

INDUSTRIAL PSYCHOLOGISTS and the LAW

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Practising consulting actuary in damages claims

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Publications:

Damages for Lost Income (Juta 1984)

The Reduced Utility of a Life Plan (Stellenbosch thesis 1993)

The Quantum Yearbook (published yearly since 1990)

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IP's and the Law

The reports by industrial psychologists (IP's) are widely used in South Africa for the determination of damages for personal injury and damages for loss of support. Most claims are against the Road Accident Fund.

For an injury the claim is for loss of earnings, **loss of likely earnings** brought about by loss of earning capacity. This is usually calculated as the difference between likely earnings but for the accident, and likely earnings having regard to the accident. Ideally this criterion should be stated at the beginning of each IP report.

For death claims there needs to be an assessment of the **likely earnings** of the deceased, and secondly the **likely earnings** of his wife **had the death not occurred**.

The emphasis is on "**likely earnings**". There is much loose talk of "earning capacity" but the highest Court in the land has ruled unambiguously that "**likely earnings**" is the true criterion (see *Quantum Yearbook* 2020 at page 124 for case references).

IP's and the Law

In law a division must be made between “**Past earnings**” and “**Future earnings**”. This means that the report should give accurate detail of past earnings actual and prognosticated as well as projections for the future. The date of division is the date of trial.

These reports are sent to actuaries to calculate the lump-sum amount to be awarded for loss of earnings. **Every IP report should thus include a “Recommendations for actuary table” at the end of the report summarising the earnings assumptions to be adopted by the actuary.** I will enlarge on this later.

The summary for the actuary is a useful exercise to check the validity of the earnings prognosticated. Quite often IP's predict career paths with earnings less than what the claimant is currently earning.

It is also important to quantify fringe benefits. It is not enough to mention things like pension and medical aid. The **rand value** thereof is what is needed for the actuarial calculations. **The total package is needed.**

IP's and the Law

Retirement ages:

The Sanlam Employee Benchmark survey (2010) found the average retirement age for pension fund members to be between 63 and 65 years of age. This survey found that 30% of retirement fund members prefer to defer retirement and that 54% continue working after retirement age (Koch Newsletter 88 June 2013).

When an IP says retirement age is 60 to 65 it is my practice to assume age 64, unlike most other actuaries who assume age 62,5.

Age 60 is compulsory for the uniformed Government services (army, police, etc).

