THE ACTUARY ACTING AS EXPERT WITNESS IN CASES INVOLVING COMPENSATION FOR LOSS OF FUTURE EARNINGS: SOME GUIDELINES FROM SOUTH AFRICAN LAW

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ABSTRACT

South African courts readily consult and rely on actuarial opinion when determining monetary compensation (or when 'assessing damages') in lieu of a loss of future earnings after a damage-causing event. Rarely do our courts determine compensation without having had the opportunity to consider actuarial opinion. Such reliance places the South African actuarial profession in a revered position. Du Plessis (2012) traced the origins of this practice by considering the branches of our law that influence assessment of damages by our courts, within a narrowly defined situation. Du Plessis (op. cit.) found that by setting the (admittedly, contentious) precondition that our applicable law obeys the principles of a formal system, it can be concluded that the reliance placed by our courts on actuarial opinion is rational. Some questions then spring to mind: what do the courts expect of actuaries? What should the profession do to guard its position? This paper extracts guidelines from law (when viewed as a formal system) that may assist actuaries professing that their opinions are of value to our courts. Consideration of such guidelines when actuaries frame their opinions may assist in preserving the high esteem in which our courts hold our profession.

KEYWORDS

Guidelines for expert witnesses; quantum of damages; loss of future earnings; expert opinion; actuarial expert evidence; expert testimony; patrimony; the difference rule of damages; formal view of law; common law as a formal system; admissibility of evidence

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1. CONTEXTUALISATION

In the personal experience of the author, South African actuaries are often called upon to present their opinions in legal disputes that involve financial valuation of inherently uncertain future events. Actuaries are well equipped to do so, and judging by the frequency with which our courts consult actuarial opinion for assistance on this matter, our body of law appear to agree.

From the time of Koch's doctoral thesis of 1993 (unpublished b), limited academic activity has taken place in this field. The recent publication of articles by Koch (2011) and by Lowther (2011) rekindled interest. These articles may be viewed as 'articles by actuaries, for actuaries'.

This paper uses a different point of departure, similar to that used by Du Plessis (op. cit.). Initially the train of thought disregards any prior knowledge of actuarial science, however superficial this may seem to the reader. This assumption can however be relaxed further on. With actuarial science yet not in the picture, the assessment of damages due to loss of future earnings is treated as a matter to be addressed from the point of view of 'law' as a science in itself, and law is expected to provide the answer. A particular view of law[1] is then taken which allows restatement of the findings from a perspective of law in a format which is more familiar to actuaries. The chosen format is that of a formal system.[2] This paper may then be described as 'a paper by a reader of law, for actuaries'.

It is trusted that this reversed approach will provide an interesting and different perspective to actuarial practitioners. It may also shed some more light on the expectations that our law and its practitioners have of actuaries acting as expert witnesses.

2. INTRODUCTION

Consider the backdrop of a South African court being tasked to determine compensation for an individual's loss of future earnings, after some earlier damage-causing event. Our courts readily consult actuarial opinion when determining the

1 whether it is right or it is wrong

2 The inner workings of a formal system ought to be familiar to actuaries from their undergraduate studies of mathematics and its derivative subjects. As a reminder though, a formal system contains definitions and a list of well-formed statements called axioms that are accepted without proof. Building on the axioms it is possible to create valid (but not necessarily true) statements called theorems, obtained by applying logical deduction, possibly with the aid of further definitions.

amount of compensation. Koch (op. cit.: 112) observed that only in rare cases will compensation for personal injury[3] be settled without the benefit of an actuarial report. This observation is mirrored by Lowther (op. cit.: 106).

Du Plessis (op.cit.:11) concluded that, seen from a substantive point of view (i.e. content rather than form), South African law considers the amount of damages to be awarded as a matter of fact, to be established by consideration of the circumstances of the particular case.[4]

In order to establish a fact, our courts may consider 'evidence', which Carstens (unpublished: 50) defines as 'the testimony of witnesses and the production of documents and other exhibits, which can be used for the purpose of proof in legal proceedings.' Generally speaking, witnesses in court may only testify about what they have perceived with their senses, e.g. what they have seen. They may not offer their opinions to the court, or restated in the language of law, their opinions are 'inadmissible'. An exception to this rule concerns the opinions of so-called 'experts'. A court may be presented with and may consider the opinion of an expert, provided the opinion lends appreciable assistance to the court when performing its task *in casu* – determining the amount of damages.

