THE ROAD ACCIDENT FUND - AN OVERVIEW

WHAT IS THE ROAD ACCIDENT FUND?

The RAF is a state funded, parastatal organisation providing indemnity insurance to drivers of motor vehicles in South Africa. This indemnity insurance covers drivers for damages caused as a result of injuries sustained by others and arising from either the negligence or unlawful act of such drivers (or owners of the vehicles concerned).

The RAF is funded by way of a levy on fuel purchases. The quantum of the levy per litre is determined annually by the National Treasury. It sits currently at R2.07 per litre. Total revenue for last year was 43.2 billion rands. The Department of Transport is the executive authority of the fund and the organisation reports to the Minister of Transport.

WHEN CAN YOU CLAIM FROM THE RAF?

A motor vehicle driver or a pedestrian may claim from the RAF if he or she sustains injuries in a collision which was caused by the negligent or other unlawful act of either the driver or owner of another motor vehicle. Passenger claims are significantly easier as the pre- 2008 limitations have been removed from passenger claims. Provided one can prove negligence on the part of another driver, a passenger enjoys full cover - to the extent of that provided by the Fund. Claims for loss of income and general damages are capped. There is also an abolition of common law rights so the portion of damages that is not claimable from the RAF cannot be claimed directly from the wrongdoer.

PRESCRIPTION:

If the driver who caused the collision is identified, then a claim arising therefrom needs to be submitted within 3 years of the collision. If the driver who caused the collision is unidentified then the collision is considered to be a hit and run and the claim deriving therefrom must be lodged with the RAF within 2 years. The identified claim of a minor child shall only become prescribed three years after the age of majority. This is not the case with a hit and run claim which would still need to be lodged within 2 years. Summons has to be issued within 5 years of the date of the collision except in the case of a minor involved in a collision where the negligent driver is identified. In this case, summons would have to be issued within 5 years of the age of majority. It is to be noted that one cannot simply issue summons. One is required to lodge the claim in accordance with the legislation first.

WHAT CAN YOU CLAIM FROM THE RAF?

- Past hospital, medical and related expenses;
- Future hospital, medical and related expenses;
- Past and future loss of income earning capacity;
- General damages
- Funeral expenses

There are several different experts who provide medico legal reports to the claimant and/or to the RAF. These reports set out the nature and extent of the injuries sustained, the manner in which such injuries have impacted on the functionality of the claimant and also the nature and cost of treatment or assistance necessary to ensure either a full recovery or at least the best recovery possible.

It is important to note that the RAF covers only damages suffered as a result of injuries sustained. One cannot claim from the Fund for damage to vehicles or items inside a vehicle. A brief explanation of each head of damages is set out below but before that, a brief discussion of previous conditions and/or comorbidities is necessary.

Pre-existing conditions and comorbidities

Not all claimants are completely healthy or functional when they are involved in a collision. People suffer all manner of diseases, ailments, impairments and disabilities. If a claimant suffers from any of these and they have a bearing on the functionality of the claimant, they may very well impact on the quantum of damages claimable. The extent to which any such condition may impact on the claimant is a question answered by medico legal experts. What makes the life of both attorneys and the RAF easier, is if a medico legal expert advises of the contribution of the pre-morbid condition by way of percentage. Not always easy but exceptionally helpful. An example would be an individual who previously underwent a cervical fusion operation and who then re-injures his or her neck in a collision. Whether or not the previous surgery has a bearing on long term function post-morbidly is a medico legal question. Attorneys and the RAF require guidance in this regard.

Past hospital, medical and related expenses

All accident related hospital and medical expenses incurred are claimable. We generally submit a schedule of expenses with accompanying vouchers in support of this head of damages. It is required that the voucher specify the name of the service provider, the date of the treatment and the nature of such treatment. To this end, medical aid printouts are not generally sufficient proof as they do not

specify the nature of treatment rendered. Receipts for payment do not constitute adequate proof either. It is to be noted that special schooling is also claimable as a past expense. If a child was previously in a mainstream school and post-accident requires remedial assistance, the difference in cost is claimable.

