bonus[1432] and overtime payment,[1433] contingencies,[1434] inflation[1435] and factors that would have increased the deceased's income.[1436]

Portion of the breadwinner's income, which could have been devoted to the support of the dependant[1437]

This is the amount that the dependant could actually have expected to receive from the breadwinner.[1438] According to Kramer, in order to calculate the share of the claim for loss of support, the income of the deceased breadwinner is generally split between the different dependants, each adult receiving a two-part share, and each child a one-part share.[1439] This amount depends upon the relationship between the dependant and the deceased breadwinner, the needs of the dependant, and the actual amount of support the deceased provided to the dependant prior to his or her death.[1440] For example, if the deceased-breadwinner left a dependant-spouse, the possibility of divorce or separation must be considered, as this could shorten the period of maintenance,[1441] and therefore have an impact on the amount. If the deceased left a sickly child, this implies the allocation of a larger proportion of the income to the maintenance of such a child.[1442] When a man is customarily married to more than one wife at the time of his death, all wives should be equally protected. Although the first wife does receive preferential treatment in respect of her relationship with the other wives towards their husband, the award for the loss of support is to be equally divided

1431 *Milns v Protea Assurance Co Ltd* 1978 3 SA 1006 (C) 1010.
1432 *De Jongh v Gunther* 1975 4 SA 78 (W) 79.
1433 *Maasberg v Hurt* 1944 WLD 2 10.
1434 *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O) 467.
1435 *Mokoena v President Insurance* 1990 2 SA 112 (W).
1436 *Khan v Padayachy* 1971 3 SA 877 (W) 878.
1437 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4.3.
1438 *Ibid*.
1439 Kramer 2013 *De Rebus* 60.
1440 *Ibid*.
1441 This relates to the first step – period of support.
1442 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4.3.

amongst the surviving dependant-wives.[1443] Seniority does not play a part in determining the amount that the first wife receives.

Calculation of annuity[1444]

The total calculated amount of loss of support which would have been devoted to the dependant must, in terms of an annuity calculation, be reduced to its present value (capitalisation or discounting),[1445] which means that a capital sum must be calculated to purchase an annuity, which will produce periodic (annual) payments equal to the loss of support, and which sum will exhaust itself at the end of the relevant period. Actuarial evidence is imperative, but not absolutely critical, in the calculation of an annuity.[1446] A net rate of interest is used for the purposes of capitalisation, and allowance must be made for inflation in the computation of an annuity.[1447] This computed amount has to be adjusted in an equitable manner, in accordance with the general circumstances and contingencies of the case.[1448]

Another important aspect of assessment of damages for loss of support is the role of the actuarial expert. In the next section, the issue of actuarial evidence will be discussed.

4.7.3 Expert actuarial evidence

South African courts readily consult and rely on actuarial opinion when determining monetary compensation (or when 'assessing damages') in lieu of loss of support. Du

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1443 Kerr 2006 *Speculum Juris* 4.
1444 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4.4.
1445 *Nochomowittz v Santam Insurance* 1972 3 SA 640 (A) 645-646.
1446 *Southern Insurance Co Ltd v Bailey* 1984 1 SA 98 (A) 112.
1447 *Snyders v Groenewald* 1966 3 SA 785 (C) 790; *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O) 466.
1448 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.4.4.

Plessis[1449] states that our courts rarely determine compensation without having had the opportunity to consider actuarial opinion, and such reliance places the South African actuarial profession in a respected position. The authors of *Visser & Potgieter Law of Damages*[1450] deal authoritatively with the role played by expert opinion as follows:

> "An actuary is an expert witness whose opinion is merely part of all of the other evidence before this court, to be given greater or lesser weight according to the circumstances of the case. The calculations and evidence of an actuary often plays an important role."

Klopper,[1451] in his authoritative legal book, states the following:

> "Of course, the actuarial report is only used as a base and does not in any way bind, the court's inherent discretion to asses such damages."

Koch[1452] observed that only in rare cases will compensation for loss of support be settled without the benefit of an actuarial report. Lowther mirrors this observation.[1453] An expert witness should provide independant assistance to the court by way of an objective, unbiased opinion in relation to matters within his area of expertise. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts, which could detract from his concluded opinion. An expert witness should also make it clear when a particular question or issue falls outside his area of expertise.[1454] The value of expert witnessing cannot be denied, but the court is not obliged to accept the evidence presented by the actuarial expert, and if the evidence of two or more experts differs, the court must attempt to reconcile the inconsistencies, or otherwise prefer the evidence of one expert above that of the

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1449 Du Plessis http://www.up.ac.za/media/shared/Legacy/sitefiles/file/48/2057/rinusduplessistheactuaryactingasexpertwitnesscopy.pdf (accessed on 19 July 2017).
1450 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.6.3.
1451 Klopper *Third party compensation* (2012) 177.
1452 Koch *Quantum year book* (2018) 112.
1453 Lowther 2011 *SAAJ* 106.
1454 Koch 2011 *SAAJ* 126-127; *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 3 SA 352 (A).

other.[1455] Actuarial evidence is used in the application and explanation of complex mathematical or actuarial calculations in respect of future loss,[1456] which are applied to assess the current value of uncertain future losses.[1457] According to Koch,[1458] the original purpose of actuarial witnessing was to advise the court on an appropriate price for the issuing of a life annuity, which relates directly to the calculation of an annuity in determining damages for loss of future support.

Taking contingencies into account in the assessment of damages[1459] is one of the areas of potential conflict between the expert witnesses and the court. Making contingency adjustments lies within the subjective discretion of the court. It is, however, often impossible for the actuary to complete the calculations, without making suggested contingency adjustments. The reasoning behind the actuary's calculations should be of such a nature that the court can be convinced of their logic and fairness. The contingency adjustments suggested by the actuary should be handled by the court in exactly the same manner as the calculations themselves – they serve merely as a guideline to the court.[1460] Contingency provisions fall squarely within the court's discretion as to what is reasonable and fair. An actuary cannot give direct evidence on the issue of contingencies. It seems as if the courts are hesitant to allow expert evidence in respect of matters over which the court should make the judgment.[1461] The court could argue that expert witnesses enter the domain of the court if they make suggestions regarding contingency adjustments, while the court itself has a wide

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1455 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017).
1456 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017); *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O) 466-467.
1457 Koch *Quantum year book* (2018) 75.
1458 *Idem* 115-6.
1459 See chapter 4 of this thesis, par 4.6.7 above.
1460 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017).
1461 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 6.7.3.

discretion in respect of the application of contingencies.[1462] Consequently, actuaries should declare, in their report, the assumptions on which they based their calculations, and whether the contingency adjustments have been included in the calculations.[1463]

Steynberg[1464] has stipulated the following guidelines for actuaries and legal professionals in handling expert actuarial evidence:

a) Actuaries should clearly indicate in their report the assumptions and premises on which they based their calculations, as well as the contingencies they have already provided for in their calculations.

b) The actuarial calculations should be taken as the starting point or basis for the assessment of damages by the court in the case of future loss.

c) The court is not bound to the expert actuarial calculations.

d) When confronted with two conflicting expert reports or evidence, the court has the discretion to choose between the two, or to appoint an alternative expert.

e) In assessing the final damages award, the court has a wide discretion to adjust the findings of the expert evidence.

This thesis respectfully agrees with the guidelines provided by Steynberg. These guidelines are not only correct, but should be expanded and discussed further by the South African actuarial profession, since it has not made any practice-specific guidance available to its members acting as expert witnesses.[1465] It is clear from the above that expert evidence presented to the court should be, and should be seen to

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1462 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017).

1463 *Trimmel v Williams* 1952 3 SA 786 (C) 792-793.

1464 Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017).

1465 Du Plessis https://www.up.ac.za/media/shared/Legacy/sitefiles/file/48/2057/rinusduplessistheactuaryactingasexpertwitnesscopy.pdf (accessed on 19 July 2017) 91.

be, the independant product of the expert, uninfluenced as to form or content by the exigencies of litigation.

Similar to South Africa, in Australia, actuarial expert evidence, testimony and opinion lend appreciable assistance to the court when performing its task of assessing and quantifying damages.[1466] Generally, the legal position and handling of expert witnesses in Australia is the same as in South Africa.[1467] This in effect means that there can be no direct lessons derived from Australian jurisprudence in as far as expert witnessing is concerned.

4.8 Chapter conclusion

This chapter provided a comparative overview of the legal principles and elements of compensatory damages for loss of support under the dependency action in the law of South Africa, Botswana, Lesotho and Australia. There are remarkably broad similarities across all four comparative countries, with lively replication of legal concepts in the area of assessment of damages, as well as noteworthy concepts such as “damage”, “damages” and “compensation”. The South African definitions and understanding of these concepts are also the accurate versions of the definitions and understanding of these concepts under the laws of Botswana, Lesotho and Australia.[1468]

In all comparative jurisdictions, the normal measure of damages for loss of support under the dependency action is concerned with subtracting the current patrimonial

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1466 See in general Ellis “*The actuary as an expert witness”* 2002 (This paper has been prepared for issue to, and discussion by, Members of the Institute of Actuaries of Australia (IA Australia) at the March 2003 Horizons Session); Australian Judicial Perspectives on Expert Evidence, NSW Law Society Journal, August 2000, 54 at 55; Australian Law Reform Commission, Background Paper No 6, Australian Government Publishing Service, 1999.

1467 Luntz *Assessment of damages* (2006) par 9.2.

1468 See chapter 4 of this thesis, par 4.2 above.

position of a dependant[1469] from the hypothetical patrimonial position the dependant would have occupied if the breadwinner had not been killed.[1470] This follows from the principle that the compensation should put the dependant in the position he or she would have been, but for the unlawful and negligent death of his or her breadwinner, so far as can be done by the payment of money, and without undue hardship to the wrongdoer.[1471] These rules of assessment and measure of damages for loss of support in terms of the dependency action are formulated in similar terms in all four comparative jurisdictions.[1472]

The one area in which the Australian jurisdiction differs significantly from the comparative Southern African countries in this study is with regard to recoverable damages in terms of the dependency action. Although, the assessment of the amount of damages for loss of support and other related losses in terms of the dependency action is based on the principle of full compensation, the objective being, as stated above, to put the dependant in the position he or she would have been if the act that gave rise to the death of his or her breadwinner had not occurred at present, the recoverable damages under the dependency action in South Africa, Botswana and Lesotho is more limited than in the Australian law. It is therefore not sufficiently wide to cover all or most of the losses that a dependant could have suffered due to the death of his or her breadwinner.[1473] There is a need to bring the laws of these three countries in line with the more persuasive position taken by Australia.

1469 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.3.
1470 *Ibid*.
1471 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.2; Barnett & Harder *Remedies* (2014) 186.
1472 See chapter 4 of this thesis, par 4.3 above.
1473 See chapter 4 of this thesis, par 4.4 above.

It was observed that the South African, Botswana, Lesotho and Australian laws contain and apply a number of principles and rules in the acknowledgment of accountability for loss of support and other related losses. Such principles are uniform and applied in all comparative countries. However, these principles are foreign to customary law. Customary law jurisdictions have not necessarily developed or embraced mechanisms similar to the common law principles of assessment of damages for losses in terms of the dependency action; hence, the judicial process in the customary courts has its own shortcomings in this respect. It also does not differentiate in terms of the manner and cause of death of the breadwinner.

This thesis notes that although customary law systems have valuable features relevant to the dependency action,[1474] the application of customary law in the assessment of damages for loss of support also presents some challenges. The determination of delictual liability in customary law is in contrast to Western law. The general elements and principles for delictual liability and assessment of damages in terms of customary law have not been as clearly expressed as in South African common law.[1475] In addition, the traditional awards granted where the breadwinner was negligently and unlawfully killed were matters of pence and chillies,[1476] which undercompensated the dependants and failed to restore them to the positions they would have been in if there had been no wrongdoing committed against their breadwinner. Although the dependants under customary law have the principle of *molato ga o bole*,[1477] this principle is poorly recognised and seldom utilised in the context and spirit of

1474 *"Go tsoša/tsosa hlogo"* customary law principle.
1475 Knoetze 2012 *Speculum Juris* 43-44.
1476 According to Palmer *Law of delict* (1970) 19 & Poulter *Legal dualism* (1979) 70, the maximum penalty for killing a breadwinner would be the payment of 10 cows.
1477 See discussion on *molato ga o bole* in chapter 4 of this thesis, paras 4.6.2 & 4.6.3 above.

emphasising the traditional goals of reconciliation and reintegration in dispute resolution.

Having examined the above issues regarding assessment of damages under the dependency action, in the final analysis, it is clear that the legislatures and courts of South Africa, Botswana and Lesotho must take a realistic, clear-headed, and practical approach to reforming the law, and should learn from countries such as Australia with regard to compensating the dependants fully.

The next chapter will deal with the Road Accident Fund Act 56 of 1996 (as amended) and Compensation for Injuries and Diseases Act 130 of 1993 (as amended) as examples of social security legislations that have had a significant influence on the assessment of loss of support as a head of damages.

CHAPTER 5

ANALYSIS OF SOCIAL SECURITY LEGISLATIVE FRAMEWORKS PERTINENT TO THE ACTION OF DEPENDANTS

5.1 Introduction

Claims for payment of compensation for depriving dependants of support following the wrongful and negligent death of their breadwinners have received the attention of the legislature. This chapter presents a brief overview of the current leading social security legislative frameworks covering death claims or the dependency action for loss of support and funeral expenses in South Africa,[1478] Botswana,[1479] Lesotho[1480] and Australia.[1481]

In South Africa, the drive behind social security is to offer and secure an income, in order to replace earnings when they are interrupted by unemployment, sickness or accidents; to provide for retirement through old age; to provide against loss of support through the death of a breadwinner; or to meet exceptional expenditure associated with birth, marriage, death, or unemployment.[1482] This is also an accurate description of the objectives of social security under the laws of Botswana,[1483] Lesotho[1484] and Australia.[1485] This chapter proposes to broaden the conceptualisation of social security, by incorporating other elements of social security that are often omitted from discussions. Sources on social security policy in South Africa tend to focus on the social security aspect of social assistance to the poor, and often neglect the social

[1478] See chapter 5 of this thesis, par 5.2 hereunder.
[1479] See chapter 5 of this thesis, par 5.3 hereunder.
[1480] See chapter 5 of this thesis, par 5.4 hereunder.
[1481] See chapter 5 of this thesis, par 5.5 hereunder.
[1482] Social Security (Minimum Standards) Convention (No. 102) adopted by the ILO in 1952.
[1483] See chapter 5 of this thesis, par 5.3 hereunder.
[1484] See chapter 5 of this thesis, par 5.4 hereunder.
[1485] See chapter 5 of this thesis, par 5.5 hereunder.

security aspect of social insurance in respect of the dependency action for loss of support. This is also an accurate description of the status of discussions on social security policies or laws with regard to the dependency action for loss of support in Botswana, Lesotho and Australia. In all four jurisdictions studied, it seems that the only two sets of legislation where the dependency action can apply under social security (social insurance) are associated with road and workplace-related accidents. Consequently, in this chapter, only the road and workplace social security legislations will be discussed.

The most important social security legislation in South Africa that regulates compensation for death as the result of injuries or diseases associated with the workplace is the Compensation for Occupational Injuries and Diseases Act (COIDA),[1486] as amended. On the other hand, the framework for compensation for death due to a motor vehicle road accident is the Road Accident Fund Act (RAF Act),[1487] as amended. A brief overview of the relevant provisions of these two legal frameworks, to the extent that they specifically relate to the claim for loss of support and funeral expenses, will be provided, and critical comments on these systems will be presented in this chapter. This will include changes brought about by the RAF Amendment Act (RAFAA),[1488] and the proposed Road Accident Benefit Scheme (RABS) Bill.[1489] The perspective that will be offered is therefore a relatively limited one, as the discussion will focus only on the important aspects related to a claim for loss of support and funeral expenses, as outlined in the RAF Amendment Act and the proposed Bill, examining its influence on future claims by the dependants of the victims

[1486] Act 130 of 1993.
[1487] Act 51 of 1996.
[1488] Act 19 of 2005.
[1489] Road Accident Benefit Scheme Bill, 2017 - Government Gazette No. 36138.

of motor vehicle accidents. An overview, analysis and assessment of the COIDA claims process, coverage, and how employer contributions are determined in a claim for loss of support are also presented in this chapter. In addition, an analytical discussion of the calculation of compensation under both legislations is provided. Furthermore, the interrelationship between the RAF Act and COIDA is examined. Some recommendations are then made in light of the suggested legislative reforms and redrafting of the legislation, in order to align the two sets of legislation.

This chapter also endeavours to compare and evaluate the effectiveness of the RAF Act, including its Amendment Act (RAFAA), the proposed Road Accident Benefit Scheme (RABS) Bill, as well as COIDA and its Amendment Act (Compensation for Occupational Injuries and Diseases Amendment Act (COIDAA)).[1490] The past, present, and future of the RAF Act and COIDA systems are discussed, firstly, by looking briefly at the history of both systems and how they have evolved into their present status. Secondly, their present developments are discussed by viewing the systems in terms of the RAFAA[1491] and COIDAA,[1492] and how the developments have affected claims for loss of support and funeral expenses. The discussion focuses on the possibilities the future holds for us through the eyes of the proposed RABS Bill.[1493] This chapter also reviews and discusses the social security systems of Botswana, Lesotho and Australia, to the extent that they specifically relate to the claim for loss of support and funeral expenses under the dependency action.

