RISK ALERT BULLETIN FEB 2004

GENERAL MANAGER'S COLUMN

"May your trails be crooked, winding, lonesome, dangerous, leading to the most amazing view. May your mountains rise into and above the clouds."

By the time you read this, the first eight of these words by the naturalist and author Edward Abbey will probably apply, as the uphill climb begins in earnest. I do hope that the spectacular view is not too long in coming!

At the time of writing, we are still waiting with trepidation to see what becomes of the Road Accident Fund Second Amendment Bill of 2003, the passing of which was postponed for further consultation and which could have far-reaching consequences for claimants and the profession.

Some of the more troubling aspects of the Bill are the proposed payments of general damages, loss of support and loss of income in instalments and payments of medical expenses subject to a tariff.

NB: In our November edition, I wrote that retired attorneys continued to enjoy professional indemnity cover for work done whilst they were still in practice, regardless of when the claim was made. I wish to qualify my statement by pointing out that the cover can obviously only be provided as long as the current insurance is in place. Retired practitioners will need to satisfy themselves from time to time that the insurance is indeed still in place, in the same form as it is at present. I must, however, make it clear that I am not aware of any imminent changes to the insurance.

We really appreciate the feedback that we get from readers, both within and outside the legal profession. Please continue to correspond with us.

POLICY QUERIES

I am a practising attorney in the employ of the State attorney. Am I covered by the Fund's Professional Indemnity Insurance Scheme?

In terms of the scheme, not all "practising attorneys" are covered, but only those who are, "in possession or would have been obliged to apply for a current Fidelity Fund certificate in terms of Section 42 of the Attorneys Act."

In other words, only practitioners as contemplated in section 41(1) of the Attorneys Act are entitled to seek indemnity i.e. those practising for their own account or in partnership, or in an incorporated practice.

Ann Bertelsmann, General Manager **Abertelsmann@glenrandmib.co.za**

COMMON PITFALLS IN BUSINESS SALES-PART 1

Introduction

Claims very often arise against attorneys as a result of the drafting of Sale of Business Agreements and the Statutory consequences thereof. Our object, in these articles, is to draw attention to the principal matters, which can, and very often do, give rise to difficulties. This is not exhaustive or all-encompassing, or even a

check-list, but merely a guide as to some aspects which attorneys should be alerted to in drafting these agreements.

Here, we deal briefly with the statutory issues of VAT and the Labour Relations Act as it affects the sale of businesses. In forthcoming issues we will deal with the Competition Act and the Insolvency Act as they affect sales of businesses; and the common-law matters of warranties, the extent to which book debts, liabilities and contracts are (and should be) transferred and the requirements for transfers of contracts with third parties.

VAT

The conventional wisdom is that all business sales are zero-rated for VAT purposes. This is generally correct, but it is crucial that the requirements of s11 (1)(e) of the Value-Added Tax Act be carefully considered and applied. Briefly:

- The purchaser must be a registered VAT vendor.
- The agreement of sale of the business must be:
    a. in writing;
    b. of all the assets which are necessary for the carrying on of the business sold (which may be either the whole or a part of the seller's business);
    c. of an undertaking which is an income-earning activity;
- and must state that the purchase price is inclusive of VAT at 0%.

If all these requirements are not satisfied, the sale will not be zero-rated. It is not unusual for one or more of these requirements to be overlooked, with substantial VAT consequences, which are unnecessary and undesirable.

Labour Relations Act and Employee Relations

This is not intended as a discourse on s197 of the LRA. However, it is always necessary to consider the effects of the section. These provide that when a business is sold the employees can (and as a rule will) be "transferred" to the service of the purchaser on identical terms - even without their agreement. If this is not what the parties (or the employees) want, then there must be agreement as to where the financial responsibility for retrenchments falls (if there are to be retrenchments), or otherwise proper consultation, before the transfer of the business, with the transferring employees as to the terms on which they will be employed.

