PREFACE

This Guide provides an outline of the main aspects of the Zimbabwean Law of Delict. After the main text there is a Cases section. The Cases section contains summaries of salient Zimbabwean cases and also of some important South African and English cases.

This Guide should be read together with South African textbooks such as:
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INTRODUCTION

Definition of a delict

The word delict is derived from the Latin word delictum, meaning a wrong. In England and America the term used for what we call a delict is a tort, which is also derived from a Latin word, namely, tortus meaning twisted or wrong. Thus in Roman-Dutch law we refer to the law of delicts whereas in English and American law they refer to the law of torts.

The law of delict is a branch of private law falling under the law of obligations. It deals with civil wrongs as opposed to criminal wrongs. It does not, however, cover all civil wrongs. The special rules relating to the legal consequences of breaches of contracts that are also civil wrongs are dealt with under the law of contract and not the law of delict. Although the same act or omission may constitute a delict and a crime, or both a delict and a breach of contract, the law of delict must be carefully distinguished from criminal law or contract.

A delict has been variously defined as–

- A civil wrong to an individual for which damages can be claimed for compensation and for which redress is not usually dependent on a prior contractual undertaking to refrain from causing harm.
- An unlawful, blameworthy act or omission which causes damage to a person or his or her property, or injury to personality, and for which a civil remedy for recovery of damages is available.
- A breach of a general duty imposed by law giving rise to a civil action at the suit of the injured person.
- The breach of a duty, imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach.

Purpose of law of delict

From these definitions we can discern that the essential purpose of the law of delict is to afford a civil remedy, usually by way of compensation, for wrongful conduct that has caused harm to others. This civil remedy is not in any way dependent upon the existence of any contractual relationship between the plaintiff and the defendant. The law, thus, imposes a
general duty upon all persons not to harm others wrongfully and sets out to define when an act or omission is wrongful so as to attract civil liability. An English writer depicts this as follows—

The law of torts constitutes a body of liability rules. These rules signal when a person is to compensate another by the payment of damages or to be restrained from doing certain acts by way of injunction. [In our law this is known as interdict.] Those rules, then, indicate whether or not losses caused by human conduct will be shifted from one party to another (or the loss will be where it falls).

In broad terms, the law of delict acts as a regulator of social conduct in the sense that it establishes how people should behave in relation to one another by laying down when one person is delictually liable to another. The wrongdoer who causes harm is made to pay compensation to the wronged person.

The two main types of loss for which compensation can be claimed under the law of delict are wrongs of substance leading to financial loss and wrongs to personality leading to sentimental loss. Wrongs of substance are wrongs that cause tangible harm, such as injury to person (including psychological harm), damage to property and harm to economic interests. Wrongs to personality are those that cause intangible harm, for example, by harming reputation or subjecting a person to indignity.

Not every type of harm suffered by a person is actionable in the field of delict. A person can only sue successfully in delict if the law of delict recognises that there is legal liability for that type of harm. An easy example of where the law of delict does not provide a remedy for loss is where P and D are both store-owners and D lowers the prices of his goods so as to attract to his business the customers who have previously been buying those goods from P’s store. Trade competition is the essence of a free market economy and in such an economy the law allows such competition and thus provides no remedy for the person who suffers economic loss as a result of such competition.

**Delict, contract and crime**

The main object of a criminal prosecution is the punishment of the offender whereas a delictual action is a civil action in which the injured party will be claiming compensation. Many wrongs, however, can lead to both criminal prosecution and also a civil claim. Wrongs such as negligent driving resulting in a collision with another vehicle, assault and rape are all crimes for which persons can be punished and delicts for which the wrongdoers can be made to pay compensation to the persons injured by the wrong. Some wrongs, however, are only delicts and are not crimes, such as, seduction and adultery.
The main object of a contractual action is either to enforce the contractual obligation or to obtain damages for breach of the contract. This is different from a delictual action. The table below sets out the major differences between a delict and a contract.

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<tr>
<th>Delict</th>
<th>Contract</th>
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<tr>
<td>General obligation imposed by law</td>
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**Fault liability system**

Most delictual actions in our system require proof of fault. There are only a few strict actions, such as the Pauperian action, where no proof of either intention or negligence is required. All the rest of the actions require proof of either intention or negligence. Some actions, such as fraud and assault, require proof of intention. By far the most frequently brought action in our system, the Aquilian action, requires proof of either intention or negligence. Most Aquilian actions are based upon allegations of negligence. Negligence is thus the most important species of fault in our system of delict.

The theory underlying the fault liability system is that a blameworthy individual who injures another intentionally or carelessly should be made to compensate the injured party. The defendant is “punished” by having to pay money to the plaintiff. This causes him suffering and acts as a deterrent in the future and thus helps to reduce the accident rate in society. But the defendant should only be made to pay for the loss (i.e. the loss should only be transferred to him) if he has been at fault. It is seen as being unfair to make him pay the loss if he was not at fault. But this theory is premised upon payment for the loss by the wrongdoer himself. In many instances in the modern world, the defendant will be covered by liability insurance and the insurance company and not the defendant will pay the loss. The only “punishment” that the insured person may suffer is that he may sometimes lose his no claim bonus. Because the injurer does not personally pay for the loss, there is little deterrent effect. Loss spreading also undermines deterrence. For example, a manufacturer who is made liable to pay damages for the harm caused by his poorly manufactured product may be able to absorb the costs of this liability by passing them on to his customers by raising the prices of his products. (There
are clearly limits to this process. A manufacturer is likely to go out of business if he continues to manufacture shoddy products and seeks to pass on to his customers the liabilities incurred for harm caused by such products.)

**Sources**

Zimbabwe’s modern law of delict is based upon Roman Law as received and developed in Holland and further developed in Southern Africa. It has been heavily influenced by South African law.

**Onus of proof**

The general evidential rule that applies in all delict cases is that the plaintiff must prove his claim on a balance of probabilities. Where a defendant seeks to rely upon a defence to liability, he or she must prove the defence on a balance of probabilities.

**Financial means of defendants**

In deciding upon liability in delict the financial means of defendants is not considered; the fact that they are poor does not affect liability or serve to reduce the amount of damages to be awarded. (The amount of damages is assessed on the basis of the loss or damage caused.) However, in practical terms there will be no point in suing a completely poverty stricken, uninsured defendant.
DELICTUAL ACTIONS IN CUSTOMARY LAW

General aspects

Customary law is basically the collection of traditionally accepted legal rights and duties of black Zimbabweans who live a traditional way of life.

In general law there is a clear differentiation between crime and delict. In customary law, on the other hand, there is almost no distinction between crime and delict. Most wrongs in customary law are dealt with by extracting compensatory damages. The primary emphasis is upon the correcting of the upset equilibrium and the restoration of social harmony. In customary law where the wrong is serious the damages may be partly penal and partly compensatory e.g. with homicide there is a penalty payable to the Chief and damages to the guardian or family of the person killed.

Whereas in general law liability is based upon fault, in customary law liability is based upon causation and not fault (although damages may be reduced where there was an absence of fault.) In customary law, unlike in general law, a parent will be held vicariously liable for the delicts of his children.

Specific customary law delicts

Unlawful killing

This was treated as a serious delict for which damages are payable to the dead person’s family, to the Chief and to the court. As part of these damages the D’s family would have to give the family of the dead person a young girl as compensation to ward off the avenging spirit of the dead (ngozi). The giving of a young girl as compensation is now illegal and, if it is done, the authorities will take action to protect the girl. It is also illegal to extort payment of compensation from the family of the person responsible for causing the death by dumping the body at the homestead of that family and refusing to bury the body until compensation has been paid.

Rape

This is a serious delict. However, it is not the raped woman who will claim damages for the rape. If she is married her husband can claim damages for adultery against the person who raped her. If the woman is unmarried her guardian can claim damages for seduction.
Assault

This consists of causing of harm to another either intentionally or accidentally. Traditionally the amount of damages increases if the offender assaults a person to whom he or she owed special respect such as his or her sekuru or father.

Wife and child beating

Although traditionally a man was entitled to discipline both his wife and his child by beating them, customary law did not allow him to beat his wife excessively. A wife whose husband beats her excessively and for no reason can claim damages from her husband for assault. Under general law a husband has no right to beat his wife and, if he does so, he can be found guilty of assault. A wife can also claim damages from her husband if he criticises or nags her unreasonably or if he constantly causes quarrels between them.

Harm caused by animals

A person is held liable for harm caused by his animals. For instance if cattle trample the maize in the P’s field, P can claim damages from the owner of the cattle. If D’s bull kills a person, the family of the deceased may be able to claim damages from the owner of the bull.

Defamation

This consists of damaging another’s good name and reputation in the community by saying something untrue about a person in public or writing something untrue about someone and showing that written statement to others. The traditional courts would nearly always investigate whether the defamation resulted in a disturbance of peace in the community. The most serious form of defamation is to make a false accusation that a person is a witch. Under general law, it is a criminal offence under the Witchcraft Suppression Act [Chapter 9:19] to make an accusation that a person is a witch.

Speaking disrespectfully to another

Damages can be claimed from a person who speaks disrespectfully to P and this has resulted in a breach of the peace. If P is a person to whom D owes special respect the court will order D to pay extra damages as, for example, where a man speaks rudely to his mother-in-law or father-in-law.

Lying
A person who has lost money because of a lie that another person told has the right to claim damages from the liar.

**Quarrelling**

A traditional court could order a person who is very quarrelsome to pay damages and to keep the peace in the future.

**Adultery**

A husband can claim damages from a man who commits adultery with his wife. Only the male spouse can bring an action for damages for adultery and only the male adulterer would be sued. See *Gwatidzo v Masukusa* (2000) at 415C.

**Persuading wife to leave husband**

P can claim damages from a person who has persuaded P’s wife to leave him.

**Seduction**

The guardian of a minor girl has the right to claim damages from the person who has seduced her. If she is a major, however, then the seduced woman may herself claim damages for seduction. The legal age of majority is 18.
DELICTUAL ACTIONS IN GENERAL LAW

By far the most important actions in our law of delict are the Aquilian Action (actio legis Aquiliae) and the actio injuriarum. The overwhelming majority of cases brought to court are Aquilian actions for negligent causing of harm. Actions brought under the actio injuriarum usually involve the claiming of damages for defamation.

Essentially, the Aquilian action provides a remedy for what are known as wrongs of substance. It provides a remedy for loss due to—

- injury to person including psychological harm (for example, where a person is injured in a motor vehicle accident);
- for damage to property (for example, where D starts a fire on his land and the fire spreads to P’s land and causes damage to his property);
- harm to economic interests (for example, where D defrauds P and causes him financial loss); and
- loss of support (for example a young child is left without support when her parents are killed in a motor vehicle accident).

On the other hand, the actio injuriarum provides a remedy for wrongs to personality. It provides a remedy for sentimental loss or intangible harm. This harm can be—

- harm to reputation, that is, harm to one’s standing in the eyes of others (for example a newspaper publishes an article about P in which it alleges that he has engaged in corruption);
- harm to dignity, for example, D makes sexual advances to P, a woman); and
- invasion of privacy (for example, D, a policeman, enters P’s house to carry out a search of the premises when he has no search warrant and there was no lawful justification for him to carry out the search).

In addition to these two major actions, there are certain other delictual actions which have their own separate and distinct requirements, such as the Pauperian action for harm done by animals, the action for seduction, the action for wrongful arrest and imprisonment and so on.
AQUILIAN ACTION

This action is the cornerstone of our law of delict. Most of the delictual actions that are brought are Aquilian actions.

Requirements

The requirements for this action are–

- There must have been some conduct on D’s part (i.e. an act or omission) which the law of delict recognises as being wrongful or unlawful (the wrongfulness requirement);
- The conduct must have led either to physical harm to person or property and, thereby, to financial loss, or have caused purely financial loss which does not stem from any physical harm to person or property. (The so-called patrimonial loss requirement, a person’s patrimony being his or her property and finances);
- D must have inflicted the patrimonial loss intentionally or negligently (the fault requirement); and

There must be a causal link between D’s conduct and the loss (the causation requirement).

Duty of care concept

The expression “duty of care” is frequently used in such cases. The phrase is, however, somewhat confusing insofar as it is used in two separate and distinct senses. It is therefore necessary to identify in which of the two senses the expression is being used in the context concerned. The first sense in which it is used is in connection with negligence. A person is said to have breached the duty of care (i.e. to have been negligent) when he fails to foresee and guard against harm which the reasonable person would have foreseen and guarded against. The second connotation of this phrase is in connection with wrongfulness. When it is used to denote wrongfulness, it will be used in this sort of way– although the reasonable man would have foreseen and guarded against harm, D is not liable in the circumstances as the law does not recognise any duty of care to avoid causing that sort of harm (i.e. the conduct was not wrongful or, to put it another way, there was no recognised legal duty to avoid causing harm by negligent conduct).

In *J Paar v Fawcett Security* 1986 (2) ZLR 255 (S) a security company was employed by X company to guard certain premises. A third party, P, had a tanker stored at those premises. The guard allowed one of the employees of the security company to take the tanker out of the premises. This employee was not employed as a driver. The employee crashed the tanker.
The court held that the security company was not liable to P as there was not a sufficient relationship or proximity between the parties to create a duty of care. (But see (1988) 105 SALJ 395 for criticisms of the approach of the Supreme Court in this case. Compare this case with that of Compass Motors v Callguard Security 1990 (2) SA 520 (W) where the security company was held liable to the third party whose property was stolen.)

In Witham v Minister of Home Affairs 1987 (2) ZLR 143 (H) a mentally unstable policeman was given a weapon and was assigned to guard a house. He wandered off and shot some civilians. The Ministry was held to have been negligent in arming him knowing of his mental state. It was reasonably foreseeable that he might end up harming members and the Ministry owed a duty of care to members of the public.

The case of Standbic Bank Zimbabwe Ltd 2007 (1) ZLR 398 (H) dealt with a situation in which a customer defrauded a bank. The bank had opened the account for the customer on the basis of a recommendation by D. The bank then sued D. The court decided that a duty of care would arise in this situation where there is a legal relationship between the parties which would create an obligation on the part of D to exercise such duty in relation to P. In the present case there was no such relationship and in any event the bank was at fault in sustaining the loss.

**Voluntary conduct**

The conduct of D must be voluntary. Thus if X had a sudden and unforeseeable blackout or epileptic fit whilst driving his vehicle, he would not be liable. On the other hand, if he continued to drive a motor vehicle after he knew he was prone to blackouts or epileptic fits he would be liable for the harm caused on the basis of his negligence.

In the criminal case of S v van Rensburg 1987 (3) SA 35 (T) X had had blood tests which had led to a fall in his blood sugar levels. His doctor did not warn him that this might happen and it was not reasonably foreseeable. X was thus not responsible for the accident and he was found not guilty of negligence.

On the other hand in Wessels & Anor v Pickles 1985 (4) SA 153 (C) D was found guilty of negligence. While driving he had suffered a diabetic coma due to low blood sugar He had suffered previous attack resulting in an accident. He knew of his condition and how to control even if not been told this by his doctor.
Capacity

D must have the capacity to commit a delict. A child under the age of 7 does not have the capacity to be negligent. See *Tena v UANC* HS-367-81. So too a mentally incompetent person would not have the capacity to be negligent.

However, the parent of a child under the age of 7 or the person responsible for the supervision of a mentally incompetent person could be guilty of negligence if that person fails to take reasonable steps to ensure that the person lacking capacity does not commit a delict. So too, on the basis of the *qui facit per alium facit per se* doctrine, if a person uses a person who lacks capacity to commit a delict, the person who does this can be guilty himself or herself of the delict even though the “instrument” was a person lacking capacity.

Patrimonial loss

There must be some quantifiable financial loss stemming from D’s conduct. This financial loss usually arises out of damage or destruction of property or physical injury to a person or the causing of the death of a breadwinner. Sometimes, however, the loss is purely financial not flowing from harm to person or property. Loss includes prospective loss, e.g. loss of profits. Frequently, in an Aquilian action for personal injury, damages are also claimed for pain and suffering.

Wrongfulness (unlawfulness)

This requirement operates as a device for controlling the scope of actionable negligence.

It has two main roles, namely—

- to decide whether there is any liability at all for that type of conduct.
- to restrict the ambit of liability where liability is recognised.

In *Musadzikwa v Minister of Home Affairs & Anor* 2000 (1) ZLR 405 (H) the court stated that in order to determine the wrongfulness or reasonableness of any given conduct the court is enjoined to make a value judgment based on, among other things, contemporary *boni mores*, in the sense of the convictions of the community as to what is fair, just and equitable.

In this case the police had used automatic weapons to quell a riot, injuring an innocent passer-by. The court found that it does not conduce to harmonious community relations for the police force to unleash its members onto an urban shopping centre located in the centre of a densely populated suburban residential area armed with FN rifles. While they were entitled to use firearms to disperse the rioters, it was unreasonable to use FN rifles and so they were liable to P.
In *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H) the court pointed out that wrongfulness and fault are separate and distinct requirements. Wrongfulness is determined by reference to public policy or the legal convictions of the community. Both fault and wrongfulness must be pleaded and proved. See also *Border Timbers Ltd v ZRA* 2009 (1) ZLR 131 (H)

In most cases the wrongfulness requirement poses no problem. The law of delict lays down that it is always wrongful or unlawful intentionally or negligently to cause by a positive act physical harm to person or property resulting in financial loss.

Where, however, there was not a positive act but instead an omission (i.e. a failure to act positively), or the positive act did not result in physical harm to person or property but only purely financial loss, or the harm caused was psychological harm, the courts have used the wrongfulness criterion to limit the range of liability in these cases further than would be the case if the fault criterion was the sole determinant of liability. (These special situations are dealt with in more detail later).

In *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) the court considered whether there were policy reasons for denying the claim. It decided that there were no such reasons and allowed the claim. In this case there had been a negligent failure to perform an agreed sterilization operation. The result of this failure was the birth of a healthy unplanned child. The parents were awarded compensation for the financial burden of having to raise an unwanted child.

### Range of Liability

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<th>Negligence</th>
<th>Wrongfulness</th>
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### Fault requirement

It must be proved that D caused the harm either intentionally or negligently.

In *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR 296 (H) the court pointed out that fault is requirement for the Aquilian action. The fault element must be specifically pleaded and proved in all Aquilian actions. This must be so even where P is able to establish wrongful conduct and consequential harm and then relies on the principle of *res ipsa loquitur*
to prove fault on the part of D. Here, although fault might be inferable from the nature and circumstances of the harm occasioned, it would still be necessary for P to plead some form of fault, viz. actual intention or negligence, in order to enable a reasonable inference of liability to be drawn from the proven facts. Even if fault can be implied from the peculiar circumstances of the case as a matter of *prima facie* evidence, D’s reprehensible intention or negligence must be explicitly articulated as a matter of pleading.

**Intention**

Only rarely is the basis of the action an allegation of deliberate and intentional infliction of harm, although, of course, crimes such as assault and malicious injury to property are delictual wrongs as well as criminal wrongs. Intention includes both knowing and deliberate infliction of harm as well as cases where the main object is not the infliction of the harm but D recklessly engages in some enterprise with realisation that the harm will probably or possibly occur.

Fraud is a delictual wrong that is based upon intentional action, namely, the intention to defraud. In *Industrial Equity v Walker* 1996 (1) ZLR 269 (H) D was guilty of fraud when he had sold shares sent to him in error. D knew he had no right to the shares and had sold the shares knowing that he had no right to do so. He was held liable on the basis of unjust enrichment.

Rape is also a delictual wrong based upon intentional wrongdoing. See *Nkosi NO v Moyo* HB-43-91 in which a fifteen-year-old girl was awarded damages for rape. See also *M v N* 1981 (1) SA 136 (Tk) and *N v T* 1994 (1) SA 862 (C).

**Negligence**

Almost all Aquilian actions are based upon allegations of negligence. Negligence is a societal norm (interpreted by judges) of socially desirable and acceptable behaviour. It is a community standard to measure conduct.

**Determining whether has been negligence**

Negligence is concerned with the protection of society against the dangers posed by a conduct that falls below the standard of the average prudent person. The test applied for negligence is the objective standard of the reasonable person.

The first stage in any case of alleged negligence is for the court to decide the facts. The facts will frequently be in dispute. P will be trying to establish facts that point clearly in the
direction of clear-cut negligence, whereas D will be seeking to show a version of the facts that point to a complete lack of negligence. More rarely, the facts may not be in dispute but the parties will be in dispute as to whether or not, on the agreed facts, there was negligence. The facts are vitally important in a case of alleged negligence as whether or not there was negligence may turn on a number of particular facts. Where the facts are disputed the court must carefully decide which version of the facts to accept.

After the facts have been decided, the court has to determine how an ordinary, average, reasonably careful Zimbabwean would have behaved in the circumstances. Often, the situation may be one that has arisen in the past and there will be previous court rulings setting out what constitutes negligence in a particular situation. This is particularly the case in motoring situations. To take one example, there are numerous cases laying down that it is negligent for a driver to attempt to overtake on a blind rise when there may be oncoming traffic. But if the situation has not arisen in the past and the courts have thus not ruled on what constitutes negligence in that situation, the court must decide what standard of care a reasonable person would have exercised in that situation. Once it has determined this standard, the court will then decide whether D’s conduct measured up to this standard. If it did not he will be adjudged to have been negligent. Negligence is thus the failure to display the same degree of care in avoiding the infliction of harm which the reasonable person would have displayed in the circumstances.

The decisions in criminal cases which revolve around principles of negligence, e.g. culpable homicide and negligent driving, can be cited as authority in civil cases because the same tests for negligence which are applied in civil cases are also applied in criminal cases.

More specifically, the issue of negligence is examined by asking two main questions. The first is whether harm was reasonably foreseeable.

See—

*Gordon v Da Mata* 1969 (3) SA 285 (A) it was not reasonably foreseeable that during the cutting of cabbage leaves a small piece of cabbage leaf would fly that distance and land under P’s foot causing her to slip and fall and be injured.

*Workmen’s Compensation Commissioner v De Villiers* 1949 (1) SA 474 (C) a lorry nudged a door as it entered into municipal market. A workman was on a ladder resting against the door unbeknown to the lorry driver. The impact with the door caused the workman to fall off the ladder and he suffered injuries. The court found D not liable to the injured workman because the presence of the workman was not foreseeable.

*Palsgraf v Long Island Railway Co* (1928) 284 NY 339 a passenger boarding a train dropped a package due to negligence of two railway guards. The package contained fireworks and there was an explosion. The force of the explosion caused some scales at the other end of the
platform to be knocked over. The railway company was not liable as it was not foreseeable that the negligence in causing the package to be dropped would result in injury to P.

The second question is whether the reasonable person would have guarded against that harm. The second enquiry is necessary because there are some situations where, despite the fact that harm was reasonably foreseeable, the reasonable person might not necessarily have taken any steps at all to prevent that particular harm or he might only have taken certain limited precautions. Therefore, in addition to reasonable foreseeability, the question of what steps, if any, the reasonable person would have taken has to be investigated. The way in which the enquiry is customarily broken down into its component parts is as follows–

Would a reasonable person placed in the position of D have foreseen the possibility that harm would result from the sort of conduct in which D was engaged?

If the reasonable person would have foreseen harm, would the reasonable person have taken steps to prevent that harm from eventuating?

If the reasonable person would have taken steps, what steps would the reasonable person have taken?

When deciding whether the reasonable person would have guarded against harm that was reasonably foreseeable the courts will take into account the following factors:

- The degree of risk that the harm would occur (was it probable or unlikely that the harm would occur?)
- The nature of the harm that would occur (if the harm occurred would it be serious harm or only trivial harm?)
- The nature of the precautions required to prevent the harm (were these elaborate and expensive or easy and inexpensive?)
- The objective that D was seeking to attain (was this legitimate or illegitimate?)

See Mills v Farmery 1989 (2) ZLR 336 (H).

These factors are weighed against one another and the court then decides whether, on balance, the reasonable person would have taken certain precautions. For instance, if D was pursuing a legitimate objective, the risk of harm was very slight, the harm that might occur was likely to be very slight, and the precautions necessary to prevent the harm were complicated and costly, the court may well find that the reasonable person would not have
guarded. On the other hand, if the harm would be great and it was very probable that it would occur and the precautions to guard against it are straightforward and not costly, the court will be likely to find that the reasonable person would guard.

Below are some illustrative cases of how these four factors have been applied.

In *Lomagundi Sheetmetal v Basson* 1973 (1) RLR 356 (A) dry maize stalks had been stacked against the side of silo. A company engaged to erect a roof on the silo had been doing some welding and the molten metal had landed on the dry material and the resulting fire had damaged the silo and a nearby field. The court found that there had been negligence. Although the risk of the fire starting was remote the damage would be extensive if it did start and the precautions necessary to avoid the harm were straightforward;

In *Peattie & Ors NNO v Clan Syndicate* 1984 (4) SA 829 (W) a fire had started on D’s estate and spread to P’s farm. The fire had started as a result of the use of a chainsaw. The court found that there was negligence. Although the risk was slight, the damage would be extensive and the precautions required would not be excessive in relation to the magnitude of the risk.

In *Mills v Farmery* 1989 (2) ZLR 336 (H) a fire had started on D’s vacant piece of land and had spread in residential area causing damage to P’s property. D had allowed to become overgrown with grass and this constituted a fire hazard. D was held liable as it was reasonably foreseeable that a fire might start and spread to adjoining properties. A reasonable person would have taken the relatively simple and inexpensive precaution of slashing or cutting the grass to a point where it would be harmless. It did not matter that the fire may have been started by an unauthorized person who had come onto D’s land as unauthorised persons had easy access to D’s land.

In *Clarke v Welsh* 1976 (3) SA 484 (A) the freak accident during a golf game was not reasonably foreseeable and D was not therefore liable for the injury sustained by P when she was hit in the eye with a golf ball being hit off the tee by D.

In *Murray v Union Insurance* 1979 (2) SA 825 (D) the kind or type of harm (grave injury to the eyes of a motor cyclist from the exhaust fumes emitted from a bus) was not reasonably foreseeable in the circumstances.

In *Wagon Mound (No) 2* 1967 AC 617 the court decided that although the risk of a fire starting was very slight, the precautions to prevent the possibility of a fire breaking out were very easy. D was therefore held liable.

In *Paris v Stepney Borough Council* 1951 AC 367 the court found that although it was not usual in the trade to supply goggles to workmen, the worker in question had only one eye and therefore the injury that would occur if his remaining eye were harmed would be particularly serious. The employer therefore had a duty to take special precautions to prevent injury to the worker’s eye by supplying him with goggles. The failure to do this was negligent in the circumstances.
In *Bolton v Stone* 1951 AC 850 the court found that the precautions taken by the cricket ground to prevent a cricket ball being hit out of the ground and injuring a passer-by were reasonably adequate.

In *Chaguma v Kondani* 2001 (2) ZLR 216 (H) P, a passenger in a commuter bus, was seriously injured when a car coming from the other direction, and driven by D, struck the bus. The evidence showed that a tread had unexpectedly stripped off a rear tyre of the car, causing the car to swerve to one side then the other. D tried to bring the car under control, but was unable to do so before it hit the bus. He had travelled for a mere 50 metres, and for only a few seconds, after the tread stripped. The court held that D could not be held to be negligent, and his failure to bring the car under control before it struck the bus was in the circumstances not unreasonable.

See also *Straw v Porter & Anor* GB-1-81 and *Bickle v Minister of Law and Order* 1980 ZLR 36 (G)

If the court decides that harm was reasonably foreseeable and that the reasonable person, having foreseen this harm, would have taken certain precautions to prevent the harm from occurring, it will find D guilty of negligence if either he failed to advert to the risk of that harm and, because of this failure to appreciate the risk, he failed to take reasonable precautions to prevent it, or if, although he was aware of some risk of harm, he failed to take reasonable steps to prevent it.

In actions based on negligence the courts have to deal with a wide range of situations. For example, injury, death, property damage or harm to economic interests caused by—

- careless driving;
- dangerous conditions on land and in buildings;
- defects in manufactured products;
- faulty design or construction of buildings and bridges;
- careless handling of dangerous substances and firearms;
- improper medical treatment;
- inadequate control over dangerous animals; and
- negligent advice by a lawyer or accountant to his client.

**Dangerous conditions on land and in buildings**

**Note**

In English Law according to the doctrine in the 1867 case of *Rylands v Fletcher*, an occupier of land is strictly liable if he brings onto his land an object or gathers on his land matter which creates more than an ordinary risk of causing harm if it escapes from his land, e.g. water in a dam or reservoir or explosives. The *Rylands v Fletcher* doctrine is not part of our
law (See Boberg p 17). In our law, ordinary principles of negligence would be applied to
decide liability in this situation.

See—

Spencer v Barclays Bank 1942 (2) SA 230 D was liable to P who had slipped on highly
polished stairs at his block of flats.

Burton v Cotton Research Board 1950 (4) SA 34 A factory was liable for injuries caused
from hidden hazard (sunken alleyway) alongside the factory.

City of Salisbury v King 1970 (1) RLR 141 (A) P was injured by slipping on some vegetable
matter on the floor of a vegetable market. The municipality was held not liable as it had taken
reasonable precautions to remove vegetable deposits from the floor by regular sweeping.

Gent v Taylor 1972 (2) RLR 336 (A) P suffered injury as a result of a floorboard in a hotel
collapsing when he walked on it. The floorboard had probably been weakened by employees
of the hotel moving furniture over the floorboards. The hotel was held liable.

Norman v Highway Construction 1975 (2) RLR 108 (G) Gravel dumps were left on the road.
A motorist hit one of these. The company was held liable as it had taken totally inadequate
steps to warn motorists of the hazard.

Jones v Maceys 1982 (1) ZLR 1 (H) An elderly customer, P, slipped on small piece of
icecream that had dropped onto shop floor. The supermarket was held not liable as had taken
reasonable precautions to keep walkways clean.

Cape Town Municipality v April 1982 (1) SA 259 (C) the municipality, D, operated a number
of playgrounds in parks. At one of the playgrounds vandals had ripped out a plank from a
revolving platform upon which children played. A little girl jumped onto the platform when
it was in motion and her leg went through the gap created by the removal of the plank. She
suffered injuries. The court held that the municipality was not liable as it had taken reasonable precautions to ensure that the playground equipment in its parks was maintained.

van der Merwe v Zak River Estates 1913 CPD 1053 P’s property was damaged by a bursting
dam. D was held liable because he had failed to inspect and detect the fault in the dam and to
take steps to prevent the dam from collapsing;

King v Dykes 1971 (2) RLR 151; 1971 (3) SA 540 (RA) If a fire spreads onto a farmer’s
land he has a legal duty to take reasonable precautions to stop the fire from spreading further,
although he did not start the fire.

De Villiers v Godley & Anor 1975 (1) RLR 108 (G) Fire spreading in farming area.

Cape Town Municipality v Paine 1923 AD 207 the municipality was negligent as it had
failed to take reasonable precautions to ensure that a wooden stand used by spectators was
not unsafe. A spectator was injured when he put his foot through a wooden plank on the stand.

_**Kruger v Coetzee** 1966 (2) SA 428 (A)  _P’s husband collided with a horse belonging to D. D had been negligent in failing to provide a guard at the gate to the field where the horses were kept to ensure that the horses did not escape through this gate.

_**Gordon v Da Mata** 1969 (3) SA 285 (A)  _it was not reasonably foreseeable that during the cutting of cabbage leaves a small piece of cabbage leaf would fly that distance and land under P’s foot causing her to slip and fall and be injured.

_**Monderwa Farm v BJB Kirstein Ltd** 1993 (2) ZLR 82 (S)  _a farmer built a dip tank. The chemicals in the tank overflowed and contaminated a public stream during a storm. This resulted in the poisoning of fish in the downstream fishery belonging to P. The chemical was harmless on land, but it was dangerous if it polluted a stream. The pollution of a public stream is an offence under the Water Act. D had a duty to take reasonable precautions to prevent the pollution of the nearby river. He was liable as he had failed to take such steps and the harm was reasonably foreseeable.

_**Van Buuren v Minister of Transport** 2000 (1) ZLR 292 (H)  _P’s aeroplane had been badly damaged when it fell into a hole when taxying across a grass patch at an aerodrome. Pilots had been warned not to use this grass patch whilst taxying but the air traffic controllers had not enforced this prohibition. There was evidence that the grass patch was inspected daily because pilots were using it. P claimed damages for negligence. The court held that before D could be held liable, it would have to be shown that his servants were aware of the existence of the hole or that their failure to notice it was due to negligence. The duty to guar against the likelihood of harm presupposes that the defendant is aware of the existence of a source of danger. In this case, the employees did what was reasonably prudent to ensure the safety of the aerodrome. They had not been shown to have been negligent.

In _**Kruger v Coetzee** 1966 (2) SA 428 (A)  _P’s husband collided with a horse belonging to D. D had been negligent in failing to provide a guard at the gate to the field where the horses were kept to ensure that the horses did not escape through this gate.

**Defects in manufactured & assembled products & in construction work**

See—

_**Donoghue v Stevenson** 1932 AC 562  _P found a decomposed snail in a ginger beer bottle after she had consumed half of its contents. She suffered shock and impairment of health. The court held that in this sort of case the manufacturer could be liable as it was reasonably foreseeable that the ultimate consumer would suffer harm if the bottle of ginger beer contained such foreign objects. The bottle was opaque and there was no possibility of any intermediate inspection before the consumer consumed the contents.
Grant v Australian Knitting Mills 1936 AC 85 A doctor, P, suffered severe dermatitis after wearing underpants which he had bought in a shop which contained excess sulphites which had been left in underpants when they were manufactured. The factory was held liable as the contamination of the underpants caused the harm and it was foreseeable that they would be worn by the buyer without being washed first.

A Gibb & Son Ltd v Taylor & Mitchell Timber Supply Co 1975 (2) SA 457 (W) D, a timber dealer, supplied timber to P who used it in scaffolding. One of the planks supplied broke and a workman was injured. Because the plank contained a large knot which was plainly visible, the dealer was held not liable as the use of the plank for this purpose without prior inspection was not reasonably foreseeable. However, the court stated that a dealer may be delictually liable for harm caused by defects in the items he supplies without inspecting them first. Liability would depend on factors such as the methods employed in that trade and the expectations of those customarily engaged in the trade.

Municipality of Kwekwe v Imrecon (Pvt) Ltd 1984 (1) SA 38 (ZS) There was a clause in the contract requiring due diligence by contractor requirement of good workmanship;

Transport and Crane Hire (Pty) Ltd v Hubert Davis 1991 (1) ZLR 190 (ZS) D company negligently assembled a lorry, so that the steering wheel was incorrectly assembled. After some distance the steering failed and there was an accident and the lorry was a total write off. The court decided that the harm was reasonably foreseeable and it rejected the argument that P’s failure to detect and repair the defect in the steering column was the proximate cause of the accident.

Junior Books v Veitchi Co Ltd [1983] 1 AC 520 Negligent laying of floor by contractor;

Doornbut v Ciba Geigy (Discussed in 1980 SALJ 83)

**Learner drivers**

Learner driver needs to acquire skills by practice on the roads but if the law were to apply the standard of the “reasonable learner driver” injured plaintiffs would often end up going without compensation. Additionally, the standard of the reasonable learner driver would be difficult if not impossible to apply. Thus, in the interests of ensuring proper compensation of injured parties, the standard of the reasonable driver who is not a learner is applied in such cases. But where the supervisor/instructor of the learner is primarily to blame, the supervisor/instructor is also delictually liable for the resulting harm to P e.g. an instructor taking a brand new driver into busy traffic conditions, or he falls asleep in the passenger seat leaving the learner driver to fend for himself.
See *R v Msongelwa* 1960 (4) SA 699 (SR) D was not guilty of negligent driving. It was not proved that the bad driving was due to anything beyond want of skill. A non-skilled learner driver with a learner’s licence is permitted to drive on the roads. (This case is criticised in Cooper *Motor Law* Vol 2 pp 51-2).

See also *S v Mtizwa* 1984 (1) ZLR 23; *S v van der Merwe* S-211-88; *S v Claassen* 1979 RLR 323 (A); *McCrone v Riding* [1938] 1 All ER 157 (KB); *Nettleship v Weston* [1971] 3 All ER 581 (CA) The test to be applied is that of the ordinary driver and no allowance is made for the inexperienced driver); (1961) 78 *SALJ* 140 Macintosh & Scroble *Negligence in Delict* p 294.

**Persons with physical disabilities**

Allowances are expected to be made for people with disabilities e.g. a blind man crossing the street with a white stick. The same sort of approach would be adopted here as in relation to cases where young children are on or in the vicinity of the road. In such cases drivers are expected to exercise special care and caution because children are prone to run out into the road. So too, a motorist seeing a person with a white stick should exercise special caution. But obviously it is negligent for a blind person to attempt to perform a task that his disability prevents him from performing such as driving a car.

**Persons with mental incapacity**

It would seem that the mentally deranged can be held liable for causing accidents. See Prosser and Keaton on *Torts* 5 ed pp 177-178.

**Professionals**

Where an allegation of negligence is made against a professional or skilled person, such as a doctor, an engineer or a lawyer, it would obviously be inappropriate for the court to use the standard of the ordinary reasonable person who has no expertise in that professional field. Thus, the test that will be applied in this situation is how the ordinary, reasonable skilful professional person operating within that field would have dealt with the situation. For example, the test that will be used to decide whether a doctor has been negligent is how a reasonable doctor would have dealt with that situation. Naturally, it is negligent for a person without any training within a skilled field to attempt any procedure requiring proper training and expertise for that procedure to be carried out safely.
Doctors

Doctors receive lengthy and intensive training to equip them with the necessary skills to practise their profession proficiently. After qualification, doctors acquire practical experience under supervision and if they wish to become specialists, they have to sit further examinations after acquiring specialist skills under supervision. Doctors therefore have skills that others do not have and they are required to make good use of these skills.

The law requires doctors to behave as ordinary, reasonably skilful doctors would have behaved in the circumstances. They are not obliged to exercise the highest possible skill. If a patient suffers harm as a result of the negligence of a doctor, he/she is entitled to sue the doctor for compensation. If a patient dies as a result of the doctor’s negligence, the doctor may be prosecuted for culpable homicide. In a legal action, the doctor’s degree of negligence does not have to be gross before the doctor is liable. Any degree of negligence suffices. This standard is used in respect of cases involving allegations of negligence in relation to diagnosis, treatment and post-operative care.

The test for establishing the negligence of a professional requires that the allegedly negligent professional be judged by the standards set by his peers. Cases of professional negligence are difficult to successfully prosecute in this jurisdiction where most professions are still small and closely knit and members of the profession know each other on personal levels. To some extent testifying against a fellow professional is still frowned upon as being in itself unprofessional and thus evidence of negligence may be difficult to come by.

Doctors are not expected to be miracle workers who will undertake always to cure their patients. Nor are they expected to be infallible. Certain mistakes are excusable; what is not excusable are blatant, indefensible mistakes that would not be made by reasonably competent doctors. It is these sorts of errors that rightly attract sanctions. See Thebe v Mbewe t/a Checkpoint Laboratory Services 2000 (1) ZLR 578 (S) at 585 – 586.

In a South African case, the test for medical negligence was stated in these terms—

Both in performing surgery and in his post-operative treatment, a surgeon is obliged to exercise only reasonable diligence, skill and care, no more than the general level of skill and diligence possessed and exercised at the time by members of that branch of the profession to which he belongs. The mere fact that an operation was not successful or that the treatment he administered did not have the desired effect does not necessarily justify an inference of lack of diligence, skill or care on the surgeon’s part.
As regards doctors who are specialists, the court will apply the test of how would a reasonably skilful doctor specialising in that particular branch of medical practice have dealt with the situation.

When applying the test for negligence a court of law will take into account the circumstances in which the doctor was working. A doctor dealing with an emergency, with inadequate facilities, and under great pressure, is not judged by the standard of the doctor working in more ideal circumstances. It must be noted that, not infrequently, medical accidents are not so much the result of poor professional behaviour, but rather of intolerable pressure on doctors due to under-staffing. Indeed, it must be said that drastically overworked doctors working under great pressure will eventually end up making mistakes. The situation is compounded where a shortage of specialist skills leads to junior doctors being given only minimal supervision.

One of the ways to seek to prove negligence is to allege that the doctor who caused harm deviated from a usual and normal practice. If there is a widely recognised way of dealing with a particular condition or there is a generally accepted precaution that needs to be taken, departure from the normal practice will point to negligence and the doctor will have to justify this departure. But this will only apply where there is a commonly accepted approach. Where there are differing medical opinions as to the best way to proceed, the doctor is entitled to adopt the approach that he believes is the most appropriate.

Resort to innovative techniques may be appropriate in certain circumstances but doctors should be cautious in employing such techniques, especially where they carry greater risks than more conventional forms of treatment. In deciding whether resort to a novel technique is justified the court takes into account such facts as the seriousness of the patient’s condition, his previous response to more conventional treatment, and his attitude to the use of the new procedure upon him.

Junior doctors are expected to exercise reasonable care consistent with their training. Thus in *S v Mkwetshana* 1965 (2) SA 493 (N) a junior doctor negligently administered the wrong dosage of a drug, thereby causing the death of the patient. The doctor was found guilty of culpable homicide.

In *Magwara v Minister of Health NO* 1981 ZLR 315 (H) casualty medical staff were negligent in applying and failing thereafter to check a plaster cast for a fracture of the ankle.

In *Correira v Berwind* 1986 (1) ZLR 192 (H) the court found that Surgery had been performed negligently. It ruled that medical staff owe a duty of care to their patients, whether or not a contract exists between them.
In *S v McGown* 1995 (1) ZLR 4 (H) an anaesthetist was held criminally liable for causing the deaths of two patients. He had used an anaesthetic technique which required careful monitoring of the patient’s condition after the operation and had failed to take reasonable steps that the facilities were available to ensure that the required careful monitoring took place.

In *Chibage v Ndawana* 2009 (2) ZLR 387 (H) it was pointed out that the issue of whether to bring claims of professional negligence against medical practitioners in delict or in contract is not new. The line of division where negligence is alleged is not always easy to draw; for negligence underlies the field both of contract and of delict. It is not necessary for a plaintiff to plead a contractual relationship between the parties to enable him to bring an action in delict against a defendant medical practitioner. Our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which he wishes to pursue. Where the conduct of a defendant medical practitioner towards a plaintiff, who may not be his patient, is unlawful and causes injury to the plaintiff, the medical practitioner is liable if his conduct was negligent. The particulars of negligence alleged against a medical practitioner can only be validated by reference to the standard operating procedures of other medical practitioners in that field. This is so because, to test the negligence of a professional, one has to first establish what an average reasonable professional in the shoes of the defendant would have done. An average professional is not one who is so careful that he will weigh each and every risk attendant upon the task at hand and advise the client of all such risks before proceeding. He will weigh the obvious risks and advise the client of same. The reasonable professional is one who will bring his training to bear on the task at hand to assess the attendant risks and proceed with alertness. He has a certain degree of confidence in his capacity and skill that allows him to proceed without undue timidity and is, to a large extent, a practical person who wishes to achieve a specified result.

In *Castell v de Greef* 1993 (3) SA 501 (C) Both in performing surgery and in his post-operative treatment, a surgeon is obliged to exercise only reasonable diligence, skill and care; no more than the general level of skill and diligence possessed and exercised by members of the branch of the profession to which he belongs. The mere fact that an operation was not successful or that the treatment he administered did not have the desired effect does not necessarily justify the inference of lack of diligence, skill or lack of care on the surgeon’s part.

In *Thebe v Mbewe t/a Checkpoint Laboratory Services* 2000 (1) ZLR 578 (S) P had a routine blood test for insurance purposes. The test, carried out in D’s laboratory, showed positive for AIDS. P immediately went for further tests, both with her own doctor and at the instance of the insurer. The results of both these further tests were negative for AIDS. P claimed damages for shock and suffering caused by D’s alleged negligence. The court held that D’s laboratory as a professional institutional was obliged to exercise reasonable skill and care. The laboratory had been guilty of professional negligence. It had made an error in the collecting and labelling of the blood sample in question. This error was in relation to the most fundamental aspect of blood testing. The laboratory was thus liable to P.
negligence was not an “inherent risk” of the kind that is attendant on surgical procedures, nor was it an excusable error of judgment of the kind a professional person might make.

