A PRINCIPLED APPROACH TO THE COMPUTATION OF DAMAGES UNDER SECTION 8 OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000 FOR LOSSES SUFFERED AS A RESULT OF THE NON-PERFORMANCE OF SOCIAL WELFARE ADMINISTRATORS

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

DUE DATE: 15 February 2006 **SIGNATURE:** Signed by candidate

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'I say,' returned Mr. Micawber, quite forgetting himself, and smiling again, 'the miserable wretch you behold. My advice is, never do to-morrow what you can do to-day. Procrastination is the thief of time. Collar him!'

(Charles Dickens – David Copperfield)

'Tis true! But I don't have the discipline!

ABSTRACT

Social Welfare Departments, particularly in the Eastern Cape, are in disarray. Welfare grant applications are taking many months to be processed and paid. Consequently, those most in need of support are bringing actions against the Department requesting that their applications be considered and where necessary paid out. Applicants have also asked for damages for the losses that they have suffered as a result of tardy administrative payments. Such actions can be brought in the law of delict. However, this paper suggests that actions for damages in the social welfare context may be better suited to administrative law because it is more far reaching than delictual damages. It is suggested, however, that the manner in which delictual damages are quantified forms the basis for administrative law damages. Constitutional and administrative law principles will expand upon these delictual foundations to fashion damages that are better suited to the public law context. An analysis of the relevant case law has crystallized certain principles that the courts have adopted. These principles can be used to formulate appropriate compensation in each contextual scenario that presents itself before the courts. It must be recognized, however, that damages or compensation is only an element of remedial actions that can be adopted by the court. Any award of damages must complement these other approaches with the ultimate goal of administrative efficiency, provision of services and fairness in the Social Welfare Department.

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By Matthew Burnell

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1. INTRODUCTION

The creation of Africa's first welfare state by the South African Government has come under severe criticism by the media and the judiciary as the State, in certain provinces, has failed to fulfil its obligations under the Social Assistance Act[1]. The situation is dire. Jeter, in an article for the *Washington Post*, reiterates the need for an effective and efficient welfare system. He states that

> '[f]our generations get by on the $100 pension that Johannes Khanye collects each month. There are his two daughters, their seven children and their four children, the youngest born only six months ago. Counting the old man, that's 14 people in all: two households, no jobs, no prospects. Still, there are groceries to buy, electric bills to pay, schoolbooks and diapers and always, always, too much month left when the money runs out'.[2]

This brief example illustrates the desperate situation that exists for many South Africans. The non-timeous payment of grants by the State deepens the suffering experienced by those that are most in need of support. This tardy delivery of social grants by provincial welfare departments has resulted in a plethora of cases[3] coming before the court - the

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[1] 59 of 1992.

[2] Jeter J 'South African Weighs a Welfare State System of Payment for All Would be Continent's First' in *Washington Post Foreign Service*. Last accessed on 23 June 2005 at http://www.globalaging.org/pension/world/SouthAfricaExper.htm

[3] *Somyani v Member of the Executive Council for Welfare, Eastern Cape and Another* (SECLD) undated judgment (case no: 1144/01) unreported; *Ndevu v Member of the Executive Council for Welfare, Eastern Cape and Another* (SECLD) undated judgment (case no: 597/02) unreported; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape and Another* 2004 (2) SA 611 (SCA); *Mjenji v Minister of Health, Eastern Cape* 2000 (4) SA 446 (Tk); *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government & Another* 2001 (2) SA 609 (E); *Kate v Member the Executive Council for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE); *Mbanga v MEC for Welfare, Eastern Cape & Another* 2002 (1) SA 359 (SE); *Mahambehlala v MEC for Welfare, Eastern Cape & Another* 2002 (1) SA 342 (SE); *Mashavha v President of the Republic of South Africa & Others* 2004 (12) BCLR (1243 (CC); *Vumazonke v Member of the Executive Council for Social Development, Eastern Cape Province* 2005 (6) SA 229 (SE); *Ntame v Member of the Executive Council, Department of Social Development, Eastern Cape* 2005 (6) SA 248 (SE).

applicants requesting the State to process their welfare grant applications and to enforce payment thereof.

In one of these cases, *Vumazonke v Member of the Executive Council for Social Development, Eastern Cape Province,*[4] Plasket J indicated that in most cases the applicant never received a response from the department until the action was instituted. 'To make matters worse, this situation is not new. Over the last four or five years, judges have commented, often in strident terms, about the unsatisfactory performance of the respondent's department in the administration of the social assistance system in the province'. [5]

The court's desperate pleas to the Department, however, have been ignored. It seems that the Department would rather foot the hefty legal bill than take steps to rectify the 'laziness and incompetence'[6] that lies 'at the root of the malaise in the...Department of Welfare'.[7] In addition to the exorbitant legal costs the Department is accruing, the plaintiffs in these cases are requesting that damages be awarded for losses arising from the State's non-performance. The awarding of compensation may not always be (and in fact in most cases is not) the most appropriate approach to correcting the problem.

In fact, the Supreme Court of Appeal in *Minister of Safety and Security v Van Duivenboden*[8] was at pains to emphasize that holding the State to account

> 'need not always translate constitutional damages into private law duties enforceable by an action for damages, for there will be other appropriate remedies....[For example], where the conduct in issue relates to questions of state policy, or where it affects a broad and indeterminate segment of society, constitutional accountability might at times be appropriately secured through the political process, or through one of the variety of other remedies that the courts are capable of granting'.[9]

The court, however, is mandated to award damages where it is appropriate and necessary for it to do so.

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[4] 2005 (6) SA 229 (SE).
[5] *Vumazonke and Others v Member of the Executive Council for Social Development, Eastern Cape* supra note 3 at [1] – [2].
[6] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* supra note 3 at [18].
[7] Ibid.
[8] 2002 (6) SA 431 (SCA).
[9] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at [21].

Such claims for compensation can be founded in terms of the law of delict, constitutional law or administrative law. It is suggested, however, that instances in which delictual or constitutional claims may be brought are closely conscribed and it will usually be appropriate to seek redress by way of judicial review in terms of the Promotion of Administrative Justice Act (PAJA).[10] This Act makes provision for the court to award compensation in "exceptional circumstances".[11] This paper seeks to address the computation of social welfare damages in terms of this section. It will be argued that the point of departure in quantifying damages under this section is the limited manner in which compensation is awarded in terms of the law of delict. From here, constitutional and administrative law principles will modify this private law approach into something more appropriate for the public law sector.

2. THE LAW OF DAMAGES: ADMINISTRATIVE LAW, CONSTITUTIONAL LAW AND THE LAW OF DELICT

Actions for damages could be founded in administrative law, constitutional law and the law of delict. In determining which of these approaches a welfare applicant could pursue, it is suggested that the administrative law route is the most likely to yield a favourable result. From the outset, damages under constitutional law can be excluded.

In the case of *Jayiya v Member of the Executive Council for Welfare, Eastern Cape*[12] the Supreme Court of Appeal held that it could not award 'constitutional damages' to the applicant. The court said that the PAJA was created to give effect to section 33 of the Constitution. Consequently, this Act should have been the applicant's first point of reference. Constitutional damages, on the other hand, may only be called upon where statutory or common law remedies are not in place. 'Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used'.[13] The result of this judgment is that plaintiffs demanding social welfare damages may only proceed in terms of the law of delict or in terms of the PAJA unless the plaintiffs challenge the constitutionality of the PAJA, in which case they may rely on constitutional law.

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[10] 3 of 2000.
[11] The Promotion of Administrative Justice Act 3 of 2000, s8(1)(c)(ii)(bb)
[12] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* supra note 3.

The Department's failure to consider the applicant's social welfare application falls within the scope of the definition of an 'administrative action' set out in section 1 of the Act. Consequently, the Department's conduct can be the subject of a judicial review. Section 8 of the Act states that '[t]he court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders...setting aside the administrative action and...in exceptional cases...directing the administrator or any other party to proceedings to pay compensation'.[14] Once the applicant has established that his or her case is 'exceptional' – a term which itself is not clear – the court may grant compensation. Compensation can be awarded to achieve numerous objectives. 'Apart from compensating the victim, such awards may be useful in promoting respect for human rights, deterring future violations of rights and punishing public officials for their flagrant disregard of rights'.[15]

The objective of awarding damages in the law of delict, however, is far more specific. These damages are aimed at compensating the plaintiff for the harm he or she suffered as a result of the state's wrongful and culpable conduct. That is, '[d]amages are a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his past as well as future damage'[16] and placing him or her in the position he or she would have been in had the damage-causing event never occurred. This distinction becomes apparent when one considers the difference between unlawfulness in administrative law and wrongfulness under the law of delict.

This is an important distinction that must be made because unlawfulness under administrative law is not synonymous with wrongfulness under the law of delict. The law as it currently stands, in terms of the State Liability Act,[17] is that the State is liable for any damage resulting from the exercise of its statutory powers. Therefore, if the plaintiff is able to prove the delictual elements, damages will be awarded. The State can escape such liability by rebutting one of these elements. This can be achieved by establishing that the disputed conduct was authorised by statute and the violation of any rights was either

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[13] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* supra note 3 at [9].
[14] The Promotion of Administrative Justice Act 3 of 2000, s8(1)(c)(ii)(bb)
[15] Hoexter *The New Constitutional and Administrative Law* Volume Two (2002) at 294. Also see *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) at [17].
[16] Neethling *et al Law of Delict* 4th Ed (2001) at 236.

expressly or impliedly provided for in the statute. That is, if State conduct is *intra vires* the legislation it cannot be wrongful and liability cannot be imputed. It does not follow, however, that liability will arise - in the law of delict - where the state's action is *ultra vires*. In such cases, the administrator's conduct will be *unlawful* in that he or she has acted beyond the four-corners of the statute but that does not mean that this conduct was *wrongful*. In order to fully appreciate this distinction and the impact that it has on the quantification of damages, it is necessary to consider wrongfulness and unlawfulness in more detail.

2.1 Wrongfulness

If wrongfulness cannot be equated with unlawfulness, it is necessary to consider the scope of application of each of these terms. Wrongful conduct is legally reprehensible or unreasonable conduct. *Prima facie* an omission or a failure to act to prevent harm to another is not wrongful. Consequently, if the conduct is not wrongful, then liability cannot be imputed to the individual who failed to act. It follows, therefore, that liability only flows from a wrongful omission.

Conduct (and this includes an omission) is only wrongful if the respondent was under a specific legal duty to act positively to prevent harm to the plaintiff under circumstances and he failed to fulfil this responsibility.[18] In assessing whether such a legal duty exists, the courts must objectively consider whether, in the circumstances, the community believes that the State should be held delictually liable for its non-performance. It is impossible to determine which factors the courts must consider in assessing the existence of this duty. However, a consideration of the case law illustrates that certain elements indicate the existence of such a duty. These factors include, *inter alia,* prior conduct, control of a dangerous object and most importantly, within this context, legal duties created through legislation.

Any damage caused pursuant to the exercise of a statutory duty is *prima facie* wrongful. Notably, however, it is not the infringement of the statutory duty that renders the conduct wrongful, but rather the infringement of the legal interest. McKerron, in his

[17] 20 of 1957.
[18] Neethling *et al op cit* note 16 at 58.

analysis of the case law, lists 5 elements that the plaintiff must prove in order to establish the violation of a legal interest and thus wrongfulness:[19]

(i) The legislation in question must provide the plaintiff with a remedy in private law;
(ii) The statutory duty created is aimed at specifically protecting the plaintiff;
(iii) The resultant harm and the circumstances in which it arose are those contemplated by the legislative provisions;
(iv) The defendant must, in fact, have acted outside the scope of the legislation; and
(v) The harm the plaintiff suffers must have been the result of the defendant's *ultra vires* action.

These elements will be discussed briefly in turn below.

2.1.1 The legislation in question must provide the plaintiff with a remedy in private law

The existence of such a private law remedy will require the courts to consider the statute in its entirety in order to determine whether the legislature intended such remedial action. The point of departure is that if the statute protects the interests of a class of people, of which the plaintiff is a member, then - unless the statute states otherwise - the plaintiff will have an action under private law.[20] Similarly, the courts find disfavour in allowing actions for damages to protect individual interests where the governing legislation is aimed at protecting the public interest.[21]

It has also been suggested that where legislation prescribes a specific remedy then the legislature intended for such remedy to trump,[22] and not exclude,[23] private law actions. That is, 'if it be clear from the language of a statute that the Legislature, in

[19] McKerron *The Law of Delict* (1971) at 257.
[20] *Da Silva and Another v Coutinho* 1971 (3) SA 123 at 134H.
[21] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A); *Ellis v Vickerman* 1954 (3) SA 1001 (C).
[22] *Von Moltke v Costa Areosa (Pty) Ltd* 1975 (1) SA 255 (C).
[23] *Coetzee v Fick* 1926 TPD 213.

creating an obligation, has confined the party complaining of its non-performance, or suffering from its breach, to a particular remedy, such party is restricted thereto'.[24] It has been suggested that, in certain situations, where no private law remedy has been provided for in the legislation, the legal convictions of the community, moulded by the Constitution, would allow the courts to prescribe a remedy.[25]

Davis J argues that if 'the principle of accountability is intrinsic to the legal convictions of the community, and hence to our transformed legal culture, it must follow that a remedy should be available to a person wishing to hold an authority accountable for actions which he or she can show were negligent and satisfied the requirements of legal causation and damages'.[26] Despite this reading in of delictual remedies in the name of the Constitution, the scope of the available remedy is still limited. This is because, as is discussed in more detail below,[27] the available remedy is chained to the empowering legislation. All that need be said now is that the remedy that is awarded must be expressly or implicitly present in the legislation to rectify the harm caused from the breach of a specific duty created in that legislation.

2.1.2 The statutory duty created is aimed at specifically protecting the plaintiff

This notion of the existence of a legal duty specific to the plaintiff was decided by the Appellate Division in *Knop v Johannesburg City Council.*[28] In this case, the defendant City Council granted, in breach of the governing legislation, the subdivision of the plaintiff's property. When the Council realised its error, it ordered the plaintiff to halt all the developments in respect of the land. As a result the plaintiff suffered financial loss.

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[24] *Callinicos v Burman* 1963 (1) SA 489 (AD) at 497H – 98A.
[25] *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) at 66.
[26] *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* supra note 25 at 64. There is argument as to whether negligence can be determined before wrongfulness as Davis J did in this case. See further Neethling *op cit* note 15 at 119 fn 6 which lists the following cases: *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA); *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C); *African Life Assurance Co Ltd v NBS Bank Ltd* 2001 (1) SA 432 (W); *Dersely v Minister van Veiligheid en Sekuriteit* 2001 (1) SA 1047 (T); *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W); *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA); *Mkhatswa v Minister of Defence* 2000 (1) SA 1004 (SCA); *Mukheiber v Raath*1999 (3) SA 1065 (SCA); *Goldstein v Cathkin Park Hotel* 2000 (4) SA 1019 (SCA); *Standard Bank of South Africa Ltd v OK Bazaars (1929) Ltd*2000 (4) SA 382 (W).
[27] At page 7 – 8.
[28] 1995 (2) SA 1 (A).

