

# NEWSLETTER

(Number 15 - December 1994)

Dear Reader,

**Maintenance claimed from breadwinner's estate:** In a claim for damages for loss of support due to the wrongful killing of a breadwinner it quite often happens that prior to finalization of the damages claim the dependants successfully claim support from the estate of the deceased. In *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86) it was ruled that the support received from the estate must be deducted when assessing the damages suffered by the dependants. The deduction for acceleration comprises the amount actually received **less** the *spes* of receiving it had the deceased lived out his normal lifespan **less** the value of the use of the assets that the dependant would have enjoyed during the deceased's normal lifetime. When making a deduction for the accelerated benefit of maintenance from an estate **the normal rules do not apply**: For children the *spes* of receiving maintenance from the deceased's estate at the end of his normal lifespan is usually nil, because by then they would have been grown-up and self-supporting; a wife will have a much shorter life expectancy than as now, so her hypothetical claim for maintenance in the distant future will have a value very much less what she has received now, quite apart from the discounts for interest and the chance of her dying before her husband.

**Risk of divorce:** Statistics published by the Human Sciences Research Council ('Marriage and Family Life in South Africa: Research Priorities' - HSRC 1987 at 446 462) indicate a divorce rate for whites of about 1% for each year of marriage, that is to say 10% of marriages will break down during the next 10 years, 20% will break down during the next 20 years, and so on. This is a major contingency to be born in mind when assessing damages for loss of support. The deduction for general contingencies applicable to a widow comprises two major components: The contingencies attaching to her husband's employment, that is to say the contingencies that would be applied were he being compensated for a total loss of earnings; over and above this are the contingencies attaching to the duty of support, that is to say the risk of divorce and the chance of further children. For those living according to tribal custom there would also be the chance of further wives. The divorce percentages of 10% and 20% stated above are for marriages concluded in the 1960's. The statistics indicate that for more recent marriages the divorce rates are much higher than for the older marriages. On divorce a wife may receive maintenance, but this will generally be at a much lower level than had she remained married to her husband. A good rule-of-thumb when allowing for the risk of divorce would be ½% per year to attainment of age 55. The level of support enjoyed by children is usually adversely affected by divorce. For this reason the contingencies applying to children claims should also be increased, but certainly not by as much as for the widow.

page 2....

**3rd Party Claims - 'Drastic Measures Proposed'**: So reads the caption in the Cape Times of 12 November 1994. Amongst the proposals to resolve the financial problems of the MMF will be: limitation of claims to R200000; benefits provided on a no-fault basis; small claims will not be paid; **abolishment of the common-law right to claim damages for personal injury or death!** These are drastic proposals indeed, so drastic that it defies belief that a concerned Parliament could ever make it law. '3rd Party Fund R3,7 billion in the red' reads the paper. There is an element of 'cry wolf' in this statement. The MMF is currently enjoying a positive cash flow, income is substantially exceeding outgo. The MMF is not a private insurer locked into paying claims from the premiums received in the past. As a public body with access to a levy on petrol money it can afford to operate according to different financial criteria from those that would apply to a normal insurance company. This is not to say that there is no occasion for concern, but it is to say that the proposed legislation is 'overkill'. Whatever the Melamed Commission might have said to the contrary, the fact remains that 3rd party legislation is a form of social welfare. Were it not so the question of insurance for the victims of motor vehicle accidents would have been left entirely to private enterprise. If there is to be reform of the 3rd-party system then let us do something that keeps in view the original purpose of the legislation. Here are some suggestions for meaningful reform:

There has been a dismal failure to co-ordinate the system of State disability and welfare grants with the system for compensating accident victims. The MMF ought to be acting as an agent for the Government with initiating these grants as a basic no-fault benefit.

Insurance and pension benefits should be deducted when assessing compensation. In South Africa we cannot afford to compensate people as though they had not received their insurance payments. Just as those with higher incomes pay higher income tax so those with adequate insurance cover should receive less compensation so that the available funds can be distributed to those more in need (albeit improvident). The Assessment of Damages Act 9 of 1969 needs to be abolished. This Act gives rise to substantial double compensation quite apart from concentrating wealth in the hands of the more affluent members of society who can afford life insurance and pension benefits.

If claims are to be capped then this should be at a fairly high level of about R1 million. Paraplegics do have substantial expenses with coping with their disability, although one may question some of the more luxurious items that are sometimes allowed by the courts as 'necessities'. A major expense to the MMF is claims by visiting foreigners. There should be a special fund for such persons with extra premiums being paid on entry to South Africa if full cover is required.

A major financial 'time bomb' for the MMF is future medical and related expenses from old settled matters which are to be paid by the MMF as and when these occur in the future. In order to manage these costs should the MMF not become a service provider for the more expensive items such as hip replacements and prostheses for amputated legs? What about an MMF recruitment bureau for attendants? What about a 'standards policy' identifying adequate provision for an injury as distinct from the ideal, standards drafted in consultation with suitable panels of experts?

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