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NEWSLETTER

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The "future" of the Road Accident Fund (RAF): extract from www.welfare.gov.za:

"The Committee (for Social Welfare) is not in a position to make final recommendations concerning future directions for the RAF. After consultations with the Satchwell Commission, and a review of some of the processes underway, the Committee has chosen to make certain observations that can serve as inputs into more substantive processes.

"In some countries there is only one accident compensation system covering both employment-related and road accidents, and often other accidents outside the employment and road spheres. Where separate schemes exist for occupational injuries and diseases and road injuries, certain problems can arise:

- * The possibility of double compensation
- * Victims shopping around for the best possible compensation
- * Different definitions of quantum of damages creates uncertainty
- * Double administration costs

"However, in South Africa the long history of two separate schemes probably prevents the likelihood at this stage of one integrated scheme for all instances of compensation as a result of injury.

"It is, however, clear that some ambiguities could be eliminated by, for example, adopting one model of assessing damages, eliminating fault as a requirement for liability in both schemes, and creating an integrated computer data basis as to eliminate double claims. As suggested in Chapter 9, a case can be made for the introduction of an integrated system that offers life, disability and health insurance cover for all accidents and diseases".

"Gains" offset against "losses": A fundamental consideration when assessing damages is that gains arising from the accident must be offset against losses in order to arrive at the net loss suffered and the damages to be paid (see, for instance, *Santam v Fourie* 1997 1 SA 611 (A)). Precisely what is a "gain" and what is a "loss" can sometimes be a matter for debate (see, for example, the rules of law against deducting "gains" classified as "*res inter alios acta*"). A new development concerns claims for damages for loss of support: Consider a family in which both parents work and contribute to the support of the family. The wife earns less than her husband, but is much younger than he and also has the expectation of substantial pension benefits (such as are provided by the government service) whereas the husband had no pension prospects. If he is wrongfully killed there is a continuing loss of support for the widow during the period prior to her deceased's husband's notional retirement. However, once he notionally retires, she would have become the main breadwinner and now has a gain by reason of not longer needing to support her husband in his later years. If gains are to be properly offset against losses then the future gain after notional retirement must be offset against the shorter-term losses during the period prior to retirement. At least one prominent actuary in Johannesburg takes the view that all gains after notional retirement should be ignored. His rationale for adopting this approach is that to make a nil award to the widow is to prevent her from providing properly for her support during the years prior to the deceased's notional retirement. This reasoning ignores the fact

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that no amount of money can precisely restore what has been lost. All that can be done is to provide a reasonable equivalent. One may note that by accepting a lower living standard during the pre-retirement years the widow has the prospect of a higher standard of living in her later years. The award for loss of support includes savings and is not confined to immediate necessary living expenses (see *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A)). What is more, many widows will have had the benefit of life insurance and pension monies which are non-deductible from their compensation by reason of the Assessment of Damages Act 9 of 1969. I respectfully submit that to ignore post-retirement gains by the widow places an unnecessary and unjustifiable additional financial burden on the defendant.

Remarriage deductions for black widows: The remarriage prospects of a lower income black widow are poor (see 1988 *De Rebus* 631-5). This consideration, sadly, does not stop RAF claims handlers forcing settlements using deductions as high as 40%. Only white widows have remarriage prospects at anything approximating this level. Much has been said about attorneys who misappropriate claimants' compensation money. I am of the respectful opinion that an RAF claims handler who forces an excessively low settlement on an illiterate impecunious black widow is engaging in comparably dispicable conduct. Claims handlers are performing a public service and it is incumbent on them not only to fend off the greedy and the devious, but also to ensure that the deserving get a fair deal.

Metal Industries Pension Fund: A large proportion of workers in South Africa are members of the MIPF. The rules of this fund provide for substantial disability benefits in the event of the injury to a member. If the victim is also entitled to benefits from the RAF the MIPF rules provide that it can recover from the RAF award what the MIPF has paid by way of disability benefits. It follows that disability benefits paid by the MIPF should be ignored when assessing damages for personal injury. It appears that the MIPF is judicious not to cause undue hardship and in a recent instance they notified a claimant against the RAF that as soon as the RAF award has been paid the MIPF disability pension payments would cease. There was, however, no suggestion of recovering payments made prior to the RAF settlement. Death benefits payable by the MIPF must, in any event, be ignored by reason of the Assessment of Damages Act 9 of 1969. The widow cannot then complain if she is required to repay or forego such death benefits.

Deferred payment of actuarial fees: As many attorneys know I am prepared to wait for my fees until the matter is "finalised". By finalised is meant "determination of the damages payable". My willingness to wait does not extend to delays with taxation issues. My full fee is payable regardless of the results of taxation. The instructing attorney guarantees my fees regardless of the outcome of the matter. If the matter is transferred to another attorney my fees then become payable notwithstanding that the matter has not been finalised. Part and parcel of this deferred payment arrangement is the understanding that the attorney is actively and competently pressing for finalisation. I am thus entitled to be fully and properly informed as to what efforts are being made to achieve finalisation. An important indicator in this regard is the request for an updated actuarial value. For most claims these actuarial revision gives rise to a higher claim value, but not always. The onus for keeping me informed as to events rests with the instructing attorney. In the event of excessive delays without good cause shown I reserve the right to call up my fees. For more recent matters I have contractually restricted the period of waiting to a maximum of three years.

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