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The assessment of damages for delict in South African and German Law, with special regard to loss of use and fraudulent misrepresentation inducing a contract

University of Cape Town

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A. The Assessment of Damages for delict in South African and German Law, with special regard to loss of use and fraudulent misrepresentation inducing a contract

I. Introduction

This thesis deals with the question of how the existence and extent of damage, as well as well the proper amount of damages, are to be determined in the case of delict. To answer this question most legal systems have devoloped different rules and principles which do work satisfactorily in most cases. There are, however, certain cases in which the basic principles do not lead to satisfying results. In these cases courts often have a problem establishing their decision, as neither basic legal principles nor legal theory are able to provide a satisfying solution.

One such case is whether and to what extent damages may be recovered for the loss of use of property. Another is the assessment of damages in cases where intentional misrepresentation has induced a contract. In order to find a satisfying solution it is often helpful to note the legal position in a comparable legal system. For the purposes of this thesis I have decided to compare the solutions offered by South African and German law.

In discussing the problem comprehensivly, first the assessment of patrimonial loss in general will be discussed. For this it is essential to find a working definition of the terms "damage" and "patrimonial-loss". Secondly, the basic principles of the assessment of damages in the case of damage to property will be explained. Finally, the assessment of damages in the context of loss of use and fraudulent misrepresentation will be referred to.

II. The Assessment of patrimonial loss in general

1. Definitions

a) damage

Under both South African and German law finding a satisfying definition of the term damage has been difficult. According to an analytical definition of the concept of damage offered in South Africa, damage is the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved[1].

German law draws a distinction between the term damage (German: *Schaden*) in its natural and legal sense. Damage, in its natural sense is defined as any diminution, as a result of a damage causing-event, that a person sustains in his legally protected rights. This definition corresponds with the South African definition of damage given above. In certain cases, damage in its natural sense is complemented and corrected by a legal perception of the term damage. As a result, damage in its legal sense is recognised, even though there is no diminution in one person´s patrimony. As the legal sense of the term damage has developed through case law, it is generally recognised that the legal sense of damage cannot be defined but has to be considered in every single case[2]. As the definition above indicates, in both legal systems only harm in regard to legally

[1] Harms & Vessels, The Law of South Africa, Volume 7, at p. 9
[2] Palandt/Heinrichs, Bürgerliches Gesetzbuch, 59. Auflage 1999, Vor. § 249, No. 7

recognised patrimonial and non-patrimonial interests of a person qualifies as damage[3].

In German law, the term "damage" is used to denote both patrimonial (pecuniary) damage and non-patrimonial (non-pecuniary) loss[4]. In South Africa, the situation is not so clear. Some authors[5] define damage only as patrimonial loss. This approach is based on the assumption that patrimonial damage and injury to personality do not share any meaningful common dominator. Other South-African authors[6] are of the opinion that damage is a broad concept which consists of patrimonial as well as non-patrimonial loss[7]. They argue that any other interpretation in terms of a restricted view of damage would obviously have unjust results. In South African law, however, no clearly defined line exists between patrimonial and non patrimonial damage[8]. In German law the differences between patrimonial and non-patrimonial loss are expressed in § 253 of the German civil code BGB providing that the injured cannot claim monetary compensation (*Geldersatz*) but only restitution in kind (*Naturalrestitution)* in cases of non-patrimonial loss. (except §§ 847, 1300 BGB).

b) patrimonial loss

Under South-African law, patrimonial loss is defined as the diminution in the utility of a patrimonial interest in satisfying the legally recognised needs of the person entitled in such interest. It can also be considered the loss or reduction in value of a positive

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[3] Neethling, Potgieter, Visser, Law od Delict, second edition, at p. 198
[4] Palandt/Heinrichs, Vor. § 249, No. 7
[5] Van der Walt, 1980 THRHR3; Reinecke 1976 TSAR 34; Boberg, The Law of Delict, at. p 435
[6] Visser and Potgeter, Damages at p. 27-28; Neetling and Potgieter, Law of Delict at p. 200
[7] Harms, Vessels, The Law of South Africa, Volume 7, at p. 9
[8] Neetling, Potgieter, Visser, Law of Delict, at. p 202

asset in someone's patrimony or the creation or increase of a negative element of such patrimony (a patrimonial debt)[9]. Despite the fact that the German BGB contains no definition of patrimonial loss, a similar definition is accepted in Germany.

2. Basic Concept

a) *Traditional Sum-Formula Approach*

In both legal systems, the sum-formula approach has been the basis for the nature and assessment of patrimonial law[10]. This approach describes a comparative method through which damage is determined by subtracting the plaintiff's present patrimonial position (after the damage-causing event has occurred) from the hypothetical patrimonial position which he would have enjoyed had the damage-causing event not occurred[11]. This general principle of compensation has found expression in § 249 Sentence 1 BGB, which states that a person who is obliged to make compensation must restore the situation which would have existed if the circumstances which render him liable to make amends had not occurred.

b) *Criticism of the sum-formula approach*

In South Africa, the sum-formula has been subjected to criticism. First, it has been said that the sum-formula is not supported by the doctrine of interesse in Roman law[12]. Secondly, it has been argued that the sum-formula assesses the damage to anonymously as it does not indicate how the amount is made up[13]. Thirdly, the sum-formula has been considered to potentially

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[9] Neetling, Potgieter, Visser, Law of Delict, at. p 206
[10] Visser, Potgieter, Law of Damages, at. p. 59
[11] Erasmus, Gauntlett , The Law of South Africa, First Reissue, Volume 7, at p 19
[12] Visser, Potgieter, Law of Damages, at. p. 64
[13] Visser, Potgieter, Law of Damages, at. p. 64

confuse t has been considered the patrimonial and the causal elements of damage[14], because damage has been determined with the sum-formula, at the same time this shows that the damage-causing event is a necessary condition in terms of the condition sine qua non "test" of causation[15].

c) ***Concrete Concept of Damage***

Those who argue in favour of the abolition of the sum-formula simultaneously advocate accepting a concrete concept of damage. A concrete approach focuses on the withdrawal or deterioration of a particular part of someone's patrimony and is concerned with individual heads of damage[16].

Under German law, in cases of *damnum emergens* damage is generally assessed in a concrete way. (*konkrete Schadensberechnung*), because § 249 BGB provides that damage generally has to be compensated in kind. If monetary compensation is claimed instead, the focus shiftes to the real diminution of somone's patrimony regarding one individual head of damage.

In the case of *lucrum cessans*, an abstract assessment of damage (*abstrakte Schadensberechnung*) plays a decisive role[17]. In these cases, damages are awarded according to an average standard[18]. One example of an abstract assessment of damage can be found in § 252 sentence 2 BGB. This Article provides for the presumed loss of profit which in the ordinary course of events could have been expected, or according to special circumstances, especially in the light of the preparations

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[14] Reinicke, 1988 de Jure at p. 225
[15] Visser, Potgieter, Law of Damages, at. p. 65
[16] Visser, Potgieter, Law of Damages, at. p. 66
[17] Palandt/Heinrichs, Vor. § 249, No. 50

and arrangements made. This presumption can, however, be rebutted and is systematically to be qualified only as a presumption of law.

Another example of the abstract assessment of damage can be found in § 288 paragraph 1 BGB. This provides that interests of 4% per year are payable unless the creditor has reason to claim a higher percentage. Accordingly, an abstract assessment of damage is allowed in favour of the creditor.

Where the assessment of damages according to average standards is not permitted, damages are to be assessed as concrete, i.e. according to the diminution the plaintiff has sustained in his patrimony. In this context the sum-formula approach still play a decisive role in Germany.

In summary, one can say that the sum-formula approach is well established in both legal systems. Nevertheless, adding certain principles of the South African concrete concept of damage in order to modify the sum-formula in certain aspects could be useful. In cases of *damnum emergens* for example a concrete concept of damage can be used to measure the damage without using a hypothetical element[19] as in these cases, the quantum of damage often will be obvious. If, for example a dog has been run over by a car the loss suffered is the value of the dog which can be assessed without comparing the present patrimonial position with the hypothetical patrimonial position. On the other hand, the sum-formula and the comparative method are inevitably used to assess prospective loss, loss of profit or contractual damage[20].

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[18] Larenz, Lehrbuch des Schuldrechts, Band I at. p 417
[19] Visser, Potgieter, Law of Damages, at. p. 67
[20] Visser, Potgieter, Law of Damages, at. p. 67

The following section discusses the calculation of damages for patrimonial loss resulting from damage to property, loss of use of object and fraudulent misrepresentation.

