

APN 701: DELICTUAL AND OTHER LEGAL MATTERS**Classification**

This version of APN 701 is classified as an Advisory Practice Note (APN).

Abstract

This APN provides guidelines to members involved with delictual or other legal matters. Delictual damages can arise from causes of action such as accidents, criminal or negligent acts, occupational injuries and diseases, commercial disputes etc. Other legal matters could include maintenance claims against deceased estates, divorce settlement or accrual calculations, unfair labour practices etc.

Purpose

The purpose of this APN is to provide guidelines for members acting as expert witnesses in matters such as these and to provide guidelines for the minimum content of an actuarial report in order to promote consistency and completeness of disclosure.

Legislation or Authority

Delictual matters are predominantly governed by common law. Various acts may also be applicable to delictual matters such as the Road Accident Fund Act 56 of 1996, the Assessment of Damages Act 9 of 1969 etc. Calculations for other legal matters may be performed in terms of the Maintenance of Surviving Spouses Act 27 of 1990, the Administration of Estates Act 66 of 1965 etc.

The reader is referred to the reading list maintained by the Damages and Compensation Committee for a comprehensive list of common law rulings and acts that may be of relevance.

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Application

All signatories to actuarial reports of this nature. The minimum requirement for members of ASSA wishing to sign off reports is an Associate Actuary (with Fellow Actuary being preferred). The recommended experience requirements for signatories to reports are detailed in a separate document authored by the Damages and Compensation Committee. Signatories must be able to illustrate suitable experience in preparing the type(s) of reports signed off, with specific reference to the Code of Professional Conduct.

Status

Version 1 Effective from 1 June 2016

1. ACTUARY IN THE DAMAGES AND LITIGATION FIELDS

- 1.1. Members are involved in various parts of the damages and litigation fields in South Africa. The roles of members in these fields usually relates to assisting the Court with quantum calculation, reporting and testifying (as an expert witness) on matters that are deemed to require the expertise of members.
- 1.2. A member practicing in these fields needs to ensure, in conjunction with the instructing attorney, they take into account the various legal considerations, legislation, precedents and other factors that influence calculation methodologies, reporting requirements and their role as an expert witness to ensure that professional standards are met. In this regard members should take specific note of the principles of professional conduct, in particular paragraph 2.a. of the Code of Professional Conduct:

“Knowledge and expertise: A member shall perform only those professional services for which the member is competent and appropriately experienced.”
- 1.3. The following are the main types of claims where actuarial expertise might be required:
 - 1.3.1. Loss of income.
 - 1.3.2. Loss of support.
 - 1.3.3. Future medical costs.
 - 1.3.4. Maintenance.
 - 1.3.5. Accrual of estates.
- 1.4. Claims can arise from numerous causes of action (for example: road accidents, train accidents, medical negligence, contract breach, wrongful arrest, divorce and wrongful dismissal). There is specific legislation governing certain causes of action which will influence the calculation of damages. The member must ensure that the applicable methodology is used and requirements are adhered to.
- 1.5. The nature of the work in damages and litigation involves conflicting interests between the various stakeholders. It is also often required of the member to deal with incomplete information or instructions. Care and sound professional judgment should be exercised in these situations.
 - 1.5.1. The damages actuary will work alongside and depend on other experts. These experts could include medical specialists, occupational therapists, industrial psychologists and forensic accountants. The member will rely on the opinions of other experts in compiling a report. The member should understand the scope of his/her expertise in relation to the other expert opinions. The member may have to make assumptions that are outside his/her scope of expertise. The member should reasonably attempt to clarify such issues and avoid making such assumptions. He/she must state clearly when and where such assumptions have been made.
 - 1.5.2. The member will receive instructions from attorneys or other clients. In some instances these instructions may include requests to use a method that is not usual practice or information that may contradict factual information. In such cases the member should take care not to compromise his/her duty to the Court while acting within his/her scope of expertise. The member should take

into account the interests of all stakeholders and act with caution and conscientiousness to ensure that the interest of the Court is served and the independence of the member as an expert is not compromised.