Future hospital, medical and related expenses

In years gone by, the RAF would make a cash award for future medical and related treatment. The problem with this was that claimants living in poverty or those managing their funds badly would not utilize the funds for their intended purpose. In later times, there would be no money left for treatment. Also, if the claimant did not undergo such treatment, they would be unduly enriched by the award. Some years back, the RAF made a decision to compensate claimants for future medical and related treatment by way of a Section 17(4) undertaking. This is a contract between the RAF and the claimant in terms of which the RAF pays for accident related intervention, if and when such costs are incurred. The administration of the RAF over the last two decades has made service providers wary to treat claimants without cover for costs. However, it is possible to arrange such treatment via the RAF undertakings department. If sufficient funds are available, it is practical to pay for the treatment up front and to then claim back from the RAF afterwards. Of course this is not always viable.

Past loss of income

If a claimant is able to prove that he or she suffered a loss of income as a result of the injuries sustained in the collision then there is a claim for loss of income. The RAF requires documentary proof of such loss. If a claimant is employed, the loss can generally be proved by salary documentation or a stamped

letter from the employer. IRP5s are also used in this regard. If a claimant is self-employed and keeps financial statements, similarly proof should be fairly simple. If employed in the informal sector, proof becomes somewhat more difficult. Many employed in the informal sector receive no salary information and do not record their earnings. There are however ways of providing proof of these losses. For example, a hairdresser working in the informal sector could provide a list of regular clients as well as a list of product suppliers who could then confirm their vocation. Industrial psychologists are of crucial importance when quantifying both a past and a future loss of income or earning capacity.

As it crops up regularly, the author addresses the SARS issue. It must be noted that failure to pay tax does not in itself preclude a claimant from claiming a loss of income. Attorneys are quite regularly advised that a client earns significantly more than is reflected on his or her or tax returns. A common "threat" made by the RAF or its attorneys is that of SARS enquiries. In fairness however, a claimant cannot have his or her cake and eat it too.

It is customary to apply a 5% contingency deduction to past loss of income. (See discussion on contingencies below).

Future loss of income and/or earning capacity

As stated above, industrial psychologists are crucial in quantifying a claimant's loss of income earning capacity. This is done by plotting out a claimant's career path both before and then after the collision. If career progression is delayed, chances of promotion lost, an early retirement envisaged or the person is not as productive as before then a future loss is generally claimable. What becomes incredibly important in this regard is the application of contingencies deductions to the actuarial calculation. Contingencies in this context are risk factors which may affect an individual's earning

capacity in future. One applies contingencies to both the pre- and the post-morbid calculation. Examples of contingency factors are an individual's life expectancy, the possibility of retrenchment or the possibility of unrelated illness or incapacity.

In the normal course, and in the pre-morbid calculation it is customary to apply 0.5% for every year of the claimant's working life. If for example a claimant is 30 years of age and he was expected pre-morbidly to retire at age 65, then the pre-morbid contingency deduction applied would be 17.5%. As can be seen, the younger an individual is, the higher the pre-morbid contingency would be. If one applies some logic, a youngster's career path is not as solid as someone who is in his or her fifties.

If a claimant is no longer an equal competitor in the open labour market, is a vulnerable employee or is enjoying an element of sympathetic employment, the chances of job loss or loss of income are significantly higher. It is customary in these circumstances to apply a higher post-morbid contingency deduction to cater for this vulnerability. The differential between the pre- and post-morbid contingency is a matter for negotiation between the parties.

It can also be that an industrial psychologist plots out a number of different pre-morbid career progressions and possibilities. Sometimes these different scenarios are just as probable as each other while in other cases one scenario is more probable than the other. It is common for industrial psychologists to refer to *probable* scenarios and *possible* scenarios. Possible scenarios cannot be ignored but it is not fair to the RAF to weigh both scenarios equally. It is customary to cater for these possibilities by way of lowered pre-morbid contingency deductions. When it comes to loss of income, contingencies play a very important role in facilitating settlement of a matter.

