NEWSLETTER

(Number 23 - December 1996)

Dear Reader,

Oops: Last newsletter (September 1996) I cited the reference *Nel v le Roux* 1996 3 SA 562 (A) for authority that an undertaking must be apportioned. The correct reference is *Mutual & Federal Insurance v Ndebele* 1996 3 SA 553 (A). My thanks to Mr Schwimmbacher of the MMF for pointing out my error.

Accelerated benefits deducted from death claims: In the unreported judgment in *Searle v Guardian National Insurance* 1996 (T) (unreported 11.10.96 case 5772/95) it was ruled that when calculating the deduction for acceleration no regard may be had to escalation in the value of the inherited assets after the date of the death. The court did not discuss what allowance was to be made for notional escalation in the estate had the death not occurred, but one must assume that the same principle must apply else the deduction for acceleration would become an add-on to the damages instead of a deduction. In other words if the ruling is to be consistently applied then, for the "but for" scenario, one must also assume that the estate would not have escalated for inflation. For Gauteng (Transvaal) claims my office now follows the practice of making nil allowance for future inflation in the value of the estate both before and after the date of settlement or trial.

Between date of death and date of trial the dependent child had received regular payments derived from interest earned on the inherited assets. The court ruled that these payments must be ignored by reason of the principle of nominalism and the prohibition of interest on damages. This ruling is in direct conflict with a recent Cape ruling in *Marks v Santam Insurance* 1995 (C) (unreported 12.4.95 case 1510/93) where a deduction from the widow's damages of several hundred thousand rand was ordered by reason of her past and future interest receipts on the assets inherited (after the death she had converted her late husband's stock market shares into fixed interest deposits). In the *Searle* case the judge was not aware of the *Marks* ruling.

In both the *Searle* and the *Marks* judgments the assets had been placed in trust.

In the *Searle* case claimant's actuary had ignored certain assets because the child had had the benefit of the use of these assets prior to the death. The court ordered that only part of the value of such assets should be ignored to allow for the benefit of the use thereof.

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Working wives and death claims: In *Santam Insurance v Fourie* 1996 (A) (unreported 27.9.96 case 113/95) it was ruled that if a wife works and contributes to the common household jointly with her husband then her earnings must be deemed to be applied first to the cost of her own support. Only if her earnings net after tax exceed the cost of her own support can it be said that she is making a contribution to the cost of the support of the children. The cost of a wife's support will, in the absence of evidence to the contrary, usually be assumed to be two parts of the total combined net after-tax earnings of herself and her husband.

In the circumstances of the *Fourie* case the deceased wife had been earning R36000 per year while her husband had been earning R360000 per year, ten times as much as her. The Appellate Division ruled that in the circumstances the children had no claim for damages. The court reasoned that the deceased's net earnings were less than her two parts share of the total combined income of the family. This is method A described in Koch "Reduced utility of a life plan" at 308-24.

The appeal court noted that by agreement between the parties it was precluded from expressing an opinion on the value of the chance of support from the deceased had her husband died while she was still alive, or lost his job. A suitable approach to this type of claim would be to award 2,5% to 5% of the value of a child's claim assessed according to method B described in Koch (loc cit).

The *Fourie* ruling has application in the maintenance courts where it may now be argued that a woman who earns much less than the father of her children has no obligation to contribute to the support of her children while the father has the means to meet the entire cost. See in this regard *Zimelka v Zimelka* 1990 4 SA 303 (W) where the court all but made such an order.

Whiplash statistics: The University of Pretoria has recently hosted a seminar on whiplash injuries. I have summarised some of the available literature in past newsletters (now consolidated in *Quantum Yearbook* 1994 at 88-9). A text of the articles considered at the seminar reveals the following **additional** references: Gore *Spine* 6 (1986) 521; Gore *Spine* 12 (1987) 1; Hodgson *Neuro Orthopaedics* 7 (1989) 288; Vlok *SA Bone & Joint Surgery* 3 (1993) 5; MacNab *Journal of Bone & Joint Surgery* 46A (1964) 1797 (experiments using baboons); MacNab *OCNA* 2 (1971) 389; Evans *Neurologic Clinics* 10 (1994) 975; Jonsson *Spine* 19 (1994) 2733; Task Force for Quebec *Spine* 20 (1995) 355; Chester *Spine* 16 (1991) 716; Gorgan *JBJS* 72B (1990) 899. My thanks to Dr P P Kruger of Pretoria for sending me a document summarising these articles. Copies may be obtained from my offices in Cape Town.

Earnings of domestic servants: The Department of Statistics has recently released a survey of the earnings of domestic servants in 1994. This gives separate figures for a number of different areas in South Africa. The best paid domestics are in the Western Cape with total earnings of R14000 per year after adjustment for inflation to 1997. The worst paid are in the Klerksdorp/Stilfontein/Orkney area earning R9400 per year in terms of 1997 rand values. The average for South Africa as a whole is R13000 per year in terms of 1997 rand values. This amount includes R6200 per year by way of fringe benefits and R6800 per year in cash.

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