- 1.5.3. The member will act for either of the plaintiff or defendant sides. The member is an independent expert and advisor to the Court, and as such the member's calculations and conclusions should not differ when engaged as a plaintiff versus a defendant expert, provided the underlying information provided is the same.
- 1.6. It is emphasised that every signatory to an actuarial report bears a personal professional responsibility for the report signed. Each signatory must take into account all facts relevant to his/her instructions and consider them in light of the unique and specific circumstances applying to the claimant at the time the report is compiled.

2. THE LAW, LEGISLATION, CASE LAW AND PRECEDENT

- 2.1. The South African legal system is woven from different legal traditions (civil law, common law, customary law). These act in a complicated interrelationship. For the purpose of this section the in depth workings of the law will not be discussed. Members need to ensure that they are familiar with the general system of South African Law.
- 2.2. Damages fall under the Law of Delict. Delict can be loosely described as an unlawful infringement of another person's rights, in which the person so wronged is entitled in law to claim compensation for patrimonial loss.
- 2.3. The expertise of members is often required in calculating Patrimonial loss. Visser & Potgieter, Law of Damages states: "*Patrimonial damage is generally seen as the reduction of patrimony, that is, the diminution of utility value of a positive element of patrimony (an asset) or the creation or increase of a debt (a negative patrimonial element or liability).*"
- 2.4. The highest legal authority in South Africa is the Constitution which underlies all legislation. Where legislation requires clarification, legal precedent (case law) is relied on. Precedent binds future decisions in the jurisdiction it was made, but if it is a decision of the Supreme Court of Appeal (SCA) or the Constitutional Court, it is binding on all jurisdictions across the country. Case law becomes relevant to members when it is instructional. Either it instructs the actuary how to do different calculations, or how to treat certain items, or how to interpret the law and legislation which is relevant to the actuarial calculation. When providing services, members must ensure that they are familiar with, and take into account all the legislation and precedents that are appropriate to each specific case.
- 2.5. The law and legal environment is always changing as new precedent and legislation is established. Members need to ensure that they remain up to date with all relevant changes in this dynamic system of law, as it pertains to actuarial calculations.

3. METHODOLOGY

- 3.1. The member should include a section in the report, describing the methodology followed to perform the calculations. The description can refer to the following:
 - 3.1.1. The nature of the projections performed for the future period.

- 3.1.2. The application of discounting and mortality for the future period.
- 3.1.3. Whether interest adjustments were made in respect of past losses and the type of interest applied.
- 3.1.4. The method applied for the past accumulation of losses, including the allowance made for historic inflation.
- 3.1.5. The impact of taxation (including tax credits) on the calculations, in respect of general income and fringe benefits.
- 3.1.6. The treatment of gains and losses.
- 3.2. Where a member is instructed to use a specific methodology, the instructions should be noted and the member should consider commenting whether or not he/she is satisfied with the overall reasonability of the methodology from an actuarial point of view.
- 3.3. The member may follow a specific methodology that was set as a precedent following a Court ruling. Where such case law is followed, details must be provided, with reference to the relevant ruling if applicable.
- 3.4. In practice a large number of complications can occur, for the various damages calculations. The member should set out the methodology employed to deal with the various complications and peculiarities of each case. The remainder of the section provides a non-exhaustive list of typical factors that may be covered:
- 3.5. The treatment of retirement benefits:
 - 3.5.1. The incorporation of retirement benefits should be detailed. Where relevant, the method used to model Defined Benefit and Defined Contribution benefits should be detailed.
 - 3.5.2. Where possible, the applicable registered rules of the retirement fund should be taken into account.
- 3.6. The treatment of other fringe benefits:
 - 3.6.1. Fringe benefits can come in many forms and may be of relevance to the calculations to varying degrees.
 - 3.6.2. The assumed impact of taxation or tax credits on fringe benefits should be stated.
 - 3.6.3. It should be detailed whether a fringe benefits was modelled as increasing or level, as a fixed amount or as a percentage of income etc.
 - 3.6.4. Not all fringe benefits are for personal use and the relevant treatment should be detailed.
- 3.7. Approximations that were employed:
 - 3.7.1. Approximations may be appropriate where it will not materially impact on the calculations but will reduce complexity. Approximations that were employed must be clearly stated in the report. Such approximations could include ignoring child mortality, adding employer pension contributions to income etc.
- 3.8. Any allowance for Impaired mortality:
 - 3.8.1. It may be necessary to allow for impaired mortality in respect of one or more individuals.

