

Transforming a child's claim for loss of earning capacity

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SUMMARY

This article explores the possible constitutional transformation of a child's delictual claim for loss of earning capacity. As such, it is located at the intersection of the law of delict and child law. The current law on a child's claim for loss of earning capacity is explained first. It is shown that such a claim involves a concurrent violation of the constitutional rights to bodily integrity and property which common-law thinkers call a person's "personal immaterial property". A claim for loss of future earning capacity may be brought by or on behalf of a child in terms of the common law's rules for Aquilian liability. In this regard, it is noted that the assessment of future losses is a controversial legal issue because it necessarily involves speculation about future hypotheticals. While controversial, claims of this nature may be reasonably determined with reference to available evidence. In terms of the law, as it stands, factors that courts consider in quantifying a child's damages for loss of earning capacity include the average probable income, the child's schooling and familial context, wage statistics, and broad judicial discretion. It will be shown that these factors could be applied (and sometimes have been applied) in ways that perpetuate past patterns of exclusion and poverty that are often racially determined – ultimately resulting in some children's claims for loss of earning capacity being pitched below a liveable wage. Relying on the constitutional right to equality and the constitutional best interests of the child standard, it is argued that the common law ought to be developed in this regard to move our law of delict in the direction of distributive justice. In this regard, reference to "liveable wages" and "fairness" (as a consideration in exercising judicial discretion) may be appropriate guidelines used to quantify children's claims for loss of earning capacity in future.

1 Introduction

In this article, I wish to pay tribute to the academic contribution of Professor Trynie Boezaart to South African law. In particular, I am interested in exploring the interface between two areas of law that have been recurring concerns in Boezaart's scholarship and teaching: law of delict and child law. The child law/delict interface has received much attention in recent times in the context of age-related capacity for fault, including important arguments made by Boezaart.¹ However, there are other significant instances where child law and delict also interact which are worthy of further investigation, but which have not received as much academic airtime in South Africa.

One such instance is where a bodily injury has been inflicted on a child culpably and wrongfully, with the consequence that the child's future potential to earn an income has been reduced. A common example may involve a motor vehicle accident where a child is physically harmed,² but of course, children could suffer bodily injuries in a variety of other ways.

Earlier case law and academic commentaries seemed to have caused terminological confusion as to whether the claim should be called "loss of future income" or "loss of earning capacity", sometimes treating the two terms as distinct concepts. Since the case of *Santam Versekeringsmaatskappy v Byleveldt*,³ this relationship should be clear: The loss of the capacity to earn an income, although usually measured against the standard of expected income, is a loss of capacity and not a loss of income per se.⁴ In light of this, Millard provides us with a clear explanation of this type of legal construction:⁵

This confusion surrounding terminology may be simplified by employing two steps: Firstly, there must be proof of a loss of earning capacity before there can be any future loss of earnings. The actual loss of earnings is then a manifestation of the inability of a person to earn the same income as before, because of the damage-causing event. Secondly, once it has been established that there is, in fact, a definite loss of earning capacity, an amount must be attached to the incapacity. Therefore, for purposes of clarity, it is suggested that earning capacity is a diminution of a claimant's ability to generate an income.

As such, in this article I use the term "loss of earning capacity" to explain the situation where a victim of a harm-causing event institutes a claim against the wrongdoer for reducing the victim's ability to generate an income, the damages for that being quantified with reference to the lost earnings.⁶

In this article, I will unpack the past and future of a child's claim for loss of earning capacity, which has received little academic intervention in South Africa in more recent times. My principal aim is to consider

1 Professor Boezaart's writings on this topic include Boezaart "Toerekeningsvatbaarheid van kinders in die Suid-Afrikaanse deliktereg" 2017 *TSAR* 68; Davel "The delictual accountability and criminal capacity of a child: How big can the gap be?" 2001 *De Jure* 604. Other recent debates around the topic are captured in Jansen and Neethling "Delictual capacity and (contributory) negligence of minors" 2017 *THRHR* 474; Neethling and Potgieter *Law of Delict* (2020) 158; and Zitzke "Transforming age-related capacity for fault in delict" 2021 *SALJ* 367.

2 One of the most recent unreported cases dealing with this issue is *Mahlangu v Road Accident Fund* [2016] ZAGPJHC 193 which involved a motor vehicle accident and a minor.

3 1973 2 SA 146 (A).

4 My translation of *Santam v Byleveldt* 150C.

5 Millard "Loss of earning capacity: The difference between the sum-formular approach and the 'somehow-or-other' approach" 2007 *LDD* 15 and 18.

6 See in this regard similar approaches by Boberg *The Law of Delict* (1984) 538-539; Klopper *Damages* (2017) 117; Koch *Damages for Lost Income* (1984) 131.

whether the current law related to a child's loss of earning capacity requires constitutional re-imagination in light of the constitutional protections afforded to children. To this end, §2 will expound the legal position as it currently is. Then in §3, we turn to the legal position as it should be. By §4, we should have a blueprint for an argument about what a constitutionally transformed law of lost earning capacity for children ought to look like.

2 The law as it is on earning capacity

2.1 The constitutional backdrop

At least two constitutional rights of the child would be concurrently violated in the common factual construction where a child's bodily injuries cause a loss of earning capacity. First, the child's right to bodily integrity is enshrined in section 12 of the Constitution. Secondly, the child's right in property is enshrined in section 25 of the Constitution.

The former right infringement is less controversial. Someone with a vague recollection of their undergraduate delict studies should be able to recall that where the right to "physical-mental integrity" is violated a potential lawsuit for "pain and suffering" or, in cases of intentional harm-doing, "civil assault" may ensue.⁷ When a wrongdoer makes reparations to the victim for a violation of their physical integrity, this is usually done through the payment of damages for non-patrimonial harm. The damages award in such a case may serve various purposes including the vindication of the violated right, corrective justice (civil retribution), and/or satisfaction.⁸ When we are dealing with a child's loss of ability to generate an income, a violation of the right to bodily integrity is often foundational. However, the reparations for a violation of that right in particular are more symbolic rather than related to the market value of the child's body (given that the human body should never be commodified). The child's loss of the ability to generate an income in future is mathematically/scientifically more easily quantifiable in monetary terms. Thus, the financial claim of the child may be indirectly about the violation of the right to bodily integrity but is more directly about the violation of the right to property.