III. Damage to property

Under South African law, the principle of delictual compensation - that the plaintiff be placed financially in as good position as he would have been in a had the delict not been committed - requires that the plaintiff be awarded the diminution in the value of his property that the delict has brought about[21]. This measure of damage caused by injury to property is usually the diminution in its market value[22]. This diminution is measured by subtracting the post-accident market value of the property from its pre-accident market value[23]. An easier way to calculate the loss is to rely upon the reasonable costs of necessary repairs as a measure of damage. Such evidence, however, is not always a reliable indication of the diminution in value, as the case of Erasmus v Davis[24] showed.

1. Erasmus v Davis

In this case, the plaintiff sued the defendant for R930 in respect of the damage her motor car sustained in a collision caused by the defendant's negligence. Evidence for the plaintiff established that (a) the pre-collision value of the car was 1200, (b) the reasonable cost of repairing the damaged bodywork was R771; and (c) after the collision the car was sold to a scrap-car dealer as salvage for R270. There was no other evidence of the car's post-accident value.

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[21] Boberg, Law of Delict, at p. 622
[22] Boberg, Law of Delict, at p. 622
[23] Visser, Potgieter, Law of Damages, at. p. 330
[24] 1969 (2) SA 1 (A) at 18

The magistrate awarded the plaintiff the R930 claimed, on the basis that this was the difference between the car's pre-accident value (R1200) and its post-accident value (R270).

On appeal to the Provincial Division, the court held that the magistrate's award could not stand because the plaintiff had not proved the car's post accident value to be R270. The Provincial Division was, however, of the opinion that the assessors unchallenged evidence as to the reasonable costs of repairs showed that the least amount the plaintiffs damage was R771. This sum was therefore awarded to the plaintiff.

The defendant's appeal to the Appellate Division was dismissed by the majority of the court. In its judgement, the majority of the court explained that the plaintiff is entitled to establish the difference between the pre-accident and post-accident value of his property in order to prove the diminution in value to his property. The majority of the court held that from the fact that present plaintiff had failed to do so, it did not follow that the plaintiff was not entitled to succeed. The majority of the court was rather of the opinion that evidence of the reasonable costs of repairs constitutes prima facie proof of the diminution in value of property, and that it is for the defendant to cast doubt on the validity of these measure of loss[25].

Another view was put forward by Muller AJA in his dissenting judgement. Here Muller AJA pointed out three instances where the cost of repairs cannot serve as a measure of damage and damages:

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[25] 1969 (2) SA 1 (A) at 12

(a) where the cost of repairs exceeds the pre-accident value of the property;

(b) where the cost of repairs exceeds the diminution in value;

(c) where the repairs, though restoring the property to its pre-accident condition, do not also restore its pre-accident market-value.

In Muller´s view, since the real salvage value of the plaintiff's vehicle had not been established, possibility (b) had not been excluded. It had been for the plaintiff to prove the quantum of her loss, which entailed showing that the method she adopted for doing so was an appropriate one in the circumstances. Muller AJA concluded that because she had failed to do this, the plaintiff was not entitled to any damages.

This decision has caused some differences of opinion among commentators. Boberg[26] view is that the true criterion is the diminution in value and the plaintiff is required to prove this fact. In his view, the cost of repairs is only circumstantial evidence of this fact when, on a preponderance of probabilities, it creates an interference, that such cost is the least amount of money required to make up the diminution in value. According to Boberg, it this is not, per se, the most probable interference. He concluded therefore that Muller AJA´s approach was correct.

Other authors[27] are unconvinced of Boberg´s argument. They purport that, in most cases, it would be impractical to assess the market value of a motor vehicle involved in an accident and that

[26] 1969 Annual Survey, at p 153
[27] Visser & Potgieter, Law of Damages, at. p. 333

the reasonable and necessary cost of repairs would be the best indication of diminution in value.

To summarise the South African position, generally damages are assessed according to the diminution in value at the time of damage. The reasonable cost of repairs may be taken into account in assessing damages where the pre-damage value is established, but where the plaintiff fails to prove the post-damage value. The cost of repairs alone may be an appropriate measure where it is shown that the repairs were necessary, fair and reasonable.

2. German position

Although § 249 sentence 1 BGB states that damage normally has to be restituted in kind, the necessary costs of repairs also play an important role in the assessment of damages. This is because § 249 sentence 2 BGB contains an exception to the rule that damage has to be restituted in kind, providing that in cases of injury to a person or damage to property the plaintiff can claim the amount necessary to restitute the pre-accident condition of the property. This amount is normally represented by the necessary costs of repairs. As the *ratio* of § 249 BGB is to protect the integrity of the property, the equivalent amount of the costs of repairs can on principle also be claimed:

(a) where the cost of repairs exceeds the pre-accident value of the property or

(b) where the cost of repairs exceeds the diminution in value,

if this necessary to restitute the pre-accident condition of the property.

An exception to this rule follows from the principle of good faith, which finds expression in § 252 II BGB. The consequence of this article is that the diminution in the value of the property and not the costs of repairs must be used to measure the amount of compensation, if the costs of repairs are unreasonably high. In cases of damage to cars, German courts have held that the costs of repairs are unreasonably high if they exceed the pre-accident value of the car by more than 30%. However, this rule is not rigid and has to be considered from case to case.

If the property is destroyed or the if the costs of repairs are too high the plaintiff is allowed to claim the costs for the replacement of the property. This is usually will be higher than its market-value (the selling price). This follows from the rule laid down in § 249 Sentece 1 BGB that the pre-accident condition has to be restituted and, accordingly, the plaintiff is to be put in the position of having the funds to get an equivalent item[28].

While § 249 BGB protects the interest in the integrity of the property (*Intigritätsinteresse*), § 251 BGB additionally protects the interest in its value (*Wertinteresse*). According to this, the plaintiff can claim monetary compensation if the restitution of the pre-accident condition is impossible or inadequate. This includes cases where the repair takes an unreasonably long time or those where the repairs, though restoring the property to its pre-accident condition, do not also restore its pre-accident market-value[29]. As distinct from the compensation payable according to § 249 BGB, the measure of compensation is in the realm of § 251 BGB not the costs of repairs but the diminution in the value of the property.

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[28] Larenz, Lehrbuch des Schuldrechts, Band I at. p 400
[29] Palandt/Heinrichs, § 251 No. 4

3. Comparison of the South-African and German position

While German law gives priority to the interest in the integrity of property South African law merely protects the interest in the value of the property. This can lead to different results where the cost of repairs exceeds the pre-accident value of the property or where the cost of repairs exceeds the diminution in value. While South African courts in these cases assess the amount of compensation strictly according to the diminution in value, German courts see the relevant measure in the cost of repairs, as long as they are not unreasonably high.

IV. loss of use

The assessment of damages is especially complicated when damages for consequential loss are claimed . One typical consequential loss is the loss of the possibility to use property. This may be the result of different types of damage-causing events, such as damage to property, theft, alienation or destruction of property[30]. Loss of use may cause damage in the form of a loss of profit or income, because an article could not be used, or damage in the form of the reasonable cost of acquiring a substitute[31]. However, under South African law, it is not clear whether damages may be recovered for any loss of use of property, unless such loss is caused by unlawful and culpable impairment, withdrawal or retention of the object in question[32].

[30] Visser and Potgieter at p. 334
[31] Visser and Potgieter at p. 334
[32] Stoll, Visser, "Some thoughts on delictual damages for the loss of use of property in terms of South African and German Law", De Jure 1990 at p. 347

1. Case law

South African courts first awarded damages for the loss of use where the res was used to run a business. This was the case, for example, in Mosselbay Divisional Council v Oosthuizern[33].

a) *Mosselbay Divisional Council v Oosthuizern*

In this case, the plaintiff claimed damages for loss of income from the defendant who had negligently damaged the plaintiff's taxi. The court held that where damage to property deprives a man of the means of making a living, he can claim that loss of income he is able to prove as to be his average daily income.

b) *Shrog v Valentine*[34]

This rule was further developed and extended in Shrog v Valentine. In this case, the plaintiff's lorry, which he used in his business, was damaged through the negligence of the defendant. The plaintiff had caused the lorry towed to a garage and while it was being repaired there he hired another vehicle to use for business. With regard to Mossel Bay Divisional Council v Oosthuizen[35], the court pointed out that where a vehicle which is damaged through the negligence of another has been in use in its owners business the damages recoverable, apart from the costs of repairs, include the loss of income to the owner due to the loss of use of the vehicle. The loss could be proved by the plaintiff showing his loss of profit and the interference with his business as a result of his being deprived of the use of his lorry. The court then held that hiring the substitute lorry was an necessary act to mitigate the loss of income. As a person is entitled to recover the expenses to which he has been put, in minimising the damage the

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[33] 1933 CPD 509 at 511

[34] 1949 (3) SA 1228.

court concluded that the plaintiff was entitled to claim damages not only for the cost of the repairs but also for the loss of use.

c) *Monumental Art Co v Kenston Pharmacy*[36]

In Monumental Art Co v Kenston Pharmacy, however, the court expressed a reserved view on the subject in question. In this case, the property of the plaintiff (a firm of monumental masons) was stored in the basement of premises in which the defendant carried on a business on the ground floor. Due to the negligence of the defendant´s servants, a tap was left turned on with the result that water seeped through the basement causing damage to the plaintiff's property. Besides other damages, the plaintiff claimed damages for the loss of use of the basement for 30 days to the sum of the monthly rent of R 224,50 that the plaintiff paid for the hire of the premises. The defendant argued that the loss of use of the basement was only for the nine days that it took to clear the basement of water and goods, while the plaintiff submitted that an additional compensation for the three months´ inconvenience due to the flooding of the basement should be awarded.

