The Law of Third Party Compensation

Ch 1. Introduction

1. General

1.1 law of third party compensation
- third party generally used = victim who suffers damage or is prejudiced by the negligent or unlawful driving of a motor vehicle by another
- use of Law of Third Party Compensation allows distinction between actions for recovery of damages to property and vehicles and third party claims

2. underlying common law principles
- law of delict
- in terms of Act, claims are based on recovery of damage and prejudice to certain rights of personality caused by negligent and unlawful acts of a driver, owner of a vehicle or their employee resulting in injury of a person or the injury or death of the breadwinner or dependents
- prove all elements of delict: conduct, wrongful or unlawful, fault, causality and damage
- all common law defences available, self-defence, emergency, consent, contributory fault, absence of element

6. object and interpretation

6.1 Object of the MMF Act of 1989
- Multilateral Motor Vehicle Accident Fund
- no clear object, preamble: to provide for MMVA fund and matters connected
- schedule: payment of compensation for certain loss or damage unlawfully caused by driving of certain vehicles

6.2 Object of the RAF Act of 1996
- title: to provide for establishment of RAF
- S3 : payment of compensation in accordance with act for loss or damage wrongfully caused by driving of vehicle

6.3 Object and interpretation of acts
- objects similar, unaltered
- system introduced 1946 due to increasing accidents and inability of victims to fully recover their common law delictual damage from wrongdoer
- exclusive benefit and protection of victim
- interpretation usually extensive to afford third party widest possible protection, in favour of liability of the RAF

Fn 71
-Aetna Insurance Co v Minister of Justice: compulsory ins to remedy problem of members of public injured or killed in MVA’s without redress against wrongdoer

6.4 interpretation of the MMF and RAF Acts
6.4.1 extensive interpretation
- predecessors of RAF and MMF and RAF interpreted to give widest possible protection to victim/ third party
- to interpret provisions of RAF one should compare to what extent provisions in question are in pari material to predecessors, then interpretation of of preceding provision be followed when interpreting current provisions of MMF and RAF, keeping first principle in mind

6.4.2 restrictive interpretation
- Chauke v Santam Limited: was forklift vehicle?
appellate div held that legislator intended that only certain specified instances of loss or damage fell to be indemnified by relevant act; those occasioned by motor vehicle, restrictive interpretation of motor vehicle.
- RAF v Radebe: failed to comply with regulations, court held particular provision enacted for benefit of MMF in order that latter be apprised of extent and nature of claim and be given opportunity to assess, and should be complied with. Restrictive interpretation followed as to whether claimant had substantially complied with regulation (regs into s 17 MMF)

6.4.3 extensive or restrictive interpretation?
- s 21 RAF suspends claimants common law delictual claim and substitutes statutory claim against RAF
- Widest possible protection misinterpreted - alludes to protection in respect of claimants inability to effect retribution against a common law wrongdoer because he might be indigent
- ordinary meaning and legislator’s intention
- where: clear provisions and intention of legislator to limit ambit of third party compensation legislation
  - and where claimant has to comply with clear duty imposed by leg for claim to be enforceable against RAF as substituted defendant, = restrictive approach

Fn 83
-Chauke: purpose not to provide indemnification in cases of collision with vehicles which have not been designed to travel on a road but which can be driven on a road provided it is not at the same time being used by others as such

Fn 87
-Radebe: purpose of reg is to facilitate decision whether fatal accident caused death and whether driver in question was negligent

Fn 94
- chauke, radebe = restrictive, Van der Merwe v SA Eagle = extensive approach to compliance with art 62 of MMF, case distinguished from Radebe in that Radebe dealt with regs

Ch 2 Basis of claims, liability and requirements for liability: Identified claims

1. **legal basis of third party claims**
   - delict
   - Statutory displacement of liability away from wrongdoer to RAF provided that requirements for liability as set out in RAF Act are fully met

Liability of Fund and agents

17.
1. The Fund or an agent shall-
2. a. subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
   b. subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the
driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee.

2. exclusion, restriction of liability and prescription
   - Provisions for above exclude or limit liability

3. RAF liability
   3.1 general principle
   - third party compelled by law to institute action against RAF, may not claim from wrongdoer driver or employer who is vicariously liable if claim 3rd party claim acc to Act

   fn 9
   - S 21
   Claim for compensation lies against Fund or agent only

21. When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation.

3.2 exceptions: wrongdoer or employer personally liable
   3.2.1 introduction
   - inability of RAF to pay compensation
   - relevant motor driven without owners permission
   - claim excluded by provisions of Act
   - claim restricted by provisions of Act
   - other instances of personal liability based on right of recourse and joint and several liability
   - where secondary road accident victim suffers emotional shock

   fn 12
   - RAF Act 2005 new s21 will abolish common law right to claim from wrongdoer except where RAF unable to pay or emotional shock

3.2.2 inability of RAF to pay compensation or no current operative third party compensation system
   - then wrongdoer personally and directly liable
   - even if RAF partially unable
   - Inability must be proven
   - Onus on third party
   - Proved by instituting liquidated claim against RAF or on preponderance of possibilities

3.2.3 vehicle driven without permission of owner
   - option of claiming from wrongdoer or RAF

3.2.4 liability of RAF excluded
   Liability excluded in certain cases
19. The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-
   a. for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21; or
   b. suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death-
      i. was being conveyed for reward on a motor vehicle which is a motor cycle; or
      ii. is a person referred to in section 18(1)(b) (social or gratuitous passenger) and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned, and was being conveyed in or on the motor vehicle concerned; or

      (RAF not obliged to pay compensation)
   c. if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by-
      i. any person entitled to practise as an attorney within the Republic; or
      ii. any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or
   d. where the third party has entered into an agreement with any person other than the one referred to in paragraph (c)(i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim-
      i. a portion of the compensation in respect of the claim; or
      ii. any amount in respect of an investigation or of a service rendered in respect of the handling of the claim otherwise than on instruction from the person contemplated in paragraph (c)(i) or (ii); or
   e. suffered as a result of bodily injury to any person who-
      i. unreasonably refuses or fails to subject himself or herself, at the request and cost of the Fund or such agent, to any medical examination or examinations by medical practitioners designated by the Fund or agent;
      ii. refuses or fails to furnish the Fund or such agent, at its or the agent's request and costs, with copies of all medical reports in his or her possession that relate to the relevant claim for compensation; or
      iii. refuses or fails to allow the Fund or such agent at its or the agent's request to inspect all records relating to himself or herself that are in the possession of any hospital or his or her medical practitioner; or
   f. if the third party refuses or fails-
      i. to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or
      ii. to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

   (wrongdoer will prob not be liable as liability will not revive due to wilful conduct of claimant, right to claim suspended until last exclusions are removed))

- Third party or his or her breadwinner is conveyed and injured or killed by sole negligence of driver of vehicle in which he or she is being conveyed

3.2.5 liability of RAF restricted in respect of certain classes of passengers
- s 18, to be abolished by RAF amendment Act
- claim more than maximum amount- claimed from wrongdoer
- passengers (not military) who have been injured or have suffered prejudice as a result of the sole negligence of the driver of the vehicle in which they are conveyed and who are conveyed
  - for reward
  - in the course of business of owner of motor vehicle
  - in the course of his/her employment where s 18(2) does not apply (coida)
  - in motor car for purposes of lift club = R25000 special and general damages as well as costs of recovery thereof
not in any of previously stated manners (gratuitous or social passengers)= R25000 special damage only plus costs of recovery

3.2.6 other instances based on right of recourse and joint and several liability
- personal liability: drove without driver’s license, under the influence of intoxicating liquor
  : driver and RAF joint wrongdoers

4. requirements for liability of RAF where owner or driver of vehicle is identified and jurisprudential nature of third party claim
4.1 Requirements
- S 17(1)
- 6 req: claimant must be any person or a third party who has suffered damage or prejudice because of injury to self or injury or death of another
  : conduct specified being either driving of motor vehicle or another unlawful act by owner, driver or employee of owner acting in course of employment or any other person
  : specific minimum of fault req, viz negligence
  : causal link req between damage or prejudice and conduct
  : damage or prejudice must occur any place in RSA
- Claimant third party must prove all req

4.2 jurisprudential nature of third party claim
- unitary common law claim even though it is for patrim and non-patr damages, cannot be ceded or inherited b4 litis contestatio

5. individual requirements for liability
5.1 road accident victim or claimant as third party
5.1.1 introduction
- 2 classes of third party entitled to claim against RAF: bodily injured third party
  : 3rd P who suffers damage due to bodily injury or death of his breadwinner

5.1.2 general meaning of third party
- driver = first party
- ins co = 2nd party
- person who suffers damage due to negligent driving= 3rdP, any road accident victim who has suffered damage or loss as a result of the bodily injury of him or injury or death of his breadwinner as result of negligent and unlawful driving of a motor vehicle, must comply with all req

5.1.3 bodily injured third party
5.1.3.1 introduction
- any person who sustains bodily injuries (incl person who is legally obliged to compensate such person for his/her injuries) due to negligent driving or other unlawful act which can be linked to driving of motor vehicle = 3rdP
- incl: unborn person
  : minor rper by guardian
  : guardian of minor in own right
  : person married ICOP/OCOP even if injured by negligence of spouse
  : unrehabilitated insolvent

5.1.3.2 unborn persons
- claim if shown that injury and consequences suffered by child claimant under these circs solely attributable to accident, child born alive inj not due to birth or hereditary.
- Approach based on causality not fiction

fn 62
- Both parents equally guardians, each guardian equal competence
- Unmarried biological father guardian if complied with certain req

fn 68
- Consider all children of 18 on 1/7/2010 majors

5.1.3.3 Minors
- Persons under 18
- Widow married acc to customary law no longer minor
- Lack legal standi

5.1.3.4 guardians of minors
- eg parent
- basis of guardians claim is legal duty to support child has been accelerated and exacerbated by unlawful act of driver
- may sue RAF or RAF and child as joint wrongdoers, if RAF then RAF has right of recourse against minor to extent of minor’s contributory negligence
- guardian party in own right for medical and other expenses, claim co-exists with that of minor child

5.1.3.5 married persons
a. married OCOP: separate estates, spouse may hold each other liable for delictual acts, can also be joint wrongdoers vis-a-vis each other
b. ICOP: one joint estate with equal indivisible shares
   : estate subject to joint control of spouses
   : restricted ability to claim from each other
   : liability of joint estate for delicts committed by spouses circumscribed
- Patrimonial damage not claimable from other spouse
- Non-patr loss may be recovered from other spouse
- Van der merwe v RAF: injured spouse may recover part loss from other spouse where he was pedestrian, CC, decision criticised, allows wrongdoer to benefit from negligence

5.1.4 third parties who suffer loss of maintenance
5.1.4.1 duty to maintain as legal basis of claim
- without this duty, no claim
- where 3rdP suffers loss of maintenance as a result of injury (full or partial loss) or death of breadwinner
- widows, children, persons who are legally dependent on breadwinner

5.1.4.2 claimant legally married to deceased
a. civil marriages
b. marriage acc to customary law- registered and certificate, if unregistered certificate req from commissioner, material part of claim
- certificate prima facie proof of marriage
- widow married to customary law entitled to claim loss of maintenance irrespective if one of the spouses in such a customary marriage was a spouse in an existing civil marriage [prob before 2000 when recog of cust marriage
act in force, no cust marriage if existing civil marriage, if more than one cust marriage property aspects regulated]

fn 99 – recognition of customary marriages act 1998 reg and certificate does not affect validity, only proof

fn 112 - civil union act- civil union partner =spouse

5.1.4.3 partners in same sex unions
- du Plessis v motorvoertuigongelukfonds: marriage ceremony between same-sex partners, by marriage officer not in that capacity, crt held that mutual duty of support created, common law extended to include permanent life unions; civil union act enacted by legislature in response
- such unions registered
- signed certificate prima facie proof of union