It goes almost without saying - but is said because, again, it is often overlooked - that when what is sold is a part of a business, it is important to identify the particular employees who will be transferred.

Competition Act

The sale of a business will require the approval of the competition authorities if it is an intermediate or large merger. "Merger" includes any acquisition by one party of the business assets, or undertaking, or part of the assets or undertaking, of another.

The consequences of proceeding to implement an affected sale of a business without approval or, worse yet, without notification, are dire. They can include an order to unwind the transaction or an administrative fine of up to 10% of the turnover of the combined undertaking.

No large merger should be contemplated without proper professional advice on the considerations, which apply when approval is sought, and the same applies in small mergers if there is any reason to suppose that there are competition issues.

Sharifa Ally - Editor - **Sally@glenrandmib.co.za**

With acknowledgement to Hugh Bisset of Deneys Reitz (Commercial Update- September 2001)

USEFUL TIPS FOR MVA PRACTITIONERS

Who to use when you sue- Part 3

This is the final instalment of our series, which we trust has been beneficial to practitioners.

1. EAR, NOSE AND THROAT SURGEON
   This expert deals with damage to a person's ears, nose and throat. They recommend future medical

treatment, either conservative or surgical. Hearing loss as well as breathing/asthma- related difficulties, can be determined.

2. SPECIALIST PHYSICIAN / GENERAL SURGEON
   These experts are used to assess a person's general state of health. They can advise on life expectancies (both pre- and post-morbidly), determine the damage (if any) to the internal organs etc.

   They can also advise on medication, which may disagree with some people, and/or medication, which should not be taken in conjunction with others e.g. in poly-trauma etc.
3. PULMONOLOGIST
   These experts deal with lung problems and recommend future medical expenses. They can also advise as to whether a person has a reduced life expectancy as a result of those injuries.
4. CARDIOLOGIST
   A cardiologist specialises in heart-related problems, and again, can recommend future medical treatment, and possibly detect a reduction in life expectancy.
5. PLASTIC AND RECONSTRUCTIVE SURGEON
   This expert deals with scarring following trauma, and discusses whether these scars can be improved by either conservative or surgical means, by recommending future medical treatment.
6. UROLOGIST
   This expert deals with a person's urological problems, which can include bed-wetting in children, incontinence in adults and sexual difficulties. Future medical expenses, again in the form of either conservative treatment, or surgery, can be recommended.
7. GYNAECOLOGIST
   This expert specifically deals with problems concerning a woman's reproductive system. Where a woman has injured her pelvis in an accident, it may be necessary to obtain a report from a gynaecologist on whether she will be able to give birth and if so, whether it will be naturally or by caesarean section.
8. PAEDIATRICIAN
   There are some general practitioners and specialised experts who deal specifically with injuries sustained by children.
9. ACTUARY
   An actuary is able to actuarially calculate what the future medical expenses are worth when calculated over the person's lifetime and based on the medico-legal reports at hand. In addition, an actuary calculates the loss of earnings, which is normally based on an industrial or educational psychologist's report.

With acknowledgement to Lesley- Ann Marshall of Savage Jooste & Adams

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LETTERS TO THE EDITOR

Dear Editor
Re: Bilingual Bulletin

I would like to join Mr. Johan Fourie (Risk Alert 4/2003) in commending you on your decision to publish all articles in both English and Afrikaans. Having regard to the many Afrikaans speaking attorneys and the significant role which Afrikaans still plays in the country's justice system, we are of the view that this is a good decision.

I would also like to congratulate you on the practical way in which the bulletin is presented and the high standard of the articles contained therein.

Andre Arnoldi
Bekker Brink & Brink Ing.

Dear Editor
Re: Risk Alert 2\2003- Who to use when you sue

1. I refer to your article dealing with neurologists and neurosurgeons.

Probably, the most misunderstood profession is that of Neurosurgery and there is a widespread belief amongst the public, health professionals as well as the legal fraternity, that neurosurgeons deal with brain pathologies- trauma and non-trauma and this is where their mandate stops. The reality is that on the whole, a neurosurgeon's practice consists of 80% "spinal" patients and 20% "head" patients.

