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NEWSLETTER

Dear Reader,

2½% per year net capitalisation rate: Pepper (TFA 1984 145) analysed the difference between interest and inflation since 1800 and expressed the opinion that in future the difference would average 3¼% to 3½% per year. In 1998 the House of Lords in England ruled that 3% py should be used for capitalising damages claims (*The actuary* October 2001 24). The Lord Chancellor then initiated consultations and in July 2001 decreed that 2½% per year should be used in place of 3% per year.

Many actuaries in South Africa use 2½% per year, but there remain several who use higher rates. One must not confuse the apparent net capitalisation rate (13% minus 10% = 3%py) with the true effective rate (1,13/1,1 = 1,0273 ie 2,73%py, or 1,1/1,0732 = 2½%py). The higher the net capitalisation rate the lower the present capital value. In *Minister of Defence v Jackson* 1991 4 SA 23 (ZSC) the court, on the "authority" (!?) of Koch "Damages for lost income" (1994) ruled that an 8% per year net capitalisation rate be used thereby completely missing the point about the need to reduce the rate to allow for future inflation (but then Zimbabwe and Alice in Wonderland do have something in common).

The indigent parent: In *Volkburn v Volkburn* 1946 NPD (see too Boberg "The law of persons" 1977 268) a mother sued her son for maintenance. The court refused her claim and ruled that she must first sell her house and consume the proceeds before she could succeed.

Compensation to be paid directly to claimants: In order to avert the abuse by certain attorneys of their position of trust in relation to awards for damages for personal injury and death the RAF (a public body) has unilaterally decided to pay the compensation money directly to the claimant, and not to the attorney's trust fund. This is the procedure in Botswana, reportedly most successful. There is a serious danger that in South Africa, however, much injustice of another sort will result: Now, instead of a few claimants being deprived of compensation money there will be a number of attorneys who will have difficulty recovering their fees and the many disbursements which they have made on behalf of claimants. Some attorneys lend money to their clients to tide over the impecunious years until the RAF can be pursuaded to part with the compensation money (be assured no bank would make such loans). One solution would be to treat compensation awards in like manner to deceased estates and subject to the review of the Master's Office, or some similar authority. A major objection to this procedure is the added delay and administrative costs. Another solution might be to pay 25% (or some similar percentage) of the agreed damages to the attorney and the balance directly to the claimant.

Intestate succession: Recent amendments (1998) to the Intestate Succession Act 81 of 1987 have had the effect that for marriages by black customary union the family home goes to the eldest son and not the widow. This can be somewhat disastrous for a second wife/widow who then has to hand over her home to the son of the first wife. The "good news" is that for the widow's loss of support claim there is no deduction to be made in respect of the inheritance of the family home.

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"Common-law" wives and notional children: In general the extent of the support enjoyed by dependants is a question of fact. It is not enough to establish that the deceased had a duty to provide support and the means to provide it. It must also be established that the deceased would have provided support in pursuance of this duty. **It follows that if the deceased would regularly have applied his income to expenditures not for the benefit of his dependants then the income available for the support of the dependants should be reduced**: In one instance the court made a deduction for the payments that the deceased was making to his mother in Italy without having a duty to do so (see *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A)). Support payments to stepchildren should, it seems, be deducted despite there being no duty in law to make such payments.

For a young family there will be the prospect of further notional children and a deduction needs to be made for the notional costs of keeping these children (*Chisholm v ERPM*1909 TH 297 301inf; *Burns v NEG Insurance* 1988 3 SA 355 (C) 362G; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1010-11; Davel `Skadevergoeding' 91 98 111n753). For potentially polygamous marriages there is the prospect that the deceased may also have taken a further wife, or wives.

When a man and a woman choose to live together as man and wife but without the sanction of a formal ceremony, civil or sacred, it is usual to speak of a `common-law wife' or `houvrou'. Such living arrangement justify making a deduction for the cost of her keep, notwithstanding that she has no right to claim for damages for loss of support (McGregor `Damages' 14ed 893-4; Luntz `Damages' 2ed 413n4). Allowance for this is usually by way of allocating 2 parts of the family income in addition to the 2 parts allocated to the deceased and 1 part to each child.

Statutory limits to overtime: The Prescribed Conditions of Employment Act restricts the amount of time that any one employee can work overtime to 10hrs per week. That means 30% to 45% overtime depending on "normal hours per week" and whether the time is worked during the week (1,33x) or at weekends (up to 2x). The effects of this legislation on the big overtime earners such as train drivers and truck drivers has not yet manifested in damages claims.

The unemployed husband: A new "dependant" now appearing in claims for damages for loss of support is the "househusband" who alleges being permanently unemployed and entitled to compensation for the wrongful killing of the breadwinner wife. Such claims need to be subject to a very high contingency (say 50%) for the chance of finding employment. It is instructive to consider what would happen if such a "dependant" were subsequently injured in an MVA and seeking to claim damages for loss of earnings.

Age for dependency for children: When claiming damages for loss of support a child with a good school record and parents with the means to pay can readily argue that the dependency calculation allow for tertiary education and dependency to age 21 and even longer. For the less gifted child the RAF generally insists on using age 18. It is true that trainee nurses and apprentices earn a modest wage sufficient to cover personal support. However, for some 95% of school leavers there are no regular jobs. One realistic industrial psychologist (of which there are too few) provides in his career path estimates for 2 or 3 years of casual irregular employment generating very little income. Such children are effectively dependent until age 19 or 20 or even 21. An average age of 19½ for such dependency claims has much to commend it.

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