The court held that in a delictual action damages is awarded for patrimonial loss alone and not for inconvenience, discomfort, annoyance or vexation unassociated with any pecuniary loss. Accordingly, the court awarded damages only for the period of nine days that it took to clear the basement.

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[35] 1933 CPD 509 at 511
[36] 1976 (2) SA 111 (C)

d) *Smit v Abrahams*[37]

The case of Smit v Abrahams shows nowadays it is out of question to award damages for loss of use where the res was used in a business. In this case, a vehicle belonging to the plaintiff had been irreparably damaged in a collision with a vehicle driven by the appellant. The plaintiff had used the vehicle in his hawker business. The plaintiff claimed first of all, payment of the market value of the vehicle and, secondly, compensation for the three month rental which the plaintiff had paid for the use of another vehicle which he had had to hire to conduct his business. It appeared from evidence that the respondent had not been in a financial position to afford purchasing another vehicle, or even to pay the deposit on one.

The defendant argued that the plaintiffs damages regarding the loss of use were not recoverable, because they were brought about by the plaintiff's impecuniosity.

The magistrate´s court found that the plaintiff had acted reasonably in continuing as a hawker and in hiring a substitute vehicle for the period covered by the claim. An appeal to a Provincial Division against the award of damages on the second claim failed. Finally, the defendant's appeal was dismissed by the Appellate Division.

e) *Criticism of the case law*

These decisions were the subject of criticism. Lee and Honore[38], for example, suggest that a claim for loss of use of something should not be confined to an article used for business purposes. They argue that a plaintiff who proves patrimonial loss is entitled

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[37] 1992 (3) SA 158 (C)
[38] Obligations 251-2

to the reasonable cost of providing himself with a substitute. As example they refer to a retired pensioner whose vehicle has been damaged. In their opinion, this pensioner should not have to rely on charity but should be entitled to recover an amount equal to his usual transport costs for the period. According to Lee and Honore, these damages should be assessed as the difference between the costs of the substitute transport and the usual running costs of the vehicle[39].

This view is supported by Visser and Potgieter[40]. In their view it is indefensible to limit compensation to instances where property is employed to generate income, since a loss of use is not dependent upon the fact that property is used in earning income.

Van der Walt[41] suggests that a distinction has to be drawn between temporary and permanent loss of use. In his opinion, permanent loss of use always constitutes compensable damage, irrespective of whether the plaintiff would or could in fact have used the property in question. Where there is temporary loss of the use of property, Van der Walt submits that a distinction has to be made between the position of an owner and a non- owner. He argues that a non-owner suffers damage irrespective of whether or not he would have used the article during the relevant period. The situation of an owner is different as his power to use the property is not of limited duration. Van der Walt therefore concluded that temporary loss of use can only amount to damage if the plaintiff proves that either a) he would have used the article during the relevant period, or b) that he has already incurred expenses to protect himself against the consequences of a temporary loss of use, or c) that he has suffered loss of profit.

[39] Obligations 251-2
[40] Law of Damages at. p 335
[41] Van der Walt, Sommeskadeleer, at p. 287

f) ***Extension of the liability for loss of use: Kellerman v South African Transport Services***[42]

An important extension regarding the liability in cases of loss of use occurred in Kellerman v South African Transport Services. In this case, the appellant's motor vehicle had been damaged as a result of the negligence of one of the respondent's employee's. While the vehicle was being repaired, the appellant hired a motor car at a cost of R1674 which he personally paid and which he thereafter sought to recover from the respondent.

As the motor vehicle was not used in the generation of the plaintiff's income, this case was different from the cases in Shrog v Valentine and Mosselbay v Oosthuizern.

Marais J, in distinguishing the present case from the case in Monumental Art, explained the difference between saying that there is no compensation for inconvenience, discomfort, annoyance or vexation and that compensation can never be recovered for the loss of use of a res which is not used in the generation or production of income, even though such loss of use has caused patrimonial loss. Marais J is of the opinion, that there is no good reason to deny compensation where the deprivation of use of such a res occurs in circumstances and at a time which make it entirely reasonable for the owner of the res to use a temporary substitute and where he suffers patrimonial loss as a consequence.

Furthermore, Marais J purported that ownership of a res embraces the right to use it for the functional purpose for which it

was designed. In his view, this availability for use has an economic value which is reflected in the prevailing rate of hire of such a res. Accordingly, Marais J sees himself to be entirely in accord with the principles of Aquilian liability that the third party whose negligence caused the loss of use of the owner's own res should have to compensate the owner for expenses so incurred. In his view, this is especially cogent in cases where deprivation of use, occurrs at a time when the owner reasonably desired to use the res. As a consequence the owner then incurs expense to which he otherwise would not have been put in obtaining the temporary use of a substitute.

On the other hand, Marais J emphasised that each claim of this part has to be decided on its own merits, and each claimant will have to satisfy the court that his decision to hire a substitute was a reasonable one. If no use was intended to be made of the res during the period it was under repair, no claim for loss can arise. The claimant than will not of course be entitled to an additional sum to compensate him for the inconvenience to which he has been put by having to hire a substitute.

In the present case, the court concluded that it was reasonable to hire a substitute car and accordingly awarded damages to the plaintiff.

2. Evaluation of the case law

From the above discussion, it is clear that that South African courts only award damages for the loss of use of property where the plaintiff has suffered actual patrimonial loss as a result of the

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[42] 1993 (4) SA 872 (C)

loss of use[43]. In this respect, the rule is still valid that no damages may be awarded for "inconvenience, discomfort, annoyance or vexation unassociated with any pecuniary loss[44] . Pecuniary loss can either occur in the form of loss of income, in the form of expenses reasonably occurred in mitigating damages, or in the expenses occurred in obtaining the temporary use of a substitute.

3. German position

German courts have extended the borders of liability drawn by South African courts. This is surprising as the German position, laid down in the German civil Code BGB, does not greatly differ from the South-African one described above. In terms of § 253 BGB, compensation in money is generally only available for patrimonial damage. According to this article, damages can consequently only be claimed if the loss of use has led to a quantifiable patrimonial loss; for example, loss of profit due to the loss of use of a car.

German courts, however, have never applied this article strictly. Rather, they have awarded the costs incurred in renting a substitute car if the plaintiff has actually hired one for the necessary period of repairs. This is fi in the courts opinion these costs are costs which must be expended in order to bring about restitution and are therefore claimable in terms of § 249 (second sentence) BGB. In this respect, German Courts made no difference whether the car was use exclusively for enjoyment or for the exercise of any profitable activity.

[43] Harms and Wessels, The Law of South Africa, Vol.7 at. p 52
[44] see Monumental Art Co v Kenston Pharmaty (Pty) Ltd 1976 2 SA 111 (C) 124

In further development of German law, it was found unsatisfactory to let the defendant benefit from the fact that the plaintiff did not hire a substitute car. Primarily because of this unfairness, German courts have held that the loss of a privately used car may give rise to an award for pecuniary damages suffered, even if the plaintiff does not rent a substitute car does not or incur additional expenses nor loses any profit[45].

An important factor underlying this solution was the theory of commercialisation of loss of use. According to this, the personal advantages associated with the use of an object form an independent economic asset if they can only be "purchased" by expenditure of money. In this sense, personal advantages and convenience are of a commercial nature. The German High Court (BGH), however, based its decision mainly on the general view that the availability of a car both at work and at home saves time and energy and that the resulting advantages are accordingly to be regarded as "money".

In consequence of these decisions, damages for the loss of use of a caravan, a motor boat or a valuable fur coat were claimed. The courts did not award these damages, explaining that only the loss of something indispensable for one's daily needs may be viewed as a pecuniary loss; while the loss of use of a luxury item only affects the non-pecuniary sphere.

These distinction have been much criticised on the grounds that even the loss of a luxury item may obviously be expressed in money. Furthermore, it has been argued that according to the sum-formula approach (*Differenhypothese*), there is no

[45] see BGHZ 40, 345 and BGHZ 45, 212

patrimonial loss where the plaintiff has not paid any additional costs, for example for hiring a substitute.

