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Committee Report No 11

Coverage against employment injuries and diseases

11.1 Introduction

The introduction of insurance schemes for occupational injuries and diseases is a response to the peculiar nature of the problem of work-related accidents and diseases. The common law, which premises liability on the principle of fault, is ineffective in the said circumstances. Therefore, a particular form of liability (delictual *in casu*) for any civil compensation claim against the employer is replaced by insurance coverage. It is thus correct to view this responsibility of the employer to compensate as a case of “strict liability”. Employees make their labour potential available to the employer (who benefits from the economic process). Also, at common law employers bear the responsibility of providing safe and healthy working conditions. It follows that the responsibility for financing the insurance scheme is the employer’s.

11.2 Fragmented statutory framework

As noted in a submission to the Committee, there are various health and safety laws in South Africa that deal with occupational health and safety enforced by various government departments.¹ These laws, the Report of the Committee on Inquiry into a National Health and Safety Council in South Africa concluded,² remain fragmented since no overarching national health and safety policy currently exists in the country.

The *Compensation for Occupational Injuries and Diseases Act*³ came into effect on 1 March 1994.⁴ The Act, which is administered by the Department of Labour, brings about a number of significant changes to the system of statutory compensation.⁵ COIDA provides a system of no-fault compensation for employees who are injured in accidents *that arise out of and in the course of their employment* or who contract occupational diseases. However, fault continues to play a role since an employee is entitled to additional compensation if he/she can establish that the injury or disease was caused by negligence of the employer (or certain categories of managers and fellow employees). The Compensation Fund established in terms of COIDA requires employers to contribute to a centralised state fund (contra compulsory insurance policies with private insurers).

There are, however, two important exceptions: these are the Rand Mutual Assurance Company Limited which operates in the mining industry and the Federated Employer’s Mutual Association which operates in the building industry. They are allowed to perform the same functions as the Fund.⁶ Subject to the said exceptions (and exempted employers who are individually liable in section one of the Act) all employers in South Africa must register and pay assessments to the Fund.⁷

The *Occupational Diseases in Mines and Works Act (ODMWA)*⁸ provides for mandatory reporting of and the payment of certain benefits to workers who develop certain occupational lung diseases,⁹

as well as the payment of certain benefits for dependants of workers who die from such diseases. The Act, which is enforced by the Department of Health, covers employees in all mines and works.

There are major differences between COIDA and ODMWA as far as benefit structure and entitlements and other matters are concerned, as discussed later on. There is clear need for alignment of the two laws, and their integration within the broader occupational health and safety, and social security framework.

Health and safety standards in mines are also dealt with differently from the same standards in other workplaces. The *Mine Health and Safety Act (MHSA)*,¹⁰ which is enforced by the Department of Minerals and Energy, requires of the owner of every worked mine to ensure, as far as reasonably practicable, that the mine is designed, constructed, equipped and operated in such a way that employees can perform their work without endangering the health and safety of employees or of any other person.¹¹ The *Occupational Health and Safety Act (OHSA)*¹² spells out the duties of employers and employees respectively in other workplaces and makes provision for a number of offences if the Act is contravened.¹³ Major differences exist as far as these two laws are concerned.¹⁴

11.3 Overview

Compensation for occupational injuries and diseases is covered by the *Compensation for Occupational Injuries and Diseases Act (COIDA)*¹⁵ and the *Occupational Diseases in Mines and Works Act (ODMWA)*.¹⁶ COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. Fault continues to play a role since an employee is entitled to additional compensation if he/she can establish that the injury or disease was caused by negligence of the employer (or certain categories of managers and fellow employees).

The main problems that currently exist as far as health and safety measures are concerned are:

- Large numbers of persons are excluded from the operation of COIDA, namely domestic workers, the unemployed and those involved in non-standard forms of work—such as the informally employed, the self-employed, and so-called dependant contractors. Provision is only made for an employment-related and a traffic-related social insurance system. Persons who are injured outside the employment sphere and the traffic context therefore enjoy no social insurance protection. Social assistance, in the form of a disability grant, is only available to the indigent disabled.¹⁷
- Labour market (re)integration is not a priority, as little general provision exists in this regard. Similarly, prevention in these cases does not seem to receive any particular attention from policy-makers.
- Finally, a lack of linkage with other social insurance¹⁸ and social assistance schemes¹⁹ leads to duplication of payments (double-dipping), thereby seriously eroding the financial soundness of the respective public insurance funds and the source from which social grants

are paid. It does, of course, also serve as a disincentive to access or return to the labour market.

11.4 Employee protection and employer interests

It is recommended that appropriate departmental measures be adopted to ensure that the Fund and the officials employed at the Fund sufficiently appreciate the fact that employer and employee interests are to be respected alike. Furthermore, the protection of employee interests requires that significant steps be taken to enforce compliance by employers of their statutory duties, and that claims processing by the Fund be streamlined in order to deal speedily and efficiently with claims by employees and their dependants.

11.5 International standards

A set of general principles can be deduced from the ILO Conventions passed on this subject with regard to:²⁰

- Financing of employment injury benefits must be by employers.
- Periodic payments should be made available rather than lump-sum benefits.
- Coverage: The appropriate scheme's scope must extend to at least half of the national workforce or 20 per cent of residents.
- Minimum compensation levels must be provided for.
- Migrant workers must receive equal treatment.

South Africa has not ratified Convention 121 of 1964 (the Employment Injury Benefits Convention) yet, but is in a position to do so.²¹ It is recommended that steps be taken to effect the ratification of this Convention, and that the ratification of the other Conventions in this field be seriously considered.²² By doing so, South Africa will be seen to adhere to basic international standards informing policy-making in an area fraught with problems.

11.6 Policy initiatives

Numerous national policy initiatives have been taken in the area of health and safety reform.²³ These recent policy initiatives aim to deal with historic fragmentation of occupational health and safety standard setting, enforcement and compensation (Department of Labour and Department of Minerals and Energy) and occupational health service provision and compensation (Department of Health). They include:

The *White Paper on Transformation of the Health System*, which calls for effective interdepartmental coordination and organisation of the various components of occupational health and safety by proposing a legislative framework to create a national health and safety agency with provincial components. This is in line with the recommendation of the *Department of Labour's Committee of Inquiry into a National Health and Safety Council in South Africa* that also

recommended the establishment of a statutory National Council to develop an integrated national occupational health and safety policy. Some of its recommendations include:

- the integration of the different compensation systems should be investigated
- the use of compensation funds to promote prevention of occupational accidents and diseases
- a thorough investigation into the types of benefits provided by the existing compensation laws and the ability of employees to gain access to those benefits
- the effective integration of the compensation system into a national occupational health and safety system will require the development of strategies to enhance the administration of the compensation fund and to improve the level of awareness of employers and employees of their respective rights and obligations

The *National Parliamentary Asbestos Summit* (November 1998).

A recent *cabinet memorandum* also calls for the rationalisation of occupational health and safety services, enforcement and compensation activities.

Another key strategy outlined by the *White Paper on Transformation of the Health System* is the development of occupational health services and associated human resources at the national, provincial, regional and district levels.

In the Department of Labour the following have been cited by the Compensation Commissioner:

- cost containment plan to reduce medical expenses
- electronic administration and submission of claims
- promoting health and safety training of workers and employers
- training of health professionals in submitting claims
- information and awareness programmes through the media
- targeted workplace inspections of small and medium sized workplaces (following widely publicised disasters in the media)
- technical committee on occupational diseases

In the Department of Health, there two programmes that have been undertaken that have a bearing on workers being identified with occupational diseases and submitting claims for compensation.

- One of main programmes in the Department of Health includes the extension of benefit examinations to ex-miners where ex-miners clinics have been established in provinces.
- The Department of Health has also undertaken capacity building programmes whereby nurses in particular provinces are offered training in occupational health and safety.

11.7 Preventative measures

There are three instruments that insurance schemes can use in attempting to prevent occupational injuries/diseases from occurring: firstly, active accident prevention; secondly, the use of risk-based contributions/premiums; and, thirdly, sanctions for misconduct.²⁴

South Africa has a relatively poor safety record in the workplace and on roads. One would, therefore, expect that that part of the social security system which regulates injury-related coverage would be strong on preventative measures.

The Occupational Health and Safety Act (OHSA)²⁵ and the Health and Safety in Mines Act²⁶ have in common that their main focus is to prevent accidents at work, and that maintenance of health and safety standards is a joint responsibility of employers and employees. In accordance with some of the international standards in this regard,²⁷ COIDA contains several monetary incentives which have the combined effect of encouraging employers to maintain high safety standards.

