

PROTECTION OF ROAD ACCIDENT VICTIMS

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Opsomming

Suid-Afrikaanse padongelukslagoffers (POS) het vir meer as sestig jaar uitmuntende en billike beskerming van hulle regte geniet. In hierdie tyd is hulle regte duidelik omskryf en regverdiglik afgedwing. Weens die opvatting dat die stelsel van vergoeding onbekostigbaar geword het, is hierdie regte ernstig deur die Padongelukfonds Wysigingswet (POFWW) van 2005 ingekort met maatreëls wat as 'n tussentydse "skema" beskryf word. Die voorloper van die inkorting van regte is te vinde in die bevindings en voorstelle van die Padongelukfondskommissie van 2002. Die POFWW het konstruktiewelik die reg van die POS om nie-vermoënskade te vorder afgeskaf en die gegoede POS se eis vir verlies van verlies van inkomste en onderhoud ingekort. Die POFWW is deur die grondwetlike hof grondwetlik bevind. Hierdie bevinding is gegrond op die verkeerde uitkenning van die reg wat by die Wet op die Padongelukfonds 56 van 1996 betrokke is. Hierdie reg is 'n gemeenregtelike reg en word nie wetterereglik of in die Grondwet geskep nie. Dit is steeds 'n gemeenregtelike reg wat deur bemiddeling van wetgewing teen 'n statutêr-geskepte vermoënde verweerder afgedwing word om sodoende sekerheid van verhaling van 'n POS se gemeenregtelike reg op skadevergoeding te verseker. Die meganisme wat deur die wetgewer gebruik word, is die opskorting van die gemeenregtelike deliktuele eis teen die gemeenregtelike delikpleger vir solank as wat die Padongelukfonds aanspreeklik is met die doel om aan die POS die wydste moontlike dekking te gee teen die moontlikheid dat sy eis weens die finansiële onvermoë van die delikpleger nie afgedwing kan word nie. Die inperking van regte deur die POFWW is vir hierdie rede ongrondwetlik omdat dit regte wegneem sonder enige vergoedende voordeel en die wysigings strydig is met die doel van die hoofwetgewing. Die POFWW skep 'n drempel wat deur 'n POS oorgesteek moet word (daar moet 'n "ernstige besering" soos deur die wet en regulasies bepaal gely word) voordat so 'n slagoffer sy eis vir vermoënsnadeel teen die POF kan afdwing. 'n Oorsig van ander regstelsels in Amerika en Australië wat drempels gebruik, toon dat sulke drempels toegepas word waar daar toereikende vermoënsvoordele op 'n skuldlose grondslag aan 'n POS toegesê word. Die noodigheid vir inperking van die voordele van die Suid-Afrikaanse POS word allerweë deur die tekort aan fondse regverdig. 'n Tekort aan fondse is nie 'n grondwetlik-erkende rede vir die inperking van regte nie en die finansiële posisie van die POF kan tot 'n mate aan die POF se nie-nakoming van sy grondwetlike plig om die POS van diens te wees, toegeskryf word. Die verbreking van hierdie plig word in 'n reeks van sake aangetref en gee aanleiding tot koste-implikasies wat in die POF se finansiële state ('n yslike regsrekening van R3,5 biljoen in 2012) weerspieël word. Die regering het op 8 Februarie 2013 die Padongelukvoordele-skema Wetsontwerp van 2013 (POVSWW) vir kommentaar gepubliseer. Dit is nie moontlik om in die afwesigheid van inligting wat die vlak van voorgestelde voordele openbaar volle kommentaar hierop te lewer nie. Hierdie wetsontwerp is 'n direkte uitvloeisel van die Padongelukfonds Kommissieverslag van 2002. Die wetsontwerp beoog skuldlose aanspreeklikheid met vaste voorgeskrewe voordele en die afskaffing die betaling van nie-vermoënsnadeel deur motorbotsings veroorsaak. Die afskaffing op die reg op nie-vermoënsnadeel is ongrondwetlik. Nie een van die regstelsels wat soortgelyke vergoedingskemas bevat, skaf hierdie reg algeheel af nie en dit behoort by die voordele (al is dit op 'n beperkte wyse) ingesluit te word of andersins voor voorsiening gemaak word. Verskeie van die bepalings is onduidelik – (veral die aanspreeklikheidsbepalende artikel en die wyse waarop vergoeding bepaal word) in teenstelling met die Wet op Beroepsbeserings en Beroepsiektes van

1993, omslagtig. Die POVSWW maak ook sonder enige teenwigtige voorsiening vir die eensydige wegneem en inperking van voordele en skryf vervaltermynne voor wat duidelik ongrondwetlik is. Dieselfde opmerking geld vir die gebruik van ouderdom om voordele te beperk. Die samestelling van die appèlliggaam gee die indruk van partydigheid terwyl dit die reg van toegang tot die howe inperk. Die POVSWW het die potensiaal om die algehele posisie van die POS verder te verstewig, maar beslis nie in sy huidige vorm nie.

1. Introduction

South African road accident victims have enjoyed full, specialized and equitable protection of their rights by means of legislation for six decades years.¹ During these years the legal principles relating to the rights of road accident victims (RAVs) have, to a great degree, been identified and adequately circumscribed and protected.² Due to perceived problems regarding the financial sustainability of the compensation system introduced by legislation the South African RAV's rights to compensation have been seriously eroded - particularly by the promulgation of the Road Accident Fund Amendment Act 19 of 2005 (RAFAA) which has been described as an interim "scheme" and found to not offend the Constitution³. The RAFAA has virtually abolished the enforcement of a RAV's non-patrimonial rights with little or no reciprocating advantage.⁴ The erosion of the rights of the South African RAV was heralded by the Road Accident Fund Commission under chairmanship of Judge K. Satchwell.⁵ The commission recommended that a no-fault system with structured prescribed benefits for road accident victims be introduced. Subsequent to the RAFAA of 2005 the government published the Road Accident Benefit Scheme Bill of 2013⁶ for comment. In order to properly evaluate the recent developments regarding the protection of road accident victims, it is necessary to have a clear picture of the state of such protection prior to the first developments which seek to alter, amend and/or curtail the rights of road accident victims. In doing so it is accepted that the

¹ See Suzman and Gordon *The Law of Compulsory Motor Vehicle insurance* Juta (1970) 1; Suzman, Gordon & Hodes *The Law of Compulsory Motor Vehicle Insurance in South Africa* Juta (1982) 1; Klopper *Derdepartyvergoedingsreg Academica* (1991) 3; Klopper *The Law of Third Party Compensation* LexisNexis (2012) 3.

² See in this regard Klopper *The Law of Third Party Compensation* (2012) LexisNexis.

³ *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) par 25, 46 and 53; *Road Accident Fund v Oupa William Lebeko* (802/11) [2012] ZASCA 159 par 4; *Road Accident Fund v Duma* (202/12) and three related cases (*Health Professions Council of South Africa as Amicus Curiae*) [2012] ZASCA 169 par [3].

⁴ The RAFAA introduced a threshold of 30% whole person impairment (WPI) which a RAV has to overcome before being entitled to general damages. WPI is determined using the American Medical Association's Guide to Impairment. RAV's that previously enjoyed compensation for common injuries such as whiplash and ordinary fractures are stripped of the rights to claim general damages as the RAFAA exonerates the wrongdoer from liability. See s 21 of the RAF Act 56 of 1996 as amended by section 9 the RAFAA and also Slabbert and Edeling "The Road Accident Fund and Serious Injuries: The Narrative Test" 2012 PER Vol 15 no 2, 261 ff.

⁵ See the Report of The Road Accident Fund Commission of 2002, Vol 1 – 3.

⁶ Notice 98 of 2013 in *Government Gazette* 36138 of 8 February 2013.

need for protection of road accident victims is beyond question. This need is widely and internationally accepted by victims, policy makers, lawmakers and jurists.⁷

3. Road accident victim protection prior to the RAFAA⁸

3.1 Scheme

Recent judgments seemingly adopt the view that the South African road accident victim is afforded legislative protection by a legislative scheme and to this end the government is empowered to curtail RAV rights – such curtailment not offending the Constitution.⁹ This view is neither supported by fact nor reality and is based on a misconception of both the right and the mechanism employed in order to engineer legal protection of the rights of South African RAVs.

3.2 Widest possible protection

It is generally accepted that the enactment by parliament of laws governing personal injuries caused by or arising from motor vehicle accidents was in order to provide a RAV with the “widest possible protection”. This principle has been widely employed in defence of the rights of RAVs in cases where their rights were somehow affected and/or endangered. It has seldom been stressed what this protection encompasses. The specific protection becomes clearer when the judgment of Ramsbottom JA in *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 285 is carefully and fully read in context:

“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 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 inures 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.”¹⁰

⁷ See the Report of the Road Accident Commission (2002) Vol I, 565 ff.

⁸ 1 August 2008 when the RAFAA was brought into operation by Proclamation R29 in *Government Gazette* 31249 dated 21 July, 2008.

⁹ See the judgments referred to in fn 3 and s 36 of the Constitution of the Republic of South Africa of 1996.

