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DEPARTMENT OF TRANSPORT

WHITE PAPER on the ROAD ACCIDENT FUND

(As approved by Cabinet on 21 January 1998)

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PREFACE

The Road Accident Fund (RAF), as were its predecessors, is the instrument by which Government compensates victims of motor vehicle accidents (MVA's) on terms and conditions provided for in the various Acts governing such compensation. It is the culmination of a long historical development spanning some fifty years, commencing with the introduction of compulsory MVA insurance in 1942. Over the years a system of compensation developed which has been the subject of numerous commissions of inquiry (the latest being the Melamet Commission which reported in 1992), and there have been many amendments to the governing acts. Despite these measures, the financial condition of the system has progressively deteriorated.

More recently the Minister of Transport published two Draft White Papers for public comment. During this period the problems with the compensation system and suggested solutions have been aired extensively - in bilateral discussions with the various role players, and in numerous joint meetings between role players, the Portfolio Committee on Transport, and the Board of the RAF.

The proposals herein reflect Government's view of the optimum amalgam of all the suggestions and counter-suggestions after a process of protracted consultation and investigation. They are designed to achieve an interim sustainable system of providing reasonable benefits within the financial constraints of the present economic situation. These proposals will apply until Government can consider recommendations by the Road Accident Fund Commission.

The proposals reflect a new vision. The system has evolved from the original private insurance to public compensation. The demands of a new socio-economic and constitutional dispensation - and with them, the constraints on public spending - require a transition from a delict-based compensatory system to a system of affordable state benefits.

In so far as common law and legal rights may be limited by the proposed scheme Government has also taken advice and reflected on the constitutionality of the elements of the scheme in relation to the need to comply with the Constitution.

STATEMENT OF THE PROBLEM**CHAPTER I**

The current system of delivering compensation to victims of road accidents suffers from a number of shortcomings. These shortcomings have been **analysed** at some length in the two preceding draft white papers, and can be summarised as follows:

1. Growing Deficit

The following table gives a summary of the financial results of the RAF (and its immediate predecessor, the MMF) as taken from the Annual Reports over the past 5 financial years. It is a matter of grave concern that the undiscounted deficit has more than doubled, from R2 999 million to R7233 million.

	Financial Year ending 30 April				
	1993	1994	1995	1996	1997
	(Rm)				
INCOME FROM:					
- FUEL LEVY	763	1111	1181	1244	1439
- INVESTMENTS	28	45	35	89	110
CASH EXPENDITURE TO:					
- CLAIMS PAID	692	812	985	1 103	1226
- ADMINISTRATION	35	42	30	43	57
NETT CASH FLOW	64	302	201	187	266
DEPRECIATION	.	1	1	1	2
INCREASE IN PROVISION FOR OUTSTANDING CLAIMS	200	950	600	2350	1150
OPERATING LOSS	136	648	400	2165	886
DEFICIT BEGINNING OF YEAR	2999	3135	3783	4183	6347
DEFICIT END OF YEAR	3135	3783	4183	6347	7233
PROVISION FOR OUTSTANDING CLAIMS	3450	4400	5000	7350	8500
LESS NETT RESOURCES*	316	617	817	1003	1267
DEFICIT END OF YEAR.	3135	3783	4183	6347	7233

* Assets less creditors and non-claim provisions

NOTES:

- (a) The levy rate on petrol was increased from 6,0 c/l to 9,0 c/l on 2 April 1993, to 10,5 c/l on 7 August 1996, and again to 12,5 c/l on 5 November 1997 (diesel: 3,8 c/l, 5,8 c/l, 6,8, and 8,8 c/l respectively).
- (b) Investment income and Assets do not include unrealised capital gains. At 30 April 1997 these amounted to R174 million.
- (c) Over the period claims paid increased by 15,4% p.s. on average. The rate of growth is, however, distinctly lower over the last two years.
- (d) On average administration costs amount to 4,3% of claims paid.
- (e) The provision for outstanding claims is calculated by external actuaries. With the knowledge of hindsight the provision of R5 000 million as at 30 April 1995 seems low. These figures reflect the sum total of amounts expected to become payable in future in respect of accidents which occurred up to the respective balance sheet dates. The present value of the latest provision of R8 500 million is R5 900 million.

2. High Settlement Costs

To put the matter into perspective, the claims paid during the latest financial year can be analysed as follows:

	<u>R million</u>	<u>00</u>
Compensation:		
Medical expenses	223,8	18,3
Loss of earnings	237,1	19,3
Loss Of support	161,6	13,2
Funeral costs	4,2	0,3
General damages	351,4	28,7
Settlement costs:	<u>247,6</u>	<u>20,2</u>
TOTAL	<u>1225,7</u>	<u>100,0</u>

Settlement costs represent the costs involved in proving and agreeing the entitlement to, and the amount of, the compensation. With the exception of general damages, settlement costs exceed all the various items of compensation. This is a clear

indication that the delivery system – i.e. the claims procedure and the legal framework within which it operates – is inefficient.

An analysis of the settlement costs paid to the various external experts in the latest financial year shows the following:

<u>Payee</u>	<u>Amount (Rm)</u>	<u>% of Settlement Costs</u>
Attorney	162,0	65,4
Advocate	26,2	10,6
Medical Expert	41,3	16,7
Investigator	8,1	3,3
Actuary	4,9	2,0
Other experts	3,9	1,6
Sundry	<u>1,1</u>	<u>0,4</u>
	<u>247,6</u>	<u>100,0</u>

Attorneys charge their clients fees which are higher than those reimbursed by the RAF. The difference is normally recouped as attorney and own client costs from the compensation paid to the victim and maybe as much on average as a further 10% of the claims paid. This implies that road traffic victims may receive less than 70% of the RAF's claims expenditure.

3. Settlement Delays

On average, claims and supporting evidence are submitted some 18 months after the accident, often up to 36 months and even longer. The RAF then needs to undertake investigation of the following:

- The **validity** of the claim (i.e. that the injury or death was in fact caused by a motor vehicle accident);
- The **merits** of the claim (i.e. the degrees of fault on the part of the wrongdoer and the victim respectively); and

. The **quantum** of the damages suffered (i.e. the amount of the loss under various heads).

Presently, claims are settled on average some 2,8 and 3,8 years after the accident, measured by number and by amounts respectively. This is clearly unsatisfactory. Although the hardship of some road traffic accident victims is relieved by the RAF making Interim Payments, every endeavour should be made to speed up the claims settlement process,

4. **Passenger Claims**

In terms of present legislation the compensation of certain passengers involved in single vehicle accidents is limited to R25 000, and in certain cases general damages are excluded. It is anomalous for example that a pedestrian injured in the same accident qualifies for unlimited compensation, whilst the passenger's claim is limited.

5. **Dependants' Benefits**

At present the dependants of a deceased victim receive a loss of support benefit which for practical purposes can be viewed as a no-fault benefit: if the other driver was only marginally at fault, the dependants of the deceased are entitled to compensation without apportionment of fault, however negligent, reckless, or intoxicated the deceased might have been. In a dispensation which remains **fully** fault-based, it is appropriate to apportion fault fully in this instance as well.

6. **General Damages**

Paying general damages – i.e. for pain and suffering, disfigurement, loss of amenities of life – is a financial consolation for a non-financial loss. A disproportionate percentage of the RAF's limited resources (more than 28% of claims paid) is paid out as General Damages.

