Mere conduits of data will not do

By Gregory Whittaker

It follows that South African actuaries providing services **in RAF matters must be familiar with developments in the common law**

The professional promise

The Actuarial Society of South Africa's Code of Conduct requires members to render quality services to their clients through, inter alia, the application of up-to-date actuarial knowledge and expertise. Members are encouraged to consider the public interest when rendering actuarial services but, provided that members meet the requirements of inter alia the applicable Law, they will be deemed by the Actuarial Society to have met the expectations of the profession with respect to the public interest. The vast majority of matters coming before South African courts involve Road Accident Fund (RAF) matters, that are governed by the Road Accident Fund Act. The calculation methodology employed in such matters is derived from the common law. It follows that South African actuaries providing services in RAF matters must be familiar with developments in the common law and study applicable judgments if they are to act in the public interest.

Professional vigilance

Aside from RAF claims handlers and senior litigation managers, if actuaries are to be seen as acting with professionalism, it is important that they study three recent judgments concerning Road Accident Fund claims. Whilst the judiciary has been vigilant in their approach to RAF claims due to the vast amounts of public money at stake, the courts noted the following in M T v Road Accident Fund and H M v Road Accident Fund:

The courts have, for years, worked tirelessly in their attempts to stem the tide of fraud in the RAF arena. However, the task has always been, and continues to be, an intractable one. The

approach of attorneys and the RAF seeking to avoid the court's jurisdiction by forgoing orders of court in settled matters is just the latest gambit. It comes as part of backlash to concerted attempts by the judiciary to enhance its oversight role where public funds are at stake in personal injury claims. This area is clearly vulnerable to corruption in that people are not litigating with their own money but with a seemingly endless supply of State funds. This can tend to make them less vigilant and more careless, and there is broadened scope for malfeasance.

Actuaries are normally the last expert to be briefed at the end of what can sometimes be an inadequately prepared case in that no objective proof of earnings evidence has been sourced from the claimant. What should our approach be in these circumstances? The following three cases are instructive:

Moshidi v Road Accident Fund

Mr Moshidi was 43 years old when he was involved in a motor vehicle accident. The Fund did not provide a version from the insured driver, so his claim on the merits was accepted. He suffered no fractures, but soft tissue injuries to his right hip, right knee, and right shoulder, and symptoms of post-traumatic stress disorder.

The experts were an orthopaedic surgeon, a psychologist, an occupational therapist and an industrial psychologist. Their findings were that he experienced pain in his leg but that he would be able to continue his work tasks with a good prognosis for his orthopaedic injuries. Though there was mention of post-traumatic stress disorder, it appeared that his cognitive abilities were intact, and the effects should not influence his work ability.

Acting Judge Phahlamohlaka emphasised that for the plaintiff to succeed in a claim for loss of earnings and loss of earning capacity, he must prove that the accident in question resulted in the diminution of his estate. The mere fact that the plaintiff sustained injuries in an accident did not automatically qualify him for an award for damages. Three years after the accident, he was employed as a rubber liner and was more recently employed as a belt splice assistant. The industrial psychologist believed that Mr Moshidi's career path in an uninjured state would most probably have been similar to his post-accident career path to date.

The court found that the accident did not result in the diminution of the plaintiff's patrimony and, therefore, the plaintiff had not sustained a loss of earning capacity. His earnings had increased over the years, and he can find employment at various companies. The court was not satisfied that the plaintiff had proved that he suffered a past loss of earnings either. The plaintiff's claim for loss of earnings and earning capacity was dismissed.

Many loss of income claims come before the court as so-called capacity loss claims. One common feature of such claims is that no loss of income has occurred from the date of the accident until the date of hearing which, in some instances, can be over five years. On occasion, claimants have received regular increases or promotions from the date of the accident until the date of hearing. Despite this, a claim for future loss of income is still pursued on the basis of factually indeterminable possibilities where it is alleged that the injuries sustained in the accident cause greater vulnerabilities of either demotion or job loss in the future. The evidence presented to the court to establish these claims is that of an expert report procured from an industrial psychologist. A trend is developing where industrial psychologists are used as a tool to argue for a higher post-accident contingency deduction in future, despite the fact that no provable loss has been incurred to date.

Acting Judge Phahlamohlaka is to be applauded for taking a considered and realistic approach to the opinion of the industrial psychologist. At the end of the day, it is the role of the presiding officer to decide whether or not a higher post-accident contingency deduction is warranted. They may only do so based on the evidence that has been put to the court and it is our view that incomplete expert reports, lacking in comprehensive interrogation of the actual work history and probable future of the claimant are just not good enough to justify higher contingency deductions. The only role player positioned to question the conclusions reached by industrial psychologists (largely based on hearsay evidence and anecdotes from the plaintiff rather than actual pay-slips and work site visits) is the Judge because the RAF is not opposing these fantastical views.

A further opportunity for the bleeding of public funds in these unopposed RAF matters is cost orders. In the afore-mentioned case, the plaintiff failed to prove past loss of income and future loss of income. The court, nevertheless, awarded costs against the RAF. It is concerning whether or not the plaintiff will still claim all the expert fees incurred in their failed investigations into proof of loss of income.

