IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A 19/01

In the matter between:

ELAINE NOREEN AUCAMP	First Appellant
ARMAND EMILE AUCAMP	Second Appellant
MARC DERIQUE AUCAMP	Third Appellant
EMILIE JANE AUCAMP	Fourth Appellant
and	
THE UNIVERSITY OF STELLENBOSCH	Respondent

_____ **JUDGMENT: 15**

MARCH 2002

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VAN ZYL J:

INTRODUCTION

[1] The first appellant is the widow of the late Emile Aucamp (the "deceased"). The second, third and fourth appellants are the children of the deceased and the first appellant. They are joint parties to the present proceedings in their respective capacities as nominated beneficiaries of the deceased, who had been in the employ of the respondent as a theatre technician from 1 July 1966 until his death on 16 August 1995.

[2] In the belief that the deceased had been a member of the respondent's group life insurance scheme, and that certain benefits would, in terms thereof, accrue to his

beneficiaries upon his death, the first appellant made enquiries from the respondent. She was informed, and this is common cause, that the deceased had not been a member of the scheme.

[3] The appellants subsequently instituted an action against the respondent, claiming damages for pure economic loss sustained by them as so-called disappointed beneficiaries. In this regard they relied on two alternate causes of action, namely, in the first place, the negligent breach of a contractual duty owed to the deceased and, in the second place, a negligent misrepresentation made to the deceased. Either of them would give rise to a claim in delict by the appellants against the respondent.

[4] The first cause of action related to the respondent's negligent failure to ensure, as it was obliged to in terms of its contract of employment with the deceased, that the deceased was registered as a member of its group life insurance scheme. The alternative cause of action was based on the respondent's negligent misrepresentation to the deceased that he was in fact registered as a member of such scheme. As a result the appellants, as beneficiaries of the deceased under the scheme, suffered damages in the amount the insurers would have paid them had the deceased been registered as a member of the scheme.

[5] The claim of the appellants as beneficiaries is, in short, that the respondent knew, or should have known, that its aforesaid conduct would inevitably cause them to suffer

damages as aforesaid. The total amount claimed by them was R382 820,00, later amended to R414 211,02, being the amount of the benefit that would have accrued to them jointly had the deceased been a member of the scheme. The proportion of their shares in such benefit would be 70% to the first appellant and 10% to each of the remaining three appellants. This was the proportion allocated to them as beneficiaries in terms of the provisions of the respondent's USAF pension scheme, which was established in 1994 and of which the deceased became a member on 13 October 1994 (par 26 and 27 below). In addition the appellants claim *mora* interest on the said amount at the rate of 15,5% *per annum* as from 13 December 1995, being the date of a letter of demand from the attorneys of the appellants to the principal of the respondent.

[6] The respondent denied, on the merits, that it was liable to the appellants on either of the alternate causes of action. In addition it raised two special pleas. The first was that the appellants did not have *locus standi* to bring a claim against the respondent, in that they were not acting as heirs or trustees of the estate of the deceased, nor were they acting as dependants of the deceased. The second was that their claim had prescribed. In this regard it was alleged that the cause of action had come into existence on the date of death of the deceased, namely16 August 1995. Service of the amended particulars of claim, however, by which a new cause of action was introduced, took place on 10 August 1999, more than three years later. In view of its finding on the facts, the court *a quo* did not deal with either of these special pleas. They were not abandoned, however, and full argument was addressed to us in respect thereof.

[7] The matter proceeded to trial. Both parties presented evidence to the court. Much of it turned upon the interpretation of certain documentation, on which the alleged misrepresentation by the respondent was based. Particularly material was the evidence of one Smal, a former employee of the respondent. He testified (par 13 below) as to certain documentation which had emanated from his office, and on his recollection of a personal discussion he had held with the deceased, more than seven years before his death, in regard to his membership of the scheme.

JUDGMENT OF THE COURT *A QUO*

[8] In his judgment Motala J held, on the first cause of action, that the respondent did not have an obligation to ensure that the deceased became a member of the scheme, in that membership thereof was optional for the deceased. At best for the appellants the respondent might have had a "moral, and perhaps a legal duty" to give the deceased "a clear option" to acquire membership thereof. The deceased had, however, unequivocally chosen not to join the scheme.

[9] On the second cause of action Motala J held that certain documentation and seminars relating to, and comparing the benefits of, the respondent's old and new pension funds, had indeed constituted a misrepresentation that such pension funds in fact included group life insurance (par 26 below). On the other hand a letter of 12 June 1978, from Smal to the deceased, as backed by Smal's evidence (par 13 and 23 below), indicated that

the deceased could not have been misled by such misrepresentation.

[10] In this regard the learned judge observed that he had treated Smal's evidence with caution, and did not believe that he was "deliberately misleading the court" or "fabricating his evidence" in regard to the discussion he had held with the deceased (par 13 below). In any event, the learned judge held, the appellants failed to prove a causal *nexus* between the alleged misrepresentation and their loss. The claim was accordingly dismissed with costs. It is against this judgment and order that the present appeal is directed.

THE EVIDENCE

[11] In her evidence the first appellant, Mrs E N Aucamp, testified that she had married the deceased in 1963 and remained so married until his death in 1995, a period of some thirty two years. The second, third and fourth appellants were born of their marriage. She herself had been a theatre technician and part-time lecturer in the employ of the respondent until her retirement, and appears to have been well informed as to the insurance and pension benefits accruing to employees like the deceased. She and the deceased, at various times before his death, had discussed the topic of their financial future. He had consistently assured her that, in the event of his death, she and the children would have no "financial worries" because they were adequately covered by the respondent's insurance scheme. He referred to it as a "widow's pension" or "widow's benefits". In this regard he had impressed her as being knowledgeable in insurance

matters and having an interest in his financial affairs. It was her belief that the deceased had accepted that the respondent's pension scheme included group life insurance, in that it was compulsory for all permanent members of staff. There could be no other explanation for his having failed to become a member of a scheme that provided excellent cover at a relatively small premium. He would not, she testified, intentionally or deliberately have rejected so beneficial a scheme, particularly in view of his concern, throughout his life, with providing for his wife and children. He had been, she testified, "an extremely good provider and a very concerned father". If he had believed that he did not have sufficient life cover for his family, he would undoubtedly have made an attempt to remedy the situation by taking out additional life insurance.

[12] Mr P A Viljoen, an insurance broker, testified that he had acted as the financial adviser of the deceased from approximately 1986. This had not included advice on life insurance, since the deceased had brought him under the impression that he was adequately covered and well insured under the respondent's group life insurance scheme. In this regard he had had insight into a booklet dealing with the respondent's pension scheme (introduced in 1994) and had attended a seminar relating thereto (par 26 below). His personal impression from the contents thereof was that group life insurance was included in the pension scheme benefits. This concluded the evidence for the appellants.

[13] The key witness for the respondent was Mr J T R Smal, the former head of personnel finance matters in the administration of the respondent. He had held such

position for a period of ten to twelve years, during which time he had been acquainted with the deceased. At the time of his testimony in the present matter he had been retired for a period of some twelve years. The gist of his evidence was that the deceased, with whom he had had a friendly relationship, had deliberately chosen not to acquire membership of the respondent's group life insurance scheme, despite Smal's efforts to persuade him that it was in his interest to do so. In this regard he referred to a letter dated 12 June 1978 (par 23 below), in which the deceased was given a last opportunity to join the scheme. When the deceased failed to respond to the letter, Smal invited him to his office to discuss the matter. He explained to him the benefits of the scheme and assured him that he was making a mistake by not opting to join it. According to Smal the deceased was the only one of some three thousand staff members who had not joined the scheme. Much to his surprise the deceased was, apparently, still not persuaded to do so and simply left his office without saying a word. Smal was unable to give any explanation for this bizarre behaviour.

