UNIT 5:
THE QUANTUM OF DAMAGES:
THIRD-PARTY CLAIM IN TERMS
OF ROAD ACCIDENT FUND ACT
56 OF 1996
Introduction

This part of the course will cover the following themes:

Unit 5.1: Introduction to the general principles of the assessment of damage and the quantification of damages. (Klopper 2008: 89-99, 143-151)

Unit 5.2: Quantification of general (non-patrimonial) damages: fundamental principles and specific heads of damage. (Klopper 2008: 152-168)

Unit 5.3: Quantification of specific (patrimonial) damages: general principles and specific heads of damage. (Klopper 2008: 169-193)

Unit 5.4: Development and assessment of the claim by the third party as a result of the injury or death of another

    Apportionment of Damages Act and the joinder of co-wrongdoers

    Section 17 RAF Act (costs and miscellaneous items). (Klopper 2008: 193-214, 307-309)

Learning outcomes

After covering Unit 5, you are expected to be able to do the following:

➢ Assess damage and the general principles thereof, define and identify the different kinds of damage, and distinguish between “general” and “specific” damages whenever a third party is caused injury by means of the unlawful and negligent driving of a motor vehicle.

➢ Identify, expand on, and have a workable knowledge of, the quantification of the different heads of damage in the RAF Act 1996 (whether these be patrimonial or non-patrimonial).

➢ Know how to deal with the Apportionment of Damages Act and joinder in the context of the RAF Act 1996, as well as other miscellaneous provisions of section 17 of the same.

Readings

Klopper (2008) (See introduction above.)
UNIT 5.1: INTRODUCTION TO THE GENERAL PRINCIPLES OF THE ASSESSMENT OF DAMAGE AND THE QUANTIFICATION OF DAMAGES

Learning outcomes

After you have completed Unit 5.1, you should be able to do the following:

- Master concepts such as damage, patrimonial damage, non-patrimonial damage, and special and general damage.
- Understand the general principles of determining the quantum of damages.
- Know what is meant by damnum emergens, lucrum cessans (prospective loss), collateral benefits, "once and for all", and "take your victim as you find him".

Time schedule

It should take you approximately three hours to do the reading for Unit 5.1.

Note

This is a very specialised topic; its scope is extensive, and therefore, no comprehensive exposition is undertaken. The surface of the type of damage suffered in terms of section 17 of the Road Accident Fund Act is only scratched – especially the concept of damage, the heads of damage that may be recovered by the third party, and the quantification of each head of damage.

1. Assessment of the different kinds of damage (especially found in the RAF Act 1996)

In connection with the above, please read the following:

- Klopper 2008: pp. 89-99 and 143-146.
- Section 17(1) of the RAF Act.
**Note**

**Scope and nature of the damage recoverable in terms of the RAF Act**

Not all damage caused by the wrongful and negligent driving of a motor vehicle by another person can be recovered from the Road Accident Fund (RAF). Furthermore, the third party must suffer damage of a particular nature to bring the claim against the RAF within the scope of the Act.

For these reasons, damage to a motor vehicle (as well as damage to clothing, spectacles, false teeth, or prosthesis, unless occasioned by the accident, and bodily injury), claims in terms of insurance, and assault on physical integrity claims fall outside the distinct damage referred to in section 17(1) of the Act and are NOT recoverable. Similarly, loss or damage suffered as a result of infringement of one’s *fama* (reputation) and *dignitas* (dignity) (as opposed to *corpus* (bodily injury)) falls outside the scope of the Act and is disregarded for purposes of a third-party claim.

Only damage (or loss – considered by the legislator as synonyms) resulting from

(i) bodily injuries of a third party himself or herself (both physically (including drowning) and non-physically (for example, mental illness and emotional shock)), whether patrimonial (medical and hospital expenses) or non-patrimonial (for example, pain and suffering, psychological trauma, loss of amenities – in terms of the RAF Amendment Act 19 of 2005 the Fund will only be obliged to compensate the third party for non-patrimonial damage if the damage was brought about by a so-called “serious injury”), including past and future loss, AND

(ii) damage and loss caused to a third party because of the bodily injury or death of any other person liable for such maintenance or service can be claimed in terms of section 17(1) of the RAF Act 1996.

**Distinction between "damage" and "damages"**

For purposes of clarity and perspective, it is important to distinguish between the concepts "damage" and "damages". The latter concept ("damages") is a monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his/her past as well as his/her future damage. "Damages" also refers to the process through which an impaired interest may be restored. "Damage", on the other hand, refers to the reduction in the utility or quality of a patrimonial or personality interest.

"Damage" includes both patrimonial and non-patrimonial damage

The comprehensive concept of "damage" (other terminology: "skade", loss, harm, detriment) includes both patrimonial and non-patrimonial damage and can be defined as "... the diminution (reduction), as a result of the damage-causing event, of the utility of a patrimonial interest or quality of a personality interest in satisfying the legally recognized needs of the person involved" (see Visser & Potgieter. 1993. *Law of Damages*. Cape Town: Juta, p. 22). When the legislator refers to damage in the RAF Act, it actually has precisely this in mind, namely, both patrimonial and non-
patrimonial loss caused by prejudice to the body \textit{(corpus)} of a person – thus, in a third-party claim, all prejudice or loss that flows from the compromise of a third party's right to his/her physical integrity (and attendant financial consequences, such as medical expenses) and his/her right to claim maintenance (performance) from the person legally obliged to pay such maintenance.