5.1.4.4 live-in partners or concubines
- only possibility of claim is where contractual duty to maintain

5.1.4.5 duty to maintain contractually created (generally not recognised in our law)
- Henery v Santar versekering: divorced and then lived together as man and wife, husband supported her beyond divorce settlement, crt held that in facts of that case, divorce settlement entered into created valid duty to maintain

5.1.4.6 parties to relationship solemnised by other rites
- generally does not give rise to claim
- Amod v MMF: Islamic law created duty of support, under particular cirrc right to claim maintenance

5.1.4.7 other dependants
- who were owed duty of support by deceased
- children, grandchildren, parents, grandparents, siblings

5.1.4.8 children and spouse on death of one parent/spouse
- only if suffered loss fn125

5.1.4.9 adopted children
- legally adopted child of deceased
- child of deceased who is subsequently adopted: claim for maintenance not extinguished by adoption

fn 114- only in one civil union, then not marriage or cust marriage and vice versa

fn 119- divorce settlement will not substitute for common law duty to maintain in circumstances where common law duty has lapsed eg death of spouse having duty to maintain

fn 125- santam ins v Fourie: deceased mother spent more on herself than the amount contributed to the household

5.1.5 other third parties
5.1.5.1 persons who benefited from services of deceased
- value of such services may be claimed
5.1.5.2 cessionaries
- cessionary of third party claim cannot be third party before litis contestatio

5.1.5.3 executors, curators, heirs, legatees
- executor and curator third party into medical expenses, loss of income, funeral costs, loss of ins benefits, if death after litis, also non-patrimonial loss
- heirs and legatees: third parties in respect of damage but non-patrimonial loss only claimed if deceased passed away after litis contestatio

5.1.5.4 owner of vehicle injured by own vehicle
- also third party due to wording ‘any person’; eg if owns 2 cars and accident between these 2 cars or own car overturns
- must comply with req and no exclusionary provisions

5.1.5.5 persons legally obliged to compensate third parties
- may also be third party

5.1.5.6 employer of a third party
- may not recover payments made to third party employee while absent from work due to injuries from RAF

5.1.6 suppliers
5.1.6.1 introduction
- s 17(5) supplier who supplies hospital or nursing home accommodation, treatment or goods or renders services may claim directly from RAF
- Req must be complied with
- ? independent claim from victim’s

5.1.6.2 legal nature of a suppliers claim
- Van Der Merwe v RAF: statutory right to claim directly from RAF, subject to third party having valid claim, paid from proceeds of third party claim (unitary claim)
- Accessory claim, may be independently exercised, but not independent from 3rd P claim
- Suppliers relationship with injured based on contract
- No claim against wrongdoer
- Not third party

5.1.6.3 Requirements
- A third party must be entitled to compensation
- A third party must have incurred costs in respect of accommodation of self or any other person in hospital or nursing home or treatment or goods or services
- A supplier has submitted its claim in accordance with RAF act and regulations and has fully complied with applicable provisions of act to claim
- Amount claimed does not exceed amount third party would be entitled to
  a. Entitled to compensation: precondition, entitled to interpreted restrictively, meaning having a rightful claim thereto; compensation: all damages have been settled, once and for all rule and unitary claim
  b. Has incurred costs: existing enforceable contractual obligation between supplier and 3rdP
  c. Prescribed form: form 2 completed and lodged in same manner as third party claim
  d. Not excessive- amount may be reduced, confirms that claim not independent from 3rd P claim
5.1.6.4 Compliance
- Compliance w s17 when supplier proves on balance of prob: third party injured or breadwinner injured or killed by unlawful negligent driving of motor vehicle
  : third party complied w all relevant provisions of RAF act in particular s24 relating to completion and lodging of prescribed claim form (form 1)
  : 3rd P has suffered damages and damages claimed constitute proper recompense
  : such damage not precluded from being legally recovered (eg by s19, prescription, collateral benefit rule)
  : supplier has valid and enforceable claim against 3rd P for costs as envisaged by section
  : has submitted claim as prescribed by act and regs
  : amount claimed does not exceed amount 3rdp entitled to

5.1.6.5 right of supplier to sue RAF
- not on s17(5), no direct right to receive payment
- only once all req of 3rd p claim and supplier claim complied with and 3rdP becomes entitled to compensation may supplier sue RAF based on non-compliance of statutory duty if fails, neglects or refuses to pay account or pays whole amount to 3rdP
- 3rdP entitled to compensation when claim validly lodged, negligence conceded, no exclusions applicable, damages agreed on or settled by crt.

5.1.6.6 Costs
- Third party entitled to taxed costs on acceptance of compensation, does not extend to supplier

5.2 conduct: driving of a motor vehicle or other unlawful act committed by certain persons
5.2.2 driving
5.2.2.1 introduction
- 2 meanings: ordinary and extended

5.2.2.2 ordinary sense of the concept driving
a. driving strict sense of word
- voluntary action which directly sets a stationary vehicle into motion and is directed to control the motor vehicle after it has come into motion as well as all related actions which are reasonably and necessarily connected therewith
- incl starting, braking, use of lights hooter and indicator and stopping fn 199
- not incl involuntary acts

Fn 194-
Presumptions regarding driving of motor vehicle
20. 1. For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle.
  2. For the purposes of this Act a person who has placed or left a motor vehicle at any place shall be deemed to be driving that motor vehicle while it moves from that place as a result of gravity, or while it is stationary at that place or at a place to which it moved from the first-mentioned place as a result of gravity.
  3. Whenever any motor vehicle has been placed or left at any place, it shall, for the purposes of this Act, be presumed, until the contrary is proved, that such vehicle was placed or left at such place by the owner of such vehicle.

Fn 199- Wells and ano v Shield ins
b. actions related to driving not strictly driving meaning- test to determine whether act related to driving constitutes driving as intended by legislator is of causal nature
- test is whether driving related act so intricately linked to driving of motor vehicle that if driving related act did not take place, it cannot be said that vehicle was capable of being driven
- driving related acts which do not constitute driving- opening of car door to get in and out
- hydraulic hitching or unhitching of trailer to or from vehicle
- starting of tractor-driven harvester without intention of setting combination in motion fn208
- lifting of front-end loading part of front-end loader

Driving related acts considered to be driving- starting of tractor-driven harvester combination in prep to be driven off
- hurling of petrol bomb into bus injuring passenger where route known to be dangerous
- switching on of winch of recovery vehicle to extricate recovery vehicle that had become stuck

Fn 208: starting of stationary permanently installed and immobile combination can never constitute driving

5.2.2.3 extended meaning of driving
- presumptions in s20 extend meaning of driving
- they identify driver where: mv is brought into motion by other than mechanical power means
  - mv is set into motion due to gravity
  - mv left at specific place
- covers instances where not clear who was driving and to include: owing or pushing of mv by other mv
  - pulling of mv by animals
  - pushing or pulling of mv by hand
  - movement on downhill slope w engine off
  - movement by own momentum or other mechanical means
  - runaway vehicle
  - parked mv when it has moved from one place to another without driver
  - stationary vehicle left at dangerous place
- all above, deemed to have been driven by person in control, or who left the vehicle or owner

5.2.2.4 towed vehicles
- if person in towed vehicle has some control, also a driver

5.2.3 motor vehicle
5.2.3.1 importance of concept of motor vehicle
- if injury or death not caused by driving of motor vehicle, no 3rdP claim (Chauke)
- general accident ins v Xhego: hurling of petrol bomb into bus = not good distinction between 3rdP claim and delictual claim

5.2.3.2 definition
- vehicle propelled or towed on a road by means of fuel, electricity or gas and is designed or adapted for use on a road (s1)

5.2.3.3 essential elements
3 elements- method of propulsion/propulsion test
- purpose of vehicle design (propelled or hauled on road)- design test
- road in relation to design test
a. propulsion test- fuel elec or gas
b. design test- will not comply if ordinary reasonable person will see that driving of vehicle on road hazardous to normal road traffic without special precautions-jettisoned in RAF v Van den Berg
  - if objectively viewed, vehicle was designed for general use on road
c. road- case law: nor necessarily limited to public road, prepared surface leading from one place to another to which number of persons or vehicles have access
: line of communication, specially prepared track between places for use by pedestrians, riders, vehicles
: incl haul roads found on mines
: not limited to public road although publ roads remains factor in application
- common law meaning: connects 2 places for traffic purposes
- definition: any surface specially prepared for the use of vehicles and pedestrians and links at least two places with one another
d. application - not mv's: forklift, ride-on lawnmower, midget racing car, specialised construction vehicle, self-propelled vehicle designed to provide power for starting of jet-powered aircraft, go-kart.
- mv's: mining truck, flatbed transporter, pneumatic wheeled roller
e. comment- unpredictable when vehicle will be motor vehicle ito act
- common law meaning of road will provide clarity, legislator wanted to provide for ordinary not exceptional occurrence, all non-standard vehicles not being capable of being included in primary def and its inclusionary phrase are excluded

5.2.4 conduct : other unlawful act
5.2.4.1 scope nature and application
- s17(1) conduct=driving of mv or other unlawful act
- if driver owner or employee of owner or any other person commits any other unlawful act directly linked with mv and driving thereof, other than the negligent driving of a mv and such act injures a person or causes death or injury to another person such act may qualify as conduct

Fn 272- santam versekeringsmtskpy v Kemp: injury or death may occur even if faultless driving eg wheel falls off due to negl of owner

Fn 274- wells, kemp: two prerequisites for liability, two separate enquiries, distinction is made between negl driving or other unlawful act

5.2.4.2 case law
- Xhego: wrongly decided
- diesel spilt on road from stationary truck- not driving, if was driving not negligent, if no negligent driving, causation irrelevant. Wrongly decided; min of safety and security v RAF. In order to qualify as other unlawful act conduct must be such that the causal relationship is so real and close that it cannot be said that the occurrence is totally divorced from driving (kemp)

Fn 281: collision with dead horse in road held to be negligent driving but in fact negligence was constituted by foreseeability of likelihood of collision with dead animal and failure by motorist to take precautions

fn 282: Erskine: fixing of winch to telephone pole opposite side of road- reasonable person would have seen possibility of people colliding with it, negligence not in driving of tow truck but other unlawful act

5.2.4.3 examples of other unlawful act
- if driver owner or empl of owner or any other person allows incompetent person to drive vehicle
- allows drunk or any other person to travel on back of truck when mere conveyance of persons in this manner can be considered negligent
- fails or neglects to maintain his vehicle properly
- fails to maintain tyre pressure or brake fluid
- Fails or neglects to install fire-fighting equipment in vehicle
- fails to secure load properly

5.3 fault: negligence
5.3.1 negligence as minimum requirement in relation to fault and intent
- s17(1) then obviously intentional as well

5.3.2 concept: negligence
- conduct does not comply with standard of care legally required
- if reasonable person in same position as the driver would have foreseen consequences and taken steps to avoid

5.3.3 degree of negligence
- slightest degree suffice, used by court to apportion damage in accordance with degree of fault

5.3.4 test for establishing of negligence: reasonable person or bonus paterfamilias
5.3.4.1 characteristics of reasonable person
- typical average member of society

5.3.4.2 reasonable person test and children
- reasonable person not reasonable child

5.3.4.3 disabled pedestrians
- reasonable disabled

5.3.4.4 reasonable person test and experts
- acted as reasonable member of same profession would