In order to reclaim this loss, the plaintiff brought the matter to court arguing that the defendant was under a legal duty to act in accordance with the legislative scheme and thus prevent him from suffering loss. Botha JA agreed with the applicant to the extent that the empowering legislation

> 'imposes a duty on the local authority to ensure that the proposed subdivision will not fall foul of the provisions of the scheme in question, *but* it is not a duty owed by the local authority to the applicant for subdivision. The object of the provision is certainly not to protect an applicant against economic loss. Its object is to promote public order by ensuring that the township development takes place in accordance with the applicable scheme, in the interests of the inhabitants of the area as a whole and in the furtherance of the precepts governing the general purpose of the scheme'.[29] [Emphasis added].

This case illustrates that the creation of a legal duty flows from the empowering legislation. It shows further that the legal duty exists only in respect of the purposes the legislation seeks to achieve. Therefore, any remedial action – even in terms of the constitutional principle of accountability – can only be for a breach of the legal duties intended in the statute. If the legislation did not intend a legal duty to exist, then no duty was owed to a specific plaintiff and therefore non-action by the defendant could not have been wrongful.

The *Faircape Property Holdings*[30] case seems to extend this last statement. This is because Davis J incorporated the principle of accountability in the form of the legal convictions of the community in proving that *negligent* conduct in the exercising of the legal duty set out in the legislation rendered the conduct wrongful. In this way, the element of negligence is established prior to proving the requirement of wrongfulness. Criticism has been levelled against this approach because to determine the existence of fault (in the form of negligence or intent) requires wrongfulness to have already been established. This judgment, therefore, is effectively placing the cart before the horse.[31] However, in certain cases,[32] the courts have dealt with the enquiry into negligence before considering wrongfulness, stating that wrongfulness will not arise if negligence has not been established. The question of whether wrongfulness must precede negligence or vice versa is a moot point with case law in support of either approach. This paper does not wish to enter the debate; it merely seeks to indicate that no matter how wrongfulness is

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[29] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 33J – 34B.
[30] *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* supra note 25.
[31] For a more detailed discussion see Neethling *op cit* note 16 at 119 fn 6.
[32] Ibid.

established, it can only be determined with reference to the specific legal duty set out in the legislation. As a result, the wrongful conduct may be inflicted on those individuals to whom the legal duty was owed and not against any injured plaintiff.

2.1.3 The resultant harm and the circumstances in which it arose are those contemplated by the legislative provisions

The example given in the textbooks to illustrate this point is the English case of *Gorris v Scott.*[33] In this case, '[t]he defendant, a ship owner, transported the plaintiff's sheep. The sheep were washed overboard and lost as a result of the absence of pens of the kind required by certain statutory regulations. The court held that the defendant was not liable, because the purpose of the regulations was not to avoid occurrences such as the one complained of, but to prevent the spread of contagious diseases among animals'.[34] Had the sheep died of a disease it contracted during transit then Mr Gorris would have been successful in his claim for damages. The *Knop case* is another example. These examples illustrate that the damages that may be awarded are tied to the purpose of the legislative provisions.

2.1.4 The defendant must, in fact, have acted outside the scope of the legislation

The defendant's conduct cannot be wrongful if he acted within the scope of the empowering legislation. Therefore, the court must objectively assess whether the defendant in fact acted in terms of the statute. If he did, then the infringement of any right is not punishable in terms of delict.

2.1.5 The harm the plaintiff suffers must have been the result of the defendant's ultra vires action

The court will be required to assess the existence of a causal connection between the breach of the statutory provision and the loss suffered. That is, the court must assess

[33] (1874) LR 9 Ex 125.
[34] *Gorris v Scott* (1874) LR 9 Ex 125.

whether the breach of the statutory duty was the factual[35] and legal[36] cause of the harm suffered by the plaintiff.

These factors do not constitute a closed list. They are merely guidelines to the courts in assessing wrongfulness in light of the legal convictions of the community in order to determine whether the State should be held delictually liable. Imputing liability under the heading of 'unlawfulness', however, is not restricted to prescribed remedies set out in the legislation.

2.2 Lawfulness

An important distinction between lawfulness and wrongfulness is the nature of the *ultra vires* doctrine. In the wrongfulness context, it is used in a very narrow sense. That is, has the administrator literally acted within or outside the scope of the power granted him under the empowering legislation. However, as Henderson has convincingly argued, in the new constitutional era that South Africa has entered into, the notion of *ultra vires* is far broader.[37] He reiterates the arguments put forward by other academics in suggesting that the principle of lawfulness requires administrators to act within in the scope of the authorising statute and the common law rules that give effect to legislative intent.[38] 'The Constitution not only requires the constitutional validity of those rules, because *all* law must be consistent with the Constitution, but also facilitates a court's declaration of the intentions of the legislature. The legislature will intend that the acts of agents of the executive be in accordance with the Constitution'.[39] In this way, an administrator can act unlawfully by breaching the literal scope of his or her legislative jurisdiction as well as acting contrary to the principle of legality or, as it is also called, the principle of constitutionality.

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[35] *Minister of Police v Skosana* 1977 (1) SA 21 (A) at 34E; *Siman & Co v Barclays National Bank* 1984 (2) SA 888 (A) at 907D – H.
[36] *Smit v Abrahams* 1994 (4) SA 1 (A).
[37] Henderson A 'The Curative Powers of the Constitution: Constitutionality and the New Ultra Vires Doctrine in the Justification and Explanation of the Judicial Administrative Action' (1998) 115 *SALJ* 346 at 351 – 358.
[38] Henderson A *op cit* note 37 at 353.
[39] [Emphasis in original article]. Ibid.

The Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[40] stated that this principle of legality is an element of the rule of law and is 'implicit in the Constitution'.[41] The content of the principle is determined through the interpretation of the Constitution as a whole, relative to the factual context. Thus far, the courts have found that the principle includes the requirement that authorities must act within the scope of the powers conferred upon them,[42] they must not misconstrue their powers[43] or act in an arbitrary or irrational manner.[44] In this way, unlike wrongfulness, the unlawfulness of an administrative action is not chained to the governing legislation or the existence of a legal duty. As a result, the factors that can be taken into consideration in the quantification of damages are far more extensive in judicial review of unlawful administrative action than in cases of delictual liability. However, the polarity of this distinction was somewhat collapsed by Davis J in his extension of the element of wrongfulness in the case of *Faircape Property Developers (Pty) Ltd v Premier, Western Cape.*[45]

The Cape High Court held that 'the principle of accountability is intrinsic to the legal convictions of the community, and hence to our transformed legal culture...Thus our law has reached a point where the legal convictions of the community would consider the negligent decisions by a public authority to represent wrongful conduct'.[46] This decision was overturned, for different reasons, on appeal to the Supreme Court of Appeal.[47] The appeal court has subsequently endorsed Davis J's reasoning, albeit in *obiter*, in the *Olitzki Property Holdings*[48] case, holding that 'in deciding whether a statutory provision grounds a claim in damages the determination of the legal convictions of the community must take account of the spirit, purport and objects of the Constitution, and that the constitutional principle of justification embraces the concept of accountability'.[49]

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[40] 1998 (2) SA 374 (CC).
[41] *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1998 (2) SA 374 (CC) at [59].
[42] *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* supra note 41 at [56 – 58].
[43] *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 1999 (10) BCLR (CC) at [148].
[44] *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at [85].
[45] 2000 (2) SA 54 (C).
[46] *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* supra note 25 at 65G – I.
[47] *Premier of the Western Cape v Faircape Property Developers (Pty) Ltd* 2003 2 All SA 465 (SCA).
[48] *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA).
[49] *Olitzki Property Holdings v State Tender Board* supra note 48 at [31].

Despite the widening of the element of wrongfulness through the incorporation of the Constitution, it can still only be seen as a subset of (and not synonymous to) unlawfulness. That is, conduct is said to be unlawful if it does not comply with the broad notion of *ultra vires* as illustrated above. Conduct that is deemed wrongful, on the other hand, is more closely linked to the governing legislation. This is because the legislation will set out the scope and nature of the legal duty. Marais JA, for the minority, held in *Van Duivenboden v Minister of Safety & Security*[50] that the determination of a legal duty and thus wrongfulness need not always have regard to the Constitution. Relying on *Seema v Lid van die Uitvoerende Raad vir Gesondheid, Gauteng*[51] he found that a legal duty existed based on the factual matrix of the case at hand. Determining unlawfulness, however, will always require the Constitution itself to have been breached.

In order for damages to be awarded in delict, the plaintiff must establish not only the existence of a legal duty but also that the legal duty was owed specifically to that plaintiff. For example, in the *Knop case*, damages were not awarded to the plaintiff because the legislation was aimed at promoting public order and not protecting the plaintiff from sustaining financial loss. Therefore, in this case no legal duty was owed to the plaintiff and consequently no damages could be awarded. The existence of a legal duty specific to the plaintiff alone is insufficient to trigger damages. The breach of the legal duty must be accompanied by a desire to hold the administrator *delictually* liable. This desire is assessed according to the legal convictions of the community. Correctly, Davis J in the *Faircape Property Holdings* case moulded legal convictions of the community in a constitutional fashion in holding administrators accountable. A further indication that damages under wrongfulness are less as extensive as under unlawfulness is to consider the nature and purpose of the law of delict.

Delictual damages are corrective in nature. That is, lump-sum, once-off damages are awarded to the plaintiff for the damages he or she has sustained as a result of the defendant's wrongful conduct. Furthermore, the damages are specific to the parties and are not aimed achieving a broader more general objective. Administrative and constitutional law damages, on the other hand, are far more prospective in nature, they

[50] *Van Duivenboden v Minister of Safety and Security op cit* note 9.
[51] 2002 (1) SA 771 (T).

seek to compensate the injured individual as well as guide administrators and the general public in their future conduct. Furthermore, these damages are far more politicized and publicised. The distinctions drawn above indicate that wrongfulness is a far narrower and far less reaching enquiry than that of unlawfulness. As a result, the considerations taken into account in assessing damages under wrongfulness will be more restrictive than in the assessment of damages under section 8 of PAJA. It is argued, however, the manner in which damages are quantified in these more restrictive circumstances will form the basis from which damages under section 8 can be determined and expanded upon using public law principles.

3. QUANTIFYING DAMAGES IN DELICT

One of the delictual requirements is that the plaintiff, as a result of the defendant's wrongful and culpable conduct, must have suffered harm.[52] Once all these delictual elements have been established, the courts are required to assess and quantify the damage suffered by the plaintiff. The assessment of damage involves the court considering the extent of the harm suffered while quantifying damage requires the courts to attach a monetary value to the sustained loss. The ease with which the courts can assess and quantify damage largely depends on the nature of the alleged damage. That is, are the plaintiff's patrimonial or non-patrimonial interests impinged?

According to Neethling *et al* '[p]atrimonial loss...is the diminution in the utility of a patrimonial interest in satisfying the legally recognised needs of the person entitled to such interest. It can also be seen as the loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of such patrimony (a patrimonial debt)'.[53] The authors go on to state that patrimonial loss may take the form of *inter alia* loss of profit, damage to property, pure economic loss, consequential loss and general and specific damages.[54] Non-patrimonial loss \ damage, on the other hand, refers to the diminution in the personality (rather than the patrimonial) interests of the plaintiff. The effect of this distinction is that, patrimonial interests are assessed in monetary terms (a quantitative measure) while a reduction in personality interests

[52] There are some general exceptions to this rule. For example, the plaintiff can sue under delict for trespass without suffering any physical harm or damage.
[53] Neethling *et al op cit* note 16 at 219.
[54] Neethling *et al op cit* note 16 at 221 – 2.

involves a diminution in the quality of life.[55] This distinction has been teased out further by McKerron. He categorises damages as '(a) all pecuniary losses already sustained; (b) non-patrimonial loss...and (c) prospective expenses [and losses] and loss of earning capacity'.[56] The manner in which damages are assessed and quantified under each of these headings is different. Each of these headings are discussed below in order to determine the platform from which administrative law \ social welfare damages can be fashioned.

3.1 All Pecuniary Losses Already Sustained

This element is probably the least controversial as the determination of the damages (that is the loss sustained) is a factual enquiry into the monetary loss he or she suffered as a result of the damage causing event. [57] In this way, the assessment of damage and the actual award of damage overlap. The compensatory nature of the law of delict aims to place the plaintiff in the financial position he or she would have been in had the damage-causing event never occurred. 'This requires that the plaintiff be awarded the diminution in value of the property that the delict has brought about as well as any consequential loss if it is not too remote'.[58] The case of *Erasmus v Davies*[59] is an example of the manner in which compensation for pecuniary loss is calculated.

In this case, the plaintiff and the defendant were involved in a motor vehicle accident. The value of the damages awarded to the plaintiff was determined according to the diminution of the market value of the vehicle.[60] That is, the 'estimate[d] loss...measured by a comparison of market value before and after the damage causing event'.[61] The determination of such pecuniary values is generally not problematical because it is calculable. All that is required is that the plaintiff lodge proof of his loss with the court. This normally takes the form of invoices, receipts and quotations. Consequently, the court is not called upon to exercise its discretion and pluck a monetary

[55] Visser *et al Visser & Potgieter's The Law of Damages* 2nd Ed (2003) at 24.
[56] Ibid. McKerron *op cit* note 19 at 117 – 8.
[57] Joubert *The Law of South Africa* vol 7 First Reissue (1998) at para 80. Also see *Marais v Louttit* 1911 TPD 307.
[58] Glazewski 'Environmental Law in South Africa' 2nd Ed (2005) at 544.
[59] 1969 (2) SA 1 (AD).
[60] Visser *et al op cit* note 55 at 367.

value out of the air that the defendant must pay to compensate the plaintiff. Such exercises of discretion, however, are required in assessing damages for non-patrimonial loss and – to a lesser extent – the determination of prospective expenses and loss of earning capacity.

3.2 Non-patrimonial loss

As in the case of patrimonial loss, non-patrimonial damage is assessed by determining the 'utility or quality of the personality interests in question before and after the delict...in order to establish the existence and extent of the loss'.[62] The assessment comprises of an objective and / or a subjective element.

The objective element refers to a manifest impairment of the plaintiff's patrimonial interests that can be determined by an independent third party. For example, where the damage-causing event was a defamatory statement that diminished the plaintiff's reputation. The manner in which the community responds to the plaintiff after the statement has been made can be objectively determined.