1490 Act 61 of 1997.
1491 RAFAA refers to Road Accident Fund Amendment Act.
1492 COIDAA refers to Compensation for Occupational Injuries and Diseases Amendment Act.
1493 Road Accident Benefit Scheme Bill, 2017 - Government Gazette No. 36138.

The next section briefly discusses the nature of social security and the historical context of the establishment of the legal frameworks relating to road accident-related injuries and death, as well as work-related injuries, diseases and death in South Africa.

5.2 South Africa

5.2.1 Nature of social security

The concept of social security is defined in the International Labour Organization's (ILO) discussion paper as the protection that society provides for its members through a series of public measures, in order to offset the absence or substantial reduction of income from work due to various contingencies (i.e. sickness, maternity leave, occupational injury, unemployment, invalidity, old age or death of the breadwinner); to provide people with health care; and to provide benefits for families with children.[1494] The overall nature of the social security system in South Africa is unique in Southern Africa, in that the provision of social security flows from the Constitution of South Africa,[1495] and is therefore enforceable.[1496] The social security system consists of at least two common elements, namely social insurance and social assistance.[1497]

Social assistance is a state-funded system, also referred to in South Africa as social grants, and is non-contributory and financed entirely from government revenue. This scheme is means-tested and the onus is upon individuals to prove that they are destitute.[1498] Triegaardt and Patel[1499] observe that social assistance is the most

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1494 Kaseke 2010 *ISW* 159-161.
1495 See s 27(1)(c) of the Constitution; Kaseke 2010 *ISW* 160.
1496 See *Khosa* v *Minister of Social Development* [2004] ZACC 11; 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).
1497 Triegaardt https://www.dbsa.org/.../Accomplishments%20and%20challenges%20for%20partners (accessed on 22 September 2017); Kaseke 2010 *ISW* 160.
1498 See in general Strydom *Essential social security* (2006) 10-12.
1499 Triegaardt and Patel "Social security" in Patel (eds) *Social welfare & social development in South Africa* (2015) 124.

significant social security strategy. It is generally granted to designated groups, namely persons with disabilities (disability grants), older persons (old-age pension grants —the largest social assistance programme), child support grants, and foster care grants.[1500] The social assistance provided to individuals is in the form of cash or in-kind, in order to enable them to meet their basic needs.[1501]

Social insurance is provided to protect employees, victims of road accidents and their dependants, through insurance, against contingencies that interrupt income.[1502] There are three social insurance schemes in South Africa, namely the Unemployment Insurance Fund (UIF),[1503] the Compensation for Occupational Injuries and Diseases Fund (in terms of COIDA)[1504] and the Road Accident Fund (RAF).[1505] The unemployment insurance scheme provides protection to workers, including domestic workers, in case of temporary unemployment. However, coverage is not extended to civil servants and non-South Africans in the event of temporary unemployment. The scheme covers temporary unemployment occasioned by termination of employment, maternity leave, illness and adoption.[1506] Contributions come from both the employee and employer, and are paid into the Unemployment Insurance Fund.[1507] The Compensation for Occupational Injuries and Diseases Fund reimbuses compensation for occupational injuries, diseases and death. The scheme is funded by employers' contributions, which vary from employer to employer, depending on the risks inherent

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1500 Kaseke 2010 *ISW* 160; Triegaardt and Patel "Social security" in Patel (ed) *Social welfare & social development in South Africa* (2015) 129.

1501 Triegaardt https://www.dbsa.org/.../Accomplishments%20and%20challenges%20for%20partners (accessed on 22 September 2017).

1502 *Ibid.*

1503 See Unemployment Insurance Act 63 of 2001.

1504 See COIDA 130 of 1993.

1505 See RAF Act 56 of 1996 as amended by the RAFAA 19 of 2005.
Olivier "Social protection in SADC: Developing an integrated and inclusive framework - a rights-based framework" in Olivier & Kalula (eds) *Social protection in SADC: Developing an integrated and inclusive framework* (2004) 21 26 35.

1507 Kaseke 2010 *ISW* 161.

to their businesses. Domestic workers are not covered by this scheme. It pays compensation to work-related victims and their dependants. The third scheme, the Road Accident Fund, is not employment-based and is therefore financed by an obligatory fuel levy. The scheme provides protection against the risk of road-related accidents and pays compensation to victims of road accidents and their dependants.[1508]

Olivier opines that South Africa has a fairly poor safety record on the roads, as well as in the workplace.[1509] Consequently, most claims for loss of support under the dependency action occur as a result of work-related and road-related accidents and, as stated above, are omitted from discussions in sources on social security policy in South Africa. Most social security structures are concerned with securing consistency of support or income to the dependants of the employee-victims or road accident victims. In other words, social security (social insurance) attempts to provide a replacement for the loss of support to the dependants affected by such a loss, whether it is due to a motor vehicle accident or occupational injury or illness.[1510] In South Africa, as stated above, a constitutional imperative exists regarding social security.[1511] The South African Constitution[1512] includes social security as one of the socio-economic rights enshrined in the Bill of Rights.[1513] Section 27(1)(c) of the Constitution states that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The Constitution requires the state to ensure the progressive realisation of these rights by

1508 Kaseke 2010 *ISW* 161-162.
1509 Olivier et al *Social security law: general principles* (1999) 317-318.
1510 Myburgh 2000 *Law, democracy & development* 43-44.
1511 *Ibid.*
1512 The Constitution.
1513 See s 27 of the Constitution.

employing “legislative and other measures, within its available resources”.[1514] It is evident that a more sensitive approach plays a decisive role in socio-economic matters.[1515]

Against this theoretical background of the applicable principles of social security law, the next section provides a historical background to the social security legislative framework related to the dependency action for loss of support and funeral expenses.

5.2.2 Historical background

5.2.2.1 General

It is important to familiarise readers with the historical background that gave rise to the social insurance legislative framework of the third party compensation system in terms of the RAF Act, and the workplace compensation system in terms of the COID Act. This is particularly important in light of current debates on the changes presently experienced[1516] and projected for coming decades[1517] in the third-party compensation system. An understanding of the historical context of both systems and the rights associated with them (for example, the action for loss of support) will assist in interpreting both systems within their technical settings. These systems must be understood in terms of their social and historical contexts. The history of the third-party compensation system can be of considerable value in efforts to understand the difficulties faced within the current system, while making us re-examine the existing approaches towards dealing with different claims, with a view to improving the lives of victims of motor vehicle accidents. However, this section does not attempt to provide

1514 See s 27(2) of the Constitution.
1515 Dekker 2009 *Law, democracy & development* 1 3.
1516 Act 19 of 2005.
1517 RABS Bill, 2017.

an extensive historical background to the introduction of social security laws and practices related to loss of support. In the next section, a brief overview of the road accident legislation will be provided.

5.2.2.2 Road accident legislation: RAF Act and its predecessors

5.2.2.2.1 Introduction

Motor vehicle road accident legislation has always been the subject of heated debates. The widespread perception of a local crisis[1518] regarding the Road Accident Fund (RAF) Act, and the recent changes brought about by the Road Accident Fund Amendment Act (RAFAA), are amongst the issues that have encouraged the positioning of the third party compensation system at the heart of the analytical and conceptual explorations in this thesis. Therefore, a brief background to the road accident system of social security is necessary, in order to contextualise the current tensions in the present system.

5.2.2.2.2 Line of road accident legislation

A detailed historical background to the early road accident compensation systems has been presented by Suzman and others,[1519] as well as by Klopper.[1520] In South Africa, the third party compensation system was established in the early 1930's.[1521] Prior to 1997, the system of compulsory motor vehicle accident insurance was governed by the following legislation: Motor Vehicle Insurance Act, 1942;[1522] Compulsory Motor

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1518 For example, Knowler www.timeslive.co.za/.../BREAKING-NEWS-Road-Accident-Funds-bank-account-attached (accessed on 5 February 2017).

1519 Suzman & Gordon *Law of compulsory motor vehicle insurance* (1954) 1; Suzman & Gordon *Law of compulsory motor vehicle insurance* (1970) 1; Suzman, Gordon & Odes *Law of compulsory motor vehicle insurance* (1982) 1.

1520 Klopper *Third party compensation* (2012) par 4.1-par 5.

1521 Klopper *Third party compensation* (2012) par 4.1.

1522 Act 29 of 1942.

Vehicle Insurance Act, 1972;[1523] Motor Vehicle Accident Act, 1986;[1524] and Multilateral Motor Vehicle Accidents Fund Act, 1989.[1525] The third party compensation system was introduced as a direct consequence of the need to protect victims of motor vehicle accidents.[1526] Legislation on third party compensation systems was established to give the greatest possible protection to, and to promote the socio-economic rights of, victims of motor vehicle accidents.[1527] The greatest possible protection principle has been widely employed in defence of the rights of victims of motor vehicle accidents, in cases where their rights were somehow affected and/or endangered.[1528] Klopper observes that the principle of greatest possible protection becomes clearer when the judgment of Ramsbottom JA in *Aetna Insurance Co v Minister of Justice*[1529] is read carefully in context:

> "The obvious evil that it is designed to remedy is that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and is uninsured, the person who has been injured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance. The scheme of the Act is that the owner of a motor vehicle must obtain a declaration of insurance from a registered company. Not only is the owner compelled to insure the vehicle – failure to do so is an offence – but all registered companies are compelled, subject to certain qualifications, to issue declarations of insurance in respect of a motor vehicle when the owner thereof has applied for the insurance of the vehicle in a prescribed form. The insurance insures for the benefit of any person who has been injured and of any person who has suffered loss through the death of a person who has been killed; such persons claim compensation direct from the registered company."[1530]

1523 Act 56 of 1972.
1524 Act 84 of 1986.
1525 Act 93 of 1989.
1526 Klopper *Third party compensation* (2012) par 4.1.
1527 See *Mbele v RAF* [2016] ZASCA 134 par 17; *Law Society of South Africa & another v Minister for Transport & another* [2010] ZACC 25; 2011 1 SA 400 (CC) par 40; *Mvumvu & others v Minister of Transport & another* [2011] ZACC 1; 2011 2 SA 473 (CC) 479 par 20; *Engelbrecht v RAF* [2007] ZACC 1; 2007 6 SA 96 (CC) par 23; *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A) 285E-F.
1528 Klopper 2014 *THRHR* 73.
1529 1960 3 SA 273 (A) 285.
1530 See also *Engelbrecht v RAF* 2007 6 SA 96 (CC); *Mvumvu and others v Minister of Transport and another* (7490/2008) [2010] ZAWCHC 105, 2010 12 BCLR 1324 (WCC); (CCT 67/10) [2011] ZACC 1, 2011 5 BCLR 488 (CC), 2011 2 SA 473 (CC) where the Constitutional Court acknowledged and applied this principle. This is in contrast with the judgment of Moseneke DCJ in *Law Society of*

On 1 May 1997, South Africa introduced its fifth principal Act, the Road Accident Fund Act (RAF Act).[1531] In terms of this Act, the Road Accident Fund (RAF) is responsible for providing compulsory social insurance cover to all users of South African roads; to rehabilitate and compensate persons injured as a result of the negligent driving of motor vehicles; and to actively promote the safe use of all South African roads. Section 3 of the RAF Act stipulates that "the object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of a motor vehicle". The fund only compensates third parties for bodily injury or death resulting from the driving of a vehicle. It is noteworthy that where the definition of driving is not met by the circumstances, the fund will not be liable. Furthermore, this fund excludes cover where the wrongdoer is not legally liable for the injury. If the wrongdoer is not legally liable, the RAF is also not liable. These relate to cover under the Compensation for Occupational Injuries and Diseases Act (COIDA).[1532]

Owing to apparent difficulties concerning the monetary sustainability of the RAF, the Road Accident Fund Act of 1996[1533] has been subjected to one major commission, known as the Satchwell Commission that prepared various extensive

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South Africa and others v Minister for Transport and another 2011 1 SA 400 (CC); 2011 2 BCLR 150 (CC) par 40, where the principle is referred to but not applied. For other judgments where the principle was recognised, see *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466 (A) 471; *Op 't Hof v SA Fire and Accident Insurance* 1951 2 SA 353 (A); *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 2 SA 546 (A); *Aetna Insurance v Minister of Justice* 1960 3 SA 273 (A) 285; *Van Blerk v African Guarantee and Indemnity* 1964 1 SA 336 (A); *Hladhla v President Insurance* 1965 1 SA 614 (A) 623; *Rondalia Versekeringsmaatskappy v Lemmer* 1966 2 SA 245 (A) 255; *Da Silva and another v Coutinho* 1971 3 SA 123 (A) 138; *Commercial Union Assurance v Clark* 1972 3 SA 508 (A); *AA Mutual Insurance v Biddulph* 1976 1 SA 725 (A); *Webster v Santam Insurance Co Ltd* 1977 2 SA 874 (A); *Nkisimane v Santam Insurance* 1978 2 SA 430 (A) 435; *Santam Insurance v Tshiva* 1979 3 SA 73 (A); *Maxanti v Protea Assurance* 1979 3 SA 73 (A) 82; *Motorvoertuigassuransiefonds v Gcwabe* 1979 4 SA 986 (A) 991; *Workmen's Compensation Commissioner v Santam Insurance* 1949 4 SA 732 (C); *Swanepoel v Johannesburg City Council* 1994 3 SA 789 (A); *President Insurance Co v Kruger* 1994 3 SA 789 (A) 796E; *Smith v RAF* 2006 4 SA 590 (SCA); *RAF v Makwetlane* 2005 4 SA 51 (SCA).

1531 Act 56 of 1996.

1532 For the historical background to COIDA, see chapter 5 of this thesis, par 5.2.3 hereunder.

1533 Act 56 of 1996 - see chapter 5 of this thesis, par 5.3.1 hereunder for a detailed discussion on the RAF Act.

recommendations.[1534] Although these recommendations were constitutionally challenged,[1535] they were formalised in terms of the RAF Amendment Act of 2005,[1536] which came into operation on 1 August 2008. This Act has been described as an interim "scheme" and was found to not offend the Constitution.[1537] Subsequent to the RAF Amendment Act of 2005, the Department of Transport (DoT) published the Road Accident Benefit Scheme Bill of 2013[1538] for comments. The Bill[1539] was revised and published for further public comment on 9 May 2014. The period for comments on the Bill expired on 6 October 2014. The object of the Bill is to provide a new social security scheme for the victims of road accidents; to establish the new Road Accident Benefit Scheme Administrator (RABSA), which will replace both the Road Accident Fund (RAF) and the current compensation system administered by the RAF; to administer and implement the scheme; to provide a set of defined benefits on a no-fault basis to persons for bodily injury or death caused by or arising from road accidents; to exclude the liability of certain persons otherwise liable for damages in terms of the common law; and to provide for matters connected therewith.[1540]

It is clear from the above discussion of the line of road accident legislations that the South African government assumed responsibility for economic security, in order to provide for its citizens by developing a series of RAF laws to assist the dependants or victims of road accidents. In this regard, the problem of economic security was seen

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1534 See Klopper 2014 *THRHR* 73; Report of the Road Accident Fund Commission of 2002, vol 1-3.

1535 *Law Society of South Africa and others v Minister for Transport and another* [2010] ZACC 25; 2011 1 SA 400 (CC); 2011 2 BCLR 150 (CC).

1536 Act 19 of 2005 – see ch 5 of this thesis, par 5.3.2 hereunder for a detailed discussion on the RAF Amendment Act.

1537 *Law Society of South Africa v Minister for Transport and another* 2011 1 SA 400 (CC); 2011 2 BCLR 150 (CC) par 25, 46 & 53; *RAF v Oupa William Lebeko* [2012] ZASCA 159 par 4; *RAF v Duma and three related cases (Health Professions Council of South Africa as Amicus Curiae)* [2012] ZASCA 169 par [3].

1538 Notice 98 of 2013 in Government Gazette No. 36138 dated 08 February 2013.

1539 See chapter 5 of this thesis, par 5.2.5 hereunder for a detailed discussion on the RABS Bill.

1540 See Department of Transport's website: http://www.transport. gov.za/ (accessed on 12 May 2017).

as an issue affecting the dependants and victims of road-related accidents. Social insurance in the form of RAF legislations was regarded as the reasonable, practical alternative to radical solutions to the uncertainties created by the unemployment, illness, disability, or death of the breadwinner as a result of a road accident. These unavoidable aspects of road accidents are threats to the economic security of the dependants and victims of road accidents.

Linked to the social security compensation cover system under the Road Accident Fund Act is the compensation cover in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA).[1541] In the next section, the historical context of COIDA will be briefly discussed.

5.2.2.3 Workplace compensation legislation: COIDA and its predecessors

5.2.2.3.1 Introduction

In South Africa, workers who are affected by occupational injuries and diseases are entitled to compensation. The legislation on compensation for occupational injuries and diseases has a history that dates back more than a century. The Compensation Commissioner Fund provides compensation to employees who are injured, contract diseases, or die during the course of their employment. The latest statute in a long line of national legislation dealing with occupational injuries, disease and death is the Compensation for Occupation Injuries and Diseases Act (COIDA) of 1993, as amended in 1997 by the Compensation for Occupation Injuries and Diseases Amendment Act.[1542] This Act determines how and by whom the fund should be administered, as well as the conditions for eligibility for compensation.