5.3.4.5 reasonable person test and unskilled and unlicensed drivers
- absence of skill may indicate negligence
- illegal to drive without license, ensures driver possesses a minimum amount of skill
- in our law not necessarily negligent if unskilled, reasonable person test, even if offence to drive without license

5.3.4.6 reasonable person and errors of judgment
- how reasonable person would have acted under same spec conditions
- not armchair approach

5.3.5 negligence, foreseeability and preventability
- in order for person to be liable, damage must be foreseeable and preventable
- only general consequences foreseeable, reasonable steps to prevent after weighing cost and benefit

5.3.6 negligence and precedents
- case law established general and specific legal duties owed by drivers, pedestrians and other persons

5.3.7 negligence: duties owed by driver
5.3.7.1 general duties driver
- keep proper lookout
- reasonable speed
- keep left
- allow for lateral movement
- safe following distance
- maintain vehicle properly

5.3.7.2 duties owed to others
- pedestrians
- cyclists
- animals
- night driving
- passengers

5.3.8 conduct in specific situations follow course of conduct
- pulling away
- stopping
- reversing
- overtaking
- turning
- approaching an intersection
- approaching or crossing a level crossing

5.3.9 negl and contravention of statutory provisions
- certain statutory provisions indicate standard of behaviour and contravention may constitute negligence, but can never be equated with proof of negligence

5.3.10 negl: collisions with objects and stationary vehicles
5.3.10.1 foreseeability
- reasonable and prudent driver will foresee certain prevailing conditions, eg stationary vehicles pedestrians animals cyclists obstacles on road
- Ordinary and extraordinary conditions
- Other drivers right to use road, must take reasonable steps to prevent harm to others
- Duty to authorised passengers but not unauthorised passengers
- Not drive faster than visibility permits
- Proper lookout be able to stop

5.3.10.2 speed and visibility
- drive-within-visibility rule, not negl in following circ: collided with trailer and broken down bus on country road
  **: collided with truck in process of extracting truck from mud on country road**
  **:Collided with unlit and reflectorless bicycle in urban area**
  **: collided with pile of rubble left on roadway during road construction**
- possibility of the existence of particular obstruction or stationary vehicle must be generally foreseeable
- collision while blinded by oncoming lights negligent- should foresee
- if object or vehicle was not timeously visible, driver not negligent

5.3.10.3 use of shoulder (emergency lane)
- at night in contravention of regs not necessarily negl
- negl if unnecessarily drives on shoulder and constitutes danger to other road users on shoulder

5.3.11 negl: justified assumptions
5.3.11.1 generally
- entitled to assume other users will also act reasonably until clear that collision possible then driver must take all reasonable steps to avoid collision

5.3.11.2 all drivers will keep left
- fact that collision occurred on incorrect side of road prima facie proof of negl of driver on incorrect side of road

5.3.11.3 drivers of emergency vehicles
- may assume that while siren is operating other drivers will give way to his vehicle
- driver who collided with emergency vehicle negl if: warning apparatus on vehicle clearly visible and audible and operative at stage that other driver was capable of observing and reacting to thereto
  - hearing impediment or difficulty no excuse
  - if driver does not hear siren but sees flashing lights should give way and foresee that emergency driver might disregard traffic signals
- emergency driver must still drive safely

5.3.11.4 uncontrolled intersections and junctions
- no exclusive right of way, approaching driver may assume he has been seen and if he enters intersection first that other driver will take reasonable steps to avoid collision
- road significant to determine justification of assumption-eg main road with subsidiary roads leading into it

5.3.11.5 stop sign controlled intersections
- driver of road not regulated by stop sign may assume that other driver will timeously heed stop sign.
- Not unconditional and exclusive right of way
- Must still keep proper look-out, safe speed and reasonable steps to avoid collision

5.3.11.6 intersection controlled by yield sign
- failure to heed yield sign negl only if traffic on intersecting road and traffic so close as to constitute a danger

5.3.11.7 traffic light controlled intersections
- if other vehicles have vacated intersection, driver may assume other drivers will heed red light
- still proper look-out

5.3.11.8 overtaking
- driver overtaking may assume that other car will maintain course, sound hooter if other car does not, may then again assume other car will maintain course

5.3.11.9 turning
- may assume approaching traffic will maintain direction and speed and will not unsafely cross his path
- may take evasive action if clear approaching vehicle not maintain course
- may not assume with some exceptions that traffic has seen turning signal

5.3.12 negligence and sudden emergency
5.3.12.1 generally
- emergency in delict excludes wrongfulness, but in mva’s sudden emergency factor which excludes negligence
- did driver act reasonably in the case of sudden emergency or dangerous situation
- allowance made for human fallibility

5.3.12.2 principle of sudden emergency
- a driver who encounters an unexpected sudden emergency cannot be found to be negligent if, while subjected to a sudden emergency, he or she chooses an option which after the event was proven to be wrong, as long as it was the best possible course of action to avoid a collision prevailing at the time of making the wrong decision.

5.3.12.3 examples where may rely on sudden emergency
- approach of vehicle on wrong side of road
- other vehicle suddenly swerves across path
- approach of vehicle which is out of control
- surprised by car door opening
- pedestrian or child suddenly running in front of vehicle
- attacked
- skid
- mechanical failure

5.3.12.4 requirements
- unexpected and sudden: no opportunity to consider merits of courses of action
- reasonable care and skill: to avert accident
- mechanical defects: must be unaware of defects and not reasonably be required to know
- skid: road surface, tyres, manner of driving
- blackouts: not sudden emergency. Plaintiff must show defendant aware of condition and elected to drive

5.3.12.5 proof
- plaintiff to adduce evidence which indicates negligence on part of defendant, burden rests on def to raise and prove sudden emergency by means of adequate factual basis to found defence

5.3.13 negligence: proof
5.3.13.1 prima facie
- collisions on incorrect side of road: of driver on wrong side of road negligent
- rear-end collisions: driver who collides with rear negligent until explanation why not negligent

5.3.13.2 proof on balance of probabilities
- statutory presumptions have to be rebutted
- from circumstances eg hit and run
- motor vehicle collision expert to reconstruct accident= can never be conclusive

5.3.13.3 proof: res ipsa loquitur
- facts of case indicate negligence where proven facts are only available evidence
- the only reasonable inference of negligence from proven facts- not presumption or transfer of proof
- eg: driverless vehicle comes into motion and collides with other vehicle
  : collision on wrong side of road
  : vehicle overturns on straight and level road or while negotiating corner
  : vehicle collides with parked stationary vehicle in broad daylight
  : collision with pedestrian where ped visible and walking in roadway
- failure to rebut inference will lead to def found negligent
- rebutting evidence will depend on circs of case
- res ipsa loq may be applied even if plaintiff contributory negl
- also applied where more than one driver, eg head on collisions in middle of road

5.3.13.4 accident reconstruction as method of showing probabilities
- care taken that facts on which reconstruction is based are as far as possible irrefutable
- preferably reconstruction supported by witnesses

5.3.13.5 contributory negl
- apportionment of damages act
- deviation from reasonable person test expressed as percentage

5.4 damage: bodily injury or loss of maintenance
5.4.1 introduction
- only damage specifically referred to in s17(1) claimed

5.4.2 different types of damage
- bodily injury of third party
- bodily injury or death of any other person
- once and for all, past and future loss

5.4.3 loss or damage as result of bodily injury to third party
5.4.3.1 meaning of damage
- patrimonial and non-patrimonial loss
- but does not include all loss, eg damage to motor vehicle, false teeth, glasses, clothing, existing prosthesis excluded

5.4.3.2 meaning of bodily injury
- injury which physically affects person
- incl drowning or emotional shock (painful disturbance or fright which results from person observing or experiencing a disturbing event, sufficiently severe nature and reasonably foreseeable, fear for safety of self or property or that of another)
- encompasses all detrimental consequences eg personality change, psychological trauma, cardiac arrest, miscarriage which may follow physical injury or emotional shock

5.4.3.3 recoverable damage resulting from bodily injury
a. medical and hospital costs- patrimonial, past present and future
b. loss of income-ex gratia salary recoverable, payments on basis of employment contract or civil servants contract pertinent, insurance taken out by injured collateral benefit recoverable
c. loss of earning capacity- past and future, may employ manager
d. travelling and transport costs- to hospital, social hospital visits if shown to be necessary eg guardian, to therapy eg physio, not airfare when travelling by car painful
e. cost of nurse, assistant, helper or manager
f. pain and suffering- past and future, extent and duration and must be suffered
g. psychological trauma resulting from physical injury- depression, withdrawal, anxiety
h. emotional shock- not resulting from physical injury
i. disfigurement
j. loss of amenities- loss of enthusiasm and ability to participate in sport social recreational and other normal activities
k. loss of general health
l. shortened life expectancy

fn 516: s6 of RAF AA restricts costs recoverable for med and hospital to a prescribed tariff, those of public health establishments and emergency tariffs negotiated
loss of income restricted 160,000 annually or support in respect of each breadwinner

pain and suffering only recoverable in respect of serious injury as lump sum. Person other than third party may claim compensation for emotional shock from wrongdoer

barnard v Santam: foreseeability of emotional shock—shock resulting from physical injury to other person, personal danger, prejudice to family and friends, or personal observation, may also suffer on being informed

5.4.4 loss or damage as result of bodily injury and death of another
5.4.4.1 meaning of damage
- third party not suffer personal injury but loss of maintenance from death or injury of his breadwinner
- patrimonial, past and future, if third party had right to claim maintenance

5.4.4.2 bodily injury or death
- see 5.4.3.2

5.4.4.3 recoverable damage as a result of bodily injury or death of another person
  a. loss of maintenance—amounts deceased was legally obliged to pay for food, clothing, education, meds; not if self-sufficient
  b. funeral and cremation expenses—b4 1/11/1991—reasonable funeral and cremation expenses
    - after 1/11/1991 only necessary funeral and cremation expenses
    - after 1/5/1997 only necessary actual costs of cremation

5.5 causality
5.5.2 causality in terms of RAF Act of 1996
5.5.2.1 generally
- s17(1) 2 phrases: arised from, caused by

5.5.2.2 relationship between caused by and arising from
- not tautologous acc to cmts
- caused by: immediate and direct consequence, indicate direct causality
- arising from: Wells and ano v Shield insurance: restrictive interpretation; indicates those circs where driving did not directly cause death or injury of a person but where a causal connection between such conduct and the death or injury can be construed; sine qua non

5.5.2.3 test for causation: conduct related to driving
- summary: death or injury arises from a driving related activity if acc to standards of common sense the death or injury is not too remote from the conduct and is the actual consequence of such conduct
- general Accident insurance v Xhego: no causal connection between driving of bus and injuries of passenger from petrol bomb, rather delictual liability of bus owners in not changing route; wrongly decided, both required conduct and causality absent
- RAF v Russel: accident seriously injured victim and induced depression which led to suicide, court failed to deal with causation as intended by legislature

5.5.3 common law causality and causality in RAF Act 1996
- caused by = common law concept of causality, but where driving related conduct considered, there is a difference and principles in Wells apply see 5.5.2.2
5.6 locality
- any place in RSA, not confined to public road

Ch 3. Requirements for liability: Hit-and-run (unidentified motor vehicles)

2. Meaning of unidentified vehicle
- MV of which general description may be known, but the identity of owner and driver is unknown

3. Basis of liability
- Same as where owner or driver identified
- Remains liability based on the unlawful and negligent injury or killing of a person by the unlawful and negligent driving of a MV, even though driver unknown
- Additional requirements
- Assumed liability