7. High Accident Rate

Compared with international norms South Africa has an exceptionally high road accident rate. In 1996 almost half a million accidents, of which 60000 can be described as serious, caused almost ten thousand deaths.

PROPOSED INTERIM SOLUTIONS**CHAPTER II**

8. Road Accident Fund Commission

In order to find long term and sustainable solutions to the complex problems discussed in Chapter I, Government will set up a Road Accident Fund Commission to reconsider in its entirety the system of benefits and/or compensation for victims of road accidents. The members of the Commission, who will be independent, will be appointed by the Minister of Transport after consultation with the Ministers of Finance, **Health** and Justice.

In the meantime in order to take the urgent action needed to stem the alarming losses presently being sustained by the RAF, Government proposes to implement the interim solutions set out hereafter with effect from 1 May 1998. The objective of these interim proposals will be to create a viable financial system for claims arising from accidents taking place from 1 May 1998.

9* Assumptions & Projections

9.1 In order to illustrate the future prospects of the RAF's finances and to gauge the future financial effects of the proposals made below, certain assumptions have to be made regarding the **future**:

- (a) The levy on petrol and diesel increased by 2,0 cents per **litre** each from 5 November 1997 (placing the petrol and diesel levy at 12,5 and 8,8 cents per **litre** respectively). Further levy increases of 2,0 and 1,4 cents per **litre** on petrol and diesel respectively are expected from 1 February 1998. Thereafter, **the** Minister in consultation with the Ministers of Finance and Mineral and Energy Affairs, carry out an annual review of the levy and consider adjustments that may be necessary as a result of new needs and costs and any other extraneous factors. For purposes only of

illustrative calculations, and without any commitment by **Government**, it is assumed that the levy rates will increase by 9% per annum.

(b) The following rates are assumed to apply:

Volume of fuel sold:	4% per annum growth
Number of claims:	6% per annum growth
Claims inflation rate	1 1'Yo per annum
Investment return:	15'00 per annum
Administration:	4% of claims paid.

9.2 Based on these assumptions, the table below illustrates the **discounted** values of the projected deficits on 30 April 2008, depending upon various levels of savings brought about in respect of claims arising from 1.5.98:

%	0%	1 0%	18%	20%	30%	40'40
Savings						
Deficit (Rbn)	39,3	29,5	21,6	19,7	9,8	0

The **above** table shows that a deficit of R39 300 million will have accumulated in 10 years' time if the present system of compensation should continue unchanged - this despite the assumptions in paragraph 9.1 (a) regarding the fuel levy. At the other extreme, an immediate saving of some 400/0 would be required if the RAF's total liabilities were to be fully **funded** by 30.4.2008.

9.3 (a) Neither of these two extremes is acceptable to Government, and it is proposed to "**ringfence** the past" and "manage the future" by drawing a distinction between an "Old Fund" and a "New Fund" as follows: The Old Fund will be constituted by the assets and liabilities of the **RAF** as at 30.4.98, whilst the levy income and

liabilities arising from 1.5.98 will accrue to the New Fund. The intention is to keep the New Fund solvent over the next decade, and given the assumptions made in paragraph 9.1, it has been estimated that this requires a reduction of the order of 18% in current levels of expenditure. Appendix A shows the projected financial progression of the New Fund. There is a relatively small estimated surplus of R457 million on 30.4.2008, but the following year there would be a deficit, and in any event the actual progression will certainly differ from this estimated progression and necessary action will be taken in good time in light of the findings of the RAF Commission (see paragraph 8).

(b) The 18% saving mentioned above is assumed to be approximately achievable by -

• Reducing settlement costs (paragraph 10)	4%
• Restructuring benefits for loss of income (paragraphs 11.2 to 11.4)	4%
• Fully apportioning loss of support benefits (paragraph 11.6)	4%
• Replacing General Damages with the Catastrophic Permanent Impairment Benefit (paragraph 11.5)	<u>19%</u>
TOTAL	<u>31%</u>

This saving of 31 % is reduced to a nett result of some 18% by the removal of the current cap on certain passenger claims (paragraph 13) and the contribution to road safety measures (paragraph 15).

(c) Although no new liabilities arising from 1.5.98 will be added to the Old Fund, the estimated deficit of R5,2 billion as at that date (using the present value of the provision for outstanding claims) will accumulate at interest of 15% p.a. to R22, 1 billion over the next

decade (see Appendix B). The assets in the Old Fund will probably be depleted within the first year or so, and thereafter the Old Fund would have to “borrow” from the New Fund - at interest, in order not to undermine the solvency of the New Fund. The funding of the deficit in the Old Fund will therefore require separate and urgent attention.

- (d) In view of the uncertainty of future increases in the fuel levy rates and since the assumptions mentioned in paragraphs 9.1(b) and 9.3 are unlikely to be realised exactly, the projections in Appendices A and B should merely be viewed as best estimates for the time being. As the future unfolds and experience under the new dispensation becomes available, the position of the New Fund and the deficit of the Old Fund will be re-evaluated and reviewed at regular intervals. Aspects such as altered human behaviour, the actual income and expenditure, the deficit of the Old Fund, the actuarial valuation of the Funds, the incidence of accidents and claims, the structure of benefits and the experience gained under this proposed system will be assessed with a view to adjusting the system of benefits in the light of inflation and the resources available.
- (e) In summary, it must be clearly stated that –
- (i) The New Fund cannot be allowed to develop a deficit.
 - (ii) The deficit in the Old Fund cannot be allowed to double every 5 years or so by leaving it unattended. Whilst Government does not know at this stage what opportunities will present themselves to fund the deficit, it will receive the high priority it deserves.

- (iii) Government cannot commit itself to fixed **future** increases in the levy rates. There is accordingly no alternative – apart from abandoning the Road Accident Fund Act altogether, with its important social **welfare** and insurance benefits – other than to reduce expenditure to the extent indicated. The proposals which follow aim to achieve this in a way which is equitable to the population as a whole, within the constraints faced by Government.

9.4 **The Nature, Objectives and Approach of the RAF**

The solutions proposed flow from Government's decisions on the nature and objectives of the RAF which in turn define the broad approach to determining the benefits.

The RAF in future will have elements of social welfare in the form of state benefits and risk cover. The social welfare element will provide stated benefits instead of compensation to ~~the risk cover~~ **will** protect negligent drivers against claims by victims.

The main objective of the RAF is to provide adequate medical care and benefits to road accident victims, within an affordable and sustainable financial framework.

Subsidiary objectives are to:

- a) Protect negligent drivers against claims for compensation by victims.
- b) Apply the bulk of the available resources equitably towards real economic loss suffered by victims.

- c) Allocate the limited resources in accordance with **the** best interests of the majority of victims to achieve a more even distribution than at present.
- d) Award seriously impaired victims increasingly larger shares **of** the available funds.
- e) Ensure easy access to the **RAF** and that benefits are paid efficiently and rapidly.
- f) Contain settlement and administration costs to the minimum so that as much as possible of the **RAF's** resources are applied for the benefit of victims.
- g) Contribute towards **the** reduction of road accidents.

9.5 **Prioritisation of available resources**

In setting its priorities Government is guided by the following considerations:

- (a) Adequate **healthcare** should receive the highest priority.
- (b) The allocation of available resources will be driven by the best interests of the majority of victims to achieve a more even distribution than at present, but subject to 9.5(c).
- (c) The more seriously impaired victims should receive increasingly larger shares of the available funds.