[14] The last witness for the respondent was Mr B J Geldenhuys, the deputy-director of human resources of the respondent. His evidence turned, for the most part, around the meaning and interpretation of certain documentation, to which reference will be made hereinafter. For present purposes it is not necessary to deal with his opinions in this regard, other than to point out that they represented his personal viewpoints. In addition he testified that he was aware of the fact that the deceased had previously been a member of the old scheme. When this scheme terminated, however, the deceased had, it would

appear, deliberately chosen not to acquire membership of the new scheme, despite its obvious benefits. Geldenhuys was likewise unable to tender any explanation for the deceased's decision in this regard.

THE RELEVANT DOCUMENTATION

[15] It appears from the relevant documentation that, on 26 March 1970, the deceased became a member of an optional group life insurance scheme administered by the respondent. It was underwritten by Sanlam and known as the Group Life Insurance Scheme for Teachers (*Groepslewensversekeringskema vir Onderwysers*). I shall refer to it as the "old scheme".

[16] With effect from 1 January 1971 the respondent introduced a compulsory group life insurance scheme known as the Group Life Insurance Scheme for the Employees of the University of Stellenbosch (*Groepslewensversekeringskema vir die Werknemers van die Universiteit van Stellenbosch*). It was likewise underwritten by Sanlam, subject to partial reinsurance by Old Mutual, and may be referred to as the "new scheme". Although it was compulsory for all new employees, commencing employment after that date, to become members of the new scheme, it was not compulsory for persons like the deceased, whose employment had commenced prior to such date.

[17] In a notice dated 11 February 1971, emanating from the office of the respondent's

financial registrar, persons such as the deceased were given four options:

1. to join the new scheme unconditionally and without proof of insurability;
2. to remain with the old scheme but to acquire additional cover under the new scheme;
3. to terminate membership of the old scheme and to join the new scheme;
4. to have membership of both the old and the new scheme.

This option had to be exercised by 15 February 1972, failing which the right to acquire membership of the new scheme would be forfeited. In addition proof of insurability would be required should the new scheme not be joined prior to 15 May 1971. It is common cause that the deceased did not accept any of the aforesaid four options and did not become a member of the new scheme.

[18] The cut-off date for joining the new scheme without proof of insurability was extended, in a further notice from the financial registrar dated 11 June 1971, to 30 June 1971. Attached to this notice was a form containing only two questions and requiring persons exercising an option to respond thereto by answering only "yes" or "no" in the appropriate blocks. The options were:

1. to join the new scheme unconditionally and without proof of insurability;
2. to retain membership of the existing (old) scheme.

[19] The difficulty with the new form was that the first option was made expressly applicable only to persons who were not members of the old scheme and the second only

to persons who were indeed members thereof. This means that a person such as the deceased would be expected to ignore the first question and answer only the second, in terms of which a "yes" answer would indicate his wish to retain his membership of the old scheme. This is exactly what he did, as appears from the form completed and signed by him on 25 June 1971. In the block next to the second question he inserted the word "JA" (YES) in black, while leaving the block next to the first question empty.

[20] For some or other reason the empty block was subsequently, on 22 July 1971, filled in with the word "NEE" (NO) in red. This appears to have been done in the respondent's financial administration offices by a person who inserted his or her initial and the date in the left-hand margin. When Smal was asked to explain this, he testified that his department had been under the impression that there was overwhelming support for the new scheme. This form was directed at obtaining their final choice. He was unable to say, however, who had made the insertion in the empty block. In his view the person who had made the insertion must have communicated with the deceased before doing so. Otherwise the insertion would not have been permissible. His interpretation of the form, as amended by the insertion, was that the deceased had wished to retain membership of the old scheme and not to join the new scheme.

[21] In a letter dated 21 May 1975 and directed to the financial registrar of the respondent, Smal recommended that the old scheme be terminated as from 1 June 1975. In this regard he pointed out that the only employees who were members of the old

scheme alone were persons who had retired on pension prior to the introduction of the new scheme. Such persons, he suggested, should be absorbed into the new scheme with retention of their cover and premiums. Significantly, no reference was made to employees like the deceased, who had not yet retired but were members of only the old scheme. The impression is created that, to the best of Smal's knowledge at the time, there were no such employees in that they were all members of both schemes or of only the new scheme. When he was questioned on this aspect, his response was that he could not recollect why provision had not been made for a further category of employees such as the deceased. He appears to have conceded, however, that such persons would have been dealt with in the same way as pensioners in their position were treated.

[22] In a notice dated 2 June 1975 to all members of the old scheme, Smal indicated that the council of the respondent, in consultation with the executive committee of the senate, had accepted his recommendation. The old scheme was hence terminated on 1 June 1975, subject thereto that no further premiums would be paid in respect thereof as from the end of May 1975. As from 1 June 1975 additional cover, amounting to four times (later increased to five times) the annual basic salary of the employee, would come into operation under the new scheme, thereby compensating those employees who would lose their cover under the old scheme. The contribution of the employee to the premium payable in respect of the new scheme would be limited to 50% thereof.

[23] The next document of relevance in the present matter, on which Smal placed great

reliance during his testimony (par 13 above), was the copy of a letter dated 12 June 1978 from Smal to the deceased. Herein the deceased was informed that Sanlam had decided to give employees of the respondent a further opportunity to join the new scheme, subject thereto that proof of insurability would have to be furnished at the employee's expense. The deceased was requested to inform Smal, on an attached "option form", whether or not he wished to join the scheme. He appears not to have responded thereto. This gave rise to the aforesaid meeting in Smal's office, on which occasion the deceased apparently refused to be persuaded to join the new scheme and made his exit without saying a word.

[24] Further documentary evidence relied upon by the respondent includes certain salary slips of the deceased, from which it appears that no monthly deductions for group life insurance were being made from his monthly salary. It was suggested in this regard that the deceased should have been alerted by the absence of such deductions, in that monthly deductions of R7,10 had previously been made, when the deceased was a member of the old scheme. On being questioned about this, the first appellant's response was that it was difficult to notice something that was not there. She suggested that it was easier to notice an insertion than an omission.

[25] The appellants in turn suggest that later documentation indicated that the respondent was itself under the impression that the deceased was indeed a member of the new scheme. An example of such documentation is a letter dated 11 October 1991 from one Mr A J van Tonder, the respondent's director of finances and services, to the manager

of Alexander Forbes Consultants. In this letter Van Tonder gave the assurance that all its employees (including the deceased), who were members of its existing Pension Fund for Associated Institutions (*Pensioenfonds vir Geassosieerde Inrigtings*, abbreviated PGI), were also members of the respondent's compulsory group life insurance scheme (the new scheme).

[26] Similar indications appear from certain information booklets and computer-generated "benefit certificates" (*voordeelsertifikate*) issued by the respondent. These certificates particularised, in respect of each of the respondent's employees, a comparison of his or her benefits under the existing pension scheme (PGI), with the benefits he or she would enjoy under the new pension scheme. The latter scheme, which was established during 1994, after the respondent had apparently begun to lose confidence in the viability of the PGI scheme, was underwritten by Old Mutual and became known as the University of Stellenbosch Retirement Fund (*Universiteit van Stellenbosch Aftredefonds*, abbreviated USAF). In promoting the USAF pension scheme, the Old Mutual organised a number of seminars during the course of which its benefits were set forth. The aforesaid documents and seminars appear to have assumed and, indeed, created the impression, that members thereof would automatically have group life benefits. This was confirmed by Viljoen in his evidence on behalf of the appellants (par 12 above).

