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## **NEWSLETTER**

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### **WE WISH YOU A VERY HAPPY XMAS AND A PROSPEROUS NEW YEAR**

**Xmas presents for amputees:** Commonwealth gold medalist Natalie du Toit has been provided by the RAF with a state-of-the-art computerised leg prosthesis costing R350000 (she lost her leg in a motor vehicle accident 5 March 2001). The announcement is good publicity for the RAF, but also good news for all other amputees who may now reasonably demand to be issued with comparable state-of-the-art legs. So much for moderation and containment of costs at the Fund.

**Above-knee prostheses:** The use of an above-knee prosthesis requires 40% more energy than the use of crutches. For this reason it is reported that 60% of above-knee amputees attempt to use an initial one or two prostheses and then cease to use a prosthesis at all (report by Dr Lourens of Paarl). If this statistic is correct then it means that a contingency deduction of 50% or more should be applied to capitalised present lump sum value of future above-knee prosthesis costs.

**Xmas presents for widows: "loss" of notional widow's pension:** The Assessment of Damages Act 9 of 1969 states that when assessing loss of support no regard shall be had to pension benefits payable as a result of the death. I emphasise the word "the" because it clearly refers to the death that has occurred and given rise to the claim for loss of support. If the widow is now receiving a widow's pension from her late husband's pension fund then this pension must be ignored when assessing the damages. However, what about the prospect of receiving this same pension had the deceased lived out his normal lifespan and died at some other time? The Act, it seems, does not preclude account being taken in the widow's damages of the future prospect of her widow's pension. This value can readily be calculated by an actuary and when the deceased was fairly old and the widow is relatively young the rand value of such a claim can be substantial.

**Xmas presents for widows: "loss" of share of deceased's notional pension:** In many instances of claims for loss of support had the deceased lived out his normal lifespan he would have become entitled to a pension and his widow would have been supported from this pension. There are two different types of pension fund:

**The "defined benefit" scheme** where the pension is determined by reference to the employee's salary at retirement without regard for how much has been saved to pay for that pension. The employer must then pay in what is needed to ensure that pension is fully funded. A typical example of a "defined benefit" scheme is that provided by the Government for civil servants, police and army (see *Quantum Yearbook* 2002 at 110 for details of the formulae); and

**The "money purchase" scheme** where the employee and employer each contribute a specified percentage of salary. This is invested by the pension or provident fund

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and when the employee retires he gets whatever pension can be purchased with the money saved up. A typical example of such a scheme is the Metal Industries Pension Fund to which employees contribute 6% of salary and the employer 6½%

Some years ago the labour unions became disgruntled with defined benefit schemes because these tended to provide very small payouts in the event of the employee changing jobs or being laid off. The result has been a substantial decrease in the number of defined benefit schemes with a massive increase in the number of money purchase schemes and the associated large payouts when an employee withdraws.

The Assessment of Damages Act 9 of 1969 does not prevent a widow claiming for the loss of her share of the notional defined benefit pension that her husband would have received had he lived to normal retirement age. In *Du Toit v General Accident* 1988 3 SA 75 (D) it was ruled that even if he has retired she may still claim for the loss of his pension even though she is receiving a continuation thereof by way of widow's pension.

However, with a money purchase scheme the general practice is to ignore the notional pension that the deceased would have received and merely to add to his distributable income the contribution that the employer would have made to his pension or provident fund during the remainder of his working lifetime between date of death and date of notional retirement. In *Mariamah v Marine & Trade* 1977 2 PH J30 (D), 1978 3 SA 480 (A) it was ruled that savings are also part of family income and should be apportioned between the dependants. If widows of members of money purchase schemes are to be treated on the same footing as widows of members of defined benefit schemes then regard ought to be had to the notional pension that the savings would purchase **inclusive of savings accumulated prior to the date of death**. On the other hand by reason of the greater ease with which money purchase savings can be encashed perhaps it is reasonable to distinguish between the two types of benefit? In practice attorneys requesting actuarial calculations do not advise the accumulated pension or provident fund savings at date of death, a figure that is essential if the relevant pension calculation is to be done.

**Saved living expenses:** Accident victims who require special care in an institution will usually be spared a substantial proportion of their normal living expenses by way of accommodation and food. In order to avoid double compensation it is proper to reduce the lump-sum award for the future costs of the institution to exclude those expenses which in the normal course of events would have been paid from earnings (*Lim Po Choo v Camden and Islington Area Health Authority* [1979] 1 All ER 332 (CA), [1979] 2 All ER 910 (HL)). In South Africa the RAF has a policy to pay the costs of the institution by way of an "undertaking" as and when such expenses arise. It follows that if double compensation is to be avoided the payments to the institution need to be reduced, or else the adjustment for saved living costs applied to the lump-sum award for loss of earning by way of an increased deduction for general contingencies.

**More children, more money!:** With a claim for loss of support for a young couple who had the prospect of having more children it is appropriate to assume the birth of one or two further notional children. For a single breadwinner this has the effect of reducing the shares of the deceased's income available for the claimant dependants, and thus reducing the overall claim. However, where both spouses were working the ruling in *Santam v Fourie* 1997 1 SA 611 (A) applies the assumption of a further notional child can have the anomalous effect of increasing the claim (for more details consult your actuary).

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