NEWSLETTER

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Dear Reader,

John Melville has qualified: In May this year John tackled both final examinations for admission as a Fellow of the Institute of Actuaries in England and has succeeded in passing both at one sitting. This is an unusual achievement and we are very proud of him. John will now be taking primary responsibility for calculations while Robert Koch concentrates on legal issues and the formulation of claims.

Verification of data: The auditors for the Multilateral Motor Vehicle Assurance Fund have been carrying out a number of investigations. They have reported back to the Fund that Robert Koch is the only actuary who takes proper steps to verify the data used as input for his calculations. The auditors have recommended that all actuaries be compelled to take steps to verify their data and to report as to their findings in this regard. Mr Swanepoel, actuary seconded to the Fund, has telephoned us to discuss the matter. He advises that he does not consider it practical to implement the recommendation. His view is that verification is in general the responsibility of the legal advisors. He also expresses the view, however, that an actuary who has legal training and experience may advise on such matters.

Earning capacity and income tax: *Oosthuizen v Homegas (Pty) Ltd* 1992 3 SA 463 (O) has now been reported. This judgment ruled, inter alia, that when assessing damages for loss of earning capacity no deduction should be made for notional taxation (at 481A-B). The authorities were not fully canvassed and to Juta's credit the tax issue is not mentioned in the headnote. It is standard actuarial practice to make a deduction for taxation (see Boberg 'Law of Delict' 544 inf). In *Sigournay v Gillbanks* 1960 2 SA 552 (A) at 568 the court declined to express an opinion on taxation because any estimate might be 'wildly wrong'. We respectfully note that it is not the practice of the courts to ignore a possibility (*Blyth v van den Heever* 1980 1 SA 191 (A) at 225-6). We also note that difficulties of assessment do not excuse a court from assessing the damages (*Parity Insurance v van der Merwe* 1967 1 PH J17 (A) inter alia). The dicta in *Sigournay v Gillbanks* were made without reference to an earlier AD ruling that when assessing damages a deduction should be made for taxation (*Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 at 29). A deduction for taxation is only justified if the lump-sum award will be tax free in the hands of the claimant.

Impecuniosity: *Smit v Abrahams* 1992 3 SA 158 (C) has put into proper perspective the dubious principle that damages flowing from a claimants impecuniosity are not caused by the original wrongful act. *In casu* claimant had been unable to afford to buy a replacement vehicle and incurred hire costs. It was held that the possibility of impecuniosity was foreseeable and that the hire charges could be recovered as damages. When assessing damages in this manner a court should bear in mind that the value of a motor vehicle usually decreases with the passage of time (4% per year on average according to the Automobile

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Association). It follows that any allowance for the value of the vehicle lost should be assessed according to notional value at the date of the trial and the value that prevailed at the date of the delict. There is English authority for the proposition that damages for loss of use of goods may be recovered even if the cost of hiring substitute goods has not in fact been incurred (see 'McGregor on Damages' 14ed at 701-2). This reflects the utilitarian approach to damages promoted by Van der Walt in his thesis 'Die sommeskadeleer en die "once-and-for-all" reël' at 281.

Beware of marriage certificates: A customary union, ie a marriage according to black law and custom is terminated if one of the parties enters into a civil marriage with another person (*Nkambula v Linda* 1951 1 SA 377 (A)). However, legislation was promulgated on 2 December 1988 which has reversed the state of affairs (s1 of Marriage & Matrimonial Law Amendment Act 3 of 1988). A civil marriage concluded after that date is now nul and void if either of the parties was party to a prior customary union with some other person which has not been properly dissolved. The existence of the legislation is not widely known. This well-intended provision only serves to create confusion and frustration in an already difficult area of the law. Proof of the existence of a customary union is often a contentious issue (see Prof Dhlamini's article in 'African Customary Law' Juta 1991 pages 71-85). A registered civil marriage used to have superior probative value.

Reform we would like to see: It is to be regretted that those responsible for reforming the law did not leave alone the law as regards the monogamous civil marriage and introduce alongside it a registered polygamous marriage which did not invalidate prior other customary unions. This latter form of marriage would then be presumed, ie would be automatic, if there was a pre-existing customary union and monogamy was not explicitly stipulated in the ante-nuptual contract. The fact of the pre-existing customary union might be grounds for divorce and damages if it had not been disclosed at the the time that the subsequent marriage was registered. Where monogamy has been stipulated and a prior customary union thereby terminated the erstwhile customary law wife should be accorded a right of action for maintenance. s31 of the Black Laws Amendment Act 76 of 1963 should be amended to cover potentially polygamous moslem and hindu customary unions. s31 should also be amended to remove the provision that limits damages for more than one wife to what would have been paid had there been only one wife. There is also an urgent need for legislation which gives a right of action for damages for loss of support for a divorced woman, or erstwhile customary law wife, whose ex-husband has been wrongfully killed.

State grants: The legislation governing state disability and welfare grants is extremely complex due to a plethora of Acts, many of which have been part repealed. Fresh consolidated legislation is in the pipeline. Suffice it to say for the moment that these grants are claimable as of a right and should thus be deducted when assessing damages. The benefit is subject to a means test and will thus fall away once compensation is paid. It follows that the benefit should be deducted from past loss only. Because the benefit may be claimed as a right it is arguable that an injured victim is obliged to mitigate his damages by claiming a state grant. A similar deduction from past loss is made for welfare grants payable to dependants (*Indrani v African Guarantee & Indemnity Co* 1968 4 SA 606 (D) at 609G 610A-D). Insurance companies who have settled damages awards should make a point of notifying the relevant government office so that the grant can be terminated. The ruling for non-deduction in *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) was concerned with a special pension payable in terms of the Defence Act 44 of 1957 and was not concerned with social welfare payments. The *Swanepoel* judgment was in any event based on a somewhat maverick view of awards for general damages, out of line with other AD rulings. The *Swanepoel* ruling notably ignored the common practice to include under general damages an award for loss of earning capacity. finis