See also *Chimusoro & Anor v Minister of Health* HH-254-89; *Dale v Hamilton* 1924 WLD 184 (a radiologist negligently performed a diagnostic X-ray and the patient had been badly burned); *Blyth v van der Merwe* 1980 (1) SA 191 (A) (a doctor put fractured arm in a plaster cast and then negligently failed to detect sepsis and take appropriate action); *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) (a doctor negligently failed to perform a sterilization operation which he had undertaken to carry out on a woman); *Mtetwa v Minister of Health* 1989 (3) SA 600 (D) (deals with whether the Ministry was vicariously liable for negligence by professional doctors under its command but not subject to the dictation of others); *S v Kramer* 1987 (1) SA 887 (W) (an anaesthetist negligently placed the oxygen tube in the oesophagus instead of in the trachea and the patient died); *Roe v Minister of Health & Ors* [1954] 2 All ER 131 (CA) (contaminated anaesthetic was injected into patients who then were paralysed from the waist down. The Ministry of Health was held not liable as the contamination of the anaesthetic was not reasonably foreseeable); *Clarke v McLennan & Anor* [1983] 1 All ER 416 (QB) (the gynaecologist failed to comply with a recognised medical precaution); *Ashcroft v Mersey Regional Health Authority* [1983] 2 All ER 245 (QB); *Whitehouse v Jordan & Anor* [1981] 1 All ER 267 (HL); *Pringle v Administrator of Transvaal* 1990 (2) SA 379 (W); *Wilsher v Essex Area Health Board* [1986] 3 All ER 801. See also Chapter 1 of Feltoe & Nyapadi *Law & Medicine in Zimbabwe*.

**Lawyers**

**Generally**

Lawyers are trained professionals. In performing their professional legal work, they are expected to exercise reasonable skill and competence. If they fail to measure up to this standard they can be sued for damages. In South Africa, over the last few years there has been an increasing number of claims against lawyers for negligence.

The most common situation where lawyers have been sued successfully for damages is where they have negligently allowed claims to prescribe. As regards damages, if the negligence deprives P of the chance of bringing proceedings, the damages would be the value of the opportunity that has been lost. If there was a good chance of the claim succeeding, an award can/will be made of most of what would have been recovered if the claim had not been allowed to prescribe. See *Kitchin v Royal Air Force* [1958] 1 WLR 563.

In a case where there was a good defence to the claim, but due to the lawyer’s negligence it was not raised and P had to pay out on the claim, the measure of damages would be the amount P had to pay out. If the lawyer has settled P’s claim for a paltry amount without authorisation, the amount claimable would be the difference between the settlement amount and the amount originally claimed.
See also—

Honey & Blanckenberg v Law Society 1966 (2) SA 43 (R) The lawyer misinterpreted a words in a statute and this led to a failure to commence proceedings in time. The court held that the lawyer had not been negligent.

Washaya v Washaya 1989 (2) ZLR 195 (H) A legal practitioner erroneously consented to judgment on behalf of his client.

Masama v Borehole Drillers 1993 (1) ZLR 116 (S) A negligent lawyer was ordered to bear the costs himself and the matter was reported to the Law Society.

Immelman v Loubser & Anor 1974 (3) SA 816 (A) Various mistakes were made in connection with bringing an appeal.
Samakange & Anor v The Master S-174-93

Mouton v Mine Workers Union 1977 (1) SA 119 (A) D failed to ascertain that a person was competent to stand surety for loans and D’s client lost the money that he had loaned. D was held liable. (At p 143 of this judgment there is a comment on the Honey & Blanckenberg case.)

Rampal Ltd v Brett, Wills & Partners 1981 (4) SA 360 (D) A lawyer, D, was negligent in failing to ensure that the security was adequate to cover the loans that his client was to advance. D was liable for the portion of loans unable to recover.

Slomowitz v Kok 1983 (1) SA 130 (A) A lawyer was negligent in allowing a claim to prescribe leaving it to last minute and not being able to effect service.

Moatshe v Commercial Union 1991 (4) SA 372 (W) D failed to issue summons in time to prevent a claim from prescribing. The lawyer was held liable.

Khan v Mzovuyo Investments D prematurely enrolled a case before it was ripe for hearing. The case had to be postponed on a number of occasions. D was found liable as he was negligent.

MidlandBank v Hett, Stubbs & Kemp [1979] CH 384 D negligently failed to register an option to purchase owner selling property to third party option holder losing option firm held liable.

**Liability to third parties**

In Tinarwo v Hove & Ors HH-138-03 the court held that a legal practitioner who is instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in carrying out the transaction, since such a third party
is a person within the legal practitioner’s direct contemplation as someone who is likely to be so closely and directly hurt by his acts or omissions. In this case P’s property was sold in execution when he failed to service a mortgage bond. The building society had instructed a firm of legal practitioners to sue P. Default judgment was taken against P and the messenger of court removed P’s goods for sale. P instructed his own legal practitioners to apply for rescission and for the sale in execution to be stayed. By consent, rescission was granted but the messenger of court was not informed; he proceeded with the sale. P claimed for the loss from the building society and its legal practitioners, claiming that they should have advised the messenger of court. Their failure to do so constituted a breach of a duty of care they owed him. The court held that the legal practitioners were agents of the building society. A legal practitioner who is instructed by his client to carry out a transaction that will affect an identified third party owes a duty of care towards that third party in carrying out the transaction, since such a third party is a person within the legal practitioner’s direct contemplation as someone who is likely to be so closely and directly hurt by his acts or omissions. The legal practitioner can reasonably foresee that the third party is likely to be injured by those acts or omissions. P’s own legal practitioners brought the application for rescission against, *inter alios*, the messenger of court. It was for them to do their duty towards P and to protect his interests by having the papers served on the messenger. They failed to do so.

See also—

*Ross v Caunters* [1979] 3 All ER 580 D negligently drew a will which was invalidated, D was liable to the the beneficiary who would have benefited had the will not been invalidated.

*White v Jones* [1993] 3 All ER 481 A lawyer failed to draw a will for his client prior to his death. The court decided his liability to disappointed beneficiaries under the will.

**Compensation for persons suffering loss from dishonesty by lawyers**

Section 54 of Legal Practitioners Act provides for compensation for person suffering loss due to dishonesty of client. The claimant must prove to the satisfaction of the Law Society that he has sustained loss through the dishonesty of a legal practitioner. The policy is applied whereunder the aggrieved party must first claim against the other partners where the responsible legal practitioner practiced in a firm of lawyers.

**Court work**

In respect of court work, it seems that under the common law lawyers have an immunity from delictual liability. The main rationale for this immunity is that lawyers owe an overriding duty to the court when appearing in court and if they were liable to be sued by
their clients, they might find it very difficult to discharge their duty to the court. Another reason advanced for the immunity is that if clients could sue for negligent performance of court work, this would result in having to retry cases. The immunity, however, does not cover pre-trial work that is not so intimately connected with the conduct of the case in court that it constitutes a preliminary decision on the way the case is to be conducted when the case is tried. See *Rondel v Worsley* [1969] 1 AC 191 (HL) and *Sarif Ali v Sydney Mitchell & Co & Ors* [1978] 3 All ER 1033 (HL).

For criticism of the blanket immunity of lawyers in respect of court work see (1977) 94 *SALJ* 184. The author argues that in certain cases lawyers could be held liable without any adverse effect on their duty to the court e.g. a lawyer uses an entirely wrong procedure, or the lawyer arrives drunk in court and is incapable of presenting the case, or he fails to come to court at all when he was fully aware of the court date. The author of this article argues that lawyers should not be allowed to get away with such blatant blunders.

**Accountants**

Accountants are responsible for keeping accurate books of account and they also give financial advice on matters such as investment and taxation. If they perform their work carelessly this can result in financial loss. For example, his client, P, asks D, an accountant, whether he should invest money in a certain corporation. D says the investment would be a good investment. Acting on D’s advice, P invests in the company. The company goes insolvent soon after P had invested in it and P loses the money he has invested. In these circumstances, D would be liable to P if a reasonable accountant would not have given the advice to P that D gave, as the reasonable accountant would have known of the bad financial position of the company or would have found it out had he taken reasonable care.

**Auditors**

Auditors carry out audits of various institutions such as commercial companies in order to provide independent and reliable information of the true financial position of the institution in question at the time the audit is carried out. One of the main reasons for carrying out audits is to uncover errors and fraud in commercial and other institutions that are handling money. The auditor is expected to perform these tasks with due care, diligence and competence. It is not always negligent for an auditor to fail to detect a fraudulent practice within the company he is auditing. The fraud may be so ingenious and difficult to uncover that no reasonable auditor performing his work diligently would have uncovered the fraud in question; if this is the case the auditor who failed to detect the fraud will be found not to have been negligent.
If, on the other hand, the reasonable auditor would have uncovered the fraud, the commercial corporation that employed him to carry out the audit could sue the auditor.

The more difficult question with auditors is whether they can be liable to third parties if they carelessly carry out their professional work. For example, if the audit creates a completely false picture of the company as being financially sound when it is in deep financial trouble, can current shareholders or new shareholders who invest money on the strength of the audit report sue the auditors for the losses they have suffered? Does it make any difference that the audit report was included in a prospectus soliciting share investment and the auditors knew that the audit report was going to be put in the prospectus? The courts in England and South Africa have generally been unwilling to make auditors liable to persons other than those who engaged them to carry out the work. The reason for this reticence has been the fear of opening the floodgates to a huge scale of liability.

See *International Shipping v Bentley* 1990 (1) SA 680 (A); *Al Saudi Banque v Clarke Pixley* [1989] 3 All ER 361 (Ch D); *Caparo Industries v Dickman* [1990] 1 All ER 568 (HL).

(For further discussion on this point, see under Negligent misstatements causing purely pecuniary loss below.)

**Engineers, architects and constructors**

Again, such professionals are expected to exercise the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which they belong. In the South African case of *Randeree & Ors v WH Dixon & Associates & Anor* 1983 (2) SA 1 (A), the court cited with approval this passage from a book on engineering contracts—

The architect or engineer is under a special duty to take the best advice available upon the use of such new techniques and to advise his employer of any potential risks; and where the selection of the technique is the architect’s, the onus of justifying his action will be correspondingly heavier, since nearly all building and civil engineering techniques are empirical in origin and have evolved gradually by experience and trial and error, and non-traditional methods are notoriously susceptible to unexpected difficulties and failure.

The court went on to point out that this passage from a South African case applied with equal validity to the work of professionals such as engineers.

If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances.
Trainees and newly qualified professionals

As regard newly qualified professionals, these persons will be negligent if they attempt to do something which they do not have the competence to do, for example, a newly qualified doctor, engineer or lawyer must not try to perform a complex and difficult procedure beyond their capabilities. A newly qualified doctor, however, may be able to rely on the defence of necessity if he attempts to perform a medical procedure when the patient is in a critical condition and there isn’t a qualified doctor available, or by the time a more qualified doctor is summoned the patient would have died. Conversely, if a senior doctor instructs a newly qualified doctor to carry out a difficult or complex procedure, the major responsibility for any harm that eventuates may lie with the senior doctor.

Defective services by garage & inadequate maintenance of vehicles

See Bulford v Bob White’s Service Station (Pvt) Ltd 1973 (1) SA 188 (RA); Blore v Standard Insurance 1972 (2) SA 89 (O); Dube v Super Godlwayo (Pvt) Ltd HB-129-84

Carriers of goods by land

Carriers are strictly liable for loss caused by them whilst transporting goods. In Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe 1988 (1) ZLR 304 (S) the court said it is good law and good common sense that the strict liability imposed by the Edict on public carriers by water should be extended to public carriers by land, particularly in Zimbabwe, where the Edict forms part of the common law and the main mode of transportation is by land. In any action against a carrier for the loss of or damage to goods the owner of the goods need not prove how the goods were damaged, lost or destroyed. The onus is on the carrier to prove that the loss was due to vis major or to damnum fatale, to inherent vice in the goods or to the negligence of the owner of the goods. All that he requires to shake off liability is to prove that the occurrence resulting in the event was unforeseen, unexpected and irresistibile and that human foresight could not have guarded against it. The use of the word “sole” in the phrase “at the sole risk of the sender or consignee” merely emphasized that the risk is the sender’s or consignee’s, but added nothing that helped in the interpretation of the clause, nor did it help to explain whether the head of damage arising from negligence is included or excluded. While carriers may contract out of the strict liability imposed on
them by the common law or by contract limit their liability, the clause exempting the carrier from liability must do so in clear terms, with an express reference to negligence. In the absence of such clear terms, the clause is to be construed as relating to a different kind of liability and not to liability based on negligence.

**Liquidators of companies**

In *Kerbels Flooring Ltd v Shrosbree* it was stated that a liquidator of a company can be held liable for causing of loss to others arising out of the negligent performance of his duties.

**Children**

**Negligence in allowing children access to firearms**

See *Flowers v Towers* 1962 R & N 221 (FS); *Maylett v Du Toit* 1989 (1) SA 90 (T)

**Supervision of young children**

See *Rusere v Jesuit Fathers* 1970 (4) SA 537 (R) which deals with the extent to which school authorities had a duty to supervise children during breaks’

In *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S); 1989 (2) SA 342 (ZS) the Council negligently failed to employ lifeguard at swimming pool used by children, but Council nonetheless was not held liable as it has not been established that if guard had been employed death of child would have been avoided.

**Running down of children**

Drivers must exercise extra care when there are children in the vicinity of the roads on which they are driving.

See *Tena v UANC & Anor* HS-367-81; *Levy NO v Rondalia Assurance* 1971 (2) SA 598 (A); *Santam Insurance v Nkosi* 1978 (2) SA 784 (A); *S v Chimimba* S-62-86; *S v Ferreira* 1992 (1) ZLR 93 (S); *S v Notje* HB-23-03.

**Handling of heavy equipment**

See *Roeloffze v M Ranchod & Sons (Pvt) Ltd* 1972 (1) RLR 353

**Guard of security firm failing to guard premises**

See *Socrat Ltd v Electra Rubber Products Ltd* HH-77-83
In *J Paar & Co (Pvt) Ltd v Fawcett Security* 1987 (2) SA 140 (ZS) A security company, contracted with an oil company to guard its premises. A transport company had certain vehicles on the premises as part of its contract with the oil company. One of these vehicles was stolen by an employee of the oil company and destroyed. The transport company instituted action in delict against the security company claiming damages in delict for the loss of the vehicle alleging the negligent breach by the security company of a duty of care owed by it to the transport company to prevent the theft of its vehicle. The court held that the security guard was not negligent in failing to prevent the theft of the vehicle. (*Obiter* the court stated that negligent infringement of a contractual obligation may give rise to delictual liability even where there would have been no initial obligation to act but for the contract. It also stated *obiter* that a duty of care arises where there is sufficient proximity of relationship between the parties concerned. Such proximity did not exist between the parties in this case.) (This decision was heavily criticised in (1988) 105 *SALJ* 395).

In *Modcraft Transport (Pvt) Ltd v Vultures Security (Pvt) Ltd* HH-81-03 a security guard who was guarding premises saw intruders on the premises but did not try to apprehend them or disturb them: he simply went and informed the company’s security officer, who took a long time to respond. By the time he had responded the intruders had already stolen property and got away. The guard’s employer was liable in negligence for the theft. *Compass Motors Industries v Callgauard* 1990 (2) SA 520 (W)

**Interfering with rights of landowners & occupiers**

There is no separate action for trespass in our law. If the owner of land can establish that he suffered patrimonial loss through physical damage or through deprivation of occupation the action which should be brought is the Aquilian action. (See Boberg p 170. McKerron at p 212 says that the *actio injuriarum* could also be brought in certain circumstances.)

**Relative or directional negligence**

In our law, negligence is a relative or directional concept. Thus, it is said that ‘negligence in the air’ will not be sufficient to found delictual liability. Before P can succeed in a delictual claim, he or she has to establish that D was negligent in relation to him. In other words, there may be situations where D was negligent in his conduct, but yet he or she was not negligent as regards the particular harm that P suffered. It may have been reasonably foreseeable that harm to some other person might result but not reasonably foreseeable that that particular P would be adversely affected, or it may have been reasonably foreseeable that harm of a particular type (for instance, trivial harm) might result but not harm of the character which actually occurred (such as serious harm). In the latter case, P will only be able to recover for the harm that was reasonably foreseeable.
This concept of relative negligence must not, however, be taken to mean that it is invariably required that harm to a specific pre-identified plaintiff must have been prospectively reasonably foreseeable. In many situations it is quite sufficient that it was reasonably foreseeable that harm would result to persons within the field of danger created by D’s negligent conduct. For example, if due to carelessness at a chemical factory there is an explosion and numerous people some distance away in a public street are injured, the question is not whether those victims were pre-identified but simply whether it was reasonably foreseeable that the explosion would result in injury to any persons who happened to be in the street. This is sometimes expressed by saying that injury to the class of persons of whom P was a member must be reasonably foreseeable.

For a critical discussion on the concept of relative negligence see (1990) 107 SALJ 56.

**Res ipsa loquitur**

Sometimes a person seeking to recover damages for harm done to him does not know how the occurrence that caused the harm came about and he cannot produce any evidence to establish how the occurrence came about. In these circumstances, he may seek to invoke the concept of *res ipsa loquitur*. This expression means that the occurrence speaks for itself. If the occurrence in question would not normally occur without negligence this may lead to an inference of negligence. This doctrine can only be invoked where the cause of the occurrence is unknown and thus there is no direct evidence that can be led to establish negligence. In order for the inference to arise—

- the injury must have been caused by a thing which was under the control of D; and
- that sort of occurrence would not have taken place if reasonable care had been exercised.

*Res ipsa loquitur* cannot be relied upon where it is possible for the claimant to call evidence of how the occurrence came about.

In *Mafusire v Greyling & Anor* HH-173-10 the court pointed out that there is no obligation on a person who is driving along a road to ride through all the ruts and other rough patches on the left of the road. He is at liberty to avoid such obstacles. If he can find a better part of the road, he is entitled to ride on that part of the road, especially when driving in the country, but then he must use more care than when he is on his own side of the road. If there is a vehicle in the way, and he wishes to pass it, then whether the road on his left is rough or not he must keep to his left. If he does drive on the incorrect side of the road, he must exercise greater care and take every precaution to avoid colliding with vehicles approaching him:
persons travelling on the correct side of the road have a paramount right and are entitled to preference in the use of the road. If any danger of collision arises, it is his duty first to give way. He must swing to his left as far, and as quickly, as possible in the face of approaching vehicles. Failure to do may be negligence. If a collision occurs between two vehicles travelling in opposite directions along the same road when the defendant’s vehicle is on the incorrect side of the road, the fact that it is on the incorrect side of the road is, as a general rule, *prima facie* evidence of negligence. When a plaintiff proves that the defendant’s vehicle for no apparent reason suddenly swerved on to its incorrect side of the road, an inference of negligence could, in the absence of an explanation, be drawn against the defendant: *res ipsa loquitur*. The defendant is then required to produce evidence sufficient to displace the inference of negligence which arises from the fact that he was on the wrong side of the road. If he fails to do so, the *prima facie* evidence becomes sufficient to discharge the onus which rests on the plaintiff. But if the defendant gives an explanation, the plaintiff can succeed only if, at the conclusion of the case and on the evidence as a whole, there is a balance of probabilities in his favour that the defendant was negligent.

See also *Dunlop v West* 1974 (1) RLR 89 (G) (Car leaving road and colliding with tree) *Hammar & Anor v Nunes* 1976 (1) RLR 202 (G) (Car moving to incorrect side of road) *Freelance Contracting v de Clerk* 1982 (1) ZLR 193 (S) (Defective fridge); *Wallace v Goncalves* S-35-93; *Arthur v Bezuidenhout & Anor* 1962 (2) SA 566 (A); *Jadezweni v Santam Insurance Co (Ltd) & Anor* 1980 (4) SA 310 (C); *Keown v Ned-Equity Insurance Co Ltd* 1982 (2) SA 391 (C); *Smit v SA Vervoerdienste* 1984 (1) SA 246 (C); *Leon Bekaert SA (Pty) Ltd v Rauties Transport* 1984 (1) SA 814 (W)

**Apportionment of damages (contributory negligence)**

**General**

This matter is relevant in regard to cases under the Aquilian action based upon negligence. The type of situation with which we are dealing here is, for example, where a vehicle being driven by D collides with P, a pedestrian. It turns out that both parties were negligent in causing the accident because P tried to cross the road without ensuring that it was safe to do so and because D was driving at an excessive speed and was not keeping a proper look out. In the event of P suing D for damages, how does our law deal with the claim? Since 1971 we have had apportionment legislation, namely, the Damages (Apportionment and Assessment) Act [Chapter 8:06]. Under this legislation, if P and D were involved in an accident and both were at fault, in the event of P suing D for damages, P’s claim will be reduced to such an extent as the court deems ‘just and equitable having regard to the respective degrees of fault of the claimant’ and of D ‘insofar as the fault of either of them contributed to the damage’. Apportionment is thus based on ‘the equitable precept that A (person) should not recover in full for damage caused partly by his own fault’.

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For instance, if P was 20% at fault, and D was 80% at fault, P will be able to recover 80% of his damages from D and D in turn will be able to recover 20% of his damages from P. This methodology of examining the respective degrees of fault of the two parties in relation to one another is the one that is usually employed in these sorts of cases. (In a motor accident situation, where the events happened over a very brief space of time, it is, however, by no means easy to apportion blame.) Sometimes our courts have used a more complicated methodology to deal with apportionment. This entails measuring individually the percentage deviation of the two parties from the norm of the reasonable person and then reducing these figures to proportions. To give an example of this manner of computation—
If P deviates from the norm by 20% and D by 40%;
Reduced to proportions this is 1 : 2;
Therefore, P is liable to pay one third of 3rd of D’s loss and D is liable to pay two thirds of P’s loss.
For cases on apportionment see the Appendix.

**Intentional wrongdoing**

Fault does not include intentional wrongdoing. See *Minister of Law and Order & Anor v Ntsane* 1993 (1) SA 560 (A).

**Failure to wear seat belts or crash helmets**

Following English and South African cases to similar effect, the Zimbabwean High Court in *Koen v Keates* HH-212-89 ruled that the failure by a front seat passenger to wear a seat belt fitted in the car can amount to contributory negligence under s 4(1) of the Law Reform (Contributory Negligence) Act. Although the failure to wear a seat belt did not contribute to the accident, s 4(1) required that damages are to be reduced to an extent deemed just and equitable if the fault of the claimant contributed to his or her damage. The failure to wear a seat belt amounted to fault on the part of the claimant as not only was it a negligent failure to take reasonable safety precautions, but it also amounted to a breach of a statutory duty under s 4(1) of the Road Traffic (Safety-Belt) Regulations SI 288 of 1983 and as such constituted fault as defined in s 4(6) of the apportionment legislation. Such fault would have contributed to the damage suffered (unless exactly the same injuries would have been suffered even if the seat belt had been worn) and thus the court would be obliged to reduce P’s damages. However, in this type of situation the negligent driver must bear the greater share of responsibility. (In the *Koen* case, P’s damages were reduced by 15%.) The same approach would have to be applied in cases involving failure by motor cyclists and pillion riders to wear crash helmets, it being compulsory under Zimbabwean legislation that crash helmets be
Boberg argues that the reduction should only apply to the extra damage which would not have been suffered had safety precautions been taken. But in practice it will usually be very difficult to separate out which harm would have occurred in any event and which harm is the extra harm which would not have occurred had the safety precautions been taken.

**Contributory negligence of children**

If a child runs across a road and is hit by a car and the driver is sued for damages for the injuries that the child has sustained, then the issue of contributory negligence on the part of the child may arise. Where the child is under 7, the child is irrebuttably presumed to lack capacity (to be *culpae incapax*) and thus the child cannot be found to have been guilty of any contributory negligence such as to reduce the damages payable to that child. See *Muchechetere v Boka* HH-148-89. On the other hand, with children between 7 and 14 the presumption that they are *culpae incapax* is a rebuttable one. If the presumption is rebutted, and the child in question is found to be *culpae capax*, the issue that arises is whether the degree of contributory negligence of the child is to be assessed according to the standard of the reasonable adult or the reasonable child of that age? In South Africa, the standard of the reasonable adult is applied (to assess the degree of contributory negligence on the part of the child) whereas in the United Kingdom the courts ask what reasonably could be expected of a child of that age and development. (In the UK, capacity and negligence issues are merged and the question is whether an ordinary child of that age could be expected to have done any more than P or was he simply following instincts natural to a child of that age. The Pearson Commission recommended that in car accident cases contributory negligence should not be a defence where a child in under 12 (Vol 1 para 1077).

The reasonable adult test has been severely criticised as being harsh, unrealistic and unfair in its consequences. (See 1973 Annual Survey of SA Law 160-162, *Boberg* pp 674-682.) Although the South African courts still apply the reasonable adult test, the stringency of this approach has been somewhat alleviated as a result of the SA Appellate Division case of *Weber v Santam Insurance* 1983 (1) SA 381 (A).

Firstly, the court in the *Weber* case stated that in deciding whether or not the child is *culpae capax* courts must be careful not to place ‘an old head on young shoulders’. Not only must facts like age, knowledge and experience be taken into account to decide this, but also it must be remembered that knowledge is not the same as experience and therefore it must also be decided whether the particular child was mature enough to control the impulses which children often have to act heedlessly. Under this approach, many children under 14 may be adjudged to be *culpae incapax*. 

Secondly, even if the child in question is found to be *culpae capax*, the negligence of the motorist knocking down the child would always be adjudged to be greater than that of the child in circumstances where the driver knew or should have known that children might be in the vicinity and he failed to take extra care to guard against childish folly. Special care and vigilance must guard against the propensity of children to dash across the road, etc. In other words, in apportioning in circumstances where both the driver and the child who is *culpae capax* are guilty of contributory negligence, the driver will be held to be guilty of greater negligence than the child even testing the child against the austere standard of the reasonable adult.

There is no Zimbabwean case dealing with this situation. However, in the criminal case of *S v Ferreira* 1992 (1) ZLR 93 (S) the court stressed that motorists must exercise special care and vigilance when they know that there are children in the vicinity of the road, as it is known that children have a propensity for impulsive and irrational behaviour. It would be open to our courts to adopt the less harsh standard of a reasonable child of comparable age and experience instead of the full-blown reasonable adult standard if the child is found to be *culpae capax*. The standard of the reasonable child would be rather difficult to apply in practice, however. As the *Weber* case goes so far in the direction of not placing an old head on young shoulders at the stage that the child’s capacity is considered, it could be maintained that our law should go one stage further and adopt the position that the childish heedlessness of children under 14 should not be held against them at all in these sorts of cases. It could simply say that as the adult driver has been negligent in not guarding against harm to the child, he should be made solely liable and apportionment should not apply in respect of a child under 14. In other words, the law could excuse the foolhardiness of young children by laying down that below the age of 14 all children are irrebuttably presumed to be *culpae incapax* thereby casting the responsibility solely on the driver to guard against harm to these young children. Against this it could be said that this approach does not encourage children to display greater caution on the roads and it would be unduly harsh upon the negligent motorist.

**Dependant’s claim**

P is dependant upon B for support. B is killed or is seriously injured. B’s death or injuries were caused partly as a result of C’s negligence and partly as a result of B’s own negligence. What happens if A sues for loss of support?

The section of the Damages (Apportionment and Assessment) Act, 1985 that used to cover this situation before it was repealed in 1985, s 4(4), simply stated that–
Damages recoverable by any person in consequence of the death or injury to another person shall be reduced to such an extent as the court may deem just and equitable having regard to the respective degrees of fault of the person killed or injured and of the other party in relation to the occurrence which resulted in such death or injury.

Under this, the court would simply reduce the damages payable to A based upon the proportionate degree of fault of B.

In 1985, s 4(4) was repealed and s 8 was inserted. Under s 8, A’s claim is no longer subject to reduction on the basis of the negligence of B. What now will happen is that if A sues C and B (if he is alive) or his estate (if he is dead) will be treated as a joint wrongdoer with C in relation to the dependant. If the court apportions liability in terms of s 5 between C and B, it could hold C and B or B’s estate liable to pay damages to A in amounts proportional to their degrees of fault. If C pays the dependant’s damages, he can then claim a contribution from B (if B is injured but does not die) or from B’s estate if B had died in the accident.

In South Africa the legislation also provides for the breadwinner or his estate to be treated as a joint wrongdoer. However, the South Africans have added this proviso (which we do not have in Zimbabwe) –

Provided that if the court in determining the full amount of the damage suffered by P deducts from the estimated value of the support of which P has been deprived by reason of the death of any person, the value of the benefit which P has acquired from the estate of such deceased person, no contribution which the joint wrongdoer may so recover from the estate of the deceased person shall deprive P of the benefit or any portion thereof.

Commenting upon this proviso Burchell states at p 244 of his Principles of Delict that –

The effect of this proviso is unsatisfactory in the amount of protection it gives to dependants. In many cases, the bulk of a deceased breadwinner’s estate consists of insurance monies or pension benefits. Since, in terms of the Assessment of Damages Act 9 of 1969 these insurance or pension benefits are not taken into account in reduction of the dependant’s damage, they are available for the satisfaction of the joint wrongdoer’s action for a contribution against the breadwinner’s estate. The only possible limit to such claim is in terms of s 40 of the Insurance Act 27 of 1943 which protects on death the proceeds of life policies against creditors up to a certain amount. Perhaps a practical way of avoiding the unsatisfactory result of s 1 of the Assessment of Damages Act read with s 2(6)(a) of the Apportionment of Damages Act is for the breadwinner to stipulate in the insurance policy that the benefit is to be paid to the dependants i.e. they become the beneficiaries not the estate.
As regards whether *volenti non fit injuria* can be a complete defence to a dependant’s claim, see later under the defence of *volenti*.

**Concurrent and joint wrongdoers**

Previously, there was no provision for apportionment between concurrent wrongdoers. Thus, if A and B acting independently of one another were both at fault in causing harm to P, even if A was 80% at fault in causing P his injuries and B was only 20% at fault, P could still nonetheless claim 100% of his damages from either A or B. The concurrent wrongdoer who has paid the damages, was, however, entitled to claim a contribution of 50% from the other concurrent wrongdoer (or if there were two other concurrent wrongdoers he can claim a third from each or if there were three others a quarter from each, and so on). In other words, the proportion of contribution which concurrent wrongdoers were obliged to pay was not dependent upon their respective degrees of fault.

However, an amendment was made to our apportionment legislation in 1985 allowing our courts to apportion damages as between concurrent wrongdoers or between joint wrongdoers. (Concurrent wrongdoers are persons who acting independently both cause harm to P whereas joint wrongdoers act in concert in causing harm to P.) Under this amendment, (Act 28 of 1985) a court may either make a single award or may apportion liability as between concurrent or joint wrongdoers in the light of the respective degrees of fault of the wrongdoers. Thus if A and B are concurrent wrongdoers who cause harm to P who is blameless and the court decides that A is 90% at fault and B is 10% at fault in the causing of P’s harm, the court can now order A to pay P 90% of his damages and B to pay P 10% of his damages. If A pays the entire amount of damages to the injured party he can claim a contribution from B based upon his respective degree of fault.

**Joining of wrongdoers**

The plaintiff should join all wrongdoers in the action otherwise he will be barred from claiming damages from the other wrongdoers unless they can obtain leave of the court on good cause shown: See (s 6(1)(a)).

A defendant should join all wrongdoers in the action otherwise he will be barred from claiming a contribution from other wrongdoers not joined in the action unless they can obtain leave of the court on good cause shown: See (s 6(1)(b)).

For a commentary on these provisions, see 1988 *Legal Forum* Volume 1 Number 2 p 34.
**Fraud**

Fraud is a delictual wrong that is based upon intentional action, namely the intention to defraud. In *Industrial Equity v Walker* 1996(1) ZLR 269 (H) D was guilty of fraud when he had sold shares sent to him in error. D knew he had no right to the shares and had sold the shares knowing that he had no right to do so.

**Causation**

**General**

The conduct of D must be both the factual and the legal cause of the harm to P. The test for factual cause is: but for D’s action would that harm have occurred to P? The test for legal cause is the narrower test of reasonable foreseeability, namely, was it reasonably foreseeable or was it within the range of ordinary human experience that the harm would result from D’s conduct? (The direct consequences test is not used in Zimbabwe.) In overall terms the primary question which is being asked is whether, on a common sense basis, there was a sufficiently close connection between D’s conduct and the harm to justify imposing delictual liability upon him or her.

As the test for legal cause is essentially the same test as for the fault requirement where negligence is alleged, it has been suggested that the two tests could be merged together into a single inquiry, namely, whether the particular harm to that plaintiff in respect of which he is suing was reasonably foreseeable. However, given the fact that the inquiry into causation contains a policy element, at times it seems that the test for legal cause is applied in a more extensive fashion than that for negligence and that the test for legal cause is applied with hindsight knowledge, namely, looking at the events which actually occurred the courts enquire as to whether that sequence of events was so exceptional as not to be reasonably foreseeable. On the other hand, in the fault context the test for negligence has more of a prospective character and the question asked is: would a reasonable person placed in the shoes of D have foreseen the harm which flowed from the conduct?

In *Kruger v van der Merwe* 1966 (2) SA 266 (A) there was a motor accident due to negligence of D. A passenger thrown out of D’s car after the collision. He was lying on road and was run over by another car. The subsequent event reasonably foreseeable and D liable for his death.

In *Sadomba v Unity Insurance* HS-131-78 there was a motor accident caused by D’s negligence. P, who was injured, was dragged from vehicle and placed on the side of the road in an unconscious state. His watch and shoes were stolen while he was lying there
conscious. He was entitled to claim for these losses of property, as it was reasonably foreseeable that such losses could occur in the circumstances.

In *Bickle v Minister of Law and Order* 1980 ZLR 36 (G) D’s negligent act triggered off a freak accident leading to damage to an aircraft. Nonetheless the court held that the damage was sufficiently related to negligence to make D causally responsible.

In *Mbulawa v Mutandiro* 1989 (3) ZLR 83 (S) the court said that as a general rule, intervention by means of intentional or negligent conduct, whether it be that of P or a third party, interrupts the chain of causation. However, if a reasonable person in the position of D would have foreseen the possibility of such intervention and guarded against it, the defendant is negligent if he fails to do likewise. He cannot rely on the intervention of a *novus actus interveniens*. (This is a new and independent act that breaks the causal link.) Similarly, the negligent act of P or a third party, which was itself an inherent risk created by the negligent conduct of the defendant and which was reasonably foreseeable by him, can never amount to a *novus actus* relieving him of liability. In this case the defendant driver, who had been drinking, drove dangerously by overtaking another vehicle at an excessive speed on a narrow bridge. He started to return to his side of the road before he had fully passed the vehicle being overtaken. The passenger in the front seat, thinking that a collision was about to take place, grabbed the steering wheel and moved it to the right. As a result, D lost control of the car, which went off the road and overturned. The passenger was killed and P, who was in the back seat, was severely injured. It was held that the action of the deceased arose out of the exigencies of the situation created by D’s own conduct and was one which, together with the resultant accident, a reasonably prudent man would have foreseen.

In *United Bottlers (Pvt) Ltd v Shambawamedza* 2002 (1) ZLR 341 (S) P (respondent on appeal) hired a paraffin refrigerator from D (appellant on appeal). It was a term of the agreement that D would service the fridge and keep in good working order. A mechanic employed by D lit the burner of the fridge but failed to position the tank correctly beneath the chimney. As a result, heat generated by the burner melted solder on the burner which ignited paraffin that the mechanic had spilled on the tank and omitted to wipe off. When P who was unaware of what had happened opened the cover of the tank in order to adjust the flame of the burner, he was engulfed in flames and suffered severe burns. The court found that the mechanic had been negligent. The subsequent harm to P was reasonably foreseeable and should have been guarded against. P’s act in opening the cover of the tank was a reasonably foreseeable consequence of the mechanic’s negligence and was therefore not a *novus actus interveniens* that broke the causal link. There was also no contributory negligence on the part of P.
All that is necessary is that harm of the kind in question is in general terms foreseeable; neither the precise manner in which it occurs nor its exact degree or extent has to be foreseeable before liability will ensue. In practice, however, these distinctions are often difficult to draw. See *R v John* 1969 (2) RLR 23; *BAT Ltd v Fawcett Security Ltd* GS-22-72; *Kruger v van der Merwe* 1966 (2) SA 266 (A); *Botes v van Deventer* 1966 (3) SA 182 (A) and *Doughty v Turner Manufacturing Co (Ltd)* [1964] 1 All ER 98.

**The thin skull rule**

The thin skull rule applies in the field of delict as it does in criminal cases. The courts have laid down that it is reasonably foreseeable that some people in society suffer from ailments and other physical conditions which make them more susceptible to injury or more serious injury than persons who do not suffer from those conditions. The general rule is that defendants must take their victims as they find them and if, for instance, the victim in the case of a collision caused by D’s negligence has a weak heart and the shock of the accident induces a fatal heart attack, D may be liable to the victims even though a person without that condition would not have died in the accident.

In *Wilson v Birt (Pty) Ltd* 1963 (2) SA 508 (D) a worker on a construction site suffered greater injury than the normal person because he had a thin skull. The court however went on to say that a victim who is especially vulnerable must take reasonable precautions to protect himself and failure to do so will amount to contributory negligence.

In *Smith v Lee, Brain and Co* [1961] 3 All ER 1159 (QB) a fleck of molten metal splashed on a workman’s lip because D had failed to provide him with a shield. The burn turned cancerous and he died. D was held liable for the death.

In *R v John* 1969 (2) RLR 23 (A); 1969 (2) SA 560 (RA) the court held you assault a person moderately it is reasonably foreseeable that he may have a thin skull and may end up dying.

In *S v Ncube* GB-47-80 during a minor tussle one of the people involved, Y, suffered haemorrhaging into lung cavity probably precipitated by exertion of struggle combined with tubercular condition from which Y suffered. The court held that the thin skull rule did not apply as death was not reasonably foreseeable in the circumstances.
In Santam Insurance Co (Ltd) v Paget 1981 ZLR 73 (A) an accident aggravated a pre-existing back complaint. The court applied the thin skull rule.

**Areas where wrongfulness issue arises**

As indicated earlier there are only a limited number of particular types of harm that result from negligent conduct where the issue of wrongfulness is a live one. In these situations, the courts have been concerned that if liability were to be based upon negligence, the scope of liability would be far too extensive and far too onerous. (The so-called spectre of liability “in an indeterminate amount to an indeterminate number of plaintiffs over an indeterminate period”.). As a matter of legal policy, therefore, the courts have sought in these situations to impose further legal requirements based upon policy so as to limit the extent of liability for the negligent causing of patrimonial loss. There are four situations where this has been done—

- Liability for omissions;
- Liability for causing purely economic loss by negligent misstatements;
- Liability for causing purely economic loss other than by negligent misstatements; and
- Liability for causing nervous shock.

**Omissions**

Where patrimonial loss accrues as a result of harm caused by an omission as opposed to positive physical conduct there are special rules which apply. In general terms, there is no delictual liability for an omission unless, in the circumstances, the law recognises that there is a legal duty to take positive action to prevent the harm from occurring. Thus, even though harm may have been clearly foreseen or foreseeable and the good citizen would have felt himself morally obliged to take action, D will still not be liable for the harm unless the situation was one recognised by the law as one in which there was a legal obligation to take preventive action.

The situations recognised as leading to such a legal duty are—

- Creation of a dangerous situation;
- Assumption of control over a dangerous situation which D did not create;
- Protective relationship (which includes both blood relationships, such as a mother and her own child, and other relationships, such as baby-sitter and a child which she is looking after);
- Public office or calling (e.g. a policeman);
- Statutory duty; and
- Contract or undertaking.
See *Halliwell v Johannesburg Municipal Council* 1912 AD 659 non-repair of dangerous road but *see Burger v Warenton* 1987 (1) SA 899 (NC); *van Reenen v Glenlily Management Board* 1936 CPD 315 fire spreading; *Silva’s Fishing Corp (Pty) Ltd v Mawaza* 1957 (2) SA 256 (A) owner of vessel failing to rescue crew when in distress; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) condition causing harm created by predecessor in title; *Meskin v Anglo American Corp of SA (Ltd) & Anor* 1968 (4) SA 793 (W) failure to disclose when inviting share-subscription; *King v Dykes* 1971 (2) RLR 151 A) There was a duty on a farmer to take steps in relation to fire which has spread to farm and which he has not started *Blore v Standard General Insurance* 1972 (2) SA 89 (O) garage failing to notify owner of defect in his vehicle; *Minister of Police v Ewels* 1975 (3) SA 590 (A) failure by police to stop assault; *Minister of Police v Skosana* 1977 (1) SA 31 (A) sick prisoner in policy custody not taken timeously for treatment; *Mbhele v Natal Parks Board* 1980 (4) SA 303 (D) wild animals escaping from reserve; *Havenga v Minister of Police, Justice & Prisons* 1981 (2) SA 344 (T) prisoner not given proper instructions on how to use pressure cooker; *Magwara v Minister of Health* 1981 ZLR 315; 1981 (4) SA 472 (Z) medical negligence; *van der Merwe Burger v Warenton Municipality* 1987 (1) SA 899 (NC) municipality is not in a specially privileged position regarding negligent omissions - introduction of new source of danger not required; *Rabie v Kimberley Municipality* 1991 (4) SA 243 (NC); *Dorset Yacht Club v Home Office* [1970] AC 1004 (HL); *de Villiers v Godley & Anor* 1975 (1) RLR 108 (GD) Fire in rural area; *Mills v Farmery* 1989 (2) ZLR 336 (H) duty of landowner in residential area to prevent condition constituting fire hazard to neighbours; *Ministry of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A); *Porritt v Molefe* 1982 (3) SA 76 (A)

In addition to these recognised categories, in the leading case of *King v Dykes* 1971 (2) RLR 151 (A) the appeal court reserved to itself the power to create additional legal duties to act positively in cases falling outside the scope of these specific categories. It would recognise such further legal duties only in borderline cases where, on a value judgment, the court decides that it is appropriate that an undoubted moral duty should be translated into a legal duty. The fact situation in *King v Dykes* which led to the court exercising this power to create a new legal duty was one of fire spreading in a farming area. The appeal court laid down that there was a legal duty on a farmer who had not started the fire but onto whose land a fire had spread from an adjoining property, to take reasonable steps to fight the fire and to try to prevent it from spreading further.

Since the decision in *King v Dykes*, the power to translate moral duties into legal ones has not been used to impose new legal duties in any other situations than fire spreading. Thus, the fire spreading situation at present is the only one where the courts have created liability for an omission which would not fall into the previously recognised categories of liability. It would seem likely therefore that the need to resort to this residual power to create a new legal duty will arise only very rarely in exceptional cases which do not fit into the traditional categories of liability for omission.
In South Africa, the courts have laid down that in a situation where there is no precedent for making D liable in this type of case, the courts will only recognise a legal duty so as to impose liability if in that situation, not only does the omission evoke moral indignation but also the legal convictions of the community demand that the omission be regarded as wrongful and that the loss should be compensated by the person who failed to act positively. See the cases of Minister of Police v Ewels 1975 (3) SA 590 (A) and Minister of Law and Order v Kadir 1995 (1) SA 303 (A). There appears to be little difference between the test applied in South Africa and that applied in Zimbabwe to decide whether a new legal duty should be recognised because the final decision will obviously revolve around policy considerations such as social utility, practicality of enforcing a new duty, and the likely impact upon the D’s activities of such a duty.

In Minister of Police v Ewels 1975 (3) SA 590 (A) a civilian was assaulted at a police station by a police sergeant who was not on duty at the time. The assault took place in the presence of several members of the police (including a sergeant) who could easily have put an end to the assault. The court held that the police officers on duty had a legal duty to come to intervene and assist the person being assaulted. The Ministry was vicariously liable. The court said the time had come where an omission should be actionable where it occasions not only moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful.

In Minister of Police v Skosana 1977 (1) SA 31 (A) a prisoner died due to the failure timeously to procure medical attention for him. The prisoner probably would have survived had he been taken for treatment timeously. The police had failed in their duty towards the prisoner.

In Minister of Law and Order v Kadir 1995 (1) SA 303 (A) the police attending to a traffic accident failed to record the particulars of the driver who caused the accident. The result of this failure was that a person who had been injured in the accident was unable to locate the driver and sue him. He then sought to sue the police. The appeal court held that the police did not owe the injured party a legal duty to record information relating to the identity of the driver or his vehicle and thus the injured party was not entitled to sue the police.