While these general laws on prevention are fairly elaborate as far as their areas of coverage are concerned,²⁸ their effectiveness as true preventative mechanisms is qualified by various considerations:

- the sanctions are criminal in nature, leaving the employee with little remedy other than a limited claim to compensation against the Compensation Fund, as employees do no longer have the possibility of suing negligent employers.²⁹
- these preventative measures are alone-standing, with little attempt to link them directly to the social security system and the dispensation foreseen in the accident compensation legislation (COIDA).
- some of the crucial definitions used in the legislation tend to be unnecessarily narrow, potentially limiting the sphere of responsibility which an employer may have. This is in particular true of the definitions of “health”³⁰ and “safety”.³¹ The introduction of internationally accepted nomenclature may assist in solving these problems.³²

The Report of the Committee of Inquiry into a National Health and Safety Council concluded that the system of compensation under COIDA and ODMWA has not maximised its potential to promote prevention activities.³³ It found that the ODMWA compensation system contributed significantly to the poor control of health hazards in the mining industry.

It is, therefore, clear that, unlike overwhelming precedent in this regard, no comprehensive strategy has yet been developed to incorporate prevention as part of the overall system of employment injury and disease protection. The recommendation made by the Report of the Committee of Inquiry into a National Health and Safety Council, namely that prevention policy must be developed as part of a national strategy, is supported. All compensation agencies, including the mutual associations, should participate in developing this policy. Key aspects of this would include the use of funds to support the prevention of occupational accidents and diseases.³⁴

11.8 Re-integration

Neither COIDA nor the RAF Act is strong on reintegration measures. In contrast with the position elsewhere, there is no provision in COIDA, which specifically attempts to enforce reintegration measures—such as compulsory rehabilitation or vocational training programmes.³⁵

It is, therefore, especially in the area of reintegration measures that the system is extremely deficient. One would have to suggest that policy-makers should as a matter of priority consider the introduction of measures which would give effect to the principle of labour market integration. Rehabilitation, vocational training and, where appropriate, linking entitlement to benefits payment to participation in such programmes, should serve as minimal mechanisms to attain this goal.³⁶

11.9 Benefits

The main functions of COIDA are / (should be) financial compensation, rehabilitation and prevention.³⁷

The basis upon which benefits are paid out should be amended to reflect a more balanced approach towards compensating the individual. The so-called “meat-chart” creates the impression that this is compensation for loss of a limb rather than income-replacement (social security as a (temporary) by-pass³⁸).

An issue concerns the question whether the Act permits for non income-replacement compensation (“*solatium*”) or for devices to assist people to be re-integrated into the workplace and/or society. Not only is a cap placed on the amount to be claimed, but there is very little consideration for the real need of an affected individual employee in terms of re-integration. Benefits also are not inflation-linked. So-called sentimental damages (e.g. for pain and suffering, loss of amenities) or “*solatium*” are also not covered.

If negligence (on the part of the employer) is established, the Commissioner must award an amount of compensation that he considers equitable.³⁹ The increased amount may not exceed the economic loss that the Commissioner expects the worker to suffer.⁴⁰ The Commissioner may elect to pass the costs of a claim for additional compensation onto the employer by increasing its assessment rates.⁴¹

An extremely small number of claims for increased compensation are lodged.⁴² This would appear to be because of a general ignorance of the provision and the inability of many employees to institute claims.

All payments of compensation in terms of COIDA depend upon a calculation of an employee’s earnings. The indexing of pension payments is extremely important in order to keep periodic payments on par with inflation.

There are several major differences between ODMWA benefits and compensation payable under COIDA. The net result of these differences is that ODMWA benefits are generally inferior to those under COIDA. However, ODMWA affords free benefit examinations—which are not available under COIDA. The benefit systems under COIDA and ODMWA are for various reasons deficient and dated. These systems have largely failed employees and their dependants in that rather limited benefit payments are made, impacting negatively upon in particular poorer workers (usually the manual labourers). The benefits are also not inflation indexed. No account is taken of the loss of earning capacity or of a job. Benefits are linked to fixed percentages mechanically allocated to the loss of a particular limb (in the case of COIDA). Additional compensation based on employer negligence is usually not accessed (due to a lack of knowledge), or not available. The payment of lump sums creates potential long-term problems, since beneficiaries may well become dependant on State social assistance provision when the lump sum has been exhausted.

The recommendation made by the Report of the Committee of Inquiry into a National Health and Safety Council is endorsed, namely that there is an urgent need for a thorough investigation of benefits provided by the compensation system, in particular as far as the type of benefit, the basis for awarding compensation, and access to benefits are concerned.⁴³ The removal of unnecessary discrepancies between the two systems, and the possible amalgamation of the two systems, also has to be considered. This could best be achieved by the establishment of a separate committee of enquiry into the compensation system, and its rationalizing and alignment, also within the broader OHS framework.⁴⁴

In fact, it could be said that the compensation system results in a transfer of costs from employers to employees and society due to sub-optimal benefits accorded under this system.⁴⁵ This is exacerbated by the fact that the right to claim civilly from the employer has been taken away by COIDA⁴⁶ and ODMWA.⁴⁷ Furthermore, by using level of wages as a basis for calculating compensation, the system does not protect the position of workers earning very low wages, resulting in meager compensation payouts. As pointed out, the consequences of this are most severe for manual and semi-skilled workers who may be rendered unemployable by a relatively minor permanent disability.⁴⁸

11.10 Exclusionary nature

COIDA excludes certain categories from its definition of “employee”, notably contractors and domestic employees.

It must further be borne in mind that only an “employee” as defined qualifies for inclusion. A person who has, therefore, not entered into a contract of service or apprenticeship or learner ship, is not covered by COIDA.⁴⁹ Non-standard workers, in particular informal sector workers, independent and dependent contractors, and other self-employed persons are consequently excluded.

It has also been noted that individuals, families and communities with environmentally acquired diseases due to exposure from industrial pollutants, asbestos contamination of mine dumps, and

industrial disasters (e.g. AECI sulphur fire) are not covered under the current compensation dispensation.⁵⁰

Foreign employees working on South African soil and employees working outside of the South African borders: Foreign employees operating in South Africa can be covered if arrangements are made with the Commissioner. In South Africa benefits may be remitted through government-to-government agreements or through the mines' major recruitment agency, The Employment Bureau of Africa (TEBA), in those countries where it has offices. In some cases government corruption in the receiving country has, unfortunately, sometimes prevented payments from reaching the actual beneficiaries. This has apparently been a particular problem in Mozambique, where a survey undertaken in 1996 by Rand Mutual, showed that 70 per cent of compensation payments remitted on a government-to-government basis had not reached the beneficiary.⁵¹

It is suggested that:

- A checks and balances-system should be in place to prevent the overlapping of benefits and the possibility that a person might be “better-off” after the occurrence of the occupational injury/disease.
- Institutional arrangements for administering claims should be established with more countries, especially in the region. If possible, at all, follow-up investigations should be done to ensure that payments actually reach beneficiaries.
- Temporary grants, for the duration of the processing of claims, should be considered.

The exclusion of domestic workers, the self-employed, and dependent contractors⁵² may be found to constitute a violation of section 9(1) of the Constitution (equal protection and benefits of the law) and section 9(3) (indirect discrimination against, for example black women (as domestic workers) as a particularly vulnerable group). An employee would also have a claim in terms of the Employment Equity Act of 1998 if the employer does not provide all employees with adequate protection in the event of employment injuries or diseases, especially bearing the definition of “employee” in the EEA in mind. Its definition of “employment practices and policies” in terms of which no unfair discrimination may take place and in terms of which barriers must be removed, includes literally all phases, stages and elements of the employment relationship.

As far as benefits to dependants are concerned, preference is given to a civil law wife at the expense of an indigenous law wife, a wife according to custom, and a cohabitant (if the spouse was married to more than one). This is constitutionally challengeable—also in view of the fact that no distinction is made between children born out of these relationships.

It is suggested that the possibility of voluntary registration in terms of COIDA should be considered, if compulsory coverage is not found to be feasible.

11.11 Commuting injuries

Under COIDA, in the event of commuting injuries it is required that “... the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a vehicle driven by the employer himself or one of his employees and specially provided by his employer for the purpose of such conveyance”—in which case the accident will be deemed to take place in the course of such employee’s employment.⁵³

COIDA therefore narrows down considerably the already limited coverage.⁵⁴ Employer control, as required in the previous Act,⁵⁵ has now been statutorily defined to exclude outside agencies: the employer or one of his/her employees must him-/herself drive the vehicle. The way in which the limitation has been formulated effectively restricts and in many cases bars relief to which an employee so conveyed may be entitled in terms of the motor vehicle accident insurance scheme or at common law.

It is, therefore, submitted that there is an unnecessarily narrow coverage of commuting injuries under COIDA. It is further recommended that the approach advocated by ILO Recommendation 121 of 1964 should be adopted. In terms thereof accidents sustained while on the direct way between the place of work and the employee’s principal or secondary residence; or the place where the employee usually takes his meals; or the place where he usually receives his remuneration should be treated as industrial accidents.⁵⁶

It is recommended that urgent attention be paid to enlarging the scope of accidents covered under COIDA so as to include commuting injuries on a wider basis than presently foreseen.

