

DAMAGES FOR PERSONAL INJURY AND DEATH: LEGAL ASPECTS RELEVANT TO ACTUARIAL ASSESSMENTS

by **RJ Koch**

ABSTRACT

In this paper the actuarial assessment of damages for personal injury and death is discussed in the context of South African law. The legal framework imposes a variety of calculation rules that need to be born in mind if an actuary is to produce a quality product. This framework changes with the passage of time. The purpose of the paper is to summarise the current state of affairs and highlight issues deserving of further actuarial discussion.

KEYWORDS

Quantum; damages; loss; support; breadwinner; dependant; earnings; claimant; defendant; differencing; capitalisation; contingencies; accelerated benefits; inheritance; apportionment; two-parts-one-part; MVA; RAF; COID

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1. INTRODUCTION

1.1 In 1974 Milburn-Pyle & Van der Linde (unpublished) (MPVL74) presented a paper to the Actuarial Society of South Africa (the Society) documenting the rules and procedures governing actuarial calculations for the assessment of damages for loss of support arising from the wrongful killing of a breadwinner. There have since been a number of developments and this paper sets out to document the current state of affairs as regards both death claims and claims for personal injury.

1.2 With a view to promoting greater community of practice in this field the Society has set up a Damages Committee. This forms part of a general concern in the actuarial profession to ensure quality in the delivery of actuarial services.

1.3 This paper sets out to summarise the present state of affairs as regards the actuarial assessment of damages, with an emphasis on the legal as distinct from the actuarial. Related topics such as claims for maintenance from deceased estates and claims for breach of contract have not been fully documented in the anticipation that they will form the subject of a future separate paper. Issues such as discount rates of interest and life tables are also not discussed in any depth. Readers with an interest in the general quality of actuarial services are referred to Lowther (2011), which covers *inter alia* ethical and quality issues such as professional negligence, conduct before and at a trial, billing and recovery of fees, and the content of actuarial reports.

1.4 The South African legal system is adversarial, which means that there is a plaintiff (claimant) and a defendant and each presents her/his version of the facts by way of witnesses and documents. In the event that parties are unable to settle their differences by agreement the judicial officer is required to give a ruling. The actuary will usually and ideally be acting as an impartial expert retained by one of the parties. The actuary may be called upon to justify her/his calculations to the court and be subjected to cross-examination by the advocates representing each party. Under the continental inquisitorial system the witnesses are cross-examined by the judge and the parties have the onus to present witnesses to assist the judge in arriving at an informed decision.

1.5 For actuaries, the overriding goal is accuracy of calculation and information. For lawyers, the overriding goal is agreement achieved by way of settlement or court ruling. That agreement is the goal of lawyers is not always obvious while heated negotiations and position-taking are under way. Lawyers, including the courts, may disregard science and logic if this is necessary to achieve agreement. However, the dictates of science and logic are important tools for achieving agreement. Notwithstanding the focus on court procedure the vast majority of damages claims, particularly those against the Road Accident Fund (RAF), are settled without being referred to a court.

1.6 The South African courts, unlike those in England, place great weight on actuarial evidence and it is rare for a damages claim for personal injury or death to be settled in or out of court without the benefit of an actuarial report. South African actuaries can be proud of this trust placed in their quantification skills.

2. SOURCES OF THE LAW

2.1 Actuaries wanting to better understand how old authorities, precedent and statute work together should read Hahlo & Kahn (1968).

2.2 The role of judicial precedent can be confusing. A ruling by the Supreme Court of Appeal is generally overriding. The extent to which it becomes binding on subsequent courts depends on circumstances. Thus a ruling on the apportionment of family income has been treated as binding¹ precedent whereas a ruling on interest and inflation rates, deemed factual issues, is not binding.² Some judges, and their rulings, are not taken seriously by the legal fraternity,³ or else are confined in application to the precise circumstances giving rise to the ruling.⁴ Reported judgments are generally better known, and more likely to be applied, than unreported judgments. The legal fraternity also has a capacity to forget older rulings. These subtleties are not always obvious to an outsider such as an actuary.

3. LIFE TABLES AND DISCOUNT RATES OF INTEREST

3.1 The scope of this paper does not extend to a discussion of life tables, inflation rates, and discount rates of interest, which is left for further research.

3.2 However, it is appropriate to record that South African actuaries generally capitalise future earnings and support using a net capitalisation rate of 2,5% to 2,73% a year. Allowance for real increases in earnings and promotions is made explicitly rather than implicitly.⁵ In England the official net capitalisation rate is 2,5% a year.⁶

3.3 For future medical expenses there are instances where price escalation above the rate of inflation is assumed and the costs are capitalised at rates of 1% or 0% a year or even negative rates.⁷ There are no fixed rules in this regard and each case depends on the evidence before it.

3.4 The Compensation for Occupational Injuries and Diseases (COID) Act,⁸ which replaced the Workmen's Compensation Act (WCA), dictates that pensions payable in terms of the Act are capitalised using the Commissioner's tables based on a net capitalisation rate of 4,5% a year (cf. Koch, 2011: 101). The calculations do not distinguish between past and future payments. The pension increase for each year is capitalised separately, a cumbersome approach.

1 e.g. *Santam v Fourie* 1997 1 SA 611 (A).

2 e.g. *Singh v Ibrahim* (413/09) [2010] ZASCA 145

3 e.g. *Kotwane v USBIC* 1982 4 SA 458 (O)

4 e.g. *RAF v Monani* 2009 (4) SA 327 (SCA)

5 cf. Koch (unpublished: 125–48).

6 www.gad.gov.uk/services/other%20services/compensation_for_injury_and_death.html

7 *Oberholzer v NEG Insurance* 1988 4 QOD A3–1 (C); *Gallie NO v NEG Insurance* 1992 2 SA 731 (C); *Dusterwald v Santam Insurance* 1990 4 QOD A3–45 (C) 60–4; *Ngubane v SATS* 1991 1 SA 756 (A) 781E; *Singh v Ibrahim* (413/09) [2010] ZASCA 145

8 The Compensation for Occupational Injuries and Diseases Act no. 130 of 1993

4. GENERAL DAMAGES FOR PAIN AND SUFFERING

4.1 The determination of general damages is a legal issue, but actuaries are commonly called upon to adjust old cases for inflation to the present time. Koch (2011) lists most reported cases with the awards adjusted for inflation to date.

