NEWSLETTER

(Number 26 - September 1997)

Dear Reader,

Prescribed interest on past losses: This is now claimable (see my newsletter for June 1997). Since then I have been asked to do several interest calculations and these are by no means as complicated as some persons have suggested. For loss of earnings or support the technique is as follows: split the past loss loss calculation between the period up to the date of demand (usually lodgement of the form MMF1) and the period from then until the date to which discounting is done. Simple interest on the first portion is calculated using the full rate of interest applied to the full period in years and fractions of a year. The rate of interest has been 15½% since 29 September 1993 so the vast majority of calculations will require only one rate of interest (in the event of multiple interest rates the past loss calculation needs to be split further at the date that the rate changed). For interest on losses between date of demand and date of discounting calculate interest at half the prescribed rate on the full amount for the full period. Then add together the separate components of the interest calculation.

Claimants against the RAF who anticipate that their cases may run should timeously amend their pleadings to include a claim for prescribed interest. It is official RAF policy to refuse to pay claims for interest and it is desirable that this policy be tested in court.

Damages for an unplanned child: It is settled law that damages may be claimed if sterilisation surgery is done negligently and there is a subsequent pregancy (see *Administrator Natal v Edouard* 1990 3 SA 581 (A)). What is not so well settled is the manner in which the damages are to be calculated. At first blush one would think that the normal calculation used for loss of support arising from the death of a breadwinner would apply. This is certainly the starting point. However, should the calculation be done allocating a part to the additional child? or should the child giving rise to the claim be omitted from the calculation and the damages then calculated according to the share that would be taken by each of the older children had the sterilisation been successful. The latter approach seems to be that preferred by advocates acting in these matters. The method for calculating the damages has not, to my knowledge, yet been the subject of a formal judgment.

Implicit to the preferred approach is that after all other children have left home the additional child continues to be allocated a one-fifth share (a claim by a single parent family would allocate a one third share during this period).

The cost to the breadwinner of medical aid benefits may be unaffected by the additional child. If so, then medical aid benefits should be excluded from the apportioned earnings.

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The unemployed victim: Victims of motor accidents are quite often unemployed at the time. One also finds when telephoning the employer for update earnings information that the victim would have been laid off, or that the relevant employer has gone out of business after the date of the accident. These circumstances all call for a substantial increase to the deduction for **past** general contingencies. In *Maqula v AA Mutual Insurance* 1978 1 SA 805 (A) a deduction of 50% was applied to **both past and future** losses. The claimant, a chef by profession, was unemployed at the time of the accident and had had a history of increasingly frequent job changes related, it seems, to the claimant's disgruntlement with employment conditions. For purposes of the actuarial calculation regard was had to what would have been earned had he not left the service of his last employer. Many unemployed persons will not have a history of frequent job changes, as with Mr Maqula, and a deduction less than 50% will often be appropriate, perhaps 35% or 25%. What needs to be born in mind in this context is that the unemployment during the past period is clearly established whereas unemployment during the future period is not so clearly established. For a claimant with a good work ethic the chances of a return to employment will generally be better in the longer term than in the past. It is well known that unemployment statistics reflect mostly persons who are temporarily out of work between jobs. For this reason the deduction for future contingencies should in many instances **be less than that for the past**. Thus one might deduct 35% from past loss of earnings but only 25% or 20% for future loss of earnings.

More than one widow: s31 of the Black Laws Amendment Act 76 of 1963 restricts the compensation payable in the event of more than one wife to what would have been payable had there been only one wife. This implies a double calculation: firstly a calculation to determine what would have been payable had the limitation not been enacted, that is to say allocating two parts to each wife; then a second calculation to determine what would have been payable if there were only one wife. This latter calculation determines the maximum total liability for all dependants, **but not the allocation between the dependants**. In practice one does only one calculation allocating one part to each wife (two-thirds of a part each if there are three wives, etc). This calculation does double duty both by determining the limit and by equitably distributing the total award between the dependants.

It is clearly incorrect, as some defendants have attempted to argue, to allocate two parts to each wife and then insist on paying only half the claim of each widow. This approach gives rise to an overall award that is less than the limit specified by the legislation.

The limitation seems unnecessary and unfair and it is to be hoped that it will not remain much longer on the statute books.

Fees for professional witnesses: I have had some unfortunate instances where attorneys have sought to evade payment of my fees after I have waited until finalisation. Such persons are reminded that ruling 7(8) of the Law Society states that "When a member requests a report, or other assistance, from an expert on behalf of a client, he must make it clear at the inception whether he or the client will be responsible for the payment of the reasonable fees of such expert. A failure to do so, to the prejudice of the expert, may be regarded as unprofessional conduct". As yet I have not submitted any complaint to the Law Society. My normal terms of business have always been that the instructing attorney guarantees payment of my fees and prescription only begins to run once I have been notified that the matter has been finalised.

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