¹⁰ See also *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC); *Mvumvu and Others v Minister of Transport and Another* (7490/2008) [2010] ZAWCHC 105, 2010 (12) BCLR 1324 (WCC); (CCT 67/10) [2011] ZACC 1, 2011 (5) BCLR 488 (CC), 2011 (2) SA 473 (CC) where the Constitutional Court acknowledged and applied this principle. This is in contrast with the judgment of Moseneke DCJ in *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC) par 40 where the principle is referred to but not applied. For other judgments where the principle was recognised, see *Rose's Car Hire (Pty)*

3.3 True and actual mechanism of protection

From the *dictum* of Ramsbottom it is apparent that the legislator never created a legislative compensation scheme in terms of which the RAV directly derived his or her right to claim compensation from a parliamentary statute. The “scheme” of the compensation was clearly based on the existing common law rights of the RAV. What parliament engineered with the relevant legislation was certainty of recovery of damages when a RAV exercises his/her common law rights by substituting the original wrongdoer with a deep pocket defendant (initially an insurance company and recently the RAF). The basis of the right of RAV’s has been and still remains a common law right to claim damages where damage or loss is suffered as a result of the negligent driving of a motor vehicle – more particularly a RAV’s right to bodily integrity and his/her right to pursue a claim for damages for pain and suffering caused by the negligent infringement of his/her bodily integrity¹¹ and the loss of the common law right to maintenance in the case of the death of a breadwinner.¹² This right is mirrored in the Constitutional right to bodily and psychological integrity.¹³ The constitutional right is clearly not the absolute basis of a RAV’s claim for damages caused by or arising from the unlawful and negligent driving of a motor vehicle.¹⁴

From the preceding it is clear that a RAV’s right to claim loss or damage from the RAF is a RAV’s common law right to compensation for bodily injury and loss resulting from death and not (as recent judgments¹⁵ would seem to have it) a legislative scheme. The only legislative scheme that can be discerned from a close and proper reading of the entire RAF Act 56 of 1996 and its predecessors is that the legislator retained the common-law liability of a wrongdoer caused by and arising from the unlawful and negligent driving of a motor vehicle. This principle is clearly underscored by section 19(a)¹⁶ which reads as follows:

Ltd v Grant 1948 (2) SA 466 (A) 471; *Op ’t Hof v SA Fire and Accident Insurance* 1951 (2) SA 353 (A); *Workmen’s Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (A); *Aetna Insurance v Minister of Justice* 1960 (3) SA 273 (A) at 285; *Van Blerk v African Guarantee and Indemnity* 1964 (1) SA 336 (A); *Hladhla v President Insurance* 1965 (1) SA 614 (A) at 623; *Rondalia Versekeringsmaatskappy v Lemmer* 1966 (2) SA 245 (A) at 255; *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 138; *Commercial Union Assurance v Clark* 1972 (3) SA 508 (A); *AA Mutual Insurance v Biddulph* 1976 (1) SA 725 (A); *Webster v Santam Insurance Co Ltd* 1977 (2) SA 874 (A); *Nkisimane v Santam Insurance* 1978 (2) SA 430 (A) at 435; *Santam Insurance v Tshiva*; *Maxanti v Protea Assurance* 1979 (3) SA 73 (A) at 82; *Motorvoertuigassuransiefonds v Gcwabe* 1979 (4) SA 986 (A) at 1991; *Workmen’s Compensation Commissioner v Santam Insurance* 1949 (4) SA 732 (C); *Swanepoel v Johannesburg City Council*; *President Insurance Co v Kruger* 1994 (3) SA 789 (A) at 796E; *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA); *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA).

¹¹ *Sigournay v Gillbanks* 1960 (2) SA 552 (A) 571E: “...compensation under this heading is given for pain, not for the seriousness of the injuries or the risk to the plaintiff’s life. Injuries may leave after-effects and may cause mental anxiety but they are not themselves pain.”

¹² See *Union Government v Warneke* 1911 AD at 664; *Schnellen v Rondalia Assurance Corporation of SA* 1969 (1) SA at 520G – H; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 818.

¹³ See s 12(2) of the Constitution of South Africa, 1996.

¹⁴ *Idem*. The common law right of a RAV was recognised and enforced long before the enactment of the Constitution in 1996.

¹⁵ See the judgments in fn 3.

¹⁶ S 19(a) was not repealed or amended by the RAFAA of 2005 but was retained as is.

“19. Liability excluded in certain cases.—The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—

- (a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21;”¹⁷

The legislative scheme that existed on a proper and full reading of the RAF Act of 1996 (even after amendment by the RAFAA of 2005) and its predecessors remains as it was since 1946. This entails the:

- Retention of a RAV’s common law right to claim damages and loss from a wrongdoing driver of a motor vehicle; and
- Substitution of the wrongdoer by a deep pocket defendant¹⁸; and
- The suspension of the wrongdoer’s common law liability for as long as the deep pocket defendant is liable and able to pay.¹⁹

Viewed against this backdrop, Moseneke DCJ’s concern in *Law Society of South Africa and Others v Minister for Transport and Another* with the fortunes of the wrongdoer as a result of the retention of the principle of suspended common law liability is completely misplaced and unfounded.²⁰ In

¹⁷ S 21 before amendment by s 9(a) of the RAFAA read: “21. Claim for compensation lies against Fund or agent only.—When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation”.

¹⁸ Initially from 1946 to 1986 an authorized insurer, then in 1986 the Motor Vehicle Accident Fund, thereafter in 1989 the Multilateral Motor Vehicle Accident Fund and since 1997 the Road Accident Fund.

¹⁹ This is the effect of ss 19(a) read with s 21 (before amendment by s 9(a) of the RAFAA of 2005). See also in this regard *Rose’s Car Hire (Pty) Ltd v Grant* 1948 (2) SA 466 (A) and *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A). See also *Conradie v Erasmus and Son* 1951 (4) SA 29 (T). The RAF Commission seemingly also does not appreciate the true scheme of the RAF Act and seems to accept that the liability of the RAF is statute driven. See Vol I, Chapter 18 of the RAF Commission Report.

²⁰ See *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at par 50: “[50] The colossal risk to which the new cap exposes all drivers (from which the Fund would previously have protected them by paying full compensation), as against the relatively small inattentiveness or oversight that could give rise to the risk, lends further support to the abolition of the common-law action. What is more, the retention of the common-law claim does not sit well with a social security compensation system that aims to provide equitable compensation (as distinct from the right to sue for compensation) for all people, regardless of their financial ability. There are two aspects to this incongruity. The first is that the common-law claim would be actually recovered only from those drivers or owners who are capable of in fact paying compensation or who are able to afford the required insurance. In my view, the number of drivers and owners who would be able to pay would be very small. It would be pointless for any person to sue in circumstances where actual recovery would not result. The second consideration is that the right to sue would be available only to those who can afford to pay legal fees or who are granted legal aid. And it is unlikely that legal aid would be granted to people who have claims that are in fact irrecoverable because of the inability of the driver or owner to pay. These two factors would have a negative effect on an equitable compensation system if the common-law right of action were to be retained.” The object of the RAF Act is precisely to prevent this situation but is ignored by the learned judge who hands down his judgment without

terms of the legislative scheme that is created by third party compensation legislation the wrongdoer is the primary liable party at common law and also in terms of the RAF Act of 1996. The legislation was not enacted for the benefit of the wrongdoer.²¹ What the learned judge does not appreciate is that the right afforded the RAV (as was determined above) is a common law right. That common law right is an indivisible right which exclusively inures for the benefit of the RAV and no one else.²² Consequently and *sensu stricto* such a concept as a residual right is jurisprudentially non-existent – precisely because a right is an indivisible unitary concept. The RAV's right against the wrongdoer happens to be the same right which it exercises against the RAF in terms of section 17(1)(a) and 17(1)(b) of the Road Accident Fund and is the self-same common law right to which a RAV is entitled to by virtue of him or her being a legal subject. This right is not created or endowed by the RAF Act of 1996 and neither does it have its origins in the Constitution.²³ It is exactly because the RAFAA seeks to do the opposite to the purpose of the RAF Act of 1996 (giving the widest possible protection) by limiting the right of RAV's that not only RAVs are prejudiced but also wrongdoers are consequentially adversely affected by exponentially increasing their liability in the same ratio as to which the rights of RAVs are curtailed.

4. Road accident victim protection after the RAFAA

4.1 Amendment of section 21 by the RAF Amendment Act 19 of 2005.

If it is accepted that the RAV's right is a common law unitary right primarily against the wrongdoer for the recovery of damage or loss caused by or arising from the unlawful and negligent driving of a motor vehicle as a result of personal injury or the death of a breadwinner²⁴ and that the wrongdoer is substituted by the RAF and his/her liability suspended as provided for by the RAF Act, then it follows that the amendment of section 21 by section 9(a) of the RAFAA of 2005 (in the particular manner that it does²⁵ by absolving the wrongdoer from all liability except for emotional shock and in circumstances where the RAF is unable to pay) created a huge legislative problem. The abolition of the right to claim against the wrongdoer is the self-same right which a RAV exercises against the RAF. The only section which renders the RAF liable is section 17(1) which reads:

“17. Liability of Fund and agents.—(1) The Fund or an agent shall—

any consideration to the purpose of the RAF Act of 1996. See par 3.2 above and fn 11. The view of the learned judge is also contrary to the finding of Road Accident Fund Commission Report (2002) Vol I par 16.118 (p 489).

²¹ See *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA).

²² See Klopper *Law of Third Party Compensation* LexisNexis (2012) Ch 2, par 4.1; *Barkett v SA National Trust and Assurance Co Ltd* 1951 (2) SA 353 (A); *Oslo Land Co Ltd v Union Government* 1938 AD 584 ; *Lampert-Zakiewicz v Marine and Trade Insurance* 1975 (4) SA 597 (C); *Evins v Shield Insurance* 1980 (2) SA 814 (A); *Smith v Road Accident Fund* 2006 (4) SA 590 (SCA); *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC); *Duduzile v Road Accident Fund* [2007] 4 All SA 1241 (W); *Mntambo v Road Accident Fund* 2008 (1) SA 313 (W); *Duduzile v Road Accident Fund* [2007] 4 All SA 1241 (W); *Nonkwali v Road Accident Fund* [2008] 2 All SA 503 (SCA), 2009 (4) SA 333 (SCA). The RAF Commission also does not appreciate the true scheme of the RAF Act and seems to accept that the liability of the RAF is statute driven. See Vol I, Chapter 18 of the RAF Commission Report.

²³ See par 3.2 and fn 11.

²⁴ See in this regard Klopper *op cit* 11

²⁵ *Idem*.