Du Plessis (op. cit.) hypothesised a narrowly defined situation that is well described by classical actuarial science, and where our courts would usually be presented with the opinion of an actuary. Analysis of the situation above concluded that, provided law is viewed as a formal system,[5] the heavy reliance that our courts place on actuarial expert opinion evidence is rational. Furthermore, the strong reliance on actuarial opinion is helped along by a particular instance of the intersection of our law of evidence and our law of damages (Du Plessis, op. cit.: 11–3).

The aim of this paper is to provide guidelines to actuaries who offer opinions to our courts. The reversed approach used by Du Plessis (op. cit.) is also applied here, in order to establish these guidelines.

Lowther (op. cit.: 105–6) makes the point that a court may consider opinion evidence from whoever it accepts as an expert. Assistance with the assessment of damages is not a role reserved for actuaries, and the litmus test of 'lending appreciable assistance to the court' still applies. Hence, the actuarial profession has to look to its laurels. It has to stay abreast with the changing needs of our courts. The rule of precedent applies to the reception of opinion evidence (Zeffert, Paizes & Skeen, 2003: 300), yet the author is not aware of any instance where our lawmakers were prepared

3 which includes loss of future earnings.

4 Confirmed by *De Jager v Gruder* 1964 1 SA 446 (A) at 451, and reaffirmed by *Erasmus v Davis* 1969 (2) SA 1 (A) at 17.

5 The view that law manifests itself as a formal system has been put forward many times and over a long period. It should be pointed out that this view remains contentious amongst scholars of law (Tillers 2011, Franklin 2012), and it is unlikely that the point will ever be settled. To complicate matters even further, Gödel's Incompleteness Theorems imply that an entirely satisfactory formal system (where 'satisfactory' is associated with strong explanatory powers) cannot exist, not generally and not for law either (Bavli, 2005).

to elevate the reception of actuarial expert opinion evidence to a common law rule. It remains for the court itself to evaluate the actuary's opinion on a case-by-case basis.

Events may turn against the actuarial profession. By way of example, Du Plessis (op. cit.: 15) found that the courts of England[6] consider actuarial opinion to be [generally] inadmissible within the scope of current consideration.[7]

Lowther & McMillan (2006) developed a quality framework that can be used to group the capabilities and values of members of the actuarial profession into three strands: cognitive, normative and organisational. Lowther (op. cit.) applied the quality framework of Lowther & McMillan (op. cit.) to a practice area of which this paper's scope defines a subset, and proceeded to suggest steps that could be taken to professionalise the contribution of actuaries to that selected practice area. Consequently, the focus of this paper overlaps that of Lowther (op.cit.) in part. Actuarial opinion currently holds a pivotal position in the field considered by Lowther (op. cit.), and it is suggested that it is in the public interest that actuarial opinion continues to be heard by our courts. However, it is imperative that we actuaries as members of a profession be aware of what is required of experts assisting the courts, as seen from the perspective of law in its widest sense. It is trusted that this paper will assist members in reaching such goal.

3. TERMINOLOGY

A summary of terminology used in this paper is set out below. The terminology is adopted from Du Plessis (op. cit.: 7–8), and that source may be consulted for a more extensive enunciation of the terminology.

— 'Damage' is 'harm or injury impairing the value or usefulness of something, or the health or normal function of a person', as taken from the *Concise Oxford Dictionary*.
— 'Damages' is 'a sum of money claimed or awarded as compensation for a loss or an injury', quoting from the same source.
— 'Quantum of damages' appears to be the preferred term in legal circles of the measure of damages, or amount of damages, and will be interpreted as such in this paper.
— 'Loss' and 'damage' are used interchangeably.
— 'Prospective loss' is taken to mean 'damage which will, with a sufficient degree of probability or possibility, materialise after the time of assessment of damage on

6 In this paper reference is often made to England and the law of England. This comparative approach is considered appropriate because the branches of law relevant to the scope of this paper are broadly similar in the jurisdictions of England and South Africa. While acknowledging the similarities some surprising differences exist, though. Refer to Du Plessis (op. cit.) for an example.