[27] It is common cause that the deceased became a member of the respondent's PGI pension scheme from the date of commencement of his employment with the respondent

on 1 July 1966 (par 1 above) until 13 October 1994, when he became a member of its USAF pension scheme. It is likewise common cause that he nominated the appellants as his beneficiaries in a specified proportion in terms of the latter scheme (par 5 above). In his judgment, as mentioned above (par 9), Motala J held that the aforesaid documentation and seminars created the impression that the benefits under both the PGI and USAF pension schemes included group life insurance.

FIRST SPECIAL PLEA: LACK OF *LOCUS STANDI*

[28] The basis of the first special plea, namely that the appellants lack the *locus standi* required to bring a claim against the respondent, is that they are not acting in the capacity of trustees of the deceased's estate, nor as the heirs or dependants of the deceased.

[29] Mr Trengove, for the respondent, submitted in this regard that there was no proof that the appellants would have been the beneficiaries of any insurance that the deceased might have attempted to obtain had he realised that he was not covered by the new scheme. The fact that they were nominated as beneficiaries in specified proportions, in terms of the USAF pension scheme, did not mean that they would similarly have been nominated in any new insurance policy he might have decided to take. In any event the respondent could not have become aware of the identity of the appellants, as beneficiaries of the deceased, prior to their nomination as such when the deceased became a member of the USAF pension scheme. For the rest, he argued, the appellants did not purport to enforce their interests as heirs or as dependants of the deceased. There was in fact no proof that they would have qualified as dependants of the deceased under the rules of the

new scheme.

[30] Mr Fagan, for the appellants, submitted that it was very probable that the appellants would indeed have been the beneficiaries of the deceased in terms of the new scheme had he become a member thereof. This was confirmed by their nomination as beneficiaries in terms of the USAF pension scheme. The respondent's contention that the claimant in the court below should have been the executor in the estate of the deceased was based on the assumption that the proceeds of the deceased's group life insurance benefits would have been paid into his estate. This was not, however, the case with life insurance policies, the proceeds of which are normally paid out directly to the nominated beneficiaries. In this regard, Mr Fagan submitted, the relevant documentation indicated that Sanlam, the underwriters of the new scheme, preferred to make direct payments to beneficiaries and only in exceptional cases to the estate. In any event, he argued, the appellants were the disappointed beneficiaries to whom the benefits would have been paid had the respondent not negligently breached its contractual obligation to the deceased or not made the aforesaid negligent misrepresentation.

[31] It is correct that the executor in the estate of the deceased would have been perfectly entitled, in his or her official capacity, to bring the present action against the respondent. There is, however, no indication from the papers that the executor was ever requested, or even considered, doing so. It is also quite correct, as submitted by Mr Fagan, that the proceeds of policies such as that under consideration in the present matter,

are usually paid directly by the insurer to beneficiaries and not into the deceased estate. It was not suggested by the respondent that this was not so, nor was it argued that this is, on the applicable facts and circumstances, an exceptional case requiring the insurer to make payment into the estate.

[32] It may well be so that the respondent might not have become aware of the identity of all the appellants as beneficiaries at the time of the alleged misrepresentation. The second, third and fourth appellants must, at that time, have been young children who were not necessarily identifiable as potential beneficiaries. The respondent could, however, by the exercise of reasonable care (see par 70(e) below), readily have established the identity of at least the first appellant as a beneficiary of the deceased. At the relevant time she was not only the legal spouse of the deceased, but was, herself, also in the employ of the respondent (par 11 above). The respondent could simply have directed an enquiry to the deceased or had reference to the documentation recording his membership of the PGI pension scheme and the old group life insurance scheme.

[33] What is clear from the evidence of the first appellant (par 11 above) is that the deceased consistently assured her that she and the children would be adequately covered by the respondent's insurance scheme. It is hence, in my view, highly improbable that he would not have identified at least the first appellant as his beneficiary in terms of the PGI pension scheme or the old group life insurance scheme. As his main dependant, she naturally and logically fell into a class or category of persons who would, under normal

circumstances, benefit from such schemes. There is, indeed, no indication from the relevant evidence or documentation that, during the intervening period prior to his becoming a member of the USAF pension scheme, his care and concern for her and the children had changed or fluctuated in any way. This was demonstrated unequivocally by his nominating them expressly, in specified shares, as beneficiaries in terms of the USAF scheme.

[34] It must hence be accepted that the deceased intended, at all relevant times, to nominate at least the first appellant as his beneficiary. She was not as such required to bring the present action in the name of the deceased estate. Nor did she have to do so in her capacity as an heir or dependant intent on enforcing her rights. It follows that she had the necessary *locus standi* to institute the present proceedings against the respondent. Inasmuch, however, as the second, third and fourth appellants might not, because of their youthfulness, likewise have been intended beneficiaries at the time of the respondent's alleged misrepresentation, it may well be that they do not have the required *locus standi* to pursue the present action. The first special plea must hence succeed in respect of the second, third and fourth appellants, but fail in respect of the first appellant.

SECOND SPECIAL PLEA: PRESCRIPTION

[35] The second special plea raised by the respondent is that the claim of the appellants has prescribed. The averment in this regard is that the alternate causes of action came into existence on the date of death of the deceased (16 August 1995). The amended particulars

of claim, however, which contain allegations not appearing in the original particulars of claim and which have the effect of introducing a new cause of action, were served on the respondent more than three years later (10 August 1999).

[36] In his argument on prescription, Mr Trengove submitted that, in the original particulars of claim, the appellants merely alleged that the respondent had, by its conduct, breached a duty owed to the deceased. No allegation of causation was made. In the amended particulars of claim, however, they alleged that the respondent, by such conduct, had breached a duty owed to them, as beneficiaries of the deceased. In addition they raised the prerequisite of causation by alleging that the deceased had, in the planning of his estate, relied on misrepresentations made by the respondent.

[37] Mr Fagan conceded that the original particulars of claim were defective in a number of respects pertaining to factual allegations. The correct facts, particularly regarding the events of 1971 and 1975, came to light only after the respondent had made discovery. Indeed, these facts were supplemented by documents emerging for the first time during the course of the trial. There was no suggestion, Mr Fagan submitted, that the first appellant did not attempt, during the three years subsequent to the deceased's death and prior to the institution of the present action, to elicit all the relevant facts from the respondent. In any event the original particulars were properly directed at pursuing a claim for pure economic loss on the basis of a negligent misrepresentation made by the respondent and of the breach of a duty owed by the respondent to the appellants. Such

particulars included the allegations required to found a claim in delict. At no stage did the respondent except thereto.

[38] Our courts have, as correctly submitted by Mr Fagan, adopted a generous approach to the amendment of pleadings. They have allowed amendments to cure defects in pleadings, even to the extent of allowing one cause of action to be substituted by another and even in cases where prescription might otherwise have intervened. See in this regard: *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 279C-E; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 343B-D; *Mabaso and Others v Minister of Police and Another* 1980 (4) SA 319 (W) at 323D-325A; *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) at 329C-D; *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SEC) 600I-J; *Vorster v Havemann* 1996 (4) SA 308 (T) at 312A-I.

[39] It is true that, in the present case, the amendments to the particulars of claim had the effect of curing certain defects and *lacunae* in the alternative causes of action. This was doubtless prompted by the acquisition of new sources of information, and by a reconsideration of the basis of the claim by the legal representatives of the appellants. It is quite clear that certain highly relevant information was not available to them at the time their claim was initiated. They could not have been aware of the full nature and ambit of the alleged misrepresentations attributed to the respondent from as early as 1971 and continuing until 1994, when the USAF pension scheme came into operation. Nor

could they have known of the significant role played by Smal in this process. There is no indication that they or their legal representatives were lax in seeking to acquire further relevant information prior to discovery by the respondent. When such information came to hand, they duly amended their particulars of claim. The amendments, as far as can be ascertained from the papers, could not have prejudiced, and were not opposed by, the respondent.