In countering this argument some authors have developed the so called theory of frustration *(Frustrationslehre).* This approach is based on the idea that the owner of a vehicle pays maintenance costs, such as tax, insurance and servicing costs in order to "buy" the use of the vehicle. If using the vehicle is impossible due to a damage-causing event, these costs are vain. Some authors[46] see in this fact a form of patrimonial loss which has to be compensated according to § 251 paragraph 1 BGB.

This approach lacks cogency, as the maintenance costs are not the result of the damage-causing event: The owner would have paid the maintenance costs even in the absence the damage-causing event. The theory of frustration would, furthermore, lead to a claim in cases where the owner cannot use the res because of a bodily injury, as the maintenance costs would be vain in this case, too. The injured party could not only claim the loss of use of his vehicle but also the loss of use of his flat or any other res he maintains. This result is not acceptable as it leads to indeterminate liability and opposes legal security.

Today, it is accepted that neither the theory of commercialisation nor any other theory is able to establish damage in cases where the plaintiff has not hired a substitute car. However, as courts have allowed the plaintiff to recover his loss of use for over 30 years, it is now customary law that recovery in these cases is possible, if the prevention of use was perceptible by the plaintiff.

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[46] Eike Schmidt, JuS 1980, at p 636

Damages are generally denied to a plaintiff who neither could or would use the item damaged or withheld for the period in question. Accordingly, abstract damages for the loss of use were denied to the plaintiff owner of a car where he was himself injured in the accident that caused the damage and could not in any event have used the car during the period of repairs[47].

4. Conclusion

This view of the German position shows that an extension of the scope of liability for loss of use is difficult to establish, in cases where the injured has had no additional expenses. This result mainly from the fact that loss of use per se does not constitute damage in terms of the sum-formula approach (Differenzhypothese). The attempt to create a new form of patrimonial damage was not successful, as no theory could convincingly explain why only the loss of use of certain items could be regarded as patrimonial loss.

From the theoretical point of view, it is therefore most convincing to award damages only in cases where the plaintiff has suffered patrimonial loss in its classic sense. This may lie either in a loss of profit or the reasonable costs incurred for hiring a substitute. It might initially appear unjust to let the defendant benefit from the fact that the plaintiff does not hire a substitute. Furthermore, to keep insurance costs low, it has been considered an useful bonus to award damages lower than the hiring costs, in order to discourage the plaintiff away from hiring a substitute.

This is, of course, not the right solution. In my view, the fact that a plaintiff has not hired a substitute is evidence that the hire of a substitute was neither necessary nor reasonable. Where a

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[47] BGH NJW 1968 at. p 1778

plaintiff has hired a substitute, he should have to prove, that this decision to hire was a reasonable one. This proof can only be easily provided where the hire of a substitute is necessary to avoid an equally large or even larger pecuniary loss. In other cases, it will be difficult to establish that the owner reasonably desired to use the res, which was the criterion used in Kellerman.

In my view it is not inequitable to use a restrictive approach in cases of loss of use, as the possibility of using a res is, in general,. not a right which deserves special legal protection. Not beeing able to use a res might be inconvenient, uncomfortable, annoying or vexatious, but this is not reason enough for success in an action, as the court has stated correctly in Monumental Art Co v Kenston Pharmacy[48]. I therefore conclude that the restrictive approach purported by the South-African courts serves justice better than the ill-founded approach German courts have adopted.

V. Fraudulent misrepresentation

Another controversial issue is the assessment of damage caused by fraudulent misrepresentation. Under South-African law fraudulent misrepresentation is defined as a false statement of fact (or possibly opinion), which is made in the course of negotiating a contract, with the requisite fraudulent knowledge and intent, which induces a party to contract (either at all or on the terms in fact agreed on) but which does not become a term of the contract[49]. As the false statement does not become a term of the contract, the fact that the representation is false does not give rise to breach of contract. Consequently, the aggrieved party has

[48] 1976 (2) SA 111 (C)
[49] Cameron, 1982 SALJ 109

no contractual claim for damages. Accordingly, he is not entitled to claim to have been placed in the position he would have occupied had the misrepresentation been true, because that is the contractual measure[50]. The misrepresentee´s claim for damages arises in delict and is therefore governed by delictual principles.

As the contract is not void, the misrepresentee has the choice between resiling and claiming damages, and enforcing the contract and claiming damages[51]. Consequently, the question which delictual principles apply is initially dependent on the fact whether the misrepesentee cancels or upghelds the contract.

Where the misrepresentee cancels the contract, the situation is relatively clear, the misrepresentee must, as far as possible, restore what he has received, reclaim what he has performed and claim whatever damages he may have sustained, generally in the form of wasted costs[52]. The measure of these damages is that sum which will restore the misrepresentee to his position prior to the misrepresentation, or the sum of all losses sustained as a direct consequence of having been induced to enter into the contract[53]. This follows from the basic principle of placing the plaintiff in the position he would have been in if the delict had not occurred.

The problem is more complicated where the misrepresentee seeks both to maintain the contract and sue for damages. This problem results mainly out of the fact that the misrepresentee has in most cases already received something from the other party pursuant to the contract, and he may have difficulty proving that,

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[50] Dlamini, 1985 De Jure p. 347
[51] Frost v Leslie 1923 AD 276
[52] Dlamini, p.351
[53] Erasmus & Gauntlett, The Law of South Africa, Vol. 7 at. p 53

despite what he has received, he is still worse off than if there had been no contract[54].

In order to cope with these difficulties,different approaches have been followed by the appellate division in the assessment of damages in cases where fraudulent misrepresentation has induced a contract. Originally,the appellate division followed the so-calles approach of the comparison of the two performances. This approach provides that if the misrepresentee received less that what he paid for, he suffered loss. But if he received more or equal to what he paid for, he would not have suffered any loss and therefore would not be entitled to damages. The difference between the purchase price and the real value of the merx is therefore the measure of damages[55]. This rule was applied in Trotman v Edwick.

1. Trotman v Edwick[56]

In this case, the seller of an erf with two flats on it led the purchaser to believe that a strip of municipal land adjoining the erf formed part of the merx. Although the case involved causal misrepresentation, the purchaser elected to abide by the contract and sue for damages in delict.

The Appellate Division held that the correct measure of damages for the seller's fraud was the difference between the purchase price and the market value of the land actually sold.

In later cases, however, the appellate division did not follow the measure of damages proposed in the Trotman case. The question was no longer whether or not the misrepresentee received less

[54] Dlamini, p. 351
[55] De Jager v Grunder 1964 1 SA 446 (A)

than what he paid, but how much more he was induced to pay by reason of the delict. In this respect, his out-of-pocket loss is the difference between the purchase price and the putative price, namely the price they would have agreed upon in the absence of fraud. This approach was first applied in Bill Harvey's Investment Trust v Orangezicht Citrus Estates.

2. Bill Harvey's Investment Trust v Orangezicht Citrus Estates [57]

In this case, the plaintiff bought a citrus farm from the defendant and the defendant fraudulently misrepresented the number of citrus trees. The plaintiff relied on the decision in the Trotman case and claimed in delict for the difference between the contract price and the true value of the merx. The Appellate Division held that this was not the appropriate measure of damages.

In order to distinguish this case from the Trotman case, the court explained that, in the latter, the misrepresentation affected the value of the property as an indivisible whole. In the Bill Harvey case, in contrast, the representation merely affected a specific aspect, namely, the number of the citrus trees. The court furthermore pointed out that in the Trotman Case the causal connection between the misrepresentation and the damages awarded was clearly established, whereas it was not in the Bill Harvey case. Consequently, the plaintiff could recover only such part of his loss as had been caused by the representation and not for loss resulting from his own bad bargaining. Accordingly, the court awarded only R3000 as the value of the missing trees which represented the amount he had been induced to pay by his relying on the misrepresentation.

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[56] 1951 (1) SA 443 (A)
[57] 1958 (1) SA 579 (A)

This decision was criticised on the grounds that the court did not properly apply the principles for the assessment of damages in the case of *dolus incedens*. It has been submitted that the court, did not enquire what the misrepresentee would have offered in absence of fraud and whether the seller would have accepted that. Instead the court simply placed value on the missing trees and regarded this as damage[58]. Some authors[59] argue that this amounts to positive interesse as a result of breach of contract, and they therefore criticise the court because the facts of the case did not justify such a finding.

3. Scheepers v Handley[60]

In the case of Scheepers v Handley and despite the criticism expressed, the court followed the pattern in the Bill Harvey case; namely, how much more the misrepresentee had been induced to pay by relying the representation. In the Scheepers v Handley case the defendant fraudulently misrepresented the extent of a farm sold by public auction. The plaintiff claimed damages representing the difference between the purchase price and the value of the property at the time of the sale based upon a shortfall of 231 morgen.

