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NEWSLETTER

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Oops! Apportionment of undertakings: Please replace text of last newletter with the following: Medical and other necessary expenses paid in terms of an "undertaking" by the RAF are subject to apportionment for contributory negligence (*Mutual & Federal v Ndebele* 1996 3 SA 553 (A)). However, the fees of a *curator bonis* which are calculated as a percentage of an apportioned amount and then paid in terms of the undertaking are not subject to further apportionment (*Mokgatla NO v RAF* (W) (unreported 13.5.2003 case 27035/2000)). Where the curator's fees are capitalised as in *Carstens v Southern Insurance* 1985 3 SA 1010 (C) at 1029 and *Webster v Commercial Union* 1994 4 C&B A4-154 (C) the same principle applies. To do otherwise would result in a double apportionment. The gazetted tariff for a curator (Government Gazette R1602 of 1 July 1991) does not provide for any fee on expenses collected, only on income received and capital released. It appears to be the practice of the RAF to pay curator's fees on expenses even though there is no obligation to pay.

Salary surveys and other tidbits: Did you know that the Peromnes earnings survey covers only about 20% of the workforce, that is to say one million workers out of 5 million. These surveys are used extensively, and often inappropriately it seems, as a guide to the future earnings of an injured claimant. I suspect that research would reveal that the majority of road accident victims come from the informal sector.

Some 30% of road accident victims are pedestrians, persons who cannot afford a car of their own. This 30% figure seems to be a good argument for the view that pedestrians traversing a public road under the influence of alcohol should be subject to criminal penalties.

Then there are the impecunious car owners who have difficulty with keeping their vehicles in roadworthy condition. I have many times been checked for my drivers licence and my lights, but I have never yet encountered a roadblock that checked my brakes.

South Africa's labour legislation prevents the dismissal of workers to a degree that is exceptional by world standards. That, of course, is bad news for someone who wants to pursuade the RAF that by reason of their injuries they will lose their job. On the other hand it also means that employers are reluctant to employ further staff. There are employers who are setting up staff members as independent contractors. Other employers just go into liquidation and then reform the business under a new name.

Sick leave: It is usual to compensate a victim for loss of earnings while off work for surgical and other procedures in future years. An extension of this is the proposal by some medico-legal experts that the claimant be allowed 5 or 10 weeks off work **in total over his remaining working life** for sundry minor absences to visit doctors etc. The RAF claims handlers are remarkably generous as regards such claims and seldom, if ever, raise the objection that the claimant will be entitled to statutory sick leave (6 weeks in each 3 year cycle). For multiple brief absences the normal sick leave entitlement will usually ensure nil loss of earnings.

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Capitalised and "recapitalised": I have finally discovered what the RAF claims handlers are talking about (see my newsletter for March 2000): "Capitalised" means multiplying an annual amount of income by the appropriate annuity factor to get the capitalised lump sum. "Recapitalised" means discounting the "capitalised" lump sum for the the fact that it will only start payment a certain number of years in the future, such as the earnings of a child. "Recapitalisation" is also used extensively in loss of support calculations to cope with the changing parts that dependants are allocated as older dependants leave home.

The wealthy wife: A woman who has substantial assets is, strictly speaking, not entitled to claim support from her husband. This point is generally overlooked in loss of support calculations. Thus a wife who owns the family home or farm or business is a major contributor to support of the family and, following *Santam v Fourie* 1997 1 SA 611 (A), a substantial deduction should be made when assessing her loss of support. In the extreme case of *Volkburn* 1946 NPD 76 (see too Boberg "The law of persons" 1977 268) the Court ruled that a mother who claimed maintenance from her son must first sell her house and exhaust those proceeds before she would be entitled to maintenance.

Law Reform: There is one archaic piece of legislation that seems to have escaped the attention of the SA Law Commission: s31(5) of the Black Laws Amendment Act 76 of 1963 reads:

> 'If a deceased partner to a customary law union is survived by more than one partner to such a union, the aggregate of the amounts of the damages to be awarded to such partners ... shall under no circumstances exceed the amount that would have been awarded had the deceased partner been survived by only one partner to a customary law union.'

The usual approach to assessing damages for loss of support is to apportion two parts to each adult and one part to each child. In order to give effect to this legislation it is usual to allocate to multiple spouses a pro-rata share of two parts. I have had to do calculations involving as many as four wives. Each then gets a quarter share of two parts, that is to say ½ a child's share each. To me this does not seem like justice.

While on the subject of customary law marriage it is appropriate to mention that under the old regime the conclusion of a civil law marriage automatically terminated the customary law unions. However, from 2 December 1988 the law was changed (s1 Marriage and Matrimonial Property Law Amendment Act 3 of 1988). From that time on the existence of an undissolved customary law marriage rendered a subsequent civil marriage null and void, save if it was concluded with the one and only customary law wife. The Recognition of Customary Marriages Act 120 of 1998 now provides for consultative procedures to be followed for the conclusion of second and third customary marriages. It also renders community of property the normal matrimonial property regime. Customary marriages under the Black Administration Act 1927 were normally out of community of property - although many persons affected did not know this and conducted their affairs as though in community. The Customary Marriages Act allows such couples to regularise their matrimonial property regime beyond doubt by registration.

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