

**LAW SOCIETY OF SOUTH AFRICA**

**A BRIEF COMPARATIVE OVERVIEW OF THE  
CURRENT ACT AND NOVEMBER 2004 PROPOSED  
AMENDMENTS THERETO**

## Current System

### COSTS TO MOTORISTS

The current system is funded by a levy on fuel sold ie petrol and diesel presently 32.5 cents per litre. This generates an income in excess of R6 billion per year. No action at all is required on the part of motorists to obtain this insurance and every single motorist, pedestrian and passenger injured on the roads as a result of the negligent driving of another is covered. The cost to the average motorist is presently estimated at R600.00 per annum ie R50.00 per month. To the extent that the cost of fuel is built into the cost of most commodities, non-motorists such as pedestrians or passengers also contribute indirectly for the cover they enjoy.

### PAST HOSPITAL & MEDICAL EXPENSES

Driven by business principles almost all Private Hospital Groups provide comprehensive first world ambulance facilities to the overwhelming majority of accident victims. In conjunction with the RAF a hotline facility exists where accident victims who are not covered by medical aid are provided emergency trauma care, at the cost of the Fund, on it being established, usually at the scene of the accident, by the ambulance and traffic personnel; that there is negligence on the part of a driver. Medical aid cover continues to be extended to almost all workers, and Government's latest initiative is to bring even more workers into the Private Health Care net. The experience of Personal Injury lawyers and medical practitioners is that the majority of accident victims receive the very best that first world medicine offers with respect to trauma care. State Health Care facilities in the major centers are struggling to cope and the situation in country areas is desperate.

### FUTURE MEDICAL EXPENSES

Accident victims are entitled **as of right** to first world medical care, appliances and prosthetics eg artificial limbs from institutions and caregivers of their choice. In practice the RAF issues an Undertaking to this effect and the accident victim has the peace of mind and security of being able to rely on receiving this care for life. Whilst the RAF is known to often contest benefits due in terms of its Undertakings, the claimant's right to enforce the Undertaking at any time in Court, compels the RAF to honour its Undertaking.

## Proposed Amendments

The fuel levy will almost certainly remain at current levels and probably increase so as to pay for the "golden hour" emergency medical treatment. In addition and whether or not common law rights are retained, all motorists and others who use the roads and who earn in excess of R8 600.00 per month nett will be forced to purchase expensive income replacement insurance. If common law rights remain to sue the wrongdoer for the balance of damages indemnity insurance will also have to be purchased by every motorist. Estimates in respect of this insurance as per the expert report of consulting actuary, Mr Jacobson is an approximate cost of R7 500 00 per month for a two car family. Contrast this with the current system at approximately R50 00 per month through the fuel levy. There is currently no need for any road user to do anything and all vehicles are automatically fully covered.

### *Section 4(A) and (B)*

No right to best private health care of the victim's choice as all medical care will only be provided at a prescribed limited tariff probably unacceptable to most providers of medical services.

## PAST LOSS OF INCOME

Accident victims are entitled as of right to receive their **actual loss of income** from the time of the accident up to the time where the claim is finalised or settled. This loss could relate to an actual termination of employment, the loss of promotion opportunities on account of disability, reduction in profits or commissions and so on. No differentiation is made as to whether the victim was employed prior to the accident or not. A factual enquiry as to what would have been the case but for the accident determines the compensation. I.e. an unemployed housewife who was shortly to have entered the workplace in which she would have used skills such as to justify a substantial income but who is precluded from doing so on account of injury sustained in the accident would nevertheless on satisfactory proof be compensated for the loss sustained

## FUTURE LOSS OF INCOME

Disabled or incapacitated accident victims are entitled as of right before an independent Court and with legal and medical representation of the victim's choice, to their proven income loss for the rest of their lives. Such income loss is proven through the engagement of experts of the victim's choice and takes into account all possible circumstances including promotion prospects, and business and professional opportunities. The loss of income is payable in a lumpsum and the victim is not for life dependent on continual re-assessments at the instance of a bureaucrat or succession of bureaucrats. Life time planning can be made without the victim having to continually prove disability and unemployability.

## GENERAL DAMAGES

Accident victims are entitled as of right before an independent Court and with legal and medico legal representation of choice to prove and recover General Damages in respect of pain and suffering, loss of amenities of life, disfigurement and so on, and to receive such payment in a lumpsum. It is significant to note the Satchwell Commission's observation that "*the largest amount of compensation (paid out by the RAF) ie (38% of the total) were paid in respect of general damages*" - (paragraph 19 volume 1). It would therefore appear that the majority of claimants received, as a significant proportion of their damages, lumpsum general damages. Anecdotally the Profession's experience is that many victims particularly unskilled black victims utilise their general damages as seed capital for small business ventures. In this way independence is retained, and the family unit remains supported and intact.

### *Section 4(B)(a)*

No lumpsum compensation for loss of income due to inability to work - the limited proposed amount of R160 000.00 gross will be assessed annually and probably paid monthly. It may be withdrawn at any time on reassessment of disability by the RAF, thereby subjecting victims to lifetime uncertainty and the need to engage in costly litigation. The assessment of disability or incapacity is by a **RAF appointed medical panel**. This is an administrative process and judging from the context of this provision, the victim will have no right to approach the Court or to lead independent medical evidence by the victim's own expert.

