

**COMMENT BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE ROAD ACCIDENT BENEFITS
SCHEME BILL 2013**

POLICY UNDERLYING THE ROAD ACCIDENT BENEFITS SCHEME (RABS)

The strategic imperative and underlying policy of the ROAD ACCIDENT BENEFIT SCHEME (RABS) is to abolish the current ROAD ACCIDENT FUND ACT (RAF) which provides for the payment of compensation to a road accident victim for loss or damage wrongfully caused by the driving of a motor vehicle, and to replace it with a no fault system of benefits as part of a comprehensive social security system. This is a fundamental change to the very essence of the remedy naturally available to a person in common law who suffers harm at the hands of another and amounts the total abolition of compensation based in delict for road accident victims, not only in terms of the new state benefit scheme, RABS, but also at common law. This leaves the innocent South African road accident victim in a uniquely deprived position.

The current RAF evolved from the need to protect the innocent road accident victim who was injured by a motorist without the means to pay the compensation due to the injured victim based on the common law principles of natural justice. The RAF merely stepped into the shoes of the wrongdoer as his or her compulsory statutory insurer and paid the compensation due by the wrongdoer to the injured party. The wrongdoer remained liable to the injured victim for any shortfall in compensation not covered by the compulsory insurance scheme.

The proposed RABS scheme, on the other hand, seeks to protect the guilty motorist at the expense of the innocent victim. In terms of RABS the right to look to the wrongdoer for compensation for losses not covered by the scheme is taken away from the injured victim. Thus, in terms of RABS, passengers in a commercial bus who are killed or maimed as a result of the gross negligence of the owner or driver of the bus have no remedy, whatsoever, against the bus company or driver and both the owner and driver escape with absolutely no financial responsibility to make good the harm they have caused. The same goes for taxis. Drunk drivers are totally immune from financial responsibility, as are the operators of un-roadworthy vehicles.

In the briefing document published by the Department of Transport on 28 February 2012 the motivation for the deprivation of this fundamental civil right from a large class of claimant is on the basis that it is *“protecting especially the poor”*.

It is not understood how such a policy could possibly assist *“the poor”*. *“The poor”* are far more likely to be passengers and pedestrians injured by motorists, rather than drivers or owners of motor vehicles. It seems, therefore, as if the policy, in fact, prejudices *“the poor”* and protects the rich.

On a practical level, a person with no assets or income would not be able to meet an adverse judgment and no purpose would be served in pursuing a claim against such person. This argument was in fact used when motivating the abolition of the common law rights in the ROAD ACCIDENT FUND AMENDMENT ACT 2005, namely that it served little purpose, as a large proportion of the motoring public was uninsured and the common law right would not be economically viable to pursue.

The reality is that the poorest of the poor are most unlikely to be vulnerable to being sued as either drivers or owners or employers of drivers of motor vehicles. They are, however, most likely to be passengers in taxis and buses. Recent horrific accidents resulting in multiple deaths of passengers, including children, in buses and taxis, with no financial consequences, whatsoever, to the owner/operator or driver serves as an eloquent demonstration of the inequity of the proposed policy.

The discrimination arising from RABS is further exacerbated by the fact that the benefits payable in terms of the proposed scheme, in the main, bear no relationship, whatsoever, to the loss actually suffered by a victim of a road accident. This will be dealt with on more detail when the provisions of RABS are analyzed.

The benefits provided by RABS (as part of the social security system) are in line with the recommendations of the TAYLOR COMMISSION report of 2002, which saw no need to differentiate between benefits offered by the State to any person disabled or impaired from any cause, whatsoever, and to this end recommended that not only should the ROAD ACCIDENT FUND be dismantled but also WORKMAN'S COMPENSATION operating under the COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (COIDA).

However, there was no suggestion that all persons in receipt of state pensions or grants should be denied their common law rights to sue for compensation for personal injuries suffered, which may have resulted in their disability. The SATCHWELL COMMISSION which sat for several years and conducted an in depth examination into the operations of the road accident fund with a mandate to recommend a reasonable,

equitable, affordable and sustainable system of compensation, recommended retaining the common law right to sue for all losses not covered by the statutory scheme. It also recommended that general damages be paid (life enhancing benefit) to those who suffered catastrophic injuries, only.