10. **Reducing Settlement Costs**

With the objective of maximizing the amount of the **RAF's** resources available to victims, it is proposed that Legal, Medical and Actuarial costs be reduced in the manner set out below.

10.1 Reducing Legal Costs

It is proposed to **simplify** and streamline the settlement procedures with a view to saving time and expense. The detailed proposals are contained in Appendix C.

The most significant changes are:

- The merits of the claim are to be settled first before a claim on quantum may be lodged.
- A merits claim form must be lodged within 12 months of the accident, failing which there is no claim.
- There will be no formal pleadings or discovery.
- Magistrates' Courts will be granted jurisdiction to hear disputes on merits regardless of the amount of the claim or the location of the court.
- The normal 3 year prescription period contemplated in the Prescription Act No 68 of 1969 will apply but commence to run only upon final resolution of the merits.
- Pre-trial conferences will be obligatory and will crisply define the issues in dispute.
- Costs will be awarded on the so-called disparity basis.
- A special tariff for RAF litigation will be prepared.

It may not be possible to implement all the procedural proposals with effect from 1 May 1998. These proposals will be implemented in stages when it becomes possible to do so.

10.2 Reducing Medical Costs

The following is a summary of Appendix D which sets out the detailed proposals.

- (a) In terms of current legislation, **future** medical expenses of road accident victims can be settled either by way of a cash lump sum, or by way of an Undertaking by the RAF to discharge its liability in the future when the expense is incurred (or a combination of the two). In the latter case it would save costs if the RAF negotiated preferential rates with suppliers of medical goods and services, and it would also save time and costs in **verifying** claims in terms of Undertakings if those claims were submitted in good time.
- (b) To reduce subjectivity and disputes, medical evidence regarding the victim's injuries should be standardised. The "Guides to the Evaluation of Permanent Impairment" (4* Edition) of the American Medical Association presents itself as an internationally comparable system to assess the nature and degree of impairment of a victim. Resultant disability will be determined with reference to the International Standard Classification of Occupations (ISCO-88) as published by the International Labour Organisation. More information on ISCO-88 is contained in Appendix E.

10.3 Reducing Actuarial Costs

- (a) Actuaries are employed to discount expected future streams of medical expenses and loss of earnings or support to a single present value or capitalised amount for purposes of lump sum settlements. In the process they have to make assumptions regarding –
- the expected real rate of interest;
 - life contingencies likely to materialise in respect of the particular individual, each with various degrees of probability (e.g. surviving from year to year, remarrying etc.)
- over periods usually stretching far into the future.

- (b) The real rate of interest over the next 10 or 20 years cannot be predicted with certainty, and opinions thereon will necessarily diverge – leading to disputes and concomitant increases in costs and delays.
- (c) Likewise mortality varies by gender, race, economic level, health, occupation, sport, habits, etc., and without extensive and expensive investigation - which at best will still yield only an approximation in any particular case - any attempt at refinement is misplaced, again resulting in subjective opinion. It is proposed that standardised mortality levels distinguish only by gender (recognizing the greater longevity of female lives), and that **all** other factors which may influence the mortality level be disregarded.
- (d) It is proposed that for purposes of arriving at lump sum settlements, the real rate of interest and the two mortality tables referred to in paragraphs (b) and (c) above be determined by the Minister on the advice of the Fund's consulting actuaries, and be published in Regulations together with tables derived therefrom to ease calculations.
- (e) The remarriage contingency applicable in cases of the death of a breadwinner, is also to be standardised, namely:
 $65 - x$, where x = age of surviving spouse.
The result, expressed as a percentage, will be deducted from the calculated benefit payable to the surviving spouse.
- (f) At present other general contingency deductions apply. It is proposed that all these be disregarded in future.

11. Benefits

Government proposes that road accident victims be granted the following benefits:

11.1 Medical Expenses

The cost of medical expenses (past and **future**) necessitated by the accident is to be reimbursed, subject to apportionment of fault and to a modest threshold of **R500**. A large number of small claims (which always involve settlement costs far in excess of the benefit) would be excluded. Government has already made medical care available to the indigent at little or no cost. Medical expenses can be claimed under the current five headings, viz.:

- . ongoing medical treatment;
- provision and maintenance of assisting devices such as wheelchairs and prostheses;
- personal assistants;
- . home alterations;
- . transport assistance.

The benefits will be structured to provide for adequate **healthcare**. These benefits will be subject to standardised items and rates (e.g. the tariffs recommended by the Representative Association of Medical Societies and the Nursing Council of SA), and the RAF may limit its liability to that at which it could reasonably have procured the service or device from a contracted provider. Thus if a victim contracts with a service provider of his/her choice, the **RAF's** liability will be limited to the cost at which it could have procured the service. Payment towards future or

ongoing medical treatment (after settlement of the claim), will be made to service providers directly. Such measures will facilitate effective management of the RAF's liability for future health care. These medical benefits will only cover medical treatment received in South Africa, or the rand-value equivalent of similar treatment available in South Africa.

11.2 Temporary Total Disability Benefit

A benefit equal to the loss of Qualifying Earnings (as defined) will be payable during the period of the victim's temporary total disability subject to fault and subject to a time threshold of 1 month in respect of which no benefit will be paid. This benefit is payable to victims under the age of 65 years.

11.3 Qualifying Earnings

Qualifying Earnings will be fixed at 75% of the deemed earnings stipulated below:

- (a) In the case of children, students, apprentices, and trainees in a trade, occupation or profession, the deemed earnings will be R1 500 p.m. commencing from the age of 21 years.
- (b) For all other South African residents under the age of 65 years the deemed earnings will be a minimum of R1 000 p.m. and a maximum of the higher of actual monthly earnings at the time of the accident and the average actual monthly earnings over the preceding 3 years. Claims based on deemed earnings above the tax threshold (currently R1 410 p.m.) must be supported by appropriate tax documentation.

- (c) **The** deemed earnings of foreign residents and tourists will be limited to the lesser of actual income at the date of collision or R10 000 p.m. so as to optimise the use of resources available to the **country's** residents.

The level of the **qualifying** earnings will be fixed at the date of accident, and for that victim will increase annually only in accordance with the published Consumer Price Index, disregarding the victim's possible **future** career path, had the accident not occurred.

Precedents for awarding 75% of the above amounts and for fixing earning levels at the date of incident exist in the payment of pension benefits under disability or retirement schemes.

The skew distribution of **claims** is well illustrated in Appendix F, showing that some 7% of claims at the **upper** end account for 62% of the claim payments. The highest awards are generally driven by claims for loss of high income. Thus it is both effective and equitable to freeze earnings at the date of accident, to pay 75% thereof, and in each instance to allow only for annual CPI increases, in order to optimise the use of already limited resources.

11.4 Permanent Disability Benefit

This benefit will commence as soon as a "permanent impairment" (as defined in Appendix D) has set in and will be subject to apportionment of fault and based on the Qualifying Earnings as defined in paragraph 11.3.

The nature and degree of permanent **impairment** will be determined with reference to the Percentage Permanent Impairment (**PPI**) as per the “Guides to the Evaluation of Permanent Impairment” (4th Edition) of the American Medical Association. A threshold of 10% PPI applies before a victim may claim this benefit.

