

NEWSLETTER

(Number 22 - September 1996)

Dear Reader,

Board appointment: I have accepted an appointment to the Board of the Road Accident Fund (formerly the MMF) as from 26 July 1996. No restriction is placed on my continuing to do actuarial assessments both for and against the RAF provided I declare my interest should a conflict arise at Board level. An actuary who acts for a claimant or defendant does so as an independent expert. My personal views on compensation matters are already well documented. I will not be involved in the day-to-day running of the RAF and will thus be free to maintain confidentiality as regards individual claims. I thus do not feel that my appointment to the Board gives rise to any conflict of interest. Although I reside in Cape Town, the majority of my work is from Gauteng.

Cheques and bank accounts: Once upon a time I practised jointly with John Melville and the practice was styled "Koch & Melville". This association was dissolved two years ago and I returned to practising under the style "Robert J Koch". My bank is now refusing to accept cheques made out in favour of "Koch & Melville" and endorsed "not transferable". When making payment you are requested to make out cheques to Robert J Koch.

Late payments: Most claimants make use of my late payment facility for which a higher tariff is applicable. A 25% discount is allowed if payment is made within 90 days of the relevant debit. For cash customers, such as the Road Accident Fund, the fees billed are at a reduced rate which includes the full 25% discount.

Notification of settlements: A number of attorneys do not notify me when a matter has been settled. This is a breach of the terms on which the work has been accepted. It prevents me from submitting a final account that includes all debits for work done. An attorney who pays without calling for a final account runs the risk of having to pay further amounts at a later stage long after he has closed his file on the matter. The fees are not due and payable until I have been notified that the matter has been settled. It follows that prescription does not begin to run until I have been informed of the date of the settlement.

Knee replacements: Newsweek February 5 1996 reports promising prospects of repairing damaged knee cartilage with cartilage implants cultivated from the victims own cartilage material. This would obviate knee transplants and revisions thereof. However, the costs for the new procedure are as yet high and the advantages not fully proven.

Measuring the degree of whiplash: A new technique known as "electromyographic dynamic studies" measures the muscle tensions in neck or back. These readings are then compared to a table of standard muscle tensions of uninjured persons thereby providing

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guidance as to pain levels in different parts of the body. This technology seems to provide an objective measure of what has hitherto been a very subjective topic. It remains to be seen to what extent this has an affect on court rulings.

Apportionment of undertakings: In *Nel v le Roux* 1996 3 SA 562 (A) the Appellate Division has ruled that when the RAF elects to pay future medical and related costs as and when these are incurred **and** the claim is subject to an apportionment due to the contributory negligence of the claimant **then** reimbursements for costs incurred are to be reduced according to the contributory negligence of the claimant. The court observed that if the future expenses had been capitalised and the relevant lump-sum award apportioned then the claimant would be in the same position as with an apportioned undertaking. This is, however, not an entirely valid observation because hypothetical future expenses will be compensated by lump sum without the need for the claimant to have actually incurred the expense. If the claimant anticipates that in future years he will be unable to claim under the undertaking because he cannot afford to pay his share of the expenses then he is well advised to settle for a lump sum. The lump sum, if properly calculated, will include discounts for the investment advantage of getting the money early **and also a discount for the chance that the claimant may die early**. Medical experts tend to capitalise future expenses by the simple expedient of taking the present costs of the relevant treatments and adding these up. They argue that the advantage from investing the funds is entirely offset by the very rapid rates of escalation in medical costs above the rate of inflation. However, even if a nil net capitalisation rate is justified there remains the need for a further discount for the chance of early death. Thus a hip replacement at age 60 for a low-income male now aged 30 should be discounted by 36% solely to allow for the mortality risk. Quite apart from that I do believe that a further discount should be applied for the investment advantage.

Accelerated benefits: In *Marx v Santam Insurance* 1995 (C) (unreported 12.04.95 case 1510/93) the widow had inherited the right to income from a trust fund. The deduction was calculated as the present value of her past and future interest from the fund discounted to date of trial. This was reduced by the actuarially calculated present value of the prospect she had of inheriting the right to a larger income had the deceased died at some later date. As regards general contingencies the court adopted the unusual approach of first deducting the accelerated benefit and then applying a substantial contingency of 25%. The usual approach has been to make a deduction for general contingencies from the prospect of inheriting at a later date **but not from the value of what has been inherited** (see *Groenewald v Snyders* 1966 3 SA 237 (A) at 248E-F). The court did not enlarge upon its reasons for deviating from the usual approach.

It is notable that notwithstanding the traditional objection by the courts to having regard to interest in calculation of past damages (see, for instance, *Muller v Mutual & Federal Insurance* 1993 4 C&B J2-56 (C) where a claim was rejected for loss by way of overdraft interest charges) a substantial deduction was made in the *Marx* case for interest received between date of death and date of trial.

A further point of note in the *Marx* case was that the widow had gratuitously agreed to the distribution of capital from the trust fund to her children. Her damages were assessed according to the notional interest she would have received had the distributions not been made.

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