**Types of damage prominent in the RAF Act**

Two distinct types of damage are prominent in the RAF Act. The one is pecuniary in nature (in the form of medical expenses, loss of income, loss of earning potential, loss of maintenance, etc.) and the other non-pecuniary, namely, prejudice to rights of personality (specifically injury to the third party's physical integrity in the form of pain and suffering, loss of amenities, loss of health, disfigurement, etc.).

The first type, patrimonial damage, is the diminution of someone's patrimony. In an effort to determine the reduction, the sum-formula (comparative or abstract approach) is used to compare the patrimony immediately before the damage-causing event with the position immediately thereafter. The net result will be the pecuniary damage suffered. Patrimony is considered legally to be the sum total of all his/her (present and future) entitlement to subjective rights (as well as expectations of acquiring such rights) and obligations (debts) with a monetary value. Factually and economically speaking, patrimony includes all (present and future) assets (such as material objects, rights, and factual possibilities) and liabilities of a person, having a monetary value, being utilised to satisfy his/her legally recognised needs.

The second type, non-patrimonial loss, is the diminution in the quality of the highly personal (personality) interests of a person in satisfying his/her legally recognised needs, but which does not affect his/her patrimony (see Neethling & Potgieter. 2001. \textit{The Law of Delict}. 4\textsuperscript{th} Edition. Durban: Butterworths, pp. 212-215). In a third-party claim, detrimental personal consequences are being suffered because of the compromise of the third party's physical (bodily) integrity.

"Special damage" and "general damage"

Patrimonial loss and non-patrimonial loss correspond to concepts found in English law, namely, "special damage" and "general damage", respectively. If this were to be the only explanation, it would be practical and satisfactory to continue using the concepts. But this is not the case. The English law distinction of general and special damage (viewed from a South African law perspective) confuses patrimonial and non-patrimonial loss in that future loss of income and future medical and hospital expenses are deemed to be general damages.

The English concepts have a procedural basis. General damage has to be alleged and proven generally without particularising a claim. Special damage has to be specifically averred and set out in detail. This distinction is somewhat blurred by Supreme Court Rule 18(10), stipulating that sufficient details of general damage (listed under certain prescribed headings such as medical and hospital costs, pain and suffering, loss of income, and loss of amenities – a mixture of general and special damage) must be furnished in order to apprise the defendant of the nature and composition
of the claim for general damage. A similar principle (although not present in the Magistrate's Court Act) should apply in the lower courts. If not, the summons may be subject to exception as being vague and embarrassing.

If the terminology of general and special damage is used to indicate that particular principles of remoteness of damage, the pleading thereof, and the proof of damage are relevant, then *cadit question*. In other words, if general damage (also called intrinsic damage) refers to damage that is legally presumed to flow naturally from an unlawful act or breach of contract that needs to be generally pleaded and proved only, while special damage (or extrinsic damage) is not presumed to be the consequence of a damage-causing event and must be specifically pleaded and proved, then the distinction serves a jurisprudential and practical purpose and can be supported. In the contractual context, general damage refers to damage flowing "naturally" from the breach of contract and that the law presumes to be within the contemplation of the parties. In contrast, special damage is loss that is usually too remote and in respect of which liability exists only if the parties had actually or presumptively foreseen the special circumstances at the time the contract was concluded (convention principle applied in *Shatz Investments v Kalovymas* 1976(A), overruling the contemplation principle in *Laverys* case (1931 AD)).

General damage in regard to delictual liability for bodily injuries includes all non-patrimonial loss as well as prospective medical expenses and future loss of income or support (quite confusing, one must say!). In practical terms, these are damages for which the third party does not have a receipt. Special damage refers to all (past) pecuniary expenses and losses up to the time of the trial. For this type of damage, the third party does have a receipt, simply speaking. Because a third-party claim is delictual in nature, these expressions will carry the same meaning. Nevertheless, it seems as if the RAF Act favours the distinction between "general" and "special damage" to coincide with the appellations "non-patrimonial damage" and "patrimonial damage", respectively – an approach that is not objectionable and one that is being used (especially the terminology of "general damage" and "special damage") by authors, practitioners, and courts alike.

**Activity 1**

What types of damage are recoverable (and not recoverable) in terms of section 17(1) of the RAF Act 1996? (6)

(For some direction, see Klopper 2008: pp. 89-99; preceding note.)

**Activity 2**

Identify the subjective rights (or aspects thereof) being infringed or compromised whenever a third-party claim in terms of the RAF Act 1996 is under consideration. (3)

(See Klopper 2008: p. 144, line 10 in the text. This will give you a solid starting point.)
Activity 3
What is the difference between the concepts "damage" and "damages"? Illustrate your answer by means of a practical example. (5)

Activity 4
Define the wide concept "damage" being propagated by authors, practitioners, courts, and the RAF Act. (5)

Activity 5
What are the differences between patrimonial and non-patrimonial damage? Is there common ground between the concepts? Explain. (10)

Activity 6
Why are the English concepts of "special damage" and "general damage" so confusing from a South African law perspective? When will the use of these concepts present no objection? (10)

Activity 7
What is the meaning of the concepts "general" and "special" damage in the South African contractual and delictual context? How are these concepts dealt with in the RAF Act? (10)

2. General principles in the quantification of damages in terms of section 17 of the RAF Act 1996

In connection with the above, please read the following: Klopper 2008: pp. 146-151.