(a) *subject to this Act*, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;

(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,

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:..."²⁶

From a reading of section 17(1) it is clear that the Road Accident Fund's liability as created by this section of the RAF Act of 1996 is subject to the other provisions of the RAF Act. Section 19(a) is one such other provision. Section 19(a) states:

"19. Liability excluded in certain cases.—The *Fund or an agent shall not be obliged to compensate* any person in terms of section 17 for any loss or damage—

(a) *for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21; or...*"²⁷

The wording of section 19(a) makes it abundantly clear that the RAF's liability in terms of 17(1) is *excluded* by the provisions of section 19(a). Section 19(a) provides that the RAF is only liable if the wrongdoer (driver or owner) is liable and refers to section 21 where this section before its amendment by section 9(a) of the RAFAA of 2005 read as follows:

"21. Claim for compensation lies against Fund or agent only.—When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation"

Section 19(a) read with s 21 (unamended) confirms the actual mechanism for the protection of RAV's by the RAF Act of 1996 by providing for substituted liability of the RAF and the reviving of wrongdoer liability in certain stated circumstances.

Effectively the amendment of section 21 by section 9(a) of the RAFAA draws a line through this structure without having any regard to the wording of section 17(1) or 19(a). The amended section 21 reads:

²⁶ My emphasis.

²⁷ I emphasise.

“21. Abolition of certain common law claims.—(1) No claim for compensation in respect of loss or damage resulting from bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—

(a) against the owner or driver of a motor vehicle; or

(b) against the employer of the driver.

(2) Subsection (1) does not apply—

(a) if the Fund or an agent is unable to pay any compensation; or

(b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle”

This has the peculiar and absurd result by the conjunctive operation of sections 19(a) and 21 of simultaneously absolving the wrongdoer *and* the RAF from liability except where the RAF is unable to pay or where the RAV claims for emotional shock.²⁸ The RAF is nonetheless entertaining claims subsequent to the amendment of section 21 as if the wording omitted from the previous section 21, was retained and as if the amendment of section 21 has no effect on its liability.

4.2 Curtailment of rights

4.2.1 General damages and loss of income and maintenance

Amendments to section 17 of the RAF Act of 1996 brought about curtailment of the rights of a RAV compared to the position prior to amendment in the following respects:

- a) Restriction of the recovery of general damages (pain and suffering, loss of amenities of life etc) to those RAVs who suffered serious injury²⁹ and
- b) Limited recovery for damage or loss suffered as a result of loss of income, loss of earning capacity and loss of maintenance by the capping of the income on which such damage or loss is assessed to a prescribed amount.³⁰

²⁸ See in this regard Klopper *op cit* 10 *ff*. See also Klopper *Some Observations on the RAF Amendment Act October 2006 De Rebus* 28 where this legislative short-circuit was pointed out.

²⁹ See the proviso to s 17(1): “...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...”

³⁰ See s 17(4)(c) “...includes a claim for loss of income or support, the annual loss, irrespective of the actual loss, shall be proportionately calculated to an amount not exceeding— (i) R160 000 per year in the case of a claim for loss of income; and (ii) R160 000 per year, in respect of each deceased breadwinner, in the case of a claim for loss of support.” and s 17(4A)(a) “The Fund shall, by notice in the Gazette, adjust the amounts referred to in subsection (4) (c) quarterly, in order to counter the effect of inflation.”

In the case of general damages the liability of the RAF for these damages is suspended until a RAV can show that he or she sustained a “serious injury”.³¹ Whether a RAV sustained “serious injury” is determined by the procedure prescribed by regulation 3 of the RAF Act. Clearly this provision and the procedure introduced a completely new requirement which did not exist before the amendment the effect of which is to distinguish and discriminate between the injuries sustained by RAVs. As far loss of income is concerned, the calculation of the loss is currently based on a maximum income R204 904 per year.³²

4.2.2 General damages: Serious injury

4.2.2.1 Determination of serious injury³³

A RAV’s entitlement to payment of non-patrimonial damages by the RAF is dependent on the exceeding of a threshold being the classification of his or her injury as serious. An injury is not serious if such injury appears on a list published by the Minister of Transport in the *Government Gazette*.³⁴ No such list has been published. In terms of regulation 3, a serious injury is determined by a healthcare professional³⁵ that has undergone a training programme as prescribed by the Minister.³⁶ No such training programme has been prescribed. Such assessment is done using two tests: (a) By applying the American Medical Association’s Guide for Impairment (Sixth Edition) (AMA Guide). A whole person impairment exceeding 30% is required and (b) Gauging the injury with the narrative test found in regulation 3(1)(b)(iii). In the latter instance an injury is deemed to be serious if it resulted in a serious long-term impairment or loss of a body function, constitutes permanent serious disfigurement, resulted in severe long-term mental or severe long-term behavioural disturbance or disorder or resulted in loss of a foetus. These tests are complementary so that if the first test is used and an injury is not serious, such an injury can still be deemed serious if the narrative test is satisfied.³⁷ In applying an assessment a health care professional is enjoined by regulation 3(1)(a)(iv) to conduct the assessment “in accordance with operational guidelines or amendments, if any, published by the Minister from time to time by notice in the Gazette.” No such notice has been published. The cost for determining serious injury is paid by the RAV unless it can be

³¹ See *Road Accident Fund v Oupa William Lebeko* (802/11) [2012] ZASCA 159 par [4]; *Road Accident Fund v Duma* (202/12) and three related cases (*Health Professions Council of South Africa as Amicus Curiae*) [2012] ZASCA 169 par [3]. A claim for compensation of a serious injury remains part of the unitary claim for compensation created by s 17(1). See Klopper “The nature and content of serious injury” October 2011 *De Rebus* 32 and *Van Zyl v Road Accident Fund* (34299/2009) [2012] ZAGPJHC 118.

³² The initial amount of R160 000 p.a. is adjusted quarterly by Board Notices published in the *Government Gazette*. See the latest Board Notice 6 of 2013 in *Government Gazette* 36042 of 25 January 2013.

³³ For a full exposition on the procedure for the determination of serious injury see Klopper “Determining serious injury” November 2011 *De Rebus* 20.

³⁴ Regulation 3(b)(i).

³⁵ See s 17(1A)(b): “The assessment shall be carried out by a medical practitioner registered as such under the Health Professions Act, 1974 (Act No. 56 of 1974).”

³⁶ Reg 3(1)(b)(vi).

³⁷ *Daniels and others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC 104.

shown that the injury is serious.³⁸ Disputes regarding serious injuries are dealt with by an appeal board constituted in terms of the regulations.³⁹

4.2.2.2 Establishing the legal principle for the application of thresholds

The introduction of the concept of “serious injury” effectively creates a threshold which a RAV is required to surmount in order to effectively access his or her common law right and is patently inequitable, unfair and discriminatory. A cursory survey of jurisdictions that employ a threshold shows that where thresholds are used, the RAV is afforded an adequate no-fault benefit for patrimonial damages (and in some instances even a no-fault non-patrimonial benefit⁴⁰). In most cases the RAV retains common law rights to recover non-patrimonial loss subject to a threshold. In Victoria, Australia⁴¹ and Ontario Canada⁴² a RAV receives no-fault benefits for patrimonial loss and is allowed to access his or her common law rights if a serious injury has been sustained. In Quebec province a RAV has no fault benefits for both patrimonial and non-patrimonial loss – the latter being capped at \$175 000.⁴³ Out of the 49 states of America, 12 states have opted for a form of no-fault liability. Of the states which originally opted for no-fault liability, four states reverted to a common-law based liability.⁴⁴ In New York State no-fault benefits for patrimonial loss are paid for patrimonial losses and a RAV can access his/her common law rights if a serious injury is proven.⁴⁵ In Michigan State, a no-fault system funded by compulsory insurance operates which provides medical and loss of earnings benefits.⁴⁶ Non-patrimonial damages can be recovered provided that more than 50% negligence can be proven and when an accident has resulted in death, permanent serious disfigurement, the serious impairment of a body function or long term income loss. In the State of Florida no-fault insurance for at least \$10 000 is required in order to cover mainly medical costs. A

³⁸ Reg 3(2)(a).

³⁹ Reg 3(4)

⁴⁰ See the Ontario *Insurance Act* read with Bill 198 of 2003.

⁴¹ See eg Australian Transport Accident Act 111 of 1986; In New York State the RAV is afforded a \$50 000 no-fault benefit for medical costs, lost income and other pecuniary losses in substitution of the RAV’s common law rights. The common law rights were not completely abolished but RAVs who suffered serious injury are permitted to proceed on a fault basis to enforce their claims.

⁴² See S 267.5(5) of the Ontario *Insurance Act* read with Bill 198 of 2003 brought into effect by Ontario Regulation 381/03 accessed at: <http://www.canlii.org/en/on/laws/stat/rso-1990-c-i8/latest/rso-1990-c-i8.html>

⁴³ Quebec Automobile Insurance Act, R.S.Q., c. A-25. Accessed at <http://www.canlii.org/en/qc/laws/stat/rsq-c-a-25/latest/rsq-c-a-25.html> where a RAV is entitled to no fault patrimonial and non-patrimonial damages – the latter being subject to a cap of \$175 000 in terms of s 73 of that Act.

⁴⁴ See James M. Anderson, Paul Heaton, Stephen J. Carroll “The U.S. Experience with No-Fault Automobile Insurance” RAND Institute for Civil Justice, Published 2010 by the RAND Corporation 1776 Main Street, P.O. Box 2138, Santa Monica, CA 90407-2138 and accessed at www.rand.org/pubs/monographs/2010/RAND_MG860.pdf.

⁴⁵ See Rogak, LN “Rogak’s New York No-Fault Law & Practice” iUniverse (2009) 1; NY Insurance Law § 5106(a); 11 NYCCR §65.

⁴⁶ See Michigan No Fault Auto Insurance, MCL 500.3101-500.3179 accessed at <http://www.legislature.mi.gov/%28S%280mjc0vzjost00fj0lfs02q55%29%29/mileg.aspx?page=loadvirtualdoc&bookmarkid=6515>.

