I have noted the provisions to curtail the benefits enjoyed by victims of road accidents in terms of the Road Accident Fund Act (RAF) 56 of 1996 by the promulgation of the Road Accident Fund Amendment Act 19 of 2005.

My concern is that the proposals are directed at the wrong end of the RAF's expenditure. The RAF Commission under the chairmanship of Judge Kathy Satchwell has found that approximately 40% to 55% of each rand of fuel levy is spent by the RAF on evaluating claims and on administration. These figures are based on information for the period 2000 to 2002. This figure does not take into account the attorney-and-client fee charged by the claimant's own attorney. It follows that the actions—or even inaction—of the RAF that may adversely influence this already unfavourable ratio of costs in relation to compensation actually delivered should be closely monitored and effective steps taken to rectify any deficiencies in the claims-handling process, before one resorts to the drastic step of reducing road accident victim benefits. This needs to be done in order properly to substantiate any conclusion that the current system of compensation is financially unsustainable. In my view, there are two aspects that need closer scrutiny and remedial steps before any action that results in the curtailment of the existing common-law rights of an RAF victim can be justified. These are management decisions and the state of claims handling within the RAF.

Management decisions
Prior to and since 2002 the management of the RAF has taken decisions that have contributed to the deterioration of the RAF's financial position. These are the following:

- The alteration of the staff structure by the introduction of more claims handlers and fewer claims assistants, having a negative effect on productivity and resulting in an increase in litigation.
- The entertaining and encouragement, by the implementation of a project called traffic, of separate claims by hospitals and doctors (although ostensibly sanctioned by s 17(5) of the RAF Act) before the claim of the actual victim is lodged and finalised. The decision to enter into a relationship with a private enterprise in the traffic project was, in my view, contrary to a provision of the RAF Act (s 19) and the provisions of the Competition Second Amendment Act 39 of 2000 as it constituted a restrictive practice. The particular private enterprise enjoyed perceived if not actual preferential treatment in respect of claims lodged by it on behalf of medical suppliers. It also resulted in a marked proliferation of claims necessitating...
the creation of a separate division dedicated to the handling of these claims, and created anomalies *inter alia* in that medical claims have sometimes been paid when there was no legal claim by the claimant or where apportionment of damages was applicable but was not applied to the medical accounts.

- A unilateral decision in 2004 to withdraw and suspend all offers that gave rise to a flood of summonses to the extent that some litigation officers at the RAF’s Pretoria office have to deal with up to 1 000 defended magistrate’s court matters (each case having an estimated average legal cost exposure to the RAF of R16 000 per defended claim).

- A decision unilaterally to implement payment of compensation in instalments of loss of income and maintenance without the RAF Act authorising such instalments and without the RAF having the administrative capacity to administer deferred payments properly, resulting in further litigation and unnecessary legal costs.

- The unilateral decision unofficially to cap claims for pain and suffering, loss of amenities of life, etc by introducing an arbitrary internal damages list not based on legal principle or precedent, with instructions to staff that deviation from the list carries the sanction of disciplinary steps. This resulted in more litigation and legal costs.

- The decision to give undertakings only for future medical expenses without providing adequate administrative resources, once more resulting in litigation and unnecessary legal costs.

- Recently, the instruction to staff to enter an appearance to defend in all matters where summonses are issued, irrespective of whether the merits of the case indicate that such defence is justified or not and by doing so, adding to the RAF’s legal bill.

- The creation of a separate ‘summons section’, whereas the RAF Act is in fact designed to discourage litigation and where the creation of such a section envisages continued litigation to the extent that it requires a separate section. It has the further possibility of discouraging staff to settle involved claims speedily. The neglect of such claims (or any other claim for that matter) will ultimately result in a summons that in turn will result in the file being transferred to the summons department, thereby ridding the staff member of what he perceives to be a troublesome claim.