[1541] Act 130 of 1993.
[1542] Act 61 of 1977.

5.2.2.3.2 Line of workplace compensation legislation

In South Africa, the first Workmen's Compensation Act (WCA) was passed in 1907.[1543] Prior to the passing of this Act, dependants of employees who died during the course of their employment had to institute a common lawsuit against the employer for negligence.[1544] This Act was the first milestone in the field of statutorily enforceable compensation for mining-related occupational diseases, and set the tone for future legislation.[1545] The purpose of the 1907 Act was to provide for and regulate the liability of employers to make compensation for personal injuries to workers.[1546] The Act expressly preserved an employee's right to institute a common law claim against the employer.[1547] However, the employee had to elect whether to claim under common law or in terms of the Act.[1548] The 1907 Act was followed by the Workmen's Compensation Act of 1914.[1549] The 1914 Act consolidated, amended and extended the law with regard to compensation for injuries suffered by workers in the course of their employment, or for death resulting from such injuries.[1550]

The Act provided for the liability of the employer to compensate a worker who had an accident that resulted in incapacity or death, and allowed employees to choose between compensation in terms of the 1914 Act and compensation under the common law.[1551] The employer and the employee could agree on an amount to be paid by the employer as compensation in respect of the permanent partial incapacity or permanent

1543 Workmen's Compensation Act 36 of 1907.
1544 *Ibid.*
1545 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [41].
1546 *Ibid*.
1547 See ss 17 32(1) & (2) of Act 36 of 1907.
1548 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [42].
1549 Act 65 of 1914.
1550 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [43].
1551 See s 1 of Act 65 of 1914.

total incapacity of the worker due to the injury.[1552] The 1914 Act also expressly preserved a worker's right to claim common law damages from the employer, if such accident was caused by an act or default of the employer, or of some person for whose act or default the employer is responsible.[1553]

This Act was amended by the Workmen's Compensation (Industrial Diseases) Act of 1917.[1554] The purpose of the 1917 Act was to amend the 1914 Act's extended coverage, in order to provide for specified industrial diseases, including cyanide rash, lead poisoning or its sequelae, and mercury poisoning or its sequelae.[1555] This Act entitled a worker to claim compensation if it appeared, based on a certificate granted by a medical practitioner, that he was suffering from a scheduled disease that caused incapacity, or that the disease was due to the nature of his work.[1556] In addition, the Act provided that nothing in the Act should affect the rights of a worker to obtain compensation[1557] in respect of a disease, other than a scheduled disease, since, in accordance with the meaning of the principal Act, the contracting of such disease is a personal injury caused by an accident.[1558]

The 1917 Act was repealed by the Workmen's Compensation Act of 1934.[1559] By 1930, workers, industry and government recognised the need for compulsory insurance.[1560] The 1934 WCA made insurance compulsory, through private companies rather than a state fund favoured by workers and trade unions. In terms of the 1934 Act, a worker

1552 See s 32 of Act 65 of 1914.
1553 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [45].
1554 Act 13 of 1917.
1555 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [46].
1556 See s 1 of Act 13 of 1917.
1557 This refers to compensation in terms of both common law and the Act.
1558 See s 6 of Act 13 of 1917.
1559 Act 59 of 1934.
1560 Budlender *Agriculture and technology: four case studies* (1984) 19.

and an employer could agree in writing as to the compensation to be paid by the employer, following the injury in respect of which the claim for compensation had arisen.[1561] The compensation paid in the case of permanent disablement, including permanent injury or serious disfigurement, was linked to the degree of disablement of the worker.[1562] The dependants of the worker could obtain a determined amount if the latter died as a result of an injury or accident.[1563] Section 4(2) of the 1934 Act provided that no liability for compensation should arise, except under and in accordance with the provisions of the Act in respect of any such injury. This was important, as it was the first time that the common law right of an employee was abolished.[1564] Section 5 of the 1934 WCA provided for increased compensation in instances where the employer was negligent, and a magistrate had the power to determine the additional compensation, in an amount deemed equitable.[1565]

The 1941 Workmen's Compensation Act 30 of 1941 repealed the 1934 WCA.[1566] The aim of the Act was to revise and harmonise the laws relating to compensation for disablement caused by accidents, or industrial diseases contracted by workers in the course of their employment, or for death resulting from such accidents and diseases.[1567] The provisions of section 7(a) and (b) of the 1941 WCA capture the same aspects as section 35(1) of COIDA.[1568] The section provided that: "From and after the fixed date: (a) no action at law shall lie by a workman or any dependants of a workman against such workman's employer to recover any damages in respect of an injury due

[1561] See s 15(1) of Act 59 of 1934.
[1562] See s 48 of Act 59 of 1934.
[1563] See s 49 of Act 59 of 1934.
[1564] *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [49].
[1565] *Ibid*.
[1566] See s 109 of Act 30 of 1941.
[1567] *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [50].
[1568] Act 130 of 1993.

to accident resulting in the disablement or the death of such workman; and (b) no liability for consideration on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death." Section 27(1) of the 1941 Act provided that if, after the fixed date, an accident befell a worker, resulting in his disablement or death, such worker would be entitled to compensation in accordance with the provisions of this Act. Section 50 of the 1941 Act provided for the submission of a written notice by or on behalf of a worker to the employer, as soon as reasonably possible after the accident.[1569]

The 1941 WCA was repealed in 1993 by COIDA.[1570] This Act follows the same outline as the 1934 and the 1941 Acts. Section 35(1) of COIDA bars common law claims for damages against employers, and limits compensation to that which is payable under COIDA. The purpose of COIDA is to provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases, and to provide for matters connected therewith.[1571]

Section 10 provides for the establishment of the Compensation Board. Section 15(1) provides for the establishment of a Compensation Fund that will be funded, inter alia, by contributions levied from employers.[1572] Section 22(1) provides for compensation to be payable to an employee who meets with an accident that causes his disablement or death, if the accident has arisen out of or in the course of his employment. Section 56(1) provides for increased compensation. This applies if the employee meets with

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1569 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 paras [51]-[53].
1570 See Schedule 1 of COIDA.
1571 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [56].
1572 See also s 15(2)(c) of COIDA.

an accident or contracts an occupational disease, which is due to, amongst others, the negligence of the employer, or an employee charged by the employer with the management or control of the business.[1573] Section 67(1) provides for the calculation of compensation for a disease. This may be based on earnings at the time of the onset of the disease.[1574] The dependants of an employee who died due to an occupational disease would essentially receive a lump sum of twice the monthly pension (a minimum of R4 600 as at 1 April 2010).[1575] The dependants would also benefit from a monthly pension of 40% of the amount that would have been payable to the employee if the employee had been 100% permanently disabled.[1576] Thirdly, the Director-General has to pay the employee's funeral costs, subject to a maximum of R12 300 as at 1 April 2010.[1577]

It is clear from the above discussion that the COIDA, RAF Act and their predecessor Acts were designed to improve and protect the economic and social positions of the dependants following the death of their breadwinner due to a motor vehicle accident, work-related accident, or a disease contracted in the workplace. A proper understanding of this historical background to the social security statutes relevant to the dependency action for loss of support and funeral expenses is essential, in order to ensure the correct approach to problems encountered in the interpretation and modern-day application of social security statutes to the action of dependants. Much of the past application of social security statutes forms the basis of the dependency action's current application.

1573 *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 par [58].
1574 See ss 65(1) and 67(1) of COIDA; *Thembekile Mankayi v Anglogold Ashanti Limited* [2011] ZACC 3 paras [59] & [84].
1575 See s 54(1) (a) of COIDA, read with item 6 of Schedule 4: To date, this amount has not changed.
1576 See s 54(1) (b) of COIDA, read with item 7 of Schedule 4.
1577 See s 54(2) of COIDA, read with item 10 of Schedule 4: This amount has still not changed.

The above discussion has reviewed and discussed the historical background to and interpretation of the dependants' action in terms of social security statutes. It is against this background that the author now considers the material changes introduced by the RAF Amendment Act, in comparison to the provisions of the old RAF Act and the proposed RABS Bill. The discussion will focus on the provisions of all three legal frameworks, to the extent that they relate to the dependants' claim for loss of support and funeral expenses. Reference will only be made to those changes that are directly relevant to aspects of the dependants' action for loss of support and funeral expenses.

5.2.3 Protection of the dependants of the road accident victim

5.2.3.1 Road Accident Fund Act 56 of 1996 (RAF)

This chapter notes that both the RAF Act and RAF Amendment Act are still relevant, applicable and concerned with providing death claims to the dependants of the deceased-breadwinner who was killed in a car accident, and allow the dependants the right of action to benefit from the estate of the deceased. The object of the enactment by parliament of laws governing death caused by or arising from motor vehicle accidents was to provide the victim of the road accident and his or her dependants with the "widest possible protection".[1578] This principle has been widely employed, and South African road accident victims have enjoyed full, specialised and equitable protection of their rights through legislation for six decades.[1579] During these years, the legal principles relating to the rights of road accident victims have been largely identified, and adequately circumscribed and protected.[1580] The RAF Act allows the

[1578] *Aetna Insurance Co v Minister of Justice* 1960 3 SA 273 (A) 285; Klopper 2014 *THRHR* 74; *Multilateral Motor Vehicle Accidents Fund v Radebe* [1995] ZASCA 80; 1996 2 SA 145 (A) 152E-I; *Pithey v RAF* [2014] ZASCA 55; 2014 4 SA 112 (SCA); [2014] 3 All SA 324 (SCA) par [20].

[1579] Klopper 2014 *THRHR* 73; Suzman & Gordon *Law of compulsory motor vehicle insurance* (1970) 1; Suzman, Gordon & Hodes *Law of compulsory motor vehicle insurance* (1982) 1; Klopper *Third party compensation* (2012) 3.

[1580] Klopper *Third party compensation* (2012) 3.

victim of a road accident and his or her dependants to claim damages from the RAF in full, where restrictions and/or exclusions do not apply. The compensation system under the RAF Act is adversarial in nature.[1581] It is based on fault, indemnity, insurance principles, and common law (law of delict).[1582]

Klopper observes that what parliament engineered with the RAF legislation was certainty of recovery of damages when a victim of a road accident exercises his or her common law rights, by substituting the original wrongdoer with a deep-pocket defendant (initially an insurance company, and more recently the RAF).[1583] Klopper further opines that the basis of the right of the road accident victim has been and remains a common law right to claim damages, where damage or loss is suffered because of the negligent driving of a motor vehicle.[1584] Klopper also states that a constitutional right is clearly not the absolute basis of a road accident victim's claim for damages caused by or arising from the unlawful and negligent driving of a motor vehicle. This is because the common law right of a victim of a road accident was recognised and enforced long before the enactment of the Constitution in 1996.[1585] In terms of the RAF legislation, the victim or dependant-claimant is required to prove that someone else was negligent, and that such negligence was the cause of the accident, which resulted in the death of his or her breadwinner.

The claim for payment of compensation for depriving the dependants of support by wrongfully and negligently causing the death of their breadwinner is enforced by bringing a dependant action against the statutory third-party insurer in the case of

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1581 Manyathi https://www.saflii.org/za/journals/DEREBUS/2014/159.rtf (accessed on 12 May 2017); Manyathi-Jele 2014 *De Rebus* 6.
1582 *Botha v RAF* [2013] ZAGPJHC 400; 2015 2 SA 108 (GP); Klopper 2014 *THRHR* 74.
1583 Klopper 2014 *THRHR* 74.
1584 *Ibid*.
1585 *Ibid*.

motor vehicle accidents.[1586] In terms of sections 17 and 21 of the Road Accident Fund Act,[1587] an action for damages falling within the scope of the Act cannot be brought against the owner or driver of the motor vehicle, but must be brought against the authorised insurer, namely the RAF (Fund). While the Fund shares its goal of compensating victims for the incredible loss of a breadwinner with the dependants' action, it is limited to death resulting from a motor vehicle accident.[1588] In addition, its method of calculating rewards differs from those used in the law of delict.

In terms of sections 17 and 21 of the RAF Act,[1589] an action for damages falling within the scope of this Act is limited to injuries or death that resulted from a motor vehicle accident,[1590] and cannot generally be brought against the owner or driver of the motor vehicle personally, but must be brought against the authorised insurer. All road users have a security safety net in the form of the RAF. The RAF system indemnifies the wrongdoer by stepping into his or her shoes. Consequently, the liability for payment of compensation for depriving the dependants of support, by wrongfully causing the death of their breadwinner, is enforced by bringing a dependant action against a statutory third-party insurer, which is the Road Accident Fund (RAF) in the case of motor vehicle accidents.[1591] Although the RAF steps into the shoes of the wrongdoer, the latter is not absolved from all liability.[1592] The wrongdoer is still liable for compensation not covered by the RAF compensation system.

1586 Boberg *et al Law of persons and family* (1999) 297.
1587 Act 56 of 1996.
1588 Klopper *Third party compensation* (2012) 2.
1589 Act 56 of 1996.
1590 Klopper *Third party compensation law* (2012) 2 9 16. Damage to a motor vehicle, as well as damage to clothing, spectacles, false teeth, or prostheses, unless occasioned by the accident and bodily injury, fall outside the distinct damage referred to in section 17(1) of the Act, and are not recoverable.
1591 Boberg *et al Law of persons and family* (1999) 297.
1592 The wrongdoer could still be sued for the balance of the damages and for the cost of the reparation of damage to the motor vehicle, etc.

For purposes of the dependency action, the scope and nature of the damage recoverable in terms of the original RAF Act were as follows: where the deceased sustained bodily injury in a motor vehicle accident and the pleadings were closed prior to his death,[1593] the RAF compensation system was liable for the payment of unlimited damages, as well as for general damage (pain and suffering, loss of amenities of life, disfigurement and disability), except where the passenger limitation[1594] was applicable. The RAF was also liable to pay reasonable and necessary hospital, medical and related expenses resulting from the injuries sustained by the breadwinner prior to his or her death. The RAF compensation system was also liable for the unlimited actual loss of support, except in instances where the passenger limitation of R25000 applied, but its method of calculating the loss[1595] differed from that used in the law of delict.

The funeral costs are expenses linked to the death of the victim of a road accident. In terms of the RAF Act,[1596] only the necessary actual costs to cremate the deceased or to inter him or her in a grave are recoverable from the RAF. In terms of the RAF Act, claimants who are paid compensation by the RAF are entitled to have their legal fees (on a party and party basis) paid by the RAF. This provision of the RAF Act imposes an automatic liability on the RAF to pay the party and party costs to claimants who are paid compensation.

However, recently, significant and far-reaching changes were made to the RAF Act's recoverable damage in relation to the dependency action.[1597] These changes must be reconsidered in terms of whether they ensure consistency of support to the dependants

1593 *Sirdiwalla NO v RAF* [2009] ZAKZPHC 45.
1594 See s 18 of the RAF Act, 1996.
1595 See *RAF v Sweatman* [2015] ZASCA 22; [2015] 2 All SA 679 (SCA); 2015 6 SA 186 (SCA).
1596 Klopper *Third party compensation* (2012) 105 241; s 18(4) of the RAF Act, 1996.
1597 See RAF Amendment Act 19 of 2005.

of the road accident victim. The next section will focus on the amendments pertinent to the dependency action in terms of the RAFAA.

5.2.3.2 Road Accident Fund Amendment Act 19 of 2005 (RAFAA)

Prior to the amendments, the RAF Act provided victims of motor accidents and their dependants with the widest possible protection, except where limitations or exclusions applied. In principle, the dependants of the victim of a road accident could claim their damages from the RAF in full. The problem that arose was that the income derived by the RAF from the levy charged to motorists on the fuel that they purchased did not match the liabilities incurred by the RAF. For years, this funding deficit kept growing, despite rapid increases in the fuel levy every year.[1598] Eventually, this predicament gave rise to the appointment of a commission of inquiry, which became known as the Satchwell Commission.[1599] In its report of 2002, the Satchwell Commission[1600] made many far-reaching recommendations.[1601] For instance, the victims are now also required to waive their right to litigate against the wrongdoer[1602] and to have their award limited to a prescribed amount (capped).[1603] The liability of the RAF for hospital, medical and related expenses resulting from the injuries sustained by the breadwinner prior to his or her death is determined and limited on the basis of emergency medical treatment, and is paid according to a tariff based on the National Health Reference Price List. The non-emergency medical treatment is paid in accordance with the

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1598 Klopper 2014 *THRHR* 74.

1599 *RAF v Duma, RAF v Kubeka, RAF v Meyer, RAF v Mokoena* (202/2012, 64/2012, 164/2012, 131/2012) [2012] ZASCA 169; [2013] 1 All SA 543 (SCA); 2013 6 SA 9 (SCA) par [3]; Klopper *Third party compensation* (2012) 8.

1600 The Road Accident Fund Commission was appointed in terms of the Road Accident Commission Act 71 of 1998.

1601 For a more detailed account of these recommendations, see eg *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) par 41.