- 3.8.2. If a specific mortality table was used, which is deemed to accurately reflect the nature of the impairment, the table must be clearly specified. If the mortality table is of a specialised nature, appropriate references should be provided.
- 3.8.3. If a standard mortality table was adjusted to allow for the impairment, the method to determine the loading, as well as the level of the loading, must be specified.
- 3.9. Capping of the loss in terms of the Road Accident Fund Amendment Act 19 of 2005:
 - 3.9.1. The methodology used to cap the loss, if applicable, should be detailed.
 - 3.9.2. The methodology should, *inter alia*, set out the following where relevant:
 - Interaction with contingencies and other probabilities.
 - Interaction with collateral benefits.
 - Treatment of lump sum benefits.
 - Treatment of gains.
- 3.10. Accelerated inheritance calculations:
 - 3.10.1. A number of considerations arise for accelerated inheritance deductions. The following is a non-exhaustive list of issues to consider:
 - 3.10.2. The impact of the type of marriage (e.g. in or out of community of property).
 - 3.10.3. The nature and treatment of the inherited assets e.g. whether growth or depreciating assets.
 - 3.10.4. The treatment of the family home and other such family assets together with any related liabilities.
 - 3.10.5. The treatment of accelerated benefits in respect of minors.
 - 3.10.6. The allowance for the income ("use value") that could be generated from the inherited assets.
 - 3.10.7. The treatment of allowable vs non-allowable assets and liabilities
 - 3.10.8. The treatment of life assurance and pension benefits that impact on the estate.
- 3.11. Collateral benefits:
 - 3.11.1. Benefits that came into payment as a result of the accident should be considered. Assumptions as to when the benefits commenced should be detailed.
 - 3.11.2. Not all benefits may be deductible from the loss and the treatment of the benefits, as well as the underlying reasoning, should be detailed.
 - 3.11.3. In the case of Social Welfare benefits, the impact (or assumed impact) of the means test should be stated.
- 3.12. Pre-existing benefits:
 - 3.12.1. Benefits that were in payment prior to the date of the accident should be dealt with appropriately.
 - 3.12.2. Such benefits can include pension benefits, various Social Welfare benefits etc.

3.13. Foreign income:

3.13.1. Certain calculations may involve foreign income, either a local citizen earning foreign income or a foreign national with a local claim.

3.13.2. The treatment of foreign income, including currency conversion and taxation, should be specified.

3.14. Self-employed individuals or Business owners:

3.14.1. Self-employed or business income may be volatile or display a historic trend. The treatment of such income, e.g. inflation adjusted averaging or trend extrapolation should be detailed and justified.

3.14.2. There may also be more than one component of earnings to take into account e.g. salary as well as profit sharing. The treatment of the various components should be detailed.

3.15. Factors specific to Loss of Support calculations:

3.15.1. Loss of support calculations can be influenced by household or personal circumstances of the dependants. This could include natural children, multiple spouses, parents etc. Any unusual circumstances should be detailed as well as the treatment thereof.

3.15.2. The basis for the support calculation e.g. the parts of the deceased's income allocated to each dependant or the actual maintenance allowed for, should be stated.

3.15.3. The allowance for notional spouse(s) and children should be stated.

4. ASSUMPTIONS

4.1. The aim of this guidance is not to prescribe the assumptions to be used in a particular matter.

4.2. The member should however employ sound actuarial principles in deciding on the assumptions employed. The following principles are relevant:

4.2.1. The assumptions should be set with reference to the purpose of the calculations.

4.2.2. Damages calculations are typically aimed at providing fair compensation to a party or individual. This typically implies that assumptions should be of a best-estimate nature. It may however be acceptable to include a margin in assumptions for certain types of calculations.

4.2.3. The member should also be cognisant of typical industry practice as well as the precedents set by case law, with respect to the setting of assumptions.

4.2.4. At the same time the member should also be aware of current research regarding experience and assumptions.

4.2.5. The member should also be aware of and consider the relevance of the issues raised in the various position papers that may be published by the Damages and Compensation Committee from time to time.