4.2 The judgment of an appeal court substitutes the judgment of the trial court, so the adjustment for inflation should run from the date of the trial court's ruling and not from the date that the appeal court handed down its ruling.⁹

5. DISCOUNTING TO DATE OF DELICT

5.1 There is a rule of law that damages must be assessed at the date of the delict. This is relevant to claims for damages to a motor car, for example. However, it is not applicable to actuarial assessments for which discounting should be done to the date of trial or settlement.¹⁰

5.2 Confusion reigns amongst lawyers and actuaries as to the correct approach to the capitalisation of accelerated benefits. Discounting to date of death has been ordered,¹¹ in another instance the court ordered that nil allowance be made for inflation when projecting future asset values.¹² The problem is exacerbated by the poor understanding that many lawyers, and even judges, have of the problem. A fuller exposition of accelerated benefits appears below with the discussion of claims for loss of support.

5.3 For lost earnings in a foreign currency, discounting is usually done using interest and inflation rates appropriate to the foreign country. The resulting capital sum is expressed in terms of the foreign currency and converted to rands at the exchange rate applicable as at the date of settlement or trial.¹³ Some claims involve earnings partly in rands and partly in foreign currencies. For such claims it is usually acceptable to convert all income flows to one currency before doing the capitalisation calculations. The same holds true for claims for loss of support.

9 *Bailey NO v General Accident Insurance* 1987 2 SA 702 (AD); more generally see Koch (unpublished: 255–61)

10 *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 3 SA 577 (A)

11 *Mohan v RAF* 2008 (5) SA 305 (D)

12 *Searle v Guardian National Insurance* 1996 (T) (unreported 11.10.96 case 5772/95)

13 *Infoldsdottir v Mutual and Federal Insurance* 1988 (SWAZI) (unreported 27.5.88 case 1054/86); *Bane v d'Ambrosi* 2010 2 SA 539 (SCA)

6. MORA INTEREST

6.1 Mr P. Milburn-Pyle campaigned for interest to be awarded on damages for past loss. The Prescribed Rate of Interest Act¹⁴ was amended in 1997 to allow such interest. The amendment prescribes simple interest from the ‘date of demand’ (usually taken to be the date of service of summons) at the rate applicable at the time that interest starts to run and unchanging thereafter. The issue of summons is necessary to interrupt the running of prescription so it usually takes place fairly soon after the time that the cause of action arose. The rate has been 15,5% a year since 1 August 1989. The RAF Act¹⁵ prohibits the payment of interest on damages until two weeks after the date of judgment or settlement, so for motor vehicle accident (MVA) claims there still is no interest on damages. A court is not bound by the calculation rules of the Act and can order interest from any date it chooses and at any rate it chooses. Thus, for instance, past loss of earnings has been assessed by multiplying the rate of pay now by the number of past years without adjusting backwards for inflation.¹⁶

6.2 It is acceptable to calculate mora interest¹⁷ by applying to the past loss half the rate of interest for the whole period or the full rate for half the period.¹⁸ If interest only starts to run some time after the date of the delict then the past loss needs to be split at the date of demand, the full rate is applied for the full period to the losses accumulated to date of demand, and a half rate is applied to the losses after date of demand up to date of discounting.

6.3 Interest is paid on general damages for pain and suffering and loss of the amenities of life. General damages are assessed in terms of rand values at the time of the trial and should thus be calculated as a real rate of return only. However in South Africa’s one and only ruling on the subject the full 15,5% was allowed on a general damages award of R2 million for wrongful detention in gaol.¹⁹

6.4 The medieval rule that interest may not accumulate to more than the original debt still prevails in South Africa.²⁰ However, the rule does not apply to mora interest calculated in terms of the Prescribed Rate of Interest Act.²¹

14 Act 55 of 1975 as amended by Act 7 of 1997

15 s17(3)(a) of the Road Accident Fund Act 56 of 1996

16 *De Vries (o.b.o. Rawoot) v Minister of Safety & Security* (C) (unreported 31.10.2006 case 16058/92)

17 That is to say interest for which the liability derives from the Prescribed Rate of Interest Act 55 of 1975 as amended by Act 7 of 1997.

18 *Jefford and Another v Gee* [1970] 1 All ER 1202 (CA)

19 *Zealand v Minister of Justice* [2009] JOL 23423 (SE)

20 *LTA Construction v Administrateur, Tvl* 1992 1 SA 473 (A); *Otto* 1992 THRHR 472–80

21 *Meyer v Catwalk Investments* 2004 6 SA 107 (T); *De Vries (o.b.o. Rawoot) v Minister of Safety & Security* (C) (unreported 31.10.2006 case 16058/92)

7. VALUE OF A CHANCE

7.1 The principle of value of a chance is a legally approved method for dealing with uncertain past and future events.²² The principle states that if there is, for example, a 30% chance of surgery costing R100 000 then the compensation to be awarded is R30 000, 30% of R100 000.

7.2 Actuaries are trained to use the word ‘probability’ to mean a chance both greater than and less than 50%. For lawyers, ‘probability’ means a chance greater than 50%. A chance less than 50% is a ‘possibility’. However, many lay person, and medico-legal experts, use ‘possibility’ to mean any chance less than 100%.

7.3 The original actuarial evidence in the nineteenth century was directed at the cost of purchasing a life annuity that would provide an income equal to that which had been lost, a very practical approach. Inflation was not discussed, i.e. it was ignored. From the late 1920s actuaries started explaining their calculations to the courts as being the means to reproduce what is lost by consuming income and capital over the relevant life expectancy, a simple but misleading approach.²³ The affirmation in 1980 of the value of a chance as a legally acceptable method of calculation allows actuaries now to explain their calculations correctly as a year-by-year (or month-by-month) application of the values of the chances of death in each period.