In Mapuranga v Mungate 1997 (1) ZLR 64 (H) the court awarded damages to P for unlawful imprisonment. There had been an incident at D’s house, where D accused P of having committed adultery with D’s wife. When P denied the allegation, he was assaulted by the D and others, including D’s brother, then prevented from leaving D’s house before being forced into the D’s car and taken against his will to a traditional healer, where he was forced to drink a herbal concoction which caused him to lose consciousness. The court held that although the doctrine of common purpose, applicable in criminal cases, has not been
accepted in civil actions, a defendant will be liable for a delict committed by another where he has by his acts created the situation leading to the delict or has failed to act to prevent its commission when he was under a legal duty to act. P had been invited to D’s house and D had thereby assumed a legal duty to protect him from foreseeable harm. D’s brother had been invited to confront P on an emotional subject which a reasonable person would have foreseen would be likely to provoke an assault. D, observing the assault by his brother, did nothing to prevent it and even joined in. Consequently, he was liable for the assaults by his brother.

In the South African case of Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA) the State was held liable for a rape committed by a known dangerous criminal and serial rapist who had escaped through an unlocked gate from police cells where he was being held for an identification parade. The court noted that an omission is wrongful under the common law if D is under a duty to act positively to prevent harm to P. D is under a legal duty if it is reasonable for him to have taken positive measures to prevent the harm, reasonableness being assessed according to the court’s conception of the legal convictions of the community (i.e. the convictions of legal policy-makers such as judges and the legislature). The court noted, with apparent approval, a minority judgment in the case of Minister of Safety & Security v Van Duivenboden 2002 (6) SA 431 (SCA), which held that the police were under a positive duty to act to protect citizens from assault, even on an application of the traditional test for delictual wrongfulness.

Negligent misstatements causing purely pecuniary loss

Where a person suffers physical harm to his person or property and resultant patrimonial loss by acting upon a negligent misstatement, no issue of wrongfulness arises. In such a case, provided there was a cause and effect relationship between the negligence and the physical harm, D’s conduct will automatically be deemed to be wrongful and the loss will be recoverable.

Where there is an issue of wrongfulness is in cases where there is no physical harm or damage but only pecuniary loss. An example of purely financial loss not arising out of physical damage is: P is considering extending credit facilities to B and P asks D about B’s credit-worthiness. D negligently informs P that B is a very good credit risk when, with the information at his disposal, he should have known that B’s financial position was extremely precarious. Acting on this information, P extends credit to C and soon thereafter C goes insolvent and P loses his money.

Because of fears of liability in this context in an indeterminate amount to an indeterminate number of persons over an indeterminate period arising out of the volatile character of words
and statements and their potentiality for reaching many people, our courts have adopted a test
for causing purely pecuniary loss by negligent misstatements which imposes further
restrictions on top of the negligence criterion. The test adopted is taken from the American
case of *International Products Co v Erie Railway Co*, which test has several component
parts. The test is as follows: in deciding whether there was a duty to give correct information,
there must be “knowledge or its equivalent” (this has been interpreted to mean that D either
knew or ought to have known) that—

- the information was desired for a serious purpose;
- the recipient intended to rely on the information;
- if the information was erroneous the recipient would suffer loss; and
- the relationship of the parties, arising out of contract or otherwise, must be such that in
  morals and good conscience the recipient had the right to rely upon the other for
  information and the giver of the information owed a duty to give it with care.

An analysis of the different facets of this test disclose that the first three criteria are really
just an extrapolation of the test for negligence, whereas the fourth criterion allows the court
to scrutinise the relationship between the parties and to decide whether this is the sort of
relationship which it should recognise as creating a legal duty to take care. Given the inherent
vagueness of this last criterion, the courts will be obliged to make a value judgment based
upon policy considerations, especially the policy of keeping within reasonable bounds
liability for negligent misstatements.

*See Murray v McLean NO* 1969 (2) RLR 541 (A); *Bristow v Lycett* 1971 (2) RLR 206 (A);
Negligently leading P to believe it was safe to approach a baby elephant  P being knocked
down by elephant; *Scottish Rhodesian Finance Ltd v Taylor* 1972 (2) RLR 165 (G)  No
misrepresentation and no duty to give information; *Dillon NO v Bentley* 1973 (1) RLR 55;
Company no right to rely on accuracy of plan drawn by D  no relationship between P and D
leading to duty to give information with care; *Wood v Northwood Service Station* 1974 (1)
RLR 49 (G) Negligent valuation of car by garage; *Macheke Rural Council v Cilliers* 1980
ZLR 144 (G): *Autorama (Pvt) Ltd v Farm Equipment Auctions* 1984 (1) ZLR 162 (H)
Negligent representation by auctioneer that car which was being sold not subject to hire
purchase agreement.

South African cases:
*Perlman v Zoutendyk* 1934 CPD 151  Negligent valuation of property; *Herschel v Mrupe*
1954 (3) SA 464 (A)  D supplying name of wrong insurance company; *Currie Motors v
Motor Union Insurance* 1961 (3) SA 872 (T); *SAB v Ross Jacobz* 1977 (3) SA 184 (A) at 187
Problem of limitation of liability; *Administrator of Natal v Bijo & Anor* 1978 (2) SA 256 (N);
*Administrator of Natal v Trust Bank* 1979 (3) SA 824 (A)  Estate agent negotiating with
authorities for compensation for expropriation, wrongly describing his client as registered
owner; *Siman & Co v Barclays National Bank* 1984 (2) SA 888 (A)  Causation; *Pilkington
Brothers (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 (2) SA 157 (W)  Negligent
advice on suitability of site for construction of particular type of plant; *Mc Cann v Goodall
A person may be liable for a negligent misrepresentation by omission where there is a legal duty on D to disclose a material fact to P and he fails to do so.

English cases: 
*Hedley Byrne & Co v Heller & Partners* [1963] 2 All ER 575 (HL) Bank advising on creditworthiness of customer; *Mutual Life & Citizens’ Assurance v Evatt* [1971] 1 All ER 150; *Esso Petroleum v Mardon* [1975] 1 All ER 203; [1976] 1 QB 801 (CA); *JEB Fasteners Ltd v Marks, Bloom & Co* [1981] 3 All ER 289 (QB)

**Negligent misstatement inducing contract**

Under this heading, the special situation of negligent misrepresentation inducing contract needs to be considered. The situation under consideration here is as follows: P and D are negotiating a contract. During the course of the negotiations, D makes certain material representations to P that induce P to enter into the contract. The representations made by D at the pre-contractual stage are not made terms of the contract. They are, however, erroneous and the effect of these erroneous statements is that P suffers financial loss at the post-contractual stage because the contractual deal is inferior to that which P was led by D’s representations to believe it would be. P seeks to sue D in delict for negligent misrepresentation. Until the 1980s, the approach in South Africa was that the courts adopted the position that it was unnecessary to allow recovery in delict in this type of case, the main reason being that any reasonable business-person would extract guarantees as to the accuracy of any such material representations, have them included as contractual terms, and would thereby be able to sue in contract if the representations proved to be erroneous. Under this approach, it was argued that to allow an additional delictual right of action would lead to unnecessary proliferation of actions. More recently, however, in the Cape Provincial Division decision in *Kern Trust v Hurter* 1981 (3) SA 607 (C) (which decision was approved in the Zimbabwean case of *Autorama (Pvt) Ltd v Farm Equipment Auctions* 1984 (1) ZLR 162 (H)), the court held that there was no compelling reason for denying a delictual right of action in this type of case, it being unreasonable to expect P to have to have included as contractual terms every single representation which has been made to him at the pre-contractual stage. He should rather be able to expect reasonable care from D in making statements that would induce P to conclude the deal. The South African Appellate Division has ruled emphatically that there can be liability in this situation. See *Bayers SA Ltd v Frost* 1991 (4) SA 559 (A).

In case of *Standbic Bank Zimbabwe Ltd* 2007 (1) ZLR 398 (H) a customer defrauded a bank. The bank had opened the account for the customer on the basis of a recommendation by D. The bank then sued D for its financial loss. The action for damages failed as the court found that there was no duty of care owed by D to P and in any event the loss was caused by the bank’s own negligence.
See also Amalgamated Dry Cleaners & Steam Laundry (Pvt) Ltd v Boiler & Steam Services (Pvt) Ltd GS-175-81 (Negligent advice as to equipment or negligent installation of equipment); Pilkington Brothers (Pty) Ltd v Lillicrap, Wassenaar and Partners 1983 (2) SA 157 (W) and Howard Marine & Dredging Co v Ogden & Sons Ltd [1978] 2 All ER 1134 (CA)

**Purely financial loss caused other than by negligent misstatements**

The type of situation falling into this category is as follows–

D is digging a ditch near a factory belonging to P. Whilst digging this ditch D negligently severs the power cable supplying P’s factory with electricity and the factory cannot resume operations until the cable is repaired. During this time, P suffers financial loss due to lack of production.

In respect of cases falling into this category, the courts have again adopted the approach that there must be some further limiting criteria additional to the criterion of negligence because in some cases liability could be almost limitless if such further restrictions were not imposed. In the leading Zimbabwean case, namely, TobaccoFinance v Zimnat Insurance 1982 (1) ZLR 47 (H) the court therefore lays down that in addition to negligence there must be, in the circumstances, a legal duty to avoid causing financial loss. It goes on to lay down that policy requires that liability in these sort of cases should be kept within reasonable and manageable bounds and only where the loss was specific and would not expose D to a multiplicity of claims would the loss be recoverable. P must not simply be part of an indeterminate or unascertained class of potential claimants. In this case an insurance company negligently paid out insurance directly to a farmer instead of to Registrar of Stop Orders as required under legislation. The farmer disappeared with the money. P, whose loan to farmer was secured by insured property, suffered economic loss as it could not recover the loan. D was liable to P. The loss was finite and specific and there was no public policy reason for denying P damages.

The courts have been called upon to apply these principles in relation to a range of situations. One group of situations relate to banking transactions. Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia 1972 (1) RLR 56 (G) the bank negligently paid out on a restrictively endorsed cheque and P suffered economic loss. The bank was held liable. The court, however, failed to address the issue of wrongfulness. (See 1972 Annual Survey of SA Law pp 134-136).
In the case *Zimbabwe Banking Corp v Pyramid Motor Corp* 1985 (1) ZLR 358 (S) a cheque that was endorsed account payee only and not negotiable was stolen. A person other the payee presented the cheque to the collecting bank for payment and the bank paid out to this person despite the restrictive endorsement. P suffered purely economic loss as a result. The court held that the bank was liable to P. There was no danger of opening Pandora’s Box. The parties were limited by the endorsement and there would not be a multiplicity of claims. The recognition of this duty would not wreak havoc in the commercial world.

In *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1990 (2) ZLR 397 (S) the collecting banker for the cheque was negligent and could have prevented the loss through fraud if he had properly examined the cheque and detecting the discrepancy in the names even though the cheque was crossed and endorsed “not negotiable account payee only”. The bank was held partially liable for the financial loss that occurred.

On the other hand, the court decided in the case of *The Music Room (Pvt) Ltd v ANZ Grindlays Bank Zimbabwe Ltd* 1995 (2) ZLR 167 (H) that the bank should not be held liable as this would open the floodgates to such a multiplicity of actions. This case involved a situation where an employee of the bank negligently handed over a chequebook belonging to one of its customers to a person falsely claiming to be a messenger of the customer and one of these cheques was then used to defraud the plaintiff company. The court decided that the bank was not liable as it would not be in the interests of society to impose a legal duty of care on the Bank in respect of economic loss suffered by P. The legal convictions of the community did not demand that this negligent act be regarded as unlawful. A reasonable person is likely to say that both parties were victims of fraud and the loss should lie where it falls. P’s employee should have acted with very much circumspection in the circumstances. No compelling reasons existed in this case for extending the scope of the *lex Aquilia* so as to impose a legal duty of care on a drawee bank towards a third party who suffers economic loss as a result of its negligent act of giving its customer’s cheque book to a wrong person who uses a cheque therefrom to defraud the third party, thereby causing him economic loss.

In *Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1990 (2) ZLR 397 (S) a finance house had negligently agreed to finance the sale of a non-existent farm and had issued a cheque in the name of the alleged seller, Mixed Tums (Pvt) Ltd. No such company existed. The person who received the cheque paid it into a bank account which he operated in the name of his company, Mixed Tans (Pvt) Ltd, the bank having failed to notice the discrepancy in the names even though the cheque was crossed and endorsed “not negotiable account payee only”. The finance house then sued the bank for the amount of the cheque. The court held that the finance house was negligent to greater degree than the bank.
In *Biddulphs Removals & Storage (1981) Pvt Ltd v Standard Chartered Bank Ltd & Anor* 1996 (2) ZLR 206 (H) P issued a cheque to a fuel company to pay for petrol products it had bought. The cheque was stolen before it reached the fuel company and an endorsement was forged on the back of the cheque to make it look as if the fuel company had endorsed over the cheque to the person named in the endorsement. The cheque was deposited into a building society account. The building society cleared the cheque and banked it with Standard Bank, who were their own bankers as well as P’s bankers. The bank then cleared the cheque, as a consequence of which P’s account with the bank was debited. The person who had stolen the cheque was then able to withdraw money from the building society account. P sued the building society and bank to recover the amount it had had to pay the fuel company to make up for the lost cheque. Held, that in terms of s 59 of the Bills of Exchange Act [Chapter 14:05] a banker is protected in all cases where in good faith and in the ordinary course of business, he pays out to a person whose title to payment purports to be derived from an endorsement, whether or not the endorsement is genuine. If he pays out in good faith he will not be liable even if he has been negligent. However, the effect of the proviso to this section is that only the banker on whom the cheque is drawn is protected; the collecting bank is not protected. A collecting bank is liable for purely economic loss that is caused as a result of the bank failing to exercise reasonable care to avoid causing loss to the owner of a stolen cheque. As banks and building societies are aware of the incidence of fraud involving forged cheques, they are obliged to adopt reasonable measures to guard against such fraud. There is an even greater need for care in respect of third party cheques. Where there are facts or circumstances which would lead a reasonable banker to inquire further, it would be negligent to fail to make such further inquiries. Taking into account the duties of the building society and the bank when dealing with a cheque of this nature and taking into account the information the respective tellers had before them when handling the cheque, the building society had been negligent. It is a moot-point whether the bank in these circumstances should have exercised more care than it did. In this sort of situation, the building society will usually have considerably more information than the bank and must therefore appreciate that the bank will rely to a large extent on the fact that the building society would have made preliminary investigations and satisfied itself of the entitlement of the account holder to the proceeds of the cheque. The building society had failed to exercise reasonable care in the handling of the cheque to ensure that the account holder was entitled to the proceeds before the cheque was referred to the bank and had negligently allowed the forged cheque to be deposited with it. The building society had been the proximate cause of the loss and was therefore liable under the Aquilian action for the economic loss sustained by P. The bank was not liable.

In *Border Timbers Ltd v Zimbabwe Revenue Authority* 2009 (1) 131 (H) P claimed that he had suffered economic loss as a result of incorrect calculation of duty by the Zimbabwe Revenue Authority. The court ruled that inquiry as to wrongfulness in situations where P has
suffered pure economic loss as occurred in this matter involved a determination of the
existence or otherwise of a legal duty owed by D to P to act without *culpa*. The inquiry into
whether or not D owed P a legal duty would be a matter for judicial judgment, involving
criteria of reasonableness, policy and, where appropriate, constitutional norms. Having
approached the court for an order redressing pure economic losses, P had to persuade the
court to make a value judgment to the effect that D owed P a duty not to cause it loss through
the incorrect calculation of duty. No evidence was led as to what a reasonable collector of
revenue would have done in the circumstances and whether to hold D liable in the
circumstances of the matter would promote any social or economic norm that is consistent
with current policies on revenue collection.

Sometimes third parties who are in contractual relationships with injured parties suffer purely
economic loss. For example, if D carelessly burns down A’s factory, can A’s workers sue D
for damages for loss of wages if they are put out of work as a result of the destruction of the
factory? Or if P who owns the factory is killed in a motor accident due to the carelessness of
D and P’s factory closes as a result, can P’s workers sue for damages for their lost wages? Or
if P’s employee A is negligently injured by D, and P has to pay A whilst he is off work and
has to pay someone else to do A’s work whilst he is away, can P sue D for his economic
loss? It would seem that in all these cases the indirect economic loss to the third parties is not
recoverable.

See also *Pickard v Bindura Haulage* HH-318-84; *Windmill v Minister of Justice & Anor* HH-
635-87 The Registrar of Stop Orders failed to register a stop orders submitted for
registration;

South African cases:
*Union Government v Ocean Accident & Guarantee Corp* 1956 (1) SA 577 (A) When his
employee was injured, the employer claimed damages for the loss of services of employee.
This action failed; *Combrinck Kliniek v Datsun (Pty) Ltd* 1972 (4) SA 185 (T) Defects in
vehicle. The cost of repairs was claimed from the manufacturer. The action was unsuccessful.
It is arguable that this case is wrongly decided contrary decision in *Colgate* 1990 (2) SA
520; *Greenfield Engineering v NKR Construction* 1978 (4) SA 901 (N) Payment was made
by cheque as requested but the cheque which was inaccurately made out was stolen and
payee suffered loss. P’s action was successful; *E G Electrical v Franklin* 1979 (2) SA 702
(EC) D negligently certified that electrical wiring in a building was in sound condition. The
purchaser of the home suffered loss. His action was successful; *Shell & BP (Pty) Ltd v
Osborne Panama* 1980 (3) SA 653 (D) D negligently damaged a buoy that was used by ships
transporting oil to offload the oil. This led to a number of ships being delayed in the
offloading of oil. P was one of the parties who suffered such loss because he was liable to the
charterer for damages for any delay in delivering the oil. The court held that D should not be
held liable as P was merely one of an unascertained class of potential sufferers and if he was
held liable to P there could be a possible multiplicity of claims; *Franschhoek Wines v SARH*
1981 (3) SA 36 (C) A co-op did not receive grapes for processing as a result of negligent
damage to vines of members by D action unsuccessful; Coronation Brick v Strachan Construction 1982 (4) SA 371 (D) D negligently severed as power cable to P’s brickworks. D knew that this cable supplied P’s brickworks. P suffered loss of profits as he was unable to make bricks whilst the power was off. D was held liable.

English cases
Weller & Co v Foot & Mouth Disease Institute [1965] 3 All ER 560 D negligently allowed a virus to escape from its Institute and this led to the imposition of a quarantine of cattle in the surrounding area. P, who were cattle auctioneers, suffered economic loss as it was not able to conduct any cattle auctions. The court decided that the Institute was not liable because if liability were to be imposed it would open the floodgates to a multiplicity of actions from such persons as butchers, dealers in dairy products, suppliers of cattle feeds, etc; SCM Ltd v W J Whittal [1970] 3 All ER 245 Cutting of power supply to factory; Dutton v Bognor Regis Building Co & Anor [1972] 1 All ER 462 (CA) Builder negligently laying foundations - liability to subsequent purchaser; Spartan Steel Ltd v Martin & Co Ltd [1972] 3 All ER 557 (CA); [1973] QB 27; [1972] 3 WLR 502 Cutting of power supply to factory; Ross v Caunters [1979] 3 All ER 580 Lawyer negligently drawing will; Caltex Oil (Australia) v The Dredge “Willemstadö” [1976] 136 CLR 429Junior Books Ltd v Veitch Co Ltd [1982] 3 All ER 201 (HL) sub-contractor (D) for builders constructing a factory for P negligently laid a factory floor. The entire floor had to be re-laid and P claimed from D the cost of replacement and consequential economic loss such as the cost of moving machinery and loss of profits. The court held that the relationship between D and P was a proximate one and that P could claim in delict against P.

Third parties suffering loss due to injury to others

See Union Government v Ocean Accident & Guarantee Corp 1956 (1) SA 577 (A); Cottle v Stockton Waterworks Co (1875) LR 10 QB 453; Spartan Steel Ltd v Martin & Co Ltd [1973] 1 QB 27 (CA) at 36

Nervous shock

Whereas damages can be claimed for pain and suffering, damages cannot be claimed for transient nervous distress which does not lead on to a recognised psychiatric complaint requiring treatment. Where, however, nervous shock has resulted in psychiatric harm necessitating medical treatment, in certain circumstances, damages can be claimed for such harm.

There is a paucity of Zimbabwean case law dealing with nervous shock. About the only case where this matter arose was in Thebe v Mbewe t/a Checkpoint Laboratory Services 2000 (1) ZLR 578 (S). In this case a laboratory had been negligent in carrying out a routine blood test. The test showed positive for AIDS. P immediately went for further tests and these correctly found that she was negative. P claimed damages for shock and suffering caused by D’s alleged negligence. In awarding damages, the court found that the trauma suffered by P was
transitory and there was no evidence that she needed counselling or psychiatric care. It therefore decided that no more than a small sum of damages was justifiable.

**Fear for personal safety**

Firstly, it is clearly established that where the psychiatric harm was sustained as a result of P’s being in fear for his own safety, then damages will be awarded. Thus, if D drives carelessly and nearly knocks down P, if P is so badly shocked by narrowly escaping death that he suffers psychiatric harm requiring treatment, P can recover damages from D.

**Shock due to injury to third party**

What is the position if a person suffers psychiatric harm not because he/she has been in fear for his/her own safety, but because of traumatic shock from observing someone else being physically injured? For example, a mother witnesses her own child being run down due to the carelessness of a driver; she is so shocked that she suffers deep-seated, emotional disturbance of more than a transient nature requiring psychiatric treatment.

Over the years, a wide variety of fact situations have come before the English and South African courts wherein the psychiatric harm has occurred when one person has been shocked about what has happened to another person. These situations include cases where persons have suffered nervous shock when they have witnessed their close relatives being killed right in front of them, cases where the witness is a stranger to the person who dies or is injured, and cases where a relative has not seen the accident but is shocked when he is informed about it some time later.

The present position in South Africa is that liability in all such cases is to be determined simply by applying the ordinary test for negligence, namely, reasonable foreseeability. See *Bester v Commercial Union* 1973 (1) SA 769 (A). Prior to this decision, a debate had raged as to whether, in addition to the test for negligence, other limiting factors should be applied, such as the closeness of relationship between the person physically injured and the person emotionally harmed, and the proximity of the emotionally harmed person to the scene of the accident. In England, also, the highest court decided in the case of *McCloughlin v O’Brian* [1982] 2 All ER 289 (CA) that the sole test was that of reasonable foreseeability. However, the House of Lords in the case of *Alcock v Chief Constable of South Yorkshire* [1991] AC 310 (HL) decided that additional factors to reasonable foreseeability had to be weighed such as the closeness to the scene of the accident.

In the *McCloughlin* case a mother learnt of a car accident involving her children and her husband. She suffered nervous shock when she went to the hospital and saw the condition of members of her family. D was liable for nervous shock to mother. In the *Alcock* case
numerous people died at a football ground when they were crushed to death due to overcrowding at the ground. D was responsible for the deaths because he had allowed the ground to become overcrowded and unsafe. Some people witnessed the deaths from other parts of the ground and others was recorded television pictures. The court held that to establish a claim in respect of psychiatric illness resulting from shock it was necessary to show not only that such injury was reasonably foreseeable, but also that the relationship between P and D was sufficiently proximate; that there were ties of love and affection between the parties; and that P had to show closeness in time and space to the accident or its immediate aftermath. The court decided that none of the Ps were entitled to succeed in their claims.

The reasonable foreseeability test is certainly not without its difficulties as the sole determinant of liability in these sorts of cases which span a wide spectrum of differing situations. On the other hand, criteria such as proximity and relationship are also very difficult to apply with any precision. There is no leading Zimbabwean case laying down definitively what approach is to be adopted in this sort of situation and if such a case comes before our courts a decision will have to be made as to how we should tackle these sort of cases.

See also Lutzkie v SARH & Anor 1974 (4) SA 396 (W); Boswell v Minister of Police & Anor 1978 (3) SA 268 (EC); Muzik v Canzone Del Mare 1980 (3) SA 470 (C); Masiba v Constantia Insurance 1982 (4) SA 333 (C) Attia v British Gas [1987] 3 All ER 455.
DEFAMATION & OTHER ACTIONS UNDER
ACTIO INJURIARUM

General note

The leading textbook on this subject is Burchell The Law of Defamation in South Africa. However, as substantial differences exist between South African and Zimbabwean law arising out of differing approaches to the concept of animus injuriandi, care should be taken in relying upon this South African text. As English law has heavily influenced our law in the field, reference should be made to English texts. Additionally, the chapter in McKerron’s book The Law of Delict 7 ed dealing with defamation in South Africa is a useful reference as it states the South African law prior to the subjectivisation of animus injuriandi, which subjective approach has not been adopted in Zimbabwean law.

Defamation

Competing interests

The law of defamation seeks to balance two competing interests. On the one hand, it recognises the right of the individual to be afforded protection against harm to his reputation. On the other hand, it also recognises that the public have a right to free speech and to proper access to information. Put in the context of newspaper reporting it is vitally important that there should be a free press that keeps the public informed, especially about public affairs. This free press should not be stifled by highly restrictive defamation laws. But at the same time the law cannot ignore the fact that newspapers and other broadcasting media are extremely powerful agencies which are able to reach enormous numbers of members of the public and that, if they publish defamatory material, the end result can be devastating harm to reputation. It should also be borne in mind that harm to reputation is extremely insidious and once reputation has been damaged it is very difficult to repair the damage. There is much truth in the Shakespearean saying “Who steals my purse steals trash; it is something, nothing. But he who filches my good name robs me of something which not enriches him, and makes me poor indeed”.

Animus injuriandi

English law has very substantially influenced the Zimbabwean law on defamation. A similar heavy influence was found in early South African law, but in more recent years the South African courts have made substantial efforts to remove this influence and to revert to “pure” Roman-Dutch law. The outstanding result of this effort by these courts has been to
subjectivise the law of defamation by ruling that under the Roman-Dutch law the requirement of *animus injuriandi* (in this context intention to defame) was not a fictional requirement, but a real one and thus if subjective intention to defame is absent, P should not be able to recover damages. It is submitted that our courts will not and should not follow this trend. The opposition to the subjective approach clearly emerges in the Zimbabwean case *Smith NO and Lardner-Burke NO v Wonesayi* 1971 (2) RLR 62 (G). See also *Tekere v Zim Newspapers & Anor* 1986 (1) ZLR 275 (H)

From a policy standpoint, any move towards subjectivism would seem to create a position where the reputational interests of plaintiffs would be afforded insufficient protection. If our courts continue to adopt an objective approach within this field, our courts would be likely to rely on English cases to develop this branch of the law of delict and to disregard South African cases in which a subjectivist line is employed. This is not to say, however, that all contemporary South African case law on defamation will be ignored.

However, contrary to the above, in the case of *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) the High Court the court dealt with the defence of absence of intention to defame that was raised in that case as if this defence is applicable in Zimbabwe.

In *Zvobgo v Kingstons Ltd* HH-485-86 at p 17 stated that liability of distributor of published material based on negligence and not intention.

**What constitutes defamation**

Defamation causes harm to reputation, that is, the estimation in which a person is held by others (his good name and standing). A defamatory statement is one which is published and injures the person to whom it refers by lowering him in the estimation of reasonable, ordinary persons generally; it diminishes his esteem or standing in the eyes of ordinary members of the general public. It may also cause the target of the statement to be shunned or avoided or may expose him to hatred, ridicule or contempt. Finally, a person can be defamed by casting aspersions on his character, trade, business, profession or office.

In *Masuku v Goko & Anor* 2006 (2) ZLR 341 (H) the court stated that in determining whether or not a person has been defamed, the court should adopt a three-stage approach:

(a) consider whether the words complained of are capable of bearing the meaning attributed to them, that is, whether the allegedly defamatory meaning is within the ordinary meaning of the words;

(b) assess whether that is the meaning according to which the words would probably be reasonably understood; and

(c) decide whether the meaning identified is defamatory.
In this case the court found that the plain meaning of the offending article was that P was being investigated for improper or unethical behaviour and that he had committed acts of corruption rendering him unfit to hold public office. Its overall tenor suggested that he was already under investigation and that the case against him had overtaken mere allegations of corruption. Applying the tests cited, the words, as understood by the ordinary reader, were defamatory of the plaintiff, in that they cast aspersions on his character, lowered him in the estimation of ordinary reasonably persons and, having regard to the diverse public offices he held, exposed him to public ridicule and contempt.

In *Garwe v Zimind Publishers Ltd & Ors* 2007 (2) ZLR 207 (H) said that the ordinary meaning of the words is determined by looking at the context in which they were uttered. The court must decide both whether the words in their ordinary significance are capable of bearing a defamatory meaning and whether the ordinary reader would understand the words as being defamatory. The reasonable reader is a person who gives a reasonable meaning to the words used, within the context of the document as a whole. The reasonable reader will not engage in an exercise to subtly, elaborately or intellectually analyse a word and come up with a meaning different from that ordinarily assigned to it.

A few examples may be given to show the range of statements encompassed by this definition. Reputation would be damaged and defamation would be committed if I say of a person that he is engaging in criminal activities, of a woman that she is a prostitute, of a politician that he is corrupt, of a businessman that he is deliberately falsifying his expense account or of a newspaper editor that he is deliberately distorting the facts in order to give a false picture of events.

In *Mapuranga v Mungate* 1997 (1) ZLR 64 (H) the court held that to accuse a person of committing adultery is still defamatory, in spite of great changes in general notions on the subject. Although adultery is no longer criminal, the reason why an allegation of adultery is defamatory is because adultery is an act of sexual incontinence which brings the perpetrator into odium from a social point of view. Adultery is still widely reprobated by public opinion and the defamation was inherently serious.

In the following situations each of the plaintiffs was awarded damages for the harm to his or her reputation—

*Haas v Greaterman Stores (Rhodesia) Ltd & Anor* 1966 RLR 313 (G) In front of a number of bystanders D made a verbal insinuation that P had committed shoplifting.

*RP & P Co & Ors v Howman NO* 1967 RLR 318 (G) A newspaper was accused by the Minister of Information of deliberately presenting an incorrect, unbalanced and biased picture of the news.

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Parsons v Cooney 1970 (2) RLR 75 (A) D sent a letter to a potential employer of P indicating that P was unsuitable for appointment to the post.

Khan v Khan 1971 (1) RLR 134 (A) D called a woman a prostitute.

Mavromatis v Douglas 1971 (1) RLR 119 (G) D, in the presence of one other person, accused P of criminal conduct.

Association of Rhodesian Industries & Ors v Brookes & Anor 1972 (2) RLR 1 (G) In a newspaper report, Ps were accused of corruption in the allocation of foreign exchange.

Mahomed v Kassim 1972 (2) RLR 517 (A) D told the audience that P had dishonourably failed to repay a loan. The audience was already aware of the allegation. A nominal amount of damages of £1 was awarded.
Associated Mine Workers Union & Anor v Gwekwerere & Ors GS-202-81 D accused P of theft.

Moyo v Abraham HH-467-84 D made an accusation that woman was a prostitute.

Ireland v Chihambakwe HB-65-85 D made an allegation that the P’s activities had destroyed his company and country’s economy.

Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H) a report that a Minister was a “regionalist” and conduct not been that expected of leader.

Birchall v Mararike HH-43-86 P made a false allegation that P had assaulted and abused him.

Arnold v Majome HH-431-86 Information supplied that chairman of a co-operative society had been suspended by the Registrar because funds donated to the society could not be accounted for.

Tekere v Zimbabwe Newspapers 1986 (1) ZLR 275 (H) A newspaper unjustifiably accused a prominent politician of being lazy, inefficient, irresponsible and hypocritical and of not attending properly to his political duties, but instead spent his time womanising.

Nyamwanza v Kambadza & Ors HH-104-87 an unfounded allegations were made against a headmaster that he was inefficient and was guilty of dereliction of duty and sexual impropriety. Mupita v Bayaii HB-31-89 P was accused at her workplace of theft within the hearing of her subordinates and some customers.

Darangwa v Bushu HB-68-89 a factory manager was falsely accused of unjustly demoting a worker because the latter had stated publicly that the manager had gone fishing with his girlfriend during working hours.
Tabanie v Chimanzi HB-75-90 a police constable was falsely accused by a member of CIO of providing assistance to two armed bandits and sharing in the spoils of the robbery and attempted murder committed by them.

Marongwe & Anor v Tsvaringe HH-5-91 two persons were ridiculed in front of subordinates by calling them mad and also making other insulting remarks about them.

Madaka v McLean HB-86-91 D took default judgment against a farmer after he had paid in full and caused publication of the judgment in *Dun’s Gazette*, causing the AFC to threaten foreclosure.

Bikwa v Ndlovu HB-18-92 D published to Community Court Presiding Officer’s superiors and others a number of false allegations of an immoral relationship between P and D’s wife and of abusing his office to set up this immoral liaison.

Chikukwa v Marisa & Anor HH-3-92 a newspaper published a misleading article in which it was stated that P had been dismissed following maladministration by him.

Chinengundu v Modus Publications (Pvt) Ltd HH-135-92 a newspaper published allegations that P, at a time when he was still a politician, had bought votes during an election. This story was published at a time when the President had been considering appointing him as a judge.

Prakash v Wilson & Anor S-208-92 in the headline to a story about P, it was incorrectly stated that P who was a businessman was sought by Interpol. This implied that he had been guilty of criminal conduct rather than that he had simply committed a breach of contract.

Robertson v Eriksen HH-256-93 P, a gynaecologist, was widely defamed by D’s complaint that he was rude, incompetent, greedy, generally unprofessional and unethical, and had assaulted her. D made her complaint to the Health Professions Council, did not retract it, and it became widely known in the medical profession.

Zimunya v Zimbabwe Newspapers (1980) Ltd 1994 (1) ZLR 35 (H) Following its article featuring P as the chief executive of a rising star rural council, the newspaper published the response from an angry reader suggesting that P was incompetent and corrupt and allowed council cars to be used as bedrooms

Remba v Sanyangara HB-12-94 a senior factory nurse told a labour hearing that another nurse, P, was a danger to human life and unfit for her calling. When sued for defamation, she did not justify the comments and admitted that they were not necessary. As a result of her statements, P had been suspended and later given work only in a storeroom. Her relationship with her employer had suffered.

Musukutwa v Marova HH-20-94 D said that another railway worker had caused the death of a workmate through witchcraft or similar means.

Transtobac (Pvt) Ltd & Anor v Jongwe Printing and Publishing Co (Pvt) Ltd HH-67-94 A newspaper alleged that a tobacco company and its financial director had victimised workers,
illegally detained them, and fired some of them because of their political affiliation and that they had detained and tortured people including the President.

*Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd* 1994 (1) ZLR 133 (H) A magazine published a story reporting that the police were re-opening an old case of fraud involving P, the Attorney-General. In this story it was stated that lawyers were concerned about P’s fitness for his post.

*Shamuyarira v Zimbabwe Newspapers (1980) Ltd* 1994 (1) ZLR 445 (H) A newspaper published a story exposing widespread abuse of power by Government Ministers and other senior officials. P was implicated in this story. P was found by the commission of enquiry into the scandal not to have been guilty of any abuse of his position.

*Mudukuti v Hove & Ors* HH-152-94 Ds drove their executive officer from his jobs by vitriolic verbal attacks upon him.

*Bushu & Anor v Nare* HH-97-95 D sent a letter to three parties in which he made a series of allegations of financial mismanagement by the two plaintiffs in respect of their handling of the affairs of the Public Service Association Investment Company.

*Zimbabwe Newspapers (1980) Ltd & Anor v Bloch* 1997 (1) ZLR 473 (S) Two newspapers of the defendant published articles accusing of well-known economist of racism, hypocrisy, insanity and fuelling tribal conflicts.

*Levy v Modus Publications (Pvt) Ltd* 2000 (1) ZLR 68 (H) A businessman was awarded damages arising out of two newspaper articles dealing with the construction of a shopping complex. The articles pointed out that the construction had commenced before building permits had been obtained and they implied that the businessman was a crook who had used his wealth and political connections to subvert Ministers and officials.

*Nyatatanga v Editor, The Herald & Anor* 2001 (1) ZLR 63 (H) Allegations which impugn the integrity of a person holding the post of Master of Sheriff of the High Court are defamatory in the highest degree and call for punitive damages. They are much more serious than allegations defaming a politician or businessman. To attack falsely the honesty and integrity of a person holding high office in the judicial system undermines the confidence that the public should have in the judicial system of the country.

*Kawonde v Dun & Bradstreet (Pvt) Ltd* 2003 (2) ZLR 352 (H) P was a legal practitioner who, through a misunderstanding, had a default judgment granted against him for non-payment of a debt. When the misunderstanding was cleared up the judgment was rescinded. Shortly after the rescission, D published an issue of *Dun’s Gazette* in which it recorded that judgment had been granted against P. Although D did not know, and had no way of knowing, that judgment had been rescinded, D declined to remove P’s name from the list for 5 months after being informed of the rescission. The initial publication of P’s name was privileged because D did not know and had no way of knowing that the judgment had been rescinded. However, after D was made aware of the true facts the situation changed, and any continued
publication of the information in the Gazette or through D’s computers became unlawful. The court awarded D $150 000 damages for defamation.

The basic test is that of the response of ordinary, reasonable people. In respect of written material, the test obviously does not take account of how a reader with a morbidly suspicious mind or how an abnormally sensitive or supercritical reader would respond to the contents. It should also be stressed that the test is not how highly virtuous people who always think perfectly rationally and are totally devoid of all prejudices would respond to the material. Instead, it is the likely reaction of ordinary people of average intelligence. Thus, if a person is being prosecuted for a crime, but has not yet been convicted, the highly ethical individual who is completely fair-minded would adopt the stance that a person is presumed innocent until his guilt is proven and thus he would suspend all judgment upon the guilt of the accused until the court has ruled. The response of ordinary people, however, would be more likely to be that the prosecution would never have been brought unless the police had cogent evidence that he was guilty. So too, the moralistic person would have nothing but sympathy for a victim of rape; but to say of a woman that she has been raped will lower her reputation in the eyes of many people in the general public.

This test pays heed to contemporary social and political values and if, over time, values undergo change what is defamatory may alter within the society. To give an extreme example, in the fascist white-rulled “Rhodesia” the courts would have looked upon the term “Communist” as being defamatory, whereas in post-independent Zimbabwe at a time when a socialist economic path was being pursued the use of this term certainly not be defamatory. It should also be noted that the test is the response of ordinary, reasonable people generally. Under this test, a sectional or segmental test is not used. It has, however, been argued that the test should rather be whether a substantial and respectable group of society members would construe the remark as defamatory so as to accommodate the situation where a remark would seem innocuous in the society as a whole, but amongst people with similar beliefs to P, say Hindus, the remark would be construed as being highly defamatory, e.g. that a Hindu eats beef which is completely forbidden for people of his faith. There was support for the sectional test approach in Velempini v Engineering Services Dept of Works 1988 (2) ZLR 173 (H).

Where the alleged defamatory statement is contained in a newspaper article the court is entitled to examine the article as a whole and not just the words specified by P. See Ndewere v Zimbabwe Newspapers (1980) Ltd & Anor 2001 (2) ZLR 508 (S).

Material can be defamatory either in a primary or in a secondary sense. Where it is alleged that the material is per se defamatory, it is not permissible to call witnesses to testify as to how they understood that material. It is for the court to decide how reasonable people generally would have been likely to construe that material. Where, however, P is alleging
innuendo (i.e. that in the primary sense the words are not defamatory but because of special circumstances they assume a secondary meaning which is defamatory), it is necessary and permissible for P to call witnesses to testify that they were aware of the special circumstances and that, given those special circumstances, P’s estimation was lowered in their eyes. (The court still has to consider such witness testimony from the standpoint of whether the witnesses were reasonably justified in interpreting the material in this fashion.)

Although words are *per se* defamatory, P may still allege an innuendo, the object of which is to highlight the sting of the imputation. The highlighting of the sting of the imputation is not an innuendo in the true sense, as the imputation can be derived from the words themselves. The highlighting of the sting has been referred to as a *quasi-innuendo*. See *Zvobgo v Kingstons Ltd* 1986 (2) ZLR 310 (H) and *Zvobgo v Mutjuwadi & Ors* 1985 (1) ZLR 33 (H)

Where the statement is defamatory *per se* no witnesses need to be called: *Mavromatis v Douglas* 1971 (1) RLR 119 (G);

But witnesses can be called when innuendo is pleaded: *Mahomed v Kassim* 1972 (2) RLR 517 (A); 1973 (2) SA 1

In *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) the court decided that a person claiming damages is bound by the specific meaning selected by him as being defamatory and the court will deal with that meaning and no other.

**Oral and written defamation**

No distinction is drawn in our law between written and verbal defamation. The requirements for both are exactly the same. In other words, the English law distinction between written defamation (libel) and verbal defamation (slander) does not exist in our law.

**Persons who can be defamed**

An action for defamation can be brought by–

- a natural person;
- a trading or non-trading corporation when the status or reputation of that corporation has been damaged. See *Boka Enterprises v Manatse & Anor* 1989 (2) ZLR 117 (H) and *Dhlomo NO v Natal Newspapers & Anor* 1989 (1) SA 945 (A); and
- a political party. But Government itself cannot sue for defamation.
A person cannot sue in respect of defamatory statements about his dead relative. Only if the statements about the dead relatives have the effect of defaming **him personally** can he sue.

When a statement is made about an entire **class** or group of persons (say all university lecturers), P, who is a member of that class, can only sue for defamation if reasonable people generally would have understood the statement as referring to P individually as well as to others in the class and therefore they would have thought less of P himself or herself. See *Arnold v Majome* HH-431-86

In the case of *Moyo v Chipanda* 2004 (2) ZLR 67 (H) P sued D for defamation. The statement, published in a widely circulated newspaper, did not refer to P by name or by description. However, the same newspaper subsequently published articles in which P was identified and linked to the earlier statement. D excepted to the declaration, arguing that a subsequent publication cannot cure the defect in a previous publication. The court held that publication of defamatory words and identification of the person intended to be defamed need not occur contemporaneously. It would be absurd to hold that a summons was excisable merely on the ground that identification of P occurred after the publication complained of and in subsequent publications. The evidence of such subsequent publication was therefore admissible and could be summoned to support P’s case.

**Publication**

If a defamatory statement about P is published only to P, he may be able to sue for **injuria**, but he cannot sue for defamation because, by definition, defamation is only committed when there is publication of the defamatory statement to at least one person other than P. (This requirement is satisfied if D publishes it to P’s spouse. However, because of the closeness of the marital relationship as an exception to this rule, publication is not deemed to have taken place if the publication is only to the D’s own spouse.) The fact that other people have previously published the same defamatory statement is no defence.

See *Grindlays Bank v Louw* 1979 ZLR 189 (G) Publication to P’s agent; Re-publication

If another person re-publishes a statement originally made by D, D will also be liable to pay damages for that further publication of his defamatory statement if–

- he or she authorised or intended the repetition; or
- to his knowledge, the other person had a moral duty to repeat the matter; or
- the publication flows in the ordinary course from the original publication.
Damages

The award of damages for defamation is more as a solace for injured feelings, rather than as a way of repairing all the damage that has been done. This is the approach because once the defamatory statement has been published, it is very difficult to rehabilitate completely a reputation even if it is proved in court that the statement was misguided and a full apology is extracted. The case of *Thomas v Murimba* 2000 (1) 209 (H) deals with the purpose of awards of damages in defamation cases.

It can be argued that damages for defamation have a distinctly class character and that our approach to damages in this area strongly reflects capitalist values as to status and human worth. Thus a person’s worth depends upon his class or status. This approach comes under fire from the author of an article entitled “Defamation in Tanzania and its Reflection on Socialism” Vol. 9 No. 3 *Eastern Africa Law Rev* 99. The author refers to Eyakuze’s case where it is suggested that damages should not vary in accordance with class. An ordinary worker’s contribution to the social good is as valuable as, say, a managing director’s. Both should receive the same amount of damages for the same sort of defamatory statement, all other things being equal, such as, extent of publication of the statement. Underlying assumptions about human worth based upon class should be challenged, the author maintains.

In Zimbabwe the following criteria are taken into account in assessing damages for defamation—

1. the nature and gravity of the defamation, its probable consequences and the intended effect of the words used;
2. the plaintiff’s reputation and standing in society (Did P have a good or bad reputation prior to the defamation?);
3. the extent of the publication (Was the defamatory statement contained in a newspaper with wide circulation or published on the internet or was the defamatory statement only published to a single person or a small number of persons?);
4. whether the defamatory statement was made recklessly without taking proper steps to check the accuracy of the facts upon which it was based?
5. whether there has been an attempt to rectify the situation by making a retraction and apology or there has been a refusal to retract and apologise.
6. comparable awards in other cases; and
(h) the declining value of money.