While this last claim may at first blush appear to be controversial, Bhana and Visser argue that the constitutional right to property is defined loosely enough to include all of a person's patrimonial interests.⁹ Current

7 See generally Neethling, Potgieter and Roos *Neethling on Personality Rights* (2019) 135ff.

8 Neethling, Potgieter and Roos (2019) 168–170.

9 Bhana and Visser "The concurrence of breach of contract and delict in a constitutional context" 2019 *SAJHR* 112.

property law orthodoxy confirms the same. Muller et al say the following about the constitutional idea of property:¹⁰

It is relatively clear that interests regarded as property in private law will enjoy protection under the property clause as well. In addition to land, which is classified as property in section 25(4)(b), corporeal movable things undoubtedly also qualify as property, which is evidenced by the *FNB* case wherein motor vehicles were the subject of the dispute... The examples above are relatively uncontroversial because they form part of what is regarded as property in private law. However, because the scope of constitutional property protection is broader than its private law counterpart, interests not recognised as “property” under private law can be acknowledged and protected as such in terms of section 25, if the public interest and the constitutional function of property so requires. Such instances of incorporeal property would entail accrued rights with a patrimonial value but that do not relate to a traditional object of property law. Examples are personal rights under contract, delict or unjustified enrichment law; intellectual property such as trademarks, copyright and patents; licences; financial instruments like shares and other securities; welfare claims and other rights of commercial value. This idea of rights qualifying as property relates to the notion of “dephysicalised” property (that is to say, incorporeal property or intangible interests in property with a distinct economic value). Dephysicalised property should, in principle, qualify as property for purposes of constitutional protection. This type of property is becoming increasingly significant in the private, commercial and public spheres of life.

In light of the above, I contend that the legal interests that people have in their income and in their ability to generate an income are properly conceptualised as constitutional property concerns. While a violation of the right to bodily integrity may be closely related hereto, for purposes of claiming reparations for lost income, section 12 of the Constitution plays a concurrent but separate role. The direct right that is at stake is the right in property. This “concurrent” conceptualisation of property and personality interests involved in cases pertaining to loss of earning capacity is supported by Neethling, Potgieter and Roos, even though they do not clearly link the ideas to separate but concurrent constitutional rights.¹¹

About 50 years ago, when the introduction of a bill of rights such as ours was merely a *spes*, Neethling broke new ground by arguing a case for the recognition of earning capacity (similar to creditworthiness) as a legal object worthy of the law's protection – the protection taking the form of conferring a new category of subjective rights onto the legal subject, namely the right to “personal immaterial property”.¹² He explained that we are dealing with immaterial property interests in the sense that the ability to generate an income is purely economic and intangible. Further, we are dealing with a type of personality interest in the sense that the ability to earn an income is not inheritable or

10 Muller et al *Silberberg and Schoeman's: The Law of Property* (2019) 617–618 (footnotes omitted).

11 Neethling, Potgieter and Roos (2019) 21–24.

transferable to others in the conventional sense of property because of the inherently personal nature of earning capacity. My understanding is that no one has been able to refute Neethling's conceptually clear exposition of the legal objects and specific rights involved in the context of loss of earning capacity. What I add here is simply to say that personal immaterial property rights recognised by South African common-law commentators and cases can easily be slotted in under the new constitutional concept of property. This brings claims of this nature within the ambit of the constitutional property clause. This means that our law on the loss of earning capacity must be in harmony with the constitutional spirit embodied in section 25. This is a crucial background point to which I will return in §3 below.

Under South African law, the infringement of a child's constitutional right in property could notionally attract the wrongdoer's reparatory liability in terms of the rules of (what is conventionally called) the law of delict. While the law of delict is classically understood exclusively as a common-law discipline, the current South African legal system indicates that a cacophony of sources operates in symbiosis to provide victims of rights infringements with reparatory remedies.¹³ It has been argued that this muddle of sources for this area of law is best navigated through the doctrine of adjudicative subsidiarity.¹⁴

In terms of the doctrine of adjudicative subsidiarity, a child's rights will generally not be vindicated through sole reliance on "constitutional damages". A key case in point for purposes of this discussion pertaining to children is *Minister of Police v Mboweni*.¹⁵ There it was decided that if a child's parent is wrongfully and culpably killed, the appropriate route is not necessarily to claim constitutional damages for an infringement of the right to parental care embodied in section 28(1)(b) of the Constitution. Instead, regard must first be had to other available

12 This is the gist of Neethling and Le Roux "Positiefregtelike erkenning van die reg op die verdienvermoë of 'the right to exercise a chosen calling'" 1987 *ILJ* 719; Neethling "Persoonlike immaterieelgoedereregte: 'n Nuwe kategorie subjektiewe regte?" 1987 *THRHR* 316; Neethling "Die reg op verdienvermoë en die reg op die korrekte inligting as selfstandige subjektiewe regte" 1990 *THRHR* 101.

13 The delict canon in South Africa has rarely had regard to statutes and customary law. See in general McKerron *Law of Delict* (1971); Neethling and Potgieter (2020); and Van der Merwe and Oliver *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989). Van der Walt and Midgley *Principles of Delict* (2016). However, there is a growing realisation that delict is a complex field regulated by Constitution, legislation, and customary law, where these sources operate in symbiosis rather than in isolated pockets. One source that has started to move explicitly in this direction of thought is Loubser and Midgley (eds) *The Law of Delict in South Africa* (2017) chs 2–3. For a more radical take on this shift see Zitzke "Decolonial comparative law: Thoughts from South Africa" 2022 *RabelsZ* 180.

14 Zitzke "Constitutional heedlessness and over-excitement in the common law of delict's development" 2015 *Constitutional Court Review* 290.

15 2014 6 SA 256 (SCA).

remedies, like the established claim for loss of support.¹⁶ Constitutional damages are clearly envisaged as a remedy of last resort; a safety net of sorts to ensure that constitutional rights are adequately protected even when other sources of law fail to give proper effect to those rights.¹⁷ We will discover shortly that the common law of delict has a long track record of providing reparatory relief to a child victim whose earning capacity has been diminished on account of a bodily injury.

Instead of direct reliance on constitutional damages, following section 8 of the Constitution, the child's lawyers ought to enquire whether any legislation gives effect to the affected rights or, in its absence, whether the customary or common law could provide reparatory remedies.¹⁸

If a child is harmed in a motor vehicle accident, the Road Accident Fund (RAF) Act¹⁹ may apply,²⁰ ousting the common law's application.²¹ If the RAF Act does not apply, the common law would probably be the appropriate fall-back option, given that the official customary law does not provide relief to the victim in question.²²

Because the RAF Act is largely a statutory embodiment of the common law of delict with mostly procedural nuances involved, the nature of a claim for loss of earning capacity is the same under both liability schemes – the major caveat of course being that the RAF Act caps claims for lost income and imposes different procedural requirements on claimants.²³ Given the substantial overlap between the common law and the RAF Act's understanding of loss of earning capacity, I will now turn to the common-law principles espoused in this regard.