7.4 A life expectancy is the sum of the separate chances of survival: ‘death by degrees’ as it has been waggishly described.

8. PROOF OF EARNINGS

8.1 Traditionally the earnings of a victim have been proved by way of payslip or a certificate from the employer. More recently it has become fashionable to make use of industrial psychologists who tend to rely on the corporate earnings surveys.²⁴ The reader may refer to Koch (2011: 107) for estimates of the expected survey results in 2011.

8.2 The earnings of street vendors and taxi drivers are commonly proved by way of affidavits from persons working the same beat.

8.3 It is acceptable to assume that a child will earn at the same level as a parent.²⁵

22 *Blyth v Van den Heever* 1980 1 SA 191 (A)

23 cf. MPVL74: 320, 322–3; Koch (unpublished: 97–111)

24 e.g. the Peromnes surveys done by PE Corporate Services (Pty) Ltd.

25 *Southern Insurance v Bailey NO* 1983 QOD 351 (AD) at 360

8.4 There are emergency occasions, such as imminent prescription, when an actuary may be called upon to provide guidance as to earnings assumptions without the benefit of a report by an industrial psychologist.

9. LOSS OF 'EARNING CAPACITY'

The expression 'earning capacity' is thoroughly misleading. The courts have made it clear that compensation for loss of earnings is not directed at the claimant's highest and best use of his ability to work, his optimal earning capacity. The expression means the earnings that the claimant is most likely to generate by using her/his capacity to work.²⁶ Thus a trained lawyer may elect to go work as a game ranger; if he is wrongfully injured he will be compensated for earnings as a game ranger, not for what he could have earned as a successful lawyer.

10. CAPPING OF DAMAGES

The latest RAF legislation²⁷ has introduced a cap limit of R160 000 a year to the level of the loss that can be brought into the actuarial calculation. The cap only applies to claims for accidents that happened after 1 August 2008 and is adjusted quarterly by an RAF board notice published on the RAF website and in the *Government Gazette*.²⁸ The precise interpretation of this legislation by the courts remains to be seen. Meanwhile the following approach is suggested: the cap applies to the total yearly loss suffered and not to the actual earnings of the claimant or deceased. "The actual loss" before application of the cap is the loss net after application of the ruling in *Santam v Fourie*,²⁹ (see below under discussion of dependants' action) and after deduction of all contingencies, including notional taxation and general contingencies. For claims for loss of support the losses for all dependants in any one year must be added together before applying the cap. Lump-sum payments and deductions should be spread with an appropriate annuity factor over the lifetime of the claimant or the widow, or the remaining dependency of a child dependant. This approach is based on a 2006 memorandum for the RAF prepared by Schwalb Van Niekerk & Muller. An updated memorandum is currently being prepared and actuaries active in MVA work can expect to be circulated and asked for their comments. There is much to be said for assessing the normal lump-sum damages and then spreading the result evenly over the lifetime of the claimant, or widow, and then testing that annual amount against the cap. The legislation states that the cap in force at the date of the accident shall apply. In order to avoid absurd results the actuary should assume that this cap amount is regularly notionally increased after the date of accident to offset the effects of inflation. The courts may hand down a rescue ruling as they have for badly worded RAF legislation.³⁰ A legal obstacle to using the annual losses after discount

26 *Minister van Veiligheid v Geldenhuys* 2004 1 SA 515 (SCA) at 1020G

27 s17(4)(c) of Act 19 of 2005

28 www.raf.co.za/Legislation/Documents

29 1997 1 SA 611 (A)

30 *Marine & Trade Ins v Katz* 1979 4 SA 96 (A) at 971H

for interest is that it has been ruled that continuing loss comprises the monthly or yearly losses before application of the discount for interest.³¹ For long periods of past loss there will in years to come be some difficulties with achieving a fair result.

11. INCOME TAX

11.1 The standard actuarial calculation should deduct the notional taxation that would have been paid had the income been earned.³² It is usual to assume future adjustment of the tax tables in line with inflation so that for constant real income the average rate of taxation remains the same. For consistency with this approach, the capital sums awarded as compensation are viewed by the tax authorities as capital and are thus not subjected to taxation in the hands of the claimant.

11.2 An exception to this rule arises when the income lost is of short duration (such as loss of profits on a contract) and the award constitutes taxable income.³³ For wrongful dismissal claims the parties will often request a calculation net of notional tax and one gross of notional tax. The gross calculation will be tax-deductible in the hands of the employer and the claimant may be able to claim tax concessions on the lump-sum payment.

11.3 In circumstances where the claimant has failed to pay tax on her/his earnings the courts will not deny compensation but will assess damages on the assumption that tax would have been duly paid on the lost earnings, and then order that a copy of the court record be transmitted to the revenue authorities.³⁴

11.4 Pensions payable in terms of the COID Act are not subject to taxation.³⁵ The relevant section refers to injury claims only, but it is SARS practice to treat as tax-free the COID pensions of widows.

12. REDUCED LIFE EXPECTANCY

12.1 If as a result of an accident the life expectancy of the claimant has been reduced, her/his mortality uninjured must be taken to be the same as her/his reduced life expectancy now injured. Medical experts usually state reduced life expectancy as an explicit number of years reduction to normal life expectancy or as a percentage reduction to normal. In

31 *SA Eagle Ins v Hartley* 1990 4 SA 833 (A) 838–9

32 *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at page 29

33 *Omega Africa Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd* 1978 3 SA 465 (A)

34 *Santam v Fick* 1982 (A) (unreported 24.05.82 case 282/79/AV); *Twala v RAF* 2006 (TPD) (unreported 08/2006 case 01/15178)

35 s10(1)(gB) of Income Tax Act 58 of 1962

the ensuing actuarial calculation the most common form of adjustment is a percentage extra mortality, but other techniques can be appropriate such as adding years to age for a drastically impaired life.