11.12 Defining accidents and diseases

Employees need to be made aware of their rights under COIDA, in particular as far as claiming in respect of occupational diseases is concerned. The Compensation Fund should be actively involved in broad public awareness campaigns.

- Fragmented, inefficient & inequitable compensation administration

The fragmented nature of the statutory compensation dispensation has been commented on above.⁵⁷ The poor administration of the two funds is notorious.

The critical gaps and concerns mainly relate to:

- Responsibility for compensation is divided between two different government departments with different administrative criteria for assessing claims and making awards, resulting in an inequitable system; and
- The administrative backlogs of both compensation systems in resolving compensation claims submitted by and on behalf of workers has resulted in inefficient compensation service provided by the state, which is prejudicial to workers affected by an occupational injury or disease.⁵⁸

It is suggested that these problems should be addressed within the framework of developing a comprehensive national occupational health and safety policy.

In the interim a more efficient administration of the current compensation system needs to be established, while indicators for the assessment of progress in this regard have to be determined.⁵⁹

A lack of linkage with other social insurance⁶⁰ and social assistance schemes⁶¹ leads to duplication of payments (double-dipping), thereby seriously eroding the financial soundness of the respective public insurance funds and the source from which social grants are paid. It does, of course, also serve as a disincentive to access or return to the labour market.

A checks and balances-system should of course be in place to prevent the overlapping of benefits and the possibility that a person might be “better-off” after the occurrence of the occupational injury/disease.

Institutional arrangements for administering claims should be established with more countries, especially in the region. If possible, at all, follow-up investigations should be done to ensure that payments actually reach beneficiaries.

Co-operation between the Compensation Commissioner, the Unemployment Commissioner, SARS (for registration purposes), the organised disabled community, the Health Care Insurance sector (state, private and employment-related in connection with, *inter alia*, the problem of over-insurance and overlapping in different areas), RAF, etc. has to be enhanced.⁶²

A victim of an accident who was injured in the scope of his/her employment, can claim compensation under both COIDA and the RAF Act. Although the RAF’s claim form makes provision for the submission of details concerning any claims that were lodged with the CC, it is possible for a claimant to institute claims against the CC and the RAF without notifying the one of the other. This is an administrative problem that can easily be remedied by a linked computer system. It will have the effect of registering duplicate claims so as to avoid the exploitation of either of the two systems.

11.13 Access and detection

There are several obstacles in the efforts of provinces to provide occupational health services.

The following are recommended:

- It is necessary to develop information, education and training programmes to increase awareness among workers regarding their rights and how to exercise them within the current dispensation, with particular consideration to literacy levels, with added focus on rural areas and among women workers where there is a greater degree of under-reporting.⁶³

- Simultaneously, it is required to review the existing training programmes for the Department of Labour occupational health and safety inspectorate and Department of Health Environmental Health Officers and to develop occupational health and safety training programmes for an integrated and enlarged Occupational Health and Safety inspectorate.⁶⁴

Furthermore, it is necessary to:⁶⁵

- improve the medical knowledge and capacity of the office of the Compensation Commissioner when dealing with occupational diseases arising from newly transferred technologies and other common occupational diseases; and to
- improve access of workers to public sector occupational health services for the medical diagnosis and assistance of compensation claims as outlined in the White Paper on Transformation of the Health System (1997).

11.14 Employees suing employers civilly?

In *Jooste v Score Supermarket Trading (Pty) Ltd*⁶⁶ the Constitutional Court found that section 35 of COIDA does not violate the right to equal protection and benefit of the law in section 9 of the Constitution. The question whether or not an employee ought to have retained the common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Act, represents a highly debatable, controversial and complex matter of policy, according to the Court. The Court stated that such a contention represents an invitation to the court to make a policy choice under the guise of rationality review, an invitation which the court firmly declined.

Another alternative would be to allow tort-based civil claims to be brought in respect of the damages not covered in terms of the present compensation systems. The current dispensation operating on a no fault basis would then provide limited benefits, as is the case presently. In fact, workmen's compensation schemes by their nature do not provide full coverage.⁶⁷ In addition thereto, and only if fault can be established, employees and their dependants are allowed to sue employers directly (also for general damages, such as for pain and suffering). This combination of workmen's compensation and employer (tort) liability is most common in Europe.⁶⁸ Of course, if the employer is sued directly, any amount paid out by the compensation system should be deducted from the damages award, as the principle should remain that the employee/dependant should not receive more than his/her actual damages.

11.15 Cost and funding of scheme

The assessment paid by employers to the Compensation Fund is determined by two principal factors: the remuneration paid to employees and the class of industry in which the employer operates. The Commissioner may vary an employer's assessment so as to reward the adoption of an active approach to the prevention of accidents. The Commissioner may also penalise employers with poor safety records over a period of time.

The assessment rate, at which an employer is assessed, depends on the nature of an employer's business operations. For rating purposes employers are therefore divided into different classes and subclasses according to the nature of their activities. This practice of dividing employers into classes (currently there are 23) is, however, also susceptible to constitutional review and a rational connection with a legitimate government purpose would have to be demonstrated.

Even though the Act defines "an employer" widely, the numbers of registered employers are decreasing.⁶⁹ Even where employers are registered, they sometimes do not contribute, or do not contribute fully.⁷⁰ This is also a direct result of weak enforcement of the compensation system.

To adjust the position of employers who pay substantial amounts in assessments, which are out of proportion to their accident costs, the system of awarding merit rebates every three years was introduced. However, it has been argued that the possibility of a rebate leads to the under-reporting of claims.

Programmes should be established to ensure that employers comply with current legislative provisions in respect of registration, contributions to the Fund, reporting injuries and diseases and developing preventive strategies.⁷¹

An actuarial assessment of the entire compensation system should be undertaken to assess the feasibility of increasing (and/or individualizing) employer premiums, abolishing the rebate system in order to improve benefits awarded to employees and fully cover all costs related to administration of the Fund.⁷²

The staff component of the Fund should be strengthened in order to be able to target non-complying firms sufficiently.

11.16 Administration, review and appeal

Appropriate and simple (internal) review procedures should be developed and gazetted. These procedures should include the giving of notice to employees concerned, and should provide for their representation by (at least) union officials or co-employees.

Time limits for the taking of action by the Commissioner should be set, and should ensure that matters be dealt with speedily by the Commissioner.

The appointment of part-time and even full-time assessors within a revamped review/adjudication system should be considered.

A three-tiered revamped system of review/adjudication (with the possibility of letting the first two tiers lapse into one) is proposed:

- At the **first level**, internal review takes place, bearing in mind the suggestions made above.

- At the **second level**, an administrative tribunal or ombudsman, as assisted (where necessary) by assessors with the necessary skills (e.g. medical professionals), deals with appeals/objections against decisions taken by the Commissioner.
- At the **third level**, an appeal should lie to an adjudicating institution with jurisdiction to deal with the matter finally on the basis of law and fairness. Preferably this should not be the High Court, given the formal nature and jurisdictional basis of that Court. A special Social Security Court, or the Labour Court, could be granted jurisdiction to deal with such matters finally.
- Legal representation for employees should be allowed, at least at the third level. Consideration should be given to either restricting legal fees to be charged (by, for example, providing for a fixed tariff to be paid),⁷³ or the granting of legal aid to employees or dependants lodging claims at this level.⁷⁴

11.17 A long-term view: An integrated accident compensation system?

The insurance entitlement replaces the private law obligation on employers (this is also true for the area of prevention, which is also a civil law obligation imposed on employers under most legal systems).

There are mainly three reasons why it is argued that a separate and more favourable scheme for industrial injuries should be retained: firstly, some work is especially dangerous, and it is desirable that people should not be discouraged from doing it by the risks involved; secondly, a person injured while at work is injured whilst working under order; and thirdly, only if special provision was made for industrial injury would it be possible to compensate appropriately, and to limit the employer's liability at common law.⁷⁵

A single, general scheme could address the reality of persons who have been incapacitated as a result of occupational-related or other diseases and injuries much more effectively by providing for a coherent, non-overlapping system addressing the needs of those temporary disabled and those permanently disabled in the employment-, health care- and assistive spheres.

In the United States “24-hour coverage” has been proposed—a generic term for proposals that eliminate the distinction between occupational and non-occupational accidents and diseases.

Furthermore, where separate schemes exist for occupational injuries and diseases and traffic injuries, certain other problems can arise:

- the possibility of double compensation
- victims shopping around for the best possible compensation
- different definitions of quantum of damage creates uncertainty
- double administration costs

Counter arguments raised include that the exclusive remedy doctrine would be seriously eroded if injured workers were forced to pay deductibles and co-payment charges that are now part of traditional group health insurance plans. Employers may have less incentive to stress job safety and safety programs.