RAV can only recover non-patrimonial loss if serious injury is proven.⁴⁷ In Massachusetts no-fault cover for medical costs and loss of income is provided.⁴⁸ Non-patrimonial common law damages may be claimed by a RAV where the medical expenses exceed a given amount or where the injury is deemed to be serious or death occurs.⁴⁹ Some states such as Kentucky, New Jersey, and Pennsylvania a RAV has a choice to access fault based or no-fault benefits.⁵⁰

4.2.2.3 Threshold criteria

When surveying the use of thresholds, it becomes very apparent that the South African double threshold test approach⁵¹ is unique among all jurisdictions that employ thresholds inasmuch as two tests are employed and the fact that it is used to access existing common law rights without according the RAV any no-fault patrimonial benefits. Victoria, New South Wales and South Africa are the only jurisdictions that use the AMA Guides in the application of their threshold. The overwhelming majority of jurisdictions use threshold criteria which are verbal qualitative or monetary quantitative. The following are examples:

- An injured party may sue if his general damages for pain and suffering exceed \$1,000, or if his specific damages exceed \$2,000 subject to certain deductions;⁵²
- Pain and suffering if special damages exceed a \$500 threshold in medical expenses, or in cases of specified serious injuries or death;⁵³
- A RAV may sue for non-patrimonial loss if the personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a foetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system, or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.⁵⁴

⁴⁷ Florida Statutes, Title XXXIV Insurance Chapter 627, Section 627.737 Florida Statutes accessed at http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0627/Sections/0627.737.html.

⁴⁸ Mass. Gen. Laws Ann. ch. 90, § 34A (Supp. 1971) accessible at <http://www.malegislature.gov/Laws/General-Laws/>.

⁴⁹ *Idem* at ch. 231, § 6D.

⁵⁰ Edith N. Dinneen "How Faultless Are the No-Fault Statutes? - A State Survey" *Boston College Law Review* Vol 13, 935. Also see RAF Commission Report (2002) par 18.142 (p 492) *ff*.

⁵¹ See par 4.2.2.1 above – i.e. 30% whole person impairment and a narrative test.

⁵² See Edith N. Dinneen *op cit* 944. This test is used in Puerto Rico.

⁵³ *Idem* fn 68. Applied in Florida and Massachusetts. Fla. Sess. Laws ch. 252, § 8(2) (1971). This section preserves the right to sue for general damages when the injured party incurs permanent disfigurement, a fracture to a weight-bearing bone, a fracture with certain stipulated complications, loss of a body member, permanent injury, permanent loss of a bodily function, or death. The Massachusetts provision, Mass. Gen. Laws Ann. ch. 231, § 60 (Supp. 1970), preserves the right to sue for pain and suffering when the injury causes a permanent and serious disfigurement, a fracture, loss of a body member, loss of sight or hearing, or death.

⁵⁴ New York Insurance Law § 5102(d): "Serious injury" means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a foetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member;

- In Michigan non-patrimonial loss can be recovered if a RAV suffered an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.⁵⁵

4.2.3 Discussion and criticism

(a) Threshold and tests

In view of the principle regarding the application of threshold and the criteria of such thresholds to access claims for non-patrimonial damages established in the preceding paragraphs, it is clear that the South African RAV is currently receiving short shrift. Not only is the use of a threshold to access common law rights unjust but the South African RAV⁵⁶ is in addition subjected to a harsh test of 30% whole person impairment determined using the AMA Guide to enable these rights.⁵⁷ The dual test

significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment." accessible at <http://codes.lp.findlaw.com/nycode/ISC>.

⁵⁵ In *McCormick v Carrier No. 136738 (July 31, 2010)* the Michigan Supreme Court ruled that a serious injury entails **(1) an objectively manifested impairment-** The common meaning of "objectively manifested" in MCL 500.3135(7) is an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function. In other words, an "objectively manifested" impairment is commonly understood as one observable or perceivable from actual symptoms or conditions. When considering "impairment", the focus is not on the injuries themselves, but how the injuries affected a particular body function. Medical testimony will generally be required to establish impairment, but not always. **(2) of an important body function-** If there is an objectively manifested impairment of body function, the next question is whether the impaired body function is "important." Whether a body function has great "value," "significance," or "consequence" will vary depending on the person. Therefore, this prong is an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life. **(3) that affects the person's general ability to lead his or her normal life-** Finally, if the injured person has suffered an objectively manifested impairment of body function, and that body function is important to that person, then the court must determine whether the impairment "affects the person's general ability to lead his or her normal life." A person's "general ability" to lead his or her normal life is affected when the injury "influences" some of the person's power or skill, i.e. the person's capacity to lead a normal life. This requires a subjective and fact specific inquiry that must be decided on a case-by-case basis.

⁵⁶ See *Mvumvu v Road Accident Fund 2011 (2) SA 26 (CC)* at par [28] where South African RAV passengers are characterised as: "... poor black people. They state that the vast majority of poor people in this country are black people, and the mode of transport accessible to them is public transport consisting of, amongst others, taxis and buses. They claim that the provisions impact disproportionately on black people. [29] It will be observed that the applicants do not assert that the impugned provisions discriminate against black people in a manner that is direct. Indeed, they could not make the assertion because the provisions do not expressly place a cap on claims by black people. Instead, it applies to claims of the categories of victims mentioned in para [22] above. What is established by the applicants' evidence, though, is the fact that at a practical level the majority of the victims affected by the cap are black people. This in turn shows that, indirectly, the provisions discriminate against black people in a manner that is disproportionate to other races." Clearly this classification *mutatis mutandis* applies to all South African RAV's

⁵⁷ In New South Wales, Australia 10% WPI impairment is applied. See § 131 of the NSW Motor Accidents Compensation Act 1999 No 41: "No damages may be awarded for non-economic loss unless the degree of

that is used is further legally suspect and fraught with practical and other problems⁵⁸ which are to the prejudice of the average South African RAV. Not only is the use of the AMA guides in the RAF regulations *ultra vires* the empowering RAF Act⁵⁹ but the AMA guides is wholly unsuited for the intended purpose of establishing whether a person has suffered a serious injury. The AMA guide does not take personal circumstances into account, in particular ignores the South African RAV's circumstances and further does not take account of future consequences of injuries sustained. Finally, it is currently applied by health professionals not trained as envisaged by the regulations and fully versed in its intricacies, without the guidelines as provided for by the regulations. He/she is also saddled with the risk of substantial costs if the attempt to surmount the threshold by complying with the tests is unsuccessful.⁶⁰

The use of a dual test for serious injury contained in regulation 3(b) unnecessarily burdens the RAV. For example, should a RAV qualify in terms of the narrative test such is the case when there was a loss of a foetus, a RAV is compelled to have the WPI test done. Because of the stringency of the 30% WPI test, the majority of RAVs qualify for payment of non-patrimonial loss because of the narrative test.⁶¹ The application of the narrative tests results in a factual enquiry as it in essence requires whether a RAV suffered long term serious effects on his/her life.⁶² Our courts have not improved the situation either by finding that an essentially factual question has to be judged by the essentially medical appeal tribunal established by the RAF regulations and that any dispute regarding seriousness is of an administrative nature by implication resulting in a RAV being compelled to resort to the provisions of Promotion of Administrative Justice Act 3 of 2000 when seeking redress in this regard.⁶³

(b) *Constitutionally*

Due to the misidentification of the right sought to be curtailed in *Law Society of South Africa and Others v Minister for Transport and Another*⁶⁴ a RAV's rights have been limited and such limitation found not offend the Constitution. If it is accepted that the RAV's right is a common law right to

permanent impairment of the injured person as a result of the injury caused by the motor accident is greater than 10%."

⁵⁸ See Slabbert and Edeling "The Road Accident Fund and Serious Injuries: The Narrative Test" 2012 PER Vol 15 no 2, 261 ff.

⁵⁹ S 17(1)(1A)(a) provides: 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 AMA Guides do not do this. See in this regard *Daniels and Others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC 104 par {88} and Slabbert and Edeling *op cit* 271 ff.

⁶⁰ In *Daniels and Others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC 104 par [87] the uncontested evidence showed that such costs can amount to R7000.

⁶¹ See Slabbert and Edeling *op cit*.

⁶² See *Ninkovic v Pajvancek* [1991] VicRp81; [1991] 2 V.R.; *Dwyer v Calco Timbers Pty Ltd* [2006] VSCA 187 (8 September 2006) and *Richards v Wylie* (2000) 1 VR 79. Australian authority is apposite as the narrative test was entirely gleaned from legislation in Victoria.

⁶³ See *Road Accident Fund v Oupa William Lebeko* (802/11) [2012] ZASCA 159 par 4; *Road Accident Fund v Duma* (202/12) and three related cases (*Health Professions Council of South Africa as Amicus Curiae*)[2012] ZASCA 169 par 3.

⁶⁴ 2011 (1) SA 400 (CC) ; 2011 (2) BCLR 150 (CC).

bodily integrity and a right to recover maintenance due to the negligent driving of a motor vehicle, then it follows that the finding in the *LSSA* case becomes questionable. There are three arguments that militate against the constitutionality of the restrictions imposed on the rights of a RAV to recover non-patrimonial loss by the RAFAA:

- It violates the principle of proportionality applicable when section 36 of the Constitution is considered⁶⁵ as the measure constructively abolishes a RAV's claim for non-patrimonial loss in order to achieve a financial saving;⁶⁶
- It offends the principle of rationality applicable in terms of section 36 of the Constitution as the object of the RAF Act is to widely protect the RAV while the RAFAA does exactly the opposite by restricting recoverable patrimonial damages for loss of income and maintenance, constructively abolishing the RAV's right to non-patrimonial loss and burdening the RAV with an onerous and costly administrative procedure to establish whether the RAV may enforce his/her rights;⁶⁷
- It negates the principle established by the Constitutional Court when such rights are affected in that in order for the abolishing of the right to be constitutionally defensible, the legislator must provide an adequate compensatory advantage;⁶⁸

⁶⁵ See *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and another* 2002 (4) SA 613 (CC); *Poswa v Member of the Executive Council For Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).

