NEWSLETTER

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Dear Reader,

Deduction for taxation: In *Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 at 29 it was ruled that `The defendant cannot be called upon to compensate the plaintiff for the loss of such share of its profits as would in any event have been appropriated by the State'. This passage seems to confirm the generally accepted actuarial practice to deduct taxation when assessing loss of earning capacity.

Increased business expenses: If a businessman is injured and as a result has to employ an additional person in his business then the expense of this person will be a tax-deductible business expense. Compensation for this expense will thus not be for the full cash outlay but for the net cost after taking into account the tax advantage. This consideration would not apply to a farmer who operated at a continuing tax loss.

General contingencies: As a general rule past contingencies will be assessed at a fairy low level of between 0% and 15%. In those instances where the claimant, or his dependants, have been spared his costs of travelling to and from work then the percentage deduction will include allowance for a saving of about 7,5% of earnings (see *Quantum Yearbook* 1993 at 94-5 for decided cases). Future contingencies will normally be taken at a higher level than past contingencies up to as much as 60% or more, the general principle being that the distant future holds far more uncertainty than the recent past. Allowance may also be made for saved living expenses (see *General Accident Insurance v Uijs* 1993 4 SA 228 (A), the trial court judgment is reported in Corbett & Honey vol 4). General contingencies are concerned not only with unemployment, but many other factors such as the failure of salaries to keep pace with inflation, and economic restructuring due to war and political upheaval. It often happens that a claimant, or a deceased breadwinner, was unemployed at the time of the death. In this instance it will often be appropriate to reverse the normal pattern of contingencies **and deduct a far higher contingency from past loss than from future loss**. The reason for this is that if one is out of a job the chances of finding one are better over a longer period of time than over a short period. Evidence of many years of unemployment prior to the accident would, however, require a different interpretation. Typical contingencies for an unemployed general labourer who has been killed would be about 35% past and 25% for future.

General damages and future medical procedures: In the recent unreported judgment in *Van Drimmelen v President Versekeringsmpy* 1993 (T) (unreported 13.08/93 case 23013/90) compensation for future expenses was to be done by way of an undertaking to pay as and when the expenses were incurred. The court observed that in order to make a proper determination of general damages payable as a once-and-for-all lump sum it was nonetheless necessary to make findings as to the likelihoods of future medical procedures.

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Instalment compensation and causation: When compensation for future medical and similar expenses is done by way of an undertaking many years, 20 years or more, may elapse before the expense is incurred and the MMF called upon to pay. Many complicating supervening events may have occurred. It may then be extremely difficult to prove causation notwithstanding that the expense was foreseeable at the time of the trial. For this reason the court in the *Van Drimmelen* case (see previous paragraph) considered itself competent to express an advance opinion on causation in a provisional sense. This approach is much to be commended. The need for this approach does, however, highlight one of the major deficiencies of compensation by instalments.

Reduced life expectancy: When the life expectancy of a breadwinner is shortened by his injuries then he will be compensated only for the period of his shorter lifespan (*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) at 305-6). The victim's dependants suffer a prospective loss of support during the `lost years', that is to say that the years that the victim would, but for the injury, have lived **and for which he, the breadwinner, is now not compensated**. In *Evins v Shield Insurance* 1980 2 SA 814 (A) the court emphasised the *facta probanda* of the dependants' action, notably proof of causation of death by the wrongdoer. If the victim is going to die 20 or 30 years in the future, albeit an early death, the dependants can expect to have extreme difficulty proving causation. For that reason once shortened expectation of life has been proved the law ought to allow the dependants an immediate right of action for their prospective loss. I seriously doubt that an advance finding on causation, as in the *Van Drimmelen* case, will much assist the dependants in getting just treatment in the far distant future.

Medical ethics: It appears that medical ethics require that when there is doubt, the medical practitioner should give the victim the benefit of the doubt. This approach is in direct conflict with the legal principle that in cases of doubt and difficulty defendants should be preferred to claimants (see Corbett & Buchanan 3ed at 6). **For this reason it will usually be appropriate to make a substantial deduction from projected future medical costs for the `benefit-of-the-doubt' factor, quite apart from other factors.** In a recent court case in Cape Town the medical experts agreed the victim's life expectancy to be to age 60 whereas a proper analysis of the statistics indicated a life expectancy to age 45. This `benefit of the doubt' almost doubled the damages payable to over R1 million. Such serious errors, it is submitted, demonstrate the need for medical experts to consult with actuaries when it comes to the interpretation of mortality statistics, as is done by the life offices. This will facilitate a better balanced decision. The `expectation of life' is a far more complex and potentially misleading concept than many laymen, and doctors, appreciate.

Houses for paraplegics: When a victim is rendered a paraplegic or quadriplegic by his injuries he will require a modified house in order to cope with his disabilities. It is usual to allow at least the costs of modifying the house and the increased running and maintenance costs. If the full cost of a house with modifications is claimed as a lump sum then there must be deducted the bond or rent payments that would, but for the injury, have been made from earnings. Some improvements, such as burglar alarms, powered garage doors, intercoms, and airconditioning, enhance the value of the property, and thus the claimant's estate, and may justify a further deduction. The provision of a comfortable home, sometimes far better than could have been expected had there been no injury, may justify a substantial reduction to the award for general damages.

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