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NEWSLETTER

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Procedural delays: The Satchwell report records that it takes on average 2½ years to finalise an MVA claim. Grotius writes (*Inleidinge* III xxxII 7):

> 'If a person had been intentionally killed the dead body was brought before the judge, and the next of kin made complaint on behalf of the dead: then the living, if he was taken in the act, was laid by the dead (executed?), and thereby the kinsmen were reconciled to the other. But if the slayer could not be taken ... the dead body must be present before the Court and naked, but no judgment might be given except on the complaint and in the presence of the dead.
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> 'In course of time, legal proceedings lasting longer than in times of old, so that matters could not be disposed of by "standing sun" nor "overnight" it was found good that the hand of the dead should be cut off from the corpse by the next of kin to take the place of the corpse ...
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> 'When (proper complaint had been) done the criminal was declared outlaw with fire and brand, and after that all the kindred of the dead ... might seize or slay the criminal ... (in those times no distinction was made between civil and criminal liability) ... and if anyone aided the criminal or tried to aid him he forfeited as much as the criminal himself ... It was the practice not to bury the dead before and until the death-blow was punished or atoned. The atonement took place over the open grave by the intervention of chosen compositors ... all griefs and quarrels were common to the whole family so an atonement must take place between the kinsmen on both sides ... the kinsmen of the culprit contributed a certain sum of money .. and in addition the culprit must pray foregiveness on his knees. The atonement was sworn to (for) so long as wind blew and cock crew; and whoever broke such a peace forfeited his right hand. This practice lasted in Holland until 1446 ...(Grotius wrote this about 1620).
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> 'A complaint over a wound was made with call to arms and was assessed at the value of the third part of a murder ... and if any one could not make amends in goods then he must make amends with a like limb'.

RAF "actuarial" calculations: I am regularly asked to comment on calculations done by RAF claims handlers. With few exceptions the calculations are done correctly save for a persistent failure to allow for inflation between date of accident and date of calculation. This error causes massive understatement of the claim value. I have yet to see an RAF calculation where this error is not made. Maybe one day someone at the RAF will surprise me. The blame probably lies with those responsible for training the claims handlers?

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Apportionment of undertakings: Medical and other necessary expenses paid in terms of an "undertaking" by the RAF are not subject to apportionment for contributory negligence. The same applies to the fees of a *curator bonis* which are paid in terms of the undertaking (*Mokgatla NO v RAF* (W) (unreported 13.5.2003 case 27035/2000)). The fees would, however, be calculated on a capital sum which has been reduced for apportionment. Where the curator's fees are capitalised as in *Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1029 and *Webster v Commercial Union* 1994 4 C&B A4-154 (C) then, it seems, apportionment will be applied. The gazetted tariff for a curator (Government Gazette R1602 of 1 July 1991) does not provide for any fee on expenses collected, only on income received and capital released. It appears to be the practice of the RAF to pay curator's fees on expenses even though there is no obligation to pay.

Deferred payment of actuarial fees: For many years I have done work on the understanding that payment is only due when the damages payable have been finalised. Since March 2000 I have limited this concession to a maximum period of three years. Several of my older customers have abused this deferred payment concession, so I am now clamping down on attorneys who have failed to make significant progress with finalising matters within a reasonable time. For example: when there are a large number of matters still "running" after 5 years or more it seems reasonable to call into question the competence of the attorney concerned; for such attorneys I now refuse to accept new work on a deferred basis. Attorneys who have not previously sent me work are now in any event required to pay up front. Deferred payment terms may later be granted if justified by the flow of instructions (and payments).

HIV/AIDS and life expectancy: The use of retrovirals can significantly increase the life expectancy of an AIDS victim. For an untreated AIDS victim life expectancy is about 11 years at the onset of HIV positive. For lucky victims retrovirals can extend life expectancy to nearly normal. However, retrovirals produce a number of unpleasant side effects and many victims are unable to keep taking the medication, or else derive little or no benefit even if they do. Then there is the question of the cost of the treatment. Retrovirals are expensive. For a deceased breadwinner this means less income for the support of the family. The onset of fullblown AIDS is often associated with an inability to continue working, even though still alive. In a recent extensively argued matter (now settled) the breadwinner was assumed to have a life expectancy halfway between 11 years and normal. It was also assumed that he would have had to retire three years early.

"Normal contingencies": I am frequently asked to apply "normal contingencies". In theory there is no such thing as "normal contingencies". Every case must be judged on its own particular circumstances. The "widening funnel of doubt" associated with projections into the distant future justifies a larger deduction for long term calculations than for short-term calculations. It is a fallacy that the passage of time reduces the contingencies applicable to past loss. For long past-loss periods an increased deduction for general contingencies is appropriate. However, RAF claims handlers do have a predilection for deducting 5% for past loss and 15% for future loss, regardless of the realities. This formula they apply to both claims for loss of earnings and claims for loss of support. It seems fair to say that if there is such a thing as "normal contingencies" then it must be 5% for past loss and 15% for future loss.

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