16 It would be remiss for me not to cite Professor Boezaart's famous Davel *Skadevergoeding aan Afhanklikes by die Dood van 'n Broodwinner* (1987), based on her doctoral research, which dealt with the claim for loss of support in great historical and doctrinal detail.

17 See generally in the context of delict: Zitzke "The Life Esidimeni Arbitration: Towards transformative constitutional damages?" 2020 *TSAR* 419; Zitzke "Grondwetlike skadevergoeding as 'nominale' en 'verswaarde' skadevergoeding in dringende aansoek" 2020 *LitNet Akademies* 790; Zitzke 2015 *CCR* 289.

18 Zitzke 2015 *CCR* 287–288.

19 Road Accident Fund Act 56 of 1996.

20 If the essential conditions stipulated in S 17(1) of the Act have been met.

21 S 21 of the Act.

22 The following official sources of customary law make no mention of a claim for lost earning capacity or anything similar: Rautenbach (ed) *Introduction to Legal Pluralism in South Africa* (2018); Himonga and Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2017).

23 S 17(4) of the Road Accident Fund Act; see also Klopper *The Law of Third Party Compensation* (2012) 172ff.

2 2 Aquilian liability and lost earning capacity

The relevant common-law rules that provide a mechanism for interpersonal reparations in cases of property harms are known as Aquilian liability.²⁴ This is because our modern South African rules that regulate the reparatory liability for property harms derive from the old Roman *actio legis Aquiliae*. In this regard, Innes J remarked the following in the case of *Union Government (Minister of Railways and Harbours) v Warneke*:²⁵

The position of our law with regard to negligence to-day is the result of the growth and the regulated expansion of the original provisions of the *Lex Aquilia*. Crude and archaic in some respects, their operation was gradually widened by the application of the *utilis actio*, and by the interpretation of the Roman jurists. The broadening process was continued by Dutch lawyers on the same lines; and there is no reason why our Courts should not similarly adapt the doctrine and reasoning of the law to the conditions of modern life, so far as that can be done without doing violence to its principles.

There is broad consensus that in order for a claim to succeed today, the victim must prove that the wrongdoer's conduct culpably and wrongfully caused property (patrimonial) harm.²⁶ The great classical works on the South African law of delict, cited throughout this article, deal with the elements in much greater detail than I can do here. The only element that I will focus on for present purposes is property harm.

Property harm amounts to a reduction of a person's patrimony. In *Warneke's* case, after explaining the historical roots of Aquilian liability, Innes J continued as follows:²⁷

That being so, it becomes necessary to consider the fundamental features of this form of action which have a bearing upon the matter before us. And we are at once faced with the fact that it was essential to a claim under the *Lex Aquilia* that there should have been actual *damnum* in the sense of loss to the property of the injured person by the act complained of... In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between that *universitas* as it was after the act of damage, and as it would have been if the act had not been committed... Any element of attachment or affection for the thing damaged was rigorously excluded. And this principle was fully recognised by the law of Holland. As pointed out by Professor de Villiers...

24 This is the certainly gist of Fagan *Aquilian Liability in the South African Law of Delict* (2019) and was also what Boberg had in mind in the writing of his treatise which he sub-titled *Volume 1: Aquilian Liability* (1984). The Continentalists are less likely to use this terminology but do acknowledge the *lex Aquilia* as the root of the current South African rules that regulate property harms. In this regard see Neethling and Potgieter (2020) 8–12; and Loubser and Midgley (eds) *The Law of Delict in South Africa* (2015) 15.

25 1911 AD 657 at 664–665.

26 The definitions vary in minor ways but the core is about the same. See Fagan (2019) ix; Neethling and Potgieter (2020) 4; Loubser and Midgley (eds) (2015) 24.

27 *Union Government v Warneke* para 665, references omitted.

the compensation recoverable under the *Lex Aquilia* was only for patrimonial damages, that is, loss in respect of property, business, or prospective gains.

There are at least two major take-home messages from this extract in *Warneke*.

First, as already alluded to in the earlier discussion on the constitutional backdrop of loss of earning capacity, property harm in Aquilian liability is not only limited to tangible property violations. From *Warneke*'s case, we see that whenever people's net worths are negatively affected (whether by a reduction of a positive property entitlement, or the increase in a debt) they have suffered property harm. This understanding of property harm in Aquilian liability enjoys academic support.²⁸ Uncomplicated practical examples of property harm in the context of income include the following: A wrongdoer steals a victim's salary that the victim withdrew and placed under the mattress (this is the loss of tangible property in the form of cash); a wrongdoer injured the victim and the victim was hospitalised for a month, not being able to draw wages for that period (this is the loss of a more intangible conception of property, namely the right to an income).

Secondly, property harm includes both past and future losses, made abundantly clear by the use of the term "prospective gains". Commentators on damages note that the Romans acknowledged both *damnum emergens* (roughly: harm suffered up to the date of the trial) and *lucrum cessans* (roughly: loss of profit and other forms of prospective loss).²⁹ The underlying rationale for including reasonable expectations in future gains under the ambit of one's right in property relates to the once-and-for-all rule. In terms of that rule, a victim of a delict must claim for all their losses, past and future, in one lawsuit, which prevents a victim from repeatedly suing a wrongdoer over a lifetime for losses that flow from one cause of action.³⁰ The thrust of this summary of prospective loss has received support from the apex courts.³¹ These principles of prospective loss can be applied to the context of income. If a victim has suffered an injury at the hands of a wrongdoer that would probably lead to a future loss of income, a claim must be made for that prospective loss concurrently with the claim for past income loss. As noted earlier, the

28 Neethling and Potgieter (2019) 263; Loubser and Midgley (eds) (2015) 24; Klopper *Damages* (2017) 6; Potgieter and Floyd *Visser & Potgieter Law of Damages* (2012) 20.

29 Neethling and Potgieter (2019) 265; Loubser and Midgley (eds) (2015) 80–82; Klopper (2017) 14; Potgieter and Floyd (2012) 20–24 and ch 6.

30 Neethling and Potgieter (2019) 270 ff; Loubser and Midgley (eds) (2015) 491ff; Klopper 91 (2017); Potgieter and Floyd (2012) ch 7.

