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EDITORIAL

Future proofing the South African actuarial profession

Ronald Richman & Rob Rusconi
Co-editors

The world is changing fast. Yesterday's skill set is not necessarily helpful tomorrow. New players, new ways of thinking and new customer behaviour, not to mention falling national borders, can quickly render today's hero or miracle product obsolete. Actuaries, we offer professional skill, technical aptitude, a unique way of thinking and an integrity of approach that our clients find valuable. For now. Are we adapting to the challenges not just of tomorrow, but of the here and now?

Yes, you may say. AI is becoming part of the standard tool set. Data are being effectively deployed. Public interest is an integral part of the mandate of the Actuarial Society and so is research. Standards are high. Students are encouraged to think more openly. Actuaries are in high demand by employers of many types and are finding interest in new areas. The standards of education at our universities and in our professional exams are high.

No, some may counter. Business models have not adapted. The education system is moving too slowly. Generations of new models and techniques are coming faster than we can train our students in them. Our data management, pricing and valuation methods are not keeping up with the times. We waste expensive time undertaking repeat calculations on broken models with poor inputs. Locally and internationally, in the insurance space we've ceded decision-making power to accountants and we act on their bidding. In pensions, we have walked ourselves to the brink of irrelevance by handing the risk to members and leaving them to it. Clinging to the right to self-determination in health care financing, we have not been effective in the policy space. Guilty of arcane and defensive thinking, we risk being out-modelled by statisticians, data scientists and machine learning engineers, out-thought by economists and out-manoeuvred by physicists and mathematicians.

The truth lies somewhere in between, argues the diplomat or pragmatist. We have skills and we have something to offer. That's a risky position to hold when new offerings are

emerging at pace. Many have faded into obscurity holding to similar rocks in rising floods. Perhaps the problem indeed lies with the profession and its way of thinking. If that is the case, we cannot leave it to those that we have elected to lead us.

You, actuary, you, associate and you, student, are responsible for your own fate. Blow away the cobwebs of pre-supposition. Think more clearly. Read more widely but pursue originality. Dedicate yourself to open-minded enquiry and diligent research, contributing to a better environment and to better solutions to difficult problems.

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Road Accident Fund loss of income claims for non-serious injury: a local and international comparison

By GA Whittaker

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ABSTRACT
The Road Accident Fund (RAF) is a component of South Africa's social security landscape. If one claimant is paid more than they are entitled to receive, this represents wasteful expenditure of South African taxpayer money. Over the decades, a litany of issues has beset the RAF, including fraud, corruption, collusion and administrative inefficiencies. These issues are in the context of a very high rate of accidents on South African roads. This paper examines a subset of loss of income claims, namely those for non-serious injury. It is shown that, by local and international standards, loss of income compensation for non-serious injury within the RAF framework is excessive. One policy option, that involves excluding loss of income claims for non-serious injuries entirely, would save the RAF an estimated R3 billion a year in claim payments in 2023.

KEYWORDS
Road Accident Fund; compensation; Compensation for Occupational Injuries and Diseases; loss of income; non-serious injury; expert witness.

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1. INTRODUCTION

1.1 The RAF promulgated by the Road Accident Fund Act[1] (RAFA), as were its predecessors, is the instrument used by the government to compensate victims of motor vehicle accidents for bodily injuries or loss of financial support following the death of a breadwinner. The RAF is a fault-based system where the victim must prove that the accident was caused by the negligence of another party in order to obtain compensation. The RAF also applies elements of the common law in the sense that a victim's contributory negligence can be used to reduce the value of their claim.

1.2 Despite the promulgation of the Road Accident Fund Amendment Act[2] (RAFAA), which resulted in compensation being limited for loss of earnings and loss of support, and compensation for general damages only being available for serious injuries, the deficit of the RAF has grown from R11.1 billion at 31 March 2002[3] to R344.8 billion at 31 March 2022.[4]

1.3 The Actuarial Society of South Africa has previously noted that:[5]

> It cannot be over-emphasised that the primary cause of the position in which the RAF finds itself is the extraordinarily high rate of accidents on South African roads.

1.4 This was reiterated by the former Minister of Transport:[6]

> The RAF's most significant cost driver is the number of road accidents. In South Africa, more than 45 people die daily on the roads due to road traffic crashes. This poses a huge challenge to the government and to the RAF in particular for the compensation of road accident victims.

1.5 Notwithstanding this incontrovertible fact, the RAF has seen a significant increase in the number of loss of income settlements. In the financial year ending 31 March 2008 the RAF made 5,957 individual claims payments in respect of loss of income;[7] in the financial year ending 31 March 2023 it made 20,957 individual claims payments in this respect.[8]

1.6 This paper critically examines the RAF's approach to settling claims for loss of income in cases of non-serious injury, comparing it with other local and international compensation schemes. It also provides a comprehensive overview of the role of expert witnesses in the quantification process through case law. The focus on non-serious injury claims was chosen for its potential to directly address systemic inefficiencies and the immediate impact it could have on reducing the financial burden of the RAF.

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1 Road Accident Fund Act 56 of 1996
2 Road Accident Fund Amendment Act 19 of 2005
3 Road Accident Fund Annual Report 2006, p. 33
4 National Treasury Estimates of National Expenditure, 2023, p. 914
5 Report of the Road Accident Fund Commission 2002 Volume 1, Chapter 4, p. 71
6 Road Accident Fund Annual Performance Plan 2022–2023, p. 1
7 Road Accident Fund Annual Report 2010, p. 12
8 Road Accident Fund Annual Report 2023, p. 41

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1.7 This research is crucial for guiding policy around RAF compensation and future amendments, such as potentially restricting loss of income claims to serious injuries only. The goal is to create a more equitable system where resources are allocated to those with more severe injuries.

1.8 The primary aim of this paper is to demonstrate how the RAF method for determining loss of income for non-serious injuries is excessive compared to other compensation schemes. This is achieved through a comparative analysis of the RAF compensation model against other local systems like the Compensation for Occupational Injuries and Diseases Act (COIDA)[9] and international schemes in BRICS countries, highlighting disparities in compensation levels for similar injuries.

This paper also aims to:

— Assess the financial implications of the current RAF compensation model, focusing on the sharp increase in loss of income claims for non-serious injuries and the resulting escalation of the RAF deficit.
— Critically examine the role and methodologies of expert witnesses, such as industrial psychologists, in the quantification of loss of income claims, and to identify inconsistencies and potential biases in their contributions to the RAF claims process.
— Provide actuarial professionals with a framework for contributing to policy reforms that can balance fairness and sustainability in public compensation schemes.

1.9 The paper unfolds as follows. Section 2 sets out the methodology employed in the paper. Section 3 provides a literature review. Section 4 describes the loss of income benefits available for non-serious injury under COIDA and compares those with loss of income benefits from the RAF based on a differential contingency on lifetime earnings. Section 5 assesses international systems of compensation for motor vehicle accidents in Brazil, Russia, India and China. Section 6 gives a historical overview of the RAF and claims assessment. Section 7 illustrates the financial deterioration of the RAF and sets out a claims analysis. Section 8 accounts for loss of income benefits available under RAFAA and explores the methodology and role of experts in the quantification process. The paper concludes in Section 9.

2. METHODOLOGY

2.1 This paper makes use of comparative analysis, incorporating both qualitative and quantitative approaches to examine the loss of income compensation system under the RAF. The research is structured to provide a holistic view of the current system, its challenges, and potential improvements through the steps outlined in paragraph 2.2 to paragraph 2.8.

2.2 Section 3 employs a qualitative approach to analyse various sources, including reports, academic articles and comparative studies, to explore the compensation system for road

9 Compensation for Occupational Injuries and Diseases Act 130 of 1993

accidents. The section synthesises findings from various sources to provide an understanding of the current challenges and potential reforms in the compensation system.

2.3 Section 4 provides a quantitative comparison between claim settlements for non-serious injury available under COIDA and claims settlements based on a contingency differential applied to lifetime earnings which is the method frequently used to calculate claims settlements under the RAF.

2.4 Section 5 provides a comparative legal analysis. The research examines the legal frameworks governing motor vehicle accident compensation in Brazil, Russia, India and China. This comparison focuses on statutory provisions, eligibility criteria, and compensation limits for loss of income due to non-serious injuries.

2.5 Section 6 provides a chronological review of statutory developments, commissions of inquiry and significant legal amendments. It analyses the administrative challenges and legal complexities that have arisen over time, particularly in the handling of non-serious injury claims. The section uses case law and official reports to illustrate recurring issues such as inefficiency, litigation volume, and settlement practices.

2.6 Section 7 utilises financial analysis to examine the growing deficit of the RAF. It analyses trends in claims payments, particularly for general damages and loss of income, using data visualisation to illustrate key points. The section also reviews legal disputes and regulatory changes that have impacted on the financial position of the RAF.

2.7 Section 8 adopts as mixed-methods approach with a detailed review of statutory provisions, regulations, and case law, as well as an analysis of compensation trends and practices. The section examines the impact of the RAFAA on claims, the use of industrial psychologists in determining loss of income, and the application of the differential contingency approach in compensation calculations.

2.8 The final phase synthesises the findings to provide policy recommendations. These recommendations are aimed at improving the equity and sustainability of the RAF's compensation system, informed by best practices from other jurisdictions and actuarial principles.

3. LITERATURE REVIEW

3.1 Compensation systems for road accident injuries have been under extensive review amid mounting criticism over their efficiency and fairness. The RAF Commission Report,[10] underscores a critical issue: a large portion of RAF resources is spent on minor injury claims, which, despite being less severe, require substantial administrative effort. This is compounded by the Department of Transport's findings on the distribution of compensation payments,

10 Report of the Road Accident Fund Commission 2002 Volume 1, Chapter 8, p. 168

that indicate a disproportionate allocation of funds to minor injuries and high-income claimants prior to RAFAA reforms. This review examines these concerns, explores historical and comparative perspectives, and examines the evolution of South Africa's compensation statutes, the discrepancies between RAFA and COIDA, and international approaches from the United Kingdom and New Zealand.

3.2 The RAF Commission Report sheds light on the distribution of claims, revealing that most claims pertain to relatively minor injuries. Despite their simplicity in theory, these claims require a thorough administrative process. Each claim necessitates the opening of a file, verification of the road accident's occurrence, confirmation that either the claimant or a third party was injured, and proof of the claimant's loss. The Commission raised concerns about the disproportionate resources spent by the RAF on claims involving minor injuries, particularly when these claims do not involve permanent or long-lasting disabilities.

3.3 The Department of Transport (DoT)[11] has noted a significant allocation of the fuel levy to claims involving minor injuries and high-income earners. This observation predates the introduction of the RAFAA. Before RAFAA imposed a cap on non-financial losses, up to 60% of compensation went towards general damages for pain, suffering, and other non-economic impacts. The DoT also pointed out that lump sum payments could lead to over-compensation for minor injuries. Between 2006 and 2008, 85% of compensation claims were paid in a lump sum for non-financial loss and for future loss of income before those losses were incurred.

3.4 Wessels (2022) explores the evolution of three key South African statutes related to victim compensation: the RAFA as amended by the RAFAA, COIDA, and the Consumer Protection Act.[12] While Wessels offers a detailed historical account, he does not address the interplay between these statutes or the disparities in compensation for minor versus serious injuries. This omission highlights a gap in understanding how compensation aligns with severity of injury.

3.5 The research by Myburgh et al. (2000) sheds light on the fragmented development of the RAFA and COIDA systems. Created in isolation from each other, these systems exhibit inconsistences due to their lack of integration. The authors advocate for a shift to a defined benefit system, which would provide a more uniform assessment of damages. They propose this as a foundational step toward reforming the RAF to ensure a more cohesive and equitable system.

11 Draft Policy on the Restructuring of the Road Accident Fund as Compulsory Social Insurance in Relation to the Comprehensive Social Security System. *Government Gazette* No. 32940, Notice 121 of 2010

12 Consumer Protection Act 68 of 2008

3.6 The analysis by Ehrlich (2012) uncovers persistent issues within COIDA, such as delays in claim processing, inadequate responses to information requests, and poor disability assessments. These issues were corroborated by the Public Protector[13] in 2019, who found that the Compensation Fund (CF) was guilty of maladministration. As a result, the CF was ordered to address these problems, including making overdue payments and providing interest on these payments, underscoring the need for substantial reforms in claim management.

3.7 Slabbert & Edeling (2012) address the RAFAA's significant change: it now restricts general damages to serious injuries only. This shift marks a departure from previous practices, focusing compensation more sharply on injury severity. Sharkey (2005) further examines the interplay between placing a cap on non-economic damages and not on economic damages. Sharkey observes a tendency for plaintiff attorneys to focus on maximising economic claims instead.

3.8 Millard's 2007 critique highlights a critical issue in South African courts: the interchangeability of "loss of earnings" and "loss of earning capacity". Millard argues that capacity loss should be treated similarly to general damages. However, the frequent confusion and misuse of these terms in court have led to inconsistencies in calculating loss of earning capacity, complicating the fair assessment of compensation.

3.9 In the United Kingdom (UK),[14] challenges with minor injuries have led to significant reforms. Financial incentives historically encouraged exaggerated or frivolous claims, especially for whiplash injuries. To combat this, the UK introduced the Official Injury Claim service on 31 May 2021, as part of broader reforms to address the compensation culture. As shown in Appendix A, over 90% of reported road accidents in the UK result in slight or less serious injuries, the majority of which are whiplash injuries. The reform aimed to streamline the claims process for low-value cases and mitigate issues that had been flagged by the Institute of Actuaries in Lowe et al. (2002).

