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NEWSLETTER

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State old age pensions: Entitlement to a State old age pension arises at age 60 for women and age 65 for men. In his latest budget speech Trevor Manuel announced that from April 2008 the entitlement age for men would be reduced to age 63, to age 61 from April 2009, and to age 60 from April 2010. This development is to be welcomed in that along with the readily granted State disability grant and child support grants it provides a partial bridge towards a general basic income grant. The benefit remains dependent on a means test (see *Quantum Yearbook* 2008 at 101 for details). As from April 2008 the maximum benefit will increase from R10440 per year to R11280 per year. A retired husband and wife can now expect a joint income of R22560 per year. For many couples this will be a good deal more than the paltry income on which they survived during the hard years of commuting to lowly paid jobs and informal hawker posts, not to mention those who were plain and simple unemployed. Many employed persons are members of the employer's pension fund. However, the pensions that will be provided by such funds will in many instances be so meagre that the employee will also qualify for a State old age pension in addition to the pension provided by the employer.

Economic theory and general damages: All awards of general damages for pain and suffering and loss of the amenities of life reflect the rand value of lost "utility". This elusive product of economic theory has some curious properties: One property is that it is not linearly additive. Thus a utility valued at R100000 combined with a utility valued at R50000 is not generally worth R150000 but something less or something more. The classic example cited in the literature is a matching set of antique chairs. One chair on its own is worth R5000, but as a matching set of 6 the combined value increases to R90000 (R7500x6). Examples of the reverse are also observable, such as a litter of puppies or kittens. The awards for general damages for pain and suffering and loss of the amenities of life generally manifest the "litter of puppies" phenomenon. Thus a victim who suffers a fractured femur and a fractured wrist will not be awarded the sum of the awards that would have been made had only the femur fracture been suffered by one victim and only the wrist fracture by another victim. Utility theory says that R60000+R40000 makes R80000.

An award for general damages should reflect the intensity of negative utility and the duration thereof. Thus, all else being equal, a victim of advanced years should receive a lower award of general damages than a young person. An unconscious or heavily drugged victim should receive less than a victim who has had to bear the full psychological impact of acute pain and awareness of bodily mutilation.

The reported Court awards are not always rational. One glaring example is that the awards for below-knee amputations, in real terms, generally exceed the amounts awarded for above-knee amputations.

Indexation of awards for general damages: The RAF has proposed that awards of general damages be indexed: a medical expert will assess the degree of permanent disability using a standard benchmark, such as the AMA guide. A paraplegic who is assessed as having a 60% degree of disability and will then be awarded 60% of a

legislated maximum of, say, R1½ million. The general damages will be assessed as R900000. The result looks correct. For an above-knee leg amputation the percentage might be 30% and the award R450000. For a below-knee amputation the percentage might be 25% and the award R375000. However, what of the unconscious victim with 2 or 3 years to live? The degree of disability here is close to 100% so the formula will award R1½ million. But that is clearly incorrect. Both intensity of suffering and duration are low and only a modest award is appropriate. Then there is the young lady who suffers mutilation of her face. Her permanent disability is close to zero but her suffering is extreme and lifelong. One can also cite examples of victims who have spent months in hospital recovering from horrific injuries but who then successfully make a full recovery and have little or nil permanent disability.

The disability benchmarks include "whole person" disability, a measure which would accommodate victims like the scarfaced young lady, but not temporary disabilities.

One way to accommodate temporary pain and suffering, and also unconscious victims, would be to have the medical experts fill in a table with a percentage disability for each year of life. For the year of the accident the percentage may be quite high and thereafter decline to fairly low levels. For a victim with a fractured hip there may be peaks of intensity prior to the first and subsequent hip replacements at 12 year intervals. This series can then be averaged to produce a single percentage. Alternatively the maximum general damages for any one year could be set at R40000, say, and a series of separate year-by-year rand values written down in the table. The award for any one year would be the percentage disability for that year applied to the specified maximum of R40000. The series can then be capitalised to get the total award.

The specified maximum should be adjusted each year to offset the effects of inflation.

Damages for pure shock: In *Fourie v Naranjo* 2008 1 SA 192 (C) the claimant had witnessed her husband being mauled by a dog and was "haunted by the picture in her mind of Bruno with blood and pieces of flesh in his mouth. She developed a stutter which lasted for about three weeks and her ability to drive a motor vehicle was also affected." The Court ruled that she was entitled to damages for emotional shock notwithstanding that she had not been personally attacked by the dog.

Nil deduction for general contingencies: In *RAF v Reynolds* 2005 5 C&B D3-1 (W) the claimant was compensated for loss of earnings on the basis that he would for the rest of his working life have to employ a qualified electrician instead of a labourer assistant. The measure of the damages was the capitalised difference between the cost of the qualified electrician and the cost of a labourer. On appeal the nil deduction for general contingencies was upheld. Several important questions were not raised in the discussion:

Firstly, the cost of employing a qualified assistant would have been a tax-deductible business expense. Was proper allowance made for this advantage in the calculations by the actuary?

Secondly, was the cost of employing an assistant based on informal or formal sector earnings statistics? A small electrician's firm would almost certainly pay the lower rates appropriate to the informal sector.