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NEWSLETTER

(Number 70 - June 2008)

Impairment ratings and general damages: My March 2008 newsletter referred to a permanent disability percentage according to the AMA guidlines. The use of the word "disability" attracted a flurry of correcting emails from the experts. The AMA guidelines measure "impairment" not disability. My thanks to those who have brought this to my attention.

A second ground of objection to my comments was that the RAF Act amending legislation provides for nil compensation for "minor impairments", so what purpose is there in discussing the assessment of general damages for minor impairments? There are several good reasons: The RAF legislation will only affect MVA claims and not medical negligence, assault, dogbites, etc; my limited contact with the Department of Transport elicited the comment that they are embarrassed by the shortcomings of the amendments as enacted and are considering amending the amending Act; and, thirdly, the assessment of general damages for minor injuries presents far greater difficulties than for major injuries. I do believe that a sound theoretical basis for the assessment of general damages can assist with ensuring consistency between awards, an essential quality of a fair and just system of compensation.

R2 billion award for damages!: Rumour has it that the RAF has recently paid out compensation of some R2 billion (the R100 million type of billion). That is almost the entire annual cash flow of the RAF. The claimant was a Swiss internet software expert injured while riding a motorbike during a visit to South Africa. My mother would have huffed that riding a motorbike was extreme negligence in itself. Fortunately for the numerous victims with smaller claims the RAF had insured itself against such extreme claims and has thus been able to continue to pay the smaller claims. The incident is, however, a warning that more such mega claims may happen again in the future and the RAF reinsurers may become increasingly reluctant to provide cover.

State welfare incomes: It happens that the sole breadwinner of a family derives his entire income from a State disability grant or a State old age pension. This has been R11280 per year since April 2008. It has for many years been standard practice for the RAF to pay compensation for loss of support when such a breadwinner is wrongfully killed. To the best of my knowledge there has never been a Court ruling to confirm this practice and this practice can be questioned: In *Zysset v Santam* 1996 1 SA 273 (C) the Court ruled that State welfare payments should be deducted from a claim for damages because the compensation money was coming from the same public funds as the welfare payments. So, then, if dependants have lost support derived from public welfare funds should they not be denied compensation paid from other public funds. The welfare legislation provides for grants for needy children, so the loss of one welfare benefit is replaced with another. But not so for an able-bodied widow, and the child grants fall away at about age 14 or 15 notwithstanding that dependency may continue to age 18 or 21. The *Zysset* ruling was concerned with double compensation and it caused no hardship to make the deduction of welfare benefits. For the dependants of a State welfare pensioner, however, to deny compensation for loss of support would leave the dependants out of pocket.

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Now what about personal injury claims? Consider an accident victim who prior to the accident was so disabled that he was entitled to a State disability grant. After the accident he is disabled far worse than prior to the accident, but this fact rather strengthens his claim to his State disability grant. However, if he has been seriously injured, rendered a paraplegic, say, then he will be awarded a large sum by way of general damages, about R800000. His State disability grant is subject to a means test and his entitlement thereto will thus fall away. May he claim compensation for loss of his State disability grant? The answer seems to be yes. Once again the problem has never been the subject of any Court ruling.

Loss of support claims by children: When a breadwinner dies the usual approach to calculating the loss of support is to apportion 2 parts of the deceased's income to each parent and one part to each child. This is a simplistic substitute for detailed evidence as to the actual application of family income towards the support of each member. What is more the formula is only applicable when the family members all live together in a common household.

When the deceased breadwinner did not live in a common household with the dependent child then, strictly speaking, evidence must be provided as to the actual level of support that would have been provided. This is usually done by way of copies of a divorce order or a maintenance court order or an affidavit by a competent person.

For the vast majority of claims by children who did not live with the breadinner there is no evidence whatsoever of how much was being paid prior to the death. The procedure then is to apportion the deceased's income with 2 parts to the deceased breadwinner and one part to each dependent child. This method of calculation usually leads to notional levels of support substantially in excess of the amounts evidenced by divorce orders and maintenance court orders. Thus, for example, a deceased breadwinner may have been earning R100000 per year and there are two dependent children, one legitimate and one illegitimate. The divorce order may provide for R12000 per year, say, for the legitimate child whereas for the illegitimate child there is no evidence as to the payment of any support. The legitimate child's claim will be based on R12000 per year whereas the illegitimate child's claim will be based on a 1-part share of the deceased's income, that is to say R29333 per year (R100000 less R12000 divided by 3). The illegitimate child for whom there is no maintenance order will thus receive substantially more compensation than one for whom there is an order.

Many lawyers rationalise this seemingly absurd state of affairs on the grounds that the illegitimate child has lost a right to support. But then so too has the legitimate child, so why must he receive less compensation?

When a child is wrongfully killed the parents lose their right to support from the child. This does not automatically entitle them to claim for loss of part of the child's income; they must first prove that the deceased child was supporting them. The late Professor Boberg put it very nicely when he said that their claim is usually extinguished by the weight of accumulated contingencies.

So what of the illegitimate child who claims for loss of support after the death of a father who never paid one cent of maintenance? Ought not that child's claim also be pressed to extinction by the weight of accumulated contingencies?

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