

Towards best practice in the actuarial assessment of claims for maintenance against deceased estates

By Mickey Lowther and Jonathan Mort

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ABSTRACT

This paper begins to record best practice in the actuarial assessment of claims for maintenance against deceased estates in South Africa. Although this is a small field of actuarial practice, it is in the public interest that generally accepted standards be agreed upon. The paper applies an actuarial quality framework to identify aspects of the field. The authors then populate each aspect from their legal and actuarial experience respectively, and their interactions with other practitioners.

KEYWORDS

Maintenance claims; deceased estates; surviving spouses; duty of support

CONTACT DETAILS

Mickey Lowther BSc FASSA, 8 Aloe St, Newlands, Cape Town, 7700
Tel +27(0)21 683 2909; Email: actuary@mweb.co.za

1. INTRODUCTION

1.1 The aim of this paper is to initiate debate on best practice in the actuarial assessment of claims for maintenance against deceased estates in South Africa. The authors refer to them as 'maintenance claims' as opposed to claims for compensation as a result of wrongful injury or death (these being 'compensatory claims').

1.2 Each author brings a different contribution to the research. Jonathan Mort is a lawyer, with experience inter alia in trusts, estates and retirement funds. Mickey

Lowther is an actuary with a special interest in professional conduct, as well as experience in maintenance claims and retirement funds.

1.3 Actuaries are often instructed by executors, estate beneficiaries or family members to calculate the quantum of maintenance claims, usually in respect of surviving spouses and minor children. The various Masters of the High Court, who are there to serve and protect the public in respect of deceased estates, often insist on an actuarially formulated maintenance claim. The authors hold that it is in the public interest that standards for such assessments by members of the Actuarial Society of South Africa ('the Actuarial Society') be agreed and maintained. In so doing, actuaries will be better able to deliver the 'professional promise' that they are required to keep in terms of their Code of Professional Conduct. This promise is to maintain the capability to deliver a quality actuarial service that is up-to-date, ethical and subject to professional oversight.

1.4 The Actuarial Society has formed a practice committee to encourage community of practice in the area of compensatory, maintenance and similar claims. This paper aims to contribute to the committee's work, which includes encouraging research and formulating guidance, so that two actuaries would not give two widely differing assessments without good reason.

1.5 Unlike compensatory claims, a maintenance claim does not arise out of delict. Rather, a maintenance claim places a value on a duty of support that has been interrupted (usually by death). It is therefore to be expected that different principles of law apply with respect to the computation of maintenance claims and compensatory claims respectively. In general terms, a maintenance claim envisages financial support from the deceased estate that will enable (at best) the claimant's standard of living not to deteriorate in the context of the resources of the claimant and the deceased. By contrast, a compensatory claim evaluates the likely financial support that the deceased would have provided, had he/she not died.

2. METHODOLOGY

2.1 The concept of an actuarial quality framework was developed by the Financial Reporting Council (2000) to facilitate its oversight role of the UK actuarial profession. The framework suggests various drivers of a quality actuarial service.

2.2 Lowther (2011) reviewed practice in the actuarial assessment of damages for lost income and lost support, commonly requested in compensatory claims. This paper follows a similar approach, with the authors, from their experience, analysing the topic by the various aspects of an actuarial quality framework, rather than listing an unconnected series of technical points.

2.3 The actuarial quality framework developed in Lowther (2011: p89) used the following drivers:

TABLE 1 An Actuarial Quality Framework

Technical Methods and Skills	Normative Capabilities	Environment
The reliability and usefulness of actuarial methods	Ethics and professionalism of actuaries;	Professional
Technical skills of actuaries	Communication of actuarial information and advice;	Regulatory
	Other normative capabilities	Commercial

2.4 For ease of understanding, the drivers are dealt with in the following order. A brief review of the regulatory environment is reported in Section 3. Ethical and other normative issues arising from this environment are discussed in Section 4. Relevant technical methods and skills are discussed in Section 5, and in Section 6 professional oversight and the commercial environment are discussed.

