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NEWSLETTER

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Maintenance orders: Did you know that a maintenance order in favour of an ex-wife terminates on the death of the ex-husband? It will only continue against the ex-husband's estate if it is expressly so stated in the order (*Hodges v Coubrough* 1991 3 SA 58 (D&CLD)).

COID "claw backs": The acronym "COID" stands for "Compensation for Occupational Injuries and Diseases", the new name since 1993 for what used to be called the "Workmen's Compensation Act". Its application has some extraordinarily harsh aspects:

* **Limited claims:** For passengers the RAF legislation limits the compensation payable to R25000, a limit that long ago should have been increased (how many more "Commissions of Inquiry" are needed?). For those who have received compensation from the COID office the COID award is deducted, not from the common-law damages **but from the R25000 limit** (see s22(2) of RAF Act 56 of 1996).

* **Apportionment of Damages:** Collateral benefits are normally deducted before making an apportionment for contributory negligence. However, COID benefits are not viewed as collateral but as compensatory, and are thus deducted **after apportionment** (*RAF v Maphiri* 2004 2 SA 258 (SCA)).

* **"Like from like":** For many years the rule has prevailed that COID awards be deducted "like from like". In other words the COID recovery for past medical expenses paid could not be deducted from an award for loss of earnings or general damages. However, since the recent ruling in *RAF v Maphiri* 2004 2 SA 258 (SCA) this has all changed. The COID recovery must henceforth be deducted from whatever compensation has been awarded, regardless of the nature of the award. The caveat here is that claimants should, inter alia, ensure that their claim against the RAF includes every item to be recovered by the COID Commissioner, particularly past medical costs paid by the Commissioner.

Administrative delays: It is not unusual that the COID Commissioner's office is unable to provide claimant with timeous details as to what amount will be "clawed back", thereby delaying settlements. RAF claimants are not the only ones to suffer from endless delays from the COID office: Terry Bell in *Business Report* 27 August 2004 reports the death on a bench in a hospital waiting room of a paraplegic COID claimant 3 years after he had been shot in the course of his employment. There are also apocryphal reports about the State attorney delaying settlement of paraplegic claims until the claimants are dead. I am myself involved in a quadriplegic claim (shooting injury) which has already lingered for more than 10 years.

Touting: Good or Evil?: The Satchwell Report states at page 318 that: 'At least touts perform an extremely useful public awareness service. They make contact with road accident victims, advise them that they are entitled to make a claim and put them in touch with

attorneys who will assist them'. The Satchwell report also lists some of the undesirable aspects of touting. The use of "touts" is frowned upon by the law societies. Such disapprobation notwithstanding it is my impression that quite a large number of respectable attorneys do make use of touts. For them it is a business necessity. In an effort to impose discipline one law society has recently criminalised these activities by demanding that its members depose under oath that they have never in the past used touts. Failing submission of the required affidavit the attorney will be denied his fidelity fund certificate. This strikes me as more evil than the "wickedness" it seeks to address: For one the tactic is retrospective; secondly it smacks of an abuse of the power the law society has to issue fidelity certificates; and thirdly it criminalises an activity which is arguably good and useful. The law society would do better to accept the realities and look for ways to regulate the touting industry, such as the formulation of guidelines for acceptable conduct by touts, and discussions with relevant organisations.

Instalment settlements: The RAF encountered a cash flow crisis about May 2004. The board of the RAF ordered that compensation thenceforth be by way of instalments calculated as the lump sum otherwise payable divided by 6 for awards under R500000, and divided by 12 for larger awards. The claimant is expected to sign a document waiving the right to interest. **The instalments include no provision for loss of interest**, yet the one interest waiver clause which I have seen reads "The Defendant shall not be liable to pay any interest on the capital sum **by reason of the payment in instalments**". In the absence of this clause interest would have been payable on unpaid capital at the rate of 15½% per year simple from 14 days after determination of the lump sum. It perhaps also deserves mention that the RAF Act does not give the power to pay by instalments in this manner. However, emergency and consent by the claimant do legitimize many things.

As a general technique for payment of compensation for loss of earnings or support a modified version of the RAF approach has much to commend it. Lump-sum compensation has the advantage that proper allowance, by way of value of a chance, can be made for contingent events for which no amount of unfolding reality can provide guidance. Lump-sum awards also facilitate allowance for collateral benefits, particularly once-off lump sum payments. The "tailored" lump sum, including general damages, can then be converted to an annuity escalated in line with inflation, payable during the lifetime of the claimant, and making proper allowance for loss of interest on the original capital. The conversion can be done by clerical staff using pre-prepared actuarial tables. Past loss can continue to be paid by way of lump sum. Awards to dependent children should be spread over the period until attainment of age 18 or 21. The Income Tax Act needs to be amended to ensure that such annuities are tax free.

The Satchwell Report recommends a compensation system that focuses on "need" rather than "loss or damage". A good example of the difference between these two approaches is the spreading of the capital sum over the full span of life rather than terminating payments at the retirement age at which the victim would otherwise have stopped working.

Insolvent estate: It happens that the estate of the deceased is insolvent. This may be good grounds for an increased deduction for general contingencies. Inquiry may reveal that a substantial proportion of the deceased's income was being applied to paying interest on unproductive debt. The fact of insolvency may also point to impending business failure.