Social security aspects of accident compensation: COIDA and RAF as examples*

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1 INTRODUCTION

Employees enjoy a common law right to a safe work environment and health and safety legislation is aimed at supplementing this basic right. Studies have shown that, generally, occupational injury risks are concentrated in four industries: transport, mining, agriculture and construction (Loewenson 1997:12). Incapacity for work as a result of occupational injuries and diseases is usually conceived of as the loss of the ability to earn and is classified under social insurance. Most social security schemes will, therefore, try to provide an income replacement for those persons affected by a loss of the ability to earn, whether it is due to accident or sickness.

In South Africa a constitutional imperative regarding social security exists (s 27 of the Constitution of the Republic of South Africa 1996). Collective labour agreements can also contain engagements relative to social security and health and safety at work.[1] The most significant legislation in South Africa that provides for preventive safety measures are the Occupational Health and Safety Act 85 of 1993 (OHSA)[2] and the Mine Health and Safety Act 29 of 1996. OHSA spells out the duties of employers and employees respectively and makes provision for a number of offences if the Act is contravened (s 38(1)). The Mine Health and Safety Act of 1996 repealed the provisions of the Minerals Act of 1991. Once again provision is made for health and safety representatives and committees (s 25(1) and (2)). The Labour Relations Act 66 of 1995 now also provides for workplace forums to play a role in health and safety issues in the workplace.[3]

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* Portions of this contribution have been based on research published in Olivier *et al Social Security Law – General Principles* (1999). COIDA refers to the Compensation for Occupational Injuries and Diseases Act and RAF to the Road Accidents Fund.

1 For the legal effect of collective agreements in South Africa see ss 23, 31 and 32 of the Labour Relations Act 66 of 1995.

2 OHSA replaced the Machinery and Occupational Safety Act of 1983 on 1 January 1994.

3 See s 84(5).

The most important legislation that regulates the compensation of employees for work-related illness, injury and death is the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).[4] Finally there is also the Occupational Diseases in Mines and Works Act 78 of 1977.

The aim of this article is to give an overview of current workplace injury insurance legislation (COIDA) and to highlight some of the issues related to its scope of application. The interaction between COIDA and motor vehicle accidents legislation will also be examined. Motor vehicle accidents legislation has always been the subject of heated debates. A brief overview of the most important provisions of the Road Accident Fund Act will be provided and criticism against the current system will be highlighted. Some recommendations will be made in the light of the suggested legislative reform.

2 INSURANCE AND EMPLOYMENT INJURIES AND DISEASES: THE NATURE OF THE SOCIAL SECURITY SYSTEM

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 not very effective in this context. Therefore, a particular form of liability (*in casu* delictual liability) for any civil compensation claim against the employer is replaced by insurance coverage.

In *Jooste v Score Supermarket Trading (Pty) Ltd* (1998 BCLR 1106 (CC)) the Constitutional Court was called upon to decide whether the prohibition (contained in section 35 of COIDA) on an employee instituting a claim for damages against his or her employer violates the Constitution. The court held that COIDA is important social legislation, with a significant impact on the sensitive and intricate relationship between employers, employees and society at large. The court found that section 35 does not violate the right to equal protection and benefit of the law contained in section 9 of the Constitution. The Constitutional Court accepted that the bar on civil claims in section 35 is rationally connected to COIDA's purpose of providing "no fault" financial compensation to employees from a Compensation Fund to which employers are required to contribute. Whether 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 a rationality review, an invitation which the court firmly declined.

Separate occupational accident insurance ascribes responsibility to the employer since it is the employer who gains from the economic activity. If a separate occupational accident/disease-insurance scheme were to be removed, it would result in other social security branches, eg sickness or disability and pension schemes, being burdened with this peculiar category

4 See also the Compensation for Occupational Injuries and Diseases Amendment Act 61 of 1997 that came into effect on 1 March 1998.

of work-related risks. In most cases this would mean a lower level of compensation for the individual concerned, which in turn would lead to the individual seeking further compensation elsewhere, for example through private action.