1602 See s 9 of the RAF Amendment Act 19 of 2005, which substituted s 21 of the RAF Act 56 1996.

1603 See s 17(4)(c) of the RAF Amendment Act 19 of 2005.

Uniform Patient Fee Structure for fees payable by full-paying patients, as prescribed by the National Health Act of 2003,[1604] and as revised from time to time.[1605]

Similar to the system of compensation administered by the RAF in terms of the RAF Act, the system of compensation established under the RAF Amendment Act is based on the requirement of fault. The RAF is only obliged to pay compensation if an injury or death is due to the negligent or other wrongful act of the driver or owner of a motor vehicle, or his or her employee, in the performance of the employee's duties as an employee. In establishing fault, the common law rules of delict are applied.

Another amendment is compensation that can be claimed for the loss of support. The annual loss of support cannot exceed the amount published in the Government Gazette. This amount is currently capped at R276 928[1606] per annum, per breadwinner,[1607] irrespective of the actual loss. Previously, no limitation was in place, and the actual income of a breadwinner was used to calculate this loss. In terms of the new amendments to the RAF Act,[1608] in any loss of support sustained due to an accident that occurred after 31 October 2008, the total loss of support of all dependants (combined loss of support) of one deceased breadwinner will be limited to R276 928[1609] per year. The same formulae,[1610] as explained above, will be applied. For example, if a deceased breadwinner husband is survived by a wife and three children, the total loss will be limited to the sum of R276 928 per year. This amount is adjusted quarterly

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1604 Act 61 of 2003.
1605 See s 17(4B) (a) of the RAFAA, 2005.
1606 As at 31 October 2018.
1607 See s 17(4) (c) of the RAFAA, 2005.
1608 RAFAA 19 of 2008.
1609 Adjustment of statutory limit in respect of claim for loss of support as of 31 October 2018 – see Notice Board 145 of 2018 No 41996.
1610 Over the years, our courts have accepted the formula for apportioning the income of a breadwinner according to the nature and number of dependants: 2 portions of the income are allocated to a spouse, and 1 portion is allocated to a child and indigent parent.

to allow for inflation. The limit will then be applied proportionally per dependant. In other words, each dependant's claim will be reduced in proportion to the total of all claims, to bring the total claims within the limit of R276 928[1611] As each child becomes self-sufficient, this entitlement falls away and there are fewer portions by which to divide the lost income, and thus a greater share for the remaining dependants. There is no age limit on the period of support for the dependants, and only actual loss is compensated. Children are entitled to support until they are self-supporting. In determining the amount of the dependant's loss of support, there is no fixed formula. The courts rely on assessments by actuaries, who base the calculation of the loss of support on assumptions.[1612] The courts also make awards with reference to precedents, which differ in various jurisdictions.

Dependants of deceased income earners above the current cap amount (R276 928) per annum will therefore not be able to claim their entire loss of support under the amended Act. Therefore, people earning in the higher income ranges will accordingly still only receive this amount, irrespective of the fact that a previously earned salary could have been much higher. Lastly, the limitation of the RAF's liability to pay only the necessary actual costs of cremation or interment remains in the RAF Amendment Act.

In 2013, the Road Accident Benefit Scheme (RABS) Bill was proposed to replace the Road Accident Fund Amendment Act (RAFAA), in order to address these issues. In the next section, the protection of the victim of a road accident and his or her

[1611] Taking a practical amount of R22000 per month as the income of a deceased breadwinner with a wife and 3 children, the split will look something like this: Dad = R6338 per month – falls away; Mom = R6338 per month – loss; Every child = R3169 per month – loss.

[1612] Steynberg https://www.sayas.org.za/per/article/view/2557/3661 (accessed on 12 October 2017).

dependants in terms of the proposed RABS Bill will be discussed, as well as how this proposed Bill will impact on road accident victims and their dependants.

5.2.3.3 Road Accident Benefit Scheme (RABS) Bill of 2017

The core strategy of the Road Accident Benefit Scheme (RABS) Bill is to provide for a new, no-fault benefit scheme and a new administrator called the Road Accident Benefit Scheme Administrator (RABSA), which will abolish and replace the current Road Accident Fund (RAF), as well as the compensation system administered by it.[1613] The RABS compensation system is based on principles of social security and the social solidarity system.[1614] The Bill was criticised on various aspects by the legal profession.

The LSSA[1615] questions where this abolishment of the fault base leaves the innocent road accident victim, who also contributes to the Road Accident Fund levy as a driver, commuter, passenger and/or consumer, and whose civil law right to be compensated for harm suffered because of another person's fault has been completely abolished. The LSSA stressed that the abolishment of the common law right is an entirely different scenario for the Constitutional Court to consider and added that if the RABS was enacted with the abolition of common law rights, the LSSA would consider challenging the proposed section 29 of the Bill as unconstitutional.[1616]

The BLA[1617] highlighted the fact that a number of the provisions that are to be introduced by RABS will make it fundamentally impossible for victims of road accidents to be placed in the position they would have been in, had the accident not occurred.

1613 See s 29 of the RABS Bill.

1614 As stated in the chapter, the transformation of the scheme was recommended by the Road Accident Fund Commission in 2002, under the leadership of Judge Kathy Satchwell, and was ultimately endorsed by Cabinet.

1615 LSSA stands for Law Society of South Africa.

1616 Manyathi-Jele 2014 *De Rebus* 6.

1617 BLA stands for Black Lawyers Association.

What makes matters worse is that the victims of the road accident will not have recourse against the wrongdoer, as the common law right in this regard will be abolished.[1618]

The LSNP[1619] stated that there can be no question that the Bill seeks to impact severely on the enforceable common law and fundamental rights guaranteed by the Constitution, not only of all future road accident victims, but also of a multitude of stakeholders that are directly and indirectly affected by the injury and/or death of victims. The LSNP indicated that it should be borne in mind that section 29 of the Bill sought to strip the road accident victim of his common law remedies against the wrongdoer.[1620] The LSNP also highlighted the fact that the direct effect of the Bill is that the victim of a road accident is completely deprived of his hitherto actionable common law right to enforce recovery of actual damage suffered due to the unlawful actions of another.[1621]

A recent newspaper article[1622] reported that the RAF bank account was attached due to the failure of the RAF to pay claims. It was also reported that if a no-fault system is introduced at the current level of funding, it will result in an even larger deficit, increased taxes, and could even lead to the drastic reduction of compensation to keep it afloat. The latter will defeat the object of social security.[1623] which as stated above, is to replace a portion of the loss of support for the dependants who are affected by such a loss, whether it is due to a motor vehicle accident or occupational injury or illness.[1624]

1618 See s 29 of the RABS Bill; Manyathi-Jele 2014 *De Rebus* 9.
1619 LSNP stands for Law Society of the Northern Provinces.
1620 Manyathi-Jele 2014 *De Rebus* 13.
1621 *Idem* 12.
1622 Knowler http://www.timeslive.co.za/.../BREAKING-NEWS-Road-Accident-Funds-bank-account-attached... (accessed on 12 May 2017).
1623 Social Security (Minimum Standards) Convention (No. 102) adopted by the ILO in 1952.
1624 Myburgh 2000 *Law, democracy & development* 43 46.

According to the proposed no-fault system, it is irrelevant how the accident occurred. Questions related to who was at fault, or whether there has been contributory negligence on the part of the claimant, will not arise. The wrongdoer remains indemnified and is also entitled to claim if he or she has suffered any injuries arising from the road accident. The right to sue the wrongdoer for recovery of losses not covered by the RAF is abolished. For example, if passengers in a taxi are killed as the result of the negligent driving of the owner or driver of the vehicle, the dependants of the deceased have no remedy whatsoever against the taxi owner or driver. Both the owner and driver escape with no financial responsibility to make good the harm they have caused. The same goes for every motor vehicle driver or owner, even drunk drivers. Although the law allows for them to be criminally prosecuted, the criminal side of the matter is never confronted. In practice, the matter is simply left at the civil claim level.

In terms of the RABS Bill, everyone will be able to claim, but the Bill severely reduces the compensation recoverable, and removes the lump sum payments. The claimable damages are replaced with four prescribed classes of benefits, namely health care services (part A), income support benefit (part B), family support benefit (part C), and funeral benefit (part D). For purposes of this discussion, the focus will only be on benefits that directly affect the dependency action for loss of support and funeral expenses.

In terms of the Bill, as LSSA has noted,[1625] the loss of support benefit is limited to a maximum of 15 years, regardless of the age of the dependants, or until the deceased would have been 60 years old, whichever period is the shorter. This maximum period

[1625] Manyathi-Jele 2014 *De Rebus* 8.

of 15 years runs from the date of death of the breadwinner; no lump sum payment is payable for loss of support; children are only supported until the age of 18, regardless of whether the deceased would have supported that child longer; and no family support benefit is paid to a dependant who is not ordinarily resident in the country.[1626] The writer is in agreement with LSSA and BLA's view that this is an extraordinary and inexplicable provision, in that the exclusion does not apply to the residency of the breadwinner, but only to that of the dependant. If a breadwinner supports a child who is, for some or other reason, resident in another country (perhaps for study purposes, or a child in the care of a South African parent in terms of a divorce order, who may be resident overseas, but who is still entitled to child support), that child is denied any benefit, regardless of the fact that the deceased may have had a legal obligation to support the child, and did so. This appears to be an irrational exclusion and may be vulnerable to constitutional attack, especially as it affects the right of a child to support and discriminates against a child on arbitrary grounds.[1627]

Furthermore, the use of age to limit compensation for loss of support is unfair and discriminatory. A minor's entitlement to be supported is not age-dependant[1628] and is constitutionally protected.[1629] The age of 60 years is also discriminatory, as the COIDA of 1993 is not age-specific as far as the calculation of compensation is concerned.[1630] The central principle in South African law underlying a claim for loss of maintenance is

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1626 See ss 35(1) & (2)(*a*) read with s 39(1) & (2) of the Bill.

1627 Manyathi-Jele 2014 *De Rebus* 8-9.

1628 See Klopper 2014 *THRHR* 25; also see *Bursey v Bursey* 1999 3 SA 33 (SCA). A child is defined by the COIDA of 1993 as: (*d*) a child under the age of 18 years of the employee or of his or her spouse, and includes a posthumous child, step-child, an adopted child and a child born out of wedlock; (*e*) a child over the age of 18 years of the employee or of his or her spouse, and a parent or any person who in the opinion of the Director-General was acting in the place of a parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee. The Bill does not define a "child."

1629 See *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC); Klopper 2014 *THRHR* 25. See s 28(2) of the Constitution.

1630 Klopper 2014 *THRHR* 25.

the duty to support, which the deceased owed to the relevant dependants.[1631] The definition of dependants under the RABS Bill is very specific. The wording seems to suggest that only persons specifically mentioned in the definition[1632] are subject to the requirement of a pre-existing duty of support. According to Klopper,[1633] the definition should avoid specifics and merely state that a spouse is a person who was legally married to the deceased immediately prior to his or her death and includes life partners in a marriage according to religious rites, and live-in life partners, provided that such life partners were owed a legally recognised duty of maintenance by the deceased, regardless of how it was created.[1634]

In terms of the Bill, a flat rate payment of R10 000 is made to either the family or a funeral director for funeral benefits.[1635] The writer is in agreement with LSSA and BLA that this amount is inadequate to cover the funeral costs and is unreasonably low. The

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1631 Klopper 2014 *THRHR* 22; also see Davel *Afhanklikes* (1987) 69; Van der Vyver & Joubert *Persone-en familiereg* (1991) 629; Spiro *The law of parent and child* (1985) 403; *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260; *Lambrakis v Santam Ltd* 2000 3 SA 1098 (W).

1632 See s 1 - definition of the RABS Bill: In terms of s 1 of RABS Bill, a "dependant" means- (a) any spouse of the deceased breadwinner; (b) any child of the deceased breadwinner; or (c) any other person who was dependant on the deceased breadwinner, provided such person is legally entitled to support from the deceased breadwinner and would have received such support had the breadwinner not died.

1633 Klopper 2014 *THRHR* 22.

1634 See Klopper 2014 *THRHR* 22; also see *Ismail v Ismail* 1983 1 SA 1006 (A); *Ryland v Edros* 1997 2 SA 690 (C); *Mlisane v SA Eagle Insurance Co Ltd* 1996 3 SA 36 (C); *Santam Insurance v Fondo* 1960 2 SA 467 (A); *Nkabinde v SA Motor and General Insurance* 1961 1 SA 302 (D). In *Govender v Ragavayah NO and others* 2009 3 SA 178 (D) it was held that the word 'spouse', as used in s 1 of the Intestate Succession Act 81 of 1987, includes the surviving partner to a monogamous Hindu marriage, and especially *Amod v MMF* 1998 4 SA 753 (CC), where it was held that on the facts of the case, a duty of maintenance was created. See also *Verheem v RAF* 2012 2 SA 409 (GNP); *Paixão and another v RAF* [2012] 4 All SA 262 (SCA); 2012 6 SA 377 (SCA) 106; *Chauke v Santam Limited* 1995 3 SA 74 (W); 1997 1 SA 178 (A); *Prinsloo v Santam* [1996] 3 All SA 221 (E); *Matsiba v Santam* 1996 3 SA 87 (T); 1997 4 SA 832 (SCA); *Santam Limited v David Russel Mundy, Peter Viola and the Automobile Association* (unreported CPD case no. 4427/95) reported in July 1998 *De Rebus* 55; *Day v Mutual and Federal* [1998] 2 All SA 87 (SEC); 1999 4 SA 813 (E) reversed on appeal in *Mutual and Federal Insurance Co Ltd v Day* [2001] 4 All SA 6 (A); 2001 3 SA 775 (SCA); *RAF v Mbendera and others* [2004] 4 All SA 25 (SCA); *Mtamane v RAF* 2002 4 SA 599 (N); *RAF v Vogel* 2004 5 SA 1 (SCA); *RAF v Van den Berg* 2006 2 SA 250 (SCA); *Berry and another v Spe Security Patrol Experts and another* 2011 4 SA 520 (GNP); *RAF v Coleman* (unreported case no A3045/2009) (GSJ); *Jeffrey v RAF* (2008/5396) [2012] ZAGPJHC 259; 2012 4 SA 475 (GSJ).

1635 See s 40 of the RABS Bill.

legislator disregarded the cultural practices and customs of the majority of the citizens of the country, for whom funerals must be dignified. They bury their loved ones with love and dignity. Furthermore, a funeral is for the whole family and community – it is not a private ritual. At the majority of African funerals, the mourners must eat, and there must be a coffin and a tombstone. Under these circumstances, it is suggested that the appropriate award for funeral expenses should not be less than R25 000 per funeral.[1636] This amount should also be increased on a yearly basis. Reasonable funeral expenses have been judicially interpreted to encompass much more than is apparently envisaged by this flat rate of R10 000.[1637]

From the above discussion, it is clear that the benefits payable in terms of the proposed RABS scheme bear no relationship whatsoever to the loss actually suffered by a victim of a road accident or his or her dependants. Section 41 dealing with benefit review contains the harsh provision that the Administrator may wholly or partially suspend, revoke or review a benefit, without a specific reference to subsection 2, which specifies the circumstances under which suspension, revision or revocation may occur.[1638] The provision is one-sided and should allow for reasonable notice, incorporating reasons for such a step to the beneficiary, before it can be implemented. Furthermore, it may only be implemented after consideration of all representations made by the beneficiary. It must also be possible for a claimant to apply for a benefit review in cases where there are substantial changes in the circumstances of a road accident victim.[1639]

1636 Manyathi-Jele 2014 *De Rebus* 12.

1637 See Klopper 2014 *THRHR* 20; also see *Rondalia Versekeringsmaatskappy v Britz* 1976 3 SA 243 (T); *Young v Hutton* 1918 WLD 90; *Schneider v Eisovitch* 1960 2 QB 430.

1638 Klopper 2014 *THRHR* 26.

1639 See in this regard ss 33 & 34 of the Constitution; *Oosthuizen's Transport (Pty) Ltd v MEC, Road Traffic Matters, Mpumalanga* 2008 2 SA 570 (T); *Langa CJ v Hlophe* 2009 4 SA 382 (SCA); *Bullock NO v Provincial Government, North West Province* 2004 5 SA 262 (SCA).

5.2.4 Protection of the dependants of a workplace victim

Another important South African social security Act regarding the enforcement of the action of dependants for loss of support against an insurer is the Compensation for Occupational Injuries and Diseases Act (COIDA).[1640] The compensation cover in terms of COIDA[1641] is comparable to the system under the third party compensation legislation[1642] and the proposed RABS Bill.[1643] These sets of legislation may differ in terms of the type of claimant they are protecting, but they address the same social value.