An **apology** will only mitigate damages if—
- it is a full, unconditional and unreserved withdrawal of all imputations together with an expression of regret;
- it is done as soon as reasonably possible after the original publication; and
- the apology is given the same or greater prominence than the original defamatory statement.

On these criteria see *Garwe v Zimind Publishers Ltd & Ors* 2007 (2) ZLR 207 (H) and *Masuku v Goko & Anor* 2006 (2) ZLR 341 (H). In the *Masuku* case the court said that in applying these factors, it must be borne in mind that damages are intended as a *solatium* and should not as a rule be punitive. In this case the court found that D’s conduct was aggravated by their failure to investigate further the allegations before publication; by failing to verify the authenticity of the document on which they were based; by failing to publish any retraction or apology; and by persisting with their denial of liability even after the action was instituted. In the *Garwe* case the defamation was particularly serious as it was about a senior judge about whom it was alleged that in a treason trial he had attempted improperly to depart from established procedure by excluding the assessors in the formulation and handing down of judgment in a treason case. This was highly damaging to his professional integrity.

In *Nkala v Sebata & Anor* 2009 (2) ZLR 203 (H) the chief of the area in which P lived presided over a meeting of his subjects. This was a public meeting open to all villagers; most of them were in attendance. D1, who was a senior kraalhead, was present, as was D2 a senior villager. D1 addressed the meeting and made utterances to the effect that P was a stock thief who had stolen cattle from fellow villagers and had recruited other villagers to participate in this nefarious practice. He stated that P’s herd boy and young brother had stolen cattle and sold them to P. D2 made utterances that supported what D1 said. He further said the other villagers in attendance were afraid to unmask P as a stock thief because they thought he would steal their cattle in revenge. P claimed that these utterances were false and actuated by malice, in that D’s principal intention was to persuade the chief to order P’s eviction from his homestead. The defendants were in default and the plaintiff applied for summary judgment. The only issue was the quantum of damages. As a result of such utterances and at such a meeting P’s dignity, self-esteem and reputation were maligned and lowered in the eyes of the villagers present.

The court held that the assessment of damages in a case such as this is not easy because it is difficult to recompense P for the insult perpetrated against him and the pain which he suffered as a result of the false allegations levelled against him. The quantum ultimately determined by the court represents what is designed to be a fair and appropriate sum which,
in contemporary thinking, will help to assuage P’s injured feelings, and will compensate him reasonably for the injury. It is not always a simple matter to decide what is proportionate or adequate. Here, in a rural setting, the defendants participated in an extremely grave attack upon the applicant. They wanted to cause the applicant to lose his homestead. They wanted to maliciously influence the chief to remove the applicant from the village. Bearing in mind these factors and the true value of the awards in previous cases in this country, an award of US$2 000 would be appropriate.

In Garwe v Zimind Publishers Ltd & Ors 2007 (2) ZLR 207 (H) aggravating factors may lead to the imposition of punitive damages.

See also Khan v Khan 1971 (1) RLR 134 (A) Circumstances under which exemplary damages would be awarded; Mahomed v Kassim 1972 (2) RLR 517 (A) Nominal damages; Tekere v Zimpapers & Anor HH-286-86 Exemplary damages.

**Defences**

**Interdict**

The courts are reluctant to issue an order to prevent the media from publishing a story on the basis that the story is allegedly defamatory.

In Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor 2000 (1) ZLR 234 (H). In the early hours of the morning on which a weekly newspaper was to be published, the applicant bank sought an interim interdict preventing the publication of the paper. The paper contained an article which the bank said would be damaging to it because it suggested that the bank was in serious financial trouble. There had been an article in the previous edition of the paper in which it was said that the bank was in trouble. The court refused to grant an interdict to stop the circulation of the paper. It held that the bank had produced no proof that the article was false and that the article would harm it, particularly as there had been a previous article that gave an equally bleak picture of the bank’s situation. The court also held that there were a number of alternate remedies available to the bank, including suing the paper for defamation. The court did, however, point out that a newspaper has a duty to act responsibly and to take reasonably adequate steps to satisfy itself of the veracity of the reports it publishes. This is particularly so when a report alleges that a bank is in serious financial difficulties because of the reaction such report can generate from the bank’s customers.

In Schweppes (Central Africa) Ltd v Zimbabwe Newspapers (1980) Ltd 1987 (1) ZLR 114 (H) Before an interdict may be granted restraining the publication of matter alleged (or
admitted) to be defamatory, the court must be satisfied not only that the matter is defamatory but also that there is no defence (such as that the statement is true and for the public benefit) and that nothing has occurred to deprive the plaintiff of his remedy (such as consent to publication). Where a newspaper received an anonymous letter concerning the petitioner, which letter was grossly defamatory and potentially harmful to the petitioner, the court refused an application for a perpetual interdict. The letter had not been published and would not be published until or unless the truth or otherwise of the allegations in it was established; and the final article, if published, might not be defamatory of the petitioner. It could only be determined at the publication of the contemplated article, if it could be determined at all, what the truth was.

In *Moyo v Muleya & Ors* 2001 (1) ZLR 251 (H) A Cabinet minister, sought an interdict against the respondents after they published an article which referred to legal proceedings being brought against him in Kenya. The applicant had already instituted proceedings against the respondents in respect of the article already published; the respondents had raised the defences of qualified privilege and justification. The court held that the competing interests of the right to personal dignity and integrity and the right of freedom of speech had to be balanced. In doing so, the court should interfere as little as possible with freedom of speech. Before granting a final interdict, the applicant had to establish a clear right. He could not do so when the existence of the right had yet to be determined in the other case pending. The fact that the applicant was a politician was important in assessing the respondents’ defences. Generally speaking, politicians are open to greater scrutiny than ordinary persons. This meant that the defences being raised had a reasonable prospect of success.

**Defences to defamation**

As a result of certain South African Appellate Division cases since 1960, it is now a defence to defamation in South Africa that D did not subjectively intend to defame (i.e. that he had no *animus injurianti*). This defence would not appear to be available in Zimbabwe as *animus injurianti* is a purely functional requirement because as soon as it is proved that objectively the statement was defamatory, *animus injurianti* is presumed to exist by the courts and, at this stage, D will only escape liability if he successfully pleads one of the recognised defences, namely, justification, fair comment, privilege, compensation, *rix* or consent to the publication of the defamatory material. For this reason, only these defences will be dealt with.

However, in the case of *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) the High Court the court dealt with the defence of absence of intention to defame that was raised in that case as if this defence is applicable in Zimbabwe.
Justification

In Zimbabwe truth alone is not a full defence. In addition to truth, it must be established that the publication of the true defamatory material was for the public benefit. This further requirement for the defence of justification was introduced to guard against things like the raking up of long forgotten scandals, for example, the fact that a person who is now a public figure was convicted of a minor criminal offence thirty years ago where this has no bearing on his present conduct.

**Truth.** The statement does not have to be completely accurate in every single particular detail. It is sufficient that it was substantially true in its major particulars that form the basis of the complaint of defamation.

**Public benefit.** The publication of that statement in that manner at that time must be of some benefit to the public. Thus, for instance, this requirement would be satisfied if the statement is about the integrity or competence of a public official. But it would not if D publishes to a man information that the man’s wife is committing adultery.

In *Levy v Modus Publications (Pvt) Ltd* 1998 (1) ZLR 229 (S) A well-known businessman sued a newspaper for defamation arising out of two editorials criticising the manner in which the businessman had implemented his project to develop a shopping complex. On appeal, the majority of the court decided that the newspaper had defamed the businessman. The editorials implied that the businessman was a crook, that he had corruptly used his wealth and his political connections to suborn officials who ought to have prevented the continuation of the project and that he had bent the rules and violated the law in pushing through the project. The majority of the court also decided that the defence of justification had not been established as the statements had not been shown to be true. In relation to defamation, the court decided that the court must determine the matter on the facts as they existed at the dates of publication of the alleged defamatory articles, not as they were when the judgment was given some months later by the court. The minority of the court decided that in a democracy the public should guard against the tendency of prominent, wealthy and well connected people in society to get away with breaking and bending the law and rules and trampling on the rights of other citizens. In this case, the newspaper had a right to raise these issues pertaining to the conduct of this public figure. The statements were generally true and the comments based on them were fair. The newspaper was therefore not liable to pay damages for defamation.

See also *RP & P Co v Howman NO* 1967 RLR 318 (G); *Mahomed v Kassim* 1972 (2) RLR 517 (A); *Tekere v Zimpapers & Anor* 1986 (1) ZLR 275 (H); *Graham v Ker* (1982) 9 SC-185 Raking up of old scandal; *Yusaf v Bailey & Ors* 1964 (4) SA 117 It is permissible to make reference to past misconduct where this has a bearing on present conduct.
Fair comment

The law recognises this defence subject to certain requirements in the interests of free speech. It lays down that in certain circumstances a citizen should be immune from civil liability if he expresses his genuine opinion concerning matters of fact which are of public interest, even if that opinion is defamatory in its effect. The basic requirements for this defence are–

- There must be a comment or an expression of opinion as opposed to a statement of fact.
- The comment must be “fair” in the sense that it must be an honest opinion that is relevant to the facts. In other words, the opinion must be one which D genuinely held based upon those facts and he must have been exercising his citizen’s right to express his opinion and his motivation must not have been simply to cause harm to P’s reputation because he had, say, a grudge against him.
  Provided that the opinion is fair in the sense that it is genuinely held and if D is expressing the opinion in the public interest and not because of motives of spite or grudge towards the plaintiff, the defence will apply even if the opinion is expressed in strong and somewhat intemperate, exaggerated and extravagant language. The defence is extended in the interests of free speech and this right would be substantially negated if it was an essential pre-requisite that opinions expressed must always be well-balanced and completely impartial.
- The facts commented upon must be stated or referred to unless they are so notorious as to make this unnecessary.
- The facts commented on must also be true in their salient particulars and must be facts that are legitimately matters of public concern.

In *Moyse & Ors v Mujuru* 1998 (2) ZLR 353 (S) A politician had been acquiring business interests in an area contrary to the leadership of the ruling party by which he was bound. A magazine had published a story in which it referred to the ‘goings on’ of this politician. This story was defamatory as the ordinary reader would take this to mean that the politician had been doing things of a dishonourable or disreputable nature and perhaps even of a dishonest nature. However, the magazine successfully raised the defence of fair comment. The comment was fair, it was based on true facts, the matter commented upon was a matter of public interest and, although the facts relied upon were not stated, they were generally known to the relevant audience.

In *Ndewere v Zimbabwe Newspapers (1980) Ltd & Anor* 2001 (2) ZLR 508 (S) The second respondent wrote an article which appeared in a newspaper published by the first respondent. The article was critical of a decision made by the Zimbabwe Broadcasting Corporation. It alleged that the decision was taken by the Corporation’s “in-house lawyer”. The article
referred to “the calibre of some of the people who make decisions at ZBC” and referred to “the lawyer’s strange and warped thinking”. The appellant claimed that the article referred to her, as she was the Corporation’s corporate secretary and legal adviser. She stated, though, that the decision which was being criticised was made, not by her, but by the Corporation’s Board of Governors, although she had, in her official capacity, signed the press statement in which the decision was announced. The court held that that to question the calibre of people working for a particular employer necessarily implies that some are of a low calibre. When this was followed by reference to the lawyer’s “strange and warped thinking”, this necessarily implied that this was meant as an example of the work of a low calibre employee. While the word “strange” may not be regarded as defamatory, to refer to the “strange and warped” thinking of one of those employees is to make a statement calculated to lower that person in the esteem of those who know the remark refers to him or her. If fair comment is pleaded, the factual allegations on which it is based must be true. The article alleged that the appellant made the decision which was being criticised. The evidence established that the decision was not made by the appellant, even though she had, in her official capacity, signed the press statement. Where the allegations are made about P, and should have been made about someone else, the defence of fair comment must fail.

See also RP & P Co v Howman NO 1967 RLR 318 (G); Tekere v Zimbabwe Newspapers & Anor1986 (1) ZLR 275 (H); Zvobgo v Kingstons Ltd 1986 (2) ZLR 310 (H); Crawford v Albu 1917 AD 102 at 125; Marais v Richard & Anor 1981 (1) SA 1157 (A)

Privilege

There are two types of privilege, namely absolute privilege and qualified privilege. The difference between the two is whereas qualified privilege does not apply if D was actuated by malice, with absolute privilege the defence still applies even if malice was the motivating force and the statement was entirely untrue.

Absolute privilege

The sole form of absolute privilege recognised in Zimbabwe is that extended to Parliamentarians in respect of statements made by them in Parliament. This absolute privilege that is contained in section 5 of the Privileges and Immunities of Parliament Act [Chapter 3:03]. Parliamentarians are given absolute privilege in the in the interests of unconstrained and probing debate by the Parliamentarians.

Qualified privilege

The law recognises certain situations where a person has a right to make a statement even though the statement turns out to be untrue. If, however, the maker of the statement
knows in advance of making it that it is completely untrue and nonetheless goes ahead and makes it, this will frequently mean that the maker was acting out of malice towards P and, if so, the defence will not then apply as this defence is forfeited if the statement was made maliciously. The onus is on P to establish malice. *Faber v Barrow* (2) 1962 R & N 657.

In *Masuku v Goko & Anor* 2006 (2) ZLR 341 (H) the court stated that the defence of privilege requires the defendant to establish that he had a duty or interest in publishing the statement and that the persons to whom it was published had a similar duty or right to receive it. Newspapers have a right to keep their readers informed about matters of public interest involving public figures. Even if the elements of privilege are established, the defence is vitiated if P shows that D was actuated by malice or that he abused or exceeded the bounds of privilege. In this case the court decided that P’s conduct was a matter of public interest and D’s newspaper had a duty to report on his activities as a public figure. However, the contents of the article were published recklessly and exceeded the bounds of privilege, in that (a) the article was unbalanced and selective; (b) D acted contrary to the clear advice offered by the plaintiff to withhold publication until they had investigated further; and (c) the article’s reference to earlier press reports of alleged corruption on the part of the plaintiff was unsubstantiated. It could thus not be said that the contents of the article were even partially true, let alone completely or substantially true.

In *Parsons v Cooney* 1970 (2) RLR 75 (A) the defence was defeated by malice.

Where the law recognises that a privilege attaches in the sort of situation, the defence will still not apply if–

- D makes defamatory statements which are not relevant to the assertion of that sort of privilege; and
- D publishes the statement to persons other than those who have a legitimate interest in receiving the information in terms of the privilege.

In *Garwe v Zimind Publishers Ltd & Ors* 2007 (2) ZLR 207 (H) the defence of qualified privilege failed because the newspaper had failed to check the facts and seemed to have had an improper motive.

In *Mugwadi v Nhari & Anor* 2001 (1) ZLR 36 (H) P, who was the Chief Immigration Officer, sued his former deputy (R1) and a weekly newspaper (R2) for defamation. P and R1 did not get on well. P considered R1 to be insubordinate, incompetent and possibly corrupt, while R1 thought that P was corrupt, practised nepotism and mismanaged the department’s affairs. R1 wrote a letter to the responsible Minister and Permanent Secretary, making certain accusations about P. Subsequently, a board of inquiry recommended that R1 be charged with misconduct. The charges were heard by a provincial magistrate. R1 was found guilty of most
of the charges and his employment was terminated. He applied unsuccessfully to the High Court for a review of the proceedings. The judge nevertheless recommended that an investigation be carried out into the allegations of corruption in the Immigration Department. R1 appealed to the Supreme Court, which set aside the magistrate’s decision on the grounds that his constitutional right to a fair hearing had been violated. The merits of the case were not considered. R2 published an article about the whole matter, entitled “Immigration Chiefs in Corruption Scandal”. In the article, statements were made which were admittedly defamatory of P. R2’s defence was that the statements were made on a privileged occasion. R1 stated that in communicating defamatory matter to the Minister and Permanent Secretary he had the duty to do so, and they had the duty, right and interest to do so. R2’s argument was that it faithfully reported the proceedings before the magistrate and relied entirely on the documents before the judicial inquiry, that it had a duty to publish the proceedings, and that the public had the right to know what was going on. The court held that the defence of qualified privilege does not depend on the truth of the statement made. The degree of truth only becomes relevant when P alleges that the defendant has exceed the bounds of privilege or has been motivated by malice. Once the defendant shows that he had a duty or interest in publishing the statement and that the persons to whom he published it had a duty to receive it, the onus shifts to P to prove animus injuriandi. He can do this by showing that the defendant acted mala fide, not only by proving actual malice, but by showing that the defendant was actuated by any indirect or improper motive or that he stated what he did not know to be true, reckless as to whether it was true or false. The evidence must be affirmative and cogent. The communication in the present case was made in circumstances of privilege. Both the Minister and the Permanent Secretary had a duty and interest in respect of the Department. P should have established not only that the statements made against him were false but that there was a motive or other indirect purpose for making them. This he failed to do. Generally speaking the public has a right to know and an interest in knowing what is happening in a department funded from public coffers. R2 could not have more faithfully reported on what was taking place between the two top officials in the Immigration Department. When a newspaper reports faithfully about the counter-accusations made by senior officials in a government department, and does so merely by reporting what was said in judicial or quasi-judicial proceedings, it cannot but be protected by law.

*Judges, magistrates and legal counsel*

These persons only have a qualified privilege in respect of the statements they make during the course of a court case. *May v Udwin* 1981 (1) SA 1 (A).

*Publication of statements made by Ministers at public meetings*

See *Zillie v Johnson & Anor* 1984 (2) SA 186 (W)
Qualified privilege applies in respect of—

The reporting of the proceedings of Parliament and other public bodies such as city councils and to the reporting of court cases. (All of these matters are dealt with in a special section on newspaper reporting contained at the end of this section on defamation.)

Statements made during the course of judicial proceedings by a judicial officer, a party, a witness or a legal practitioner, but this defence only protects such statements if they are relevant to the issue under consideration in the proceedings.

Statements made by defendants having a legal, moral or social duty to communicate certain information to persons having a legitimate interest or duty to receive such information.

One example of this sort of situation would be where an ex-employee of D is seeking a job with X and X approaches D to provide a reference about the ex-employee. If D supplies a candid, condemnatory reference he will be covered by a qualified privilege unless he was actuated by malice.

Another example is where D has received certain information that suggests that the plaintiff has committed a crime. If, acting out of duty, he supplies this information to the police, he will be covered by qualified privilege. This will apply even where he thinks that the information is probably incorrect but nonetheless feels obliged to hand it over to the police so that they can investigate it to see if it is true or false.

In the case of *Thomas v Murimba* 2000(1) ZLR 209 (H), the judge stated that the range of duties and rights to communicate defamatory matter is wide and should be widened further in the interests of social transparency.

**Compensation**

It may be a good defence to show D had replied in equal measure to a defamatory statement about him made by P.

**Jest**

In Zimbabwe, D is only protected where he made the statement complained of in jest if objectively, given the character of the statement and the circumstances in which the statement was made, it could not reasonably have been understood in a defamatory sense.

**Rixa**

D may not be liable if he uttered the defamatory words without premeditation, in sudden anger on provocation by P and did not subsequently persist in them. In other words, this is
tantamount to a defence of provocation. Presumably, the provocation has to be of a serious character before this defence will avail in Zimbabwe.

See *Mahomed v Kassin* 1972 (2) RLR 517 (A); 1973 (2) SA 1 (RA). This case was probably incorrectly decided see Burchell; *Moyo v Abraham* HH-467-84

Consent

It is a good defence for D in an action for defamation to show that P consented to the injury to his reputation. However, a challenge or a dare to repeat a defamatory statement should not be a defence if the implication is that P will proceed against D should he or she repeat the statement. Thus, if the statement is originally made in Parliament and is originally protected by absolute privilege, if the statement is repeated outside Parliament after P has challenged the maker to do so, the defence of consent will not apply.

See *Fortune v African International Publishing* 1976 (2) RLR 223 (G). For criticism of this decision, see 1985 ZL Rev 110.

Customary law defamation

In customary law, defamation consists of a false accusation that P behaved in a certain way or spoken words by D which could cause P suffering or disturb the peace. The lowering of the status or reputation of P in the community is not an essential ingredient. It is enough that the statement will cause personal suffering or anger. The most serious false accusation that can be made is to accuse a person of being a witch or wizard. See Goldin and Gelfand.

Newspapers and defamation

This special section concentrates on the difficulties which newspapers, magazines and journals face in trying to avoid liability for defamation. As written defamation is the most frequent type of defamation, this section is intended to provide a guide to the main practical aspects that are relevant to this type of defamation.

Test applied

When it comes to newspaper reports which are allegedly defamatory the courts apply the test of whether readers with normal understanding and average intelligence would interpret the item in question in a defamatory sense. As Stuart points out in his book *The Newspaperman’s Guide to the Law* 3 ed, the courts accept for this purpose that the ordinary reader of a newspaper is not supercritical and does not read every item with meticulous care. Rather than engaging in a process of careful intellectual analysis, because of the mass of material he is
likely only to form an overall impression of the material. Because this reality is recognised
by the courts, Stuart advises that sub-editors should read the various reports and then put
them aside and consider what overall impression they would create in the minds of ordinary
readers who might not read all the items in the paper right through. If a particular item could
create an impression in the minds of readers that could adversely affect reputation, then the
paper’s lawyers should be consulted.

The test of the response of ordinary readers is varied in respect of specialist journals or
papers which require special expertise to understand the contents thereof. With, say, a
technical, scientific or economics journal, the test applied is how ordinary readers with
specialist knowledge that would allow them to comprehend the contents would understand
the contents.

**Defences**

A newspaper that publishes defamatory material can be sued for damages and so can the
publisher of the newspaper. The journalist who wrote the story could also be sued. There are,
however, a number of defences which a newspaper can raise to actions for defamation. These
defences apply even though reputation may have been damaged by the report in question.
The main defences that are recognised are justification, fair comment and qualified privilege.
Justification obviously would cover such things as reporting true allegations of corruption by
public officials. Fair comment would be applicable where, for instance, a damning criticism
of a book or a play is published in the newspaper. Perhaps the most important defence for
newspapers is that of qualified privilege. This defence may succeed even though the
defamatory report turns out to be untrue. Here the law lays down that in certain
circumstances newspapers should be afforded protection against defamation actions where
they were reporting events in the public interest. This defence has application in relation to
the reporting of Parliamentary proceedings, reporting of court cases and the reporting of
certain public meetings.

It should be noted that a journalist must disclose his or her source of information when
ordered by a judge to do so during a trial. See *Serfontein & Anor v Irvine* 1979 RLR 510 (A)
*Shamuyarira v Zimbabwe Newspapers* (1980) Ltd 1994 (1) ZLR 445 (H)

**Reporting Parliamentary proceedings**

Taking firstly Parliamentary proceedings, if a newspaper reports fairly and accurately and
in a balanced fashion what has been said during Parliamentary debates a qualified privilege
will attach to these reports. The newspaper is not obliged to check the veracity of a statement
made by a Parliamentarian in Parliament. Even if the statement from the Parliamentarian
which it publishes turns out to be false, the newspaper would still be protected unless it knows the statement was totally false and, nonetheless, it went ahead and published the statement with the sole purpose of harming someone’s reputation. The requirement that the report be balanced means that if, for instance, on one day in Parliament a defamatory allegation is made which the paper publishes, but on a subsequent day the allegation is refuted or disputed, the debate on this subsequent day must be properly reported and equal or greater prominence must be given to this second report.

**Reporting court proceedings**

Secondly the reporting of court proceedings is also covered by a qualified privilege. Again, the law lays down that a privilege will attach only if the report of court proceedings is fair, accurate and balanced. Court reporting is a difficult operation and is fraught with dangers as far as the newspaper is concerned. Newspapers are entitled in the public interest to report not only the court proceedings themselves (i.e. evidence led in open court) but also the preliminary proceedings before the case comes to court. In criminal matters, they are allowed to report the arrest of a person by the police on suspicion of committing an offence and the remand of a person in or out of custody pending trial. It should be carefully noted, however, that it is not permissible to publish documents relating to a pending case. Indeed, some documents or evidence may never be produced when the case is tried as, for instance, when the prosecutor decides not to call a particular witness to give evidence.

Thus, the newspaper can only report on the evidence *that is elicited in the actual court case* and it risks a prosecution for contempt of court if it publishes evidence which may or may not be produced at the actual trial in open court. It should also be noted that a newspaper is not permitted to publish information about a case held *in camera* (i.e. a case from which the public have been excluded). Cases involving juveniles are usually held *in camera*. The court is also empowered to order that certain information, such as the name of a State witness, should not be published. The newspaper is obviously bound by this restriction.

The report of a court case must be fair and balanced. Both sides of the case must be reported impartially. This does not require exactly equal detail and prominence to the cases of the two sides, but there must not be undue emphasis upon the one side or omission of important facts highly favourable to one side. Thus, the law requires that if certain evidence is reported, there should be equal coverage of evidence in rebuttal. Qualified privilege would not attach, for instance, where the newspaper has concentrated exclusively on the prosecution case and has ignored the defence case. So too, in a criminal case if the charge is withdrawn or the accused is acquitted or is found guilty of a lesser charge, if the newspaper has reported the original charge, it is obliged to report the subsequent developments relating to that charge. There are logistical difficulties in keeping proper track of what has happened in a large number of court cases. But if a newspaper has started to report a case, it must report what has happened at
subsequent stages in that case and court reporters must design an efficient system of monitoring of cases. Wherever possible, they should be in court to report verbatim what has transpired and they should be very cautious about relying upon what they have been told will happen or has happened in the courtroom by prosecution or defence counsel or officials such as clerks of court because, if this information is erroneous and the newspaper publishes it, the paper may be sued. A particular problem arises with lengthy trials where there may be variable or diminishing public interest in the matter as it proceeds. Still, nonetheless, the paper is obliged to report the case in a balanced fashion.

A report of a court case must be reasonably contemporaneous with the proceedings and should not be long after the trial. This is because the public has an interest in receiving information about cases, as they take place, but the newspaper is not usually permitted to rake up court cases that took place years ago, especially if they were of a trivial nature. Where evidence is led in court, however, of an accused person’s previous convictions, the newspaper can report this evidence. Secondly, the newspaper should not publish gratuitous defamatory remarks made by legal counsel or witnesses about persons other than those on trial as these will often fall outside the scope of qualified privilege.

There is the pervasive difficulty of ensuring accuracy in reports of court cases. The newspaper will want to condense reports of most court cases, but condensation can lead to a report becoming distorted, garbled and misleading. It may in the process fall foul of the requirements that the report must be balanced and accurate. The court reporter himself must exercise meticulous care in gathering and checking his information. He must ensure that no vital facts are left out of his or her report and that he has not distorted the facts or, even worse, invented any facts. A particular point to note is that where a witness has given evidence through an interpreter, the report must report only the interpreter’s translation, as this is what will be noted in the court record. He must not make his own translation of the testimony where he believes the court interpreter’s translation is not accurate and include his own translation in his report of proceedings. The court reporter must be especially on his guard to avoid errors such as erroneously reporting that a person has been charged with a more serious charge than he has (e.g. murder instead of culpable homicide) or that he has been convicted of a more serious charge than he has (e.g. attempted murder instead of culpable homicide or five counts of fraud and two of theft instead of just one count of theft).
Reporting public meetings

What about reporting of things such as statements by prominent politicians at public meetings and rallies? What happens if the newspaper accurately reports what a Cabinet Minister has said about a person when addressing the public but after publishing the statement, which is highly defamatory, it turns out to be completely untrue? In England, this situation is covered by legislation. Under this legislation, the newspaper is protected if the report related to something of public interest said at a public meeting from which reporters were not excluded. In the absence of similar legislation in Zimbabwe, the position would be governed by common law and it would seem that under common law it is arguable that a qualified privilege would attach to such reports. This privilege would, however, not exist if the paper published the statement knowing it to be completely without foundation. The legal position, however, is unfortunately not clear and, as a safeguard, the paper should try to check the facts if it is intended to publish such a highly defamatory statement. (But see Minister of Justice v SA Associated Newspapers 1979 (3) SA 466 at 467 and Zillie v Johnson & Anor 1984 (2) SA 196 (W). See below for suggestions for reform of our law in this regard.)

Investigative reporting

Newspapers often believe that they are protected by qualified privilege if they publish reports seeking to expose corruption or misconduct on the part of public officials such as politicians which reports turn out to be false. If the paper’s information is without substance, the defamed official can sue for damages and the newspaper would not be protected by qualified privilege in this instance. In Zimbabwe, it would seem that mistaken belief in the accuracy of the facts of this nature is no defence. However, in the case of Thomas v Murimba (2000), the judge stated that the range of duties and rights to communicate defamatory matter is wide and should be widened further in the interests of social transparency.

Accuracy

Newspapers must obviously do their best to eliminate inaccuracy and errors in their reporting because errors can lead to people being defamed. The need for accuracy in order to avoid defamation suits is illustrated by two cases. The first, an English case, illustrates how even a small mistake in a headline can lead to a newspaper having to pay damages. The headline in question read: “Car thief to pay wife £2 000”. The headline should have read: “Car chief” but the letter “t” was substituted for the letter “c”, due to a compositor’s error. P was the chairman of a well-known firm of car dealers and he was able to sue successfully for defamation because of this headline. In a South African case a newspaper meant to publish a photograph of a dangerous criminal who was being tried on a criminal charge. Unfortunately,
by mistake, they published P’s photograph in connection with the story about this criminal case. P was able to sue successfully for defamation as his reputation had been adversely affected by the publication of his photograph as the criminal on trial.

**Suggested changes to law**

It is argued in an article entitled “Does our defamation law muzzle the press?” contained in 1989 Vol. 1 No. 3 *Legal Forum* 39 that the present law on reporting of public meetings and on investigative reporting is unsatisfactory and should be changed. On **reporting of public meetings** at p 44, the following suggestions are made—

It is right that the press should be protected under a qualified privilege in reporting upon public meetings. Indeed, because the legal position is still unclear in Zimbabwean law, the best course would be to pass legislation along the lines of the English Defamation Act of 1952. In s 7 of this Act, the press are given a qualified privilege when reporting lawful meetings from which the press has not been excluded. To be covered by this privilege, the report must be fair and accurate and the subject matter reported must be of public concern. This applies to all lawful public meetings, whether admission is general or restricted. However, this protection will fall away if—

- the report was made maliciously, with the primary intention of harming P’s reputation rather than informing the public; or
- the paper or broadcasting station concerned has refused a request to publish a reasonable statement from P by way of contradiction or explanation.

The obligation on the part of the press to publish a reasonable contradiction or explanation from P should be incorporated into Zimbabwean law. It is right that D should be made to forfeit the qualified privilege if there is a refusal to publish such a reasonable statement from P.

As regards investigative reporting, these proposals are made at pp 42-43—

. . . it is submitted that we should substitute negligence for strict liability as the basis of liability for defamation in all such cases. To base liability on negligence seems to draw a fair balance between freedom of speech and protection of reputation and would bring our defamation law into conformity with our freedom of expression constitutional safeguard.

Under the suggested approach, the press would be protected against liability for defamation if it publishes stories about either public or private persons on a matter pertaining to them of legitimate public interest, unless there was a negligent failure to discover the falsity of the facts. (Of course, if there was knowledge of falsity or recklessness, liability would also
ensue.) As the precautions taken are singularly within the knowledge of D, it should be specified that the onus rests squarely on D to prove absence of negligence. Moreover, as with reporting of statements made at public meetings, the press should be under a duty to publish any reasonable statement by way of contradiction from P. Any refusal to do so should lead to the forfeiture of this defence.

Additionally, as soon as D discovers the falsity of the facts, he or she is under an obligation to take corrective action. The penalty for failure to do this within a reasonable period of time should be the forfeiture of this defence. This will provide an incentive promptly to retract a false statement and to apologise for making it. Such prompt remedial action is beneficial. As Burchell points out at p 318–

The plaintiff’s reputation will be vindicated by a prompt, unreserved acknowledgement of the falsity of the imputation if the retraction receives prominence equal to the original imputation (and) the reputation of the publication for journalistic integrity and honest reporting may well be enhanced by effecting a retraction and apology.

**Injuria (excluding defamation)**

This delict is committed when a person, without justification, intentionally affronts another’s dignity or invades that other’s privacy.

In *Mandaza v Daily News & Anor* 2002 (2) ZLR 296 (H) a newspaper published photographs of residential properties owned by a person who was a public figure. The photos had not been obtained as a result of unlawful intrusion into the properties. The public figure sought an interdict to prevent the publication of details of his property holdings and any further intrusion into his private life. The court refused to grant the interdict, finding that the right to privacy only extends to unlawful intrusion into privacy. The applicant has not suffered any injuria by the publication of photographs of his property.

In *Chituku v Minister of Home Affairs & Ors* 2004 (1) ZLR 36 (H) the court stated that treatment of an arrested, detained or convicted person that affronts the dignity of that person or exceeds the limits of civilised standards of decency and involves the unnecessary infliction of suffering or pain is inhuman and degrading. The right to dignity is recognised in the Roman-Dutch law as an independent right that can be protected by the *actio injuriarum*, the *actio injuriarum* being wide enough to encompass any action that violates the *corpus* or *dignitas* of the plaintiff. Inhuman and degrading treatment affronts the dignity or self-respect of an individual and could found a claim.
In *Karimazondo & Anor v Minister of Home Affairs* 2001 (2) 363 (H) P1 and P2 were both arrested on allegations of murder. The charges were subsequently dropped. P2 was a serving police officer. P1, his wife, was tortured while in custody and suffered long-lasting physical and psychological effects, full details of which were disclosed in medical reports. The court held that the circumstances of the case were exceedingly grave and warranted a substantial award of damages. The actions of the police were in flagrant and reckless disregard of the rights of the Ps. The fact of the detention in itself created a hardship. The brutality and callousness with which the assaults were perpetrated on P1 instilled in any right thinking person a sense of horror and shock. The unlawful and inhumane treatment to which P1 was subjected to was totally unnecessary, vindictive and malicious. The court would make an award which in money terms expressed its disapproval of the seriousness, brutality and humiliating effect of such treatment.

In *Tendere v Harare City Council* 2004 (1) ZLR 495 (S) the court dealt with a situation of wrongful attachment of P’s property and the circumstances in which a judgment creditor could be liable for injuria in relation to P.

In *Coltart v Minister of Home Affairs & Ors* 2006 (1) ZLR 543 (H) the court dealt with an allegation that an *injuria* had been committed against P because the police had searched his premises illegally.

In the case of *Mazibuko v Sithole & Ors* 2009 (1) ZLR 33 (H) the court awarded exemplary damages to a legal practitioner for *injuria*. P had been denied access to his clients and had been assaulted and sworn at by the police. The court held that the fact that P was a legal practitioner and that the delict was directed against him in his professional as a professional was grave, warranting heavy damages. This was a proper case for the award of exemplary damages.

*Mehta v City of Salisbury* 1961 R&N 911 (SR) P had been barred from entering a swimming pool on the basis of his race. He was awarded damages for the affront to his dignity.

*Rhodesia Printing & Publishing Co Ltd v Duggan & Anor* 1975 (2) RLR 281; 1975 (1) SA 590 (RA) A newspaper intended to publish an article alleging that Ps had come into the country with their children in violation of the access rights. Ps sought an order restraining the paper from publishing the story. The court granted the order, finding that if the story was published it would interfere with the rights of the children to privacy, tranquility and peace of mind of the children.
Reid-Daly v Hickman & Ors (2) 1980 ZLR 540 (A); 1981 (2) SA 315  P, a high-ranking army officer, had been placed under surveillance and his phone had been tapped and his letters had been opened. This constituted a serious impairment of his dignity.

S v Israel & Anor 1975 (2) RLR 191; 1976 (1) SA 781  Private detectives had invaded the privacy of P by peeking through his windows in order to try to obtain on behalf of the wife evidence of adultery by P. They were justified in doing this because they did so solely with the bona fide motive of obtaining evidence of adultery.

Granger v Minister of State (Security) 1985 (1) ZLR 153 (H)  P, an elderly legal practitioner, had been assaulted by CIO officers. P was awarded $1 200 damages for injuria.

Zimunya v Zimbabwe Newspapers (1980) Ltd 1994 (1) ZLR 35 (H)  A photograph published in a newspaper misleadingly suggested that P was urinating or exposing himself outside some offices. He was awarded damages for injuria.

Nkosi NO v Moyo HB-43-91  A fifteen-year-old was raped. She was a virgin and suffered physical pain and emotional trauma. She was awarded damages.

Ndebele v Ncube 1998 (1) ZLR 377 (S)  D called P, an employee of a District Council, a dog and a mad person. The court awarded P a small amount as damages for injuria. The court, however, warned that people frequently exchange insults, arising out of grievances real or imagined, large or small. It said it would be intolerable if every insult were to be followed by a law suit, so a court should be very careful about awarding damages for abuse such as occurred in the present case.

M v N 1981 (1) SA 136 (Tk)  Damages for victim of rape against rapist.

N v T 1994 (1) SA 862 (C)  Rape.

Kitson v SA Newspapers 1957 (3) SA 461

Snyman v Snyman 1984 (4) SA 262 (W)  A wife was awarded damages for injuria against her husband who had committed bigamy. The court said that damages are awardable to a wife who had been induced to enter a void marriage with a man, who unbeknown to her was party to an existing valid marriage.

De Lange v Costa 1989 (2) SA 857 (A)  D had sent P a letter criticising P. Fair criticism is not wrongful.
HARM CAUSED BY ANIMALS

When harm has been caused by an animal belonging to or under the control of someone, the owner or possessor may be held delictually liable under the following actions—

- Aquilian action;
- Pauperian action;
- Quasi pauperian action;
- Edict concerning wild animals (Edictum de feris);
- Harm caused by grazing animals (Actio de pastu); and
- Nuisance

Aquilian action
If the owner or controller of an animal has intentionally used his animal to cause harm (e.g. he sets his ferocious dog on a person) or has negligently allowed his animal to cause harm (e.g. he negligently fails to control his ferocious dog and it bites someone on a public street), D will be liable for patrimonial loss caused in this way.

This action is applicable in respect of all types of animals (i.e. domesticated and wild) and the usual basis of the action is a negligent omission properly to control an animal when it was reasonably foreseeable that such failure to control that particular animal would result in harm to P or his property.

In *Wallman v Leathes* 1969 (2) RLR 80 (G) dogs chased motor cyclist and the cyclist was knocked off his cycle and sustained serious injuries. He was awarded damages based on the negligence of the owner of the dogs.

In *Portwood v Svamvar* 1970 (1) RLR 225 (A) a dog was caught in fence. P tried to rescue the animal and was bitten. The court awarded damages against the owner of the dog. It found that the dog was a savage dog and the owner ought to have foreseen that it might bite an innocent person.

In *Bristow v Lycett* 1971 (2) RLR 206 (A) at a game park an elderly woman was knocked down and injured by a baby elephant which was seeking sweets. An employee had been negligent in assuring the woman that it was safe to alight from her vehicle. He was also negligent in leaving the baby elephant unattended and going to rest under a tree. The owners of the game park were liable to pay damages to the injured woman.

In *Rocky Lodge Ltd v Livie* 1977 (1) RLR 218 (A) P drove into a cow that had strayed onto the road. D had taken precautions to prevent this from happening such a fencing his property
and stationing an employee along the fence. It had not been proven that D had been negligent.

In *Wynne v Jones* GS-202-79 a bull had attacked some persons. The question was whether there had been negligence on the part of the owner of the bull.

**Pauperian action (domesticated animals)**

**The action**

This action lies only against the person who was the *owner of the animal at the time the injury was inflicted*. It does not lie against a possessor or controller who is not the owner.

For this action to succeed, P must prove—

- D was the owner of the animal when the harm was inflicted;
- The animal that inflicted the harm was a domestic animal;
- P was lawfully present at the location where the harm was inflicted;
- The animal acted contrary to the nature of its species.

The major advantage of this action is that it is a *strict liability* action in the sense that it does not require that the owner of the animal was at fault. P does not have to prove that the owner intentionally or negligently caused the harm. All that has to be proved is that the animal was a domesticated animal that had acted contrary to the nature of its species (*contra naturam sui generis*). By this is meant that it must be established that the animal acted contrary to the species of domesticated animals generally (rather than contrary to the nature of that particular animal or class of animals). Domesticated animals are assumed to be under the control of man and therefore it is contrary to the nature of their species of domesticated animals for such animals to inflict harm upon man. If without any provocation a dog bites a person or an ox gores a person or a horse kicks a person, it is assumed that it is acting from some inner wildness or viciousness and *contra naturam sui generis*. On the other hand, it is in accordance with the nature of the species for cattle to graze grass or a horse which has been caused pain to kick out.

**Defences**

Under this action, liability is not absolute. Apart from the defence that the animal in question was not acting contrary to the nature of its species, the following defences can be raised—

- the harm resulted from a *vis major* or *casus fortuitus*, e.g. a horse has kicked another horse and the second horse has kicked out in pain causing injuries to a person;
the injured party was to blame for his own injuries, e.g. P provoked the animal into attacking him;

- a third party was to blame for P’s injuries, e.g. a third party provoked the animal into attacking P;
- the injured party was unlawfully present at the place where he sustained the injury, e.g. P was a trespasser.

In the case of *Odendaal v Inn on the Ruparara* 2006 (1) ZLR 1 (H) P was severely injured when a horse she had hired from the hotel to go riding bolted and P was injured when she hit her head on a tree as the horse was bolting. The horse, which was a docile, well-behaved animal had bolted after being frightened, possibly by a wild animal or the scent of a wild animal. There was no liability as the animal was not acting from inward excitement or vice but on the basis of an external stimulus. It was therefore not acting contrary to the nature of its species. An action based on negligence was also not viable as there had been no fault on the part of the owner of the animal. (The court also found that the defence of voluntary assumption of risk was available as guests who wanted to ride were warned that they rode at their own risk and they agreed to assume the risk.)

In *Joyce v Venter* 1979 RLR 478 a fierce watchdog trained to attack intruders had bitten P. The pauperian action does not apply to injury caused by a dog which has been trained to behave fiercely where P is aware of the nature of the dog in question.

In *Da Silva v Otto* 1986 (3) SA 538 (T) a dog had run out of some premises and had attacked P’s dog. P had whipped the dog in order to protect his own dog. The dog had then attacked him and bitten him. P was entitled to recover damages.

See also *Wallman v Leathes* 1969 (2) RLR 80 (A) and *Portwood v Svamvur* 1970 (1) RLR 225 (A)

**Quasi-pauperian action (wild animals)**

This action can be brought when a wild animal kept in captivity causes harm. It can be brought only against the owner of the animal at the time the harm was inflicted.

Unlike the Pauperian action, this action can be brought when the animal was acting *in accordance* with the nature of its species because a wild animal cannot be acting contrary to the species of wild animals if it inflicts harm on man. This action will apply even if the wild animal has been reduced to a state of semi-domesticity and even if the animal was not acting with ferocious intent.
The defences which can be raised to this action, being as it is, a sub-species of the Pauperian action, are the same as those maintainable to a Pauperian action except that it is no defence that the animal was acting in accordance with the nature of its species.

The following are defences to this delict: *Vis major* or *casus fortuitus*, or P or the third party was to blame for the incident or P was unlawfully at place).

**Edict concerning wild animals (Edictum de feris)**

This is a Roman law action still recognised in the modern law that makes any person who keeps a wild animal in the vicinity of a public place strictly liable if the wild animal causes injury.

It would seem that the defences that can be raised to a Pauperian action are also maintainable in respect of this action.

**Harm caused by grazing animals (Actio de Pastu)**

This is a strict liability action which can be brought when damage is caused by D’s animals (usually cattle, sheep or goats) straying onto Ps land and causing damage by grazing. The damage for which compensation can be sought under this action includes not only damage to pasture-land caused by grazing the grass, but also damage caused by the trampling by the animals of standing crops and other plants and shrubs.

In the case of *Bwanya v Matanda* 2000 (1) 546 (H) the court held that the *actio de pastu* remains part of our law and has not fallen into disuse. If one person’s animals stray onto another person’s land and cause damage by grazing or trampling crops, the *actio de pastu* is available to the owner of land against the owner of the animals for the damage caused by them.