3. THE LEGAL ENVIRONMENT

3.1 Duty of Support

3.1.1 In our common law, the duty of a parent to support a child continues after the parent's death as an obligation on their estate. A similar duty between spouses is specifically created by the Surviving Spouses Act.¹ As mentioned in the introduction, this is a completely different legal framework to the law of delict governing compensatory claims for wrongful loss of support.

3.2 The Estates Act²

3.2.1 The overarching legislation that governs the winding up of estates is the Estates Act. This Act provides for the appointment of an executor to wind up an estate.³ It is the executor who has the sole right and duty to include a maintenance claim in the liquidation and distribution account,⁴ but a quasi-judicial process is required to be followed if a claim is rejected.⁵ In our experience, most often it is the executor who will request an actuarial report on behalf of the estate. Alternatively, the claimant will request a report, and submit it to the executor in support of their maintenance claim. In the latter case, there is often contestation between the beneficiaries of the will and the claimant, with each party possibly consulting their own actuary. (As discussed in Section 4 below, actuaries must nevertheless be impartial 'experts' and not 'advocates'

1 Maintenance of Surviving Spouses Act, No 27 of 1990

2 Administration of Estates Act, No 66 of 1965

3 Section 13

4 Section 33

5 See section 32: the executor may require the claim to be confirmed in an affidavit, or to appear before the Master or a magistrate to be examined under oath in respect of such a claim.

for their principals.) As a claimant has recourse to the High Court in respect of a rejected claim,⁶ it is important, in order to avoid unnecessary legal costs and delays, for executors to use their discretion in a way which will be fully defensible in law; and equally for a claimant or a disgruntled beneficiary to appreciate properly the factors which may permissibly inform the computation of a maintenance claim.

3.3 The Master of the High Court

3.3.1 The executor submits the estate account to the regional Master for approval, *inter alia*, to pay the claims against the estate.⁷ The Master may require a voucher in respect of a claim against the estate,⁸ and typically does so in respect of a maintenance claim. Such a voucher could be the actuarial report, if (as discussed in Section 5 below) the actuary has been able to address all the relevant issues. Dissatisfied claimants or beneficiaries may object to the Master regarding a claim and/or its quantum as decided by the executor.⁹ As a maintenance claim must be met before the dutiable estate is determined¹⁰ the South African Revenue Service ('SARS') also has an interest in the validity of a maintenance claim and may object.¹¹ In practice, if there is no estate duty consequence to the admission of the maintenance claim,¹² the Master usually accepts the decision. As discussed under 3.5 and 3.6 below, there are not many reported cases, especially recently, regarding the quantum of maintenance claims.

3.4 The Surviving Spouses Act

3.4.1 The Surviving Spouses Act, as amended, provides that the survivor of a marriage that is dissolved by death shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.¹³ The Act is very short, and the crucial section 3 is quoted in full below:

3. Determination of reasonable maintenance needs.-

In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

- (a) The amount in the estate of the deceased spouse available for distribution to heirs and legatees;

6 Section 33

7 Section 35

8 Section 35(2A)

9 Section 35(7)

10 Because it is a debt due by the deceased, per section 4(b) of the Estate Duty Act, No 45 of 1955. In one matter in which the writers were involved, the maintenance claims of the minor children substantially reduced the estate duty payable, and the executors were required to defend to SARS the quantum of the maintenance claim.

11 Estate duty, and related tax planning, is a large and ever-changing topic of its own, not dealt with further in this paper.

12 For example if the residue of the estate devolved on the deceased's widow.

13 Section 2

- (b) The existing and expected means, earnings capacity, financial needs and obligations of the survivor and the subsistence of the marriage; and
- (c) The standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.

Clearly, therefore, the quantum of a maintenance claim must have regard for the assets, income and expenses of the claimant,¹⁴ but may not exceed the net value of the estate.¹⁵ This in turn may be reduced by other valid maintenance claims if there are insufficient assets to meet all the claims in full. This situation is obviously quite different from compensatory claims.