COIDA came into effect on 1 March 1994. COIDA provides a system of no-fault compensation for employees who die or are injured in accidents that arise out of and in the course of their employment, or who contract occupational diseases. Conversely, negligence continues to play a role, since a worker is permitted extra compensation if he or she can establish that the injury or disease was caused by the negligence of the employer (or certain categories of managers and fellow employees).[1644] The right to compensation is provided for in section 21 of COIDA: Any dependant of an employee who falls within the definition of the Act is entitled to compensation, irrespective of whether the employer of the breadwinner has registered or paid contributions.[1645] In terms of the Act, if a person who falls within the definition of an "employee" dies or becomes disabled because of an accident that occurred in the scope of his or her employment, or contracts a disease in the scope of his or her employment, COIDA provides for the payment of benefits to him or her, or to his or her dependants. An

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1640 Act 130 of 1993.
1641 *Ibid*.
1642 RAF Act 56 of 1956; RAF Amendment Act 19 of 2005.
1643 RABS Bill, 2013.
1644 Myburgh 2000 *Law, democracy & development* 45.
1645 *Idem* 49.

action for damages falling within the scope of COIDA cannot be brought against the employer personally, but must be brought against the authorised insurer, also known as the Compensation Commissioner.[1646]

According to section 35(1) of COIDA, an employee (who was an employee in terms of COIDA) or his or her dependants may not hold the employer liable for damages arising from his or her injuries or death in the course of employment, if such injury or death is attributable to the employer's negligence. In other words, if an employee (who is an employee for the purposes of COIDA) sustains injuries or is killed in a motor vehicle accident that can be attributed to the employer's negligence, section 35(1) of COIDA would exclude the liability of such employer. This means that such an employee or his or her dependants have a claim for compensation in terms of COIDA against the Compensation Commissioner, as well as a third-party claim against the RAF[1647] or the proposed RABS Bill.

5.2.5 RABS Bill and COIDA

It appears that in terms of section 28 of the RABS Bill, the Compensation Commissioner (COIDA) is not entitled to reimbursement by the Administrator (RABS) for compensation paid by the Compensation Commissioner to an employee who is killed or injured in a motor vehicle accident. However, the RABS Administrator is entitled to deduct any amount received by a dependant-claimant from the Compensation Commissioner, which is due to the dependant in terms of the RABS Bill. The scale of the Compensation Commissioner's rights, in terms of section 36 of COIDA, to recover compensation paid by him from a negligent "third party" is not clear

[1646] See s 35(1) of the COIDA 130 of 1993.
[1647] Myburgh 2000 *Law, democracy & development* 56.

with regard to the RABS Bill. The question is whether the Compensation Commissioner is entitled to claim against a guilty motorist if the RABS Administrator is exempt. Where compensation is paid under the RAFAA to a dependant of an innocent road accident victim, the shortfall in compensation recovered by them due to the removal of the common law right is nowhere near as significant as the losses they will face under the regime proposed by the RABS Bill. Under the RABS Bill, dependants of road accident victims will receive, in many cases, severely condensed loss of support. The abolition of common law rights in this context is likely to be again challenged in the Constitutional Court. Therefore, it is strongly advised that the government should reconsider the proposed abolition of the common law right of the injured road accident victim in the context of RABS, as presented in the current proposed Bill.[1648]

The difference between the RABS Bill and COIDA is further highlighted in the formula for the calculation of loss of support. The benefit afforded in terms of the proposed RABS does not accord with the compensation for loss of support in terms of COIDA.[1649] The formula for calculating the compensation of dependants of employees who die because of an occupational accident or disease is contained in schedule 4 of COIDA:[1650] Where death benefits have to be calculated, the surviving spouse receives a lump sum of twice the employee's monthly pension, which would have been received if the deceased was permanently disabled, subject to a minimum of R5 109 and a maximum of R36 504. Where the deceased left a widow and child, the compensation that accrues is 40% of the monthly pension that would have been payable to the employee if he had been permanently disabled, with a minimum of R1 021 and a

[1648] Manyathi-Jele 2014 *De Rebus* 12.
[1649] See Klopper 2014 *THRHR* 18.
[1650] See s 47 of the COIDA; Myburgh 2000 *Law, democracy & development* 49.

maximum of R7 300 per month. The dependants thus receive both a lump sum and a monthly pension. RABS makes use of the average of the deceased income to determine compensation.[1651] However, section 55(3) of the RABS Bill does not make any provision for the manner in which the average amounts are to be determined. The average or cap on income in the RABS Bill, in the context of the provision of maintenance, has an adverse effect on dependants and is probably contrary to the State's constitutional obligation to ensure that children are adequately cared for.[1652] The writer agrees with Klopper that the use of averages to determine compensation is discriminatory and defeats the primary goal of compensation, namely to provide the widest protection possible to dependants of road accident victims, to the extent that the dependant does not burden society and/or place a strain on other social security benefits. The manner in which COIDA determines compensation cannot be ignored when framing benefits in terms of the RABS Bill, as this would be biased and prejudicial towards the dependants under the RABS Bill. COIDA uses the actual income of a deceased-employee, but restricts compensation to 75% of the actual earnings, with minima and maxima.[1653]

Reasonable funeral expenses have been judicially interpreted to encompass much more than is apparently envisaged.[1654] Furthermore, the reasonableness of the expenses is contradicted by the restriction of R10 000 in section 40 of the RABS Bill. In light of section 54 and item 10 of Schedule 4 of COIDA of 1993, which provides for a current funeral benefit of R13 716 (or the actual amount, whichever is smaller), the proposed limit of R10 000 is discriminatory. Provision must therefore be made for the

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1651 See s 55(3) of the RABS Bill.

1652 See Klopper 2014 *THRHR* 18; also see *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC); ss 27(1)(c) & 28(1)(c) of the Constitution.

1653 See Klopper 2014 *THRHR* 20.

1654 *Rondalia Versekeringsmaatskappy v Britz* 1976 3 SA 243 (T); *Young v Hutton* 1918 WLD 90.

amount to be increased, in order to make provision for rising funeral costs and inflation.[1655]

The definition of a "child" is also lacking in the RABS Bill.[1656] Section 1 of the Children's Act 38 of 2005 defines a child as "a *person* under the age of 18 years." The latter definition and the definition of "child" in COIDA should be incorporated into the current definition of a child under the RABS Bill.[1657]

Another important element is the liability of the RABS Bill, which is problematic. Section 28 of the RABS Bill does not contain wording which clearly determines the liability of RABS. As it stands, it is unclear, and a reading of the wording is therefore required to establish precisely when the RABS is liable. The liability created by the RABS Bill is based on no-fault. The redress that is enforceable in terms of section 36 of COIDA of 1993 is based on common law delict, which implies fault. In terms of the RAF Act, the RAF replaces the wrongdoer, thereby rendering the former subject to section 36. In contrast, the RABS Bill contains no provision rendering it liable in its capacity as substituted wrongdoer, hence the RABS will not be liable in terms of section 36 of COIDA. A policy decision has to be made regarding whether wrongdoers may be held liable in terms of section 36, where the RABS has liability. If no liability has to be introduced, it must be done through the amendment of section 36 of the COIDA of 1993.[1658]

The manner of the calculation of benefits in the RABS Bill is long-winded and not in compliance with the objective of the setting of structured benefits. In this regard, the

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1655 *Ibid*.
1656 The RABS Bill only defines a posthumous child.
1657 For the definition of a child, see Klopper 2014 *THRHR* 23.
1658 See Klopper 2014 *THRHR* 24.

concise method employed by the COIDA of 1993 should rather be used as a template.[1659] However, an aspect that has been neglected by COIDA is the position of the dependants of such a worker, who experience a significant loss of support.[1660] Currently, an employee's dependants are only entitled to compensation where such employee died because of his or her injuries, or from a disease contracted in the scope of his or her employment. In cases of severe disability, relatives of the injured worker may have to take care of the injured relative, and this may have a negative effect on their own economic activities. Interestingly, section 28 of COIDA provides for payment of a long-term attendance allowance if an employee requires constant help. A certain degree of predictability is needed to encourage settlement and clarity of claims by the dependants of a severely disabled employee. These are areas where the unfair and discriminatory treatment of dependants of employees or victims of road accidents may only be resolved by a clear statutory amendment provision.

5.2.6 Conclusion

It is clear from the above discussion that although COIDA, RAF Act and their predecessor Acts were designed to provide the dependants, following the death of their breadwinner due to a motor vehicle accident, work-related accident, or a disease contracted in the workplace, with the widest possible protection, the reality is that there are many limitations placed on this goal. Neither of these Acts can provide sufficient financial protection to the dependants of the deceased breadwinner. The Acts provide inadequate payouts, with no uniform approach in the assessment of "damage" suffered by the dependants. A move towards universal assessment of "damage" suffered by the dependants should be the first step towards integrating the two sets of legislation.

1659 *Idem* 28.
1660 Millard 2009 *IJSSWC* 47 51.

The discrepancy in awards of compensation granted by both Acts is capable of being corrected through an intelligent reform process, not via the introduction of the RAFAA and RABS Bill, which hopelessly exacerbate the financial situation of the dependants. The RAFAA and the RABS Bill actually work against the dependants, rather than protecting them. Their low and inadequate level of compensation, with RABS' principle of complete non-accountability of the wrongdoers, defeat the objectives of the establishment of a comprehensive third-party compensation system. The government's priority of saving money through the changes brought about by the RAFAA and proposed RABS Bill is clearly not aligned with the priniciple of the widest possible protection.

The RABS' abolishment of the common law right entirely protects the wrongdoer, at the expense of the deceased and his or her dependants, leaving the dependants with no right to compensation other than in terms of RABS. This makes it easier for wrongdoers, hence the increase in accidents. To add fuel to the fire, the wrongdoer, if injured in the same accident, receives exactly the same benefits.

The loss of support for a surviving spouse is paid for a maximum of 15 years or until age 60, whichever period is the shortest, and a dependent child is only entitled to family support until age 18, regardless of whether the dependant wishes to further his or her education, or whether the deceased would have supported that child longer. These factors, coupled with the denial of any lump sum payments for loss of support, afford the dependants no prospect, whatsoever, of financial rehabilitation via the RABS Bill.

The above discussion provided the background to the South African legal position on the workers and road accident victims' compensation systems. The following

discussion focuses on the status of the workers and road accident victims' compensation systems in Botswana and Lesotho.

5.3 Botswana and Lesotho

5.3.1 Workers' compensation scheme

As previously mentioned,[1661] similar to South Africa, a statutory workers' compensation scheme exists in both Botswana and Lesotho. The Lesotho workers' compensation scheme was established in 1977 under the Workmen's Compensation Act,[1662] while the Botswana workers' compensation scheme was established in 1998 under the Workers' Compensation Act.[1663] In most respects, both Acts are materially identical to the South African Workmen's Compensation Act.[1664] Both Acts provide for the compensation of workers for injuries suffered, or occupational diseases contracted, in the course of their employment, or for death resulting from such injuries or diseases, as well as for matters incidental and connected thereto. Should a worker be injured or die as a result of a work injury or disease, any person who is dependant upon the worker at the time of his or her death may be entitled to workers' compensation benefits. The Acts state that an employer should insure his workers and himself in respect of all liabilities that he may incur under the provisions of the Act.[1665] Both Acts further state that an employer who fails to do this will be found guilty of an offence, and is liable for a fine.[1666]

1661 See chapter 2 of this thesis.
1662 Workmen's Compensation Act 13 of 1977.
1663 Workers' Compensation Act 23 of 1998.
1664 Workmen's Compensation Act 30 of 1941.
1665 See s 2(1) of the Workmen's Compensation Act 13 of 1977; s 2(1) of the Workmen's Compensation Act 23 of 1998.
1666 See s 2(2) of the Workmen's Compensation Act 13 of 1977; s 2(2) of the Workmen's Compensation Act 23 of 1998.

In terms of regulation 2(1) of the Lesotho Workmen's Compensation Regulations of 2014, the amount payable as compensation to a dependant of an employee who died because of an injury sustained at work, leaving the dependants wholly dependant on the worker's earnings, shall not exceed two hundred and forty thousand, five hundred Maloti (M240 500).[1667] Regulation 2(2) provides that the amount payable by the employer for burial expenses of the deceased shall not exceed sixteen thousand, seven hundred Maloti (M16 700).[1668]

In terms of the Botswana Workmen's Compensation Act 23 of 1998, where death results from an injury or occupational disease under circumstances in which compensation is payable, the compensation to be paid shall be equal to such number of monthly earnings as may be prescribed by the Minister in terms of subsection (2). In terms of section 13(2), the Minister may prescribe the compensation payable in terms of subsection (1) in the case (a) where a worker leaves dependants who are wholly dependant upon his earnings; (b) where a worker leaves dependants who are only partially dependant upon his earnings; and (c) of reasonable expenses for the burial of the deceased worker.[1669] According to the Botswana Workmen's Compensation Act 23 of 1998,[1670] a "dependant" of a worker means–

> a widow or widower who at the time of the accident was married, in accordance with either the customary or statute law, to the worker; (b) where there is no widow or widower in terms of paragraph (a), a woman or man with whom the worker was at the time of the accident living as wife or husband; (c) a child of the worker or of his spouse and includes a posthumous child, a step child, an adopted child and a child born out of wedlock; (d) a parent of the worker or any person who was acting in the place of a parent; and (e) a brother or sister, grandparent or grandchild; who was at the time of the accident wholly or partly financially dependant upon the worker.

[1667] Currency Converter Results: M240500 = R241165.14 @ 15:50 on 9 August 2017 http://www.exchange-rates.org/converter/LSL/ZAR/240500.00 (accessed on 9 August 2017).
[1668] Workmen's Compensation Regulations, 2014, submitted on Thursday, 04/16/2015.
[1669] See s 13 of the Botswana Workmen's Compensation Act 23 of 1998.
[1670] See s 2 of the Botswana Workmen's Compensation Act 23 of 1998.

Unlike Botswana, the Lesotho Workmen's Compensation Act does not expressly categorise the dependants. It only states that the dependants eligible to claim are those who are wholly or partially dependant on the deceased worker's earnings.[1671]

5.3.2 Motor vehicle accident compensation scheme (MVA)

Botswana and Lesotho are two of the five countries[1672] in Southern Africa that administer a fuel levy-funded motor vehicle accident compensation system. These accident compensation systems are administered by statutory bodies established through the respective Acts of Parliament, with the exception of Lesotho, which is outsourced to a private insurance agency for administration purposes. The motor vehicle accident compensation legislations for both Botswana and Lesotho[1673] are clearly a repetition of the South African RAF Act 51 of 1996. South African judgments, which command a persuasive status in the two countries, have also been relied on where necessary.[1674] Neither country has yet amended their MVA legislation in accordance with the new South African RAFAA, or the proposed RABS Bill. It is uncertain whether these countries will follow suit or not. Therefore, a claim by the dependants of the deceased is not limited, since both countries apply the law in accordance with the old RAF Act 51 of 1996.

5.3.3 Conclusion

The development of Botswana and Lesotho's road and work-related accident compensation systems has been shaped by South African law. Both their COIDA and MVA Acts are replicas of the South African Acts. Although Botswana and Lesotho

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1671 See s 2 of the Lesotho Workmen's Compensation Act 13 of 1977.

1672 The five countries are Botswana, Lesotho, Namibia, South Africa and the kingdom of eSwatini (the old Swaziland – see https://www.bbc.com/news/world-africa/43905628 (accessed on 28 December 2018)).

1673 Order 26 of 1989.

1674 Ailola 1991 *CILSA* 365.

followed and reproduced the South African Acts, neither country has yet amended their MVA legislation in accordance with the new South African RAFAA, or the proposed RABS Bill. The assumption to be made from this is that Botswana and Lesotho do not experience the same financial deficit in their third party compensation systems as is the case in South Africa, which begs the question how they managed to escape the same fate as South Africa? Could this perhaps indicate that the problem does not lie with the legislation itself, but in the management of the legislation?

The above discussion provided the background to the Botswana and Lesotho legal position on the workers and road accident victims' compensation systems. The following discussion focuses on the status of the workers and road accident victims' compensation systems in Australia.

5.4 Australia

5.4.1 Workers' compensation scheme

The Australian system shares common features with South Africa, Botswana and Lesotho, as illustrated by a comparison of the social security systems in the four countries.[1675] For instance, in New South Wales, there are two important legislations: Workers Compensation Act 1987 (NSW) (1987 Act) and Workplace Injury Management and Workers Compensation Act 1998 (NSW) (1998 Act). The most recent amendments to the workers' compensation scheme occurred in 2012 in terms of the Workers Compensation Legislation Amendment Act 2012 (NSW): If a worker is injured or dies as a result of a work injury, any person dependant upon the worker at

[1675] *Ibid*.

the time of his or her death may be entitled to workers' compensation benefits.[1676] In the Northern Territory, the Workmen's Compensation Act (NT) provides for compensation to be paid to relations by blood, traditional marriage or custom, and there is specific provision for additional dependant traditional wives aged 16 or older. Dependant traditional wives aged below 16 are only eligible as "dependant children".[1677]

In all other Australian jurisdictions, a traditionally married spouse would only be able to rely on the rights given to *de facto* spouses (eg widows) pursuant to workers' compensation legislation, with the use of a broad definition of "dependant".[1678] For example, section 6(1) of the Workers Compensation Act 1926 (NSW) defines a "dependant" as:

> such of the worker's family as were wholly or in part dependant for support upon the worker at the time of his death ... and includes ... a person so dependant who although not legally married to the worker lived with the worker as the worker's husband or wife on a permanent or bona fide domestic basis.