In *Monteiro v Brown* HH-291-83 D’s cattle had broken through a fence surrounding a stack of maize and had caused damage to the maize. The claim in this case could have been based on the *actio de pastu*.

See also *Stegman Bros Ltd v Nassan Ranch (Pvt) Ltd* GS-32-79; *Potgieter v Smit* 1982 (2) SA 690 (D)

The defences that can be raised to this action are dealt with in the *Bwanya* case. Where there was fault on the part of the injured party there would be a complete or partial defence, as where the injured party had failed to maintain a fence or had let the animals in. It is also a
defence that the straying was brought about by a deliberate act on the part of a third party as, for instance, where the third party deliberately cuts the fence thereby allowing the animals to stray onto someone else’s land. *Vis major* would be a defence only in limited circumstances, as where the animal is directly motivated by the *vis major* and did not act of its own volition. *Vis major* would not be a defence where, for instance, lightning struck a fence knocking it down and the animal discovered the gap in the fence and of its own volition moved onto the adjoining property and caused harm. In such a case, the owner of the animal would remain liable. See *van Zyl v van Biljon* 1987 (2) SA 372 (O)

The legislative machinery dealing with the impounding (pending the payment of compensation for damage) of straying animals is contained in s 9 of the Animal Health Act [*Chapter 19:01*].

**Nuisance**

Under the common law an action can be brought against another who allows his animals to cause a nuisance. If patrimonial loss has been caused then damages can be claimed; if no patrimonial loss has resulted then the remedy for a continuing nuisance, such as barking dogs causing disturbances, is that of an interdict.

In addition to the common law, there are a variety of regulatory offences in terms of which penalties can be imposed for causing a nuisance by, for instance, allowing dogs to bark continuously thereby causing a nuisance.

**Cattle and other animals on rural roads**

A problem that has come up repeatedly in the cases is that which arises when cattle or other livestock wander on the roads and persons driving on the roads are in collision with them. The duties of the driver to guard against hitting these animals and the duties of the owners of the livestock or persons in control of them (such as herders) are set out in the cases listed below.

See *White Line Trucks v Cilliers* A-175-72; *E B Ranchers v Bus Service* A-18-76; *Rocky Lodge (Pvt) Ltd v Livie* 1977 (1) RLR 218 (A); *Ure v Jordan* GS-144-78; *Beattie v United Refineries (Pvt) Ltd* A-130-80; *Viriri v Wellesley Estates* 1982 (4) SA 308 ZS; *P Hall & Co (Pvt) Ltd v Kennedy* HB-79-84; *Pachirera v Whartley* HH-32-89.

Table showing different actions that can be brought in respect of harm caused by animals
<table>
<thead>
<tr>
<th>Action</th>
<th>Type of animal</th>
<th>Type of harm covered</th>
<th>Person against whom action brought</th>
<th>Whether negligence required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aquilian</td>
<td>Any type</td>
<td>Patrimonial loss - physical injury or property damage</td>
<td>Owner of animal or person in control of animal</td>
<td>Yes</td>
</tr>
<tr>
<td>Pauperian</td>
<td>Domesticated animals acting <em>contra naturam sui generis</em></td>
<td>Patrimonial loss</td>
<td>Owner of animal at time harm caused</td>
<td>No</td>
</tr>
<tr>
<td>Quasi-pauperian</td>
<td>Wild animals acting in accordance with their nature</td>
<td>Patrimonial loss</td>
<td>Owner of animal at time harm caused</td>
<td>No</td>
</tr>
<tr>
<td>Edictum de feris</td>
<td>Wild animals kept in vicinity of public place</td>
<td>Patrimonial loss</td>
<td>Owner of animal at time harm caused</td>
<td>No</td>
</tr>
<tr>
<td>Actio de pastu</td>
<td>Grazing animals e.g. cattle, goats</td>
<td>Damage to property e.g. to grass, shrubs, trees</td>
<td>Owner of animal at time harm caused</td>
<td>No</td>
</tr>
<tr>
<td>Nuisance</td>
<td>Any type</td>
<td>Annoyance &amp; irritation caused by e.g. barking dogs</td>
<td>Person in control of animal’ whether or not owner</td>
<td>No (applies to both interdict &amp; damages)</td>
</tr>
</tbody>
</table>
DELICTS ARISING OUT OF ARREST, IMPRISONMENT AND LEGAL PROCEEDINGS

Unlawful arrest and imprisonment (false imprisonment)

This delict is committed when D, without lawful justification, restrains the liberty of P by arresting or imprisoning him or her.

In our law it would seem that for this action it has to be proved only that the arrest or imprisonment was illegal and not that there was intention to act illegally or there was intention to cause harm to P. Thus, the view of McKerron at p 160 that inevitable mistake is no defence would seem to be correct in our law. On the other hand, it is argued in Lee & Honore p 286 that this action falls under the actio injuriarum, but such animus is presumed. In our law, as opposed to South African law, animus injuriarum is still a totally fictional requirement and therefore intention is not a requirement for this delict.

Force is not a pre-requisite for this delict and neither is pecuniary loss. Damages can be awarded for affront or humiliation stemming from the arrest and imprisonment of P.

Obviously, if the arrest or detention is legal, such as arrest and detention under the Criminal Procedure and Evidence Act [Chapter 9:08] or detention under the Emergency Powers Regulations, then this action cannot be brought.

This action is usually brought against the Ministry of Home Affairs arising out of illegal arrests and detention by the police.

But a private individual can also commit this delict against another private individual. See Mapuranga v Mungate (1997).

For further commentary on this delict, see 1987 Vol 5 Z L Rev 26 at 30-38.

In Minister of Home Affairs & Anor v Bangajena 2000 (1) ZLR 306 (S) the Supreme Court stated that the deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. The courts have properly taken the stance that deprivation of liberty through unlawful arrest and imprisonment is a very serious infraction of fundamental rights. Damages for this delict should therefore be exemplary and punitive to deter would-be offenders.

Mandirwhe v Minister of State 1981 (1) SA 759 (ZS) At the request of the Mozambican Government a person had been arrested and handed over to that Government. These actions had been illegal as no proper extradition process had been followed.
**Granger v Minister of State (Security) 1985 (1) ZLR 153 (H)** P had made no claim for illegal detention.

**Minister of Home Affairs v Allan 1986 (1) ZLR 263 (S)** P had photographed some buildings. Thinking wrongly that he had photographed the nearby police station, the police arrested him. The arrest was illegal as there was no reasonable suspicion.

**Makomberedze v Minister of State (Security) 1986 (4) SA 26 (ZH)** P was unlawfully arrested and detained for 20 months. He was given no reason for his detention and was refused access to a lawyer. He was handed over to the Mozambican authorities without following proper extradition procedures. He was awarded $50 000 damages.

**Masukusa v National Foods Ltd & Anor HH-95-89**

A 71 year old man was arrested by the police on suspicion that he had committed murder. He was held in custody for six days in a crowded cell. He sued for unlawful arrest and detention. The court held that for an arrest to be lawful the arresting officer has first to establish that he had reasonable grounds for suspecting that the man had committed the murder. But even where there are reasonable grounds for suspecting that a First Schedule offence has been committed, the power of arrest, which is a discretionary power, has to be exercised reasonably. Where a person is arrested when it is not reasonable to do so, the arrest will still be unlawful. In the circumstances the arresting officer had no reasonable grounds for suspecting that the appellant had committed the murder in question. Even if there had been reasonable grounds for arrest, the decision to arrest and hold the appellant in custody was unreasonable as there was no reason to believe that he would try to escape if he was not detained and neither was the arrest necessary to prevent further crime or to prevent interference with police enquiries. The arrest and detention were therefore unlawful and that the appellant was entitled to damages for the interference with his liberty. Interference with liberty is a serious matter and in the circumstances an amount of $20 000 would be an appropriate award.

**Muzonda v Ministry of Home Affairs 1993 (1) ZLR 92 (S)** An elderly woman, lived with her son and her daughter-in-law. She was involved in a dispute with her daughter-in-law, during the course of which she struck her daughter-in-law, whose wrist watch fell off. The daughter-in-law left the watch in the house and went to report the incident to her husband. On returning to the house she found the watch was gone, so reported the assault and the apparent theft of the watch to the second respondent, a police officer. The next day he fetched the appellant and another woman who lived at the same house to the police station and questioned them, following which he formally arrested the appellant on charges of theft and assault. She was detained in the cells until the next day, when she was released, following the intervention of her son. She claimed damages from the respondent Minister and the police officer for wrongful arrest and detention. The court held that the police officer had, as required by s 29(1)(b) of the Criminal Procedure and Evidence Act, reasonable grounds for suspecting that the appellant had committed the crimes of assault and theft, which are both First Schedule offences. Although the police officer was authorised to arrest the appellant, he had a discretion as to whether to do so or not; the power of arrest is not intended always, or even ordinarily, to be exercised. On the question of whether the police officer
exercised his discretion reasonably, that the principles applicable to administrative law applied: that the court would have to find that the exercise of the discretion was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it. Among the considerations to be taken into account in determining whether an arrest is open to challenge are the possibility of escape, the prevention of further crime and the obstruction of police enquiries. On none of these grounds could the exercise of the discretion be justified. The deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. For this type of civil wrong there must be an exemplary element in the assessment of reparation.

*Mapuranga v Mungate* 1997 (1) ZLR 64 (H) The court awarded damages to P for unlawful imprisonment. There had been an incident at D’s house, where D accused P of having committed adultery with D’s wife. When P denied the allegation, he was assaulted by the D and others, then prevented from leaving D’s house before being forced into the D’s car and taken against his will to a traditional healer, where he was forced to drink a herbal concoction which caused him to lose consciousness. The court held that the mere intentional seizure or physical confinement of a person by another for any time, however short, prima facie constitutes false imprisonment. Once an act of imprisonment or complete deprivation of liberty has been established, there is a presumption that the imprisonment was wrongful. It is not necessary for the plaintiff to establish malice or the absence of a reasonable cause for the imprisonment, or even that he was at all times aware of the imprisonment. Detaining a man and denying him freedom of movement is a serious infringement of his liberty, far beyond the estimate of mere money damages. The motive for the imprisonment was dishonourable and malice was present.

*Minister of Home Affairs & Anor* v *Bangajena* S-13-2000 The owner of a car was wrongly arrested by a police officer on an allegation that he was stealing the car. During the arrest, the arresting officer shot at the owner and his friend. The arresting officer, who had been drinking, knew the person arrested. A number of police officers at two police stations refused to detain the person, saying that they knew the person to be the owner of car. Eventually, the person was detained overnight after the police officer took personal responsibility for his detention. The next morning the police officer came to the station and on seeing the respondent he expressed surprise that he had arrested a person he knew and said he would not have arrested him if he had realised this. The court held that deprivation of personal liberty is an odious interference and has always been regarded as a serious injury. Even if no pecuniary damage has been suffered, the court will not award a contemptuous figure for the infringement of the right to personal liberty. Our courts have properly taken the stance that deprivation of liberty is a very serious infraction of fundamental rights. Damages should be exemplary and punitive in order to deter would-be offenders.

*Nyatanga v Mlambo & Ors* HH-85-03 The Master of the High Court was arrested without warrant on a charge of fraud and detained in the cells over a weekend. The alleged fraud concerned a judicial sale of immovable property that had taken place eight years previously. The decision to arrest and detain had in the circumstances been so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it.
Abuse of legal proceedings

This delict is committed when D maliciously and without reasonable and probable cause brings legal proceedings against another. Every citizen has a right to use legal proceedings legitimately for the purpose of upholding and protecting his rights. He or she does not, however, have the right to abuse the legal process for the purpose, not of upholding and furthering his or her rights, but instead solely for the purpose of causing harm to P because he or she has malice towards P. Thus, it constitutes a delict if D, actuated by malice and with no reasonable and probable grounds for doing so, does any of the following—

- procures the arrest or detention of P by the proper authorities (malicious arrest or detention); or
- institutes against P unsuccessful civil or criminal proceedings resulting in injury to reputation or pecuniary loss (malicious prosecution); or
- issues execution against P’s property, which writ has been set aside (malicious execution).

Whereas with unlawful arrest or imprisonment it is normally the police which is sued for the wrongful actions of their employees (servants), with abuse of legal proceedings D is a private citizen who has used the agency of the police or the courts to cause harm to P.

As regards malicious prosecution, the case of Bande v Muchinguri 1999 1 ZLR 476 (H) points out that the term “malice” did not here mean spite or ill-will or a spirit of vengeance; it had a wider connotation. It included any motive different from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law. In this case a magistrate brought a baseless charge of contempt of court against P.

For further commentary on this delict, see 1987 Vol. 5 Zimbabwe Law Rev 26 at 38-40.

See also Lovemore v Rhoguard Ltd GS-154-72 Laying false charge; Nyakabambo v Minister of Justice 1989 (1) ZLR 96 (H) P was arrested on a charge of murder. After she was acquitted she claimed damages for malicious prosecution. She was unsuccessful; Bande v
Muchinguri 1999 (1) ZLR 476 (H). A prison officer successfully sued a magistrate who had without reasonable and probable cause had caused the police to bring a case against the prison officer for contempt of court; Ramakulukusha v Commander, Venda National Force 1989 (2) SA 813 (VSC) Malicious prosecution; Beckenstrater v Rottcher & Theunissen 1955 (1) SA 129 (A)

ASSAULT

This delict is committed when a person unlawfully and intentionally applies force to the person of another or has threatened to do so in a manner that inspires a reasonable fear of immediate danger in the mind of the person threatened.

Damages are awarded under this action both for patrimonial loss (e.g. hospital expenses) and for injury to feelings (e.g. humiliation and degradation). The main defences that are raised in this action are–

- The harm was inflicted when D was acting under some lawful authority e.g. a policeman effecting a lawful arrest or a parent moderately chastising his child for disciplinary purposes;
- Defence of person or property;
- Consent (such as where a doctor obtains the consent of the patient to operate for therapeutic purposes);
- Provocation. (In Zimbabwe, there is case law which lays down that provocation may sometimes justify an assault, whereas in South Africa the cases maintain that provocation never justifies an assault, but may sometimes deprive P of his right of recovery.)

As regards assaults and torture perpetrated upon persons in police custody, in Nyandoro v Minister of Home Affairs & Anor HH-196-10 P claimed damages for an assault by members of the police force. He had been involved in a peaceful demonstration organised by a non-government organization. The police had broken up the demonstration. P was caught and assaulted by about 10 to 12 policemen. P was further assaulted at the police station. The injuries he received resulted in hospitalization and surgery. The court held that the assaults upon P’s physical integrity were unlawful in that they were perpetrated without lawful authority. They were also patently wrongful as being demonstrably incompatible with boni mores and the legal convictions of the community concerning the exercise of police powers. It is necessary to take into account the public and private embarrassment suffered by P as a result of the wrongful conduct. P was initially assaulted in a public place in full view of his colleagues and passers-by. The photograph of the assault was also published for all of the newspaper’s readers to see. The assault was aggravated by the fact that it was committed by members of the police who are State servants paid from public funds. P was consequently
humiliated and embarrassed and must therefore be entitled to appreciable damages for contumelia.

In Vellah v Moyo & Anor HB-101-10 an elderly pastor was assaulted by being severely beaten in his buttocks after being accused by members of a political party of belonging to the MDC party. He was awarded substantial damages.

Manuel v Holland 1972 (2) RLR 18 (GB) D struck P with such force that he fell to the ground and broke his leg. D was liable as causation had been established.

Joseph v Dennison GS-137-75 Damages.

Robinson v Fitzgerald 1980 ZLR 508; GS-258-80 There had been a vicious unprovoked assault on man in presence of wife and employer. He was awarded damages for assault including damages for humiliation.

Dzvairo v Mudoti 1973 RLR 166; 1973 (3) SA 287 (RA) Provocation.

Mordt v Smith 1968 (2) RLR 330; 1968 (4) SA 750 (RA) Provocation had not been established in this case.

Mapuranga v Mungate 1997 (1) ZLR 64 (H) The court awarded damages to P for unlawful imprisonment. There had been an incident at D’s house, where D accused P of having committed adultery with D’s wife. When P denied the allegation, he was assaulted by the D and others, Including the defendant’s brother, then prevented from leaving D’s house before being forced into the D’s car and taken against his will to a traditional healer, where he was forced to drink a herbal concoction which caused him to lose consciousness. The court held that it is an actionable wrong to administer a deleterious herbal concoction to an unwilling victim, but P does not have to show that the substance was poisonous. It need not be poisonous; forcing someone to drink any substance could constitute an assault. Procuring another person to administer a concoction renders the procurer as liable as the person who administered it.

Powell v Jonker 1959 (4) SA 443 (T) Provocation.

M v N 1981 (1) SA 136 (T) Rape.

DELICTS RELATING TO SEXUAL INTERCOURSE AND TO MARRIAGE
Seduction

General law

This delict is committed where a man induces a woman who is a virgin and who is not his wife to have sexual intercourse with him.

The woman may recover damages—

- as compensation for the loss of her virginity and consequent impairment of her marriage prospects; and
- if a child is born as a result of such seduction, lying-in expenses, maintenance for herself before, at the time of, and after, the confinement, and maintenance for the child. If maintenance is being claimed, paternity will have to be established.

If D denies seduction P’s evidence has to be corroborated. If D admits to sexual intercourse, but denies paternity, the onus is on D to prove that he cannot be the father.

It has been argued that the claim for loss of virginity is an anachronistic action and that all that should be retained in the modern context is the claim for maintenance.

For further commentary on this delict, see Ncube *Family Law in Zimbabwe* pp 27-34.

See also *Bull v Taylor* 1965 (4) SA 29 (A); *Gomwe v Chimbwa* 1983 (2) ZLR 121; *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (H) *Effect of the Legal Age of Majority Act*; *Wolfenden v Jackson* S-122-85

Customary law

At customary law the delict of seduction is committed when a man induces a woman (whether or not she is a virgin) who is not his wife to have sexual intercourse with him. The action for damages is at the instance of the father or guardian of the woman who is entitled to claim damages for impairment of the bridewealth (*roora*) value of the woman. It was laid down in the case of *Katekwe v Muchabaiwa* (1984) that, where the woman in question is 18 or over, under the Legal Age of Majority Act she becomes a major and thus only she can sue for seduction and her action is under common law in this instance. In other words, the guardian’s right to sue for seduction under customary law falls away when the girl attains the age of 18.

See *Gomwe v Chimbwa* 1983 (2) ZLR 121 (S); *Ketero v Mukarati* S-20-84; *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (H); *Lopez v Nxumalo* S-115-85; *Mwashita v Simango* S-116-87; *Chidembo v Machingambi* S-50-87.
**Adultery**

This delict is committed by D when he or she has sexual intercourse with a person whom he or she knows to be P’s spouse. P can claim damages for humiliation and loss of the companionship and society of the guilty spouse.

The recognised defences to this action are—
- that D was unaware that the adulterous spouse was married; or
- P connived at the adultery; or
- D was raped.

The cases of *Nyakudya v Washaya* 2000 (1) ZLR 653 (H) and *Nyandoro v Tizirai* 2006 (1) ZLR 121 (H) set out the factors to be taken into account in assessing damages for adultery. These are—
- the character of the woman or the man involved;
- the social and economic status of P and D;
- whether the D has shown contrition and has apologized;
- the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse;
- the level of awards in similar cases;
- the decrease in the value of money;
- whether P has suffered lack of consortium as well as contumelia.

In *Jhamba v Mugwisi* HB-1-10 the court pointed out that damages for adultery are claimable on two entirely separate and distinct grounds: firstly, on the ground of the injury or *contumelia* inflicted upon P; and, secondly, on the ground of the loss of comfort, society and services of the other spouse (*consortium*). It is wrong for P to lump her claims in one, mixing both *contumelia* (injury) and loss of *consortium*. Loss of *consortium* is the main element in the estimation of damages for adultery. The quantum should reflect all the circumstances surrounding the occurrence of the adultery, including P’s own conduct in the matter. Where D had been having an illicit relationship with the P’s husband for over 20 years, resulting in four offspring, P could not say she was not aware of his sexual escapades. She chose to ignore the situation and thereby condoned the adultery. She did not sue for divorce. Consequently, damages for loss of *consortium* could not be high.

The case of *Nyakudya v Washaya* HH-118-00 deals with the factors to be considered in determining the amount of damages to be awarded against a third party for adultery with P’s spouse are: (a) the character of the woman (or man) involved; (b) the social and economic status of P (and D); (c) whether D has shown contrition and has apologised; (d) the need for
deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and (e) the level of awards in similar cases. In addition to the above, the court should also take into account whether P has suffered lack of consortium as well as contumelia, or just the latter, and the decrease in the value of money.

In Nyandoro v Tizirai 2006 (1) ZLR 121 (H) the court held that where the marriage still subsisted in spite of the adultery, damages could only be awarded for contumelia and not for loss of consortium.

In Gwatidzo v Masukusa 2000 (2) ZLR 410 (H) the court held a woman married in a customary law marriage did not have the right to claim damages for adultery.

See also Landry v Landry 1970 RLR 134 (G) Contumelia; Johnson v Joubert 1975 (2) RLR 176 (G) Contumelia; Nyaumba v Murapa 1975 (2) RLR 138 (A) Measure of damages; Maria & Anor v Murimbika 1976 (1) RLR 385 (A) Ignorance that woman married is defence; Cottham v Cottham & Anor GB-5-76; Hickey v Hickey & Anor GS-28-79 Basis for awarding damages; Meakin v Meakin HH-384-83 Wife against woman persistently committing adultery with husband; Shongwe v Shongwe & Anor HH-414-86 Knowledge that woman is married essential element; Dzemwa v Makarati HH-85-87 Adultery by man with wife who had been living apart from husband.

For further commentary on this delict see Ncube Family Law in Zimbabwe pp 154-155.

Abduction, enticement, harbouring of another’s spouse

This delict is committed if D, knowing that a person is married, detains that married person against his or her will or entices or persuades that person to leave or stay away from his or her spouse. P can claim damages for loss of the companionship and society of his or her spouse who has been so detained or so enticed away.

The recognised defences to this action are–

- that the spouse was justified in leaving P or D believed that the spouse was justified in leaving; or
- D did not coax or persuade the spouse to leave.

The case of Van Nuil v King HH-90-83 deals with what P must prove for enticement and alienation of affections.

For further commentary on this delict see Ncube Family Law in Zimbabwe pp 153-154.
Bigamy

In *Sibanda v Sibanda & Anor* 2002 (1) ZLR 622 (H) the court held that an action for damages lies under the actio injuriarum against D who when already married to a woman purports to enter into a second marriage with P who was not aware that he had been married already. But the damages for injuria would not be high without evidence that she was a sensitive woman who suffered anguish and humiliation when she discovered the bigamy.

**ILLEGITIMATE TRADING PRACTICES**

The law in this field was developed within a capitalist economic system and very much reflects the ideology of that system. Thus, for instance, as robust trade competition is an integral part of the whole capitalist economy, the law adopts the stance that it should not normally interfere when such trade competition occurs even if there is fierce trade rivalry resulting in financial loss. However, certain *glaring excesses* within the field of trading are categorised as being ‘unfair’ and illegal and the law will provide remedies when such practices are utilised. Most of the actions in this regard require proof of intention (*dolus*) as opposed to negligence.

**Deceptive trade practices**

**Fraud**

This delict is committed when D with intent to defraud makes a statement to P knowing or suspecting that the statement is false and intending that P will act upon the statement to his or her prejudice.

If P suffers financial loss as a result of such fraudulent deception, he is entitled to claim damages. (For the circumstances in which a negligent misstatement is actionable, see under the Aquilian action.)

Where a person has sustained loss due to the dishonesty of a registered legal practitioner in the course of his work as a legal practitioner, the injured party may be able to claim compensation out of the Compensation Fund in terms of s 54 of the Legal Practitioners Act of 1981.
Injurious falsehood

Whereas with fraud the false statement is made to P who acts upon it to his detriment, with this delict the false statement about P is made to a third party or parties and the third party or parties act upon the statement thereby causing financial loss to P.

This delict is committed when D intentionally published to a third party a statement concerning P or P’s business which D knows or suspects is false intending that the third party will act upon the statement and that P will be caused financial loss. Thus, if a trade competitor of P deliberately spreads false stories about the nature of P’s products (e.g. that his aspirins will cause cancer or are poisonous) and P suffers loss as a result of his customers buying D’s products instead of his own, P will be able to claim damages or obtain an interdict against D.

See International Tobacco v United Tobacco 1955 (2) SA 1 (W)
See 1980/81 Vol 10 Businessman’s Law 14

Passing off

This delict is committed when D, by means of a misleading name, mark or description or otherwise, represents that his business or merchandise is that of another, so that members of the public are misled. In other words, if D uses a business name which he is not entitled to use so that his business is mistaken for that of P’s and, in this way, he unfairly procures P’s customers, or D packages his goods in such a way that they are likely to be mistaken for P’s goods, P can obtain an interdict to prevent D continuing this practice and can claim damages for any loss which he has suffered as a result of the public being misled.

Passing off involves deception in the form of taking unfair advantage of a trade reputation that P has built up. In F W Woolworth & Co (Zim) (Pvt) Ltd v The Store & Anor 1998 (2) ZLR 402 (S) the court said that the purpose of the action for passing off is to protect a business against misrepresentation by D that his business, goods or services is that of P or associated therewith. P must thus prove that D has misrepresented his business, goods or services as being those of P or associated therewith.
The test applied by the courts when deciding upon whether the similarity in trade name or packaging was likely to mislead is: is there a reasonable likelihood that members of the public might be of the public would be deceived or confused into believing that D’s business or goodswas that of P. In this regard, factors such as the nature of the businesses, how they operate and the localities in which they operate will be taken into account.

In *F W Woolworth & Co (Zim) (Pvt) Ltd v The Store & Anor* 1998 (2) ZLR 402 (S) the court stressed that this delict is only committed in relation to a business that has acquired goodwill. Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business. As passing off harms the reputational element of goodwill, P must prove that he has acquired a business reputation associated with his business name. In the present case, P had failed to prove that it had acquired a trading reputation in its name or that there was a reasonable probability that members of the public would confuse the two businesses given the radically different character of their businesses.

In *Unilever plc & Anor v Vimco Pvt) Ltd & Anor* 2004 (2) ZLR 253 (H) the applicants for many years had been the registered owners of the trade mark “Vim”, which was the name given to a household scouring powder. That powder had been sold in this country for many years. The respondent company, Vimco (Pvt) Ltd, sold several products, among them a scouring powder. The applicants sought an order interdicting the respondent from infringing its trade mark and from passing off its goods as those of the applicants. The court held the trade mark used by first respondent so nearly resembled the applicants’ registered trade mark as to be likely to deceive or cause confusion.

In the *F W Woolworth* the court said that P must prove that D has misrepresented his business, goods or services as being those of P or associated therewith. In order to do this, he must establish that there was a reasonable probability that members of the public would be deceived or confused into believing that D’s business was that of P. In this regard, the court will take into account factors such as the nature of the businesses, how they operate and the localities in which they operate will be taken into account.

In *Zimbabwe Gelatine (Pvt) Ltd v Cairns Foods (Pvt) Ltd* 2003 (1) ZLR 352 (S) the court held that once a trade mark is registered it gives the registered owner of the trade mark an exclusive right to use it concerning the goods for which it is registered. Persons who purchase goods with the registered trade mark associate those goods with the owner of the trade mark. Use of the trade mark on goods other than those of the owner of the trade mark is an infringement generally referred to as “passing off”. It amounts to a misrepresentation. A person who believes his rights have been infringed can either proceed in terms of the Trade Marks Act if he has a registered trade mark, or at common law in an action for passing off.
In this case the respondent produced dog food in pellet form. The food was marketed under the name “kibbles”, which name had been registered as a trade mark. The appellant subsequently started to produce similar, but cheaper, dog food, which it also described as “kibbles”. The respondent complained of both passing off and infringement of a registered trade mark, and obtained an interdict preventing the appellant from using that name. The court held that the appellant was not entitled to manufacture a similar product and then give it the same name as that of the respondent’s product. There was no reason for the appellant to use the name “kibbles”; it could have used a different name for its product, the word not being descriptive of the dog food manufactured by the parties.

In **Zapchem Detergent Manufacturers CC v Polaris Zimbabwe (Pvt) Ltd 2003 (1) ZLR 481 (H)** the court held that the question was who has the right to the goodwill of a product manufactured by one person in one country and sold or marketed almost exclusively by another person in another country. Goodwill, the attracting force of an undertaking, is determined by a multiplicity of factors – the reputation of the undertaking, the fact that it is well-known, its creditworthiness, but more particularly the undertaking’s locality, the personality of the entrepreneur or another person such as an employee who is connected with the business. However goodwill is created or however it comes into existence, it cannot be created or come into existence independently of or outside the context of an undertaking. The only situation in which a trader in the position of the respondent can acquire goodwill in respect of a product which is manufactured by another but sold by itself is where such a person is not a mere conduit for the goods of another but markets its own product under its own name. This was not the case here, as the packaging indicated that the goods were manufactured by the applicant.

In **Polaris Zimbabwe (Pvt) Ltd v Zapchem Detergent Mfrs CC 2004 (2) ZLR 351 (S)** the court held that the owner of goods, or the person who has proprietary rights in the goods, or the assignee of the goods, has the *locus standi* to sue for passing-off if his rights are infringed by the act complained of. The only situation in which a trader in the position of the appellant could acquire goodwill in respect of a product which is manufactured by another but sold by itself is where such a person is not a mere conduit for the goods of another but marketed its own product under its own name. This was not the case here, as the packaging indicated that the goods were manufactured by the respondent.

In **Zambezi Conference of Seventh Day Adventists Church v Seventh Day Adventists Association of Southern Africa 2000 (1) ZLR 179 (H)** the court held that the principles of a passing-off action apply also to the unauthorised use of the name of a non-trading body. Thus a mother church which was a long established and well-known religious body with branches world-wide was entitled to the protection of the law insofar as its name is concerned.
See also *Blue Bell Inc v Lennard Clothing Manufacturing (Pvt) Ltd* HH-54-84 (Trade mark registered but not presently trading in Zimbabwe); *Bon Marché (Pvt) Ltd v Brazier & Anor* S-68-84; *Rixi Taxis Owners’ Association v Machidza* HH-203-86; *Saybrook (Pvt) Ltd & Anor v Girdlestone* S-119-86; and *Rixi Taxi Co-op v Matigi & Ors* HH-451-88.

As regards registration and protection of trade names and trade descriptions by legislation, the provisions of the Trade Marks Act *Chapter 26:04* and the Industrial Designs Act *Chapter 26:02* are the most important pieces of legislation. See also sections 20 and 21 of the Companies Act *Chapter 24:03* regarding non-registration and de-registration of company names identical to or so similar to other company names that the public is likely to be misled.

**Interference with contractual relations and business**

**Inducement to breach of contract**

This delict is committed by D who, knowing or suspecting that A has a contract with P, intentionally induces A to break his contract with P. For example, if A is employed by P, and D, knowing that A has a contract with P, deliberately persuades A to break his contract causing P financial loss, P can claim damages.

See *New Kleinfontein Co Ltd v Superintendent of Labourers* 1906 TS 24; *Solomon v Du Preez* 1920 CPD 401

**Other forms of unlawful interference in trade or business**

The law in this regard is not as fully developed as in the United Kingdom but it would seem that the following forms of intentional interference will be considered as being unlawful in Zimbabwe.

**Intimidation**

By actions which are unlawful in relation to third parties, e.g. destroying the tools of P’s workmen so that they cannot perform their work; assaulting or threatening to assault P’s workmen to induce them to cease to work for P; threats by one firm that it will stop dealing with another firm in breach of a contract between them unless the threatened firm ceases to trade with P’s firm.

**Conspiracy**
Where a number of defendants, acting in concert, deliberately take action not intended to further their own trade interests, but intended only to cause financial loss to P.

It is possible that the same may apply when one defendant, acting alone, deliberately causes financial loss to P without in any way seeking to further his own trade interests. (But in the United Kingdom in the absence of a combination of persons, no tort is committed.)

See Crofter Hand Woven Harris Tweed v Veich [1942] AC 435 (HL)

Stealing or disclosing trade secrets

The basis of this action that has been developed in South Africa is the lex Aquilia. Where P by his skill and knowledge has made a certain discovery or invented a formula or designed a certain system and D, by surveillance or by extracting information from an ex-employee of P’s, has gained information about this invention or design which P was keeping confidential, there may be an action for an interdict or damages.

On legislative protection of inventions and designs, see the Patents Act [Chapter 26:03], and the Industrial Designs Act [Chapter 26:02]. See also the Copyright and Neighbouring Rights Act [Chapter 26:05].

See Girdlestone v Saybrook (Pvt) Ltd & Anor HH-363-83 Protection of small industries from large industries; Dun & Bradstreet (Pvt) Ltd v SA Merchants Combined Credit Bureau (Pty) Ltd 1968 (1) SA 209 (C); Schultz v Butt 1986 (3) SA 667 (A).


Other forms of unlawful interference in trade or contractual rights

See Murdoch v Bullough 1923 TPD 495; Tothill v Gordon & Ors 1930 WLD 99; Ebrahim v Twala & Ors 1951 (2) SA 490 (W); Hawker v Life Offices Association 1987 (3) SA 777 (C) Unlawful interference with right to earn living; Dantex Investments v Brenner & Ors 1989 (1) SA 390 (A); Rookes v Barnard [1964] AC 1129
NUISANCE

The law on nuisance seeks to adjust the conflicting interests of neighbouring occupiers of land and premises. Whilst a person should be at liberty to use and enjoy his land, he should not be permitted to use his land in such a way that he interferes with his neighbours’ rights in an unreasonable fashion (i.e. the neighbour has a right to enjoy his land free of such interference). The law thus seeks to balance these conflicting rights in an equitable fashion and provides the injured neighbour remedies in the event of an unjustified nuisance being caused to him.

Nuisances have been sub-divided into two categories, namely, private nuisances and public nuisances. A private nuisance is one which interferes with only one neighbour or only a limited number of neighbours, whereas a public nuisance is one which affects the public at large or some considerable section of the public.

Private nuisance

The requirements for an action for private nuisance are–

- the interference with P’s rights must be a continuing one as opposed to a single, isolated event; and
- there must be an unreasonable use of land by D which causes an unreasonable and unjustifiable degree of interference with P’s rights to the use and enjoyment of his land.

In considering whether there has been an unreasonable user that has caused an unreasonable degree of interference the following factors will be salient–

- The nature of the locality (i.e. is it rural, semi-rural, urban or industrial);
- Whether the user is a common and ordinary one given the nature of the locality. (However, if D engages in what normally would be a common and ordinary user in that locality with the sole purpose of adversely affecting his neighbour rather than enjoying his own land by putting it to that use, D will be liable because he was actuated by malice. This is the so-called spite fence situation);
- Whether the user substantially impinged upon P’s rights or the degree of interference was only of a trivial character; and
- If D causes a nuisance in the course of taking steps to protect his property, whether there were other alternative less drastic steps which he could have taken.

In considering whether any unreasonable extent or interference has resulted, only normal sensitivities of ordinary citizens will be considered. Thus, there will be no action if D was abnormally sensitive to say, noise or smells.
The nuisance may result in physical damage to property or physical harm to a person or it may cause merely irritation and upset (e.g. noise or smell nuisance). Damages can only be claimed in our law for nuisance if there has been *patrimonial loss*. Where there has been no patrimonial loss but only irritation, then the sole remedy is an interdict.

Where an interdict is being sought no intention or negligence on the part of D has to be proved (i.e. all that has to be shown is that there has been an unreasonable user which causes an unreasonable degree of interference in P’s rights). Where damages are being claimed there has been a dispute in South Africa as to whether this action falls under the Aquilian action and whether at least negligence has to be established (i.e. that the interference was reasonably foreseeable and the reasonable person would have guarded against this.) In English law at one time it appeared that negligence was not an essential requirement but more recently it seems that negligence is now required. In Zimbabwe, it is somewhat unclear. Although in the local case of *Cosmos v Phillipson* 1968 (2) ZLR 128 (G) the judge ruled that negligence did not have to be proved before damages could be recovered, this case was influenced by case law in South Africa and Britain. This ruling needs re-examination in the light of contemporary developments in these two countries.

In respect of private nuisance, there are a variety of offences contained in legislation prohibiting nuisances on pain of penalties being imposed. Most of these are contained in local government by-laws. See, for instance, s 4 the Harare (Noise) By-Laws, SI 1195 of 1973. There are various other provisions contained in primary legislation. For example, s 46 read with the Third Schedule of the Criminal Law Code makes it an offence for an owner, lessee or occupier to fail to take such steps as may be necessary to prevent the creation on the property of a nuisance to neighbours by offensive smells or otherwise.

See *Francis v Roberts* 1972 (2) RLR 238 (G); *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A); *Gien v Gien* 1979 (2) SA 1113 (T) *Wright v Pomona Stone Quarries* 1988 (2) ZLR 144 (S) Nuisance existing before P took occupation; *de Charmoy v Day Star Hatchery* 1967 (4) SA 188 (D); *Savoy House Ltd v City of Salisbury* 1959 (1) R & N 145 (H); *Regal v African Superslate* 1963 (1) SA 102 (A) Created by predecessor in title.

**Public nuisance**

This is largely the subject matter of controls contained in legislation. The most important pieces of legislation in this regard, controlling such matters as pollution which is affecting public health and so on, are the Public Health Act [*Chapter 15:09*], the Regional Town and Country Planning Act [*Chapter 29:12*], the Factories and Works Act [*Chapter 14:08*], the
Atmospheric Pollution Act \textit{[Chapter 20:03]} and the Environmental Management Act \textit{[Chapter 20:27]}.
SPECIAL DELICTS RELATING TO THINGS FALLING FROM BUILDINGS

Actio de effusis vel dejectis

This delict is a strict liability action which can be brought against the occupier of premises from whose premises something has fallen or been thrown or poured thereby causing injuries to P. No negligence on the part of the occupier has to be proven before damages can be recovered.

Actio de positu vel suspensi

Where a thing has been dangerously placed or suspended on a building or over a public way creating a risk of injury an action for an interdict can be brought to stop the continuation of the hazard.

BREACH OF STATUTORY DUTY

The primary question is whether the statute was intended to create a civil right of action.

The breach of statutory duty allows a person affected thereby to sue if–
- he has suffered damage as a result of such breach;
- he is one of the persons for whose benefit the duty was imposed;
- the harm caused was within the mischief contemplated by the statute;
- the statute has not expressly or impliedly excluded the ordinary civil remedy; and
- the breach of the statute was the proximate cause of the loss.

In the case of Patz v Greene 1907 TS 427 the court established the rule that where the Legislature intends to protect the interests of a particular group of persons, then if P is part of that group, he or she does not have to prove that he or she has suffered damage as it will be presumed that he or she has suffered damage. If, on the other hand, the Legislature simply wants to protect the general public interest, P must prove that he or she suffered damage.

See also Salisbury Bottling Ltd & Ors v Central African Bottling Ltd 1958 R & N 17; Tobacco Finance Ltd v Zimnat Insurance 1982 (1) ZLR 47 (H); van Buuren v Minister of Transport 2000 (1) ZLR 292 (H); Da Silva v Coutinho 1971 (3) SA 123 (A); and Knop v Johannesburg City Council 1995 (2) SA 1 (A).

Burchell in Principles of Delict at p 46 has this helpful comment –

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A statute may specifically provide for a civil remedy for damages, specifically provide for a criminal penalty but remain silent on the availability of a civil remedy, remain silent on any means of enforcement or provide for a ‘special’ remedy. Obviously if a statute includes a civil remedy for the enforcement the ordinary principles of liability apply. Where the statute specifically provides for a criminal sanction this does not necessarily exclude the availability of a civil remedy and the intention of the legislature on this matter must be determined. Where the statute remains silent on the means of enforcement it may be presumed that the legislature intended it to be enforceable by ordinary private right of action. Where the statute provides for a ‘special’ remedy there is a strong indication that the legislature intended the special remedy to be the only one.

**NEGLIGENT PERFORMANCE OF STATUTORY DUTY**

Where D is a public authority carrying out a function authorised by statute it will not be liable for harm caused by carrying out this function provided that it acts *without negligence*. There may, however, be immunities contained in the empowering legislation for harm negligently inflicted.

In *Van Buuren v Minister of Transport* 2000 (1) ZLR 292 (H) P’s aeroplane had been badly damaged when it fell into a hole when taxying across a grass patch at an aerodrome. In a claim for damages for negligence, P argued that the Ministry had been negligent in failing to comply with its statutory duty to maintain the aerodrome in a safe condition. The court held that the Ministry had permissive discretionary powers under the statutory provisions in question. Where the Ministry is not positively enjoined to do something and is merely given permissive powers to do something, not duty to act positively can be implied. A litigant who contends that the legislature intended to impose an obligation bears the onus of showing that a duty can be implied from the wording of the statute. The power given to the Minister was discretionary. The Minister could not be directed to exercise these powers. The statute thus did not create a duty giving rise to delictual liability. The Minister’s liability could only arise if the exercise of his statutory power cause injury to another, and the power had been exercised negligently.

See also *Knop v Johannesburg City Council* 1995 (2) SA 1 (A)
TRESPASS

In our law there is no separate action for trespass. If the owner or occupier of land can establish that the occupation of his land by a trespasser or by trespassers resulted in patrimonial loss to him through physical damage or through deprivation of occupation, he is entitled to bring an Aquilian action for damages against the wrongdoer/s. In many instances, the trespassers will have little or no financial resources and in those instances it would be futile to bring this action. In instances where the trespassers have subjected the landowner or occupier to an injuria, an action could be brought under the actio injuriarum.
VICARIOUS LIABILITY

Doctrine

The doctrine of vicarious liability lays down that an employer is vicariously liable for all delicts committed by his employees (who are not independent contractors) who are acting in the course and within the scope of their employment at the time the delicts were committed. The employer is not only liable when the delict is due to his own fault, for instance, when he employs an incompetent employee, or he authorises or directs the employee to commit the delict; he can be vicariously liable for harm caused by the fault of his employees. In other words, he could be liable under this doctrine even though he was not at fault, i.e. he could have employed a competent employee, he could have instructed him properly and yet he would still be liable even though the delict was committed by his employee in circumstances where he neither knew nor should he reasonably have known that the delict would be committed by his employee.

It should be noted that the employee can be sued as well as the employer. The employee is liable for his own delicts but in practice the employee is not often sued because he will often lack the financial resources to be able to pay compensation.

Rationale for doctrine

Why does the law hold the employer liable for the delicts of his employee? The social policy that has led to the doctrine has not been clearly articulated by the courts. However, the doctrine is usually justified on the basis that–

By instructing employees to engage in activities, he creates the risk that the employees may cause harm to others. (He also has the capacity to control his workers’ activities);

The employer operates his business through his employees and makes profits;

The employer is usually in a far better financial position to compensate the injured party than the employee who will often not have the financial resources to pay compensation and, as between the employer and the employee, it is therefore, unfair to expect the employee to pay compensation for a delict arising out of performing work on behalf of the employer;

The employer, which is often a sizeable enterprise rather than a single individual, can far better absorb losses of this description by taking out insurance and by way of distribution of costs to customers by increasing the price of products or services (i.e. the employer can afford insurance whereas the employee often cannot).

In Gwatiringa v Jaravaza & Anor 2001 (1) ZLR 383 (H) the court said that there is a compelling social policy behind the concept of vicarious liability. Corporations or large employers conduct a large part of the affairs of the world, so that of necessity the operations
are performed by employees. That being the case, it is inevitable that the employer must, in an appropriate case, answer for the faults of his employees, as long as they are committed in the course of and within the scope of their employment. There is, however, a limit. Policy considerations notwithstanding, an employer cannot be held liable for the delicts of an employee who acts in pursuit of personal interests. If the employee’s abandonment of his employer’s work amounts to mismanagement of it or negligence in its performance, the employer will be responsible for harm done to third parties. But where the harm is caused, not by the employee’s abandonment of his employer’s work but by his activities in his own affairs, unconnected with those of his employer, the employer will not be responsible. An act done by an employee solely for his own interests and purposes and outside his authority is not done in the course of his employment.

In the case of *Mungofa v Muderede & Ors* HH-129-03 the court said that the doctrine of vicarious liability of employers for the delicts of employees is based on social policy. The most important considerations are the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant, who is apt to be a man of straw; and that the rule promotes wide distribution of delictual losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices.