### *Section 6 amending Section 17(1)*

There will effectively be no compensation for pain and suffering, disfigurement or loss of amenities of life, even for the seriously injured save for a very limited category of injuries such as paraplegia or major brain damage and even then limited to a nominal R100 000.00.

## DEPENDENT'S ACTIONS - FAMILY SUPPORT BENEFITS

The spouse, children, and other qualifying dependents of a breadwinner, killed in a motor vehicle accident, are entitled **as of right** before an independent Court, and through choice of their own legal representation to such amounts without any limit, as are proven on the balance of probabilities to represent the amount of support which would have been received from the deceased. Even if the deceased was unemployed at the time of the accident or had never worked, future prospects are taken into account. For example in a marriage where the now deceased husband happened to be a student at the time of the accident, could nevertheless result in the widow and any children being awarded loss of support benefits, on the basis that the student would have become a highly paid - professional or business person resulting in a substantial level of potential support. Similarly dependents of breadwinners engaged in the informal sector and others who might not at the time of the accident been registered tax payers are not deprived of the right to claim and receive loss of support benefits

## CLAIMS PROCESS

Statutory prescribed lodgement of claims against the RAF followed thereafter by normal common law litigation process whereby the victim is entitled to legal and medico legal representation before an independent Court and recovery **as of right** of full common law damages. In addition the RAF in exactly the same way as occurs with any other defendant litigant is liable to pay the claimants fees and disbursements on the party and party Court tariff resulting in a significant cost recovery by the claimant. In practice plaintiff attorneys act on contingency and the victim therefore has unfettered access to justice and to the very best legal and medico legal expertise

### *Section 4(B)(a), (b), (c) and (d)*

Limited compensation paid to dependents of deceased breadwinners not exceeding R160 000.00 per annum gross and no lumpsum payable. No certainty that benefits will continue, as to be reassessed annually almost certainly leading to disputes and lengthy litigation. These limited benefits to the surviving spouse terminate on remarriage thereby impacting on the right to happiness and a normal life by the survivor. No compensation payable to surviving child after age 21 thereby depriving such child or orphan of the right and ability to attain a tertiary education. Discrimination against physically or mentally disabled children who normally require lifetime support by parents.

Lodgement of statutory prescribed claim form in terms of Section 24. Thereafter **no obligation on the part of the RAF to compensate the victim by virtue of the proposed new Section 19(f)(3) providing for an interrogation of the victim at the request of the RAF "in order to elucidate matters relating to the claim or at such meeting fails to respond truthfully..."**. No provision is made for legal representation or for the victim to have a similar right to interrogate the insured driver or the driver's witnesses. Past and future loss of income thereafter limited to a maximum of R160 000.00 gross **and no payment of party and party legal costs by virtue of the proposed removal of Section 17(2) from the current Act.** Probable removal of common right to prove assessment of the nature of an injury in the normal way by leading factual and medico legal evidence having regard to the proposed new Section 26(a) which will enable the Minister to make regulations regarding (a) the method of assessments to determine whether a serious injury has been incurred (c) the establishment of Provincial Assessment panels who shall have the power to determine the nature of injuries sustained (e) the resolution of disputes about the assessment of the nature of an injury.

As future loss of income is dependent on the assessment of the nature of the injury and the impact this has or will have on employability and insofar as this is to be determined by regulation it appears unlikely that the normal common law Court process will still apply.

## COMMON LAW LIABILITY

Since the 1940's in South Africa and throughout the western world motorists and accident victims are wholly protected, the motorist with respect to having no personal liability and the victim with respect to at all times there being a pocket to pay the claim. The RAF is the nominal defendant and the motorist is completely indemnified (In some limited instances the fund has the right of recourse).

*Paragraph 6 of the Amendment amending Section 17(1)*  
By virtue of the proposed limitations of general damages to R100 000.00 as also the limitation of loss of income or loss of support to a maximum of R160 000.00 gross per annum. As will be noted from the reports by consulting actuaries, G Jacobson and Clemans, Murfin & Rolland, this will result in financial disaster for motorists and accident victims alike. Removal of the common law right by the victim to sue for the balance of damages will force all economically active South Africans who are able to afford insurance to have to protect their incomes through expensive insurance if available. In the absence of appropriate insurance there will result financial disaster for **drivers** as balance of compensation claimable personally from drivers resulting in drivers losing everything and victims remaining without full compensation. Financial disaster for **accident victims** as very few motorists will have private comprehensive insurance. Financial disaster for businesses which will be liable with respect to damages claimed arising out of the negligent driving of employees. In either event the attorneys and advocates professions are satisfied that the removal of common law rights in RAF matters will be discriminatory and unconstitutional.

## THE CHOICES

The current system which is affordable at R60.00 per month per motorist;

Equitable in that all accident victims receive full common law damages and are not discriminated against;

Sustainable in that the levy on fuel is easily adjustable in accordance with inflation;

Automatic resulting in no motorist or victim not having recourse.

A proposed untested, uncosted, inequitable and probably unconstitutional amalgam of disjointed tinkering with the current Act resulting in tragedy and financial disaster for victims and motorists alike;

Horrendously expensive insurance, if available, for victims and motorists alike.