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Road Accident Fund

Dear Sirs

COMMENTS BY THE LAW SOCIETY SOUTH AFRICA ON THE DRAFT PAPER ON THE PROPOSED DESIGN SOLUTION FOR CREATION OF ACTUARIAL FORMULAE TO CALCULATE LOSS OF EARNINGS (LoE), LOSS OF SUPPORT (LoS) AND GENERAL DAMAGES (GDs) FOR THE ROAD ACCIDENT FUND

The public has been invited to comment on the above paper circulated by the Road Accident Fund earlier this year. Time period for comment closes on 28 February 2025.

Before considering the mechanics of the proposal to develop standard formulae to calculate the quantum of damages one needs to examine the environment in which it will have to operate. Currently that environment is **the Road Accident Fund Act, 56 of 1996**, (the **RAF Act**) as amended, as read with the common law and case law.

The RAF Act has evolved over the years having its roots in the **Motor Vehicle Insurance Act 29 of 1943**. Despite the delivery system for the collection of premiums having changed in 1984 from the sale of annual tokens to a dedicated levy on every liter of fuel, it remains in essence a compulsory insurance scheme which both indemnifies the car owner and driver as well as ensuring that compensation is paid to qualifying road accident victims. One can do no better than to quote Ramsbottom JA in **Aetna Insurance Company vs Minister of Justice 1960(3) SA 273 (A) 285**:

‘The obvious evil that it is designed to remedy is that members of the public who are injured, and the dependants of those who are killed, through the negligent driving of motor vehicles may find themselves without redress against the wrongdoer. If the driver of the motor vehicle or his master is without means and

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is uninsured, the person who has been injured or his dependants, if he has been killed, are in fact remediless and are compelled to bear the loss themselves. To remedy that evil, the Act provides a system of compulsory insurance. The scheme of the Act is that the owner of a motor vehicle must obtain a declaration of insurance from a registered company. Not only is the owner compelled to insure the vehicle – failure to do so is an offence – but all registered companies are compelled, subject to certain qualifications, to issue declarations of insurance in respect of a motor vehicle when the owner thereof has applied for the insurance of the vehicle in a prescribed form. The insurance ensures for the benefit of any person who has been injured and of any person who has suffered loss through the death of a person who has been killed; such persons claim compensation direct from the registered company.’

The RAF Act, to this day remains a delict-based compensation scheme covering losses suffered from personal injuries or death arising from a motor vehicle accident caused by negligence on the part of an owner or driver of a motor vehicle. In this regard it is to be distinguished from other compensation schemes such as COIDA which covers workers for defined benefits for injuries or diseases contracted on duty, regardless of fault. The defined benefits in terms of COIDA have regard to the AMA Guides for Evaluation for Permanent Impairment, which is an objective based assessment tool, totally inappropriate for the assessment of pain and suffering for general damages for the purposes of a claim in delict. To offset this, the narrative test was inserted in the 2005 Amendment Act which does provide a subjective assessment method as it deals with outcomes rather than the mechanics of a specific injury. Thus, to contend that the narrative test has been incorrectly interpreted and “*adulterated to the point of introducing subjectivity*” demonstrates a complete misunderstanding of the nature of the narrative test and the requirements for assessing non-pecuniary loss stipulated in the proviso to Section 17 of the Act as ready with section 17 (1A)(a).

Section 17 of the RAF Act provides:

“17 Liability of Fund and agents

(1) *The Fund or an agent shall-*

.....

be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee:
Provided that 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.

(1A)(a) Assessment of a serious injury shall be based on a prescribed method adopted after consultation with medical service providers and shall be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party

The power to prescribe (after due consultation) accordingly rests with the Minister in terms of Section 26 of the RAF Act and is subject to the restrictions contained in Section 17 (1A)(a) of the RAF Act. Any proposed method of assessment of general damages accordingly falls within the power of the Minister, only and should be published by way of regulation after following due process. It is not open to the RAF to determine such methods. The RAF's attempt to implement methods of assessment and calculation of general damages which fail to ensure that the injures are assessed subjectively contravenes the RAF Act and falls outside the powers afforded to it in the RAF Act and Regulations, it is *ultra vires* and can be set aside once implemented.

Accordingly, the RAF's dissatisfaction with the narrative system and its proposed method of standardised formula to calculate general damages, is not only in conflict with the principles laid down by the Supreme Court of Appeal, but also *ultra vires*.

The RAF's attempt to standardise a formula to calculate loss of earnings is in direct conflict with the principles laid by our courts. You should take your victim as you find him or her. It is clear that a subjective assessment of the road accident victim must be conducted in order to determine the loss which he or she subjectively suffered. That loss is then reduced according to the relevant contingencies (subjective and objective factors of life) which ought to be taken into account.

It is important to remember that the RAF steps into the shoes of the wrongdoer. If it was not for the RAF Act, a road accident victim would have the right to claim from the wrongdoer. Accordingly, the RAF cannot reduce and dilute rights which a claimant would have had but for the RAF Act, unless the RAF Act itself is amended to provide for such diminishment of rights.

The continued perpetuation of the incorrect premise that the Fund is a social benefit organization rather than a social insurer will not provide a legal basis for avoiding compensating road accident victims the true value of their claims in accordance with the provisions of the RAF Act as it currently stands.

Whilst any system aimed at improving inefficiencies and expediting resolution of claims is to be supported the current proposal completely loses sight of the fact that in terms of the law, as it currently stands, injured road accident victims are entitled to be compensated for their own personal injuries and that this requires assessment of the impact that those injuries have had on the injured party concerned. This is the essence of a "personal" injury claim.