7 An anonymous reviewer of a draft of Du Plessis (op. cit.) remarked that the courts of England are more likely to turn to economists or forensic accountants, even though the matter at hand is essentially actuarial in nature. Hodgkinson & James (2007: 470), with reference to personal injury litigation in England, observe that 'accountants are often used instead of actuaries since the actuarial evidence generally required is pretty basic and the accountant can also be deployed to undertake calculations of non-actuarial parts of the case (e.g. such as the loss of past earnings).'

account of an earlier damage-causing event' as suggested by Visser & Potgieter (2003: 22).

— One's 'patrimony' (or 'estate') can be viewed as 'the collection of all of one's rights and duties, including expectation of such rights and duties'. The rights and duties must be capable of monetary expression, to be counted towards patrimony. It excludes personal rights such as health of mind or body (Du Plessis, op. cit.).
— 'Testimony' is a solemn statement or declaration made under oath.

4. SCOPE OF CONSIDERATION

As in Du Plessis (op.cit.), this analysis assumes a narrowly defined hypothetical situation. In this paper, however, the situation's scope is slightly broadened by assuming that the legal process has progressed to a point in time where pre-trial exchange of expert opinions occurs. The matter in dispute is not being heard by a court yet.

In summary then it is assumed that damage and damages under consideration will satisfy the following limiting criteria:

— the damage relates only to the period following the date of assessment, i.e. it is prospective, (i.e. we are ignoring any losses between the date of commission of the wrong and the date of assessment, on the presumption that such losses have been agreed upon and are not part of the dispute);
— the plaintiff had no promotional prospects over the balance of his career;
— there is only one plaintiff and only one defendant;
— the plaintiff has zero residual earnings capacity;
— it has already been established that the defendant is liable;
— it has already been established that there is no contributory negligence on the side of the plaintiff;
— the legal process has reached such a stage that pre-trial exchange of expert opinions is taking place with the aim of comparing the opinions of the various experts regarding the quantum of damages;
— it has already been established that the damages will be settled in the form of a lump sum, not an annuity; and
— likely damages is so large that the matter is set to be heard in the High Court.

5. A TIMELINE OF EVENTS

Consider the way in which a dispute regarding damages progresses over time. It is helpful to represent the realisation of 'events' that have some relevance to the outcome of the dispute in the form of a 'timeline', similar to that commonly used to illustrate the elementary financial mathematics underlying the time value of money. Each event is associated with a particular point in time, as measured on the timeline. The timeline commences with the occurrence of some damage-causing event. The most drawn-out version of the timeline concludes with the assessment of damages by a court, without any right of appeal. As to the universe of real-life disputes being settled within the confines of the South African legal system, typical timelines rarely stretch that far. In

fact, it is very rare for a dispute even to proceed as far as a court hearing.[8] Progression along the timeline may be halted at any point in time, if the parties can agree on a settlement amount with respect to the quantum of damages. Such agreement concludes the matter, and the timeline stops ticking.

Procedural law is the branch of law that defines the timeline and particular events along the timeline. If, at the point along the timeline of any predefined particular event the parties are unable to reach a negotiated settlement as to the quantum of damages, then the whole process shifts on to the next predefined event.

As a general point, at the conclusion of the timeline for a particular case the successful party will be able to recoup his reasonable costs from the unsuccessful party[9] to the extent that the successful party's costs were justifiably expended for the protection of his rights. The precise interpretation of the previous sentence is at the discretion of the presiding judicial officer. Suffice to note though that both parties are incentivised to negotiate a settlement earlier rather than later: the costs associated with legal action accumulate over time, and so does the risk of being saddled with a large cost account.

6. CONTEXTUALISED QUANTUM RULES OF SOUTH AFRICAN LAW

6.1 Axioms

With regard to the assessment of damages within the scope set above, Du Plessis (op. cit.: 10–12) suggested that South African common law contains only two rules that may be considered fundamental in an axiomatic sense. The findings of the court (including the process followed to arrive at the finding) may not contradict any one of these two rules, since doing so would be in breach of the confines of the formal system as hypothesised.

— Rule 1: The Difference Rule
  The quantum of damages is the difference between the plaintiff's patrimony (or estate) after the damage-causing event, and what it would have been had the event not taken place.[10]
— Rule 2: Damages is a Fact
  The quantum of damages is a fact that has to be determined by reference to the specific circumstances of the case. There is no standard formula to calculate it.

