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NEWSLETTER

(Number 3 - June 1992)

Dear Reader,

The Advocates' Devil: We have received a complaint that some readers do not have access to law journals and that we should cite more copiously in the newsletter. We are anxious to confine the newsletter to its present size. Those who require copies of any material, particularly hard-to-get journals and text books are referred to Tommy Prins in Cape Town - telephone 021-4482704 - telefax 021-479308. Tommy will arrange copies by post or telefax of any material you require, both local and overseas. He charges a modest fee for a most useful service.

Consumer Price Index: We have been asked why we have used in the Quantum Yearbook the consumer price index as published by the Bureau for Economic Research at Stellenbosch University? The reason is that the Department of Statistics publishes its index on a monthly basis whereas we have published the index on a yearly basis. There are different ways of arriving at a yearly rate of inflation given a series of monthly rates. I will not bore the reader with a discourse on the diverse alternatives. Suffice it to say that we have used the method of averaging used by the BER, this being an arithmetic average of the year-on-year rates for the 12 month period concerned. The CPI figures published in the Quantum Yearbook are derived from the monthly figures published by the Department of Statistics.

Extra mortality for amputees: Hrubec & Ryder 1980 (33) *J Chron Dis* 239-50 report that among 4000 World War II victims it was found that those with the amputation of an arm or a leg experienced 40% more deaths than a comparable group that had suffered only scarring. A higher rate of mortality means a shorter expectation of life. There is no reason to believe that the factors giving rise to the extra mortality have changed materially with the passage of time. It follows that accident victims who have suffered an amputation should have their damages assessed with life expectancy reduced by about 8% to 24%, depending on age and the life table used.

Consuming interest and capital: It has been said that compensation for loss of earnings should be awarded such that by regular drawings and consuming interest and capital the capital will be consumed at the expiry of the victim's expectation of life (*Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A). This is unsound investment advice because roughly 50% of victims will live beyond their expectation of life. A quick look at page 68 of the Quantum Yearbook 1992 will reveal that a white male aged 40 has an expected age at death of 70,74 years (40+30,74). By the time this man reaches age 70 his expected age at death has increased to 79,79 years (70+9,79). A wise victim will not consume all his capital but save a goodly proportion thereof to provide for his living expenses in the event of an advanced old age.

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Curator bonis: A *curator bonis* will be appointed for a victim who by reason of his injuries is unable to manage his own affairs. The costs of the *curator* may be claimed as part of the damages (*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D). We were pleased to see the text Koch 'Damages for Lost Income' 80 cited on this point in *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T) 420D. In *Carstens*' case the damages, including general damages, were increased by just under 6%. The *curator*'s fees are 6% of income collected and ½% of capital released. Some actuaries have calculated the adjustment by reducing their discount rate of return by 6% to get add-on percentages of about 25% of the damages award. This substantially overstates the adjustment because in times of high inflation compensated victims are best advised to invest in growth assets which produce a relatively low income, and thus low fees for the *curator*. In times of low inflation interest rates will roughly equal the real rate of return. The first and best investment for a seriously injured victim is usually a home of his or her own. This will generate no income unless rent-paying boarders share the house.

The costs for providing security would generally be disallowed because a claimant can be expected to choose a *curator* of sufficient standing that security is not required.

The appointment of a *curator bonis* is not something to be lightly undertaken. Every transaction has to be documented with quotations. In one matter in which the claimant was awarded about R1 million (lost earnings R30000 per year) the Master's office insisted that, because the claimant had managed to survive on an income of R400 per month during the pre-trial period, no more than that should be paid out after compensation had been awarded. Such a problem can be resolved by resort to the courts, but is it all really worth it? It is preferable that the parties agree to form a trust and thus avoid the Master's office.

Net capitalization rates: There are differences of opinion as to the extent to which future investment returns will exceed the future rate of inflation. A survey of actuarial opinions in 1987 produced 7 replies in the range 2%-3% per year with 3 replies above this range and 2 below this range. In *Gallie v NEG Insurance* 1992 2 SA 731 (C) the court voiced a preference for 1% per year but in deference to actuarial opinion ruled in favour of 1,5% per year. In the unreported judgment in *Dusterwald v Santam Insurance* 1988 (C) (16.01.90 12.03.90 case 11558/88) the court ruled in favour of a 1% per year differential but made the point that the dismal view it took of the future of the South African economy meant that a substantial deduction should be made for general contingencies and that the victim's lost earnings should be escalated at well below the rate of inflation. The *Dusterwald* ruling was handed down after the *Gallie* ruling. In *Ngubane v SATS* 1991 1 SA 756 (A) at 781E the Appellate Division made the point that the net capitalization rate is a question of evidence and then ruled that 3% per year be used as testified by the actuary. In the unreported matter *Brink v The MVA Fund* 1991 (C) (02.08.91 case 6038/89) actuarial evidence in favour of a 1% per year differential was rejected as unduly conservative. The court ordered that a rate of 2,5% per year be used as testified by two other actuaries.

