

NEWSLETTER

(Number 18 - September 1995)

Dear Reader,

The new contingency deduction: The MMF has taken to making offers subject to normal contingencies **less a further 50% for the inconvenience of claiming the money through the courts.** The proper response to such an offer is to issue summons forthwith.

WCA deductions and apportionment: I have already decried the iniquitous practice whereby damages are first apportioned and then reduced by the WCA award (see my newsletter of March 1995). The rot is getting worse, however, because the MMF, and many other claims clerks, are now extending this principle to deductible lump-sum payments from pension funds and other sources. This is a wholly unjustified development. Apportionment applies to the amount of money that would have been awarded as damages had there been no contributory negligence.

Public sector salary scales: Messrs Morris and Mullins have published an article (1995 *De Rebus* 375) in which they suggest that public servants, or their dependants, are being overcompensated if the actuarial calculation has assumed future increases in line with inflation. There is little doubt that in recent years public service general increases salary have been woefully below the rate of inflation, but that is no reason for thinking that the phenomenon will continue much longer. The proper approach is to assume increases in line with inflation and then, if it seems correct, to make a larger-than-normal deduction for general contingencies to allow for the chance that future general salary increases will continue to fall below the rate of inflation for a shorter or longer period of time into the future.

Interest on damages: The Law Commission has produced a report on interest on damages dated January 1994. My copy has only reached me just recently. The proposed legislation leaves much room for improvement:

- * **Date from which interest begins to run:** Interest does not begin to run until the debt is claimed in writing or by summons or by submission to arbitration. Since a summons or submission to arbitration is normally in writing the reference to these latter events seems wholly superfluous. For the victims of accident the provision seems wholly unfair in that the first concern of an injured person is physical recovery. Why should he be penalised for interest because he can only get to his lawyer a year or more after the accident? The dependants of dead victims are often unsophisticated persons. The compilation of claim documents can take time. Officialdom is not noted for expediting matters. Why should dependants be penalised by loss of interest due to delays beyond their control?

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- * **Compound interest:** In *Davehill v Community Development Board* 1988 1 SA 290 (A) at 298H-I the Appellate Division ruled that the mediaeval prohibition on compound interest no longer applied in our law. The Law Commission, however, has decided that the ancient rule should now be perpetuated by legislation.
- * **Present capitalised values:** The proposed legislation states that "A part of a debt consisting of loss of future income or future earning capacity shall bear no interest". But what about future loss of support and the present value of future medical expenses and appliances and attendants?
- * **Changing rates of interest:** The rate of interest will be fixed at the date that interest begins to run, notwithstanding that rates may subsequently rise or fall by 50% of that original rate. This decision was made despite numerous submissions in favour of a system which had regard to changing rates. Changing rates are readily handled using an interest index system, similar to the Consumer Price Index. The Law Commission rejected the index system, but without, it seems, consideration of worked examples to illustrate how the system worked. A worked example now may not be out of place:
Old system of fixed rates: Consider a legal rate of 18% per year **simple** at the date that interest begins to run; a period of 2 years; original indebtedness of R100000. The Law Commission's proposed calculation of interest plus capital is then as follows:

$$\mathbf{R100000+0,18 \times 2 \times R100000=R136000}$$

Indexed system: Consider an interest index which was 440,5 at the date that interest begins to run; suppose the index at end of the 2-year period is 582,2 (this allows for a drop in interest rates to 12% per year in the 13th month of the period); the period that interest runs is 2 years; the original indebtedness is R100000. The indexed calculation of interest and capital proceeds as follows:

$$\mathbf{R100000 \times 582,2 \div 440,5=R132168}$$

Is this a formidable calculation? But it does allow for changing interest rates and also for compound interest. An interest index can be published monthly like the Consumer Price Index.

In order to avoid the above pitfalls, and several others which I have not detailed here, the proposed legislation should be reformulated to read as regards damages for personal injury and death:

`(a) The common-law rule against interest on damages is revoked and a Court shall be competent to include in its assessment of damages an adjustment for past loss of interest or loss of buying power.

`(b) Any determination of damages by agreement or by arbitration or by a Court shall, for purposes of this Act be deemed to be a single undivided debt due as at the date of determination.

`(c) This amendment shall apply to assessments of damages taking place after the commencement of this amendment to the Act, save that in assessing the relevant adjustment the Court may have regard to periods prior to the commencement of this amendment.'

Progress to date with drafting suitable legislation provides a fine example of that phenomenon known as "analysis paralysis".

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