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NEWSLETTER

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

Quantum Yearbook 2005: The *Quantum Yearbook* 2005 is now available from van Zyl Rudd in Port Elizabeth (tel: 041-3734322 fax: 041-3734323).

State disability grants: So you thought the RAF had cash flow problems? Their total outlay for the 2002/2003 financial year was R3,6 billion. The Department of Social Welfare reports an increase in State disability grant payments from R4 billion to R10 billion between 2000 and 2004 (Cape Times 02/09/2004). Many of these disability grant beneficiaries will have received and dissipated their RAF lump-sum compensation and are now back on the "dole" South African style.

Fraud at the RAF: On 18 August 2004 Sath Cooper, the new chairman of the RAF, reported that the cost of fraud in the RAF was running at R1 billion per year. This is an astonishingly large figure and one would like to have more details as to the nature of the activities that could go unchecked to this degree. At the same time that Sath Cooper was making his statement the SA life insurance industry reported that it had had R160 million of fraudulent claims during the preceding year. In its efforts to prevent fraud the RAF is unfortunately stalling the making of many legitimate payments to suppliers, quite apart from its *ultra vires* decision to pay lump-sum compensation over 6 and 12 months (see my September 2004 newsletter).

To its discredit the RAF website fails to list its financial statements. At very least the 2003 finstats should be available (the last 3 years would be the best option). One RAF webpage refers to the 2001 finstats, but clicking thereon produces an "Unable to find page" result. The RAF is a public fund and the public ought to be provided with ready access to its financial reports.

Value of a chance: *De Klerk v ABSA* 2003 4 SA 315 (SCA) at 330 neatly restates (with copious references) the oftentimes forgotten distinction between "proof on the balance of probabilities" and "valuation of a chance". Thus, if there was a 10% chance of winning a beauty competition (1 out of 10 applicants) with a prize worth R100000 then the damages suffered are 10% of R100000, that is to say R10000. The 10% percentage is subject to proof on the balance of probabilities, or by way of "estimation" by the Court.

Life expectancy is calculated as the sum of the separate chances of surviving to each possible year of life. The SA56/62 table of assured lives in South Africa, for instance, gives the yearly percentage survival chances up to age 114. Most tables stop at age 100.

A future hip replacement may be needed with a 25% chance. If the cost is R90000 then the value of the chance is 25% of R90000, ie R22500. If the surgery will only happen in 20 years' time then a further discount needs to be applied for the investment advantage over those years.

Then there is the "further" further discount needed to allow for the chance that the claimant may die before needing the surgery (often as much as 10%).

Now future medical expenses belong to that class of contingent damage classified by the ancients as "*damnum emergens*". The attaching uncertainty can be eliminated by waiting and paying the expense if and when it happens. However, "*lucrum cessans*" remains an eternal speculative mystery, such as 'Would the claimant have been promoted had he not had a head injury?'. There are some who have argued that the uncertainty of past loss is removed by waiting. But this is not true of *lucrum cessans*, the uncertain past promotion (inter alia).

Another quirk of chances is that they change with the passage of time. Waiting may remove some uncertainty, but it can also alter its magnitude for better or for worse (eg waiting may reveal that the claimant's employer has since gone out of business - so much for the promotion). Statisticians (and some actuaries) know this phenomenon of adjusting chances in the light of experience as a "Bayesian revision". The poet Wordsworth described the phenomenon in *Ulysses*: "I am a part of all that I have met; yet all experience is an arch wherethrough gleams that untravell'd world whose margin fades for ever and for ever when I move".

Increased awards for general damages: In *RAF v Marunga* 2003 5 SA 164 (SCA) the claimant was awarded the unusually large sum (by South African standards) of R175000 for a femur fracture with complications. This was more than double the "norm" at the time. Some have enthusiastically received this ruling as heralding a new era of much increased awards of general damages in South Africa. This enthusiasm ignores, however, the reality that the Supreme Court of Appeal was reducing the trial Court's award of R375000, and thus rendering the claimant liable for costs. Hard cases make bad law. In *De Jongh v Du Pisanie* 2004 5 C&B J2-103 (SCA) at J2-124 the Court noted that the *Murunga* ruling does not set a new benchmark but merely relies on an existing tendency for general damages awards to increase. In the *De Jongh* appeal the trial Court's award of R400000 for severe brain injury was reduced to R250000. The *Marunga* ruling refers with approval to *Wright v MMF* 1997 4 C&B E3-36 (N) where it was said that "... one must recognise that there is a tendency for awards now to be higher than they were in the past" (at E3-36). There have been warnings by judges against slavish adherence to the consumer price index (see, for example *Sigournay v Gillbanks* 1960 2 SA 552 (A) at 556c; *AA Onderlinge v Sodoms* 1980 3 SA 134 (A) at 141 G-H). It seems that freedom from slavish adherence to inflation rates includes freedom to leapfrog inflation indexed award levels. Whatever freedoms there may be, awards for general damages are not totally arbitrary: There is now a substantial body of case law that provides the same guidance for lawyers as do records of sales of immovable property for property valuers.

Interest and the "*In duplum*" rule: Unpaid interest may not accumulate to more than the original capital (*LTA Construction v Administrateur, Transvaal* 1992 1 SA 473 (A)). Capitalisation of interest as further bond debt does not alter its character (*Standard Bank v Oneanate Investments* 1998 1 SA 796 (A)). However, the *in duplum* rule does not prevent an investor from realising a profit on investment of more than double the original investment (*Sanlam Life v SA Breweries* 2000 2 SA 647 (W)). Nor does the *in duplum* rule apply to "deemed interest" for taxation purposes (*SARS v Woulidge* 2002 1 SA 68 (SCA)).