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NEWSLETTER

(Number 64 - December 2006)

WE WISH YOU A VERY HAPPY XMAS AND A PROSPEROUS NEW YEAR

Loss of life cover: In *De Vos v SA Eagle Versekeringsmpy* 1985 3 SA 447 (A) death had prevented the payment of the premium which would have brought life cover into effect under a new life policy. The loss of the benefits under the policy were claimed as damages. Compensation was denied by the Court on the grounds that had there been no death the deceased would have been alive and without a right to claim under the policy. This was hardly a good reason for denying compensation because had the deceased still been alive he would have been at risk for dying at some other time at which stage the policy benefit would have been payable. One may observe, however, that the present value of premiums payable under the policy was at least equal to, and cancelled out by, the present value of the chance of benefits payable in the event of death at some later date. The *De Vos* ruling would, with respect, seem to be correct, but for the wrong reasons.

Damages awards and income tax: An award for loss of earnings, or earning capacity, is capital and, as such, tax free in the hands of the recipient. However, when assessing the lump sum, notional tax will be deducted from the notional income capitalised to arrive at the lump-sum award (*CIR v African Oxygen* 1963 1 SA 681 (A); *Taeuber & Corssen v SIR* 1975 3 SA 649 (A); Boberg 1981 *BML* 25; Boberg `Delict' 543).

It sometimes happens that the award made is a replacement of profits (see, for instance, *Omega Africa Plastics v Swisstool Manufacturing* 1978 3 SA 465 (A) 475-6). Such awards rank as taxable income in the hands of the claimant and no deduction should be made for notional taxation when assessing the damages. Compensation for personal injury or death is never in this form.

When compensation is paid by instalments these payments constitute an annuity and are taxable (*KBI & MMF v Hogan* 1993 (A) (unreported 28.5.93 cases 663/91 & 683/91)). It follows that instalment payments should be assessed gross of liability for notional taxation.

Revenue practice is to treat as tax free instalments directed at meeting medical and prosthetic expenditure.

Loss of earnings/earning capacity will sometimes be measured by the cost of employing a suitable assistant. This cost is usually tax deductible and should then be reduced for the associated reduction in tax liability. In *Muller v Mutual & Federal Insurance* 1993 4 C&B J2-56 (C) the evidence was that the claimant would have had a substantial ongoing tax loss even if she had not been injured. The cost of the assistant was thus awarded without deduction for any tax advantage.

Pensions awarded for work related injuries by the Commissioner for Occupational

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Injuries and Diseases (COID) are tax free (s10(1)(gB) of Income Tax Act 58 of 1962). The Income Tax Act does not mention COID pensions payable to widows, but Revenue practice seems to be to treat these as equally tax free.

Blended earnings scenarios: Dr van Daalen, an industrial psychologist, has been producing reports in which he proposes several alternative scenarios (nothing unusual about that) and then proceeds to express an opinion as to the percentage chances of each different scenario (eg 33% chance of formal sector earnings and 67% chance of informal sector earnings). This expression of an opinion as to the percentage chances is a most welcome development and other industrial psychologists would do well to emulate his approach. This is to trespass into the realm of general contingencies which, strictly speaking, is a prerogative of the Court. Most modern judges, however, welcome expert guidance as regards general contingencies. The deductions proposed are, of necessity, quite substantial and the lawyers acting for the plaintiff will usually prefer that the industrial psychologist's opinion as to the chances is confined to a separate confidential addendum to the report.

Attorneys operating as Inc: The Law Societies allow their members to practise as registered companies with unlimited liability, provided that the articles of association render the directors subject to s53(b) of the Companies Act 61 of 1973. This section renders a company director personally liable for debts incurred during his or her period of office. This personal liability for past debts is restricted to contractual debts (*Fundstrust v Van Deventer* 1997 1 SA 710 (A)). It does not extend to liability for damages for negligence during the director's period of office. In this sense a director attorney who has left his Inc firm has a lesser liability than an attorney who practised in a conventional, now dissolved, partnership: the latter does remain liable for damages for negligent acts. On the other hand the continuous succession of an Inc means that damages for negligence can be claimed from the Inc and its current directors, even if none of the current directors were directors at the time of the wrongful act. The "continuous succession" benefit is of little value if the Inc has ceased to trade and has no assets, but then the same is true for an insolvent defrocked attorney.

Loss of earnings by a widow: It does happen that, due to the shock of the event and/or the needs of the children for closer care, or her own personal injuries in the same accident, a widow ceases employment after the death of her husband. For certain cultural groups cessation of employment after the death of a spouse is mandatory. The loss of earnings suffered by the widow under these circumstances is patrimonial and, strictly speaking, must be claimed by way of a separate action (*Evins v Shield Insurance* 1980 2 SA 814 (A)). An exception to this rule is when the cessation of employment has been occasioned by the need to care for the children (*Union Government v Warneke* 1911 AD 657 669inf; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A)). As a general rule the calculation of loss of support for the widow must have regard to what would have happened had there been no death. Her claim for loss of earnings is then by way of separate calculation and should not be muddled into the loss of support calculation. In one instance referred to me the widow was injured in the same accident. Had her husband lived she would not have worked. However, now that he has died she is pressing a claim for loss of earnings. To award her damages for loss of support **and** loss of earnings smacks of double compensation, but then so too does the rule that a Court assessing damages for loss of support must ignore the earnings of a widow who has gone out to work (see *Nochomowitz v Santam* 1972 1 SA 718 (T); 1972 3 SA 640 (A)).

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