⁶⁶ See Slabbert and Edeling *op cit* 261ff. Financial constraints provides no ground for the curtailment of rights – see *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

⁶⁷ See par 3.2 above and *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC); *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

⁶⁸ See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) where at par [13] – [16] Jacob J says the following: “[13] The purpose of the Compensation Act, as appears from its long title, is to provide compensation for disability caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment. The Compensation Act provides for a system of compensation which differs substantially from the rights of an employee to claim damages at common law. Only a brief summary of this common-law position is necessary for the purposes of this case. In the absence of any legislation, an employee could claim damages only if it could be established that the employer was negligent. The worker would also face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming litigation to pursue a claim. In addition, there would be no guarantee that an award would be recoverable because there would be no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that the employee would incur the risk of having to pay the costs of the employer if the case were lost. On the other hand, an employee I could, if successful, be awarded general damages, including damages for past and future pain and suffering, loss of amenities of life and estimated 'lump sum' awards for future loss of earnings and future medical expenses, A apart from special damages including loss of earnings and past medical expenses. [14] By way of contrast, the effect of the Compensation Act may be summarised as follows. An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the Compensation Act to which the employer is obliged to contribute on pain of criminal sanction. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence. The amount of compensation may be increased if the employer or co-

- It ignores the primary dictate of section 36(1)(a) of the Constitution that a restriction must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors⁶⁹ and
- Does not consider section 36(e) requiring less restrictive means to achieve the legislative objective was neither canvassed nor considered.

As far as section 36(e) is concerned, the necessity of the curtailment of the rights of RAV's was ascribed to financial considerations. It is submitted that the financial position in which the RAF found itself prior to the promulgation of the RAFAA was not entirely ascribable to structural cost generating principles of the RAV protection system governed by the RAF Act 56 of 1996. A significant portion of the deficit can be related to the manner in which the RAF goes about its business. A

employee were negligent but not beyond the extent of the claimant's actual pecuniary loss. An employee who is dissatisfied with an award of the Commissioner has recourse to a Court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which s 35(1) deprives the employee of the right to a common-law claim for damages. [15] The Compensation Act supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute. Compensation is payable even if the employer was not negligent. Though the institution of the regime contemplates a differentiation between employees and others, it is very much an open question whether the scheme is to the disadvantage of employees. [16] Counsel for the applicant did not base his contention on a comparison of the position of the worker under the scheme contemplated by the Compensation Act with the position at common law. He submitted instead that s 35(1) had to be viewed independently of the rest of the Compensation Act because it did not have to be an integral part of the scheme, that there was no reason why a negligent employer should not be obliged to pay both the assessed contributions to the fund and common-law damages, and that there was accordingly no rational basis for the inclusion of s 35(1) as part of the scheme. He said that the assumption that it was unduly onerous for the employer to be obliged to pay both contributions to the fund and common-law damages if negligent was ill founded. Indeed, counsel confessed that his contention concerning the absence of a rational connection amounted to the employee having 'the best of both worlds'. In essence, the contention amounted to this: the nature of the balance achieved by the Legislature through the Compensation Act tilts somewhat in favour of the employer, while requirements of policy and the nature of the relationship between the employee and the employer indicate that a different balance is appropriate. It was contended that the object of the Act is to provide compensation for workers, not to benefit employers. Section 35(1) benefits only employers. It is therefore not rationally related to the purpose of the legislation." The gist of this judgment equally applies to the position of the RAV – except that the RAFAA brings no compensating advantages whatsoever and to the contrary severely restricts the RAV's rights and burdens it with costly procedures to enforce a right which the RAV is unconditionally entitled to and has enjoyed for more than 60 years in terms of the legislation that preceded the RAFAA. It must also be remembered that the underlying object of the COIDA of 1993 is to ensure job security by protecting the employer (see s 35(1)) against delictual claims by employees arising from their employment. This is different from the object of the RAF Act of 1996 which has the objective of security of the recovery of common law damages. See fn 10.

⁶⁹ See the discussion in par 4.2.2.2 where the principle is established that in other open and democratic society based on human dignity, the right to patrimonial damages is retained despite affording a RAV reasonable no-fault patrimonial compensation. The RAFAA does not make provision for no-fault compensation and requires that a RAV at his cost and risk still has to prove both fault and quantum which places the RAV in a far more disadvantaged position compared to RAV in other open and democratic societies. The limitation of common law rights by COIDA is no justification for the abolishment of the rights of RAVs due to the different purposes of the COIDA and RAF acts. See fn 68.

survey of reported cases in which the RAF was severely criticised for the manner in which it deals with claims shows that all is not well. The following conduct was reported:

- No proper investigation of claims and litigating without proper preparation;⁷⁰
- Unwarranted opposition of an appeal;⁷¹
- Failure to properly execute its obligations imposed by the RAF Act of 1996;⁷²
- Raising unfounded defences against valid RAV claims;⁷³
- Failing to timeously pay agreed compensation;⁷⁴
- Incompetence of attorneys employed by the RAF and insufficient supervision of appointed attorneys;⁷⁵
- Closure of offices at 12:00 on days preceding public holidays without notice;
- Not acknowledging receipt of a claim in compliance with section 24(1)(b) of the RAF Act of 1996 resulting in a punitive costs order;⁷⁶
- Unjustifiably frustrating the legitimate claim of a RAV;⁷⁷
- Non-compliance with its constitutional duty of upholding '*the constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms*', with a directly adverse effect on the human rights of RAV's.⁷⁸
- Failure to respond to a request by experts for scans and the timeous making of a proper offer;⁷⁹
- Failure to settle a matter capable of being settled before trial;⁸⁰
- Unjustifiably applying for the setting aside of a default judgment and writ of execution;⁸¹
- Using litigation as a cash flow management tool and unjustifiably frustrating the rights of RAVs⁸²;
- Payment of the medical accounts of a RAV and then opposing a RAV's personal claim for injuries on the merits⁸³ and

⁷⁰ *Road Accident Fund v Klisiewicz* [2002] ZASCA 57.

⁷¹ *Madzunya and Another v Road Accident Fund* 2007 (1) SA 165 (SCA).

⁷² *Idem*.

⁷³ *Seymour-Smith v Road Accident Fund* WLD case no. 12441/03 (26 January 2006).

⁷⁴ *Road Accident Fund v Delport* [2006] 1 All SA 468 (SCA); *Razack v Road Accident Fund* [2007] ZAKZHC 26; *Road Accident Fund v Radebe* (1226/2008) [2010] ZAFSHC 154.

⁷⁵ *Road Accident Fund v Ramalebana* [2010] ZAGPJHC 52; *Jwili v Road Accident Fund* SA 32 (GNP); *Louw v Road Accident Fund* 2012 (1) SA 104 (GSJ). In *Louw's* case a punitive cost order was made *de bonis propriis* against the RAF's attorneys. It is submitted that the fact that this occurred is due to the fact that the RAF did not exercise proper control over litigation being conducted on its behalf.

⁷⁶ *Chetty v Road Accident Fund* 2009 (5) SA 193 (N).

⁷⁷ *Mlatsheni v Road Accident Fund* 2009 (2) SA 401 (E); *Daniels and Others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC 104.

⁷⁸ *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) par [78]; ⁷⁸ *Daniels and Others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC 104 par [55].

⁷⁹ *Nonkwali v Road Accident Fund* (771/2004) [2009] ZAECMHC 5.

⁸⁰ *Shikwambana obo Ngobeni v Road Accident Fund* (22252/2005) [2007] ZAGPHC 105.

⁸¹ *Road Accident Fund v Radebe* (1226/2008) [2010] ZAFSHC 154 par [52].

⁸² *Daniels and Others v Road Accident Fund and Others* (8853/2010) [2011] ZAWCHC 104 par [58].

⁸³ *Idem*.

- Failing to answer questions at a pre-trial conference, failing to communicate and offer and only conceding the merits of the claim on the day of the trial.⁸⁴

The picture created by the preceding cases, is reflected in the RAF's financial statements. The following aspects in the financial statements can be noted:

- The RAF pleads poverty to justify its failure to efficiently and properly execute its obligation to RAV's but pays generous remuneration to its executives;⁸⁵
- Considerable amounts are expended on preventable expenses such as sheriff's fees on writs of execution and interest on claims not timeously paid;⁸⁶
- Vast sums of money are used for legal costs.⁸⁷

As far as the expenditure on legal costs is concerned, the RAF may contend that it is sued by claimant's attorneys and cannot control litigation. In actual fact there is a constitutional duty on the RAF to timeously and effectively investigate the claim of a RAV and to ensure that an offer is made at the earliest possible moment.⁸⁸ In addition, the RAF Act is set up in such a way to ensure early settlement and discourage litigation. Sections 19(c) to 19(f) contain provisions which force the claimant to provide information required for settlement even before summons is issued. Section 24(6) creates a respite period of 120 days to allow the RAF to properly investigate a claim before it may be sued. Section 17(3)(b) contains a provision which protects the RAF against the incurring of costs after an offer was made by the RAF. As far as section 17(3)(b) is concerned, this is rarely used and there have been no recent case law has been reported where this section was applied. The RAF seems to not appreciate the urgent need to curb litigation and is seemingly comfortable with the current level of litigation by proposing the establishment of an in-house litigation department as its solution to its substantial legal bill.⁸⁹

⁸⁴ *Louw v Road Accident Fund* 2012 (1) SA 104 (GSJ) and consequently *Louw's* case can on this basis be added to the cases in fn 71.

⁸⁵ According to the RAF financial statements the remuneration package for the CEO for the years 2009 to 2012 exceeded R6 million p.a. Included into this amount was performance bonuses exceeding R2 million p.a. The COO remuneration exceeded R2 million p.a. To put this into perspective Mywage.co.za reports that the total package for the President of the Republic of South Africa is R2,6 million p.a.

⁸⁶ The RAF financial statements show payments amounting R14,9 million in 2009, R23,2 million in 2010, R26,2 million in 2011 and R22, 1 million in 2012.

⁸⁷ The RAF financial statements reflect total legal cost expenditure (own and claimant) as R2,5 billion in 2009, R2,7 billion in 2010. This must be seen against the backdrop of legal costs of R313 million paid by the compensation system in 2001. See the Road Accident Fund Commission Report (2002) Vol I, 283. This constituted 11% of expenditure. On p 84 of the 2012 RAF financial statements the following analysis of legal costs appear: "The average Rand value of claimants' legal costs settled increased by 38% at the end of the 2012 financial year from R28,008 in the previous reporting period to R38,534 (2011: increase of 79% from R15,647 to R28,008). The average claimants' legal cost payments per claim increased by 43% per annum since 2008" and on p 85 "The average Rand value of the RAF's legal cost payments per claim increased by 10% at the end of the financial year from R13,476 in the previous financial year to R14,878 (2011: increase of 32% from R10,224 to R13,476). The average increase in the RAF's legal cost payments per claim has been 9% per annum from 2008 to the end of March 2012."

