

# CONTINGENCIES

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**SIOPSA**  
SOCIETY FOR INDUSTRIAL &  
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# DIFFERENCING – BASICS

- **Sweatman v Road Accident Fund unreported case no 17258/2011 dated 3 December 2013:**
- *"Where the actuarial approach is adopted, the traditional method entailed a four-stage process, outlined by Gauntlett as follows:*
- *(a) calculate the present value of the future income which the plaintiff would have earned but for the injuries and the consequent disability;*
- *(b) calculate the present value of the plaintiff's estimated future income, if any, having regard to the disability;*
- *(c) subtract the figure obtained under (b) from that obtained under (a);*
- *(d) adjust the figure obtained as a result of this subtraction in the light of all relevant factors and contingencies."*
- *"I have in the past suggested that steps (c) and (d) in the above process ought to be reversed, this is because our courts have recognised on many occasions that different contingencies may impact differently on the pre- and post-morbid career paths..."*

## DIFFERENCING – EXAMPLE

Present value of pre-accident income:	R1,000,000
Less 15% contingency:	R150,000
Net present value of pre-accident income [A]:	R850,000
Present value of post-accident income:	R800,000
Less 25% contingency:	R200,000
Net present value of post-accident income [B]:	R600,000
Total net loss [A] – [B]:	R250,000

# WHAT ARE CONTINGENCIES? – PART 1

- **Southern Insurance Association Ltd v Bailey NO 1984 (1) SA98 (A):**
- *"Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case. In making such a discount for 'contingencies' or the 'vicissitudes of life', it is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable."*

# WHAT ARE CONTINGENCIES? – PART 2

- **Hulley v Cox 1923 AD 234:**
- *"It is at any rate desirable to test the result of an actuarial calculation by a consideration of the general equities of the case."*
- The adjustment for general hazards of life therefore provides the means to blend the scientific (the actuarial calculation) with the equitable (the Judge's impression of the case).

# TWO TYPES OF CONTINGENCIES

- LIFE CONTINGENCIES

- **Bee v Road Accident Fund (093/2017) [2018] ZASCA 52 (29 March 2018):**

- *"In regard to the future loss of earnings, the standard actuarial calculation would have taken account of the appellant's mortality risk (i.e. life expectancy)."*

- GENERAL HAZARDS OF LIFE

- **Shield Insurance Co Ltd v Hall 1976 (4) SA 431 (A):**

- *"Murfin is a consulting actuary. He is in no position and is not qualified to give evidence as to the hazards and contingencies applicable to any particular type of work."*

- **Shield Insurance Co Ltd v Booysen 1979 (3) SA 953 (A):**

- *"....the determination of allowances for such contingencies involves, by its very nature, a process of subjective impression or estimation rather than objective calculation...."*

# PARALLEL WITH OGDEN TABLES

- **Government Actuary's Department Actuarial Tables With explanatory notes for use in Personal Injury and Fatal Accident Cases (Seventh edition) 2011:**
- *"Tables 1 to 26 make reasonable provision for the levels of mortality which members of the population of the United Kingdom alive today may expect to experience in future. The tables do not take account of the other risks and vicissitudes of life, such as the possibility that the claimant would for periods have ceased to earn due to ill-health or loss of employment. Nor do they take account of the fact that many people cease work for substantial periods to care for children or other dependants."*

# TWO TYPES OF GENERAL HAZARDS OF LIFE

- **GENERAL CONTINGENCIES**

- Relevant at any stage in all people's lives (for example illness and unemployment).

- **SPECIFIC CONTINGENCIES**

- Relevant at specific stages of specific people's lives (for example maternity leave).

- Generally substantiated by evidence particular to the plaintiff.

# POSSIBLE CONSIDERATIONS (NOT EXHAUSTIVE)

- Individual's track record in respect of past performance and stability of employment, evidence of job hopping, previous disciplinary procedures.
- Loss of earnings due to illness, strike action, labour unrest, accident, retrenchment, redundancy or economic adversity.
- Taking unpaid leave, gap years, maternity leave, study leave or a sabbatical.
- Costs of travelling to and from employment.
- The chances of divorce.
- Prospects of inheritance altering the expected career path.
- Loss of pension due to frequent job changes or lack of retirement provision.
- Fringe benefits and benefits in kind.
- Informal income generating activities.
- The real prospects of promotion (most industrial psychologists frame it as a certainty whereas it rarely is).

# CONTINGENCY DEDUCTIONS FROM OGDEN TABLES – FACTORS

- Gender and age at time of injury.
- Those who at the time of the accident are employed, self-employed or on a government training scheme.
- All others (including those temporarily out of work, full-time students and unpaid family workers).
- Three levels of educational attainment are defined for the purposes of the tables as follows:
  - (a) Degree or equivalent or higher.
  - (b) GCSE grades A to C up to A levels or equivalents.
  - (c) Below GCSE C or CSE 1 or equivalent or no qualifications.
- Disability status.