5. Requirements for liability
   - regulation 2
   - req: must comply with all req of act:
     - driver or owner unknown of MV that caused bodily injury or death
     - bodily injury caused by unlawful and negligent driving of unknown vehicle
     - 3rdP must have taken reasonable steps to ascertain identity of owner or driver of unidentified MV
     - N.A ANY LONGER: 14 days to submit affidavit; physical contact between unid MV and person which is cause of injury or death

6. Individual requirements for liability
6.1 introduction
6.2 compliance with requirements of RAF Act 1996
- claimant must be third party
- suffer damage as a result of bodily injury to him or death of his breadwinner from unlawful and negligent driving of unidentified MV
- establish causal link between driving of unidentified MV and damage suffered by claimant
- prove that occurrence which gave rise to claimants claim within geographical borders of SA

6.3 unlawful and negligent driving of unidentified MV
6.3.1 meaning of unidentified vehicle
- id of driver and owner unknown

Fn 34- not necessarily person who is registered as such with licensing authority, encompasses common law concept of owner

6.3.2 who is driver?
- person who for purposes of act drives vehicle
- may be 2 drivers if one gives directions
  – also extended meaning due to presumptions s20
6.3.3 who is owner
- registration of vehicle ito road traffic act not conclusive to establish ownership, only liability to pay reg fees.
- owner = common law concept and s1
xii.A "owner", in relation to-
  a. a motor vehicle which a motor dealer has in his or her possession during the course of his or her business and which may in terms of any law relating to the licensing of motor vehicles not be driven or used on a public road except under the authority of a motor dealer's licence of which the motor dealer concerned is the holder, means that motor dealer;
  b. a motor vehicle which has been received for delivery by a motor transport licence holder in the course of his or her business of delivering new motor vehicles and which has not yet been delivered by him or her, means that motor transport licence holder;
  c. a motor vehicle which is the subject of an instalment sale transaction, means the purchaser in the instalment sale transaction concerned;
  c. motor vehicle under an agreement of lease for a period of at least 12 months, means the lessee concerned;
- if any of these classes of owner ascertained RAF liable ito s 17(1)(a) not s17 (1)(b) read with reg 2

6.3.4 multiple motor vehicle collisions involving an unidentified MV
- if uncertain if unidentified MV caused collision, safest to hold RAF liable in the alternative ito s17(1)(a) and S17 (1)(b) read with reg 2

6.4 third party must take reasonable steps to establish identity of owner or driver
6.4.1 reasonable steps
- will be if made enquiries with police and police confirm unable to trace owner or driver
- appointed tracing agent and agent submits report under oath that no owner/driver located and steps taken
- personally or through agent made enquiries to establish identity of owner/driver and then submit written report under oath pref setting out steps taken and futility thereof

6.4.2 burden of proof
- claimant must prove on balance of prob that reasonable steps taken

6.5 reporting of accident within 14 days
6.5.1 effect of provision
- failure to comply would have excluded claim
- introduced MMF act 1989

6.5.2 compliance
- within 14 days or within reasonable period that claimant was able to submit affidavit to police with full details of accident
- held in cases that affidavit did not need to be by claimant personally, or be submitted personally, or if SAPS were inactive and made it impossible for claimant to comply; where age, injuries and circs made it not reasonably possible to submit in 14 days

6.5.3 provision unconstitutional
- reg 291)(c) questioned in RAF v Makwetlane: reg ultra vires empowering act, did not relate to common law justiciable claim
- Engelbrecht v RAF CC; denied claimant who had justiciable claim a real and fair opportunity to access court
Could not be justified by rationale of preventing fraud and providing proof
Invalid and unconstitutional from 6/5/2007

Fn 63- legislator did not intend for minister to make restrictive regulations ito MMF act 1989; physical contact reg held to be ultra vires
Ch 4. Exclusion of liability

1. What are the important changes introduced by the amendments regarding the liability of the RAF?

1. Under the old Act, the claims of certain categories of passengers were limited to a maximum of R25,000. The amendments have done away with this limitation and these passengers will in future be treated on an equal footing with all other types of claimants.

   a. The lifting of this cap has the effect that certain categories of passengers will enjoy better cover than what was previously the case.

   b. This amendment will place additional pressure on the RAF’s financial position, but was necessary to ensure equal access by the public to the benefits provided by the RAF.

2. Under the old Act, claims by claimants conveyed for reward on a motorcycle are excluded. The Amendment Act deleted this exclusion with the result that the RAF will in future entertain such claims.

3. The old Act excludes claims by passengers where the claimant is in law responsible for the maintenance of the driver, or where the claimant is a member of the same household as the driver and the driver is the sole cause of the accident. The amendments deleted this exclusion with the result that the RAF will in future entertain such claims.

4. The old Act does not exclude claims for secondary emotional shock. The amendments however introduced a new exclusion in respect of claims for secondary emotional shock. Secondary emotional shock refers to instances where the claimant was not involved in the accident but either witnessed or heard of the accident. While the RAF’s liability is excluded in respect of this type of claim, the claimant retains his/her common law claim for secondary emotional shock against the wrongdoer.

5. The amendments retain the claimants common law right to claim against the wrongdoer only in instances where the RAF is unable to pay any compensation and in instances of secondary emotional shock.

6. The amendments limit the RAF’s liability for compensation in respect of claims for non-pecuniary loss (general damages) to instances only where a serious injury has been sustained.

7. The old Act provides that a claimant is entitled to party and party costs when the claimant accepts an offer by the RAF. The amendments deleted this entitlement.

8. The RAF may issue a claimant with an undertaking in terms of which the RAF will compensate the claimant for future medical and related expenses. The amendments now entitle the RAF to pay the compensation to the claimant or directly to the medical service provider. The amendments also provide that claims lodged under the undertaking shall not prescribe before the expiry of a period of five years from the date on which the medical service was rendered.
9. The amendments limit the RAF’s liability in respect of medical expenses to one of two medical tariffs. The first (higher) tariff will apply in all cases where emergency medical treatment was provided. Emergency medical treatment is defined as all medical treatment necessary for “…the immediate, appropriate and justifiable medical evaluation, treatment and care required in an emergency situation in order to preserve the person’s life or bodily functions, or both…” All medical treatment that cannot be defined as emergency medical treatment will be compensated on the lower tariff. This lower tariff is the Uniform Patient Fee Schedule for fees payable to public health establishments by full-paying patients, prescribed under section 90(1)(b) of the National Health Act, 2003 (Act No. 61 of 2003), as revised from time to time.

10. The amendments limit the RAF’s liability in respect of claims for loss of income to R160,000 per year, irrespective of the actual loss.

11. The amendments limit the RAF’s liability in respect of claims for loss of support to R160,000 per year, irrespective of the actual loss, in respect of each deceased breadwinner.

12. In terms of the amendments, the RAF is required to adjust the R160,000 limit on a quarterly basis, to counter the effects of inflation, by giving notice of the adjusted statutory limit in the Government Gazette.

2. What claims are affected by the amendments?

1. All claims arising from accidents that occur on, or after 1 August 2008 will fall to be assessed in terms of the Amendment Act.

2. Claims that arise from accidents that occur prior to 1 August 2008 will be assessed in terms of the old Act, i.e. the amendments will have no impact on these claims.

3. What and who determines whether an injury is considered serious or not?

1. A medical practitioner determines whether the claimant has suffered a serious injury by undertaking an assessment through which the following process of elimination, prescribed in the Regulations, is followed:

a. Firstly, the medical practitioner must have regard to a list of non-serious injuries. This is a list that will be published by the Minister of Transport, after consultation with the Minister of Health. If an injury appears on this list, such injury may not be assessed to be serious by the assessing medical practitioner. Where no list has been published, the assessing medical practitioner may omit this step and immediately move on to the next step;

b. The next step involves the assessment of the injury by the medical practitioner in terms of the American Medical Association’s Guides to the Evaluation of Permanent Impairment, Sixth Edition (“the AMA Guides”). If the injury resulted in 30% or more impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious;

c. The final step in the assessment process will only be followed where the injury is not listed on the list of non-serious injuries and where the injury did not result in 30% or more impairment of the Whole Person. In terms of this step, the medical practitioner may assess an injury as serious if the injury resulted in:
(i) A serious long-term impairment or loss of a body function;
(ii) Permanent serious disfigurement;
(iii) Severe long-term mental or severe long-term behavioural disturbance or disorder; or
(iv) Loss of a foetus.
2. The medical practitioner who performed the assessment must complete a Serious Injury Assessment Report ("RAF 4");

3. The claimant may lodge the RAF 4 form with the main claim form ("RAF 1"), or separately after the submission of the main claim, at any time before the expiry of the periods for the lodgement of the claim prescribed in the Act and these Regulations;

4. Who pays for the Serious Injury Assessment Report?

1. The RAF shall only bear the cost of the assessment if the claimant’s injury is found to be serious and the RAF attracts overall liability in terms of the Act as amended;

or

2. If the RAF decides that there is a reasonable prospect that a medical practitioner may assess the injury to be serious and the claimant lacks sufficient funds to obtain an assessment, the RAF may, at the RAF’s cost and at the request of the claimant, make available to the claimant the services of a medical practitioner, or alternatively, refer the claimant to a medical practitioner for purposes of an assessment.

5. What recourse exists if a dispute arises regarding the assessment of the seriousness of an injury?

1. The Regulations provide for a dispute resolution mechanism in circumstances where the medical practitioner has assessed an injury as “not serious”, or where the RAF has rejected a Serious Injury Assessment Report by a medical practitioner in terms of which the injury has been assessed as “serious”.

2. A claimant wishing to lodge a dispute must do so within 90 days of being notified of the outcome of the assessment, or being notified of the rejection of the Serious Injury Assessment Report by the RAF.

3. The dispute must be lodged, on the prescribed form ("RAF 5"), with the Registrar of the Heath Professions Council of South Africa ("the HPCSA").

4. The dispute will be determined by an appeal tribunal appointed by the Registrar of the HPCSA and will publish its findings within 90 days from the date that the dispute was referred to the Registrar.

5. Where the dispute relates to a question of law, the Registrar may request the Chairperson of the Bar Council or alternately the Chairperson of the Law Society of the jurisdictional area concerned, to appoint an advocate of the High Court of South Africa, or alternately an attorney with at least five years experience in practice, to participate as a member of the appeal tribunal and preside over the matters of law.