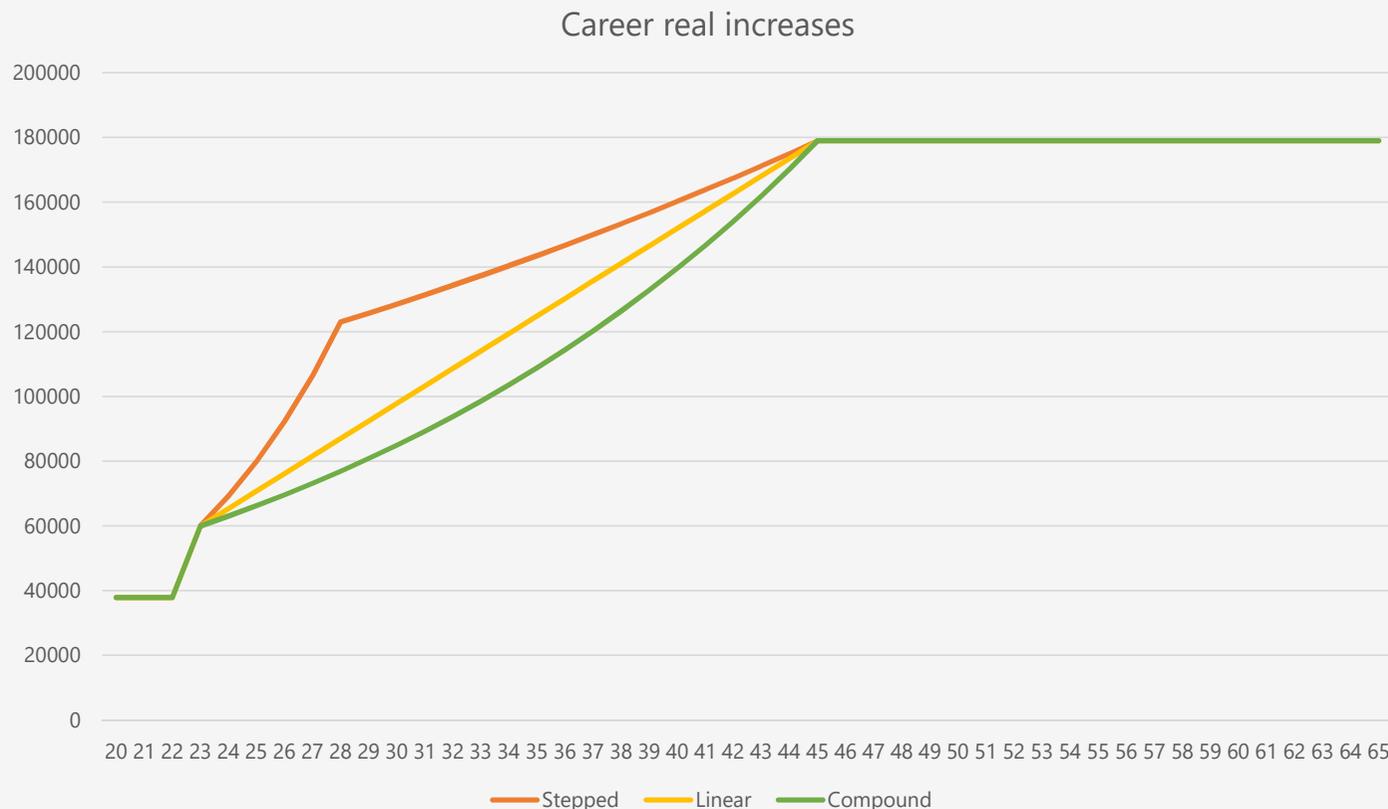
IP's and the Law

Linear real increases:

This is the lazy way to allow for the phenomenon of larger real increases during the early years of a career.

For younger persons it probably understates the rates of increase that would arise if regard were had to job grades (red line).

It is usually inappropriate for older persons who get cpi only.



IP's and the Law

Job grades are by job content – NOT by level of remuneration

Many IP's ascertain the victim's job grade by comparing his actual earnings with the remuneration table. That is a wrong procedure.

The correct approach is to analyse his/her job content and then identify job grade. Comparison with actual earnings will reveal whether he/she is being remunerated at the lower or median or upper of that job grade. Persons high up in their job grade may well not have good prospects for further real increases, etc. The higher grades usually involve management skills. If advancement to management level is to be assumed then psychometric tests should support that assumption.

IP's and the Law

Likely earnings

In the days before IP's damages awards were based on a payslip, or earnings certificate by the employer. If real increases were to be assumed the employer had to be brought to court to testify.

Modern day IP's glibly prognosticate that a casual labourer earning R18000 a year at the time of injury would soon have obtained corporate sector employment at a very much higher rate of pay. The likelihood of such a progression will often be quite remote, a 25% chance perhaps, maybe less.

For many victims, particularly the older ones, the likelihood is that they would have continued in the same job.

IP's and the Law

Actuary table:				
	Likely earnings			Risk adjustment
Age	Salary		Fringe Bens	%ge
	2020 R-val	Escalation	& o'time %	chance
20	37900	CPI	0	100
23	60000	LRI	15	60
45	179000	CPI	30	35
65	179000		30	

