

RABS

THE GOOD, THE BAD THE UGLY



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ROAD ACCIDENT BENEFIT SCHEME: THE GOOD, THE BAD AND THE UGLY

1. Introduction

The Road Accident Benefit Scheme (RABS) is touted by the government as the ultimate solution for the financial malaise of the Road Accident Fund. The chairman of the Portfolio Committee stated that once the Bill is operationalised, 'road accident victims will ... receive more benefits than ... (under) the old regime' (Legalbrief, 22 November 2018). The question arises whether this is true and whether RABS is all good news for road crash victims and motorists who through the RAF fuel levy fund the road crash compensation system.

2. The good

The biggest advantage of RABS over the current compensation system is that claimants will not be required to prove fault. The only other innovative feature is that unemployed claimants will be entitled to an "unemployed benefit". The latter is the only new benefit which is not to be found in the current fault-based compensation system.

3. The bad

The greatest advantage of no-fault is at the same time one of its biggest failings. In a country where internationally, drunken driving related deaths are amongst the highest, sound policy should dictate that drunken drivers (to be covered by RABS) should not be rewarded with compensation benefits when they are injured in road crashes caused by their drunk driving. (see "No to drunk driving" at <https://www.news24.com/SouthAfrica/Local/Hillcrest-Fever/no-to-drunk-driving20170822>).

Unfortunately, the innovation also comes at a cost to the road crash victim whose current compensation is further eroded by the introduction of RABS (compensation being initially restricted in the name of affordability from 1 August 2008 by an arbitrary cap on earnings and qualified ability to recover pain and suffering).

The following may be noted:

- The medical claims of children (persons under the age of 18 years) are limited to emergency medical care;
- Funeral expenses are limited to R 20 000.00;
- Loss of earning capacity “career pathing” is abolished resulting in a substantially reduced benefit;
- Benefits terminate on death of the beneficiary potentially leaving surviving dependants destitute;
- Claims for loss of income and support are capped to 75% of the national average income which is less than the similar benefit afforded by the Workmen’s Compensation Fund. Save for emergency medical care victims who earn more than R276 928.00 per annum, will have no medical claim against RABS. These restrictions discriminate against the class of citizens who are one of the main contributors to the RAF/RABS fuel levy fund;
- The claims of foreigners are limited to emergency medical care which may have a negative impact on tourism;
- Save for emergency medical care road accident victims older than 60 years have no claim for medical costs;
- Loss of support benefits are forfeited after 15 years or the dependent reaching the age of 60, whichever comes first;
- Loss of support benefits are terminated when a dependent child turns 18 years of age;
- No contribution towards legal or administrative costs which means that a crash victim must fund his/her engagement of legal aid from his/her benefits or out of own pocket;
- The RABS administration will also reserve the right to stipulate the nature of the medical treatment that every injured individual receives, and to specify which healthcare providers can be used which is contrary to principles of current law.

4. The ugly

South Africa is internationally ranked as the 38th worst country as far as road safety is concerned. CSIR research shows that road crashes cost our country an estimated R143 billion p.a. 14 000 South Africans annually die on our roads affecting an estimated 52 000 additional persons through loss of their support. 63 000 persons are seriously injured and 203 000 sustain minor injuries. Road deaths and injuries on our roads have remained at current levels for at least the past five years. We have a shortage of road traffic enforcement officers. It is reported that there are 18 000 where 100 000 officers are needed. The government is under a constitutional duty to prevent injury and death on our roads but is clearly failing in this duty. The government's practical road safety campaigns are confined to some token measures during the Easter and Christmas holidays not recognising that road fatalities are not seasonal and that approximately 1 200 persons die and approximately 2 200 are injured on South African roads every month. A road crash victim's common law right to pain and suffering will be abolished by the adoption of RABS thereby seriously and detrimentally affecting compensation for brain injured and paralysed crash victims. The right to this compensation is constitutionally guaranteed and it is doubted that the abolishment will survive constitutional challenge. RABS is clearly discriminatory of the young, the aged and the middle-class and high earning income group by disallowing these groups of persons equitable and justifiable medical, income and support benefits and is therefore palpably unconstitutional. The curtailment of benefits does not neutralise the existence of the loss that gives rise to such benefit. In this instance the loss is likely to be transferred from the victim road crash benefit fund to firstly the crash victim and their family and ultimately the general fiscus in the form of social benefits. For example, the medical costs not covered by RABS will become an expenditure by the Department of Health for those medical costs not covered by RABS. Alternatively, such costs will ultimately be paid by the victim or his/her family, his/her medical aid or his family or the NHI when it becomes a reality.

