

ROBERT J KOCH CC BSc LLB LLD

Fellow of the Faculty of Actuaries in Scotland
DHL 305056388 E-mail: rjkoch@attglobal.net
CK 2000/058266/23 VAT 4870191808

1A Chelsea Avenue
Cape Town
Tel: 021-4624160

PO Box 15613
Vlaeberg 8018
Fax: 021-4624109

NEWSLETTER

(Number 43 - December 2001)

Dear Reader,

WE WISH YOU A VERY HAPPY XMAS AND A PROSPEROUS NEW YEAR

Earnings in the informal sector: In *Bridgman NO V RAF* 2000 5 C&B B4-1 (C) at B4-6/7 the Court discusses earnings statistics for the informal sector collected by the Department of Statistics in 1999 (published as release P0317 31/07/2000). One version of this table reads as follows:

Earnings R per year	Salaried employees (sample size 219773)	Self-employed persons (sample size 2645790)
Up to 2400	14,4%	21,5%
2401 - 6000	17,5%	24,0%
6001 - 12000	10,2%	18,0%
12001 - 18000	14,3%	8,7%
18001 - 30000	16,0%	9,5%
30001 - 42000	10,0%	5,1%
42001 - 54000	5,4%	3,6%
54001 - 72000	6,1%	3,3%
72001 - 96000	3,6%	1,5%
96001 and up	2,3%	2,3%

75% of self-employed persons earned R1500 per month (R18000 per year) or less in 1999 and 57% of informal salaried persons earned at or below this level. It is of interest to note that of the 2865563 persons engaged in the informal sector only 219773, that is to say 8% were working for someone else. These informal sector earnings are significantly lower than those normally quoted by industrial psychologists in their reports based on the formal sector surveys (FSA and Peromnes - *Quantum Yearbook* 2001 or 2002 last page). Labour minister Tito Mboweni (as he then was) reported to Parliament several years ago that only 3% to 4% of persons who left school at the end of 1994 would find employment in the **formal sector** during 1995. There is no reason to believe that this statistic has improved.

Industrial psychologists called upon to project earnings for injured claimants are reminded that it is misleading to cite formal sector earnings packages without a caveat as to unlikelihood of such earnings being achieved. Compensation for loss of "earning capacity" is directed at "likely earnings" not unlikely "potential earnings" (*Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1020G).

A Court that relies on formal sector statistics alone runs a serious risk of overcompensating the victim.

Post-traumatic stress disorder: In *Daniels v RAF* 2000 5 C&B C3-1 (C) an unusually high

page 2....

award of general damages was made for a whiplash injury (R80000). The reported judgment, surprisingly, records no evidence of the statistical finding that some 60% of those who suffer whiplash injuries become asymptomatic within 5 years after the accident (see *Quantum Yearbook* 1994 at 88 reproduced in the two paragraphs below). The research (see paragraph below) also indicated an 85% incidence of psychosomatic problems. In keeping with this statistic the *Daniels* matter involved a severe instance of post-traumatic stress disorder from which there had been considerable recovery by the time of the trial. The extent to which the PTSD influenced the Court's findings is not clear from the case report. The Court did, however, apply a substantial general contingency deduction of 20% (double what one would expect for claimant's age) with the observation that "the plaintiff suffered a severe psychological disability in circumstances where the vast majority of the population would not have reacted in the same way" (at C3-10).

Whiplash injuries (from *Quantum Yearbook* 1994 at 88): Research has indicated that between 20% and 40% of persons who have suffered a serious whiplash injury continue to have symptoms after compensation had been paid: Gotten 162 (1956) *JAMA* 865-7 reports that out of 100 victims 88% had recovered a year or more after being compensated (54% with no residual and 34% with minor symptoms not requiring therapy); Hohl 56-A (1974) *Journal of Bone and Joint Surgery* 1675-82 reports symptomatic recovery after 5 years in 57% of 146 victims with degenerative changes in 39%; Maimaris Barnes & Allen 19 (1988) *British Journal of Accident Surgery* 393-6 report that out of 102 victims 67% were asymptomatic after 2 years. These figures suggest that as a general rule the allowance made for future loss of earnings or expenditure in respect of whiplash injuries should be reduced by about 60% to allow for the chance that the symptoms will disappear. *Gotten* reports psychosomatic problems with 85% of victims with rapid improvement after settlement of claims. Seatbelt legislation has much increased the incidence of whiplash injuries.

Further articles on whiplash injuries which merit consideration are: 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; Gore *Spine* 6 (1986) 521; Gore *Spine* 12 (1987) 1; Hodgson *Neuro Orthopaedics* 7 (1989) 288; Vlok *SA Bone & Joint Surgery* 3 (1993) 5; MacNab *Journal of Bone & Joint Surgery* 46A (1964) 1797 (experiments using baboons); MacNab *OCNA* 2 (1971) 389; Evans *Neurologic Clinics* 10 (1994) 975; Jonsson *Spine* 19 (1994) 2733; Task Force for Quebec *Spine* 20 (1995) 355; Chester *Spine* 16 (1991) 716; Gorgan *JBS* 72B (1990) 899. 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 victims examined by Norris & Watt. The conclusion 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 (75% of the 40%) experienced moderate discomfort, whilst 10% (25% of the 40%) experienced severe symptoms. Older persons tend more readily to long-term symptoms. In only 2% of cases was surgery indicated (with 100% success rate). The incidence of joint degeneration in the normal population is about 6% (*The Cervical Spine* 2ed (Lippincott 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. None of the articles deal with victims who have suffered a second or third whiplash (as was the case in *Griffiths v M&F* 1993 4 C&B C3-33 (A)). **finis**