The subjective element, on the other hand, is far more difficult to assess. This is because the extent of the loss suffered exists solely in the mind of the plaintiff and the manner in which he or she responds to the damage-causing event. As a result, the magnitude of the loss suffered is very difficult to compute. An example of this genre of loss would be pain and suffering or loss of amenities of life. Compensation can be claimed for any pain and suffering experienced by the plaintiff as a result of the damage-causing event as well as subsequent events (such as medical treatment).[63] These losses, however, cannot be tangibly assessed.

Determining an appropriate monetary amount to compensate the plaintiff for such objective and subjective damage, therefore, requires the court to exercise its discretion. In reaching this value the courts are guided by a number of factors:

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[61] Visser *et al op cit* note 55 at 367 – 8 and the following cases cited therein: *Smit v Saipem*1974 (4) SA 918 (A); *Erasmus v Davies* 1969 (2) SA 1 (A); *Janke v Ras* 1965 (4) SA 583 (T); *West Rand Steam Laundry Ltd v Waks* 1954 (2) SA 394 (T); *Du Plessis v Nel* 1961 (2) SA 97 (GW).
[62] Neethling *et al op cit* note 16 at 244.
[63] *Van der Westhuzien v Du Preez* 1928 TPD 45 at 49.

3.2.1 The extent of the non-patrimonial loss[64]

The extent of the non-patrimonial loss involves a consideration of the intensity, nature and duration of the injury. The pain and discomfort suffered by the plaintiff in each case is of a personal nature. As a result, the quantification of damage cannot easily be calculated. The court, therefore, must consider the nature of the injury suffered in conjunction with 'the plaintiff's age (and expectation of life), gender, social status, culture and lifestyle, race (which is obviously not relevant per se), and degree of consciousness'.[65] These criteria will manipulate the monetary amount that the court may award.

3.2.2 The Object of Compensation[66]

Once the court has determined the nature and extent of the harm suffered by the plaintiff, it can consider the object that the awarding of compensation is aimed at remedying. This is because the awarding of damages in this context (unlike patrimonial loss) cannot be used to restore the non-patrimonial interest. The object of compensation must be considered on a casuistic basis. Visser and Potgieter list a number of examples. They say that damages may 'be intended as (a) a counterbalance to a plaintiff's unhappiness, or (b) to give him the ability to overcome the effects of his injuries, or (c) to provide psychological satisfaction for the injustice done to him'.[67]

3.2.3 Effectiveness of Compensation[68]

In addition to the object that the compensation is aimed at remedying, the court must consider how effective the awarding of compensation will be in achieving this identified objective. This involves the incorporation of factors that do not directly impact upon the assessment of non-pecuniary loss but are relevant to the awarding of compensation generally. For example, the 'plaintiff's financial status may...give an indication of his

[64] Visser *et al op cit* note 55 at 436.
[65] Ibid.
[66] Ibid.
[67] Visser *et al op cit* note 55 at 437.
[68] Ibid.

culture and lifestyle, which may, in turn, be relevant in determining the extent of some forms of non-patrimonial loss (eg loss of the amenities of life)'.[69] This means that the award of damages must be proportionate to the actual harm suffered by the plaintiff. Damages awards are aimed at placing the plaintiff in the position he or she would have been in had the damage-causing event never occurred. Therefore, the award of damages must attempt (as far as is possible) to isolate the object to be compensated and effectively achieve it. This, however, is not foolproof as money is often not a substitute for the loss suffered.

3.2.4 Principles of fairness and conservation[70]

In awarding damages to effectively compensate the plaintiff, the court must ensure that the award does not unduly prejudice the defendant. The court must ensure that there is fairness between the parties. The court 'must take care to see that its award is fair to both sides – it must give compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense'.[71] What constitutes fairness, however, is vague and uncertain. It involves a casuistic assessment of numerous components including, *inter alia*, the relevant circumstances that indicate the extent of the non-pecuniary loss and the ignoring of factors such as undue sympathy to the plaintiff. Furthermore, the court must exercise its discretion conservatively in awarding damages. It is suggested that it is better to award too little rather than too much money. This is because damages should not unnecessarily burden the defendant at the expense of the plaintiff.[72]

3.2.5 Comparable case law[73]

Fairness between the parties can best be achieved by considering comparable case law. The courts must consider the awards of damages in similar cases in determining the

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[69] Ibid. Also see the cases cited thereunder at footnote 27 *Strougar v Charlier* 1974 (1) SA 225; *Jojo v William Bain & Co Ltd* 1941 SR 72; *Mkize v South British Ins Co Ltd* 1948 (4) SA 33 (D); *Witham v Minister of Home Affairs* 1989 (1) SA 116 (Z).
[70] Visser *et al op cit* note 55 at 438.
[71] *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) at 287.
[72] Visser *et al op cit* note 55 at 438 – 9.
[73] Visser *et al op cit* note 55 *at* 439 – 442.

amount that must be awarded in the present case before the court. The problems associated with the calculation of damages is that

> '[i]n the nature of things no two cases are likely to be identical or sufficiently similar so that the award in one can be used as an accurate yardstick in the other...The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess'.[74]

Despite the court's declaration that the quantification of damages is nothing more than guesswork, it must – at least – be educated guesswork. That is, consideration must be given to the specific factual environment of the case as well as general principles on the quantification of damages.

Previous awards of damages, however, must not act as a limiting factor. That is, the court's general discretion in awarding damages must not be fettered by the decisions in previous cases. These cases must rather afford the court some guidance in fashioning an award of damages so that the damages granted are not grossly inconsistent with past awards. In this way, the court can consider the different factual considerations in the precedents and in the case at hand and alter the amount accordingly. Practically, this involves the courts taking the similarity of physical injuries, nature and intensity of medical treatment, the permanence of certain injuries, the loss of the amenities of life and the age of the plaintiff into account.[75]

By using these factors as a 'check-list' in computing damages, the courts can make an educated assumption as to what would be an appropriate award of damages for non-patrimonial loss in the circumstances. Many of the same difficulties concerning computing damages for non-patrimonial loss are experienced by the court when fashioning damages for prospective expenses and consequential loss.

3.3 Prospective Expenses and Consequential Loss

Prospective damage is an important element of compensation in the law of delict. This is because, '[f]rom a practical point of view, prospective damage is damage in the form of

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[74] *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and Others* 2001 (3) SA 242 (SCA) at 260E – G.
[75] Visser *et al op cit* note 55 at 441.

patrimonial (or non-patrimonial) loss which will, with a sufficient degree of probability, materialise after the date of assessment of damage resulting from an earlier damage-causing event'.[76] The problem with prospective damage is that the quantification of future expenses or losses are speculative and no empirical data exists that can accurately predict future events. However, the court is required to quantify a once-off lump sum amount that the defendant must pay to the plaintiff to compensate him or her for the loss he or she has already suffered as well as the losses he or she will sustain in the future as a result of the damage-causing event.[77] These losses include the loss of future income, business, support or profit and future expenses arising because of the damage-causing event such as medical expenses.

The most common actions for damages are claims for 'future medical expenses' and 'loss of earning capacity'. The manner in which damages under these categories are calculated is different.

In the case of prospective medical expenses, the plaintiff is not required to prove that such medical expenses will be incurred. All that is required is that he or she can establish that there is a reasonable possibility that such costs may arise.[78] In support of this claim, the plaintiff should obtain expert medical evidence. 'A plaintiff's medico-legal report should thus also deal with his [or her] prognosis (the future development of his injuries and their consequence) as well as the nature and cost of the required treatment'.[79] On this basis, the court will, at the date of the trial, assess the cost of such treatment and approximate an amount that will cover such expenses in the future should they arise. 'In the nature of things an award under this head will tend to be approximate to the point of arbitrariness'.[80] This arbitrariness seems to be the common denominator in damage calculation under this heading. The loss of the capacity to earn a salary is also determined by considering random approaches.

> 'An attempt at mathematical precision – particularly with an annuity basis – has sometimes been decried. So, on the other hand, has any award by mere intuitive

[76] Neethling *et al op cit* note 16 at 224.
[77] Joubert *op cit* note 57 at para 79. Also see the following cases cited thereunder: *Wille v Yorkshire Insurance Co Ltd* 1962 (1) SA 183 (D) at 187; *Roberts v Northern Assurance Co Ltd* 1964 (4) SA 531 (D); *Ncubu v National Employers General Insurance Co Ltd* 1988 (2) SA 190 (N) at 200.
[78] Joubert *op cit* note 57 at para 80 and the cases cited there: *Swanepoel v Parity Insurance Co Ltd* 1963 (3) SA 819 (W); *Beverly v Mutual & Federal Insurance Co Ltd* 1988 (2) SA 267 (D).
[79] Visser *et al op cit* note 55 at 403.
[80] Joubert *op cit* note 57 at para 80.

> assessment. The middle way is a recognition that exact mathematical computation is impossible, but that a calculation on an annuity basis is an appropriate guide though not a peremptory one. An award of this type is designed to provide such a sum presently payable as will give to the plaintiff a periodic payment calculated in such a way that at the end of the appropriate period there will be no capital sum left. The period must be computed on the basis of life expectancy, natural or reduced. Thus the present value of the plaintiff's future income but for the disability is first calculated and from that is deducted the present value of his or her future income with the disability. This is then adjusted according to appropriate contingencies'.[81]

The courts have a very broad discretion in fashioning these damages and will consider the 'benefits which a plaintiff has received or will probably receive on account of his loss[es]'.[82]

These include elements such as insurance pay-outs, pensions or donations and can be used to reduce the amount of damages awarded by the court.[83] In this way, the courts consider not only the negative effects of the damage-causing event but also the positive elements. These considerations will form the departure point on which damages in the social welfare context can be fashioned. However, as will be discussed in the next section, the wholesale incorporation of this delictual classification and all its principles is not always appropriate in the defence of constitutional rights and in actions against the State.

4. APPLICATION OF THIS DELICTUAL CATEGORISATION TO THE SOCIAL WELFARE SITUATION

At this point, it is necessary to apply this delictual classification to losses suffered from the malperformance of social welfare administrators and adjust it in a manner more suited to its public law setting.

4.1 All Pecuniary Losses Already Sustained

It will be recalled that pecuniary loss is the retrospective calculable loss that the plaintiff has suffered. In the context of social welfare, such a loss would arise where the Welfare Department has failed to make payment of the grant to the eligible individual. In the case

[81] Joubert *op cit* note 57 at para 82.
[82] Joubert *op cit* note 57 at para 43.
[83] *Van Heerden v African Guarantee and Indemnity Co. Ltd* 1951 (3) SA 730 (C).

of *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape*[84] the applicants were the recipients of social grants. The applicants alleged that their grants were unlawfully suspended or cancelled. They claimed, and it was not opposed, that they were not given the opportunity to make representation to the Department prior to the decision to cancel or suspend their grants.

Froneman J, sitting in the Eastern Cape High Court, found in favour of the applicants. He held that, the Welfare Department's decision to cancel the applicant's disability grant was unlawful and invalid. He ordered that the applicants be paid the value of their grants from the date of cancellation, 'together with interest thereon at 15,5% per year from the date of judgment to [the] date of payment'.[85] In this case, the loss that was suffered by the right-holder is easily calculable. The court must multiply the value of the grant (which is a known amount) by the number of months in which it has not been paid out (a determinable value). The resultant value is the loss suffered by the right-holder on which interest can be calculated. Not all the welfare cases, however, fit neatly into this mould.

This initially became apparent in the cases of *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape*[86] and *Mbanga v Member of the Executive Council for Welfare* where the number of months in which the grant should not have been paid cannot be easily established.[87] In *Mahambehlala*[88] the applicant alleged that 'a period of three months would be "more than sufficient" for a decision to be made in respect of an application for a social grant, and that a number of her constitutional rights had been infringed by the failure...to take a decision on her application'.[89] Consequently, she sought an order requesting the respondent

- to commence payment of her grant as if it has been approved on 7 June 2000, 3 months after she made her application;
- to continue payment for as long as she is eligible to receive support under the grant; and

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[84] *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape* supra note 3.
[85] *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape* supra note 3 at 629 – 30.
[86] 2000 (9) BCLR 899 (SE).
[87] 2002 (1) SA 359 (SE).
[88] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3.
[89] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 347.

- 'to pay interest on amounts which should have been paid calculated at the currently prescribed legal rate of 15,5% per annum commencing from 7 June 2000'.[90]

The respondents, on the other hand, argued that the applicant's disability grant was approved on 9 November 2000 and that – although applications should "ideally" be processed within three months – the nine months it took the Department to take a decision was not unreasonable.[91] Consequently the court needed to determine the date on which the social grant accrued. Once this date is established, the court would be able to calculate the back payments and interest that must be paid to the applicant.

Determining the date of accrual, however, was a controversial matter. According to reg 11(1) of the regulations, '[t]he date of accrual of a grant shall be the date on which the Director-General approves the application for the grant in terms of reg 25(1): Provided that a grant shall not accrue for a period exceeding three months from the date of approval of the grant'.[92] This regulation is cryptic. The first half of the regulation indicates that the date of accrual is the date of approval. The proviso, however, provided that 'a grant *shall not accrue for a period exceeding three months from the date of its approval*,...is wholly inconsistent with the provision in the subregulation itself. It is this inconsistency which, understandably, has led to the confusion'.[93] In trying to solve this conundrum it was argued that the provision is equivocal. It states that a social grant must accrue on the date of approval but the proviso requires that a grant must not accrue in excess of three months from the date of approval. Leach J said that the only logical interpretation would be to read the proviso as stating that payment must be paid for a period of not longer than three months. However, this cannot have been the Minister's intention when creating the regulations as the regulations prescribes for grants that extend for periods much longer than three months. It was also suggested that the Minister intended for grants to be back paid by three months from the date of approval of the grant. This argument was also dismissed on the ground that there was no evidence that supported such an interpretation.[94]

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[90] Ibid.
[91] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 348.
[92] Government Notice R418 of 31 March 1998, reg 11(1).
[93] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 348.
[94] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 349.

Ultimately, the Judge went on to say that the proviso is vague and confusing and can be severed from that part of the regulation which is clear and certain. He held that what is clear and certain is that the social grant will accrue on the day that it is approved, that is, from 9 November 2000.[95] The problem with such an interpretation is that the department's torpid response to processing administrative grants is protected rather than challenged. That is, if the date of accrual is only the date of approval of the grant then the department is not penalised for taking 9 months or 3 years or even ten years to process an application. Such a delay in approving grants impinges upon the applicants' right to lawful, reasonable and procedurally fair administrative action. Therefore, a more favourable argument is one that recognizes the needs of social welfare grant recipients. That is, for the department to process the grant within a reasonable time and to make payment of the grant from that date.