⁸⁸ See *Road Accident Fund and Another v Mdeyide* 2011 (1) BCLR 1 (CC) par [78]. Also see *Viljoen en 'n Ander v AA Onderlinge Assuransie* 1973 (2) SA 673 (T) at 678D; *AA Mutual Insurance v Gcanga* 1980 (1) SA 858 (A).

⁸⁹ See p 85 of the 2012 RAF financial statements.

The wastage of fuel levy money destined for application to the benefit of the RAV is totally unacceptable when at the same time the RAF pleads poverty and advances the curtailment of benefits of the RAV as the only solution to the balancing of its books in circumstances where it has the undisputable constitutional duty to serve the RAV and is furthermore enjoined by the Act that it administers to provide the RAV with the widest possible protection.⁹⁰

If for argument's sake, wasted expenditure is eliminated, a saving of R22 million can be made. Bringing down the CEO remuneration to presidential level, can save another R4 million. Reducing litigation costs by 50% by introducing a policy of early settlement in compliance with the RAF's constitutional duty and enforcement of section 17(3)(b), arguably another R1,75 billion can be saved. Further savings can be made by jettisoning the payment of supplier's claims separate from the claim of a RAV which in any event is legally problematical and adds to legal and administrative costs.⁹¹ The total saving in expenditure thus achieved could have reduced the necessity of the curtailment of RAV rights or at least have contributed to the amelioration of the financial level of restrictions.

4.2.3 Loss of income and maintenance

The RAFAA by virtue of the amendment of section 17 by the introduction of section 17(4)(c) restricts the maximum income on which these losses are to be calculated to an initial amount of R160 000 which is periodically adjusted for inflation. There is no indication in the RAFAA of how this amount is determined and seems to be an arbitrary figure. The principle advanced in the preceding paragraphs relation to the curtailment of a RAV's non-patrimonial rights; apply with equal force to this limitation. The limitation is manifestly discriminatory because it does not affect all RAVs equally. The RAV who earns less than the prescribed limit is fully compensated, while the high income earner receives proportionally less. Of course, it is the loss of earnings which is limited and therefore the same arguments apply to restrictions placed on claims for loss of maintenance. In addition the cap on income in the context of the provision of maintenance has an adverse effect on dependants and is probably in principle contrary to the State's constitutional obligation to ensure that children are adequately cared for.⁹²

In addition, the benefit afforded does not accord with similar legislative compensation for loss of earnings. Section 47 of the Compensation of Occupational Injuries and Diseases Act 130 of 1993 (COIDA) regulates payment for temporary disablement to work. Item 1, Schedule 4 of COIDA

⁹⁰ See in this regard the arguments advanced on behalf of the Minister in *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) and par 3.2 above. Also the disingenuous claim that the removal of the restrictions in relation to passengers would generate a R3 billion additional exposure when the Road Accident Fund Commission Report (2002) Vol I, p 89 states that these passengers only make up 16% of all claimants. Par 5.35 (p 90) – 5.36 of the report indicates that 54% of passengers are slightly injured and 25% had moderate injuries. The average income of employed passengers in 2001 was R2 502 per month.

⁹¹ See Klopper *Law of Third Party Compensation* (2012) 24; Klopper "Supplier's claims in terms of section 17(5) of the RAF Act of 1996" August 2007 *Contemporary Journal of Roman Dutch Law* 469.

⁹² See *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

provides that monthly compensation for temporary disablement be paid at a rate calculated at 75% of the actual income of the claimant at the time of the injury subject to a maximum of R18 252 and R2 554, 50 per month. In the case of 100% permanent disablement, the benefits as determined by section 49 and item 4 of Schedule 4 of COIDA are paid. This amounts to 75% of the claimant's income with the same maxima as stipulated for in the case of temporary disablement. Where death benefits have to be calculated, the surviving spouse receives a lump sum of twice the employee's monthly pension which would have been receivable if the deceased was permanently disabled, subject to a minimum of R5 109 and a maximum of R36 504. Where the deceased left a widow and child, the compensation that accrues is 40% of the monthly pension that would have been payable to the employee had he been totally permanently disabled with a minimum of R1 021 and a maximum of R7 300 per month. In contrast the current benefit which accrues to all claimants who have been injured or whose breadwinners have been killed in a motor vehicle accident is based on a current income of R204 904 per year (R17 075,33 per month). This must be seen against the backdrop of the RAV's position as claimant. In terms of COIDA the claimant does not have to prove fault and neither the amount to which he is entitled whereas the RAF claimant bears the cost and risk of proving both which means that the RAF benefit is reduced by the cost⁹³ incurred in proving loss.

5. Road Accident Benefit Scheme

5.1 Introduction

The naming of the road accident compensation system as a scheme conjures up negative connotations. Road Accident Victim Benefit Fund (RAVBF) is more descriptive and delivers a far more positive image. The Road Accident Fund Benefit Scheme Bill of 2012 comprises 61 sections of which sections 3 to 27 are concerned with administration and finance. These sections are for purposes of this discussion ignored.

The constructive and full discussion and evaluation of the Bill is hampered by the fact that no hard supporting information on the level of funding of proposed benefits is given. It is virtually impossible to either commend or reject the Bill without being privy to this information. For this reason no opinion on the merits of the benefits and their computation can be expressed.

The legislator seemingly has accepted that the introduction of no-fault liability will as if by magic reduce the amount of claims, costs, and litigation. This is not necessarily the case. Experience in jurisdictions in the USA seems to show differently.⁹⁴ For this reason the legislature must be enjoined to ensure that the proposed system does not become unaffordable in future.

The Bill has to be judged against the backdrop of existing no-fault systems – preferably those in the USA and not the systems found in Australia because the American jurisdictions have a much longer

⁹³ Provision of expert medico-legal reports (at an average R12 000 per report) and legal fees which may be up to 25% of the compensation received or double the taxed attorney and client costs. See The Contingency Fee Act 66 of 1997.

⁹⁴ See James M. Anderson, Paul Heaton, Stephen J. Carroll *op cit*.

history and experience to draw upon. In addition, it must comply with Constitutional principles such as proportionality and be non-discriminatory.⁹⁵

5.2 Definitions

5.2.1 Average national income

As pointed out above, the use of averages to determine compensation is discriminatory and defeats the primary objective of compensation being the compensation of a RAV by applying dedicated funds for the compensation of RAV to the extent that the RAV does not burden society and does not place a strain on other social security benefits. In addition, section 55(3) does not make any provision for the manner in which the average determined and amounts to legislation by regulation.⁹⁶ The manner in which COIDA determines compensation cannot be ignored when framing benefits in terms of RABS as this will be discriminatory. COIDA uses the actual income of a claimant but basically restricts compensation to 75% of the actual earnings with minima and maxima.⁹⁷

5.2.2 Reasonable funeral expenses

Reasonable funeral expenses have been judicially interpreted to encompass much more than is apparently envisaged.⁹⁸ Furthermore, the reasonableness of the expenses is contradicted by the restriction of R10 000 in section 40. Viewed in the light of section 54 and item 10 of Schedule 4 of COIDA of 1993 which provides for a current funeral benefit of R13 716 (or the actual amount, whichever is the lesser) the proposed limit is discriminatory. Provision must be made for the increase of the amount to make provision for rising funeral costs and inflation.

5.2.3 Child

The current definition does not clearly define a child other than a posthumous child. Section 1 of the Children's Act 38 of 2005 defines a child as a *person* under the age of 18 years. The latter definition and the definition of "child" in COIDA should be incorporated in the current definition.⁹⁹

5.2.4 Dependant

The wording seems to suggest that only persons in (c) of the definition are subject to the requirement of a pre-existing duty of support. The definition can be simplified by defining a

⁹⁵ See *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa*; *Executive Council of KwaZulu-Natal v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC); 1995 4 SA 877 (CC).

⁹⁶ *Idem*.

⁹⁷ *Idem* and also see Schedule 4 of COIDA.

⁹⁵ See *Rondalia Versekeringsmaatskappy v Britz* 1976 (3) SA 243 (T); *Young v Hutton* 1918 WLD 90; *Schneider v Eisovitch* 1960 2 QB 430. These cases are applicable because the Bill is *in pari materia*.

⁹⁹ A child is defined by the COIDA of 1993 as: "(d) a child under the age of 18 years of the employee or of his or her spouse, and includes a posthumous child, step-child, an adopted child and a child born out of wedlock; (e) a child over the age of 18 years of the employee or of his or her spouse, and a parent or any person who in the opinion of the Director-General was acting in the place of a parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee."

dependant as any person who, immediately before a deceased's death, was owed a legally recognised duty of support by a deceased person.

5.2.5 Funeral

The remains of the deceased needs to be interred and not the deceased.

5.2.6 Medical practitioner

The concept "medical practitioner" is not confined to those practitioners registered as such in terms of the Health Professions Act 56 of 1974 but also include health practitioners registered in terms of the Allied Health Professions Act 63 of 1982.¹⁰⁰

5.2.7 Road Accident

This is the most important definition in the entire Bill but has not been well considered or adequately framed. The jettisoning of existing liability determining concepts previously used and judicially defined is unwise as it may give rise to unwanted litigation regarding what, for instance, is meant by the "use" of a motor vehicle. The definition also skirts the question of hit-and-run cases where there is no impact. Actual impact ("physical contact") as a requirement for liability has been found to be constitutionally illegitimate.¹⁰¹

No-fault liability system is frequently based on a preceding common law liability of the wrongdoer or the use or operation of a motor vehicle.¹⁰² None of them use the concept "road accident". Those jurisdictions that do not refer to common law liability use the concept of "use or operation of a motor vehicle" and avoid the concept of collision (road accident). It is unwise to disregard the body of law developed in relation to motor vehicle collisions and resultant personal injury or death over 60 years in favour of a new concept which is likely to give rise to unwanted and costly litigation. The obvious solution is to discard the concept of road accident and retain common law liability without fault as the basis for liability of the RAVF. This means that the definition of "road accident" should be discarded. If not, the definition is as it stands inadequate to cover all possible situations.¹⁰³

¹⁰⁰ See *Geel v Road Accident Fund* (20964/2011) [2012] ZAWCHC 145.