3.4.2 As discussed in Section 4 below, actuaries therefore need to clarify the purpose of their instructions. For example, the response to a request to limit the calculation to the needs of the claimant and the earnings of the deceased should not be presented as if it were a complete claim for maintenance. In one recent matter that was referred to the Master of the High Court, the actuary was criticised by the Master for not giving an indication of the claimant's assets.

3.4.3 The requirements of section 3 are quite similar to the requirements of section 37C of the Pension Funds Act.¹⁶ The board of a retirement fund is required to allocate a benefit accruing on the death of a member between his nominees and any person who is a dependent as defined.¹⁷ There has been extensive development in the thought around the quantification of such allocations, particularly in the determinations of The Pension Funds Adjudicator.¹⁸

3.4.4 A claim by a surviving spouse in terms of the accrual system, or any other marital regime applicable to the marriage of the deceased, is a liability of the deceased estate.¹⁹ Such an accrual claim would therefore reduce both the maintenance claim by the spouse, and the amount of the estate from which the children may make a

¹⁴ This includes, it is submitted

- any benefit accruing to the claimant in consequence of the deceased's death, such as a life policy of which the beneficiary was the nominee,
- the death benefit payable from any retirement fund of which the deceased was a member
- the value of any benefit from any trust to which the beneficiary was entitled or would reasonably be entitled to receive

¹⁵ Note that the value of the estate would not include the death benefit payable by a retirement fund, nor any life policy owned by someone other than the deceased, or of which there was a nominee.

¹⁶ No 24 of 1956

¹⁷ This includes a legal dependent, a spouse or child whether or not financially dependent, a factual financial dependent and a person who would have become financially dependent on the deceased.

¹⁸ See for example *Nsele v Human Rights Commission Provident Fund* [2000] 7 BPLR 756 (PFA) and *Nieuwenhuizen v SAB Staff Provident Fund* [2000] 12 BPLR 1413 (PFA), *Motsoeneng v AECI Pension Fund* [2003] 1 BPLR 4267 (PFA) and the exposition in Hunter (2010) p 682 *et seq.*

¹⁹ See Meyerowitz at 15.81.

maintenance claim. However, if the surviving spouse is also the mother of the child making the maintenance claim, the surviving spouse's financial position would be improved by the accrual claim with a concomitant increase in the liability (see below) to maintain such children.

3.5 Claim for Maintenance against Estate of Deceased Parent

3.5.1 Unlike a spouse, there is no specific Act regulating the maintenance claim of a child, so reliance must be placed on common law principles and precedent arising from the few decided court cases. Meyerowitz (2010) highlighted the following issues:

- Both the father and mother are liable for the support of their minor children
- This duty does not cease on death, but is a debt resting on their estates
- It should follow that the burden of maintenance be shared between the estate and the surviving spouse, although case law suggests that a claim only arises to the extent that the surviving spouse is unable to maintain the child
- A minor's maintenance claim must be satisfied before any payments of legacies and inheritances
- Any benefits received by a minor from the estate must be taken into account in considering his claim for maintenance.²⁰

3.5.2 In *The Law of South Africa*, Joubert et al. (2011) also mentions that, as far as quantum is concerned, each case will be considered on its merits, but it seems that the court will look at the standard of living to which the child had been accustomed before the parent's death. There must be a need for support, so the court will determine whether the child has income which is sufficient for his/her support.²¹

3.5.3 Where there is a maintenance order against the deceased by the child in terms of the Maintenance Act,²² this merely indicates the amount of the maintenance order and is not necessarily determinative of a proper maintenance claim: the order may not take into account new circumstances of the child or a subsequent impoverished financial position of the other parent. The order may not even allow for inflation. Furthermore, the estate may be in a better financial position to support the child, for example through the receipt of the proceeds of a life policy. As discussed further in Section 5 below, it is unfortunately common that a parent simply ignores a maintenance order.