12.2 The logic behind this rule is that the award for loss of earnings is to be applied to meeting normal living expenses. If the claimant dies early she/he is spared living expenses for the years that might otherwise have lived, the so-called ‘lost years’.³⁶

12.3 The main objection to disallowing a claim for the lost years is the financial interest that dependants may have had in the earnings of the victim during those years. South African law, at least in theory, allows a claim to the dependants for loss of support during the lost years. In practice this requires proving that the victim’s death, when it does occur, is causally related to the original wrongful act, a tough assignment 20 or 30 years after the original damage-causing event. For a more comprehensive discussion the reader may refer to Koch (unpublished: 347 *et seq.*). A neat solution in the South African context would be to allow an immediate right of action by the dependants as soon as there is proof of reduced life expectancy caused by the damage-causing event.

12.4 Choice of life table and adjustments for AIDS are not covered by this paper; they are left for further research.

13. DIFFERENCING

13.1 The standard approach to the calculation of loss of earnings is to calculate on one hand the capitalised value of all the earnings that the claimant would have received had she/he not been injured, and then on the other hand the capitalised value of all that he will receive now injured. The difference between these two values, after adjustment for general contingencies, is the loss she/he has suffered.³⁷

13.2 A more complex version of this differencing process has regard not only to earnings but also to living expenses and underlies the adjustments made under general contingencies for saved living expenses.³⁸ The payment of damages is ideally directed at restoring the net *patrimonium* to what it was immediately prior to the damage-causing event. In a real world this is, of course, not possible, but the ideal does provide a guiding light. The determination of the net *patrimonium* for a breadwinner victim uninjured and for non-breadwinner uninjured is illustrated in Tables 1 and 2 respectively.

36 *Lockhat’s Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) at pages 306/307; *Singh v Ibrahim* (413/09) [2010] ZASCA 145

37 *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) at page 917E

38 cf. Koch (unpublished: 233–5)

Table 1: Breadwinner victim notionally uninjured

Assets	R'000	Liabilities	R'000
gross earnings	900	taxation	180
services of spouse	150	own services in home	40
chance of inheritance	50	support for self	350
house	200	support for spouse	230
car	30	support for children	270
		bond on house	90
Total	1330	net patrimonium	170
		Total	1330

Table 2: Non-breadwinner victim notionally uninjured

Assets	R'000	Liabilities	R'000
gross earnings	320	taxation	70
services of spouse	40	own services in home	150
chance of inheritance	5	support for self	350
support from spouse	200	support for spouse	0
chance of 2nd spouse	30	support for children	30
car	15	net patrimonium	70
Total	670	Total	1330

13.3 For death claims the focus is on the support that would have been provided had there been no death. Many alternative sources of support are ignored.³⁹ Deductions are made, however, for remarriage, inheritance, State welfare payments and COID benefits.

14. GENERAL CONTINGENCIES

14.1 It is useful to look back to the early nineteenth century judgments and bear in mind that in those days the compensation was based on the cost of purchasing a life annuity. For example:

She had lost an annuity for the joint lives of herself and her son ... The value of the annuity spoken to in the evidence was the value of an annuity on Government or other very good

³⁹ *Groenewald v Snyders* 1966 3 SA 237 (A), MPV 1974 pages 332–3; Assessment of Damages Act no. 9 of 1969; *Constantia Versekeringsmaatskappy Bpk v Victor NO* 1986 1 SA 601 (A) (adoption)

security, and that the annuity lost was that Secured by the personal security of the deceased and, therefore, of much less value.⁴⁰

and:

When the Fatal Accidents Act, 1846, was passed, it was thought for a short time by some that damages might be given ‘to the full extent of a perfect compensation’... ‘It would be most unjust’ [however] ‘if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done.’⁴¹

Until the passing of the Fatal Accidents Act, English law followed the Roman-law rule that the body of a freeman has no value and thus that no damages could be awarded for the killing of a breadwinner. This was a deviation from the medieval English law, which allowed a claim for ‘wergilt’. In another judgment it is stated:

A thousand circumstances might have prevented him from making that income if he had remained well, and the accident had not happened ... the jury would be wrong if they did not consider those circumstances as upon the doctrine of chances.⁴²

14.2 The so-called ‘normal deductions’ are 5% past and 15% future. In practice, deductions can range from 0% to 90%. In theory the determination of these deductions is the prerogative of the court. In practice they are often negotiated between the parties. It is not unusual for an actuary with experience in damages claims to be asked by the Court to express an opinion on general contingencies.

14.3 It often happens that a victim continues in employment, but with increased difficulty due to the injuries. Allowance for this ‘reduced mobility in the job market’ is commonly made by applying a larger general contingency percentage to the value of earnings now injured.⁴³ It was said that “These risks which would have attached to the plaintiff in any event are ... more likely to affect him in the future because of his disability.”⁴⁴ In another case differential contingencies were rejected because of high risks attaching to the pre-injury occupation.⁴⁵

14.4 The actuarial assumption may be that the victim will never work again. The deduction for general contingencies may then be increased to allow for the chance of some employment. Thus, in one instance, the 10% deduction for earnings uninjured was increased to 35%.⁴⁶

40 *Rowley v London & NW Rail* [1861–73] All ER Rep 823 (Exch) 828

41 *Rowley v London & NW Rail* [1861–73] All ER Rep 823 (Exch) 829–30

42 *Phillips v London & SW Rail* [1874–80] All ER Rep 1176 (CA) 1180–1

43 *Van Drimmelin v President Versekeringsmpy* 1993 4 QOD E2-19 (T)

44 *Brijlall v Naidoo* 1961 1 QOD 266 (D) 271. See too *Hutchings v General Accident Insurance* 1986 3 QOD 737 (C) 744; *Venter v Mutual & Federal Versekeringsmpy* 1988 3 QOD 749 (T) 759; *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89)

45 *Shield Insurance v Hall* 1976 4 SA 431 (A) 443–5

46 *Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) at 105E

14.5 Medical experts commonly state a percentage permanent impairment or disability or loss of work capacity. Reference is commonly made to the American Medical Association impairment guide (AMA, 1993). There is no necessary proportional relationship between percentage impairment and loss of earnings. However, because this is often the only solid evidence, it is commonly used as basis for compensation, either as an increase to general contingencies or as a proportional loss of uninjured earnings.