3 COMPLIANCE WITH INTERNATIONAL, REGIONAL AND SUPRA-NATIONAL STANDARDS

None of the countries in the Southern African region has ratified Convention No 102 on Minimum Standards of Social Security of 1952. A set of general principles can be deduced from the Conventions passed on the subject of employment injuries:[5]

- employment injury benefits must be financed by employers, in contrast with other forms of social security for which governments may require of employees to match employer contributions;
- compensation must generally be in the form of a periodic payment which lasts throughout the contingency, as opposed to a lump-sum benefit;
- the appropriate scheme's scope of application must extend to at least half of the national workforce or 20 per cent of residents;
- minimum compensation levels are provided for – set at 50 per cent of lost wages for an eligible worker with a family (spouse and two children), and 40 per cent for a surviving spouse and two children; and,
- migrant workers must receive equal treatment and there should be reciprocal agreements between governments to ensure that migrants can receive compensation at home or away from home.

Ultimately it has to be established whether South Africa is delivering a social security scheme in conformity with the principles set out above.

4 THE SOUTH AFRICAN EXPERIENCE

4.1 General

The Compensation for Occupational Injuries and Diseases Act (COIDA) came into effect on 1 March 1994. 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, negligence continues to play some role since an employee is entitled to additional compensation if he or 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. There are, however, two important exceptions that will be discussed later.[6] Subject to the said exceptions (and exempted employers in section 1 of the Act) all employers in South Africa must register and pay assessments to the Fund.

5 Fultz and Pieris 1998:3.
6 See below at para 7.

COIDA provides for benefits to be paid to:

- employees who suffer a temporary disablement;
- employees who are permanently disabled; and
- the dependants of employees who die as a result of injuries sustained in accidents at work or as a result of an occupational disease.

The Act lists the more common occupational diseases. If an employee contracts a disease that is not listed he or she must prove that the disease is related to their work to receive compensation.[7] Problems with regard to access to medical facilities, the availability of specialists and other restraints regarding resources have led to an under-reporting of occupational diseases.[8]

The Act provides for the payment of medical aid received by disabled employees to the private medical profession at tariff rates. Huge problems regarding the timeous payment of these fees exist in the present system. The situation has become so serious that medical practitioners are refusing to treat patients with occupational injuries or diseases. Adding to this dilemma, medical costs have escalated considerably resulting in the largest increase in costs faced by the Fund.

Failure to comply with any of the obligations imposed by the Act is a criminal offence and, in addition, the Compensation Commissioner[9] has the power to penalise employers who do not comply with their statutory obligations.

4.2 Scope of application (COIDA)

An employee is defined widely in the Act (s 1). An "employer" has the corresponding meaning of any person, including the State, who employs an employee. Persons employed outside of South Africa are excluded from the Act, but while they are temporarily performing work within the country they may be entitled to compensation in the event of injuries, provided that arrangements have been made with the Commissioner. The same principles are also applicable, *mutatis mutandis*, to persons who ordinarily work within the country, but who perform work on a temporary basis outside the country (s 23). In contrast to the old legislation, persons are not excluded because their salaries exceed a specified amount (subject to an annual ceiling) or because they are home workers.[10]

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7 Its requirements are considerably simpler than the previous requirement that employees must prove that the disease was contracted in circumstances amounting to an accident in order to receive compensation.

8 In 1990 only 128 cases of occupational diseases were compensated - Accident Fund *Annual Report* 1993:14.

9 The Compensation Commissioner is responsible for the administration of the scheme, although the 1997 amendments to COIDA made the Director-General of Labour accountable for the Fund (s 3).

10 Persons to whom employers give articles or material to work upon in premises not under the employer's control. ILO Convention No 177 of 1996 concerning home work extends all basic rights to those involved in homework, which is defined in Article 1. Article 7 provides that national laws on health and safety will apply to home work.

