

KOCH & MELVILLE

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NEWSLETTER

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Dear Reader,

Calling all claimants: After discussion with a number of our clients we have substantially revised our reporting format for claimants. The cost of our full reports has, in addition, been reduced by 33%. If you have not used our services lately try us and see. We think you will be pleased with the result.

Report back from clients: Our clients, both claimants and defendants, tell us that what they like about us is:

Our extremely fast turnaround, especially when the pressure is on.

Our detailed knowledge of the case law and other literature on damages.

Our inquiry system whereby we check and update the earnings information used as input for the calculations.

Our low-priced certificate-of-value reporting format. We pioneered this format which is now in use by most consulting actuaries.

Claimants like our **claim-financing facility** whereby, subject to certain conditions, we are prepared to wait for payment until the matter has been settled.

When we do work in the Transvaal, which is quite often, we do not charge for the cost of our travel from Cape Town, in other words we charge as though we kept an office in Johannesburg. We keep a car permanently in the Transvaal.

Spinal-cord injuries: Time Magazine of 14 December 1992 at 48 reports that 'After decades of hopelessness, researchers are developing drugs that limit spinal-cord damage, encourage nerve growth and might someday even reverse paralysis'. The article reports that fairly minor damage to the spinal cord is greatly aggravated by body secretions in the damaged area. By timeous injection of secretion inhibitors the degree of damage can be greatly reduced. It seems essential that every medic and paramedic should be equipped with such drugs. A cure for paraplegia, although possible, is not expected within the lifetimes of existing paraplegics (or quadriplegics) so there is no justification yet for massive contingency deductions in anticipation of miraculous cures.

Instalment compensation is taxable: Payments by instalments for loss of earnings are taxable income and the MMF is obliged to deduct PAYE before paying the instalments over to claimant (*KBI & MMF v Hogan* 1993 (A) (unreported 28.05.93 cases 663/91 & 683/91)). However, Revenue practice is that instalments of expenses, such as medication or an attendant, are not subject to taxation.

The contingency of early or late death: A number of writers on damages mention the general failure by the courts to appreciate that a calculation by an actuary includes full allowance for the contingencies of early and late death (see Boberg 1964 *SALJ* 194 204n54; Street 'Principles of the Law of Damages' (Sweet & Maxwell 1962) 120; Luntz 'Assessment of Damages for Personal Injury and Death' (Butterworths 1983 2ed) 280). However, there are exceptions (see *Bester v Silva Fishing Corporation* 1952 1 SA 589 (C) 600B). When capitalizing the actuary calculates the appropriate contingency deductions from the life table and applies them on a sliding scale to each separate year of the calculation. In other words there is a good deal more to the actuary's discounting process than just discounting at interest for a stated number of years. When applied to a calculation by an actuary **the deduction for general contingencies must therefore exclude allowance for early or late death**, otherwise there will be a double deduction.

Costs of *curator bonis*/trustee: The tariff of fees for a trustee or *curator bonis* is 6% of income collected and ½% of capital released. An appropriate present value for this expense is 6% of the lump-sum compensation, including general damages (see *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029). This assumes that the bulk of the capital will be invested in growth investments thereby greatly limiting the income receipts on which a *curator* or trustee may charge his 6%. The *curator* or trustee is not entitled to any remuneration for receiving the original capital sum. Payments from the capital for necessary expenses such as an attendant or a wheelchair are a release of capital and thus subject to a fee of ½%. Recoveries of these amounts from the MMF in terms of an undertaking are receipts of compensation and thus, it seems, not subject to any fee. If the above reflects a correct interpretation of the fee structure then it is most unsatisfactory and should be modified to at least provide for a 6% fee for the *curator* or trustee on expenses recovered.

Protection against price escalation: In *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 64 it was said that '...if defendant were concerned at all about about the risks I have mentioned which attach to the insurer in a lump sum situation, defendant could have taken steps to minimise these by resorting to the procedures stipulated in section 8(5) of Act 84 of 1986. This defendant has not done' (payment by instalments). **In order to avoid such an adverse inference by the court defendants would do well to offer an undertaking to pay future expenses by instalments, while at the same time offering a capitalized lump-sum settlement.** Our experience is that claimants will generally take the lump-sum offered even if this has been capitalized using a fairly high net capitalization rate.

Capping of claims: The MMF has suggested 'capping claims', that is to say legislating to limit its liability to only the first R1 million or so of a claim. We think that justice, and effective distribution of national resources, would be better served by legislating for the deduction of all insurance and pension payments, presently treated as *res inter alios acta*. Luntz 'Assessment of Damages' 2ed 10-11 notes that the non-deduction of insurance and pension benefits has the effect of concentrating wealth in the hands of those who are already reasonably well off and can afford such luxuries. Take note ANC! The deduction for insurance and pension benefits should, however, be confined to the 'risk' component, that is to say to the funds provided by contributions by other policyholders and the public. We do not advocate the deduction of savings, such as the surrender value of a life policy.