The impact of the RAF Statutory Cap

Legal practitioners, particularly those dealing predominantly with RAF matters, are by now aware of the *Elizabeth Jemma Sweatman v the Road Accident Fund* 2013 JDR 2821 (WCC) judgement.

This matter was heard on October 15 and 16 2013 and judgement was granted on December 3 in the Western Cape High Court. Even though there was consensus between the parties on most aspects of the case, there was a difference in the actuarial approach in computing the future loss of earnings. The respective actuaries adopted their own approach when it came to the application of the Statutory Cap in terms of s17(4)(a)(i) read with s17(4A)(b), which was introduced by s6 of the Road Accident Fund Amendment Act (19 of 2005) and came into operation on August 1 2008. The Statutory cap is directed at the higher income group. Most ordinary South Africans have earnings that are far lower than the statutory cap and, therefore, it has no effect on their claim for loss of earnings.

The approach used by the actuaries for Sweatman was that actual loss is calculated using a year-to-year approach, which makes allowance for mortality, tax and contingencies in each year, discounting it to the present day value. The loss in each year must be compared with the cap and the lesser of the two amounts should be used. The methodology used by the Road Accident Fund Actuaries was to project the actual loss for each year after tax and contingency but the difference comes in where mortality is not included. The value obtained is then compared with the cap value of each year and adjusted for annual inflation in the future and the lesser amount of the actual loss is discounted with interest and mortality. This methodology was applied in *Jonosky v the Road Accident Fund* 2013 (5)SA 356 (GSJ). According to the actuary for Sweatman, the capped loss was R5.3m. In the approach used by the RAF, the loss amounted to R3.7m. The effect of the two different methodologies made an impact of R1.6m. The general method of actuarially calculating the expected capitalised loss or expected present value of future loss is agreed by the actuaries.

In a broad sense the method involves projecting expected losses into the future, applying the tax tables, applying mortality, discounting the losses back to the date of calculation at the appropriate discount rate and summing all discounted loss to the expected present value. The biggest impact on the calculation is whether or not the cap is projected and applied before discounting in accordance with the Jonosky methodology or whether the cap is not projected and only applied after discounting as in the Sweatman methodology. According to the Jonosky methodology, if mortality is applied after the cap, it results in inconsistencies in the percentage impact of the cap between the different gender and age groups. This is due to the generally lower mortality rates for females and younger people and consequently the cap will have a bigger impact on these groups.

The cap, therefore, is presented as a gender and age bias. However, when applying the cap before mortality the result is a consistent percentage impact regardless of gender and age. In Sweatman, mortality is applied first, followed by the current cap. This means the cap is absolute but the percentage impact of the cap will be lower for females and older people. In Sweatman v the Road Accident Fund, Griesel J agreed with Sutherland J who held in *Sil and other v The Road Accident Fund* 2013 (3) SA 402 (GSJ) that “the purpose of the cap is to limit merely the sum to be paid and its purpose is not to interfere in the calculation of the loss”. The arguments persist in courts today; the only resolution will be a deci- sion by
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