6. Who pays for the costs of the dispute resolution?

1. The RAF shall bear the reasonable costs of the HPCSA.

2. The RAF shall bear the reasonable fees and expenses of the persons appointed to the appeal tribunal.

3. If the claimant is legally represented, the claimant will bear such costs.

Liability excluded in certain cases

19. The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage-
a. for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21; or
b. suffered as a result of bodily injury to or death of any person who, at the time of the occurrence which caused that injury or death-
   i. was being conveyed for reward on a motor vehicle which is a motor cycle; or
   ii. is a person referred to in section 18(1)(b) and a member of the household, or responsible in law for the maintenance, of the driver of the motor vehicle concerned, and was being conveyed in or on the motor vehicle concerned; or
c. if the claim concerned has not been instituted and prosecuted by the third party, or on behalf of the third party by-
   i. any person entitled to practise as an attorney within the Republic; or
   ii. any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority; or
   d. where the third party has entered into an agreement with any person other than the one referred to in paragraph (c)(i) or (ii) in accordance with which the third party has undertaken to pay such person after settlement of the claim-
      i. a portion of the compensation in respect of the claim; or
      ii. any amount in respect of an investigation or of a service rendered in respect of the handling of the claim otherwise than on instruction from the person contemplated in paragraph (c)(i) or (ii); or
e. suffered as a result of bodily injury to any person who-
   i. unreasonably refuses or fails to subject himself or herself, at the request and cost of the Fund or such agent, to any medical examination or examinations by medical practitioners designated by the Fund or agent;
   ii. refuses or fails to furnish the Fund or such agent, at its or the agent’s request and costs, with copies of all medical reports in his or her possession that relate to the relevant claim for compensation; or
   iii. refuses or fails to allow the Fund or such agent at its or the agent's request to inspect all records relating to himself or herself that are in the possession of any hospital or his or her medical practitioner; or
   f. if the third party refuses or fails-
      i. to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or
      ii. to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

Claim for compensation lies against Fund or agent only
21. When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation

3. Individual exclusionary circumstances
   3.3 wrongdoer not legally liable
   3.3.1 at common law
   - if third party cannot hold wrongdoer liable at common law, RAF also not liable
   - third party may then claim from wrongdoer who is personally liable unless such liability excluded by law or statutory provision
   - under RAF AA wrongdoer only liable if RAF can’t pay or secondary emotional shock
3.3.2 statutory exclusions
- s35COIDA (compensation of occupational injuries and diseases act): employee who is employee ito COIDA or his dependents may not hold his employer liable for damages arising from his injuries or death in the course of his employment if such injuries or death is attributable to his employers negligence irrespective of the fact that the claimant may have been a pedestrian +employee has no claim against employer or RAF, but claim ito COIDA against compensation commissioner; applies to whole claim of part and non-patr loss even though COIDA only pays patrimonial loss.
- third party claim against RAF not excluded if employee injured or killed: where COIda does not apply : being employee ito COIDA but injury caused by co-employee
- being employee ito COIDA injured by employer in other capacity as employer and claim brought against employer in that other capacity
- S 149 defence act: if any person makes use of any vehicle which is the property of the dept of defence and derives personal benefit or profit and such person is injured, no claim may be instituted against the min of defence

3.4 paying motorcycle passengers
-excl was never applied, now repealed

3.5 passengers being members of household of driver or being legally obliged to maintain driver where conveyance was not for reward, in course of business, in course of employment or in terms of lift club
3.5.2 meaning of household
3.5.2.1 ordinary meaning
- repealed
- people living together in one house collectively
- under same roof who comprise family
- group living under same domestic government
- minimum essential req= members should cohabit same common dwelling or house and some kind of relationship between them giving rise to common cohabitation

3.5.2 meaning acc to non-related case law
- persons occupying same house with lessee
- persons occupying house who received free meals and accommodation
- unit that is established when owner or occupier of house lives in such house
- organised unit constituted by cohabitation of man and woman in common home and other persons living with them either permanently or temporarily

3.5.2.3 related case law
- IGI v Reynecke: one or more people who ordinarily reside in the same dwelling and who are bound to some extent by ties of dependency to one who is the head of the household
- req acc to minority in Reinecke: some kind of relationship or affinity between persons constituting unit : members must permanently or continuously cohabit dwelling
Masombuka v Constantia Versekeringsmaatskappy: cohabitation by brother and sister of dwelling of their parents constitutes a household Fn 52
- S 19 actually does not provide that third party must be member of household, but refers to household of driver of vehicle

3.5.2.4 applicable principles
- Whether household exists or not question of fact to be judged by circs of each case, existence or membership of household of driver not readily assumed or accepted, using guidelines in Reinecke
3.5.2.5 test
- household can be said to exist if: third party concerned cohabits same dwelling as the head of that household
  - cohabitation is continuous or permanent
  - there is some kind of relationship between the members of the household and the head of that household
  - provided that the existence and membership of a household will not be easily presumed or accepted and the concept household is interpreted restrictively (Masombuka)

3.5.3 meaning of member of household
3.5.3.1 when is a person a member of a household?
- depends on facts of case whether all persons who cohabit same dwelling are members of household

3.5.3.2 member of which household
- driver as head or ordinary member?
  - Masombuka: excl only applies if third party who is a member of a household suffers damage as a result of negligent driving of the head of the household

3.5.4 meaning of responsible in law for the maintenance
- duty to maintain factual question, in certain circumstances conditional
- mere existence of duty to maintain between passenger and driver excludes third party claim of passenger if passenger duty to maintain driver

3.5.5 meaning of conveyed
3.5.5.1 general meaning
- driver and passenger aware of each other’s presence in or on the vehicle used as conveyance, the passenger is conveyed if both driver and passenger had the intention to convey and be conveyed
- where driver and passenger unaware of each other, intention of either driver or passenger can be conclusive to constitute conveyance
- whether a passenger has in fact been conveyed for the purposes of the act is a question of fact which depends on the circumstances and facts of each case

3.5.5.2 qualified conveyance
- only the claims of passengers who are passengers ito s18(1) (b) are excluded (social or gratuitous passengers)
  - not conveyed for reward
  - not conveyed in the course of business of owner of relevant MV
  - not employees in terms of COIDA and not conveyed in course of employment
  - not conveyed ito lift club

3.5.6 in or on the MV concerned
- if passenger or driver as described above in accident due to negligence of driver of other vehicle, exclusion becomes of no consequence
- for exclusion to apply, social passenger must suffer damage as result of exclusive negligent driving of head of household or by driver to whom he owes duty of maintenance

3.5.7 any person
- no one, incl dependents of person subject to exclusion
3.5.8 burden of proof
- onus to prove that exclusion does not apply to third party rests with third party

Ch5. Assessment of damage

Uniform rule of crt 18
(10) A plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for-
(a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;
(b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
(c) disability in respect of-
(i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);
(ii) the enjoyment of amenities of life (giving particulars);
and stating whether the disability concerned is temporary or permanent; and
(d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.
(11) A plaintiff suing for damages resulting from the death of another shall state the date of birth of the deceased as well as that of any person claiming damages as a result of the death.
(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30.

2. Concept of damage
- Patrimonial and non-patrimonial loss

3. Different types of damage
3.2 patrimonial damage
- diminution of value of a persons estate or patrimony as result of delict
- estate/patrimony = sum total of legal entitlement to all (present and future) assets and liabilities incl claims (present and future) in favour of or against such person
- patr loss= difference between value of estate immediately prior to delict and immediately after delict

3.3 prejudice to rights of personality or non-patrimonial loss
- detrimental impact on personality interests worthy of protection by law and which does not affect patrimony

3.4 general and special damage
- from English law
- general: damage presumed to flow naturally from wrong; alleged generally without furnishing particulars:
  prejudice to rights of personality
  : future loss of income
  : Future medical expense
- special : not presumed to be natural consequence of act; specially averred and stated with particularity,
  : past medical and hospital expenses
  :funeral expenses
  : loss of income
  : loss of maintenance
4. assessment of damage: general principles

4.1 function of damage
- to place third party in as far as is practicable in same position he would have been in without delict by payment of sum of money

4.2 past and prospective damage
- show on balance of prob that will suffer future loss
- contingencies allowed for by deducting certain percentage
- assessment of prospective loss done at date of trial, inflation taken into account

4.3 only one claim possible
- once and for all rule; common law
- s 17 RAFA exception to common law rule, may institute one action for bodily injury or loss of maintenance, and thereafter or simultaneously institute action for damage to vehicle and other possessions
- s 17 also creates two distinct causes of action on same facts, claim for bodily injury and claim for loss of maintenance due to death of breadwinner

4.4 inherent physical and psychological infirmities
- talem qualem- must take victim as find him, no reduced liability because of victim’s inherent infirmities

4.5 income tax
- moot (debatable) point

4.6 duty to mitigate damage
- costs of reasonable steps to mitigate may be claimed from RAF

4.7 accrual of benefits resulting from accident: deductible and non-deductible benefits (collateral benefits or res inter alios acta)

4.7.1 general principles
- if benefit accrued purely as result of injury or death and no other reason, benefit falls to be deducted
- if accrued benefit is inappropriate acc to public policy and reasonableness, benefit is ignored when assessing damage
- crt has to determine whether benefit actually accrued as direct consequence of accident and falls to be deducted
- crt must distinguish between duty to mitigate from the accrual and deriving of benefits from accident

4.7.2 non-deductible collateral benefits
- benefits from ins and ass policies maintained by 3rdP or breadwinner
- sick and medical benefits payable at sole discretion of employer or medical fund
- ins and pension benefits payable to dependents (assessment of damages act)
- all ex gratia payments
- savings in income tax as result of reduced income
- pension benefits of SANDF member
- saving in cost of living expenses
4.7.3 deductible collateral benefits
- sick and medical benefits payable by employer or medical fund ito legally enforceable duty (contract)
- pension ito statute (COIDA) or contract where payment legally obligatory

4.8 damage recoverable irrespective of whether claimant actually utilises or will utilise damage
-Fn 57: Blyth V van den Heever- recoverable damage recoverable even if not utilised for purpose

4.9 method of compensation
- money: to compensate for damage, satisfaction, society’s feelings of justice

5. assessment of compensation for non-patrimonial/ non-pecuniary damage/ general damage
5.2 applicable principles in the assessment of non-patrimonial damage
5.2.1 general principles
- cannot be readily assessed, fair and reasonable

5.2.2 influence of physical and psychological characteristics on award
- may all influence award, eg age, status sex, culture

5.2.3 object of compensation see 4.1
- factor in assessment of general damage
- award in equilibrium with damage
- fair and reasonable

5.2.4 fairness and reasonableness
5.2.4.1 role of fairness and reasonableness in assessment
- because difficult to calculate

5.2.4.2 meaning of fairness and reasonableness
- claimant sufficiently compensated
- not unnecessarily burden defendant

5.2.5 prior comparable awards as guide
5.2.5.1 prior awards as expression of fairness and reasonableness
- useful basic guide if certain principles in comparison with previous award observed

Fn 73: Protea assurance v Lamb: comparable cases when available should be used to afford guidance in a general way

5.2.5.2 applicable guiding principles
- only general award and not comparison of every detail taken into account
- comparison to previous awards not the method to assess non-patr loss but only guide
- facts of cases must be identical to extent that comparison valid
- despite any previous award, principles of assessment still be applied
- conclusion arrived at after reference to prior awards tested against pattern of awards if injury of comparable nature
- awards adjusted for inflation
- non-comparable cases can be used to test the award resulting from the use of awards in prior cases
- crt not bound by previous awards, nor strikingly disparate
- appeal crt will only interfere if award excessive in comparison to pattern of previous awards
5.2.5.3 Use of non-comparable awards
- If no comparable awards available
- To determine pattern of previous awards, general approximation
- Factors: similarity of physical injuries
  - Nature and duration of medical treatment
  - Permanence of some injuries
  - Similarities in loss of amenities of life
  - Age and sex of claimant

5.2.5.4 Adjustment of awards to reflect current value
- Inflation: consumer price index, but not purely mechanical exercise, CRT unfettered discretion
- Principle of elasticity, CRT deviate from previous comparable awards if circumstances so dictate
- Adjustment calculated by determining ratio by which CPI has increased with reference to the base year (original award) in relation to current date and then multiply factor with original award

5.2.5.5 Tendencies in awards
- Upward tendency, CRT’s discretion

5.3 Assessment of different heads of damage
5.3.1 Introduction
- Pain and suffering, emotional shock, shock induced by physical injury, disfigurement, loss of amenities of life, loss of general health, shortened life expectancy
- In order to recover general damage, specific heads need to be considered as well as evidence being led in order to enable court to make appropriate award

5.3.2 Pain suffering and shock induced by bodily injury
5.3.2.1 Meaning of pain and suffering, and shock
- Pain and suffering: pain, general discomfort, shock resulting from physical injury, past and future, psychological (phantom) pain, direct from injury and medical procedures
- Shock: psychological suffering, trauma or anguish