The effect of the degree and nature of the impairment on the victim’s ability to meet the demands of his/her occupation and alternative occupations for which the victim may be qualified (as per the International Standard Classification of Occupations (**ISCO-88**)), will be expressed as a Percentage Permanent Disability (**PPD**). The maximum PPD limit is fixed at **100%**. Further standardisation of the system may be considered once experience has been gained under the proposed dispensation.

Monthly benefit = Qualifying Earnings x PPD x % Merit.

The RAF may opt to pay this benefit in a lump sum or at regular intervals on an ongoing basis in the future, or as a combination of these options. This benefit is payable until the victim reaches the age of 65 years.

11.5 Catastrophic Permanent Impairment Benefit

This benefit will be subject to apportionment of **fault** and determined with reference to the definition of Catastrophic Permanent Impairment as provided in Appendix G, and will be dependent upon the age of the victim.

Benefit = A x B x % Merit

- where $A = 4 \frac{1}{6} [3PPI^2 + 70 PPI - 1000]$

$B = 1 - \text{age}/100$

Ages below 20 are taken as 20 and ages above 80 as 80.

The following table illustrates some sample benefits, disregarding fault:

PPI	Benefit At Ages (Rand)			
	0 - 20	40	60	80+
55	39750	29812	19875	9938
60	46667	35000	23333	11667
65	54083	40562	27042	13521
70	62000	46500	31000	15500
75	70417	52812	35208	17604
80	79333	59500	39667	19833
85	88750	66562	44375	22188
90	98667	74000	49333	24667
95	109083	81812	54542	27271
100	120000	90000	60000	30000

11.6 Loss of Support Benefit

This benefit provides income to the deceased victim's dependants. For this purpose dependants are the surviving spouse(s) (i.e. partners of a legal marriage and/or customary union), children (natural or legally adopted), and dependent parents of the deceased (natural or legally adoptive).

This benefit will also be based on the **Qualifying Earnings** (as defined) of the deceased breadwinner, using the customary allocation of 2 parts for the deceased, 2 parts for the surviving spouse(s), and 1 part for each child and for each surviving dependent parent. The actual earnings of **the** surviving spouse will be taken into account to determine this income-related benefit.

This benefit will be reduced by the degree of fault on the part of the deceased breadwinner.

The surviving spouse and dependent parents will receive the benefit until they reach 65 years or until the deceased would have become 65 years old, whichever event occurs earlier. Dependent children will benefit until they reach 21 years or until the deceased would have become 65 years, whichever event occurs earlier.

11.7 Funeral Benefit

A standard funeral benefit of R3 000 will be paid in all instances, subject to apportionment of fault.

11.8 Apportionment of Fault against Children

Generally all the benefits are subject to fault, but it is proposed that in no instance should fault on the part of a child under the age of 14 years be apportioned. However, fault on the part of a wrongdoer, i.e. the driver or owner of the offending vehicle, must be proven.

12. Common Law Rights

Currently a victim has a claim at common law against the wrongdoer – to the extent that the latter was at fault – for loss suffered in excess of the RAF's statutory liability. The current benefits of the RAF are unlimited – except that the claim of a passenger against his own driver is capped at R25 000 maximum. The passenger victim has to proceed at common law against the driver for any balance of loss suffered above R25 000. (If the driver of a second vehicle involved is negligent, the passenger has an unlimited claim against the RAF). The proposed restructuring of loss of earnings benefits, the linking of PPD to awards for permanent impairment and the redirection of General Damages to the seriously impaired, raise the question of how the excess losses are to be handled.

Although this question has no relevance to the finances of the R4F, it is of considerable social importance.

Leaving this common law right intact has many disadvantages, and would create uncertainty, anxiety and loss of confidence amongst private motorists and have grave implications for the transportation' industry, including the taxi industry. On the other hand to deny innocent victims the right to claim the damages they have suffered in excess of the benefits they have received from the RAF would seem to be protecting the negligent driver at the expense of the innocent victim.

After **careful** consideration of the factors set out in Appendix H Government has concluded that the population at large would be better served if the common law right to recover excess damages from the wrongdoer be abolished. A statutory precedent exists in respect of injuries and diseases contracted in the course of employment as provided for in the Compensation for Occupational Injuries and Diseases Act No 130 of 1993

13. Passenger Claims

As mentioned in paragraph 4, the present legal situation is anomalous, and it is proposed that all victims of road accidents qualify for the same benefits – be they drivers, passengers, pedestrians, or cyclists. This proposal will add approximately 10% to the claims liability of the RAF, but Government wishes to remove this serious inequity.

14. Exclusions

In certain instances it is considered inappropriate to pay benefits from public funds and total exclusions should apply to:

- (a) claims arising from organised motor sport, as such accidents are not deemed to be MVA'S.
- (b) claims by thieves of stolen vehicles and their accomplices.
- (c) claims by perpetrators of intentional harm or self-harm.
- (d) claims submitted by persons who are illegally present in South Africa at the time of the accident.
- (e) fraudulent and misrepresented claims.

15. Road Safety

South Africa's road accident rate is shocking – however one measures it – and can be as much as 5 or 10 times that of other countries. This naturally affects the finances of the RAF, and therefore it is proposed that (with retroactive effect from 1.5.97) the RAF “invest” 2½% of its fuel levy income in road safety measures, expecting a “yield” in the shape of fewer and smaller claims. A comprehensive Road Traffic Management Strategy has been developed with a clear target of reducing road accident fatalities by 10% by the year 2000. A Road Traffic Safety Board, involving National and Provincial Ministers, the RAF, and other role players has been established to act as guardians of the Strategy.

16. Party and Party/Attorney and Own Client Costs

- (a) The RAF has to reimburse the victim for legal costs on a party and party basis. The following relationships emerged in the latest financial year.

Victim received from RAF:

Compensation	79,80%
Victim's party and party costs	11,75%
RAF's legal costs:	<u>8,45%</u>
TOTAL	<u>100.00%</u>

- (b) Attorneys usually charge fees for professional services rendered on a more comprehensive basis than allowed by the party and party basis, viz. the attorney and own client scale (**A&OC**). This latter charge is mostly recovered from compensation payable to the victim. Both party and party costs and **A&OC** costs reduce the amount of compensation available for victims and it is estimated that in the order of **30%** of the resources of the RAF may be spent on settlement costs, rather than reaching the victims for whom it is intended.
- (c) At the moment it is impossible to obtain reliable information as to the extent of **A&OC** costs. Informed sources estimate that such costs may be double party and party costs.
- (d) In order to establish the level of attorney and client costs, there should be an obligation on attorneys – who have a monopoly in relation to handling claims against the RAF – to advise the RAF of their **A&OC** costs and any advances made by them to clients, when their party and party bills of costs become agreed or taxed. Such party and party costs will be paid after this requirement has been complied with. The RAF should additionally **be** empowered in its discretion and at its own expense to call for a detailed **A&OC** bill of costs in cases where it believes this would give it a better understanding of how such costs are made up. This information will be required by the RAF Commission to make informed recommendations on **future** costs structures.

17. Payment of Compensation to Minors

Many of the victims and their families are financially unsophisticated and the danger exists that benefits paid to minors may be dissipated before they reach majority. This would be avoided if the **funds** were placed in trust with a bank and became payable to the

minor on attaining majority. A model which achieves this has been set up in Botswana and is described in Appendix I. It is proposed to explore whether a similar model could be setup in South Africa.