Note

There is a difference between the "assessment of damage" and the "quantification of damages". Whenever the assessment of damage is at hand, the utility or quality of a patrimonial or non-patrimonial interest is measured immediately before the wrongful and culpable conduct and then compared to the same immediately after the said delict. This abstract comparison (also called Mommsen's sum-formula) will give an indication to what extent the sum total of patrimonial or non-
patrimonial interests has decreased in utility or quality for the legal subject in question. When this diminution is expressed in an equivalent monetary value, it is called the *quantum* of damages.

The following diagram illustrates the process leading to the ultimate net amount of damages recoverable.

**Activity 8**

What is the function of damages awarded?  
(See Klopper 2008: p. 146, par. 4.1, for an answer.)

**Activity 9**

What is the difference between *damnum emergens* and *lucrum cessans*? Also between *lucrum cessans* and prospective loss?  
(For an answer, please consult Klopper 2008: p. 147, par. 4.2.)
### Activity 10

The problem with future loss is that it will materialise only after the time of assessment of damage on account of an earlier damage-causing event and needs to be claimed “once and for all” at an earlier date when the claim is instituted. How is this problematic issue dealt with in the law? (4)

(Consult Klopper 2008: p. 147 for an answer.)

### Activity 11

What is understood by the “once and for all” rule? Explain whether the RAF Act 1996 applies the rule and/or creates exceptions to the rule. (8)

(For an answer, see Klopper 2008: pp. 147-148, par. 4.3. Is it possible that section 17(4) may result in an exception to the “once and for all” rule as well? Comment on and incorporate this possibility in your answer.)

### Activity 12

What do you understand by the phrase "take your victim as you find him" in relation to the quantification of damages? Is this phraseology applicable to the RAF Act 1996? (4)

(See Klopper 2008: p. 148, par. 4.4, for an answer.)

### Activity 13

What is understood by the duty to mitigate damages? Are the costs of reasonable mitigating steps recoverable from the RAF? Explain. (4)

### Activity 14

What are the general principles pertaining to collateral benefits? Also indicate when such accrual will be considered *res inter alios acta* and when not. (10)

(See Klopper 2008: pp. 149-151, par. 4.7.)

### Activity 15

"Damages are always paid in money." Comment on this hypothesis. (3)

(See Klopper 2008: p. 151, par. 4.9.)
UNIT 5.2: QUANTIFICATION OF GENERAL (OR NON-PATRIMONIAL) DAMAGES: PRINCIPLES AND SPECIFIC HEADS OF DAMAGE

Learning outcomes

After you have completed Unit 5.2, you should be able to do the following:

- Have mastered the general principles applicable to the quantification of unquantifiable damages.
- Know what is meant by "pain and suffering", "psychological trauma", "emotional shock", "disfigurement/mutilation", "loss of amenities", and "shortened life expectancy".
- Understand which damages can be claimed for and how they are calculated to determine the quantum.

Time schedule

It should take you approximately three hours to do the reading for Unit 5.2.

1. Fundamental principles for the quantification of general (non-patrimonial) damages

In connection with the above, please read the following: Klopper (2008: pp. 152-158).

Note

This topic relates to the appropriate amount to be awarded for bodily injuries (injury to personality interests) sustained by the third party, while that which is to be "compensated" has no intrinsic value, is highly personal and subjective in nature, and is not readily calculable. For this reason, the topic is covered rather superficially, but with sufficient detail to be of practical use. First of all, some fundamental principles in the quantification of non-patrimonial (general) damages will be dealt with.

Remember that the amount to be considered as "compensation" can only be determined by the broadest general principles of the assessment of damage and the quantification of damages (Unit 5.1), and the figure arrived at must necessarily be uncertain pending the judge's view of what is fair and reasonable in all the circumstances of the case (see Sandler v Wholesale Coal Supplies 1941 AD 194 at 199).
2. Quantification of specific heads of non-patrimonial damages

In connection with the above, please read the following: Klopper 2008: pp. 158-168 (par. 5.3).
Note

This section contains a discussion of the different heads of non-patrimonial damage resulting from bodily injury and recoverable in terms of the Road Accident Fund Act of 1996. These heads include, inter alia, pain and suffering, shock induced by physical injury, emotional shock, disfigurement, loss of amenities, and shortened life expectancy. It would be helpful to tabulate the different heads in columns alongside each other and to use the same headings (for instance, "Meaning of .../definition", "Circumstances under which damages recoverable/factors considered in assessing award", "Inherent characteristics of claimant", "Consciously experienced", and "Previous comparable awards") for each head of damage. In this way, differences will be highlighted and resemblances simplified.