14.6 The contingency deduction for past loss is often 5% or more when the risks of unemployment during the period are close to nil. The reason for this substantial deduction can be explained as saved costs of travelling to and from work. In two cases the saving was expressly addressed to arrive at deductions of 7,5% and 9%.⁴⁷ The actuarial calculation for past and future loss must include all travel and similar allowances.⁴⁸

14.7 For a victim rendered unmarriageable a deduction has been made for saved costs of supporting a wife and family.⁴⁹ The courts balk at accepting an actuarial quantification of such a contingency, it being preferred to muddle the adjustment into the deduction for general contingencies.

14.8 If the victim would have earned her/his income outside South Africa in a place where living costs are higher, an increased deduction for general contingencies will be made for the saving in living expense by now staying in South Africa.⁵⁰ Again, the courts balk at accepting an actuarial quantification of such a contingency.

14.9 A victim who is confined to an institution will thereby be saved living expenses that he would otherwise have had to spend on housing and food.⁵¹

14.10 More generally see MPVL74: 312–3, 371–2 and Koch (unpublished: 149–62).

47 *Sumesur v Dominion Insurance* 1960 1 QOD 228 (D) 232–3 (7,5% deducted); *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 12

48 *Dhlamini v SA Eagle Insurance* (T) (unreported 01.02.94 case 8951/93)

49 *Reid v SAR&H* 1965 2 SA 181 (D) 190F-H; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1023–4 1027I-J confirmed in *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 3 SA 577 (A); *Dusterwald v Santam Ins* 1990 4 QOD A3-45(C) at 60 69

50 *Bane v d'Ambrosi* 2010 2 SA 539 (SCA).

51 *Shearman v Folland* [1950] 1 All ER 976 (CA); *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921; *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 979inf; *Dyssel v Shield Insurance* 1982 3 SA 1084(C) 1086A-G; *Kontos v General Accident Insurance* 1989 4 QOD A2-1 (T)

15. COLLATERAL BENEFITS

15.1 Benefits accruing after the accident will not be deducted if they are gratuitous or the result of privately negotiated insurances.⁵² Benefits that accrue as a part of the contract of employment, such as government-service pension benefits, will be deducted.⁵³

15.2 State welfare benefits are generally deductible.⁵⁴ However, the State foster-care grant is not deductible.⁵⁵ State welfare benefits are subject to a means test.⁵⁶ Once the victim has substantial capital by way of an award she/he will no longer be entitled to the State benefits and it is appropriate to assume termination on the date of the trial or settlement. For smaller claims the benefit will not fall away and the future payments need to be capitalised and deducted.

15.3 The Assessment of Damages Act⁵⁷ provides that life insurance, pension benefits, and a refund of pension contributions, payable as a result of the death, must be ignored. This Act does not apply to claims for loss of earnings.

15.4 Where there is an apportionment of damages for contributory negligence, the collateral benefits are deducted before apportionment. COID benefits are an exception to this rule; the COID award is deducted after apportionment.⁵⁸ The Apportionment of Damages Act does not apply to death claims for loss of support.⁵⁹ (There is one exception that rarely arises, which is when the Assessment of Damages Act has been applied to exclude life insurance and pension benefits.) For a general discussion of collateral benefits the reader may refer to Koch (unpublished: 179–212).

15.5 The RAF commonly makes offers to dependants reduced for a risk discount. This is not an apportionment for contributory negligence, but a commercial discount for the risk that the dependants may be unable to prove negligence on the part of the insured driver and then get nothing at all.

16. MEDICAL AND OTHER EXTRA LIVING EXPENSES

16.1 A major component of a claim for personal injury is often the additional living expenses that the victim now needs to incur. This may be by way of surgery,

52 *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A)

53 *Dippenaar v Shield Insurance* 1979 2 SA 904 (A)

54 *Zysset v Santam Insurance* 1996 1 SA 273 (C); *Indrani v African Guarantee* 1968 4 SA 606 (D); *RAF v Timis* 2010 (SCA) (unreported 26.03.2010 case 29/2009)

55 *Makhuvela v RAF* 2010 1 SA 29 (GSJ)

56 For details cf. Koch (2011: 105)

57 Act no. 9 of 1969

58 *RAF v Maphiri* 2004 2 SA 258 (SCA)

59 cf. ss2(1B) 2(6)(a) Apportionment of Damages Act 34 of 1956; Koch (unpublished) at 342–45

or wheelchairs, or the need for a personal attendant. The RAF normally provides an undertaking to pay such expenses as and when they are incurred so future expense calculations are not really needed for RAF claims. The actuary is, however, frequently requested to capitalise future expenses for RAF claims either for reasons of jurisdiction (a claim worth less than R100 000 falls within the jurisdiction of the magistrates' court and costs are then awarded on the lower tariff) or because the RAF is agreeable to paying an up-front lump sum for reasons of convenience.

16.2 The actuary is frequently required to make calculations for multiple expert reports with overlapping and duplicated expenses. There is no need for the actuary to adjust for such overlaps and duplications because the legal representatives will themselves make the necessary adjustments, just as they have the final word as regards general contingencies.

16.3 If hip-replacement surgery has a present cost of R120 000 and has a 25% chance of being needed twenty years from now, the claimant will be compensated with the value of the chance of incurring the expense, that is to say 25% of R120 000, discounted for the chance of being alive after 20 years and also for the investment-return excess or shortfall relative to the expected rate of escalation in the cost of such surgery. There will also be a calculation for the expected loss of earnings while off work after the surgery. For this latter calculation lawyers prefer that sick leave entitlement be ignored. In one case⁶⁰ the actuaries calculated the small value of the chance that the claimant might have needed the sick leave for some other contingency.

16.4 Loss of earnings may take the form of the cost of employing an assistant in the business. Such an expense is usually tax-deductible and needs to be reduced for the notional tax relief that the claimant can expect.