It was suggested that three months would be more than sufficient time to reasonably process the social grant application. Although this assertion was unsubstantiated, the honourable judge looked favourably on the applicant. He held that despite the applicant's claim being unsubstantiated, the Department gave no reason why three months was not unreasonable especially since the application was immediately processed once the proceedings were launched. 'This leads to the inevitable inference that it was the institution of proceedings which led to her application being processed and that, had she not done so, the administrative sloth and inefficiency which currently bedevils the Department of Welfare of the Eastern Cape...would have continued and her application would not have been considered when it was'.[96] Consequently, Leach J found that the applicant's right to administrative justice had been infringed and in terms of section 38 of the Constitution, he was authorised to grant 'appropriate relief'.

What constitutes 'appropriate relief' is assessed on a case by case basis. In certain situations, the application of the common law remedies will be appropriate. However, the court is not limited to these remedies. In *Fose v Minister of Safety and Security*[97] Ackermann J held

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[95] Ibid.
[96] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 352.
[97] 1997 (7) BCLR 851 (CC).

> 'that there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce chap 3 [(chap 2 under the Final Constitution)] rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right, if on a proper construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in a claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right that has been infringed'.[98]

That is, an appropriate (and therefore an effective) remedy is one that is 'determined against the background of a large proportion of the living in this province being poor, access to legal assistance being limited and the necessary financial assistance to take an unhelpful and unresponsive public administration to court being problematic'.[99] Furthermore, the remedy must be just and equitable attempting 'to synchronise the real world with the ideal construct of a constitutional world'.[100] In achieving this goal, the court is obligated to consider the democratic principles of public administration set out in section 195(1) of the Constitution. This section 'provides that public administration should be governed by the democratic values and principle enshrined in the Constitution, including the maintenance of a high standard of professional ethics, the provision of services impartially, fairly, equitably and without bias, and the necessity to respond to the needs of the people'.[101] Finally, the award of appropriate relief (be it prospective or retrospective[102] in nature) must be 'specifically fitted or suitable'[103] to the contextual scenario.

Taking these factors into consideration, Leach J, in quantifying the plaintiff's compensation, looked at two constituents: firstly, the back paying of the grants to the date by which the application should have reasonably been approved (i.e. within three months of applying for the grant) rather than the date of accrual, and secondly, the matter of interest.

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[98] *Fose v Minister of Safety and Security* supra note 15 at [60].
[99] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 355.
[100] *Fose v Minister of Safety and Security* supra note 15 at [94] as quoted by Leach J in *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 355.
[101] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 356.
[102] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) at [229].
[103] The 'specifically fitted or suitable' test was coined by Kriegler J in *Fose v Minister of Safety and Security* supra note 15 at [97].

In respect of the former amount he held that it would be 'just and equitable for an aggrieved person in the position of the applicant to be placed in the same position in which she would have been in had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed, and that relief placing her in such a position would be 'appropriate' as envisaged by the Constitution'.[104] In this way, the manner in which damages are calculated overlaps with the 'all pecuniary loss already sustained' category in the law of delict. That is, the value of the grant multiplied by the number of months for which it was not paid after the initial three month period in which the application could reasonable have been expected to have been processed. Although the formula relied on when calculating damages in the law of delict and in this context is identical, the justification for such a calculation in these situations is different in that in delict the calculation of damages is cold hard factual arithmetic while determining the reasonable date of accrual factors in elements of fairness.

Under the common law, 'interest is not payable unless there is either an agreement to pay it or default or *mora* on the part of the defendant'.[105] It cannot be said that the parties had agreed that interest would be paid from 7 June 2000. *Mora* interest, on the other hand, is aimed at compensating a creditor for a debtor's tardy payment of a monetary obligation. Interest can only run when a debt becomes due and payable. In this case, 'the debt (the so-called 'arrears' due in respect of the period 7 July 2000 – 9 November 2000) only becomes due and enforceable upon this Court's order and, that being so, *mora* interest on the amount awarded could at common law only be recoverable from the date of judgment'.[106]

This therefore raise the question as to whether it was appropriate for interest on this so-called arrears could be awarded under the heading of constitutional damages.

The court found that interest on the 'arrears' amounted to constitutional relief. In considering the nature of the payment of interest, the court found that such payments were not penal in nature. Rather, interest payments were aimed at compensating a creditor for losses suffered as a result of tardy payment by the debtor. This was at least

[104] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 356.
[105] Ibid. Also see *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A); *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A); *Schenk v Schenk* 1993 (2) SA 346 (E).

the objective behind *mora* interest. In light of this, in order for the applicant to be placed in the position she would have been in but for the department's torpid response to social welfare applications, it is necessary for the court 'to order the respondents to pay interest on the amounts that she should have been paid as a social grant had it been approved with effect from 7 June 2000 until date of payment'.[107] Therefore, despite the fact that interest (in a delictual sense) could only have legitimately run from the date of accrual, fairness and reasonableness insist that a fictitious back-dated accrual date be established from which interest must be calculated. The case of *Mbanga*[108] also revolved around this matter of the payment of interest on tardy social grant approval.

As in the *Mahambehlala* case,[109] the contentious issue was determining the date of accrual from which interest must be calculated. In this case, Leach J (presiding again) held that the common law grounds for claiming interest had not been met. Firstly, the applicant was unable to prove that the Department had agreed to pay interest from the application date of the grant.[110] Secondly, *mora* interest only accrues from the date in which the debtor is in default of payment. In this case, the application was approved in November 2000. In terms of the application, the grants would be paid from the date of attestation, being 10 March 1998. Up until the date of approval the applicant had no right to payment. At best he could have applied for a *mandamus* directing the respondents to process her application. In terms of regulation 10(1), on approval of the grant the total amount owed to the applicant became payable immediately. As the applicant could only claim payment from November 2000, it could not be said that the department was tardy in paying the grant as it has not been due and payable.[111] Consequently, the applicant may only claim *mora* interest from the approval date of the grant.

Based on his judgment in the *Mahambehlala* case, however, Leach J held that he was authorized under sections 38 and 172(1) of the Constitution to award an 'appropriate remedy'. He was of the opinion that an equitable order would be one that places the applicant in the position he would have been in had the application been processed within a reasonable time. It was common cause between the parties that 'it was reasonable for a

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[106] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 356 – 7.
[107] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3 at 357.
[108] *Mbanga v MEC for Welfare, Eastern Cape and Another* supra note 3.
[109] *Mahambehlala v MEC For Welfare, Eastern Cape and Another* supra note 3.
[110] *Mbanga v MEC for Welfare, Eastern Cape and Another* supra note 3 at 367 – 8.

decision on an application for a social grant to be taken within three months'.[112] Consequently, as in *Mahambehlala*, the court ordered the Department to make back payments for the 32 months that the applicant had been waiting for a response from the Department. Furthermore, the court order that the respondents pay interest at the prescribed rate of 15.5% from 10 June 2000, 3 months after the application was made. Unfortunately, this sorry state of affairs had not improved by the time the case of *Jayiya v Member of the Executive Council for Welfare, Eastern Cape*[113] came before the Supreme Court of Appeal.

The factual make-up of this case seems to follow the same pattern as the *Mahambehlala* and *Mbanga*. That is, the applicant applied for a welfare grant in accordance with the procedure established in the Social Assistance Act. After an extended period of time elapsed, the application had been neither processed nor paid. Furthermore, applicants have suffered harm because of the state's non-performance and so damages – in the forms of back pay and interest – were claimed.[114] Although Conradie JA did not have to decide the suitability or correctness of this relief, he did make some 'tentative comments'[115] about it.

Firstly, as has already been discussed above, Conradie JA emphasised that the PAJA was created to give effect to section 33 (the administrative justice provision) of the Constitution. The appellant, therefore, should have sought her remedy in terms of this Act and not as 'constitutional damages'. Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, or course, that they are constitutionally unobjectionable, they must be used'.[116] In this regard, Conradie JA indicated that claims for damages must be brought in terms of section 8(1)(c)(ii)(bb)[117] of the PAJA.[118]

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[111] *Mbanga v MEC for Welfare, Eastern Cape and Another* supra note 3 at 366 – 7.
[112] *Mbanga v MEC for Welfare, Eastern Cape and Another* supra note 3 at 369.
[113] *Jayiya v MEC for Welfare, Eastern Cape & Another* supra note 3.
[114] *Jayiya v MEC for Welfare, Eastern Cape & Another* supra note 3 at [2].
[115] *Jayiya v MEC for Welfare, Eastern Cape & Another* supra note 3 at [8].
[116] Ibid.
[117] Section 8(1) 'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –
(a) directing the administrator –
(i) to give reasons; or
(ii) to act in the manner the court or tribunal requires;
(b) prohibiting the administrator from acting in a particular manner;

Additionally, the court stated in *obiter* that the award of the damages in the form of 'backpay' and interest 'were predicated upon the award of a *permanent* disability grant. The grant made to the appellant was, however, a temporary one for twelve months...[T]here could be no question of 'backpay' if the grant was [only] temporary'.[119] Therefore, the courts have not needed to discuss how such damages should be calculated. Conradie JA, however, did take this opportunity to criticise the approach adopted by Leach J in these cases. He stated that he found it 'perplexing' that the court changed the plain meaning of the Social Assistance Act. The regulations clearly 'prescribes the date of approval of the grant as the date of accrual'[120] and do not refer to a specific period in which the approval must be made. Conradie JA uses this reasoning to further bolster his argument that damages in the form of 'backpay' and interest are inappropriate in this case.

Legally, Conradie JA's criticisms of the reasoning in *Mahambehlala* and *Mbanga* are not unfounded. His approach, however, may be too legalistic in that, although it correctly applies the law, it fails to consider what justice demands in the contextual situation. The Constitution grants everyone the right of access to welfare and administrative actions that are reasonable, lawful and procedurally fair. Does a "Conradie

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(c) setting aside the administrative action and –
  (i) remitting the matter for reconsideration by the administrator, with or without directions; or
  (ii) in exceptional cases –
    (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    (bb) directing the administrator or any other party to proceedings to pay compensation;
(d) declaring the right of the parties in respect of any matter to which the administrative action relates;
(e) granting temporary interdict or other temporary relief; or
(f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders –
  (a) directing the taking of a decision;
  (b) declaring the rights of the parties in relation to the taking of the decision;
  (c) directing any of the parties to do, or refrain from doing, any act or thing the doing, or the refraining from doing, of which the court or tribunal considers necessary to do justice between the parties; or
  (d) as to costs.

[118] *Jayiya v MEC for Welfare, Eastern Cape & Another* supra note 3 at [9]; *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3 at [13 – 14].
[119] *Jayiya v MEC for Welfare, Eastern Cape & Another* supra note 3 at [10].
[120] *Jayiya v MEC for Welfare, Eastern Cape & Another* supra note 3 at [11].

styled" approach not run contrary to these constitutional objectives and endorse administrative inefficiency?

In *Kate v Member of the Executive Council for Welfare, Eastern Cape*[121] - yet another case against the Eastern Cape Welfare Department for an unreasonable delay in processing the social grant applications – Froneman J handed down a scathing criticism of the *Jayiya* judgment. He stated that

> 'in matters of this kind (where innovative relief may be called for) judges of the High Court may legitimately expect some guidance from higher courts. Conradie JA's comments are, however, only critical of the developments following upon Leach J's judgment in *Mahambehlala*. They offer no guidance other than to imply that these developments are ill-founded. Unfortunately it is, with respect, on my reading of the judgment, not altogether clear why this is the case.
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> The judgment discusses the provisions of PAJA in the paragraph immediately following upon reference to *Mahambehlala*. The impression is thus created that *Mahambehlala* was decided under the provisions of PAJA. It was not. PAJA had not yet come into operation when *Mahambehlala* was decided. In para [11] of *Jayiya* reference is made to the 'perplexing' fixing of the date of accrual of the grant for the purposes of interest in the order under discussion. In *Mahambehlala* Leach J dealt with the reasons for such an order at 356G to 357H – dealing with the applicable principles relating to *mora* interest and the conceded fact that social grant applications could be dealt with reasonably within three months of submission of the application. He discussed this further in *Mbanga*. A reading of these two judgments may evoke concurrence or disapproval of his reasoning and it would, with respect, have been of considerable assistance to lower courts had this been elaborated upon rather than merely being labelled as 'perplexing''.[122]

Froneman J's criticism of the Supreme Court of Appeal judgment is no more than judicial finger-pointing as the matter of damage computation was not ripe for consideration in *Jayiya*. However, his comments are not unjustified as Conradie JA did miss out on the opportunity to provide guidance to the lower courts as to the approach or considerations that must be taken into account. Conradie JA's judgment does raise a number of questions.

Firstly, do the provisions of the PAJA exclude the court from granting an appropriate remedy in terms of section 38 of the Constitution? And secondly, does and award of 'compensation' in terms of the PAJA include or exclude back payments and interest. Froneman J indicates that, although *Jayiya* can be interpreted in this way, such an interpretation of the case would be wrong. This is because the Constitution is the supreme law in South Africa and it sets out a number of fundamental rights. The courts

[121] *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3.
[122] *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3 at [20].

are mandated to ensure that these rights are upheld and promoted. The courts fail to fulfil this responsibility in situations where they apply the law formalistically or refuse to create new remedies under the Constitution merely because such remedies did not exist under the common law.

> 'In these situations the judge who fails to examine the existing law with a view to ensuring the effective realisation of constitutional rights and values that were not recognised before is not, as is often presumed by proponents of this course, merely neutrally and objectively applying the law. That will only ever be true if the existing common law proceeds from a fair and equal baseline, an assumption that will not often be open to the present judiciary in South Africa in cases such as the present, given our unequal past. More often than not such a supine approach will effectively result in a choice for the retention of an unequal and unjust *status quo*'.[123]

Therefore, the PAJA cannot be said to preclude the court from awarding 'constitutional damages' under the principle of legality. The courts, however, will only review matters for legality if they do not amount to administrative action in terms of section 1 of the PAJA. In this case it is clear that the issuing of social welfare grants falls within the scope of this definition. As a result, the first port of call in administrative matters is the PAJA[124] and the court must rely on the remedies found therein. However, as Froneman J states in his judgment, the remedies provided in section 8 of the PAJA are 'couched in wide, open-ended and permissive terms'.[125] There is no reason why back pay and interest cannot be incorporated under this remedy where the protection of fundamental rights requires such an award to be made. For this reason, the court awarded damages that 'the applicant is entitled to payment of her social grant from the deemed date of its approval...[and the] payment of interest on the monthly sums she should have received had the grant been properly and timeously approved'.[126] He went on to say that this approach – the same approach adopted in *Mahambehlala* and *Mbanga* – is the most fair and equitable under the circumstances.

