NEWSLETTER

(Number 17 - June 1995)

Dear Reader,

Compensation for wrongful dismissal: Actuarial calculations are now being used extensively in claims for wrongful dismissal. The quantum is calculated according to the general principles governing Aquilian liability for damages, that is to say a deduction is made for the chance that the claimant will find alternative employment (always a difficult item to quantify). A further deduction is made for the notional tax that the claimant would have had to pay had he received the income that has been lost. The lump sum then awarded as compensation is tax free in the hands of the claimant **and not tax-deductible in the hands of the employer**. This latter point is of some importance to an employer who has a large taxable income. For this reason it is common that the parties negotiate an out-of-court settlement by way of a gratuity for termination of services. The capital amount of this gratuity is calculated **without deduction of notional taxation on the lost income**. The gratuity is taxable in the hands of the claimant but tax-deductible in the hands of the employer. The end result can be financially more attractive to both claimant and employer than a normal damages calculation. For this reason it is usual to prepare figures on both bases when exploring a settlement figure for wrongful dismissal.

General damages for shock: In *N v T* 1993 (C) (unreported 11.10.93 case 11871/92) a child was awarded R30000 damages for sexual molestation. **The child's mother was awarded a further R10000 for the emotional pain of daily contact with a traumatised child**. Against this background it seems highly likely that a court will make an award of general damages for the trauma flowing from the shock of the death of a close family member (see the *Quantum Yearbook* 1994 at 89-90 for further discussion of this topic). Whether the damages awarded will be as much as R10000 remains to be seen.

State disability and accident benefits: In *Zysset et al v Santam Insurance* 1995 (C) (unreported 30.03.95 case 17124-7/92) the defendants, Swiss citizens, had received substantial payments from compulsory Swiss State insurance schemes covering accident and disability. It was argued by the claimants that the benefits were in the nature of insurance and thus should not be deducted when assessing compensation. The court distinguished compulsory State benefits from privately negotiated insurance on the grounds that most taxpayers were contributors to the State scheme **and also contributors by way of a petrol levy** to the funds from which compensation was paid to victims of motor vehicle accidents. The court observed that in general double compensation should be avoided unless there were other weighty considerations of public policy. In the present instance the taxpayers would be called upon to pay twice if no deduction were made whereas the claimants would receive double compensation. In the circumstances the court ordered that the State benefits be deducted. The court ruled that the principle was not affected by the fact that the benefits to be deducted had been paid by a foreign State insurance fund.

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The claimants in the *Zysset* case, had prior to the trial, entered into an agreement with the Swiss State insurer whereby the claimants undertook to repay to the State insurer certain amounts of money. The court ordered that no deduction should be made from the damages to the extent of the repayments.

Quaere: It often happens that due to the incidence of taxation on the benefits paid the amount to be deducted from the damages is less than the amount to be repaid to the welldoer. In such circumstances the damages should be assessed by first deducting the benefits received **and then adding back to the damages the amount that the claimant will be required to repay to the welldoer**. A general principle that collateral insurance benefits are just ignored tends to overlook this finer point of compensation arithmetic.

Quaere: The general principle of insurance schemes is that a large number of policyholders contribute to a central pool of funds. Those who are unfortunate enough to suffer loss receive payment from this pool **while those who suffer no loss receive nothing at all**. The benefits received from an insurance policy are paid from money received from numerous other policyholders **who are also taxpayers and contributors by way of a petrol levy to the funds used to compensate the victims of motor vehicle accidents**. A court that refuses to deduct an insurance benefit is burdening this sector of the general public, `the whipping boys of the 20th century', with a double payment. **A distinction needs to be made between the savings element of life insurance benefits (the `surrender value') and the pure risk element by way of life cover**.

Use of the family home: *Marx v Santam Insurance* 1995 (C) (unreported 12.04.95 case 1510/93) was concerned with compensating a widow for loss of support for the death of her husband. The widow had, prior to the death, owned the family home in her own right. This had been paid for by the deceased many years prior to his death. **The court ordered that a deduction be made when assessing the damages for the use of this family home**. The value of the use of the home was set at 2,5% per year of the market value of the home **apportioned between the dependants with two parts to the each adult and one part to each child**. It was ruled that the value of the home should be assumed to increase over the years in line with inflation. The court ordered that a similar deduction be made for the use of a time-share unit also owned by the widow. The primary rationale for this deduction is that had there been no death the wife, by reason of owning these assets, was able and duty bound to make a contribution, by way of use of assets, to the support of the family.

Savings from the deceased's income: In the *Marx* case (see previous paragraph) the deceased had been a successful pharmacist who had over 20 years amassed from nothing an estate of some R1,3 million. The court ordered that it be assumed that 10% of his income would have continued to be saved in future **and thus not apportioned between the dependants**, ie only 90% of the deceased's income was to be apportioned according to the 2-parts-1-part formula. **However, for purposes of calculating the deduction for acceleration it was ordered that it be assumed that his estate would have escalated after the date of the accident at 2% per year above the rate of inflation until his retirement at age 65, and in line with inflation thereafter**.

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