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Put in another way, that similar injuries may attract different awards results from the fact that each person's loss is particular to that person. The essence of evaluating and thus quantifying a personal injury is not the nature of that injury, per se, but the impact that injury has had on the particular injured party concerned and the resultant diminution of quality of life and disability flowing therefrom having regard to that person's own particular circumstances.

It should not be overlooked that the 2005 Amendment Act took away the injured road accident victim's right to look to the wrongdoer for the balance of his or her claim not covered by the statutory insurance cover provided in terms of the legislation. This amendment withstood constitutional challenge in **Law Society and Others vs Minister of Transport and Others 2010 ZACC 25** because the limitation of rights was seen as only partial because the victim remained entitled to compensation under the legislative scheme. It was also seen as an interim step which properly advanced the government's purpose to make the Fund financially viable and sustainable and to render the compensation reasonable, transparent, predictable and equitable.

In particular the court had the following to say in paragraph 80 :-

“The impugned scheme puts in the place of the common law residual right a compensation regime that is directed at ensuring that the Fund is inclusive, sustainable and capable of meeting its constitutional obligations towards victims of motor vehicle accidents. In any event, the limitation of the right is only partial because the victim is entitled to compensation, although now limited, under the legislative scheme. Given the purpose and importance of the scheme and in the absence of less restrictive means and having taken in consideration other relevant factors I am satisfied the limitation of section 12 (1) 2 of the Constitution is reasonable and justifiable. Consequently, the legislative abolition of residual common law claim passes constitutional muster.

(Pages 49 & 50)

It is apparent that the main purpose for the development of standard formulae is to achieve significant savings in the quantification of damages and thus reduce the liability of the Fund to compensate injured road accident victims. This purpose cannot be achieved by the introduction of a procedure to administer claims. It requires a fundamental change to the law as it now stands which can only be done by legislation after following due process.

It is also being promoted as a method to shorten the turnaround time and eliminate procedural delays and inefficiencies which are attributed to reliance on human intervention. The stated average processing of backlogs of 3 – 5 years is attributed to procedural delays and processual efficiencies “*largely due to its predominant reliance upon human intervention*”. It also cites as a factor the use of “*comparatively antiquated manual and paper-based claims*”.

Whilst it might be convenient to describe what are clearly administrative and managerial inefficiencies to the system, rather than to failures on the part of those administering it, the reality is that if the claims were properly attended to and administered promptly after lodgement and if offers were made early on proceedings much time and costs would be saved. To complain that the prevailing process is marred by subjective inputs and non-uniform judgements from medical and actuarial professionals loses sight of the varying nature of personal injury compensation and avoids confronting the realities of the current administration of the Fund. The continued implementation of various managerial directives and Board Notices has compounded the problems of an already inefficiently managed institution. 90% of claims submitted since July 2022 have been rejected relying on Board Notice 271 and other managerial directives and are thus not being registered or administered. Despite what must be a considerable falloff in claims to administer, the backlogs remain.

The decision to abandon the appointment of a panel of attorneys to assist with the litigation of claims has had a significant impact on the ability of the Fund to function effectively and has directly contributed to the fact that courts in Gauteng, alone, each process 200 default judgments a week. The congestion of court rolls in Gauteng is also directly attributable to litigation against the Fund and trial dates in Pretoria are now being allocated in 2031. Implementation of yet another scheme primarily aimed at reducing the payment of compensation to innocent road accident victims will not alleviate this nor is it a solution to the systemic and administrative problems plaguing the Fund.

The costs of implementing a complicated online active platform plus the development of standardize formulae for the calculation of loss of earnings, loss of support and general damages needs to be considered, as it must be very significant. It appears that none of the actual algorithms that will be used to calculate losses have been developed yet. The factors enumerated for pay out of general damages are described as a function. The exact formula is still to be derived post research on obtaining appropriate and testing the suitability of various formulas to arrive at the best fit. It is questioned whether any of the data sets fundamental to the creation of these algorithms exist or do they still have to be created? To do this will require considerable financial investment and time. It is stated that research still needs to be undertaken for this to happen. Has the cost of this and time required been considered?

The implementation of a digital lodgement process further ignores the fact that many direct claimants are indigent, lack the necessary computer literacy skills and have no access to computers, nor will they have the means to obtain the required documents or information for the calculation of an offer to be made in accordance with the proposed system. These provisions alone stand to fall foul of Sections 2 and 9 of the Constitution. The RAF Act as it stands, does not provide for such a reform and would have to be amended prior to implementation, in the absence of which it amounts to more wasteful expenditure and follows

the same perilous route as the RAF's unlawful accounting standard and Board Notice 271 of 2022.

As legal practitioners (lawyers) we are not equipped to comment on the technical details relative to the systems to be created to achieve the above purpose – namely the standardisation of awards for various heads of damages. We have therefore taken advice from Willem Burger, a qualified Actuary and Fellow of the Actuarial Society of South Africa. Willem Burger is an expert on the computation of loss of earnings and support and has given expert evidence many times. He has prepared a preliminary comment within the available time, and which is attached to this submission as **Annexure A**.

The Law Society of South Africa (LSSA) aligns itself, in particular, with his criticism of the use of racial based mortality life tables 2 to 5 as well as the assumptions regarding divorce and remarriage in loss of support claims.

As is apparent from the comment in Annexure A and from a general reading of the proposal paper, without access to the data proposed to be used to create the formulae and the actual algorithms for each head of damages further meaningful comments on the impact of the proposed system and its function are not possible.

Yours faithfully



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