The court awarded the plaintiff the amount he had been induced to pay more by reason of his having relied upon the truth of the misrepresentation.

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[58] De Vos 1964 Acta Juridca 36; Mulligan 1958 SALJ 132-133; Kahn "Random Reflections on Damages for Misrepresenation" 1961 SLAJ 145

[59] De Vos 1964 Acta Juridca 36; Mulligan 1958 SALJ 132-133; Kahn "Random Reflections on Damages for Misrepresenation" 1961 SLAJ 145

[60] 1960 (3) SA 54 (A)

4. De Jager v Grunder[61]

A new trend emerged in De Jager v Grunder. In this case, G and D had entered into an agreement of exchange of their respective farms. D had fraudulently misrepresented the number and value of pine trees on one of his farms (Magermanskraal) . G alleged that, had he known the truth, he would have insisted upon Magermanskraal being valued lower and he sued for the difference. D argued that G had suffered no loss as the assets G had received from D were worth more than what he had transferred to D.

The majority of the court held that damage caused by fraud does not merely relate to a comparison of the value of the performance and the counter performance. Such a comparison is correct only in cases where there would have been no contract in the absence of the misrepresentation (*dolus dans*). In this case, it would be unjust to limit damage to damages emanating from the comparison of what each party had performed, as in the absence of the misrepresentation, the plaintiff would have contracted, but on different terms (*dolus incedens*). The court pointed out that it was not the fraud which caused the favourable price to be negotiated for G´s land and that it would be unfair to deprive him of such benefit. Accordingly, the majority of the court upheld G´s suit, finding that in determining G´s damages regard was to be had only to Magermanskraal.

The minority judgement differed from the majority view that the plaintiff had proved his damages. Rumpff JA explained, that in the absence of proof of a putative price, the fair market value must be treated as the putative price on the assumption that both parties would at least have agreed on the market value of the merx as the

[61] 1964 (1) SA 446 (A)

price. If the purchase price is more than or equal to the market value, the plaintiff has suffered no loss. But if the market value of the merx is less than the purchase price, the difference will be the measure of damages. Rumpff JA found that there was no difference between what the plaintiff gave and what he received. In his view, even if this were incidental fraud, the plaintiff had not proved any loss. In the absence of proof of what the contract price would have been were it not for fraud, it must be assumed to be the market price, and once again the plaintiff had suffered no loss.

Both judgements have given rise to criticism. The majority judgement was considered to be wrong as it applied the contractual measure, in so far as the plaintiff was placed in a better position than the one he would have occupied had there been no misrepresentation[62]. Another author is of the opinion that the plaintiff had not proved sustained damage, as the misrepresentee had not proved ante omnia that the market value of the merx which he received in his estate was less than the market value[63].

In contrast to this, another author[64] considers that the opinion that the minority judgement is neither just nor satisfactory. In his opinion, it is most unfair, in the context of causal misrepresentation, to limit proof of loss to comparison of pre- and post-contractual positions. The author continues that its is equally unfair, in the case of incidental misrepresentation, to saddle the innocent party with the initial burden of proving that, in the absence of the misrepresentation, the other terms of the contract

[62] Van der Merwe, 1964 THRHR 194
[63] De Wet 1960 ASSAL 94
[64] Cameron, at p107

would nevertheless have remained the same. This is virtually impossible to discharge in practice.

Other authors[65] are of the opinion that the minority judgement of Rumppf JA is correct according to the facts, but criticise the lack of significant difference between the arguments of the majority and the minority. In their view, the only difference existed as to the application of the legal principles to the facts of the case. The criterion used by all the judges in the case to determine the extent of damages to which the plaintiff was entitled, was the delictual one. This involved ascertaining what amount would suffice to place the injured party in the patrimonial position he would have occupied had the delict not been committed and not had the misrepresentation been true. According to these authors, even the majority applied this test, but was concerned about the too rigid application of a formula which might frustrate the main principle.

The decision in De Jager gave further reason to the discussion whether the delictual or contractual measure was used in the majority judgement. Some authors[66] are of the opinion that the effect of the judgement was to put the misrepresentee in the position he would have been in had there been no fraud. Other[67] consider that the effect of the judgement was to put the misrepresentee in the position in which he would have been had the misrepresentation been true.

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[65] Reinicke and Van der Merwe 1964 THRHR 294

[66] Van der Merwe and Reinecke, THRHR 66, Reinicke and Van der Merwe 1964 THRHR 297

[67] Van der Merwe and Oliver, 324

5. Ranger v Wykerd[68]

Whether to apply the contractual or the delictual measure was also the main question in the case Ranger v Wykerd. In this case, the plaintiff had bought a house, including a swimming pool, at the price of R22 000. The seller's husband fraudulently misrepresented the pool to be in good order and condition and the seller herself failed to disclose that it had serious structural defects. The plaintiff had the swimming pool repaired at a cost of R1250 which he claimed from the seller and her husband. He based his claim on the fact that, had he known of the defect, he would not have paid more than R20750 for the property. In the alternative, the plaintiff argued that R 1250 also represented the difference between the market value and the purchase price. The Appellate Division accepted the reasonable cost of repairs to be R1000 and awarded this amount to the plaintiff.

Jansen JA, finding in favour of the appellant, expressed the opinion that the court should, in appropriate circumstances, be prepared to apply the contractual measure in order to do justice between the parties. Referring to the De Jager case, Jansen JA said that in effect the majority applied the contractual "benefit of the bargain" measure whilst paying lip-service to the delictual principle of "out of pocket loss". According to Jansen JA, although the court applied the delictual measure in the Trotman case, "and has since purported to continue to do so", it has, in effect, in some instances determined damages on the basis of making good the representation and thus, in reality applied a contractual measure"[69]. Jansen JA emphasised the policy advantage of the contractual measure which often allows recovery of a larger sum than the delictual test and pointed out that it is anomalous that a

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[68] 1977 (2) SA 976 (A)
[69] 1977 (2) SA 976 (A) at 989

person "guilty of wilful fraud" should suffer less than one who merely breaches his contract[70].

Trollip JA, delivering the majority judgement, did not agree. According to him, the basic measure is delictual, but its application to the particular facts of a case founded on fraud is problematic. He explained that one cause of the difficulty is the quantification of the patrimonial loss, another the application of the "swings and round-abouts principle". The applicability of this "swings and roundabouts principle" decides whether or not the claimant's loss on the swings (the cost of repairing the swimming pool) can be compensated by the gain on the roundabouts (the gain from the whole contract).

In order to cope with these difficulties, the court approached the problem on the basis that if the defendants had intentionally or negligently physically damaged the swimming pool after the plaintiff had taken transfer of the property, they would have been liable for the reasonable cost of repairs as an indication of the diminution in value of the property. The court than pointed out that it should make no difference whether the delict in casu is fraud and not wilful injury to property. It explained that the main argument for differentiating between the two kinds of delicts rests on the applicability of the "swings and roundabouts principle". As the fraud, unlike the delict causing physical damage, is committed in a contractual context, it must be evaluated "not in isolation, but in context of the whole of that transaction"[71]. As a result, whatever loss in incurred "on the swings" (through the cost of repairs) is compensable by the net gain in patrimony derived "on the roundabouts" through acquiring the property. If the plaintiff wants to establish his loss, he must prove that he has not made any

[70] 1977 (2) SA 976 (A) at 990
[71] 1977 (2) SA 976 (A) at 991

compensatory net gain by proving that the property is now worth less than the price he had paid for it. If the plaintiff does not prove this, his claim fails despite evidence of expenditure incurred him as a result of the fraud.

Turning to the facts before the court, Trollip JA began by assuming for the purposes of argument that the fraud was causal and that the "swings and roundabouts principle" should accordingly apply. Although the plaintiff did not lead any objective evidence as to the market value of the property, Trollip JA was nevertheless satisfied that the plaintiff had indeed proved his loss. Trollip came to this conclusion because of three crucial assumptions of fact. According to the first assumption, the purchase price of R22000 was prima facie its market value in its represented condition at the time of contracting. The actual market value of the property in its defective form must, therefore, have been less than R22000. The amount of R1000, which was the cost of repairing the defect must have been the value of the discrepancy. From these assumptions of Trollip JA the court concluded that the plaintiff had not made any net gain to be set off against his loss. As a result, he had proven his loss of R 1000, which could not regarded as too remote in the light of the negotiations.