[40] In my view the amended particulars of claim, while curing certain defects in the original particulars of claim, had the effect of supplementing and clarifying the existing causes of action. The respondent knew full well, from the outset, that it had to meet a case in delict, arising from the breach of a duty it allegedly owed the deceased and from a misrepresentation it had allegedly made to the deceased. It likewise knew that the beneficiaries of the deceased alleged that they had been prejudiced by this breach of duty and misrepresentation. The allegations to this effect were supplemented and elucidated by the amendments introduced at a later stage. It was never suggested that such amendments should be regarded as an attempt to introduce a new or an already prescribed cause of action. It follows that there can be no question that any part of the claim, instituted by the appellants against the respondent, has prescribed. The second special plea must, therefore, fail.

BREACH OF DUTY BY THE RESPONDENT

[41] On consideration of the aforesaid facts and circumstances, I am in respectful

agreement with Motala J (par 8 above) that the respondent had no contractual obligation to ensure that the deceased become a member of the compulsory group life insurance scheme. The contract of employment between the respondent and the deceased, as far as I have been able to ascertain, makes no mention at all of membership, optional or otherwise, of any group life insurance scheme. Nor does there appear to have been any later amendment to the contract of employment to make provision for such a duty.

[42] This does not, however, mean that the respondent had no duty to the deceased in regard to group life insurance benefits that might become available to him. On the contrary, the respondent was, in my view, obliged to ensure, firstly, that the deceased was fully and properly apprised of the availability of such benefits and, secondly, that he was given an adequate opportunity to subscribe to the group life insurance policy in question. It seems to me that such a duty must necessarily have arisen from the fiduciary nature of the employer-employee relationship between the respondent and the deceased, even if no provision had been made for it, expressly or by implication, in their contract of employment. Not only would this be just, fair and reasonable, but it would also accord with the dictates of good faith and public policy.

[43] The decision of the deceased to join the respondent's optional group life insurance scheme (the old scheme - par 15 above) on 26 March 1970, some four years after commencing employment with the respondent on 1 July 1966, appears to have been quite voluntary. It may be accepted that he took such decision after considering the benefits, rights and obligations arising from membership of the scheme.

[44] The introduction of a compulsory group life insurance scheme by the respondent on 1 January 1971 (the new scheme - par 16 above) did not place the deceased under any obligation to join it. He appears to have been satisfied with his insurance coverage under the old scheme and, therefore, acted voluntarily and entirely within his rights when he refused to exercise any of the four options appearing from the notice of 11 February 1971 (par 17 above).

[45] The deceased appears once again to have indicated voluntarily, in response to the notice of 11 June 1971 (par 18 above), the desire to retain his membership of the old scheme. As pointed out earlier in this judgment (par 19 above), however, the said notice did not give the deceased any option to join the new scheme, in that the option to do so, as formulated in the notice, was restricted to persons who were not members of the old scheme.

[46] It seems clear, in retrospect, that this could not have been the intention of the drafter of the notice. Both the first option, to join the new scheme, and the second option, to retain membership of the old scheme, must have been directed at members of the old scheme who had not, as yet, joined the new scheme. The notice was, however, drafted in a clumsy and confusing way, in that it created the impression that employees such as the deceased, who were members of the old scheme only, were entitled to retain their membership of the old scheme, but were not permitted to join the new scheme.

[47] It follows that the notice effectively deprived the deceased of the opportunity to join the new scheme. This means that he was not empowered to exercise any option, let alone do so voluntarily. It must inevitably be concluded that the respondent failed to comply with its duty (par 42 above) to apprise the deceased fully and properly of his right to become a member of the new scheme, and likewise failed to give him an adequate opportunity to acquire such membership. I shall return to this in the discussion of wrongfulness of the respondent's conduct (par 89-95 below).

[48] The attempt, by some or other administrative official who was never called to the witness stand or even identified, to remedy the aforesaid situation, was extremely questionable (par 20 above). His or her insertion of a negative response in the block next to the first option, deliberately left blank by the deceased, simply had the effect of compounding the confusion and perpetuating the respondent's breach of duty. Smal's attempt to explain this conduct cannot be accepted. Not only was the insertion in conflict with the purportedly overwhelming support for the new scheme, but the suggestion that the anonymous official must have communicated with the deceased before making the insertion, was based on pure speculation.

MISREPRESENTATION BY THE RESPONDENT

[49] The decision of the respondent, on the recommendation of Smal, to terminate the old scheme was founded on the assumption that only retired employees of the respondent

were members of the old scheme alone (par 21 and 22 above). The only reasonable inference that can be drawn from this assumption is that it was accepted that employees like the deceased were members of both the old and the new schemes or of the new scheme only. This accords with Smal's concession that employees who were members of only the old scheme, and had not yet retired, should have been dealt with in the same way as employees who, on retirement, had been members of the old scheme alone.

[50] This means that persons such as the deceased should have automatically become members of the new scheme when the old scheme terminated on 1 June 1975. This is certainly the clear impression created by the notice dated 2 June 1975 to all members of the old scheme: such members would be compensated for their loss of cover under the old scheme by receiving additional cover under the new scheme and paying only half the premium.

[51] It follows that the deceased must, reasonably, have been under the justified (but mistaken) impression that he became a member of the new scheme on 1 June 1975. Inasmuch as the respondent failed to correct this mistaken impression, it misrepresented unequivocally that persons like the deceased were indeed members of the new scheme and would receive additional cover at lower premiums.

[52] Not only did the respondent fail to correct this misrepresentation, but it further compounded it, many years later, in the aforesaid documentation relating to the

introduction of the new USAF pension scheme (par 25 and 26 above). There is little doubt that the respondent was itself under the impression that all its employees, including the deceased, who were members of its PGI and USAF pension schemes, were also members of its compulsory group life insurance scheme (the new scheme). Inasmuch as the deceased had been a member of the PGI pension scheme, and subsequently joined the USAF pension scheme (par 27 above), the respondent must have accepted, and hence misrepresented, that the deceased was indeed a member of the new scheme.

WAS THE DECEASED MISLED?

[53] On whether or not the deceased was indeed misled by this misrepresentation, I must respectfully differ from Motala J (par 9 above). It cannot be accepted that, on receipt of the letter of 12 June 1978 (par 23 above), the deceased must have realised that he was in fact not a member of the new scheme and was now being invited to become a member. For several reasons I have grave reservations as to the evidentiary value of the letter, as will appear from the following.

[54] Apart from the fact that there is no evidence that the deceased ever received the letter, it is quite inexplicable why he should have been given a second opportunity to become a member of the new scheme more than three years after the old scheme had terminated. If he was indeed the only employee out of three thousand who had deliberately chosen not to join the new scheme on termination of the old, it is strange that so formal a letter was addressed to him. One would have expected Smal to approach him

personally, particularly in view of his evidence that they had had a friendly relationship. It is furthermore incomprehensible that the deceased would not have completed the annexed option form or otherwise reacted to the letter. This would have been his obvious response, especially after having been brought under the impression, more than three years earlier, that he had automatically become a member of the new scheme on termination of the old.