Although the accident figures have more or less stabilised since 2000, the average case load per claims handler has since 2000/2002 reportedly risen from approximately 700 to 1000 claims. According to the Sheriff in Pretoria he and his deputies daily serve the RAF with summonses by the box full. The RAF is currently receiv-

If one considers that the Viviers Commission of Inquiry (1989) into the establishment of dedicated courts for road accident matters found that only one per cent of all matters litigated on proceed to trial, one gets a notion of the vast amount of resources of the RAF being deviated from its intended purposes of compensating victims to conducting unnecessary litigation against it.
ing more summonses in one day than it previously received in a month. Default judgments are regularly being taken against the RAF. According to the Sheriff in Pretoria, millions of rand's (which includes unnecessarily incurred legal costs) are routinely paid over to the Sheriff on writs executed against the RAF. Up to 80% of the High Court in Pretoria's roll is taken up by matters where the RAF is the defendant. If one considers that the Viviers Commission of Inquiry (1989) into the establishment of dedicated courts for road accident matters found that only one per cent of all matters litigated prior to the road accident tort should have proceeded to trial, one gets a notion of the vast amount of resources of the RAF being deviated from its intended purpose of compensating victims to conducting unnecessary litigation against it. It is rumoured that the RAF in 2004 paid approximately R44 million for legal services rendered to it to one firm on its panel of attorneys alone. The number of summonses issued against the RAF and defended matters handled by its litigation department and attorneys are a result of ill-considered management decisions and/or inefficient claims handling and/or reduced productivity.

It is convenient at this stage to refer to the proposed scrapping of s 17(2) of the RAF Act (a road accident victim's right to recover party-and-party costs from the RAF). The scrapping will not deliver any benefit as it will encourage litigation. The section was originally introduced to remedy the situation where summonses were issued as a matter of course in order to entitle a claimant to these costs.

Claims handling

I have on numerous occasions spoken to staff members at the Pretoria office of the RAF. From my conversations I have gained the impression that the inefficiency and/or lack of productivity can inter alia be ascribed to the following considerations:

• There is inadequate training of staff.
• The management of the RAF has created a culture in its Pretoria office where staff are demoralised and are very reluctant to take the initiative and make decisions.
• There is generally a lack of discipline within the staff of the RAF’s Pretoria offices, although there are those dedicated staff members who render excellent service. Attempts by some senior staff to apply discipline and increase productivity are resisted and have in some extreme instances been met with retaliatory threats from the staff members concerned and the subsequent resignation of skilled senior staff.
• Staff members arrive late for work and fail to answer their telephones promptly or at all.
• Staff turnover is high. The average experience of a claims handler in Pretoria is approximately 12 months, that of a senior claims handler two years and that of managers three to five years.

Unnecessary litigation and factors promoting litigation against the RAF should not be countenanced. More so, if it is taken into account that the thrust some of the provisions of the RAF Act (such as ss 17(2), 17(3)(b), 19(c) – (t), 24(5) and 24(6)) is specifically designed to promote early settlement of claims and discourage costly litigation. Unfortunately the RAF in many instances forfeits and/or seemingly neglects to avail itself of the benefits of these provisions. In terms of s 24(5) of the RAF Act the RAF may object to the validity of a claim within 60 days from date of lodgement of a claim. It usually takes more than 60 days to register and acknowledge receipt of a claim. In terms of s 24(5) a claimant is prohibited from issuing summons before 120 days have elapsed from the date of the submission of the claim and s 19(f)(i) (submission of affidavit by claimant) has been complied with. It is a very rare occurrence (if at all) that any offer is made before the prescribed period has lapsed. The RAF Act (s 17(3)(b)) provides that if the RAF makes a written offer (including an offer made without prejudice) in the course of settlement negotiations before summons is issued, the court is empowered to take this offer into account when making an order for costs. Generally this provision is not being fully utilised.

Justification of curtailed compensation

Financial solvency as a justifiable interest

The above considerations may have an important bearing on the constitutionality of the provisions curtailing the rights of the road accident victim. The only basis on which the rights of a road accident victim may possibly be limited is when such limitation serves a justifiable interest (see s 35 of the Interim Constitution). In Tsotetsi v Mutual & Federal Insurance Co Ltd 1997 (1) SA 585 (CC), it was stated that the financial solvency of the then Multilateral Motor Vehicle Accident Fund as a welfare programme may be such an interest. However, an existing restriction on the claims of certain passengers and not an intended curtailment of rights of all other claimants was in issue.