16.5 For those with serious brain damage a *curator bonis* may need to be appointed. As a general rule 7,5% will added to the overall award including general damages, though in one case 5% was added.⁶¹ Depending on the assumptions made as regards the mix of interest-bearing and growth investments a variety of different percentages would emerge from a calculation. In the event that security must be provided, 18,4% is added instead of 7,5%. Security is not necessary for attorneys acting as curators as they are covered by the Attorneys Fidelity Fund.⁶²

60 *Bosch v Parity Insurance Co Ltd* 1964 2 SA 449 (W) at 452 D/E

61 *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029

62 *Webster v Commercial Union* 1994 4 QOD A4-154 (C)

17. LOSS OF SUPPORT

17.1 The calculation for loss of support claims is directed at the support that would have been provided had there been no death. Each dependant has a separate right of action and the actuarial calculation must provide separate values. South Africa, unlike other countries, allocates the net-after-tax earnings of the deceased with two parts to each parent and one part to each child. This convenient algorithm, originally adopted to get around inadequate evidence as to the actual division of household expenditure, is nowadays applied as though it were a rule of law.

17.2 In one instance⁶³ the deceased had expended a disproportionate amount of his income on himself. The Court ordered that he be allocated three parts in the actuarial calculation.

17.3 In another instance⁶⁴ the family had been giving regular financial assistance to three street children. It was ruled that the cost of such charity was part of normal household expenses and that such amounts should be included in the compensation payable to the legal dependants. In other words, that there should be no deduction for the cost of the granting of charity.

17.4 In circumstances where a breadwinner has a so-called ‘common-law wife’, or ‘houvrou’, to whom he is not married but in a permanent relationship, the two parts she consumed will usually be ignored because there was no duty to render such support. Three or sometimes four parts may be allocated to the deceased to allow for the contingency of marriage. There might then also be explicit allowance for the birth of further children. The duty of support extends to grandparents and grandchildren. Between siblings it falls away at age 21, but continues for life between parent and child. Parties to customary marriages, both black and Islamic have a reciprocal duty of support.

17.5 However, when both parents are working, two parts will be allocated to each parent with a view to making proper allowance for the contribution by the surviving parent to the support of the children. This will be done even if the parents do not cohabit.

17.6 If a child is killed in the same accident that killed the deceased then the parts that would have been consumed by that child must be ignored.⁶⁵ It remains to be seen whether this same principle will be applied when both mother and father have been killed in the same accident. It is eminently arguable that the parts that would have been consumed by the breadwinner’s deceased spouse should be ignored.

63 *Van Aardt NO v Southern Versekerings-Assosiasie Beperk* 1986 (O) (unreported 27.2.86 case 523/82)

64 *President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A)

65 *RAF v Monani* 2009 (4) SA 327 (SCA)

17.7 A prospective spouse does not have a claim for loss of support if the partner is killed shortly before the wedding.⁶⁶ A life partner in a same-sex relationship does have a right to claim for loss of support if the breadwinner is killed.⁶⁷ However, a life partner in a male–female relationship other than marriage is not entitled to claim damages if the breadwinner is killed,⁶⁸ but is entitled to claim maintenance from the estate of her/his partner provided the relationship has been formally registered.⁶⁹ The Maintenance of Surviving Spouses Act⁷⁰ applied for a limited period of two years from 21 February 2005 or until Government passed appropriate amending legislation. The Civil Union Act⁷¹ now applies and requires formal prior registration of a relationship if the surviving partner is to be successful with a claim for maintenance.

17.8 When parents of the deceased claim for loss of support it is usual to allocate to each such parent a one-part child's share. Entitlement to a State pension from age 60 is relevant. Since April 2011 the amount of the pension has been R13 680 a year, increasing to R13 920 a year from age 75.

17.9 When a breadwinner dies, household expenses do not necessarily reduce by two parts. The South African approach using two parts to each adult and excluding the deceased's two parts from the compensation money will, in many instances, under-compensate the dependants. In *Botes's* case⁷² the spouses had occupied a flat for which the rental did not reduce after the death. The court ordered that the widow be compensated with only half the rental. The effect of this ruling is that household expenses must be assumed to reduce by two parts even if this is not the reality.

17.10 Some breadwinners receive benefits in kind at work that are not shared with their family. They are personally spared part of their own living expenses and it is appropriate to allocate less than two parts to the breadwinner.

17.11 In the event that a breadwinner was saving part of her/his earnings the calculation is not based on what the breadwinner actually expended on keeping her/his dependants but will include the saved portion of her/his earnings.⁷³

17.12 Black customary law allows a man to have more than one wife and these wives are entitled to claim damages for loss of support. The legislation granting them a right

66 *Sibanda v RAF* 2008 (WLD) (unreported 10.10.2008 case 9098/07)

67 *Du Plessis v RAF* 2004 1 SA 359 (SCA)

68 *Sibanda v RAF* 2008 (WLD) (unreported 10.10.2008 case 9098/07)

69 *Robinson v Volks* 2004 6 SA 288(C); *Volks v Robinson* 2009 6 SA 232 (CC)

70 Act no. 27 of 1990

71 Act no 17 of 2006

72 *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A).

73 *Mariamah v Marine & Trade Ins* 1978 3 SA 480 (A) at pages 488/489

of action⁷⁴ provides that, when there is more than one widow, the damages payable must not exceed what would have been payable had there been only one widow. The usual approach to this problem is to divide the allowable two parts equally between each widow. Thus, if there were three widows then each would be allocated two-thirds of a part.

17.13 Before 2 December 1988 the conclusion of a civil marriage nullified all previous customary unions. From that date onwards the position is reversed and a civil marriage concluded during the subsistence of a customary marriage has been null and void.⁷⁵ This obscure *volte-face* legislation has been occasion for some unpleasant shocks for widows in possession of marriage certificates.

17.14 It is appropriate to make explicit allowance in the actuarial calculation for contingent events such as the birth of further children or the marriage of a single breadwinner had she/he lived. These assumptions are really part of general contingencies and a second calculation is usually needed in which such speculation is left out of account.