Certain issues relating to the scope of application of COIDA, include:

(a) Domestic workers are excluded and it can be questioned whether their exclusion can still be justified in light of the fact that there are more than one million domestic workers in South Africa. Before 1994 domestic workers were excluded from most labour legislation in South Africa (Huber and Sack 1997:20). However, the new Basic Conditions of Employment Act 75 of 1997 as well as the Labour Relations Act 66 of 1995 apply to domestic workers as well (with certain pre-conditions in some instances).

(b) Another issue that arises is whether the Act provides satisfactory recognition of extended families and unconventional unions. Even though live-in partners and partners in an indigenous marriage are recognised, the problem of the treatment of same-sex unions or relationships still remain. In *Langemaat v Minister of Safety & Security & others* (1998 19 *ILJ* 240 (T)) the applicant, a lesbian police officer, had applied to have her live-in partner registered as a dependent member of the medical aid scheme. The court held that the medical aid's rules excluded a great number of persons who were *de facto* dependants of Polmed's members and that this amounted to discrimination. Extended "families" are often dependant on one breadwinner and the loss of the ability to earn of that one individual can cause hardship to numerous *de facto* dependants.

(c) In many rural areas it seems as if the compensation system had broken down leaving the rural families and communities to bear the burden of disabilities and diseases incurred in urban-industrial workplaces (which should have been covered by the urban-based employers) (Standing *et al* 1996:467). Problems in administration are largely responsible for this situation.

(d) Is the principle of equality given effect to as required by the Constitution? Special attention needs to be given to the position of domestic workers – the majority of this excluded category is comprised by women, and furthermore, black women, which could constitute indirect discrimination.

(e) Are new types of employment or new categories of workers recognised satisfactorily? Here one can for example think of *atypical employment* and *dependent contractors*. 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 by adopting a formal approach be classified as self-employed and therefore excluded from coverage under COIDA, this is not in line with reality. In most instances these people are distributing goods or services of (and assisting in furthering the business) of someone else rather than their own private enterprise.

In COIDA, unless the context indicates otherwise, "accident" means an accident arising out of and in the course of an employee's employment and resulting in personal injury, illness or the death of the employee.[11] Where an

11 Definition of "accident" substituted by s 1(a) of Act 61 of 1997.

employee is guilty of serious and wilful misconduct which causes an accident, such an employee will forfeit his or her entitlement to compensation unless the accident results in serious disablement (s 22(3)(a)(i)) or the employee dies as a result of the accident leaving a dependant wholly financially dependent upon him or her (s 22(3)(a)(ii)). Usually employees travelling to or from work are not covered by the Act. However, the Act provides that in certain circumstances, these employees are regarded as being transported in the course of employment and therefore entitled to compensation.[12]

Occupational diseases are listed in Schedule 3 to the Act and an employee is entitled to compensation should he or she contract such a disease (s 65(1)(a)). When an employee contracts a disease, other than a scheduled disease, which arose out of and in the course of his or her employment, compensation is also payable (s 65(1)(b)). Therefore, should an employee contract a disease listed in schedule 3 it is presumed that the disease was caused by the employment, whilst where the disease is unlisted the employee must establish that the disease arose out of and in the course of employment. The diseases listed in schedule 3 are diverse and now also include "repetitive strain injuries", which affect many employees working (for example) on assembly lines that are not covered by the definition of an "occupational accident/injury"

In South Africa the mining industry employs thousands of workers. Specialised legislation regulates this sector (Occupational Diseases in Mines and Works Act 78 of 1977). It is especially in the mining industry where migrant workers are employed in South Africa. An occupational disease may only materialise after such a worker has returned to his country of origin and the question arises where such an employee's remedy lies. The ILO requires in this regard that there should be reciprocal agreements between governments to ensure that migrants can receive compensation either at home or abroad.