3.10 Armstrong & Tess (2008) compare pure tort systems with defined benefit systems. Tort systems, which are typically uncapped, often result in disproportionate compensation where less seriously injured plaintiffs receive excessive amounts, while more severely injured plaintiffs may receive inadequate compensation. Defined benefit systems, which cap damages, generally offer more consistency but may still face challenges in setting benefit entitlements.

3.11 The examination by Todd (2011) of New Zealand's no-fault compulsory accident insurance scheme, administered by the Accident Compensation Corporation (ACC), offers a

13 Report on an Investigation into Allegations of Undue Delay and Maladministration by the Compensation Fund with Regard to the Processing and Payment of Compensation Benefits to Employees of Private Employers. Report No. 14 of 2019/2020

14 Ministry of Justice 2017, Part 1 of the Government Response to Reforming the Soft Tissue Injury ('whiplash') Claims Process

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contrasting approach. In New Zealand, lump sum compensation for permanent impairment is reserved for injuries resulting in a whole-person impairment of 10% or more. Compensation ranges from N$2,500 to NZ$100,000, adjusted for inflation, and is designed to ensure that more seriously injured claimants receive proportionately greater compensation. This system aims to address disparities and ensure equitable compensation across varying degrees of injury.

3.12 The review of compensation systems across different legislative frameworks reveals a complex interplay between fairness, efficiency, and financial sustainability. The criticisms of South Africa's RAF system, particularly the handling of minor injury claims, reflects broader challenges observed globally. As reform efforts continue, there is a clear need for a more cohesive approach that addresses the disparities in compensation, while maintaining the integrity and functionality of the systems designed to support victims of road accidents.

4. LOSS OF INCOME BENEFITS AVAILABLE FROM THE COMPENSATION FUND FOR NON-SERIOUS INJURY

4.1 By analysing the differential contingency approach applied to lifetime earnings under the RAF and comparing it with COIDA's structured benefits, this section seeks to highlight the disparities in compensation levels for similar injuries. This comparison is essential in understanding the financial implications of each system and provides a foundation for discussing potential reforms aimed at creating a more equitable and sustainable compensation model.

4.2 The CF provides compensation to employees who are injured or contract diseases through the course of their employment. The CF is governed by COIDA. COIDA determines how and by whom the fund is administered, the conditions for eligibility for compensation and the amount of compensation. COIDA was subject to a significant amendment assented to on 6 April 2023.[15]

4.3 Temporary disability benefits are payable if a claimant is booked off work for more than three days by a medical doctor. The nature of the benefit is a periodical payment calculated at 75% of monthly earnings at the time of the accident multiplied by the number of days off work divided by the total days in a month. The minimum compensation (effective from 1 April 2022) is R4,589 for each month off work and the maximum compensation is R32,763 for each month off work. Compensation for temporary disability is payable for up to one year, but the Commissioner may extend benefits to two years, after which the condition is deemed to be permanent and a decision is made concerning compensation on the basis of permanent disability.

4.4 If the injury or disease results in a permanent anatomical defect, loss of function or disfigurement, which means disablement for employment, the employee is entitled to

15 Compensation for Occupational Injuries and Diseases Amendment Act 10 of 2022

compensation in respect of permanent disablement. This can include total or partial loss of a limb, impairment of movement of a joint, loss of vision or hearing, restricted lung function, loss of an organ, as shown in Schedule 2 of COIDA.

4.5 Schedule 2 is based on the American Medical Association Guidelines discussed in section 8.2. Any other permanent disability not prescribed in Schedule 2 is assessed by the Commissioner on condition that it is consistent with the Schedule. The compensation for permanent disability is paid either as a lump sum or a monthly pension depending on the degree of disablement.

4.6 For a permanent disability in the range of 1% to 30%, compensation is paid in the form of a lump sum and is calculated at 15 times an employee's monthly earnings at the time of the accident. Monthly earnings are subject to a minimum and a maximum as prescribed by COIDA. The lump sum payment in the event of a permanent disability of less than 30% is calculated pro rata in relation to the lump sum for 30%. With effect from 1 April 2022, the minimum lump sum benefit for partial disability (based on a 30% disability) is R91,752. The maximum lump sum benefit for partial disability (based on a 30% disability) is R366,959.[16] If the permanent disablement is assessed at more than 30%, the employee will receive a monthly pension for life. The threshold of 30% is consistent with the RAF that deems a Whole Person Impairment (WPI) of more than 30% as a serious injury. COIDA does not provide for benefits in respect of pain and suffering or what is commonly referred to as general damages.

4.7 The current distribution of WPI within COIDA claims is not known. Data from 1999[17] revealed the following number of cases by extent of disablement across all carriers.

TABLE 1. Number of cases by extent of disablement

Extent of disablement	Number of cases	Percentage
Medical aid only	149,886	67.03%
Temporary disablement	60,789	27.18%
Permanent disablement	12,050	5.39%
Fatal	889	0.40%
Total	223,614	100.0%

4.8 The number of permanent disablement cases in 1999 according to WPI, with 70.9% of cases resulting in a permanent WPI of less than 10%, are shown in Table 2.

16 *Government Gazette* No. 46884
17 Compensation for Occupational Injuries and Diseases Act, 1993 Report on the 1999 Statistics

TABLE 2. Number of permanent disablement cases according to WPI

Percentage WPI	Number of cases	Percentage
Under 10%	8,543	70.90%
11% to 30%	3,138	26.04%
31% to 99%	319	2.65%
100%	50	0.41%
Total	12,050	100.0%

4.9 Set out in Figure 1 is a comparison of the minimum and maximum lump sum compensation payable under COIDA compared to under the RAF for the same WPI, with the latter being determined on a contingency differential basis. Illustrative claims payments are provided in Appendix B and Appendix C.

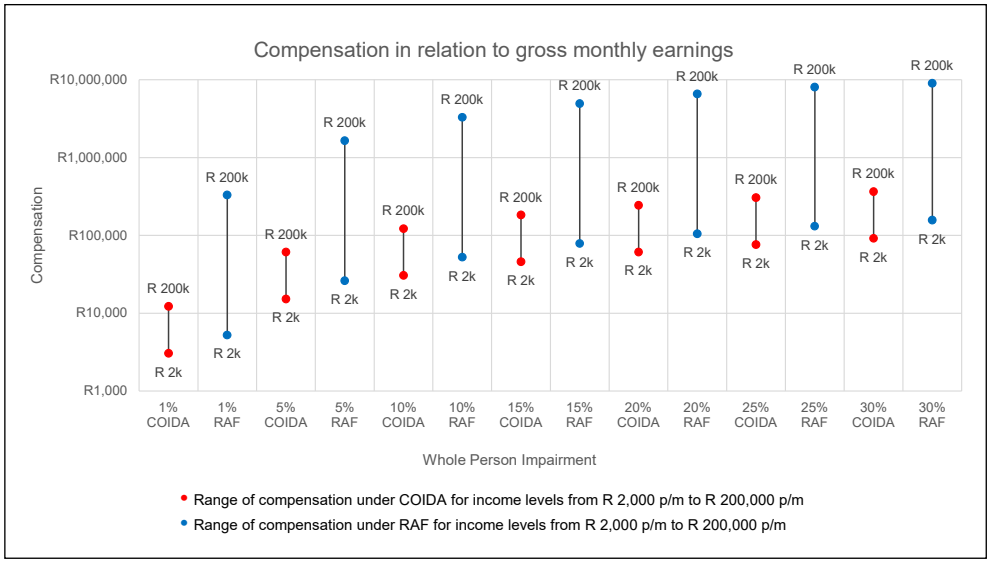

FIGURE 1. Lump sum compensation by earnings level and WPI

4.10 With respect to values calculated under the RAF, the illustrative values are for a male aged 30 at a calculation date of 1 March 2023. The date of injury is taken as 1 March 2022. The relevant statutory cap at the date of the accident is taken as R315,504 per annum.[18] Losses have been discounted at a net discount rate of 2.5% per annum compound (Koning, et al., 2022). Mortality is taken as the South African Life Tables No. E9 for males (Whittaker, 2021). A retirement age of 65 is assumed in all of the scenarios and the losses merely represent a percentage of the after-tax present value of earnings from age 30 to age 65 using various levels of earnings as indicated in Appendix C.

18 *Government Gazette* No. 45816

4.11 COIDA provides for a narrow range of awards for loss of income ranging from R3,058 for low-income earners with a 1% WPI to R305,800 for higher income earners with a 30% WPI. During the financial year ending 31 March 2021, the maximum loss for non-serious injury paid by the RAF was approximately R7.7 million.

4.12 The analysis of compensation models under COIDA and the RAF reveals significant disparities in how non-serious injuries are compensated. These differences highlight broader issues of fairness and equity in the compensation landscape, where similar injuries may result in vastly different financial outcomes depending on the governing system. That stark contrast between structured benefits and the contingency differential approach underscores the need for reforms aimed at harmonising compensation frameworks. Such reforms would ensure that all individuals, regardless of the system under which they fall, receive fair and equitable compensation for their injuries, thereby creating a more sustainable model for injury compensation.

5. INTERNATIONAL SCHEMES

5.1 Introduction

5.1.1 Despite their differences in economic development and legal frameworks, Brazil, Russia, India, China and South Africa (BRICS) all experience high mortality rates from road accidents, which reflect broader social, economic, and infrastructural issues. The motivation for comparing road accident systems in the BRICS countries lies in their substantial share of the global population and road accident fatalities: BRICS countries account for approximately 41.0% of the world's population and approximately 40.5% of road accident fatalities worldwide (Sources: footnotes below).

5.1.2 Table 3 sets out a comparison of the population,[19] Gross Domestic Product (GDP)[20] per capita in United States dollars and mortality caused by road accident injury per 100,000 of the population.[21]

TABLE 3. BRICS countries

Country	Population (2021)	GDP per capita (2021)	Mortality caused by road accident injury per 100,000 of the population (2019)
Brazil	214.3 million	$ 7,507	16.0
Russia	143.4 million	$ 12,195	12.0
India	1,407.5 million	$ 2,257	15.6
China	1,412.3 million	$ 12,556	17.4
South Africa	59.4 million	$ 7,055	22.2

19 World Bank Open Data (2021). https://data.worldbank.org/indicator/SP.POP.TOTL
20 World Bank Open Data (2021). https://data.worldbank.org/indicator/NY.GDP.PCAP.CD
21 World Bank Open Data (2019). https://data.worldbank.org/indicator/SH.STA.TRAF.P5

5.2 Brazil

5.2.1 In Brazil, Danos Pessoais causados por Veículos Automotores de via Terrestre (DPVAT) requires all vehicle owners to have mandatory liability insurance for personal injuries caused by motor vehicle accidents.[22] Owners of motor vehicles are required to purchase DPVAT insurance at the same time as renewing their annual vehicle licence. The insurance policy provides compensation to victims of motor vehicle accidents on a no-fault basis (Gönülal, 2009). Hence, there is no apportionment of damages due to the negligence of the party claiming compensation. DPVAT provides primary risk coverage, however motor vehicle owners can supplement their coverage by obtaining additional optional civil liability insurance cover.

5.2.2 Claims for compensation must be filed within three years from the date of the accident. The Forensic Medical Institute in the jurisdiction where the accident happened or where the victim lives must provide a report on the extent of the victim's physical injuries and the level of their permanent disability within 90 days of filing the claim. Once the claim has been assessed and compensation finalised, all DPVAT compensation payments, regardless of their amount, are paid into a digital social savings account opened in the name of the accident victim. All compensation payments are administered by Caixa Econômica Federal which is a state-owned bank in Brazil.

5.2.3 Minimum compensation for permanent disablement is 135 Brazilian Real and the maximum compensation for permanent disablement is 13,500 Brazilian Real. The maximum amount of compensation of 13,500 Brazilian Real was written into DPVAT in 2007[23] and it has subsequently not been adjusted for inflationary increases. The result is that DPVAT provides for low levels of compensation.

5.2.4 DPVAT makes no award for pain and suffering. In order to obtain additional compensation such as an award for pain and suffering, as well as for loss of income, an accident victim must launch civil proceedings against the wrongdoer in terms of Brazil's Civil Code[24] (BCC). In that case, they need to prove negligence on the side of the wrongdoer. Battesini et al. (2022) observe that Brazilian law adopts the "whole reparation principle" which means placing the injured party in the same situation that they would have been but for the injury.

5.2.5 Article 950 of the BCC provides that if the delict results in the victim being unable to exercise their trade or profession, or if they have a reduction in work capacity, compensation shall include a pension corresponding to the importance of the work for which they became incapacitated or for which they have a reduction in work capacity. Battesini et al. (2022) note that compensation through a monetary annuity is the most common remedy in the case of loss of earning capacity. Annuities are fixed in judgments until the prospective

22 Law No. 6,194 of 19 December 1974 available at: http://www.planalto.gov.br/ccivil_03/leis/L6194.htm

23 Law No. 11,482 of 31 May 2007 available at: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2007/Lei/L11482.htm#art8

24 Law No. 10,406 of 10 January 2002 available at: http://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406.htm

time of retirement. Article 950 does however provide for the injury party to demand that damages be paid in a lump sum, in which case the lump sum compensation amount is subject to arbitration.