Interest on damages: The Law Commission has now come up with proposed legislation but has failed to take account of major differences between claims for damages and claims for civil debt. A commentary on the proposed legislation is attached herewith.

Readers are invited to keep us informed of unreported judgements and other interesting developments and also suggestions as to topics for comment.

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The Secretary
The SA Law Commission
Private Bag X668
Pretoria
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12 June 1992

Dear Sirs,

re: Working Paper 40: Interest on Damages

Thankyou for sending me a copy of this paper which I have read with great interest. I fear, however, that the proposed amendment to the Prescribed Rate of Interest Act is going to evoke considerable adverse comment from the judiciary in years to come and to cause a number of of problems for practitioners. In order to get to grips with the problems consider the following:

Rates applicable: Since the inception of the Act the prescribed rate has been as follows:

From	Rate	Home Loans	CPI
16/07/75	11,0%	10,5%	13,5%
08/02/85	20,0%	19,8%	16,2%
01/08/86	15,0%	16,0%	18,7%
01/09/87	12,0%	14,5%	16,1%
01/07/89	18,5%	20,0%	14,7%

I have also shown the rates in the same year for home loans and the consumer price index. In terms of the proposed legislation if the cause of action arose in January 1988 then the rate of 12% would apply to the transaction indefinitely thereafter despite subsequent movements in the level of interest rates and inflation. With damages for personal injury and death the cause of action arises when the injury or death takes place. The Commission proposes that a court may be approached for relief if the laid down rate is unjust. A simple defended matter in the Supreme Court can lead to legal costs of well in excess of R10000. Whatever legislation is proposed should attempt to maximise equity and minimise the need to approach a court for special rulings.

Case A: Consider a single liquidated debt of R10000 which was due to be paid on 1 January 1990 and which has not been paid. Interest runs from the due date at the prescribed rate of interest in force at that time. The Act provides for simple interest. Interest for the period until 1 July 1992 is then 18,5% of R10000 for 2,5 years, ie R4625.

Case B: With maintenance orders and leases one finds a series of payments which have not been made. A separate calculation as under 'case A' then needs to be done for each such payment. In *Jefford v Gee* [1970] 1 All ER 1202 (CA) at 1208g-inf it is mentioned that with

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a continuing series of payments one may reduce calculation work by averaging the periods so that the interest is calculated on the sum total of debts for half the period. This short-cut approach presumes that there is a continuous series of payments up to the date to which interest is to be calculated. In *Dexter v Courtaulds* [1984] 1 All ER 70 (CA) the court failed to grasp that it was dealing with a 'case A' problem and proceeded to order that a 'case B' approximate calculation be used, much to the prejudice of the victim.

Case C: Consider an injured victim who two years after the accident undergoes major back surgery at a cost of R20000. The cause of action arose at the date that he was injured for at any time after that date he is entitled to lodge a claim for all future losses. The proposed draft legislation would allow interest from the date of accident to the date of trial on an expense incurred two years after the date of the accident. It was this same defect in Australian legislation that led their High Court in *Ruby v Marsh* (1975) 6 ALR 385 (HC) to order that discounting of all losses be done to the date of the delict. The important point here is that with true debts ('case A' and 'case B') the cause of action arises once the due date has passed and the debt has not been paid. With claims for damages, however, the due date is the date of the wrongful act with an immediate right of action then for the discounted present value of future items of loss. Debt and damages require separate treatment as regards the definition of the date from which interest will run.

Case D: A continuing loss such as loss of earnings (or loss of support) will run from date of injury (or death) until the date of the trial. This justifies the use of the approximate approach to calculating interest described under 'case B' above. *Jefford v Gee* was concerned with a claim for damages.