The majority of the case law, therefore, seems to indicate that pecuniary loss already sustained can be calculated according to the same approach adopted in the law of delict. However, the applicability of this calculation is limited in the law of delict to those situations where an existing right has been infringed. In the constitutional context, on the

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[123] *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3 at [16].
[124] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC).
[125] *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3 at [20].
[126] *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3 at [34].

other hand, the courts are the protectors of fundamental rights and must ensure that people's rights are not unjustifiably limited. Consequently, in this case, individual's social welfare right must be protected. Awarding damages (in the form of back pay and interest) only up until the date of approval of the grant would undermine this right. Therefore, the courts, in these cases, have decided that a three-month period in which to process the application is sufficient time. Subsequently they have ordered the Department to make back payments and interest up until three months after the application was submitted. In reaching this decision, the court developed a number of principles that must be taken into consideration in determining the date from which the application should have been processed and therefore the value of the damages to be awarded. In summary, these principles are:

- A contextual assessment of what is a reasonable length of time to process an application under the circumstances;[127]
- The length of time between application being submitted and it being processed or bringing matter to court;[128]
- The response and attitude of the Department. Were they unresponsive and unhelpful but when push came to shove would miraculously process the application;[129]
- Interpreting legislation in such a way that favours effectiveness, efficiency, validity and fairness rather than absurdity;[130]
- The demographics of the province. That is, the proportion of the population living in poverty and relying on social grants and the availability and accessibility of legal assistance.[131]
- Are there alternative remedies that they court can award under the common law? Is the court in some way limited in the monetary amount it may award?[132] Is the remedy specifically suited or fitting in the situation?[133] Can the applicant be placed in the position he or she would have been in had the payment been made timeously?[134]

[127] Above at page 21.
[128] Above at page 22.
[129] Above at page 23 – 4.
[130] Ibid.
[131] Ibid.
[132] See monetary limits in legislation like the Marine Pollution (Control and Civil Liability) Act 6 of 1981..
[133] Above at page 24.
[134] Ibid.

- Is the awarding of damages (for example, in the form of interest) aimed at compensating the applicant or penalising the Department?[135]
- Consideration of the 'basic values and principles governing public administration';[136]
- Consider if the award of damages is giving effect to the realisation of the social welfare right and the right to administrative justice;[137]
- Taking into consideration the fact that there has been serious restructuring of the welfare grant system as well as the delegation of the implementation of the social welfare system to provincial governments.[138] It is important to distinguish whether the tardy processing of application is attributable to teething problems in this amalgamated system or laziness and incompetence on the part of the administrator;[139] and
- What justice demands in the circumstances.[140]

4.2 Non-Patrimonial Loss

General damages awarded under the heading of non-pecuniary loss are damages for a non-calculable diminution in a person's interests or utilities. That is, damages are awarded to the plaintiff for the pain he suffered or the loss of the amenities of life because of the damage-causing incident. In the context of social welfare, the damage-causing event is the non-payment of the social grant. Therefore, the court needs to consider whether the applicant experienced pain, loss or suffering to his interests or his lifestyle because of the Department's non-performance. For example, in *Kate v Member of the Executive Council for Welfare, Eastern Cape,*[141] the applicant was a sixty-two year old woman suffering from arthritis. Although she did not claim damages for non-patrimonial loss in this case, her age, condition and social environment are not very different from many social welfare applicants. Consequently, her position can set the

[135] Above at page 25 – 6.
[136] The Constitution of the Republic of South Africa Act 108 of 1996, s195; Above at page 24.
[137] Above at page 27.
[138] *Mashavha v President of the Republic of South Africa & Others* supra note 3.
[139] Above at page 28 – 9.
[140] Ibid.
[141] *Kate v MEC for the Department of Welfare, Eastern Cape* supra note 3.

foundation for a hypothetical analysis of the court's approach to quantifying damages for non-patrimonial loss stemming from the Department's non-performance.

Prior to considering the factors the court considers in the law of delict, it is essential that the court establish that the plaintiff's harm or loss was caused by the administrator's non-payment of the welfare grant.[142] For the purpose of this example, it is assumed that as the applicant was not paid her welfare grant, she was unable to purchase the necessary medicines for her arthritis. Consequently, she suffered excruciating pain and her movement became impaired – requiring assistance to stand and was unable to walk unaided for a distance. Eventually her condition rendered her bedridden. Because of her condition, the applicant was unable to assist in the maintenance of the household and continue crocheting. The court will need to consider these facts in light of the delictual criteria set out above; namely the nature, extent and intensity of the harm, the objective and effect of compensation, elements of fairness and compensation awarded in comparable cases.

As has been stated already, it is impossible for the court to quantify in monetary terms the pain or loss a person experiences. The court can only look to objective factors to determine the extent of the non-patrimonial loss. That is, owing to the age, social status and consciousness of the plaintiff, the court is able to determine the intensity of the pain or loss. The court must also take cognisance of the duration or time period over which the applicant suffered the pain. The longer the period, the greater the suffering. In the context of this social welfare example, the extent of the applicant's loss or harm can be determined by considering that:

- she was an elderly lady but not yet a pensioner;
- despite the debilitating effect the arthritis has on her body her mental faculties were intact;
- the medication was aimed at prevention and not cure. It delayed the onset of the arthritis, however, eventually (in time) she would be bedridden;

[142] The defendant's conduct must not only be the factual cause of the plaintiff's loss or harm but the legal cause as well. That is, the defendant cannot be held responsible for consequences that (although they factually stem from the defendant's conduct) are too remote to impute liability on the defendant. The element of remoteness is a policy consideration exercised by the court to break the chain of causation and hence prevent the defendant from being liable for all subsequent harms the plaintiff suffers.

- the medication also prevented the applicant from suffering from physical pain and discomfort;
- the nature of the disease is not corrective; and
- the applicant, along with all other grant applicants, are the people that are most in need of assistance.

The court is also required to consider what the objective of compensation is. That is, is it aimed at counterbalancing the plaintiff's unhappiness or assisting the person to overcome difficulties? An example of this would be the provision of compensation so that the plaintiff could purchase occupational therapeutic devices to assist her in her daily living.[143] Such tools would assist the applicant in certain daily activities and thus ameliorate the loss of the amenities of life she experiences.

Furthermore, the courts, in quantifying a compensatory amount, must not be unduly sympathetic to the plaintiff. It must make an award that is fair. That is, it must not unduly burden the defendant but, at the same time, must provide for adequate compensation for the plaintiff. When claiming compensation from the State the court must consider that this notion of fairness contains another facet. That is, the effect that the payment of compensation to injured individuals impacts upon the public as it does involve the spending of public money. When awarding damages the courts are called upon to act conservatively. When the defendant is the State, the courts will need to consider the effect that compensation payments will have on the public and consequently may respond more conservatively than if the defendant was a private body. In this regard, the courts may be guided by comparable case law.

As of yet, there have been no claims for non-patrimonial loss in the social welfare cases. Consequently, the courts will need to consider damages awards in cases against the State as well as delictual cases of comparable injuries or loss. In the case of *Lutzkie v South African Railways and Harbours and Another,*[144] the applicant was injured in an accident. As a result of the accident suffered a number of physical, emotional and psychological injuries as well as severe pain and discomfort.

[143] It must be noted that the provision of compensation for such devices could also fall under the heading of 'prospective expenses and consequential loss'. The courts, therefore, must ensure that they do not count such expenses twice in quantifying the compensation.

Trengove J referred to a number of cases in which the plaintiffs had suffered similar injuries. 'The problem in a matter such as this is, of course, that none of the cases can really be said to be on all fours with the present one. It is always necessary for the court to have regard to the particular circumstances of each case and, although analogous cases often serve as a useful guide as to the compensation which should be awarded, they can never be regarded as being conclusive'.[145] The court went on to consider a number of cases that could assist it in reaching its conclusion, keeping in mind the depreciative value of money and the fact that each case must be casuistically assessed. Similarly, in continuing my hypothetical extrapolation of the *Kate* case, comparable case law must sought and contrasted with the present example in order to quantify an award of damages.

It will be remembered that the applicant in the above example suffered, as a result of her arthritis, was handicapped in her movement, was bedridden and was unable to continue her normal lifestyle. From the outset, it is important to recognise that the medication that the applicant could have purchased with the money from the welfare grant would not have cured her condition. It is merely preventative. That is, it decreases the rate of degeneration of the condition; the medication cannot reverse the damage that has already been done. Ultimately, in the long run, the applicant would have ended up in the position she currently finds herself. This fact will reduce the award of damages that the applicant could obtain because the Department cannot be held responsible for a condition that they did not cause. Consequently, any individual suffering from arthritis would incur certain expenses, for example the occupational therapeutic tools, at some point in the future and therefore the Department cannot be held responsible. However, the tardy payment of social grants that prevents applicants from obtaining medication that keeps them free from pain and allows them to remain active, albeit to a limited degree, may be compensated.

The courts have a very broad discretion in determining this value. To gain some consistency the court consider similar factual scenarios but can never apply the principles adopted in any one case wholesale into the present case. Rather, the courts must be

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[144] 1974 (4) SA 396 (WLD).
[145] Ibid.

guided by comparable principles but must primarily be guided by what justice demands in each case.

In quantifying this amount, the court tends to grant compensation under the heading 'general damages, that is pain and suffering, disability, loss of amenities of life and loss of life expectancy'.[146] On occasion, the courts award damages under each of these headings, however, in most cases a lump sum amount covering all of these elements. This is because in most cases the different factors are all so closely related. For example, in the hypothetical example set out above, the applicant – because of her condition – was effectively disabled. She could not move or if she could, it was with much difficulty and pain. Consequently, many of the functions that we associate with common day living become a struggle. Therefore, in quantifying general damages the courts can consider cases in which the plaintiff's mobility was restricted or severely impinged.

There are a number of examples that could be relied on by the courts.[147] In *Du Bois v Motor Vehicle Accident Fund*[148] Sally Du Bois had been diagnosed as a paraplegic following a motor vehicle accident in 1985. She died intestate in 1990 as a consequence of her injuries prior to the completion of the action proceedings. The only matter for the court to decide is the award of general damages. In reaching an amount, the court considered the fact that the pain she suffered was continuous and that she underwent a number of treatments and surgeries. She was also required to take a number of different medications. As a result of this treatment, her 'psycho-social amenities of life have therefore have not been partially but permanently lost'.[149] However, she still suffered from severe emotional turmoil because of her condition. The court considered these facts along with the expenses the deceased would have incurred to ease her patrimonial loss, such as mobility aids and costs of a converted car.[150] Furthermore, Stafford J recognised

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[146] *Du Bois v Motor Vehicle Accident Fund* 1992 (4) SA 368 (T) at 369.
[147] There are a number of cases that can be cited concerning mobility. A few examples are: *Roberts NO v Northern Assurance Co Ltd* 1964 (4) SA 531 (D); *Reid v South African Railways and Harbours* 1965 (2) SA 181 (D); *Mair v General Accident Fire & Life Assurance Corporation Ltd* 1970 (3) SA 25 (RA); *Solomon v de Waal* 1972 (1) SA 575 (A); *Blyth v Van den Heever* 1980 (1) SA 191 (A); *Muzik v Canzone Del Mare* 1980 (3) SA 470 (C); *Administrator-General, South West Africa v Kriel* 1988 (3) SA 275 (A); *Du Bois v Motor Vehicle Accident Fund* supra note 161; *Kekae v Road Accident Fund* [2001] 2 All SA 41 (WLD); *Road Accident Fund v Marunga* [2003] 2 All SA 148 (SCA).
[148] *Du Bois v Motor Vehicle Accident Fund* supra note 146.
[149] *Du Bois v Motor Vehicle Accident Fund* supra note 146 at 373.
[150] *Du Bois v Motor Vehicle Accident Fund* supra note 146 at 374.

that the award of damages was not going to benefit the person who suffered the pain and inconvenience but rather her intestate heirs. Consequently, he said that this impacted upon the amount of compensation that he would award; adopting a much more conservative approach. Ultimately the court awarded 'R60 000 for general damages, pain, suffering, disability, loss of amenities, including the fact that the complainant died five years and six months after the collision which caused her paraplegia'.[151]

Almost a decade later the Witwatersrand Local Division were faced with a similar situation in *Kekae v Road Accident Fund.*[152] In this case, the applicant, as a consequence of a motor vehicle accident, sustained injuries resulting in paraplegia as well as a closed head injury and treatable abdominal injuries. A consequence of his injuries is, *inter alia*, depression, inability to obtain employment, pressure sores and lack of bladder control.[153] It was common cause between the parties that the plaintiff's injuries severely diminished his amenities of life. The court considered a number of cases in which damages were awarded for paraplegia.[154]

Counsel, however, argued that this case could be distinguished from those cases cited by the plaintiff. In this case, 'the plaintiff was not totally paralysed, does not suffer from total sensory loss, is capable of maintaining an upright position and walking with mechanical assistance'.[155] In support of this assertion, he relied on the case of *Ngubane v SA Transport Services.*[156]

In this case, 'the plaintiff was an adult male who sustained a fracture of the spine, resulting in permanent partial paralysis. He was able to walk for short distances only with

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[151] *Du Bois v Motor Vehicle Accident Fund* supra note 146 at 375.
[152] *Kekae v Road Accident Fund* supra note 147.
[153] *Kekae v Road Accident Fund* supra note 147 at 43 – 5.
[154] '*Motloung v SA Eagle Insurance Co Ltd* (1996), Corbett & Honey, vol IV, A3 – 120; *Bennie v Guardian National Insurance Co Ltd* (1989), Corbett & Honey, vol IV, A3 – 34; *Dusterwald v Santam Insurance Ltd* (1990), Corbett & Honey, vol IV, A3 – 45; and *Godlwana v President Insurance Co Ltd* (1992), Corbett & Honey, vol IV, A4 – 121.
[21] In *Motloung's* case (supra) the plaintiff was a 30-year old woman who sustained a spinal injury resulting in total paraplegia. She was awarded R240 000 in respect of general damages.
In *Bennie's* case (supra) the plaintiff was a 40-year old married woman who sustained a fracture of the lumbar spine, resulting in paraplegia. She was awarded R80 000 for general damages.
In *Dusterwald's* case (supra) the plaintiff was a 26-year old electrician who sustained a spinal injury resulting in paraplegia. He was awarded R95 000 in respect of general damages'. (*Kekae v Road Accident Fund* supra note 147 at 47).
[155] Ibid.
[156] 1991 (1) SA 756 (A).

the aid of two walking sticks. He as awarded R85 000 in respect of general damages'.[157] Although all these cases deal with spinal injuries rather than debilitating conditions like arthritis, the common issue is the fact that the plaintiff's experience limited or no mobility. The court will weigh up this lack of mobility with the person's lifestyle in order to determine the loss of amenities of life. For example, if the applicant was an active person who enjoyed walking and swimming[158] and was unable to participate in these activities as a result of their disability, the court would be inclined to award them more damages. Furthermore, the applicant's inability to work can also be considered a loss of the amenities of life.[159]

In the present example, before factors such as the complainant's inability to crochet or be involved in the running of the household can be included the consideration of general damages, it must be established if such a loss can be imputed to the State's non-performance. As has been mentioned, the State cannot be held responsible for a person suffering from arthritis. However, if the complainant's condition could have been ameliorated if the Department acted timeously then liability can be imputed for the pain and suffering that was caused. Factors that would, *inter alia*, be important to consider would be:

- The length of time the applicant experienced pain and intensity of such pain. The quantum of damages would be significantly higher where the applicant had not received her welfare payment for two years as opposed to 6 months.
- The extent of the applicant's condition at the time she applied for the grant, the rate at which her health deteriorated and whether permanent medication would have aided her condition and subsided her pain.
- The applicant's mobility and amenities of life at the time the social welfare application was made. Would a course of medication have significantly assisted the complainant in maintaining this lifestyle?
- The age and life expectancy of the applicant.

