

ROBERT J KOCH cc BSc LLB LLD

Fellow of the Faculty of Actuaries in Scotland
VAT 4870191808 E-mail: rjk@robertjkoch.com
CK2000/058266/23 Website: www.robertjkoch.com

1A Chelsea Avenue
Cape Town
Tel: 021-4624160

PO Box 15613
Vlaeberg 8018
Fax: 021-4624109

NEWSLETTER

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

The looming legislation: The Parliamentary Portfolio Committee for Transport has let it be known that they are pressing ahead with legislation to replace the existing system of compensation for road accident victims with a social welfare system with no fault compensation and instalment benefits along the same lines as for COID victims and nil general damages, not even for serious injuries. Precisely when this new system will take effect is not clear but it could be so soon as the end of 2011. The details of transitional arrangements have not been disclosed. It is to be hoped that for accidents prior to the commencement date the claims will be run off under the present legislation.

Domestic worker fringe benefits: A survey conducted July 2007 in and around Durban revealed the following benefits for domestic workers:

Benefit	Minimum per year	Maximum per year
Salary	R10200	R27000
Accommodation	R10200	R24000
Bus fare	R1225	R2450
Meals	R1100	R3675
Rice , pap, sugar, toiletries	R720	R1200
Provident fund	R600	R2400
Annual bonus	one month salary	one month salary

A domestic servant who lives in does not require busfare. The average total package for a live-in domestic worker is R31000 per year in terms of rand values in 2011.

Treatment of AIDS: In South Africa damages claims are assessed on the assumption that the claimant is not HIV positive. For this reason use is made of life tables derived from census data covering 1984 to 1986. I am frequently asked why we do not use more modern tables and the answer is simple: some 25% of the population are HIV positive. Any mortality survey will show increased mortality rates and shortened life expectancies. The present practice at least ensures that those who are not HIV positive are not tarbrushed with the reduced life expectancy that goes with AIDS. In those instances where a claimant is known to be HIV positive then an explicit extra mortality is applied (see *Quantum Yearbook* 2010 at page 83). There are some optimistic medical experts who will opine that with the benefit of anti-retrovirals the life expectancy of an HIV victim can be close to normal.

Professor van Rooyen has neatly summarised the obstacles to achieving such a result:

- * The untreated victim of HIV has a life expectancy of 11 years.
- * Whatever the medication it will only suppress the symptoms, it will not clear the victim of HIV.
- * Missing even one dose a week can result in treatment failure and viral resistance.
- * Anti-retrovirals are expensive and associated with severe drug side effects.
- * Ongoing medical supervision and testing is essential.
- * Some victims have pre-existing drug resistance.
- * The use of alternative traditional medicines such as garlic, St John's wart, and african potatoe can interact negatively with the anti-retrovirals.
- * Only about 12% of the AIDS population in South Africa is receiving free treatment.

The good news is that properly managed anti-retroviral triple-drug therapy can arrest the progress of AIDS for many years.

Wrongful failure to terminate a birth: John Mullins puts the record right (see Newsletter 79 of September 2010):

"With reference to the pregnancy termination damages issue I think, Robert, that you might have confused wrongful birth with wrongful life claims.

"Wrongful birth claims are claims, as appears to have been the case in Sonny, by the parents of a deformed or retarded child whose pregnancy they say they would have terminated had they been properly advised, whereas wrongful life claims are claims by the child himself or herself. Our law, in line with a number of other systems, allows the former but not the latter, on the basis that there is nothing inherently wrong with a parent saying I wouldn't have wanted that deformed child, but that there is everything wrong with the deformed child saying I would rather not have been born.

"Stewart was a wrongful life claim, and as I have it what was disallowed in Stewart was the child's claim, and not the parents' claim".

Let us look at how the relevant damages are calculated: The child who is the subject of the claim will usually be incapable of supporting himself or herself and will in many instances have a reduced life expectancy. The damages claimable by the parents will be for the total costs of keeping this child, not just extra medical and attendant costs. The claim is for the joint lifetime of the child and the breadwinner. Had there been no wrongful act there would have been no child, only the costs of an abortion.

As a general rule extra living costs and future medical expenses for a normal injured child can procedurally be claimed either by the parent or by the child. For the non-terminated pregnancy this is clearly not the case. Only the parent is able to claim. The claim will thus be subject to the shorter prescription period applicable to adults.

If the seriously disabled non-terminated child had had a right to claim it would have been for living costs and medical and attendant costs. There would be no question of a claim for loss of earnings.

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