5.2.6 Social security has a significant impact on Brazilian tort law, as most victims of bodily injury are compensated for loss of earnings by social security (Battesini et al., 2022). In addition to DPVAT and social security benefits, the victim may receive other monetary benefits from other sources such as private plans. All of these benefits may result in a reduction of the victim's civil claim depending on the court's reasoning and the specific law applicable to such cases. For example, there is a ruling that the value of mandatory insurance must be deducted from judicially determined compensation.[25]

5.3 Russia

5.3.1 In Russia, Obshchestvennoe Strakhovaniye Obostoyatel'stv Avto-mobil'nogo Grazhdanskogo Obozatel'stva (OSAGO)[26] or "On Compulsory Insurance of Civil Liability of Vehicle Owners" requires all vehicle owners to purchase third-party liability insurance from an insurer.

5.3.2 Article 7(a) of OSAGO limits the total compensation to 500,000 rubles for personal injuries. OSAGO does not make provision for monetary compensation for pain and suffering (referred to as "moral damages"). As noted by Bocharov (2021), claimants have to sue the wrongdoer directly in order to obtain compensation above the statutory insurance limits. It is observed that the right to make a direct claim against the insurance company for damages under compulsory insurance reduces the number of civil road traffic accident suits reaching Russian courts.

5.3.3 There are a number of rules concerning earnings set out by the Supreme Court of the Russian Federation.[27] The amount of income that an injured person is entitled to receive as compensation is determined as a percentage of their average monthly income before the injury. The percentage is based on the degree of loss of the victim's professional ability to work. If the victim is unable to work in their profession, the percentage is based on the degree of loss of their general working capacity.

5.3.4 Determination of the degree of loss of professional ability to work is carried out by institutions of the state service with medical and social expertise.[28] The degree of loss of general disability is determined by forensic medical examination in medical institutions of the state healthcare system.[29]

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25 Súmula 246 do Superior Tribunal de Justiça, Brasília.

26 Federal Law No. 40-FZ of 25 April 2002 available at: https://autoins.ru/osago/

27 'On the application by the courts of civil legislation regulating relations on obligations as a result of causing harm to the life or health of a citizen'. Resolution of the Plenum of the Supreme Court of the Russian Federation of 26 January 2001, No. 2010

28 'On the procedure for organizing and operating federal state institutions of medical and social expertise'. Decree of the Government of the Russian Federation of 16 December 2004 N. 805

29 'Fundamentals of the Legislation of the Russian Federation on the Protection of the Health of Citizens'. Article 52 of the Decree of the Supreme Council of the Russian Federation of July 22, 1993 N 5487-1

5.3.5 The average monthly income of the victim is calculated by dividing the total amount of his income for the twelve months of work preceding the injury by twelve. In the case where the victim worked for less than twelve months at the time of the injury, the average monthly income is calculated by dividing the total amount of income for the actually worked number of months preceding the injury by the number of these months. Income to be taken into account when determining average monthly income must be based on stable income. Compensation will not be based on a temporary promotion or once-off bonus, but where stable changes have occurred to improve the financial situation of the victim such as a promotion having occurred in the year prior to the injury, compensation will be based on that higher income. In the case when the victim was unemployed at the time of the injury, the income before cessation of employment or the usual amount of income of an employee of their qualification in the given locality, but not less than the subsistence level of the able-bodied population as a whole in the Russian Federation, is taken into account.

5.3.6 Compensation for an injury to a child is dealt with in Article 1087 of the Civil Code of the Russian Federation[30] (CCRF). That section provides that when a minor is under the age of fourteen, as well as in the case of where a minor is between the age of fourteen and eighteen but does not have an income, the person responsible for the damage shall be obliged to compensate the victim for their loss in working capacity. The compensation is based on the subsistence level of income of the able-bodied population as a whole in the Russian Federation as established by law.[31]

5.3.7 Article 1092 of the CCRF states that compensation for damages caused by a decrease in the ability to work shall be made in monthly instalments. In certain cases, for example where the tort-feasor is expected to leave the Russian Federation and take up permanent residence elsewhere, the court can award a lump sum. However, the lump sum may not be more than three years of compensation payments.

5.3.8 Article 1090 of the CCRF allows a victim who has partially lost their ability to work to demand higher compensation if their capacity to work has decreased in relation to their capacity at the time of awarding compensation. The tort-feasor also has the right to demand a reduction in compensation if the victim's capacity to work has increased in relation to their capacity at the time of awarding compensation.

5.3.9 Article 1091 of the CCRF allows for compensation to adjust in proportion to the growth of the subsistence minimum per capita established in accordance with the relative constituency of the Russian Federation at the place of residence of the victim. In the absence of a suitable measure of indexing in the place of residence of the victim, the growth in the subsistence minimum per capita for the Russian Federation as a whole is applied.

5.3.10 Bocharov (2021) finds no evidence of a compensation culture in Russia, noting that scepticism toward official legal institutions in Russia is evident in the extremely low trust that people have in the judicial system, according to national surveys.

30 Civil Code of the Russian Federation No. 14-FZ of 26 January 1996
31 Federal Law No. 05-FZ of 12.2022.466

5.4 India

5.4.1 The Motor Vehicle Act[32] (MVA) in India regulates all aspects of road transport, including the licensing of drivers of motor vehicles, the registration of motor vehicles, the control of traffic, traffic offences and penalties, the insurance of motor vehicles against third party risks and the establishment of a claim tribunal.

5.4.2 Section 166 of the MVA states that any state government may constitute one or more Motor Accident Claims Tribunals (MACT). The purpose of the MACT is to adjudicate claims for compensation in respect of accidents involving death or bodily injury arising out of the use of motor vehicles. At least one member of a MACT must be a judge of the high court or a district judge. Section 168 of the MVA enjoins the MACT to determine an amount of compensation that appears to be just and reasonable. As noted in *Vijay Kumar Dahiya* vs *Sachin Garg and Others*:[33]

> The compensation should not be a windfall or a bonanza nor it should be a pittance.

5.4.3 In the case of *Sarla Verma and Others* vs *Delhi Transport Corporation & Another*,[34] the court noted that there is a lack of uniformity and consistency in awarding compensation by various MACT. In response to this, the Indian courts have developed a standard method of calculating an amount of just compensation. This has been built on the matter of *Reshma Kumari & Others* vs *Madan Mohan & Another*[35] and *National Insurance Co. Ltd* vs *Pranay Sethi*.[36]

5.4.4 For non-serious injury, the compensation formula is as follows:

[Actual income of the claimant after taxes] x [1 + future prospects percentage] x [multiplier] x [percentage loss of earning capacity]

5.4.5 Future prospects are determined in accordance with Table 4, thereby forgoing the need for highly speculative projections of earnings such as used in the South African context.

TABLE 4. Adjustment for future prospects

Age at the date of injury	Future prospects of a claimant having a permanent job with increments	Future prospects of a claimant who was self-employed or in a fixed salaried position
Below 40	50%	40%
Between 40 and 50	30%	25%
Between 50 and 60	15%	10%
Above 60	0%	0%

32 Motor Vehicle Act of 1988
33 *Vijay Kumar Dahiya* vs *Sachin Garg And Others*, p3, paragraph 9 on 19 May 2023
34 *Sarla Verma & Others* vs *Delhi Transport Corportion & Another* on 15 April 2009
35 *Reshma Kumari & Others* vs *Madan Mohan & Another* on 2 April 2013
36 *National Insurance Co. Ltd* vs *Pranay Sethi* on 31 October 2017

5.4.6 The multiplier is determined in accordance with Table 5.

TABLE 5. Multipliers

Age at the date of injury	Multiplier	Age at the date of injury	Multiplier
15 to 20	18	46 to 50	13
21 to 25	18	51 to 55	11
26 to 30	17	56 to 60	9
31 to 35	16	61 to 65	7
36 to 40	15	Above 65	5
41 to 45	14		

5.4.7 The principles of determining the percentage loss of earning capacity are set out in *Raj Kumar* vs *Ajay Kumar & Another*:[37]

(i) Not all injuries result in a loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person is not always the same as the percentage of loss of earning capacity. This is because the percentage of permanent disability is based on the medical assessment of the extent of the injury, while the percentage of loss of earning capacity is based on the economic impact of the injury, such as the ability to work and earn income. In some cases, the MACT may conclude that the percentage of loss of earning capacity is the same as the percentage of permanent disability, but this is not always the case.

(iii) The doctor who treated the claimant or who examined them subsequently to assess the extent of their permanent disability can give evidence only in regard to the extent of the permanent disability. The loss of earning capacity is something that will have to be assessed by the MACT with reference to the evidence in its entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of the claimant's profession, occupation or job, age, education and other factors.

5.4.8 For children's claims, no reliance is placed on experts such as an industrial psychologist in the South African context. The notional income for a child is set at INR15,000 a year, multiplied by the cost inflation index for the financial year in which the cause of action arose, divided by 331 that represents the cost inflation index in the base year in which the amount of INR15,000 a year was determined.[38]

5.5 China

5.5.1 On 1 July 2006 China's Insurance Regulatory Commission introduced compulsory motor vehicle third-party liability insurance[39] subject to statutory indemnity

37 *Raj Kumar* vs *Ajay Kumar & Another* on 18 October 2010

38 *Naveen Yadav (Minor)* vs *Banwari Lal Meena & Others* on 28 March 2018

39 Regulation on Compulsory Motor Vehicle Traffic Accident Liability Insurance of 2006

limits. Motorists may supplement the compulsory coverage with commercial motor vehicle third-party liability insurance for liabilities above the statutory limits.

5.5.2 Article 1213 of the Civil Code of the People's Republic of China[40] provides that where damage is caused to another person as a result of a traffic accident and the liability is attributed to the motor vehicle driver, the insurer that underwrites the compulsory motor vehicle insurance shall make compensation within the limit of the insured liability. The deficiencies (if any) shall be paid by the insurer that underwrites the commercial motor vehicle insurance in accordance with the stipulations of the insurance contract. Any remaining balance or the part not covered by any commercial motor vehicle insurance shall be paid by the tort-feasor.

5.5.3 Article 23 of the Regulations stipulates that compulsory insurance for motor vehicle traffic accident liability shall implement a unified liability limit nationwide. The liability limit for disability compensation is a maximum amount of 180,000 Yuan under compulsory insurance.[41] The aforementioned limit came into effect from 19 September 2020.

5.5.4 For non-serious injury, the compensation formula is as follows:[42]

[The per capita disposable income of urban residents in the year prior to the accident at the provincial location of the court subject to the lawsuit] x [multiplier] x [disability compensation coefficient]

5.5.5 Prior to 2022, the per capita income standard distinguished between urban and rural areas, but now claims are uniformly calculated according to urban standards.

5.5.6 With respect to the multiplier, disability compensation is calculated for 20 years from the date of determination of disability. For those over the age of 60, the multiplier is reduced by one year for each additional year of age. The multiplier for those over the age of 75 is five years.

5.5.7 The disability compensation coefficient divides the degree of disability of injured persons into ten grades according to their disability status in road traffic accidents, from grade I (100%) to grade X (10%), with a difference of 10% for each grade.

5.5.8. Where the victim is disabled as a result of the injury but his actual income has not decreased, or the degree of disability is minor but causes occupational obstruction and seriously affects his or /her employment, the disability compensation may be adjusted.

5.5.9 Unlike India, compensation in China does not take into account merit or promotional increases in earnings. The application of a fixed multiplier of 20 for claimants under the age of 60 favours older claimants over younger claimants.

5.6 Summary

5.6.1 In Brazil, the DPVAT system provides mandatory no-fault insurance with limited compensation, supplemented by social security and civil claims for additional com-

40 Civil Code of the People's Republic of China 2020

41 China Banking and Insurance Regulatory Commission 9 September 2020

42 Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases 5 May 2022

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pensation. Russia's OSAGO system offers third-party liability insurance with capped compensation, requiring victims to sue for higher damages. India's Motor Vehicle Act establishes the MACT that calculates compensation based on a standardised formula considering future prospects and loss of earning capacity. China's system includes compulsory third-party liability insurance with fixed compensation limits, using a multiplier and disability grading to determine compensation. Each system has its mechanisms for addressing loss of income, disability and other damages, with varying degrees of reliance on social security, civil claims and insurance coverage. By examining these systems, policymakers and stakeholders can better understand the interplay between legal frameworks, economic conditions, and road safety, leading to more informed decisions on reforming road accident compensation systems.

6. HISTORICAL OVERVIEW OF THE RAF AND CLAIMS ASSESSMENT

6.1 This section traces the legislative changes and commissions of inquiry that have shaped the current compensation system in South Africa, highlighting the administrative challenges and legal complexities that have arisen, particularly in the handling of non-serious injury claims. Recurring issues of inefficiency and litigation over the years set the stage for understanding the current challenges and the need for reform in compensating non-serious injuries.

6.2 The first statutory road accident compensation scheme in South Africa was the Motor Vehicle Insurance Act,[43] that came into effect on 1 May 1946. The scheme was originally underwritten and administered by a consortium of private insurance companies and funded by compulsory annual premiums payable by motorists. The Motor Vehicle Insurance Act was subject to four commissions of inquiry, namely:

— the Smit Commission of Inquiry (1950),
— the Corder Commission of Inquiry (1954),
— the Du Plessis Commission of Inquiry (1962), and
— the Moll Commission of Inquiry (1964).