- 4.2.6. The member should generally apply assumptions that are consistent with his/her own past practice, for similar calculations, provided there is no objective reason to deviate from past practice.
- 4.3. Where a member is instructed to use specific assumptions, the instructions should be noted. The member should consider indicating whether or not he/she is satisfied with the overall reasonability of the assumptions, where this is in the actuarial sphere of expertise.
- 4.4. The member should detail the various assumptions that were made. It is useful to distinguish between the following types of assumptions:
 - 4.4.1. Actuarial assumptions.
 - 4.4.2. Assumptions regarding data.
 - 4.4.3. Assumptions regarding the situation being modelled.
 - 4.4.4. Broader assumptions based on actuarial judgement.
- 4.5. The member should pay attention to all the assumptions made, including implicit assumptions which should ideally be stated explicitly. A non-exhaustive list of the various assumptions that may be of relevance, is as follows:
- 4.6. Actuarial Assumptions:
 - 4.6.1. The mortality table(s) employed as well as any adjustments to the tables, for instance allowance for a reduced life expectancy. The mortality assumption for each of the individuals forming part of the calculation should be specified.
 - 4.6.2. The discount rate that was used, as well as the impact of taxation if relevant.
 - 4.6.3. The inflation assumption that was used. Where relevant, a distinction should be drawn between price inflation, earnings inflation, medical inflation as well as the inflation rate that may be applicable to pensions in payment.
 - 4.6.4. Promotional increases that were assumed in addition to earnings inflation.
 - 4.6.5. The tax tables or rates that were used, where relevant.
 - 4.6.6. The monetary terms assumed to be associated with a salary or fringe benefit.
 - 4.6.7. The type of increase assumed between earnings levels e.g. compound or linear.
- 4.7. Data Assumptions:
 - 4.7.1. The member should clarify any shortcomings or discrepancies in the data.
 - 4.7.2. Where this is not possible, all assumptions relating to the data should be stated.
 - 4.7.3. The member should consider the likely financial impact of any data assumptions that were made. Where a significant impact is expected, the member should provide suitable qualifications, warnings or sensitivity tests in the report.
- 4.8. Situational Assumptions:
 - 4.8.1. It may be necessary to make assumptions regarding the situation being modelled, either in respect of individuals, dependants or their circumstances. Any such assumptions should be clearly stated.

4.8.2. Examples of such assumptions include retirement or dependency ages, household circumstances of the dependants, which income streams are relevant to the calculation, future Social welfare grants that may come into payment etc.

4.9. Broader Assumptions:

4.9.1. It may be necessary to interpret the opinion of another expert, the information that was provided etc.

4.9.2. Where it is not possible to clarify the relevant issue, it may be necessary to form an interpretation or apply judgement which should be stated in the report. An alternative approach may be to produce results on multiple scenarios, each aligned with a specific interpretation of the information provided.

5. ACTUARIAL REPORTS

General comments in respect of actuarial reports:

5.1. Details of who requested the report and for what purpose should be provided.

5.2. Each signatory to an actuarial report should indicate their name and professional body on the report.

5.3. Every signatory to an actuarial Report must take reasonable steps to ensure that the calculations reflect the instructions provided and are free of material calculation errors.

5.4. This APN applies to full actuarial reports (on which expert witness testimony may be based) and shortened versions of actuarial reports used for settlement purposes, often referred to as certificates of value.

5.5. The requirements detailed in this APN, and any other information included in the report, shall be presented in a way that minimises the possibility of misinterpretation.

5.6. The actuarial report must make a clear distinction between the instructions that have been provided to him/her; the reliance placed on other expert reports; other information supplied to the member and other information obtained by the member including the source where applicable.

5.7. The member should consider commenting in the report regarding data that has not been supplied, but may normally be expected to form part of the instruction for similar cases.

5.8. The member should be aware of confidential information that is relied upon. Suitable confidentiality clauses may be applicable to reports.

The actuarial report shall contain sufficient information for another member to recreate the calculations and results. This will include the following:

5.9. Details regarding the Methodology (refer to Section 3) and Assumptions (refer to Section 4) that were used.

5.10. The date of the incident which resulted in the loss (e.g. date of accident or the date of death) and the date at which losses have been capitalised.