5.3.2.2 Consciously experienced
- Not if unconscious, if sedated or periods of unconsciousness, only for periods of subjective experience
- If subsequent amnesia may still claim

5.3.2.3 Duration and intensity
- Subjective experience
- Gauged by nature of injuries, evidence by claimant corroborated by family, medical staff

5.3.2.4 Psycho-physical and other characteristics of claimant
- Supported by expert medical opinion

5.3.2.5 Social status and circumstances under which injury occurred
- No bearing on amount

5.3.2.6 Previous comparable awards
- Used as guide
5.3.3 psychological trauma resulting from physical injury
5.3.3.1 definition
- combination of negative psychological consequences stemming from bodily injury
- anxiety, personality change, depression, social withdrawal

5.3.3.2 circumstances under which damages recoverable
- if trauma reasonably foreseeable and causal connection between injury and psychological trauma

5.3.3.3 nature of trauma
- factors like degree of depression, plaintiff's vulnerability and general psychological sequelae of physical injury taken into account when assessing damage

5.3.3.4 inherent characteristics of claimant
- personal characteristics ignored

5.3.3.5 prior comparable awards
- almost none available yet

5.3.4 emotional shock
\[\text{fn 121: RAFAA: not recoverable, only from wrongdoer}\]
5.3.4.1 definition
- suffered by third party without sustaining bodily injury
- caused when third party observes or is informed of unpleasant or disturbing event, witnessing or awareness of which causes psychological trauma
- not if deceased unrelated or acquaintance

5.3.4.2 circumstances under which damages recoverable
- if reasonably foreseeable and of sufficiently serious nature so as to affect general health of claimant and require treatment
- if reasonable man in position of wrongdoer could foresee the detrimental consequence of the emotional shock

5.3.4.3 physical and psychological characteristics of claimant
- age, sex, general health may have bearing, not inherent inability to cope with shock

5.3.4.4 previous comparable awards
- Majiet V Santam: seems that extent and duration of psychological consequences main factors

5.3.4.5 factors in assessing an award for emotional shock
- Majiet V Santam: severity of shock and consequences thereof
  - duration of consequences
  - extent to which consequences would influence claimant's future emotional well-being

5.3.5 disfigurement or mutilation
5.3.5.1 definition
- all forms of facial and bodily disfigurement and mutilation
- scars, loss of limbs, limping, facial contortions and contorted limbs
5.3.5.2 psycho-physical characteristics
- personal appearance before, disposition, sex will influence award
- conservative, depends on severity
- loss of income and loss of amenities separately influenced

5.3.5.3 separate assessment?
- Usually considered with pain and suffering, sometimes with loss of amenities

5.3.5.4 Not recoverable in addition to future medical expenses
- If future med ex is to rectify disfigurement
- If residual disfigurement, amount may still be awarded

5.3.5.5 To be specifically alleged
- Rule 18: nature and effect of disability in respect of amenities

5.3.6 Loss of amenities
5.3.6.1 Definition
- Permanent disability or loss of enjoyment of life
- Loss, due to bodily injuries of claimants drive and capability to actively participate in normal activities of life, recreation and social events which he was accustomed to or participated in prior to injury

5.3.6.2 Assessment
a. General: nature and extent of claimants disability
   : activities, enjoyment, recreation and sport which were part of claimants life before he was injured
b. Psych-physical characteristics: age, sex, physique, general health
c. Effect of med treatment and para-medical aids: procedures and aids awarded which mitigate loss of amenities will reduce award, not double compensation
d. Unconscious and coma: no pain and suffering, perhaps loss of amenities
e. Prior comparable awards: basis
f. Particulars to be stated: nature, effects and amount R18(10)

5.3.7 loss of general health
5.3.7.1 what is loss of general health
- despite medical treatment general deterioration of health ascribable to injury, past and future

5.3.7.2 assessment
- as loss of amenities

5.3.8 shortened life expectancy
5.3.8.1 what is shortened life expectancy
- natural life expectancy curtailed by injuries
- statistical tables actuaries
- trauma anguish loss of happiness caused by knowledge

5.3.8.2 assessment
a. separate head: or as part of LOA
b. factors: prior lifestyle
   : will knowledge of shortened life expectancy cause unhappiness
   : would claimant be unhappy irrespective of knowledge of shortened life expectancy
: age of claimant: younger, award less

6. **patrimonial loss (special damage)**

6.2 different heads of special damage resulting from bodily injury of third party or bodily injury or death of a breadwinner
- past and future hospital and medical expenses
- loss of income
- loss of earning capacity
- loss of maintenance
- funeral and cremation costs
- travelling expenses
- the costs of a nurse or an aid
- claim for loss of services
- loss of insurance benefits

6.3 assessment of patrimonial damage resulting from bodily injury

6.3.1 past hospital and medical expenses

fn 185- RAFAA will provide for fixed tariff

6.3.1.1 which medical and hospital expenses recoverable
  a. principle: those which can reasonably be attributed to the injury, question of fact
  b. reasonable costs: costs which reasonably results from wrongful and unlawful driving of MV, proved by submission of vouchers; onus to prove costs reasonable with claimant
  c. what is reasonable costs: claimant acted reasonably under prevailing circumstances in incurring such costs or submitting himself to certain procedure
  d. private treatment: if reasonable under prevailing circumstances, recoverable. If not, limited to state tariff
  e. incorrect diagnoses and treatment: costs may still be recoverable if diagnosis difficult and life in danger
  f. multiple practitioners: recoverable if these services were reasonably required

6.3.1.2 related transport and other expenditure
  a. generally: directly and reasonably related to medical treatment
     : eg transport costs,
     : prosthesis, nurses, assistants and other medical requirements
     : expenses related to paraplegia and quadriplegia
     : specialised accommodation
  b. transport costs: ambulance
     : costs to and from hospital (incl airfare) and therapists
     : special school transport
     : costs to holiday resort for purpose of convalescence, not reg holiday
     : transport costs of person who is to attend to seriously injured claimant and whose visits will materially contribute to recovery
     : purchase of MV eg in rural area
  c. prosthesis, nurses etc: prosthesis
     : crutches, wheelchairs, lifts, brace, shoes socks
     : nurse; assistant (even if spouse performs duties)
     : medical and related requirements eg catheters, stomach bags
  d. paraplegia/quadriplegia: MV converted, home modified,
  e. specialised accommodation: even if does not utilise it
6.3.1.3 interim payments of incurred medical expenses
- claim instituted and established on merits, RAF authorised to make interim payments pending finalisation
  fn 210: interim payment for expenses and losses already incurred

6.3.2 future medical and hospital costs
6.3.2.1 when recoverable
- if at time of hearing on balance of prob that claimant will need future treatment
- amount ascertained from med-legal reports and expert evidence

6.3.2.2 which future medical cost recoverable
- those established by medical evidence on balance of probabilities
- onus on claimant to prove costs will be incurred
- claimant to quantify future loss/ expense

6.3.2.3 future medical expenses and incidental losses
- may claim incidental losses

6.3.2.4 assessment
- lump sum
- cost of treatment at time it is needed calculated
- actual escalation in medical services used as guide
- interest deducted and allowance for contingencies

6.3.2.5 undertaking to pay future medical expenses
  a. object and effect: pay costs when incurred and on proof thereof, s 17(4(a)), instead of lump sum
     : amount of instalments payable in terms of undertaking fixed in order for undertaking to be effective
  fn 229: Marine and trade insurance v Katz: undertaking removes uncertainty inherent in once and for all lump sum, insurer must elect to to invoke section 17(4)(a)
  fn 230: Mutual and Federal ins V Ndebele: judgment that apportioned undertaking was not competent overturned
  b. refusal to accept undertaking: case will continue, raf can furnish undertaking or crt can order undertaking if raf elected it
  c. disadvantages: disputes as to which costs covered
     : costs incurred before claiming, prejudices indigent claimant
     : costs cannot be restricted to costs of provincial hospital
  d. essential elements: to avoid disputes, wording must go wider than article, cannot be restricted to state hosp costs
     : as precaution, wording must include all reasonable costs
     : claim, bodily injuries and sequelae must be adequately identified and defined in settlement agreement or undertaking
  e. unreasonable future medical expenses and costs: fund should tender amount it thinks reasonable and place balance in dispute
     : crt then make suitable order at end of hearing
  f. partial undertakings: if claim reduced ito apportionment of damages act or restricted by RAF act

6.3.3 loss of income
6.3.3.1 what is loss of income
  a. own income, full-time and formal: whether self-employed or employed
     : must prove that income lost due to injury
6.3.3.2 only legal income recoverable
   a. principle: against public policy, not recoverable
   b. when illegal? Lebona v President versekeringsmaatskappy: not necessarily unlawful if trading without license
   c. prohibited by statute: prob unlawful, depends on act, interpretation, for collection of revenue only, inaction by auth of contraventions
   d. against public policy or morals: not recovered
   e. test for illegality: would claimant be able to enforce any right against a patron of his ‘illegal’ activity
   f. formulating claims in respect of illegal income: illegal income not claimed together with illegal income, indicative of earning capacity

6.3.3.3 when assessed
   - general rule is at time of accident, but if prejudice will ensue, may be at time of trial

6.3.3.4 interim payments of past loss of income
   - RAF authorised

6.3.4 loss of earning capacity
6.3.4.1 what is loss of earning capacity
   - temporarily or permanently precluded from earning what he earned prior to accident due to injury, resulting in damage due to loss of capacity to earn in future

6.3.4.2 principles of assessment
   a. generally: crt inherent discretion to lasses damages, not unqualified acceptance of mathematical assessment
   b. different assessment approaches: reasonable and fair amount based on proven facts and prevailing circumstances
   c. preferred approach: mathematical, if based on proven facts. Crt still discretion, if no reliable facts, gut feel approach ok as long as sufficient evidence before crt to assess damage

6.3.4.3 method of calculation
   a. generally: position of claimant but for injury cf position thereafter
   3 methods- permanent loss of earning capacity
      - temporary loss of earning capacity
         - loss equal to actual future prospects
         - exceptional circumstances
   b. permanent loss of earning capacity: calc present value of future income which claimant would have earned but for injury
      : calc claimants estimated future earnings with injury
      : deduct latter from former
      : adjust amount
c. temporary loss of earning capacity: as above but adjusted to reflect temporary nature

d. loss equal to actual future prospects: calc present value of claimants periodic loss over period of earning
   \[ \text{adjust amount for relevant facts and contingencies} \]

e. exceptional circumstances: inability to calculate loss-crt may assess amount
   \[ \text{reduced cost of living- taken into account (?)} \]
   \[ \text{partial loss of earning capacity- provision made for this and may not be assured of employment} \]

6.3.4.4 calculation of present value of future earnings ignoring claimants injuries
   a. facts on which calc based- work and life expectancy
      \[ \text{-average future income ignoring disability} \]
   b. determining work and life expectancy: normal period of productive work, life expectancy by medical actuarial statistical information
   c. future income: level of income at date of accident and future increases, average income usually used with adjustment
   d. net income used: pension fund, UIF and income tax deducted
   e. calculation: determination of annuity allowing for inflation

