NEWSLETTER

(Number 13 - June 1994)

Dear Reader,

State disability grants: An impecunious injured victim is entitled in terms of welfare legislation to obtain a State grant (currently R4440 per year). This grant is subject to a means test and will usually terminate once the victim has been awarded compensation. The general practice as regards State disability grants has been to deduct from past loss but to make no deduction from future loss (see *Indrani v African Guarantee* 1968 4 SA 606 (D) as regards a welfare grant for dependent children). In *Nxele v President Insurance* 1993 (W) (unreported 01.07.93 case 8652/92) it was ruled that a State disability grant is gratuitous in nature and thus should not be deducted at all. The court was clearly unaware of the *Indrani* ruling and also, most regrettably, failed to have any regard to the macro-economic consideration that the deduction of State benefits is a question of who should bear the loss suffered by the claimant? The primary justification for non-deduction of gratuitous benefits is that the claimant should be placed in a position to reimburse the welldoer. With State grants there is no question of re-imbursement. What is more, State benefits are paid from general tax revenue to which almost everybody contributes. The victim would have been adequately compensated had his past loss been reduced by the State welfare grant, thereby containing the costs of the injury to society. A `knee-jerk' judicial response to anything tainted with gratuitousness is not necessarily consistent with fairness and the overall good.

Travelling expenses: A major component of the deduction for general contingencies is the saving that the victim, or his dependants, enjoy from his no longer travelling to and from his place of work (7,5% was deducted in *Sumesur v Dominion Insurance* 1960 1 C&B 228 (D) 232-3; 9% in *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 12). It follows that for death and total disablement the appropriate deduction for general contingencies from past loss will usually be 7,5% or more. In *Dlamini v SA Eagle Insurance* 1994 (T) (unreported 01.02.94 case 8951/93) the claimant had been receiving a travelling allowance from his employer. Defendant argued that this should be excluded by the actuaries when doing their calculations. Claimant argued that it should be included and then borne in mind when making the deduction for general contingencies. The court ruled in favour of including the allowance in the calculations and then proceeded to make a substantial deduction for general contingencies (15% from past loss alone).

Reduced medication costs: ChroniMed, a new pharmaceutical distribution venture has been launched in Johannesburg, directed at persons who require ongoing expensive medication. ChroniMed expects to provide savings of at least 30% on the published price of drugs for persons who enter into long-term supply contracts with them (Business Day 1 June 1994 page 4). This service is much to be welcomed and will assist those who are not eligible for low-cost medication from the State hospitals. This development is a reminder that a deduction for general contingencies should in many instances be applied to the present capitalised value of future medication.

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`Reciprocal' duties of support**: There is general consensus that the duty of support between husband and wife is `reciprocal' and that each has a duty to contribute to the support of the children in accordance with his or her `means'. A similar `reciprocal' duty of support arises between children and parents. There is also general consensus that a person who earns sufficient to support himself or herself has no right to claim support from another. In *Fourie v Santam Versekering* 1994 (T) (unreported 18.04.94 case 23576/91) the court ruled that the word `reciprocal' means `simultaneously' and that the word `means' means in proportion to total earnings net after income tax. The *Fourie* case was a claim by dependent minors for loss of support arising from the wrongful killing of their mother. The deceased would have been earning R36000 per year by the time of the trial. The father of the children was earning R336000 per year. By reason of the saved living expenses of the deceased (2 parts of R36000+R336000 per year less tax) the family had *prima facie* suffered no loss. **Alternatively the defendant argued that by reason of the mother's duty to support herself **and the indisputed ability of the children's father to carry the burden of the full cost of their support** the mother's contribution had been applied entirely to meeting the cost of her own support. Defendant argued that the word `reciprocal' should be interpreted in sense of `*mutatis mutandis* but not simultaneous', and that the word `means' should be interpreted in the sense of `surplus to the cost of the parent's own support'.

The court observed that, from its preferred point of view, there was a logical inconsistency between the different principles governing the duty of support. What the court failed to grasp was that the defendants' approach reconciled and removed the apparent inconsistency. The court's failure to properly grasp this point was due to the court being wedded to the notion that a parent's duty of support to a child has regard to the parent's total income rather than the parent's surplus income. The decision is to be regretted:

Thus a mother who earns R20000 per year and lives separately from her children and her ex-husband, who earns R80000 per year is, in terms of the *Fourie* approach, expected to `assist' her ex-husband with a financial contribution notwithstanding that she personally has a lower standard of living than her ex-husband and her children. Such a result seems to be a gross miscarriage of justice.

Another problem area is the divorced working mother who remarries and continues to receive a contribution from her ex-husband to the support of the children of her first marriage, **who live with their mother and their stepfather and step brothers and sisters**. The analysis of the respective levels of support can only be resolved by means of the approach rejected in the *Fourie* matter. It is inceivable that the support payments by the ex-husband should be viewed as applied proportionately to the benefit of the entire family, as the *Fourie* approach requires.

The court's failure to grasp the defendant's **alternative** reasoning is further evidenced by the court's view that *Groenewald v Snyders* 1966 3 SA 237 (A) at 247 was irreconcilable with the defendant's approach. Defendant's **alternative** approach to the duty of support was entirely consistent with the ruling in *Groenewald v Snyders* because it has regard solely to what would have happed had there been no death and disregards what happens after the death. It is only with the approach preferred by the court that redistribution of incomes after the death comes into issue. So much for *audi alteram partem*.

In the *Fourie* matter the court has failed to adequately address the extremely complex web of logical relationships that balance the duty of support between family members. The matter is being taken on appeal to the Appellate Division.

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