

## LAW SOCIETY OF SOUTH AFRICA

### ROAD ACCIDENT FUND ACT 56 OF 1996

### ROAD ACCIDENT FUND BENEFIT SCHEME BILL B17 – 2017 (RABS)

#### INTRODUCTION

The Parliamentary Portfolio Committee on Transport issued an invitation to the **LAW SOCIETY SOUTH AFRICA (LSSA)** during the course of our verbal submissions to make proposals for an alternative scheme, taking into account the need for transformation of the current **ROAD ACCIDENT FUND ACT 56 OF 1996** (the **ACT**).

As pointed out by the **SATCHWELL COMMISSION**, for **any** scheme to work it has to be properly administered. The administration of the current scheme under the **ACT** remains the subject of continued criticism by the courts and claimants. The **ROAD ACCIDENT FUND (RAF)** operates on a pay as you go basis and has done so for many years. The **RAF FINANCIAL STATEMENTS 2017** revealed a **cash flow profit** of almost **R1.4 Billion** despite the fact that there is much room for improvement in its current administration.

The **2017 FINANCIAL STATEMENTS** also record **fruitless and wasteful expenditure** of **R14.1 million**, that the **RAF's** spent **R3.5 Billion** in its own legal and other costs and that, in addition, the costs of administration were over **R2 Billion**. If the current scheme were properly administered, many of the above expenses would be significantly reduced, which in turn would result in a reduction of **claimant legal and other costs** which amounted to **R4.4 Billion** and a consequent increase in positive cash flow.

Failure to address claims long before the doors of court and/or to properly utilise the Rules of Court in relation to secret settlement offers in those matters that cannot settle, account for significant litigation expenses which could be easily avoided.

## **PROPOSALS IN PRINCIPLE**

The below proposals are intended merely to form a skeleton for a proposed hybrid scheme and to serve as a basis for further detailed submissions in the event that the concept proposed finds favour. The proposal takes into account some of the aspects raised by other presenters during the course of the Portfolio Committee hearings commencing on 16 May 2018 and, in particular, the submissions made relative to risk control and assessment and bearing in mind that, with current claims experience and data, it is not possible to calculate with any accuracy the cost of implementing the scheme envisaged in **RABS**. It is also suggested that, to avoid running two schemes in parallel, the amendments necessary to accommodate the hybrid scheme be incorporated in a redrafting of the current legislation, to govern claims arising with effect from a proclaimed date.

The proposed hybrid scheme contemplates the introduction of no fault in phases to provide access to compensation to claimants previously denied compensation in terms of the **ACT**.

## **THE PROPOSED HYBRID SCHEME**

### **1.1 NO FAULT: FIRST LAYER COVER**

All claimants, regardless of fault, entitled to emergency medical and hospital treatment for injuries suffered in a motor vehicle accident.

All claimants, regardless of fault, entitled to non-emergency medical and hospital treatment to be provided as per tariff to be promulgated after consultation with the Minister of Health and private health care providers.

## 1.2 **NO FAULT: OPT IN OPT OUT FOR LOSS OF EARNINGS AND SUPPORT**

Any person injured in a motor vehicle accident will have the option to opt in to a no-fault compensation scheme to be administered by **RABS**. The maximum claimable in terms of the no-fault compensation scheme is loss of earnings or of support capped at the average annual national income (**AANI**). However, to address the concerns raised regarding a perverse moral incentive, consideration could perhaps be given to introducing a dual scale of compensation to take into account those claimants between the ages of 30 and 65 who are unemployed and are unlikely to have ever earned an income and those who are or have been employed or who would probably have been employed, had it not been for the accident.

There will be no claim for general damages in terms of this option.

If the claimant suffers injuries which qualify him / her for loss of income support he / she will be entitled to claim broadly along the lines postulated in Sections 34 to 37 of **RABS**.

A claimant for family support benefits can also elect to opt in to the no-fault scheme, in which event the benefits will be capped at **AANI** and administered broadly along the lines of section 38 of **RABS**.

However the following sections should be reworked in relation to the no-fault scheme namely:-

1. Section 27(4) (compensation denied to foreign nationals not in possession of a valid permit or visa);
2. The proviso to Section 34 (compensation denied to persons not ordinarily resident in the Republic);

3. Section 35(c)(i) (denial of compensation for 60 days post accident);
4. Section 35(c)(iv) (cessation of benefits at age 60);
5. Section 35(7) (no inflationary adjustments);
6. The proviso to Section 38(1) (denial of loss of support benefits to dependants resident in another country);
7. Section 35(9) (loss of support benefits cease after 15 years);
8. Section 38(10) (cessation of benefits to child at age 18);
9. Section 38(14) (no inflationary increases);
10. Section 46 (prescription to set in 1 year from date of majority or other disability);
11. Section 46(3) (appeal against decision to be made within 30 day).

The reasons for the objection to the above provisions appear from the submissions already made by the **LSSA** and from the verbal presentation made to the Committee on 16 May 2018.

The above remarks and procedures to apply to the no-fault scheme level of the scheme, only.

## 2. **FAULT OPTION**

If an injured party elects not to opt into the no-fault compensation scheme, then the claimant shall be required to prove fault in the normal course and such

claim will be subject to apportionment reflecting the degree of fault attributable to each party.

The process for establishing fault and resolving disputes arising is dealt with below.

