

NEWSLETTER

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Dear Reader,

Maintaining cover under the new legislation for MVA claims: The new legislation has already been drafted. Whatever its final outcome the compensation payable will, for larger claims, be less than is claimable under the existing dispensation. The legislation will include a provision abolishing the common-law right to claim the excess. This provision may (or may not) survive a challenge in the Constitutional Court. Regardless of the outcome of such debates the concerned citizen will be needing a new type of top-up insurance. The conventional disability insurance plans offered by life offices are going to be wildly expensive (actuary Jacobson estimates about R15000 or more per year for a family). Much cheaper cover could be provided by modifying the existing "balance of third party" cover that attaches to most motor car policies. Features of the new "balance of third party" cover would be:

- * Entitlement to benefits under such "new" cover would be dependent on proving negligence either by the driver of the insured vehicle **or by the driver of the other vehicle.**
- * The cover would be capped at, perhaps, R10 million or less, depending on the premium charged.
- * The cover should extend to all passengers in the insured vehicle.
- * In its ideal form the cover would extend to nominated family members who are injured as pedestrians or while passengers in other inadequately insured vehicles.

This extended "balance of third party" cover can probably be provided at about 10% of the cost of the Jacobson type cover. The big question is "Are our motor insurers sufficiently liberated to provide this sort of cover"?

Curator bonis and expenses: A *curator bonis* is entitled to 6% on income collected and 2% on capital released. The gazette (R1602 of 1 July 1991) which governs the remuneration of curators says nothing of expenses paid and recovered from a medical aid scheme or the Road Accident Fund. At best it can be argued that a curator is entitled to 2% when he initially pays the bill. At worst it is arguable that curators are not entitled to any remuneration whatsoever for expenses paid and recovered for their ward. It is my impression that many curators are, seemingly without proper authority, claiming a 6% fee for expenses paid and collected.

Investment of compensation money: The most important decision for a claimant who has received a large award is the choice of who will manage the funds. There are certain fundamental principles (guidelines) that can be of help in making this decision:

page 2....

- * Do not trust your own judgment in investment matters.
- * If at all possible split your funds **equally** between two (or preferably 3) investment managers. You can then meaningfully compare the performances.
- * Remember that interest earnings are taxable and thus only to be considered for short-term investments.
- * Guaranteed interest returns are usually well below the returns attainable on capital growth investments. Guaranteed returns generally mean guaranteed poor performances **in the long term**.
- * Remember that by reason of the high rates of inflation there is a "balloon" effect whereby you do not start drawing on capital for some 15 or twenty years after the original investment is made. Beware of persons who talk about consuming interest and capital at an early stage. Those very words betray their lack of understanding of the effects of inflation on investment decisions.
- * For small amounts very good returns are available through fixed term annuities (of the immediate-monthly-payment variety) obtainable from life offices.

Interest on unliquidated damages: The 1997 amendment to the Prescribed Rate of Interest Act 55 of 1975 allows interest on unliquidated damages. The new legislation came into effect on 5 April 1997. It has been argued that the rule against retrospectivity of statutes requires that such interest may not run for periods prior to 5 April 1997. In *The MV Sea Joy* 1998 1 SA 487 (C) this argument was rejected. It was ordered that interest should run from 27 August 1993, the date at which defendant was provided with sufficient information to make a reasonable assessment of the damage suffered.

The prescribed rate at 27 August 1993 was 18½% per year. However, one month later the official rate was reduced to 15½% per year. The court ordered that the lower rate be applied.

Potential earnings vs likely earnings: Industrial psychologists are frequently engaged to assist the court with making a finding on the loss of earnings (or earning capacity) suffered by an injured victim. These persons, almost without exception, make use of formal sector earnings statistics which have no regard to the very much lower rates of pay prevalent in the informal sector. Some of these industrial psychologists make little or no effort to canvass the erstwhile employer as regards the realistically likely earnings of the victim. This gives rise to nonsensical opinions whereby gardeners earning R10000 per year at the time of the accident are stated to be earning R36000 per year merely 3 years after the accident. One hopes that such unrealistic evidence will be rejected by the courts bearing in mind that RAF financial resources are limited. At least one industrial psychologist, to my knowledge, justifies his approach on the grounds that compensation should be based on "potential" earnings. Such persons are advised to read the judgment in *Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1020G where it was stated that:

'Strict adherence (to the loss of earning capacity) may sometimes lead to a plaintiff being awarded more by way of compensation than would be considered just and fair... in some cases it is proper for the Court to take into account not merely the plaintiff's lost capacity (what he could have earned had he not been injured), but rather the question of what use he would probably have made of his earning capacity (what he would probably have earned).'

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