[55] Smal's evidence as to the inexplicably bizarre behaviour of the deceased, on being accosted about his failure to respond to the letter and to join the new scheme, must, in my view, be rejected as highly improbable. It cannot be accepted that a person like the deceased, who appears to have been knowledgeable in insurance matters and cautious in his personal financial affairs, would have rejected membership of so beneficial a new scheme once he had lost the cover provided by the old scheme. Such conduct would have been quite out of character, in that it would inevitably have been to the detriment of his wife and family, who stood to benefit substantially from the new scheme. There was not the slightest suggestion, by Smal or anyone else, that the deceased was unbalanced or unpredictable. Nor is there any indication that he was an incorrigible individualist who would be comfortable with the idea that he was the only employee out of three thousand who had deliberately chosen to forfeit the obviously beneficial provisions of the new scheme.

[56] It is highly significant that Smal, despite his purported concern for the deceased,

at no stage followed up on the failure by the deceased to respond to the letter and on his conduct at the subsequent meeting. At the very least one would have expected him to confirm the preceding events in writing and, more specifically, to place on record that the deceased had deliberately foregone a further opportunity to remedy the situation by becoming a member of the new scheme. This would have served to protect his own, and the respondent's, interests, should there at any future stage be a query as to why the deceased, to the prejudice of his beneficiaries, had never acquired membership of the new scheme.

[57] It is difficult to escape the conclusion that the letter of 12 June 1978 was a clumsy attempt to remedy the respondent's aforesaid breach of duty and subsequent misrepresentation. It served only to compound and aggravate, rather than improve, the situation.

[58] The fact that the monthly salary slips of the deceased did not, as from the end of May 1975, indicate that deductions were being made for group life insurance, does not, in my view, assist the respondent. Inasmuch as the deceased appears to have believed that group life insurance benefits were included among those provided by his pension scheme, he would not have expected any deductions in this regard to be reflected on his monthly salary slip. He would, indeed, have accepted that his relatively small contribution to group life insurance was included in the monthly pension fund deduction. No additional or separate deduction would, therefore, have appeared necessary or justified. And even if

a separate deduction should have been made, it is highly unlikely that the deceased would have noticed the omission thereof.

[59] It follows that the deceased must be held to have been misled by the respondent's misrepresentation and to have believed that, as from 1 June 1975, he had group life insurance cover, under the new scheme, as a benefit arising from his membership of the respondent's USAF pension scheme. On the strength of this misrepresentation he failed to take any steps to acquire membership of the new scheme, as might reasonably have been expected of him.

ACTION OF DISAPPOINTED BENEFICIARIES FOR PURE ECONOMIC LOSS

[60] Mr Fagan, on behalf of the appellants, submitted that this is a case where the legal convictions of the community cry out for the payment of compensation to the widow and children of the deceased. He relied particularly on two recent cases of this division, in which claims by disappointed beneficiaries appear to have been recognised.

[61] Mr Trengove, for the respondent, submitted that the claim of the appellants should be rejected. To avoid the danger of indeterminate liability in actions for pure economic loss, he argued, strict limitations should be placed on such liability. In this regard he suggested, following the "proximity test" as applied in English law, that liability should be restricted to plaintiffs whose identity was certain at the relevant time. The South African cases relied on by the appellants, Mr Trengove submitted, were distinguishable

from the present case in that the disappointed beneficiaries in those cases had been clearly identified at the relevant time. This argument has already been fully canvassed and considered in the discussion of the *locus standi* special plea (par 29 and 32 above).

[62] A further argument raised by Mr Trengove was that the respondent had at no stage held itself out as having special skills or knowledge in the field of group life insurance. For this purpose it had engaged the services of a professional and duly specialised insurer. Imposing liability on the respondent under these circumstances would have serious social consequences in that it would open the floodgates of litigation by indeterminate beneficiaries against any employer who had offered employees optional life insurance benefits at some time in the past. This could not, Mr Trengove submitted, be consonant with the aims and needs of public policy, as represented by the legal convictions of the community.

[63] The question whether or not a disappointed beneficiary has a legal right to claim damages for the loss of an envisaged benefit as a result of the wrongful and culpable conduct of another, has been vexed and controversial. It relates to a problematic field of delictual liability that has exercised the minds, and provoked the creativity, of lawyers in a number of common law, and even civil law, jurisdictions. Not only does it involve damages in the form of pure economic loss, but it also requires liability to be imposed in respect of “indirectly” caused damages arising from the conduct of a party with whom the victim ostensibly has no legal relationship. See in general Owen Rogers "The Action of

the Disappointed Beneficiary" in *SALJ* 103 (1986) 583-614; G A M Radesich "Negligent Attorneys and Disappointed Beneficiaries" in *THRHR* 50 (1987) 276-289; B S Markesinis “An Expanding Tort Law – The Price of a Rigid Contract Law” in *Law Quarterly Review* 103 (1987) 354-397; Dale Hutchison “Relational Economic Loss in the Supreme Court of Canada” in *SALJ* 111(1994) 240-257; J Neethling "Professionele Aanspreeklikheid teenoor Derdes" in *THRHR* 59 (1996) 191-208; Basil Wunsh “The Disappointed Beneficiary Revisited: The Decision of the House of Lords in *White v Jones*” in *SALJ* 113 (1996) 46-70; Dale Hutchison “Relational Economic Loss (or Interference with Contractual Relations): The Last Hurdle” in *Acta Juridica* (2000) 133-157; Dale Hutchison “When Rigs do Roam: Relational Economic Loss in Table Bay Harbour” in *SALJ* 118 (2001) 651-658.

[64] The relevant issue may be simply illustrated. In the usual case the perpetrator of the conduct in question (A) has a contractual relationship with another party (B), such as that between an attorney and client. As a result of the negligent non-compliance by A with a duty or obligation arising from such contractual relationship, a third party (C) suffers damage. Under normal circumstances A would be contractually liable to B for breach of contract. Any action C might have against A, however, would have to be delictual and based on the breach of a legal duty A has towards C. This presupposes that A must, in fact, have a legal relationship with C, in the sense that A must owe C a duty not to cause him or her any injury, loss or damage. It may justifiably be said that this duty, and resultant legal relationship between A and C, must flow from the contractual

relationship between A and B.

[65] It may, of course, be that the damage suffered by C does not arise from any negligent breach of the contract between A and B, but is the result of wrongful and culpable conduct by A towards B. Under normal circumstances A would be delictually liable to B on the basis of A's breach of a legal duty he owes B. The existence of this duty would create an extra-contractual legal relationship between A and B. Any action C may have against A would likewise have to be delictual, on the basis of the breach of a legal duty A owes C. In this case the duty, and the resultant legal relationship between A and C, would flow from the extra-contractual legal relationship between A and B.

[66] It is irrelevant whether the damage caused to C arises from the negligent breach of a contractual duty owed by A to B, or from a delict (wrongful and culpable conduct) committed by A against B. In both cases C's cause of action against A would be delictual and based on the breach of a legal duty owed by A to C. In both cases C's action would be directed at recovery of the "pure economic loss" he or she has suffered as a result of A's wrongful and culpable conduct. South African law has long since recognised an action of this nature. See *Suid-Afrikaanse Bantoetrust v Ross en Jacobsz* 1977 (3) SA 184 (T); *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Hefer v Van Greuning* 1979 (4) SA 952 (A); *Franschhoekse Wynkelder (Ko-operatief) Bpk v SAR&H* 1981 (3) SA 36 (C); *Coronation Brick (Pty) Ltd v Strachan*

Construction Co (Pty) Ltd 1982 (4) SA 371 (D); *Arthur E Abrahams and Gross v Cohen and Others* 1991 (2) SA 301 (C); *McLelland v Hulett and Others* 1992 (1) SA 456 (D); *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W); *The Oil Rig* South Seas Driller *Sheriff of Cape Town v Pride Foramer SA and Others* 2001 (3) SA 841 (C) at 843E-F.