Remember, general damage is usually expressed in one global sum representing the applicable heads, but this does not derogate from the divergent nature of the different heads or the unique principles of assessment applicable in respect of each individual head to come to an appropriate award. As a consequence, the specific heads need to be considered separately along with the necessary evidence to prove the ultimate appropriate award made by the court.

Activity 6

1. What is understood by the phrase “pain and suffering”? Does it include past and future pain and suffering? What about phantom pains? Will pain and suffering resulting from medical procedures (such as surgery) rendered reasonably necessary as a result of the bodily injury form part of this heading? (Please find the answer in Klopper 2008: p. 159, par. 5.3.2.1 (a).)

2. Will the immediate reaction of shock (psychological trauma) induced by the physical injury form part of the pain and suffering heading? Substantiate your answer. Will the causal connection, degree of depression, aggressive behaviour, sex, age, race, social (financial) status, and the plaintiff’s vulnerability have an influence on the calculation of the appropriate amount? (Please find the answer in Klopper 2008: p. 159, par. 5.3.2.1 (b), pp. 159-161, and pp. 161-162 (5.3.3.2/3/4).)

3. What influence will unconsciousness, sedation, intermittent lapses into a coma, and amnesia have on the determination of the appropriate amount? How will this subjective measurement of pain and suffering be proven? (Please find the answer in Klopper 2008: pp. 159-160, par. 5.3.2.2-5.3.2.3, p. 161, par. 5.3.2.6, and p. 162 (5.3.3.5).)
Activity 7

1. What is understood by the phrase "emotional shock"? How does "emotional shock" differ from shock induced by, or related to, bodily injury or the treatment of such injuries sustained by another party? Is the phrase "nervous shock" a good alternative for recognisable psychological lesion? (Please find the answer in Klopper 2008: p. 162, par. 5.3.4.1. Also see Neethling. 2001. *Law of Delict*. 4th Edition. Durban: Butterworths, pp. 290-291; read *Barnard v Santam Bpk* 1999 1 SA 202(SCA) at 208-209.)

2. Under what circumstances (limitations) will emotional shock be actionable? What was ruled in the *locus classicus* *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769(A)? (Please find the answer in Klopper 2008: p. 163, par. 5.3.4.2; Neethling op. cit., p. 291. Also refer to section 19(g) of the RAF Act 56 of 1996 as amended by section 8(b) of the RAF Amendment Act 19 of 2005).

3. What factors will be considered in calculating an award for emotional shock? (Please find the answer in Klopper 2008: pp. 163-164, par. 5.3.4.3/4/5.)

Activity 8

1. What is considered to be "disfigurement" or "mutilation"? (Consult Klopper 2008: p. 164, par. 5.3.5.1, for an answer.)

2. Which psychophysical characteristics will play a role in the determination of the award? (Please find the answer in Klopper 2008: pp. 164-165, par. 5.3.5.2.)

3. Is disfigurement considered separately from pain and suffering or additional to future medical expenses, or not? (Please find the answer in Klopper 2008: p. 165, par. 5.3.5.3/4.)

4. What role does Rule 18 of the Uniform Rules of Court play in the context of disfigurement? (Please find the answer in Klopper 2008: p. 165, par. 5.3.5.5.)

Activity 9

1. What is meant by "loss of amenities"? Is it a wider concept than "permanent disability"? (Consult Klopper 2008: pp. 165-166, par. 5.3.6.1, for an answer.)

2. What factors will be considered in the quantification of the award? Express your opinion on the question whether the unconscious claimant should be entitled to an award. How would you substantiate your conclusion? (Please find the answer in Klopper 2008: pp. 166-167, par. 5.3.6.2 (a)-(f).)
### Activity 10
What is meant by "loss of general health"?  
(Consult Klopper 2008: p. 167, par. 5.3.7.1, for an answer.)

### Activity 11
1. What is "shortened life expectancy", and how is it determined?  
(Consult Klopper 2008: p. 168, par. 5.3.8.1, for an answer.)
2. Mention the factors considered to determine the award for loss of life expectancy.  
(Consult Klopper 2008: p. 168, par. 5.3.8.2, for an answer.)
UNIT 5.3: QUANTIFICATION OF SPECIAL (OR PATRIMONIAL) DAMAGES: PRINCIPLES AND SPECIFIC HEADS OF DAMAGE

Learning outcomes

After you have completed Unit 5.3, you should be able to do the following:

- Have mastered the general principles applicable to the calculation of quantifiable damage.
- Know what is meant by past and future "medical and hospital" costs, "loss of income", and "loss of earning potential".
- Understand which damages can be claimed for and how they are calculated to determine the quantum.

Time schedule

It should take you approximately three hours to do the reading for Unit 5.3.

1. Quantification of special (patrimonial) damages

In connection with the above, please read the following: Klopper 2008: pp. 169-193; section 17(3)-17(6) of the RAF Act of 1996.

Note

This topic deals with the quantification of patrimonial damage flowing from the bodily injury of the third party himself/herself.

Be aware that the English connotation attached to special and general damage is not followed here. At the most, the distinction is applied to classify damage as patrimonial and non-patrimonial. For that matter, future medical expenses and future loss of income are grouped under special (patrimonial) damages. A summary of this whole unit is included for your convenience.