All payments of compensation in terms of COIDA depend upon a calculation of an employee's earnings. Section 53 prescribes rules as to how the Commissioner should calculate the compensation payable. However, if the Commissioner does not believe it practicable to utilise the prescribed method, he may calculate earnings in any manner that he considers equitable. An employee's earnings must be calculated with a view to establishing at which rate an employee was *remunerated* at the time of the accident or disease. Hence, the definition of remuneration in kind that would qualify as "earnings" should be as wide as possible in order to ensure that an employee or dependant receives benefits comparable to the *status quo ante*. The indexing of pension payments is extremely important in order to keep periodic payments on par with inflation.

12 In Belgium s 46(6) of the *Arbeidsongevallenwet* of 10 April 1971 since 1 August 1998 extends the payments in terms of the *Burgerlijke aansprakelijkheid* (civil liability) of the employer to traffic accidents and claims can be brought against the employer. The definition of the places at which a accident can happen to qualify is the same as the definition of a 'public road' in South African road traffic legislation. See below for the interaction between COIDA and motor vehicle accidents legislation.

5 THE RIGHT TO COMPENSATION AND BENEFITS

5.1 General

The compensation structure is explained at length in the Act, which describes the benefits that the employee is entitled to. The right to compensation is provided for in section 21 of the Act. Any employee who falls within the definition of the Act is entitled to compensation, irrespective of whether his or her employer has registered or has paid contributions. If the employer fails to comply with the provisions of the Act it will be held liable in terms of the common law. The Compensation Commissioner has been very lenient up to now in the sense of allowing compensation in terms of the Act and thereafter requiring the employer to fulfil its past obligations, with penalties, in terms of the Act.

Should the employee fail to report the accident within 12 months the right to benefits is forfeited (s 44 regulates prescription). It is clear that this limited period causes many instances of hardship in practice and consideration should be given to the question whether this period could not be extended. Since the strict application of these prescription periods might have a negative impact on the uninformed employee, this must be weighed against the availability of the information needed and the possible loss of evidence. Provision should be made for condonation on good cause shown. The same criticisms apply to occupational diseases.

An employee is entitled to increased compensation if he or she is injured in an accident or suffers from an occupational disease caused by the negligence of his or her employer (s 27(1)).[13] Increased compensation may also be claimed if an accident or occupational disease is caused by a patent defect in plant, material or equipment. The claim will not succeed if the defect could not have been discovered by reasonable diligence. Negligence on the part of the injured employee does not exclude a claim for increased compensation if the negligence did not contribute to causing the accident. The Apportionment of Damages Act has no application to claims of this type (*Grace v WCC* 1967 4 SA 137 (T) 140F). If negligence is established, the Commissioner must award an amount of compensation that he considers equitable (s 56(4)(a)).

An employee and his or her dependants may not claim damages from the employee's employer as a result of an accident or a qualifying disease. This prohibition covers both claims based on an employer's vicarious liability for the acts of employees and claims occasioned by the employer's own negligence. All claims for damages are excluded including those for pain, suffering and loss of amenities of life. However, an employee is not prevented from claiming damages where the accident results from the deliberate wrongdoing of the employer. An employer is only protected in its capacity as an employer. Therefore, an employee[14] may recover damages from a third party who has caused an accident or occupational disease

13 And certain categories of its employees - s 56(1)(b)-(e).

14 Or, in the case of a fatal accident or disease, his or her dependants.

(s 36 (1)(a)). Recovery from third parties is also the only means available to an employee to recover non-economic damages in a claim arising out of an injury caused in the workplace.

5.2 Benefits

The formula for calculating the compensation of employees who suffered temporary or permanent injuries or serious disfigurement, and dependants of employees who die as a result of an occupational accident or disease, is contained in schedule 4 of the Act.

