NEWSLETTER

(Number 11 - December 1993)

Dear Reader,

A farewell: John Melville will be leaving my service from the end of December 1993. John and his wife Jackie are going on an overseas trip. We wish them *bon voyage*.

Project completed: My thesis entitled `The Reduced Utility of a Life Plan as Basis for the Assessment of Damages for Personal Injury and Death' has now been approved by the Faculty of Law of the University of Stellenbosch for purposes of the degree of LLD. This text replaces my, now somewhat dated, publication `Damages for Lost Income' (Juta 1984). Persons wishing to acquire a copy of the thesis should make use of the attached order form.

Analysing maintenance problems: Consider the following extended family: Mr X earns R40000 per year net; his wife earns R36000 per year net; there are two legitimate children; there are also two illegitimate children who live with their mother Miss Y who earns R90000 per year net. Is Mr X duty bound to contribute to the support of the two illegitimate children? An actuary or magistrate might well conclude `Yes', and calculate Mr X's contribution by dividing his income with two parts to each adult and one part to each child, legitimate and illegitimate. A more circumspect analyst would observe that there is a total of R76000 per year for the support of the legitimate family comprising two adults and two children, but R90000 per year for the support for the illegitimate family comprising one adult and two children. It is clear that the illegitimate children, by reason of their mother's high income, enjoy a very much higher standard of living than do the legitimate children. It would be most unjust to order Mr X to make any contribution whatsoever to the support of the illegitimate children because that would reduce further the standard of living of the legitimate children. **The conclusion is that Mr X has no enforceable duty to support his illegitimate children.** Any support that he does provide would be gratuitous. It follows that if he were wrongfully killed the illegitimate children would have no claim for loss of support save, perhaps, for a small nominal amount for the value of the chance that their mother may have died or lost her job.

Instalment agreements are once-and-for-all: In *MVA Fund v Andreano* 1993 3 SA 227 (T) compensation for loss of earnings was to be paid by instalments. The claimant had the prospect of being off work in future for medical treatment for about 2 years. The court, instead of providing for increased payments during such periods, as could easily have been done, allowed for the contingency by an increase to the deduction for general contingencies applied to the instalments of earnings. By way of contrast in *KBI & MMF v Hogan* 1993 (A)(unreported 28.05.93 cases 663/91 & 683/91) the instalment agreement seems to have made no provision for any deduction for general contingencies whatsoever. Lucky claimant!

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Costs of *curator bonis*: In *Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1029 the court ordered that 5,65% be added to the overall award, including general damages, to allow for the present capitalized value of the expected future fees of a *curator bonis*. For practical purposes it has since been common to add 6% to damages awards when the evidence indicates that a *curator bonis* or trustee will have to be appointed. Government Gazette R1602 of 1 July 1991 increased the *curator*'s fee on release of capital from ½% to 2%. The *Carstens* rate of 5,65% was based on ½% on release of capital. By reason of the increased tariff the addition to the overall award should now be increased from 6% to 7,5%.

Apportionment of WCA benefits: In *Ngcobo v Santam Insurance* 1993 (T) (unreported 4.11.93 case 20784/92) it was ruled that when there is to be an apportionment of the damages, and also a deduction by reason of benefits paid in terms of the Workmen's Compensation Act 30 of 1941, then the damages must be first be apportioned and after that reduced for the full amount that the WCA commissioner seeks to recover, save that the commissioner may not recover more than the apportioned damages. This is in accordance with a directive by the MMF to its agents. *In casu* the WCA award exceeded the value of the apportioned damages so the claim was assessed by the court as nil. The damages apportioned included general damages and future medical expenses. After apportionment the damages award still included general damages and future medical expenses, albeit reduced amounts for these heads. In *Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A) at 368 the AD emphasised that WCA benefits are patrimonial and thus not to be deducted from general damages. The *Ngcobo* ruling is thus at odds with the AD ruling. Similar considerations of equity seem to apply to the apportioned future medical expenses.

In the *Ngcobo* case the court did not consider my two articles on the subject (1987 *THRHR* 475-80; 1990 *De Rebus* 343-6) which reasoned as follows: WCA benefits are not *res inter alios acta*. They should thus be deducted when assessing the common-law damages **prior to apportionment**, as with any other deductible compensating advantage. WCA benefits are awarded on a no-fault basis whereas common-law damages have regard to fault and are apportioned. If justice is to be done then the treatment of WCA benefits should not deprive the claimant of his right to non-apportioned WCA compensation. This is not to suggest that the third-party insurer should have to reimburse the WCA commissioner for the full value of the WCA benefits awarded. The Workmen's Compensation Act (s8(1)(b)) contemplates that a third-party insurer should not be liable for more than his liability **but for the provisions of the Act**. Full and fair effect is given to that provision if the commissioner is restricted to recovering the difference between apportioned common-law damages ignoring the WCA benefits, and the apportioned common-law damages having regard to WCA benefits. The commissioner cannot complain about receiving less than the full amount; he administers a no-fault insurance scheme and what he does not recover is merely part of the additional cost of no-fault insurance as compared to with-fault insurance. There are many instances where he is obliged to award full WCA compensation without having any right of recourse whatsoever. The claimant for his part does not receive double compensation but merely part of his compensation on a no-fault basis and part on a with-fault basis. **Third-party insurers, such as the MMF, have the same liability regardless of whether there are WCA benefits or not**. Employees have to pay for their WCA benefits and should not be deprived of their no-fault insurance cover without considerable circumspection. The Ngcobo decision, rumour has it, is to be taken on appeal, so maybe justice still has a chance.

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