**Operation of doctrine**

The requirements for vicarious liability are—

- The employee is a “servant” and not an independent contractor; and
- The employee is acting in the course of his employment.

**Employee who is not independent contractor**

There is no vicarious liability for the delicts of independent contractors. An independent contractor is a person employed to do work who is not subject to the control and direction of the employer as to the manner he does the work. A person who is employed as a “servant” is subject to the employer’s control and direction both as to what work he does and the manner in which he carries out the work.

What is important is whether there is a right to exercise control over the manner of performance of the work and not whether this right is actually being exercised for the time being by the employer. If there is such a right of control the employee cannot be an independent contractor. The easiest example of this distinction is that if D employs a person as a taxi driver that person is normally an independent contractor as he decides upon the
manner in which he carries out the work, whereas if D employs a person as a chauffeur, he is usually an employee as D has the right to control the actual manner of his driving. Persons with special expertise such as architects, lawyers and so on are usually employed as independent contractors.

For discussion on the test to decide whether a person is an employee or an independent contractor see *Banda v Gamegone (Pvt) Ltd & Anor HH-133-03.*

**Course of employment**

It is not sufficient that the employee committed the delict during his ordinary work hours. If the employee does something which is entirely for his own benefit and which does not form part of his duties as an employee in that business, the employer will not be held liable. For example, if D employs a person as a worker on a car assembly line and during work hours he steals from another employee or assaults him, the employer will not be vicariously liable. The same applies even if the employee has been permitted by the employer to use the employer’s property for his (the employee’s) own purposes, e.g. I permit my employee during work hours to borrow my bicycle to visit a sick friend and the employee rides carelessly and knocks down someone whilst riding to or from his friend’s house. Here again, the employee was not in the course of his employment when the delict was committed. Even if the employee is doing the thing with the intention of benefiting his employer and not himself, the employer will still not be liable if the employee is doing something which is neither part of his employment duties nor reasonably incidental thereto. Thus, in one case a person employed as a baker had an accident whilst driving the van of the employer in order to deliver some confectionery. As it was not part of the employee’s duties to drive the delivery truck, the employer was not held liable, even though the employee was attempting to benefit the employer’s business.

The employer may still be liable if, although the thing done by his employee is not directly part of his duties, it is reasonably incidental thereto. Thus, in one case it was held that the cooking of food on the roadside was reasonably incidental to the duties of the employees as they were long-distance wagon drivers and it was to be expected that they would stop and cook their own food along the way.

**Deviation from course of employment**

As regards the concept of “course of employment”, it has been ruled in a series of cases that the fact that the employee deviates from the course of employment will not necessarily mean that there is no longer vicarious liability. Considerations of social justice have led the court to adopt the approach that the degree of deviation from the course of employment has to be of a
major extent before they will hold that the employee is no longer in the course of his employment. If the employee, whilst about his employer’s business, temporarily diverts from that business to do something for his own purposes, the courts will ask the question: was the deviation of such a degree in terms of time and distance that it cannot reasonably be said that he was still exercising the functions for which he was employed? To give a concrete example of a typical case where this issue arises, D instructs his delivery driver to deliver certain items and then to return the delivery van to his premises. If, having done his delivery rounds the driver drives to his own home to pick up some of his personal possessions before returning the van to D and he drives negligently and has an accident either on the way to his home or on his way from his home to D’s premises, the question is whether D will be vicariously liable for the harm caused, and this will depend upon the extent of the deviation.

In *Nott v ZANU (PF)* 1983 (2) RLR 208 (S) a driver had collided with A’s vehicle. At the time of the driver had deviated from his assigned task to do his own personal business. The court held that the employer was nonetheless still vicariously liable to A because in terms of time and space the deviation was not major and had not seriously interfered with the exercise of the driver’s. The deviation could not such as to lead to the conclusion that the driver had abandoned his functions.

In *Witham v Minister of Home Affairs* 1987 (2) ZLR 143 (H) a policeman, despite a known history of alcohol-related psychiatric problems, had been detailed to guard the residence of Government minister in a Harare suburb. He had been issued with a rifle and ammunition. He had deserted his post during the night and gone on a shooting spree, ending up in the servant’s quarters at P’s house, which was not far away in the same suburb. P and his wife, unaware that the policeman was in their servant’s quarters, went out to the quarters early in the morning when their servant failed to appear at the arranged time. The policeman fired at the couple, killing the plaintiff’s wife and severely injuring the plaintiff. The policeman was himself later shot and killed by other police details. The court held that the Minister was not vicariously liable because the policeman’s digression from his appointed duty was so great in respect of space and time that it could not be reasonably said that he still exercised the functions to which he was appointed. His digression was a complete relinquishment or abandonment of his master’s business in favour of some activity of his own. The situation might have been otherwise had the policeman fired accidentally at the premises he was meant to be guarding. However, the Ministry was directly liable as it had created a danger by putting the policeman, with his mental history, in charge of a weapon was foreseeable and as a result of the danger serious injury to a member of the public was foreseeable. The police also owed a duty of care to the public to protect them against either a gunman in general terms who is loose in the area, but more specifically against a fellow member of the police who was in uniform and using a police weapon.
In *NSSA v Dobropoulos & Sons (Pvt) Ltd* 2002 (2) ZLR 617 (S) the Supreme Court stated that the rational behind holding employers vicariously liable for the acts of their employees, even where they have deviated from the strict course of their duty, is that it is right and proper, where one of two innocent parties has suffered a loss arising from the misconduct of a third party, that the loss should fall on the one of the two who could most easily have prevented the happening or the recurrence of the mischief. This approach does not depend upon a “creation of risk” theory, but uses the customary test for determining the existence of vicarious liability which serves the interests of society by maintaining a balance between imputing liability without fault, which runs counter to general legal principle, and the need to make amends to an injured person who might otherwise not be recompensed. Where there has been a deviation from duty, the employer’s liability depends on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed, or still is essentially a question of degree. In this case the court found that the employee had recommended the assigned task after a deviation and the employer was vicariously liable. The court approved the tests relating deviation from employment set out in the South African case of *Feldman Pty Ltd v Mall* 1945 AD 733.

In *Standard Chartered Finance Ltd v Georgias & Anor* 1998 (2) ZLR 547 (H) the court said that a master will be liable for the acts of his servant committed in the course of employment; but an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of employment, even though it may have been done during his employment. But provided the servant is doing his master’s work or pursuing his master’s ends, he is acting within the scope of his employment, even if he disobeys his master’s instructions as to the manner of doing the work or as to the means by which the end is to be attained. In the present case, an employee of a finance company had told another company that the P’s company was in financial difficulties. This had led the other company cancelling its contract with P’s company resulting in financial loss to the P company. There was no evidence as to what the employee’s duties were at the finance house and the employee may simply have been pursuing a personal vendetta. The cancellation of the contract would have been contrary to the interests of the finance company. It could not therefore be said that the employee was acting in the course of his employment.

In *Biti v Minister of State Security* 1999 (1) ZLR 165 (S) the driver of a government vehicle was instructed to take three government officers home after work and then keep the vehicle safely overnight. In the morning he was to pick up the same officers and drive them to their work place. He was on call while not actively on duty. About two and a half hours after he should have finished dropping the three officers, he rammed into a stationary taxi owned by P, badly damaging the taxi and severely injuring P. The accident occurred at a place which was about a 5 km deviation from the routes he would have had to have taken to drop off the
government officers. There was some evidence that the driver was heavily intoxicated and that he had his girlfriend in the car. The trial court had held that the Ministry which employed the driver was not vicariously liable. On appeal the court held that the standard test for vicarious liability requires the court to decide whether the wrongdoer was engaged in the affairs or business of the employer when he committed the delict. In the present case, the business of the government driver included not only the transporting of passengers to their homes, but also keeping the vehicle in safe overnight custody. Although the driver had deviated from his authorised route, the deviation, in terms of time and space, from was not such as to convert it into “a frolic of his own.” The improper mode of exercising his duty of keeping the vehicle safely overnight was still done within the course of his employment and the Ministry which employed him was vicariously liable.

In *Gwatiringa v Jaravaza & Anor* 2001 (1) ZLR 383 (H) D1 was employed by D2, a security company, as a roving dog handler. He had been assigned to guard a municipal workshop in an industrial area of Harare. When on duty, he should have worn uniform. On the night in question, he took off his uniform, tethered his dog, and drove off in a municipal vehicle. He was not a licensed driver. Some distance away he crashed the vehicle through P’s gate, causing damage to the gate and the guardroom next to it. The court held the situation in this case was one of complete abandonment by the employee of the task to which he was appointed. The damaging of P’s property could not be said to be an improper or negligent mode of performance of his duties as a guard. His conduct bore no relation to the scope of his employment. No policy reasons would justify imposing liability on the employer, who did not sanction the driving in the first place.

See also *South British Insurance v Du Toit* 1952 SR 239; *Reid-Daly v Hickman* (2) 1980 ZLR 540 (A); *Ziyeresa v Fleming* HH-92-84; *Workers Compensation Commissioner v Minister of Construction* HH-403-86; *Murenge v Minister of Local Government* HH-434-88; *Boka Enterprises v Manatse & Anor* 1989 (2) ZLR 117 (H) (the State was held liable for a defamatory statement by public official during course of his duties); *Nyakabambo v Minister of Justice & Ors* 1989 (1) ZLR 96 (H) (The State was not vicariously liable for the actions of the Attorney-General as he was an independent officer); *Hokonya & Anor v Chinyanyi & Ors* HH-17-95.

**Disobedience of instructions**

When instructions have been given to an employee and he disobeys these instructions, the vital question will be whether the instructions limited and defined the actual sphere of employment or whether they merely sought to regulate the conduct of the employee within his sphere of employment. If it is the former, disobedience to instructions will mean that there is no vicarious liability, whereas if the latter, vicarious liability may still be imposed. See *Gorah v Mahona* 1984 (2) ZLR 102 (S).
In *Mungofa v Muderede & Ors* HH-129-03 P was injured in a bus accident caused by the negligence of D1, the driver of the bus. The driver was a part-time employee of D2. D2’s employees, the bus crew, permitted D1 to drive the omnibus with fare paying passengers. The bus crew member who allowed D1 to drive was obviously permitting him to drive the omnibus “doing his master’s work in pursuing his master’s ends”. The court held that the doctrine of vicarious liability of employers for the delicts of employees is based on social policy. The most important considerations are the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise; that the master is a more promising source of recompense than his servant, who is apt to be a man of straw; and that the rule promotes wide distribution of delictual losses, the employer being a most suitable channel for passing them on through liability insurance and higher prices.

The court held that the fact that the bus crew member may have acted contrary to D2’s instructions did not necessarily take the conduct out of the scope of his employment. The question is whether the instructions given to the employee limit the scope of his employment or merely relate to conduct within that sphere. It may be that the employee is carrying out his assignment in a manner which was contrary to his instructions, but he is nevertheless carrying out that assignment and none other. Here there was no express prohibition; at most there was an implied prohibition. The use of D1 was wholly in pursuance of D2’s interests, so the second defendant was liable for the delict perpetrated by D1 on P.

In *Wentworth-Wear v Zvipundu* 2000 (1) ZLR 281 (S) Appellant was injured in a motor accident caused solely by the negligence of the driver of a commuter bus. She sued the employer of the bus driver. The employer maintained that the driver was not in his employment at the time, having been discharged for non-payment of traffic fines incurred while in previous employment. The driver had nonetheless driven the vehicle involved in accident, directly contrary to to instructions that he was not to drive. The court differentiated between two types of instructions from an employer: those that limit the sphere of employment and those that deal with conduct within the sphere of employment. The employer only remains liable if the employer disobeys an instruction that is supposed to regulate his conduct within the sphere of employment. The instruction in the present case limited the actual sphere of employment and the employer was no longer vicariously liable after the employer had disobeyed such an instruction.

What if the employee has a business involving the transports of goods and D employs a driver to drive his lorry on a certain route. D has given his driver strict instructions never to pick up hitchhikers whilst driving his lorry. If the driver disobeys this express instruction and picks up an unauthorised passenger and then, due to his negligence crashes the lorry causing injuries to the passenger is the employer still liable. D would not be held vicariously liable
for the passenger’s injuries because the courts would hold that the employee’s scope of employment was circumscribed by the instruction and, whilst he was in the course of employment in driving the lorry, it was not part of his employment to carry passengers (i.e. he was employed to carry goods not passengers). Thus in Khosa v Cargo Carriers 2006 (2) ZLR 109 (H) P sustained serious injuries due to the negligence of the driver of D’s lorry. The driver had, in spite of specific instructions that passengers were not to be carried in the lorry, given P a lift and charged him a fee for the lift. The court held there was no deviation from the route the driver was to use while carrying his employer’s cargo. His only digression was to carry P against his employer’s instructions. The driver was instructed not to carry passengers. He carried P in disobedience of his employer’s instruction. It cannot therefore be said that in so doing he was acting within the sphere of his employment.

See also Karoi Tractor Services (Pvt) Ltd v Doro & Co (Pvt) Ltd HH-188-87.

** Crimes committed by employees**

Even if the delict committed by the employee also constituted a crime, the employer can still be held liable provided the delict crime was committed in the course of the employee’s employment. However, in the Zimbabwean case of Fawcett Security v Omar Enterprises 1991 (2) ZLR 291 (S) the court held that a security company can only be vicariously liable where its guard steals property from the property he is guarding if the goods that have been stolen have been entrusted to the custody of the employee. (In this case a guard who had been placed inside a supermarket in plain clothes to guard the goods inside the premises against theft had participated in stealing or had allowed some of the goods to be stolen.)

In Gorah v Mahona & Anor 1984 (2) ZLR 102 (S) a lorry driver had been forbidden by his employer to give lifts to people. He had nonetheless given a lift to a youth. The lorry driver had driven negligently and had overturned the lorry, injuring the youth. The court decided that the employer was not vicariously liable.

In Rose NO v Fawcett Security Ops (Pvt) Ltd 1998 (2) ZLR 114 (H) a security company contracted to collect money every week from P and take it to be banked. On the day that a collection was due to take place, a phone call was received by the security company which purported to come from P’s office. The caller informed the security company that no collection was required that day by P so the security company proceeded to cancel the security run on that day. Two men who turned out to be employees of the security company went on that day to P’s premises dressed in their normal security clothes and collected money from P. They appeared to have written authority from the security company to collect the money and they issued a receipt for the money. The money was then stolen by these men and was never recovered. P claimed the money from the security company arguing that it was vicariously liable for the dishonest acts of its employees. The court held that the employees
were acting contrary to instructions and against and in breach of the general purposes of their employment and the wishes and interests of their employer. However, if the goods had been entrusted to the employees’ care by the employer, the employer would be liable. For this to apply, the employer did not have to physically hand the goods to the employees; he had merely to entrust the employees with the receipt and care of the goods on his behalf. The authority of the employees to receive and care for the goods includes an ostensible authority. Such authority covers acts to which the ostensible performance of the employer’s work gives occasion or which are committed under the cover of the authority which the employees are held out as possessing or the position in which they are placed as representatives of the employer. By appointing persons as security guards, a security company creates the risk that the guards could prove to be untrustworthy and abuse or misuse their powers. On this basis, the security company was liable to P for the acts of its employees.

In *Phillips Central Cellars (Pvt) Ltd v Director of Customs and Excise* 2000 (1) ZLR 353 (H) it was decided that even where an employee commits a wrong in pursuit of his, rather than the employer’s, interests, the employer may still be vicariously liable, provided that the wrong is nonetheless sufficiently proximate to his duties and authority and to the employer’s interests as reasonably to justify the conclusion that in committing the wrongdoing the employee was still engaged upon functions to which he was appointed. The key issue is the degree of departure from the employer’s business. Since the question is a matter of degree, the further removed the misconduct is from the employer’s own interest and business, the more important becomes the questions of the employee’s ostensible authority, general powers and specific duties. For the employer to be held vicariously liable it is not enough that the employee merely takes advantage of an opportunity for dishonesty presented by his employment. In this case P paid a clearing agent to clear goods through customs. P handed over the correct amounts of customs duty to the agent to pay the duty but the agent, acting in collusion with a corrupt customs officer, converted most of the payments to his own use. The court held that the employer was vicariously liable for what the customs officer had done. The customs official was behaving in a way that was forbidden and was pursuing his own interests. However, in doing so he was using an authority vested in him to assess duty; to receive payment of duty; to enter data into a computer system; to produce and issue bills of entry; and to pass payment of duty on to his employer. In doing these authorised acts, he deviated from his appointed course by falsifying computer entries; producing, issuing and filing false documents; converting part of the duties received; and accounting to his employer for only part of those duties. This was more than merely taking advantage of an opportunity for fraud afforded by his employment. It was an abuse of a power and a misuse of authority so clearly connected with his duties that the false bills of entry were on file as official records. The duties not stolen, and balancing the false bills of entry on file, had become receipts in the hands of the employer. On the other hand, P was not liable for the fraud of its agent as a principal. It would only be liable for the agent’s delicts which were specifically
authorised or committed in obtaining the authorised results, neither of which applied in the present case.

In *Mberi v Fawcett Security Operations (Pvt) Ltd* HH-24-03 a Fawcett security guard was assigned to guard P’s premises. The guard broke into the locked house and stole property. The security company was held vicariously liable. The court held that it is essential in this type of case that the employer has entrusted the care of the property stolen to the employee. In the present case by posting the guard the employer had entrusted the care of P’s property to its employee, even though the house was locked and the guard did not have access to it as part of his duties. See also *Hirsch Appliance Specialists v Shield Security* 1992 (3) SA 643 (D).

Even though the employer may not be vicariously liable, the employer may sometimes still be liable on the basis of the negligence on the part of the employer. Thus in *Witham v Minister of Home Affairs* 1987 (2) ZLR 143 (H) even though the police were not vicariously liable for the shooting of civilians by a mentally deranged police officer because the police officer was not acting in the course of his employment when he shot the civilians, the police were directly liable under the Aquilian action as the police has created a dangerous situation by putting on duty this officer when they knew that he was suffering from mental instability. Similarly a security company could be held be liable for theft by an employee on the basis of its own negligence if it negligently employs a security guard that it knows or should have known is dishonest or where it negligently fails to properly supervise its security guards. See *Fawcett Security v Oman Enterprises* 1991 (2) ZLR 291 (S).

See also *Nel & Anor v Minister of Defence* 1978 RLR 455 Thefts by State servants; *Lloyd v Grace, Smith & Co* [1912] AC 716 (HL) Liability for fraud committed by employee and *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 Thefts.

**Claim by employer against employee**

In *Quest Motor Corporation (Pvt) Ltd v Nyamakura* 2000 (2) ZLR 84 (H) the judge stated that there is no reason in principle why an employer who has suffered loss as a result of the negligent performance by an employee of his duties should not be able to claim damages
from the employee. It is an implied term of a contract of employment that an employee will exercise skill and care in the performance of his duties. This must be combined with the employer’s duty to provide all necessary assistance. However, if the employee does not hold himself out as possessing any special ability or skill, it may be that the employee undertakes no responsibility, and the employer would be held to have incurred all risks.

The employee in the present case did not hold himself out as possessing any special skills or attributes. The plaintiff had decided that he was suitable for the position, but did not put in place any supervisory procedures to ensure that he carried out his duties. The employee’s failure was due to incompetence rather than negligence. The employer was the author of its own misfortunes.

**Delicts committed by independent contractors**

There is no vicarious liability for delicts committed by independent contractors. However, if the person employing an independent contractor to do a job of work is himself negligent, he may be held liable for that negligence. An example of this would be if D hired an independent contractor whom he knew was not competent to perform the task. For example, D employs someone to repair his car. He knows the person employed has no mechanical qualifications and no expertise to carry out the work. The result is that the repairs are not done properly and when D takes the car out on the road D has an accident in which a third party is injured. D may be liable to the third party because of his own negligence.

So too if, in order to carry out the work safely, it is necessary for the employer to appraise the person engaged of certain facts known to the employer or to give him certain instructions, then again the employer may be liable for his own negligence in failing to supply the information or the instructions.

An exception to the rule that an employer of an independent contractor is not vicariously liable for the delicts of the independent contractor is where the employer employs an independent contractor to do work which is *inherently dangerous*. Here, it has been ruled in a number of cases that if the work is of a dangerous character the employer is bound to ensure that the proper precautions are taken by the independent contractor and if he fails to do so he will be liable if harm results to a third party from the work being done. What is meant by “inherently dangerous” work in this context has not been exhaustively spelt out, but the demolition of a building close to a public road and the use of explosives have been held to fall into this category. On the other hand, the felling of a tree has been said not to be an inherently dangerous operation. It would seem therefore that the danger must be *extraordinary* or of a high magnitude before the rule that the employer *himself* is obliged to ensure that due precautions are taken comes into operation.
In *Banda v Gamegone (Pvt) Ltd & Anor* HH-133-03 the court said that the vicarious liability of employers for the delicts of employees does not extend to independent contractors. The test as to whether a person is an employee or an independent contractor is the existence of a right of control over the person in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it. The usual test is the “supervision and control” test. Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. However, while the questions of control and supervision are important factors in determining the issue, they are not the sole criteria; all the circumstances surrounding the contract must be considered in order to determine the issue, and no single factor could be treated as the sole basis of determining the issue.

In *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) a D is only liable for actions of independent contractor if he was personally at fault. The fact that the work is *per se* dangerous is one of the factors to be taken into account in deciding whether D was personally negligent. The majority of the court found that the main contractor was liable for the delict perpetrated by a subcontractor who was an independent contractor because the main contractor had been negligent.

In *Dukes v Mathinusen* 1937 AD 12 the court found that demolition of a building next to a road was an inherently dangerous operation. See also *Rhodes Fruit Farms v Cape Town City Council* 1968 (3) SA 514 (C)

### Vicarious liability of State

Under the State Liabilities Act [*Chapter 8:14*], the State can be sued in delict for harm caused by State employees acting in the course of their employment or, as the Act puts it in s 2, the State is liable for “any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant”. Section 3A of the Act provides that the President, Vice President or the Minister or Deputy Minister of the relevant department may be cited as the nominal defendant, but he shall be cited by his official title.
and not by name. Under s 5, notice in writing of the intention to bring the claim has to be served on the State at least 60 days before the institution of the proceedings.

It should be noted that certain statutes contain immunities against delictual liability, or lay down special procedures for suing the State. Before commencing action against the State the relevant statute should be carefully examined to ascertain whether there are such immunities or specified procedures. (Particular note should be taken of s 76 of the Police Act [Chapter 11:10].)

**Parents and spouses**

Under general law, parents are not vicariously liable for the delicts of their minor children. A parent is only liable if he or she was *personally* negligent. For instance, if he or she fails to take reasonable steps to prevent a child from having access to a dangerous object, such as a firearm, then there may be liability under the Aquilian action if the child uses that object in such a way as to cause harm to a third party.

*See Flowers v Towers 1962 R&N 221 (FS) on a parent and child situation and Labuschagne v Cloete 1987 (3) SA 638 (T) on a husband and wife situation.*

On the other hand, under customary law a father is held liable for the delicts of children under his control. See Goldin & Gelfand *African Law and Custom in Rhodesia* p 238.

A spouse is not vicariously liable for the delicts committed by his or her spouse.

**Vicarious liability for wrongful attachment of property by Sheriff & Messenger of Court**

In *Tendere v Harare City Council* (2003) the respondent had obtained judgment against a debtor and issued a warrant of execution. The Messenger of Court went to the address given as the address for service and seized property found there. The property belonged to the appellant, who now resided there, the debtor having moved elsewhere. The appellant sued the respondent for the loss and expenses caused, claiming that the respondent had been negligent. He did not sue the Messenger of Court. Negligence was not established on the part of either the respondent or the Messenger. The court held that the Messenger of Court is appointed by the Minister of Justice in terms of Magistrates Court Act [Chapter 7:10]. He is the executing arm of the court and performs the functions given to him under the Act. He is thus the Messenger of the Court and not the messenger of the judgment creditor. Apart from the statutory provision, the proposition that a Messenger of Court is not an agent for the judgment creditor is well settled. Even if the messenger of court is strictly liable in delict for
wrongful attachment, the judgment creditor is not vicariously liable for the actions of the Messenger of Court. It is only where the judgment creditor or his attorney plays an active role in the unlawful attachment of the property by the Messenger of Court and makes the Messenger’s actions his own that he or his attorney can be held liable on the same basis as the Messenger of Court.
DEFENCES

Authority

This takes two forms. The authority can derive from common law or, more usually, from statute.

Under common law just about the only recognised situation where harm may be inflicted without delictual consequences is where parents or guardians inflict moderate corporal punishment upon their children for disciplinary purposes. The law recognises that parents are legally entitled to inflict such punishment. As regards corporal punishment in schools, this is subject to legislative control and, for instance, no corporal punishment may be inflicted upon female pupils. Doubt was cast on the legality of corporal punishment in schools as a result of the judgment by Dumbutshena CJ in the constitutional case on juvenile whipping *S v A Juvenile* 1989 (2) ZLR 61 (S). However, the Constitution was amended and it now provides in s 15 that the infliction of moderate corporal punishment will not be held to violate the right to protection against inhuman or degrading punishment or treatment—

- in appropriate circumstances upon a person under the age of eighteen years by his parent or guardian or by someone *in loco parentis* or in whom are vested any of the powers of his parent or guardian; or
- in execution of the judgment or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law.

Parents, guardians and schoolteachers are legally authorised to inflict moderate corporal chastisement upon children in their care. In terms of the Education (Disciplinary Powers) Regulations, SI 298 of 1990, which relate to both Government and private schools, only headmasters and deputy headmasters are permitted to inflict corporal punishment and this punishment may only be inflicted on schoolboys; schoolgirls may not be so punished.

In *Mahomed v Silanda & Anor* HH-281-91 a teacher severely assaulted a young pupil with a stick. The assault was unlawful and the Regulations relating to the administration of corporal punishment were not complied with. In *S v Mangwarira* S-194-88 a student teacher, was convicted of assault after she had caned a pupil. She admitted during her trial that she knew that only the headmaster was allowed to administer strokes.

Husbands have no legally recognised right to chastise their wives. Such chastisement constitutes an assault.

Regarding statutory authority, a distinction must be made between where the statute is directory and where it is merely permissive. If an authority is directed to do a certain thing,
the authority cannot be held delictually liable if it does the very thing it was directed to do in
the manner authorised. Where the authority is only permissive the courts have to decide what
was intended by the Legislature and to what extent interference with rights was intended. In
more general terms, if a body or individual was authorised by legislation to do a certain thing
it will not be delictually liable, provided that the act fell within the power given and provided
that the act was done without negligence. Immunities may also be contained in legislation
whereby no compensation is payable for negligent infliction of harm.

**Contributory negligence**

Under the Law Reform (Contributory Negligence) Act contributory negligence is not a full
defence but instead the courts will apportion blame between the two parties and reduce the
amount of damages that a claimant can recover by the extent of his fault.

Obviously, if D’s negligence was the sole and proximate cause of the harm, then
apportionment will not apply and D will be liable to pay all P’s damages.

**Inevitable accident**

If the harm resulted from an event in nature or some other outside force over which D had no
control, D will not be delictually liable. This sort of event, such as a flood or damage caused
by wind, is variously referred to as an act of God, an act of nature, *vis major* or *casus
fortuitus*.

**Necessity**

The requirements for this defence are—

- A legal interest must have been endangered;
- The threat to that legal interest must have commenced or be imminent;
- The threat must not have been caused by D’s own fault;
- The action must be necessary to avert the threat; and
- The means used to avert the threat must be reasonable.

The defence covers situations other than those encompassed by private defence (i.e. it does
not cover cases of defence of person and property against an assailant). In situations of
necessity, D inflicts harm upon the person or property of an innocent third party to avoid
greater harm to the person or property of himself or another. As harm is caused in these sorts
of cases to an innocent third party the defence is only allowed to succeed very sparingly. An
example of where the defence would be likely to succeed is where, for instance, D, in order
to avoid a collision with a young child who has suddenly stepped onto the road, mounts the pavement and damages property such as a shop window or a stall on the pavement.

See S v Ndlovu HB-31-84

**Negligence of third party**

It is a complete defence if D establishes that the negligence of a third party was the sole and proximate cause of the damage.

**Private defence**

The requirements for this defence are—
- There must be an unlawful attack;
- The attack must be on D, a third party or the D’s property;
- The attack must have commenced or be imminent;
- D’s defensive action must have been necessary to avert the attack; and
- The means used to avert the attack must be reasonable.

A typical example of where the defence would be raised in delict is where D kills an animal belonging to D to prevent the animal from injuring him or damaging his property.

**Public policy**

Where P has suffered damage as a result of his participation in an illegal enterprise, the court may hold that it is contrary to public policy to allow him to recover damages from a fellow criminal who caused him loss.

In *Murphy v Tengende* 1983 (2) ZLR 292 (H) P was defrauded of money whilst attempting to purchase foreign currency illegally. The court held that it was contrary to public policy to allow to recover damages. See also *Ashton v Turner & Anor* [1980] 3 All ER 870 (QB) in which injuries were inflicted by a car accident caused by thieves trying to get away from the police.
Trivialities

This defence has a very limited scope. It will apply only where the damage caused was so slight that it does not warrant the attention of the courts. (It is referred to by the Latin tag *de minimis non curat lex* - the law does not concern itself with trivialities).

Voluntary assumption of risk

General

In our law it is recognised that in certain circumstances the defence of voluntary assumption or risk (*volenti non fit injuria* - he who voluntarily exercises his will suffers no injury) will operate as a total defence to an action brought by P thereby precluding him from recovering any damages. The theory underlying this defence is basically that if a person, knowing of the full nature and extent of the risks involved in an enterprise, voluntarily goes into that enterprise, thereby freely assuming or undertaking the risk of injury to himself, he should not be able to sue for his injuries. Thus, *even if D was negligent*, under this defence P would be debarred from recovering damages from D as he is held to have voluntarily assumed the risk of such injury.

In *Lampert v Hefer NO* 1955 (2) SA 507 (A) a passenger was aware that the motor cyclist with whom was under the influence of alcohol. The defence of volenti succeeded as a full defence.

The tendency in many countries has been to confine this defence within extremely narrow limits. Indeed, in some countries the defence has been totally abolished in favour of dealing with these situations under the law relating to contributory or comparative negligence. In Zimbabwe, there is no leading case authority that lays down definitively the scope of this defence. In South Africa, the courts have rejected the narrow so-called “bargain” or bilateral agreement approach to this defence in favour of the more extensive voluntary assumption of risk approach. The basic difference between these two approaches is as follows: With the “bargain” approach, nothing less than an advance communication leading to an express or implied agreement between the parties is required whereunder P agreed to waive or give up his legal right to claim in respect of that type of harm. (This pre-supposes that P had full knowledge and appreciation of the nature and extent of the risk involved.) On the other hand, the voluntary assumption of risk approach does not require that P must have agreed in advance of the enterprise to surrender his right to sue in the event of his being injured; all that is required is that P, having full knowledge and appreciation of the nature and extent of the risk involved in an enterprise, nonetheless voluntarily goes into the enterprise thereby assuming the risk of injury. For example, if P, knowing that D was very badly drunk and
incapable of driving his car properly, accepts a lift in D’s car and is injured in an accident caused by D’s drunken condition, P would be debarred from recovering under the voluntary assumption of risk approach. (But not under the “bargain” approach, as there had been no agreement whereunder P agrees to waive his legal rights to claim against D in the event of an accident occurring.)

Even though South Africa has adopted the wider voluntary assumption of risk approach, the defence is still a difficult defence to raise successfully because of its requirements. It only applies where P, having full knowledge and appreciation of the nature and extent of the risks involved in an enterprise, nonetheless enters the enterprise thereby indicating that he is prepared to undergo those risks. In the leading South African case of Santam Insurance Co v Vorster 1973 (4) SA 764 (A), it was laid down if P had subjectively foreseen the risk of injury to himself, this would “ordinarily” suffice as consent thereby debarring P from recovering damages. It went on to refer to the practical difficulties of establishing subjective foresight, given the fact that direct evidence of this was infrequently available and P would be likely to deny subjective foresight. In order to overcome these difficulties, the court said that a two-stage approach should be adopted. Firstly, the question should be asked as to what objectively were the inherent risks of the hazardous activity in question. Secondly, having determined what objectively were the inherent risks, the subjective test was then to be applied and the court had to make a factual finding as to where P, despite protestations to the contrary, must have foreseen the particular risk which caused his injuries (that being an objectively inherent risk) and thus whether he will be held to have consented to undergo that risk.

Under the voluntary assumption of risk approach towards this defence, there are certain further limiting features arising out of the requirement that the assumption of risk must be voluntary. In two situations P will be acting under an obligation or constraint such that it cannot be said that his conduct was voluntary. The first situation is the rescue situation. An example of this is where D negligently leaves a horse unattended and unrestrained and it bolts. If P is injured in the process of trying to stop the horse trampling a child directly in its path, it cannot be said that P was acting freely as he was under a moral obligation to prevent injury to the child. The second situation is where an employee (who is not employed to do inherently dangerous work such as a steeplejack or a fireman) has to undergo a certain danger negligently created by the employer or his foreman. The general approach adopted here is that even if the employee is fully aware of the danger and continues work or continues under protest, the defence of voluntary assumption of risk will not apply against him. This is because it will be accepted by the courts that the employee was under economic constraint, namely, that if he did not obey the order to do the work or did not assume the risk he might be sacked and therefore in undergoing the work he was not acting freely.
See *Mutandiro v Mbulawa* HH-354-84 (passenger was aware that the driver he got a lift with was under influence of alcohol); *Santam Insurance v Vorster* 1973 (4) SA 764 (A) (A race between two cars on an ordinary road resulted in one of the cars overturning. P who was a passenger in the vehicle that overturned sustained very serious injuries) *Mathee & Anor v Harz* 1983 (2) SA 595 (W) (P knowing that D not licenced to drive volenti did not apply); *Boshoff v Boshoff* 1987 (2) SA 694 (O) (Harm arising out of playing of sport); *Labuschagne v Cloete* 1987 (3) SA 638 (T) (Liability of owner of car for negligence of driver); *Dann v Hamilton* [1939] 1 All ER 59 (KB) (Drunk driver); *Ashton v Turner & Anor* [1980] 3 All ER 870 (QB) (Drunk driver in course of criminal enterprise). See also *Withers v Perry Chain Co* [1961] 3 All ER 676 (CA) and *Birch v Thomas* [1972] 1 All ER 905 (CA)

With medical procedures that result in harm being caused to patients, consent can be a defence but only if the nature of the procedure and its risks have been properly explained to the patient before obtaining the consent of the patient. See *Stoffberg v Elliott* 1923 CPD 148; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T); and *Chatterton v Gerson* [1981] 1 All ER 257 (QB)

In *S v Chipinge Rural Council* 1988 (2) ZLR 275 (S) the court decided that young children do not have the capacity to assume risks so as to be covered by volenti.

For a case of dangers encountered by persons trying to rescue persons in danger see *Haynes v Harwood* [1935] 1 KB 146; 152 LT 121

**Which test should Zimbabwe adopt?**

In due course, the Zimbabwean courts will have to work out the principles that will apply in respect of the defence of *volenti non fit injuria* generally. The policy considerations will have to be fully considered before decisions are made. Three options present themselves, namely—

- to adopt the “voluntary assumption of risk” approach; or
- to adopt the narrower “bargain” approach; or
- to abolish the defence entirely and deal with all such cases by apportioning liability by using our legislation on contributory negligence.

It can be strongly argued that because the “all or nothing” approach which applies when this defence is allowed to debar a claim is inequitable, the defence should be severely limited and that most cases should be dealt with under the more equitable principles of apportionment. This could be achieved by the adoption of the ôbargainô basis liability. We could go even further and entirely abolish this defence and deal with all cases under the apportionment legislation.
**Intentional infliction of harm**

So far only cases where D has negligently inflicted harm have been dealt with. Situations where D intentionally inflicts harm will now be examined. The type of case with which we are concerned here is where a medical practitioner intentionally inflicts harm (e.g. by surgery) for therapeutic purposes. (Non-therapeutic medical experimentation will not be dealt with.) The starting point in this regard is the rule that any medical procedure is *prima facie* an assault (in criminal law and delict), unless the patient has freely consented to having that procedure carried out upon himself by the medical practitioner. Except in emergencies and in cases where the patient is incapable of consenting and substitutionary consent from someone else is allowed by the law (e.g. parents of a young child, the curator of an insane person, etc.), the medical practitioner is obliged to recognise that the patient is a free agent who has a right to choose whether or not to receive the treatment. Consequently, the medical practitioner is obliged to disclose the nature and extent of risks inherent in a procedure so that the patient is able, on an informed basis, to make up his mind as to whether he wishes to undergo those risks. At the same time the law has attempted to take into account the practical difficulties that medical practitioners may face in dealing with unduly timid patients who may be scared away from receiving desperately needed treatment if the doctor discloses in gory detail the nature of the procedure and all conceivable attendant risks.

For further details on this aspect of consent, see Feltoe & Nyapadi *Law and Medicine in Zimbabwe* Chapter 2.

**Dependant’s action**

It would seem that the defence of *volenti* cannot be successfully raised by a defendant in respect of an action by a dependant for loss of support due to the death of a breadwinner, as the duty of support of the breadwinner is independent of the duty of care owed to the deceased. (The position appears to be different in English law. See Salmond & Heuston *The Law of Torts* 19 ed p 650.) The dependant’s action would, however, fail if the deceased’s negligence was the proximate cause of his own death. Presumably, if the deceased has in his lifetime, in the interval between the accident and his death, accepted full compensation from D, the dependants will no longer be able to sue after his death. The dependant’s claim is subject to reduction based on the contributory negligence on the part of the deceased (see under apportionment).
REPRESENTATIVE AND CLASS ACTIONS

Representative actions

There is a provision in the High Court Rules (1971) which does not seem to be well known. This is Rule 89 in Order 13. This provision provides the framework for bringing what is known as *public interest* or *social action litigation*. It is of particular importance when a number of persons have all been affected by certain conduct, but the individuals in this group cannot afford to litigate individually. Together, however, they can raise enough money to employ a lawyer to argue the case on behalf of the group. A representative or representatives can then be nominated and the lawyer can bring the action in the name of the representatives on behalf of all the persons in the group. The provision is designed to avoid the laborious and unnecessary process of each person in the group having to sue separately when all have the same basis for suing. The sort of situation where this action would be highly appropriate is in a “Bhopal” type disaster affecting the health of various persons.

Rule 89(1) reads—

Where numerous persons have the *same interest* in any proceedings, the proceedings may be begun, and, unless the court otherwise orders, continued, by or against *any one or more of them as representing all* or as representing all except one or more of them. (my emphasis).

Rule 89(2) allows P to apply to the court for the appointment by the court of one or of some of a number of defendants to represent the defendants in the proceedings.

From the standpoint of the claimants, this provision is very useful insofar as it makes the proceedings far less cumbersome and costly.

Under Rule 89(3), the judgment (or order) at the end of such proceedings is binding on all the plaintiffs and the defendants who were being represented. (It can only be enforced against persons not parties to the proceedings with the leave of the court).

Under Rule 89(5), however, a person against whom the judgment or order is binding may dispute his liability “on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.”

How these provisions would be applied can be illustrated by a few concrete examples.

The escape of noxious fumes from a fertilizer manufacturing plant causes harm to the health of fifty people in the vicinity who inhale these fumes. One of the fifty claimants can be
nominated as representative for the other forty-nine. A legal practitioner can then sue the owners and operators of the factory under the Aquilian action, citing the person nominated as the representative plaintiff. The legal practitioner would then seek to prove that the defendants wrongfully and negligently allowed the escape of the noxious fumes and that it was these fumes which caused the injuries to the plaintiffs. If then the requirements for the Aquilian action are established, the defendants would be made liable to pay damages. The damages suffered by each plaintiff would, however, have to be individually quantified as these would vary from person to person.

A municipality is empowered under legislation in certain specified circumstances to expropriate land for development purposes after following set procedures and subject to payment of fair compensation. It purports to expropriate a certain block of land on which thirty people have individual smallholdings. The thirty persons affected seek to challenge the expropriation and have it set aside on the basis that the action by the municipality was *ultra vires* its powers and that the mandatory procedures for the exercise of these powers were not complied with. Alternatively, they are alleging that if the municipality had acted *intra vires* its powers, it had failed to pay fair compensation for the properties. The thirty can nominate a representative and the action on behalf of the entire group can be brought in his or her name.

One hundred persons have brought shares in a company. They are all alleging that they were induced to do this as a result of certain fraudulent misrepresentations made by the owner of the company. Soon after they invested in the company it went insolvent and they lost all their money. The owner of the company, however, owns several other lucrative enterprises. The investors wish to sue for damages for fraudulent misrepresentation. They nominate one person to sue on behalf of himself and the other ninety-nine plaintiffs.

**Class actions**

There are various restrictions on the use of the representative action procedure under the High Court Rules that make it narrow in scope. It can only be employed where the persons on behalf of whom the action is brought all have the same interest in the proceedings. This effectively disqualifies public interest non-governmental organisations, such as the Legal Resources Foundation and the Consumer Council, or concerned individuals from bringing a class action on behalf of other people. There are other limitations such as that all the parties must be asking for the identical relief; damages cannot be claimed in a group action; and it is doubtful whether a court can make a globular award to be distributed against the persons in the group.

The Law Development Commission recommended that the law on group actions be changed to facilitate group actions so as to provide an expeditious and inexpensive method for large
numbers of persons to exercise and enforce their legal rights. It recommended that non-governmental organisations should be allowed to bring such actions. See Report No. 50 Proposed Class Action (1996).

Acting on this recommendation in 1999 the Government passed the Class Actions Act [Chapter 8:17]. The important features of this legislation are as follows.

A class action is now available for a far wider range of circumstances than previously. For example, it could be brought even though there are different issues of fact or law relating to the claims or the relief sought which may require individual determination.

A person or organisation wishing to bring a class action on behalf of others will be required to obtain the leave of the court to mount such action. The court will grant leave if it considers that a class action is the appropriate way of proceeding. The court will exercise a supervisory role over the ongoing action to ensure that this procedure is used genuinely for the purpose for which it was designed, namely, to facilitate access to justice for those who would often, because of poverty, ignorance or lack of motivation to try to manoeuvre through complex legal procedures, end up not receiving justice (s 8). The court can also appoint a commissioner to perform such duties as determining particular issues or assessing individual monetary claims of individuals in the class (s 9).

To make the proceedings benefit as many potential beneficiaries as possible, the judgment in a class action is binding on all members of the class concerned other than those who, after notice has been given of the action, have advised that they wish to be excluded from the class action concerned (s 11). In a class action the court can, where appropriate, award judgment in the form of an aggregate amount to be distributed amongst the members of the class concerned (s 12).

In order to assist representatives embarking upon such actions on behalf of others, there will be a Class Action Fund (s 14). This fund will be constituted of monies made available by Parliament, donations and re-inbursements of costs made by members of the class in a successful class action.

Usually in Zimbabwe, legal practitioners are not permitted to take on actions on a contingent fee basis. However, in respect of class actions, subject to certain limitations, it is proposed here that a legal practitioner will be permitted to make an arrangement with any person who is to be a representative in a class action for the payment of fees and disbursements in respect of the class action dependent on the success of the class action.
EXEMPTION CLAUSES EXCLUDING DELICTUAL LIABILITY

A number of countries have passed legislation to offer protection to consumers against insertion in contracts of unfair exemption or limitation clauses. In 1994, Zimbabwe decided to follow suit and adopt legislation to give protection to consumers against such unfair clauses. In terms of the Consumer Contracts Act [Chapter 8:03], the courts have the power to cancel or ameliorate unfair provisions in consumer contracts. As regards actions in delict, the important provisions in this legislation are those dealing with exemption or limitation of liability for negligence.

Consumer contracts are contracts for the sale or supply of goods or services or both, in which the sellers or suppliers are dealing in the course of business and the purchasers or users are not (s 1). This means that the Act will apply to most sale and lease of consumer goods and to manufacturing contracts, but it will not apply to contracts between dealers and between non-trading individuals. The Act also does not apply to contracts for the sale, letting or hire of immovable property or contracts of employment (s 1).

Where a contract contains any of the provisions set out in the schedule, a court can grant relief against that provision unless it is satisfied that the contract is nonetheless fair despite the fact that it contains the scheduled provision (s 4(3)(b)).