I am of the view that the necessity of the curtailment of benefits of road accident victims’ rights does not serve such a justifiable interest. As was indicated above, the unfavourable financial position of the RAF cannot be ascribed solely to structural considerations within the RAF Act and thus the unavoidable and absolute necessity of the reduction of compensation of the victim, who is served by the RAF Act to the extent as is provided for in the RAF Amendment Act, can therefore be questioned. Added to this, the proposed restrictions are at odds with the objective of the RAF Act. The objective of the Act is to afford the road accident victim the widest possible protection against the impecuniosity of the common-law wrongdoer (see Aetna Insurance Co v Minister of Justice 1960 (3) SA 273 (A)). The amendments have the opposite effect.

Inequality

The road accident victim’s right to be compensated is not a right created statutorily by the RAF Act but is entirely based on common law (see s 19(a) read with s 21 of the RAF Act; 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)). This being the case, the curtailment of the common-law rights of a road accident victim with the retention of fault creates inequality in terms of subs (9)(1) and (2) of the Interim Constitution and is in principle constitutionally unjustifiable, as is the fact that the potential liability of contributor funds (the motorist) to the Road Accident Fund is extended (see Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC)).

The Amendment Act not only creates inequality in the above discussed respect, but also in the following specific instances:

• In contrast to the Compensation for Occupational Injuries and Disease Act (the COID Act) 130 of 1993 (see Schedule 4), the limitation on the loss of income does not equally affect all road accident fund victims. The restriction is applicable only to high income earners.
• The retention of s 18(2) of the RAF Act, while abolishing the restrictions on claims in respect of all other passengers injured by the sole negligence of their driver, is undoubtedly unequal and discriminatory towards a passenger who is subject to the COID Act of 1993 and who is injured in the course of his employment as his third-party claim against the RAF remains limited to R25 000.
• The limitation of a claimant’s claim and the retention of fault results in double jeopardy as the claim of claimant who is con-
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tributorily negligent is further subject to reduction in terms of the Apportionment of Damages Act 34 of 1956 and a right of recourse in terms of the same Act (see Dodd v Multilateral Motor Vehicle Accidents Fund 1997 (2) SA 763 (A)).

**Extension of benefits to secondary victims**

Curtillement of the rights of primary victims is ostensibly brought about not only to justify but also to afford compensation to certain passengers who historically were never intended to be beneficiaries of the road accident compensation system but who were granted limited benefits based on affordability considerations. Previous commissions of inquiry held that the extension of liability to cover these passengers was unaffordable under circumstances where there was nowhere near the deficit currently faced by the RAF. Apart from this, the restrictions in respect of passengers were found to be constitutionally justifiable (see the Tsotetsi case (above) at 590B-D). It makes no sense to introduce inequitable and consequently unjustifiable restrictions and at the same to abandon existing justifiable restrictions on compensation.

The obvious solution in view of the ultimate objective of the balancing of the financial affairs of the RAF would be to (based on research) lift the monetary limit on the claims of passengers who have been injured by the sole negligence of their drivers to a more suitable limit (eg R125 000) instead of the RAF assuming an open-ended liability in respect of this class of victim, especially if one considers that this type of claim can be readily abused if the relevant parties concerned (driver and passenger) collude.

**Conclusion**

What needs to be realised is that the road accident victim is, in terms of the RAF Act, not the beneficiary of legislative largesse, but the holder of established common-law rights that he enforces against a defendant (the RAF) that was created by legislation for the victim's benefit. In principle, restrictions on compensation can be legally viable only if and when the rights of a road accident victim are completely taken out of the common law domain and are fully regulated statutorily. This, in essence, means the acceptance and introduction of no fault and statutorily prescribed compensation (as is the case in terms of the COID Act).

Government must now urgently take immediate responsibility for this situation and act decisively and effectively to correct the problems within the RAF without unjustifiably victimising (by the amendment of the RAF Act) the road accident victim for the financial ills of the RAF that are not of the victim's own doing. The problems within the RAF were acknowledged by the former Minister of Transport, the late Dullah Omar, in his keynote address at a Seminar on the Road Accident Compensation Environment held in May 2002. Problems with claims administration and resultant default judgments were also noted by the RAF Commission in its report submitted in December 2002.

Although potentially controversial, the Government has since December 2002 been in possession of a well-researched strategy in the form of the RAF Commission Report, which at least offers a basis for long-term solutions to the RAF problem. It has instead opted for a band-aid approach (that may in practice prove to have little effect in salvaging the RAF) at the expense of common-law rights of the road accident victim who is and should be the intended and actual beneficiary of the RAF Act.

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