5.11. The name and date of birth of the injured party/deceased.

5.12. Reference should be made to specific pieces of information that were relied upon, e.g medico-legal reports and/or written instructions.

- 5.13. In respect of death claims, the names and dates of birth of each dependant. Details of all earnings information including, but not limited to, income tax documentation, pay-slips, employer certificates, reports of industrial psychologists and rules of pension funds that were relied upon for the calculations.
- 5.14. The pre-accident and the post-accident retirement ages used for the calculations (if applicable).
- 5.15. All deductions applicable to the calculations including, but not limited to, disability benefits in respect of injury claims, general contingency deductions, state disability grants, awards in terms of the Compensation for Occupational Injuries and Diseases Act, 1993, inheritance in respect of death claims and remarriage in respect of death claims.
- 5.16. A recommendation concerning the adjustment of any award that should be made, should the date of settlement occur after the date at which losses are capitalized. (there may be a court prescribed basis for applying return from date of calculation to date of payment).
- 5.17. A detailed schedule of calculations on a year by year basis should be provided on request.

6. THE ACTUARY AS EXPERT WITNESS

- 6.1. An expert witness must be familiar with the rules of evidence in Courts.
- 6.2. An expert witness must be familiar with any directives, directly applicable to the expert, that are in force in the jurisdiction they may be required to testify. An example of such directives is the 2015 Directive for the first term, issued by the Gauteng Division of the High Court.
- 6.3. A normal witness is required to limit testimony to factual statements and not draw inference from these facts. An expert witness may however express an admissible opinion where, by reason of their special knowledge, they are better positioned to draw inferences than the judicial officer.
- 6.4. Members who act as an Expert Witness have a duty to the Court first. The expert witness should provide objective, unbiased assistance to the Court within his/her expertise, and should be seen to be uninfluenced by external factors while having considered all material facts.
- 6.5. The member could act as expert witness in a variety of cases, and this is not necessarily limited to the Damages and Compensation field.
- 6.6. A report by an expert witness must (in the body of the report or in an annexure) specify or reference, as appropriate:
 - 6.6.1. the person's qualifications as an expert.
 - 6.6.2. the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed).
 - 6.6.3. reasons for each opinion expressed.
 - 6.6.4. if applicable – that a particular question or issue falls outside his or her field of expertise.
 - 6.6.5. any literature or other materials utilised in support of the opinions.

- 6.6.6. any examinations, tests or other investigations on which he or she has relied and should identify, and give details of the qualifications of, the person who carried them out.
- 6.7. If an expert witness who prepares a report believes that it may result in the reader reaching a conclusion that is incomplete or inaccurate, the expert should consider stating such qualification and reasons in the report.
- 6.8. If an expert witness considers that his or her opinion is not a conclusive opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- 6.9. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect.
- 6.10. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.
- 6.11. The member should consider commenting on any material concerns that he or she may have in respect of the reliability of any information provided. This may include, for example, an Industrial Psychologist's report that is based on the hearsay of a claimant. The member should note any such concerns in his/her report.
- 6.12. The member should have no interest in the outcome of litigation. The member should therefore consider the payment terms offered to clients, and must avoid circumstances in which financial considerations could be deemed to have influenced the member.

7. PROFESSIONALISM

- 7.1. The litigation field is of an adversarial nature. The member may therefore find himself/herself in a position of being opposed by another professional party. The member should remain professional and courteous during such interactions. This could include the preparation of joint minutes with another member, being questioned by opposing counsel etc.
- 7.2. Damages calculations are often required under extreme time pressure. The member should always act professionally under such circumstances, maintain quality standards and communicate clearly with clients as to what is realistic.
- 7.3. The member should stick closely to his/her mandate, instructions and/or area of expertise. For example, it may not be appropriate to at times act as an advocate for the cause of the plaintiff or defendant, except where this role has explicitly been accepted and communicated. A further example would be to prepare actuarial joint minutes only on instruction and to limit the preparation of joint minutes to issues of an actuarial nature or the correctness of the calculations.
- 7.4. It is possible that the member may discover at a later stage that an error has been made e.g. during the calculation of quantum. The member should immediately bring such errors to the attention of the client or Court as appropriate.