Regarding the definition of a "dependant" entitled to compensation (substituted by section 1(d) of Act 61 of 1997), attention must be drawn to the following fact that a widow's or widower's status is largely influenced by the status of the previous relationship (ie whether it was a civil marriage, a customary one, or in terms of indigenous law) where more than one relationship existed. Civil marriage spouses enjoy preference and it must be questioned whether this position is still tenable.[15]

Special rules apply to the compensation for dependent children[16] in terms of section 54. These rules include:

- where there are more than three children entitled to a pension the entitlement of each child is proportionately reduced;[17]
- the entitlement of a dependent child to a pension lapses on turning 18 or if he or she marries or dies prior to turning 18 (s 54(1)(c)(iv)); and
- where a deceased employee leaves a widow or widower in terms of a customary law marriage as well as children, the Commissioner may determine the allocation of the compensation between the widow or widower and the children(s 54(5)(b)).

Only a person wholly or partly financially dependent upon the deceased may receive compensation as a dependant. A widow or widower and children under the age of 18 are assumed to be dependent. All others must satisfy the Commissioner of their dependence upon the deceased.

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15 The matter will have to be addressed soon, since a similar provision regarding "dependants" in terms of the Road Accident Fund Act (also relevant in the event of commuting injuries) has been declared unconstitutional recently. In *Hafiza Ismail Amod (born Peer) v Multilateral Motor Vehicle Accidents Fund* (Case CCT 4/98) the applicant applied for leave to appeal directly to the Constitutional Court against a judgment delivered by Meskin J in the Durban and Coast High Court. The applicant claimed damages in the High Court for loss of support arising out of the death of her husband in a motor vehicle collision in 1993. The Court held that this question was one within the jurisdiction of the Supreme Court of Appeal and the appeal ought to have been noted to that court and not to the Constitutional Court. The matter was thus referred to the Supreme Court of Appeal (*Hafiza Ismail Amod (born Peer) & Commission for Gender Equality v Multilateral Motor Vehicle Accidents Fund* (Case No:444/98 decided on 29 September 1999)). The Court held that even though the widow and her deceased husband were married in terms of Islamic law it was a *de facto* monogamous marriage. Hence, the right of the spouse to support in such a union is worthy of public recognition and protection by the law. The Court found the Multilateral Motor Vehicle Accidents Fund legally liable to compensate the widow for loss of support of her husband.

16 A child includes a child of the employee or of his or her spouse including a posthumous child, a stepchild, an adopted child and an illegitimate child.

17 S 54(1)(c)(i). See the discussion in Thompson and Benjamin 1998:H1-28.

The most significant medical benefit provided by the Act is the payment of the medical expenses of employees for treatment for occupational accidents and diseases. Other aspects of medical aid covered in the Act are the provision of first aid and the conveyance of injured employees to medical care. Where a disabled employee requires constant help to perform essential actions of life, the Commissioner may grant an allowance towards the cost of such help (s 28). This is available to both temporarily and permanently disabled employees. The grant of an allowance does not affect the employees' entitlement to any other benefits.

6 ADMINISTRATION[18]

The Compensation Fund (formerly the Accident Fund) is the central institution for the financial administration of the Act. It is administered by the Commissioner (s 4(1)), who receives all money payable to the Fund and who is responsible for accounting for the receipt and utilisation of such money (s 18(1)).[19] The Fund consists of assessments and other payments (including penalties) by employers, interest on investments, amounts transferred from the reserve fund and contributions by employers individually liable and mutual associations (s 15(2)).

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 assessment is based on an annual statement of earnings that all employers must submit to the Commissioner (Thompson and Benjamin 1998:H1–11). Once the Commissioner has received the relevant information concerning earnings, he assesses all employers according to a tariff of assessment. 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 Commissioner may assess a business that is designed to prevent or avoid accidents at a lower rate. He may do this if he believes the cost of accidents is likely to be less than that of similar businesses (s 85(1)). The Commissioner may also give a rebate on assessments to any employer whose accident record is more favourable than that of employers in a similar business. It has been argued that the possibility of a rebate leads to the under-reporting of claims. However, it also has the positive effect of encouraging safe work practices and workplaces.