31 This rule appears to have made its first appearance in the apex courts in *Cape Town City Council v Jacobs* 1917 AD 615 at 620–622 and was most recently affirmed by our uppermost court in *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) para 15, 23, 46 and 54. As if the historical trajectory was unclear, the fact that future losses are claimable in a delictual suit was made abundantly clear in *Transnet v Sechaba Photoscan* 2005 1 SA 299 (SCA) para 16.

appropriate terminology in this regard appears to be that the claim is for lost earning capacity (the personal immaterial property of the victim that clearly affects the victim's net worth in the long run) which is quantified with reference to the projected future loss of income. Potgieter and Floyd are surely right when they observe that, in a sense, loss of earning capacity occurs simultaneously in the present and the future – the bodily injury reduces the victim's earning capacity right away but future events “co-determine the content of the expectation”.³² Even though it is an unsettled position, it seems that our courts would be willing to make an affirmative finding of property harm even in a case where no harm has yet materialised, as long as the balance of probabilities indicates that future harm will occur.³⁵

In light of the above general principles, it should come as no surprise that our case law firmly recognises the loss of earning capacity as a valid claim that falls under the umbrella of Aquilian liability.³⁴ The next question that arises is exactly how the Aquilian damages for such a claim will be quantified. In this regard, we turn to the intricacies of the law of damages.

2 3 Aquilian damages for lost earning capacity

2 3 1 *Revisiting the basics of property damages*

Potgieter and Floyd identify the “definition and assessment of prospective loss” as one of the most significant issues in the South African law of damages today.³⁵ But before we can get to unpacking the controversies involved in the calculation of damages for a child's loss of earning capacity (as an instance of quantifying prospective loss), some basic principles of the law of damages must be revisited briefly.

Damages for property harm are one of the most common remedies in a case of Aquilian liability. Damages are defined by Potgieter and Floyd as the “monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage”.³⁶ The “law of damages” thus regulates this space.

According to Potgieter and Floyd, the law of damages does not have the main purpose of providing the “fullest possible compensation for

32 Potgieter and Floyd (2012) 131.

33 While not deciding the issue definitively, the court was willing to entertain a purely future-based claim in *Jowell v Bramwell-Jones* 2000 3 SA 274 (SCA). There the probabilities were not in favour of the claimant which is why we do not have a final word on this issue.

34 It would be impractical to provide a full list of cases, but a representative sample includes *Santam v Beyleveldt* 150A-C; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) at 917A–B; *Southern Insurance v Bailey* 1984 1 SA 98 (A) at 111C–F; *Rudman v Road Accident Fund* 2003 2 SA 234 (SCA) paras 10–11 and 14.

35 Potgieter and Floyd (2012) 16.

36 Potgieter and Floyd (2012) 20ff.

damage” but it is about providing “just, logical and practical rules and principles for solving problems regarding the determination of damage, damages and satisfaction”.³⁷ This is an important “purpose statement” to bear in mind while the discussion below unfolds with regard to damages for loss of earning capacity.

It is generally understood that determining the quantum of damages involves a two-stage process.³⁸ First, we must assess the property harm. Secondly, we must make certain adjustments to the first figure to ensure a just result, which makes sense if the essential purpose of the law of damages is to ensure a type of corrective justice explained above. The latter part of the process may be called the quantification stage.

Regarding the assessment of property harm, it is established law that we apply the “comparative method” (also called the “sum-formula approach”). Indeed, the Supreme Court of Appeal has said that it is “beyond question” that this is the method we use to assess harm in delict.³⁹ In terms of this method, we compare the “actual position that obtains as a result of the delict” and the “hypothetical position that would have obtained had there been no delict”.⁴⁰ The negative difference between the actual position and the hypothetical position gives us the assessed harm.⁴¹

Once the harm has been assessed, we move on to the quantification stage. Here we determine the appropriate quantum of damages to be paid by the wrongdoer to the victim. Neethling and Potgieter provide the following useful overview of considerations:⁴²

After damage has been expressed in money with reference to the correct time and standard of value, this amount must be adjusted in terms of other principles to obtain the final sum of compensation. For instance, damages cannot be calculated in respect of damage which is too remote; a plaintiff's damages are reduced in proportion to his contributory negligence; damages are reduced when regard is had to compensating benefits and failure to take reasonable steps in mitigation. Furthermore, damages for prospective damage are discounted or capitalised and provision is made for contingencies. There are also special rules in connection with the disregarding of income from illegal activities, as well as statutory limitations on the amount of recoverable damages.

I would endorse this paragraph as a good summary of the extant law on quantification but for two small aspects. In my view, the remoteness of a particular head of harm is rather a question of legal causation (and thus substantive liability) instead of one of quantifying the damages.⁴³

37 Potgieter and Floyd (2012) 4.

38 For more thorough treatments of the general principles of the law of damages see Neethling and Potgieter (2020) 266ff; Klopper (2017) 23–90.

39 *Transnet v Sechaba Photoscan* para 15.

40 As above.

41 Potgieter and Floyd (2012) 72.

42 Neethling and Potgieter (2020) 282–283.

43 This is how I read *Smit v Abrahams* 1994 4 SA 1 (A).

Furthermore, in my view, the issue of illegal income is one best left to the assessment of harm in the sense that a victim cannot really suffer harm to their property when they suffer a perceived loss in something that they had no legal right to in the first place,⁴⁴ but this controversy could be largely moot if we take Dendy's call seriously to focus on lost earning capacity (including the capacity to do lawful work) instead of actual lost earnings generated from an illegal activity.⁴⁵ Minor differences aside, this is roughly what quantification is all about. Now we can turn to how the assessment and quantification stages play out in a case of lost earning capacity in general before we consider its specific application in the context of children.

2 3 2 Assessing and quantifying damages for loss of earning capacity and future income in general

When dealing with prospective loss, including loss of earning capacity which results in a loss of reasonably expected future income, the general principles related to assessment and quantification apply.

As to assessment, the comparative approach plays out as follows.⁴⁶ We determine the present value of the victim's *hypothetical* projected future income, but for the delict. We compare that to the present value of the victim's *actual* projected future income, now after the delict. The negative difference between the two is the assessed harm. This figure is then adjusted (read: quantified) to account for contingencies, discounting, capitalisation, annuitisation, and the general principles related to mitigation, apportionment, statutory limitations, and so forth.⁴⁷

The use of the phrase "projected future income", in both hypothetical and actual senses, highlights that we are dealing with a highly speculative exercise.⁴⁸ Thankfully, the speculative nature of the exercise is not necessarily arbitrary. While the exercise might be "difficult" it can nevertheless be "reasonable".⁴⁹ Available evidence may be useful in indicating the possibilities and probabilities in a particular case.⁵⁰ While hardcore evidence does not seem to be an absolute requirement for the

44 This is what I would regard as the logical implication of *Warneke's* case that clearly defines the Aquilian concept of property in terms of rights. It cannot be said that a person has a right to something that was acquired illegally.

45 See his famous triad in this regard: Dendy "Illegal income and remunerative loss – Claims by income-earnings in Southern African law" 1998 *THRHR* 564; "Illegal income and remunerative loss – II: Claims by dependents in Southern African law" 1999 *THRHR* 34; "Illegal income and remunerative loss – III: Loss of Lawful Earning Capacity" 1999 *THRHR* 169.