Similarly, the reduced payment of income and support and its regulated cessation is a potential burden for social security. It will leave certain road crash victims in a worse position than is currently the case and where a victim does not qualify for social benefits, his loss for which he/she has a common law right will be constructively abolished as a victim in terms of RABS has no claim against the driver who caused the loss. Government by the promotion of RABS is misidentifying the actual problem of road crash victim compensation (too many crashes) ignoring its constitutional duty and the fate of road users and is electing to further restrict the rights of injured and breadwinner deprived crash victims in order to balance its books. The government's policy regarding abolishment and curtailment of road crash victim compensation where it is failing in its constitutional duty in ensuring effective road safety is in some instances unconstitutional, demonstrably misdirected and uncaring. Especially where it is a fact that 37% of road crash victims are pedestrians and probably poor. The fault system against the backdrop of 14 000 deaths and approximately 263 000 injuries annually according to the 2018 RAF Annual Report gives rise to 94 000 personal claims against the RAF costing some R35 billion p.a. in compensation. The abolition of fault will clearly drastically change the claims rate as the absence of fault will no longer bar claims for benefits/compensation. To illustrate this, the fault system with 14 000 annual deaths results in 7 235 loss of support claims p.a. (2018 RAF Annual Report). Assuming (based on Statistics SA data) that each deceased has three dependants, this will result in a 70,5% increase or 45 000 more support claims which based on current average claim values (R417 281 per claim) cause an increased expenditure of R21,6 billion (an increase of approximately 1,00 c/l in the fuel levy). Even if the curtailment of benefits by RABS is taken into consideration (a saving of 20% has been touted), the increase of this benefit head remains a substantial increase in benefit expenditure. Claims and expenditure for injury will similarly increase. Currently there are 174 106 fault-based claims for medical costs. No-fault may cause this to rise to 260 000 at an average cost of R10 621 per claim. RABS medical expenditure (currently R2 billion) will be R3 billion (or approximately 0,05 c/l more).

Even if savings of medical costs by contractual means can be achieved, this will not be enough to negate the effect of substantial more claims from no-fault. The introduction of the unemployment benefit in the face of rising unemployment (currently 27%) is a completely new expenditure. If the actual unemployment rate (including persons who have ceased looking for employment) is considered, the potential claims under this head can be postulated at 190 648 claims. The benefit is set at R10 000. This equates to an additional amount of some R2 billion (approximately 10 c/l). The preceding heads are a selection for illustrative purposes and do not deal with loss of earnings and funeral expenses which will also have increases in claim numbers and cost. In proposing RABS the assumption is made that the current compensation system is being optimally administered. Currently 94 000 claims per annum take an average of 55 months to complete. The RAF's annual legal bill has burgeoned from R2.5 billion in 2009 to R9 billion in 2018 while the claims against the RAF in the same period fell from 166 146 to 94 000. The RAF and recently the current Minister of Transport has blamed attorneys for the high legal costs. The high litigation cost cannot be solely ascribed to attorneys but is largely the consequence of, as the Western Cape High Court has stated, the RAF using litigation as a cash flow tool. As matters stand, the RAF defends claims regardless of whether a defence is really merited. The RAF has been harshly criticised by the courts and recently by both the Free State and Gauteng North High Courts for its abuse of the litigation process. In some instances, courts have sanctioned the RAF and its claims handler's for their neglectful dealing with crash victim claims. What makes the RAF's litigation more deplorable is that the RAF Act contains provisions which can be used by the RAF to curb litigation. These provisions are not employed precisely because of the RAF's policy of waiting to be sued and then defending indefensible claims. In addition to the extraordinary expenditure on legal costs, the RAF's deferred payment scheme to manage cash flow costs some R17 million. The expenditure on legal costs and deferred payments translates to 45 c/l. The RAF had R342,357,229 irregular expenditure in 2018. The RAF is (contrary to the recommendations of the RAF Commission) set to become the RABS administrator.

It takes little imagination (based on the RAF's current claims completion performance) to predict the delayed benefits for road crash victims in view of the projected substantial increase of claims which a no-fault system must necessarily bring. In addition, RABS, unlike the RAF system, employs periodical payments which is administratively far costlier than the once and for all lump sum payments of the current system. To further complicate matters, RABS proposes that a claim lapses after 180 days of inaction by the RABS Administrator. The current system and RABS is funded by a fuel levy of R1,93 c/l. The government with RABS unjustifiably assumes that fuel levy will indefinitely remain a consistent source of revenue. Research shows the fuel levy as a source of fiscal revenue may disappear in 10 years from now (see <https://www.iol.co.za/business-report/international/fuel-levy-could-be-gone-in-10-years-logistics-expert16764404>). There is no indication that the government noted this possibility. Should RABS be introduced with its attendant increase in cost and be funded by the fuel levy, a funding disaster of apocalyptic proportions awaits.

5. Conclusion

The obvious solution is for the government to reduce road crashes and to improve administration of the current system. Reducing road crashes in compliance with its constitutional duty will have exponential financial benefits for the country and simultaneously greatly enhance the quality of life of road using citizens. It will also pave the way for the introduction of no-fault benefits sometime in the future when levels of crashes are such to sustain the introduction of no-fault benefits.