In some jurisdictions, a *de facto* relationship will only be recognised if the parties have lived together for a specified period,[1679] or if there are children born of the relationship. These provisions are undoubtedly capable of benefitting traditionally married spouses, who would otherwise not qualify under the statutory criteria of dependency, although it is not clear whether they would allow compensation to be paid to more than one wife.[1680] It is very hard to justify excluding traditionally married dependants from

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1676 The entitlement to workers' compensation benefits is set out in s 9 of the 1987 Workers Compensation Act. S 9 provides that a worker who has suffered an injury (and in the case of the death of a worker, his or her dependants) shall receive compensation from the worker's employer.

1677 ss 6 & 7 of the Workmen's Compensation Act (NT), Second Schedule, especially par (1A) (b)(i), D, E. There has been no Northern Territory experience of claims by traditional wives under the Act: President, Workmen's Compensation Tribunal, *Submission* 326 (29 April 1982).

1678 Eg s 6(1) of the Workers Compensation Act, 1926 (NSW).

1679 s 4AA of the Family Law Act, Australia; Family Law Australia https://www.diyfamilylawaustralia.com (accessed on 9 August 2017).

1680 cf *In re Fagan* (1980) 23 SASR 454 464-465 (Jacobs J).

entitlements to workers' compensation benefits. These benefits are an important form of protection for employees and their dependants.[1681] To deny compensation to Aboriginal dependants because they practice different family traditions would be to deny Aboriginal employees an important aspect of their employment rights, and to shift the burden of dependency from the employer to the State (through the social security system). It would be even less justified, in that the Australian Worker's Compensation Acts pay little attention to the forms or categories, as distinct from the fact, of dependency.[1682]

A traditional marriage should be recognised as a "marriage" for all workers' compensation purposes. Specific provision for traditional spouses, as in the Northern Territory, is a better way of ensuring that this right of traditional married couples is implemented in practice.[1683] Existing provisions entitling putative or *de facto* spouses to workers' compensation vary significantly between the states.[1684] Unnecessary time limits are imposed and the position of plural (polygamous) wives (between whom compensation rights on death should be shared) is not clearly addressed.[1685] In most jurisdictions, the legislation relating to dependants appears to be wide enough to include situations of polygamy (even though it may not have been envisaged by the drafters of the legislation), but specific provision for this situation should be made.[1686] In South Africa, although there are no specific provisions dealing with the sharing of the compensation money, it is common practice that the money will be divided equally amongst the polygamous wives.

1681 Australian Law Reform: Compensation for Injury or Death Aboriginal traditional marriage: areas of recognition https://www.alrc.gov.au/ (accessed on 8 August 2016).
1682 *Ibid*.
1683 *Ibid*.
1684 *Ibid*.
1685 *Ibid*.
1686 *Ibid*.

5.4.2 Motor vehicle accident compensation scheme

The most common claims for loss of support are due to accidents on the road.[1687] Each state and territory in Australia has different laws on compensation of claims, with each state having its own third-party compensation policies. A compulsory third party (CTP) insurance policy provides cover for legal liability for personal injuries or death arising from the use of a motor vehicle. The insurance covers the relevant motor vehicle for accidents causing personal injury and/or death anywhere in Australia. The relevant authorities in terms of road accidents in Australia are New South Wales - Motor Accidents Authority; Northern Territory - Territory Insurance Office; Queensland - Motor Accident Insurance Commission; South Australia - Motor Accident Commission; Tasmania - Motor Accidents Insurance Board; and Western Australia - Insurance Commission of Western Australia.

In the New South Wales state, claims for personal injury and death arising out of motor vehicle accidents that occurred on or after 5 October 1999 are dealt with under the provisions of the Motor Accidents Compensation Act of 1999 (NSW).[1688] The relevant Queensland legislation is the Motor Accident Insurance Act of 1994 (Qld) (MAI Act). This Act does not provide for the payment of statutory or no-fault benefits. The legislation governs an entirely fault-based scheme. No compensation is paid to injured road users, unless they can prove that the injury was caused by the negligence of another person.[1689]

[1687] Comparison of Workers' Compensation Arrangements in Australia https://www.safeworkaustralia.gov.au/.../ComparisonWorkersCompensationArrangementsAusNZ2011.doc (accessed on 8 August 2016).

[1688] s 4 of the Motor Accidents Compensation Act, 1999 (NSW).

[1689] See Motor Accident Insurance Act, 1994 (Qld) (MAI Act).

In South Australia, the government institution that provides third party injury insurance solutions for South Australians is the Motor Accident Commission. The institution offers coverage and compensation for people injured in road crashes, where the owner or driver of a registered motor vehicle, or a passenger, is at fault. The Motor Accident Commission (the Commission) was established pursuant to the Motor Accident Commission Act of 1992 (the MAC Act). The main function of the Commission is to provide compulsory third party (CTP) insurance for motor vehicle users in South Australia.[1690]

The Motor Accidents Insurance Board (MAIB) is a Tasmanian government enterprise that operates a compulsory third party personal injury insurance scheme.[1691] The Insurance Commission of Western Australia (Insurance Commission) is a statutory corporation or government trading enterprise owned by the State Government of Western Australia. The Insurance Commission has operated the Motor Injury Insurance Scheme in Western Australia since 1943.[1692]

The Motor Accidents Compensation (MAC) Scheme provides personal injury and death cover for individuals and their families, which is included in their NT motor vehicle registration. The Motor Accidents (Compensation) ("MAC") Act (NT) establishes a compensation scheme in respect of people who are injured or killed in motor vehicle accidents in the Northern Territory. MAC can provide benefits such as loss of support, medical, rehabilitation and financial support, in order to help people recover from

1690 s 18 of the Motor Accident Commission Act, 1992 (the MAC Act) (SA); Motor Accident Commission https://www.audit.sa.gov.au/Publications/Annual-reports/2015-Reports/Annual-Report-by-agency/Motor-Accident-Commission (accessed on 16 September 2017).

1691 Motor Accidents Insurance Board (MAIB) (Tas) https://www.legalaid.tas.gov.au/referral-list/listing/motor-accidents-insurance-board (accessed on 16 September 2017).

1692 Motor Vehicle (Third Party Insurance) Act, 1943 (WA) sets out the scheme details; see Motor Injury Insurance https://www.icwa.wa.gov.au/motor-injury-insurance (accessed on 16 September 2017).

serious and sometimes permanent injuries caused by a road accident.[1693] It is a no-fault scheme, which means that an individual is covered, regardless of who caused the accident. However, some exclusions and reductions in benefits may apply if the driver was under the influence of alcohol or drugs, was unlicensed to drive, or was involved in criminal or reckless conduct. A reduction may apply to some benefits if the injured person failed to wear a seatbelt or safety helmet where required by law.[1694] MAC is a government-owned scheme managed by the Motor Accidents Compensation Commission (MACC), and administered on its behalf by the Territory Insurance Office (TIO).[1695] The Motor Accidents (Compensation) Act (*Northern Territory* - NT) [1696] specifically provides for benefits to be payable both to a *de facto* spouse and an Aboriginal traditional spouse. A "spouse" is defined in section 4 to include:

> (d) a person who was not legally married to the person but who, for a continuous period of not less than three years immediately preceding the relevant time, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis, and who, in the opinion of the Board, was wholly or substantially dependant upon the person at the time: and
> (e) where that person is an aboriginal native of Australia — a person referred to in (a), (b), (c) or (d) or who is, according to the customs of the group or tribe of aboriginal natives of Australia to which he belongs, married to him.

A traditionally married person under paragraph (e) above is in a better position than if he or she was forced to rely on the *de facto* relationship qualifications in paragraph (d).[1697] The Compensation (Fatal Injuries) Act of 1974 (NT)[1698] applies to claims for loss of support arising from incidents other than motor vehicle accidents, and has similar recognition provisions for *de facto* relationships and traditional marriages.

1693 Motor Accidents Compensation Scheme (NT) https://www.tiofi.com.au/car-insurance/macc/ (accessed on 13 September 2017).

1694 See Motor Accidents (Compensation) ("MAC") Act (NT) https://www.ntmacc.com.au/GeneralInformation.pdf (accessed on 16 September 2017).

1695 Northern Territory Motor Accidents Annual Report 2015-2016 https://parliament.nt.gov.au/.../152.-Annual-Report-2015-2016 (accessed on 16 September 2018).

1696 s 4(d) & (e) of the Motor Accidents (Compensation) Act (NT).

1697 According to the Northern Territory Insurance Office, in the first three years of the operation of the Act, there had been no claims involving Aboriginal traditional wives, *Submission* 330 (13 May 1982).

1698 s 4(3)(e)(ii) of Compensation (Fatal Injuries) Act of 1974 (NT).

Section 4(3)(e)(ii) provides that a person who, being an Aboriginal, has entered into a relationship with another Aboriginal that is recognised as a traditional marriage by the community or group to which either Aboriginal belongs, shall be treated as the wife or husband, as the case may be, of the deceased person.

A similar approach is adopted in the Compensation (Commonwealth Government Employees) Act of 1971 (Cth),[1699] which provides for compensation to dependants on the death of a Commonwealth employee. A dependant is defined to include a lawful spouse, as well as a woman who, throughout the period of three years immediately before the date of the death of the employee, although not legally married to him, lived with him as his wife on a permanent and bona fide domestic basis. In addition, an Aboriginal traditional spouse is specifically provided for: a "spouse" in relation to an aboriginal native, or a deceased aboriginal native, of Australia or of an external Territory, includes a person who is or was recognised as the husband or wife of that aboriginal native by the custom prevailing in the tribe or group of aboriginal natives of Australia, or of such a Territory to which that aboriginal native belongs or belonged.[1700] The point of this provision was explained by the Commonwealth Commissioner for Employees' Compensation as "a special provision required to cover such cases because unless a tribal wife or wife by native custom could fulfil the requirements that a *de facto* wife had to meet, eg, cohabitation throughout a period of three years, then an incapacitated employee with a tribal wife or wife by native custom would, probably, be ineligible for the additional weekly compensation in respect of such a wife. Moreover, in the case of a compensable death of an Aboriginal employee, the wife or

[1699] This Act applies to an employee who sustained injuries or contracted a disease during the course of his or her employment.

[1700] s 5 of Compensation (Commonwealth Government Employees) Act, 1971 (Cth).

husband would, probably, not have been eligible for compensation although she or he was, in fact, a dependant spouse."[1701]

In other Australian jurisdictions, traditionally married spouses would only be entitled to accident compensation benefits if they fell within the provisions covering *de facto* relationships or a qualification based on dependency.[1702] For example, in South Australia, the Wrongs Act of 1936 enables a "putative spouse" to bring an action in respect of the death of a deceased spouse, if caused by the "act, neglect or default" of another person.[1703] This legislation is unique, in that it also specifically provides for an apportionment of benefits (in such manner as the court thinks fit) if the deceased is survived by both a lawful spouse and a *de facto* spouse.[1704] There is a five-year qualification requirement for a "putative spouse" under the South Australian Act.

In Victoria, the Motor Accidents Act of 1973 (Vic) established a system of no-fault compensation for persons injured in road accidents. A "dependant spouse" is defined in section 3(1) to include a woman living with a man immediately prior to his death on a permanent and *bona fide* domestic basis, and who is wholly or mainly dependant on him for economic support.[1705] No time qualification is specified for a *de facto* spouse. The parties to a traditional marriage should be able to claim compensation for death or injury, regardless of whether they fall within the definition of a *de facto* relationship.

1701 Dwyer "Commissioner for Employees Compensation" *Submission* 327 dated 3 May 1982.

1702 Not all States recognize *de facto* spouses. Western Australia does not, despite the recommendation of the WALRC to include *de facto* spouses: WALRC, *Report on Fatal Accidents*, (Perth, 1978), par 3.32.

1703 s 3a of the Wrongs Act of 1936 (South Australia): definitions of "spouse" and "putative spouse."

1704 Wrongs Act of 1936 (SA): s 20(4) & (7) (action for wrongful death), s 23b (action by spouse for solatium). The apportionment provisions are ss 20(3) 23(b)(2) & (3). Under the Compensation (Commonwealth Government Employees) Act, 1971 (Cth), apportionment would be the responsibility of the Commissioner under s 45(3) & (4).

1705 s 3(1) of the Motor Accidents Act, 1973 (Vic).

The House of Representatives Standing Committee on Aboriginal Affairs, in its report on *The Effects of Asbestos Mining on the Baryulgil Community (1984),* recommended that priority be given to legislation under the Commonwealth marriage power, providing recognition to Aboriginal marriages, at least for the purposes of actions for damages for loss of support by surviving dependants in cases of death caused by personal injury.[1706] Where there is more than one spouse (whether a traditional spouse or a Marriage Act spouse) who is eligible to receive compensation, the compensation should be apportioned between them at the discretion of the court or authority responsible for paying the compensation.[1707]

5.4.3 Conclusion

Similar to South Africa, Australian workers and road accident victims' compensation systems originated because of the need to address the plight of workers, road accident victims and their dependants left destitute due to road accidents and work-related disabilities or death. The Australian road and work-related accident compensation systems share common features with South Africa, Botswana and Lesotho. Statutory workers and road accident victims' compensation schemes exist in all Australian states and territories. Like South Africa, Botswana and Lesotho, the road accident legislations govern an entirely fault-based scheme. No compensation is paid to victims of road accidents, unless they can prove that the death or injury was caused by the negligence of another person. Unlike in South Africa, each state and territory in Australia has different laws on compensation of claims, with each state having its own third-party compensation policies. In South Africa, all provinces are governed by one and the

[1706] House of Representatives, Standing Committees on Aboriginal Affairs, *Report: The Effects of Asbestos Mining on the Baryulgil Community*, AGPS, (Canberra, 1984), 120.

[1707] The arguments outlined in par 5.4.1 dealing with workers' compensation apply here as well; Carney 2010 *Sydney Law Review* 196.

same third-party compensation legislation. Similar to Botswana and Lesotho, Australia has not yet amended their MVA legislation towards a no-fault system.

5.5 Chapter conclusion

This chapter has discussed selected social security legislations pertaining to a dependency action for loss of support and funeral expenses in all four comparative countries. It has been indicated that all four countries have developed social security legislations, though the legislations lack universality, despite their common objective of protecting the dependants of a deceased, who was unlawfully and negligently killed. In South Africa, there is not one specific statutory law comprehensively dealing with the dependants' action for loss of support and funeral expenses.

Social security legislations that deal with the dependency action are fragmented. Although there is a clear interrelationship between the RAF Act and COIDA, major differences exist insofar as the two pieces of social security legislation regulating the dependency action or claim for loss of support and funeral expenses are concerned. The two sets of legislation address similar issues, but there is no uniform approach in the assessment of "damage" suffered by the dependants, and the awarding of benefit structures and entitlements, which is seen as one of the greatest hurdles to overcome in addressing this matter. This area of social security demands that there be more unity, in order to provide every dependant of the victim of workplace or road-related accidents with the same platform, no matter how rich or poor they are. This will help to inculcate a feeling of equality amongst these dependants. When the legislations are uniform, the claimants will approach them more confidently. Therefore, there is a clear need for some degree of alignment between the different laws, and their integration within the broader dependency action and social security framework. A lack of

alignment between the two sets of social insurance legislations may lead to duplication of payments, which could seriously reduce the financial soundness of the respective public insurance systems, thereby putting a strain on the revenues from which social securities are paid.

A move towards universal assessment of "damage" suffered by the dependants should be the first step towards integrating the two sets of legislation. Although the object of the RAF compensation system was to provide the victim of road accidents and his or her dependants with the widest possible protection, the reality is that the RAF can no longer provide extensive financial support for victims and their dependants. Therefore, even if the RAF does pay out, the amount will probably be insufficient to cover the full extent of the damage or losses suffered. This gap between the pay-out and the true expenses could be vast. It is thus vital to address this financial gap. The government's priority of saving money through the changes brought about by the RAFAA and proposed RABS Bill is not aligned with the widest possible protection principle, and this has influenced the "pay-out-amount" to claimants in an unprofitable way.

The proposed RABS compensation system is a product of the perception of limiting the scope of protection that the RAF compensation system is providing, under the pretense of cutting costs. Invariably, the very same costs that are cut (if at all) are not cut, but rather shift to the dependants or victims, who are supposed to be protected by the system. The changes in terms of the RAFAA and proposed RABS Bill actually leave the victim with the financial duty to supplement the compensation provided by the RAF with an effective personal insurance policy, in the event that they are involved in an accident. Consequently, each road user now has the increased burden of financially preparing for the possibility of a serious motor vehicle accident, and the

potential repercussions of such an accident, which range from injury or disability to death. Every road user has to ensure that he or she has adequate personal accident insurance cover, disability insurance, life insurance, health insurance, funeral cover, and unemployment insurance due to incapacity or temporary loss of income due to injury. Road users should consider consulting a financial planner to assist them in planning their estate and determining the levels of insurance required, in order to avoid being over-insured or under-insured when such an unfortunate accident occurs.

Since the RAF Act, the proposed RABS Bill and COIDA do not provide full cover, victims of road accidents and their dependants, as well as employees and their dependants, should be allowed to sue the wrongdoer and employers directly (also for general damages, such as pain and suffering). Logically, if the employer or wrongdoer is sued directly, any amount paid out by the compensation system should be deducted from any damages claimed, as the principle should remain that the road accident victim, employee, or his/her dependants should not receive more than their actual loss or damage. Despite the fact that the goals of the RAF compensation system are honourable, the system has culminated in escalating costs over the years and has been insolvent for years. In addition, efforts to cut the costs and return it to financial stability were unsuccessful, and it remains to be seen whether the proposed RABS Bill will be any different.