46 This summary is a restatement of how the *Sechaba* principles play out in loss of earning capacity cases, as explained by Klopper (2017) 121; Potgieter and Floyd (2012) 469; Koch (1984)131ff.

47 Potgieter and Floyd (2012) 142–150 and 476. I will not deal with these concepts in any further detail here.

48 Klopper (2017) 96; Potgieter and Floyd (2012) 139.

49 Potgieter and Floyd (2012) 133.

50 Klopper (2017) 97; Potgieter and Floyd (2012) 140.

success of a notional claim for lost earning capacity manifesting as prospective loss, it can certainly assist in providing a more accurate (and higher) assessment of harm and quantification of damages.⁵¹ As trained professionals in the complex mathematical field of future probabilities, actuaries may be particularly helpful expert witnesses to assist a court in its findings in this regard.⁵² Actuaries necessarily base their projections on available evidence and deductions that may be drawn from it. For example: medical reports may indicate the victim's life expectancy and work-life expectancy which can affect the calculation of projected future loss of income;⁵³ medical reports may also indicate the extent of the disability which could be a useful guide as to the extent of the loss of the ability to earn an income after the delict;⁵⁴ the victim's gross income before the delict may be a useful starting point from which to work; economic forecasts regarding fluctuations in the value of money and inflation may be relevant; projections regarding future tax schemes may also play into the calculation.⁵⁵

From the above exposition, it appears that a situation may arise where clear-cut scientific evidence on projected future loss of income may be difficult to present in many cases, while it is nevertheless clear on a balance of probabilities that loss of earning capacity manifesting as loss of future income will occur. Once the element of harm is established on a balance of probabilities (here, loss of earning capacity) some type of award for damages ought to be made, subject to the rule: *de minimis non curat lex*.⁵⁶ Klopper thus suggests that the award of damages may thus be determined either with some degree of mathematical accuracy (where sufficient scientific evidence is available) or with reference to a "fair amount" which is derived from the facts and circumstances of the case.⁵⁷ Millard similarly distinguishes between scenarios where the comparative method is strictly observed versus where a "somehow-or-other" approach is employed.⁵⁸ Regarding the latter, she contends that awards of that nature seem to follow a method of quantification that is much closer to the process involved in pain-and-suffering cases.⁵⁹

Klopper and Millard both prefer the more mathematically sound approach for situations where scientific evidence is available but recognise that it is not always practical in ensuring an outcome that

51 Klopper (2017) 97 citing *De Klerk v ABSA Bank* 2003 4 SA 315 (SCA).

52 Klopper (2017) 98; Potgieter and Floyd (2012) 467; Koch *passim*.

53 Klopper (2017) 121.

54 As above.

55 Potgieter and Floyd (2012) 470. For a complete treatment of the legal-practical dimensions of the actuary's role and their approach to available evidence see Koch *passim*.

56 This is implied also in *Komape v Minister of Basic Education* 2020 2 SA 347 (SCA) para 47 read alongside *Ngomane v Johannesburg (City)* 2020 1 SA 52 (SCA).

57 Klopper (2017) 121.

58 Millard *Loss of earning capacity: The difference between the sum-formula approach and the somehow-or-other approach* (LLD thesis 2007 UWC).

59 Millard (2007) 21. See 22ff for a brilliant survey of case law in this regard.

accords with a sense of justice – which we will recall is the key underlying rationale of the law of damage.

Equipped with a basic knowledge of how loss of earning capacity claims for future earnings are dealt with in general, we can now direct our attention to the more specific manifestation of the issue, namely the quantification of damages for loss of earning capacity of children.

2 3 3 Assessing and quantifying damages for loss of earning capacity of children

The general principles related to the assessment of harm and quantification of damages for loss of earning capacity apply to a child's claim. However, in the case of children, unique difficulties arise. Klopper's most recent treatise on *Damages* provides a detailed list of practical considerations that play into the quantification of damages for loss of earning capacity of children.⁶⁰ The following considerations are instructive. The key difficulty with assessing a child's loss of earning capacity is that there is no clear basis of earnings from which we can work, making this exercise particularly challenging. As noted in the previous section, in the case of victims with established careers, we at least have their payslips before the delict to use as a starting point. In the case of children, we enter a room full of smoke, making the future projections particularly difficult and speculative. Actuarial calculations may be useful in this regard, but courts tend to make serious contingency adjustments to the quantum of damages – generally around 30% in contingency deductions.

Klopper has identified four chief factors that may nevertheless provide useful direction:⁶¹ (i) average probable income; (ii) the child's schooling and familial context; (iii) wage statistics; and (iv) judicial discretion. I will now analyse each of these factors with reference to relevant case law. I defer my critiques of the case law to §3 below.

First, Klopper suggests that the damages award could be made with reference to the "average probable income expected by the reasonable person".⁶² Klopper deduces this from the case of *Mrwarwaza v Rondalia Assurance*.⁶³ However, that specific expression finds no explicit grounding in the case itself. In *Mrwarwaza*, the court considered the evidence before it from the victim's sub-A (Grade 1 in today's terms) teacher who labelled the child as "intelligent and reasonably well-experienced" as well as "bright" and in the top tiers of her class.⁶⁴ But,

60 Klopper (2017) 118–119.

61 Klopper (2017) 118–119. For a slightly different take see Potgieter and Floyd (2012) 66; Nienaber and Van der Nest "Actuarial science v equity: Contingency deductions for future loss of earnings and the HIV/AIDS pandemic" 2005 *THRHR* 551ff.

62 Klopper (2017) 118.

63 1978 (2A4) QOD 760 (E).

64 *Mrwarwaza v Rondalia Assurance* at 764.

her intelligence and maturity aside, the court noted that the future trajectory of an African woman's career would necessarily be limited by the political conditions of the time in the 1970s, where available jobs were limited to cleaners, factory workers, shop assistants and, in exceptional cases, nurses.⁶⁵ In the end, the court determined that there was a "statistical probability" that the victim would become a nurse with an income more than that of cleaners,⁶⁶ but, I would add, surely less than that of white comparators. For me, the principle to be derived from this case is less about reasonable expectation. Instead, I would phrase the factor as follows: "Courts have tended to be realistic about how social, economic, and political conditions determine (indeed, constrain and sometimes obliterate) a victim's future possibilities". Understandably, my phrasing of the principle is less attractive (and less compact) than the one proposed by Klopper, but I think my interpretation is a more vivid representation of the true underlying factors at play, that should not be reduced to what a reasonable person would expect "in the air".