18. The **View Ahead**

Government recognises, with regret, that in seeking to allocate limited resources equitably for the benefit of the majority of the population, some individual inequities are inevitable. However, Government will closely monitor and review the results of the new system with a view to continuously enhancing the system and will take appropriate action to do so in the light of experience.

As mentioned in paragraph 8, the Minister will appoint the **RAF** Commission with the brief to review **fundamentally** the entire system of compensation for road accident victims.

As a further initiative the Minister of Transport is facilitating the appointment of a Working Party to devise a comprehensive trauma care system which is referred to in Appendix J.

‘Date: 8 January 1998

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APPENDIX A

FINANCIAL PROJECTIONS OF THE "NEW FUND" see par. 9)

Financial year Ending	(R million)									
	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Levy Income	2 293	2 599	2 946	3 340	3 786	4 292	4 865	5 515	6 252	7 087
Investment Income	165	541	969	1 414	1 856	2 293	2 735	3 188	3 657	4 143
TOTAL INCOME	2 458	3 140	3 915	4 754	5 642	6 585	7 601	8 704	9 909	11 230
Claims Paid	10	188	705	1 509	2 415	3 330	4 231	5 215	6 235	7 407
Administration & Depreciation	0	8	28	60	97	133	169	209	249	296
TOTAL CASH OUTGO	10	195	734	1 569	2 511	3 463	4 400	5 423	6 484	7 704
NETT CASH FLOW	2 448	2 945	3 182	3 185	3 131	3 122	3 200	3 280	3 425	3 527
Increase in Claims Provision	2 006	2 471	2 706	2 743	2 763	2 879	3 147	3 508	4 052	4 711
OPERATING PROFIT/(LOSS)	442	473	476	442	368	244	53	-228	-628	-1 184
Assets	2 448	5 393	8 574	11 759	14 890	18 012	21 212	24 492	27 917	31 444
Provision	2 006	4 477	7 183	9 926	12 690	15 568	18 715	22 224	26 276	30 986
Surplus	442	915	1 391	1 833	2 200	2 444	2 497	2 269	1 641	457

APPENDIX B

FINANCIAL RESULTS OF THE "OLD FUND" see par. 9

Financial year Ending	(R million)										
	1998	999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Levy Income	1 796										
Investment Income	233	145	-140	-478	-827	-1 160	-1 477	-1 792	-2 119	-2 473	-2 869
TOTAL INCOME	2 029	145	-140	-478	-827	-1 160	-1 477	-1 792	-2 119	-2 473	-2 869
Claims Paid	1 506	1 863	2 079	1 982	1 562	1 104	711	481	258	198	120
Administration & Depreciation	60	75	83	79	62	44	28	19	10	8	5
TOTAL CASH OUTGO	1 566	1 938	2 162	2 062	1 625	1 148	740	500	268	206	125
NETT CASH FLOW	463	-1 792	-2 302	-2 539	-2 452	-2 309	-2 217	-2 292	-2 387	-2 679	-2 994
Increase in Claims Provision	1 181	-936	-1 308	-1 400	-1 160	-843	-547	-382	-200	-167	-108
OPERATING PROFIT/(LOSS)	-718	-856	-994	-1 139	-1 292	-1 466	-1 669	-1 910	-2 187	-2 512	-2 886
Assets	1 904	112	-2 190	-4 730	-7 182	-9 491	-11 707	-13 999	-16 387	-19 065	-22 059
Provision	7 081	6 145	4 837	3 437	2 277	1 435	887	505	305	138	29
Surplus	-5 177	-6 034	-7 028	-8 167	-9 459	-10 925	-12 595	-14 504	-16 691	-19 203	-22 089

APPENDIX C

Reducing Legal Costs

The following proposals are aimed at **simplifying** and streamlining the legal procedure, with a view to saving time and expense:

- (a) The merits of the claim are to be settled first before a claim on quantum may be lodged or entertained. The early resolution of merits often leads to the earlier resolution of the whole dispute, with a substantial saving in costs. It is also desirable that costs in regard to the quantum should not be incurred until the merits have been established.
- (b) In order to achieve a speedy decision on the merits, a Notice of Claim or “Merits Claim Form” (MCF) should be lodged within 12 months of the accident, failing which there is no claim. This requirement would apply to all claimants – including those under legal disability – but provision will be made for special exceptions, viz. unrepresented minors and comatose persons. The MCF will include details of injuries sustained set out in a prescribed medical report, as well as medical costs and loss of earnings to date.
- (c) The RAF shall make an offer on the merits within 3 months of receiving the MCF and supporting merits documents, failing which the merits shall be deemed to be in dispute and the claimant or the RAF may set the matter down for hearing. Provision will be made for special exceptions, e.g. where the **RAF** is still awaiting police or inquest records.

- (d) The prescribed MCF should be simplified but also amplified. It should be user-friendly, but at the same time provide sufficient information to enable the RAF to investigate the claim.
- (e) In the event of litigation on the merits, the MCF and the RAF's offer will suffice as pleadings, and the formal discovery of documents will be dispensed with. All documents, plans, statements, reports etc. relating to the merits shall be exchanged between the parties. Further, neither party shall be entitled to use during the trial any document that had not been disclosed at least 2 weeks before the **pre-trial** conference.
- (f) Magistrates' Courts should be granted jurisdiction to hear disputes on merits, regardless of the eventual amount of the claim or the location of the Court. The cost structure is much lower than in the High Court (but see paragraph (n) below), and it is also more convenient to hear the matter where the plaintiff and the witnesses reside.
- (g) Once the merits have been finalised, the RAF – on demand from a plaintiff – may make interim payments in respect of proven past medical expenses and loss of earnings.
- (h) Provided the claimant has given the early notification envisaged in (b) above and the merits have been settled, the claimant can pursue the quantum claim.

The normal 3 year prescription period contemplated in the Prescription Act No. 68 of 1969 (and those longer periods applicable to persons under legal disability) will therefore apply, but commence to run only upon final resolution of the merits.

- (i) The MCF is to be followed by a "Quantum Claim Form" (QCF) within the prescription period. This QCF will provide for the submission of all documentation necessary for the claimant to prove quantum. Once the quantum claimed has been substantiated with proof, the RAF will be obliged to respond by way of tender within 3 months. The claimant may not issue summons on the quantum issues prior to the determination of permanent impairment referred to in paragraph 11.4 and Appendix D, nor prior to the passage of the 3 months period referred to above.
- (j) If settlement on quantum cannot be reached amicably, the attorneys acting for both sides have to agree in writing that the matter is ripe for hearing before application for a trial date may be made.
- (k) Subsequently procedures prescribed in Rule 37(4) of the High Court Rules in connection with **pre-trial** conferences **should** be strictly adhered to, and such **pre-trial** conferences must take place at least six weeks prior to the hearing. The intention is that the respective legal representatives properly prepare their cases, apply their minds to the areas of dispute, and thus crisply define the issues in dispute in order to save on litigation costs.

- (l) The present discovery procedure is costly and time-consuming. Documents already disclosed by either party (in whatever form) and exchanged in preparing for a settlement or trial need not be discovered. Either party may call for the discovery of any **further** documents, but neither party shall be entitled to use during the trial any document that had not been disclosed at least 2 weeks before the **pre-trial** conference.
- (m) Cost orders are to be made on the so-called disparity basis, similar to that applicable in the case of expropriation matters:

% Cost Award in **favour** of plaintiff

= 0% if Award is
lower than Tender;

= 100% x $\frac{\text{Award} - \text{Tender}}{\text{Claim} - \text{Tender}}$ if Award is higher
than Tender.

