

# NEWSLETTER

(Number 31 - December 1998)

Dear Reader,

**Overtime earnings:** In actuarial calculations this is usually expressed as a percentage add-on to the basic salary. Some actuaries assume as a matter of course that this percentage will start to decline after about age 50 and reduce regularly to nil by age 60 or 65. The theory seems to be that an older person is less motivated to work the longer hours. My own practice is to assume the full overtime percentage until normal retirement age and then allow for the relevant uncertainties by way of a deduction for general contingencies. I am fortified in using this approach by the several instances where the issue has been disputed and my office has had occasion to telephone the employer as regards the incidence of overtime. Almost without exception the employers advise that full overtime is worked right up to retirement age. In a recent instance (a Transnet heavy duty driver) the employer stated that older drivers work **more** overtime than younger drivers because they have less in the way of family commitments.

Overtime comes in many guises: some overtime is in fact normal time worked every week, but paid at time plus one third because of wage negotiation settlements; some overtime is once off due to a labour crisis; some overtime is seasonal depending on workloads and is only worked for part of the year. As a general rule an employee may not work overtime as and when he chooses. Overtime is normally dictated by the employer according to workload and when it is needed all staff are expected to put in the time. Labour unions generally discourage overtime because it reduces the number of persons employed. Management are usually not paid overtime - a promotion thus sometimes leads to lower earnings. The economic downturn in South Africa has had the consequence that many businesses have discontinued overtime - thus the fact that a victim was earning overtime when he was injured or killed is no assurance that he would still have been earning overtime at the time of settlement or trial.

**Potentially polygamous marriages:** A marriage under Islamic law is not recognised as a valid marriage by the law of South Africa because it is potentially polygamous. For this reason the widow of an Islamic marriage has no right to claim damages for loss of support arising from the death of her husband. Recently an Islamic widow (Amod) has taken this issue to the Constitutional Court but without success. The CC declined to make a ruling and referred the matter back for consideration by the Supreme Court of Appeal. The widows of black customary unions have for decades enjoyed statutory recognition (s31 of Act 76 of 1963) and have been able to claim damages for loss of support and also maintenance, but not the widows of Islamic or Hindu marriages. The recent Recognition of Customary Marriages Act perpetuates the old inequities in that it deals only with black customary unions.

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Another matrimonial "booby trap" carried into the new Act is that a civil marriage is null and void if concluded during the subsistence of a customary union with another woman. For nearly 100 years the law was that a civil marriage terminated the customary union. Then in 1988 legislation was passed (Act 3 of 1988) to reverse this state of affairs. Undoubtedly well-intended, but not very well advertised. There are many black widows now being denied a claim for damages for loss of support because they thought that their civil marriage terminated pre-existing customary unions. Conversely they are black widows of customary unions being denied compensation because prior to 1989 their husband concluded a civil marriage with another woman. What a mess.

**The Assessment of Damages Act 9 of 1969:** This short piece of legislation lays down that when assessing damages for loss of support no regard may be had to **benefits payable as a result of the death**. This means that life insurance and pension benefits are ignored (with somewhat mixed results in terms of quality of justice). Thus the widow of a pensioner who continues to receive a pension after his death may claim damages as though she had received no pension at all (see *Du Toit v General Accident Insurance* 1988 3 SA 75 (D)). However, if the rules of the pension fund had stated that the deceased's pension was to continue to be payable to the widow then that pension would have been deductible. Pensions of this latter nature are common under "retirement annuity" plans.

An important recent development in this regard has been the switch by employers away from the old so-called "defined benefit" pension funds to the more popular "money-purchase" schemes (a purchased pension often comes with a 10 year, or even 20 year, guaranteed payment period). With a "money-purchase" scheme the employee's contributions (and those made for him by the employer) do not go into a general pool, but remain allocated to the individual like a savings deposit. The benefits paid by the fund on death or retirement or disablement are determined by the amount of money saved up at the time. In order to ensure adequate benefits on death or disability the employer usually arranges separate additional death and disability cover. The important point here is that when the savings element of the fund is paid out to a widow this is more in the nature of a deductible accelerated benefit. The rules of the relevant fund need to be examined to determine whether the payment is "as a result of the death" (not deductible) or merely the transfer of an asset "owned" by the deceased prior to his death (deductible).

A surprisingly large number of defence lawyers have argued to me that the ruling in *Dippenaar v Shield* 1979 2 SA 904 (A) and *Dugmore v Standard General* 1997 1 SA 33 (A) override the Assessment of Damages Act. Suffice it to say that *Dippenaar* and *Dugmore* were concerned with damages for personal injury and are of no relevance whatsoever to claims for damages for loss of support.

**Wrongful arrest and detention:** How much per day should be awarded? The answer to this question is clouded by the inclusion in the awards for wrongful detention of compensation for wrongful arrest. For a list of inflation adjusted awards the reader is referred to the *Quantum Yearbook* 1999 now available from the publishers Van Zyl Rudd (tel 041-334322, fax 041-334323). A survey of the awards suggests that a fair rate of compensation for wrongful detention is about **R2000 per day** in terms of 1999 rand values. Actual awards made, however, range from R1000 per day at the lower end to R8300 per day at the upper end.

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