¹⁰¹ See *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC).

¹⁰² See for example: s 34M Massachusetts General Laws, Part I, Title XIV, Chapter 90 "Motor Vehicles and Aircraft" accessible at <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXIV/Chapter90/Section34M>; s 627.737 of the Florida Statutes, Title XXXVII "Insurance" Chapter 627 "Insurance Rates and Contracts." Accessible at http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0600-0699/0627/Sections/0627.737.html. S 3105 Michigan Insurance Code of 1956, Act 218 of 1956 Accessible at <http://www.legislature.mi.gov/%28S%28gku1ts45tnin0myjfxreenfe%29%29/mileg.aspx?page=GetObject&objectname=mcl-500-3105>; Article 51 of the New York "Comprehensive Motor Vehicle Insurance Reparations Act" accessible at http://www.dfs.ny.gov/insurance/r68/r68_art51.htm; s 266 of the Ontario Insurance Act R.S.O 1990 Chapter 18 accessible at http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90i08_e.htm.

¹⁰³ See in this regard the for example the definition of a "motor accident" in s 3 of the New South Wales Motor Accidents Compensation Act 1999: "means an incident or accident involving the use or operation of a motor vehicle that causes the death of or injury to a person where the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during: (a) the driving of the vehicle, or (b) a collision, or action taken to avoid a collision, with the vehicle, or (c) the vehicle's running out of control, or (d) a dangerous

5.2.8 Spouse

The central principle in South African law which underlies a claim for loss of maintenance in South African law is the duty of support that a deceased owed to the relevant dependant.¹⁰⁴ The definition should avoid specifics and merely state that a spouse is a person who was legally married to the deceased immediately prior to his/her death and includes life partners in a marriage according to religious rites and live-in life partners provided that such life partners were owed a legally recognised duty of maintenance by the deceased, however created.¹⁰⁵

5.2.9 Vehicle

The term “vehicle” is used but the definition refers to a motor vehicle. This is confusing and may cause interpretational problems and litigation. The definition employed has been wholly taken from the RAF Act. This definition has proven to be problematical giving rise to litigation¹⁰⁶ and needs rewording either by the introduction of a definition of “road” or a proviso which excludes motor vehicles that cannot be legally used on a public road in terms of the provisions of the National Road Traffic Act 93 of 1996 and its regulations or restricting the concept “road” to a public road.

5.3 Objectives

The wording needs a serious reconsideration. The use of the word “scheme”, despite its origin being in the Road Accident Fund Commission Report (2002), is problematical. Surely the object of the Act is to establish a Fund from which reasonable and equitable benefits are paid to persons who have suffered damage or loss as a result of a motor vehicle accident in lieu of common law damages. The

situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle’s running out of control.” Accessible at www.maa.nsw.gov.au. See also the definition of a “transport Accident” in s 3 of the Victorian Transport Accident Act 1986: “transport accident means an incident directly caused by the driving of a motor car or motor vehicle, a railway train or a tram.” Accessible at http://www.austlii.edu.au/au/legis/vic/consol_act/taa1986204/s3.html.

¹⁰⁴ See Davel *Skadevergoeding aan afhanklikes* Digma (1987) at 69; Boberg *The Law of Persons and the Family* at 250 ff; Van der Vyver and Joubert *Persone- en Familiereg* (1991) at 629; Spiro *The Law of Parent and Child* (1985) at 403; *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260; *Lambrakis v Santam Ltd* 2000 (3) SA 1098 (W).

¹⁰⁵ See *Ismail v Ismail* 1983 (1) SA 1006 (A); *Ryland v Edros* 1997 (2) SA 690 (C); *Mlisane v SA Eagle Insurance Co Ltd* 1996 (3) SA 36 (C); *Santam Insurance v Fondo* 1960 (2) SA 467 (A); *Nkabinde v SA Motor and General Insurance* 1961 (1) SA 302 (D). In *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D) it was held the word 'spouse' as used in s 1 of the Intestate Succession Act 81 of 1987 includes the surviving partner to a monogamous Hindu marriage and especially *Amod v MMF* 1998 (4) SA 753 (CC) where it was held that on the facts of the case a duty of maintenance was created. See in addition *Verheem v Road Accident Fund* 2012 (2) SA 409 (GNP); *Paixão and another v Road Accident Fund* [2012] 4 All SA 262 (SCA); 2012 (6) SA 377 (SCA).

¹⁰⁶ See *Chauke v Santam Limited* 1995 (3) SA 74 (W); 1997 (1) SA 178 (A); *Prinsloo v Santam* [1996] 3 All SA 221 (E); *Matsiba v Santam* 1996 (3) SA 87 (T); 1997 (4) SA 832 (SCA); *Santam Limited v David Russel Mundy, Peter Viola and the Automobile Association* (unreported CPD case no. 4427/95) reported in July 1998 *De Rebus* 55; *Day v Mutual and Federal* [1998] 2 All SA 87 (SEC); 1999 (4) SA 813 (E) reversed on appeal in *Mutual and Federal Insurance Co Ltd v Day* [2001] 4 All SA 6 (A); 2001 (3) SA 775 (SCA); *Road Accident Fund v Mbendera and Others* [2004] 4 All SA 25 (SCA); *Mtamane v Road Accident Fund* 2002 (4) SA 599 (N); *Road Accident Fund v Vogel* 2004 (5) SA 1 (SCA); *Road Accident Fund v Van den Berg* 2006 (2) SA 250 (SCA); *Berry and Another v Spe Security Patrol Experts and Another* 2011 (4) SA 520 (GNP); *Road Accident Fund v Coleman* (unreported case no A3045/2009) (GSJ); *Jeffrey v Road Accident Fund* (2008/5396) [2012] ZAGPJHC 259; 2012 (4) SA 475 (GSJ).

nomination of an Administrator is also peculiar as section 3(2) provides that “the Administrator” is a juristic person. It would clearer if the purpose of the Act was to establish a Road Accident Victim Benefit Fund who is then the juristic person.

The complete exclusion of liability of a wrongdoer is problematical as current case law has not fixed any principle regarding a total exclusion of liability where the object is the compensation of the person whose rights are being abrogated.¹⁰⁷ This will only be possible if the RAVBF pays *all* heads of damages (including non-patrimonial loss albeit to a limited extent) in lieu of a RAV’s common law claim.¹⁰⁸ If non-patrimonial loss is to be excluded, provision must be made for the retention of rights – even if it is made subject to fault and a threshold and limited to certain predetermined amounts.

5.4 Chapter 2 to 4

No comment is made on these chapters as they are administrative matters which do not directly relate to the right to compensation of RAVs.

5.5 Liability

Section 28 should contain wording which clearly determines when the RBVAF will be liable. As it stands it is unclear and a reading of the definitions is required to establish when the RBVAF is liable. In addition provision should be made for non-patrimonial loss. Something on the following lines is suggested:

28.1 When a person is injured or killed by the driving or use of a motor vehicle anywhere in the Republic of South Africa, the driver or user or their employer shall not be liable for any damages.

28.2 The RAVBF shall be solely liable for the payment of the benefits provided for in this Act in lieu of damages caused by or arising from the driving or use of a motor vehicle that such a person could at common law be able to recover from a wrongdoing owner, driver of the vehicle concerned or the employer of the driver of such vehicle were it not for this section; provided that an injured person’s claim for non-patrimonial loss will be paid by the RAVBF if such an injured person sustained a personal injury caused by or arising from the negligent driving of a motor vehicle or another unlawful act which results in dismemberment; significant disfigurement; a fracture; loss of a foetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the

¹⁰⁷ See Vol 1 par 18.18 (p 472) of the RAF Commission report.

¹⁰⁸ See in this regard par 4.2.3(b) above. The abolishment of general damages will result in 46% of RAV’s receiving no compensation at all. See the Road Accident Fund Commission Report Vol III par 18.9 (p 210). None of the jurisdictions that offer no fault patrimonial benefits have abolished claims for non-patrimonial loss but either use limitations or thresholds to access common law rights to claim non-patrimonial loss. See the Road Accident Fund Commission Report Vol I par 20.63 (p 577). See in this regard par 4.2.3 above.

injury or impairment. A claim for non-patrimonial loss will be limited to the amounts set out in Schedule X of this Act.

Exclusion from liability must be dealt with in a separate section. In jurisdictions where no-fault liability is employed wider categories of exclusions than the one regarding terrorism currently included, are applied. The following are examples of such exclusions found in NSW, Ontario and New York:

- Driving a vehicle when you knew or should have known you were driving without the owner's consent;
- Being a passenger who knew or should have known that the driver did not have the owner's consent to drive the vehicle;
- Injured as a result of operating a motor vehicle while in an intoxicated condition or while his ability to operate such vehicle is impaired by the use of a drug;
- Using a motor vehicle in connection with criminal activity;
- After being convicted of certain specified offences in respect of driving the motor vehicle at that time;
- A person who intentionally causes his/her own injury;
- Operating a motor vehicle in a race or speed test;
- Repairing, servicing or otherwise maintaining a motor vehicle if such conduct is within the course of a business of repairing, servicing or otherwise maintaining a motor vehicle and the injury occurs on the business premises.

Apart from the preceding the exclusionary non-cooperation provisions of section 19 (c)-(f) can be adapted and added to suit the objectives of the RAVBF Act and also linked to section 46.

The current section 28(a) is problematical. The liability created by the Bill is no-fault. The redress enforceable in terms of section 36 of COIDA of 1993 is based on common law delict which implies fault. In terms of the RAF Act the wrongdoer is substituted by the RAF thereby rendering the RAF subject to section 36. The RAVBF will therefore not be liable in terms of section 36 of COIDA as the Bill contains no provision rendering it liable in its capacity as substituted wrongdoer. It is a policy decision which has to be made whether wrongdoers may be held liable in terms of section 36 where the RAVBF has liability. If no liability has to be introduced, it must be done by the amendment of section 36 of the COIDA of 1993.

