NEWSLETTER

(Number 25 - June 1997)

Dear Reader,

Graffiti: As from 1 May 1997 the old MMF is to be known as the Road Accident Fund, the "RAF" for short. In Afrikaans "RAF" abbreviates to "POF". So what do you now call an actuary who does work for the RAF? Answer: a "POF adder"!

Prescribed Rate of Interest Amendment Act (Act 7 of 1997 Government Gazette 11 April 1997 No 17914): The good news is that interest may now be recovered on unliquidated claims, including damages for **past loss** of earnings or support. The bad news is that the RAF Act exempts the RAF from liability for interest until 14 days after liquidation of the claim by judgment or settlement. It is arguable, however, that this provision merely suspends the running of interest for 14 days, just as subsection 2A(4) of the amendment suspends the running of interest if an adequate payment into court, or tender, has been made. Important considerations when calculating interest on past damages are:

Interest calculations: The relevant rate of interest is that applicable at the date that interest begins to run. A claim for damages for past loss of earnings or support is viewed, in law, as a series of separate debts each one arising as at the date that the earnings would have been earned or the support provided. The prescribed rate of interest went through a rapid series of changes between 1985 and 1989; it has been 18,5% per year since 29 June 1989 and 15,5% per year since 29 September 1993. It is arguable that different rates of interest may be applicable to different tranches of the past loss claim. The claim is for simple interest. For post-1993 past losses accumulating between date of demand/summons and date of trial/settlement it will usually be sufficient to apply the relevant rate to this section of the claim for half the period (or half the rate for the whole period - see *Jefford v Gee* [1970] 1 All ER 1202 (CA)).

Collateral benefits: Where a claimant has received a large lump-sum disability payment this will often lead to a nil past loss claim.

COID (WCA) awards: In the event of an award in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 the damages must be reduced in terms of section 36 of the Act using the capitalised value as determined by the Commissioner. At present the Commissioner's values do not separate past and future payments so detail will have to be obtained of actual past payments up to date of calculation. It will be incorrect and unfair to deduct the entire capitalised value.

Evidence: Claimants who require the actuary to calculate interest on past losses must include with their instructions the date from which interest is to run.

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AIDS: The newspapers have recently been reporting a high incidence of AIDS in South Africa. Perhaps the time has come for accident victims claiming damages over extended lifespans to submit to AIDS tests. A finding of HIV positive could have dramatic effects on the size of the award for damages. With death claims testing of the surviving spouse might be considered.

The standard life tables used by actuaries do not include allowance for AIDS. It thus follows that suspicion of AIDS can be a ground for an increase to the deduction for general contingencies.

Probabilities and possibilities: Strictly correct usage of these terms is that a "possibility" is an uncertain event with a chance of occurrence of less than 50%. A "probability" is an uncertain event with a chance of occurence of more than 50%. In civil matters the degree of proof required is "on the balance of probabilities" whereas in a criminal matter proof is required "beyond a reasonable doubt". The principle of value of a chance requires that if there is a 30% chance of a loss of R10000 then the damages to be awarded is 30% of R10000, that is to say R3000. Some medico-legal experts, a minority let it be said, have taken the view that if the chance of medical treatment is more than 50% then it may be accepted as a certainty (ie proven on the balance of probabilities) and thus that the percentage chance of occurence need not be stated. This, however, is false reasoning because if the probability of occurrence is 60%, say, then a deduction of 40% is required for the contingency that the expense will not be incurred. Medico-legal experts should not omit the relevant probability percentages from their reports merely because the chance of occurrence is in excess of 50%.

State grants and pensions: the means test: As from July 1997 the maximum State pension will increase to R470 per month (the child welfare grant is different). The same will be true of the grant available to disabled persons. The grant is subject to a means test which has regard to "assets" and income according to a formula. As from July 1997 single persons with assets in excess of R91650 or income in excess of R14664 per year will not be entitled to claim benefits. Certain assets, such as car and a house, are not counted. Only persons with nil income and nil "assets" are entitled to the maximum benefit. Many unemployed accident victims successfully apply for benefits during the pre-trial period. Once a substantial damages award has been made entitlement to the benefit ceases or reduces. It is generally accepted that this benefit is deductible when assessing damages (*Zysset v Santam* 1996 1 SA 273 (C); *Indrani v African Guarantee* 1968 4 SA 606 (D)). There is, however, a Transvaal ruling that the benefit is not deductible (*Nxele v President* 1993 C&B 4 C4-1 (W) at C4-6). The means test produces some quaint results:

Consider, for instance, a victim who, prior to the accident, was already disabled and receiving a grant. By reason of a substantial award for medical expenses and general damages he may lose his entitlement to a grant. It seems that such a person has a claim for damages for the loss of his grant.

Alternatively consider a claimant whose award, including loss of earnings, is less than R90000. His disability grant does not fall away entirely after payment of compensation thereby requiring a further deduction from his award, etc etc.

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