In terms of our common law and in most democratic legal systems, worldwide, incorporating the rule of law, persons injured in car accidents, by assault, police brutality, medical malpractice, environmental contamination or poisoning, products malfunction, at a fairground, in a railway accident, in an air crash, at a shopping center or hotel or other public place, falling down an exposed manhole, tripping over a defective pavement, slipping or tripping as a result of a hazardous surface in a public place or private home and those who contract a communicable disease whilst incarcerated, have the right to claim compensation, if their injuries were caused by a negligent act or omission. Even persons participating in a riot or violent protest, or fleeing the scene of a crime have the right to sue the police or security company seeking to arrest them if undue force is used and they are injured as a result.

Uniquely, in terms of RABS in South Africa, the innocent motor accident victim (which constitutes a large class of persons injured every day on South African roads) is denied this basic civil right to be compensated for his or her loss.

ABOLITION OF THE COMMON LAW RIGHTS

Whilst it is for the government of the day to determine policy in relation to what social welfare benefits it wishes to dispense to its citizens out of general tax revenue, the abolition of the common law right of injured road accident victims to seek redress from liable wrongdoers touches on the *bonus mores* of society. Does public policy condone the denial of a right to claim compensation to an innocent victim in favour of protecting a negligent wrongdoer? Does public policy prefer the rights of a negligent motorist (who may be not only guilty of negligence but have also committed a criminal act, reckless of the consequences thereof) to those of the injured innocent victim? Is it the conviction of society, that a drunk motorist, who paralyzes an innocent pedestrian, should not bear any of the financial consequences of his or her actions and that the victim, alone, should bear those losses? Does society consider it just that children disabled, through no fault of their own, in a car accident and rendered incapable of earning a living, should be condemned to a life of penury, reliant on a grant of R1 300.00 per month, payable from age 18, whilst the perpetrator of the wrong pays nothing? Does society also consider it just that a drunk bus or taxi driver who

drives into a tree injuring himself and his or her passengers receives the same compensation as the innocent passengers?

Even under the current RAF, where the 2005 AMENDMENT ACT removed the common law right to sue the guilty motorist for the balance of the loss not covered by RAF, it appears that the state, in misguidedly seeking to prosecute reckless motorists for murder, as opposed to culpable homicide, recognized the unfairness of this and was trying to address the obvious imbalance in justice (and to stem escalating carnage on the roads). However, there is a much simpler and effective remedy. Make the guilty party pay. There is nothing like knowing that one has to face the financial consequences of not taking proper care, to encourage road users to behave with more responsibility, both on and off the road.

In essence, the abolition of the common law rights in this scenario prefers the rights of negligent motorists and their employers, who may also be guilty of criminal acts, to the rights of innocent road accident victims, who are singled out as a class for discrimination. No other victim of a delict or wrongdoing is denied the right to seek compensation from the perpetrator of the delict or other wrongdoer. Even a workman injured on duty retains his/her common law rights to seek redress from the person causing him/her harm, provided that that person is not his direct employer.

This discrimination is further highlighted in SECTION 28 of RABS, where it appears as if the COMPENSATION COMMISSIONER is not entitled to be reimbursed by THE ADMINISTRATOR for compensation paid by him to a workman injured in a car accident but THE ADMINISTRATOR is entitled to deduct any amount received by a claimant from the COMPENSATION COMMISSIONER from the amount due to the claimant in terms of RABS. The extent of the COMPENSATION COMMISSIONER'S rights in terms of SECTION 36 of COIDA to recover compensation paid by him from a negligent "third party" is not clear, having regard to RABS. In other words, is the COMMISSIONER entitled to look to a motorist if the ADMINISTRATOR is exempt?

Under the ROAD ACCIDENT FUND AMENDMENT ACT, 2005, where some compensation is offered to innocent road accident victims, particularly those who sustain a "serious" injury, the shortfall in compensation recovered suffered by them as a result of the removal of the common law right is nowhere near as significant as the losses they will face under the regime proposed by RABS. Under RABS, road accident victims will receive no general damages and in many cases severely curtailed loss of income

and/or support as well as medical/hospital treatment at prescribed tariffs that are likely to equate to provincial hospital tariffs.

The abolition of common law rights in this context is likely to once again be challenged in the Constitutional Court.