Ideally one should construct a publicly organised (social insurance) scheme or fund which covers impairment on a no-fault basis, and which provides coverage irrespective of the cause, location and nature of the incapacity. Such a fund should pay out capped short-term and long-term income-replacement benefits more or less along the lines of COIDA. It could, in addition, pay out medical benefits, if provision in this regard is or could not be made in terms of a restructured (social) health insurance system. It should also be constructed in such a way that extra needs be covered in terms of cash or in kind benefits and services.

Given the nature of the contingency covered, (re)-integrative measures and services should be seen as an inherent part of what the fund is meant to address. Furthermore, constructing such a fund along the lines suggested above would make separate provision in terms of COIDA and RAF, and partly in terms of UIF, largely unnecessary, which implies that the contribution base of (at least) COIDA and RAF could then be used toward the contribution base of the newly constructed fund. A state subsidy and/or state contributions on the part of particular categories could further support the contribution base of such a fund.

Being a system which is public in nature, appropriate links with existing private provision in the area of incapacity must be established in a way which will ensure that no gaps are left in terms of who are being covered. Constructing a system in this way will mean that it acquires the character of a mixed system, in keeping with developments in many countries with developed social security systems. This implies that the (incapacity) system becomes less compartmentalised, and that a strict social insurance—social assistance dichotomy is absent. The further implication is that there is not necessarily a direct and automatic link between contributors and beneficiaries, and between contributions and benefits, as cross-subsidisation and the spreading of risk become hallmarks of public insurance coverage in this area. This also is characteristic of the way in which established social insurance systems have developed in welfare states.

If, however, it should be decided to retain two separate schemes, it is clear that some ambiguities should be eliminated by, for example, adopting one model of assessing damages, eliminating fault as requirement for liability in both schemes, and creating an integrated computer data basis so as to eliminate double claims.

11.18 Conclusion

Little has been done to give effect to, in particular, governmental policy initiatives. It is recommended that government endorse and implement important policy recommendations and decisions already taken and supported by the Committee.

11.19 The road accident (fund) insurance and social security

This aspect of the Committee's report draws on consultations with Judge Satchwell, Chair of the Road Accident Fund Commission. It is the considered view of the Committee that the substantive work undertaken by the Satchwell Commission and the recommendations that flow from this process will address the major problems identified in the system. The issues that are raised in this chapter are intended to focus on the main aspects of the Road Accident Fund in relation to social security.

11.19.1 Introduction

The *Road Accident Fund Act*⁷⁶ provides in section 3 that the RAF (Road Accident Fund), as substitute for the common law wrongdoer, "shall ... be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injuries to himself or herself or the death of or any bodily injury to any other person." Therefore, the object is to compensate victims for loss or damage wrongfully caused by the driving of motor vehicles. The driver of the motor vehicle is indemnified against liability incurred for loss or damage wrongfully caused. Risks covered include: disability (i.e. loss of income and reduced earning capacity); death (i.e. survivors' benefit); medical expenses; funeral expenses; and general damages (i.e. non-financial loss for pain, suffering, disfigurement and loss of amenities of life). The RAF has unlimited liability, therefore, all damages proven must be paid by the Fund. However, claims of certain categories of passengers are limited against their own driver (to R25 000). The principles regarding apportionment of fault do apply.

The Road Accident Fund is, therefore, a public compensation/insurance system based on fault.

Generally the following issues must be addressed: Firstly, the interaction between MVA (Motor Vehicle Accident) legislation and COIDA must be investigated in order to establish which fund will be liable to compensate a victim of an accident. Secondly, it must be established whether MVA legislation is effective in South Africa and whether MVA legislation is in fact a functional part of the social security system in South Africa. Thirdly, it should also be asked whether it is necessary to have separate systems pertaining to road accidents and to employment injuries. It must be investigated whether, for example, it is not a viable option either to model an act for road accident victims on the provisions of COIDA or to enact a general statute which would apply to employment- and non-employment related accidents.

11.19.2 MVA/RAF: The nature of the social security system

The current system⁷⁷ of compensation can at most be described as social benefits with elements of insurance. The same premium is paid by everyone, since the Fund cannot calculate its risks and then determine the premium to be paid. (In the case of hit and run claims the claim is settled without the version of the other party. Without this provision the victim of a hit-and-run claim would simply have to carry the risk.) The following elements of insurance are present in the current system: Compensation is paid to the victim; premiums are paid into the Fund and the moneys obtained from these premiums are used to settle claims; and the settlement of claims in the RAF is similar to the

settlement of claims in an insurance company. The Fund cannot settle claims as the accidents occur. Some claims are not immediately reported and settled, with the result that there is a so-called “long tail business”, where today’s claims are settled at some stage in the future. The RAF and other insurance companies are obliged by law to reflect on their balance sheets their outstanding liabilities. Under outstanding liabilities one distinguishes between claims reported but not finalised and claims realised but not reported.

11.19.3 The South African experience

11.19.3.1 General

The road fatality rates in South Africa compare very unfavourably with the same in other countries. According to the Automobile Association’s Annual Traffic Safety Audit of 1992, South Africa’s road fatality rates compared as follows with a couple of other countries:

Country	Per 100 000 population	Per 100 000 Vehicles
Australia	12.09	21.63
Canada	13.81	21.51
France	15.93	28.45
USA	16.35	21.53
RSA	31.78	181.83

11.19.3.2 Culpa (fault) as a requirement

Unlike the situation under COIDA, the RAF Act explicitly requires that a third party’s claim has to arise from the *negligent driving* of a motor vehicle. If negligence cannot be proven, the third party cannot hold the RAF liable.⁷⁸ Negligence as a form of *culpa* is the minimum requirement for liability. It follows that gross negligence and intent or *dolus* will obviously entitle a third party to a claim in terms of the RAF Act. A worker who was injured in the course of his employment does not have to prove negligence in order to be entitled to a claim in terms of COIDA. It is submitted that this is the most important difference between the RAF Act and COIDA. Advocates of the no-fault-system have referred to the RAF (and previously the MMF) as the negligence lottery where the issue of liability has been referred to as a thumb suck and a waste of money. Legal practitioners, on the other hand, have endeavoured to maintain the *status quo*, arguing that the Fund can scarcely afford to adequately compensate those claims where negligence has been proven.

In the social security context it has further been stated that the RAF Act does not possess the characteristics of a social welfare system, save for the so-called hit-and-run claims where a claim is settled virtually entirely on the claimant’s version. The counter-argument revolves around the so-called “one percenters”, where certain claimants need to prove that the driver was one per cent negligent for the whole claim to succeed. *The White Paper*,⁷⁹ does not do away with negligence as a requirement for the liability of the Fund. However, mention is made of degrees of negligence and that the burden of proof in this respect is not the same for all types of claimants.

11.19.3.3 Classes of Claimants

➤ **Drivers, Pedestrians, Cyclists and motor cyclists**

It is possible that a claimant can be partially to blame for his own misfortune or that he could have been entirely the author of his own misfortune. Where a so-called **apportionment** is applied against a claimant, the process involves the examination of factual evidence in the light of the reasonable man-test. The claim is reduced in accordance with the degree of negligence that can be attributed to the claimant. This situation is regulated by the *Apportionment of Damages Act* of 1956.⁸⁰

➤ **Passengers**

Where a passenger was injured, he/she needs only prove one per cent negligence against the wrongdoer in order to succeed with a claim. This proverbial one per cent negligence is sometimes more controversial than claims where apportionment for negligence is applied.

It is argued by some that this relatively low requirement is in reality nothing else than faultless liability.

➤ **Claims for Loss of Support or Funeral Expenses**

A widow or any other dependant of a fatally injured victim who wishes to lodge a claim for loss of support or funeral expenses also needs to prove one per cent negligence in order to succeed with a claim for funeral expenses or loss of support.

This position has been criticised because a dependant receives full compensation despite the deceased having been grossly negligent.

➤ **Children under 7 years**

It has been established in law that children under the age of 7 years are *doli incapax* (i.e. incapable of committing an unlawful act in the legal sense of the word). They are totally incapable of curbing their youthful impulsiveness.⁸¹ It is also not possible to place an old head on young shoulders, consequently the requirement to prove one per cent negligence on the part of the wrongdoer is really superficial.

➤ **Limitations on damages recoverable from the RAF**

According to section 19 of the Act the Fund or its agent shall not be obliged to compensate anyone in certain circumstances:

Where a wrongdoer is not liable under common law, the RAF or its agent does not incur liability either. Where the liability of a class of wrongdoers is excluded in law (*ex lege*), such exclusion will also apply to the RAF (for example section 35(1) of COIDA).⁸²

A person was being conveyed for reward on a motor vehicle, which is a motor cycle. An ordinary passenger on a motor cycle, on the other hand, has the right to submit a claim.

A non-commercial passenger is a passenger who is not conveyed for reward. Such a passenger is also referred to as a social passenger. Once it is established that a person is a social passenger *and* a member of the household of the driver, it follows that such a person's claim will be excluded from the provisions of this Act.