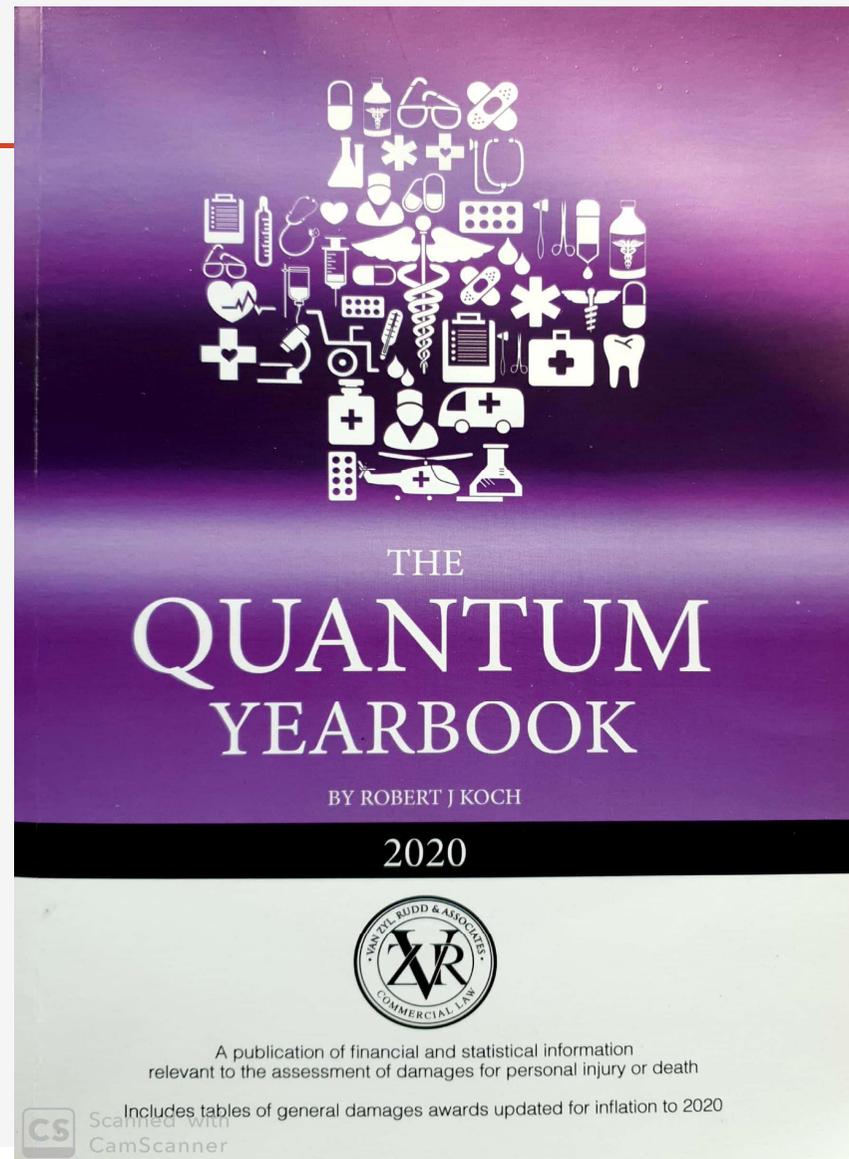
IP's and the Law

Tables in the Quantum Yearbook

STATSSA survey earnings

Corporate survey earnings

Earnings for non-corporate workers



IP's and the law

Lockdown and damages calculations

Lockdown is having a negative effect on the economy. The precise long-term outcome is uncertain. The best approach at this stage is to assume a speedy recovery and assess claims as though there were no lockdown.

The lawyers may wish to apply larger contingency deductions.

IP's and the Law - QUESTION

With the focus on mediation and settlement in the joint minute process, IPs want to know which model to use to predict likely earnings. – Answer is to use a risk-adjusted model as illustrated earlier, ie with percentage chances allocated to levels and scenarios. Purpose of joint minute is to minimise differences between the experts, ideally eliminate differences. Compromise is a virtue.

What are the benefits and limitations of using your model (data?) in the quantification of damages, and in what circumstances is it the most appropriate to use your data? - Answer is that the data in the Quantum Yearbook provide approximate earnings which are sufficiently accurate for purposes of assessing damages for loss of earnings considering the imponderables. The most accurate approach is to have the employer into court and bypass the IP, but for many claims that cannot be done.

IP's and the Law - QUESTION

QUESTIONS RE QUANTUM YEARBOOK - Informal Sector figures:

How are the figures collected (e.g. reported from individuals or validated) and can they be misrepresented? These values increase at different rates each year – is data collected annually? – Answer is that data is collected on an anecdotal basis having regard to claims arriving in my office, occasional mini-surveys by third parties, and comparison with the STATSSA and Corporate tables.

Who is included in the Unskilled and Semi-skilled figures, since domestic work can be defined as unskilled, but has its own category in QYB? – Answer is that there is overlap and common-sense should be used.

Are these figures gross earnings inclusive of overtime? – Answer is NO

IP's and the Law - QUESTION

QUESTIONS RE QUANTUM YEARBOOK - Informal Sector figures

Do these figures include periods of unemployment and if so is it reasonable for the amounts to be proportioned (e.g. "earning at the lower quartile Unskilled value for 6 months per year") ? - Answer is that these figures assume 100% employment throughout the year.

How are the Unskilled, Semi-skilled and Skilled scales related such that the lower Semi skilled is the median Unskilled and the upper Semi-skilled the median Skilled? – Answer is that the tables are graduated to be consistent with one another, as best possible.

In your opinion when should the minimum wage be used to quantify earnings compared to Unskilled earnings? – Answer is that this is a function of the occupation category – security guards and construction workers tend to be remunerated at minimum level, sometimes plus overtime. Domestic workers are paid above and below the minimum wage – regard should be had to actual earnings.

IP's and the Law - QUESTIONS

QUESTIONS RE QUANTUM YEARBOOK - Informal Sector figures

We often see suggestions to use the formal (Paterson A) or informal Unskilled figures for minors without reasoning provided. In your opinion when should the formal compared to informal figures be used? – Answer is that despite much upward mobility a large proportion of workers are trapped into the social background in which they grew up. In South Africa the children of garment workers benefited from parents (often single) with a dedicated work ethic which was transmitted to the children (eg Trevor Manuel). Children from dysfunctional homes are unlikely to succeed beyond the informal.

Paterson Table: How/where is this data sourced? – Answer is by bits and pieces collected from IP and other reports and graduated along with CPI to project likely future survey results for 2020.

IP's and the Law - QUESTIONS

Many of the questions raised suggest that IP's come to the subject of damages with inadequate knowledge of what is needed and the legal aspects of how claims are calculated. **Their governing body would do well to introduce a damages certification requirement.**

As regards **general contingencies** IP's should at the very least read page 118 of the *Quantum Yearbook 2020*.

As regards death claims for **damages for loss of support** IP's should look at chapter 13 of my thesis "Reduced Utility of a Life Plan" available free of charge on my website www.robertjkoch.com under the button "Documents Library". Suffice it to say that the earnings of the children are seldom required.