[67] It is equally irrelevant what the nature of the delictual conduct of A against B may be. It is not restricted to physical damage of property or bodily injury to a person, as implied by the concept *damnum iniuria datum* appearing in the Roman *Lex Aquilia* of 287BC (one of the corner stones of the South African law of delict). It includes delicts such as negligent misrepresentation or negligent misstatement. This has also been accepted in South African law. See *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A); *Credé v Standard Bank of SA Ltd* 1988 (4) SA 786 (E); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A); *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C). See also the informative discussion in J Neethling, J M Potgieter and P J Visser *Law of Delict* (4th ed 2001) (hereinafter referred to as "Neethling") 8-13 and 295-310.

[68] It is trite that the conduct causing pure economic loss must be wrongful in the sense that it infringes upon a subjective right of the plaintiff, or breaches a legal duty

owed to the plaintiff (Neethling 297). The legal duty as such must be directed at preventing reasonably foreseeable damage being caused to the plaintiff (*Arthur E Abrahams and Gross v Cohen and Others* 1991 (2) SA 301 (C) at 309D). Every case must, however, be approached on its own merits. In considering whether or not the conduct in question is wrongful the court is required to make a value judgment. In doing so it must weigh up the interests of the parties and of the community at large against the background of the relevant facts and circumstances. In addition it must strive, impartially and objectively, to apply the values of justice, fairness and reasonableness, while taking into account considerations of good faith (*bona fides*) and good morals (*boni mores*), otherwise known as public policy reflecting the legal convictions of the community. This has been said in a variety of ways by various courts over the years. It is exemplified in cases such as *Coronation Brick (Pty) Ltd v Strachan Construction C (Pty) Ltd* 1982 (4) SA 371 (D) at 384B-D; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 913-914; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475(A) at 498; *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 529G-530C; *Arthur E Abrahams and Gross v Cohen and Others* 1991 (2) SA 301 (C) at 309D-F; *McLelland v Hulett and Others* 1992 (1) SA 456 (D) at 464B-D; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797F; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 318E-319A; *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27F-I; *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 722-723; *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 877J-878H; *Sea Harvest Corporation (Pty) Ltd and*

Another v Duncan Dock Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA) at 837-838; *S M Goldstein and Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another* 2000 (4) SA 1019 (SCA) at 1024..

[69] There is no *numerus clausus* of factors to be taken into consideration in assessing whether or not the defendant was able to avoid reasonably foreseeable damage by taking reasonable steps to avoid it. Neethling 290-302 suggests, *inter alia*:

(a) whether the defendant knew or subjectively foresaw that his negligent conduct would cause damage to the plaintiff;

(b) whether reasonably practical steps could have been taken by the defendant to prevent such damage;

(c) whether the defendant possessed, or professed to possess, special skill, competence and knowledge;

(d) whether special protection against economic loss was required;

(e) whether a finding in favour of the plaintiff would open the floodgates and lead to a multiplicity of actions or indeterminate liability which would have severe social consequences;

(f) whether a statutory provision requires the prevention of economic loss;

(g) whether the plaintiff is able to protect himself against potential economic loss;

(h) whether the defendant can protect himself against such loss, for example by acquiring adequate insurance cover.

[70] In the context of negligent misrepresentation, wrongfulness is determined by establishing whether or not the defendant breached a legal duty to furnish the correct information to the person entitled to such information. The same principles then apply as in regard to wrongfulness in a general delictual context (par 68 above). Similar guidelines exist as to whether or not a legal duty rests upon the defendant in a particular case (par 69 above; Neethling 302-307; see also *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 770A-771A). For present purposes the following additional guidelines may be useful:

(a) whether the parties have a contractual or fiduciary relationship requiring them to furnish the correct information concerning any matter arising from such relationship;

(b) whether the defendant has certain exclusive information which is not readily accessible to the plaintiff or other parties;

(c) whether a defendant furnishes information by dint of his or her professional knowledge and competence;

(d) whether the defendant was aware, or ought by the exercise of reasonable care to have been aware, of the existence and identity of persons who would rely on his negligent misrepresentation;

(e) whether the defendant was aware, or ought by the exercise of reasonable care to have been aware, of the existence and identity of persons who would suffer damage should the misrepresentation not be corrected, and would benefit should it be corrected (see *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 877I).

[71] It goes without saying that, if the plaintiff relies on a negligent misrepresentation by the defendant, it is not sufficient to prove wrongfulness alone. The other prerequisites for delictual liability, namely fault or culpability, in the form of negligence, and causation must also be proved. This means, in a nutshell, that the court must be satisfied that the defendant did not act as a reasonable person would have acted in the particular circumstances. See *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490F; *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G; *S v Burger* 1975 (4) SA 877 (A) at 879D-E; Neethling 128-156. In addition it must be persuaded that there was a causal link, both factually and legally, between the misrepresentation, the response to it and the damage arising from it. See *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-701G; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I-765B; Neethling 308-310. For present purposes it is not necessary to deal further with these prerequisites. Their relevance will appear from the discussion hereinafter (par 96-97) of the applicability of the law to the facts of the case.

[72] The action of disappointed beneficiaries for pure economic loss appears to have been recognised for the first time in South African jurisprudence in the recently published judgment of Conradie J in *Pretorius en Andere v McCallum* 2002 (2) SA 423 (C). The defendant in this case was an attorney who was alleged to have been negligent in drawing up and executing the will of the deceased, his erstwhile client, in that he failed to ensure that the will complied with the relevant statutory prerequisites. The will was accordingly

declared invalid and the deceased was regarded as having died intestate. The plaintiffs, being the daughter and two granddaughters of the deceased, who had been named as beneficiaries in the will, suffered substantial loss as a result of the invalidity of the will. They subsequently claimed damages from the defendant on the basis of his aforesaid negligence. An exception was raised to the particulars of claim, averring that no cause of action had been disclosed. In an opposed application for amendment of the particulars of claim, the court was called upon to decide whether or not the defendant had a duty to ensure that the nominated beneficiaries receive what the deceased had intended they should inherit. Conradie J gave careful consideration to a number of common law authorities and legal literature in point. He concluded (at 430F-G) that there was no objection in principle to the recognition of a claim founded on the legal duty of an attorney to ensure that the expectations of a nominated beneficiary were met.

[73] The next South African case to deal with a claim by a disappointed beneficiary was *Ries v Boland Bank PKS Ltd and Another* 2000 (4) SA 955 (C). The plaintiff's late husband was a regular customer of the first defendant bank. At the relevant time the second defendant was employed by it as an insurance broker. While making use of the insurance broking services rendered by the second defendant, the deceased requested him to substitute the plaintiff as beneficiary in an existing life insurance policy. The second defendant failed to do so. As a result the plaintiff suffered damages in the amount of R300 000,00, being the benefit she would have received had the substitution aforesaid been duly effected. She subsequently claimed this amount from the first and second

defendants jointly and severally. In doing so she averred that the aforesaid failure of the second defendant, who had at all relevant times acted in the course and scope of his employment with the first defendant, had been wrongful and negligent.

[74] Erasmus AJ was called upon to decide whether or not a disappointed beneficiary such as the plaintiff had any legal right to recover damages for the loss of a benefit which would have accrued to her had it not been for the wrongful and negligent conduct of the second defendant. In considering this issue the learned judge had reference to wide-ranging foreign and other authorities, some of which, in general, tend to support the claim by a disappointed beneficiary. He observed in this regard (at 963D-E) that, although there was no contractual *nexus* between the plaintiff and defendants, the essence of her complaint was that the defendants had failed to carry out a contractual obligation owed to the deceased, thereby causing the plaintiff loss. Such loss, he held (at 968A) was "of a purely economic nature" and was in fact "the loss of an expectation rather than an out of pocket loss".