Cameron expresses reservations about the approaches of both judges in the Ranger case. She criticises Jansen JA´s use of the contractual measure as departing from precedent and for creating uncertainty in the law[72]. She also objects to the use of factual assumptions on the grounds that it can not always be supportable, because it amounts to an evasion so some crucial issue. In her view it can be questioned, for instance, whether the

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[72] Cameron, 1982 SALJ 113-114

"swings and roundabouts principle" should be applicable at all and therefore whether a plaintiff who has bargained well and has made an overall gain should be precluded from claiming damages for financial loss suffered as a result of the defendant's fraud[73]. Cameron furthermore points out that it may not always be feasible to make such assumptions; for example where market value is clearly far different form the value agreed in the contract[74].

6. Colt Motors v Kenny[75]

The next decision in this debate Colt Motors v Kenny made some useful contributions. In this case, the plaintiff had sold a Volkswagen Microbus to the defendant. In return the defendant had traded in an Audi motor car which he had described as a 1980 model, whereas in fact it was a 1979 model. The plaintiff argued that he had agreed to a trade-in value that was R1550 more than he would have agreed to had he not been misled. He thus claimed this amount as damages.

The magistrate dismissed the claim for various reasons. On appeal, the court found that the plaintiff had not relied on the market value of the vehicle which the defendant traded in, but on the difference between the trade-in price of a 1980 model Audi and the trade-in price of a 1979 Audi.

Stegmann J explained that the approach to follow was that of the majority in De Jager v Grunder[76]. In the present case, the effect of the misrepresentation had clearly been confined to the stipulations as to the trade-in value of the Audi and in consequence, the amount due by the defendant in respect of the

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[73] Comeron, 1982 SALJ 114-115
[74] Comeron, 1982 SALJ 114-115
[75] 1987 (4) SA 378 (T)
[76] SA 446 (A)

Microbus. In the court´s opinion there was no indication that any other aspect of the transaction had been influenced by the misrepresentation. Thus, there was no need to bring any profit that the plaintiff would make on the sale of the Microbus into account on the "swings and roundabouts" principle enunciated in the Ranger case[77].

The court explained that it is typical of the delict of fraudulent misrepresentation, in contrast to other forms of delict, that the plaintiff seeks to prove his loss without reference to the market value of the relevant asset. This is caused by the fact that the plaintiff has often not meant to pay the market value and had been induced by a fraudulent misrepresentation to pay more than he would otherwise have done. Accordingly, the central question in fraudulent misrepresentation cases is how much more the plaintiff was induced to pay by the misrepresentation than he would have paid had it not been made[78]. Following the principle in Bill Harvey's Investment Trust v Oranjezicht Citrus Estates[79], Stegmann J pointed out that the plaintiff was required to allege three facta probanda in order to make use of this principle. These are, first, the counterperformance which the plaintiff but for the fraudulent misrepresentation, would have given for the defendants performance; secondly, the fact that by virtue of the fraudulent misrepresentation the plaintiff was induced to offer a higher counterperformance as the casual connection between the delict and the alleged damages; and thirdly the amount of such increased counterperformance.

The court was of the opinion that the plaintiff had proved these three facta probanda and, accordingly, held that the plaintiff's

[77] 1977 (2) SA 976 (A) at 991H
[78] at 391 (G)
[79] 1958 (1) SA 579 (A) at 483 F-G

claim should have been upheld. This decision is remarkable in the respect that the Bill Harvey principle was considered to be the underlying principle of the measure of damages in all cases where damages had been caused by fraudulent misrepresentation. The court was, furthermore, of the opinion that the majority of cases of fraud inducing a contract could be placed in one of the following categories:

(1) In a case of *dolus dans,* where one may directly compare the values of performance and counterperformance, the correct measure of damages is the comparison of the market value of the plaintiff's patrimony before and after the commission of the unlawful conduct.

(2) Where it is impractical to compare two patrimonial positions, damage may be seen as the reasonable cost of repairs. This approach is an extension of category (1) and was used in Ranger v Wykerd.

(3) In a case involving *dolus incedens*, an increase in price caused by misrepresentation is seen as damage. In this case, the plaintiff has to prove his damage without reference to market value by demonstrating how much more he was induced to pay for the counterperformance. This method was for example used in De Jager v Grunder.

As a practical approach to the assessment of damages, the court formulated the following guidelines:

(1) A plaintiff who has suffered damage through fraudulent misrepresentation is not obliged by any rule of law to allege or

prove the market value of the merx which, as a result of fraud, he has purchased at an inflated price[80].

(2) To prove his damages it is open to the plaintiff to allege and prove what amount he would have been prepared to pay for the merx had he not been misled; and, without leading evidence, that the defendant would have accepted such amount. Unless the plaintiff's evidence is untrustworthy or other evidence is evidence is led to causes it to be doubted, his damages will the be determined on the difference between what he would have been prepared to pay and the increased amount which he agreed to pay as a result of the fraud[81].

(3) If the plaintiff is not in a position to prove what amount he would have paid, he is then free to allege and prove the market value of the merx. In the absence of evidence justifying any other finding, it will then be inferred that the parties would have concluded the contract at the market price merx had the plaintiff not been misled. The plaintiff´s damages are then determined as the difference between the market value and the increased amount, which because of the misrepresentation has been agreed upon[82].

(4) If the plaintiff does not prove the market value of the merx the defendant himself is free to allege and prove the market value and thereby to oppose the plaintiff's case[83].

(5) If the price which the plaintiff alleges that he would have paid for the merx is lower than the market value of the merx, the plaintiff will further have to allege and prove that the defendant

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[80] 1987 (4) SA 378 (T) at p 380
[81] 1987 (4) SA 378 (T) at p 380
[82] 1987 (4) SA 378 (T) at p 380
[83] 1987 (4) SA 378 (T) at p 380

would probably have accepted such lower price. In such a case, the Court would rather accept that the parties would have agreed on the market price unless the plaintiff discharges such onus[84].

7. Hunt v Van der Westhuizen[85]

In Hunt v Van der Westhuizen, the plaintiff purchased a house and a swimming pool from the defendant for R140000. The defendant had fraudulently represented to the plaintiff that pool was of a particular quality. The plaintiff claimed R11500 as being the market price required to have the swimming pool conform to such a standard. The plaintiff argued that if she had known the pool was not of the represented quality, she would not have bought the house and would certainly not have gone to her maximum price of R140000. She also stated that there was no point in asking how much less she would have paid, since knowing that there was a brick pool would have decided her not to buy the house.

The defendant gave evidence to the effect that the material of which the swimming pool was constructed made no difference to the market value. She considered that the true market value of the property was R 40000, which was the price which the purchaser was prepared to pay and the seller to accept.

In its decision, the court first pointed out with regard to Ranger V Wykerd that though a claim based on fraudulent misrepresentation inducing a contract is founded on delict, it is now well established that, in appropriate circumstances, the measure of damages may be the reasonable cost of making good

[84] 1987 (4) SA 378 (T) at p 380
[85] 1990 3 SA 357 (C)

the misrepresentation. This is despite the fact that it coincides with the measure for breach of contract[86]. The court then raised the question whether it is still appropriate to distinguish cases of causal fraud (*dolus dans*) from cases of incidental fraud (*dolus incedens*). In the court´s view, apart from the difficulty which may be occasioned by having to classify the fraud in question as causal or incidental, it is anomalous that a plaintiff alleging incidental fraud should be in a more favourable position than one who relies on causal fraud. With reference to Jansen JA in Ranger v Wykerd the court pointed out that the swings and roundabout principle results in a person who is guilty of wilful fraud suffering less that one who has merely breached his contract. The court was of the opinion that the deterrencing fraud in commercial relations is more likely to be achieved by a policy of compelling fraudulent wrongdoers to compensate their victims on a broad basis. The court supported the view that any gain and benefit which injured the plaintiff as a result of the contract should, in all cases, be treated as *res inter alios acta vis a` vis* the wrongdoer and should not figure in the assessment of damages.

Applying this approach to the present case, the court explained that it would be irrelevant to consider the real market value of the property and to compare that with what was actually paid. The court concluded that to the extent that the value of the property was diminished by the swimming pool being of less than of the represented quality, the plaintiff would be entitled to recover this amount as a material loss sustained by her and caused by the defendant's wrongdoing.

In favour of the defendant, the court alternatively assumed that the case involved causal fraud which affected the transaction as a

[86] 1990 3 SA 357 (C) at 361

whole. Consequently, the swings and roundabouts principle consequently applied. Adopting the reasoning of Trollip JA in Ranger v Wykerd that the agreed purchase price of the property was prima facie the actual market value of the property in its represented condition, the court explained that the result would be the same in this alternative.

Consequently, the court awarded the plaintiff R115000.

8. Mayes v Noordhof[87]

In Mayes v Noordhof, the plaintiffs purchased certain land from the defendant. The defendant had fraudulently non-disclosed that a squatter camp was to be erected next to the property. When the plaintiffs arrived to take possession of the property they found that a squatter camp had been erected next to it. The plaintiffs argued that they would not have bought the property had they been in possession of the information the defendant had regarding the housing of squatters in the area and claimed damages on the basis of the fraudulent non-disclosure by the defendant.

