The correct interpretation of s 17(4)(*c*) of the Road Accident Fund Act 56 of 1996

By Ian Morris, George Schwalb and Gregory Whittaker

The ruling by Griesel J in the matter of *Sweatman v Road Accident Fund* (WCC) (unreported case no 17258/11, 3-12-2013) (Griesel J) has resolved a dispute concerning the interpretation and application of s 17(4)(*c*) of the Road Accident Fund Act 56 of 1996 and more specifically the method of actuarially calculating the annual loss for the purposes of applying the statutory cap.

For accidents occurring after 1 August 2008, s 17(4)(*c*) of the Road Accident Fund Amendment Act 19 of 2005 (the Amendment Act) imposes the following limit on losses:

'Where a claim for compensation ... includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding –
(i) R 160 000 per year in the case of a claim for loss of income; and
(ii) R 160 000 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.'

As to how the 'annual loss' is to be calculated was central to the ruling.

The difference in methodology proposed by the writers as against the methodology proposed by the Road Accident Fund's (RAF's) actuaries can be summarised as follows:

We calculate the annual loss as the present value of the difference between the income had the accident not occurred and the income having regard to the accident for each year (after allowing for income tax, general contingencies, inflation and mortality and then discounted to present day terms). Each year's annual loss is then compared with the cap and thereafter the lesser of the cap (at the date of the accident) and each year's loss is used.

The above approach was also the interpretation of the RAF until earlier in 2013, when it changed its interpretation and instructed its actuaries to use the interpretation outlined below.

The RAF's actuaries' methodology is to project the actual loss for each year in future monetary terms (after income tax, including general contingencies and inflation, but not mortality and not discounted). This amount is then compared with the cap in each year (duly adjusted for inflation for each year in the future) and then the lesser of the actual inflated loss as calculated and the inflated cap value of each year is discounted (with the interest rate and mortality) to present day terms.

In coming to his decision Griesel J agreed with Sutherland J who held in *Sil and Others v Road Accident Fund* 2013 (3) SA 402 (GSJ) that 'the purpose of the cap is to limit merely the sum to be paid, and its purpose is not to interfere in the calculation of the loss' (at para 14): That is, the traditional method of calculation that has existed for many decades in South African courts was not to be disturbed. This judgment therefore clearly agreed with the methodology proposed by us where a discounted loss is compared to the cap at the date of the accident.

By way of example, it is useful to examine the case of a 40-year old male earning R 1 000 000 a year who is injured in an accident on 1 December 2013 and who is now unemployable. Had the accident not occurred, it is assumed that he would have received inflationary increases until retirement at the age of 65. A general contingency deduction of 15% has been applied for illustrative purposes.

Had the claim not been capped, then the present value of the loss (at a net discount rate of 2,5% per annum and an appropriate mortality table) would be R 9 935 860.

Under our approach, the capped loss would be R 5 341 875 (in the example the cap will have an effect throughout the whole period of the loss and the result is simply the cap of R 213 675 a year multiplied by 25 years). Under the method proposed by the RAF's actuaries the capped loss would be R 3 660 626.

It is to be noted that, in terms of the example set out above, both methods result in a significant reduction in the loss that would ordinarily have applied had there been no cap. In terms of the above example, under our approach, the claimant recovers approximately 53,76% of the award that would otherwise have applied; whereas under the RAF actuaries' approach, the claimant recovers approximately 36,84% of the award that would otherwise have applied.

In summary, in the relatively small percentage of cases where it needs to be established whether or not the claim should be capped, the actual loss must be calculated, using the traditional year-by-year method that makes due allowance for mortality, tax, and contingencies in each year, and discounting to present day value using a net capitalisation rate. The loss in each year must then be compared with the cap and the lesser of the two amounts claimed.

Ian Morris *MSc (Pembroke College, University of Oxford) FIA* is an actuary at Human & Morris in Cape Town. George Schwalb *BSc (Hons) (Wits) FASSA* is an actuary at GRS Actuarial Consulting in Stellenbosch. Gregory Whittaker *BEconSc (Wits) FSA FASSA* is an actuary at Algorithm Consultants and Actuaries in Johannesburg.