It is strongly urged that Government reconsider the proposed abolition of the common law right of the injured road accident victim in the context of RABS as presented in the current bill.

REASONABLE, EQUITABLE, AFFORDABLE AND SUSTAINABLE

There is no indication as to the projected cost of the benefits to be provided in terms of RABS. The probabilities are that it is not possible to project the costs involved as there can be no reliable statistics available as to the numbers of persons entitled to claim who were previously not covered by RAF and who would now qualify in terms of RABS for medical and hospital treatment and some form of income or loss of support compensation. Furthermore, in the absence of the prescribed tariffs and the minimum and maximum loss of income and support benefits, no estimate can be made as to the projected costs of RABS. It is assumed, however, that if payments are made to all those injured in car accidents on a no fault basis the costs will exceed the current expenses of RAF which only compensates on a fault basis.

As against this, the contention was always that the benefits provided in terms of RAF are not affordable or sustainable and that the actuarially calculated deficit of R41 billion means that RAF is bankrupt. The reality is, however, that RAF operates as a pay-as-you-go scheme and, as with other state guaranteed insurance schemes (UIF and COIDA) is fully guaranteed by the state. As a cluster, all three have always been cash flow positive and UIF and COIDA carry reserves approximately equivalent to one year's expenditure with the UIF being the most "profitable" contributing a surplus of R8 Billion in 2009.

In the 2012 financial year the Road Accident Fund made a cash flow "*profit*" of R4 billion and delegates to a recent meeting at the offices of the RAF were advised by the chief executive officer, Dr Eugene Watson, that there is currently a "*surplus*" of R9 billion.

Statistics in the annual financial accounts of RAF reflect that claims are dropping exponentially, year on year as the effects of the ROAD ACCIDENT FUND AMENDMENT ACT 2005 are felt. As against this, the

income into the RAF continues to increase, with the most recent allocation bringing the levy up R0.88 in the liter. Payments are being made regularly by Treasury of approximately R1.2 billion per month (before the recent increase announced by the Minister of Finance) into the reserves of the Road Accident Fund making it cash flow positive and, no doubt, contributing to the current surplus of R9 billion.

The Road Accident Fund income currently flows into a dedicated fund, which is applied only for the purposes of the business of the RAF.

RABS provides as follows in SECTION 27:-

“FINANCING OF ADMINISTRATOR

27(1) the administrator must be financed on a fully funded basis, benefits must be paid from its reserves and its liabilities may not exceed accumulated reserves;

(2) The administrator is funded from –

(a) A road accident benefits scheme levy provided for in the Customs and Exercise Act 1964 (Act No 91 of 1964) to perform its functions as provided for in this Act but excluding its functions referred to in paragraph (b);and

(b) Monies appropriated by Parliament to perform its functions in respect of all claims under the Road Accident Fund Act, 1996 (Act No 56 of 1996)”.

From this it appears that RABS will start off with the “surplus” accruing from the current RAF scheme, and continue to operate on the proceeds of the fuel levy as currently structured, which it is anticipated will be sufficient to “fully fund” RABS. This is ironic as one of the fundamental arguments for the disbanding of the RAF scheme was that it did not have sufficient reserves and was unaffordable.

Payments of the accrued liabilities of RAF will be covered by monies appropriated by Parliament.

ANALYSIS OF RABS

GENERAL

Comment on the full ramifications of RABS is not possible, as fundamental to computing what benefits it will provide are the determinations by the MINISTER OF TRANSPORT in terms of SECTION 55 of RABS of the “*average national income*” as well as the “*pre-accident income cap*” and the tariffs for the provision of health care services, medical reports and vocation ability assessments. Until these are prescribed one has no idea as to what benefits will actually be payable by the ADMINISTRATOR in terms of RABS.

However, certain of the conditions pertaining to claims for temporary and long term income benefits as well as loss of support give a clear indication that payments will be nowhere near what the actual loss will be.

For example, should a child suffer a serious head injury and be rendered permanently incapable of earning a living or living independently, that child will receive only an amount equivalent to the “*average national income*” (estimated at R16 000.00 per annum or R1 330.00 per month) payable in monthly installments from the age of 18 to the age of 60. In other words, regardless of the actual earning potential or loss, that child will be paid a monthly payment more or less equivalent to the national disability grant.