6.3 The second statutory road accident compensation scheme in South Africa was the Compulsory Motor Vehicle Insurance Act.[44] The Compulsory Motor Vehicle Insurance Act was in turn subject to two commissions of inquiry, namely:

— the Wessels Commission of Inquiry (1976), and
— the Grosskopf Commission of Inquiry (1981).

6.4 The third statutory road accident compensation scheme in South Africa was the Motor Vehicle Accidents Act.[45] The important change it introduced was a fuel levy to fund the compensation system. The Motor Vehicle Accidents Act was subject to one commission of inquiry, namely, the Viviers Commission of Inquiry (1987).

43 Motor Vehicle Insurance Act 29 of 1942
44 Compulsory Motor Vehicle Insurance Act 56 of 1972
45 Motor Vehicle Accidents Act 84 of 1986

6.5 The fourth statutory road accident compensation scheme in South Africa was the Multilateral Motor Vehicle Accidents Act.[46] The Multilateral Motor Vehicle Accidents Fund was subject to one commission of inquiry in the wake of an actuarial deficit estimated at R1 billion, namely, the Melamet Commission of Inquiry (1992).

6.6 The fifth statutory road accident compensation scheme in South Africa was the RAFA, which was subject to one major commission of inquiry, namely, the Satchwell Commission (2002).

6.7 The RAFA is still in force at present and has been the subject of a number of amendments, the most significant of which was the RAFAA that came into effect from 1 August 2008. The most significant amendments in so far as their impact on claims for loss of income from a direct or a behavioural aspect were as follows:

6.7.1 Section 17(1)(b) that provides for:

> the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum.

6.7.2 Section 17(4)(c)(ii) that provides for:

> the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding […] R160,000 per year in the case of a claim for loss of income […] adjusted […] to counter the effect of inflation.

6.8 Three further noteworthy amendments brought about by the RAFAA were:

6.8.1 The removal of the limitation of RAF claims for certain categories of passengers which were previously limited to R25,000 under the RAFA.

6.8.2 The RAF will only pay for medical expenses based on tariffs applicable to public health care establishments as set by the Minister of Health.

6.8.3 Removing the victim's right to sue the wrongdoer for the balance of their damages (for example, if a claim is capped in terms of the RAFAA, the victim cannot sue the wrongdoer for the excess between their actual loss of income and the capped loss of income).

6.9 The amendments noted in 6.7.1 and 6.7.2 above, survived a Constitutional Court challenge in *Law Society of South Africa and Others* v *Minister for Transport and Another*:[47]

> I have already found that the scheme, including the reduction of compensation recoverable for loss of income or support, properly advances the governmental purpose to make the Fund financially viable and sustainable and to render the compensation regime more transparent,

46 Multilateral Motor Vehicle Accidents Act 93 of 1989

47 *Law Society of South Africa and Others* v *Minister for Transport and Another* (CCT 38/10) [2010] ZACC 25

> predictable and equitable. Accordingly, I am unable to find an arbitrary deprivation of property, which is the threshold requirement for a limitation of section 25(1). It follows that absent a limitation of the right, I need not enter into a justification analysis in relation to section 25(1). The constitutional challenge to the amendment on the ground that it infringes section 25(1) of the Constitution must fail.

6.10 The civil trial rolls of both the lower and the high courts throughout South Africa are dominated by cases involving the RAF. In *MT* v *Road Accident Fund* and *HM* v *Road Accident Fund*[48] the court remarked that by far the largest percentage of litigation in most courts in the country (in some, more than 90%), is undertaken against the RAF. Historically, in order to fulfil its statutory duties, the RAF appointed agents to perform its litigious work and did so by appointing firms of attorneys from across the country to a panel.

6.11 In the 2014 hearing of *Joubert Galpin Searle Inc and Others* v *Road Accident Fund and Others*,[49] the former Chief Executive Officer (CEO) of the Road Accident Fund, namely Dr Eugene Watson, remarked that the so-called old panel of attorneys was appointed some ten years prior to the hearing. The Auditor-General had investigated the appointment of the old panel and found that they had not been appointed in an open and competitive procurement process, but instead on the basis of direct negotiations between individual firms and the RAF. The Auditor-General therefore requested the RAF to conduct a procurement process required by Section 217 of the Constitution.[50] That section requires that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

6.12 Following a tender awarded in 2014, the RAF appointed a panel of 103 attorneys around the country for a period of five years in order to provide specialised legal services to the RAF.[51] These services were all subject to identical service level agreements. With the appointment of a new CEO on 19 September 2019 and the appointment of a permanent Board of the RAF on 5 December 2019, the RAF management reported to the Board that over a certain review period, 99.65% of matters set down for trial in the Pretoria High Court were settled on the day of the trial. The Board accepted a new strategic plan on 31 January 2020 that included the insourcing of specialist legal services, thereby replacing the existing panel of attorneys. The mandate of the existing panel of attorneys was terminated with effect from 31 May 2020.

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48 *MT* v *Road Accident Fund; HM* v *Road Accident Fund* (37986/2018) [2020] ZAGPJHC 286; [2021] 1 All SA 285 (GJ); 2021 (2) SA 618 (GJ)

49 *Joubert Galpin Searle Inc and Others* v *Road Accident Fund and Others* (3191/2013) [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP)

50 The Constitution of the Republic of South Africa, 1996

51 *Road Accident Fund and Others* v *Mabunda Incorporated and Others* (1147/2020); *Minister of Transport* v *Road Accident Fund and Others (1082/2020)* [2022] ZASCA 169

6.13 The tendency to settle matters on the doorsteps of the court was commented on in *I.G.M.* v *The Road Accident Fund*[52] where the court remarked that:

> Cases of this nature must be subjected and opened to settlement negotiations and dispute resolution much earlier than at the door of the trial court. This abhorrent practise [sic] has implanted and rooted itself into the justice system at an alarming and disgusting cost to the administration of justice and the depletion of the coffers of the fiscus. It has become a tributary money-spinning atrocity that must be stopped.

6.14 In *Fourie Fismer Inc and Others* v *Road Accident Fund*[53] the current CEO of the RAF deposed to the following in an affidavit in support of the RAF's decision to dispense with the services of their panel of attorneys:

> the current system is fraught with irregularities, fraud and corruption. It involves panel attorneys, plaintiffs' attorneys, the Fund's own claims handlers and officials in the finance department. Some firms of attorneys receive disproportionately more files than other firms. This is not supposed to happen because the Fund has a vendor rotation system ("VRS") in terms of which firms are allocated files on a rotational basis, to ensure equal distribution of work. Fraudulent claims are settled by some of the panel attorneys without a proper investigation the quantum of claims exaggerated in collusion between the panel and plaintiffs' attorneys. Some of the attorneys belonging to the panel attorneys charge the Fund multiple times for appearing in Court on a single day. They also falsify invoices rendered by medical experts. All this has come at a huge cost to the Fund.

6.15 The court's frustration with the volume of RAF litigation and the settlements concluded in these matters is illustrated in *Mzwakhe* v *Road Accident Fund*:[54]

> Our courts are inundated with matters relating to the RAF and the Minister of Law and Order (in re unlawful arrest claims). The settlement agreements reached often bear no association to the damages actually suffered. The reasons for this are not apparent, although speculation is rife in regard to the motives behind such settlements. For these reasons, our courts have to be vigilant when dealing with State funds. The court can take judicial notice of the fact that the RAF claims that it is bankrupt. It is the court's duty to oversee the payment of public funds. The applicant must prove its claim with reliable evidence. The claim is for a substantial sum. The RAF, for reasons known only to it, has agreed to pay out this sum without any investigation into its validity. A court cannot allow that, when, on the face of it, the claim is based upon contradictory and flimsy evidence.

6.16 The current position in the courts is summarised in *L.N. and Another* v *Road Accident Fund*[55] in which the court remarked that it is a well-known fact that the RAF is a perpetually

52 *I.G.M.* v *The Road Accident Fund* (2549/2018) [2022] ZAFSHC 251; 2023 (1) SA 573 (FB)
53 *Fourie Fismer Inc and Others* v *Road Accident Fund* (17518/2020, 15876/2020, 18239/2020) [2020] ZAGPPHC 183; [2020] 3 All SA 460 (GP); 2020 (5) SA 465 (GP)
54 *Mzwakhe* v *Road Accident Fund* (24460/2015) [2017] ZAGPJHC 342
55 *L.N. and Another* v *Road Accident Fund* (43687/2020) [2023] ZAGPPHC 274

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delinquent litigant. It is stated that the RAF's conduct has frequently received the attention and censure of the courts and that this has primarily been brought about by the RAF's financial position and the termination of the mandate of its panel of attorneys. It goes on to state that:

> In an attempt to manage the almost overwhelming avalanche of RAF-litigation in this Division, which litigation often proceeds by way of default, either as a result of a failure to enter an appearance to defend or, after having done so, due a subsequent lack of any meaningful participation in the litigation by the RAF, the Judge President(JP), Acting JPs, the Deputy Judge President(DJP) or Acting DJPs of this Division, have from time to time published various directives since 2019. The most significant of those directives was directive 01/21 with the most recent revision thereof published on 1 December 2022. These directives have all been designed to case manage the workload of the Division, particularly in relation to RAF-cases. Some statistics, although they vary from time to time, give an indication of the magnitude and scope of the problem: on the daily trial roll in Pretoria some 40 RAF-trials feature. That is sometimes up to 200 trials per week. Most of these end up being settled or by proceeding by default of appearance while others are dispensed with by way of argument based on evidence produced by affidavit, including that of experts. At the same time, a default and settlement roll daily proceeds before no less than two judges with anything from between 10 and 20 matters per judge per day, that is up to a further 200 matters per week. Of the twenty or so matters which come before yet another judge in the Special Interlocutory Court (SIC), most are RAF-matters. The position is only slightly better (i.e. with fewer matters) on all these rolls in Johannesburg.

6.17 The correct procedure for assessing RAF claims entails a four stage enquiry as set out in *MS* v *Road Accident Fund*.[56] Firstly, did the negligence of the third party driver cause the accident or would an apportionment be applicable in terms of the Apportionment of Damages Act[57] where both the plaintiff and negligent third party driver were at fault (commonly referred to as the merits enquiry). Secondly, did the plaintiff sustain the pleaded injuries in the accident and thirdly, how have these proven injuries affected the plaintiff? The second and third stage enquiries are enquiries related to causation. And lastly, how should the plaintiff be compensated for the effects of such injuries (commonly referred to as the quantum enquiry). The court noted that often the approach of the plaintiff is to shift the focus away from causation and onto the determination of quantum which is nothing less than an attempt at hoodwinking. Most importantly, insufficient evidence of causation of loss cannot be remedied by the application of contingency deductions so as to reduce the quantum.

6.18 The early and fair assessment of a claim is reliant on sufficient information as noted by a RAF claims handler in *Hlatshwayo* v *Road Accident Fund*:[58]

> One of the biggest problems we have is that there is usually not enough evidence in the files to properly and quickly assess the matter and had that information been available earlier it would

56 *MS* v *Road Accident Fund* (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ)
57 Apportionment of Damages Act 34 of 1956
58 *Hlatshwayo* v *Road Accident Fund* [2023] 1741-2019 (MM)

> have been settled before the matter was set down for trial […] Much of the time by the claim officer in those departments is used to request further information from the plaintiff's attorneys in order for them to assess the claim […] We usually then receive that further information close to trial and then assess the further information to enable us to draft a memorandum, which will need to be approved and thereafter a settlement offer is made. If that offer is rejected, then the matter will be referred to the State Attorneys and they will act for the defendant.

6.19 Of concern in the current era of default judgment matters is the court's remark in *L.N. and Another* v *Road Accident Fund*:[59]

> The unfortunate corollary of the RAF's litigation delinquency is that a substantial number of legal practitioners who represent plaintiffs in this milieu of non-cooperation, abuse the processes of this court for purposes which are not beneficial to the proper functioning of the court and appear to be principally aimed at either generating fees or "engineering" default judgments.

6.20 With effect from 5 July 2023, the RAF issued an invitation to bid in terms of which it appears to be the intention to appoint a panel of legal practitioners to provide the RAF with legal services for a period of five years.[60] It is noted that although the RAF has an in-house legal services department which provides legal services to the RAF inclusive of claims administration and management by the duly appointed State Attorneys, the need arises to outsource some of the work to external legal practitioners.

6.21 Legislative shifts and numerous commissions of inquiry have sought to address inefficiencies, yet recurring issues of litigation volume, administrative complexities, and inconsistent settlement practices continue to burden the RAF. The historical context highlights the need for more effective policy interventions but also underscores the importance of a more comprehensive overhaul of the current compensation framework to ensure that it operates more equitably and sustainably.

7. FINANCIAL DETERIORATION OF THE ROAD ACCIDENT FUND

7.1 The accumulated deficit of the Road Accident Fund is summarised in Appendix D. It has grown from a deficit of R3.8 billion for the financial year ending 30 April 1994 to R344.8 billion for the financial year ending 31 March 2022 as shown in Figure 2.