Secondly, the child's performance at school and family employment history may be considered. In *Southern Insurance Association v Bailey*, a two-year-old girl was injured in a motor vehicle accident.⁶⁷ She was one of six children of farm labourers.⁶⁸ Her mother was an "apple grader" in Grabouw before she retired to full-time child-rearing. While working, her mother's wages were R36 per week.⁶⁹ The expert actuarial witness in this case persuaded the court to use that R36 as a basis from which to determine the child's loss of earning capacity subject to a 25% contingency deduction. Since *Bailey*, similar findings have been made in more recent High Court cases too. In *Megalane v RAF*⁷⁰ the injured boy had average performance at school,⁷¹ but at least the court noted that better opportunities are available for "previously disadvantaged groups" today for tertiary education.⁷² That glimmer of hope aside, we are told that children often follow in their parent's footsteps in terms of future income.⁷³ In *Pietersen v RAF*⁷⁴ the court followed the gist of familial determinism in *Megalane* and applied a 30% contingency deduction (10% higher than in many other cases) in part because the child was surrounded by unemployed adults.⁷⁵ If the child's family have better employment track records, this could swing in the child's favour. For

65 *Mrwarwaza v Rondalia Assurance* paras 765–766. See also *Ncubu v National Employers General Insurance* 1988 2 SA 190 (N) at 198H–199H where similarly socio-economic constraining factors were considered, but where the court incorrectly proceeded to heap the claim for loss of earning capacity under the heading of "general damages".

66 *Mrwarwaza v Rondalia Assurance* at 765.

67 1984 1 SA 98 (A).

68 *Southern Insurance Association v Bailey* at 114G.

69 *Southern Insurance Association v Bailey* at 114H.

70 2007 JDR 0171 (W).

71 *Megalane v RAF* para 13.

72 *Megalane v RAF* para 28.

73 *Megalane v RAF* para 29.

74 [2011] ZAGPJHC 73.

75 *Pietersen v RAF* paras 35–37.

example, in *Kgomo v RAF*⁷⁶ a 14-year-old boy who was injured was interviewed by an industrial psychologist. The psychologist testified to the child's abilities before and after the accident, arguing that the boy would probably have embarked on employment at a "semi-skilled level in the non-corporate sector",⁷⁷ on account of the achievements of immediate family members, coupled with the child's stable family environment.⁷⁸

Thirdly, wage statistics may be relied upon. Two examples illustrate this factor. In *Van Rensburg v President Versekeringsmaatskappy*, the actuaries who acted as expert witnesses in guiding the court considered, among other things, wage statistics of that time for the victim's likely future profession, before the delict.⁷⁹ In *Van Dyk v Mutual and Federal*, a child lost his eyesight on account of an accident.⁸⁰ The psychologist in that case determined the median income of blind people at that time and presented that to the court as a basis from which to determine the post-delict expected future income.⁸¹ I am not aware of a case where a court has awarded a child damages for loss of earning capacity based on the average or median national income in general, but it is not too far a stretch to see how that may be done relying on *Van Dyk's* deeper underlying principles. Current indicators are that the median income in South Africa today is about R13 000 per month,⁸² while the average employee working in a business environment is around R24 000 per month,⁸³ the latter being considered by some to be a liveable wage.⁸⁴

Fourthly, the court always has the discretion to determine what is fair in the circumstances – what Millard calls the "somehow-or-other" approach. In *Roxa v Mtshayi* the appeal court commended the trial court for awarding a "globular sum" instead of a mathematically precise award, given the great uncertainties and evidentiary gaps in that case.⁸⁵ More recently, a similar discretionary approach was followed in *Hlalele v RAF*.⁸⁶

76 2011 JDR 1052 (GSJ).

77 *Kgomo v RAF* para 7.

78 *Kgomo v RAF* para 8.

79 1968 2J2 QOD 62 (W).

80 1981 3I3 QOD 226 (T).

81 *Van Dyk* at 228.

82 Statista "Average monthly earnings in South Africa from November 2015 to November 2020" <https://www.statista.com/statistics/1227081/average-monthly-earnings-in-south-africa/> (last accessed 2022-11-10).

83 Staff Writer "This is what the average worker gets paid in South African right now" <https://businesstech.co.za/news/finance/547318/this-is-what-the-average-worker-gets-paid-in-south-africa-right-now/> (last accessed 2022-11-10).

84 Kruger "Living on SA's 'average' salary of R23122 per month" <https://www.moneyweb.co.za/news/economy/living-on-sas-average-salary-of-r23-122-per-month/> (last accessed 2022-11-10).

85 1975 3 SA 761 (A) at 769F–770A.

86 2015 JDR 0682 (GSJ).

In addition to Klopper's four principles, another one is identified by Potgieter and Floyd, which I would call the "under-compensation" principle. Relying on the case of *Singh v Ebrahim*,⁸⁷ Potgieter and Floyd note that courts will tend to be conservative in their awards for a child's loss of earning capacity on account of the difficulties involved in speculating far into the future.⁸⁸ In *Singh*, a baby boy became disabled due to medical negligence during his birth. In the trial court, no claim was made for loss of earning capacity. On appeal, an attempt was made to amend the pleadings to include such a claim, but it eventually failed. However, the court was urged to resist a conservative approach, favouring the wrongdoer, when it came to quantifying the damages for the child's future losses in general. This urging was based on section 28 of the Constitution which enshrines the best interests of the child as paramount in matters concerning children. The following dictum, which was essentially endorsed by the full bench of the Supreme Court of Appeal, is instructive:⁸⁹

The conservative approach to the assessment of damages is an approach based on policy considerations. Those policy considerations take account of the fact that when a court assesses damages, particularly for loss of future earning capacity and medical expenses, it has been said to be 'pondering the imponderable'. It in essence makes an assessment of what the future holds. Fairness to a defendant when an uncertain future is assessed at a time when the injuries caused by the defendant is known and could give rise to an overly sympathetic assessment of the plaintiff's damages, has also to be borne in mind. The general equities in the case need to be given due weight to achieve fairness, not only to the defendant, but the plaintiff and the public at large. The latter, because awards made affect the course of awards in the future, overly optimistic awards may promote inequality and foster litigation...

A few simple rhetorical questions serve to illustrate the potential pitfalls if section 28 is to be interpreted to favour a child plaintiff in the way that the appellants are contending for. What would happen in a case where the child is the wrongdoer and thus the defendant? What if both the plaintiff and the defendant are children? What if the child plaintiff turns 18 during the course of the trial? Surely abandoning the conservative approach in the instances where the plaintiff is a child would create intolerable consequences as it would give rise to a malleable standard to be applied to litigation for damages that is dependant on whether the victim or wrongdoer is a child, contrary to the universal principle of certainty. It would also elevate the rights of a child above other rights in the Bill of Rights like equality and the right to a fair public hearing before a court. The interpretation of section 28 that the appellants contend for, cannot be upheld.