[75] The learned judge thereupon considered whether or not the conduct of the defendants was, in the circumstances, wrongful. After applying certain relevant guidelines to the facts of the case, he was satisfied (at 971A) that the defendants had a legal duty, to "take care that the intended beneficiary's expectations were not frustrated". In regard to the requirement of negligence he was likewise satisfied (at 971H) that the defendants had rendered specialised services as insurance brokers who "should have and

did in fact foresee the likelihood of harm being caused to someone in the position of the plaintiff". Inasmuch as the second defendant was acting within the course and scope of his employment with the first defendant, his negligence was vicariously attributable to the first defendant. In the event the claim succeeded.

[76] On appeal, in *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA), the Supreme Court of Appeal rejected Erasmus AJ's finding that wrongfulness had been proved. In this regard Schutz JA expressed the view (par 10 at 46B-C) that "when an appropriate case, such that a duty of care is owed to the plaintiff, arises, this Court will accept that a disappointed beneficiary has a delictual action for his loss". For purposes of establishing wrongfulness, however, the legal convictions of the community required that the defendant should owe the plaintiff a legal, and not merely a moral, duty (par 13 at 46H-47A).

[77] On the facts of the case the court was not persuaded that there had been a professional relationship between the deceased and the second defendant, in terms of which the deceased relied upon the second defendant's "special skills". The latter had simply rendered the deceased a service or courtesy by furnishing him with a form relating to the change of beneficiary under a life policy in which neither of the defendants had any interest. Doing a favour in such circumstances did not give rise to a contract with the deceased. This was very different from engaging an attorney to draw a will (par 14 at 47B-F). In any event there was no skill involved in rendering the said service. The deceased could have done it himself, but found it more convenient to make use of a

person who had access to the necessary form and was in regular contact with the insurer. This case was hence not analogous with the disappointed beneficiary cases (par 17-18 at 47J-48F and par 20 at 49A-B). In the event the appeal was upheld and the claim dismissed.

[78] In the *Pretorius* and *Ries* judgments (par 72 and 73 above) the applicable foreign law is set forth in some detail, with reference to a number of common law authorities. Much of the literature on the subject (see par 63 above) deals with analogous cases in foreign jurisdictions. I do not propose to conduct an exhaustive comparative survey of the relevant foreign law. It would, however, be appropriate to refer briefly to the relevant English law, which has strongly influenced South African law on the subject.

[79] The starting point is usually regarded as *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 {HL). In this case the House of Lords recognised that a legal duty of care may, under certain circumstances, arise from a negligent misstatement. The relevant portion of the head note reads:

> If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply; and for a failure to exercise that care an action for negligence will lie if damage results…

[80] In *Ross v Caunters (a firm)* [1979] 3 All ER 580 (ChD), an action in negligence

was recognised, under such circumstances, in the case of a disappointed beneficiary. After considering a number of English and "transatlantic" sources, Sir Robert Megarry V-C stated (at 590*d-e*):

> Whatever may be the position about describing the relevant considerations as matters of 'policy', I find it hard to envisage a fair and reasonable man, seeking to do what is fair and just, who would reach the conclusion that it was right to hold that solicitors whose carelessness deprives an intended beneficiary of the share of a testator's estate that was destined for that beneficiary should be immune from any action by that beneficiary, and should have no liability save for nominal damages due to the testator's estate.

[81] Specific criteria for the imposition of a duty of care in such cases were set forth in *Caparo Industries plc v Dickman and Others* [1990] 1 All ER 568 (HL), namely foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing a duty. The House of Lords warned, however, against attempting to extract general principles of liability in this regard. It suggested, rather, a pragmatic approach with reference to all the relevant facts and circumstances of each case. This appears from the following statement in the speech of Lord Bridge of Harwich (at 573*j*-574*b*):

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.

[82] An important step forward was the decision in *White and Another v Jones and Others* [1995] 1 All ER 691 (HL). A testator had given instructions to his solicitors, the defendants, to prepare a new will, in which the plaintiffs would be mentioned as beneficiaries of legacies in the amount of £9,000 each. The defendants were tardy in doing so, allowing a period of some two months to elapse before arranging to meet with the testator. The testator died three days before the date set for the visit. The plaintiffs brought an action against the defendants for damages arising from the negligence of the defendants. The court of first instance held that the defendants did not owe the plaintiffs any duty of care and dismissed the action. The Court of Appeal, however, allowed an appeal on the basis that the defendants indeed owed the plaintiffs a duty of care and were liable to pay them the amount claimed, namely the £9,000 each would have inherited had the defendants duly carried out the instructions of the testator. The defendants thereupon lodged an appeal with the House of Lords. By a majority decision the appeal was dismissed and the decision of the Court of Appeal affirmed.

[83] In his majority speech Lord Goff of Chieveley emphasised (at 702*c*-703*c*) the "impulse to do practical justice" as a basis for recognising that a duty should be owed by the testator's solicitor to a disappointed beneficiary. This was prompted, principally, by "the extraordinary fact that, if such a duty is not recognised, the only persons who might have a valid claim (ie the testator and his estate) have suffered no loss, and the only

person who has suffered a loss (ie the disappointed beneficiary) has no claim". This has led to "a lacuna in the law which needs to be filled" (702*d-e*). Lord Goff suggested (at 710*f-g*) that the lacuna could be filled by extending "to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor".

[84] In his speech Lord Browne-Wilkinson observed (at 717*d-g*) that the relationship between the solicitor and intended beneficiary is neither fiduciary nor based on a voluntary assumption of liability by involvement in the affairs of the beneficiary. The particular circumstances of the case, however, justified finding a "special relationship" giving rise to duty of care. In addition, he stated (at 718*c*) that "there are more general factors which indicate that it is fair, just and reasonable to impose liability on the solicitor". It followed (at 718*d*) that it "is only just that the intended beneficiary should be able to recover the benefits which he would otherwise have received".

[85] In other common law jurisdictions the principles set forth above have, to a greater or lesser extent, been accepted and further developed. In the United States three California decisions have taken the lead, namely *Biakanja v Irving* (1958) 49 Cal 2d 647, *Lucas v Hamm* (1961) 56 Cal 2d 583 and *Heyer v Flaig* (1970) 74 Cal 2d 233. In Canada British Columbia has been prominent with cases such as *Whittingham v Crease and*

Company [1978] 5 WWR 45, *Peake v Vernon and Thompson* (1990) 49 BCLR (2d) 245 and *Heath v Ivens* (1991) 57 BCLR (2d) 391. After initial resistance in *Seale v Perry* [1982] VR 193, Australia adopted a similar approach in *Watts v Public Trustee for Western Australia* [1980] WAR 97, *Finlay v Rowlands Anderson and Hine* [1987] Tas R 60 and *Hawkins v Clayton* (1988) 164 CLR 539. In New Zealand a legal duty in favour of intended beneficiaries was rejected in *Sutherland v Public Trustee* [1980] NZLR 536, but accepted, on appeal, in *Gartside v Sheffield Young and Ellis* [1983] NZLR 37.

[86] In the hybrid legal system of Scotland, the issue was considered in *Weir v J M Hodge and Son* 1990 SLT 266. It was rejected, however, because the court held, somewhat reluctantly, that it was bound by an early decision of the House of Lords in *Robertson v Fleming* (1861) 4 Macq 167 (HL). This situation was brought in line with English and common law development in the unreported case of *Margaret Imrie Gourlay or Robertson v Watt & Co* (Court of Session: Inner House (Second Division) 4 July 1995). In this case, which was kindly brought to my attention by Professor Hector MacQueen of the University of Edinburgh, the Lord Justice Clerk, Lord Ross, together with the Lords McClusley and Morison, upheld an appeal against a decision of a sheriff who had denied relief to disappointed beneficiaries. The Court of Session held that the sheriff's reliance on *Robertson v Fleming* (*supra*) had been "overtaken by events", more particularly the decision in *White v Jones* (par 81 above). Scots law has hence followed English law in this regard.