7.2 The release of the RAF Annual Report for 2021 was subject to a court action between the Road Accident Fund and the Auditor General (AG), the Accounting Standards Board and the Minister of Transport.[61] On 28 April 2021, the RAF resolved to change the compilation

59 Ibid 28.

60 https://www.raf.co.za/Procurement/Pages/RAF-2023-00011.aspx

61 *Road Accident Fund* v *Auditor-General of South Africa and Others* (19778/2022) [2022] ZAGPPHC 737

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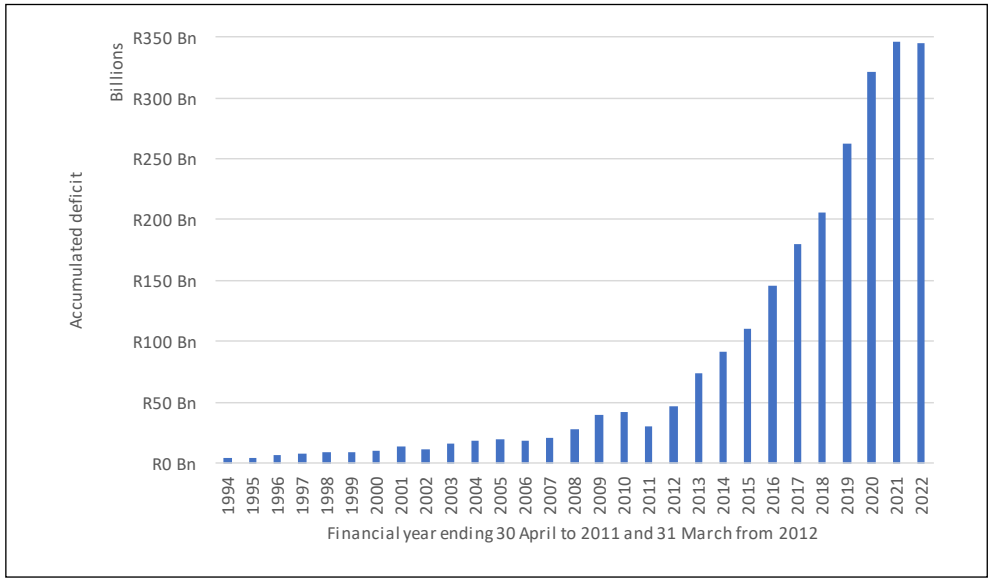

FIGURE 2. Road Accident Fund accumulated deficit from 1994 to 2022

of their annual financial statements from the International Financial Reporting Standard 4 to the International Public Sector Accounting Standard 42 (IPSAS42). The change resulted in a reduction of their contingent liability of some R300 billion. The AG contended that IPSAS42 did not fairly reflect the RAF's contingent liability for outstanding and future claims. In addition, such a change would result in non-compliance with the Public Finance Management Act.[62] The accumulated deficit shown in Figure 2 for 2022 has therefore been taken in line with National Treasury's estimates and accords with the contingent liability opinion of the AG. It is unclear why there was a slight reduction in the accumulated deficit in the 2022 financial year.

7.3 A comparison between the total of general damages claims paid and the total of loss of income claims paid (past and future loss of income) is summarised in Appendix E and shown in Figure 3.

7.4 Total claims paid for loss of income exceeded total claims paid for general damages for the first time from the financial year ending 31 March 2013 and has remained higher to date. In terms of number of claims paid, there has been a sharp decline in the number of general damages claims and currently the number of general damages claims settled a year is similar to the number of loss of income claims settled a year. General damages claims and loss of income claims do not need to be concluded concurrently as discussed in section 8.4.

62 Public Finance Management Act 1 of 1999, Section 55(1)(b)

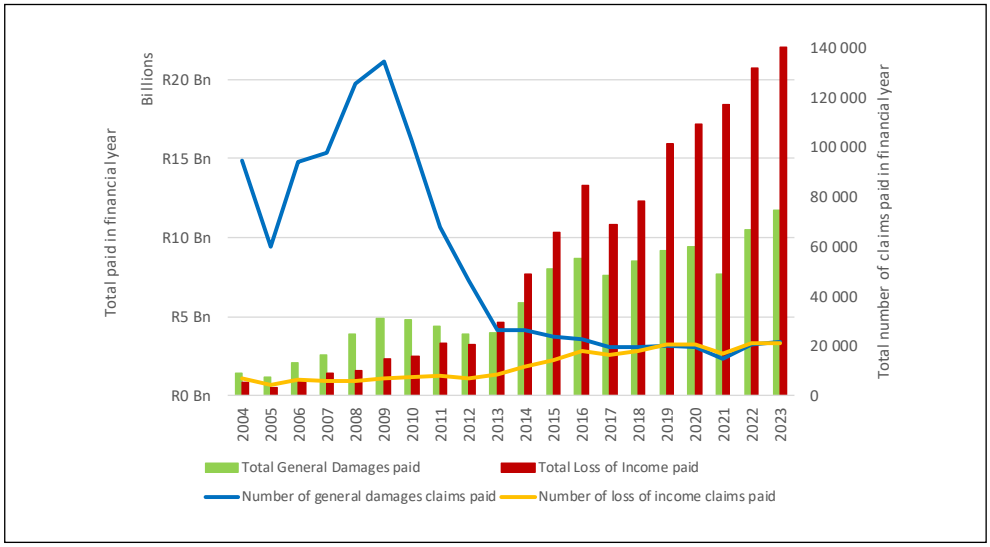

FIGURE 3. General damages and loss of income claims paid

7.5 Following an application in terms of the Promotion of Access to Information Act,[63] the RAF made available claims statistics in respect of loss of income settlements during the financial year ending 31 March 2021 totalling R18.4 billion. The claims distribution is shown in Figure 4.

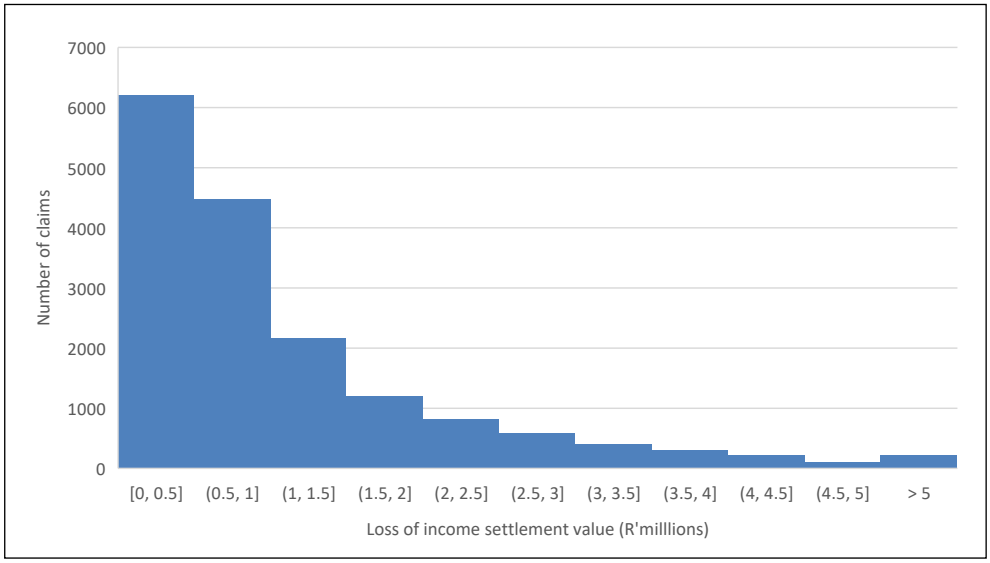

FIGURE 4. Loss of income claims distribution for year ending 31 March 2021

63 Promotion of Access to Information Act 2 of 2000

7.6 Additional data provided indicated that approximately R2.6 billion in claims for loss of income were in respect of non-serious injury (approximately 14% of the total paid in respect of loss of income). The distribution of loss of income settlements in respect of non-serious injury is shown in Figure 5.

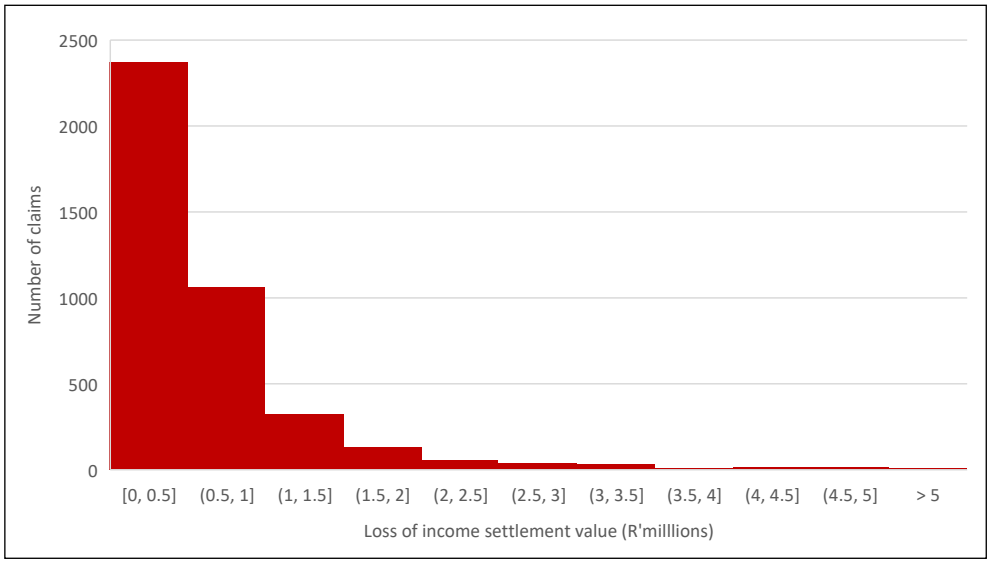

FIGURE 5. Loss of income for non-serious injuries for year ending 31 March 2021

8. LOSS OF INCOME BENEFITS AVAILABLE FROM THE RAF FOR NON-SERIOUS INJURY

8.1 As noted in *RAF* v *Faria*,[64] the RAFAA read together with the regulations thereto introduced two paradigm shifts. Firstly, general damages may only be awarded for injuries that have been assessed as serious. Secondly, the assessment of injuries as serious has been made an administrative rather than a judicial decision.

8.2 The RAFAA implemented from 1 August 2008 directs that a claim for general damages is only applicable if the injuries resulted in a whole person impairment (WPI) of 30% or more as assessed in terms of the American Medical Association Guides (AMAG) to the Evaluation of Permanent Impairment (Rondinelli, 2008). WPI describes the level of disability or functional limitations that a person experiences as a result of an injury. In general, motor vehicle accidents can result in a wide range of injuries ranging from minor injuries like bruises to severe injuries such as spinal cord injuries. As explained in the RAF4 form, if a claimant does not exceed the 30% WPI barrier, then a medical expert registered in terms of the Health Professions Act[65] may consider qualifying the claimant under the

64 *RAF* v *Faria* (567/13) [2014] ZASCA 65
65 Health Professions Act 56 of 1974

narrative test. Qualification under the narrative test as a serious injury is considered if one of four criteria are met. These four criteria are:
— serious long-term impairment or loss of body function;
— permanent serious disfigurement;
— severe long-term mental or severe long-term behavioural disturbance or disorder; and
— the loss of a foetus.

8.3 Damages recoverable in delict are either classified as special damages or general damages (Visser & Potgieter, 2004). Special damages include all monetary loss actually incurred up to the date of trial such as past medical expenses and past loss of income. General damages include non-monetary loss such as pain and suffering, loss of amenities of life and disfigurement. General damages also include monetary loss which, up to the date of trial have not yet materialised, such as future medical expenses and future loss of income (Corbett et al., 1995).

8.4 In *Maqhutyana and Another* v *Road Accident Fund*[66] the court observes that the process to determine whether a serious injury exists is completed if the RAF accepts the serious injury assessment report on the prescribed RAF4 form. If the RAF rejects the assessment, the third party can declare a dispute concerning the assessment to the Registrar of the Health Professions Council of South Africa (HPCSA). The HPCSA in turn refers the disputed assessment to the Appeal Tribunal as constituted in terms of regulations to the RAFAA. Referral to the Appeal Tribunal and waiting on the outcome of the appeal does not restrict a claimant from settling or proceeding with their claim for loss of income. Furthermore, the claim for loss of income is not barred if the HPCSA's decision on the seriousness of the injury is negative. The jurisdiction of the court to adjudicate on a plaintiff's claim for loss of earnings is also not ousted where the dispute resolution process has been invoked and the process is underway. A claim for loss of income stands on its own and is distinct and separate from any serious-injury assessment.

8.5 Medical experts often report a percentage of WPI based on the American Medical Association Guides or provide an estimated percentage loss of work capacity. Whilst there is no necessary proportional relationship between percentage impairment and loss of income, Koch (2011) notes that because this is often the only evidence, it is commonly used as a basis for compensation, such as an increase to the post-accident general contingencies.

8.6 The following is noted by the RAF:[67]

> The number of personal claims lodged with the RAF reduced substantially after the 2008 Amendment Act was introduced. Prior to the introduction of this Act, the RAF received in excess of 100,000 personal claims annually, of which the majority represented claims for minor

66 *Maqhutyana and Another* v *Road Accident Fund* (CA17/2020) [2021] ZAECMHC 30
67 Road Accident Fund Annual Report 2012

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> injuries (such as whiplash and other soft tissue injuries). Currently, the RAF receives less than 50,000 personal claims per annum, but these claims are mostly for more serious injuries, which require expert medical opinions and the determination of future loss of earnings. As a result, claims of this nature have become more complex and time-consuming to settle […] In addition, a trend has developed where pre-Amendment Act claims for minor injuries have now become claims involving future loss of earnings related to minor to moderate head injuries.
>
> As mentioned, the 2008 Amendment Act, while bringing about savings on the smaller general damages claims, has seen attempts to increase or maximise the value of compensation awarded pre-Amendment Act claims. By way of example, in some instances the Courts have awarded vast future loss of earnings claims for whiplash injuries that were settled as mere general damages claims a few years ago

8.7 The RAF[68] identified a number of contributing factors to the increase in the average rand value of loss of income claims, namely:

- Removal of the R25,000 limit for passenger claims and the resulting propensity of attorneys to try and find reasons for loss of income claims.
- Minimal proof of loss of income is accepted by the courts, especially in the cases where the plaintiff is self-employed.
- The then new trend for industrial psychologists to be involved, incorporating career progression and promotions into the loss of income calculation.
- In the past, claims for minor children were projected based on the parent's educational background. This impacted negatively on the previously disadvantaged sectors of the population, which represent the majority. With social and political changes, these claims are no longer settled on this basis and have become multi-million rand settlements.