6.3.4.5 calculation of present value of future income allowing for injuries
   a. facts on which calc based: period of future earnings, if reduced due to injury, that period used
      \[ \text{complete disability, proved by med evid} \]
      \[ \text{partial disability} \]
      \[ \text{average future annual income} \]
   b. total disability: no future income
   c. partial disability: 2 approaches- future income taking into consideration extent of disability and opportunities of earning income
      \[ \text{-ref to earning capacity as percentage of estimated earning capacity ito disability percentage} \]
   d. preferred approach: consideration taken of extent of disability and opportunities
   e. calculation: made on same basis as calc of present value without injury using same rate of interest
   f. contingency adjustment: discretionary adjustment of amount for uncertainties
      \[ \text{- fired or retrenched} \]
      \[ \text{- killed or assaulted if lives in violent neighbourhood} \]
      \[ \text{- unsatisfactory service record} \]
      \[ \text{- possibility of mistakes in life expectancy} \]
      \[ \text{- illness, inflation,} \]
      \[ \text{- accidents} \]
      \[ \text{-Cost of living expenses may change- a saving not held as contingency} \]
   \[ \text{determining contingency adjustment or allowance} \]
      \[ \text{-discretion of crt of first instance} \]

\textbf{fn 314:} shield insurance v Booysen: unless trial crt misdirected itself materially, estimates strikingly disparate or convinced estimates wrong
   \[ \text{income tax- pragmatic approach} \]
   \[ \text{loss of pension- reduced benefits taken into account} \]

\textbf{g.} date of assessment: date of trial

\textbf{h.} final calculation- income with injury deducted from income without injury and amount adjusted
6.3.4.6 cost of a manager or substitute
a. basis and requirements- alternative to claim for loss of earning capacity
   - no longer capable of doing work effectively
   - req: no possibility of other profession or alternative business, unreasonable to insist claimant do other work/ other business
   : cost of substitute not exceed losses, reasonably required to best preserve assets and ensure maximum profitability
   : prior to injury business was viable

fn 326: president ins v Matthews: entitled to substitute
fn330: francina Elizabeth Ghyoot v MMF: farm not viable
b. calculation- actuarial, future value of cost of substitute at reasonable rate

6.3.5 undertakings
- s17(4)(b)

6.4 assessment of patrimonial loss resulting from death or injury of another person
6.4.1 basic principles
6.4.1.1 object of payment of damage
   - to place dependants in position they would have been in had breadwinner not been injured or killed
6.4.1.2 basis of assessment
   - position of dependant if breadwinner not killed during entire period of dependency
   - then determine present financial effect of demise or injury on dependant
   - latter deducted from former = loss
6.4.1.3 past and future loss of support recovered
6.4.1.4 date of calculation- date killed or injured

6.4.2 approaches
6.4.2.1 two distinguishable approaches
a. - mathematical calculation of annuity for loss of support acc to fixed and assumed facts and subsequent adjustment of amount
   - fair and reasonable award under circumstances and facts of case
b. annuity calc: facts and assumptions reliable
c. fair and reasonable: more flexible, relies on proven facts, lack inherent objective accuracy
d. preferred approach: annuity method

6.4.3 assessment of damage for loss of maintenance
6.4.4.1 facts on which assessment is based
a. generally- period that deceased/inj would have owed the duty to maintain; joint life expectancy, breadwinner’s earnings, portion of earnings for support
   - income of dec/inj subject to inflation
   - pro rata share of income to dependant
   - amounts that accrued to claimant as result of death/inj
   - chances of remarriage; kids getting married
   - contribution of dec/inj to joint household expenses
   - growth potential of dec estate for inheritance
- Social status
- Other factors

b. Period of dependency: essential info - joint life expectancy: medical and actuarial evid; onus on claimant;

- Period in which breadwinner would have earned income: determined by general health of breadwinner, type of work, conditions of employment, customary retirement

- Period for which breadwinner would have maintained claimant: widow/er: reciprocal duty of spouses to support one another; til divorce or death: children: lapses when child becomes self-supporting, (18), when child likely to become self-sufficient, intention of dec, legally obliged to support, Bursey v Bursey: period determined by need and ability and not purely by age: other relationships: same

c. Deceased's income - essential info - net annual lawful income:

- Required facts: income at time of death incl of allowances and extra income during employment or retirement
  
  : Nature of deceased’s employment
  : prospects of promotion
  : ability to do job
  : only legal income: indicative of capacity, illegality may be temporary
  : Deductions: all amounts utilised or incurred to earn income: travelling expenses, income tax, annuity and pension fund contributions, UIF, life insurance
  : Contingencies: affecting continuous earning of deceased
    - Circumstances of death
    - Likelihood of increases in income
    - Gradual decrease of income due to old age
    - Factors that influence earnings

  fn 368: RAFAA restricts amount to 169 000 P A

d. Portion of breadwinners income allocated to support - basis: need to establish dependants portion

- Facts on which allocation based: relationship between dep and breadw
  
  : Amount spent by breadw on support of dep prior to death
  : needs of dep and breadw
  : Factors influencing portion of income allocated to dependents
  : Amount allocated by breadw to own upkeep and other expenses
  : Income of widow/er and contribution to joint household

  fn 391: Amount divided between parents and children for upkeep, one half parent and one half kids
  
  - Calculation: ordinary cases: CRT determine net income and allocate portions to members of family
    : Surviving spouse: equal proportions
    : Exceptions: deceased breadwinner wealthy and saved large proportion of money
      : Dependant poor health
      : Dependents will be self-supporting near future
    : Comment: if claimant want other basis of allocation than fixed proportionate share, must adduce evid to substantiate allocation sought. Dependency rate used in Oz, UK, Canada - first what breadwinner spent exclusively on himself, rest allocated to dependents

6.4.4.2 Calculation

a. Introduction

- Establishment of preceding facts is a condition precedent to assessment of loss of support to dependant
- Annuity value of lost support determined after allowing for interest and by converting amount to present value

b. Method
basis: capital amount required determined to generate sufficient income from capital and interest in order to be
equal to and cover dependants portion of breadw income
  : prevailing rate of interest
-inflation: taken into account
-evidence: actuary or sufficient facts
- adjustment for contingencies: income which may accrue: to be deducted, property or fideicommissum and
accident insurance, not to be deducted acc to assessment of damage act, refund of ins premiums and interest
thereon, refund of service or pension fund contributions, payment by mutual aid society or trade union, ex gratia
benefits, separate pension benefits
  : remarriage or marriage of minor child: crt in better position than actuary to make
decision; ongevallekommisaris v Santam: remarriage may in certain circumstances be ignored, remarriage does not
affect the amount of damage she is entitled to
  : Widow(er) earning capacity: no mitigating effect
  : loss of deceaseds contribution to common household: calculated and added to
amount recoverable by dependants
  : loss of social benefits: if causes patrimonial loss
  : loss of potential inheritance: if prove that inheritance would have been larger
  : devaluation of money:
  : other factors eg shorter life expectancy
Fn456: prospect of remarriage expressed as percentage
c. calc of final amount
  - general calc: calc and then adjusted
  - when assessed: date of trial
  - prior awards: guide

6.4.5 assessment of value of loss of service
6.4.5.1 nature and basis
  - deceased rendered valuable service to persons, value may be recovered

6.4.5.2 assessment
  - services lost converted to lump sum, similar to loss of maintenance

6.4.5.3 general damage
  - need not be specified in particulars of claim

6.6 payment of damage and interest on damage
6.6.1 deferred payment of damage for loss of future income and support
  - s17(4)(b)
Where a claim for compensation under
subsection (1)-

a.

includes a claim for the costs of the future accommodation of any person in a
hospital or nursing home or treatment of or rendering of a service or supplying of
goods to him or her, the Fund or an agent shall be entitled, after furnishing the
third party concerned with an undertaking to that effect or a competent court has
directed the Fund or the agent to furnish such undertaking, to compensate the
third party in respect of the said costs after the costs have been incurred and on
proof thereof;

b.

includes a claim for future loss of income or support, the Fund or an agent shall be entitled, after furnishing the third party in question with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to pay the amount payable by it or the agent in respect of the said loss, by instalments in arrear as agreed upon.

- fund at discretion to give undertaking, crt may fix details of payment, may not give judgment for particular amount
- claimant signs discharge before fund pays any compensation
- once undertaking issued, fund not entitled to introduce additional qualifications to its obligations ito undertaking

6.6.2 payment of loss of support to minors
- guardians fund

6.6.3 payment of damage to foreign claimant
- conversion of currency on date of payment: Radell v MMF

6.6.4 interest
- no interest unless 14 days elapsed from date of crt order, no mora interest

Chapter 6 restriction of recoverable damage

Repealed, study handbook

Ch 7. Prescription

2.2 suspension of prescription
2.2.1 definition
Prescription does not run against a person who, due to a lack of legal capacity, is not in a position to enforce his rights, suspended for duration of incapacity and commences when incapacity no longer exists

2.2.2 suspensive provisions
S23 (2) RAF act
- minors
- mentally ill persons, in coma or non compos mentos
- persons under curatorship
- no suspension in respect of hit-and-run claims regardless of legal disability

2.2.3 minors
- less than 18
Prescription commences on majority, earlier if hit and run

2.2.4 mentally ill persons, in coma or non compos mentos
- for period of detention
- RAF v Smith - need not be detained to suspend prescription, wrongly decided (?)
- act does not mention coma or ncm, so no prescription until curator steps in

2.2.5 persons under curatorship
- suspended for duration of curatorship

2.2.6 no suspension in respect of hit-and-run claims

2.3 commencement of prescription
2.3.1 injury
- date cause of action arose s 23(1) cause of action = reg 2(3) date upon which claim arose

2.3.2 death
- date of death, may be different to date of injury
- s17 allows 2 causes of action

2.4 period
2.4.1 identified claims: 3 years
- prescription act does not apply to third party claims s23(1)

2.4.2 Hit-and-run claims: two years

2.4.3 extension of prescription period
- identified claims=2yrs when claim lodged s23(3), claim properly lodged ito s24
  - Unidentified claims=3yrs reg2(4)

2.4.4 calculation of prescription period
- civil method; +first day –last day

2.5 interruption of prescription
- summons only way, as long as not premature (before 120 days elapsed since submission of claim), may be any time in 120 day period after RAF repudiated claim in writing

2.6.1 prescription act and admissions of liability
- smith v MMF, Solomons V MMF - decided prescription act applies wrongly
- s21(3) notwithstanding anything to the contrary in any law contained, and subject to ss(2) and (3)
- prescription act applies to a settlement agreement entered into between a claimant and the RAF ito which a claim ito s17 is settled

2.6.2 condonation
- not possible ito RAF act

2.6.3 extension agreements, waiver and estoppels
- legislative provisions cannot be contractually extended
- may waive right to prescription for certain period

2.6.4 failure to object to validity
- s24(5) if fund or agent not within 60 days from delivery of claim by reg mail or hand object to validity, claim shall be deemed valid in all respects. But does not apply to claim already prescribed on submission, if no objection, does not make it valid

2.6.5 acceptance of offer after prescription
- offer remains valid despite fact that claim has subscribed. Offer to be accepted in time given, or if no time, reasonable time or else lapses

2.6.6 prescription of claim for costs
- 3 yrs after costs agreed or taxed

2.7 prescription of suppliers claims
- will prescribe once third party’s claim subscribes irrespective of dates of supply

3.2 wrongdoers not subject to specific legislative limitations
- claim against wrongdoer and RAF prescribes simultaneously

3.3 wrongdoers subject to legislative limitations
3.3.1 introduction
- ILPCOSA: the institution of legal proceedings against certain organs of state act 2002 repealed virtually all prior provisions dealing with periods of limitation and procedures of enforcement of actions against the state and its organs

