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## **NEWSLETTER**

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Dear Reader,

**Curator bonis & costs of security:** The costs of providing security are extremely high. In *Webster v Commercial Union* 1994 C&B A4-154 (C) 18,4% was added to the overall award compared to the more usual 7½% that is allowed for the capitalised costs of a *curator bonis* who is not subject to security, an extra 10,4% of the award. In *Webster's* case the claimant needed as curator a person who was sensitive to her special circumstances. The person selected was a practising attorney. As a general rule the Master's Office will waive provision of security for a practising attorney known to the Master's Office. In this instance the Master, for reasons which perhaps should have been recorded, directed that security be provided. The attorney's Fidelity Fund will usually provide such security at little or no cost. The Fidelity Fund cover may be subject to certain limitations as regards the amount of the cover. In such instances additional cover may be needed from private insurers. It is unfortunate that these issues were not canvassed more thoroughly in the *Webster* hearing.

**General damages - relief from the need to work:** It can be argued that a claimant who is deemed "unemployable" and receives compensation for 100% loss of earnings for the rest of his life is thereby freed from the discomforts of "going to work". Admittedly he or she has been subjected to serious injury, pain and disfigurement, but that is now history and it is the quality of life that remains that is now in issue. The compensation money is intended to "top up the barrel of life utility to the level it had prior to the injury". Some forms of injury are so devastating that there will be little residual quality of life, "little utility left in the barrel". However, for many who are precluded from working by economic, rather than physical, limitations, and who are provided with a modest amount of compensation money to cover living expenses, life can look quite rosy. This is now an opportunity to engage in activities selected for pleasure and fulfilment, rather than income generation. The award for general damages will be adjusted downwards for a victim who has also received a substantial award to cover living aids (*Administrator-General SWA v Kriel* 1988 3 SA 275 (A) at 289E). In *Saayman v Mutual & Federal* 1989 (T) (unreported 22.11.1989 case 3259/87) the claimant suffered an amputation of the right leg below the knee. Despite this he had trained as an aircraft electrotechnician. The evidence before the Court was that he had not suffered any provable loss of earnings. The Court accepted, however, that claimant would experience an increased degree of difficulty and frustration with doing the work and bore this in mind when assessing the award for general damages. By analogy with these judgments it is eminently arguable that general damages should be reduced for the advantages of enforced **usable** leisure. The few views expressed on this topic are mixed:

^The psychic gain, if any, from being relieved of the anxiety of obtaining and retaining employment is more than offset by the plaintiff's frustration at being unable

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to support himself by his own exertions and the loss of enjoyment of being a useful member of society' (Luntz "Damages" 2ed at 53-4 quoting from an Australian judgment).

'In a society that values work and that uses occupation as a source of identity as well as of support, not having a job is a stigma that symbolizes a loss of role, purpose and meaning. ... Even when unemployment insurance or old-age pensions provide material security, as in some countries, this meeting of material needs has been found to be insufficient for self-esteem and public recognition' (Hall "Career development in organisations" at 107 103).

'Work, in more ways than one, is central to our existence. Very few people work for work's sake. It is only the fortunate few who find that the job is its own reward, and few who derive real satisfaction and pleasure from what they do. For many people, work is dull, repetitive, exhausting or downright unpleasant' (Luntz "Damages" 2ed at 53-4 - personal view).

**Partial disability:** Medico-legal reports prepared in respect of disabled victims often state a percentage permanent disability. This can be a great help for parties seeking to settle a matter where the victim is clearly still able to work. In expressing such a percentage the medical expert is, in part, performing a quasi-judicial function, making a value judgment as regards the compensation that should be awarded. Although the percentage stated should have a foundation in objective fact, the stating of such a percentage should not be avoided because it involves a value judgment unprovable according to scientific standards of proof. The subjective impression of the medico-legal expert is entirely relevant in terms of utility theory and there is an extensive body of economic literature dealing with this phenomenon (see Koch "Reduced utility of a life plan" pages 5 to 40).

An aspect of percentage disability statements which needs to be borne in mind is the combination of a percentage disability with a statement that the victim will now need to retire several years early at, say, age 60 instead of age 65. In structured salaried environments a 15% permanent disability may well produce nil financial loss until the situation becomes unbearable and the victim takes early retirement. The point is that a percentage disability and a statement as to early retirement may both be manifestations of the same loss of utility. To allow **both** a percentage loss of earnings **and** 5 years' early retirement may well amount to a double counting, an overlapping. Medico-legal experts making subjective value judgments should bear this in mind.

Awards for loss of earnings based on a number of years' early retirement need to have regard to disability benefits payable by the employer. Such benefits can substantially reduce the loss compared to a claim where no such benefits are payable. Thus a government employee who goes on early ill-health retirement will be awarded a disability pension (see *Dippenaar v Shield* 1979 2 SA 904 (A)). His loss of earnings due to early retirement is thus the difference between his notional salary and his notional disability pension. For government employees there will also be a small ongoing loss of pension continuing for the rest of life. For many other employment contracts the disability benefit guarantees a full normal pension at normal retirement age with a 75% salary benefit up to normal retirement age. Awards based on salary survey data provided by industrial psychologists commonly gloss over the disability benefit issue with resulting over-compensation for the victim.

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