1.1 Outline of Unit 5.3: special damage/patrimonial damage

(Recoverable)

- Patrimonial damage ➔ Bodily injury to third party
(Special) ➔ Bodily injury or death of third party’s breadwinner

- Types of recoverable patrimonial damage
  - Past and future hospital and medical expenses
  - Loss of income
  - Loss of earning capacity
  - Travelling expenses
  - The cost of a nurse or an aid
  - Loss of maintenance

- QUANTIFICATION of the different heads of damage
- **Past hospital and medical expenses**
  - (Medical costs in the strict sense) only reasonable (under prevailing circumstances) medical and hospital (provincial/state tariff + even costs for incorrect diagnoses and wrong treatment + multiple practitioners) costs.
  - Reasonably attributed to the bodily injury of third party caused by the wrongful and culpable driving of a motor vehicle (question of fact – bills/receipts, expert medical opinion confirm – NB medical/medical-legal reports being costs and not damages) are recoverable.
  - Also (NB) directly and reasonably related expenditure to medical treatment or reasonable expenditure to remedy or ameliorate the condition may be recovered.

For example:
- Transport costs (ambulance/to and from hospital/physiotherapist/med. councillors/to and from school/hospital resort/purchase and maintenance of car – rural area (Ngubane 1991 (A))
- Prosthesis (false teeth/spectacles/crutches/wheelchairs/neck brace/special shoes); services: nurses and assistants + other med. requirements (bandages/drips/catheter)
- Expenses: paraplegia/quadriplegia (costs of new vehicle/conversion/ramps/lowering of door handles)
- Specialised accommodation

- Section 17(6) RAF Act: interim payments
- Claim instituted.
- Claim established on the merits.
- RAF is authorised to (may) make interim payments (pending the finalisation of claim) for medical costs/loss of income/loss of support, which have already been incurred.
• Future reasonable medical and hospital costs
  - Claimant requires future medical treatment/hospitalisation – not recuperated at the time of settlement/hearing.
  - On balance of probabilities likely (even faint possibility) that such treatment be needed (even if not constantly needed) *Blyth v V/d Heever* 1980 (A) – amputation of arm.
  - Estimate given by doctor completing medico-legal report or expert medical opinion.
  - Estimated figure of treatment given in terms of going rates at the time of trial (adjusted (+) with three-year average for medical inflation/(−) benefit of future amount already received/(−) other contingencies and premature death).
  - These costs must be quantified by claimant who carries onus.
  - Also incidental losses (such as loss of income and travelling).
  - Section 17(4)(a) RAF Act – undertaking to pay future medical expenses:
    - Instead of lump sum ("once and for all"), RAF is empowered in its discretion (at any stage after the lodgement of claim) to pay such future (reasonable) costs (or costs reduced in terms of Apportionment of Damages Act) by way of an undertaking *when incurred* and *upon proof*. See *Marine & Trade v Katz* 1979(A).
    - Such undertaking removes uncertainty of assessing future damages, and at the behest of RAF (court cannot *mero motu* order undertaking or amount tendered), instalments payable must be fixed.
    - Disadvantages for claimant: costs first fixed before paid/disputes may arise over the costs covered by the undertaking and whether they flow from bodily injuries sustained/costs cannot be limited to those of provincial hospital.
    - Undertaking may be refused if
      - wording not wider than wording of section and
      - limited to costs incurred in provincial/state facility/
      - not referring to all reasonable costs/if claim; bodily injuries and sequelae not adequately defined in settlement agreement.
        - If refused, RAF can tender payment at any stage of hearing or afterwards.

• Loss of income
  - Impossibility to earn because of bodily injury.
  - Whether employed or self-employed.
  - Would have earned (including full-time/part-time/informal), but for bodily injury.
  - Simple mathematical calculation of net income (after deduction of income tax/UIF/pension) x duration of absence.
If problematical to determine income: reconstructed with tax returns/balance sheets/living standards/assets/current financial obligations (sufficient details furnished so that court is able to assess loss on a reasonable and fair basis).

Income from *ex gratia* and disability insurance payments ignored.

Subtract amounts paid in terms of legal duty by employer, for example, in consequence of absence from work (civil service payments in terms of regulations received ignored, because paid at discretion of state).

Spouse's loss of income because tending to needs of injured third-party spouse (for example, nursing) also claimed.

Only legal income recoverable (illegal income, which is

- unlawful (for example, shebeen/pirate taxi/unlicensed hawking)
- *Nkwenteni v Allianz Insurance 1992 (Ck)* – previously unlawful, not any more
- prohibited by law/against public policy (for example, gambling/illicit diamond dealing/sale of narcotics/prostitution?)
  - Test: could the claim be enforced in court of law?
  - Illegal income still indicative of earning capacity.
  - Split legal and illegal income in third-party claim not to taint totality and disqualify it all.
  - When assessed? Normally date of accident, unless that would result in prejudice – then date of trial.

Section 17(6) authorising RAF to make interim payments.