Furthermore, persons who were economically active and able to prove their income at the time of injury will have their compensation for loss of income capped at 75% of the “*pre-accident income cap*” less any residual earning capacity that the ADMINISTRATOR considers such claimant has. The bill provides that the MINISTER OF TRANSPORT will determine by notice in the gazette the “*pre-accident income cap*” and there is no indication, whatsoever, as to the amount that he will determine in due course.

Similarly, the Minister of Transport, in consultation with the Minister of Finance, will determine by notice in the gazette the “*the average national income*”. Although there is currently also no indication as to what amount he will determine, previous indications were that this would be more or less equivalent to the national disability grant.

RABS further provides for payment for health care services reasonably required for the treatment and rehabilitation of injured persons. SECTION 55 of RABS provides for the MINISTER OF TRANSPORT to prescribe by regulation tariffs for the liability of the ADMINISTRATOR for the provision of health care services, medical reports and vocation ability assessments. RABS further provides that the ADMINISTRATOR may enter into agreements with public and private sector health care providers to

provide for an agreed fee structure for payment for health care services, medical reports and record keeping which may differ, subject to affordability, value for money and an open, transparent, fair and competitive bidding process from the tariffs prescribed by the Minister of Transport in terms of this Act. One does not know whether this will be more or less than the tariffs and why this power is considered necessary.

Therefore, as presently advised, one cannot evaluate the shortfall between the medical and hospital benefits nor the loss of income or support benefits that will be provided in terms of RABS and the actual losses sustained by a road accident victim, who is currently entitled to full health and hospital care at private rates and compensation for loss of income subject to a cap, currently set at R200 000.00 per annum, increasing with inflation, plus general damages in the case of a serious injury.

However, it is suspected that the shortfall will be material, as is demonstrated with reference to a seriously injured child who in terms of RABS will basically only qualify for a disability pension from the age of 18 of approximately R1 340.00 per month and will receive no compensation, whatsoever, for pain and suffering, loss of amenities of life, disability, disfigurement and shock. If that child should require ongoing medical treatment, the liability of the ADMINISTRATOR of RABS will be curtailed to the tariffs prescribed by the MINISTER, which are likely to fall far short of private health care costs. The probability is, therefore, that the child will qualify for Provincial Hospital treatment and a disability grant, thus receiving no additional benefit to any other child suffering permanent disability from a cause other than a motor vehicle accident.

BENEFITS PAYABLE UNDER RABS

There are broadly four classes of benefits payable in terms of RABS namely:-

- HEALTH CARE SERVICES (Part A);
- INCOME SUPPORT BENEFIT (Part B);
- FAMILY SUPPORT BENEFITS (Part C); and
- FUNERAL BENEFIT (Part D).

PART A: HEALTH CARE SERVICES

Although in terms of SECTION 31 the ADMINISTRATOR is liable to pay for health care services reasonably required for the treatment and rehabilitation of injured persons, SECTION 33 provides that the ADMINISTRATOR shall only be liable to pay non-contracted health care service providers in terms of a prescribed tariff and if a prescribed tariff has not been promulgated then the ADMINISTRATOR'S liability is limited to the reasonable and necessary costs of the health care service, necessity being determined in terms of the various provisions contained in SECTION 33 (c).

SECTION 32 provides for payment to be made to contracted health care service providers and to agree with them tariffs which may differ to the tariff prescribed by the MINISTER.

The initial proposal was to move towards to a capitation scheme. It is unknown to what extent consultation has taken place with the private health sector and, to what extent there has been any buy in by the private sector to provide services at the tariffs contemplated by the ADMINISTRATOR. It is suspected that most of the contracted health care service providers will be state or provincial institutions.

Included in the definition of beneficiaries in SECTION 1 of RABS are medical aid schemes which paid a contracted health care service provider. The significance of the wording of the definition is not understood. In sub-paragraph (d) under the definition of "Beneficiary" reference is made to any person who made payment in respect of a health care service provided to an injured person by a *non contracted healthcare service provider* or by a contracted service provider *outside the terms of that provider's agreement* with the ADMINISTRATOR.

Sub-paragraph (b) provides that a beneficiary includes a medical scheme that made payment to a contracted health care service provider in respect of a health care service provided to an injured person.