This should encourage both sides to be realistic, and avoid speculative or **unnecessary** litigation on either merits or quantum.

- (n) The present structure of the party and party fee basis is unsatisfactory: it was not designed specifically for work related to MVA compensation, and more than 10 tariffs could currently apply. It is proposed that the RAF, in consultation with legal practitioners, design a special tariff specifically aimed at **RAF** work.

APPENDIX D**Future Medical Expenses and Medical Assessments****1. Management of Future Medical Expenses**

Under the current legislative framework, **future** medical expenses of road accident victims can be settled in one of three ways:

- **a** once-off cash settlement. This would be most appropriate where the probability that the **service** will be needed is very high, the need for the service expected to be of short duration and the amount involved relatively small;
- . an undertaking. This would be most appropriate where the probability that the service will be needed is relatively low, the time lapse relatively long and the amount involved relatively big (e.g. a 20% probability of a hip replacement 10 years **after** the accident), and when victims are seriously injured and require ongoing medical care.
- . a combination of **a** cash settlement and an undertaking.

It is foreseen that the RAF will in future make progressively more use of undertakings, lest victims dissipate the cash lump sum and ultimately not utilise the award for its intended purpose. Undertakings will, *inter alia*, discourage inflated claims for **future** medical expenses by road accident victims and ensure that the victims who are entitled to such services receive cost-effective and high quality care. The earlier settlement of cases will also result in a greater proportion of the total medical costs being “future medical expenses” than is currently the case.

The implications for the **RAF** are:

- . firstly, that it will have to acquire the administrative capability to receive, validate, assess, data process and pay claims from the providers of **healthcare** services to road accident victims without undue **delay** or administrative problems;

- . secondly for the RAF to operate effectively in the evolving managed **healthcare** environment of the South African private health sector, it will also have to acquire the necessary managed care capabilities such as pre-authorisation, case management and utilization reviews;
- . thirdly, as a major funder of **healthcare**, the RAF should have the authority to enter into preferred provider arrangements with a provider or a group of providers of medical aid (**healthcare** professionals, hospitals, pharmacies, etc.) to provide **healthcare** services to people who are entitled to such services in terms of the Act and to negotiate a tariff of fees and reimbursement methods with such providers;
- . **fourthly**, a prescription period of four months, after the end of the month in which the service was rendered, will apply to all claims in terms of an undertaking (similar to the provisions of the Medical Schemes Act).

The objective is to implement the latter two proposals in respect of claims to be lodged relating to accidents which will occur from 1 May 1998.

2 Assessment of Road Accident Victims to determine Degrees of Permanent Impairment and Disability

(a) Current Practice

The current practice of obtaining multiple expert and medical opinions on the instruction of either the claimant's attorneys or the RAF is **wasteful** (or inefficient) and results in **highly** subjective, operator (assessor) dependent, and often conflicting reports.

(b) **Use of Internationally Comparable Measures**

The nature and degree of a victim's impairment will be determined in terms of the American Medical Association's (AMA) Guides to the Evaluation of Permanent Impairment (4th Edition). These AMA Guides will form the basis of the medical assessment of road accident victims who may be entitled to benefits in accordance with the Act. In terms of these AMA Guides medical evidence is gathered, assessed and presented in a standardised format.

The alteration in the victim's ability to meet the demands of his or her own and alternative occupations for which that person may be qualified will be determined with reference to the International Standard Classification of Occupations (ISCO-88).

The following definitions are of particular relevance:

"impairment" : a deviation from normal in a body part or organ system and its functioning that interferes with an individual's activities of daily living such as selfcare and personal hygiene; eating and preparing food; communication, speaking and writing; maintaining one's posture, standing and sitting; caring for the home and personal finances; walking, traveling and moving about; recreational and social activities; and work activities.

"permanent impairment" : an impairment that has become static or stabilised during a period of time sufficient to allow optimal tissue repair, and that is unlikely to change in spite of further medical or surgical therapy.

“disability”: an alteration in a person’s ability to meet the demands of his or her own occupation and alternative occupations for which that person may be **qualified** in terms of **ISCO-88**.

The AMA Guides are viewed as the only currently available system for the assessment of permanent impairment which substantively complies with the following criteria:

- objective and as far as possible operator (assessor) independent;
- internationally comparable;
- comprehensive, i.e. covers **all** body parts and systems; and
- lends itself to verification via, for instance, peer review.

It is important to note that “pain” and “disfigurement” are specifically provided for in the Guides and will be included in the assessment of the percentage permanent impairment.

The intention is that AMA Guides will be submitted to the Medical Association of South Africa (MASA) and its relevant specialist associations (orthopedic, **neurosurgical**, etc.) for comments on whether and how the Guides may be amended or adapted for local circumstances. Such a consultative process could be repeated at regular intervals or at the request of the **RAF** or MASA.

(c) Medical Reports

Healthcare professionals and institutions (hospitals) who have been involved in the treatment of a road accident victim will be obliged, on request, to provide the RAF with extracts from medical records and/or medical reports in a standard format. This may include an initial and/or subsequent medical reports.

In cases where the extracts from the medical records or the medical reports referred to above provide sufficient consistent information to assign a PPI to a road accident victim, this will be done in terms of the AMA Guides. The degree of disability will be determined with reference to the demands of the victim's own and alternative occupations as per the ISCO-88.

(d) Assessments

In cases where the RAF receives conflicting or insufficient information to assign a degree of permanent impairment and/or disability from the reports referred to in 2(c), or when the victim disputes the degree of impairment **and/or** disability so assigned:

- the road accident victim shall, after reasonable notice by the RAF, submit to an examination by a designated medical assessor(s) at the time and place mentioned in the notice;
- such expenses incurred by the road accident victim to comply with this provision as the RAF may deem necessary and reasonable, and the remuneration for the medical assessment shall be paid by RAF;
- a road accident victim shall be entitled at his own expense to have a medical practitioner of his choice present at an examination by a designated medical assessor(s).

A system of peer review will be established to enhance the objectivity and consistency of the assessments.

The designated medical assessor will be independent of both the RAF and the victim and the criteria for “registration” as a designated medical assessor will be:

- . an appropriate legally registered professional qualification;
- . knowledge and familiarity with the AMA Guides and **ISCO-88**;
- acceptance of peer review and the **RAF’s** tariff of fees; and
- . an acceptable quality of work and timeous submission of reports.

In line with recommendations contained in the AMA Guides, a degree of discretion will be allowed for the assessor to deviate from the percentage impairment recommended in terms of the Guides, should the particular circumstances warrant it.

(e) Tariff of Fees for Medical Reports and Assessments

It is recommended that the RAF should, after consultation with the relevant representative professional organisations, publish a tariff of fees for the medical reports and assessments referred to in 2(c) and 2(d).

No amount in excess of that determined in the published tariff of fees shall be recoverable from the road accident victim or any other party for such medical reports and assessments.

APPENDIX E

International Standard Classification of Occupations (ISCO-88)**1. Historical Background**

Following several decades of preparatory work, the International Classification of occupations for Migration and Employment Placement **was** published by the International Labour Organisation in 1952. This was replaced by the first edition of the International Standard Classification of Occupations (ISCO) in 1958, and a revised edition followed in 1968.