What, has also never been understood clearly is the difference between a neurosurgeon and a neurologist when it comes to head injuries.

A neurosurgeon is a surgeon first and foremost and thus deals with all aspects of any neurological condition

(whether arising in the brain, spinal cord and beyond) that requires surgical procedure.

There are certain neurologists who have concentrated on giving medico-legal reports on brain injuries, but there is absolutely no comparison with a neurosurgeon who deals with the head- injured patient from the time he literally enters the hospital right through to the time he is rehabilitated and then still thereafter seen in the Outpatient's Department.

The neurologist, on the other hand, is specifically trained to deal with conditions that almost never need a surgical scalpel. He would almost exclusively indulge in conditions that require medication as a solution. He, however, in the process of training would gain a theoretical knowledge of certain conditions that are dealt with by a neurosurgeon in much greater detail.

I hope my explanation will help those who do not understand the difference between a neurosurgeon and a neurologist and put their ideas in perspective.

Dr. S.A. Parker (neurosurgeon)

2. I have been asked by one of our members, Dr. S.A. Parker, to respond to an article in your bulletin.

I would like to point out that in S.A, neurologists are not at all involved in the treatment of head trauma. This is the domain of traumatologists and neurosurgeons. Neurologists certainly are never involved in head trauma cases in the acute stage. They may be involved in cases of posttraumatic seizures when such are referred by neurosurgeons or other experts.

So the expert that primarily would be required to give an opinion on any head injured case should be the neurosurgeon as he has been trained in not only the acute management but also in the long term sequelae. He would then decide as to whether a case be referred to a rehabilitation team which could include most if not all of the following depending on the severity of the case (Physiotherapist, Occupational Therapist, Social worker, Clinical psychologist, Psychiatrist and rarely a Neurologist.)

Whiplash and spinal injuries in the private sector may also be treated primarily by neurosurgeons. Even though practises across the country may vary slightly, I am quite sure that members of the Society of Neurosurgeons of SA would all agree that neurosurgeons are primarily responsible for the management of head injuries and should be regarded as the main experts in the field.

Prof. H.B. Hartzenburg
Head of Neurosurgery
University of Stellenbosch and Tygerberg Academic Hospital
President of the Society of Neurosurgeons of South Africa

Editor's Note
Our series, "Who to use when you sue," was intended as a general guide and brief summary of the experts most commonly briefed in personal injury claims. However, we are pleased to note that our readership has extended to the medical fraternity and we invite other medical experts to give us feedback on relevant topics.

AMENDMENT OF ATTORNEYS ACT, 1979

The following amendment will be implemented shortly:

Every attorney who starts practising for his\her own account or who is appointed as a partner or director at a firm must within the period stipulated by the Provincial Law Society, attend and complete a course in Practice Management, approved by such Law Society.

The Law Society of South Africa provides various forums for training including attendance, distance or internet training courses. These courses commence during February 2004 and practitioners who fall within the above categories are therefore urged to contact:

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PRESCRIPTION ALERT - NEWS FLASH

Do you handle time-barred matters e.g. mva matters? Are you at risk of allowing these matters to prescribe?

We have the ANSWER - PRESCRIPTION ALERT

ADVANTAGES:

- We offer a free service to all practising attorneys;
- Your firm is allocated a firm number;
- Each time-barred matter that is registered receives its own reference number - linked to your firm number;
- We provide regular reminders from 3 months prior to prescription up to 1 day prior to prescription;
- You have the choice of receiving your reminders via docex, mail or email.

IF A MVA CLAIM PRESCRIBES WITHOUT USING OUR SYSTEM, THE DEDUCTIBLE IS INCREASED BY 15%;

HOW DO YOU REGISTER? - **Prescription Alert Webpage**