Du Plessis (op. cit.) could not find any other rules that can be deemed axiomatic in nature. He surmised that no other axiomatic rules exist within the bounds implied by the scope of consideration, otherwise such rules would already have emerged by now. This view can also be inferred from the remark of Judge of Appeal Van Blerk

8 The reader may then enquire why such heavy emphasis is placed on the court's involvement. However, keep in mind that unless the parties reach an agreement as to quantum, or the plaintiff withdraws from the case, the dispute will advance to the point of a court hearing.

9 Commonly referred to as 'Costs follow the event.'

10 This rule was introduced to South African law by *Union Government v Warneke* 1911 AD 657, and is widely recognised as the prevailing view in South African law (Reyneke 1976:27).

in *Erasmus v Davis,*[11] where he stated that 'the quantification of damages is not done according to formulae or hackneyed practice rules' [author's translation].

6.2 Formalisms

The lack of additional fundamental rules of an axiomatic nature has created fertile soil for the formation of informal rules that are commonly applied by actuaries and legal practitioners. Koch (unpublished a), Koch (1984), Koch (unpublished b), Koch (2011) and Milburn-Pyle & Van der Linde (unpublished) made an in-depth study of these informal rules, or 'formalisms'[12] as they are sometimes referred to. It is the experience of the author that our legal practitioners tend to view the formalisms as a point of departure in pre-trial negotiations between counsel for the plaintiff and the defendant. Koch (2011: 112) records that from there onwards the focus of counsel tends to shift towards reaching agreement on compensation that is acceptable to both plaintiff and defendant. The dictates of science and logic may be pushed to the wayside if doing so aids the process of reaching agreement. Should the plaintiff and the defendant reach a settlement on the quantum of damages before such time that the matter is being heard by the court, then that settles it. In the author's experience the vast majority of cases have the quantum of damages agreed to by negotiation, and there is no need to put any further evidence before the court. The court's role regarding quantum itself is then limited to attaching its stamp of approval to the negotiated quantum.

It is suggested that the operation of our adversarial system is likely to prevent the mindless application of any formalism without due consideration of the facts surrounding the dispute. Hence the application of formalisms may well streamline the fact-finding process, without blind adherence to the formalisms.[13]

6.3 A Decision of the Trier of Fact

Should a position of stalemate be reached, the fact in dispute (i.e. quantum) becomes the focus of the trier of fact (i.e. the court). In a High Court of South Africa the person assessing the damages will usually be a single judge.

Two branches of law are of particular relevance when the court has to assess quantum. These are procedural law and the law of evidence. Procedural law defines a formal process that has to be followed by parties to a dispute, and also by the court itself as trier of fact, when the court goes about its business of establishing a fact. The law of evidence describes how a fact in dispute may be proved (or disproved) to the satisfaction to the trier of fact (Du Plessis, op. cit.). In a form-substance continuum, it is suggested that procedural law lies closer to the 'form' end, and the law of evidence closer to the 'substance' end.

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11 *Erasmus v Davis* 1969 (2) SA 1 (A) at 5.

12 For the purpose of this paper, 'formalism' is not a synonym for 'formal system'.

13 A reviewer of this paper has commented that instances of mindless application of formalisms do occur in practice.

Our laws of evidence and procedure are adversarial,[14] when it comes to the assessment of quantum (Du Plessis, op. cit.).

The process followed to determine the fact in dispute i.e. the quantum of damages, is akin to a boxing match fought by the two parties – the plaintiff and the defendant. Punches are thrown; no quarter is asked for and none given. Thus it can become a messy affair, even though there are firm rules that direct the match and set boundaries of acceptable tactics. The rules are designed with the aim of making the match fair, even though one party will eventually gain the upper hand. Each party has the right to submit evidence to the court, which includes the right of submitting expert evidence. The aim of evidence is to sway the view of the trier of fact in the party's favour. The trier of fact plays the role of an impartial referee that does not get involved in the fight. Generally speaking he does not ask any questions.[15] He merely considers the evidence put to him. In particular, he listens to questions that counsel puts to the expert witnesses and witnesses of fact, and the replies of the witnesses. He considers the documents and other exhibits that have been submitted to the court. After having been presented with all the evidence, he delivers his finding as to the quantum. This will be a single numerical value.[16]

The adversarial approach above may be experienced as foreign by many actuaries. The actuary has to be aware that he is not the trier of the fact in dispute. He does not assess quantum. He assists the court. Also, he does not establish facts in general. Consequently, what would be considered an acceptable approach in other fields of actuarial practice may be unsuitable here.