One of the scheduled provisions is any provision “whereby the seller or supplier of goods or services excludes or limits the liability which he would otherwise incur under any law for loss or damage caused by negligence”. If the consumer contract has in it such a clause, the consumer can apply for relief before or during civil proceedings or the court can raise this issue at its own initiative during civil proceedings (s 4(2)). The relief that a court can grant in respect of an unfair contract containing an unfair provision includes cancellation of that provision.

In deciding whether a contract is unfair, there are criteria that the court can take into account. The ones relevant in relation to a provision excluding liability for negligence are as follows—
the contract as a whole results in an unreasonably unequal exchange of values or benefits;
the contract is unreasonably oppressive in all the circumstances;
the contract excludes or limits the obligations and liabilities of a party to an extent that is not reasonably necessary to protect his interests.

In *Cabri (Pvt) Ltd v Terrier Svcs (Pvt) Ltd* 2004 (1) ZLR 267 (H) D had negligently performed a contract to move P’s heavy equipment. This contract was carried out negligently by D leading to property damage to P. Using the Consumer Protection Act the court
cancelled a clause in the contract which purported to exempt D from liability for loss caused by negligence.
The periods of prescription for delictual actions are laid down in the Prescription Act No. 31 of 1975. In s 2 “debt” is defined so as to include a delict and then in s 14 the prescription periods for debts are set out. Three years is the usual period for prescription for a delict but s 14 sets out longer periods of prescription for certain types of debt, such as six years for a debt owed to the State.

Under s 5 of the State Liabilities Act [Chapter 8:14], 60 days’ notice must be given of an intention to claim money from the State. The notice must set out the grounds of the claim and, where appropriate and possible, give details of officials involved and have copies of documents relating to the claim attached to it. The courts will have the power to condone failure to give the required notice where there has been substantial compliance with the section or where there has been no undue prejudice to the State or to the officer being sued.

It should be carefully noted that there are special provisions in the Police Act [Chapter 11:10] dealing with the period of prescription for claims arising out of delicts committed by policemen. Section 76 reads as follows—

Any civil action instituted against the State or a member in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any civil action and the grounds thereof shall be given in terms of the State Liabilities Act [Chapter 8:14] before the commencement of such action.

Sections 176 and 178 of the Customs and Excise Act [Chapter 23:02] should also be noted. Under these as well, actions against customs officers in terms of this Act must be instituted within 8 months and 60 days’ notice of intention to institute proceedings has to be given. See Badenhorst v Minister of Home Affairs 1984 (1) ZLR 221 (S).

Careful note should also be taken of s 25(1)(ii) of the Road Traffic Act No. 48 of 1976. In relation to statutory third party insurance claims this provides that—

…the right of recovery directly from the insurer should become prescribed upon the expiry of a period of two years from the date on which such claim arose.

(The claim against the negligent motorist, however, only prescribes after three years from the date on which such claim arose.)
Workers compensation

In addition to the remedies for delicts provided by the common law, there are a number of other sources of compensation for injury and property loss contained in various statutory provisions. The most outstanding of these is the scheme that provides compensation to workers injured in the workplace. This scheme is now part of the National Social Security system and the detailed provisions relating to this scheme are contained in the National Social Security Authority (Accident Prevention and Workers’ Compensation Scheme) SI 68 of 1990. This scheme is funded by payments by employers into a central fund. These payments are assessed on the basis of the particular class of business and calculated against the wages earned by employees. The compensation fund is then used to compensate workers (or their dependants if they die or are unable to work any more) who are injured in accidents that occur whilst they are in the course of their employment or who contract certain specified work-related diseases. This system of compensation is a no fault compensation scheme in that the injured worker does not have to prove any negligence on the part of the employer before he is entitled to compensation. All he has to establish is that the injury occurred at the work place when he was in the course of his employment. Section 8 provides that the worker or his or her dependant cannot sue the employer under the common law.

If, however, the worker wishes to claim additional compensation on top of that paid to him out of the Workers’ Compensation Fund, in terms of section 9 he or she has to sue the employer on the basis of the negligence—

- of the employer in causing him that injury; or
- of a person who is managing or in charge of the employer’s business; or
- of a person who engages or disengages workers on behalf of his or her employer.

See *Ncube v Wankie Colliery Co & Anor* 2007 (1) ZLR 95 (H)

Section 10 further provides that where the accident was caused in circumstances creating legal liability on the part of some person other than the employer (a third party) to the worker, the worker may, in addition to claiming under the compensation scheme, institute legal proceedings against the third party to recover damages. Before instituting such action or withdrawing such action, the worker must notify the general manager of NSSA in writing.

Public servants injured at work are covered by the State Service (Disability Benefits) Act [Chapter 16:05]. (See also State Service (Pensions) Act [Chapter 16:06].)

War victims
There are various other compensation systems for persons who are injured or who sustain property loss which are contained in legislation. See the War Victims Compensation Act [Chapter 11:06].

**Persons suffering loss due to activities of dishonest lawyers**

Various other pieces of legislation exist which permit recovery of compensation in specific circumstances. One example is s 70 of the Legal Practitioners Act [Chapter 27:07] which provides for compensation to be payable to a person who has suffered loss due to the dishonesty of his legal practitioner.

**Persons injured by uninsured or hit and run drivers**

This is a voluntary scheme established by motor accident insurers under which the Motor Insurers’ Bureau will pay compensation up to certain specified limits to victims of negligence on the roads, in situations where the wrongdoers are not insured or where the wrongdoers are hit and run drivers who cannot be traced. Under this scheme, claims are made to the Motor Insurers’ Bureau.

This agreement covers—

- accidents resulting in death or personal injury where the person responsible for the accident is uninsured or his policy is held to be ineffective because a condition of the policy was breached or it was obtained by improper methods such as a false declaration. In this situation, the injured party must first obtain judgment against D but before commencing action he must notify the Motor Insurance Bureau. There is a shorter period of prescription governing this type of claim in that it is laid down that that the injured party must also issue summons against D within two years.
- where a person has been run down and has sustained serious and permanent disablement or has died as a result of injury; and the driver has failed to stop after the accident and cannot be traced. However, if he had been traced and it is reasonably certain that he would have been delictually liable, the Motor Insurance Bureau will make an *ex gratia* payment.

**Victims of crime**

A person who suffers physical injury or damage to property due to criminal activity would be able to bring a delictual claim for damages against the criminal who caused him the harm. Thus for instance a victim of assault, rape or arson could seek to sue the person who committed such a crime for damages. In practice, however, after criminals have been dealt
with by the criminal courts relatively few injured people bring civil actions against the wrongdoers. There are a number of reasons for this lack of civil claims. Potential claimants may be ignorant of the rights to sue, or they may lack the financial resources to be able to mount a civil claim, or it may be pointless to sue the wrongdoer as he is in prison and has no property or money outside that could be used to satisfy a judgment debt. In order to alleviate this situation a criminal court is now empowered under the Criminal Procedure and Evidence Act to award compensation to injured parties at the conclusion of the criminal case. This applies in cases of personal injury and property damage or loss. However, a criminal court may not award such compensation if the harm resulted from a motor vehicle accident or if—

- the compensation amount is not readily quantifiable;
- the full extent of liability is not readily ascertainable;
- the convicted person could be prejudiced if the matter is dealt with under this scheme.

Evidence during the trial can be used for this purpose and the court may call further evidence. Money found in the convicted person’s possession or in his savings account, etc. may be used for the purposes of providing compensation to the injured person.

This scheme can thus only result in actual compensation if the criminal wrongdoer has some money or property that can be used to compensate the victim. We presently have no State scheme whereunder the State will pay compensation out of a central fund to crime victims if the wrongdoer has no means that can be used for compensation purposes.
INSURANCE

In the modern society, an extremely important source of compensation for loss is that which is provided by insurance coverage.

Liability assurance (i.e. insurance cover in respect of liability to pay compensation to others) serves well the primary purpose of the law of delict which is to ensure that compensation is paid to injured persons, insofar as insurance cover assures the victim of *actual compensation* instead of merely obtaining an empty verdict against D who might well not have the financial means to pay damages.

As regards motor accidents, it should be noted that in terms of Part III of the Road Traffic Act No. 48 of 1976, it is compulsory for users of motor vehicles to be insured against third party risks. “Act only” or “minimum third party insurance” covers only physical injuries to third parties outside D’s vehicle. (But passengers being carried for reward in the D’s vehicle are covered up to a specified financial limit.)

If the required Road Traffic Act insurance coverage has not been taken out, the Motor Insurers’ Bureau, in terms of an agreement with the Minister of Roads and Road Traffic entered into in 1962, may still pay compensation to the injured party from a fund established for this purpose. A number of formalities have to be complied with before such compensation will be payable.
ASSESSMENT OF DAMAGES

General aspects

Broadly, the Aquilian action provides a remedy for patrimonial loss and the actio injuriarum affords compensation for sentimental loss. However, under the influence of Germanic custom, Roman-Dutch law accepted that there could be recovery for certain forms of non-patrimonial damage under the actio legis Aquiliae. In this latter regard, it is possible, under the modern Aquilian action, to recover damages for such things as pain and suffering, disfigurement, loss of amenities of life and loss of expectation of life.

Under the Aquilian action, “the basic principle under-lying an award of damages [under this action] is that compensation must be assessed so as to place P, as far as possible, in the position he would have occupied had the wrongful act causing the injury not been committed”. (Corbett, Buchanan & Gauntlett The Quantum of Damages in Bodily and Fatal Injury Cases.) In computing the level of damages, the court must therefore compare P’s position before and after the commission of the delict. Account must be taken not only of the positive loss suffered by him, but also of negative losses in the form of gains which P was prevented from making in consequence of the wrongful act. Thus, P who has been injured can claim not only for things such as medical and hospital expenses, but also for loss of earnings during the period of his disablement. Additionally, it is possible to claim for non-patrimonial damage, such as disfigurement and pain and suffering. These latter types of harm cannot be assessed with any mathematical precision, and the amount awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge’s view of what is fair in all the circumstances of the case.

In calculating damages for bodily injury, especially for non-patrimonial harm, the courts pay heed to the levels of awards in previous cases of a comparable nature. The courts seek to ensure that major discrepancies in the levels of awards do not arise as between comparable cases. This is merely a rough guide to calculation, however, and such comparison can only be undertaken where the circumstances of the cases are clearly shown to be broadly similar in all material aspects. When making comparisons with previous cases the courts take into account the decrease in the value of money which has occurred over the years, but Corbett, Buchanan & Gauntlett observe that the allowance made for such decrease is necessarily a rough one and should probably incline towards conservatism. In dealing with quantum of damages the court does not take into account the cultural or economic circumstances of the injured plaintiff. Thus, the court does not downgrade the level of damages because P is a very poor man, to whom money will mean a lot. By the same token, the very rich man is not entitled to more damages than the poor man in identical situations, because money means
less to the rich man. The court simply assesses the nature and extent of the injuries and the amount of loss, immaterial of the social or economic circumstances of the injured person.

In searching for comparable past cases the book by Corbett, Buchanan & Gauntlett is very useful. It contains some of the Zimbabwean cases as well as all the important South African decisions. Also useful is Koch’s book *Damages for Lost Income*. See also the last item in the cases section to this *Guide* where there is a summary of the important Zimbabwean cases on damages for personal injury.

**Single action**

As a matter of general principle, a person may only bring one action against the same defendant upon a *single cause of action*. Once he has brought that action his remedies at law are exhausted and he is precluded by the principle of *res judicata* from bringing a further action. P must therefore claim damages for all the harm flowing from the delict, because if he fails to do so, he will thereafter be precluded from claiming damages in a subsequent action. P thus must claim in a single action compensation both for the loss already suffered by him and the prospective loss which he reasonably expects to suffer in the future. If he fails to include the claim for prospective loss he will forfeit his right to such damages. This applies even if it only transpires later that the damage suffered was more severe than it appeared to be at the trial, or even though P did not know of such further damage at the date of the trial. So, too, if a delict causes both bodily injury and property damages, both claims must be combined in the same action.

In determining the *quantum* of damages for prospective loss, the court must consider all the contingencies and decide whether or not there is a reasonable probability of pecuniary loss occurring in the future. Although, strictly speaking, damages should be assessed at the date of the wrong, when considering claims for prospective damage the court is bound to inform itself of subsequently occurring facts, which are known at the date of the trial and which throw light upon the claim. In this way the difficulty of assessing prospective damages and the amount of speculation involved in such assessment are reduced.

There is some debate as to whether it is possible to claim solely prospective damages in an action where there has been no actual damage. Some *dicta* in the case law suggest that this is not possible, as prospective damages may be awarded only as ancillary to accrued damages. Corbett, Buchanan & Gauntlett, however, contend that such an action should be possible where the prospective damage can be established as a matter of reasonable probability.

The once and for all rule has been the subject of considerable criticism. The basic object of the rule is to save D from a multiplicity of actions based on a single cause of action and to
bring finality in claims for damages. But the rule causes major difficulties as regards prospective loss such as the extent of future disability. The prognosis as to what is likely to happen in the future may be highly speculative and may lead either to under-compensation if P’s condition unexpectedly deteriorates or over-compensation if his condition unexpectedly improves. In various countries they have modified the rule to allow interim awards, provisional awards or periodical payments. In Zimbabwe, the Law Development Commission has recommended the introduction of a system of provisional awards. See Report No. 43.

The report points out the harshness that this rule can cause to P and sometimes even to D. In a motor accident case where P is injured due to D’s negligence, P must claim in one action before prescription expires not only for compensation for the loss already suffered as a result of his injuries, but also for future losses that will stem from the injuries such as further medical treatment and further loss of earnings. This involves crystal ball gazing into the future to try to gauge what the future will bring: this entails asking such questions as will P’s medical condition deteriorate, and if so how badly, and what will be the cost of such treatment; will P’s condition improve over time and what earning capacity will P then have? Such estimates are exceedingly difficult to make and if they are too low they are unfair to plaintiffs and if they are too high, they are unfair to defendants.

The report points out however that there are also legitimate reasons for desiring finality in litigation in civil matters. Insurance companies object that if they have to keep their files open indefinitely this would clash with their policy of assessing appropriate premiums for potential claims on a turn-over basis which is related to a fairly limited period. This is made all the more necessary today by continuous inflation. There would be also considerable extra administrative costs involved if the once and for all rule were to be abandoned.

Taking into account these competing interests, the Law Development Commission has recommended the alteration of the hard and fast once and for all rule by allowing the courts to make interim and provisional awards in certain circumstances. These awards will only be able to be made against the State, parastatals and against insured persons or their insurers as these agencies have the administrative and financial capacity to be able to absorb the extra burden involved in this system.

Interim awards apply where D admits he/she is liable to pay compensation but there is a dispute as the amount of damages. It is unsatisfactory that P has to wait until completion of litigation before he/she receives any compensation. Once the court arrives at the final judgment, any interim award already made will be taken into account.
In a personal injury claim where the courts are satisfied that there is a reasonable possibility that the injured party may in the future develop a serious disease or suffer serious deterioration in his condition, the court should have the power to issue a provisional award, leaving it open to P to come back to court if the serious disease develops or serious deterioration occurs. The Rules of Court can then provide for placing a time limit on when any application for further damages may be made. Where a provisional award is made it will be based on the injured party’s present condition. The possibility of future injury should not be taken into account when assessing the present damages.

The recommendations contained in this report have not yet been adopted and implemented by Government.

**Special and general damages**

When damages are claimed in personal injury cases they are claimed in two broad categories, namely general and special damages. Special damages are those damages that have already occurred and can be precisely calculated at the date of the trial. These losses must be specifically claimed and proved with full details. They include such things as loss of wages, property damage, medical and other expenses incurred as a result of the injury up to the date of the trial.

General damages are those damages naturally flowing from the wrong that are of a non-pecuniary nature, such as, pain and suffering, loss of limbs and so on. The harm which has occurred in the past (e.g. pain suffered) or which he will suffer in the future (e.g. loss of amenities of life) does not have a precise value, but the court will decide upon an appropriate award with reference to comparable previous cases.

Items for which claims can be made in personal accident cases—

- Medical and hospital expenses (Past)
- Future medical expenses (Prospective)
- Other expenses occurring as a direct result of the accident (Past)
- Loss of earnings (Past)
- Loss of earning capacity (Prospective)
- Pain and suffering (Past and Prospective)
- Disfigurement (Prospective)
- Loss of amenities of life (Prospective)
- Shortened expectation of life (Prospective)

**Medical and hospital expenses**
P is entitled to recover damages for medical and hospital expenses reasonably incurred by
him and which are fairly attributable to the bodily injuries sustained in the accident. He can
also claim incidental expenses such as the cost of travelling to his medical adviser or to and
from hospital. If the medical treatment is still taking place at the date of the trial, P can claim
anticipated future medical and hospital expenses. P must establish that, as a matter of
probability, these expenses will need to be incurred. He can also claim for anticipated
ancillary losses, such as loss of earnings while undergoing future medical treatment.

**General damages**

In *Nyandoro v Minister of Home Affairs & Anor* HH-196-10 the broad purpose of an award for
non-patrimonial loss is to enable the claimant to overcome the effects of his injuries and to
provide psychological satisfaction for the injustice done to him. Since pain and suffering
cannot be accurately measured, the quantum of compensation to be awarded can only be
measured by the broadest general considerations. The compensation awarded should be
assessed so as to place the injured party, as far as is possible, in the position he would have
been in if the wrongful act causing him injury had not been committed.

General damages do not constitute a penalty but are designed to compensate the victim and
not to punish the wrongdoer. The court is entitled and has a duty to heed the effect its decision
may have upon the course of awards in the future. Moreover, awards generally must reflect the
state of economic development and current economic conditions of the country. Consequently,
they should tend towards conservatism lest some injustice be done to the defendant. No regard
is to be had to the subjective value of money to the injured party and, therefore, the award
cannot vary according to whether he is a millionaire or a pauper. Thus, the courts are not
concerned with the probably erroneous value that a person would put on his own life and
limbs, but with the dispassionate and neutral value which society at large would deem
appropriate on the basis of the prevailing value of money in that society. In assessing pain and
suffering, regard may be given to the age of the claimant because an older person has less
resistance to pain than a younger person.

In *Mbundire v Buttress* S-13-11 the appellant was involved in a road accident with the
respondent, as a result of which the appellant sustained serious injuries. The appellant claimed
for general damages, future expenses and replacement value for his motor vehicle. The court
held that if it is certain that pecuniary damage has been suffered, the court is bound to award
damages. Where the best evidence available has been produced, though it is not entirely of a
conclusive character and does not permit of a mathematical calculation of the damages suffered,
the court must use it and arrive at a conclusion based upon it. Where damages can be assessed
with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet
this requirement. Where this cannot be done, the plaintiff must lead such evidence as is available
to it (but of adequate sufficiency) so as to enable the court to quantify his damage to make an appropriate award in his favour. If there is evidence upon which an estimate not unfair to the defendant can be made, the court should not refuse to make an award merely on account of the deficiencies in the case presented upon the plaintiff’s behalf. Those deficiencies would normally operate to the disadvantage of the plaintiff in that the court would normally tend towards conservatism in computing the damages. \textit{In casu}, it certainly would have helped had the appellant undergone further examination so that the exact degree of his injuries could have been ascertained. This notwithstanding, the evidence placed before the court was sufficient to enable the court to make an award.

The basic principle underlying an award of damages in the Aquilian action is that the compensation must be assessed so as to place the plaintiff, as far as possible, in the position he would have occupied had the wrongful act causing him injury not been committed. The fall in the value of money is to be taken into account in considering comparable awards, but the allowance for inflation is a rough one and should incline towards conservatism.

\textbf{Pain and suffering}

P can claim for all pain, suffering and discomfort suffered, or to be suffered, by him as a result of D’s wrongful act. Account must be taken not only of the pain and suffering occurring as a direct consequence of the infliction of the injuries, but also of pain and suffering associated with surgical operations and other curative treatment reasonably undergone by P in respect of such injuries. The \textit{quantum} of damages in this regard is extremely difficult to assess and here particular regard should be had to comparable past cases as a guide to assessment. In making an assessment, the prime considerations are the \textit{duration} and \textit{intensity} of the pain. These factors will turn upon the nature of the injuries, the medical evidence and the general circumstances of the case. The test is a subjective one. The thin skull rule would apply here. If P is abnormally sensitive to pain he is entitled to greater damages than the normal person. Conversely, if P is abnormally insensitive to pain, he cannot enhance his claim by advancing evidence that the normal person would have suffered extreme pain.

Sometimes P has no recollection of the pain and suffering he has undergone. A distinction is drawn between pain of which the mind of the injured person was not aware at the time and which, for that reason, is not subsequently recalled, and pain of which the mind of the injured person was contemporaneously aware, but which, for some reason, he was unable subsequently to recall.

The injured person is entitled to recover compensation in respect of the latter, but not in respect of the former.
**Disfigurement**

Strictly speaking, damages for disfigurement should be merged into damages awarded for loss of amenities. Disfigurement includes bodily disfigurement such as scars, loss of limbs, facial and bodily distortion, etc.

**Disability**

A disability may be temporary or permanent. Where the disability has disappeared by the time of the trial, the claim would normally be merged with the claims for pain and suffering and loss of earnings. Where the disability is *permanent* or is likely to extend beyond the date of the trial, P will claim additionally for diminution in earning capacity and impairment or loss of amenities of life. Where P is alleging permanent disability he must show that he has no reasonable prospect of recovering. If he is alleging temporary disability he must show that there is no reasonable prospect of recovering prior to the date upon which he alleges the disability will cease. Sometimes P will seek to prove that a disability is likely to supervene, although at the date of the trial, it has not yet come about. The disability may be a physical or a mental one.

With regard to disabilities, P has a duty to mitigate his loss and this means that he must submit to any operation or other medical treatment that it is reasonable for him to submit to and which is reasonably likely to improve the condition and thereby mitigate the loss.

**Loss of amenities of life**

Limitations of amenities of life caused by permanent or temporary disabilities include impairment or loss of ability or desire to engage in sport, recreation, social commitments or other normal activities. Loss of, or impairment of, amenities would include such things as sexual impotence, sterility, loss of marriage opportunities, loss of general health, change of personality, nervous insomnia and the general handicap of a disability.

The fact that P is unaware of the loss of amenities due to brain damage or prolonged unconsciousness does not affect the claim. It is the actuality of the deprivation of the ordinary experiences and amenities of life caused by the injuries with which the law concerns itself.

Loss of amenities can include loss of general health and shortened expectation of life.

**Loss of earnings and of earning capacity**
If P’s injuries prevent him from working, he is entitled to damages for the income or wages he would have earned during the period of his incapacity.

If he has been permanently incapacitated, or his incapacity occupies a period extending beyond the date of the trial, he will be entitled to claim for loss of future earnings or loss of earning capacity. Where, as a result of his injuries, his expectations of life has been shortened, his claim for loss of future earnings must be computed with reference to his reduced lifespan. Basically, the mode of computation of loss of future earnings, where there is a permanent impairment of earning capacity, is as follows: firstly, the court will calculate the present value of the future income which P would have earned but for his injuries and consequent disability; secondly, it will calculate the present value of the estimated future income, if any, having regard to the disability; finally, it will subtract the second figure from the first and make any adjustments to the figure arrived at which are relevant.

To calculate the present value of future income without the disability, the courts have to determine the period over which P would normally have continued to work and earn his living, but for the accident. The determination of P’s expectation of life will be based either on medical evidence or, if his expectation was normal, actuarial evidence. His retirement age prior to the accident would have depended upon various factors such as his previous general state of health, the nature of his work, the terms of his employment and terms relating to retirement. The starting point is his earnings at the time of the accident, but allowance is made for possible future fluctuations.

For any award for loss of earnings or support, current inflationary trends must be considered to make sure money is still worth the same amount as at the end of the period for which the award was made.

In the case of Rusike v Tenda Transport (Pvt) Ltd & Anor HH-89-97, P had suffered serious injuries in a motor accident that had been entirely the fault of the other driver. The injuries were such that he would be unable to continue to work as a motor mechanic (he had been an apprentice motor mechanic) but that he would be able to move into some other type of employment provided that it was of a sedentary nature. As regards P’s claim for loss of future earning capacity the court decided that wherever possible the loss of future earning capacity should be assessed on the basis of an arithmetical, actuarial basis and not on the basis of a “gut feeling”. However, whilst the court should be guided by actuarial calculations it is not completely bound by them and must arrive at an award that is fair and just in the particular circumstances of the case. It decided further that in the present case although the court had evidence before it of what P would have earned in the future as a motor mechanic, it had absolutely no evidence as to what he might earn in an alternative career. In a case where there has been pecuniary loss but the court has no evidence on the basis of which an
In *Biti v Minister of State Security* 1999 (1) ZLR 165 (S) the court said that as regards the claim by P for loss of earnings, the claim for such damages should not be dismissed because he was earning that income by operating unregistered taxis or taxis that did not have certificates of roadworthiness. However, only the figure conceded by the defendant for such loss should be awarded because the courts cannot regard it as consistent with public policy to encourage the use of unregistered and/or unroadworthy vehicles as taxis.

*Gwiriri v Starafrica Corp (Pvt) Ltd* HH-20-10 P claimed damages for pain and suffering, loss of amenities and loss of future earnings after he had effectively lost the use of his right hand during an accident at work. The accident was caused by the negligence of his employer. The court held that the concept of the loss of amenities of life has been tersely but aptly defined as a diminution in the full pleasure of living. The amenities of life may further be described as those satisfactions in one’s everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one’s bladder and bowels. Factors that may influence the amount to be awarded include the age and sex of the injured person, as well as the disfigurement and its influence on the plaintiff’s personal and professional life: for instance how many of the activities he was able to do or participate in is he still able to or has he been incapacitated and what did those activities mean in his life? The assessment of an appropriate award for loss of earnings is not as easy as just multiplying figures based on the
plaintiff’s previous earnings. There are several contingencies that must be taken into account. As a starting point it is important, wherever possible, to deal with the matter on an arithmetical, actuarial basis as opposed to a “gut feeling” basis. While the court will generally have a regard to arithmetical calculation and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case. It is a fact of life that it is not in every case that one reaches retirement age. The probabilities or possibilities of early retirement or retirement due to ill health from natural causes, retrenchment and discharge by employer on other grounds have to be considered.

In the present case P was not rendered useless by the disability. What has been rendered of not much use is the right hand. His other limbs, his mental faculties and other abilities were unaffected by the injury. He should be in a position to learn how to effectively use the one remaining hand and embark on another career, which he did not seem to have done. Damages of the nature sought could not sustain him. He was not useless or hopeless. He had to mitigate his loss by engaging in meaningful activities. Due to the fact that he would be using one arm, there would be limits to the nature and extent of the employment or activities he can engage in. It is that deficiency or limitation that must be compensated by an award for loss of earnings.

In *Nyandoro v Minister of Home Affairs & Anor* HH-196-10 the court stated that in determining prospective loss, all the contingencies must be considered, including facts known at the date of the trial, in deciding whether or not there is a reasonable probability of pecuniary loss occurring in the future.
See for instance, *Herschell v Bredenkamp* GS-349-81 (capitalisation of loss of earnings) and *Jackson v Minister of Defence* HB-60-88
See *Herschell v Bredenkamp* GS-349-81 Capitalisation of loss of earnings; *Jackson v Minister of Defence* HB-60-88

**Parties who may sue in bodily injuries cases**

Primarily, the person entitled to sue for damages for bodily injury is the injured party himself. In cases where he is a minor, or for some reason does not have *locus standi in judicio*, his natural guardian or legal representative must bring the action, but this action nevertheless represents a claim by the injured party himself. However, in certain circumstances, other people may sue.

**Father**
A father may sue to recover damages in respect of medical expenses and loss of services where his minor child has sustained bodily injury. This rule is founded upon the ancient concept that a child was in *dominio patris* and injury to him constitutes a loss of the father’s property. Under present day conditions, the rule might be justified on other grounds. Medical expenses may be claimed on the ground that the father, as a parent, is obliged to furnish these as part of his obligation of support. Loss of services may be claimed for where the child is obliged to give his services on the ground that the father, through being deprived of the right to demand such services, has suffered patrimonial loss. It is clear that a father may not sue, in his own right, for damages in respect of disfigurement, pain and suffering, disability, etc. to the minor.

**Husband**

A husband may claim damages against someone who has caused bodily injury to his wife and thereby deprived the husband of his wife’s services. The husband must be able to show that the loss of his wife’s services has actually caused him patrimonial loss. Marriage in or out of community of property makes no difference to his right once established, but it is an important factor in determining whether or not such duty exists.

The patrimonial loss in this cause would be, for instance, the cost of replacing her in providing for the care and upbringing of children and the running of the household. It would also include the value of the wife’s services as assisting the husband in the business. Naturally, patrimonial loss would cover out-of-pocket expenses, such as hospitalisation, medical expenses, etc. paid in respect of the wifeÆs treatment.

A husband has no claim, unlike English law, for damages for being deprived of his wife’s comfort and society as a consequence of death or bodily injury.

**Wife and children**

The right of a wife or child to claim loss of support for a husband’s or father’s injuries only arises when those injuries result in death. This is because, if as a result of injuries sustained, a husband and father has a diminished earning capacity, then he is the person who is entitled to claim. However, it should be noted that a wife married out of community of property, who, by reason of her husband’s indigence, is under a legal duty to maintain and support him, would be entitled to claim damages for medical and other out-of-pocket expenses paid by her. The same would apply to a child.

**Employer**
The court held in the South African case of *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A), that an employer has no right of action for loss of his servant’s services, although the old Roman-Dutch authority did allow recovery in respect of loss of a domestic servant’s services. It would seem unlikely that in the modern context a distinction would be made between domestic workers and other employees in this regard.

**Property damage**

Where property has been destroyed or damaged, P is entitled to be put in as good a position that he would have been in had the wrong not been committed. The amount of damages to which P will be entitled if his property has been damaged will be the difference between the market value of the thing before and after the damage assessed at the time of the delict. The courts will take the reasonable cost of repairing the damage as the measure. But P must prove the reasonableness of the repairs. In *Halfpenny v Mujeyi & Anor* HH-96-88, P whose vehicle had been damaged had not proved the reasonableness of repairs simply by producing a quote and invoice from the company carrying out the repairs. On the other hand, in the case of *Mutendi v Maramba* 1994 (2) ZLR 41 (H) P had gone to two panel beaters to obtain quotes and had accepted the lower quote.

In *GDC Hauliers (Pvt) Ltd v Chirundu Valley Motel* 1988 (Pvt) Ltd 1998 (2) ZLR 449 (S) a vehicle belonging to D collided with an electricity pole at P’s hotel, causing an electrical blackout and resultant damage to some electric motors. The driver of the vehicle was admittedly negligent. Repairs were carried out on the motors. P sought to rely on the account from the repairer to establish the quantum of damages. The court held that where a person claims damages arising out of repairs following damage caused by another’s negligence, he must show that the repairs were necessary and that the cost of the repairs was fair and reasonable. The repairs must also be shown to be necessary to bring the article back to its pre-accident condition. It is not enough for P merely to produce an account from the repairer. Without such evidence, the damages cannot be proved.

In *Ebrahim v Pittman NO* 1995 (1) ZLR 176 (H) P claimed damages resulting from an accident in which P’s vehicle, a mechanical horse towing two trailers loaded with grain, was involved in a collision with a car. P claimed the cost of repairs to the mechanical horse; the cost of replacing the tri-axle and independent trailers; recovery expenses; and loss of profits caused by the inability of the plaintiff to carry on part of his business due to the unavailability of the vehicle. On the question of damages, P had the vehicle and trailers repaired at his own workshops, though he had obtained quotes from two panel beaters. No job cards or other documentary evidence were produced and P’s oral evidence was vague as to the cost to him of carrying out the repairs. Although P claimed that the trailers were no
longer able to carry the weights they could before, certificates of fitness had subsequently been obtained. D called an insurance assessor, who gave his opinion as to the diminution in value of P’s vehicle and trailers as a result of the accident. On the question of loss of profit, the parties reached a compromise agreement. The court held that where damages to property are claimed, P must lead adequate evidence to enable the court to quantify his damages. Where the damages can be assessed exactly, P is expected to lead enough evidence. Where he cannot produce such evidence, there must be at least enough evidence for the court, even with difficulty, to make a fair approximation of the P’s mathematically unquantifiable loss. If such evidence is not produced, D is entitled to absolution. The P’s evidence in this case was vague and unsubstantiated by documentary evidence. The evidence of the insurance assessor called by the defendant accordingly would be accepted.

**Interest on damages**

In terms of s 6 of the Prescribed Rates of Interest Act [Chapter 8:10] there are provisions relating to unliquidated claims e.g. for pain and suffering and for disfigurement. It is provided that once the amounts of such claims have been fixed by the court, interest is payable at the prescribed rate from the date the cause of action arose (e.g. the date of the motor accident that caused the injury) but the court has a discretion to order that interest is payable over a more limited period. In the case of *Mutendi v Muramba & Anor* 1994 (2) ZLR 41 (H), the court ordered that interest on damages for pain and suffering and disfigurement should be payable from the date of the accident, but that interest on the cost of repairs to the car should only be payable from the time the repairs were actually paid for.

In *Biti v Minister of State Security* 1999 (1) ZLR 165 (S) the court decided that it would not be fair to make interest run from the date of the accident, since general damages were calculated as at the date of judgment. Interest was ordered to run from the date of service of summons.

See also *Mutendi v Muramba & Anor* HH-89-94

**Damages for causing death**

**Patrimonial loss to estate**

This includes medical expenses prior to death and funeral expenses. Heirs cannot, however, claim damages for disappointed expectations based upon arguments that if the deceased had lived longer they would have inherited more.
Loss of support

In order for an action to be brought under this head, it must be proved that the deceased owed a legal duty of support to the claimant during the deceased’s lifetime. Thus, a wife can bring such a claim in respect of the death of her husband, and she will usually have no difficulty in proving a right of support, the only exception being where the husband was too indigent to provide any support. (It is interesting to note that under s 3(1) of the British Fatal Accidents Act of 1976 even a “common law wife”, that is, a person who has been living with the deceased outside wedlock, is entitled to claim for loss of support if she had been living with the deceased for a period of at least two years prior to his death.) In the case of Zimnat Insurance v Chawanda 1990 (2) ZLR 143 (S), the Zimbabwean Supreme Court ruled that a woman married to a man in an unregistered customary law marriage can claim for loss of support arising out of the death of her husband. A husband can sue in respect of his wife’s death if the wife had a legal duty to support him or to contribute towards his support. A child (even an illegitimate child) can sue for loss of support caused by the death of either parent. Even a child who has attained majority can sue if he can prove a continued duty of support after majority.

A parent can sue for loss of support caused by the death of a child if he can prove that he could not support himself and he was dependent upon the support provided previously by the deceased child. Even an indigent brother can claim in respect of the death of a brother who was supporting him, if he can prove that the parents could not provide support. However, the duty of support cannot usually be taken to extend to more distant relatives.

As regards the customary law position as to whether relatives can claim for negligent causing of death, see Tsara v Mutongawafa S-17-82 and Dlikiliki v Federated Insurance 1983 (2) SA 275 ©.

It would seem that a contract by the deceased to accept all risk of injury cannot be set up against the deceased’s dependants (i.e. the defendant is not able to raise volenti non fit injuria as a defence to the dependant’s action - see under the defence of volenti). However, apportionment applies to D’s action (i.e. the amount of damages payable to the dependant for loss of support will be reduced by the extent to which the deceased was at fault).

The computation of damages for loss of support may only take into account the actual material loss caused to the dependants. Their mental suffering and distress cannot influence the quantum of damages, unless a recognised mental ailment is caused by the shock of witnessing the death in circumstances where the law would accept that the causing of the mental condition was reasonably foreseeable.
As regards a claim for loss of support by a husband arising out of the death of his wife, see *McKelvey v Cowan NO* 1980 ZLR 235 (G)

In *Mabaire v Jailosi & Anor* HH-228-10 the court stated that damages for loss of support constitute general damages, and as such, are calculated as at the date of judgment. In most cases, the plaintiff relies either on medical or actuarial evidence; or on the general evidence of the deceased’s earning capacity prior to his or her death; or on both. Where there is proof of loss of support, even in the face of inadequate evidence, the court is enjoined “to pluck a figure from the air”. Judgment will, however, be denied to a plaintiff who through lack of diligence fails to produce evidence that would have been available to him or her. The total amount of loss of support that is arrived at may be subjected to two discounts. The first of these discounts caters for the capitalization rate of the award. This is often equivalent to the rate of interest that the plaintiff would earn on investing the award. The second discount caters for contingencies, such as errors in calculations, taxation and other unforeseen events. While the level of maintenance that the deceased used to provide to his family is important, the court cannot use the expenses incurred by the plaintiff to calculate the loss of support without reference to the deceased’s earning capacity. It is a basic fact of life that expenses may often be much higher than a breadwinner’s earning capacity, so to use the expenses to calculate the estimated loss of support may distort the award for loss of support to the prejudice of the defendant and would amount to an improper exercise of the court’s discretion.

It should be noted that in terms of s 25(5) of the Road Traffic Act [*Chapter 13:11*] only one dependant is required to take legal action against an insurer in respect of all the deceased’s dependants.

See also *Jameson’s Minors v CSAR* 1908 (1) TS 575, 589; *Munarin v Peri-Urban Health Board* 1965 (1) SA 545 (W); *Evins v Shield Insurance Ltd* 1980 (2) SA 814 (A) at 837; *Victor NO v Constantia Insurance* 1985 (1) SA 118 (C) 122G; *Tsara v Mutongawafa* S-17-82; *Dlikilili v Federated Insurance* 1983 (2) SA 275 (C)

**Duty to mitigate loss**

P is bound to mitigate or minimise his loss. This duty arises as soon as P realises that he or she has suffered loss by reason of the wrongful act of D. P’s duty is not an absolute one: it is simply a duty to take all reasonable steps to minimise the loss that has already occurred or to avert harm in the future. Where P has failed to take such reasonable steps P is debarred from recovering any loss that results from this failure. P will not be compensated for such portion of his loss as could have been avoided by taking reasonable steps. P has the further duty to avoid aggravating his damages by his own wanton or careless conduct. The onus is on D to
prove that P did not take reasonable steps to mitigate or was guilty of aggravating his damages.

See *Cargo Carriers (Pvt) Ltd & Anor v Nettlefold & Anor* 1991 (2) ZLR 139 (S) The amount payable for repairs to a vehicle had been increased due to the delay on the part of P. D was not liable for the extra amount attributable to the delay.

*Magoge v Zimnat Lion Insurance Ltd* 2003 (2) 382 (H) P is under no duty to mitigate loss but if he fails to do so he may have his damages reduced. The onus of proving that he did not take such reasonable steps is on D.

*Fokoseni v Lobels Bakery* 2004 (1) ZLR 406 (S) A person wrongfully dismissed from employment must mitigate his loss without delay. He must look for alternative employment. In the circumstances P could not have done more to mitigate his loss.

**Collateral source rule (res inter alios actae)**

Under the common law, the fact that the injured party or a dependant of the deceased receives compensation or benefits from a collateral source, wholly independent of the wrongdoer or the wrongdoer’s insurer, does not operate to reduce damages recoverable by the claimant. This rule has been justified on the basis that it is inequitable to allow D to benefit from the fact that P has been prudent enough to insure himself or pay into a sick fund or from the fact that a third party happens to have been benevolent towards P, as where there has been gratuitous payment of the wages of an injured employee. However, as Boberg at p 478 points out, this rule cuts across the object of delictual damages, that is, to compensate for material loss and points out that “this subversion of the pecuniary loss principle has been criticised and its fallacious foundations exposed”. The rule, however, continues to be applied, but in South Africa where the collateral benefit derives from the same contract of employment that P has relied upon to prove his loss of earning capacity, the benefit will be taken into account. See *Dippenaar v Shield Insurance* 1979 (2) SA 904 (A) where a statutory pension was taken into account; *Serymela v SA Eagle Insurance* 1981 (1) SA 391 (T) where a contractual right to “sick pay” was taken into account. See also *Krugell v Shield* 1982 (4) SA 95 (T) and *Gekhring v Union National* 1983 (2) SA 266 (C). *Dippenaar*’s case lays down that compulsory payments into an in-house fund within his employment must be deducted, whereas if the payments were voluntary and not compulsory these would not be taken into account. This distinction has been criticised and it has been argued that such payments should be disregarded both when they are compulsory and when they are voluntary. (See Boberg p 491.) No such deductions are allowed in England. See *Parry v Cleaver* 1970 AC 1 (HL).
Fleming, in *An Introduction to The Law of Torts* (2nd ed) at p 130, suggests that the best solution in this situation would be to compel D to reimburse the collateral source. This would compel the defendant to pay in full without conferring a windfall (in the form of double compensation) upon P. This could be done by subrogation whereby the insurer, having paid the insured, can assert the latter’s rights against the tortfeasor or by conferring an independent right to reimbursement upon the agency paying compensation to the injured party. Careful note should be taken of the Damages (Apportionment and Assessment of Damages Act [Chapter 8:06]. In s 3, it is provided that:

(1) In assessing damages for loss of support as a result of the death of a person no insurance money, pension or benefit which has been or will be or may be paid as a result of death shall be taken into account.

The terms “insurance money”, “pension” and “benefit” are defined in s 2 of this Act.

Under the old Workers’ Compensation Act, payments from the compensation fund to the injured worker or his or dependants were not collateral benefits, but had instead to be deducted from the claim against a person delictually liable for the accident. Thus, in s 9 it was provided that the injured worker could only claim additional compensation in a court action against a party negligently causing injury, that is additional to that payable under the Workers’ Compensation Scheme. Under s 9(3), the court was specifically enjoined in making such an award to have regard to the compensation paid or to be paid under the Act. On the other hand, under s 53, it was provided:

Save as is provided under this Act, there shall be no abatement of the amount of compensation which the Commissioner or the employer individually liable has to pay under this Act by reason of the fact that, in consequence of the accident causing disablement or death, money has become due to the workman or his dependants under an accident or life insurance policy effected by himself or any other person.

Under s 10(1)(b), the Workmen’s Compensation Commissioner had a right to recover compensation paid against a third party, other than the employer, who was legally liable for causing the accident.

See *Dippenaar v Shield Insurance* 1979 (2) SA 904 (A) A statutory pension was taken into account; *Serymela v SA Eagle Insurance* 1981 (1) SA 391 (T) Contractual right to ‘sick pay’ was taken into account; *Krugell v Shield* 1982 (4) SA 95 (T); *Gekhring v Union National* 1983 (2) SA 266 (C); *Parry v Cleaver* 1970 AC 1 (HL)
Inflation (fall in value of money)

In *Biti v Minister of State Security* 1999 (1) ZLR 165 (S) the court said that as regards general damages it is not safe to obtain guidance from other countries, given that our economies have changed so greatly and so differently. When referring to a comparable earlier Zimbabwean case, the fall in the value of money must be taken into account. The consumer price index should be used to calculate the equivalent figure in the present case of the damages awarded in the earlier case.

In *Muzeya NO v Marais & Anor* HH-80-04 the court said that where making a claim for a debt sounding in money, the principle of nominalism requires that any award must be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency. This principle does not apply to loss of future earnings or future support or where a comparison has to be made of previous awards in quantifying non-patrimonial loss.

In *Muchabaiwa v Chinhamo & Anor* HH-179-03 the court said that in cases where damages are sought for pain, suffering, disablement, disfigurement and shortened life expectancy, comparable cases, when available, should be used to afford some guidance to assist the court in arriving at an award which is not substantially out of accord with previous awards in broadly similar cases, regard being had to all factors which are considered to be relevant in the assessment of general damages. However, in Zimbabwe at present, account needs to be taken of the horrific rise in the rate of inflation, which is eroding the value of Zimbabwean currency. An award made a year ago for the same level of disability would not represent a true reflection of the award that should be made today.

See also *Huiberts v Cohen* GS-172-81; *Herschell v Bredenkamp* GS-349-81

**Selected cases on damages for personal injury**

*Robinson v Fitzgerald* 1980 ZLR 508 (G) D mounted a prolonged assault on P in P’s house. There was contumelia and pain and suffering. The court awarded $1 800 in general damages.

*Orne-Glieman v General Accident Insurance* 1980 ZLR 454 (G) A vigorous elderly man was rendered a virtual cripple as a result of a motor accident. He was awarded $8 000 general damages.

*Santam Insurance v Paget* (1) 1981 ZLR 73 (G) The court discussed how the court should proceed when it has insufficient information to assess accurately a claim for loss of future earning capacity.