The court held that the plaintiffs had established a claim for damages for misrepresentation or concealment. According to the court, the measure for damages varies from case to case. The court qualified the present case as a case of *dolus dans* as the plaintiffs would not have bought at all had they known the truth. The court held that, in this case, damages would have to be calculated on the basis of the market value. The court measured the damages by determining the difference between the market value of the property with the squatter camp next to it and the

[87] 1992 4 SA 233

value thereof without the squatter camp next to it and awarded the difference to the plaintiffs.

9. Evaluation of the case law

Evaluating the case law, one can say that the only consistency in the South African court's decision lies in the fact, that with one exception, the delictual measure was regarded as the appropriate one in cases where fraudulent misrepresentation induced a contract. With regard to the delictual measure, originally two approaches could be distinguished:

a) Approach of the comparison of the two performances

One approach entails the comparison of the two performances. If the misrepresentee received less than he paid, he suffered loss. But if he received more or equal to what he paid, he will not have suffered any loss and will therefore not be entitled to damages. The difference between the purchase price and the real value of the merx is therefore the measure of damages[88]. This approach is based on the Appellate Division's decision in the Trotman´s case[89].

b) Approach of the comparison of the purchase price and the putative price

According to the second approach the question is not whether or not the misrepresentee received less than what he paid, but how much more he was induced to pay by reason of the delict. In this respect, the misrepresentee´s out-of-pocket loss is the difference between the purchase price and the putative price, namely the

[88] De Jager v Grunder 1964 1 SA 446 (A)

price they would have agreed upon in the absence of fraud. This approach is based on the decision in the Bill Harvey case[90].

c) ***Further development***

As the facts of each case differed, South African courts have been generally reluctant to use one rigid formula. Moreover, none of the above approaches prevented inequitable results when applied strictly:

The first approach has the disadvantage that, in most cases, this approach is to the plaintiff's detriment because he may fail to prove that what he received was less than what he performed. This approach further favours the wrongdoer as it does not take into account the benefit of the bargain.

The second approach can be unfavourable to the plaintiff as it is not enough for the buyer simply to aver how much he would have agreed upon to pay. He must also prove that the other party would have accepted that offer[91].

Courts have therefore tried to improve on the above approaches and to find a practical way to measure the damages equitably:

(1) distinction between *dolus dans* and *dolus incedens* without prove of acceptance

The view that a distinction has to be drawn between *dolus dans* and *dolus incedens* first expressed by the majority in the De Jager case . Only in cases of dolus dans may the comparison of the

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[89] see Trotman v Edvick 1 951 1 SA 443
[90] see Bill Harvey v Orangezicht Citrus Estates (A) 1958 (1) SA 579 (A)
[91] De Jager v Grunder 1964 1 SA 446 (A)

performance an counter-performance, as used in the first approach, be the appropriate measure.

In cases of *dolus incedens,* the measure of damages is the difference between the actual price paid and the putative price paid in the absence of fraud. The party misled does not have to prove that the other party would have agreed on the putative price[92].

This approach has been criticised for ignoring an important and self evident requirement. Before *dolus incedens* can be claimed a person also has to prove that were it not for the fraud, the defendant would be prepared to contract on the terms on which the defrauded party would be prepared to contract.

It has been further argued that the view that damages for delict and those for breach of contract may coincide is based on no authority[93].

(2) fiction of the physical damage after the contract or use of factual assumptions

A completely new approach was expressed by Trollip JA in the Ranger case. This was where the "swings- and roundabouts principle" does not apply, damages can be assessed according to the principles applicable in cases of physical damage to property.

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[92] this was not stated expressly but the majority completely ignored this requirement. Otherwise the court not possibly have decided in favour of the plaintiff who did not prove that the defendant in the absence of fraud would have agreed to the same terms.

[93] Dlamini, p 360

In cases where it is not clear whether or not the "swings- and roundabouts principle" applies, factual assumptions can be used to ease the plaintiff's burden of proof regarding his damage.

This approach has been criticised for offering little assistance, because it does not address the applicability or inapplicability of the swings- and roundabouts-principle. Furthermore, it has been argued that the use of factual assumptions creates uncertainty in law.

(3) apply the contractual measure

Additionally there is also the view of Jansen JA in the Ranger case that it is preferable for policy considerations to use a contractual measure of damages as this would be in conformity with past practice.

This approach has not found favour, because the court felt that the plaintiff would be assisted without sacrifice of principle. The contractual measure belongs to the realm of breach of contract, not of delict, to which the action for fraud inducing a contract belongs. Furthermore, it has been argued that the fact that an award of damages in terms of delictual negative interesse may sometimes have the same result does not justify the conclusion that an incorrect measure of damages has been used[94].

(4) practical approach: onus of rebuttal for defendant

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[94] Dlamini at p. 344

Another approach is the practical one laid down in the case of Colt Motors. According to this, the plaintiff has to allege only what he would have ben prepared to pay, what he actually performed as a result of the misrepresentation and that he has suffered damage in the amount of the difference between the actual and putative performances. If these allegations are supported by evidence, the defendant bears the onus of rebuttal to show that he would not have accepted such putative performance.

(5) Compensation on a broad basis

Finally, there is the view expressed in Hunt v Westhuizen that the deterrence of fraud in commercial relations is more likely to be achieved by a policy of compelling fraudulent wrongdoers to compensate their victims on a broad basis. According to this view any gain and benefit which has inured to the plaintiff as a result of the contract should in all cases be treated as *res inter alios acta vis a` vis* the wrongdoer and should not figure in the assessment of damages[95].

d) Approaches developed by commentators

In considering the courts decisions, SouthAfrican commentators have developed different approaches:

(1) apply the delictual measure and distinguish between *dolus dans* and *dolus incedens* with prove of acceptance

[95] see Hunt v Vander Westhuizen 1990 (3) SA 357 at p. 362

Visser and Potgieter[96] and Erasmus and Gauntlett[97] are all of the opinion that a distinction has to be drawn between instances where the fraudulent misrepresentation has, in fact, induced the contract (*dolus dans* in contractum) and instances where the misrepresentee would in any event have entered into that agreement but on terms more favourable to himself (*dolus incedens* in contractum).

(a) *dolus dans*

These authorities suggest that where fraud is in the form of *dolus dans*, damages are to be calculated by determining the position in which the misrepresentee would have been in without a contract. Accordingly, the value of the misrepresentee´s performance must be weighed against that of the misrepresentor. In this case, the measure of the misrepresentee´s damage is restricted to this difference. If there is no difference then the misrepresentee has suffered no loss and no action lies[98].

(b) *dolus incedens.*

In cases where fraud is in the form of *dolus incedens,* these authors suggest that the measure of damages is the difference between the price actually paid and the price the misrepresentee would have paid and the defendant who made the misrepresentation would have accepted, had the misrepresentation not been made.

(c) *Criticism of distinction between causal and incidental fraud:*

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[96] Visser, Potgieter, Law of Damages, at. p. 336
[97] Erasmus & Gauntlett, The Law of South Africa, Vol. 7 at. p 53
[98] Erasmus & Gauntlett, The Law of South Africa, Vol. 7 at. p 53

The distinction between causal fraud and incidental fraud has been criticised for being artificial and leading to confusion. It has further been said that it is of little value, because if the deceived party argues that he would have contracted but on different terms, it will be extremely unlikely, that in the event of incidental fraud the deceiver would agree that he would have contracted on terms less favourable to him[99]. The very fact that the defendant committed fraud is sufficient evidence that he wanted the maximum benefit from the transaction. If there is no agreement as to the putative price, then the market value will be regarded as the putative price. In this event the situation is the same as if the deceived party had contended that there would have been no contract at all. Dlamini is therefore of the opinion that the distinction between *dolus incedens* and *dolus dans* is obsolete[100].

(2) Apply the delictual measure and do not distinguish between *dolus dans* and *dolus incedens*

Other authors[101] deny the relevance of the distinction between *dolus dans* and *dolus incedens,* submitting that the damages awarded a plaintiff should place him in the position he would have occupied if he had not entered into a contract. According to this view, the only approach which would lead to the effective application of the delictual measure is the weighing up of the counterperformances[102].

Despite the fact that this view serves legal certainty, the rigid application of the rule of weighing up the counter performances can lead to inequitable results. Furthermore, it has been said that

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[99] Dlamini, p 361
[100] Dlamini, p 361
[101] Van der Merwe & Oliver 320; Dlamini 1985 De Jure, 347-348;
[102] Dlamini, at p. 367

the renunciation of the distinction between *dolus dans* and *dolus incedens* is contrary to reality[103].