Pre 2008, claims for both past and future loss of income or earning capacity were unlimited. The RAF Amendment Act of 2005 however, capped loss of income claims to R160 000.00 per year. This figure has since been updated periodically and these claims remain limited.

General damages

General damages is a globular figure awarded for pain and suffering, loss of the amenities of life, emotional trauma and scarring and disfigurement. The quantum of general damages is assessed by looking at what courts have previously awarded to victims who have sustained similar injuries. There are many volumes of court decisions formulated to assist with the assessment of general damages. The volumes from earlier years are called Corbett and Buchanan and the newer volumes are now referred to Corbett and Honey. Robert Koch publishes an annual quantum year book in which general damages figures are updated to today's values.

Up until 2008, one could claim general damages without limitation. The more severe the injuries, generally the greater the quantum of general damages claimable. Post 2008 and after implementation of the RAF Amendment Act, one qualifies for general damages only if he or she sustains a serious injury. The term *serious* is defined in Regulation 3 of the RAF Regulations and the determination of seriousness currently lies in the hands of the HPCSA. This has proven problematic for many victims as there is little consistency within the HPCSA itself. In addition to this, the victim has no access to the Court as such access has been limited by Regulation 3. The author believes it is a matter of time before the regulation is successfully challenged constitutionally.

For the moment, the American Medical Association guides are utilized for assessment of seriousness as well as what has become known as the narrative test.

A claimant is required to complete an RAF4 serious injury assessment report and to submit same to the RAF. The RAF can either accept or reject the report or elect to refer the claimant to its own expert for assessment. While the legislation now provides that the RAF shall make this election within 90 days of receiving the report, the courts have not assisted the victim and court decisions enable the RAF to reject the RAF4 report at any time, even on the day of trial. The problem with this is it prolongs finalization of a claim and inevitably raises costs. The Regulation 3 election of the RAF should take place early and where the RAF procures its own medico legal evidence timeously, this happens.

Regulation 3 provides that a claimant is entitled to general damages in the following circumstances:

i. Where there is a whole person impairment of 30% or more;
ii. Where the injury has resulted in serious long-term impairment or loss of body function, constitutes permanent, serious disfigurement, resulted in severe long-term mental or severe long-term behavioural disturbance or disorder or resulted in the loss of a foetus.

Item (i) above is based on an American model of assessment and does not take specific circumstances into account. Loss of a finger to a concert pianist is devastating but would not render a WPI of anything close to 30%. The author finds assessment by way of WPI an utter waste of time and expense as the narrative test referred to in Item (ii) applies irrespective. Attached is a document which provides a brief but insightful account to the assessment of seriousness by way of the Narrative Test. Sadly, it is not consistently applied.

The RAF does at times award general damages without a finding from the HPCSA. If a victim is rendered quadriplegic for example it is patently clear that an award for general damages is appropriate. Even here however, the claimant is still required to submit an RAF4 statutory medical report in order to qualify for a general damages award.

Funeral expenses

It is to be noted that a claim for funeral expenses is limited to the costs of interring the body into the ground. Tombstones and other costs are not generally covered.

CAUSATION AND PROOF OF INJURIES

Causation relates to the causal nexus between the injuries sustained and the damages suffered by the claimant.

It often happens that hospital/medical records are either unavailable or incomplete. The non-availability of records is not a preclusion for a valid claim. On the same lines, the fact that records do not mention a particular injury or do not correctly reflect the seriousness of an injury does not preclude a claimant from successfully claiming for the same.

Particularly in provincial facilities where staff are often over-burdened or inexperienced, the inaccurate recording of injuries is a regular occurrence. In this event it is necessary to provide collateral information to support the allegation that injuries have been sustained or that the injuries are more serious than initially recorded. This happens regularly, for example in the case of traumatic brain injuries where the seriousness of the injury is not recognised by the casualty doctor. It is only when the victim returns home or in the weeks or months to come that his family and friends notice changes in function.

