NEWSLETTER

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Dear Reader,

Interim payments: The general principles governing interim payments have been aired again in *Fair v SA Eagle Insurance* 1995 4 SA 96 (E). It is remarkable how much legal energy has been pointlessly directed at challenging this sensible rule of procedure (*Nel v Federated Versekeringsmpy* 1991 2 SA 422 (T), *Karpakis v Mutual & Federal Insurance* 1991 3 SA 489 (O); *Van Aswegen v General Accident Insurance* 1989 (W) (unreported 16.10.89 case 8420/89)). Barroom talk says that the purpose of challenging the rule is to make it as difficult as possible for claimants to get interim payments which can then be used to fund litigation. One thing is certain, such payments seldom go to the claimant because they are immediately consumed with legal fees. There are, of course, many interim payments being made by MMF claims handlers which do not receive any publicity, and which are distributed without court orders and heavy costs. The claim for interim payment is confined to past special damages only. This is essential because the claimant may die the day after the court makes its order. The cost and effort involved in making a claim for interim payments has the result that it is a procedure not lightly undertaken. This is unfortunate because it should be possible for a claimant to receive regular payouts during the period of waiting before a final award. In both the *Fair* judgment (at 100G) and the *Karpakis* judgment (at 501D) the courts noted that in determining the interim payment regard may be had to what is expected to happen in the future. In the Karpakis judgment the court went so far as to suggest that it was competent to include the costs of future surgery in the immediately foreseeable future. This seems to be taking the provision a bit too far, but there is no reason why the court should not state that once the expense has been incurred it is then claimable. Considering the cost and effort required to get an order, Rule 34A could be usefully amended to allow the court to specify a basis for future claims for further interim payments as regards loss of earnings or medical expenses. This would then make possible a form of interim payment by instalments which the parties may find convenient to keep rolling for many years. One pitfall for which a defendant needs to be alert is a large deductible lump-sum payment, such as is often made by a pension fund. In such instances there will usually be no past loss at all. Many claimants do not disclose lump-sum payments when pressing their claims.

General damages for unconscious victims: In *Collins v Administrator, Cape* 1995 4 SA 73 (C) the court ruled that no award of general damages should be made to a permanently unconscious victim. This runs counter to the pattern of previous judgments which have all allowed a nominal award, even to a dead person (*Du Bois v Motor Vehicle Accident Fund*

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1992 4 SA 368 (T), *Potgieter v Rondalia Assurance* 1970 1 SA 705 (N), *Gerke v Parity Insurance* 1966 3 SA 484 (W), *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W)). The *Collins* ruling is to be welcomed as a step forward towards eliminating financially wasteful aspects that have traditionally attached to the assessment of damages. Along with the Collins approach goes the principle that no award will be made for loss of earnings because the victim has been spared all living expenses apart from the costs of hospitalisation. It is better that damages awards be limited in this manner than by a general capping that can deprive claimants of money they really need.

Tenders (Payments into Court): In *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 4 SA 24 (A) the defendant had made a tender in terms of South African rands notwithstanding that it was faced with a claim expressed partly in terms of US dollars. The appeal court ruled that the adequacy of the tender must be determined as at the date that payment of the damages is actually made. By reason of currency fluctuations the tender proved to be inadequate. It follows that a defendant should either take steps to regularly revise the tender, or else to express the tender in terms of the foreign currency, thereby protecting himself against adverse currency fluctuations. The appeal court's wording (at 30E) clearly implies that a tender in terms of a foreign currency is an acceptable procedure. Defendants encounter a similar problem with claims for future loss of earnings or future medical expenses. Such claims tend to increase with time (see *Carstens v Southern Insurance Assn* 1985 3 SA 1010 (C)). In order to protect themselves against the risks of claim escalation due to delay the tender should provide for the addition of interest, or inflation, at a suitable rate from date of tender to date of upliftment. The defendant runs the risk that the escalation formula may prove unduly generous to the claimant. On the other hand the failure to make an adequate tender carries with it expensive penalties as regards costs.

Erring actuaries: Mervyn Dendy 1995 *SALJ* 643 at 649n27 thinks that he has found an error in the formula used for calculating instalment payments in the *Bray* case. Mr Dendy is advised to first do a course on approximate solutions by iterative processes before jumping to such conclusions. The calculation line that he queries reflects the notional gross income before correcting for taxation. This is then used as the starting point for estimating the gross amount that should be paid to give that net amount.

Black estates: In terms of the *Black Administration Act* 38 of 1927 blacks married by customary law who died without a will, but leaving substantial assets, were not required to report the estate nor to have a liquidation and distribution account drawn. Very substantial estates are passed on this way without the payment of estate duty. Despite the new South Africa the legal position in this regard does not seem to have changed. When claiming damages for loss of support the disclosure of a substantial inheritance is often avoided by stating that no liquidation and distribution account has been prepared. Of course the devolution of a black estate without a will is often a wild and woolley affair with various relatives taking over assets on a seemingly uncontrolled basis. Black customary law awards the entire estate to the deceased's oldest brother, at the same time imposing on him a duty of support towards the dependants. To what extent such a devolution can be brought into account as an accelerated benefit remains unclear, but the courts will probably rule that the benefit must be ignored (see *Groenewald v Snyders* 1966 3 SA 237 (A)).

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