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NEWSLETTER

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Dear Reader,

Financial statistics:

Data as at January 2001	Inflation (year-on-year)	Interest (long bond yield)	Real Rate of Return	12 mnths ago
South Africa	6,6%	11,4%	4,8%	10,8%
United Kingdom	2,7%	4,9%	2,2%	4,0%
Japan	2,4%	1,5%	-0,9%	0,5%
United States	3,5%	5,6%	2,1%	4,0%

Interest rates real and nominal have decreased over the last 12 months as governments seek to revive faltering economies and the demand for borrowed money declines. A recent survey by Stellenbosch Bureau for Economic Research revealed business and trade unions in South Africa expecting an inflation rate of 6½% over the next 12 months with a little over 6% per year for the next 3 years. The real rate of return in South Africa has dropped appreciably and may well drop further over the next 2 or 3 years. Whether this will be by way of an increase in the CPI or a decrease in interest rates remains to be seen.

Clothing advisor: I have recently processed a claim which included the costs of hiring an expert to advise on how best to dress after a disfiguring injury. Such a claim clearly overlaps with general damages. There is a functional aspect to an award for general damages which includes the expectation that the victim will use this part of the award to buy services or goods that offset the effects of the injury (see, for instance, *Reyneke v Mutual & Federal* 1991 3 SA 412 (W) at 428-9). Advice on how to dress, and the additional cost, if any, of suitable clothing seem to belong to this category. It is difficult to imagine how a dress consultant can be described as a necessity, unless there are special psychological circumstances.

Retirement at age 55: When processing a claim for damages for personal injury or death it is quite common to receive an earnings certificate from the employer in which the retirement age is stated to be 55. In most instances this merely reflects the earliest age at which retirement is permitted in terms of the rules of the pension fund. The Receiver of Revenue insists on certain provisions before he will consent to the registration of the rules of a pension fund: this will include a provision that age 55 is the earliest age for retirement, save for special occupations or ill-health. For a provident fund the Income Tax Act (58 of 1962 s4(3) of the Second Schedule) states expressly that benefits payable to a member who is under the age of 55 shall be taxed as withdrawal benefits and not as retirement benefits. The distinction between "earliest retirement age" and "normal retirement age" was clearly highlighted in a recent claim that crossed my desk in which the employer had stated the "retirement age" for the employee to be age 55, but then stated that the disability income benefit to which the employee had become entitled was payable until age 63. Adherence to the literal evidence would have produced a nil loss in the actuarial calculation. Fortunately

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for the claimant reasonableness prevailed and the negotiations proceeded with a retirement age of 63 for both the injured and the uninjured states. In practice very few persons have wherewithall to be able to afford to retire early. This is particularly true for those with very low incomes and nil savings. The State old age pension of R6840 per year (from July 2001) starts at age 60 for women and age 65 for men. The uniformed services retire at age 60; teachers and civil servants normally retire at age 65; underground miners with long service may retire with full benefits at age 58.

Gains offset against losses: I was somewhat surprised to learn recently that it is the practice in Gauteng when assessing loss of support by a widow to ignore the prospective gains that accrue to her from not having to support her husband if he would have retired several years earlier than herself. Typically the deceased may have been an artisan who did not contribute to a retirement fund and 15 years older than his wife. The wife, as a teacher, has prospects not only for working some 15 years longer than her husband, but also of a substantial pension after she retires. These benefits have substantial value and the present actuarial value of a half-share thereof will often exceed the value of support lost during the deceased's notional working years. The general principle of damages assessment is that gains must be offset against losses. There are several exceptions to this rule, but none that I know of that sanctifies the cutting off of the dependency calculation once the deceased notionally attains retirement age. The RAF is urged to make a test case of this issue at the earliest opportunity.

The patrimonial value of a right to support: In my newsletter of June 2000 I made the statement "that the mere fact of a duty of support does not automatically entitle a child to compensation for loss of support." "It must also be proved that the deceased did in fact provide support and would have continued to do so had he not died when he did." This provoked some indignant correspondence from Gauteng from which I deduce that it is the practice there to compensate a "dependant" child for "loss of support" even though that child had never received support from the deceased and never would have received any support. This seems to me to fly in the face of passages such as "(T)he dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner" (*Evins v Shield Insurance* 1980 2 SA 814 (A) at 838A). Undoubtedly where there is a right to support there is a chance that support would have been provided. But the patrimonial value thereof is subject to reduction for the value of the chance of receiving support and a further deduction for other general contingencies. To use the words of the late Prof Boberg "the claim is pressed to extinction by the weight of accumulated contingencies". The RAF is urged to make a test case of this issue at the earliest opportunity.

Residual earning capacity: For the labourer classes a permanent disability of 35% or more will generally imply that the victim is unemployable. That many such victims are capable of sedentary employment cannot be disputed. However, an unforgiving economy, an inadequate education, and a physical inability to use public transport, usually mean "no job". One cannot, however, rule out the chance of some sedentary employment. Quite seriously disabled persons do sometimes obtain remunerative employment, but very few. In order to allow for the contingency of some sedentary employment it is common practice to assume "unemployable" for the actuarial calculation and then to increase the deduction for future general contingencies by 5% 10% 15% 20% or even 25% to allow for the chance of some sedentary employment. It is important to remember in this context that compensation for loss of earning capacity is concerned with "likely earnings" and not "potential earnings" (see *Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1020G).

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