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NEWSLETTER

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The RAF Act Amendment Act: Late in July this year attorneys received an email announcing that the amending Act was to come into force from 31 July 2006 **but only as regards the provisions for the appointment of the Board of the RAF and the chief executive officer**. The office of the Director General for Transport advises me that they are redrafting not only the regulations, but also the text of the Act itself. This means that the amendments will not come into force until after Parliament has amended the amending Act. It now seems that the earliest implementation date for the new dispensation is sometime in 2007.

The attorneys' Fidelity Fund & expert witness fees: The Fidelity Fund will not entertain a direct claim by an expert witness who has been deprived of his fees by the wrongful act of an attorney. The expert's only recourse is to claim his fees from the victim who has been paid out by the Fidelity Fund. RAF payments to an attorney often include amounts expressly stated to be for the fees of named expert witnesses. This aspect, it seems, brings the named expert witness within the ambit of the enabling legislation of the Fidelity Fund. The attitude of the Fidelity Fund is nonetheless to adopt a narrow view. In my newsletter of March 2006 I called upon expert witnesses to let me know who was interested in joining me to run a test case against the Fidelity Fund. The response was fairly limited so I shall not be proceeding with a test case. This does not mean that the issue is to be abandoned, but merely that other methods, such as lobbying the Law Societies, may prove more effective and less financially hazardous.

Indivisible household expenses: When a breadwinner dies the family is then spared the cost of his or her living expenses. In South Africa the saving is generally taken to be 2 parts of the available income (net after income tax) with one part allocated to each child and two parts to the surviving spouse. This approach sets South Africa apart from the rest of the Anglo-American world whose Courts recognise that when a breadwinner dies there are a number of expenses, such as rents for flats, and car repayments, which do not reduce. Such considerations notwithstanding the South African Supreme Court has rejected appeals that regard be had to this financial reality (see *Legal Insurance v Botes* 1963 1 SA 608 (A) at 616B-F; *Nochomowitz v Santam* 1972 3 SA 640 (A) at 647-9). However, in *Jagger v Sentrasure* 1997 (C) (unreported 11.12.97 case 10194/95) the court *mero motu* ruled that 27% of the family income was of an indivisible nature and was thus not to be reduced by two parts and only the balance allocated on a two-parts-one-part basis with the 27% added to the wdiow's claim. The main objection to admitting an argument for indivisible expenses is the difficulty of proving household budgets many years afterwards when the matter goes to Court.

Travelling expenses: A major component of the deduction for general contingencies is the saving that the victim, or his dependants, enjoys from his no longer travelling to and from his place of work (7,5% was deducted in *Sumesur v Dominion Insurance* 1960 1 C&B 228 (D) 232-3; 9% in *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 12). It follows that for death and total disablement the appropriate deduction for general contingencies from past loss will usually be 7,5% or more. In *Dlamini v SA*

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Eagle Insurance 1994 (T) (unreported 01.02.94 case 8951/93) the claimant had been receiving a travelling allowance from his employer. Defendant argued that this should be excluded by the actuaries when doing their calculations. Claimant argued that it should be included and then borne in mind when making the deduction for general contingencies. The court ruled in favour of including the allowance in the calculations and then proceeded to make a substantial deduction for general contingencies (15% from past loss alone).

International relative cost of living: My note on this topic in the June 2006 newsletter elicited an unreported judgment on the subject (my thanks to Vicky Smith). In *D'Ambrosi v Drs Morton & Partners* (unreported 15/06/2006 case 10179/2002 (C)) the victim was prevented by his injury from earning a living in London. It was argued that the cost of living in London was about three times that in South Africa and that it would remain so for the foreseeable future. By now staying in South Africa the victim would be able to have the same standard of living as in England, but at one third of the cost. The Court ruled that this saving should be ignored when assessing the damages.

The reasoning was that the victim should be "put in the position that he would have been in" as regards nominal earnings. However, if the purpose of an award of damages is to restore lost earnings and ignore actual living expenses then howcome a victim is awarded increased living expenses such as medical costs and costs of an attendant? Is not the saving of two thirds of living costs just the other side of the same coin that justifies an award for increased future living expenses, such as medical costs? In the end the "patrimony" to be restored is surely what is left after deduction of expenses?

There are numerous rulings by the South African courts that a deduction should be made for saved living costs: Thus a deduction will be made for the saved costs of travelling to and from work (see above); a victim who suffers a reduction in life expectancy will have his "loss of earnings" calculation cut short to his shorter lifespan because he will have no living costs of his own during the "lost years" and his dependants have their own separate claim for loss of support during the "lost years" (*Lockhat's Estate v North British & Mercantile* 1959 3 SA 295 (A) at 305-6 and *De Vaal v Messing* 1938 TPD 34); a deduction will be made for living costs saved by reason of confinement to an institution (*Roberts v Northern Assurance* 1964 4 SA 531 (D) and *Dyssel v Shield Insurance* 1982 3 SA 1084 (C)); a deduction will be made for the chance of the saved costs of not supporting a wife and family *Carstens v General Accident* 1985 3 SA 1010 (C) at 1023-4 (but not by way of an explicit actuarial calculation of the saving but rather by an increase to the deduction for general contingencies).

It remains to be seen now whether the *D'Ambrosi* ruling is to be taken on appeal.

Compensation for income not declared to SARS: Compensation will not be awarded for earnings from an illegal activity. But what of earnings won legally but not declared to the Revenue authorities? In *Santam Insurance Co Ltd v Fick* 1982 (A) (unreported 24.5.82 case 282/79/AV) it was ruled that compensation may be awarded for earnings not reported to the Revenue authorities, but that a copy of the Court record should be sent to the Receiver of Revenue. My thanks to Adv P Kemp who has sent me a recent judgment in which this principle was applied (*Winston v RAF* (unreported 08/2006 case 01/15178 (T)).

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