[157] *Kekae v Road Accident Fund* supra note 147 at 48.
[158] *Muzik v Canzone Del Mare* supra note 147 at 472.
[159] *Muzik v Canzone Del Mare* supra note 147 at 474: 'Although work is not regarded or treated as a pleasure by many people I am prepared to accept that plaintiff enjoyed going to work and that his inability to do so can, in the circumstances of this case, be considered as a temporary loss of an amenity of life'.

- The social status of the applicant.[160]

In assessing damages for non-patrimonial loss, the court has a very wide discretion. For this reason, it seems from the above considerations that there will be little distinction between quantifying damages under the law of delict and in terms of public law. However, the courts must consider the public nature of the defendant (i.e. the Department of Welfare), the number of applicants requesting damages and the fact that the payment of compensation is drawn from the public purse. Some of these principles have been discussed in delictual actions against State.

The courts have decided a number of cases concerning delictual actions for physical harm or injury resulting from allegedly negligent State action. It seems that the courts are more likely to impose liability on public bodies for personal injuries arising out of their misconduct than for monetary loss sustained by the plaintiff. If the courts were more lenient in offering damages for personal injury than economic loss then it would be expected that the principles taken into consideration when computing damages would be more general and discretionary.

The first in a trilogy of cases dealing with delictual actions against the State was the case of *Carmichele v Minister of Safety and Security.*[161] The plaintiff was suing the defendant for damages alleging that members of the South African Police Services had 'negligently failed to comply with a legal duty they owed to her to take steps to prevent'[162] her from suffering harm. This was after she had been attacked in the home of one Gosling (for whom she worked) by Coetzee.

Coetzee had had a history of violent and indecent behaviour. He had sexually abused his niece,[163] been convicted of breaking an entering and indecent assault[164] and was currently out on bail for the rape of one Terblanche[165] when he attacked the plaintiff. At the bail hearing for the rape offence, the prosecutor did not oppose Coetzee's release or proffer any information concerning Coetzee's history or prior convictions. Coetzee

[160] *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 (3) SA 134 at 136.
[161] 2001 (4) SA 938 (CC).
[162] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at [2].
[163] *Carmichele v Minister of Safety and Security* supra note 162 at [6].
[164] *Carmichele v Minister of Safety and Security* supra note 162 at [8].

was released on bail and returned to Noetzie just outside of Knysna. Members of this community were worried that Coetzee was 'at large'. Gosling had, on more than one occasion, visited the police station stating that she felt in danger. Her fears were materialised when she was attacked in Gosling's home. As a result of the attack the plaintiff suffered a number of physical injuries. Subsequently, she brought an action against the State for the damages she suffered. The case was taken all the way to the Constitutional Court. The court ordered that the State was under a legal duty to protect Carmichele and referred the matter back to the High Court for consideration.[166]

Ackermann and Goldstone JJ in the Constitutional Court decision highlighted some important principles in support of this legal duty. These principles can also be considered in imputing liability and thus in calculating damages. Firstly, section 8(1) of the 'Bill of Rights applies to all law and binds the Legislature, the Executive, the Judiciary and all organs of State'.[167] This requires the courts to ensure that effect is given to all rights in the Bill of Rights and, where necessary, justifiably limited.[168]

Secondly, the courts recognised that a balance needs to be struck between State immunity and State liability for all conduct. Blanket immunity is inappropriate in that it 'did not distinguish between cases where the merits were strong and where the merits were weak'.[169] It protected State actors from the abuse of powers and violations of rights. On the other hand, making State actors susceptible to liability may have a 'chilling effect'. That is, State actors may prefer not to act for fear of prosecution. Such a balance can be struck by adopting a proportionality exercise and considering what justice demands in the circumstances.

Thirdly, '[t]he courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to

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[165] *Carmichele v Minister of Safety and Security* supra note 162 at [9 – 13].
[166] *Carmichele v Minister of Safety and Security* supra note 162 at [84].
[167] The Constitution of the Republic of South Africa Act 108 of 1996, s8(1).
[168] *Carmichele v Minister of Safety and Security* supra note 162 at [44].
[169] *Osman v United Kingdom* 29 EHHR 245 at 305, para 115 as cited in *Carmichele v Minister of Safety and Security* supra note 162 at [47].

invade those rights'.[170] In this way, the court must consider the position of the injured person in the matter and in the community on a microcosmic and national scale.[171] 'The plaintiff was thus not simply a member of the public whom the State had a duty to protect. She was a member of a class of people whom the State would have foreseen as being potential victims of'[172] violence. Furthermore, awards of damages have the ability to lay down the gauntlet to perpetrators of offences: violate human rights at your own peril. However, where the State is such a defendant the courts' powers are restricted in two ways. Firstly, by the knowledge that the State has limited resources if exceptionally high damage orders are paid out it will further deplete the scarce reserves that are supposed to be used to promote rights. Secondly, if orders are not paid out, there is little than can be done as State assets cannot be attached and sold in execution in which case the judiciary's legitimacy is undermined as court orders cannot be fulfilled.

Prior to the *Carmichele* case being re-decided by the High Court and Supreme Court of Appeal, the case of *Minister of Safety and Security v Van Duivenboden*[173] came before the Supreme Court of Appeal. In this case, the respondent (on appeal) had been shot by one Neil Brooks. He subsequently brought a delictual action for damages against the Minister of Safety and Security alleging that 'the police were negligent in failing to take the steps that were available in law to deprive Brooks of his firearms before the tragedy occurred, notwithstanding that there were grounds for doing so, and that their negligence was a cause of the respondent being shot'.[174] The court needed to decide two issues: firstly, the matter of liability and secondly the issue of damages.

The court found that the Police were under a legal duty to take steps under the Arms and Ammunition Acts Amendment Act[175] to deprive Brooks of his firearms. The police failed to fulfil this obligation. Consequently, liability could be imputed on the State. In considering damages, a number of factors must be taken into account. Primarily, '[t]he principle of accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a

[170] *S v Chapman* 1997 (3) SA 341 (A) at 345 as quoted in *Carmichele v Minister of Safety and Security* supra note 152 at [62].
[171] *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA) at [44].
[172] Ibid.
[173] *Minister of Safety and Security v Van Duivenboden* supra note 9.
[174] *Minister of Safety and Security v Van Duivenboden* supra note 9 at [2].
[175] 117 of 1992.

central part in realizing our constitutional vision of open, uncorrupt and responsive government'.[176] Furthermore, unlike private individuals, State organs are obligated to take positive steps to promote and give effect to fundamental rights. An organ of State can only be held liable for an omission if that organ was under a legal duty to act. The reason for this requirement is to avoid the threat of litigation acting as a chilling effect on the provision of public services. The existence of a legal duty, however, does not immunise the State from being required to pay compensation where the necessary elements are established. The existence of a legal duty in matters against the State, however, limits the extent of the liability. In this way, Nugent JA held that this 'norm of accountability' need not always be converted into damages in actions against the State. He stated that 'where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will...demand'[177] that such damages be paid unless public interest requires otherwise. This statement seems to indicate that damages may be awarded but only as a matter of last resort and only then when public policy requires it.

In the final *Carmichele*[178] decision in the Supreme Court of Appeal, the court confirmed the notion that monetary damages must be a matter of last resort. The court also noticed this idea of a 'norm of accountability'. This norm of accountability included a consideration of the statutory duties and their nature and function[179] as well as the existence and degree of connection between the plaintiff and the defendant (the proximity principle).[180] That is, 'if there is in fact some connecting factor between the plaintiff and the defendant, it is more likely that in the case where the defendant is an individual the breach of a duty might arise; and in the case where the defendant is the State it is less likely that there will be any deviation from the norm of accountability that the Constitution imposes'.[181] The final case in the trilogy was *Van Eeden v Minister of Safety and Security.*[182] This case held that it was possible to deviate from the 'norm of accountability'.

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[176] *Olitzki Property Holdings v State Tender Board* supra note 48 at [31] at cited in *Minister of Safety and Security v Van Duivenboden* supra note 9 at [20].
[177] *Minister of Safety and Security v Van Duivenboden* supra note 9 at [21].
[178] *Minister of Safety and Security v Carmichele* supra note 171.
[179] *Minister of Safety and Security v Carmichele* supra note 171 at [40].
[180] *Minister of Safety and Security v Carmichele* supra note 171 at [41].
[181] Ibid.

In the *Van Eeden* case, the plaintiff had been sexually assaulted, raped and robbed by one Mohamed after he had escaped through an unlocked security gate at a prison.[183] Mohamed was considered a dangerous criminal. He had been charged with 22 offences including rape and armed robbery.[184] The plaintiff alleged that the State owed her a legal duty to take reasonable steps to prevent Mohamed from escaping and causing her harm. She said that the State failed to fulfil this duty.[185] The court recognised that the State is accountable for non-compliance with its duties unless 'there is compelling reasons to deviate from that norm'.[186] That is, a deviation from the norm of accountability may be warranted if the public interest requires it. For example, counsel raised the issue that 'the imposition of a legal duty on the police in the present case could open the 'floodgates' and result in limitless liability on public authorities and functionaries'.[187] The court disagreed with such a submission and held that a deviation from the accountability norm need not be considered in this case.[188]

In summary, in actions against the State for non-patrimonial loss – that is loss resulting in pain and suffering or loss of the amenities of life – it is necessary to 'publicise' the delictual requirements spoken of above[189] by considering the following principles:

- The State is mandated to give effect to constitutional objectives;
- The State must be held accountable for its actions taking into consideration the State's limited resources and funding, the number of potential plaintiffs, the potential chilling effect increased liability could have on State action and the potential threat on the legitimacy of the judiciary if court orders are not fulfilled;
- The nature of the plaintiff and the responsibilities of the State to that person, group of people or the public at large;
- What type of message is an award of damages supposed to send out? Will it have a deterrent effect on State malperformance?; and

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[182] 2003 (1) SA 389 (SCA).
[183] *Van Eeden v Minister of Safety and Security* supra note 182 at [1].
[184] *Van Eeden v Minister of Safety and Security* supra note 182 at [2].
[185] *Van Eeden v Minister of Safety and Security* supra note 182 at [3].
[186] *Minister of Safety and Security v Carmichele* supra note 171 at [43].
[187] *Van Eeden v Minister of Safety and Security* supra note 182 at [22].
[188] *Van Eeden v Minister of Safety and Security* supra note 182 at [22] – [24].
[189] See above at page 14.

- Actions for damages should be a last resort. The courts therefore must consider all viable alternatives before awarding damages in cases where the State has acted unlawfully.

4.3 Prospective Expenses and Consequential Loss

Prospective expenses or consequential loss normally takes the form of future medical expenses or loss of profit or loss of future income. As is evident in the above section on the quantification of these damages in the law of delict,[190] such damages are essential to compensate the plaintiff and place him in the position he or she would have been in but for the damage-causing event. However, are applicants entitled to similar treatment when the wrongdoer is the State or more specifically the Welfare Department? The court needs to factor in elements of accountability and fairness while recognizing the limits of the public purse. As of yet there have been no claims for prospective expenses or consequential loss in the social welfare context. Consequently, guidance must be sought from the Constitution and case law that governs these issues in the constitutional era. The courts have had few opportunities to exercise this power. One such opportunity arose in the case of *Olitzki Property Holdings v State Tender Board.*[191]

In this case, the plaintiff alleged that it suffered a loss of profits because of a defective tender process. Two claims were argued in the alternative before the court. Firstly, a delictual argument, the court had to consider whether damages for loss of profit could be claimed for breach of the procurement provisions (section 187) of the interim constitution. And secondly, a constitutional argument, as to whether a damages award for lost profit is an 'appropriate remedy' for a breach of the administrative justice provision in the interim constitution.

In deciding the first question, the court had to consider whether the defendants were under a legal duty to prevent loss. Therefore, a value judgment of whether the plaintiff's interest is worthy of protection against interference must be conducted. This involves an assessment of the individual circumstances of the case as well as considering policy, the legal convictions of the community and norms, values and principles of the

[190] Above at page 18.
[191] 2001 (3) SA 1247 (SCA).

Constitution.[192] Furthermore, the court was guided by the origin of the alleged legal duty. That is, whether the duty is found in the empowering legislation or if it extends from the common law. If the alleged legal duty arises from statute then the assessment of the duty is resolved through statutory interpretation. If the alleged legal duty is a common law duty, then the court needs to assess if it is just and reasonable that a civil claim for damages should be allowed.[193] Ultimately, however, the final determination that '[t]he conduct is wrongful, [is] not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his [or her] legal right'.[194] Based on the circumstances of this case, Cameron J held that the violation of certain constitutional provisions is more likely to attach a legal duty than provisions in ordinary legislation. This is because of the centrality of the principle of accountability to South African constitutionalism. However, despite this, he held that

> 'the contention that it is just and reasonable, or in accord with the community's sense of justice, or assertive of the interim Constitution's fundamental values, to award an unsuccessful tenderer who can prove misfeasance in the actual award its lost profit does not strike me in this context as persuasive. As the plaintiff's claim, which amounts to more than R10 million, illustrate, the resultant imposition on the public purse could be very substantial'.[195]

Although the Supreme Court of Appeal did not find in favour of the plaintiff's lost bargain claim, it concurred with the judgment in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape.*[196] The Supreme Court of Appeal recognized Davis J's appeal to creating a culture of accountability within government, however, indicated that the *Faircape*[197] decision was distinguishable on the ground that '[t]he proceedings...involved an ordinary statute, not a constitutional provision creating legislative duties, and the damages at issue were for out-of-pocket expenses, not for lost profit'.[198] In this way, damages in respect of constitutional matters must be dealt with differently from other legislation. As the plaintiff's first claim was unsuccessful, the court was required to consider the alternative argument. That is, is an award for damages for lost profit an

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[192] *Olitzki Property Holdings v State Tender Board* supra note 48 at [11].
[193] *Olitzki Property Holdings v State Tender Board* supra note 48 at [12].
[194] Joubert *The Law of South Africa* vol 8 (1998) at para 61; *Olitzki Property Holdings v State Tender Board* supra note 48 at [11].
[195] *Olitzki Property Holdings v State Tender Board* supra note 48 at [30].
[196] 2000 (3) SA 54 (C).
[197] *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* supra note 25.
[198] *Olitzki Property Holdings v State Tender Board* supra note 48 at [31].