If a claimant elects to follow the fault option, a successful claimant will be entitled to claim **general damages** (subject to a **serious injury threshold** and a **cap**) as well **as loss of earnings / earning capacity** or **loss of support capped** as per the current Road Accident Fund Scheme. (This is more or less in line with the recommendations made by the **SATCHWELL COMMISSION**).

The process for resolving any dispute regarding quantum is dealt with below.

### **3. COMMON LAW REMEDY**

The common law right of an injured party to sue the negligent party for the balance of his or her loss not covered by the scheme is to be retained.

A scheme of liability insurance should be considered in order to cover the common law liability and should be made compulsory, particularly for commercial road users and those who are required to obtain a public driver's permit for the purpose of conveying passengers. Consideration could be given to establishing pool schemes for groups of motorists falling in this category, which would have the effect of reducing premiums.

The fact that the liability insurance will be a second layer insurance covering only those losses not covered by the scheme, will serve to reduce the premiums payable and in many instances may be an add on to material damage cover, as was the case with passenger liability before 2011. The level of insurance required should be moderated in order to ensure that it is affordable.

The nature of such a scheme and the cost thereof would have to be developed further with input from actuaries and the insurance industry in general.

Consideration could be given to linking payment of the premiums for such liability insurance to licence fees to ensure a high compliance level.

The common law remedy to be subject to prescription as per the Prescription Act 68 of 1969.

#### **4. LODGEMENT AND DISPUTE RESOLUTION PROCEDURES**

With a view to materially reducing the cost of delivery and the length of time taken to resolve claims (currently an average of 55 months) a process involving mediation and arbitration is proposed.

To obviate the necessity for instituting action to interrupt prescription (and thus saving costs) it is proposed that prescription be permanently interrupted upon the lodgement of a claim, regardless of whether the claim is made on a fault or no-fault basis.

No-fault claims will be administered by the Administrator of the scheme and a claim will be deemed to have been lodged for the purposes of interrupting prescription by the submission to the Administrator of a prescribed form signed by the injured claimant or authorised representative. Thereafter supporting documents required to prove that the claimant was injured in a motor vehicle accident and thus qualifies to claim (such as an accident report and/or medical records) should be obtained with the assistance of the Administrator, if the claimant requires assistance and does not have legal representation. Assistance should include the Administrator bearing the cost of obtaining whatever records or documents are required to qualify a claim, subject to the rules of the scheme.

Claims made on a fault basis will be deemed to have been lodged by the submission of a prescribed form and supporting documents to the Administrator. This will interrupt prescription without any further procedural step being necessary.

After lodgement of a fault claim the parties must endeavour to reach agreement on both liability and quantum within a stipulated period. Currently the Road Accident Fund has 120 days to investigate a claim. However very little progress is currently made during that period and it may be necessary to contemplate a longer period. However, for this proposal we suggest that the 120 day period for investigating and validating a claim should be retained.

The parties should, as a priority, attempt to resolve liability and if a dispute is raised in this regard, this should proceed to mediation and if necessary arbitration before any costs are incurred in relation to quantum.

Consideration should be given to legislating that the Administrator carries the onus in relation to claims of passengers and in respect of family support claims. Liability for passenger claims by and large should be conceded and it is only in respect of contributory negligence (for seat belt cases) that any dispute could arise and in rare cases a defence of volenti or voluntary assumption of risk.

If the parties are unable to reach agreement on liability within 120 days, then the claim proceeds to mediation.

Mediators could be drawn from a list of registered mediators acceptable to both parties and render their services in terms of a specified tariff.

Should the parties be unable to reach agreement despite mediation within 60 days, the dispute shall be referred to arbitration.

Arbitrators shall be drawn from a panel of preferred arbitrators agreed to by the parties and will charge at a prescribed tariff.

Once merits are resolved and if favourable to the claimant, the parties must endeavour to reach agreement on quantum and to this end the parties should agree:-

- The nature of the expertise required to resolve quantum;
- The identity of an expert to act as a joint expert for both parties;
- A brief to the expert prepared initially by the claimant. The Administrator will have the right to supplement such instruction within 10 working days. Thereafter the instruction will be forwarded to the expert on behalf of the parties by the claimant;
- After all expert reports are to hand, the parties shall meet in order to attempt to arrive at a settlement within 30 days from the date of receipt of the last expert report;
- Failing agreement the parties will proceed to mediation and if necessary arbitration as for merits. Should the matter proceed to arbitration either party will have the right to cross examine the expert;
- In awarding costs an arbitrator will be entitled to take into account any settlement offer (a secret tender) made at any stage during the proceedings.

The Committee were advised during the course of the hearings that there is currently an 80% success rate in mediations and if this statistic holds true for motor vehicle disputes, there will be very little need to arbitrate.



Currently mediation projects are being introduced as pilot projects in certain Magistrates' Courts.

Adoption of a mediation/arbitration dispute resolution procedure will remove Road Accident Fund claims from the courts, where currently only a very small percentage actually proceed to trial but nevertheless clog up the legal system.

## 5. **PRIVATIZATION**

Consideration should also be given to privatizing the administration of the scheme and ultimately, the "fault" risks portion of the scheme, in line with the recommendations made by commissions of enquiry which sat prior to the **SATCHWELL COMMISSION**. This option (which would dovetail with the need to compulsory insure common law liability) would need to be explored further with the insurance industry and actuaries.