Findings and recommendations are often considered to be the most important part of a research study. Therefore, the next chapter is dedicated exclusively to this topic.

CHAPTER 6

FINDINGS, RECOMMENDATIONS AND CHALLENGES

6.1 Introduction

In this concluding chapter, the summary of the contributions of this thesis, its possible impact, challenges, recommendations and important directions for future research are discussed.

6.2 Summary of important findings and necessary recommendations

This section provides a summary of the main focus area and the objectives, as well as the problems addressed in this study.

6.2.1 Primary focus and objectives of this study

The primary focus of this study was on establishing the traditional values in the action of dependants under customary law,[1708] and assessing to what extent the affirmation of indigenous values in the dependency action has been effected by the South African courts and the legislature. In order to make this determination, four objectives were identified and researched for this study: Firstly, a brief historical background to the need for the action of dependants was provided. Secondly, the traditional values in the action of dependants were established and a determination was made as to whether the South African courts and legislature have affirmed indigenous values in the common law dependency action, and incorporated them into our legal system. Thirdly, a detailed comparison was made of the dependency action as applied in three different jurisdictions in Africa, and in a fourth comparative country rich with indigenous values, namely Australia. Finally, the study considered important principles that South Africa

[1708] See chapter 1 of this thesis, par 1.2.

should bear in mind in its development of the action's jurisprudence within a comparative African context.

Objective 1: Historical background

In chapter 2, this study probed the introduction and progression of the action of dependants under common law within the relevant historical context in all four comparative countries.[1709] The study found that there were similarities in the historical development of the action of dependants in South Africa, Botswana, Lesotho and Australia. All four comparative jurisdictions have historical links dating back to colonial times. The law on the dependency action in all four comparative countries has been greatly influenced by Roman-Dutch law and English law.[1710] The study also found the objective of the action to be the same in South Africa,[1711] Botswana,[1712] Lesotho[1713] and Australia.[1714] The study has shown how the introduction of the action was necessary to deal with the protection of dependants whose breadwinner had been negligently and unlawfully killed, and resulted in the development of the dependency action into a legal scheme, which encompassed deliberations of fairness to safeguard justice for such dependants. The shared civilian ancestry means that many features of the four systems are similar, although South Africa has seen notable modern developments, which cannot be traced back to Roman-Dutch or English law.[1715]

1709 See chapter 2 of the thesis.
1710 See chapter 2 of the thesis, paras 2.2 & 2.3.
1711 See chapter 2 of the thesis, par 2.4.
1712 See chapter 2 of the thesis, par 2.5.
1713 *Ibid*.
1714 See chapter 2 of the thesis, par 2.6.
1715 Eg, recognition of customary law and full marriage rights granted to the South African LGBT community. Many developments took place under the new constitutional order in South Africa to give customary law and its underlying values a rightful place in South African law, but there is still a lot of work in the future, particularly in the customary law domain.

Objective 2: Traditional values and incorporating customary law

This study was inspired by a simple curiosity to discover the traditional legal values of the dependency action.[1716] The central problem addressed in this thesis is that the available sources on the dependency action in South Africa do not mention the presence or absence of traditional values in African/customary/indigenous law pertaining to the dependency action.[1717] This is an inaccuracy in our legal system and can lead to distorted assumptions, namely that customary law does not provide protection to dependants of a breadwinner who suffered a wrongful death. Africa prides itself on having a rich cultural diversity, which has to be reflected in our current legal system.[1718]

The study established that customary law does recognise a dependant's right and action to claim damages from the person responsible for his or her breadwinner's death.[1719] The customary law dependency action is known as *go tsoša/tsosa hlogo"*in the Sepedi/Sotho/Setswana languages.[1720] It is a well-established and recognised practise in customary law and has always been part of the legal system of African people of Southern Africa.[1721] At the centre of this customary law principle lies a dependency claim for loss of support in the case of the wrongful death of a breadwinner. The *go tsoša/tsosa hlogo* principle provides an African understanding of the dependency action and can be applied to enlighten its Western counterpart. Similar to its Western counterpart, it gives the dependants under customary law the right to claim for loss of support where their breadwinner is unlawfully and negligently killed.

1716 See chapter 1 of this thesis, par 1.2.
1717 *Ibid*.
1718 Maithufi & Bekker 2009 *OBITER* 164 170.
1719 See chapter 2 of this thesis, par 2.4.3.2.
1720 *Ibid*.
1721 *Ibid*.

Many features of this customary law action of dependants are similar to the common law roots of the dependency action.[1722] The study has established that both African and Westernised law provide rules concerning the dependency action for loss of support, and compensation for such loss. Botswana and Lesotho inherited their law from South Africa and still follow the South African law and cases, hence the action of dependants in Botswana and Lesotho is mostly the same as in South Africa,[1723] and is legally enforceable. The death of a breadwinner who had a duty to support the dependants undoubtedly causes loss to such dependants, irrespective of whether it is under customary law or civil law.[1724] When one observes the aim of the dependants' claim for loss of support due to the unlawful and negligent killing of the breadwinner under customary law, it is also to place the dependants in the same financial position they would have been if their breadwinner had not been killed.[1725] In this sense, the customary law remedy of *go tsoša hlogo/go tsosa hlogo* has a purely delictual point of departure, namely damages in the case of wrongful conduct.[1726]

In spite of this commonality between the customary and common law action of dependency, there are important differences, which should be kept in mind, especially with regard to the general principles relating to the assessment and quantification of compensation (damages) for loss of support owing to the death of a breadwinner under the dependency action.[1727] In determining delictual liability and compensation under customary law, in contrast to Western law, the general elements and principles for delictual liability and assessment of damages in terms of customary law are not as

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1722 See the discussion on the nature and principles of the action in chapter 3 of this thesis.
1723 See chapters 2, 3 & 4 of this thesis.
1724 See chapter 2 of this thesis, par 2.6.2; chapter 3 of this thesis, paras 3.4.1.2 & 3.5.2.
1725 See chapter 2 of this thesis, par 2.7; chapter 3 of this thesis, par 3.4.1.3.
1726 *Ibid*.
1727 See chapter 4 of the thesis, paras 4.6.1-4.6.9.

clear as under common law in South Africa.[1728] This can be ascribed to the fact that conflict resolution under customary law puts emphasis on reconciliation and restoration objectives with the purpose of restoring peace within the society.[1729] Accordingly, there is no clear distinction between criminal law and the law of delict under customary law, as it is in its character to generalise, which is in contrast with the nature of common law, which is to comprise specialised rules and habitually refined dissimilarities between the two systems.[1730] However, the law of delict under customary law, offers compensation for the violation of any right representing material value, which can be attained by a household leader. This denotes reparation for damage (harm) to the dependants of the deceased, who was unlawfully and negligently killed.[1731]

Customary law damages can also be regarded as being in contrast to common law punitive damages, which are awarded to a plaintiff in addition to compensatory damages. The award for damages under customary law is limited to punitive damages. Concepts such as compensatory damages are strange and unfamiliar to customary law. Consequently, customary law is inadequate of the essential principle discussed here, namely that the law entitles the dependants to be awarded damages for the full measure of their losses, as best as it can be calculated in monetary terms. Therefore, it is concluded that customary law damages applied independently and exclusively are considered an inadequate and even unjust remedy for the loss of support, because it will in most cases lead to under-compensation of the dependants.

1728 See chapter 4 of the thesis, par 4.2.
1729 *Ibid*.
1730 *Ibid*.
1731 *Ibid.*

Objective 3: Comparative research

It was imperative to explore the heart of African-ness with regard to the dependency action in more detail, as well as to determine whether comparative law has anything to offer in this respect. Accordingly, the study critically examined the action of dependants in South Africa, Botswana and Lesotho from an African perspective. It then compared this to its application in Australia, a country that is known for its recognition and inclusion of indigenous Australian customary law.[1732]

In chapter 3, the study observed, among others, the nature, objectives, principles and valid requirements for the dependency action.[1733] It found the action to be a flexible delictual remedy in nature, which can be adapted to modern conditions. This appears to be the accurate version of the nature of the action throughout the four countries being studied in this research.[1734] The study also found the objectives and valid requirements for the action to be the same under the laws of Botswana, Lesotho and Australia.[1735] South Africa initially rejected the recognition of customary law, but has now moved on, with customary law being admitted and recognised in all its aspects.[1736] The non-recognition of customary law in Australia is unsurprising, because in both jurisdictions, namely South Africa and Australia, the law was greatly influenced by European colonisation. Colonial law has not, until recently, acknowledged the Aboriginal heritage, relationship to land, languages, and culture.[1737]

1732 See chapters 2-5 of this thesis.
1733 See chapter 3 of the thesis.
1734 See chapter 3 of the thesis, paras 3.4.2 & 3.4.3.
1735 *Ibid*.
1736 See ss 33 35 of the interim Constitution; ss 30 31 39 211 of the Constitution.
1737 The Federal Government's "Act of Recognition" and Aboriginal customary law. https://unlearningtheproblem.wordpress.com/.../the-federal-governments-act-of-recognition-and-aboriginal-customary-law/ (accessed on 8 August 2016).

Recently, the Australian legal system has made some attempts to recognise Aboriginal customary law. It may be said that in an unsystematic, indirect, piecemeal way, Australian law does now allow for the recognition of Aboriginal customary traditions and laws. This type of acknowledgement is limited and is usually a reaction to an explicit circumstance or necessity.[1738] There seems to be no reason in principle why Aboriginal customary law should not be given a wider recognition in Australia. Although the Native Title Act 1993 is a statute that developed through common law, it is a piece of legislation in terms of customary law that gives recognition to the indigenous Australian societies' systems of law. Unlike in South Africa, Botswana and Lesotho, the recognition of customary law is a comparatively slow-moving area of law in Australia, and it is questionable whether full recognition of customary law will occur in the near future. It will be of the utmost value for our sister jurisdiction, Australia, to learn from South Africa, Botswana and Lesotho in terms of the developments that took place under customary law.

Objective 4: Future developments

In Australia, contrary to the position in South Africa, Botswana and Lesotho, each state seems to have a law dedicated to the dependency action,[1739] though the absence of traditional legal values in their respective laws on the action is unfortunately evident.

1738 Calma https://www.humanrights.gov.au/.../speeches/integration-customary-law-australian-legal-system-tom-calma (accessed on 8 August 2016).

1739 For instance, ss 23 & 28(2) of the Civil Law (Wrongs) Act 2002 (Australian Capital Territory); Fatal Accidents Act 1950 (Western Australia); Supreme Court Act 1995 (Queensland); Civil Liability Act 1936 (Southern Australia); Civil Law (Wrongs) Act 2002 (ACT); Compensation to Relatives Act 1897 (New South Wales); Fatal Accidents Act 1934 (Tasmania); Compensation (Fatal Injuries) Act 1974 (Northern Territories); Wrongs Act 1958 (Victoria); s 57 of the Acts Amendment (Equality of Status) Act 2003 (Western Australia); s 83 of the Discrimination Law Amendment Act 2002 (Queensland); s 60 of the Law Reform (Gender, Sexuality and De Facto Relationships Act 2003 (Northern Territory); sch 1 of the Relationships (Consequential Amendments) Act 2003 (Tasmania); s 4 of the Wrongs (Dependants) Act 1982 (Victoria); sch 2.3 of the Property (Relationships) Legislation Amendment Act 1999 (New South Wales).

The fragmented collection of legislation on dependency actions[1740] in South Africa, Botswana and Lesotho, which only partly regulates and deals with the action of dependants, does not allow for a holistic recognition of the dependency action. It will therefore be of paramount importance for South Africa, Botswana and Lesotho to adopt the Australian approach and draft comprehensive legislation which specifically addresses all matters relating to the action of dependants, from both customary and civil law perspectives, in one piece of legislation.

6.2.2 Problems addressed

This thesis attempted to make a contribution in addressing the complex problems of the dependency action. Five specific problems or issues were identified[1741] and addressed[1742] in this thesis:

Problem 1: Vested rights

In Chapter 3, the study reassessed those issues of the dependency action, which affect the rights of dependants. In particular, the study considered the question of the vested rights given by the action.[1743] The issue is whether a claim for damages for loss of support arising out of the unlawful and negligent death of the breadwinner is necessarily a dependant's action, or whether, in some circumstances, such a claim must take the form of a breadwinner's action instead.[1744] The study found that the infringement of the dependants' right to support is a wrongful act committed against the dependant and not the breadwinner. It is an infringement of the rights of the dependant. In other words, the legal duty is in favour of the dependant and not the

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1740 See chapter 2 of this thesis, paras 2.4.4 & 2.5.5; chapter 5 of this thesis.
1741 See chapter 1 of this thesis, par 1.2.
1742 See chapters 2-5 of this thesis.
1743 See chapter 3 of this thesis, par 3.4.1.1.
1744 *Ibid*.

breadwinner.[1745] The effect of the independent nature of the action is that any defence, which is personal to the deceased, does not operate against the dependant.[1746] The dependency action for loss of support belongs to the dependants, not to the deceased person, although it is administered through the deceased's estate.[1747]

Problem 2: Injured breadwinner

Another question examined in chapter 3 is whether the dependants of a breadwinner who is injured (not killed) in a wrongful and culpable manner should, as in the case of death, be able to claim for loss of support with the Aquilian action.[1748] The study revealed that the dependants are granted an action for loss of support if the injured breadwinner and a third party acted negligently and are regarded as joint wrongdoers against the dependants.[1749] The Apportionment of Damages Act speaks of "injury to or death of any breadwinner". Due to the fact that the wording of the Apportionment of Damages Act now covers this issue, the dependants should have a claim, irrespective of whether the breadwinner is injured or has died.[1750] The decision in *De Vaal NO v Messing* should therefore not be seen as an obstacle to extending the action of dependants where the breadwinner is only injured.[1751] As stated in the thesis, Botswana and Lesotho are very reliant on South African law in all their legal areas. Though the provisions of the Apportionment of Damages Act were written for South African law, the position is generally similar under Botswana,[1752] Lesotho[1753] and

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1745 See chapter 3 of this thesis, par 3.4.1.1.
1746 See *Jameson's Minors v Central South African Railways* 1908 TS 575.
1747 Hedley *Death and tort* (2007) 252.
1748 See chapter 3 of this thesis, par 3.4.1.2.
1749 *Ibid*.
1750 Neethling & Potgieter *Law of delict* (2015) 285.
1751 Burchell *Delict* (1993) 236.
1752 See Apportionment of Damages Act 32 of 1969 – Botswana.
1753 The arguments outlined in chapter 2, par 2.6.5.3 dealing with the Apportionment of Damages legislation apply here as well.

Australian[1754] law. It is clear that the inconsistency in the treatment of dependants of the injured breadwinner is unjustifiable under the dependency action and should not be tolerated in the post-constitutional dispensation, as it would be in the public interest to pursue a more comprehensive approach towards such dependants.

Problem 3: Classes of dependants

Chapter 3 also scrutinised the circle of eligible dependants under the dependency action.[1755] The study demonstrated that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship, which shows that a binding duty of support can be established by one person in favour of another. Moreover, a culturally embedded notion of "family", defined as being a network of relationships of reciprocal nurture and support, informs the common law's appetite to embrace, as worthy of protection, the assumption of duties of support and the reciprocal right to claim support by persons who are in relationships akin to that of a family.[1756] This norm is not narrow-minded, but is instead likely to be universal. It certainly is consistent with both the norms derived from the Roman-Dutch tradition, as alluded to by Cachalia JA in *Paixão v RAF,*[1757] and the norms derived from African tradition, as exemplified by the spirit of Ubuntu mentioned by Dlodlo J in *Fosi v RAF*.[1758] These important developments do not, however, indicate that the action of dependency in South Africa has developed into a general remedy for the wrongful and negligent killing of the breadwinner. It has not advanced to this level yet.[1759]

1754 See chapter 2 of this thesis - the arguments outlined in par 2.5.3.4 dealing with the Apportionment of Damages legislation apply here as well.
1755 See chapter 3 of this thesis, par 3.5.
1756 *Taljaard v RAF* [2014] ZAGPJHC 229; 2015 1 SA 609 (GJ).
1757 [2012] ZASCA 130.
1758 2008 3 SA 560 (C).
1759 See chapter 3 of this thesis, par 3.5.