Within the structured setting of our court proceedings and presuming a formal system of law, two observations follow. Firstly, science and logic carry more weight. Secondly, the court is bound by Rules 1 and 2, and may only venture into the fuzzy area beyond these rules for as long as the argument being advanced is not in breach of either Rule 1 or Rule 2. It is suggested that Rule 1 and Rule 2 override any 'formalism',[17] should a conflict arise.

Rule 1 requires the trier of fact to drill down into the constituent elements of the economic value of human capital – a concept addressed by Adam Smith in his seminal work, *The Wealth of Nations* (1776). In any situation where some components of the economic value have yet to be realised it becomes a complex exercise and specialist assistance in the form of expert opinion may well lend assistance to the court.[18]

Rule 2 might seem of little consequence to the non-legal mind. Our procedural

14 as are most of those of the Anglo-American jurisdictions. This is in contrast with the other major system in use – the inquisitorial (and less combative) approach that stems from Continental Europe (Du Plessis, op.cit.: 12).

15 In practice the judge may occasionally have a question or two.

16 Readers interested in a detailed coverage are referred to Schmidt & Rademeyer (2003).

17 where formalism has the meaning as set out in section 6.2 above.

18 The difficulty faced by the judge has been well stated in *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392–3: 'The art or science of foretelling is not numbered among the qualifications for judicial office'.

law, however, which dictates (amongst other things) the administrative procedure that the court shall follow in its fact-finding mission, is quite prescriptive. The fact-finding court is bound by Rules 1 and 2. Facts vary from case to case, and hence previous awards of damages in other cases offer limited guidance. That is, 'case law' loses much of its probative value[19] (Du Plessis, op. cit.).

Under such circumstances the court is more likely to consult expert opinion evidence (of which actuarial expert opinion evidence forms a subset) presented to the court, particularly when faced with the interpretation of Rule 1. The expert offering an opinion should keep in mind that he is assisting the court in assessing damages within the aims and bounds implied by Rule 1 and Rule 2. He should therefore be well acquainted with the two rules and apply them as guiding principles. His opinion should state the facts on which he bases his opinion, as well as his valuation of the plaintiff's patrimony, both before and after the damage-causing event.

7. SOUTH AFRICAN COURTS' REQUIREMENTS FOR EXPERT WITNESSES

Our law provides surprisingly little guidance to expert witnesses. The core of the guidance can be summarised by two simple rules. In what follows, we shall limit consideration to actuarial expert opinion evidence, although the remarks apply equally to other experts.

7.1 The Impartiality Rule

In terms of this rule, the primary duty of the actuary acting as expert witness is to the court and not to the client who instructed him. This duty is neatly summarised in the *Huma* case[20] and similar statements have frequently been made by our courts:

> … the value of an expert is not to espouse and further the cause of a particular party, but to assist the court in coming to a proper decision on technical and scientific matters. It should therefore at all times be remembered that an expert is primarily there to assist the court and not necessarily to further the cause of his particular client to such an extent that he loses objectivity and in fact undermines his client's case.

19 It might appear that the court is assigned a near-insurmountable task. In practice, however, in an attempt to settle the dispute expeditiously, the parties often negotiate amongst themselves one or more 'facts' that are relevant to the assessment of damages, regardless of whether such facts are indeed true or not. In the author's personal experience, the court will usually agree to go along with the parties' negotiated 'facts', regardless of the truth or otherwise of these facts. In doing so, the plausible range of damages is usually narrowed and the trier of fact can concentrate his efforts on the matters of fact that remains in dispute. Presumably this practice is what is referred to by Koch (2011: 112) when it is noted that 'Lawyers, including the courts, may disregard science and logic if this is necessary to achieve agreement.' However, such finer points of the law of evidence are beyond the scope of this paper.

20 *S v Huma* 1995 1 SACR 409 (W)

Meintjes-Van der Walt (2003a) shows the distinction between the functions of an expert witness and an advocate, and such distinction can easily be extended to an actuary acting as expert witness.

Actuarial expert witness	Advocate
Independent	Partisan
Neutral	Biased
Knowledgeable about actuarial science	Knowledgeable about law
Not knowledgeable about law	Not knowledgeable about actuarial science
Gives evidence to the court	Represents the client
Does not argue the case	Argues the case
Assists the trier of fact	Persuades the trier of fact

A simple test can be used to establish impartiality. In terms of this test, the expert should consider whether he would express the same opinion if he was given the same instruction by the opposing party.