[87] Civil law jurisdictions, such as Germany, France and the Netherlands, have adopted varying approaches to the issue of disappointed beneficiaries, as appears from the speech of Lord Goff in *White v Jones* (par 81 above) at 698 *b-d* and 705*b*-707*a*. Particularly interesting are the German doctrines of the "contract with protective operation for third persons" (*Vertrag mit Schutzwirkung für Dritte*) and the "redress of damage caused to third persons" (*Drittschadensliquidation*) in cases of "transferred loss" (*Schadensverlagerung*). For present purposes it is not necessary to deal with these, or other civil law, doctrines directed at resolving the said issue.

APPLICATION OF THE RELEVANT LAW TO THE FACTS

[88] It is clear from the South African and common law authorities cited above that disappointed beneficiaries have a claim in delict against a person who has wrongfully and negligently caused them loss or damage, despite there being no privity of contract or any other direct legal relationship between them. Although the defendant in many of the cases dealt with was an attorney or solicitor, liability in disappointed beneficiary cases is certainly not restricted to legal representatives of deceased testators whose instructions to them were not duly carried out.

WRONGFULNESS

[89] On the basis of the relevant testimony and documentation, I am satisfied that the respondent, despite having clearly assumed an obligation to do so, failed to apprise the

deceased fully and properly of his right to subscribe to the new group life insurance scheme. It likewise failed to give him an adequate opportunity to subscribe thereto. The options it purported to give him, in its notice of 11 June 1971, were so confusing that he could not reasonably have been expected to understand what his rights were. In effect he was, therefore, deprived of his right to join the new scheme (par 47 above).

[90] Given his knowledge and experience in insurance matters (par 11 above) and his response to previous options tendered by the respondent (par 43-45 above), it is highly unlikely that the deceased would have deliberately chosen not to join the new scheme on termination of the old. Not only would such conduct have been out of character, but it would also have had the effect of depriving his wife of a substantial death benefit that would accrue to her at a minimal cost for himself.

[91] The aforesaid confusion was compounded by the misrepresentation arising from the notice of 2 June 1975 (par 22 above). As mentioned earlier in this judgment (par 51 above), the deceased must reasonably have been under the justified, albeit mistaken, impression that he automatically became a member of the new scheme on 1 June 1975. The documentation and seminars promoting the respondent's new USAF pension scheme (par 26 and 52 above) in all probability confirmed this impression. I have little doubt that the deceased was misled by the respondent's misrepresentation and, on the strength thereof, failed to take steps to acquire membership of the new scheme, as would reasonably have been expected of him (par 59 above). In the event the first appellant was

deprived of the benefits that would have accrued to her had the deceased subscribed to the new scheme.

[92] As pointed above (par 32 and 33) the respondent was at all relevant times aware, or ought by the exercise of reasonable care to have been aware, of the fact that at least the first appellant would benefit from the deceased's membership of the new group life insurance scheme. As an intended beneficiary she may hence justifiably be held to have depended and relied upon the respondent's giving the deceased appropriate advice and guidance in this regard. The fiduciary relationship between the respondent and the deceased should, therefore, be extended to the relationship between the respondent and the first appellant. In this way a "special relationship", as envisaged in *White v Jones* (par 82 and 84 above), would be created, giving rise to a duty of care.

[93] The respondent must have reasonably foreseen that the first appellant would suffer substantial financial loss should the deceased, as a result of its conduct, fail to become a member of the new scheme. If it had given reasonably careful consideration to the misleading notices and documentation aforesaid, it could certainly have prevented such a situation from developing. Mr Smal, as financial representative of the respondent, clearly possessed exclusive information that could not have fallen within the knowledge of the deceased, who must have relied on Smal's special skills in this regard. Smal certainly had sufficient skill, competence and specialised knowledge to have avoided or remedied such negligent and wrongful conduct, thereby preventing the first appellant

from suffering the said loss.

[94] It follows that the respondent had a legal duty towards the first appellant to have fully and properly advised the deceased of, and given him an adequate opportunity to subscribe to, its new group life insurance scheme. Inasmuch as the deceased would reasonably and probably have become a member of such scheme had the respondent not failed to comply with this duty, it likewise had a legal duty towards the first appellant to prevent her suffering loss or damage as a result of such conduct. In the event the respondent must be held to have acted wrongfully.

[95] I do not believe that this extension of the Aquilian action will "open the floodgates" and give rise to a multiplicity of purportedly analogous claims or to uncertain and indeterminate liability with dire socio-economic consequences. On the contrary it is perfectly consonant, I believe, with the values of justice, fairness and reasonableness. It likewise accords with the considerations of good faith and good morals constituting the all-important public policy that reflects the ever changing and adapting legal convictions of the community.

NEGLIGENCE AND CAUSATION

[96] That the respondent, duly represented by Smal, was negligent speaks for itself from the facts and circumstances set forth above. Smal’s conduct, in issuing ambiguous

and confusing notices and making a serious misrepresentation as to the deceased's membership of the new scheme, did not accord with what one would have expected of a reasonable man under the circumstances. I have no doubt that he himself realised that he had acted negligently, as illustrated by the unacceptable way in which he attempted to remedy the situation. I speak in this regard, firstly, of his speculative testimony relating to the administrative insertion appearing in the form attached to the notice of 11 June 1971 and completed by the deceased (par 18-20 above). In the second place I refer to his evidence concerning the letter of 12 June 1978, directed to the deceased as the only one of some three thousand employees who had not joined the new scheme (par 13, 23 and 53-57 above).

[97] I likewise have no difficulty with the element of causation. The respondent's wrongful and negligent conduct was the indisputable cause of the loss suffered by the first appellant. Such conduct clearly brought the deceased under a misapprehension relating to his membership of the new scheme, of which he would in all probability, if not inevitably, have become a member. His failure to do so, and the consequent loss suffered by the first appellant as the intended and disappointed beneficiary, must hence be attributed to the respondent.

CONCLUSION

[98] The quantum of the claim has not been placed in issue and stands at R414 211,02. Mr Fagan submitted, with reference to the order granted in the *Ries* matter (par 73

above), that this amount should bear interest at the rate of 15,5% *per annum* as from the date of death of the deceased, namely 17 August 1995. In the amended particulars of claim, however, interest is claimed *a tempore morae* and not *a tempore mortis*. It is therefore due from 13 December 1995, being the date of demand (par 5 above).

[99] On the question of costs it is correct that the respondent successfully raised the *locus standi* special plea against the second, third and fourth appellants. They were, however, no more than joint claimants who did not depose to any affidavits nor testify in the trial. Their citation as co-plaintiffs in the action against the respondent as defendant did not lead to any additional costs in the court below or in this court. There is hence no need to consider any special costs order.

[100] In the event I would make the following order:

1. The appeal is upheld with costs.

2. The order of the court *a quo* is set aside and substituted by the following:

    2.1 The defendant is ordered to pay the first plaintiff the amount of R414 211,02, together with interest thereon at the rate of 15,5% *per annum* from 13 December 1995 to date of payment;

    2.2 The defendant is ordered to pay the costs of suit.

D H VAN ZYL

Judge of the High Court of South Africa

I agree.

R B CLEAVER

Judge of the High Court of South Africa

I agree.

M J FITZGERALD

Acting Judge of the High Court of South Africa

It is so ordered.

D H VAN ZYL

Judge of the High Court of South Africa