While the above is helpful for the victim, it has been known to lend itself to abuse at times. The author has encountered two such matters. One was that of a claimant who alleged being knocked down by a vehicle. In actual fact he had been involved in a fight and was thrown onto the vehicle. Another matter

was that of a middle aged woman who was wheelchair bound and brain damaged. On further investigation she had sustained exceedingly minor injuries in the collision and had suffered a stroke a year prior to that.

Causation becomes an important issue in circumstances where there are pre-existing conditions or comorbidities. Also in matters where the symptoms and long term outcome of a victim are not in keeping with the mechanism of injury.

PROCEDURAL ASPECTS TO AN RAF CLAIM

Lodgement of claim:

As stated above, a claimant is required to submit a claim to the RAF either within 2 or 3 years of the collision, depending on whether the wrongdoer is identified or unidentified.

Once lodged the RAF has 120 days to investigate the claim. The claimant is thereafter entitled to issue summons.

The basic documentation included in a lodgement bundle includes:

- RAF1 form with a completed statutory medical report;
- Hospital and medical records;
- Affidavit by claimant;
- Police accident report;
- Witness statements if any;

- Schedule of hospital and medical accounts;
- Earnings documentation;
- Medico legal reports;
- Actuarial calculations;
- Power of attorney;
- Medical and hospital consent form.

There are many documents which could be attached to assist in the assessment of the claim and not all of the above are legislatively required. However, the more information provided, the easier it is for the RAF to assess the claim.

Litigation process

It does happen every so often that the RAF accepts liability for a claim early but offers on quantum have, for well over a decade now, been few and far between. Historically or for the last 12-15 years at least, the RAF has outsourced its administrative obligations to its attorneys. Some of these attorneys are fantastic while others are abysmal. However, the same holds true for plaintiff attorneys and neither collective stakeholder in this compensation system is blameless. There exists very much an "*us versus them"* culture when it comes to plaintiff attorneys and the RAF. Recently and with the RAF's request for return of its files from its attorneys there also now appears to be an "*us versus them"*

dynamic between the organisation and its own attorneys. It is imperative that there is a shift away from this.

The access to our courts, even prior to the onset of Covid 19 was severely limited. There are generally about one hundred matters set down on the trial roll on any given day (maybe more). This is the number of all trials within the court system, not merely RAF matters. Out of those one hundred matters the author would wager a guess that at least 80 to 85 are RAF matters. On the day of trial, particularly if it is not a Monday or Tuesday, there are very often no judges available to start with. It regularly occurs that a matter is postponed for 2 plus years simply because there was no judge available on the day to hear the matter. In fact in the last three or four years when these matters eventually return to court all that time later, it regularly occurs that there is no available judge for a second time. The accident victim then has to spend another two years waiting for a new trial date.

While obvious, it is worthwhile to highlight the fact that all stakeholders in the system should have one aim - to compensate accident victims fairly while at the same time limiting the costs burden to both victim and RAF alike.

The culture of litigation has resulted in claims finalizing largely on the steps of court. This is costly for both the RAF and the accident victim.

It seems that the new CEO of the organisation is trying to make a change and mediation looks to be on the cards. This is hugely positive for the accident victim and essential for the RAF.

Rule 41A now also assists in facilitating mediation as an alternative method of dispute resolution.

Entitlement to general damages

If the RAF rejects the RAF4 serious injury assessment report of a claimant then the dispute requires referral to the offices of the Health Professions Council of South Africa. The RAF's rejection must be made in writing and should provide proper reasons for such rejection.

The claimant is required to complete an RAF5 form and to submit same to the office of the HPCSA within 90 days of the RAF's rejection. The HPCSA now accepts these disputes with supporting documentation via email.

The RAF is thereafter entitled to make submissions within 60 days and the HPCSA is then meant to refer the dispute to one of its tribunals for a hearing. There are significant delays in the convening of HPCSA tribunals and court applications compelling such convening are not uncommon.