3.3.2 applicability
- ILPCOSA applies from nov 2002 to all claims arising from act or omission of any duty to any law against organs of state and particular: national and provincial depts.
  - dept constituted as such to public service act
  - municipality and its metro police
  - functionar or institution exercising power or function to constitution or prov constitution incl sadf and saps
    - sa maritime safety authority
    - sa nat roads agency ltd
    - prov admin
    - dept in prov admin
    - persons for whose debts an organ of state is liable

3.3.3 debts
- ILPCOSA s2 provides that extincive prescription of debt that becomes due b4 nov 2002 and which has not prescribed or no legal proceedings instituted, and those after 28 nov 2002 subject to the provision of the prescription act

3.3.4 prescription period
- unexpired portion of prescription period deducted from period in prescr act, that is then remaining period of prescription
- unexpired portion less than 12 months, presc expires on nov 27 2003
-debts that arose after 28 nov 2002 entirely subject to prescription act
3.3.5 compulsory notice
- b4 due debt payable by state may be enforced written notice stating facts which gave rise to debt and particulars of debt must be served on organ within 6 mths of debt falling due
- no legal proceedings instituted without notice unless authority agreed thereto in writing or condoned by court
- condonation granted: where organ relies on failure to give notice or deficient notice
  : debt has prescribed
  : good cause can be shown
  : no prejudice to state organ

3.3.6 interruption of prescription
- ILPCOSA and s15(2) of prescription act- issue and service of legal process req to interrupt

5. consequences
- claim prescribes against raf and wrongdoer due to fault of claimant, can not be recovered
- fault of legal rep- rep will be liable

Ch 8 Handling of claims

Procedure

24.
1. A claim for compensation and accompanying medical report under section 17(1) shall-
   a. be set out in the prescribed form, which shall be completed in all its particulars;
   b. be sent by registered post or delivered by hand to the Fund at its principal, branch or regional office, or to the agent who in terms of section 8 must handle the claim, at the agent’s registered office or local branch office, and the Fund or such agent shall at the time of delivery by hand acknowledge receipt thereof and the date of such receipt in writing.

2. a. The medical report shall be completed on the prescribed form by the medical practitioner who treated the deceased or injured person for the bodily injuries sustained in the accident from which the claim arises, or by the superintendent (or his or her representative) of the hospital where the deceased or injured person was treated for such bodily injuries: Provided that, if the medical practitioner or superintendent (or his or her representative) concerned fails to complete the medical report on request within a reasonable time and it appears that as a result of the passage of time the claim concerned may become prescribed, the medical report may be completed by another medical practitioner who has fully satisfied himself or herself regarding the cause of the death or the nature and treatment of the bodily injuries in respect of which the claim is made.
   b. Where a person is killed outright in a motor vehicle accident the completion of the medical report shall not be a requirement, but in such a case the form referred to in subsection 1(a) shall be accompanied by documentary proof, such as a copy of the relevant inquest record or, in the case of a prosecution of the person who allegedly caused the deceased’s death, a copy of the relevant charge sheet from which it can clearly be determined that such person’s death resulted from the accident to which the claim relates.

3. A claim by a supplier for the payment of expenses in terms of section 17(5) shall be in the prescribed form, and the provisions of this section shall apply mutatis mutandis in respect of the completion of such form.

4. a. Any form referred to in this section which is not completed in all its particulars shall not be acceptable as a claim under this Act.
b. A clear reply shall be given to each question contained in the form referred to in subsection (1), and if a question is not applicable, the words "not applicable" shall be inserted.
c. A form on which ticks, dashes, deletions and alterations have been made that are not confirmed by a signature shall not be regarded as properly completed.
d. Precise details shall be given in respect of each item under the heading "Compensation claimed" and shall, where applicable, be accompanied by supporting vouchers.

5. If the Fund or the agent does not, within 60 days from the date on which a claim was sent by registered post or delivered by hand to the Fund or such agent as contemplated in subsection (1), object to the validity thereof, the claim shall be deemed to be valid in law in all respects.

6. No claim shall be enforceable by legal proceedings commenced by a summons served on the Fund or an agent-

7. a. before the expiry of a period of 120 days from the date on which the claim was sent or delivered by hand to the Fund or the agent as contemplated in subsection (1); and
b. before all requirements contemplated in section 19(f) have been complied with: Provided that if the Fund or the agent repudiates in writing liability for the claim before the expiry of the said period, the third party may at any time after such repudiation serve summons on the Fund or the agent, as the case may be.

3.2.3 preparation of compulsory affidavit
3.2.3.1. introduction

§19f. if the third party refuses or fails-

i. to submit to the Fund or such agent, together with his or her claim form as prescribed or within a reasonable period thereafter and if he or she is in a position to do so, an affidavit in which particulars of the accident that gave rise to the claim concerned are fully set out; or

ii. to furnish the Fund or such agent with copies of all statements and documents relating to the accident that gave rise to the claim concerned, within a reasonable period after having come into possession thereof.

- then not obliged to compensate 3rd party

3.2.3.2 requirements
- every claimant, full particulars
- used in X-exam, can affect credibility and forfeiture of claim
- substantial compliance not sufficient
- opportunity to detail injuries, consequences and past and future treatment
- can disclose facts additional eg was wearing safety belt to reduce no of affidavits
- raf failure to object does not validify incomplete affidavit

3.2.3.3 suggested contents
- date time place
- vehicles reg no and descry
- drivers id
- scene of accident
- Road cond and surface
- day, night, weather, visibility
- direction and speed of travel
- change of direction of speed and travel
- actions of drivers b4 and after impact
- where point of impact
- physical evidence
- damage descry
- final pos of vehicles
- passenger claimant: where seated and safety belt
- oral statements made after accident

3.2.3.4 hit-and-run affidavit
- affidavit in 14 days unconstitutional

3.3 preparation and submission of claim documents
3.3.1 compulsory medical report
3.3.1.1 claimant injured and subsequently dies from injuries
- s24 (1)- prescribed form which contains med report, items 1-5 completed with patient ref no and date of admission/ treatment
- med prac or superintendent
- any other med prac if the above two cannot and fear of prescription
- request accompanied by fee and patients permission to release records

3.3.1.2 breadwinner killed on impact
- not med report, proof of death from accident
- inquest proceedings copy or
- criminal prosecution charge sheet
- s 24(2)(b) peremptory, non-compliance fatal
- compliance if from all docs can be deduced that death from accident
- death cert not adequate
- not closed list of docs

3.3.1.3 incomplete, omitted, incorrect or inadequate med report
- no med report or incomplete= fatal
- errors rectified by leading evidence
- subst compliant if: nature and extent of claimant or deceased’s injuries
  : degree of disability
  : treatment received

3.3.2 completion of claim form
3.3.2.1 requirements
- form 1 S24 (1)(a)
- directions- completed in all particulars
  - either clear reply or NA
  - ticks, dashes, deletions alterations countersigned
  - details of compensation claimed given + vouchers

3.3.2.2 improper completion and substantial compliance
- s24 (1)(a) and 24(4) directory
- must at least- id of claimant
  - particulars of collision
  - id of driver or owner of vehicle
  - calc and composition of amount claimed
- must be sufficient to enable RAF to decide to resist or settle
3.3.2.3 inaccurate info
- was inaccurate info germane to claim and whether inaccurate info will reasonably prevent RAF from investigating the claim
- bona fide errors do not affect validity of claim
- may be rectified after submission

3.3.2.4 duty of RAF iro deficient info
- must make reasonable enquiries to establish if it is liable on info supplied if
  : substantial compliance
  : information actually supplied by claimant
  : submitted claim places RAF in position to decide whether to resist, settle or negotiate (Radebe)
  : reg no of vehicle but not owner/driver

3.3.2.5 unsigned claim form
- not invalid

3.3.5 submission of claim form and annexure
- hand or reg post
- reg post ok but proof difficult

4. summon
4.1 compulsory waiting period b4 service
4.1.1 120 days after submission of claim, affidavit and documents
- civil method
- summons only served after submit claim 120 days and rest submitted as soon as in possession of them
- if repudiates claim b4 120 days elapsed, summons

4.1.2 repudiation by RAF
- clear unambiguous, statement that RAF does not concede merits not repudiation

4.1.3 premature service of summons
- ineffectual, does not interrupt summons

7. separation of issues and consolidation of actions
- R33 uniform rules- negligence and quantum heard separately, crt may invoke rule
- R11 Where summons issued separately for vehicle damage and injuries, actions may be consolidated, negligence for both actions heard together, quantum separate

10 payments into court
- R34 Uniform rules/R18 magistr crt rules: at any stage after summons RAF may make payment into crt

11 interest
- No interest unless 14 days elapsed since crt order.
- No mora on award of damages

12 legal costs
- 3rd party claimant may recover agreed or taxed party and party costs when accepts offer from RAF-DELETED BY AMENDMENT
- Not correspondent if cause of action in jurisdiction
- If attorney not counsel fees
- Expert witness costs - need not be excluded
- Foreign currency converted to rand to see if sufficient
- claim for costs prescribes 3 yrs after bill agreed or taxed
- if settlement contains agreement to pay taxed costs, rules not make provision for writ based on settlement, judgement has to be obtained based on settlement

13 interim payment
13.1 voluntary payments by RAF
- s17(6) – medical costs, loss of income, loss of support prev incurred

13.2 on application to high court
13.2.1 basis for application
- R 34 A unif rules : plaintiff may apply for order to which def ordered to make interim payment for damage suffered

13.2.2 damage recoverable
- personal injury or death in med costs, loss of income or support
- Karpakis v Mutual and Federal ins: R 34A not only past damage, but RAF act specifically states damage already incurred

13.2.3 when competent
- after summons has been served

13.2.4 formal requirements
- brought into R6 UR
- affid must contain amount claimed; grounds for applic; doc proof or cert copies of damage
- if raf in possession of doc not fatal if only referred to
- evidence need only be enough to allow crt to exercise discretion
- plaintiff in dire financial strait

13.2.5 substantive requirements
- defendant must have admitted liability in writing
- defendant able to pay interim award or insured
- plaintiff need not be indigent for order to be granted, but precarious financial position be ascribable to injuries or death due to accident and order equitable

13.2.6 order and effect
- discretion of crt
- fact of interim payment may not be disclosed until final quantum decided
- where interim payment made, action only discontinued or withdrawn with courts permission
- crt may order repayment or that other defendant make contribution

13.2.7 costs
- follow result of applic

13.2.8 payment of interim payment
- in full unless crt directs otherwise

13.2.9 multiple applications
2.4 circumstances

2.4.1 intoxicated driver
- to extent that intoxication was sole cause of accident
- if owner drove or allowed intoxicated driver to drive
- proof that accident solely due to intox on balance of prob

2.4.2 unlicensed driver or in contravention of learners or restricted license
- driver and owner who allows another to drive knowing license is invalid, or should have foreseen the possibility

2.4.3 failure to submit info, and furnishing of false info
- S 22(1) owner to submit info on form 3 to RAF if false info prejudices raf, owner liable

3. recourse of RAF when damage caused jointly

3.1 introduction
- s25 only in circumstances if liable acc to s 17 and 21 and: intoxicated, license deficient, or false info
- was accepted that person who was joint wrongdoer could not be held liable personally, because any claimant incl raf barred from s 21 from doing so.

3.2 basis and operation
- dodd v mmf: raf may claim from joint wrongdoer- passenger X in Y’s car was injured through negligence of Y and Z, the other driver. X claims from raf, raf claims proportionate contribution from Y, that is amount of damage minus z’s proportionate contribution minus 25000 raf can pay acc to act.

3.3 criticism
- dodd wrongly decided
- residual delictual action of passenger substituted by action against raf and revives only if s18 or more than 25000 damage (raf act ) or not can pay or emotional shock(rafaa)