If there is a deliberate and blameworthy withholding of the statement or document requested. Initially a medical report will be completed by the first medical practitioner⁸³ who treated the claimant after the accident.

In certain circumstances the claim of an applicant will be limited to an amount of R25 000. The limitations contained in section 18 of the Act apply to passengers who were conveyed under certain circumstances. Occasionally a claimant will be entitled to claim his patrimonial and non-patrimonial loss limited to R25 000 and, sometimes, such a claimant will only be entitled to claim his patrimonial loss limited to R25 000. If this section is applicable to a specific claim, the claimant is not deprived of his common law rights, with the result that the excess of his claim over R25 000 can still be claimed from the common law wrongdoer. It follows that the RAF's liability is limited to R25 000 in respect of any person who was conveyed in the (negligent) vehicle for reward or *in the scope of the business of the owner of the vehicle as an employee*, or for purposes of a *lift club*.

The claimant is entitled to institute the claim by himself or if he makes use of an attorney, the attorney should be under the authority of the Law Society.

11.19.3.4 Exclusions

Passengers rendering military service, undergoing military training and being conveyed in a private vehicle are excluded from the limitation imposed upon the RAF or its agent.

➤ **Passenger conveyed in the scope of his/her employment**

An employee in terms of COIDA will also have a claim under the RAF Act if he/she was injured in an accident. If he/she was a passenger, and is subject to the provisions of section 18(2)(b), the Act provides that the third party is entitled to compensation under the *Compensation for Occupational Injuries and Diseases Act* for bodily injuries "as a result of an accident arising in the course of his employment which rendered him disabled," or in the case of a dependant, for loss of maintenance resulting from the death of the employee. However, whatever amount the employee or his dependants are entitled to, has to be deducted from the claim against the RAF, unless the claim under the RAF Act relates to sentimental damages and no to the compensation claimed under COIDA. Where any passenger in terms of section 18 (see above) is killed in an accident, the claim of every dependant is limited to R25 000.

➤ **The claim of a dependant**

As referred to above, where any passenger in terms of section 18 is killed in an accident, the claim of every dependant is limited to R25 000. In respect of fare paying passengers and passengers

conveyed in a lift club, the total claim is simply calculated and then limited to R25 000. If a dependant is entitled to payments by the Compensation Commissioner or the Defence Force for maintenance, any such payments will be taken into account when calculating the maintenance payable by the RAF.

11.20 Damages payable in terms of the RAF act

11.20.1 Introduction

The RAF Act does not contain provisions in respect of each and every aspect of compensation, with the result that it is to a large extent common law based. The principles in respect of delictual compensation are consequently deducted from Roman Dutch law principles.

➤ Paragraph 8 of the MMF1 claim form

A claimant is entitled to claim for patrimonial (i.e. material damages) and non-patrimonial (i.e. general damages, such as for pain and suffering) loss as a result of a bodily injury. Where someone died as a result of an accident, funeral expenses and loss of support can be claimed.

11.20.2 The purpose of compensation

Traditionally, the purpose of delictual compensation is to create a set of rules and principles, which are fair, logical and practical in the solving of problems relating to the calculating of compensation.⁸⁴ The purpose of compensating victims of road accidents and employment injuries can differ from time to time, depending on the sphere in which compensation takes place. It is in the best interest of the community to indemnify a person who became disabled and to provide adequate compensation to ensure that such a person does not, for instance, turn to illegal activities in order to earn a living, or, falls back into the state assistance schemes (for example, the disability scheme).

11.20.3 The term “damages”

Damages can be described as a decline in the quality or usefulness of someone’s patrimonial or personal interest because of an event that caused the damage.⁸⁵ Damages also include the feeling of shock, pain and suffering and loss of amenities of life experienced by a victim. The exact nature of patrimonial and non-patrimonial loss is the subject of many debates which does not fall with the scope of this report. For purposes of this discussion it is important that non-patrimonial loss or the *solatium*⁸⁶ that is paid for pain and suffering is not claimable in terms of COIDA, but is claimable in terms of the RAF Act, subject to certain limitations.⁸⁷

11.20.4 The Basic Principles of Delictual Compensation

➤ Interesse

According to the “if not ... but for” approach, one needs to calculate the sum of money that is needed to place the victim in the same position he would have been in had it not been for the accident. This principle has been criticised by writers.⁸⁸ It is, according to these writers, difficult to determine the hypothetical position the victim would have been in, had it not been for the accident.

In applying this method of differentiation one makes use of the *conditio sine qua non*-doctrine. It is suggested that this doctrine is too wide a test in the case of compensation.⁸⁹ This incomplete method of calculation opens the door for speculation and disputes, unnecessarily costing the Fund money.

➤ **Res inter alios acta: the problem of collateral benefits**

It is an established rule in South African law that a victim can receive benefits other than compensation claimed from a wrongdoer (or the Fund in this instance). These so-called collateral benefits often create problems. Van der Walt divides the so-called collateral benefits into 8 categories.⁹⁰

When dealing with a Fund which cannot choose its risk and which is experiencing financial difficulties, it can be asked whether collateral benefits cannot rather be approached from a purely practical and functional viewpoint. If it is the purpose to place the accident victim in the same position (and not a better position) than before the risk occurred, one should perhaps merely require that an accident victim must disclose *all State-provided benefits received from other sources* than from the Fund and that the amount paid by way of income-replacement compensation should be reduced by all such payments. This is a drastic deviation from the common law.

However, it should be noted that the need for relying on State-provided benefits (in particular social assistance benefits) would become less apparent to the extent that pensions (periodical payments) are made to road accident victims, rather than lump sums payments.

➤ **Period of calculation**

The “once and for all” rule is firmly entrenched in South African law. A claimant will have to quantify his claim and submit a claim *once and for all* for his past and future expenses. The role of interest, the escalation of medical costs, the possibility that the victim might die before he uses the money and various other uncertain factors come into play, leaving the practitioner to do the guess work.⁹¹ However, section 17(4) of the Act⁹² allows the RAF to furnish an undertaking in terms of which they guarantee to pay a future claim or a portion thereof.

The purpose of the undertaking is twofold: It prevents the Fund from over-compensating a victim and it protects a victim from the effects of inflation and a misjudgement of medical evidence. The undertaking is an excellent tool, if used correctly. It is submitted that undertakings should be issued in all claims for future damages, without the option of a lump sum in cash.⁹³

➤ **Non-patrimonial loss**

Compensation for non-patrimonial loss or general damages includes a victim’s pain and suffering, shock, disfiguration, loss of amenities of life and reduced life expectancy.⁹⁴ The payment of general damages is limited or totally excluded in the case of certain passengers, as was pointed out *supra*. It was shown that a so-called social passenger will not be entitled to the payment of general damages.

It is submitted that accident compensation in South Africa should move to a model more like that of COIDA, where general damages cannot be claimed. Alternatively, the payment of general damages should either be capped or paid according to a fixed scale. This will have a twofold effect: Firstly, disputes will be limited and, secondly, more money can be made available for adequate medical treatment and loss of support.

➤ **The Calculation of Damages**

General

A victim has the legal duty to mitigate his or her damages. The victim must take reasonable steps to ensure that the wrongdoer is not burdened with the payment of damages that could have been avoided by taking reasonable care.⁹⁵

It should be emphasised that the Fund is unable to keep up with the compensation of accident victims under the current system. It will have to undergo drastic changes in order to avoid a fiasco.

11.21 Procedural requirements

11.21.1 Substantial compliance

Section 24 of the Act deals with the procedural requirements. The Fund has, in terms of section 24(6), 120 days from the date on which the claim was sent or delivered by hand to the Fund to investigate the claim.

11.21.2 Structure of the RAF

The RAF has four offices, in Cape Town, Durban, Randburg and Pretoria. A claim can be submitted to any of these offices, regardless of where the accident took place.

11.21.3 Repudiation of a claim

The Fund can repudiate a claim on the grounds that no negligence can be attributed to the insured driver, that no damages were incurred by the claimant or that there is no *nexus* between the damages and the accident. A victim can then proceed to issue summons against the RAF if he/she feels that the repudiation was without valid grounds.

11.22 Financing

Criticism against this method of fund raising is that the government does not raise the fuel levy in accordance with the escalation in medical costs. It is, however, difficult to keep up with medical inflation and the raising of the fuel price is always controversial, as it impacts on the economy in general.

This type of financing is unique in its kind world wide. Although this system is not without its shortcomings, it is submitted that the answer does not lie in an alternative method of funding but rather in the curbing of expenditures (e.g. by capping benefits and expenses).