The HPCSA tribunal then convenes and makes a finding on the seriousness of the claimant's injuries. Regulation 3(13) states that the finding of the tribunal is final and binding. This is not strictly speaking correct as it is possible to bring a review application to review the finding under the Promotion of Administrative Justice Act. To date however, the court has no power to make a finding on seriousness. The result of successful review applications is therefore that the matter is referred back to the HPCSA who then makes another finding. The author's experience is that the second findings are often incorrect too. In fact the RAF has on more than one occasion ignored the finding of the HPCSA and awarded general damages in spite of it.

CURATORSHIP AND INCAPACITY TO ACT

If the injuries sustained by an accident victim are such that his or her functional capacity is affected, it may become necessary to appoint a curator ad litem. A curator ad litem is someone appointed by the court (usually an advocate with at least ten years standing and with experience in the field of delictual law) to assist the claimant through the litigation process and to ensure that fair and reasonable compensation is awarded. The attorney representing the claimant brings a court application for such appointment and in Gauteng, chooses an appropriate curator who consents to act as such. Rules regarding who to appoint differ from province to province for example in Natal, our governing body provides a short list of possible candidates and the attorney is constrained to appoint off this list.

Whether or not a curator ad litem is required, is a medical question more than a legal one. The medico legal opinion of two appropriately qualified medical practitioners is required, one of them being an alienist or simply put a psychiatrist. The other is generally a neurosurgeon or neurologist or other practitioner with appropriate expertise in the assessment of function.

Once appointed, any tender made by the RAF cannot be accepted without the recommendation and reporting of the curator, as well as with the leave of the court. In such a case, mediation could still be tremendously helpful but would not result in immediate finalization of the matter. Any tender made would have to be put to the curator ad litem who would consult with the claimant and probably close family members, prepare a formal report and then approach the court for leave to accept the tender (if reasonable) on behalf of the claimant.

It is worth mentioning the difference between a curator ad litem and a curator bonis. The curator ad litem assists the claimant with the litigation process. He prepares his report and provides the court with recommendations regarding inter alia whether or not funds awarded are in need of protection

and if so, the protective mechanism to be put in place. The Master of the High Court is also meant to file its own report for the court. Matters are often finalized in the absence of Masters reports which are not forthcoming. The most common protective mechanism put in place in these times is the registration of an inter vivos trust. Another mechanism is the appointment of a curator bonis who then manages the financial affairs of the claimant. The court has a discretion as regards the above. The author knows of few attorneys or advocates who are fond of curator bonis appointments. In fact, the major banks are hesitant to act as curator due to the significant limitations of the appointment coupled with the incapacity of the Master's office.

The RAF is liable where it is needed, to cover the costs of the administration and management of the trust or the costs of a curator. Defendant attorneys regularly insist on trustee costs being limited to those claimable by a curator bonis. There is very little consistency within the judiciary in this regard and there seems little logic in such limitation on costs.

PAYMENT OF CAPITAL AND COSTS

The RAF makes two distinct payments on a matter – a capital payment and a costs payment.

As with most civil actions, the successful party is entitled to recover costs. The RAF is liable to pay the claimant's costs on a party and party scale either as agreed between the parties or taxed at court. It must be noted that these costs do not cover the total costs of the claimant as they are on a court tariff. Also, the courts' taxing masters or at least those in Gauteng will refuse to allow certain costs unless they are specified in a court order or settlement agreement. These items include for example:

- Qualifying/Preparation and reservation fees of experts;

- Transport costs to and from medico legal assessments;
- Medico legal reports of experts;
- Costs of counsel.

The author believes that costs should be addressed in sufficient detail so as to prevent prejudice to either party.

This document does not purport to be a comprehensive commentary on the RAF compensation system. It is merely a brief overview to facilitate discussion.

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Annexures:
RAF1
RAF2
RAF3
RAF4
RAF5
Narrative test guidelines