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NEWSLETTER

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Dear Reader,

Newsletter 3 monthly: We have not been spared the problems of shrinking cash flows and rising expenses. With a view to containing costs we have decided to issue the newsletter every 3 months in future, instead of every 2 months.

General damages for shock of death: In our last newsletter we cited the English case of *Jones v Wright* [1991] 1 All ER 353 (QBD) concerning general damages for shock occasioned by the news of the death of a relative. Damages were awarded to persons who had suffered shock from watching a television transmission of relatives being killed or injured by the collapse of a football stadium. Only siblings and parents were granted a right of action. It has now been brought to our attention that on appeal in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 (HL) it was ruled that **damages will not be awarded for shock occasioned by what is seen on television.**

Overdraft interest is not damages: A distinction may be drawn between interest 'as' damages and interest 'on' damages, that is to say *mora* interest. *Mora* interest is that which will be allowed by reason of delay alone without the need to lead explicit evidence as to actual interest charges incurred (*Bellairs v Hodnett* 1978 1 SA 1109 (A) 1145F). In *Muller v Mutual & Federal Insurance* 1993 (C) (unreported 26.4.93 case no 11978/91) the claimant, a winemaker, lost her entire crop by reason of her injury. The farm expenses had then to be financed from increased overdraft. An amount of R65529 was claimed by way of overdraft interest occasioned by the injury. The court ruled that such a loss could not be distinguished from prohibited *mora* interest and thus that compensation should not be awarded. The court distinguished *Smit v Abrahams* 1992 3 SA 158 (C) which held that the impecuniosity of the claimant is a foreseeable condition. **We note that despite copious commentary in 1992 the Law Commission has not yet produced a revised proposal for legislation permitting interest on damages?**

General sales tax is not compensated: In *Wikner v TPA* 1992 (T) (unreported 4.6.92 case no ?) the court refused to add general sales tax to the damages suffered despite the fact that if the claimant had actually purchased substitute goods he would have incurred this cost. The court reached this conclusion having regard to the money value of the claimant's patrimony and ignoring the fact that the claimant was being provided only with money, and not a motor car. Had the court sought to restore the utility of the patrimony by providing a substitute motor car then general sales tax, now VAT, should have been added to the compensation money. This ruling highlights one of the fundamental differences between *damnum emergens* (necessary expenses) and *lucrum cessans* (loss of profits, or net proceeds on sale of goods such as a car). Damage to a motor car is ambiguous in nature. We note that the claimant

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was probably awarded the value of the car as at date of delict. He was thus spared the cost of depreciation (4% per year according to the Automobile Association) until date of trial. From this point of view he had nothing to complain about provided he had been compensated for the loss of use of the goods during the pre-trial period.

Assets of a wife: In *Volkenborn v Volkenborn* 1946 NPD 76 a mother claimed support from her adult son of adequate means. The mother owned a house worth £1700. She lived in part of it and rented out the rest for £10 per month. The court found that although her rental income was inadequate she was not indigent because she could still sell or mortgage the house in order to meet her needs. **We note that the form MMF1 required for third party claims does not include a question as to the assets of the claimant immediately prior to the death.** For a married woman the test for indigency would not be as severe as in the *Volkenborn* case. Nonetheless the assets of the wife prior to the death are relevant to the extent to which she was entitled to claim support from her deceased husband. Thus, for instance, a wife who owns the family home would make her contribution to keeping herself and the family by way of free accommodation. It would be wrong to ignore this contribution when assessing the extent of her dependency on her husband.

Apportionment of family income: Consider a husband who earns R45000 per year net after tax and a wife who earns R30000 per year net after tax. The total family income is thus R75000 per year. If there are two children and two parts are allocated to each adult and one part to each child then the total support for an adult is R25000 per year and the total support for each child is R12500 per year. If the father has been wrongfully killed then what is the support lost by each child? The father brought in R45000 per year and, *ex hypothesi*, consumed R25000 per year. The loss to the family was thus R20000 per year. In *Bosch v Mutual & Federal Insurance* 1993 (T) (unreported 25.3.93 case no 2090/92) it was ruled that this loss should be allocated with R7500 per year to each child and R5000 per year to the widow. The widow was about to remarry so her damages had been agreed by the parties as nil. The widow continued to earn R30000 per year, of which she required R25000 per year for herself. This left her R5000 per year for the support of the children, ie R2500 per year per child. It follows that after the death each child was short of what he or she needed by R2500 per year (R12500-R7500-R2500), presumably provided by the widow's new husband! **We think that the compensation for the children should have been based on R10000 per year.** The *Bosch* judgment cites not a single case in support of the approach adopted ('method B'). The court was referred to a number of relevant damages cases but dismissed these on the grounds that 'egskeidingsake byvoorbeeld *Van Vuuren v Sam* 1972 2 SA 633 (A)' are not relevant. *Van Vuuren v Sam*, we note, was concerned with a claim for damages for loss of support; so too were relevant rulings in *Burns v NEG* 1988 3 SA 355 (C) 363-4; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A); *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196B (duty of support for injured child). The court expressed the view that if compensation were based on the higher figure of R10000 per year per child ('method A') then restitution would not be achieved. It relied for this conclusion on a paragraph 46, which it did not quote, in one of the actuarial reports. Since neither of the actuarial reports contained a paragraph 46 there is some mystery in this regard. We also note that the actuaries did not testify. The court was thus deprived of expert advice as to the consequences of the two calculation alternatives. The court emphasised that the marriage was in community of property. The judgment is marked by the judge as 'not reportable' and 'not of interest to other judges'.

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