The conduct in this matter is akin to the approach documented in Bvuma v Road Accident Fund:

This judgment is yet another example of the 'sausage machine outsourcing' approach to Road Accident Fund litigation. Where there was a claim for 'loss of earnings/ loss of earning capacity', there was no attempt by any legal representatives to conduct any enquiry into, or

obtain any information about, the plaintiff's factual situation of employment. Instead, the attorneys for both parties simply referred the plaintiff to a multitude of medical 'experts' resulting in an absence of factual information relevant to the claim for loss of earnings.

To fulfil the expectation of the professional actuary to act in the public interest, the criticisms in the afore-mentioned judgments must act as a guide to actuaries in setting the precarious boundary between the need to serve their clients and the need to maintain professional standards, in particular, in the current climate of undefended RAF claims and the source of the awards being contentious fuel levies.

Els v Road Accident Fund

Ms Els was aged 30 when she was injured in a motor vehicle accident, where she suffered a moderate brain injury and other injuries. Previously, she was a hairdresser and was then employed as a management safety officer at a mining plant. Although her physical and cognitive abilities were affected, her employer retained her in the same position and assigned her an assistant runner. She could thus meet the current job demands of this sedentary work. The evidence was that physical disabilities and tolerance for pain posed risks to sustained employment and her prospects of promotion in the workplace. She would be disadvantaged in the open labour market.

Acting Judge Hassim noted that there was no appearance for the RAF at the hearing, despite the draft order being over R6 million, and no oral evidence was led at the trial. The plaintiff's evidence was sparse. For loss of earnings, the industrial psychologists recorded that they deferred to the factual information in the joint minutes. Nevertheless, there was no reference to the factual information in either the written or oral submissions, and the court could not find certain supporting documents such as pay-slips on the records before the court.

The actuary, in his revised actuarial report, stated that he had not been provided with the 2019-2020 salary advices when he prepared his earlier reports.. The Judge pointed out that:

It is unsatisfactory that experts are not provided with accurate information from which to draw their conclusions and it is equally unsatisfactory for experts to express opinions without having the correct facts at their disposal.

The courts have been more vocal in their criticism of industrial psychologists' misconduct such as in Ntombela v Road Accident Fund:

The industrial phycologists' performance warrant special mention. Their inadequate and superficial conduct has already been alluded to. It appears that persons practising in this field regard themselves as mere conduits of data that they wrap up in jargonised waffle. It is hard to seek out of these reports the aspects in which the expertise they profess is evident. The entire edifice of these reports was built on the say-so of a person who any professional ought to have appreciated was not in a position to express the views that he did, still less that they slavishly and uncritically relied upon such views. They have short-changed their clients. I shall disallow their costs in whole.

Completing reports without all the necessary information is an endemic practice among experts such as industrial psychologists. Instructing attorneys often expect expert actuaries to merely compute whatever is supposedly documented in these incomplete reports. It is incumbent upon actuaries maintaining professional standards to insist on objective evidence of income. This falls within the rights of an actuary preparing calculations that will ultimately be provided on oath and whose reputation falls under the scrutiny of the court.

Gwentshu v Road Accident Fund

The plaintiff, Mr Sibusisio Gwentshu, sued the defendant in his personal capacity for damages allegedly sustained by him due to a motor vehicle collision that occurred on 22 February 2014 in Durban.

A few days before the hearing of the matter, on 26 May 2021, the plaintiff filed an amendment to the pleadings. The amendment effectively inflated the quantum from R 1,000,000 to

R 3,176,114.58. The bulk of the claim was for future loss of earnings.

No fewer than 8 experts were briefed by the plaintiff including a clinical psychologist, neurologist, plastic and reconstructive surgeon, occupational therapist, orthopaedic surgeon, pulmonologist, industrial psychologist and actuary.

As noted by the court:
In quantifying such a claim, an actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion, the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the industrial psychologists, who in turn are dependent on the information provided by the claimant.

The court concluded that:
From the evidence that is placed before me, the injuries sustained from the motor collision did not cause any loss to the plaintiff. The evidence before me, and the fact that there is no deduction for disabilities from which the plaintiff suffers or will suffer in the future in the Actuary report, will not, in my view, impair the plaintiff's capacity to do his work as he did prior to the accident. The Actuary's report on calculation for loss of support was based on a stale report by the Industrial Psychologist, and no explanation is provided as to why this was the position. The Actuary, in his report, indicated that he performed calculations on the reported income but defer to factual comprehensive factual information. This was simply ignored.

This is another example of a matter where incomplete evidence is placed before the court in the hope of finding a sympathetic and substantial judgment for loss of income. This particular attempt was met by an astute and discerning Judge. The claim for loss of income failed. Interestingly, costs were still awarded against the RAF. It is suggested that the courts could consider using creative cost remedies to penalize ill-prepared legal representatives, rather than penalizing the RAF and consequently taxpayers.

Conclusion

In an unprecedented arena of litigation that is rampant with a flagrant disregard for court rules and evidence rules, coupled with limited interrogation of the plaintiff's version by an absent RAF defence, there is a heightened duty on actuaries to protect not only their integrity but the professionalism of expert actuaries as a whole. These recent judgments reflect that the Judiciary is taking a rigorously active role in plugging the holes in the fraudulent and procedural draining of RAF funds. Actuaries need to be aware of both the protection afforded to them and the standards expected of them by the ASSA Code of Conduct to qualify reports where they have any discomfort with regard to evidence on which they are basing their calculations. Failing to do so could incur severe criticism from an already fuelled Judiciary.