**Loss of earning capacity**

- Bodily injury so severe either temporarily or permanently precluding third party from earning in future, resulting in loss of future earning capacity.
- Recover "once and for all" in one claim.
- Mathematical assessment (actuarial calculation/informed guess) basis (income before accident/enough information/reliable facts) approached reluctantly by the court not to inhibit discretion.
  - But still the preferred approach to the "gut feel" (for example, reasonable and fair amount based on less solid information and reliable facts to be proven by claimant – "blind guess").
  - Method to calculate: compare position of claimant before injuries and thereafter.
  - Method also influenced by prevailing circumstances, for example:
    - Permanent loss of earning capacity
    - Temporary loss
    - Loss equal to actual future prospects
    - Exceptional circumstances (for example, unknown income/reduced living expenses/partial loss of earning capacity)
Four steps in calculation:
- Present value of future income before injuries (consider annuity tables/risks/contingencies/work and life expectancy/unemployment)
- Present value of future income after injuries (disability tables of CC/medical evidence)
- \[ \text{[1 unless 2]} \]
- Adjust result with risks and contingencies (discretionary ±20% for loss of job/risk of death and assault/unsatisfactory service record/life expectancy/accidents/inflation/cost of living/tax/loss of pension).
  - An amount taking all circumstances into account
- Date of assessment: at the date of trial because future loss of income.

- **Cost of manager or substitute**
  - Claimant's earning capacity being affected to such an extent that no longer able to effectively do the work he/she had previously done; then the loss of earning capacity is the salary of a substitute or manager who could do such work.
  - Alternative to claim for loss of earning capacity.
  - Requirements to be met:
    - Unreasonable to insist that claimant obtain alternative work.
    - Cost of employing substitute should not exceed loss without such employment.
    - Prior to injuries, business or occupation was viable option.
  - Actuarial calculation at the date of the trial.

### Activity 1

Does the content of "special damage" in the RAF Act agree with the meaning attached to it in English law? (3)

(Please find the answer in Klopper 2008: p. 169, par. 6.1.)

### Activity 2

Identify and enumerate the different heads of special damage resulting from bodily injury of a third party. (3)

(Please find the answer in Klopper 2008: p. 169, par. 6.2. Take note: extract only the relevant heads from the list given.)

### Activity 3
What are reasonable past hospital and medical expenses, and how are these costs proven?
Is a claimant compelled to make use of provincial or state medical facilities because of the lower tariffs?
(Please find the answer in Klopper 2008: pp. 170-171, par. 6.3.) Keep in mind that section 17 of the RAF Act 56/96 has been amended by section 6 of the RAF Amendment Act 19/2005 in respect of motor-vehicle accidents that occurred on or after 1 August 2008. See section 17(4B)(a) of the amended RAF Act.

Activity 4
Is it possible to claim false teeth/spectacles/prosthesis in terms of the RAF Act? Are transport costs to and from a holiday resort in order to convalesce from injuries recoverable? Will a paraplegic or quadriplegic be able to claim the costs of a new vehicle for transportation purposes? Will it be possible for an injured third party (for instance, a paraplegic) to claim the costs of specialised accommodation despite the fact that the claimant chooses not to make use of it? Explain.
(Please find the answer in Klopper 2008: pp. 171-173, par. 6.3.1.2; Ngubane v South African Transport Services 1991 1 SA 756(A); General Accident v Uijs 1993 4 SA 228(A) at 235J.)

Activity 5
Once a claim (in respect of medical costs, loss of income, and loss of support) is established on the merits in terms of section 17, explain what the Fund is authorised to do in terms of section 17(6) and under what conditions.
(Please find the answer in Klopper 2008: p. 174, par. 6.3.1.3.)

Activity 6
How can future medical costs and hospitalisation be proven? Enumerate all the rules applicable to come to a reasonable lump sum quantification.
(Please find the answer in Klopper 2008: pp. 174-175, par. 6.3.2.1-6.3.2.4.) Also pay attention to section 17(4B) of the recently amended RAF Act has set out in footnote 215 on p. 174 of your prescribed textbook.

Activity 7
What is loss of income?
(Please find the answer in Klopper 2008: pp. 178-179, par. 6.3.3.1.) Take note of section 17(4) of the RAF Act which was recently amended and which is set out in footnote 240 on p. 178 of your prescribed textbook.
<table>
<thead>
<tr>
<th><strong>Activity 8</strong></th>
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<tbody>
<tr>
<td>What is understood by the adjective “illegal” in “illegal income”? When is income illegal? What is the test for illegality? How will you formulate claims in respect of illegal income? Can it be considered to be “earning capacity”? (10)</td>
</tr>
<tr>
<td>(Please find the answer in Klopper 2008: pp. 179-181, par. 6.3.3.2.)</td>
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<tr>
<th><strong>Activity 9</strong></th>
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<tr>
<td>What is loss of earning capacity? What are the principles of assessment and method of calculation of present and future earnings? (10)</td>
</tr>
<tr>
<td>(Please find the answer in Klopper 2008: pp. 181-191, par. 6.3.4.2-6.3.4.5.) Also pay attention to section 17(4) of the RAF Act which was recently amended in respect of motor-vehicle accidents which took place on or after 1 August 2008. See footnote 267 on p. 181 of your prescribed textbook.</td>
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<tr>
<th><strong>Activity 10</strong></th>
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<tr>
<td>What are the basis and requirements of manager or substitute costs? (5)</td>
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<tr>
<td>(Please find the answer in Klopper 2008: pp. 192-193, par. 6.3.4.6.)</td>
</tr>
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</table>
UNIT 5.4: QUANTIFICATION OF SPECIAL (OR PATRIMONIAL) DAMAGES RESULTING FROM THE DEATH OR INJURY OF ANOTHER PERSON: LOSS OF MAINTENANCE, APPORTIONMENT OF DAMAGES, JOINDER, AND MISCELLANEOUS PROVISIONS OF SECTION 17