"appropriate remedy" for breach of the administrative justice provision in the interim Constitution?

In answering this question, the court considered the *Fose*[199] judgment. It states that an "appropriate remedy" amounts to an effective remedy. The court held that, in this case, owing to the alternative remedies available to the plaintiff, the awarding of damages for lost profits flowing from defective tender proceedings was not an appropriate remedy.[200] However, the court did not rule out that lost profits may be an appropriate compensatory award in other circumstances.

Although both arguments were unsuccessful on factual grounds in this case, the court set out important considerations concerning damages for a defective administrative action. These elements will be incorporated into the assessment and calculation of any damages under PAJA. In summary, these principles are:

- Variability – in establishing the scope of 'appropriate relief' the courts will need to assess the individual facts of the case, the specific right that has been infringed, the convictions of the community and what would amount to an effective remedy.
- Alternative remedies that are available and perhaps more effective than a claim for damages.
- Consideration of whether the plaintiff's interest is worthy of protection against interference.
- The conduct is considered to be wrongful, not because of a breach of statute but rather because the plaintiff deserves to be compensated.
- The violation of constitutional rights is more likely to attach a legal duty than ordinary legislation because the Constitution requires that government bodies be held accountable for their conduct.

The courts are weary of awarding damages for allegations of lost profits because there is no guarantee that such profits would ever have arisen. However, in certain circumstances the courts may be required, on the basis of fairness and the promotion of rights in the Bill of Rights, to consider an award of lost profits. These principles will

[199] *Fose v Minister of Safety and Security* supra note 15.

assist the court in pin-pointing important matters and issues that should be addressed in fashioning damages. In the social welfare context it may seem unlikely that a claim for lost profits may arise. However, should such a claim arise, the value of profits allegedly lost are unlikely to be of the monetary scale seen in the *Olitzki* case. The court, therefore, may more readily award claims of lost profits in the social welfare context, as the effect on the public purse will not be as substantial and because of the fact that social assistance is fundamental right in the Bill of Rights. In this respect, the consideration of the manner in which damages are quantified for other constitutional rights might prove to be of assistance in calculating compensation.

5. THE APPLICATION OF PUBLIC LAW PRINCIPLES: ENVIRONMENTAL AND PROPERTY LAW

This delictual categorisation is a useful foundation on which to recognise the different forms of damages that can be claimed and the various approaches that can be adopted in quantifying these different amounts. However, as is evidence in the above section, this approach cannot be transplanted wholesale into the private individual \ State relationship. This is because, as was discussed above, the payment of compensation in the law of delict is aimed solely at compensating the plaintiff for the diminution of his patrimony. The objective behind the payment of compensation in public law goes beyond merely compensating the plaintiff for the loss he or she has suffered. They seek to protect and promote fundamental rights entrenched in the Constitution.

Furthermore, delictual damages will only be awarded once the delictual elements have been established. As has already been mentioned, establishing the existence of a legal duty (and thus wrongfulness) is more difficult than establishing non-compliance with the more general constitutional principles that will trigger damages under unlawfulness. For this reason, it is necessary to determine and consider the public law principles that fashion damages in that sphere and how they can assist the court in quantifying damages under section 8 of the PAJA.

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[200] *Olitzki Property Holdings v State Tender Board* supra note 48 at [42].

This chapter will consider the environmental right, section 24,[201] and the right to property, section 25,[202] of the Constitution. These sections will be considered because of their similarity in nature to the right to social welfare expressed in section 27. Not only do these sections grant everyone rights but also place the State under an obligation to achieve these rights. Furthermore, the courts have also had trouble with the quantification of damages in these areas. In this way, the manner in which the courts have tackled these problems will assist the courts in the social welfare context.

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[201] Environmental Right

'Everyone has the right –

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

[202] Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable and legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws and practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact legislation referred to in subsection (6)'.

5.1 Environmental Right

The question of the quantification of damages arises where the environment is polluted. Any claims for damages are founded in the law of delict and therefore the delictual classification of damages applies in this context. Traditionally, compensation for non-patrimonial loss, however, cannot be claimed for environmental damage.[203] This is because environmental damages per se are not recoverable. Where the loss suffered takes the form of a monetary loss or patrimonial harm damages can be recovered. Damages in respect of the environment itself, however, have not been allowed because it is impossible to quantify in monetary terms.

The environmental right expressed in section 24 of the Constitution, however, provides for the right to an environment that is not harmful to one's health of well-being.[204] According to Glazewski, '[w]hile it is not easy to impart an exact definition to "well-being", it is suggested that the term...implies that the environment has not only an instrumental value, in that it secures benefits such as good health, food and tourist-related income, but that in addition, aspects of the environment have an inherent worth and are deserving of conservation for their intrinsic value'.[205] In this way, it seems possible to claim damages under the constitutional right for the devaluation of the environment itself. As of yet, however, there is no South African case law on this subject. Therefore, it would be necessary for the courts to turn to international and perhaps foreign law in considering the approaches that they have adopted.[206]

Generally, in assessing the plaintiff's loss, the courts will compare the diminution of the plaintiff's estate before and after the damage-causing event. Compensation is aimed at placing the plaintiff in the position he or she would have been in but for the

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[203] Glazewksi *op cit* note 58 at 542.
[204] The Constitution of the Republic of South Africa Act 108 of 1996, s24(a).
[205] Glazewski *op cit* note 58 at 77.
[206] The Constitution of the Republic of South Africa Act 108 of 1996, s39(1).
Interpretation of the Bill of Rights
(1) When interpreting the Bill of Rights, a court, tribunal or forum –
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

damage-causing event. As has been discussed above in *Erasmus v Davies,*[207] the diminution of the plaintiff's estate can easily be determined in certain circumstances. 'It is much more difficult to assess damage to the environment, however, as damage to the environment by pollution is not readily quantifiable. Clean-up does not equal rehabilitation...and there is no way to put a monetary value on, for example, a mangrove swamp which has been devastated by an oil spill'.[208]

This exact problem was the subject of dispute in the case of *Commonwealth of Puerto Rico et al v SS Zoe Coloctroni.*[209] In this case, the SS Zoe Colоctroni released large amount of oil into the ocean, just off the coastline of Puerto Rico, in order to prevent the ship from sinking. The oil slick caused serious damage to the mangrove swamps of a nearby island. The court had to evaluate the damage to the mangrove swamps and convert this into a monetary amount.

In the district court *a quo* the court relied on a replacement cost formula. It estimated the number of organisms destroyed in the swamps by multiply the total area affected by the number of organisms found in a square metre. This amount was then multiplied by the average cost per organism that could be purchased from an *in situ*[210] institution. The resultant value equalled the amount of compensation that the court awarded the plaintiff over and above the clean-up costs.[211] The alternative argument that was proffered on appeal was the diminution in the value of the property because of the spill. According to this approach, one acre had a market value of about $5000 per acre. Therefore, by multiplying $5000 by 40 acres it was suggested that the award of damages should be $200 000. The appellate court, however, rejected both of these approaches.

The court said that the replacement cost formula was too mechanistic. The diminution in value test, on the other hand, was also inappropriate because '[m]any unspoiled natural areas of considerable ecological value have little or no commercial or market value...a strict application of the diminution of value rule would deny the damages for harm to such area, and would frustrate appropriate measures to restore or

[207] 1969 (2) SA 1 (AD) and see page 14 above.
[208] Glazewski *op cit* note 58 at 544.
[209] (1980) 628 Fed R 2d 652.
[210] This is essentially a storage facility of certain animals or plants outside of their natural environment. A zoo is an example of such an institution.

rehabilitate the environment'.[212] Although the court rejected both of these approaches, it did not suggest a better alternative.

In other cases, the mechanistic approach seems to have been adopted. It is suggested that this approach is adopted often because a value is then seen to be calculable and not arbitrarily plucked out of thin air. Furthermore, it creates some degree of consistency in the awards ordered by the courts. This approach was adopted in the *Antonio Gramsci*[213] case. In this case, a tanker ran aground and discharged oil into the ocean which consequently damaged the Swedish and Finnish coastlines. Damages (over and above clean-up costs) were calculated by multiplying the quantity of oil spilled by the quantity of water affected.[214]

Such formalistic approaches, however, might not always be appropriate. It is important for the courts to be flexible in fashioning suitable damages in accordance with the facts of the case at hand. This was recognised in the EC Commission's 1993 Green Paper on Environmental Liability. It stated that:

> 'An identical reconstruction [of the environment] may not be possible, of course. An extinct species cannot be replaced. Pollutants emitted into the air or water are difficult to retrieve. From an environmental point of view, however, there should be a goal to clean-up and restore the environment to the state which, if not identical to that which existed before the damage occurred, at least maintains its necessary permanent functions...Even if restoration or clean-up is physically possible, it may not be economically feasible. It is unreasonable to expect the restoration to a virgin state if humans have interacted with the environment for generations. Moreover, restoring an environment to the state it was in before the damage occurred could involve expenditure disproportionate to the desired results. In such a case it might be argued that restoration should only be carried out to the point where it is still 'cost-effective'. Such determinations involve difficult balancing of economic and environmental values'.[215]

In this way, the awarding of damages must be fair between the parties based on the facts of each case. For example, in the case of *Marquis of Granby v Bakewell UDC*[216] the defendant polluted a river, killing the fish in the river. The plaintiff had fishing rights over that river. The court found that appropriate compensation in this case amounted to

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[211] Glazewski *op cit* note 58 at 648.
[212] *Commonwealth of Puerto Rico et al v SS Zoe Colocroni* (1980) 628 Fed R 2d 652 at 673 at quoted in Glazewski *op cit* note 58 at 648.
[213] Abecassis and Jarashow *Oil Pollution from Ships* 2nd Ed (1985) at par 10-51 at 209.
[214] Glazewski *op cit* note 58 at 648.
[215] Communication from the EC Commission to the EC Council and European Parliament on Environmental Liability, 32, para 5.2 (1993) as cited in Sands 'Principles of International Environmental Law' (2003) at 884.

the cost of replenishing the river. In reaching this decision, the plaintiff is compensated for the loss he sustained but the defendant was not over-burdened with an order he cannot possibly fulfil.[217]

The cost of replenishment, however, may not always be considered fair. In *Scutt v Lomax*[218] mature trees were wrongfully bulldozed by the defendant. The claimant was awarded the cost of replanting trees of a similar age and modest damages for the loss in the maturity of the trees. The problem, however, is that although the plaintiff is compensated, the environment does not always receive a benefit equal to that which it lost. In this context, the ecological value that the more mature trees contributed to the environment was lost.[219] This latter element has been overlooked. The courts need to consider the effect that an award of damages can have on the environment. The award may be substantially less where the award cannot place the environment in the position it would have been in but for the damage-causing event. That is, is the award of damages correcting environmental damage or merely compensating the person who owns that specific environment?

At present there is no South African case law concerning the quantification of compensation for environmental damage. However, when interpreting the Bill of Rights the courts are required to take into consideration principles of international law and to consider foreign law.[220] These international principles cannot only assist the courts in calculating intrinsic environmental approaches but can also guide the courts in the context of other constitutional rights. These principles include:

- Considering the objectives the constitutional right seeks to achieve. In the environmental context, the right must give effect to health and well being as well as environmental protection for future generations, pollution prevention and social degradation, conservation and sustainable development.[221] The social welfare context does not set down definite guidelines but objectively the courts must be able to

[216] (1923) 87 JP 105.
[217] Bell and McGillivray 'Environmental Law' (2005) at 381.
[218] (2000) 79 P&CR D31.
[219] Bell and McGillivray *op cit* note 217 at 381.
[220] The Constitution of the Republic of South Africa Act 108 of 1996, s39(1) (b) and (c)

consider that, at least, the State is taking steps to progressively realise these rights.

- The courts must adopt a variable approach. That is, to consider each case on its own merits and calculate damages suitable for that situation. On occasion, a formulaic approach may be sufficient but the overriding element must be fairness between the parties. In certain circumstances the cost of restoring the plaintiff to the position he or she would have been in prior to the environmental degradation may either be impossible or the expense to the defendant disproportional to the advantage gained by the plaintiff. Likewise in the social welfare context, the formulistic calculation of damages may be appropriate in certain, but not all, circumstances.
- Perhaps one way of achieving fairness is to cap liability at a certain amount and then have a fund which plaintiff's can claim additional funding should the capped amount not be sufficient to satisfy their needs. The capping of liability has been adopted in the Marine Pollution (Control and Civil Liability) Act.[222] South African law has not yet made provision for a fund, however, in international law such a fund was created under the International Convention on the Establishment of an International Fund for Oil Pollution Damage 1992. Such an approach could be adopted in the welfare context where the courts are able to award damages up to a certain amount and then applicant can apply to a fund if the damages they suffered exceed the capped amount. This does, however, limit the court's powers to fulfil their constitutional mandate but such a limitation may be a justifiable one.
- The courts must consider the consequential effects of the damage-causing event in compensating the plaintiff and not merely the factual equivalent of which he or she was deprived.

[221] The Constitution of the Republic of South Africa Act 108 of 1996, s24.

5.2 Property Law

Section 25 of the Constitution, the property right, is the only section in the Bill of Rights that provides guidelines in the manner in which compensation for expropriation are to be calculated. The parties are firstly called upon to reach an agreement on the amount to be paid for the expropriation.[223] Where no agreement can be reached, section 25(3) requires the court to calculate the damages that should be awarded. In doing so, the court must take the following considerations into account:

- An 'equitable balance between the public interest and the interests of those affected' by the expropriation;
- All relevant circumstances;
- 'the current use of the property';
- 'the history of the acquisition and the use of the property';
- 'the market value of the property';
- 'the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property'; and
- 'the purpose of the expropriation'.

The Land Claims Court in the case of *Former Highlands Residents, in re Ash v Department of Land Affairs*[224] held that all of these criteria are objectively identifiable except the extent of state investment and subsidy. In this way, the determination of the market value is pivotal to the calculation of compensation. In most jurisdictions, the market value would be just and equitable compensation in cases of expropriation. However, in South Africa, the equitable compensation required by the Constitution involves calculating the market value of the property and adjusting it according to other relevant factors such as socio-economic elements. In many ways this approach is similar to the calculation of damages in social welfare cases because damages are seldom calculated solely on the formulistic or mechanistic approach (although this may be the starting point) without socio-economic factors manipulating the actual amount that is awarded to the injured party.

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[222] 6 of 1981.
[223] The Constitution of the Republic of South Africa Act 108 of 1996, s25(2).
[224] [2000] 2 All SA 26 (LCC).

