NEWSLETTER

(Number 16 - March 1995)

Dear Reader,

WCA benefits and apportionment of damages:

Ngcobo v Santam 1993 (T) (unreported 4.11.93 case 20784/92) was concerned with damages for personal injury where the claimant had been 50% at fault. The damages before apportionment had been agreed at R57887. The claimant had received benefits in terms of the Workmens' Compensation Act 30 of 1941 worth R31006. The court ruled that the damages must first be apportioned and only then a deduction made for WCA benefits. The claimant thus received nil. Leave to take this ruling on appeal has now been refused. This is regrettable because there are good reasons in law and equity for first deducting the WCA benefit and only then apportioning the damages. If this had been done the claimant's damages would have been assessed as R13440,50. WCA benefits accrue by reason of the Act and are thus collateral benefits, like a disability lump sum or pension paid by the employer's pension fund; they are not a part payment of the damages suffered. In terms of s8 of the Act the WCA commissioner has a right of recourse against the third-party insurer for what the commissioner had been called upon to pay, **save that the third-party insurer shall not be called upon to pay in total more than what his liability would have been had there been no WCA payment**. The court seems to have based its decision entirely on this consideration. It did not seem to occur to the court that this requirement would have been quite properly met had the defendant been required to reimburse the WCA commissioner for 50% of R31006, that is to say the R15503 effectively deducted when assessing the apportioned damages. It is to be hoped that this unnecessarily draconian ruling by a Transvaal court will not be followed in other divisions.

Employment of school leavers:

Labour minister Tito Mboweni has recently reported to Parliament that only 3% to 4% of persons who left school at the end of 1994 will find employment in the **formal sector** during 1995. It is common to use formal sector salary surveys (FSA, PE Corporate Services) when assessing damages for injured persons, particularly scholars. The minister's report makes it clear that awards based on such earnings statistics should be subject to extremely large deductions for general contingencies, perhaps as much as 50% or more. Employment in the **informal sector**, if obtained, would be at a much lower level of earnings than in the formal sector.

Actuarial obscurantism:

When a widow claims damages for loss of support there must be offset against her damages **the accelerated value** of what she has inherited from the deceased. This deduction is usually calculated by an actuary. Most actuarial reports are remarkably vague as regards the assumptions used when doing this calculation: there is generally no statement as to the rate of escalation assumed for the assets after the date of the death and, most importantly, no statement as to the date to which discounting is done. It is little known to most lawyers that despite the ruling in the *Summers/Carstens/Nhlumayo* appeal (reported 1987 3 SA 577 (A)), **most actuaries still persist with discounting the accelerated benefit to date of death**. It is also little known that most actuaries assume that

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inherited assets will increase in value after the date of the death at 2,5% per year **above** the rate of inflation.

Apportionment of death claims:
The Apportionment of Damages Act 34 of 1956 states (ss2(1B) 2(6)(a)) that if a breadwinner has been contributorily negligent in bringing about his own death then the defendant must meet the full cost of the damages suffered **but has a right of recourse against the estate of the deceased for a contribution from such assets as were not brought into account when assessing the damages**. Much to my astonishment this clearly worded legislation has been interpreted by some attorneys and advocates in recent settlement negotiations as implying a normal apportionment of damages as would apply had there been an injury. **The Act does not in any way sanction a reduction in the damages payable to the dependants.** The right of recourse is a wholly separate right of action which lies against the estate. If the estate has already been distributed the right of recourse may be exercised against the heirs, who may not necessarily be dependants, by way of a *condictio indebiti*. If the widow has inherited, her liability to reimburse the defendant may be offset against her damages. **The deduction for acceleration applied to the widow's claim remains unaffected by the right of recourse because recovery is against only those assets which were not brought into account when determining the deduction for acceleration**. The assets usually available to satisfy a right of recourse are life insurance benefits excluded from the damages calculation by reason of the Assessment of Damages Act 9 of 1969. It deserves mention that in *Snyders v Groenewald* 1966 3 SA 785 (C) at 791D it was ruled that a deduction for acceleration should be made in respect of the inheritance of the family home. It follows that the family home is not available to satisfy a right of recourse. Mr Honey has suggested otherwise.

Accelerated benefits for children:
This topic is getting to be unmanageably complicated due to the absence of sufficient judicial rulings on the subject. In a recent matter I was asked to do calculations using 4 different alternative approaches, and that did not exhaust the range of possibilities. The one thing on which both parties were agreed was that if a child has **prior to settlement** received any support payments from the estate, or a trust set up to care for the child's inheritance, then this advantage must be deducted in full, without adjustment for acceleration. This follows from the ruling in *Heyns v SA Eagle* 1988 (T) (unreported 6.7.88 case 13468/86). In this case, however, the executor had paid out past **and future** support in one capital sum and the court ordered that a deduction be made in respect of the full amount. The actuarial adjustment for receiving this benefit at the end of the breadwinner's normal life expectancy is usually negligible because an adult self-supporting child has no right to claim maintenance from the estate of his father.

Where money has been placed in trust for a child it can be argued that the financial advantage will only accrue to the child when he takes the capital at age 21, say; in other words the benefit did not accrue at the time of the death. However, the present value of such a future benefit, including accumulated interest or capital growth, will usually be the same as the here-and-now value of the asset in the trust. In other words the argument leads nowhere unless you can, in law, ignore future accruals of interest and/or capital growth. It is also arguable that money held in trust for the benefit of a child is as good as full ownership by the child, the trust being merely an administrative device..... Much more can be said on the subject of child inheritances, if space permitted.

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