# EXTRACT FROM OGDEN TABLES

Age at date of trial	D	Employed GE-A	O	D	Not employed GE-A	O
16-19		0.90	0.85		0.85	0.82
20-24	0.92	0.92	0.87	0.89	0.88	0.83
25-29	0.93	0.92	0.89	0.89	0.88	0.82
30-34	0.92	0.91	0.89	0.87	0.86	0.81
35-39	0.90	0.90	0.89	0.85	0.84	0.80
40-44	0.88	0.88	0.88	0.82	0.81	0.78
45-49	0.86	0.86	0.86	0.77	0.77	0.74
50	0.83	0.83	0.83	0.72	0.72	0.70
51	0.82	0.82	0.82	0.70	0.70	0.68
52	0.81	0.81	0.81	0.67	0.67	0.66
53	0.80	0.80	0.80	0.63	0.63	0.63
54	0.79	0.79	0.79	0.59	0.59	0.59

# POST-RETIREMENT RISKS

- Outliving your assets.
- Death of a spouse.
- Inflation.
- Business risks – loss of retirement funds due to employer insolvency.
- Public policy risk – higher income tax and property taxes.
- Unexpected health care needs.
- Loss of ability to live independently.
- Change in housing needs.
- Unforeseen needs of family members.
- Change in marital status.

# THE “VAN DRIMMELEN” PRINCIPLE

- *Van Drimmelen v President Versekeringsmaatskappy Beperk* 1993 (4E2) QOD 19 (T):
- The late Industrial Psychologist David Lewis gave evidence – it established the differential contingency deduction approach.
- In that matter the earning capacity revolved around two aspects.
- The first question was whether on a preponderance of probabilities it was proven that the plaintiff’s employment would be curtailed to an early retirement age.
- The court found that it was not proven that the plaintiff would not be able to attain normal retirement age.
- The court did however take contingencies into consideration that he would however be working with a broken body (pre-accident 10% and post-accident 30%).
- Court also considered if plaintiff would find suitable alternative work and that he would have to overcome perceptions that even with his prosthesis he would be a good worker.

# COMMONLY REPORTED BY INDUSTRIAL PSYCHOLOGISTS

- *"Reference is made to legal opinion regarding appropriate contingency deductions."*
- *"The quantification of this pre-accident contingency deduction remains the prerogative of the Court or for negotiation between the legal teams involved."*
- *"The application of contingency deductions is acknowledged as being the prerogative of the legal teams / the Court involved."*
- *"Assessment of contingencies is the prerogative of the Court together with the negotiation between the parties involved."*
- *"A higher than normal post-incident contingency percentage should therefore be negotiated by the legal teams or determined by the Court."*

# THE PHRASE THAT PAYS

Phrase =>	"Slightly higher"	"Moderately higher"	"Higher"	"Substantially higher"	"Considerably higher"
Pre-accident	R1,000,000	R1,000,000	R1,000,000	R1,000,000	R1,000,000
Contingency	15.0%	15.0%	15.0%	15.0%	15.0%
Net value [A]	R850,000	R850,000	R850,000	R850,000	R850,000
Post-accident	R1,000,000	R1,000,000	R1,000,000	R1,000,000	R1,000,000
Contingency	20.0%	25.0%	35.0%	50.0%	60.0%
Net value [B]	R800,000	R750,000	R650,000	R500,000	R400,000
Net loss [A] - [B]	R50,000	R100,000	R200,000	R350,000	R450,000

# PRINCIPLES

- **Rudman v Road Accident Fund 2003 (2) SA 234 (SCA):**
  - *"The question is whether or not Rudman has proved that he is entitled to an award of this nature.... his mobility is restricted and he suffers from other physical handicaps as well, but this does not necessarily translate into a reduction of earning capacity causing loss. Has he proved such a reduction? What is the probability of Rudman ever leaving his farm in order to seek a livelihood elsewhere? The answer involves a consideration of a variety of possibilities. In considering them it must be remembered that in the final analysis an award cannot be based upon speculation. It must have an evidential foundation."*
- **Van Heerden v Road Accident Fund (6644/2011) [2014] ZAGPPHC 958 (8 December 2014):**
  - *"The loss of work capacity postulated by the orthopaedic surgeons does not, however, equal to a straight loss of income, but represents an inconvenience at work and at times pain, possibly sick leave. It is clear therefore that her allegations in the particulars of claim for a future loss of income, are not supported by the evidence."*
  - *"I therefore, find, that the plaintiff has failed to prove that her injury had a cognisable effect on her earning capacity and the type of work she does. It would have been different if she had been, for example, a domestic worker. Her damages are therefore nil and accordingly no award will be made under this heading."*
- Van Heerden was an Administrative Officer.

# QUESTIONS?

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