11.23 Other relevant legislation

11.23.1 Apportionment of Damages Act, 1956

An important exception in third party law is that a dependant's claim is paid out 100 per cent, without taking into account the deceased's contributory negligence. The argument in favour of the current system is that a dependant cannot be held responsible for his deceased parent or spouse's irrational behaviour. However, it can also be argued that because the legislator has insisted on implementing a fault-based system, the dependant must prove his claim like any other claimant and that the deceased's negligence should definitely be taken into account.

The same applies to children under 14 years. When a pedestrian aged 8 years plays in the street and is injured by a motorist, he/she is considered to be *doli incapax*, unless the Fund can prove that he/she was indeed in a position to curb his/her youthful impulsiveness. Once again this amounts to nothing less than a claim based on no negligence. It is submitted that this situation should be remedied to limit disputes and save legal costs. By accepting that a child under 7 years old is *doli incapax* and by saying that his claim is not based on negligence, costly litigation can be avoided.

11.23.2 Compensation for Occupational Injuries and Diseases Act, 1993

It has already been indicated that a victim of an accident who was injured in the scope of his/her employment, can claim compensation under both COIDA and the RAF Act. However, whatever amount the employee or his dependants are entitled to, has to be deducted from the claim against the RAF, unless the claim under the RAF Act relates to sentimental damages and no to the compensation claimed under COIDA. The accepted principle is that the victim should not be allowed to claim double compensation, i.e. in excess of his/her actual damages.

Although the RAF's claim form makes provision for the submission of details concerning any claims that were lodged with the Compensation Commissioner (CC), it is possible for a claimant to institute claims against the CC and the RAF without notifying the one of the other. This is an administrative problem that can easily be remedied by a linked computer system. It will have the effect of registering duplicate claims so as to avoid the exploitation of either of the two systems.

11.24 The white paper on the road accident fund: Important features

11.24.1 Introduction

After the release of a second *Draft White Paper* in 1997, the *Final White Paper on the Road Accident Fund* was released in February 1998.⁹⁶ From the preface it seems that the government intends to bring the legislation within the ambit of the notion of social benefits. It states that 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 purely delict (fault)-based compensatory system to a system of affordable state benefits. It is suggested that this approach should be welcomed as it will lead to a decrease in litigation costs. It is also moves closer to other

models of social insurance (for example, employment injuries and diseases), but the retention of a fault-based system should be reviewed again.

11.24.2 Benefits, not compensation

This is probably the most important proposed amendment to the system. In the past compensation was based on common law principles. This will now be changed to a system where the RAF will determine some benefits with reference to the loss or damage suffered while other benefits will be paid as defined. Therefore, actual loss will not be compensated. This will improve the poor standing of the Fund's deficit and will curb the Fund's present unlimited liability. It is submitted that the capping of benefits is justified on the basis that the present fault-based liability tends to favour the higher-income earners, who may be able to prove huge damages. However, in fairness the capping of benefits should be linked to allowing victims to civilly claim from the wrongdoer the difference between the capped benefit and their actual damages.

11.24.3 Coverage

A major change has taken place regarding passengers. All road users will now qualify for the same set of benefits. This seems to be a more equal dispensation than before. However, the following categories will be excluded from receiving benefits: participants in organised motor sport; car thieves and accomplices; perpetrators of intentional harm; a claimant who is illegally in the RSA; and fraudulent or misrepresented claims.

11.24.4 Prescription

All claims must be submitted within 12 months of the accident. The normal prescriptive period will apply of the settlement of the merits. However, strict application of this period might lead to undue hardship, especially for illiterate and unsophisticated persons.

11.25 Shortcomings in the current system

In the recent past motor accident legislation has been amended several times and the Fund has been investigated by several Commissions of Enquiry, the most recent of which was headed by Judge Melamet in 1992.⁹⁷ The Commission found that there was widespread inefficiency, negligence, irregularity and fraudulent conduct by some role players in the system.⁹⁸ The following issues were specifically highlighted (and are still valid) and must be addressed as a matter of utmost urgency:

- Attorneys are said to unnecessarily delay claims, running up high costs and grossly overstating claims.
- Certain medical specialists are said to prepare medico-legal reports exclusively for claimants. This leads to a situation where neither the Fund nor the attorney comes closer to understanding the true nature of the victim's needs.
- Assessors are said to assist in lodging fraudulent claims and they are rendering inflated and false accounts.

- The legislation is found to be very complex, with the result that the whole system has become extremely legalistic and virtually incomprehensible to the average member of public.⁹⁹ It is said that this “social legislation” is intended for every member of public’s social benefit. If the Act is totally incomprehensible, the opposite effect is achieved.
- The many confusing and antiquated provisions result in real or perceived unfairness.¹⁰⁰ This, together with the common law basis of compensation and the open-ended liability of the MMF (now RAF) encourages expensive litigation.
- The delictual basis of a claim requires extensive investigations and these are also costly. The “negligence lottery” causes uncertainty and the erosion of the principles of delict. The emphasis is no longer on the claimant’s fault, but on the claimant’s needs.
- The claims procedure is said to be cumbersome, time consuming and very expensive to administer.¹⁰¹ A claimant has three years in which to institute a claim against the Fund. In the case of a hit-and-run claim, the period is two years. The Fund then has to conduct an investigation and more often than not it is difficult to obtain documents and evidence.
- The settlement of claims is held to be the most painstaking procedure of it all. Because of fluctuating and seemingly divergent court decisions, there are serious differences of opinion between the Fund and claimant’s attorneys.¹⁰² This often frustrates attempts at a reasonable settlement and invites costly litigation.
- The high accident rate seems to be one of the major causes of the MMF’s (now RAF’s) desperate financial position.
- Apart from the investment income generated by assets held from time to time by the Fund, the Fund’s sole source of income is derived from the income on fuel sold. The current fuel levy is 14,5 cents on petrol and 10 cents on diesel. However, the fuel levy is never increased to keep up with inflation, with the result that it is impossible to keep up with the escalation in medical costs.
- Because of the high costs involved in litigation, it was decided to implement a system where the Fund and the claimant’s attorney can work together to settle the claim out of court (alternative dispute resolution). In the Western Cape the Fund initiated an arbitration forum. By agreement the parties put their case before an arbitrator in order for him to hear the dispute. This process has not been in use for long and it is not sure what the rate of success is. One would assume that it could be cheaper than litigation. At this early stage, however, it is not possible to predict whether this system will be the answer.

11.26 Some reflection on medical expenses

One of the main reasons for the depletion of available funds is the payment of huge medical expenses. This benefits in particular those who make use of the private hospital system. One way of curbing these expenses borne by the Fund is to pay no contribution towards hospital costs. Those who can afford insurance-based protection can rely on that for the payment of hospital costs, while others can make use of the provincial hospital system.

11.27 Prevention and rehabilitation

The inability of most social security systems to provide comprehensive compensation is one of the factors which have increasingly, together with considerations of policy and principle, led to a radical rethinking of social security goals and policies. It is now generally accepted in social security thinking and policy-making that social security is not merely curative (in the sense of providing compensation), but also preventative and remedial in nature.¹⁰³ The focus should be on the causes of social insecurity (in the form of, amongst others, social exclusion or marginalisation), rather than on (merely dealing with) the effects.

This implies that measures aimed at preventing human damage (e.g. employment creation policies; health and safety regulation; preventative health care) and remedying or repairing damage (e.g. re-skilling/retraining; labour market and social integration) should be adopted as an integral part of the social security system, alongside compensatory measures. In fact, one could only speak of comprehensive coverage and true indemnification where, as part of social security, firstly, reasonable measures have been taken to prevent human damage and to keep human damage as minimal as possible; secondly, reasonable steps have been put in place to repair such damage; and, thirdly, reasonable compensation is provided if and to the extent that damage appears to be irreparable.¹⁰⁴

These principles should apply not only with regard to coverage against employment injuries and diseases,¹⁰⁵ but also with regard to traffic-related injury coverage. Funding these activities is no longer restricted to the fiscus, but monies levied for purposes of the Fund should be utilised to pay for preventive and rehabilitative interventions.¹⁰⁶

It is evident that neither the RAF Act nor any other legislation addresses this in any meaningful way. There are, therefore, also no significant linkages between traffic accident prevention, labour market policies and social security mechanisms in the event of traffic-related injuries. The philosophy underlying the RAF Act is similarly not aimed at reintegrating/rehabilitating the victim of a traffic accident socially or occupationally, but at compensating same on a delictual basis for loss or damage suffered. From the Draft White Paper and the White Paper (referred to above) it would appear that reintegration/rehabilitation efforts would still not appear to be high on the agenda of the policy-makers.

It is suggested that the prevention, and the rehabilitation of victims, receive the urgent attention of the legislature and government when revamping the RAF system. It is also proposed that rehabilitation centres be established to attend to the needs of victims in this regard. It is further suggested that monies levied for purposes of the Fund be utilised to pay for preventive and rehabilitative interventions.

