ACTUARIAL SOCIETY OF SOUTH AFRICA

THE ACTUARY AS EXPERT WITNESS: GUIDELINES FROM SOUTH AFRICAN LAW

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Setting the scene

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- Past wrongdoing caused injury and loss of future earnings
- Injured party seeks monetary compensation from wrongdoer
  - Use legal process as instrument
  - Once and for all, even though the future is uncertain
  - Assisted by an appointed legal representative (attorney)
- Attorney seeks actuarial advice on an amount which represents suitable monetary compensation for the loss of future earnings

View of a discipline (1)…actuarial science

View of a discipline (2)…law

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Bridging the divide

A formal system

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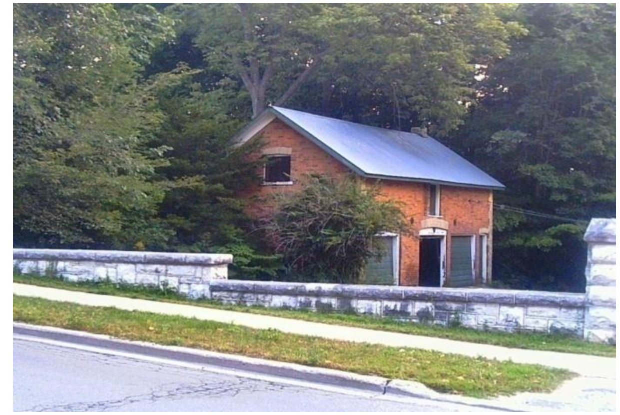
- It provides a logical base for a generalised structure of some kind
- Contains definitions
- Contains a (small) set of axioms that are accepted without proof
- Starting off with one or more axioms, logical deduction is applied to establish theorems that are necessarily valid

Chosen bridge design: formal system derived from law, applied to a very simple structure



Select a group of simple structures

(=scope: known earnings before injury, no

promotional prospects, zero residual earnings)

Isolate building blocks

(=axiomatic rules to

determine quantum for any

Individual that fits the scope)

Axiomatic rules of determining quantum: a strictly legal view

- Rule 1: The Difference Rule

  Quantum is the difference between the estate (or patrimony) after the damage – causing event, and what it would have been had the event not taken place.

- Rule 2: Damages is a fact

  No standard formula (except Rule 1) exists to calculate quantum. It has to be determined by reference to the specific circumstances of each case.

Practical application of axiomatic rules

- Calculate difference in estate (or patrimony) before and after event
- Patrimony may be interpreted as human capital's economic value
- Economic value and its determination has been extensively researched
- The fact in dispute i.e. quantum must be determined within the bounds implied by our procedural law, and our law of evidence

Timeline of pursuance

- Timeline of events in order to determine quantum include:
  - Loss-causing event
  - Appointment of legal representative
  - Notification of loss
  - Evaluation of loss
  - Estimation of quantum
  - Court hearing to assess quantum

  - Final assessment of quantum by highest ranking court, without right to appeal

South African law of procedure to establish quantum

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- Adversarial, akin to a boxing match – winning is everything!
- Punches thrown; no quarter asked for and none given
- Firm rules direct the match and set boundaries of acceptable tactics (procedural law; law of evidence)
- Trier of fact acts as impartial referee who considers the performance of each boxer
- Performance demonstrated by presentation of evidence aimed to sway the referee
- Evidence may include the opinions of so-called 'expert witnesses'
- Anything happening outside the boxing ring may not be taken into account by the referee
- Trier of fact decides on quantum after evaluation of all evidence and arguments of counsel

Formalisms – a shortcut to quantum

- Informal rules that assist in arriving at an approximate value of quantum
- Commonly applied by
  - actuaries
  - and legal practitioners
- Extensively described for a large scope of potential applications
- Tend to be seen as point of departure in pre-trial negotiations on quantum
- Science and logic are not supreme during negotiations – the main aim is an agreement on quantum, reached by negotiation
- Deviations from formalisms are acceptable, should they promote agreement
- Agreement ends the dispute – the need for a court hearing ceases

Breakdown of negotiations…quantum is determined by the trier of fact

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- Formal court hearing – tightly regulated adversarial environment
- Science and logic carry more weight (supposedly!)
- Axiomatic rules 1 and 2 of quantum override other considerations
- Expert should keep in mind the axiomatic rules of quantum, and formulate his opinion accordingly
- Expert should abide by the required standards of conduct

South African courts' requirements for expert witnesses: two rules

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- Impartiality
  - The actuary's primary duty is to the court, not to his client
  - A simple test: would the opinion remain the same if the opposing party requested the opinion?
- The basis rule
  - State data, facts and reasoning leading to the conclusion
  - Where scientific principles are applied (as opposed to ordinary logic), set out the reasoning process in summarised form
  - A similarly qualified expert must be put in a position to
    - evaluate the opinion
    - establish whether the opinion can be controverted, and if so, what evidence is required to do so.

Sanctions that the court may apply to deviant experts

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- Admissibility and weight
  - Expert not allowed to testify in court
  - Expert's report not filed in court records, and thus inadmissible
  - Even if admitted, the court may attach little weight to the expert's opinion
- Adverse commentary in judgment
  - Harmful to the expert's professional reputation
- Reporting misconduct to a professional body

Professional guidance

- South Africa: no practice-specific guidance
- UK: Information and Assistance Note (IAN) titled ‘The Actuary as Expert Witness’
  - Not mandatory to have regard to the IAN
  - ‘black box’ approach is controversial
- Potential professional guidance for SA actuaries
  - Unfamiliar environment

    e.g. adversarial nature of relevant branches of law
  - Many barriers (both soft and hard) faced by the expert
  - Recommendation: professional guidance should err on light side