The balance of the provisions needs reconsideration. The necessity of deducting awards made in terms of other legislation is a function of the assessment of damages in order to prevent overcompensation. A policy decision has to be made whether a person who has suffered loss as the result of the use or operation of a motor vehicle is to be dealt with exclusively in terms of the RAVBF or not. It will be far simpler to exclude persons who are entitled to compensation in terms of any other statute from RAVBF benefits. The more so, if the compensation afforded by RAVBF is on a par

to the compensation paid in terms of another statute which in any case is a constitutional imperative.¹⁰⁹

5.6 Benefits

5.6.1 Generally

Chapter 6 dealing with benefits seems to be comprehensive and the exact detail thereof is not considered for purposes of this article save to say that it is verbose and complicated and as such is susceptible to dispute and litigation. It also seems to be cost generating. The lawmaker can fruitfully utilise the COIDA of 1993 in this regard to considerably simplify the determination of loss of income and support benefits.¹¹⁰ Furthermore, the avoidance of specifying concrete amounts in relation to benefits and in essence employing the common law method of quantifying the amounts is contrary to what such a scheme such as the RABS is setting out to achieve – the minimising of potential disputes by the setting of prescribed liquidated compensation benefits determined in a transparent manner. The use of the national average income in the computation of benefits is unconstitutional as it creates discrimination between persons injured in terms of COIDA and RAVs.¹¹¹ The formula used in COIDA should be used as a template and adapted to the purpose of the RABS. The COIDA method is tried and proven manner of determining compensation and has not given rise to any significant litigation.¹¹² It is also easier to adjust benefits by not requiring any amendment of the governing act.

5.6.2 Age as a criterion

The use of age to limit an award compensation for loss of income and support is unfair and discriminatory. A minor's entitlement to be supported is not age dependent¹¹³ and is constitutionally protected.¹¹⁴ The age of 60 years is also discriminatory as the COIDA of 1993 is not age specific as far as the computation of compensation is concerned. If the idea is that a beneficiary will then qualify for other social assistance, it remains discriminatory in that the benefits received in terms of RABS will be far more than any other assistance causing the object of the RABS benefit to be defeated.¹¹⁵ Possibly the solution may be to deduct any statutory grant or benefit received from the benefit which a RAV receives as and when the other benefit accrues.

¹⁰⁹ In order to avoid discrimination. See ss 8 and 9 of the Constitution of the Republic of South Africa, 1996.

¹¹⁰ For example, compare the wording of s 47 of the COIDA of 1993 with s 38 of the Bill.

¹¹¹ See s 8 and 9 of the Constitution of South Africa, 1996.

¹¹² Only 19 cases over the past 14 years have been reported. Only one case relating computation of compensation was reported. See *Healy v Compensation Commissioner and Another* 2010 (2) SA 470 (E).

¹¹³ See *Burse v Bursey* 1999 (3) SA 33 (SCA). A child is defined by the COIDA of 1993 as: "(d) a child under the age of 18 years of the employee or of his or her spouse, and includes a posthumous child, step-child, an adopted child and a child born out of wedlock; (e) a child over the age of 18 years of the employee or of his or her spouse, and a parent or any person who in the opinion of the Director-General was acting in the place of a parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee." The Bill does not define a "child".

¹¹⁴ See *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

¹¹⁵ I.e the substitution of equitable no-fault compensation for common law damages.

5.6.3 Benefit review

Section 41 dealing with benefit review contains the harsh provision that the Administrator may wholly or partially suspend, revoke or review a benefit without a specific reference to subsection 2 which specifies the circumstances under which suspension, revision or revocation may occur. The provision is one-sided and must make provision for reasonable notice incorporating reasons for such a step to the beneficiary before it can be implemented and may only be implemented after consideration of all representations made by the beneficiary. It must also be possible for a claimant to apply for a benefit review in cases where there are substantial changes in the circumstances of a RAV.¹¹⁶

5.7 Claims procedure

5.7.1 Curator

The necessity to appoint a curator as envisaged by section 42 will only arise in the case of lump sum payments and in instances where the recipient is proven not to be able to manage his own affairs either by reason of minority or mental incapacity. The current provision in section 42 is too wide ranging, is cost generating and must be reconsidered by precisely qualifying the power afforded in this regard.

5.7.2 Interrogation

Section 47 must make provision for legal representation in cases where an interrogation is conducted. Furthermore, doctor-patient privilege is acknowledged in section 47(3) but disregarded in section 45(c) and (d). The necessity of obtaining personal medical information is appreciated but on the other hand the doctor-patient privilege cannot be disregarded.

5.7.3 Time restrictions

The provisions in section 47 are intended to create time bars for the institution of claims and are essentially prescription periods. This provision is undoubtedly unconstitutional. The constitutional court has held that time bars that do not accord with the Prescription Act of 1969 are illegal.¹¹⁷ In addition the present provision with its many periods is confusion and potentially prejudicial to the

¹¹⁶ See in this regard s 33 and 34 of the Constitution of South Africa, 1996 and *Oosthuizen's Transport (Pty) Ltd and others v MEC, Road Traffic Matters, Mpumalanga, and others* 2008 (2) SA 570 (T); *Langa CJ and others v Hlophe* 2009 (4) SA 382 (SCA); *Bullock NO and others v Provincial Government, North West Province, and another* 2004 (5) SA 262 (SCA).

¹¹⁷ For examples of unconstitutional time bars see See s 32A of the Black Administration Act 38 of 1927; s 343.2 of Merchant Shipping Act 57 of 1951; s 113 of the Defence Act 44 of 1957; Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970; s 68 of the Mental Health Act 18 of 1973; s 42A of the Education and Training Act 90 of 1979; s 108 of the Education Affairs Act 70 of 1988; s 52 of the Audit Arrangements Act 122 of 1992; s 26 of the Intelligence Services Act 38 of 1994; s 39 of Proc No. 103 of 1994 in terms of the Public Service Act, 1994; s 57 of the South African Police Service Act 68 of 1995; s 59 of the South African National Roads Agency Limited and National Roads Act 7 of 1998; s 130 of the Correctional Services Act 111 of 1998 and s 109 of the Local Government: Municipal Systems Act 32 of 2000. See *Mhohlomi v Minister of Defence* 1997 (1) SA 124 (CC) in respect of section 113 of the Defence Act 44 of 1957, *Moise v Greater Germiston Transitional Council* 2001 (4) SA 491 (CC) in respect of section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970.

population that the RABS intends to serve.¹¹⁸ Accordingly the time for a notice of intention of instituting of a claim must be 6 months and the claim must be enforced by the serving of a summons within 3 years. Provision must be made for an application for the condonation for the late filing of the notice of intention to claim.¹¹⁹

5.7.4 Appeals and Costs

The composition of the appeal body is unsatisfactory because it creates a perception of bias. The appeal board should be constituted by a presiding officer being a judge or retired magistrate who has suitable experience in dealing with personal injury matters, an assessor who is a suitably experienced medical practitioner or other expert with expertise relevant to the question being decided and one or more member(s) of the RAVBF. The ability of the appeal board and an interested party to refer a matter to the High Court by means of a stated case must be authorised by a specific section of the proposed act. A beneficiary must be able to appeal against a finding of the appeal board directly to the High Court. A direct appeal to the SCA by the RAVBF against any finding of a High Court with which the RAVBF is dissatisfied must be authorised. A provision relating to evidence and the record of proceedings of the appeal board must also be added.¹²⁰

The claimant should be entitled to all costs (including legal costs¹²¹) if an appeal is successful. The unqualified disavowing of all costs is to the detriment of the RAV bearing in mind the profile of the average RAV as outlined in the Road Accident Commission Report of 2002 is unwarranted.¹²²

6. Conclusion

The RAV has over the past 60 years received equitable and fair compensation for damages and losses sustained as a result of the negligent driving of a motor vehicle. These rights have been eroded in an endeavour to have the compensation system make ends meet. The method employed as an interim measure by the RAFAA has seriously degraded the rights of a RAV as they existed before the promulgation of the RAFAA on 1 August 2012. The RAFAA, despite judicial approval by the Constitutional Court is riddled with iniquity and is currently being implemented with incomplete regulations and missing proclamations by the Minister of Transport and is clearly to the RAV's disadvantage. The RABS Bill of 2013 sets out to provide adequate patrimonial benefits for the RAV but sets about doing so in a complicated and convoluted manner. It is not possible to properly evaluate the proposal without having information regarding the levels of benefits that could possibly accrue to a RAV in terms of the proposed system. The nomenclature of "Road Accident Benefit Scheme" is not sufficiently descriptive and Road Accident Victim Benefit Fund is preferred and some of the definitions have to be reworded to avoid confusion and litigation. The proposed abolition of a RAV's claim for non-patrimonial loss, the setting of average income as the basis of benefit calcu-

¹¹⁸ See *Road Accident Fund and another v Mdeyide* 2011 (2) SA 26 (CC) par {75} ff.

¹¹⁹ See the provisions of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 promulgated in response to the judgments of the constitutional court quoted in fn 117 and especially *Mhohlomi v Minister of Defence* 1997 (1) SA 124 (CC).

¹²⁰ Suggestion modeled on section 91 – 93 of the COIDA of 1993.

¹²¹ Legal costs can in this instance be subjected either to a tariff prescribed in the RAVBF Act or prescribed maximum fees to be negotiated with the legal profession.

¹²² See the report, Vol I p XIII where it is stated that 74% of victims earned less than R4000 per month.

lation and the manner in which the average is determined, the age limitation placed on benefits as well as the time restraints are unconstitutional and in need of reconsideration. The manner of the calculation of benefits is long winded and not in compliance of the objective of the setting of structured benefits and in this regards the concise method used by the COIDA of 1993 should be used as a template. The composition of the Appeal Board is unacceptable due to the possibility of bias and no provision is made for further access by a RAV to the courts thereby unjustifiably limiting the RAV's right to access the courts. The success and viability of the proposed new compensation system is dependent on the proposed level of benefits and the proper formulation of the basis and extent of liability. The current Bill fails to properly formulate the basis and extent of liability of the RAVBF.