3.5.4 The primary liability of the estate is yearly or monthly payments and the claimant is entitled to refuse to accept a lump-sum settlement. However, in order to make instalment payments the estate would have to be kept open – which neither the executor nor the Master of the High Court would want. This is a potential negotiating

20 As well as, it is submitted, any other financial benefit accruing to the minor in consequence of the deceased's death. See fn 13 supra

21 See fn 18 supra

22 No 99 of 1998

lever available to the claimant. In *Oshry v Feldman*²³ the trial court refused to award a lump sum because such lump sum would either be too little or too much. The Supreme Court of Appeal however ruled that a lump sum should nonetheless be awarded.

3.6 Other Potential Claimants

3.6.1 In *Volks v Robinson*²⁴ the Constitutional Court decided not to impose a duty upon the estate where none arose by operation of law during the lifetime of the deceased; and therefore that the Surviving Spouses Act did not apply to heterosexual permanent life partnerships. There is however a law reform project under way in South Africa, considering the extent to which marriage-like relationships should be recognised in our various laws.

3.6.2 Legal duties of support could arise from court orders for maintenance. In *Hodges v Coubrough*²⁵ the Court ruled that maintenance for a divorced spouse is only claimable from the estate if expressly so stated in the divorce settlement.

3.6.3 A duty of support also exists towards parents and siblings, although this may be argued to be ‘weaker’ than the duty to a spouse or child.²⁶

3.7 The Matrimonial Property Act²⁷ and the Divorce Act²⁸

3.7.1 Occasionally, actuaries may also be instructed to calculate a capital value of future maintenance needs in a divorce matter. The monthly maintenance in these cases is generally decided by the parties (or by court order) and the role of the actuary is reduced to simply calculating the present value of the agreed monthly maintenance. Nevertheless, issues such as tax and contingencies may require consideration.

3.7.2 Actuaries may also be requested to assist in the calculation of an accrual claim on the termination of a marriage in terms of the Matrimonial Property Act. In terms of this Act, no interest may be added, and starting values are merely revalued with the change in the Consumer Price Index (‘CPI’). However, the ante-nuptial contract of the parties should be checked, as it is not uncommon for a provision to be inserted that the values of certain assets (the value of which is declared at commencement of the marriage as opposed to being excluded entirely from the accrual system) be calculated with reference to a specific index (for example the All Share Index) according to the nature of the assets reflected in the starting values, rather than CPI.

23 *Oshry v Feldman* 2010 6 SA 19 (SCA), 2009 6 SA 454 (KZD)

24 *Volks v Robinson* 2005 (5) BCLR 466 BC (CC)

25 *Hodges v Coubrough* NO 1991 3 SA 58 (D)

26 See Meyerowitz (2010), Joubert et al. (2011)

27 No 88 of 1984

28 No 70 of 1979

3.7.3 Whether or not an amount distributed as surplus in terms of Section 15 B or C of the Pension Funds Act is to be included in or excluded from the calculation of an accrual claim may require both legal and actuarial analysis: was the corresponding pension benefit to be included or excluded in terms of the ante-nuptial contract, had the surplus been apportioned (and thus reflected as a credit in the member surplus account) at the time of marriage? A discussion of the various factors that would influence this issue goes, however, beyond the scope of this paper.

3.7.4 A further area in which actuaries may be involved is the calculation of ‘pension interest’, as defined in the Divorce Act, in retirement annuity funds. The Act envisages splitting a member’s pension interest on divorce. In occupational pension and provident funds, the pension interest is defined as the withdrawal benefit, but for retirement annuity funds it is the contributions that a member has made “together with a total amount of annual simple interest ... calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of Section 1(2) of the Prescribed Rate of Interest Act 55 of 1975 ...”²⁹ In *Davehill v Community Development*³⁰ the Court ruled that the rate of simple interest is fixed at the time when interest begins to run. So the question arises: should the rate of simple interest be fixed at the date of inception of the marriage, or the date of each payment. Practitioners are advised to seek guidance from their principals, failing which they should draw attention to the lack of guidance, and clearly explain their method.

