

# KOCH & MELVILLE

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## NEWSLETTER

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Dear Reader,

**Damages for Motor Vehicle Accidents:** In a recent judgment by the Transkei Appellate Division (*Kewana v Santam Insurance* unreported 02.02.93 case number 112/88) it was held that damages claimable under the relevant MVA legislation were not limited to what could be claimed under the common law. A child adopted under customary law was thus awarded damages for loss of support despite the fact that adoption in terms of legislation had not taken place.

*MMF se nie moet dit nie toepas*

**Whiplash injuries:** We have been much gratified by the response to our last newsletter by way of further articles on whiplash injuries: Norris & Watt (1983) *Journal of Bone and Joint Surgery* 608-11; Gargan & Bannister (1990) *Journal of Bone and Joint Surgery* 901-3; Parmar & Raymakers (1990) *Journal of Bone and Joint Surgery* 936. The 1990 article by Gargan & Bannister provides an excellent overview of the earlier literature as well as providing a follow-up survey of the same cohort of whiplash victim examined by Norris & Watt. The conclusions may be summarised as follows: 60% of persons suffering a whiplash injury do not experience long-term symptoms. Persons displaying symptoms after 3 years, that is to say 40% of the original cohort, almost without exception continue to display symptoms 8 to 12 years after injury. Of those with continuing symptoms 30% of the original cohort experienced moderate discomfort, whilst 10% experienced severe symptoms. Older persons tend more readily to long-term symptoms. In roughly 2% of cases was surgery indicated (100% success is reported). We note that the incidence of joint degeneration in the normal population is about 6% (*The Cervical Spine* 2ed (Lippencott USA 1989) at 440 per Hohl). It follows that longer-term prospects for surgery become increasingly difficult to separate from normal degenerative change. The more recent commentators are all in agreement that the prospect of a damages payment is not associated with improved symptoms after compensation has been paid, ie compensationitis is rare. We note that none of the articles deal with victims who have suffered a second or third whiplash. Clearly for such persons the degree of aggravation of the pre-existing symptoms by a subsequent accident will depend heavily on the severity of the pre-existing symptoms. The articles agree that there is a good correlation between the size of an award for damages and the severity of the symptoms, so close regard should be had to past awards to the same victim.

**General damages for shock of death:** In our last newsletter we cited cases indicating the potential in South African law for an award of general damages for the shock occasioned by the news of the death of a relative. In the English case of *Jones v Wright* [1991] 1 All ER 353 (QBD) damages were awarded to persons who had suffered shock from watching a television transmission of relatives being killed or injured by the collapse of a football stadium. Only siblings and parents were granted a right of action, more remote relatives

were excluded. Damages were refused for persons who had not been watching the TV transmission but who had experienced shock on later receiving the news. In *Hevican v Ruane* [1991] 3 All ER 65 (QBD) damages were awarded to a father following upon the death of his favourite son **despite the fact that the father was not present at the immediate aftermath of the accident.**

**Expert reports:** We are frequently sent only the relevant part of an expert report. The date of the report is usually of great importance due to the need for adjustments for inflation. This date is often not available to us with the resulting need for telephone calls and/or letters. **Expert witnesses should please endeavour to include in the header or footer of every page the date of that report.** This is readily achieved with modern word processors.

**Undertakings:** It is common these days that the liability of the MMF for future expenses is settled by way of an undertaking by the Fund to meet such expenses as and when these occur. These undertakings are often drafted in a very loose manner and all too frequently give rise thereafter to extensive and continuing litigation over what is and is not covered by the undertaking. The best wording we have seen to date is a brief statement that the expenses and frequencies recommended in the attached expert reports (urologist, occupational therapist, etc) are *prima facie* reasonable.

**Unemployment is not so bad** (nor too good): Business Day (11/02/93 at 4) reports that 'while some estimates show unemployment as embracing half the economically active population, the actual figure (is) somewhere between 7% and 12%'. A recent HSRC survey has indicated that between 5% and 10% of blacks are unemployed and living at levels of severe deprivation. Only 85 of every 1000 people entering the job market find work in the formal sector. About 45% of the economically active population is not employed in the formal sector. We add that this last consideration should be borne in mind when assessing damages on the basis of earnings statistics taken from the formal sector. Earnings in the informal sector are substantially lower than those indicated by the glossy big-business surveys (for comparative earnings levels see *Quantum Yearbook* 1993 at 86-7). The earnings certificates submitted for injury and death claims provide an invaluable source of statistics on earnings in the informal sector and the MMF should make an effort to correlate and report such statistics.

**Leg amputation: no loss of earning capacity:** In *Saayman v Mutual & Federal Versekeringsmpy* 1989 (T) (unreported 22.11.89 case no 3259/87) the claimant, a young electrician, had suffered a below-knee amputation. The court found as follows:

'Die waarskynlikhede is in ieder geval dat in vandag se elektrotegniese bedrywighede die ou konsep van wat behels word met veldwerk, nie meer geldig is nie. Ek meen dat dit in voldoende mate getoon is dat die eiser se belemmering nie 'n wesenlike een is nie. Ek dink nie dat die eiser bewys het dat hy 'n noemenswaardige verlies aan verdienvermoë ondervind het nie. Ek aanvaar dat hy homself in besonder sal moet beywer om mee te ding met ongestremde kollegas. Hy mag op tyd ook frustrasie ondervind. Ek sal dit in aanmerking neem by die bepaling van 'n bedrag vir algemene skade.'

**Readers are invited to keep us informed of unreported judgements and other interesting developments and also suggestions as to topics for comment.**

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