The impartiality rule has the capacity to put the expert witness in a difficult position. His primary duty is to the court, and if his honest opinion is to the detriment of the party who instructed him, then that does not absolve him of the duty to express his honest opinion to the court.

7.2 The Basis Rule

Meintjes-Van der Walt (2001) examines the question whether a few plain rules can be identified that may assist our courts in ruling on the admissibility (or otherwise) of expert opinion evidence, which may also assist our courts in evaluating the opinion itself. One particular rule – the so-called 'basis rule' – provides guidance that is relevant not only to the court but to the expert witness as well. This rule can be restated within an actuarial environment, as follows. The actuary acting as expert witness expresses an opinion. The facts or data upon which this opinion depends and the reasoning followed to arrive at the conclusion should be provided.

After consideration of relevant case law, Meintjes-Van der Walt (op. cit.) concludes that failure to abide by this rule will not usually lead to the evidence being deemed inadmissible, but it might well influence the weight that the court attaches to the opinion.

Rule 36(9) of the Uniform Rules of Court[21] sets down South African procedural law regarding the rendering of expert evidence in our High Courts.

> 36(9) No person shall, save with the leave of the court or the consent of all the parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall –

21 Department: Justice and Constitutional Development. *Uniform Rules of Court*. www.justice.gov.za/legislation/rules/UniformRulesCourt[26jun2009]. Accessed 19 July 2012.

> *(a)* not less than fifteen days before the hearing, have delivered notice of his intention so to do; and
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> *(b)* not less than ten days before the trial, have delivered a summary of such expert's opinions and his reasons therefor.[22]

The precise meaning of sub rule (b) was the subject of analysis in the important *Coopers* case.[23] In this judgment it was stated

> [A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which lead to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.[24]

Meintjes-Van der Walt (2003b: 371) observes that it is trite law that a court is not bound by expert evidence. If the expert and the party calling him wish the court to value the evidence, then the test of 'appreciable assistance' mentioned in section 2 should be passed.

In jurisdictions such as ours that use an adversarial approach, it is common for each party to a dispute to appoint its own expert witnesses, should the dispute be complicated enough or the likely quantum large enough to warrant the involvement of experts.

The *Coopers* judgment also stated:

> Even bearing in mind that the addressee of the summary is probably also an expert, I am of the opinion that the addressee may not be able to evaluate the opinion, so as to enable him to advise the party consulting him thereon, if he is not informed in the summary of 'the reasons' for the opinion.… I am of the opinion that the summary must at least state the sum and substance of the facts and data which lead to the reasoned conclusion (i.e., the opinion).[25]

Furthermore:

> Where the process of reasoning is not simply a matter of ordinary logic, but involves, for example, the application of scientific principles, it will ordinarily

22 Administrative decrees can be made with the effective result that a period longer than ten days is required. This has occurred in the North Gauteng Division of the High Court where the period of ten days has been extended to twelve weeks. This paper shall disregard the North Gauteng rule, since doing so ought not to invalidate the analysis.

23 *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 3 SA 352 (A). Note the weight of the judgment's authority, which is implied by the fact that it is a Court of Appeal judgment.

24 Ibid. at 371 G

25 Ibid. at 371 G-H

> also be necessary to set about the reasoning process in summarised form. The addressee should then be in a position to evaluate the opinion, and be in a position to advise the party consulting him whether the opinion can be controverted and, if so, what evidence is required to do so.[26]

It is suggested that the actuary acting as expert witness should provide sufficient information to allow another actuary to form an independent evaluation of his opinion. In particular, sufficient information should be given to allow another actuary to rebut the opinion – if warranted – to the satisfaction of the trier of fact, bearing in mind that such trier of fact will be an actuarial layperson.

An anonymous reviewer of Lowther (op. cit.: 100) reported that many South African actuaries do not provide detailed year-by-year tabulation of how capital sums are calculated. This is also the personal experience of the author. It is suggested that this omission is not consistent with the principles enunciated in *Coopers*. It may well impact on the trier of fact's evaluation of the opinion, especially if two divergent opinions are presented by expert witnesses, one of them in a transparent manner, and the other in a 'black box'-format that does not allow close scrutiny or the opportunity of rebuttal. In the interest of fairness within an adversarial system, the relative weights assigned by the court may well be in favour of the more transparent opinion.