17.15 When the parent of an illegitimate child is killed it is general practice to allocate two parts to the deceased, and one part to each child. This is done even if the deceased had never in her/his lifetime contributed a single penny to the support of the child. However, in circumstances where there is evidence as to the payments of support by the deceased, the calculation will be based on such payments even if the payments are much less than a one-part share. This can mean a monetary handout to a child way in excess of what would have been had there been no death. The child who never received any support should, strictly speaking, get only a nominal amount for the small chance of receiving some support had the breadwinner lived.

18. BOTH SPOUSES WORKING

18.1 If both husband and wife were working then their net after-tax incomes are aggregated and the total combined income apportioned two parts to each parent and one part to each child. To the extent that the spouse's earnings exceed her/his two-part share she/he is deemed to contribute in equal amounts to the support of the children. If the earnings of the deceased do not exceed her/his two-parts share then the claim values will be nil.⁷⁶ In such circumstances a small award is possible for the chance that the survivor would have predeceased the deceased had she/he lived, and rendered the children dependent on her/his income alone.⁷⁷

74 s31 of Black Laws Amendment Act no. 76 of 1963.

75 s1 Marriage & Matrimonial Property Law Amendment Act 3 of 1988

76 *Santam Insurance v Fourie* 1997 1 SA 611 (A)

77 *Cooke & Cooke v Maxwell* 1942 SR at 133–6

18.2 It may happen that the deceased breadwinner had employment that did not provide pension benefits, whereas her/his spouse is entitled to substantial pension benefits. In later years the latter spouse would have been supporting the former after his/her retirement. In general, gains are offset against losses, so it is appropriate to reduce the deceased's claim for the support she/he would have provided to her/his spouse in future years after her/his retirement. Not all actuaries share this view and there are no court rulings on the subject.

18.3 In the event that a surviving spouse was not employed at the time of the death she/he is not obliged to go out and seek employment to mitigate her/his damages.⁷⁸ However, the evidence may reveal that even if there had been no death she/he would nonetheless have gone out to work. It is then appropriate to bring her/his post-accident earnings into account.

18.4 In the event that the spouse is injured in the same accident that killed her/his spouse, she/he has a claim for loss of earnings. This is a separate claim from that for loss of support.⁷⁹ It follows that the calculation of her/his loss of support should assume the earnings she/he would have received had she/he not been injured. A separate calculation is then needed for her/his claim for loss of earnings having regard to her/his injury. Loss of earnings by a spouse who stops working by reason of the death of the deceased, be it shock or religious custom, will, strictly speaking, only be compensated if she/he satisfies the causal requirements for a separate claim for loss of earnings.

19. REMARRIAGE

19.1 It is appropriate to make a deduction for the surviving spouse's prospects of remarriage. For this purpose it is usual to use the remarriage table produced by Thomson (unpublished a; b) based on South African census statistics. There are no statistics for black persons so the coloured rates are usually used for this purpose. For black persons who subscribe to the old customary law, remarriage of a widow is discouraged because she remains the property of her house and is expected to bear further children by way of *ukungena*, the seeding of a widow by the brother of the deceased. For black widows it may thus be appropriate to use a reduced rate, say 50% of the tabular rate. There is reason to believe that remarriage rates are very low in low-income communities. There can also be religious objections to remarriage and it is then appropriate to make little or no deduction.

19.2 The tabular deduction presumes that, on the remarriage of a widow, the new husband will earn at the same level as the deceased. Where the deceased was a big

78 *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W); 1965 3 SA 367 (A); *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T); *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A)

79 *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A)

earner it can be appropriate to apply a reduced percentage for remarriage prospects. For reasons explained in Thomson (unpublished a; b), no remarriage table was prepared for the remarriage of a widower. If a female breadwinner is wrongfully killed then a remarriage deduction may be appropriate. It is usual to use the Thomson table based on female remarriage rates. This probably overstates the chances for a widowed older man with poor job prospects.

19.3 When a widow has remarried it is usual to terminate her loss-of-support calculation from the date of the remarriage. It has, however, been ruled that an explicit calculation may be done having regard to the actual earnings of the new husband.⁸⁰

19.4 Nil deduction is made for the adoption of a child after the death of the breadwinner.⁸¹ When making this ruling the Appellate Division recorded their dissatisfaction with the making of a deduction for remarriage, but acknowledged that the practice was too well established in South African law to permit a judicial retraction thereof. In many overseas jurisdictions there is no deduction for remarriage, notably England from where the South African practice was grafted (Luntz, 1990). In England the deduction has been removed by statute whereas in South Africa it continues to apply.

20. INHERITANCE AND ACCELERATED BENEFITS

20.1 The deduction for inheritance comprises:

- the actual amount inherited; plus
- the value of using the inherited assets if the death had not happened; less
- the value of the chance of inheriting the assets had the deceased lived out her/his normal lifespan.

20.2 The value of the use of the assets is appropriately determined by adding to the deceased's income a real rate of return on the inherited assets. This adjustment for use is central to whether or not a deduction should be made for the family home.⁸²

20.3 For small inheritances a detailed calculation is not warranted and it is appropriate to use a robust approach and deduct 50%, say, of the assets inherited.

20.4 The dependency of children usually extends to age 18 or 21. Inheritance after that age will not be applied to the support of the child. For this reason it has been ruled that 100% of a child's inheritance be deducted.⁸³

80 *Ongevallekommissaris v Santam Versekeringsmpy* 1999 1 SA 251 (SCA)

81 *Constantia Versekeringsmaatskappy v Victor NO* 1986 1 SA 601 (A)

82 cf. MPVL74: 314–9

83 *Lambrakis v Santam Insurance* 2000 3 SA 1098 (W), 2002 3 SA 710 (SCA)

20.5 Independently of the claim for damages for loss of support, a child has a right to claim maintenance from the estate of his or her deceased parent. If such a claim has been successfully lodged before the finalisation of the concurrent damages claim then 100% of the estate maintenance money is deductible.⁸⁴

20.6 The Assessment of Damages Act⁸⁵ states that life insurance and pension benefits payable as a result of the death must be ignored. This means that the estate accounts need to be reworked to exclude such payments and a notional inheritance calculated.