Learning outcomes

After you have completed Unit 5.4, you should be able to do the following:

- Have mastered the general principles applicable to the assessment and calculation of maintenance as patrimonial damage.
- Know what is meant by "apportionment of damages", "joint wrongdoers", "joining of wrongdoers", "joint and several liability", and "reciprocal right of recourse".
- Comprehend the other stipulations contained in section 17 and know what its content is.

Time schedule

It should take you approximately three hours to do the reading for Unit 5.4.

1. Quantification of loss of maintenance

In connection with the above, please read the following: Klopper 2008: pp. 193-214.

Note

This topic deals with the quantification of patrimonial damage flowing from the bodily injury or death of a breadwinner or other person (such as a person who rendered service) who has been injured or killed due to the wrongful and negligent driving of a motor vehicle, resulting in the payment of damages to the third-party dependants. Even though this topic is dealt with separately, it falls under patrimonial loss (special damages) as the broader heading.
1.1 Outline of Unit 5.4: loss of maintenance

(Recoverable) ➔ Third-party claim

Patrimonial damage ➔ Bodily injury to breadwinner

(Special) ➔ Bodily injury to person who rendered service

Maintenance

➢ Basic principles
  • Past and future maintenance
  • Comparable position: place dependant as far as practicable in the position he/she would have been in had the breadwinner not been killed.
  • Date of calculation: date on which the breadwinner was killed or injured.

➢ Approaches to assessment
  • Mathematical: annuity calculation.
  • Fair and reasonable: flexible under the circumstances.

➢ Assessment
  • Facts considered: (period of dependency, life expectancy, period of joint earnings, period of support) deceased's income.
  • Deceased's income
  • Portion of deceased's income allocated to support

➢ Calculation
  • Method: basis/inflation/evidence.
  • Method: contingencies (for example, prospects of remarriage).
  • Calculation of final amount

➢ Assessment of value of lost services

➢ Funeral and cremation expenses

Activity 1

What are the objects and bases of the assessment of loss of maintenance? (2)

(Please find the answer in Klopper 2008: p. 194, par. 6.4.2.)

Activity 2

What approaches for the assessment can be identified? Also indicate what the preferred approach is and why you say so. (5)

(Please find the answer in Klopper 2008: pp. 194-196, par. 6.4.3.)
**Activity 3**

What factors will influence the assessment? (10)
(Please find the answer in Klopper 2008: pp. 196-204, par. 6.4.4.1.) The RAF Amendment Act has now come into operation and it is therefore important to pay attention to the amended version of section 17(4) of the RAF Act 56/96. See footnotes 347 and 368 on pp. 196 and 199 respectively of your prescribed textbook.

**Activity 4**

How will you quantify the amount to be paid as loss of maintenance? Enumerate all the contingencies/factors that will influence the amount, and indicate to what extent the amount will be influenced. (10)
(Please find the answer in Klopper 2008: pp. 204-211, par. 6.4.4.2.)

**Activity 5**

What is understood by loss of services, and how will it be calculated? (4)
(Please find the answer in Klopper 2008: p. 212, par. 6.4.5.)

**Activity 6**

To what extent can funeral and cremation expenses be claimed? How does the position after 1 May 1997 differ from those prior to this date? (4)
(Please find the answer in Klopper 2008: p. 99, par. 5.4.4.3.b)

### 2. Apportionment of damages/joinder

In connection with the above, please read the following:
- Sections 1(1)(a), 2(1), and 2(2) of the Apportionment of Damages Act 34 of 1956.

**Note**

Although this topic more appropriately deals with the restriction of recoverable damage (Unit 6), it fits in nicely with the quantification of damages as well. Two situations are of importance: firstly, where the fault of the plaintiff has contributed to the causation of his/her own damage – thus limiting the extent of the Fund's liability in the context of the RAF Act. Contributory fault is currently regulated by the Apportionment of Damages Act 34 of 1956. In the main, apportionment will affect
the claims of drivers, pedestrians, and (sometimes) the claims of certain passengers. The claims of dependants of the deceased or injured breadwinner will not resort under contributory fault, because the breadwinner (in this instance) would rather be considered a joint wrongdoer (along with the Fund). The latter category results in the second situation to be discussed.

It goes without saying that damage can be caused not only by a single wrongdoer, but also very often by more than one wrongdoer – known as joint wrongdoers. Joint wrongdoers can be defined as persons who are jointly and severally (in solidum) liable in delict for the same damage. As such, the phenomenon fits in nicely with third-party claims as well. Presently, the position of wrongdoers is also regulated by the Apportionment of Damages Act (especially section 2).