The list of categories of dependants may expand further in the future, owing to South Africa's constitutional democracy, which promotes a culture of respect for basic human rights[1760] and the norm of public accountability.[1761] In South Africa, there is an unlimited circle of persons entitled to sue for loss of support where their breadwinner was unlawfully and negligently killed, including the LGBT[1762] societies.[1763] Australia, like South Africa, recognises same-sex relationships and recently it gave same-sex couples the right to marry. A law legalising same-sex marriages was passed by Parliament on 7 December 2017 and received royal assent the following day (8 December 2017).[1764]

The law of wrongful death in Botswana, Lesotho and Australia tends to define the class of eligible dependants narrowly.[1765] The wrongful death remedy provides for exclusive classes of beneficiaries, thereby limiting recovery to those classes of dependants.[1766] The legal recognition of the rights of LGBT societies in Botswana and Lesotho seems unlikely to happen. The law in Botswana and Lesotho performs the function of prohibition through the criminalisation of homosexual activity, and attempts to organise relationships in the public and private sphere.[1767] This implies that a surviving homosexual partner cannot institute a claim for loss of support in the case where his or her partner was wrongfully and negligently killed, as these relationships do not legally "exist" in Botswana.[1768] The Botswana Constitution does not make any

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1760 *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA) par [11].
1761 Davel https://www.up.ac.za/dspace/handle/2263/6760 (accessed on 17 September 2016) 151.
1762 LGBT stands for Lesbians, Gays, Bisexuals and Transsexuals.
1763 See chapter 3 of this thesis, par 3.5.4.
1764 Yaxley http://www.abc.nt.au/news/2017-12-08/same-sex-marriage-legislation (accessed on 12 December 2017).
1765 See chapter 1 of this thesis, par 1.4.2.3; chapter 2 of this thesis, paras 2.5.5.5 & 2.6.3.5.
1766 See chapter 3 of this thesis, par 3.5.
1767 See chapter 2 of this thesis, paras 2.5.5.6 & 2.6.3.5.
1768 See chapter 2 of this thesis, par 2.5.5.5.

reference to a right or protection from discrimination on the ground of sexual orientation.[1769] It will be valuable for Botswana and Lesotho to learn in this respect from South Africa and Australia, and to keep abreast of the shifting public perceptions which have necessitated the rectification of what has become an unacceptable position in common law.

Problem 4: Damages claimable under the dependency action

Furthermore, the study explored and addressed the assessment of compensation (damages) in respect of the action of dependants for loss of support in chapter 4 of the thesis. The study observed remarkably broad similarities across all four comparative countries, with lively replication of legal concepts in the area of assessment of damages, as well as noteworthy similar concepts such as “damage”, “damages” and “compensation”.[1770] The South African definitions and understanding of these concepts is also the accurate version of the definitions and understanding of these concepts under the laws of Botswana, Lesotho and Australia.[1771] In all comparative jurisdictions, the normal measure of damages for loss of support under the dependency action is concerned with deducting the present patrimonial position of a dependant from the supposed (hypothetical) patrimonial position that the dependant would have been in had the breadwinner not been killed.[1772] This follows from the principle that the compensation should put the dependant in the position he or she would have been, but for the unlawful and negligent death of his or her breadwinner, so far as can be done by the payment of money, and without undue hardship to the wrongdoer.[1773] It

1769 *Ibid*.
1770 See chapter 4 of this thesis, par 4.2.
1771 *Ibid*.
1772 *Ibid*.
1773 Potgieter, Steynberg & Floyd *Law of damages* (2012) par 14.7.2; Barnett & Harder *Remedies* (2014) 186.

was also observed that the South African, Botswana, Lesotho and Australian laws contain and apply uniform principles and rules on the assessment for loss of support.[1774]

The one area in which the Australian jurisdiction differs significantly from the comparative Southern African countries in this study is with regard to recoverable damages in terms of the dependency action. Although the assessment of the amount of damages for loss of support in terms of the dependency action is based on the principle of full compensation, the objective being, as stated above, to put the dependant in the position he or she would have been if the act that gave rise to the death of his or her breadwinner had not occurred at present, the recoverable damages under loss of support in South Africa, Botswana and Lesotho is more limited than in Australian law.[1775] It is not sufficiently wide to cover all or most of the losses that a dependant could have suffered due to the death of his or her breadwinner.[1776] There is a need to bring the laws of these three countries in line with the more persuasive position taken by Australia. The legislatures and courts of South Africa, Botswana and Lesotho must take a realistic, clear-headed, and practical approach to reforming the law, and should learn from countries such as Australia in terms of compensating the dependants fully. The comparative analysis reveals that non-pecuniary damages for loss of spousal consortium and a child's parental consortium, as well as pecuniary damages for loss of future savings or inheritance, are treated differently by South African, Botswana, Lesotho and Australian courts.[1777] Australian law recognises compensation for patrimonial damages for loss of future savings or inheritance, and

[1774] See chapter 4 of this thesis, paras 4.3 & 4.6.
[1775] For example, unlike in South Africa, Botswana and Lesotho, the law in Australia allows for a loss of savings or inheritance – see chapter 4 of this thesis, paras 4.4 & 4.5.
[1776] See chapter 4 of this thesis, par 4.4.
[1777] See chapter 4 of this thesis, paras 4.4 & 4.5.

non-patrimonial loss accruing to the dependants of a deceased-breadwinner,[1778] unlike the law in South Africa, Botswana and Lesotho.

Death represents the deprivation of a number of possible and even probable future enjoyments, yet the South African, Botswana and Lesotho wrongful death action does not attempt to redress all these losses. There have not been any good explanations provided as to why non-patrimonial losses and patrimonial loss of future savings or inheritance are not compensated in Southern African law. Indeed, the fact that the dependants have been deprived of these types of losses seems to have escaped the notice of our legislature. The current denial of compensation for non-patrimonial damages and patrimonial damages for loss of future savings or inheritance is unacceptable and prejudicial to the larger group of dependants.[1779] It is recommended that an award should be made in South African law to acknowledge the non-pecuniary loss and pecuniary loss of future savings or inheritance suffered by the dependants due to the death of their breadwinner. An award of damages, even if small, can have a consoling effect where a child loses a parent or a parent loses an infant child, or a partner loses his or her spouse. The amount of compensation could be fixed at a conventional sum and the right to such compensation can also, for example, be limited to a child whose parent(s) was killed in an accident (unnatural death).

Problem 5: Social security legislative frameworks

Furthermore, the study analysed selected current social security legislative frameworks covering death claims or the dependency action for loss of support and

[1778] See chapter 4 of this thesis, par 4.4.2.
[1779] See chapter 4 of this thesis, par 4.4.

funeral expenses in South Africa,[1780] Botswana,[1781] Lesotho[1782] and Australia.[1783] The study found that all four countries have developed social security legislations, though the legislations lack universality, despite their common objective of protecting the dependants of a deceased, who was unlawfully and negligently killed. In South Africa, there is no specific law dealing with the dependants' action for loss of support and other related expenses, e.g. funeral expenses. Social security legislations that deal with the dependency action are fragmented.

Although there is a clear interrelationship between the RAF Act and COIDA, major differences exist insofar as the two pieces of social security legislation regulating the dependency action or claim for loss of support and funeral expenses are concerned. The two sets of legislation address similar issues, but there is no uniform approach in the assessment of "damage" suffered by the dependants, nor the awarding of benefit structures and entitlements, which is seen as one of the greatest hurdles to overcome in addressing this matter.[1784] This area of social security demands more unity, in order to provide every dependant of the victim of workplace or road-related accidents with the same platform, no matter how rich or poor they are. A lack of alignment between the two sets of social insurance legislations may lead to duplication of payments, which could seriously reduce the financial soundness of the respective public insurance systems, thereby putting a strain on the revenues from which social securities are paid. Usually, if the RAF pays out, the amount will probably be inadequate to cover the full extent of the damage or losses suffered. The fissure concerning the "pay-out amount" and the genuine expenses could be massive, and it is thus vital to address this financial

[1780] See chapter 5 of this thesis, par 5.2.
[1781] See chapter 5 of this thesis, par 5.3.
[1782] See chapter 5 of this thesis, par 5.4.
[1783] See chapter 5 of this thesis, par 5.5.
[1784] See chapter 5 of this thesis, paras 5.2.3.1 & 5.2.4.

gap. The government's priority of saving money through the changes brought about by the RAFAA and proposed RABS Bill is not aligned with the widest possible protection principle, and this will prejudice the "pay-out-amount" to claimants in an irrational manner.[1785] The proposed RABS compensation system is a product of the perception of limiting the scope of protection that the RAF compensation system is providing, under the guise of cutting costs. The costs that are cut should rather be transferred to the pockets of the dependants or victims, who are supposed to be protected by the system.

The changes in terms of the RAFAA and proposed RABS Bill actually leave the victims with the financial duty to supplement the compensation provided by the RAF with an effective personal insurance policy, in the event that they are involved in an accident. Consequently, each road user now has the increased burden of preparing financially for the probability of a severe motor vehicle accident, and the possible consequences of such an accident, which range from injury or disability to death. Every road user has to safeguard that he or she has sufficient personal accident policy cover, life policy, disability policy, health policy (medical aid), funeral cover, and unemployment insurance, in the event of inability or provisional loss of remunerations owing to injury. Road users should contemplate consulting a financial advisor to help them in the preparation of their estate and establishing the levels of insurance premium required, in order to evade being under-insured or over-insured when such an unfortunate accident occurs.[1786]

[1785] See chapter 5 of this thesis, paras 5.2.3.2 & 5.2.3.3.
[1786] See chapter 5 of this thesis, par 5.5.

In addition, the victims of road accidents and their dependants, as well as employees and their dependants, should be allowed to sue the wrongdoer and employers directly (also for general damages, such as pain and suffering).[1787] Logically, if the employer or wrongdoer is sued directly, any amount paid out by the compensation system should be deducted from any damages claimed, as the principle remains that the road accident victim, employee, or their dependants should not receive more than their actual loss or damage. Despite the fact that the goals of the RAF compensation system are honourable, the system has culminated in escalating costs over the years and has actually been insolvent for years. The efforts to cut the costs and return it to financial stability were unsuccessful, and it remains to be seen whether the proposed RABS Bill will be any different.

6.2.3 Summary of findings

The following is a brief list of the most important findings made in this study:

(i) The study found that the violation of the dependants' right to support is an unlawful and negligent act committed directly to the dependants but not the breadwinner.

(ii) The dependants should have a claim, irrespective of whether the breadwinner has died or is injured.

(iii) The study demonstrated that the common law has been developed to recognise that a duty of support can arise, in a given case, from the fact-specific circumstances of a proven relationship, which shows that a binding duty of support can be established by one person in favour of another.

[1787] *Ibid*.

(iv) It is recommended that an award should be made in the South African law to acknowledge the non-pecuniary loss and pecuniary loss of future savings or inheritance suffered by the dependants due to the death of the breadwinner.

(v) The study found that all four comparative countries have developed social security legislations, though the legislations lack universality, despite their common objective of protecting the dependants of a deceased, who was unlawfully and negligently killed. Unlike Australia, in South Africa, Botswana and Lesotho, there is no specific law exclusively dealing with the dependants' action for loss of support and funeral expenses. Social security legislations dealing with the dependency action are fragmented.

(vi) It is of paramount importance for South Africa, Botswana and Lesotho to adopt the Australian approach and draft one comprehensive piece of legislation which specifically addresses all matters relating to the action of dependants, from both customary and civil law perspectives.

(vii) The shared civilian ancestry of the four comparative countries means that many features of the four systems are similar, although South Africa has seen notable modern developments, which cannot be traced back to Roman-Dutch or English law, for example, the recognition of the rights of same-sex partners and customary law.

(viii) Although the study found the action of dependants to be a flexible delictual remedy in nature, which can be adapted to modern conditions, blatant discrimination against homosexuals remains rife throughout Botswana and Lesotho. Same-sex couples have no legal recognition, as a result, the rights arising, on the death of a same-sex partner, to claim for loss of support

where the deceased partner was wrongfully and unlawfully killed is unavailable to them. It is suggested that Botswana and Lesotho should adopt the South African and Australian approach and recognise same-sex relationships.

(ix) Customary law recognises a dependant's right and action to claim damages from the person responsible for his or her breadwinner's death and the customary law dependency action is known as *go tsoša/tsosa hlogo* in Sepedi/Setswana/Sesotho languages.

(x) Customary law lacks the conceptual structure of modern law of damages concepts and the courts do not distinguish clearly between civil and criminal cases. This can be credited to the fact that traditional customary conflict resolution reinforces the aims of reconciliation and restoration, and not awarding the fullest possible compensation to the victim.

(xi) Customary law damages applied independently and exlusively are considered an inadequate and even unjust remedy for the loss of support, because it could lead to under-compensation of the dependants.

(xii) The common law provision for funeral-related expenses under the action of dependants is entirely inadequate when compared with the customary law approach to funerals and related ceremonies. The blanket ignorance or denial of African funerary rites and cleansing ceremonies by the dependency action and social security legislations are discriminatory, symbolises the legislator's failure to respect and recognise African burial rights and cleansing ceremonies, and forces African communities to follow the rules regarding funeral expenses that are laid down for them in terms of western views. This blanket denial or ignorance of funerary rite expenses needs to

be revised so that it recognises cultural practices, treats all cultures equally, and is in line with the current legal developments in a democratic South Africa. All the expenses related to the cultural rites of mourning and cleansing ceremonies, as well as all costs related to the administration of the deceased's estate should be expressly included in the assessment and quantification of damages under the dependency action, as well as in related social security legislations. Consequently, the proposed single, combined action of dependants should expressly integrate these expenses.

(xiii) Unlike in South Africa, the recognition of customary law is a comparatively slow-moving area of law in Australia, and it is questionable whether full recognition of customary law will occur in the near future. It will be of the utmost value for our sister jurisdiction, Australia, to learn from South Africa, with regard to the developments that took place in customary law. Corresponding to Botswana and Lesotho where recognition of customary law is also limited in respect of other personal aspects, for example LGBT's rights. The experience in Australia, Botswana and Lesotho confirms the need to broaden the recognition of customary law in all their aspects, such as in South Africa.

(xiv) Although customary law is also of great value in Australia, customary law is recognised only in certain circumstances. The absence of traditional legal values in its law on the dependency action is clear.

6.3 Critical emerging challenges

An important question posed in this study regarding the dependency action under customary law was whether or not African traditional legal rules and values on the action of dependants, when established, should be integrated with the common law

dependency action. There can be no doubt that the South African Constitution recognises the importance of customary law[1788] and the harmonisation of traditional values with common law. It is also important to note that although customary law systems have valuable features relevant to the dependency action,[1789] the application of customary law in the assessment of damages for loss of support also presents some challenges: "the calculation of loss of support is not simply a straight-forward total of the monthly loss multiplied by the number of months of lost support. The figures are referred to an actuary, who factors in inflation, discounting and various other contingencies[1790] to arrive at a figure which, if invested at a market- related return, will provide support (out of both capital and interest) until the date when the deceased would have stopped working, and thus ceased to support his dependants. For further support after this date, the dependants (eg, widow) must make provision out of the compensation for post-retirement support."[1791] The customary law action of dependants has not necessarily developed or embraced a mechanism similar to the common law principles of assessment of damages for loss of support, hence the judicial process in the customary courts has its own shortcomings in this respect.

As stated above, under customary law, compensation has a habit of looking ahead, with the aim of restoring peace within the society.[1792] Consequently, the traditional awards granted where the breadwinner was negligently and unlawfully killed were matters of pence and chillies,[1793] which undercompensated the dependants and failed to restore them to the positions they would have been in, had there been no wrongful

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1788 See ss 31 39(2) 185 & 211 of the Constitution.
1789 *"Go tsoša/tsosa hlogo"* customary law principle.
1790 See chapter 4 of this thesis.
1791 *Ibid*.
1792 See chapter 4 of this thesis, par 4.2.
1793 According to Palmer *Law of delict* (1970) 19 and Poulter *Legal dualism* (1979) 70, the maximum penalty for killing a breadwinner would be the payment of 10 cows.

act committed against their breadwinner. Although the dependants under customary law have the principle of *molato ga o bole*,[1794] this principle is poorly recognised and seldom utilised in the context and spirit of emphasising the traditional goals of reconciliation and reintegration in dispute resolution.

Based on the above, it is clear that the incorporation of the customary law action of dependants into the common law action, in its current state of lack of assessment principles of damages, would result in the unfair treatment of dependants under customary law and complications could therefore arise. The main goal of the action of the dependants is the protection of the rights of the dependants, whether under or outside customary law. It is submitted that a well-planned and structured legislation addressing the customary law action of dependency in respect of assessment of damages should first be drafted in order to bring the customary law dependency action in line with the provisions relating to the common law dependency action. However, the action of dependency should be flexible and sensitive to the existing principles and practices of customary law, by taking into account the traditional laws and customs of cultural groups, the study cautions that these customs should not contradict the protective spirit of the common law action of dependants. Therefore, the thesis recommends that there should be, through legislation, only one dependency action, and that customary law can be respected in individual cases.

6.4 Brief concluding remarks on the study

In this concluding chapter, several recommendations have been proposed to help establish the correct cultural knowledge, understanding and interpretation of the action of dependants, as presented in this thesis. The thesis provides the setting within which

[1794] See chapter 4 of this thesis, paras 4.6.2 & 4.6.3 for the discussion on *molato ga o bole.*

suggestions are made for future research. By including the customary notion of *go tsoša/tsosa hlogo* in the existing dependency action as an instrument for restorative justice, an opening would have been created for the incorporation of African traditions or values into the South African common law action of dependency, though setbacks from customary law can be very challenging. Therefore, an investigation into the factors that can hinder the incorporation of the traditional values of the action of dependants within the common law action could be a research topic on its own. Future studies in this area should explore in detail the barriers to the integration of customary and civil law dependency actions. Future studies should also focus more on the unification of both actions for the culmination of a single dependency action tailored to fit the whole nation and all its different cultures and religions.

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