4. NORMATIVE ISSUES

4.1 Maintenance vs Compensatory Claims

4.1.1 Many of the normative issues discussed in Sections 6 to 8 of Lowther (2011) are relevant, and will not be repeated here.

4.2 Impartiality

4.2.1 Unlike compensatory claims, maintenance claims do not often reach the court, so the ‘built-in’ peer review of an actuary on the other side (Lowther, 2011: p 100) cannot be relied on. The actuary must therefore bear strongly in mind her duty, in the public interest, to be impartial. This can be difficult when instructed directly by the claimant, as it is only human nature to try to help those in need, and one may become unduly supportive of one side at the expense of the other.

4.2.2 In compensatory claims, the actuary’s expert report is in effect provided to the Court. In maintenance claims, irrespective of who instructs the actuary, the Executor should be entitled to rely on that report as an independent and impartial professional assessment of the actuarial claim, because it is the executor who has the primary duty

²⁹ S1 of the Divorce Act

³⁰ *Davehill (Pty) Ltd v Community Development* [1987] ZASCA 120; [1988] (1) All SA 388 (A)

to approve any claim, subject to the Master's review. The actuary should take particular care to maintain professional standards when instructed by a lay person.

4.3 Communication

4.3.1 Since the 1990s, it has been necessary to pass a communication course in order to qualify to be a member of the Actuarial Society. It is important that actuaries deploy their communication skills so that the recipients understand the advice given. A personal preference is that the first pages of the report should give the instructions, a brief overview of the methodology, the results, any problematic issues, and the caveats. Details of the data, assumptions and calculations should follow, perhaps in annexures. Whatever approach is chosen, actuaries must observe their Code of Professional Conduct, which requires a *conscious effort* to communicate effectively. As mentioned above, an important part of communication in maintenance claims is identifying what part of the complete legal maintenance claim process the actuary's report addresses.

4.3.2 One practitioner includes in his report a detailed justification for the use of mortality tables for an individual. He explains that the present value of possible overpayment is balanced by the present value of possible underpayment.

4.3.3 The authors strongly recommend attaching as an annexure the calculation spreadsheet, which is usually quite simple in maintenance claims. This practice makes a review of the claim by another actuary so much easier and less costly.

4.4 Misrepresentation

4.4.1 On purpose, or accidentally, the claimant or her attorney may present the actuary's report as the final and definitive maintenance claim, when (as discussed below) it could be based on dubious expense data, or may only cover part of the process (ie capital value of future expenses). Practitioners should develop a standard statement clearly setting out these issues, and adjust it appropriately for each report.

5. TECHNICAL METHODS

5.1 Maintenance vs Compensatory Claims

5.1.1 Most of the discussion of technical methods and actuaries' skills in Lowther (2011) is also relevant for the calculation of maintenance claims. Accordingly, the actuary establishes the amount of lost support in each future year, and then calculates a capital value allowing for inflation, mortality, discount, other contingencies and any offsetting resources. Crucially important, however, are the areas of difference. In compensatory claims, the actuary and instructing attorney are usually quite clear on the scope of the work. The court seeks to restore the plaintiff, as far as money can do it, to the position in which he would have been had the damage not occurred – *restitutio in integrum*. Koch (1993: p 273) describes this as 'not the right to support, but the value of the financial benefits expected from the breadwinner in consequence of this right'.

5.1.2 Relevant factors in assessing this value in compensatory claims include:

- As per the Assessment of Damages Act, insurance benefits payable as a result of the death may not be taken into account;
- The value of any accelerated receipt of inheritance however should be taken into account;
- Koch (1993: p 294) holds that a spouse's claim for support should be abated by reason of the support the spouse can draw from her own assets – although the authors point out that such assets may already be allocated for other purposes such as retirement savings; and
- If the resources of the deceased would have increased such that he would have likely provided increased financial support in the future, this should be taken into account.