The present edition, ISCO-88, was adopted by the Fourteenth International Conference of Labour Statisticians in 1988. The conference went on to recommend that: "In collecting and processing statistics classified by occupation, each country should ensure the possibility of conversion into the ISCO-88 system, to facilitate international use of occupational information".

2. Conceptual Framework

The framework of the ISCO-88 is based on two concepts: the concept of the kind of work performed or job, and the concept of skill.

Job is defined as a set of tasks and duties executed or meant to be executed by one person. A set of jobs whose main tasks and duties are characterised by a high degree of similarity constitutes an occupation.

Skill is defined as the ability to carry out the tasks and duties of a given job. It has two dimensions, namely: skill level, which is a function of the complexity and range of tasks and duties involved; and skill specialisation, which refer to the field of knowledge required, the tools and machinery used, the materials worked with, and the goods and services produced.

On the basis of the **skill** concept thus defined, the **ISCO-88** occupations are delineated and **further** aggregated into the various occupational groups.

3. Design and Structure

The structure of **ISCO-88** is based on a pyramid of 10 major groups of occupations, subdivided into 28 sub-major groups, 116 minor groups, 390 unit groups and 1506 occupations.

ISCO-88 major groups with number of sub-groups

Major Groups		sub-major Groups	Minor Groups	Unit Groups
1.	Legislators, senior officials and managers	3	8	33
2.	Professionals	4	18	55
3.	Technicians and associate professionals	4	21	73
4.	Clerks	2	7	23
5.	Service workers and shop & market sales workers	2	9	23
6.	Skilled agricultural and fishery workers	2	6	17
7.	Craft and related trades workers	4	16	70
8.	Plant and machine operators and assemblers	3	20	70
9.	Elementary occupations	3	10	25
10.	Armed forces	1	1	1
Totals		28	116	390

For each of the groups at the four levels of aggregation of **ISCO-88** a code number, a title and a brief description of the content is provided. This is followed by detailed descriptions of the 1506 occupations and indexes by numerical order and alphabetical lists.

The detailed descriptions of the 1506 occupations include a brief description of the occupation, a detailed list of the tasks to be performed, examples of the occupation included and other related occupations.

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APPENDIX F

DISTRIBUTION OF CLAIMS SIZE (PER INJURED OR DECEASED PARTY) BY NUMBERS AND BY TOTAL AMOUNTS, AS FINALISED IN FINANCIAL YEAR 1996/97

NUMBER	%	CUMULATIVE %	CLAIM SIZE R.	TOTAL AMOUNT (RM)	%	CUMULATIVE %
19161	33.24	33.24	0 - 999	0.6	0.05	0.05
10817	18.76	52.00	1000 - 4999	31.4	2.87	2.93
8803	15.27	67.27	5000 - 9999	64.2	5.87	8.80
5035	8.73	76.01	10000 - 14999	61.5	5.63	14.42
3108	5.39	81.40	15000-19999	53.7	4.91	19.33
2089	3.62	85.02	20000 - 24999	46.6	4.26	23.60
1940	3.37	88.39	25000 - 29999	53.1	4.85	28.45
1156	2.01	90.39	30000-34999	37.2	3.40	31.85
714	1.24	91.63	35000-39999	26.8	2.45	34.30
541	0.94	92.57	40000 - 44999	22.9	2.09	36.39
407	0.71	93.28	45000-49999	19.3	1.76	38.15
1981	3.44	96.71	50000-99999	136.7	12.49	50.64
766	1.33	98.04	100000-149999	92.74	8.48	59.12
344	0.60	98.64	150000 - 199999	58.98	5.39	64.51
199	0.35	98.99	200000 - 249999	44.18	4.04	68.55
113	0.20	99.18	250000 - 299999	30.57	2.79	71.35
86	0.15	99.33	300000-349999	27.53	2.52	73.86
67	0.12	99.45	350000-399999	25.09	2.29	76.16
43	0.07	99.52	400000 - 449999	18.08	1.65	77.81
36	0.06	99.58	450000 - 499999	17.04	1.56	79.37
120	0.21	99.79	500000--749999	72.40	6.62	85.99
54	0.09	99.89	750000--999999	46.25	4.23	90.21
30	0.05	99.94	1000000--1249999	33.68	3.08	93.29
13	0.02	99.96	1250000--1499999	17.53	1.60	94.90
23	0.04	100.00	1500000--	55.84	5.10	100.00
57646				1093.95		

APPENDIX G

Definition of Catastrophic Permanent Impairment

The following medical conditions constitute Catastrophic Permanent Impairment:

- (a) paraplegia or quadriplegic,
- (b) amputation or other impairment causing the total and permanent loss of use of both **arms**,
- (c) amputation or other impairment causing the total and permanent loss of use of both an arm and a leg,
- (d) total loss of vision in both eyes,
- (e) brain impairment that, in respect of an accident, results in a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., Assessment of Outcome After Severe Brain Damage, Lancet i: 380, 1975, according to a test administered more than six months after the accident by a person trained for that purpose,
- (f) any impairment that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4* edition, 1993, results in a class 4 impairment (marked impairment) or **class 5** impairment (extreme impairment) due to a mental or behavioral disorder; or
- (g) any impairment or combination of impairments that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4* edition, 1993, results in 55 per cent or more impairment of the whole person, and which is, in the opinion of a designated medical assessor, **comparable** to the conditions listed in (a) to (f).

APPENDIX H

The Abolition of the Common Law Right**1. Introduction**

Under the common law the victim of a road accident has a right against the negligent driver (the wrongdoer) to be compensated in full for the damages flowing from the wrongdoer's negligence.

The damages suffered by the victim may well exceed the benefits payable by the RAF under the present proposals. Accordingly the issue arises as to whether the common law right to recover any damages not covered by the RAF (the excess) should be abolished.

This existence of a common law right to claim the excess brings with it the right to sue (as victim) and the risk of being sued (as wrongdoer).

In proposing a scheme to provide road accident victims with reasonable and sustainable benefits within the ambit of financial constraints, Government has to carefully balance this right against this risk.

2. How Appropriate is the Right?

The case for maintaining the right needs no elaboration. It is the law as it stands at present. An inherent element of this common law right is the establishment of the wrongdoer's negligence. For this reason, the common law right may no longer be entirely appropriate or equitable:

- a) Even if the victim were 100 % innocent, the absence of corroborating evidence may cause the victim to forfeit a large part or all of the claim.
- b) The establishment of fault requires the reconstruction of the accident. Reliance has to be placed on the varying and sometimes questionable powers of observation and memory of the persons involved and of bystanders, who are

required to **testify** at length to an event of a few seconds that occurred long ago. In Court, the unfamiliar and disconcerting atmosphere and the rigours of **cross-examination** may adversely affect the ability to report accurately on the events, which may cause the testimony to be found unconvincing or even unreliable. Even if the facts of the collision can be reconstructed reliably, the standards applied to determine negligence and the apportionment of guilt are imprecise. Too often the conclusions reached are quite simply artificial and speculative.