The market value is determined using the *Point Gourde*[225] principle. In terms of this principle 'the market value at the time of expropriation must be determined by disregarding any increase or decrease in the market value of the expropriated property arising from the carrying out, the expropriating scheme. This is necessary because a scheme of expropriation often has the effect of distorting the market'.[226] For example, the diminution in the value of the land after it was advertised that that land was to be subject to restitution in the gazette, is to be ignored.[227] Once the court has determined the market value, it must assess whether this amount should be adjusted upwards or downwards to ensure that the compensation awarded is 'just and equitable'. In making this decision, the court must consider the interests of the individuals affected, the public interest and the s25(3) factors listed above.

Manipulating the market value of property by weighing consideration of equality and justice against each other (as is the case with damages for social welfare) eliminates the possibility of an objective calculation of compensation.[228] However, in May 2000 the Department of Land Affairs published a handbook governing property valuation.[229] This handbook, along with the case law, will provide some guidance on the manner in which the s25(3) guidelines can assist the court in quantifying just and equitable compensation.

In using the s25(3) criteria to alter the market value, care should be taken to ensure that adjustments are not replicated and the primary aim of fairness is achieved. Each of the criteria can impact upon the adjustment of the market value in favour of 'justice and equity'. These elements will briefly be considered below:

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[225] [1947] AC 565 (PC).
[226] Currie and De Waal *The Bill of Rights Handbook* (2000) at 424 – 5.
[227] Department of Land Affairs 'DLA Handbook on Property Valuation' (2000) at www.land.pwv.gov.za/redistribution/redistribution/valuatio.html (last accessed on 12 December 2005) at 11.
[228] Currie and De Waal *op cit* note 226 at 425.
[229] Department of Land Affairs *op cit* note 227.

5.2.1. *'Current use'*

The 'current use' of expropriated property considers the use of expropriated land with respect to land restitution claimants, occupiers of land in terms of the Extension of Security of Tenure Act 62 of 1997 and labour tenants.[230]

The rights held by these individuals can be factored in either during the first stage, in determination of the market value, or the second stage, the 'just and equitable' adjustment.

> 'For example, where land is expropriated under the ESTA, the presence of restitution claimants on the land should be factored into the assessment of MV [(market value)] during the first stage, since the impact the presence on the land has on MV is unconnected to the particular scheme of expropriation. The presence of ESTA occupiers on the land should, however, be factored in only at the second stage where land is expropriated under the ESTA....According to the Land Claims Court, where the presence of land reform beneficiaries connected to the scheme of expropriation makes the land effectively useless for any purpose other than land reform, then just and equitable compensation should exceed MV so as to compensate the owner for the opportunity or actual cost incurred. For example, suppose the land is occupied by labour tenants who cease to provide labour to the owner because, under the Labour Tenants Act, they can no longer be compelled to do so. In that case...the second-stage adjustment to MV should compensate the land owner for the fact that he / she is paying an 'implicit wage' (in terms of providing land to the tenants) without deriving those labour services. One measure of the cost to the land in such cases is the actual wage he or she would have had to pay to secure the labour services to make up for those that were no longer forthcoming'.[231]

5.2.2. *'The history of the acquisition and use of the property'*

In this section the court is determining whether the owner purchased the property when the statute governing the expropriation was in force. If this is found to be the case, then the valuator must reverse the *Pointe Gourde* adjustment that occurred in determining the market value. This is the market value had already been altered by the legislative scheme prior to the owner purchasing the property or the owner should have anticipated that such an adjustment would arise.

5.2.3. *'The extent of state investment and subsidy'*

The extent of state investment or subsidy of property should impact upon the value of compensation awarded to the owner of the expropriated land. According to the DLA

[230] Department of Land Affairs *op cit* note 227 at 13.
[231] Ibid.

handbook, the Department of Land Affairs has adopted a policy to only take into consideration three types of subsidies \ investments:

- Acquisition subsidies in which the owner has purchased property from the State at an amount lower than the market value;
- Low interest loans aimed at making the acquisition of land more available to an increased number of people; and
- Subsidies aimed at improving infrastructure.[232]

An acquisition subsidy is not a physical amount of money but rather the difference in price the current owner actually paid for the property and the presumed historical value he or she should have paid for it at the date of acquisition. This requires the courts to determine the historical value of the land at the date of the acquisition. This, however, is not always readily ascertainable because in many situations property values were distorted owing to Apartheid. For example, during Apartheid many people were dispossessed of their land, which was subsequently sold to white farmers at largely deflated values. Consequently, determining an accurate value of the property during this time is almost an impossible task. In circumstances 'where an historical *market* value cannot reasonably be estimated, the historical valuation should seek to establish the historical *productive* value of the property'.[233] These values can influence the 'market value' in such a way so as to generate a more realistic and fair value of the property.

The calculation of compensation for expropriated land subject to reduced interest loans can be determined subject to interest rate tables and formulae. Infrastructure subsidies also have a positive impact on the land and therefore will be considered in the 'just and equitable' alteration of the market value. Practically it is not always possible to establish extent of past subsidies and in certain cases subsidies did not positively impact upon the land. For example, a subsidy could have been granted for the drilling of a borehole. If the borehole was dry then it cannot be said that the owner positively benefited. Examples where owners have benefited are in the area of farm worker housing

[232] Ibid.
[233] Ibid.

subsidies and tax breaks and fencing subsidies. The value of these subsidies must be adjusted according to inflation[234] and deducted from the market value.

5.2.4. *The purpose of expropriation*

The Department of Labour Handbook offers no guidance under this heading. In the *Highlands Residents* case the Land Claims Court stated in *obiter* that the purpose of the expropriation merely intended the *Pointe Gourde* principle to be applied. If this is the case, then this element does not add anything to the second stage of the inquiry.[235] The correctness of this argument is debateable.

A recent Constitutional Court judgment concerning violations of section 25 of the Constitution has been handed down. In terms of this judgment, the court has considered the awarding of appropriate relief. The case of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[236] governs the awarding of appropriate relief for the wrongful deprivation of land. In this case, squatters had moved onto the respondent's land thus depriving him of his land. He sought assistance from the relevant municipalities and organs of state but no help was forthcoming.

The appellants contested the appropriateness of awarding compensation on a number of grounds. The court, however, dismissed the appeal and agreed with the Supreme Court of Appeal in saying that '[i]f a constitutional breach is established, this Court is...mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued'.[237]

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[234] There are two different indices against which subsidies can be compared: the consumer price index and the land price index. 'The advantages of the consumer price index are that it goes back quite far in time, and that it translates into today's terms the value of past subsidy without reference to the particular use to which that subsidy was put. The argument in favour of the land price index is that, to the extent s subsidy made land acquisition more affordable to the present owner, the price index provides a measure for how land in general has appreciated over time. Land owners may also favour using the land price index because, since land has generally appreciated slower than the rate of consumer inflation, less money will be subtracted from market value'. Department of Land Affairs *op cit* note 227 at 15.

[235] Department of Land Affairs *op cit* note 227 at 16.

[236] (case no: 20/04) unreported judgment.

The court held that a number of factors must be taken into consideration in assessing 'appropriate relief'. These included:

- The squatters had developed a settled community;
- An order requesting the squatters to move was useless as there was nowhere else they could lawfully go;
- Furthermore, the cost of evicting the squatters was exorbitant while the cost of purchasing the land was substantially less;
- The court considered the State's involvement in the matter and the manner in which they responded and assisted the parties in the matter. The court found the State's conduct to be consistently negative and unhelpful.[238]

Langa ACJ, as he was then, went on to say that along with these factors it is necessary to consider the tone of the governing act. He said that 'the preamble of the Act states, for instance, that no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances'.[239] The court also cited its previous decision of *Fose v Minister of Safety and Security*[240]and the requirement that constitutional damages may be awarded in appropriate circumstances and that such remedies must be effective.

The court decided that ordering the State to expropriate the land was inappropriate in that it would amount to a breach of the separation of powers doctrine.[241] Therefore, damages could not be calculated following the s25(3) criteria. The award of compensation in the form of constitutional damages, taking into consideration the criteria above, 'was the most appropriate remedy in the circumstances...It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find alternatives'.[242]

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[237] *Modderfontein Squatters, Greater Benoni City Council v Modderkilp Boerdery (Pty) Ltd (AgriSA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and Others v Modderkilp Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amiici curiae)* 2004 (6) SA 40 (SCA) at [18].
[238] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* supra note 237 at [54].
[239] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* supra note 237 at [55].
[240] 1997 (7) BCLR 851 (CC).
[241] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* supra note 237 at [64].
[242] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* supra note 237 at [59].

This case sets out a number of useful guidelines for the calculation of damages for the violation of Constitutional rights. These include:

- The consideration of the individuals affected, particularly when other rights in the Constitution may be affect;
- The fact that the government may not have the means to support an alternative structure;
- The immediacy of matter. That is, is it necessary that the Modderklip squatters are moved off of the property immediately? The South African government is currently in the process of land reform and the provision of houses to previously disadvantaged individuals. The provision of land and the building of these houses are marred by a variety of difficulties, least of which is to continually finding alternative "temporary" accommodation. In the social welfare context it is arguable that the crisis of delayed social welfare grants resulting in a large amount of litigation requires immediate action to be taken.[243]
- Variability – it is necessary to fashion remedies that are appropriate and effective to the given circumstances.
- The consideration of legislative and constitutional guidelines. Perhaps it is necessary for the Social Assistance Act to contain objectively determinable guidelines as in the case of section 25(3) or to produce departmental guidelines like the DLA handbook.
- Ultimately the most important consideration that must be taken into account is fairness between the parties. The courts must ensure that whatever approach is adopted in quantifying an amount of compensation, and whatever factors – socio-economic or otherwise – that are utilized in manipulating that amount, that fairness and justice between the parties is achieved.

Environmental rights and property rights suffer from the same defects that plague the quantification of social welfare damages. Although the circumstances in which they arise are very different, they share the similarity in that the courts must adopt a principled approach to justifying just and equitable damages that give effect to the constitutional

rights and promote fairness. In this way, the courts can seek guidance from the factors taken into consideration, the development of guidelines and the use of the political process to ensure that compensation is fair but effective.

6. CONCLUSION

The awarding of damages as a remedy is only one aspect of a much larger remedial structure. Damages must be awarded where the court is of the opinion that compensation is due, but it is by no means the solution (in most cases and particularly in the case of social welfare) to the problem at hand. The purpose and underlying intention of remedial action by the court is the resolution of problems; damages may in certain circumstances form part of this remedial action. In the social welfare context, applicants must be paid the money that is owed to them. This, however, should be used in conjunction with other approaches to progressively achieve the rights in the Bill of Rights. '[T]he court should bear in mind that...damages are not always the most appropriate method to enforce constitutional rights. [They]...tend to be retrospective in effect, seeking to remedy loss caused rather than to prevent loss in the future. Moreover, the use of [such]...damages to vindicate public law rights may place heavy financial burdens on the State'.[244]

Plasket J perfectly summarises the problem. He states that 'notwithstanding that literally thousands of orders have been made against the...department over the past number of years; it appears to be willing to pay the costs of those applicants rather than remedy the problem of maladministration and inefficiency that has been identified as the root cause of the problem'.[245] He goes on to say that the courts have limited power in the manner in which they can resolve this problem. While they 'grant relief to the individuals who approach them for relief, they are forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people, the very people 'who are most lacking in protective and assertive armour' and those whose needs 'must animate our understanding of the

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[243] Also see Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) 21(2) *SAJHR* 215 at 217.

[244] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at [80].

[245] *Vumazonke v Member of the Executive Council for Social Development, Eastern Cape Province* supra note 3 at [10].

Constitution's provisions''.[246] Furthermore, should the court grant damages (let alone generous damages!), it is likely that the Department either will not act in accordance with court order or, even if it did, it could not sustain the continual depletion of its funds going to damages.[247] The effect of this is to undermine other people's social welfare rights as well as the legitimacy of the judiciary.

Plasket J in the *Vumazonke* judgment has embraced this approach. Rather than merely awarding damages, he ordered that the judgment be served on Human Rights Commission and Public Service Commission. These bodies are required to ensure that constitutional rights are protected and promoted and therefore are obligated to conduct investigations and take appropriate steps to redress constitutional right violations.[248] Until such time as investigations have taken place and alternative solutions have been found, the courts will need to consider the awarding of damages to social welfare applicants that have been left out in the cold.

In a system in which so many cases are being brought to court because of social welfare administrator's maladministration, it would seem daft for the courts not award damages in review proceedings. Furthermore, provided the applicants are able to successfully negotiate the "exceptional circumstances" hurdle in section 8 of the PAJA, the scope of damages is much broader. The courts in awarding such damages are not restricted to the actual damages suffered by the applicant when awarding damages under the PAJA. The courts can award damages that promote human rights and set down the seriousness with which the courts approach rights in the Bill or Rights.

In calculating such damages, the law of delict forms a stable foundation from which to work. It sets out the basic principles and considerations that the courts take into account in formulating compensation in the private sphere. The wholesale importation of this approach into the public sphere, however, is not appropriate. This is because damages in the public sphere do not only affect the parties to a particular action but the broader community. Consequently the courts need to be taking into consideration all

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[246] Ibid. Footnote omitted.

[247] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* supra note 3; *Kate v Member of the Executive Council for Department of Welfare, Eastern Cape* supra note 3. Both of these cases deal with holding the Department in contempt of court.

[248] The Constitution of the Republic of South Africa Act 108 of 1996, s184(2)(a) and (b).

these competing interests (such as the spending of public money) while promoting human rights. In doing so, the court must not breach its separation of powers responsibilities by deciding executive matters rather than merely holding the executive to account. This paper has aimed to set out a principled approach to the considerations that the courts must take into account in providing suitable remedies for social welfare applicants for damages and loss that they suffer as a result of state non-performance. Currently, the case law only has dealt the pecuniary loss already sustained by social welfare applicants. Certain cases have awarded damages in the form of back payments and interest despite criticism from superior courts. Damage awards, however, are not limited to monetary losses that have already been sustained. Non-patrimonial loss, prospective loss and consequential loss will also need to be decided by the courts at some stage. It is suggested that a similar principled approach is appropriate, factoring in these public law principles to the variable circumstances of each case.

In doing so, guidance must be sought not only from the four corners of the Constitution but also from the manner in which these rights have been fulfilled. Furthermore, a comparative analysis of many of these rights will illustrate that certain difficult problems, such as the quantification of damages, are evident in many situations and not only in the social welfare context. For this reason the courts must consider the approaches adopted in, *inter alia*, environmental and property law. It is hoped that rather than having a judiciary with a damages mechanism that runs like the proverbial well oiled machine that rather we have a social welfare system that efficiently and timeously processes welfare applicants and grants.

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