8. SANCTIONS THAT A COURT MAY APPLY AGAINST AN EXPERT WITNESS

8.1 Court's View of Admissibility and Weight

Rule 36(9) spells out one of the sanctions available to a South African court, if the presentation of the expert's opinion falls short of the procedural and evidential requirements of our law, including the requirements of the court enunciated by *Coopers*.[27] The party instructing the actuary (the actuary's client) may be prohibited from calling the actuary to testify. Also, the court may prohibit the party from filing an actuarial report in the records of the court. The non-compliant actuary will only be allowed to testify if all the parties involved agree to it or if the court allows the testimony. If the actuary's testimony is ruled inadmissible, then the actuary's opinion has limited or no value to the actuary's client. Alternatively, the court may allow the evidence, but to attach little weight to it.[28]

8.2 Adverse Commentary in Judgement

Ellis (2003: 308–9) cites an Australian example of the sanction of the court that is displeased with an expert witness. Any actuary who wishes to protect his professional

26 Ibid. at 371 H to 372 A

27 Ibid.

28 *Boland Construction Co (Pty) Ltd v Lewin* 1977 (2) SA 506 (C) at 508 '… the sanction would not be that the summary should be set aside, but that the witness may be discredited in court.'

reputation may well take note. In this particular case,[29] the architect acting as expert witness for the defendant had previously suggested in an article that:

> … the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he does he is 'fair game'.

The judge then commented as follows:

> The whole basis of Mr. Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth…"Pragmatic flexibility" as used by Mr. Goodall is a euphemism for "misleading selectivity".

Anglo Group Plc v Winther Brown[30] is an example from England where the court recorded in its judgment that it chose not to rely on the evidence of an expert being called, due to perceived partisanship. The partisanship was illustrated in an article the expert wrote a few years previously, stating:

> My duty as an expert was simply to help my client win his case on the facts as defined in the statement of claim on truthful expert evidence that I had compiled, examined and presented – nothing more.

He went on:

> It does not mean that an expert must be impartial as demonstrated by the fact that if asked same question by either party he would give the same answer.

It is to be expected that any party to a dispute would be hesitant to employ an expert if the expert has previously drawn adverse comment from a court, or whose evidence was rejected, and thus was of no use to the court or the party, due to partisan behaviour of the expert.

8.3 Reporting Misconduct to a Professional Body

In England the court can make a complaint to a professional body that the expert belongs to, relating to misconduct of an expert witness during the course of a trial (Pugh & Pilgerstorfer, unpublished: 14–5).

It is not known what the position in South Africa is. However, given that our law of evidence is an offshoot of the English version (Du Plessis, op. cit.: 7), a similar approach may well be considered appropriate.

29 *Cala Homes (South) Limited v Alfred McAlpine Homes East Limited* (1995) FSR 818 at 841-843
30 *Anglo Group plc v. Winther Brown &Co. Ltd and BML (Office Computers) Ltd* ITCLR 559 [2000]

9. PROFESSIONAL GUIDANCE FOR ACTUARIES

The actuary is not qualified to lay down law, be it by training or experience. That role is reserved for the judiciary. By the same token, the actuary is not qualified to interpret case law.

Furthermore, the environment is adversarial. This leads to a situation where the actuary has less control over the process, compared to what the actuary would be accustomed to in other areas of actuarial practice. The actuary can be used as a pawn in a battle of which he has little appreciation. Actuarial opinion often depends on the availability of suitable data, yet such data may not be available, or fictitious data may be provided. Alternatively, the actuary's opinion may be sought on the quantum of damages arising out of a range of plausible facts. There is little the actuary can do if the party requesting his work files only selects sections of his work with the court.

Lowther (op. cit.) considered guidance provided by the UK actuarial profession. In 1994 our UK counterpart made guidance available to its members in the form of GN24: The Actuary as Expert Witness.[31] It was classified as 'Recommended Practice'. The scope of the guidelines extended to actuaries in the UK only, not worldwide. In 1999, England's amended Civil Proceeding Rules came into effect. Following this, GN24 has been substantially reviewed in 2000. With effect from 9 January 2009, the status of GN24 has been effectively diminished by its withdrawal and the simultaneous issue of an Information and Assistance Note (IAN) titled: 'The Actuary as Expert Witness'.[32] The content of the IAN is quite similar to that of GN24. However, the status of an IAN is such that it is not mandatory for members of the UK profession to have regard to an IAN.