- c) Using fault as a method of determining liability presupposes that a wrongdoer had ample opportunity to consider the various options to avoid the accident with accuracy. This presumption may be equitable and efficient for other **delictual** claims, but it is quite unrealistic in the case of split-second motor vehicle accidents.
- d) In any event, fault is not the only cause of accidents: traffic density, road surface, weather conditions, mechanical defects, and inadequate road signage, among others, **all** play their part.

3. The Option to Maintain the Right

- a) If the common law right to claim the excess remains, the consequence will be to shift a large component of the burden onto individual wrongdoers and members of the transportation industry.
- b) A modest or middle-income wrongdoer may be **left** destitute by a large claim from a high-income person.
- c) Although the wrongdoers are not wrongdoers in any turpitudinous sense, a moment's inattention in years of motoring may attract a ruinous liability.
- d) All motorists are taxed through a fuel levy to provide the statutory benefits and they may expect to be reciprocally protected from the potentially devastating consequence of a personal common law liability.

- e) Whether to abolish or maintain the common law right is of considerable importance to the country's vast transport industry, including the taxi industry. Not only does the availability and risk coverage of such insurance fluctuate, but it is also expensive and the burden of expensive insurance will merely be passed on to the consumer.
- f) Additionally, a large claim or several claims resulting from one road traffic accident may ruin an uninsured transport or taxi business.

4. The Option to Abolish the Right

Should Government abolish the common law right, this will result in the wrongdoer being protected from claims by innocent victims whose lives may have been ruined by the accident. However, the abolition of the common law right may not necessarily be as radical as it may appear at first glance, nor may it necessarily be as prejudicial to the public at large, for the following reasons:

- a) Presently a victim has no common law right against the wrongdoer personally, because the RAF **fully** covers the wrongdoer's liability (with the exception of the limited passenger claims). To maintain the common law right in conjunction with the proposed restructured benefits, would lead to increasing jeopardy for the population as a whole.
- b) It would be inequitable if a road user without means who falls victim to an accident, could recover his excess from the wrongdoer with means, yet should the latter ever fall victim to the wrongdoing of a person without means, the common law right would yield no recovery.
- c) The right to sue a wrongdoer does not guarantee satisfaction, as the wrongdoer may very well be the proverbial man of straw with no means to **satisfy** the victim's excess claim.

- d) It is unlikely that many wrongdoers will **be** able to pay **meaningful** claims without expensive indemnity insurance which few can afford.
- e) Where the excess is recovered, many wrongdoers could be left destitute in contrast to the victims themselves who would have received reasonable benefits. Such wrongdoers may in turn burden the State.
- f) There exists statutory precedent for no recourse at common law for losses in excess of the benefits paid under the Compensation for Occupational Injuries and Diseases Act No 130 of 1993.
- g) For those victims who have acquired appropriate private insurance, there would be no need to revert to the common law. Their risk would already be fully covered by their top up insurance. However, it would be unrealistic to assume that many pedestrians would take out such cover.
- h) It is acknowledged that many people who are **employed** in the formal sector already have top up provision in the form of medical aid care, pension and disability benefits to replace income lost due to injury or accident. Such people may not require additional top up cover to insure against the excess not covered by the proposed system of benefits.
- i) The removal of the cap on certain passenger claims **further** alleviates the need to maintain the common law right.

Having **carefully** weighed these important factors Government has concluded that the balance of benefit from the point of view of the population as a whole, is to abolish the right to claim such excess damages from the negligent wrongdoer. It is fortified in this view by the conclusion reached by the Melamet Commission which, in considering the need to impose limits on claims for damages (which was not deemed necessary at that stage), concluded that: "If . . . any limit is imposed it seems essential that the common law rights to recover any excess or type of damages not provided for by the MMF should be abolished . . .".

APPENDIX I

Payment of Compensation to Minors

Valuable property, including money, accruing to a minor may be dealt with in accordance with common law principles as follows:

- a) such property is placed into trust until the minor's legal incapacity ceases on attainment of majority; or
- b) the minor, assisted by the legal guardian, may deal with such property.

Both options are recognised in common law and supported by judicial precedent. However, the best option is a matter of choice.

The Botswana Model

The Botswana Fund regards itself as the trustee of the public money available to accident victims. The Fund believes that if the compensation due to minors is handed to the legal guardians, those "trust funds" are rendered too susceptible to the vagaries and temptations of human nature.

Because minors are protected by guardianship and limited legal capacity, actions concerning a minor's patrimony must always be objectively tested by the best interests of that minor. Thus the Botswana Fund believes that the option in paragraph a) above is the prudent choice of a responsible trustee, and that such election will stand the test of judicial review.

The Botswana Fund utilises a large local bank to set up the trust. Every settlement offer for compensation due to a minor contains a condition precedent that the sum is paid by the Fund into a deposit account. Each settlement offer is accompanied by a facts sheet

explaining the wisdom of the procedure. Once the offer is accepted, the Fund deposits the money into the minor's account. Simultaneously the Fund prepares a document to cede the rights to such account in favour of the minor and to mandate the Bank to hold the proceeds of the account until the minor attains majority or until a Court directs otherwise. The minor's guardian receives a copy of the cession and mandate. The bank grants normal account holder status to the minor and issues normal documents of title. Given the number of accounts involved, the Fund negotiated higher than normal investment returns on these trust accounts.

Initially the scheme was instituted with trepidation. Resistance was expected because Botswana is a very patriarchal society. Now that the scheme has operated successfully for three years, it has been incorporated into a draft bill for legislative purposes.

APPENDIX J

Medical Care of Road Accident Victims

Each year thousands of South Africans are injured or killed in trauma related incidents such as road accidents, criminal and other violence and work related accidents.

There is general consensus that the victims of such trauma incidents often receive less than optimal **healthcare** resulting in an unacceptable number of "preventable" deaths or residual disability with huge economic consequences for the individuals, their families, the RAF and the country as a whole.

There is overwhelming international evidence that the mortality, morbidity and economic impact (for the victim and society at large) of trauma related incidents can be substantially reduced by the introduction of a comprehensive (or integrated) system of trauma care.

The development and implementation of such an integrated national trauma care system will require co-operation between various stakeholders such as the public health sector (Department of Health, provincial health authorities and public hospitals), private health sector (private hospitals, **healthcare** professionals), emergency medical services (public and private), the RAF and workers' compensation authorities.

It is recognised that the RAF is only one of many roleplayers in trauma service care.

It is against this background that the Minister of Transport has initiated moves to appoint a Working party, representative of all the major **stakeholders**, to develop recommendations on the development and implementation of a comprehensive or integrated trauma care system for road accident victims in South Africa.

The recommendations should cover, but not necessarily be limited to, the following:

- . pre-hospital treatment, triage and transport of road accident victims;
- . hospitalisation and associated services;
- . outpatient services required by road accident victims;
- . the respective and complementary roles of the public and private health sectors in the delivery of **healthcare** to road accident victims; and
- mechanisms to monitor and manage the care of road accident victims to ensure that they receive cost-effective and high quality care.

The severely impaired victims of road accidents often experience difficulties in obtaining appropriate care (medical and other) in spite of substantial financial settlements in their favour. The problem is obviously aggravated if a high percentage merit is apportioned against the victim.

The Working Party will also investigate and develop recommendations on the practicability and financial implications of providing the severely impaired victims of road accidents with a system of monitored and supervised care on a no fault basis.

Although the Working Party should commence with its work as soon as possible, it is not foreseen that its recommendations will be ready for implementation by 1 May 1998.

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