8.8 The differential contingency approach is often used to settle matters involving non-serious injury and the RAF has an internal basic spreadsheet set up for differential contingency deduction calculations as is evident from offers of settlement produced by the RAF. The method places a present value on a claimant's future income until retirement and then takes a percentage of that amount as the loss – the percentage is often referred to as the contingency spread. Put differently, the same value is placed on the present value of pre-accident and post-accident income; with the post-accident income stream attracting a higher contingency deduction than the contingency deduction applied to the pre-accident income stream. The differential contingency deduction approach is discussed in more detail in the next section. Thereafter, proof of earnings, the trend to use industrial psychologists and the evaluation of claims for loss of income for minor children is discussed in more detail. These all have a significant impact on the differential contingency approach used for non-serious injuries.

68 Ibid.

8.9 The differential contingency approach

8.9.1 As noted by Corbett et al. (1995), in some cases the plaintiff's injuries may affect capacity in regard to former work, but not actually prevent a plaintiff from continuing their work as before and from earning the same income as before. In those cases, the court has generally made some allowance in the calculation of damages for the fact that the plaintiff's capacity has been affected and that their position in the labour market is less secure than it was. The earliest account of this approach was over 60 years ago in *Brijlall* v *Naidoo*.[69]

8.9.2 This principle is further explained in *Sweatman* v *Road Accident Fund*:[70]

> our courts have recognized on many occasions that different contingencies may impact differently on the pre- and post-morbid career paths, because 'these risks which would have attached to the plaintiff in any event are more likely to affect him in the future because of his disability'.

8.9.3 An authority often cited regarding the application of a higher post-accident contingency deduction is the matter of *Van Drimmelin* v *President Versekeringsmpy.*[71] In that matter the plaintiff was age nearest 17 at the date of the accident. Despite an amputation of the lower left leg, future knee operations, a 50% chance of a back fusion and a 75% chance of future hip replacement surgery, no allowance was made by the trial judge for early retirement. The same career path was valued in both the pre-accident and post-accident scenario, being that based on a national diploma in engineering. The trial judge applied a 10% contingency deduction to the pre-accident earnings curve and a 30% contingency deduction to the post-accident earnings curve in order to measure the loss. The trial judge awarded a 20% contingency spread despite the WPI comfortably exceeding 30%.

8.9.4 A panel of six actuaries was appointed by the RAF in early 2013 to assist with the computation of all claims for loss of income and loss of support. On 17 February 2014, the RAF issued a training circular providing guidance on the application of actuarial principles. Of significance was the instruction to apply standard contingency deductions of 15% in the future to uninjured earnings and 25% in the future to injured earnings. All claims calculated in this way would lead to an automatic loss equal to 10% of the present value of a claimant's future earnings in matters where the same pre-accident and post-accident earnings curves are valued. This circular noted that if the facts of the case dictate otherwise, then the standard contingency deductions should be adjusted accordingly. The extent to which any deviations to this circular factually occurred and the number of cases that were settled on the basis of a 10% contingency differential should be the subject of an investigation.

8.9.5 The disconnect with the above approach is explained in *Bvuma* v *Road Accident Fund*[72] where the court observes that:

> I tried to ascertain the nature of the 'loss of earnings or earning capacity' and was informed that her career had been adversely affected by reason of her inability to coach after hours

69 *Brijlall* v *Naidoo* 1961 1 QOD 266 (D) 271
70 *Sweatman* v *Road Accident Fund* (17258/11)
71 *Van Drimmelin* v *President Versekeringsmpy* 1993 4 QOD E2-19 (T)
72 *Bvuma* v *Road Accident Fund* (2010/17220) [2012] ZAGPJHC 258

sports and as a result she may therefore be denied promotion and, if she were retrenched, she would find it more difficult to obtain employment. Also, I was informed that she would have to "*work harder*". Absolutely no information or evidence was produced in support of these vague speculations.

8.9.6 The opinion of an expert witness is only admissible in court if it is based on specialised knowledge and is relevant to the issues at hand. The expert's opinion must also be based on facts that have been proven through admissible evidence.[73] The problem with the approach noted in section 8.9.4 is that it illustrates the breakdown in the correct procedure for determining loss of income as discussed in section 6.16. That is, first admissible evidence must be established leading to an argument for a higher post-accident contingency deduction.

8.9.7 In *Moshidi* v *Road Accident Fund*[74] the court remarked that in order for the plaintiff to succeed in a claim for loss of earnings and loss of earning capacity the plaintiff must prove that the accident in question resulted in the diminution of the plaintiff's estate. The bald statement that a higher contingency deduction should be used to quantify a claim for future loss of earnings capacity, as is routinely made by industrial psychologists, must be tested against the factual evidence that may include for example the fact that earnings have increased in each year since the accident.

8.9.8 One of the changes that the Road Accident Benefit Scheme Bill[75] that was rejected by the National Assembly on 3 September 2020 would have brought about, is that a long-term income support benefit would not have been available for anyone suffering a loss of income less than 25% of pre-accident after tax income. The long-term income support benefit would have been available once factual proof was provided of an actual reduction in earnings.

8.10 Proof of earnings

8.10.1 The basic legal principle is that the burden of proving facts relevant to the establishment of the quantum of the claim rests on the plaintiff.[76] The court must be satisfied that on a "preponderance of probabilities" the plaintiff has sustained a loss as claimed.[77]

8.10.2 In a number of instances as described in Appendix F, claims for loss of income have been dismissed due to insufficient proof of earnings.

8.10.3 Contrary to the principles enunciated in Appendix F, in a few instances the courts have allowed loss of income claims where there was insufficient earnings information:

— In *Ndaba* v *Road Accident Fund*[78] the court noted that the plaintiff should not unduly benefit from her insufficient evidentiary contribution towards establishing what her income was and made a deduction of 50% from her loss in respect of both past and future loss of income.

73 *Holtzhauzen* v *Roodt* 1997 (4) SA 766 (W)
74 *Moshidi* v *Road Accident Fund* (52295/2017) [2022] ZAGPPHC 312
75 Road Accident Benefit Scheme Bill B17B of 2017
76 *Goldie* v *City Council of Johannesburg* 1948 (2) SA 913 (W)
77 *Esterhuizen* v *Administrator, Transvaal* 1957 (3) SA 710 (W)
78 *Ndaba* v *Road Accident Fund* [2011] ZAECELLC 6

— In *Swart* v *Road Accident Fund*[79] the court applied a 60% contingency deduction in respect of the past loss and a 70% contingency deduction in respect of the future loss as there was no indication that the plaintiff paid tax and there was no collateral information on earnings.

8.10.4 The courts have been inconsistent in their treatment of proof of earnings, although in recent judgments the trend has been to reject claims for loss of income where there is insufficient proof of earnings. There needs to be consistency throughout the legal system including the conduct of RAF claims handlers.

8.11 The trend to use industrial psychologists

8.11.1 In *Ntombela* v *Road Accident Fund*[80] the court remarked that:

> The industrial psychologists' performance warrant special mention. Their inadequate and superficial conduct has already been alluded to. It appears that persons practising in this field regard themselves as mere conduits of data which they wrap up in jargonised waffle. It is hard to seek out of these reports the aspects in which the expertise they profess is evident. The entire edifice of these reports was built on the say-so of a person who any professional ought to have appreciated was not in a position to express the views that he did, still less that they slavishly and uncritically relied upon such views. They have short-changed their clients. I shall disallow their costs in whole.

8.11.2 The Health Professions Council of South Africa's[81] definition of industrial psychology makes no mention of medico-legal work:

> a specialist category within professional psychology concerned with the performance and wellness of people at work and with how individuals, groups and organisations behave and function. Its aim is to help individuals pursue meaningful and enriching work, and to assist organisations in the effective management of their human resources. Industrial psychologists provide psychological assessment, diagnosis and interventions to address psychological factors of critical relevance to organisations and their members.

8.11.3 The existing regulations[82] to the Health Professions Act published in 2008 state that providing expert evidence or opinion falls within the scope of an industrial psychologist's work. There is no explicit link to Road Accident Fund work and in particular providing evidence on aspects such as career progressions, earnings levels, the appropriateness of various earnings sources and general economic activity.

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79 *Swart* v *Road Accident Fund* (74231/2014) [2020] ZAGPPHC 542

80 *Ntombela* v *Road Accident Fund* (209709/2016) [2018] ZAGPJHC 41; 2018 (4) SA 486 (GJ)

81 Health Professions Council of South Africa Guidelines to prepare for the National Board Examination for Industrial Psychology available at: https://hpcsa.co.za/Uploads/professional_boards/psb/examinations/PSBExam-Guidelines-Industrial%20Psychology-May2020_FinalPendingBoardRatification.pdf accessed on 23 May 2023

82 Government Notice R993 of 16 September 2008

8.11.4 In their seminal paper on actuarial involvement in damages assessments, Milburn-Pyle & Van der Linde (1974) make no mention of the involvement of industrial psychologists in the assessment of future income. Instead, the authors suggest that in order to make a reasonable assessment for the future it is desirable to have a history of earnings and preferably in the case of an employed person have regard to the applicable pay scales relevant to the position. Similarly, in Koch (1984) no mention is made of the use of industrial psychologists for the purposes of future earnings projections and earnings levels. In the landmark case of *Southern Insurance Association* v *Bailey*,[83] the court similarly placed no reliance on a report from an industrial psychologist. The earnings of the minor child were taken at a similar level to the child's mother.

8.11.5 The United States case of *Daubert* v *Merrell Dow Pharmaceuticals, Inc.*[84] lists critical factors that a judge should consider when assessing scientific evidence. These include whether or not the theory or technique in question can be and has been tested, whether it has been subjected to peer review and publication, its known or potential error rate, the existence and maintenance of standards controlling its operation, and whether it is widely accepted in the relevant scientific community. Whilst that decision has been relied upon in the assessment of medical evidence in medical malpractice matters in South Africa,[85] crucially it has yet to be applied to the evidence of industrial psychologists.

8.11.6 In *Twine and Another* v *Naidoo and Another*[86] the court remarked that:

> The prevalence of expert testimonies has, however, produced challenges for the courts, some of which are fundamental to its duties and functions as a justice producing institution. This is particularly so as an entire industry of alleged experts selling their skills, knowledge and/or experience to litigants has developed, especially in personal injury cases where the defendant is the Road Accident Fund. Most of the challenges faced by the court arise from the fact that the basic principles about the role, relevance and value of an expert's testimony are often ignored by the alleged experts themselves and by the parties calling them.

8.11.7 Beyond the question of the involvement of industrial psychologists, there has been a multitude of court judgments discussing their conduct as summarised in Appendix G.

8.11.8 The above instances of non-adherence to the duties of an expert witness and relying on unscientific data in the quantification of claims has come at a great cost to the South African taxpayer. Even the attempts of so-called earnings specialists have not escaped judicial scrutiny as noted in *Ndebele* v *Minister of Police*:[87]

83 *Southern Insurance Association Ltd* v *Bailey* 1984 1 SA 98 (A)

84 *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)

85 *MEC for Health, Limpopo* v *L W M obo DM* (502/2021) [2022] ZASCA 146

86 *Twine and Another* v *Naidoo and Another* (38940/14) [2017] ZAGPJHC 288; [2018] 1 All SA 297 (GJ)

87 *Ndebele* v *Minister of Police* [2022] ZAWCC 259

> She further testified that most industrial psychologist's [sic] reports are very vague with little information and do not speak to the right audience.
>
> Instead, she became argumentative, sarcastic and started to overstep the mark by attempting to usurp the function of the court and to express opinions based on certain facts as to the future employability of the Plaintiff and to express views on probabilities which is the function of the court. Her evidence is therefore unreliable and unhelpful and cannot be accepted as an earnings expert.

8.12 The evaluation of loss of income claims for minor children

8.12.1 A controversial area in the compensation environment is the determination of loss of income for child claimants. In *Hlalele obo Hlalele* v *Road Accident Fund*[88] the court remarked that:

> Notwithstanding that the future remains unpredictable, this court is still required to calculate and award compensation based on the unknown future – in respect of lives which may or may not be lived or in respect of disabilities which may or may not eventuate or persist or in respect of damages which may or may not eventuate. We do the best we can knowing that the future in the Republic of South Africa has not, in our lifetime, always been determined by the past and that change and transformation are all around us.