Based on the discussion of case law thus far, our law as it stands provides five key principles that are specifically relevant in the

87 2010 JDR 1431 (SCA).

88 Potgieter and Floyd (2012) 567–568.

89 *Singh v Ebrahim* paras 128 and 130 (footnotes omitted).

assessment of harm and quantification of damages for children's lost earning capacity. My restatement of these principles are: (i) socio-economic and political conditions are deterministic; (ii) a child's schooling and familial setup are deterministic; (iii) wage statistics may be considered where appropriate; (iv) globular sums of money may be awarded following the sum-how-or-other approach; and (v) a conservative slant is applied to the child's ultimate disadvantage. In the last case discussed, *Singh*, hints at the fact that constitutional considerations could be at play in the application of these principles. However, in the next part, I will show that the finding in *Singh* might be constitutionally wanting in the sense that it does not properly fill our law of damages with constitutional spirit. Furthermore, I will show that principles (i) and (ii) also have a tendency to lack constitutional lustre. It is perhaps in principles (iii) and (iv) where we might find a more "constitutionally woke" approach to the quantification of damages for a child's lost earning capacity.

3 The law transformed: Constitutional considerations and a child's lost earning capacity

Principles (i), (ii) and (v) listed in the previous part have the potential to offend constitutional spirit. There are at least three critical constitutional rights at stake in a case involving the lost earning capacity of a child. The constitutional right in property (found in section 25) of the child is the cornerstone right implicated in a loss of earning capacity dispute. I have explained this earlier exhaustively and take it no further. We also have the right of children to have their best interests regarded as paramount in all cases (section 28(2)).⁹⁰ The notional link between children losing earning capacity and their best interests having to be protected should be clear enough. Finally, there is the right to equality (section 9) which has been understood in the South African context to mean substantive equality – that is an affirmative conception of equality that realises that certain positive steps will have to be taken in order for a truly equal social order to be achieved.⁹¹ As I am about to show, principles (i) and (ii) above have the potential to endorse a banal realism that does not optimally promote the constitutional ideals of promoting the achievement of equality and the best interests of children.

To recapitulate briefly, principles (i) and (ii) in our extant law on children's lost earning capacity put forward a deterministic worldview insofar as social, economic, political, educational, and familial considerations are concerned. A very rough paraphrase would be that

90 See generally in this regard Skelton "Constitutional protection of children's rights" in Boezaart (ed) *Child Law in South Africa* (2018) 327 and 345ff.

91 See generally in this regard Albertyn and Goldblatt "Equality" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2008) §3.1ff.

your background invariably determines your future. At the extreme, the logic would be that if you were born poor, chances are you will die poor.

Factually, many might agree that cycles of poverty and wealth tend to be reproduced generationally. In the South African context, with our history of political and economic disempowerment of black people, it would be an unfortunate state of affairs if courts were to endorse or somehow maintain the vision of the apartheid economy despite the existence of a transformative Constitution.⁹² The intuitive concern is that the type of deterministic reasoning that informs many cases of children's loss of earning capacity has the potential to fall into a false consciousness about the necessity and unavoidability of social hierarchy – deterministic reasoning can perpetuate rather than work towards undoing historical injustice.⁹³ Following Klare,⁹⁴ transformative constitutionalists would contend that our approach to the issue should rather be “historical self-conscious”, striving for a better world where equality might be achieved instead of the pessimism that hard determinism may promote, signalling that people are trapped in the hierarchy wherever they are.⁹⁵

Van der Walt, writing specifically about the *Bailey* case discussed above, has raised a powerful critique of the court's judgment. A summary of his critique is captured in the following quote:⁹⁶

[The court] unquestioningly assumed the labour market of apartheid South Africa to be a sound basis for their unanimous assessment of Danderine Bailey's loss of future income. They never entertained the idea that Danderine Bailey might have become anything other than an apple grader. They discarded the possibility of Danderine Bailey having the natural ability of, for instance, a concert ballerina, singer or actress, despite the fact that these things do happen. In assessing her loss of earning capacity on the basis of the career of an apple grader, in grading her as an apple grader, they simply opted to inscribe her into the socio-economics of apartheid. Their decision in this regard can be commended for its realism. After all, what was the chance of Danderine Bailey escaping from the violent syntax of apartheid economics? Do we have any forceful economic argument, given the scrupulously unyielding economy of apartheid and the harsh exigencies of its labour system, which seriously challenges the reasonableness of the reduction of her career possibilities to that of her mother's? It should be clear that we have very little ground from which we can question the correctness of their assessment. But we should ask whether such an assessment can ever be justified. Can their assessment in any sense be said to relate to Aristotle's notion of corrective justice, the notion of giving back to her the full extent of what the natural development of her life might have afforded her? How can one do justice, by

92 See Modiri “Law's poverty” 2015 *PELJ* 224.

93 See Zitzke “Stop the illusory nonsense! Teaching transformative delict” 2014 *Acta Academica* 61 ff.

94 Klare “Legal culture and transformative constitutionalism” 1998 *SAJHR* 155–156.

95 Zitzke 2014 *Acta Academica* 67ff.

96 Van der Walt “The language of jurisprudence from Hobbes to Derrida (and the latter's quest for an impossible poem)” 1998 *Acta Juridica* 92 (footnotes omitted).

giving an account, by whatever economics possibly applicable, of the unpredictable events that await a 2-year-old child? Does justice not then demand from us a resistance to economics?

In the end, Van der Walt calls on us to “dream the dream of an impossible justice” for victims such as those in the *Bailey* case. A few years later he would continue his critique as follows:⁹⁷

We should bear in mind that the apartheid labour market is still very much with us. This is a fact that still has a direct bearing on the future prospects of people in this country. If the different socio-economic prospects of individuals are to continue to play a role in the assessment of awards for future loss, it will make a mockery of the promise of equality before the law embodied in the Constitution. The right to equality demands a fundamental shift from a false system of corrective justice to a fair system of distributive justice as far as assessments of claims against the road accident fund or any other social security fund are concerned.

Some have been sceptical of Van der Walt’s critique to the extent that it laments an injustice but provides little guidance on a way forward.⁹⁸ But it is in the wake of Van der Walt’s critique where I intend to construct a legal memorial of sorts for children victims who suffer a loss of earning capacity.

My proposal for a way forward that would be more constitutionally inspired involves the following. Our starting point must be to consider the effect of principles (i) and (ii) on children from affluent backgrounds versus children from poor backgrounds who suffer similar injuries. While the child with rich parents may walk away from a loss-of-earning-capacity lawsuit with a corrective justice smile, the child from a poor background might leave with much less compensation in comparison, essentially condemned for life to the original position of poverty. The message that the law sends to notional wrongdoers is tragic: It would be better to assault a poor man than a child from a wealthy background. To close the gap between the rich and the poor child – that is, to bring us closer to achieving equality – in my view, we could follow one of at least two routes. Both are ultimately premised on a conglomeration of principles (iii) and (iv) related to wage statistics and judicial discretion. My proposals must not be understood as being exhaustive.

