

# NEWSLETTER

(Number 24 - March 1997)

Dear Reader,

**The Quantum Yearbook 1997:** This has finally arrived from the printers in Port Elizabeth. Things did go a bit quicker in the days when the printing was done in Cape Town. Hopefully next year's edition will be out a bit sooner. More serious is that Jutas unilaterally decided to stop sending me updates for Corbett & Honey with the result that a number of more recent judgments are not included in the latest *Quantum Yearbook*. I attach a schedule listing the omissions in the form in which they ought to have appeared.

**Internet:** It has been suggested that the *Quantum Yearbook* be made available on the Internet. It would be an awful waste to set it up on Internet if no-one is going to access it there. However, if more than 50 readers fax, write, or E-mail (krjkoch@intekom.co.za) to me their assurance that they will use the facility then I will go ahead with setting it up. That way you will get access to the new editions at about the same time that I submit the material to the printers, that is to say in early January.

**Putting it all in one word:** The Court in *Brumage v SA Eagle Insurance* 1996 4 C&B E2-33 (C) at 47 is reported to have said that "An **indigent** claimant would not be able to receive necessary medical treatment at all as he would be unable to cover the difference between the insurer's liability and the full costs" (my emphasis). The Appellate Division has since ruled that as-and-when payments of future medical costs may be subject to apportionment (see *Quantum Yearbook* 1997 at 90-91).

**The "life expectancy" of hip replacements:** A hip replacement costs about R40000 and has a limited lifetime. Hip revisions cost more than the original prosthesis by about 25%. It is incorrect to award R50000 now for a hip revision in 15 years' time. Firstly a discount needs to be applied for the investment advantage of having the use of the money during the next 15 years, secondly a further discount needs to be applied for the chance that the victim may be dead before the surgery is needed. The "life expectancy" of a hip prosthesis is often stated in the medico-legal reports to be a 90% chance of surviving 8 years with a 10% per year rate of attrition thereafter (I have yet to discover the source of such statistics). The problem with such a statement is what period should be used for the calculation. One may observe that a normal life expectancy is the period until 50% of persons alive now of a stated age have died. It seems appropriate to use the same criterion for hip replacements, that is to say the period until 50% of hip replacements have failed. If 90% will survive 8 years and 10% of those will thereafter fail each year the "life expectancy" for the hip replacement is just over 13 years, that is to say the number of years it will take to reduce 90% to 50% if one takes off 10% of itself each year ( $90 \times 0,9 \times 0,9 \times 0,9 \times 0,9 \times 0,9 = 53\%$ ). The principle of

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discounting (capitalising) future contingent losses is well established in our law: thus Grotius (*Inleiding* 3.32.16) writes "Uncertain and future losses are not worth as much as those that are certain and immediate".

**The "discretionary" benefit:** In *Gehring v UNSBIC* 1983 2 SA 266 (C) at 273 it was ruled that **future** sick pay should be ignored when calculating the damages because it would be provided in terms of a "discretion" exercised in terms of the sick leave regulations. In *Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) at 103H it was ruled that notwithstanding a discretion sick pay is deductible provided the approval thereof could be expected in the normal course of events. In *Buttgen v Santam* 1995 4 C&B J2-125 (C) sick pay provided according to an ad hoc discretion exercised by claimant's employers was ruled *res inter alios acta*. The Court does not seem to have examined the issue of whether the discretion had been in accordance with a "normal course of events". Judgments of this nature are somewhat myopic because if the "discretionary" benefit principle is taken to its logical conclusion then most increases in salary must be ignored because they too are awarded in terms of a discretion exercised by the employer.

A variation of this theme is to be found in *Raitt v City Council of Johannesburg* 1989 4 C&B J2-82 (W) where the claimant had continued to be employed at a salary well above his market worth. The Court ordered that his full past salary be deducted from past loss of earnings, but that for calculating his future loss of earnings only his true worth should be brought into account.

**The extended family: claims for loss of support:** There is an interesting principle enunciated by the Appellate Division in *Oosthuizen v Stanley* 1938 AD 322 at 331. The father of the deceased had claimed compensation for loss of support and it was said that "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". At first blush this would seem to be in conflict with the recent unreported ruling by the Appellate Division in *Santam v Fourie* (see *Quantum Yearbook* 1997 at 92-93). However, when read in context it seems rather to state that the father is entitled to claim not only for what he needs for himself **but also for those dependent on him who do not have a direct claim for loss of support**. Thus, one may conclude, a wife whose child from a previous marriage has been supported by the deceased may include in her claim not only her two parts share but also an additional one-part share for her child. If the father of the child had been paying support this would need to be added to the total family income and then deducted when determining the stepchild's true dependency on the deceased. The same principle would apply to parents-in-law who were supported by the surviving dependent spouse.

Modern South African law requires that there be a duty of support if there is to be a right of action for damages for loss of support. This was not the case in Grotius day. Both Grotius and Voet state that damages for loss of support will be awarded if the deceased had been accustomed during his lifetime to provide support (Grotius *Inleiding* 3.33.2, Voet *Ad Pandectas* 25.3.4; see too Davel "Skadevergoeding" 66-7, Van der Merwe 1961 *THRHR* 133, *Chawanda v Zimnat Insurance* 1991 2 SA 825 (ZS)).

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