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NEWSLETTER

(Number 68 - December 2007

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

Assets of a widow: Some married women have substantial assets which are available to contribute to the support of the family, notwithstanding that the husband is the main breadwinner. The fact that the wife is unemployed does not relieve her of making a contribution from her assets. In a recent matter the unemployed wife, now a widow, had assets just prior to the death of R700000. The parties agreed to bring these into account by assuming that she had a notional tax free income equal to the yearly inflation-linked pension that she could have purchased with her capital. The assets of the deceased were treated similarly as a notional tax free income additional to his earnings. The deduction for acceleration was then taken to be 100% of the capital inherited by the widow. Following *Santam v Fourie* 1997 1 SA 611 (A) the incomes of the deceased and his wife were added together and then apportioned between the dependants with two parts to each adult and one part to each child. The wife's notional income from capital was then deducted from her two parts share to determine her dependency on the deceased.

In casu the wife's income was less than her two-parts share so she was deemed to have made made nil contribution to the support of the children. Had her notional income from assets exceeded her two parts share then the excess would have been apportioned equally between the children and applied to reduce their dependency on the deceased.

This logic suggests that children may claim for loss of support arising from the death of an unemployed parent, provided that parent had substantial assets. In most instances the deduction for acceleration will wipe out the claims, but it does happen that the children do not inherit.

The "Van Drimmelin" principle: Many industrial psychologists refer in their reports to the "Van Drimmelin" principle. That is to say the application of a larger percentage for general contingencies to the injured earnings as to the uninjured earnings (see *Van Drimmelin v President Versekeringsmpy* 1993 4 C&B E2-19 (T)). The principle has been around for a long time before the Van Drimmelin ruling was handed down: In *Brijlall v Naidoo* 1961 1 C&B 266 (D) 271 it was said `These risks which would have attached to the plaintiff in any event are... more likely to affect him in the future because of his disability'. The same principle was applied in *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 744 (10% and 20%) and *Venter v Mutual & Federal Versekeringsmpy* 1988 3 C&B 749 (T) 759 (10% and 25%). Differential contingencies were rejected in *Shield Insurance v Hall* 1976 4 SA 431 (A) 443-5 due to high risks attaching to the pre-injury occupation. See too *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) (15% & 30%).

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General contingency for residual earning capacity: When calculating loss of earnings the RAF usually prefers an express actuarial calculation for earnings having regard to the injury, even if this is then reduced by a contingency deduction of as much as 90%. An alternative approach has regard solely to the earnings but for the accident, but then applies an increased deduction for general contingencies having regard to the chance that the injured claimant has of now finding employment (see *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 4 SA 95 (T) at 105E where the 10% deduction was increased to 35%).

Applications for default judgment: In time gone by an application for default judgment was often viewed with trepidation by the claimant making the application because the Judge or Magistrate would often take on the role of advocate for the unrepresented defendant and the process of obtaining judgment then became more difficult than had the matter been properly defended. In more recent years the magistrates became very relaxed and default judgment was readily obtained. During 2006 things changed. The magistrates throughout South Africa suddenly adopted a very defensive approach to granting default judgment. The reasons given for refusals to grant default have not always made sense, but a refusal is a refusal. This development was probably initiated by the Department of Justice having regard to injustices that had been reported. However, the other side of the coin was that not-so-innocent defendants may now avoid their debt by merely failing to enter appearance to defend knowing that the magistrates can be relied upon to block any attempt to obtain default judgment. That, sad to say, would be a serious miscarriage of justice. I express the hope that magistrates will be able to strike a middle path.

Claim by estate for the "lost years": I have recently been asked to do calculations for future loss of earnings for the estate of a deceased injured claimant. This comes to me as some surprise since I had always understood that the ruling in *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) had made it clear that once a victim has died the calculation of his loss of earnings terminates from the date of his death. His estate has a claim for past loss of earnings up to the date of his death. His dependants have a claim for loss of support for the period after the date of his death, provided causation of the death can be proved. When a breadwinner is injured his dependants suffer an immediate loss of support but cannot claim for it because the deceased has a right of action for the earnings that he has lost (*De Vaal NO v Messing* 1938 TPD 34). The claims for loss of earnings and loss of support are separate and distinct actions (*Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A)). It follows that a claim for loss of support cannot be brought using the same summons as was issued for the claim for loss of earnings. The *facta probanda* and the prescription criteria are different, inter alia.

Damages for the unplanned child: When calculating damages for an unplanned child it is usual to have regard to the total combined income of both parents, net after taxation, and then, assuming two parts to each adult and one part to each child, calculate a child's share, **but excluding the part to be consumed by the unplanned child**. The reason for this is that, after the payment of damages, the family, including other siblings, must be able to enjoy the same standard of living as had there been no unplanned child. For the period after all other siblings have become self-supporting the unplanned child is allocated one half of an adult's share, that is to say 25% of total family income.

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