(3) Damages for fraudulent misrepresentation do not include loss of profit

Moreover, there is an opinion[104] that delictual damages are only based on loss which has actually been sustained. According to this opinion, damages for loss of profit are excluded. This has the consequence that where a person shows a profit he suffers no loss, since the deprivation of his opportunity to make a larger profit is irrelevant.

This view has been criticised for being untenable since it is based of incorrect views of positive and negative interesse as a measure of damages[105].

(4) physical damage after the contract analogy

Cameron[106] finally suggests that the "physical damage after the contract" analogy adopted by the majority of the court in Rangers v Wykerd should be used as this approach will prevent the court from being incorrectly influenced by the accidental fact that a delict has been committed in a contractual context.

Criticism of this approach is that it offers little assistance, because it does not address the applicability of the "swings and roundabouts" principle. Furthermore it ignores the fact that in

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103 Visser & Potgieter at p 343
104 Van der Merwe & Oliver 324-325
105 see Visser & Potgieter, at p. 343
106 1982 SALJ 113-114

cases of physical damage the plaintiff has not received anything from the wrongdoer while in the case of inducing a contract, the misled party has received something. Accordingly, this approach offers no answer to the question whether the party's performances should be taken into account or not.

Obviously none of the above approaches is free of criticism as there are difficulties inherent in all. It this therefore difficult to answer the question of which approach should be followed. In order to identify the most favourable approach a brief look at the German solution to the problem in question may be helpful.

10. German position

As under SouthAfrican law under German law the misrepresentee is in cases of intentional misrepresentation entitled to cancel or uphold the contract. One instrument to cancel the contract is the declaration of avoidance (*Anfechtungserklärung*, § 142 BGB). If an intentional misrepresentation (*argligstige Täuschung*, § 123 BGB) gives legal reason for a declaration of avoidance, the declaration effects the nullity of the contract ex tunc.

If the misrepresentee declares the contract avoided he can claim back the money paid according to the principles of unjust enrichment (§ 812 BGB).

Furthermore, the misrepresentee can claim restitution on grounds of the institute of culpa in contrahendo. This claim contains all costs necessary to place the misrepresentee in the position he was in before the conclusion of the contract. The loss incurred by relying on the misrepresentor´s declaration must also be compensated.

Additionally, the misrepresentee is entitled to claim damages in delict (*vorsätzliche sittenwidrige Schädigung*, § 826 BGB). If the misrepresentee has cancelled the contract, this claim is limited to the negative interesse. The misrepresentee can claim to be put in the position he would have been in had the misrepresentation not incurred. This claim includes the reimbursement of the misrepresentee´s performance, restitution for any special costs incurred, and any damage suffered due to the rejection of another offer.

If the misrepresentee proves that, in the absence of the misrepresentation a contract actually would have been concluded on better terms, he can claim this difference in price. The misrepresentee however, cannot claim the difference between the price actually paid and the price the misrepresentee would have paid without proving that the misrepresentor would have accepted the reduced offer[107].

German courts have created an exception from this rule in cases where the misrepresentee would not have concluded the contract in the absence of the misrepresentation but decides not to cancel the contract for special reasons. One examples of these special reasons is where it is not possible to return the purchased item. In these cases, the misrepresentee has to be treated as if he has concluded the contract on better terms, regardless whether the misrepresentor would have accepted these terms or not[108].

A claim including the positive interesse can only be brought up as a contractual claim resulting if § 463 BGB. This Article provides that the purchaser can claim damages for non-performance in

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[107] Mertens, Münchener Kommentar, § 826 Rdnr. 69
[108] see BGH NJW 1997, 1536

cases of fraudulent misrepresentation. Accordingly the purchaser must be placed in the position he would have had had the purchased item indeed the required quality. This claim includes the consequential loss caused adequately. The purchaser has the choice of keeping or returning the purchased item. If he keeps it, his damages are measured by taking the difference in price of the purchased item and the corresponding item of the promised quality. If the purchaser returns the purchased item, he can claim the purchase price, the costs of the contract, and all consequential loss caused adequately by the misrepresentation.

To summarise the German position, one can state that generally German courts strictly apply the delictual measure. Although the terms *dolus dans* and *dolus incedens* have no meaning in German law, German courts are aware of the different consequences that causal and incidental fraud may have. While in cases of *dolus dans* the plaintiff does not have to prove that the defendant would have accepted the putative offer in cases of *dolus incedens* this proof is essential when claiming the difference between the price actually paid and the putative price the misrepresentee would have paid in absence of a misrepresentation.

11. What approach should be adopted ?

In my opinion, it is questionable whether awarding delictual damages to virtually the same extent as damages for the breach of contract is desirable. One argument in support of the extension of the delictual liability is that it is anomalous that a person guilty of wilful fraud should suffer less than one who merely breaches a contract[109]. Countering this argument, one can claim that the question to consider is not whether a person guilty of wilful fraud should suffer more or less than a person who breaches a contract

but to find and apply the correct measure of damages which serve the aims of justice, equity and legal certainty. This follows from the legal concept that the punishment of a person who has committed a wrong is ruled by criminal law. Accordingly, the use of private law to punish is not acceptable[110]. It is therefore not anomalous but a matter of fact that a person guilty of wilful fraud has to compensate the victim in a way different from a person who breaches a contract.

From the above discussion of the South African cases, there is no doubt that the South-African courts consider the delictual measure as the correct measure in cases of fraudulent misrepresentation. Because South African courts are cauttious about the implications that could arise from strict application of the delictual measure and weighing up of the counter performances, these courts have tried to work out a policy-oriented approach to avoid favouring the wrongdoer. Such a policy-oriented approach is, however, not desirable as difficulties arise over when applying it appropriate. This approach does therefore not serve the aim of legal certainty.

It is furthermore questionable whether the policy of not favouring the wrongdoer, and therefore extending the scope of delictual liability, is in harmony with the general concept of private law. One principle of private law is that where a misrepresentation has become a warranty, an action on the contract for breach of warranty will award the plaintiff damages representing the benefit of the bargain. In cases where a misrepresentation has not become a warranty should a plaintiff also be able to claim the benefit of the bargain on grounds of a claim based on delict ? If this is so, the well settled principle of the law of contract would be

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[109] see Jansen JA in 1977 (2) SA 976 at 990
[110] see Dlamini at p 360

superfluous. My view is that is seems reasonable that in a case where a misrepresentation has become a warranty, the plaintiff is allowed to claim the positive interesse as the fact the misrepresentation has become a warranty proves that the misrepresented fact was of importance to the plaintiff.

On the other hand it does not appear inequitable not to award the plaintiff the benefit of the bargain where the misrepresented fact has not become a warranty because this proves that this fact was not of essential importance to the plaintiff. In this case, the plaintiff is still able to claim his out-of-pocket loss and will therefore not suffer damage in its delictual sense. The plaintiff also has the possibility of cancelling the contract, which will put him in the position he was in before the conclusion of the contract.

I therefore conclude that the aims of justice, equity and legal certainty are best served by strictly applying the delictual measure. The only approach which would lead to the effective application of the delictual measure, is in my opinion the approach of the weighing up of the counterperformances. Where the plaintiff alleges incidental fraud and is able to prove that the defendant would have contracted on terms less favourable to him, damages may be measured by taking the difference between the actual price paid and the putative price paid in the absence of fraud. However, as in most cases this prove will be not be possible, this measurement is not in my view of great practical importance.

B. Conclusion

The above discussion has shown that the sum-formula approach is the starting point for the assessment of damages in both legal

systems. This formula leads to the consequence that the plaintiff be awarded the diminution in the value of his property that the delict has brought about. In cases of damage to property, this diminution is usually measured by subtracting the post-accident market value of the property from its pre-accident market value. The reasonable costs of repairs may be taken into account in assessing damages where the pre-damage value is established, but the plaintiff fails to prove the post-damage value. The costs of repairs are only the appropriate measure, where the plaintiff proves that the repairs where necessary, fair and reasonable.

In cases of loss of use of property, German courts have awarded damages even in cases where the plaintiff has not hired a substitute. These decisions extend the scope of liability unreasonably wide. Damages for loss of use should only be awarded where the owner has suffered patrimonial loss. This may occur either in form of loss of profit or the reasonable costs incurred by hiring a substitute. Where a substitute was not hired to mitigate loss of profit, damages should only be awarded where the owner shows that he reasonably desired to use the res.

In cases where fraudulent misrepresentation induces a contract South-African courts have awarded delictual damages virtually to the same extent as damages for breach of contract. This is not desirable as the delictual and not the contractual measure is the right measure in these cases. The only approach which leads to the effective application of the delictual measure is the approach of weighing up the counter performances. This approach should be exclusively applied in cases where fraudulent misrepresentation induces a contract in order to serve the aims of justice, equity and legal certainty.