20.7 In the *Du Toit* case⁸⁶ the deceased breadwinner was a pensioner. After his death the spouse continued to receive part of his pension. The Court ordered that the spouse's pension be ignored by reason of the Assessment of Damages Act and her loss of support calculated as though there was no such pension.

20.8 Actuaries are divided as to the proper approach to the calculation of the deduction for inheritance. In the light of the above discussion the following approach would be a reasonable standard:

- Inherited assets are assumed to escalate in line with inflation from date of death subject to explicit evidence to the contrary. (The general rule is that supervening events will not be ignored; cf. ¶20.9.)
- Discounting is done to date of trial or settlement. (Discounting to date of trial for claims involving continuing loss is settled law.⁸⁷)
- Allowance is made for the widow's survival to date of trial or settlement.
- The value of the use of non-business assets is added to the deceased's income as a real rate of return on the notional estate in each year.
- The family home is included with assets subject to an explicit allowance for the use of it by way of the real rate of return mentioned above. (This has the effect that for a marriage out of community of property there is a deduction for the family home, but for a marriage in community of property there is nil deduction.)⁸⁸
- The value of the use of business assets used by the deceased to generate her/his earnings is excluded from the use calculation if the associated business income has been included in the earnings of the deceased.

20.9 A court will have regard to the factual change in estate asset values between date of death and date of trial. In one instance⁸⁹ the widow had trashed the business she had

84 *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86)

85 Act no. 9 of 1969

86 *Du Toit v General Accident Ins* 1988 3 SA 75 (D).

87 *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 3 SA 577 (A)

88 cf. *Mohan v RAF* 2008 (5) SA 305 (D); *Snyders v Groenewald* 1966 3 SA 785 (C); *Maasberg v Hunt, Leuchars & Hepburn Ltd* 1944 WLD 2

89 *Santam Insurance v Meredith* 1990 4 SA 265 (Tk)

inherited. The court ordered that nil deduction be made for the inheritance of it. The same, one would expect, would apply to the value to be placed on the family home and other immovable property if these have been sold between date of death and date of settlement.

20.10 In *Groenewald v Snyders*⁹⁰ the deduction for acceleration for the spouse's inheritance exceeded the value of her lost support. The Court ordered that the excess should not be deducted from the claims of the children. This decision is authority for the general proposition that a gain obtained by one dependant cannot be offset against the loss incurred by another.

20.11 In the *Nochomowitz* case⁹¹ the Court ordered that a deduction be made for the accelerated value of the inheritance of the deceased's business, but that the income generated from it by the widow should be ignored because, but for the death, she would not have worked.

20.12 Assets placed in trust for a widow can give rise to a deduction for acceleration.⁹² The fact that a child's inheritance has been placed in trust does not prevent a deduction for inheritance because application can always be made to release such assets for purposes of the child's support.

21. SUNDRY OBSERVATIONS

21.1 The liability of a parent to maintain a dependent child continues after age 21.⁹³

21.2 The duty of support between healthy siblings falls away when the dependent sibling attains age 21.⁹⁴

21.3 The parents of the deceased may claim for loss of support provided they can prove that they were receiving support before the death and that they are 'indigent'.⁹⁵

21.4 A parent who owns immovable property may be illiquid but is not 'indigent'.⁹⁶ The claim by parents for loss of speculative future support from a deceased unemployed young child will usually be pressed to extinction by the weight of accumulated contingencies.

90 1966 3 SA 237 (A). MPVL74: 332–3

91 *Nochomowitz v Santam Insurance Co Ltd* 1972 1 SA 718 (T); *Nochomowitz v Santam Insurance Co Ltd* 1972 3 SA 640 (A)

92 *Marks v Santam Insurance* 1995 4 QOD L2–26 ©

93 *Burse v Bursey* 1999 3 SA 33 (SCA)

94 *Boberg* (1977) at 276; *Seattle v Protea Assurance* 1983 (C) (unreported 6.5.83 case I.77/81)

95 *Burger v POF* 2000 QOD L2-1 (OFS); *Fosi v RAF* 2007 L2-14(C)

96 *Volkenborn v Volkenborn* 1946 NP 76; *Boberg* (1977: 268)

21.5 Grandparents have a duty to support grandchildren if the parents of the grandchildren are indigent.⁹⁷

21.6 A divorced woman may claim for loss of support if the divorce agreement provided for her to be paid maintenance.⁹⁸

21.7 Children adopted according to black customary law are entitled to claim for loss of support.⁹⁹

21.8 A widow married by Islamic rites has a claim for loss of support provided her marriage was *de facto* monogamous.¹⁰⁰

21.9 The surviving spouse of the deceased has a claim for the costs of employing a child minder. A deduction will, however, be made for the saving she/he has from no longer having to support a spouse. It follows that such claims are seldom successful.

21.10 In the event that a sterilisation procedure fails and an unplanned child is born the parents have a claim against the negligent medical practitioner for the costs of supporting the unplanned child.¹⁰¹ This is calculated as a one-part share of family income assuming there is no unplanned child. Once the older children have left home the unplanned child is allocated one-half of an adult's share.

21.11 Failure to terminate a pregnancy that will result in a deformed or otherwise handicapped child gives rise to a claim for compensation from the negligent medical practitioner by the parents for the costs of supporting the child.¹⁰² The child itself has no right of action.¹⁰³

97 *Gliksman v Talekinsky* 1955 4 SA 468 (W)

98 *RAF v Henery* 1999 3 SA 421 (SCA)

99 *Kewana v Santam Insurance* 1993 4 SA 771 (TkAD); *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T)

100 *Amod v MMVF* 1999 4 SA 1319 (SCA)

101 *Administrator Natal v Edouard* 1990 3 SA 581 (A)

102 *Sonny v Premier Kwazulu Natal* 2010 1 SA 427 (KZP)

103 *Stewart v Botha* 2008 6 SA 310 (SCA)

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