CONTINGENCIES AND ONUS IN THE DELICTUAL LAW OF DAMAGES

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Summary

Contingencies can be described as uncertain circumstances of a positive or negative nature which, independent of the defendant's conduct and if they should realise, would probably influence a person's health, income, earning capacity, quality of life, life expectancy or dependency on support in future or could have done so in the past, and which consequently must be taken into account in a fair and realistic manner in the quantification of damages. Essential to this definition is the element of certainty or uncertainty with which an incident can be predicted that is linked to the degree of probability that the occurrence will take place or would have taken place if it had not been for the accident. Two particular theories could be relevant in the establishment of the degree of probability, namely the Pascalian model in which a pure mathematical approach is followed and the Baconian model in which an inductive approach is followed. Because the Baconian model is less stringent, it appears to be more suitable for determining and applying contingencies. In civil law the burden of proof rests upon the plaintiff and the expected measure of proof is a preponderance of probability. It has become clear that the terms 'burden of proof' and 'measure of proof' according to their strict evidentiary meaning, do not fit naturally into the theory of proof in the case of contingencies. If the amount of damages has to be adjusted for contingencies, it does not mean necessarily that the burden of proof in respect of the adjustment always rests upon the plaintiff. In principle, one can say that the plaintiff must adduce evidence of contingencies that can increase damages and the defendant of contingencies that can reduce damages. The measure of proof also is relaxed in cases where uncertainty prevails, for instance in the case of future loss.

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