Case E: General damages for pain and suffering and loss of the amenities of life are determined having regard to currency values as at the date of the trial. In terms of the proposed legislation interest would have to be added to this amount at the full prescribed rate of 12% per year from date of accident until date of trial. This same problem would arise with a lump sum award for future loss of earnings or support which has been calculated by discounting to date of trial. The basic problem one has here is endemic to illiquid claims, namely that a hotch-potch of values are assessed relevant to different dates and with different adjustments for inflation and intrinsic interest.

Case F: Consider a total loss of earnings for life. Past loss is assessed as R50000 for the period 1 January 1990 to 1 July 1992. Interest at 18,5% py on this amount is R11563 if one uses the 'half-period' approximation from *Jefford v Gee*. Future loss of earnings is assessed as R250000 with discounting to 1 July 1992. No interest should be added to this amount. Suppose, as often happens, that the claimant has received a lump sum disability payment from his pension fund of R100000 paid on 1 July 1990, 6 months after the injury. This amount is deductible (*Dippenaar v Shield Insurance* 1979 2 SA 904 (A)). From a defendant's point of view if claimant is entitled to interest on the damages then interest should also be added to the lump sum before deduction is made, ie the amount to be deducted from the overall damages is R137000 being R100000 plus interest for 2 years. The proposed legislation is silent as to what adjustment should be made to the interest calculation to allow for the benefit of the lump-sum gain.

Case G: A South African court is competent to make an award in a foreign currency (*Murata Machinery v Capelon Yarns* 1986 4 SA 671 (C); *Elgin Brown & Hamer v*

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Dampskibsselskabet 1988 4 SA 671 (N)). The rate of exchange applicable is then that appropriate to the date that payment is made. Foreign economies have different rates of interest from South Africa. Strictly speaking the appropriate 'legal rate of interest' for such claims is that prevailing in the foreign economy. The differential between SA and foreign interest rates will often reflect the yearly rate of decline of the SA rand relative to the other currency. In the absence of express evidence as to the foreign 'legal rate' some degree of equity will generally be achieved by applying the SA 'legal rate' to the debt converted to SA rands using the rate of exchange that prevailed at the time that interest commenced to run. If the foreign 'legal rate' is to be used this will be applied to the debt expressed in the foreign currency.

Compound interest: Compound interest is now permissible in terms of the common law (*Davehill v Community Development Board* 1988 1 SA 290 (A) 298-9). If at all possible, reforming legislation should advance with the common law and provide for compound interest. A compromise solution might be to restrict compound interest to those matters where the period that interest runs exceeds, say, 3 years.

The *duplum*: Interest may not accumulate to more than the principle debt (*LTA Construction v Administrateur, Tvl* 1992 1 SA 473 (A)). The operation of this rule should be precluded by statute for damages claims. I have seen claims settled as much as 15 years after the accident and long delays with child claims for loss of support are quite common. The *duplum* rule could be invoked to disallow the accrual of interest on losses of earnings or support dating from very far back.

Taxation: It is desirable that the tax status of *mora* interest be clearly defined. It should be tax free with damages claims for personal injury and death but taxable for ordinary debts and damages claims where the primary damages awarded are subject to taxation.

Proposed method of determination: In terms of present and proposed legislation the rate is determined as the laid-down rate at the date when the cause of action arises. This is not entirely satisfactory because rates change from time to time. The method has the benefit of simplicity although complexity will arise with 'case B' situations where the series of payments spans several rate changes.

Interest index: A method of determination by reference to an interest index has been considered but dismissed on the grounds that it would require too frequent a determination by the Minister through the Gazette. This smacks a bit of 'throwing the baby out with the bath water'. An alternative to a gazetted interest index would an index determined by the Department of Statistics or the Actuarial Society of South Africa. Yield indexes are already prepared daily and published in the financial press. The consumer price index is already published monthly in the Government Gazette. It would be very easy to extend one of these procedures to the publishing of an interest index. Thus the interest index for January 1990 might have been 145,3 and for July 1992 224,5. The adjustment of 'case A' above for interest would then be achieved by the calculation R10000x224,5/145,3=R15451, ie **compound interest** of R5451.

Adjusting for inflation: As an alternative to an interest index use could be made of the consumer price index with a statutory real rate of return of about 2,5% per year over and above the rate of inflation. The identification of a real rate of return is particularly important

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for 'case E' debts where the amount assessed already includes the necessary adjustment for inflation. The Commission may wish to recommend that damages be subject to an index system (CPI plus real rate of return) whereas civil debt continue on the proposed system (or some modified version thereof).

I would be pleased to meet with the Commission and discuss these issues.

Yours faithfully,