8.12.2 The educational psychologist is generally tasked with setting out the likely pre-accident and likely post-accident educational achievement of the child. In the United States context, Spizman & Kane (2020) assign individual probabilities to each level of educational attainment category such as whether a student completes high school, attends college or receives a graduate degree. The individual probabilities are derived using ordered probit models fit to a large number of variables such as urban/rural, mother's years of schooling, father's years of schooling, whether the child resides with both biological parents, the mother's age at first birth and number of siblings. Statistical models of educational attainment are rarely used in the South African context, despite attempts that have been made by Uys & Alant (2015).

8.12.3 Once the forecasted educational level is settled, the industrial psychologist normally provides an estimate of earnings either in generic terms for the specific level of education or on a career specific basis. The difficulty is that there is no published research that justifies the standard career curves often cited by industrial psychologists in South Africa. Similarly, there is no published research that justifies the use of the various earnings levels employed and their likelihood. It is usual for there to be vastly different opinions concerning the prospects of child claimants between opposing industrial psychologists. As noted in *Hlalele obo Hlalele* v *Road Accident Fund*:[89]

> The essential dispute appears to be that each industrial psychologist lives in a different dream-land.

88 *Hlalele Obo Hlalele* v *Road Accident Fund* (41304/2013) [2015] ZAGPJHC 54
89 Ibid.

8.12.4 In *Tshazi* v *Road Accident Fund*[90] the court discussed the evidence of the two industrial psychologists. The plaintiff's industrial psychologist relied on a corporate job grading system and associated salaries, whereas the defendant's industrial psychologist relied on average income for various levels of education derived from Statistics South Africa data. The court observed that both tools depend on hearsay evidence and the experts relied on their second-hand understanding of how the data was obtained.

8.12.5 In *Z.V.S.* v *Road Accident Fund*[91] the defendant submitted that

> the Industrial Psychologist […] postulates only one pre-accident scenario for the minor, one where the minor would have entered the labour market and more specifically the corporate sector with a NQF 5. There are at least two other possibilities (1) that the plaintiff would have obtained his senior certificate without further studies, due to financial or other reasons, and (2) that the minor, much like his mother and father, would not have completed Grade 12.
>
> He further fails to state the percentage of chance of achieving the postulated level of earnings, which considering the statistics, the minor's current economic background and level of education of parents, is highly unrealistic and improbable. The Industrial Psychologist failed to show honour and integrity to the administration of justice

8.12.6 The above criticism is valid, on the basis that it must be raised at an early stage in the settlement or litigation process. Consideration should be given to performing a longitudinal study of real increases using either administrative data produced by the South African Revenue Service (Ebrahim & Axelson, 2019) or amalgamating pension fund data such as in Andrew (1994). This is an important area for further research.

8.12.7 Claims for loss of income in respect of children are sometimes made without establishing a probable level of education in a report from an educational psychologist. As noted in *Coopers (SA) (Pty) Ltd* v *Deutsche Gesellschaft Für Schadlings-bekampfung MbH*:[92]

> An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which reasoning proceeds, are disclosed by the expert.

8.12.8 Finally, *Minister van Veiligheid* v *Geldenhuys*[93] prescribes that experts should focus on likely earnings and not potential earnings. Koch (2012) explains that a court that awards compensation based on a potential earnings scenario runs the risk of substantially overcompensating the claimant. Potential earnings scenarios should be presented with a percentage chance of such a possibility materialising.

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90 *Tshazi* v *Road Accident Fund* [2019] 48702-17 (GJ)

91 *Z.V.S* v *Road Accident Fund* (5489/2019) [2023] ZAFSHC 99

92 *Coopers (SA) (Pty) Ltd* v *Deutsche Gesellschaft Für Schadlings-bekampfung MbH*, 1976 (3) SA 352 (A)

93 *Minister van Veiligheid* v *Geldenhuys*, 2004 (1) SA 515 (SCA)

8.13 This section highlights the differential contingency approach, which has often led to inflated compensation claims, and the problematic role of industrial psychologists whose contributions have frequently lacked a rigorous scientific foundation. Inconsistencies in proof of earnings, the impact of expert testimony, and the contentious evaluation of claims for minor children, reveal gaps and inefficiencies in the current RAF methodology. There is an urgent need for reform to ensure fairer and more sustainable compensation processes. One such reform, that removes claims for loss of income for non-serious injuries entirely, would result in a reduction in the annual RAF deficit of approximately R3 billion a year in 2023 money terms.

9. CONCLUSION

9.1 Over two decades, the RAF's deficit has ballooned from R11.1 billion in 2002 to R344.8 billion in 2022, illustrating the unsustainable nature of its current compensation model. The sharp rise in loss of income claims, from 5,957 in 2008 to 20,957 in 2023, further exacerbates the issue. These claims have increasingly surpassed general damages payments since 2013, with a significant portion, approximately R2.6 billion in 2021, being allocated to non-serious injuries. The stark contrast between the RAF's compensation amounts – reaching up to R7.7 million for non-serious injury claims – and the much lower benefits provided under international schemes and COIDA highlights the disproportionate distribution of resources.

9.2 This paper critically evaluates the RAF's approach to loss of income compensation, particularly in cases of non-serious injuries, and compares it with other compensation frameworks both locally and internationally. The findings reveal that the RAF's method is overly generous compared to the CF governed by COIDA and compensation schemes in BRICS countries, where similar injuries result in significantly lower payouts. The comparative analysis demonstrates that other jurisdictions manage compensation more efficiently and equitably, focussing resources on more severe injuries.

9.3 The role of expert witnesses, particular industrial psychologists, in the quantification of loss of income claims is another aspect examined in this paper. The reliance on these experts has introduced inconsistences in the assessment of claims, often leading to inflated compensation amounts. The analysis indicates that the practices of industrial psychologists in the South African context lack the rigorous scientific basis seen in other fields, contributing to the discrepancies observed in compensation awards. This paper calls for a re-evaluation of the role of such experts in the RAF's processes to ensure that their contributions are grounded in robust and relevant methodologies.

9.4 One potential reform could involve the complete removal of non-serious injury claims from the RAF compensation scheme, which would allow the fund to focus its resources on more severe cases that warrant significant support. That reform would reduce the RAF deficit by approximately R3 billion a year in 2023 money terms. Alternatively, adopting a defined benefit approach for non-serious injuries, similar to models used in other jurisdictions,

could standardise compensation and reduce the potential for inflated claims. This approach would establish clear, fixed compensation levels based on the severity of the injury, thereby eliminating the reliance on speculative and often inconsistent expert testimony. Such reforms would not only streamline the claims process but also ensure that RAF resources are allocated more equitably, enhancing the sustainability of the RAF and better serving those most in need of support.

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APPENDIX A
United Kingdom statistics on severity of injury in motor accidents[94]

Most severe injury type	Casualty severity	2019[95]	2020[96]	2021[97]
Deceased	Killed	807	763	927
Broken neck or back	Very Serious	485	521	618
Internal injuries	Very Serious	424	329	634
Multiple severe injuries, unconscious	Very Serious	196	167	138
Severe chest injury	Very Serious	192	165	276
Severe head injury, unconscious	Very Serious	421	399	524
Deep penetrating wound	Moderately Serious	79	81	133
Fractured pelvis or upper leg	Moderately Serious	892	786	927
Loss of arm or leg (or part)	Moderately Serious	41	35	50
Multiple severe injuries, conscious	Moderately Serious	492	341	313
Other chest injury, not bruising	Moderately Serious	1,177	1,208	1,752
Deep cuts, lacerations	Less Serious	797	729	968
Fractured arm, collarbone, hand	Less Serious	2,771	2,403	2,708
Fractured lower leg, ankle, foot	Less Serious	2,041	1,707	2,277
Other head injury	Less Serious	2,202	1,985	2,450
Bruising	Slight	10,926	8,233	8,604
Shallow cuts, lacerations, abrasions	Slight	10,831	9,325	11,194
Shock	Slight	2,382	1,863	2,172
Sprains and strains	Slight	11,222	9,246	12,221
Whiplash or neck pain	Slight	18,162	13,358	17,306
Other injury	Any	213	45	14
Total	All	66,753	53,689	66,214
Less serious and slight as a % of total:		92.2%	91.1%	90.4%

94 There is no obligation for people to report all personal injury accidents to the police. These figures, therefore, do not represent the full range of all accidents or casualties in the United Kingdom. All accidents that were reported by the police and that occurred on a public highway involving at least one motor vehicle, horse rider or pedal cyclist, and where at least one person was injured are included in these statistics.

95 Department of Transport (2019). Reported road casualties, Great Britain, annual report: 2019

96 Department of Transport (2020). Reported road casualties, Great Britain, annual report: 2020

97 Department of Transport (2021). Reported road casualties, Great Britain, annual report: 2021

APPENDIX B
Illustrative claims payments under COIDA

Gross monthly before tax earnings	WPI 1%	WPI 5%	WPI 10%	WPI 15%	WPI 20%	WPI 25%
R2,000	R3,058	R15,292	R30,584	R45,876	R61,168	R76,460
R4,000	R3,058	R15,292	R30,584	R45,876	R61,168	R76,460
R6,000	R3,058	R15,292	R30,584	R45,876	R61,168	R76,460
R8,000	R4,000	R20,000	R40,000	R60,000	R80,000	R100,000
R10,000	R5,000	R25,000	R50,000	R75,000	R100,000	R125,000
R12,000	R6,000	R30,000	R60,000	R90,000	R120,000	R150,000
R14,000	R7,000	R35,000	R70,000	R105,000	R140,000	R175,000
R16,000	R8,000	R40,000	R80,000	R120,000	R160,000	R200,000
R18,000	R9,000	R45,000	R90,000	R135,000	R180,000	R225,000
R20,000	R10,000	R50,000	R100,000	R150,000	R200,000	R250,000
R25,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R30,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R35,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R40,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R45,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R50,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R60,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R70,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R80,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R90,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R100,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R125,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R150,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800
R200,000	R12,232	R61,160	R122,320	R183,480	R244,640	R305,800

APPENDIX C
Illustrative claims payments under RAF

Gross monthly before tax earnings	Spread 1%	Spread 5%	Spread 10%	Spread 15%	Spread 20%	Spread 25%
R2,000	R5,234	R26,172	R52,344	R78,516	R104,688	R130,860
R4,000	R10,469	R52,344	R104,688	R157,032	R209,376	R261,720
R6,000	R15,703	R78,516	R157,032	R235,548	R314,064	R392,580
R8,000	R20,928	R104,639	R209,278	R313,917	R418,556	R523,195
R10,000	R25,220	R126,100	R252,200	R378,300	R504,400	R630,500
R12,000	R29,512	R147,561	R295,122	R442,683	R590,244	R737,805
R14,000	R33,804	R169,022	R338,044	R507,066	R676,088	R845,111
R16,000	R38,097	R190,483	R380,966	R571,449	R761,933	R952,416
R18,000	R42,389	R211,944	R423,888	R635,833	R847,777	R1,059,721
R20,000	R46,630	R233,152	R466,305	R699,457	R932,609	R1,165,761
R25,000	R56,314	R281,570	R563,141	R844,711	R1,126,282	R1,407,852
R30,000	R65,998	R329,989	R659,977	R989,966	R1,319,955	R1,649,943
R35,000	R75,142	R375,708	R751,416	R1,127,124	R1,502,832	R1,878,540
R40,000	R84,171	R420,855	R841,709	R1,262,564	R1,683,419	R2,104,273
R45,000	R92,904	R464,518	R929,037	R1,393,555	R1,858,073	R2,322,591
R50,000	R101,279	R506,393	R1,012,787	R1,519,180	R2,025,574	R2,531,967
R60,000	R117,721	R588,606	R1,177,213	R1,765,819	R2,354,425	R2,943,032
R70,000	R133,686	R668,431	R1,336,862	R2,005,293	R2,673,724	R3,342,155
R80,000	R149,206	R746,029	R1,492,058	R2,238,086	R2,984,115	R3,730,144
R90,000	R164,647	R823,236	R1,646,472	R2,469,709	R3,292,945	R4,116,181
R100,000	R180,089	R900,444	R1,800,887	R2,701,331	R3,601,775	R4,502,218
R125,000	R218,692	R1,093,462	R2,186,924	R3,280,387	R4,373,849	R5,467,311
R150,000	R257,296	R1,286,481	R2,572,962	R3,859,442	R5,145,923	R6,432,404
R200,000	R329,417	R1,647,087	R3,294,175	R4,941,262	R6,588,350	R8,035,208