The first route would dictate that children from disparate backgrounds should receive the same compensation. An easy way to ensure consistency in this principle is for courts to simply award the average or median income in South Africa today. As indicated earlier, some economic commentators believe that to be a liveable wage. This proposal would clearly benefit the child from a poorer background. Some would argue that this proposal would however be detrimental to the child who

97 Van der Walt “The quest for the impossible, the beginning of politics: A reply to Dennis Davis” 2001 *SALJ* 463–470.

98 Davis “Duncan Kennedy’s *A Critique of Adjudication*: A challenge to the ‘business as usual’ approach of South African lawyers” 2000 *SALJ* 697.

was reared in affluence because that child could end up receiving less compensation than the evidence-based predicted wages. Some would counter-reason that the child of affluence would in any case benefit through generational privilege and so even if the child only received compensation based on the average/median national income, “all things will be equal in the end”.

The second route, by contrast, would allow the child of affluence to claim an inflated amount of compensation on account of generational privilege, but would insist that the child from the poorer background may not be further deprived of opportunity and resources. Thus, the child in poverty should be able to claim the average/median national income instead of being condemned into a cycle of poverty. Either way, when we deal with a child from a poorer background, our concern would be a shift away from principles (i) and (ii) towards (iii) and (iv).

Whether or not the court was right in *Singh* about the best interests of the child and claims for prospective loss (and I make no direct pronouncement in this regard), these two suggested routes would do much for the transformative project of seeing children's rights being promoted. Whichever route we take, the sincere goals ought to be the same, namely protecting children's rights in dephysicalised property optimally; promoting the best interests of children; as well as achieving equality in society.

A notional objection to either of my two proposals would be that a single wrongdoer should not bear the responsibility of distributive justice. If distributive justice is a target towards which we should work, it is the responsibility of government, not individuals. Of course, when the RAF is the party being sued, such an objection is somewhat softened – then an organ of the state or, if you like, “all of us”, are made responsible for a distributive justice obligation. In situations where we have non-state actors like the negligent doctor in *Singh's* case, the issue does become morally trickier. One could ask why the doctor in question should bear a distributive justice obligation towards a child who grew up in poverty. One could also ask why that child in particular should be regarded as having “won the distributive justice lottery” while so many other children in poverty-stricken conditions are still ignored by governments and more well-resourced people in general. In this regard, Keren-Paz has argued that we should embrace any instance of distributive justice as morally acceptable, no matter how localised, even though a more generalised form of distributive justice that would see the end of poverty as we know it, might be the ultimate goal.⁹⁹ If Keren-Paz is right, then the *Singh* principle (v) might require some constitutional rethinking: We could argue that it would be in a child's best interest to experience some form of redistributive justice through delict.

99 Keren-Paz *Torts Egalitarianism and Distributive Justice* (2007) *passim*. He specifically identifies the issue of a child's loss of future earnings as an instance that requires redistributive imagination.

Some would say that our entire constitutional project since democratisation is about realising the need for both corrective and distributive justice.¹⁰⁰ When section 39(2) of the Constitution speaks about the “spirit, purport and objects of the bill of rights” in the common law’s development, and when section 173 speaks about courts developing the common law “in the interests of justice”, both corrective and distributive concerns may be at play. In the context of the law of damages, we should remember that the objective is providing “just, logical and practical rules and principles for solving problems regarding the determination of damage, damages and satisfaction”.¹⁰¹ We should also remember that authors are unanimous about the fact that the Constitution could play a role in the development of the law of damages,¹⁰² which is a really a vehicle through which “appropriate relief” may be granted for the infringement of constitutional rights as required by section 38 of the Constitution, though they are shy to provide examples of areas in need of development.

Beyond the “pure” constitutional argument, there are glimmers of these constitutional goals already apparent in the case law, albeit not the dominant discourse on children’s loss of earning capacity. Mention should be made in this regard to Satchwell J’s various remarks in the case of *Hlalele* mentioned earlier in the context of lumpsum awards. She writes the following: “We do the best we can knowing that the future in the Republic of South Africa has not, in our lifetime, always been determined by the past and that change and transformation are all around us.”¹⁰³ Highlighting that hard determinism is not necessarily a good approach to quantifying damages for a child’s lost earning capacity, she continues: “...who would have thought that a [boy herder] would have become the first President of a democratic South Africa?”¹⁰⁴ After grappling with contrasting expert evidence that shed no useful light on the matter, she awards a lumpsum of compensation for lost earning capacity with a clear vision for the award to be used for the child victim’s “advantage – not only his benefit”.¹⁰⁵

The spirit of distributive justice is clearly present in *Hlalele*’s case and is certainly a token of hope for a transformed law on a child’s lost earning capacity. We would do well to remember that continuously being open to the development of the law on Aquilian liability and damages is an instruction that goes back as far as the case of *Warneke* in the early days of the Union: “there is no reason why our Courts should not... adapt the doctrine and reasoning of the law to the conditions of modern life.”¹⁰⁶

100 On the latter’s relationship with equality see Albertyn “Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice” 2018 *SAJHR* 441.

101 Potgieter and Floyd (2012) 4.

102 Klopper (2017) 5; Potgieter and Floyd (2012) 17.

103 *Hlalele v RAF* para 10.

104 *Hlalele v RAF* para 17 (the judge used the term “herdboy” in her expression that I have recast in the main text).

105 *Hlalele v RAF* para 25.

The proposals that I have made here are both constitutionally defensible and justifiable on the basis of the common law itself.

4 Conclusion

In this article, I have argued a case for the constitutional transformation of the law related to a child's claim for loss of earning capacity. I have shown that this claim has firm historical roots in the principles of Aquilian liability and is today underscored by the constitutional protection of property. I have also shown that the current law regarding the assessment of harm and the quantification of damages for claims of this nature have the potential to lead to results that fail to provide optimal protection for the child's property interests, the child's best interests, and the achievement of equality in South Africa. As such, the vibrant constitutional infusion of the law of delict and damages is stifled. Instead of following approaches to harm assessment and damages quantification that fall into a trap of hard socio-economic determinism, I have suggested creative applications of wage statistics coupled with judicial discretion, slanted in favour of distributive justice, that may provide us with more equitable results. In this way, the constitutional concern with the best interests of children and the law of delict can peacefully coexist. And that is what a transformative law of delict is partly about.