Lowther's (op. cit.) view is that the introduction of the IAN to replace GN24 – thereby diminishing its status – may be attributed to the lower level of control that the actuary has over the process.

Detailed examination of UK professional guidance does not form part of this paper's consideration. However, one particular issue needs to be pointed out. The UK IAN and South African guidance from our law appear to be in conflict in one particular aspect. It concerns the level of motivational detail included in the statement of opinion. According to par 3.15 of the IAN:

> In compiling the report, an actuary should give consideration, in consultation with the instructing solicitor, as to whether it would be beneficial, and appropriate, for the report to give sufficient information to enable another actuary to be able to reproduce the calculations to an appropriate degree of accuracy.

31 The Actuarial Profession. *The Actuary as Expert Witness*. www.actuaries.org.uk/research-and-resources/documents/information-and-assistance-note-ian-actuary-expert-witness-version. Accessed 30 July 2012.

32 One can only speculate about the reason or reasons for the weakening of UK professional guidance. Reinstatement of GN24 is however currently being considered by the UK profession.

UK professionals thus enjoy some leeway as to the level of detail included in their reports, and specifically whether the level of detail should be such as to allow an independent check of their workings by another actuary.

From a reading of *Coopers*, it is suggested that our common law does not support this level of freedom. In particular, the opinion of the actuary is best not presented in a manner that renders it incontrovertible. Instead it is preferred that the presentation of the opinion is in a format that allows independent evaluation.

The South African actuarial profession does not offer any specific guidance to its members acting as expert witnesses. It is recommended that any professional guidance should be conscious of the constraints implied by our law. Professional guidance should be flexible enough to accommodate both an acceptance and a rejection of the formal view of law. Also, professional guidance cannot be seen to interfere with legal process. This may place the profession at risk of being seen as a hindrance, and may endanger the revered position that our profession holds in the eyes of the courts. Overall, it is suggested that any professional regulation should err on the light side.

10. CONCLUSION

The approach followed in this paper involves borrowing a commonly-used framework from the mathematical sciences (that actuaries are assumed to be familiar with) and then superimposing it on our law. By hypothesising a situation that is well described by classical actuarial science and is simple and sufficiently narrowly defined for the purpose of determining the particular situation's position at law, it was shown that the divide between actuarial science and our law can be bridged so that actuaries and the courts talk the same language. Once actuaries are aware of what exactly the courts are trying to achieve, they can frame their opinions in a way that ought to assist the courts in reaching their objectives.

The high esteem in which our courts hold our profession comes at a price. Actuaries must be conscious of the fact that they are guests in court. Befitting conduct is strongly advised, keeping in mind that the environment may be experienced as foreign by many actuaries. *Si fueris Romae, Romano vivito more.*[33]

A few simple guidelines on appropriate standards of conduct for expert witnesses for the benefit of our courts have been formulated by our lawmakers. In the case of actuarial experts, these may be stated in the form of two rules. Firstly, the actuary must provide an impartial opinion. Secondly, he should provide a comprehensive basis for his opinion. Of particular importance is the judgment in the *Coopers*[34] case, which analyses the basis rule in more detail and, it is submitted, casts doubt on one particular aspect of received actuarial wisdom. Every actuary acting as expert witness is advised to be well acquainted with *Coopers*.

33 When in Rome, do as the Romans do.
34 supra

The South African actuarial profession has not made any practice-specific guidance available to its members acting as expert witnesses. The need for and form of professional regulation is an area where discussion amongst members of the profession may be fruitful. The profession will have to tread lightly though, due to the large number of external (non-actuarial) constraints present in the practice area.

11. DISCLAIMER

This paper, although it covers material relating to the law, has been written by an actuary and not a lawyer. Its sole purpose is to stimulate debate within the actuarial profession. It does not purport to constitute legal advice. The author does not accept any responsibility for any reliance placed on it by third parties. Any reader who wishes to obtain legal advice or advice relating to matters where legal input may be of benefit, should seek such advice from a suitable qualified legal expert. The author has however given actuarial expert testimony regarding loss of earnings, both written and oral.

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