*Mendelsohn v Santam Insurance* GB-50-81 A 14-year-old girl lost 3 teeth and suffered lacerations to her face in a motor accident. The court had to decide upon how much to award

*Herschell v Bredenkamp* GS-349-81 A 17-year-old girl suffered head injuries resulting in brain damage, personality change and some disfigurement and also a wrist injury which would be likely to result in arthritis in the wrist. The court awarded $31 800 in general damages. It discussed the process of calculating loss of future earnings.

*Tena v UANC* HS-367-81 Motor accident. A young child suffered a leg fracture and this resulted in a slight shortening of the leg. He was awarded general damages of $2 400.

*Chibobo v Chidangi* GS-341-81 D shot P in the leg. P suffered severe initial pain and permanent inability to participate in sport. He was awarded $1 250 in general damages.

*Mabatapasi v John* HH-265-82 P lost an eye and was unable to participate in most ball games. He was awarded $6 000 in general damages.

*Gorah v Nhika* HH-40-83 Motor accident. P suffered major injury and consequent disability. He was awarded $12 000 in general damages.

*Moyo v Abraham* HH-467-84 A woman poked a pregnant woman on the forehead with her finger and and challenged her to fight. P was awarded $100 damages.

*Mayisva v Commercial Union* 1984 (2) ZLR 181 (H) P suffered severe injuries to the arm necessitating prolonged treatment. P was unable to engage in previous sports and hobbies. He was awarded general damages of $6 000.

*Ziyeresa v Fleming* HH-92-84 P was shot by D. This resulted in P losing his leg below the knee. He was awarded general damages of $3 500.

*Mutandiro v Mubawwa* HH-354-84 Motor accident. A builder suffered a fractured arm and leg and this incapacitated him from active building work. He was also left with a permanent limp and arthritis. He was awarded general damages of $10 000.

*Nyangani v Maziwesi Bus Service* HH-160-84 Bus accident. P was unconscious for 4 days and sustained an injury to the neck. He suffered pain. He was awarded general damages of $4 000.

*Hunt v Ndangama* HH-138-84 Assault ear lobe bitten off and other minor injuries general damages $1 000.

*Shepherd v Zimnat Insurance* HH-467-84

*Mathe v Maseko* HB-77-85

*Katsiru v National Railways* HH-238-85 Motor accident A 57-year-old farmer in communal lands had to have right foot amputated and suffered extreme pain $7 500 general damages (effects of inflation taken into account) $6 000 for artificial limb.

*Mabvoro & Anor v Muza* HH-199-85 P 1: Motor accident woman both legs fractured permanent pain reduced ability to walk and perform household chores inability to continue peasant farming general damages $20 000 (pain, loss of amenities and disfigurement). (P 2: Broken wrist and leg chronic pain, limp and scarring reduced ability to work general damages $15 000.

*Webster v Chivhaya* HH-209-85 Motor accident 61-year-old man resulting in backache, limping and inability to continue farming. $10 000 general damages (pain, disfigurement and loss of amenities).

*Manyika v Nyarume* HH-97-85 A motor accident led to P suffering injuries resulting in a slight limp and discomfort when he walked long distances. $8 500 general damages.
Chipinda v Zimbabwe Express Motorways HH-55-86 P was run over by bus. P was a self-employed carpenter. He suffered severe multiple injuries. He was awarded general damages of $25 000. The court commented upon the process of calculation of future loss of earnings.

Chaza v Ramajan HH-459-88 An accidental discharge of a weapon resulted in 21-year-old being paralysed from waist down. He also suffered some pain. He was awarded general damages of $5 000.

Nyathi v Tshalibe HB-158-88 An assault resulted in the perforation of P’s eardrum. He suffered persistent pain and permanent deafness in ear. He was awarded general damages of $2 200.

Chikanda v Mukumba HH-210-88 Motor accident. A 28-year-old constable suffered a severe compound fracture of the tibia and fibula. He had to spend 50 days in hospital and was in severe and prolonged pain. His right leg was an inch shorter and he had arthritis in his ankle. He was no longer able to participate in sport. He was confined to office duties. He was awarded $7 000 in general damages.

Jackson v Minister of Defence HB-60-88 Motor accident. A recently qualified young doctor suffered severe head injuries and various fractures. He spent 22 days in the intensive care unit. The injuries resulted in loss of his sense of smell, loss of memory, impaired speech, double vision, a shortened left leg and emotional instability. He was only able to perform simple medical tasks. He was awarded $35 000 in general damages.

Dube v Manimo HB-44-89 Knife attack causing cuts and resulting in amputation of ring finger on one hand other hand already disabled from polio $3 000 general damages.

Muchechetere v Boka HH-148-89 Motor accident. A young boy sustained a thigh fracture and bruising. He was in severe pain for a long period. He had an 8% permanent disability to his leg. The court awarded $6 000 in general damages.

Hokonya & Anor v Chinyanyi & Ors HH-17-95 A four-year-old child was so severely injured in a car accident that the child was reduced to a permanent vegetative state. The court awarded general damages in the amount of $65 000 for pain and suffering, loss of amenities, disfigurement and loss of expectation of life.

Ndawana v Nasho & Ors 2000 (1) ZLR 23 (H) an elderly pedestrian was knocked down by a motor vehicle that had veered off the road. He was seriously injured suffering several fractures to his leg. He had experienced severe and prolonged pain. He was awarded special damages of $30 000. (In deciding this case, the judge referred to a number of South African and Zimbabwean judgments for comparative purposes.)

Vellah v Moyo & Anor HB-101-10 an elderly pastor was assaulted by being severely beaten in his buttocks after being accused of being a member of a particular political party. He had suffered a lot of pain. He was awarded $50 000 general damages.

Mungofa v Muderede & Ors HH-129-03 P, a 40-year old woman was seriously injured in a motor accident. Her cheeknone and both her legs were fractured, he jaw was injured and she endured over four weeks of hospitalization and six operations to treat and remould her broken bones. She was bedridden for four or five months. In all, she suffered 45% disability. As a result of her injuries she was confined to crutches or a wheelchair and lost her employment as a sales manager. She was awarded a total of $8,573,941 of which $300,000 were special damages. From the total sum the court subtracted the amount P had been repaid from her medical aid.

Muchabaiwa v Chinhamo HH-179-03 P was standing on the side of the road when a commuter bus swerved off the road and hit her. She sustained some brain damage and
disfiguring injuries, was unable to walk without a stick and then only for short distances, spent a lot of time in bed and suffered epileptic seizures and continuous severe pain. She claimed $800 000 for pain and suffering and $100 000 for future medical expenses. The court held that the amounts claimed were reasonable.

*Chirinda v Minister of Home Affairs & Anor* HH-150-03 P was a bystander injured by a shot fired by a policeman who was attempting to control a riot. The bullet severed P’s spine, resulting in complete paralysis of his lower body and 100 per cent disability. He lost all bowel and bladder control, was confined to a wheelchair, was unable to take up any employment, and developed suicidal tendencies. He was awarded $1.5 million for loss of amenities of life, in addition to special damages to cover his medical expenses and loss of income.

*Gwiriri v Starafrica Corp (Pvt) Ltd* HH-20-10 P claimed damages for pain and suffering, loss of amenities and loss of future earnings after he had effectively lost the use of his right hand during an accident at work. The accident was caused by the negligence of his employer. The court held that the concept of the loss of amenities of life has been defined as a diminution in the full pleasure of living. The amenities of life may further be described as those satisfactions in one’s everyday existence which flow from the blessings of an unclouded mind, a healthy body, and sound limbs. The amenities of life derive from such simple but vital functions and faculties as the ability to walk and run; the ability to sit or stand unaided; the ability to read and write unaided; the ability to bath, dress and feed oneself unaided; and the ability to exercise control over one’s bladder and bowels. Factors that may influence the amount to be awarded include the age and sex of the injured person, as well as the disfigurement and its influence on the plaintiff’s personal and professional life: for instance how many of the activities he was able to do or participate in is he still able to or has he been incapacitated and what did those activities mean in his life?

The assessment of an appropriate award for loss of earnings is not as easy as just multiplying figures based on P’s previous earnings. There are several contingencies that must be taken into account. As a starting point it is important, wherever possible, to deal with the matter on an arithmetical, actuarial basis as opposed to a “gut feeling” basis. While the court will generally have a regard to arithmetical calculation and to actuarial evidence of probabilities to assist it in its assessment, ultimately it must decide whether the results of such calculations and evidence accord with what is a fair and just award in each particular case. It is a fact of life that it is not in every case that one reaches retirement age. The probabilities or possibilities of early retirement or retirement due to ill health from natural causes, retrenchment and discharge by employer on other grounds have to be considered. In this case P was not rendered helpless by the disability. What has been rendered of not much use is the right hand. His other limbs, his mental faculties and other abilities were unaffected by the injury. He should be in a position to learn how to effectively use the one remaining hand and embark on another career, which he did not seem to have done. Damages of the nature sought could not sustain him. He was not useless or hopeless. He had to mitigate his loss by engaging in meaningful activities. Due to the fact that he would be using one arm, there would be limits to the nature and extent of the employment or activities he can engage in. It is that deficiency or limitation that must be compensated by an award for loss of earnings.
REFORMING LAW OF DELICT

How does our system of delict operate in relation to the underprivileged sections of our community? Is it possible for injured persons with limited financial resources to obtain quick and adequate compensation for their injuries through the present delict system?

Most delictual actions are brought under Aquilian action and most Aquilian actions are based on allegations of negligent, rather than of intentional wrongdoing. It is appropriate therefore to explore how a system of civil liability based upon proof of negligence operates in Zimbabwe.

Social context

To put this debate into a social context there are two main approaches to accident compensation, namely, the individual responsibility theory and the social responsibility theory.

Individual responsibility

Under a fault system of civil liability, what is stressed is the factor of individual responsibility. If one person has been harmed by another, the person causing the harm is held liable to pay compensation, provided that the author of the harm was negligent in its infliction. Under this approach, it is considered as being both unfair and unjustified to impose delictual responsibility unless there was fault. In this regard, much stress is laid upon the deterrent function of civil liability. If harm, it is argued, is caused accidentally without fault, the loss should lie where it falls as deterrence is in no way served by punishing a doer who has taken all reasonable care. On the other hand, if D is careless he should be penalised by being made to pay damages, not only to compensate the injured party, but also to encourage him and others to exercise due care in the future. In capitalist societies, another often unstated reason for shying away from strict liability is that such a liability system will serve to discourage private enterprise initiative by placing an intolerable economic burden upon the entrepreneur. As Fleming points out in his book *An Introduction to the Law of Torts* 2nd ed at pp 6-8, these justifications for the fault system have been drastically affected by two important contemporary phenomena.

Firstly, major inroads are made into the idea of individual responsibility by insurance. By the device of insurance, it became possible to shelter the individual tortfeasor from the economic consequences of an adverse claim by spreading the cost among the public in the form of premium payers. Delictual liability thus became more or less painless for the individual tortfeasor.
By approving insurance schemes, the law impliedly abandoned the principle of individual responsibility. This is justified, however, on the basis that insurance achieved the dual benefits of safeguarding D from the potentially ruinous consequences of an adverse judgment and assuring his victims of actual compensation instead of merely achieving an empty verdict against a defendant who might well be financially impoverished. According to Fleming, the law of delict has thus lost its role as a champion of individual responsibility and of playing a major role in accident deterrence.

Secondly, with enterprises causing delictual harm, these enterprises can frequently absorb as overheads the costs of delictual damage liability in a similar fashion to other production expenses by passing on the cost of these to their customers (loss distribution). (Where there are stringent price controls, however, loss distribution may not be possible.)

Fleming op cit., p 10 deals with the effects of these phenomena on the fault theory as follows:

As long as delictual liability was seen to involve just a shifting of loss from one individual to another, the desire to compensate the victim was not enough to justify impoverishing the injurer. But now the equation has shifted: if the victim can be assured of compensation without involving a corresponding loss to the injurer, the focus of individual responsibility and fault tends to blur. It becomes more economically allocated: in short, the philosophical criterion is yielding to the economic; we are involving the utilitarian calculus of balancing benefit and cost.

In other words, where losses are distributed by insurance from the negligent driver, owner or employer to an insurance company, the fault criterion loses much of its value and the quest should be to design a scheme whereby the maximum benefits can be obtained for the injured party at the minimum possible costs.

**Social responsibility**

The social responsibility theory, on the other hand, lays the emphasis upon the responsibility of society to look after victims, whether or not the injuries are caused by negligent action, and rejects the idea that the entitlement to compensation should depend entirely upon whether P is able to prove in a court of law that a defendant negligently caused him harm.

Finally, looking at these two approaches in the political context, Atiyah in his important book *Accidents, Compensation and the Law* 3 ed at p 11 has this to say:
The distinction between an individualistic political philosophy and a more socialist philosophy affects the choice of compensation systems over and over again. Those who believe in “community care” recognise a moral obligation on society as a whole to care for those unable to care adequately for themselves; to search out those in need of such care; to offer them the help and care, partly at least in the form of help and welfare in kind. On the other hand, the more rugged individualism of the nineteenth century which still has its devotees today would insist more strongly on the personal responsibility of those who cause accidents and less on society’s responsibility for catering for these victims; it encourages the belief that those who need “help” can be left to obtain it themselves, so long at least as the State supplies the coercive framework within which those “responsible” for accidents can be made to answer for those misdeeds; and that this help is best given in the form of cash payments which the recipient is entitled to spend as he pleases.

**Operational defects of fault system**

In recent years, the fault system of compensation has come under increasing attack in developed countries and a number of countries have introduced or are considering the introduction of a variety of non-fault schemes, either State-run or operated through private insurance. The most comprehensive of State-operated systems is that which was first introduced in New Zealand in 1974.

In developed countries, the major shortcomings of the fault system which have led to these moves to replace it are:

The system is inordinately expensive to administer and in terms of the cost/benefit ratio it is highly inefficient. Prosser and Keeton on *Torts* 5 ed at pp 598-599 draws attention to the fact that—

As regards these costs one survey in England disclosed that with road accident compensation which is based on proof of fault it cost 74p to distribute £1 whereas under the industrial accident compensation system which is a no-fault system it only cost 15p to distribute £1. So too the excessive distributional costs of a fault system were clearly illustrated by the Pearson Commission in England where in their 1978 report estimated that under the tort system the cost of operation was about 85% of the value of the compensation paid (i.e. it cost about £171m to transfer £202m) whereas under the social security system the cost of operation was only about 11% of the value of the compensation paid (i.e. it cost about £46m to transfer £421m).

The system of liability based on fault has been referred to as a lottery because in many cases the inherent vagueness of the negligence concept makes the outcome in delict cases
The concept of fault is especially nebulous, inaccurate and difficult to prove in motor collision cases. In more general terms, Atiyah makes a quite devastating critique of the application of the negligence criterion in his book *Accidents, Compensation and the Law*. Prosser and Keeton *op cit* p 599 sum up the criticisms of the fault system as follows:

The whole picture is one of a fumbling and uncertain process of awarding a judgment upon the basis of unreliable evidence, fraught with ruinous delay, which fails entirely when proof of fault fails, leaves the entire remedy worthless against many defendants who are not financially responsible and diverts a large share of the money to attorney fees even when it can be collected.

The bringing of a negligence case to court is a laborious process and the proof of negligence in court may be a protracted process. This means that there are often exceedingly long delays between an accident and the final securing of compensation and this can cause great hardship in cases where compensation is immediately needed.

In one British survey, it was established that delays of over two years in motor accident cases were not uncommon and that, of the 42% of accident victims who managed to obtain any compensation at all (i.e. 58% of the victims were uncompensated), only 13% were paid out in less than a year, 20% were paid out in the second year, 6% in the third year and 3% in the fourth.

It is clear that the defects in the fault system that have been identified as applying in developed countries are substantially magnified in underdeveloped countries. This applies to Zimbabwe.

**Particular shortcomings of fault system for underprivileged people**

Our system of fault liability often results in gross injustice to financially underprivileged plaintiffs and the only persons who can adequately exploit the fault system to their advantage are the wealthy. Some of the particularly harsh effects for the financially impoverished claimant in Zimbabwe can be identified.

Firstly, there is the widespread incidence of what might be termed legal illiteracy. People are often unaware that they are entitled to claim compensation or, if they do know, they will not know how to pursue their claims and what they must establish before compensation will be paid.
Secondly, under a fault system poor claimants start from a decidedly weak bargaining position. The practical effect of this weak economic position may often be that such claimants may either receive no compensation or they may be substantially under-compensated for their injuries. If a claimant lacks the financial resources to pursue his claim in court, he may effectively be left remediless as, even in a clear cut case of fault, D can simply deny negligence knowing that P is unable to take the matter to court. Civil legal aid in this country is extremely limited in its scope and only a handful of potential claimants who are too poor to be able to go to court without assistance are enabled to pursue claims under the *in forma pauperis* system. When the claimant has barely adequate means to initiate a court case, he may frequently fear to commit those meagre financial resources to the uncertain chance of succeeding in a delict claim. Not only does the inherent vagueness of the negligence criterion make people reticent about going to court but also if a wealthy D or an insurance company is opposing, P will be aware that the other side will be able to mobilise far superior resources both to gather evidence favourable to its case and to employ very skilful lawyers to argue its case.

The claimant’s inferior bargaining position often means that he will be forced to accept a totally inadequate out of court settlement and thus the financially well endowed defendant may artificially be able to minimise the level of compensation even in the most clear cut cases of negligence. (Of course, in some cases insurance companies readily accept liability and pay adequate settlements.)

Thirdly, even where limited financial resources or legal aid assistance allowed the injured party to pursue his claim to a successful conclusion, the time lapse between the injury being sustained and compensation being paid will almost invariably have been extremely long and the impoverished injured party will have to survive without desperately needed compensation over this period. This naturally results in extreme hardship to the injured party and his family.

**Need for reform**

These major problems with the fault system strongly indicate that the time has come to find alternatives or, at least, to effect major reforms to the present system in this country. Consistent with a socialist direction, it would seem that the State should assume a greater obligation towards the care and rehabilitation of all accident victims.

The Government did introduce free medical treatment for people earning less than the specified amount and has periodically increased no-fault liability benefits under the Accident Prevention and Workers’ Compensation Scheme in terms of the National Social Security
Authority Act. That Act also provides a framework for establishing a comprehensive social security scheme that includes pensions and unemployment benefits.

Possible reform measures

**Government no-fault scheme**

In respect of accidents outside the workplace, consideration should be given to the setting up of a no-fault liability system to cover these. A vital question would be whether sufficient financial resources could be procured to allow the setting up of a Government run no-fault system covering all accident victims not presently covered. Such a scheme would result in savings as, by abolishing fault as a criterion for compensation, large-scale savings would be effected by not having to run expensive civil courts dealing with delict claims. On the other hand, the structures for administering a no-fault system would have to be established and this would involve considerable expense. One extreme approach that has been suggested would be to nationalise the assets and administrative machinery of private insurance companies to procure the necessary finance to operate a State run system.

**Private no-fault scheme**

On a less drastic basis, the Government feels that although it could not raise the necessary finance to institute a State run no-fault scheme, a private no-fault liability scheme within the field of motor accidents could be considered. This would necessitate the involvement of private insurance companies which would administer the scheme. Given the relatively small motoring population in this country, the question would be whether such a system would be economically viable? To determine this a proper costing exercise would have to be carried out. However, even if such a system operated with a very low financial ceiling for compensation, this would be an improvement on the present position where a large proportion of accident victims remain totally uncompensated. Drivers would be compelled to take out no-fault liability insurance.

Any no-fault scheme which extends beyond the field of motor accidents into accidents of other types, such as accidents in the home and in fields of employment not covered by worker’s compensation, could probably not be organised through private insurance, but would have to be operated by the State. What has been apparent in other countries is that lawyers and insurance companies make a good living out of the fault system and are very resistant towards proposals to abolish it.
Strict liability

In regard to another large source of accident cases, namely, harm caused by defects in products, careful consideration should be given to making enterprises strictly liable for the products which they produce. There are cogent arguments in favour of adopting the approach that the profit-making enterprise should be made to pay compensation to those who suffer injuries as a result of defects in the products. After all, the enterprise is in a financial position to take out insurance cover or to pass on losses to the general public.

Harm caused by criminals

In the field of injuries resulting from the commission of crimes, far too much emphasis is presently placed upon punishment of the offender and far too little upon compensation of the injured person. Instead of sending so many people to prison, part of the non-custodial penalty should be to compensate their victims. See the present provisions contained in Part XIX of the Criminal Procedure and Evidence Act [Chapter 9:07].
APPENDIX

Apportionment of damages

Collision between vehicles
Bradshaw v Salisbury United Omnibus Co A-102-70
Orne-Glieman v General Accident Insurance & Anor 1980 ZLR 454 (G) Car and motorcycle - car turning to right colliding with motor cyclist who was trying to overtake car. **Apportionment:** Car driver 50% and motorcyclist 50%.

Homela v Munyama S-49-82 Two cars driver endangering overtaking traffic by crossing to incorrect side of road and driver of overtaking vehicle failing to react to danger. **Apportionment:** Driver on wrong side of road 50% and overtaking car driver 50%.

Manuel v SA Eagle Insurance HH-270-83 Car and motor-cyclist already dark and motor cycle had no lights car going round corner on wrong side of road and hitting oncoming motorcyclist likely that car driver had drifted onto wrong side as thought there was no oncoming traffic and that it was safe for him to do so. **Apportionment:** Car driver 75% and motorcyclist 25%.

Automotive Diesel Ltd v Minister of State (Security) HH-291-85 Driver, faced with oncoming traffic travelling on wrong side of road, trying to effect right-hand turn to avoid oncoming vehicle. **Apportionment:** Oncoming vehicle 75% and turning vehicle 25%.

Cargo Carriers & Anor v Nettlefold & Anor 1991 (2) ZLR 139 (S) P was travelling on a main country road. She was dazzled by oncoming lights and slowed down to 50 km/h but saw D’s large unmarked truck parked halfway across her lane when it was too late for her to stop. She was held to be slightly negligent in not having slowed down more, since she had travelled for some distance while she was blinded and could not rely on any knowledge that the road ahead was clear; she was more negligent in not having picked out the shape of the truck earlier. **Apportionment:** P 20% and D 80%.

Madzamba v Mutsonziwa HH-218-90 D turned his car left on to a main road from a side road and collided with P’s vehicle, which was overtaking another vehicle on the main road while approaching the T junction formed by the intersection of the main road and the side road. Traffic entering the main road from the side road was controlled by a Give-way sign. Each party claimed damages from the other. Both parties were found to have been negligent. P was negligent for overtaking whilst approaching an intersection in contravention of s 7(d)(i) of the Roads and Road Traffic (Rules of the Road) Regulations, 1974. D was negligent in that he should have given way to all traffic on the main road, irrespective of whether that traffic was lawful or unlawful. **Apportionment:** P 20% and D 80%.

Makwawa v Wozhele HH-39-91 After seeing traffic behind him, a driver indicated his intention to turn right but did not check whether this traffic was responding to his signal to slow or distant enough not to be endangered. A driver turning right has a duty to both oncoming and following traffic. Parties held equally at fault.
Collision at robot controlled intersection

*Haynes v Minister of Defence & Anor* 1992 (2) ZLR 262 (H) A party turning right across the path of another vehicle when the robot is on amber must be even more careful than someone turning when the light has already turned red. Although the army vehicle should have stopped there was no indication that it was going to do so. P should therefore not have proceeded, especially as her vehicle was rather slow-moving and as special caution needed in Zimbabwe in respect of large army vehicles. **Apportionment:** P 50% and D 50%. (This figure was based on a concession made by D - if this concession had not been made the finding would have been more adverse to P.)

*Mutendi v Maramba & Anor* 1994 (2) ZLR 41 (H) P turned right at a robot controlled intersection and was struck by an oncoming emergency taxi. The lights had turned red before the taxi entered the intersection. The blameworthiness of the taxi driver was high. But P was also foolish in proceeding when the taxi was approaching at speed. **Apportionment:** P 20% and D 80%.

Collision at night with stationary vehicle on road

*Nyamanhare v Minister of Defence* S-49-94 P collided at night with an unlighted camouflaged army vehicle parked partly on road. To leave unlit vehicle on main road carrying fast traffic is *prima facie* evidence of negligence on the part of the driver, but on the other hand users of roads must exercise caution to enable them to meet an emergency presented by the fact that someone has parked an unlighted vehicle on the road, perhaps for unavoidable reasons such as a break-down. Moreover, drivers must drive within the limits of their vision, and it is for a driver to explain how, if he was driving with due care and attention, the presence of an obstacle in front of him eluded him. While much depends on the facts of each individual case, where collisions with unlit objects at night occur the starting point is that it was negligent on the part of the driver who left his vehicle so unlit on the road, thus creating a hazard for other drivers. The degree of negligence of others who collide with the unlit object is unlikely to be the primary cause of the accident, unless it can be proved that the obstacle was one which is capable of being seen in good time by a driver keeping a proper look-out. On the facts, P’s headlights allowed him visibility of about 30 m, whereas the traffic regulations required headlights to give at least 50m visibility. If the army vehicle had not been camouflaged, its driver would have been 75% to blame for the accident; because it was camouflaged the court found its driver 80% to blame. **Apportionment:** P 20% and D 80%

*Johannes v South-West Transport* 1994 (1) SA 200 (Nm HC) Where a vehicle runs into a stationary unlighted vehicle on a road at night, the question whether either driver was negligent has to be decided on the totality of the facts presented to the court. A great number of factors enter into consideration: the visibility of the obstructing vehicle, its colour, the background against which it stood, possible light from other sources, variations of light and shade and weather conditions.
Collision with parked stationary vehicle obstructing traffic

*Taunton Enterprise v Ministry of Defence* S-73-85 Car driver travelling at night at 95 km/h colliding with unlit army lorry stopped so as to obstruct half the carriageway. **Apportionment:** Car driver 15% and army lorry driver 85%.

**Vehicle turning right colliding with overtaking vehicle**

*James v Fletcher* 1973 (1) SA 687 (RA) Car trying to overtake bus when bus turning to right - bus driver clearly indicating intention to turn right. Overtaking driver failed to keep proper lookout. **Apportionment:** Bus driver 15% and car driver 85%.

*Mayisva v Commercial Union Insurance* HH-469-84 Car driver driving at excessive speed and failing to keep proper lookout - colliding with lorry which was indicating intention to turn right. **Apportionment:** Car driver 75% and bus driver 25%.

*Grindlays Industrial & Ors v Tawengwa* HH-441-87 Car trying to overtake bus when bus turning to right. Bus driver failing to check that safe to turn but visibility good and car driver should have been alerted by movement of bus and have taken avoiding action. **Apportionment:** Car driver 50% and bus driver 50%.

*Machakaire v Mavenge & Anor* HH-19-88 D1 was travelling at excessive speed along a national highway when he approached a slow-moving vehicle travelling in the same direction. He attempted to overtake this vehicle, not noticing that its indicators were on, showing that its driver intended to turn right into a side road. The driver of this vehicle started his right-hand turn, not having noticed first D’s vehicle behind him, and the two vehicles collided.

D1 was entirely to blame since she had failed to keep the other vehicle under observation before attempting to overtake it.

*Newlands Farm (Pvt) Ltd v Matanda Bros* S-100-91 Car driver trying to overtake bus when bus giving clear warning that intended to turn to right - car driver failing to heed warning signs. **Apportionment:** Car driver 85% and bus driver 15%.

Collision with pedestrian

*Jackson v Motor Insurance Pool* 1975 (2) RLR 155 Car colliding with pedestrian. Pedestrian unreasonably trying to cross road when car too close; driver negligent in travelling too fast and failing to keep proper lookout. Driver in more advantageous position to avoid accident. **Apportionment:** Pedestrian 25% driver 75%.

*Crow v Royal Insurance* 1973 (1) SA 579 (R) Car colliding with pedestrian. **Apportionment:** Pedestrian 40% and driver 60%.

*Silatsha v Santam Insurance* 1982 (2) SA 387 (A) Pedestrian attempting to cross road good visibility car colliding with him pedestrian more to blame. **Apportionment:** Pedestrian 60% and driver 40%.
**Collision with cattle on road**

*Viriri v Wellesley Estate* 1982 (1) ZLR 200 Car colliding with cow on road at night. Owner of cow negligent in failing to take precautions to prevent cow that had propensity from escaping from paddock from being on road. Driver knew cattle on adjoining land. Drove at excessive speed and not keeping proper lookout. **Apportionment:** P two thirds; D one third.  

*Kennedy v P Hall & Co* S-46-87 Collision between lorry driven too fast at night and herd of 31 cattle allowed by rancher to stray onto road through unsecured gate. **Apportionment:** Driver three fifths and rancher two fifths.

**Other cases**

*Passenger boarding train*

*Limire v Rhodesia Railways* 1981 ZLR 251 (G) Passenger attempting to board train that was already in motion. **Apportionment:** P 80% and D 20%.

**Financial dealings**

*Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1990 (2) ZLR 397 (S); 1991 (4) SA 82 (S) A finance house had negligently agreed to finance the sale of a non-existent farm and had issued a cheque in the name of the alleged seller, Mixed Tums (Pvt) Ltd. No such company existed. The person who received the cheque paid it into a bank account which he operated in the name of his company, Mixed Tans (Pvt) Ltd, the bank having failed to notice the discrepancy in the names even though the cheque was crossed and endorsed “not negotiable account payee only”. The finance house then sued the bank for the amount of the cheque. The court held that the finance house was negligent to greater degree than the bank. **Apportionment:** Finance house 80% and bank 20%.

**Contributory negligence of children**

*Children under 7*

*Tena v UANC* HS-387-81 A child under the age of 7 does not have the capacity to be negligent and there can thus be no contributory negligence on his part leading to apportionment. A boy aged 6 had been knocked down by a car. 
*Muchechetere v Boka* HH-148-89

*Children between 7 and 14*

*Weber v Santam Insurance* 1983 (1) SA 381 (A) The first task is to decide whether the child has capacity for negligence. Only if he does will apportionment apply. Even where the child is found to have capacity, the negligence of motorist will always be adjudged to be greater than the child's. 
*S v Ferreira* 1992 (1) ZLR 93 (S)

**Intentional wrongdoing**

*Mabaso v Felix* 1981 (3) SA 865 (A)
Before there can be an apportionment of damages between joint wrongdoers in terms of the South African equivalent of s 4 (1) of our Act, the fault of the joint wrongdoer must be the same form of fault. Thus, where the fault of one joint wrongdoer consists of negligence while the fault of the other amounts to intentional wrongdoing, there can be no apportionment of damages between them.

**Joint wrongdoers**

Diesel Electric v S & T Import HH-330-80

**Dependant’s action**

*Knight v Rhodesia Railways & Anor* 1975 (1) RLR 213 (R)  Collision between two cars. The driver of one of the cars, P’s husband, had deviated from the reasonable person standard by 80% and the other driver had deviated from the reasonable person standard by 60%. (Note this sort of case would now be dealt with in terms of s 8 of the Law Reform (Contributory Negligence) Act [Chapter 45].

**Additional compensation under workers’ compensation system**

*Mpande v Forbes & Anor* 1980 ZLR 302 (G)  The employee’s claim for additional compensation is defeated if there is negligence on his part in the causing of his injuries as apportionment does not apply in this situation. The correctness of this case is open to doubt. Certainly if it is correct, it will lead to inequitable results as even slight negligence on claimant’s part will lead to his claim failing.

The worker’s claim for additional compensation is now governed by s 9 of the National Social Security (Accident Prevention and Workers’ Compensation Scheme) Notice SI 68 of 1990. Where the worker is claiming for his own injuries there seems to be no provision relating to the effect of contributory negligence on his part. On the other hand, where a dependant is claiming arising out of the death of her breadwinner, s 9(6) provides that it is no defence to such action that there was contributory negligence on the part of the worker who was killed.

**Costs**

*Limire v Rhodesia Railways* 1981 ZLR 251 (G)  Where there is a claim for damages and no counterclaim or tender by D, P will ordinarily recover all his costs, notwithstanding that the court has reduced his damages on account of his contributory negligence.

*Crow v Royal Insurance* 1973 (1) SA 579 (R)

*Haynes v Minister of Defence & Anor* 1992 (2) ZLR 262 (H)

**Failure or refusal by passenger to wear seat belt or crash helmet**

*Koen v Keates* 1989 (3) ZLR 9 (H)  A motor vehicle left the road and overturning due to the negligence of the driver. A passenger in the vehicle was not wearing his seat belt despite
being asked to put it on by driver. Passenger’s failure to take reasonable precautions for his own safety by wearing belt. His damages were therefore subject to reduction on the basis of his contributory negligence. **Apportionment:** Passenger 15% and driver 85%.

*General Accident v Uijs NO* 1993 (4) SA 228 (A) (Afrik) A passenger in a car had failed to put on his seat-belt and was seriously injured in a collision whose sole cause was the gross negligence of the driver. The trial court reduced his damages by a third. On appeal, held that allowance had to be made for the fact that he had not contributed to the accident and that his fault was of a different kind from that of the driver, but it declined to vary the trial court’s apportionment of damages. **Apportionment:** P one third and D two thirds.

See also:

- *Vorster v AA Mutual* 1982 (1) SA 145 (A)
- *Union Insurance v Vitoria* 1982 (1) SA 444 (A)
- *Pasternack v Poulton* [1973] 2 All ER 74 (QB)
- *Froom & Ors v Butcher* [1975] 3 All ER 520 (CA)
- *Capps v Millner* [1989] 2 All ER 322 (CA) Motor cyclist failing to fasten properly the strap of his helmet helmet coming off just before hit head on road when accident occurred this amounted to contributory negligence on the part of the motor cyclist.

**Concurrent wrongdoers**

Graham & Anor v General Accident Assurance & Anor 1972 (1) RLR 52 (GD)

*Nu-life Batteries & Anor v Boddington & Anor* 1974 (1) RLR 1; 1974 (2) SA 175 (R) Old common law position.

*Marais v Eagle Insurance & Anor* HH-270-83 Position under present legislative provisions.

**Joint wrongdoers**

Diesel Electric v S&T Import HH-73-80
List of legislation

Constitution of Zimbabwe
Animal Health Act [Chapter 19:01] replacing the Pounds and Trespasses Act [Chapter 129]
Atmospheric Pollution Prevention Act [Chapter 20:03]
Companies Act [Chapter 24:03]
Consumer Contracts Act [Chapter 8:03]
Criminal Procedure and Evidence Act [Chapter 9:07]
Customs and Excise Act [Chapter 23:02]
Damages (Apportionment and Assessment) Act [Chapter 8:06]
Environmental Management Act [Chapter 20:27]
Factories and Works Act [Chapter 14:08]
Industrial Designs Act [Chapter 26:02]
Legal Practitioners Act [Chapter 27:07]
Miscellaneous Offences Act [Chapter 9:15]
National Social Security Authority Act [Chapter 17:04]
Patents Act [Chapter 26:03]
Police Act [Chapter 11:10]
Prescribed Rates of Interest Act [Chapter 8:10]
Prescription Act [Chapter 8:11]
Privileges, Immunities and Powers of Parliament Act [Chapter 2:08]
Public Health Act [Chapter 15:09]
Regional Town and Country Planning Act [Chapter 29:12]
Road Traffic Act [Chapter 13:11]
Small Claims Court Act [Chapter 7:12]
State Liabilities Act [Chapter 8:14]
Trade Marks Act [Chapter 26:04]
Water Act [Chapter 20:22]
Witchcraft Suppression Act [Chapter 9:19]
List of Cases

A Gibb & Son Ltd v Taylor & Mitchell Timber Supply Co 1975 (2) SA 457 (W)
A Juvenile 1989 (2) ZLR 61 (S); 1990 (4) SA 151 (ZS)
Administrator of Natal v Bijo & Anor 1978 (2) SA 256 (N)
Administrator of Natal v Trust Bank 1979 (3) SA 824 (A)
Administrator, Natal v Edouard 1990 (3) SA 581 (A)
African Guarantee & Indemnity Co Ltd v Minister of Justice 1959 (2) SA 437 (A)
Al Saudi Banque v Clarke Pixley [1989] 3 All ER 361 (Ch D)
Alcock v Chief Constable of South Yorkshire [1991] AC 310 (HL); 1991 3 WLR 1057 (HL)
Alvanger v Eagle Insurance GS-326-81
Amalgamated Dry Cleaners & Steam Laundry (Pvt) Ltd v Boiler & Steam Services (Pvt) Ltd GS-175-81
Arnold v Majome HH-431-86
Arthur v Bezuidenhout & Anor 1962 (2) SA 566 (A)
Ashcroft v Mersey Regional Health Authority [1983] 2 All ER 245 (QB)
Ashton v Turner & Anor [1980] 3 All ER 870 (QB)
Associated Mine Workers Union & Anor v Gwekwerere & Ors GS-202-81
Association of Rhodesian Industries & Ors v Brookes & Anor 1972 (2) RLR 1 (GD)
Association of Rhodesian Industries & Ors v Brookes (2) 1972 (1) RLR 338 (GD)
Attia v British Gas [1987] 3 WLR 1101; [1987] 3 All ER 455
Automotive Diesel Ltd v Minister of State (Security) HH-291-85
Autorama (Pvt) Ltd v Farm Equipment Auctions 1984 (1) ZLR 162 (H); 1984 (3) SA 483 (ZH)

Badenhorst v Minister of Home Affairs 1984 (1) ZLR 221 (S); 1984 (2) SA 13 (ZS)
Baker v Willoughby [1970] AC 467 (HL)
Banda v Minister of Defence 1986 (2) ZLR 156 (S)
Banda v Gamegone (Pvt) Ltd & Anor HH-133-03
Bande v Muchinguri 1999 (1) ZLR 476 (H)
Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd 1990 (2) ZLR 397 (S); 1991 (4) SA 82 (S)
BAT Ltd v Fawcett Security Ltd GS-22-72
Bayers SA Ltd v Frost 1991 (4) SA 559 (A)
Beattie v United Refineries (Pvt) Ltd A-130-80
Beckenstrater v Rottcher & Theunissen 1955 (1) SA 129 (A)
Best v Wonder Motors (Pvt) Ltd 1975 (1) RLR 124 (G)
Bester v Commercial Union 1973 (1) SA 769 (A)
Bickle v Minister of Law and Order 1980 ZLR 36 (G)
Birch v Thomas [1972] 1 All ER 905 (CA)
Birchall v Mararike HH-43-86
Biti v Minister of State Security 1999 (1) ZLR 165 (S)
Blore v Standard General Insurance 1972 (2) SA 89 (O)
Blue Bell Inc v Lennard Clothing Manufacturing (Pvt) Ltd HH-54-84
Blyth v van der Merwe 1980 (1) SA 191 (A)
Boka Enterprises v Manatse & Anor 1989 (2) ZLR 117 (H); 1990 (3) SA 626 (ZH)
Border Enterprises v Manatse & Anor 1989 (2) ZLR 131 (H)
Bolton v Stone 1951 AC 850
Bon Marché (Pvt) Ltd v Brazier & Anor 1984 (2) ZLR 50 (S)
Boshoff v Boshoff 1987 (2) SA 694 (O)
Boswell v Minister of Police & Anor 1978 (3) SA 268 (EC)
Botes v van Deventer 1966 (3) SA 182 (A)
Botha v Zvada & Anor 1997 (1) ZLR 415 (S)
Bourhill v Young [1942] 2 All ER 396 (HL)
Bowater v Rowley Regis [1944] KB 476; [1944] 1 All ER 465 (CA)
Bradshaw v Salisbury United Omnibus Co A-102-70
Bristow v Lycett 1971 (2) RLR 206; 1971 (4) SA 223 (RA)
Bulford v Bob White’s Service Station (Pvt) Ltd 1973 (1) SA 188 (RA)
Bull v Taylor 1965 (4) SA 29 (A)
Burger v Warenton 1987 (1) SA 899 (NC)
Burton v Cotton Research Board 1950 (4) SA 34
Bush & Anor v Nare 1995 (2) ZLR 38 (H)
Bwanya v Matanda 2000 (1) ZLR 546 (H)

Caltex Oil (Australia) v The Dredge òWillesmstadö [1976] 136 CLR 429; [1977] 51 ALJR 270
Caparo Industries v Dickman [1990] 1 All ER 568 (HL)
Cape Town Municipality v April 1982 (1) SA 259 (C)
Capital Estates & Ors v Holiday Inns & Ors 1977 (2) SA 916 (A)
Capps v Millner [1989] 2 All ER 322 (CA)
Cargo Carriers & Anor v Nettlefold & Anor 1991 (2) ZLR 139 (S)
Castell v de Greef 1993 (3) SA 501 (C)
Chaguma v Kondani 2001 (2) ZLR 216 (H)
Chatterton v Gerson [1981] 1 All ER 257 (QB)
Chaza v Ramajan HH-459-88
Chibombo v Chidangi GS-341-81
Chidembo v Machingambi S-50-87
Chibage v Ndawana 2009 (2) ZLR 387 (H)
Chikanda v Mukumba HH-210-88
Chikukwa v Marisa & Anor HH-3-92
Chituku v Min of Home Affairs & Ors HH-6-04
Chimusoro & Anor v Minister of Health HH-254-89
Chinamasa v Jongwe Printing & Publishing Co (Pvt) Ltd 1994 (1) ZLR 133 (H)
Chinengundu v Modus Publications (Pvt) Ltd HH-135-92
Chipinda v Zimbabwe Express Motorways HH-55-86
Chirinda v Minister of Home Affairs & Anor HH-150-03
Chiwanda v Zimnat Insurance HH-163-89
City of Salisbury v King 1970 (1) RLR 141; 1970 (2) SA 528 (RA)
Clarke v McLennan & Anor [1983] 1 All ER 416 (QB)
Clarke v Welsh 1976 (3) SA 484 (A)
Colonial Mutual Assurance v Macdonald 1931 AD 412
Colt Motors v Kenny 1987 (4) SA 378 (T)
Combrinck Kliniek v Datsun (Pty) Ltd 1972 (4) SA 185 (T)
Combrink v Datsun Motors 1972 (4) SA 185 (C)
Compass Motors v Callguard Security 1990 (2) SA 520 (W)
Coomer’s Motor Spares v Albanis 1979 ZLR 96
Coronation Brick v Strachan Construction 1982 (4) SA 371 (D)
Correira v Berwind 1986 (1) ZLR 192 (H)
Cosmos v Phillipson 1968 (2) RLR 128 (G); 1968 (3) SA 121 (R)
Cottham v Cottham & Anor GB-5-76
Cottle v Stockton Waterworks Co (1875) LR 10 QB 453
Cotton Marketing Board of Zimbabwe v National Railways of Zimbabwe 1988 (1) ZLR 304 (S)
Crawford v Albu 1917 AD 102 at 125
Crofter Hand Woven Harris Tweed v Veich [1942] AC 435 (HL)
Crow v Royal Insurance 1973 (1) SA 579 (R)
Currie Motors v Motor Union Insurance 1961 (3) SA 872 (T)

Da Silva v Coutinho 1971 (3) SA 123 (A)
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Dale v Hamilton 1924 WLD 184
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Dantex Investments v Brenner & Ors 1989 (1) SA 390 (A)
Darangwa v Bushu HB-68-89
De Charmoy v Day Star Hatchery 1967 (4) SA 188 (D)
de Villiers v Godley & Anor 1975 (1) RLR 108 (G)
DeLange v Costa 1989 (2) SA 857 (A)
Dhlomo NO v Natal Newspapers & Anor 1989 (1) SA 945 (A)
Diesel Electric v S & T Import HH-330-80
Dillon NO v Bentley 1973 (1) RLR 55; 1973 (2) SA 452 (R)
Dippenaar v Shield Insurance 1979 (2) SA 904 (A)
Dlikilili v Federated Insurance 1983 (2) SA 275 (C)
Dodd Properties & Anor v Canterbury City Council [1980] 1 All ER 928 (CA)
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Dunlop v West 1974 (1) RLR 89; 1974 (2) SA 642 (R)
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E B Ranchers v Bus Service A-18-76
E G Electrical v Franklin 1979 (2) SA 702 (EC)
Ebrahim v Pittman NO 1995 (1) ZLR 176 (H)
Ebrahim v Twala & Ors 1951 (2) SA 490 (W)
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Esterhuizen v Administrator, Transvaal 1957 (3) SA 710 (T)
Evins v Shield Insurance Ltd 1980 (2) SA 814 (A) at 837

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