5.1.3 However, informed by the legal framework discussed in Section 3 above, maintenance claims assess the value of the financial support that will (at best) enable the claimant's standard of living not to deteriorate. Relevant factors in assessing this value include:

- Information is needed on the extent of support that a child may expect from its surviving parent. In particular, increased support provided by the surviving spouse to a child should be taken into account;
- The claimant's future maintenance needs are subject to the chance that the deceased could not have afforded to provide them at any point;
- Then, once the capital value of the claimant's future income and expenses have been estimated, their assets need to be offset; and
- All assets, including the proceeds of insurance, should be taken into account, but subject to some of them already being allocated for other purposes.

5.1.4 It is obviously important for actuaries to understand and apply these nuances, and not merely provide a present value of future expenses.

5.2 Data

5.2.1 Adequate data regarding the claimant's future income and (especially) expenses is difficult to obtain. Some claimants may be tempted to overstate their expected future expenses, while others may end up understating their expenses through inadequate diligence, or by not taking into account future changes (for example increased future schooling costs for a baby, or increased medical expenses for an elderly person, or a depreciation provision for replacement of capital items). The actuary is not in a position to audit these expenses, beyond a reasonability check, and needs to state so in the report, requesting the executor to satisfy himself. Nevertheless, the actuary's 'reasonability check' could add value, for example, by pointing out obvious omissions or overstatements. Claimants sometimes include, as an expense, payments to a third party (for example, school fees for a domestic servant's child) as this could be seen as

an obligation in terms of S3(b) of the Surviving Spouses Act. However, the practice has been ruled inadmissible in *Seidel v Lipschitz*.³¹

5.3 Assets that should not be Offset

5.3.1 Assets that provide necessary support in kind to the surviving spouse should not be offset from their claim. The survivor's primary residence and motor vehicle are obvious items of this nature, as would be a usufruct over the primary residence. However, a second property or vehicle should be deducted. The inheritance of the primary residence by (for example) an eldest son, subject to a usufruct in favour of the surviving spouse, should probably be deducted from his claim.

5.4 Mortality

5.4.1 The discussion of mortality tables in Lowther (2011) is relevant to maintenance claims. However, it is the authors' opinion that (unlike compensatory claims) no provision should be made for the chance that the deceased would have died in any event. This is because the duty of support continues for the lifetime of the surviving spouse, or the minority of the child.³²

5.4.2 In *Seidel v Lipschitz*,³³ the Court decided that it was fair to both parties to use survival chances from life tables, balancing the chance of under- and over-compensation should the claimant survive shorter or longer than expected.

5.4.3 Mortality tables based on census data from the 1980s are still in common use, due to the lack of more recent reliable tables. This practice is increasingly criticised in litigation as not taking into account changes in mortality. Koning and Van der Merwe (2016) have initiated a discussion on a new set of tables, based on the 2011 census data, for compensatory claims.

5.5 Medical Inflation

5.5.1 The larger debate around whether the short- and long-term increase in costs of medical services and medical scheme fees are likely to exceed general inflation is also relevant in maintenance claims. The authors have seen reports assuming medical inflation 2% above CPI but pension increases 1% below CPI. The actuary should be able to justify such assumptions, and also apply them irrespective of which party has commissioned the report. On the other hand, as discussed in the next paragraph, there may be justification in explicitly giving the 'benefit of the doubt' against the estate, which has a duty to maintain the survivor.

31 *Seidel v Lipschitz* NO and others 2013 (WC) Unreported case 24960/11

32 In an informal survey, five out of five leading practitioners agreed with this practice. However, one of the anonymous scrutineers holds that the mortality of the deceased should be taken into account.

