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NEWSLETTER

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Vital statistics:

CAP determination January 2012:	R194043
CPI year-on-year January 2012	6,3%
RSA long bond yield May 2011:	8,3%
Real rate of return (8,3-6,3):	2,0%
ABSA Property Index all	4,8%

Outdated proof of earnings: Proof of the earnings of a deceased breadwinner is often by way of a payslip. Some of these payslips are very old and although they provide good evidence as to the earning capacity of the deceased they do not prove that he was employed at the time of his death. For payslips more than 4 months old there should also be an affidavit by a suitable person confirming that the deceased was in fact in employment at the time of his death. In the absence of such an affidavit the defendant is entitled to conclude that the deceased was unemployed at the time of his death. Such circumstances justify a contingency deduction of 35% and more.

***Santam v Fourie* revisited**: If the deceased breadwinner earned substantially less than the surviving spouse then the claims of the children and the surviving spouse are nil. That was the ruling in *Santam Insurance v Fourie* 1997 1 SA 611 (A) harking back to a similar method of calculation many years before in *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A); 1957 2 PH J16 (A). In *Cooke v Maxwell* 1942 SR 133 136 the Court noted that when there is a seeming nil loss for the children compensation may be awarded for the chance that had the deceased low-income breadwinner been notionally alive, and the surving spouse notionally dead, the children would have been dependent on earnings of the low-income spouse alone. Actuaries can readily calculate this value which usually works out at about 5% to 10% of the claim value had the deceased low-income spouse been the only breadwinner.

One claim for all: In *Oosthuizen v Stanley* 1938 AD 322 331 it was said `In my judgment the fact that an indigent child might have a separate claim for support from a brother is not sufficient reason for testing a father's need for support by the amount that he needs for himself alone. The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'. It seems that the claim in *Oosthuizen v Stanley* was brought as a single action by the father of the two deceased children. The marriage was in community of property. This type of reasoning would allow a wife with a child not born of the deceased, a stepchild, to add the parts for support of the stepchild to her own two-parts claim.

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Adoption by customary law: In *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T) there was a marriage by customary law. The lobola contract provided not only for the marriage but also for the adoption of the stepchild. It was ruled that a child so adopted is entitled to compensation for loss of support if the stepfather is wrongfully killed.

The value of lost sick leave: The victim of an accident often continues to receive full pay in terms of his sick leave entitlement. In *Bosch v Parity Insurance Co Ltd* 1964 2 SA 449 (W) at 452 D/E the actuaries calculated the value of the chance that the claimant might have needed the sick leave for some other contingency, some illness at another time. The value was extremely small.

Many large organisations, notably government, provide extremely generous sick leave entitlement. The glib assumption that a victim who is off work for future surgery will automatically suffer a total loss of earnings for the full period that he is off work, is very far from financial reality and should be subject to an extremely large deduction for contingency that he will be entitled to full pay for part or all of the period off work.

Claims once limited to R25000: *Mvumbu v Minister of Transport* 2011 (2) SA 473 (CC) has removed the R25000 limit for passengers and replaced it with the R160000 cap in terms of the 2008 Act. It seems that for all claims in this category the cap is a fixed R160000 and no adjustment is made for inflation back to the date of the accident.

Nil spread differential contingencies: In *Deysel v Road Accident Fund* (213/2007) [2008] ZAECHC 19 (19 March 2008) the Court ruled that the contingency deduction for the injured condition should be the same as that for the uninjured condition. There was no evidence to justify a conclusion that the claimant had suffered reduced mobility in the job market.

Chiefs & indians - the corporate pyramid: So your industrial psychologist has told you that your victim, had he not been injured, would have started working from age 22 at level B1 and then progressed by even linear real increases to a level D5 at age 45. What he does not tell you, and what is hugely relevant, is that the number of persons at level D5 in a corporation is often 20% or less of the number at level B1. What this means is that, although a victim had the capacity to achieve at a level D5, his chances of actually earning at that level were only 20%. For the C band his chances may have been 50%. He may have remained throughout life in the B band, and he may never have obtained formal sector employment at all, and have remained throughout life in the informal sector. The general contingency deductions appropriate to corporate survey compensation calculations usually need to be substantial. 25%, 35% and even 50% and more.

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