2.1 Outline of Unit 5.4: apportionment of damage and joint wrongdoers

**Apportionment of Damages Act 34 of 1956**

- Section 1(1)(a): apportionment of damages
  - Relative fault contributing to own detriment: apportionment (division) of fault.
  - Claim not forfeited because of own fault.
  - Proportional reduction of damages recoverable.
  - Claim of dependants not apportionable: breadwinner and third party deemed to be joint wrongdoers (section 2(1)(B) of the Apportionment of Damages Act).

- Section 2(1): joint wrongdoers
  - Creates concept of joint wrongdoers.
  - Third party alleges that two or more parties are jointly and severally liable to pay damage.
  - Sections 2(8)(a), 2(6)(a): jointly and severally/right of recourse.

- Section 2(2): the plaintiff or defendant in an action notifies a joint wrongdoer of the delictual action before litis contestatio (if notice is not given, the person paying fully cannot claim recourse (contribution) against the wrongdoer, unless the court condones the neglect for good cause). The effect of the notice is not to make the addressee a party to the action. Such effect is brought about by serving a third-party notice in terms of Supreme Court Rule 13, which is actually a declaratory order.

- Rule 13 (of High Court) (third-party notice of joinder)
- Rule 28(2) of Magistrate’s Court Act: to join joint wrongdoers in magistrate’s court by means of notice of motion + affidavit + request to implement subsections 2(8)(a) and 2(6)(a). This is not a declaratory order; the magistrate’s court cannot make these kinds of orders.
Activity 7
Is the Apportionment of Damages Act 34 of 1956 applicable to instances of no-fault and intent? Explain. (2)
(Please find the answer in Klopper 2008: p. 266, par. 8.2.2 and 8.3.1.)

Activity 8
What is apportioned: fault or damage? Use an example to explain. (3)
(Please find the answer in Klopper 2008: p. 266, par. 8.2.3, and p. 267, footnote 290.)

Activity 9
Will a child (older than seven years) be subject to the same reasonable-person test as adults? Why? Substantiate your answer. (4)
(Please find the answer in Neethling. 2001. Law of Delicts: pp. 133-135.)

Activity 10
How is the criterion of the reasonable person applied to apportion damage? Use the example by Klopper (pp. 266-267) to explain the different applications. (5)
(Please find the answer in Klopper 2008: pp. 266-267, par. 8.3.2.)

Activity 11
How will the failure to wear a safety belt by the third party influence his/her claim against the Fund? Explain by using the example mentioned by Klopper, p. 267-268 (par. 8.4). (5)

Activity 12
How will the RAF make use of the contributory negligence of the claimant? Explain. (2)
(Please find part of the answer in Klopper 2008: p. 268, par. 8.6.)

Activity 13
When will persons be considered to be joint wrongdoers? Explain. (3)
(Please find part of the answer in Klopper 2008: p. 268, par. 8.7.1 and footnote 296.)
**Activity 14**
Why would the RAF be deemed to be a joint wrongdoer? Explain. (2)

(Please find part of the answer in Klopper 2008: p. 268, par. 8.7.2 and footnote 297.)

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**Activity 15**
Describe the effect and value of section 2(1), (2), (4), and (6) of the Apportionment of Damages Act 34 of 1956 and Rules 13 (High Court) and 28 (Magistrate's Court). (10)

(Please find part of the answer in Klopper 2008: p. 268, par. 8.7.2, and p. 269, par. 8.7.3.)

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**Activity 16**
Write notes on married persons and dependants being special types of joint wrongdoers. (10)

(Please find part of the answer in Klopper 2008: pp. 269-270, par. 8.7.4.)

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### 3. Miscellaneous provisions of section 17 of the RAF Act

In connection with the above, please read the following: section 17(1)-17(6) of the RAF Act of 1996.

#### 3.1 Outline of Unit 5.4: miscellaneous provisions of section 17 of the RAF Act

Section 17(4)(b): undertaking to pay future income and maintenance in instalments in arrears as agreed upon.

Section 17(3)(a): no interest payable on any compensation awarded by the court unless 14 days have elapsed from the date of the court order. Section 17(2): party and party costs. (See Vermaak v RAF. Unreported case of the Cape of Good Hope Provincial Division. Case No.: 1976/06. Delivered on 5 March 2008.) (Take note that this section has been left out by the RAF Amendment Act 19/2005 with respect to claims that arose on or after 1 August 2008).

Section 17(5): supplier of goods and services (hospital) can claim the amount directly from RAF.

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**Activity 17**
Would it be possible for a hospital to claim the costs of goods and services provided directly from the Fund? Explain. (2)

(Please find the answer in section 17(5) and Klopper 2008: pp. 40-46, par. 5.1.6.)
### Activity 18
What legal costs can be claimed from the Fund? Explain. (5)
(Please find the answer in Klopper 2008: p. 311-312, par. 12, and section 17(2).)

### Activity 19
Is interest payable on the compensation awarded by the court? Explain. (2)
(Please find the answer in Klopper 2008: p. 214, par. 6.6.4, and section 17(3).)

### Activity 20
What role does section 17(4)(b) play as far as the "once and for all" rule is concerned? Explain. (5)
(Please find the answer in Klopper 2008: pp. 213-214, par. 6.6.1.)