33 *Ibid*

5.6 Other Contingencies

5.6.1 The court usually adjusts the capital value of a compensatory claim for contingencies not yet taken into account in the calculation. These could be quite specific, such as saved transport expenses because the injured party no longer has to travel to work, or more general ones such as the possibility of not being employed throughout the period due to illness, retrenchment or disinclination to work. There is also the ‘model risk’ that the actuary’s assumptions with regard to interest, discount and mortality are inaccurate.

5.6.2 The income-related contingencies seem to be equally applicable to the capital value of the maintenance claimant’s future income, if any. However, for the capital value of future expenses, contingencies would be more related to the under- or over-estimation of maintenance expenses.

5.6.3 A related contingency would be the chance that someone else incurs a duty of support, for example, if the claimant remarries. Any deduction for remarriage would depend on the facts of the case. Tables derived by Thomson (1997) were sometimes used in loss of support claims, but are now obsolete *inter alia* because of being out of date, excluding black lives, and not being applicable to widowers. In any event, Koch (1993) has noted that, for the purposes of maintenance claims and divorce settlements the remarriage rates were much lower than Thomson’s rates due to the propensity of widows to avoid a financially prejudicial marriage. One practitioner reported that he avoids any explicit remarriage deductions, leaving it for the parties or the Court to decide. He also draws attention to constitutional discrimination issues, noting that a deduction for remarriage is not permitted in the assessment of damages in the UK and Australia.

5.6.4 Koch (1993) suggests that a positive contingency or margin be added to a maintenance claim because the estate has a duty to maintain the claimant for their lifetime – and there is a risk that the settlement amount will be inadequate. However, this suggestion does not seem to have been followed much in practice. A contingency deduction might also be justified by the argument that an up-front capital sum is an advantage to the claimant as it does away with the chance of future mismanagement by the estate (the ‘bird-in-the-hand’ argument).

5.6.5 Section 3(c) of the Surviving Spouses Act is clear that maintenance must be limited to what the deceased would have been able to provide. This is very relevant with a deceased who had retired and had a much younger spouse. This fact may require an adjustment, or at least a caveat. It is important for actuaries to think through these issues, and ensure that whatever approach is adopted is adequately communicated in the report. In the matter reported at 3.4.2 above, the actuary was also criticised for not taking into account the short duration of the marriage. There is no generally accepted

practice for such adjustment – the authors suggest dealing with it as a contingency to be allowed for by the Executor.

5.7 Date of Calculation

5.7.1 The ideal date for calculation is as at date of death of the deceased. The estate may then be looked to for interest until date of payment. The fact of the spouse's survival to the current time should of course be taken into account. If maintenance is calculated at a later date, an accounting investigation may be necessary into actual income and expenses that have occurred, including interim support commonly provided by estates. Furthermore, the actuary should make clear that if late payment interest is to be added by the estate, this should be from date of calculation, not from date of death.

5.7.2 Koch (2011) reports that Section 17(3)(a) of the Road Accident Funds Act³⁴ prohibits the payment of interest on damages in road accident matters until two weeks after the date of judgement. This has led to a general practice of not adding interest to past damages, and leaving the Court to add *mora* interest at its discretion. This precedent should probably not be followed in maintenance claims where a calculation date later than date of death is selected. Rather, the normal time value of money should be observed, in the opinion of the authors.

5.8 Earnings Capacity of the Survivor

5.8.1 Section 3(b) of the Surviving Spouses Act refers inter alia to the earnings capacity of the surviving spouse, irrespective of whether such spouse was in fact working at the date of the partner's death. As mentioned in 3.4 above, boards of retirement funds have grappled with similar issues to those facing executors. In particular, there are a variety of approaches to quantifying the extent to which the surviving spouse should be expected to support her/himself. The majority of trustees and advisers surveyed by Lowther (2014) reported that they would give consideration to the age and qualifications of the survivor, and not automatically grant lifelong support to a young, employable person.

5.8.2 A practitioner reported that he tries to get claimants to obtain a report from a remuneration expert on their earnings potential. He cautions other actuaries from inadvertently giving expert remuneration advice, unless they have capabilities in this field.