11.28 Adjudication mechanisms

The RAF Act does not provide for specialised external adjudication mechanisms. The implication is that recourse has to be taken to the narrow common-law review powers of the High Court. This, it is

suggested, should be reviewed. In line with recommendations made elsewhere with regard to coverage against employment injuries and diseases,¹⁰⁷ the following is suggested:

- Appropriate and simple (internal) review procedures should be developed and gazetted.
- Time limits for the taking of action by the Fund should be set, and should ensure that matters be dealt with speedily by the Fund.
- The appointment of part-time and even full-time assessors within a revamped review/adjudication system should be considered.
- A three-tiered revamped system of review/adjudication is proposed.

At the first level, internal review takes place, bearing in mind the suggestions made above.

At the second level, an administrative tribunal or ombudsman, as assisted (where necessary) by assessors with the necessary skills (e.g. medical professionals), deals with appeals/objections against decisions taken by the Fund.

At the third level, an appeal should lie to an adjudicating institution with jurisdiction to deal with the matter finally on the basis of law and fairness. Preferably this should not be the High Court, given the formal nature and jurisdictional basis of that Court. A special Social Security Court, or the Labour Court, could be granted jurisdiction to deal with such matters finally.

Legal representation for employees should be allowed, at least at the third level. Consideration should be given to either restricting legal fees to be charged (by, for example, providing for a fixed tariff to be paid),¹⁰⁸ or the granting of legal aid to employees or dependants lodging claims at this level.¹⁰⁹

11.29 *The right to claim civilly from the wrongdoer*

A revamped RAF system whereby benefits are capped, would require that the system should allow tort-based (i.e. fault-based) civil claims to be brought in respect of the damages not covered in terms of the present compensation systems. The revamped dispensation would then provide limited benefits. In addition thereto, and only if fault can be established, victims and their dependants are allowed to sue wrongdoers directly (also for general damages, such as for pain and suffering). Of course, if the wrongdoer is sued directly, any amount paid out by the RAF should be deducted from the damages award, as the principle should remain that the victim/dependant should not receive more than his/her actual damages.

It is suggested that serious consideration be given to allowing victims and their dependants to sue wrongdoers civilly, over and above and to the extent that a revamped RAF system does not provide full redress.

11.30 A single system for COIDA and RAF?

In some countries there is only one accident compensation system, covering both employment-related and traffic accidents, and often also other accidents outside the employment and traffic spheres. In South Africa provision is only made for an employment-related and a traffic-related social insurance system. Persons who are injured outside the employment sphere and the traffic context therefore enjoy no social insurance protection. Social assistance, in the form of a disability grant, is only available to the indigent disabled. However, the amount of the grant is meagre.¹¹⁰

Where separate schemes exist for occupational injuries and diseases and traffic injuries, certain problems can arise:

- the possibility of double compensation
- victims shopping around for the best possible compensation
- different definitions of quantum of damage creates uncertainty
- double administration costs

However, in South Africa the long history of two separate schemes probably prevents the likelihood of one integrated scheme for all instances of impairment as a result of injury. It is, however, clear that some ambiguities could be eliminated by, for example, adopting one model of assessing damages, eliminating fault as requirement for liability in both schemes, and creating an integrated computer data basis as to eliminate double claims.

From a long(er)-term perspective a case could be made out for the introduction of an integrated system. This has been argued elsewhere with regard to coverage against employment injuries and diseases.¹¹¹

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- Basic Conditions of Employment Act 75 of 1997
- Compensation for Occupational Diseases and Injuries Act 130 of 1993
- Compensation for Occupational Diseases and Injuries Amendment Act 61 of 1997
- Constitution of the Republic of South Africa 108 of 1996

ILO Convention 102 of 1952

Labour Relations Act 66 of 1995

Occupational Diseases and Injuries in Mines Act 78 of 1977

Occupational Health and Safety Act 85 of 1993

Road Accident Fund Act 56 of 1996

Workmen's Compensation Act 30 of 1941

Case law

Jooste v Score Supermarket Trading Pty Ltd 1998 BCLR 1106 (CC)

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ENDNOTES

- ¹ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 11.
- ² Submitted to the Department of Labour in 1997 (the Benjamin-Greef Report).
- ³ 130 of 1993 (referred to as COIDA).
- ⁴ COIDA took effect in the former homelands which had workers' compensation laws from 1 March 1995.
- ⁵ However, the retention of the structure and wording of the previous *Workmen's Compensation Act* 30 of 1941 (WCA) as well as some of the previous wording used means that many of the decided cases under the WCA remain applicable.
- ⁶ Section 30(1). The mutual associations operate in terms of a licence issued by the Minister of Labour and are required to deposit securities with the Commissioner to cover their liability in terms of the Act. An employer who obtains a policy of insurance from a mutual association, for the full extent of its potential liability in terms of the Act, is exempted from paying assessments to the Compensation Fund. See section 84(1)(b).
- ⁷ The state, including Parliament and provincial governments, are employers individually liable and do not pay contributions to the Compensation Fund (section 84(1)(a)(i)). The Commissioner may exempt local authorities from any of the obligations on certain conditions (section 84(2)). He may require an employer individually liable to deposit securities to cover its liabilities for the costs of compensation and medical aid (section 31(1)). If an employer individually liable or a mutual association fails to pay compensation or any other benefit, he may issue an order requiring payment (section 61(1)). The power to determine claims and benefits is not transferred and all their decisions are subject to confirmation by the Commissioner. The Commissioner may authorise employers individually liable and mutual associations to settle claims for compensation and the costs of medical aid provisionally. Employers individually liable and mutual associations must contribute to the costs of administering the Act and to covering any losses suffered by the Compensation Fund (section 88(1) and (2)). The procedures concerning reviews, objections and High Court referrals are the same as described below and are dealt with by the Commissioner.
- ⁸ Act 78 of 1973.
- ⁹ Pneumoconioses, lung cancer /mesothelioma and platinum salt sensitivity/asthma.
- ¹⁰ 29 of 1996.
- ¹¹ Section 2(1).
- ¹² 85 of 1993.
- ¹³ Section 38(1): The maximum penalty for the contravention of a provision of the Act is a fine of R50 000 or 12 months' imprisonment or both.
- ¹⁴ For a comparison of these two laws, see Hermanus M *Trends in occupational health and safety policy and regulation—issues and challenges for South Africa* (Institute of Development and Labour Law, UCT)(2001) 61.
- ¹⁵ 130 of 1993 (referred to as COIDA).
- ¹⁶ 78 of 1977.
- ¹⁷ R570 per month.
- ¹⁸ Notably the UIF and the RAF systems. Statutory provisions prohibiting such practices only provide a partial solution; the question remains whether effective enforcement is administratively and otherwise possible, given the absence of a linked database system.
- ¹⁹ This is largely due to the absence of a database system which links the state social assistance system with the public insurance funds.
- ²⁰ Fultz and Pieris *Employment Injury Schemes* 3.
- ²¹ Benjamin-Greef Report 60.
- ²² Such as the Vocational Rehabilitation and Employment (Disabled Persons) Convention 159 of 1983; the Occupational Safety and Health Convention 155 of 1981; the Occupational Health Services Convention 161 of 1985 and the Labour Inspection Convention 81 of 1947.
- ²³ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 13-15 and authorities referred to there.
- ²⁴ As presented by Calabresi G *The costs of accidents: a legal and economic analysis* (1970) 26.
- ²⁵ Act 85 of 1993.
- ²⁶ Act 29 of 1996.