APPENDIX D
Road Accident Fund accumulated deficit from 1994 to 2022

Year ending	Accumulated deficit (R mil)	Source
30/04/1994	R3,783.0	https://pmg.org.za/committee-meeting/3875/
30/04/1995	R4,183.0	https://pmg.org.za/committee-meeting/3875/
30/04/1996	R6,437.0	https://pmg.org.za/committee-meeting/3875/
30/04/1997	R7,233.0	https://pmg.org.za/committee-meeting/3875/
30/04/1998	R8,385.0	https://pmg.org.za/committee-meeting/3875/
30/04/1999	R9,156.0	RAF Annual Report 2003
30/04/2000	R10,481.0	RAF Annual Report 2003
30/04/2001	R13,335.0	RAF Annual Report 2003
31/03/2002	R11,125.0	RAF Annual Report 2005–2006
31/03/2003	R15,430.0	RAF Annual Report 2005–2006
31/03/2004	R18,499.5	National Treasury Estimates of National Expenditure 2007
31/03/2005	R19,865.1	National Treasury Estimates of National Expenditure 2008
31/03/2006	R17,905.3	National Treasury Estimates of National Expenditure 2009
31/03/2007	R20,299.7	National Treasury Estimates of National Expenditure 2009
31/03/2008	R27,866.7	National Treasury Estimates of National Expenditure 2010
31/03/2009	R39,915.2	National Treasury Estimates of National Expenditure 2011
31/03/2010	R42,408.7	National Treasury Estimates of National Expenditure 2011
31/03/2011	R29,980.5	National Treasury Estimates of National Expenditure 2013
31/03/2012	R46,471.7	National Treasury Estimates of National Expenditure 2015
31/03/2013	R73,626.0	National Treasury Estimates of National Expenditure 2015
31/03/2014	R90,925.5	National Treasury Estimates of National Expenditure 2016
31/03/2015	R110,377.1	National Treasury Estimates of National Expenditure 2017
31/03/2016	R145,335.5	National Treasury Estimates of National Expenditure 2018
31/03/2017	R180,077.0	National Treasury Estimates of National Expenditure 2019
31/03/2018	R206,428.2	National Treasury Estimates of National Expenditure 2020
31/03/2019	R262,208.1	National Treasury Estimates of National Expenditure 2021
31/03/2020	R322,029.8	National Treasury Estimates of National Expenditure 2022
31/03/2021	R346,576.0	National Treasury Estimates of National Expenditure 2023
31/03/2022	R344,792.7	National Treasury Estimates of National Expenditure 2023

APPENDIX E
Claims payments for general damages and loss of income from 2004 to 2023

Year ending	Amount paid in general damages	Number of general damages claims	Average general damages claim	Source
31/03/2004	R1,465,527,525	94,325	R15,537	RAF Annual Report 2008
31/03/2005	R1,170,728,471	59,893	R19,547	RAF Annual Report 2008
31/03/2006	R2,122,606,886	94,058	R22,567	RAF Annual Report 2008
31/03/2007	R2,600,000,000	97,771	R26,593	RAF Annual Report 2010
31/03/2008	R3,900,000,000	125,572	R31,058	RAF Annual Report 2010
31/03/2009	R4,900,000,000	134,160	R36,524	RAF Annual Report 2010
31/03/2010	R4,800,000,000	102,705	R46,736	RAF Annual Report 2010
31/03/2011	R4,400,000,000	67,960	R64,744	RAF Annual Report 2013
31/03/2012	R3,900,000,000	46,174	R84,463	RAF Annual Report 2013
31/03/2013	R4,000,000,000	26,363	R151,728	RAF Annual Report 2013
31/03/2014	R5,900,000,000	26,511	R222,549	RAF Annual Report 2018
31/03/2015	R8,000,000,000	23,828	R335,739	RAF Annual Report 2018
31/03/2016	R8,700,000,000	22,494	R386,770	RAF Annual Report 2018
31/03/2017	R7,600,000,000	19,541	R388,926	RAF Annual Report 2018
31/03/2018	R8,500,000,000	19,705	R431,363	RAF Annual Report 2018
31/03/2019	R9,200,000,000	19,947	R461,222	RAF Annual Report 2021
31/03/2020	R9,400,000,000	19,588	R479,886	RAF Annual Report 2021
31/03/2021	R7,700,000,000	14,972	R514,293	RAF Annual Report 2021
31/03/2022	R10,500,000,000	20,653	R508,401	RAF Annual Report 2023
31/03/2023	R11,700,000,000	21,908	R534,051	RAF Annual Report 2023

Year ending	Amount paid in loss of income	Number of loss of income claims	Average loss of income claim	Source
31/03/2004	R862,227,410	6,730	R128,117	RAF Annual Report 2008
31/03/2005	R543,519,816	4,172	R130,278	RAF Annual Report 2008
31/03/2006	R1,023,017,220	6,444	R158,755	RAF Annual Report 2008
31/03/2007	R1,400,000,000	6,194	R226,025	RAF Annual Report 2010
31/03/2008	R1,600,000,000	5,957	R268,592	RAF Annual Report 2010
31/03/2009	R2,300,000,000	6,782	R339,133	RAF Annual Report 2010
31/03/2010	R2,500,000,000	7,695	R324,886	RAF Annual Report 2010
31/03/2011	R3,300,000,000	8,251	R399,952	RAF Annual Report 2013
31/03/2012	R3,200,000,000	7,191	R445,001	RAF Annual Report 2013
31/03/2013	R4,600,000,000	8,636	R532,654	RAF Annual Report 2013
31/03/2014	R7,700,000,000	11,865	R648,968	RAF Annual Report 2018
31/03/2015	R10,300,000,000	14,072	R731,950	RAF Annual Report 2018
31/03/2016	R13,300,000,000	17,926	R741,939	RAF Annual Report 2018
31/03/2017	R10,800,000,000	16,663	R648,143	RAF Annual Report 2018
31/03/2018	R12,300,000,000	17,787	R691,516	RAF Annual Report 2018
31/03/2019	R15,900,000,000	20,702	R768,042	RAF Annual Report 2021
31/03/2020	R17,200,000,000	20,791	R827,281	RAF Annual Report 2021
31/03/2021	R18,400,000,000	16,943	R1,085,994	RAF Annual Report 2021
31/03/2022	R20,700,000,000	21,315	R971,147	RAF Annual Report 2023
31/03/2023	R22,000,000,000	20,957	R1,049,769	RAF Annual Report 2023

APPENDIX F

Case law pertaining to proof of earnings

— In *Landzaard* v *Road Accident Fund*[98] the court emphasised that the onus of proving loss of earnings rests on the plaintiff and that this includes providing sufficient documentary evidence to show income.

— In *Yasin* v *Road Accident Fund*[99] there were unexplained gaps in salary history and different versions of earnings at various points in time leading to dismissal of the claim for loss of income.

— In *Els* v *Road Accident Fund*[100] the industrial psychologists deferred to factual information concerning the plaintiff's earnings. The actuary similarly recorded in his report that he had not been provided with salary advices and proceeded to prepare calculations on the basis of the unsubstantiated earnings relayed by the industrial psychologists. The court stated that it was unsatisfactory that experts are not provided with accurate information from which to draw their conclusions and it is equally unsatisfactory for experts to express opinions without having the correct facts at their disposal.

— In *Sello* v *Road Accident Fund*[101] the court stated that the assessment of damages only arises after a plaintiff has proffered sufficient evidence to prove the alleged loss of income. It rejected the submission that applying higher contingencies can cure the inadequacy of the plaintiff's evidence.

— In *Ncube* v *PRASA*[102] no proof of earnings was submitted by the plaintiff, not even secondary evidence. The court refused to accept the reported earnings without evidence in support thereof such as a salary advice, wage slips or a letter of appointment. The actuary's calculations were rejected and the court expressed the view that it would be unacceptable in the extreme for the court to be expected to operate from a reckless premise that seems to assume that the defendant is possessed of a bottomless pit of public funds.

— In *Qulu* v *Road Accident Fund*[103] the court expressed the view that the interests of the community demand that more scrutiny be applied to the disbursement of public funds. The court held that actuarial reports should not be treated as if they were scientific data. This principle was reiterated in *Mathebula* v *Road Accident Fund*[104] where the industrial psychologist reported that no proof of income was provided, not even contact details for the plaintiff's employer, due to the amount of time that elapsed since the accident.

— In *Adv Cawood NO obo Nell* v *Road Accident Fund*[105] the plaintiff failed to show on a majority of probabilities that he was self-employed because he failed to provide proof

98 *Landzaard* v *Road Accident Fund* (09/1443) [2010] ZAGPJHC 152
99 *Yasin* v *Road Accident Fund* [2022] ZAGPJHC 816
100 *Els* v *Road Accident Fund* (442/18) [2022] ZAGPPHC 239
101 *Sello* v *Road Accident Fund* [2022] ZAFSHC 286
102 *Ncube* v *PRASA* [2022] ZAGPPHC 381
103 *Qulu* v *Road Accident Fund* [2022] 26899-2021 (GP)
104 *Mathebula* v *Road Accident Fund* [2023] ZAGPPHC 84
105 *Adv Cawood NO obo Nell* v *Road Accident Fund* [2023] ZAGPPHC 68

of income by means of an income and loss statement, bank statements, proof of any qualifications, or proof of any invoices issued to him or by him.

— In *Phekani* v *Minister of Police*[106] the court held that the self-employed plaintiff's documentary proof of earnings and expenses was inadequate. It rejected the submission that *higher* contingency deductions can address lack of proof of earnings.

— In *Mlotshwa* v *Road Accident Fund*[107] the recommendations of the industrial psychologists were premised on information relayed by the plaintiff and the actuarial calculations were in turn based on the industrial psychologist's reports. The claim for loss of income was rejected as there was no direct detailed evidence of income.

— In *Gwentshu* v *Road Accident Fund*[108] the plaintiff's claim for loss of income was dismissed as pay-slips and bank statements were not provided.

106 *Phekani* v *Minister of Police* [2022] ZAGPJHC 1023
107 *Mlotshwa* v *Road Accident Fund* (9269/2014) [2017] ZAGPPHC 109
108 *Gwentshu* v *Road Accident Fund* (99483/2015) [2021] ZAGPPHC 571

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APPENDIX G

Case law pertaining to industrial psychologists

— In *Kunene* v *Road Accident Fund*[109] the court criticised the industrial psychologist's evidence as being contradictory and unsatisfactory. It emerged that the report that she allegedly wrote, on which her evidence was based, was not in consequence of an assessment made by her, but instead that of a colleague.

— In *M* v *Road Accident Fund*[110] the court expressed its displeasure with the partisan evidence of one of the industrial psychologists employed in the matter. In particular it was noted that the expert opined on the plaintiff's loss of earnings without having sufficient information at her disposal. That was so despite the fact that full information was available to the expert concerning the plaintiff's factual past and current earnings. Opinions regarding future projections of earnings without a satisfactory factual foundation such as a salary history are a common occurrence in industrial psychologist's reports in RAF litigation.

— In *NDB obo JWK* v *Road Accident Fund*[111], the industrial psychologist was criticised for unfounded and illogical reasoning, misinterpreting the facts, inconsistencies and contradictions.

— In *Ngwane* v *Road Accident Fund*[112] the court found one of the industrial psychologists to be an evasive witness. Despite him being an industrial psychologist, it was only after a lengthy cross-examination that he conceded to the fact that he is required as an expert to express an opinion on the employability of a person, a fact which he at the commencement of his evidence indicated was not within his field of expertise.

— In *Motswai* v *Road Accident Fund*[113] the court expressed surprise that the industrial psychologist who is frequently used by attorneys for plaintiffs in RAF litigation did not exercise professional discretion to point out that it was inadvisable to continue with a report given that the plaintiff was unemployed at the time of the accident, that he subsequently found employment as a general worker and his work is not impeded by the sprain that he sustained in the accident four years prior.

— In *Matabane obo M* v *Road Accident Fund*[114] the court deemed the industrial psychologist's evidence unacceptable and rejected the actuarial calculations that were prepared on the basis of that report. The chief difficulty noted in the matter related to the absence of a factual basis on which the plaintiff's experts based their opinions. The plaintiff's industrial psychologist had overreached in terms of trying to convince the court that there was a possibility of an undiagnosed head injury.

— In *Nkuna* v *Road Accident Fund*,[115] the court expressed concern that the industrial psychologist appeared to have moved the goal posts as the case progressed and that she

109 *Kunene* v *Road Accident Fund* [2011] ZAGPJHC 194
110 *M* v *Road Accident Fund* (12780/15) [2017] ZAGPJHC 65
111 *NDB obo JWK* v *Road Accident Fund* [2023] ZAECQBHC 7
112 *Ngwane* v *Road Accident Fund* (RAF273/15) [2017] ZANWHC 82
113 *Motswai* v *Road Accident Fund* (2010/17220) [2012] ZAGPJHC 248; 2013 (3) SA 8 (GSJ)
114 *Matabane obo M* v *Road Accident Fund* (2014/31190) [2015] ZAGPJHC 248
115 *Nkuna* v *Road Accident Fund* [2017] ZAGPPHC 1172

was prone to bend under the pressure of those instructing her instead of being of assistance to the court.

— The superficial conduct of industrial psychologists is highlighted in the further matters of *Swanevelder* v *Road Accident Fund*[116] and *Donough* v *Road Accident Fund*.[117] In the latter matter, the court remarked that it was unacceptable that some of the experts did not contact the plaintiff's employer and merely relied on the say-so of the plaintiff in formulating their opinions.

— In *Ubisi* v *Road Accident Fund*,[118] the court set aside a settlement agreement of R 2,049,830 for loss of earnings remarking that the non-existent or far-fetched projections of the circumstances of the plaintiff would cause a grave injustice to the public purse. The court further remarked that the conduct in pursuing the claim for future loss of income was plainly fraudulent and referred the matter to the Legal Practice Council for further investigation.

— The second plaintiff in the matter of *Cassim* v *Road Accident Fund*[119] was awarded loss of income of R16,000 instead of their claimed amount of R4,254,460. The inaccurate reporting of the industrial psychologist was stated to be significant and the plaintiff's employment record had shown an improvement in remuneration over the years since the accident.

116 *Swanevelder* v *Road Accident Fund* [2007] 05-15950 (WLD)
117 *Donough* v *Road Accident Fund* (8962/06) [2010] ZAGPJHC 100
118 *Ubisi* v *Road Accident Fund* [2022] ZAGPPHC 663
119 *Cassim* v *Road Accident Fund* [2022] ZAGPJHC 763

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