The intention appears to be to make payment direct to the actual service providers as opposed to reimbursing the injured party. The further intention is also, clearly, to limit liability to tariffs either as promulgated by the MINISTER or as negotiated between the ADMINISTRATOR and health care service providers. Without the Rules, Regulations, tariffs and/or agreements with service providers it is not possible to comment further on the nature of the benefits covered and not covered by RABS.

SECTION 34 of RABS provides for the ADMINISTRATOR to determine an individual treatment or rehabilitation plan for a beneficiary and that, once a plan has been determined, the liability of the

ADMINISTRATOR for payment of future health care services shall be limited to the health care service provided for in the plan. Should a claimant “*unreasonably*” not comply with conditions stipulated by the ADMINISTRATOR or refuse to submit to further medical assessment, or to undergo treatment prescribed by a medical practitioner or participate in an individual rehabilitation or vocational training program, as determined by the ADMINISTRATOR, the ADMINISTRATOR may terminate any benefit.

A claimant may appeal a decision of the ADMINISTRATOR. In terms of SECTION 49, a claimant has 30 DAYS to appeal the decision in writing, failing which, presumably, the right lapses. The appeal is dealt with by an internal appeal body consisting of three officers employed by the ADMINISTRATOR and authorized by the CHIEF EXECUTIVE OFFICER. There is no provision for any further appeal or condonation or recourse to the courts.

An injured victim is therefore at the mercy of the ADMINISTRATOR as to the nature, extent and duration of the treatment or other benefits he or she may receive for injuries suffered in a road accident.

PART B: INCOME BENEFIT

In terms of SECTION 35, the ADMINISTRATOR is liable to pay a temporary income support benefit to an injured person as well as a long terms income support benefit. The temporary income support benefit is subject to a threshold of 60 days. In other words, the first 60 days of loss of income has to be borne by the injured party him or herself. There is no compensation for that loss from the ADMINISTRATOR.

The temporary loss of support benefit is also subject to a maximum period of two years from the date upon which the accident took place. No loss of income benefit is payable to any person under the age of 18 years or to any person over the age of 60 years.

Benefits payable for loss of income benefits are determined in accordance with a sliding scale, broadly comprising three categories, depending on the injured party’s pre-accident earnings. This applies for both temporary and long term loss of income benefits.

The 3 categories are as follows:-

- Persons earning in *excess of the annual income tax threshold*;
- Persons earning *less than the annual income tax threshold but more than the average national income*;
- Persons unable to prove an income or economically inactive persons who are then deemed to earn the *average national income*.

Loss of income claims must be accompanied by proof from a medical practitioner, after conducting a physical examination, that the claimant is unfit to perform his or her pre-accident occupation as a result of injuries sustained in the accident. The maximum amount payable in respect of loss of income, temporary or long term, is 75% of the pre-accident income cap. If the claimant earns less than the pre-accident income cap then he or she will be compensated at 75% of his or her actual income.

Long term income support benefits are further subject to assessments by an occupational therapist or other suitable expert paid by the ADMINISTRATOR in the manner set out in the rules not yet published. The purpose of the assessment is to determine the claimants post accident vocational ability and residual earning capacity.

The ADMINISTRATOR, in terms of SECTION 37 (6):

“must determine with reference to all available information including the availability of employment or other income generating opportunities available to the claimant and the details of income earned subsequent to the road accident, an amount which approximately represents the claimant’s post-accident earning capacity.”

This amount is then deducted from the claimants long terms income benefit. The ADMINISTRATOR is also entitled to refer a claimant to a vocational training program and if the claimant does not co-operate the income support benefit may be withdrawn. In addition, as with medical and hospital treatment, failure to comply with any requirements stipulated by the ADMINISTRATOR will entitle the ADMINISTRATOR to terminate the benefits.

PART C: LOSS OF SUPPORT BENEFIT

Similar provisions apply to the determination of the amount to be paid for loss of support as are applied to loss of income benefits. Once the pre-accident income of the deceased bread winner is established, it is used to calculate the loss of support on the basis of 2 parts to each adult and 1 part to a dependent child. The surviving spouse's pre-accident income is taken into account in determining the loss (50% is deducted from the support lost) and a surviving spouse is entitled to loss of support until age 60 or for a period of 15 years calculated from the date of the death of the bread winner, whichever period is the shortest. So a widow aged 35 will be supported to age 50 and one aged 25 to age 40. This is regardless of her circumstances.