- ²⁷ See in particular ILO Conventions 155 of 1981 (Occupational Safety and Health and the Working Environment); 174 of 1996 (Prevention of Major Industrial Accidents); and 176 of 1996 (Occupational Safety and Health in Mines).
- ²⁸ It is clear that the legislation attempts to cast the net of coverage as wide as possible—this flows from the wide categories of persons who qualify as “employer” for purposes of the Act, as well as from the wide ambit of the notions of “employee” and “user of machinery” in the OHSA (see section 1)—limited exclusions are provided for.
- ²⁹ Section 35 of COIDA takes away the common-law liability of employers, replacing it with the entitlement to claim from the Compensation Fund. The constitutionality of section 35 has recently been upheld by the Constitutional Court—cf *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1106 (CC).
- ³⁰ Not only does the definition of “health” in the two Acts differ, but also does the OHSA have a particularly narrow definition, in that “healthy” is meant to be “free from illness or injury attributable to occupational causes”.
- ³¹ The OHSA defines “safe” as being “free from hazard”.
- ³² The World Health Organisation defines “health” as “a state of complete physical, mental and social well-being, and not simply the absence of illness or disease”. It is suggested that this definition is more in keeping with a broad social security approach, as it is clearly concerned with the total well-being of a person in a workplace.
- ³³ Benjamin-Greef Report 164.
- ³⁴ See the Benjamin-Greef Report 170-171.
- ³⁵ COIDA requires that the employer must pay the compensation due to the injured employee for the first three months of temporary total disablement (section 47(3)). This could perhaps be seen as a measure which will ensure to some extent the continuation of the employee’s link with his/her employment. However, this remains essentially a temporary measure, which is not backed by other (re)integration measures.
- ³⁶ The establishment of two rehabilitation centres (in the form of section 21-companies) by the Office of the Commissioner is commendable, but more will be needed in order to address this issue.
- ³⁷ Fuchs 1997 *ISSR* 19-21.
- ³⁸ As propagated by Berghman in most of his contributions.
- ³⁹ Section 56(4)(a). Where the worker suffers a permanent disability or dies the Commissioner will have to estimate the earnings that the employee would have received had he not been injured or killed; this is done with the assistance of actuarial reports.
- ⁴⁰ Section 56(4)(b).
- ⁴¹ Section 56(7).
- ⁴² Thompson and Benjamin *Commentary* H1-37.
- ⁴³ Benjamin-Greef Report 174.
- ⁴⁴ See Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 25.
- ⁴⁵ Benjamin-Greef Report 171, 175; Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 23.
- ⁴⁶ Section 35.
- ⁴⁷ Section 100.
- ⁴⁸ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 23.
- ⁴⁹ Definition of “employee”: section 1.
- ⁵⁰ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 21 and authorities cited there. They consequently have to resort to common law civil action, but would not qualify for State support (in the form of legal aid) in order to bring their claim.
- ⁵¹ ILO *Social Protection of Migrant Workers in South African Paper No. 3 ILO/SAMAT Policy Paper series* (1996).
- ⁵² In South Africa it is a reality that many people operate in the informal sector (for example, street-vendors) on behalf of someone else. Even though such people could through a formal approach be classified as self-employed this is not in line with reality. In most instances these people are distributing goods/services of (and assisting in furthering the business of) someone else rather than their own private enterprise.
- ⁵³ Section 22(5).
- ⁵⁴ See Olivier M ‘Workers’ commuting injuries: a South African perspective’—vol. 16(3) *Industrial Law Journal* (1995) 559-576.

- ⁵⁵ Section 27(3) of the Workmen’s Compensation Act 30 of 1941.
- ⁵⁶ Clause 5(1)(c).
- ⁵⁷ See par 2.
- ⁵⁸ See Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 21-22 and authorities cited there.
- ⁵⁹ See Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 24-25.
- ⁶⁰ Notably the UIF and the RAF systems. Statutory provisions prohibiting such practices only provide a partial solution; the question remains whether effective enforcement is administratively and otherwise possible, given the absence of a linked database system.
- ⁶¹ This is largely due to the absence of a database system which links the state social assistance system with the public insurance funds.
- ⁶² Myburgh “Investigating models to provide and sustain adequate long-term employment injury benefits in South Africa” (undated) 43.
- ⁶³ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 25.
- ⁶⁴ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 26.
- ⁶⁵ Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 26.
- ⁶⁶ 1998 *BCLR* 1106 (CC).
- ⁶⁷ Parsons 5.
- ⁶⁸ Parsons 6.
- ⁶⁹ Mittner *Vrae oor ou Ongevallewet* 69 shows that even though the number of registered employers decreased to 217 000 in the financial year 1997/1998 tariff-income still increased with 15 per cent from R792 million to R916 million.
- ⁷⁰ See the Benjamin-Greef Report 176.
- ⁷¹ See also Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 25.
- ⁷² Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 26.
- ⁷³ As is the case in the UK.
- ⁷⁴ See the paper entitled “The legal framework of social security in South Africa with reference to: (a) exclusion and marginalisation; (b) legal remedies and adjudication measures; (c) death and survivors’ benefits; and (d) legal aid within the social security system” prepared by Olivier MP, Van Niekerk R, Kuppan GY and Mpedi G, prepared for the Committee of Inquiry into a Comprehensive Social Security System (July 2001).
- ⁷⁵ Fuchs M *The German Industrial injuries insurance system* (1996) 31.
- ⁷⁶ *Road Accident Fund Act* 56 of 1996.
- ⁷⁷ Under the RAF Act.
- ⁷⁸ s 17.
- ⁷⁹ Draft White Paper GN 170 in GG 18658 of 1998-02-04.
- ⁸⁰ Act 34 of 1956.
- ⁸¹ *AA Insurance v Ndhlovu* 1991 3 SA 655 (E).
- ⁸² See par 1 *supra*.
- ⁸³ Daniels *MMF—RAF The Practitioner’s Guide* E-64.
- ⁸⁴ Visser PJ and Potgieter JM *Skadevergoedingsreg* (1993) 18.
- ⁸⁵ Visser & Potgieter *Skadevergoedingsreg* 18.
- ⁸⁶ See Visser & Potgieter *Skadevergoedingsreg* 19 where it is explained that a *solatium* is a type of solace that is used to make the victim feel better about his lot.
- ⁸⁷ See the discussion of s 18 under paragraph 4 *supra*. Passengers who do not fall under the provisions of s 18(1)(a) will be classified as social passengers, with the result that their claims will be limited to R25 000 only, excluding any payments for non-patrimonial loss suffered.

- ⁸⁸ Visser & Potgieter *Skadevergoedingsreg* 67.
- ⁸⁹ Reynecke MFB “Die Elemente van die begrip skade” 1978 *TSAR* 26.
- ⁹⁰ Van der Walt CFC “Die voordeeltorekeningsreëlknoppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding” 1980 *THRHR* 1: Continued and gratuitous employment where an injured person works during a period of incapacity; Donations from third parties other than employers; Accelerated accrual of benefits to dependants from their breadwinner’s estate; Cases of valuable wreckage; The case where a seller resells the *merx* at a profit to a third party after the initial purchaser committed a breach of their contract; The type of case where a party to a contract, whose counterpart breached their contract before he had fulfilled his own obligations under the contract, consequently saving the cost of doing so at all; The factual situation that an injured worker who has no income during the period of his incapacity also saves the income tax he would otherwise have had to pay; and, lastly, the rather obvious case where an injured person, in addition to insurance benefits already received claims, delictual damages of the wrongdoer.
- ⁹¹ Actuaries and courts have laid down principles for the calculation of future damages. See, for example, Koch RJ “Discounting to date of delict: fair or unfair?” 1987 *THRHR* 105, where he discusses the cases of *Nhlumayo v General Accident Insurance Co of SA Ltd* 1986 3 SA 859 (D) and *Mayeke v Guardian National Insurance Company Ltd* 1986 4 SA 326 (T). The problem here is that actuaries and lawyers try to bring two different disciplines together, sometimes with results that are unsatisfactory. It is submitted that disputes on future damages should rather be avoided in total by making use of undertakings where the Fund contractually undertakes to compensate future losses.
- ⁹² Daniels E-30.
- ⁹³ See *supra*.
- ⁹⁴ Visser & Potgieter *Skadevergoedingsreg* 94 95.
- ⁹⁵ Visser & Potgieter *Skadevergoedingsreg* 238.
- ⁹⁶ GN 170 in GG 18658 of 1998-02-04.
- ⁹⁷ A present commission of enquiry is chaired by Judge Satchwell, and will be reporting in due course.
- ⁹⁸ Draft White Paper on the Multilateral Motor Vehicle Accidents Fund, 1996.
- ⁹⁹ Draft White Paper 18.
- ¹⁰⁰ Draft White Paper 19.
- ¹⁰¹ Draft White Paper 20.
- ¹⁰² Draft White Paper 22.
- ¹⁰³ Berghman J “The resurgence of poverty and the struggle against exclusion: A new challenge for social security?” 1997 *International Social Security Review* (vol 50) 18, 20; Pieters D *Introduction into the Basic Principles of Social Security* (1993) 2-4.
- ¹⁰⁴ Berghman J “Basic Concepts of Social Security” in *Social Security in Europe* (1991) 18.
- ¹⁰⁵ See par 7 par 16 of the paper entitled “Coverage against employment injuries and diseases” (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Adv E Klinck) July 2001.
- ¹⁰⁶ See the 1997 Report of the Committee on Inquiry into a National Health and Safety Council in South Africa (the Benjamin-Greef Report) 100-106 for a similar viewpoint with regard to the employment injury and disease compensation system.
- ¹⁰⁷ See par 14.2 of the paper entitled “Coverage against employment injuries and diseases” (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Adv E Klinck) July 2001.
- ¹⁰⁸ As is the case in the UK.
- ¹⁰⁹ See the paper entitled “The legal framework of social security in South Africa with reference to: (a) exclusion and marginalisation; (b) legal remedies and adjudication measures; (c) death and survivors’ benefits; and (d) legal aid within the social security system” prepared by Olivier MP, Van Niekerk R, Kuppen GY and Mpedi G, prepared for the Committee of Inquiry into a Comprehensive Social Security System (July 2001).
- ¹¹⁰ R570 per month.
- ¹¹¹ See par 16 of the paper entitled “Coverage against employment injuries and diseases” (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Adv E Klinck) July 2001.