5.9 Rationale and Procedures for using Lost Share of Family Income to estimate the Capital Value of Maintenance

5.9.1 Some practitioners reported that they use a loss-of-income approach to calculate a maintenance claim where detailed expense information is unobtainable.

³⁴ Road Accident Funds Act No 56 of 1996

This approach could also form a check and maximum for the detailed method. One practitioner values a flat percentage of net household income before death for the life of the survivor, except in cases very close to retirement where post-retirement means can be estimated. He makes a deduction for earnings ability of the surviving spouse, unless they are too old or sick to work. The survivor's reasonable gross share of income is usually taken as between 60% and 85%, depending on income level and the number of children. Another practitioner cautions that this method may mask changes in ability to support, and the level of expenses, that would have applied in the future, for example, at retirement.

5.9.2 Given the extensive interrogation of the claimant's items of expense in *Seidel v Lipschitz*,³⁵ the lost share of family income method should probably be updated with an accurate calculation if a dispute arises.

5.10 Unpaid Maintenance

5.10.1 It is sadly common for a parent to ignore a maintenance order. Past unpaid maintenance would normally be lodged as an asset recoverable by the estate.

5.10.2 Although unpaid maintenance may have impaired the child's standard of living, such impaired standard of living should not, in the authors' opinion, be used as the basis to determine the future maintenance requirement. To do so would reward a breach of the maintenance obligation, which would be patently unfair. If necessary, alternate calculations could be made to illustrate the financial effect of the situation.

6. PROFESSIONAL OVERSIGHT AND THE COMMERCIAL ENVIRONMENT

6.1 Practice Committee

6.1.1 At the time of writing, the Assessment of Damages Practice Committee is working on a guidance note for the field. In that note, thought should be given to emphasising the differences between compensatory claims (in delict) and maintenance claims (under common law and the Surviving Spouses Act). The authors have submitted comments based on this research.

6.1.2 In particular, unlike compensatory claims, the actuary's report in maintenance claims may not often be reviewed by an actuary acting for another party. The Practice Committee should consider whether any form of quality control would be desirable. This could take the form of encouraging or requiring peer review between practitioners, combined with occasional sessional meetings. (In fact, the Actuarial Society's proposed new Continuing Professional Development requirements also encourage such peer review.) It should be remembered that the Actuarial Society has adopted

35 *Supra*

the International Standard of Actuarial Practice No. 1, which requires practitioners to consider whether any piece of work should be submitted for peer review – so that actuaries can demonstrate that they are keeping their professional promise to deliver a service that is technically correct and up to date, ethical, and subject to professional oversight.

6.2 Commercial Environment

6.2.1 Experienced practitioners have offered the following observations on operating a maintenance claim consultancy:

- The actuary should ascertain the reason for the claim, and make sure they know who is inheriting what. This practitioner normally insists on sight of the Liquidation and Distribution accounts and the will.
- The actuary should ensure that his/her report has commercial value. It is easy to produce an elaborate report which will not help to get to a fair claim.
- Take all parties into consideration. Where there are multiple maintenance claims, endeavour to have them calculated on compatible assumptions.
- Communicate with the executor, who may be an untrained relative rather than an experienced lawyer. The executor generally needs and expects a complete claim, not merely a present value of expenses. Be aware also that if a lawyer is involved, he may only have experience in compensatory claims and not appreciate the different approach needed for a maintenance claim.
- Be careful to give adequate attention to ‘nuisance’ claims. An actuary may have accepted (perhaps reluctantly, in the public interest) to report on a claim which has poor data, incompetent advisers, little chance of the fee being settled, etc. These parties still need full professional attention, and a slipshod attitude to such claims may lead to a professional complaint down the line.

7. CONCLUSION

This paper has made a start at identifying and recording best practice in the actuarial assessment of claims for maintenance against deceased estates in South Africa. The authors encourage the community of practitioners, led by the Practice Committee, to take the project forward, thereby keeping their professional promise to the public.

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