PART D: FUNERAL BENEFITS

A lump sum payment of R10 000.00 is paid to an immediate family member upon submission of a death certificate "*in the manner set out in the rules*" and an amount up to R10 000.00 (subject to proof of cost) to a person not a family member. Payment can also be made direct to an undertaker. There is provision for the ADMINISTRATOR to bypass the immediate family and make payment direct to an undertaker if the ADMINISTRATOR is unable to locate an immediate family member within 5 days of the accident.

BENEFITS REVIEW

Benefits terminate on the death of a beneficiary. The ramifications of this, in relation to an injured breadwinner, are obvious. Currently, future loss of income is paid as a lump sum and can be invested to provide for the future. This is of particular relevance where the injured party is a breadwinner and has been rendered unemployable as a result of the accident. In terms of RABS, future loss of income is paid by way of a monthly pension and ceases when the beneficiary dies. There is no opportunity to invest or provide for the future. When an injured breadwinner dies there is no provision for any further claim by his or her dependants for loss of support and they will be left destitute.

The ADMINISTRATOR has the right to withdraw any payment if a claimant fails to comply with conditions imposed in respect of that benefit, fails to comply with a request made in terms of SECTION 44, fails to submit to further medical assessments or vocational ability assessments, refuses to undergo treatment or participate in a rehabilitation plan or to accept employment which is within the claimants capabilities and from which he or she can generate income to provide fully or partially for his or her maintenance.

Decisions of the ADMINISTRATOR are subject to the internal appeal process.

CLAIMS PROCEDURE

Extremely short time periods have been prescribed for the submission of claims, namely 120 days for medical and other treatment, 60 days for temporary income support and 18 months for long term income support, failing which the claims lapse. Claims for family support must be made within 1 year of the date of the accident and funeral benefit claims within 30 days. Similarly short periods are prescribed for the ADMINISTRATOR to react to claims. These time periods appear unrealistic and as there is no sanction if the ADMINISTRATOR fails to deliver it seems most inequitable that a claimant's claims should lapse if they are submitted "late".

To make matter even worse, if the ADMINISTRATOR fails to do what he should do within the time periods prescribed by him, the RABS provides that the claim is deemed to have been rejected and the claimant is obliged to embark upon an appeal procedure.

APPEAL PROCEDURE

SECTION 49 provides for a dispute resolution procedure by way of an internal appeal to an internal appeal body established by the ADMINISTRATOR and comprised of officials employed by the ADMINISTRATOR and authorised by the CHIEF EXECUTIVE OFFICER. A claimant or beneficiary has 30 days within which to appeal. There is no formal hearing. The appeal body may refer the dispute to medical or other experts appointed by them for an opinion or for determination. The appeal body is thus an internal body created by the ADMINISTRATOR, manned by persons employed by the ADMINISTRATOR and authorized to take advice from experts appointed by it alone. SECTION 51 specifically provides that the ADMINISTRATOR

shall not be liable, except as provided in RABS, for professional or other fees incurred by the claimant in submitting a claim or appealing a decision of the ADMINISTRATOR, regardless of the outcome. In terms of RABS, the ADMINISTRATOR is liable to pay for the costs of the initial medical examination by a medical practitioner in terms of SECTION 35(4)(A) and (b) when submitting a claim for temporary loss of income benefit and the costs of assessment by an occupational therapist or other expert “in terms of the rules” and at the prescribed tariff, when claiming a long term loss of income benefit.

The ADMINISTRATOR is thus judge, jury and executioner.

THE RESULTS

RABS will create a new class of indigent person, to join the ranks of the 13 million already drawing state pensions.

Instead of offering road accident victims an opportunity to rebuild their lives and provide the seed capital to enable them to become economically self supporting and breadwinners for their families (which is what compensation for injuries should provide) RABS condemns them to a life of poverty and dependence on what are already overstretched state facilities. To add insult to injury, road accident victims are also deprived of the right to claim their losses from the person who caused them harm and must, themselves, bear the full burden of their loss.