

RECOMMENDED LEGISLATIVE CHANGES TO THE ROAD ACCIDENT FUND AMENDMENT ACT: COMPENSATION FOR PSYCHOLOGICAL HARM

Introduction

1. The current Road Accident Fund (RAF) legislation has set out a narrow and restricted approach to, essentially, partial restitution for damages suffered in a motor vehicle collision.
2. This partial restitution includes not only limits on quantum but, far more significantly for purposes of legislative review aimed at addressing the social security function of the RAF, limits acknowledgement of not only the severity of injuries suffered by victims of such collisions, but also limits acknowledgement of the nature of injuries that those victims may have suffered.
3. The remainder of this discussion paper focuses on legislative reform required in order to acknowledge and appropriately compensate victims of vehicle collisions who have suffered any type of injury, rather than restricting compensation to only those who have suffered “serious” physical injury.

Current status

4. Current legislation specifies that the victim of a motor vehicle collision may only claim compensation for general damages if that victim has suffered various prescribed types of injury, and that compensation is awarded only if these injuries are considered to be “serious”.
5. The injuries that may warrant compensation are, largely, restricted to only physical injuries.
6. The assessment of injuries is restricted to only suitably qualified and duly registered **medical practitioners**.
7. Those duly registered medical practitioners must have undergone training in the assessment of serious injuries, with the current prescribed training being that offered by the American Board of Independent Medical Examiners.
8. With regard to eligibility for compensation, the medical examiner must determine that the victim has suffered a “serious injury”, defined as an injury assessed by the prescribed method which has resulted in at least 30% Whole Person Impairment.
9. Compensation for psychological harm can only be awarded if the victim of the motor vehicle collision meets the diagnostic criteria for a psychiatric disorder.

Shortcomings of the current status

10. Current legislation does not acknowledge that victims of motor vehicle collisions may suffer psychological harm in the absence of physical injuries.
11. In order for the victim of a motor vehicle collision to claim compensation for emotional sequelae of a motor vehicle collision, that victim has to be diagnosed as suffering a **psychiatric** condition caused by the collision.
12. Current legislation does not acknowledge that psychological harm as a result of a motor vehicle collision may not result in diagnosis of a psychiatric disorder. It would seem, rather, that psychological harm and psychiatric disorders are considered to fall on a continuum, and as a consequence of that thinking psychological harm will only be “serious” enough to warrant compensation when the severity of that harm falls far enough along the continuum to meet the diagnostic criteria for a psychiatric disorder. This thinking is fallacious.
13. Current legislation, as mentioned above, requires that a suitably qualified medical practitioner assess the severity of injuries suffered by the victim of the motor vehicle collision. In the light of the lack of acknowledgement that psychological harm can be caused in the absence of physical injury the current legislation effectively precludes comprehensive assessment of all possible injury or harm that the victim of the collision may have suffered since, generally speaking, the medical practitioners who are undertaking the assessment of injury are not qualified or competent to assess the presence, nature or severity of psychological harm.
14. In the worst case, therefore, this may result in psychological harm not being recognised and therefore not provided for in terms of both provision for treatment, on the one hand, and award of compensation on the other. It is probable that in instances such as these the victim’s functioning within his/her particular circumstances will be diminished as a result of persisting residual psychological harm.
15. The best case scenario is that the medical practitioner recognises the possible presence of psychological harm, but is then compelled to canvass the opinion of an appropriately trained and registered psychologist or psychiatrist, thereby not only increasing the costs of suit but also exposing the victim to repetitive trauma flowing from the recounting of the collision and its sequelae.
16. In the instance where psychological harm is recognised, it is frequently the case that the nature of that harm is such that the victim’s presentation does not meet the diagnostic criteria for a psychiatric condition. In terms of the current legislation, if the victim cannot be diagnosed as suffering a psychiatric disorder as a result of the motor vehicle collision, then psychological harm is not compensated for.
17. This raises the distressing reality, one with Constitutional impact, that the victim of a motor vehicle collision may be forced to submit to the indignity of a

psychiatric diagnosis being made in order to qualify for compensation for emotional harm. The current legislation therefore falls foul of the inalienable Right to Dignity enshrined in our Constitution.

Proposed solutions

18. Current legislation, should it not be repealed and replaced by more progressive legislation, should be amended to ensure, amongst others, the following:
 - 18.1. The awarding of compensation for psychological harm in the absence of physical injury, as a result of a motor vehicle collision, must be provided for.
 - 18.2. Psychological harm and psychiatric disorders do not fall on the same continuum and as such severity of psychological harm cannot be measured by whether the victim meets the diagnostic criteria for psychiatric disorder. Therefore, awarding of compensation for psychological harm should not require that the victim meets the diagnostic criteria for psychiatric disorder. In this regard, it must be acknowledged that to compel a victim to submit to psychiatric diagnosis in order to claim compensation for psychological harm infringes on the Constitutional right to dignity.
 - 18.3. The assessment of severity of psychological harm must be undertaken by an appropriately trained and registered mental health practitioner, and **not** medical practitioner; in most instances this assessment will be undertaken by a clinical psychologist or psychiatrist. The current regulations should therefore be amended accordingly.
 - 18.4. Assessment and determination of severity of psychological harm is probably best documented in a comprehensive medical-legal/forensic mental health report (either clinical psychological or psychiatric), rather than being documented in a *pro forma* checklist such as the RAF 4 Serious Injury Assessment Report.

Benefits of these proposals

19. Psychological harm suffered as a result of being involved in a motor vehicle collision is acknowledged.
20. The Constitutional right to dignity is not infringed upon by compelling the victim of a motor vehicle collision to submit to psychiatric diagnosis in order to qualify for compensation for psychological harm suffered as a result of a motor vehicle collision.
21. Determination of the presence of psychological harm as a result of being involved in a motor vehicle collision is undertaken by appropriately qualified and trained mental health practitioners who are competent in determining psychological

harm and psychiatric disorder, and implications of these on the quantification of damages suffered by the victim.

22. Assessment of harm or damage suffered as a result of being involved in a motor vehicle collision can be comprehensively described, assessed, treatment protocols recommended and a basis for calculation of compensation determined.
23. Evaluation of probable impact of appropriate early intervention on diminution of psychological harm can contribute to appropriate determination of damages.
24. Costs of suit can be reduced by avoiding duplication of evaluations because of inappropriate assessment by medical practitioners, who are not usually trained or competent in the assessment of psychological harm, who then have to refer for appropriate assessment.

Conclusion

25. The above critique sets out some shortcomings with regard to current legislation and its failure knowledge psychological harm suffered as a result of being involved in a motor vehicle collision.
26. Recommendation, in concept, are suggested in order to alleviate these shortcomings.
27. The recommendations are considered from a healthcare practitioner's perspective. It is strongly advised that appropriately trained and experienced mental health care practitioners collaborate with legal practitioners in the formulation and articulation of recommendations for legislative reform.

A handwritten signature in blue ink, appearing to read 'TR Reynolds', with a large, stylized flourish extending to the right.

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