18 Fultz & Pieris 1998:19 state that in South Africa, scheme administrators estimate that administrative costs range from 11 to 14 per cent of contributions. This is not bad at all, when considering other countries in Southern Africa. In 1997, Zimbabwe's administrative expenses totalled 32 per cent of contributions (ILO 1997:43). According to Fultz and Pieris the scheme administrators in Zambia estimate that administrative expenses total 40 per cent of revenues.

19 The 1997 amendments to COIDA gave primary responsibility for the administration of the Fund to the Director-General, who can delegate his functions to the Commissioner and other officials.

7 MUTUAL ASSOCIATIONS AND EMPLOYERS INDIVIDUALLY LIABLE

Two mutual associations – Rand Mutual Assurance Company Limited, which operates in the mining industry and Federated Employers' Mutual which operates in the building industry – are allowed to perform the same functions as the Fund (s 30(1)).

The state, including Parliament and provincial governments, are employers individually liable and do not pay contributions to the Compensation Fund (s 84(1)(a)(i)). The Commissioner may exempt local authorities from any of the obligations in terms of the Act on certain conditions (s 84(2)). 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 (s 88(1) and (2)).

8 MOTOR VEHICLE ACCIDENTS LEGISLATION

Up to 1986 the basis of compensation to victims of motor vehicle accidents was compulsory third party insurance. On 1 May 1986 the situation changed dramatically when the Motor Vehicle Insurance Act 84 of 1986 was introduced.[20] A *fund* was established which steps into the shoes of the wrongdoer and which becomes solely liable for payment of compensation[21]. The result was the promulgation of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. This Act also stipulated that the Fund would be financed by a fuel levy.[22] The Road Accident Fund Act 56 of 1996, which commenced on 1 May 1997, now provides for the establishment of the Road Accident Fund.[23] The RAF Act does not substantively or materially alter any of the requirements for the institution of a claim for damages (Klopper 2000:9).

The Road Accident Fund's main objective is contained in section 3 which stipulates: "The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of a motor vehicle."[24] Therefore, the basis of claims against the RAF is the presence of a delict.[25]

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20 Klopper 2000:4. The object of the legislation was to compensate the victims of road accidents but with the important difference that it was no longer required to procure insurance cover.

21 A number of insurance companies had been appointed as agents to assist the Fund in investigating claims where the identity of either the owner or the driver of the motor vehicle had been established. Where the identity had not been established, the Fund itself investigated the claim.

22 Klopper 2000:4 mentions that: "[T]he former system of compensation was replaced by a system of statutory assumption of liability. The Motor Vehicle Accidents Fund was financed by levies introduced on fuel sales and the liability resulting from the unlawful driving of a motor vehicle was in terms of this Act displaced to the MVA Fund."

23 Daniels 1994:E-7. With the commencement of the RAF Act all existing laws relating to MVA was repealed.

24 The RAF "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".

25 Klopper 2000:21 states: "Apart from the displacement of liability, actual liability remains largely based on common law principles". See s 19(a) of the Act.

9 SCOPE OF APPLICATION OF RAF ACT

9.1 *Culpa* as a requirement

Unlike the situation under COIDA, the RAF Act explicitly requires that a third party's claim arises from the *negligent driving* of a motor vehicle. If negligence cannot be proven, the third party cannot hold the RAF liable. Section 17 states that the Fund shall be obliged to compensate any person "if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee". Consequently, negligence as a form of *culpa* is the minimum requirement for liability.[26] It is submitted that this is the most important difference between the RAF Act and COIDA. When one considers the possible changes to the current third party compensation system and compares it to the working of COIDA, one should bear in mind that the history, development and requirements of the two acts differ significantly.

A negligent driver is blamed for his or her careless conduct. When considering the conduct of the driver, the court places itself in the shoes of the driver and objectively judges the driver's behaviour according to the "reasonable man"-test (Klopper 2000:54; Neethling, Potgieter and Visser 1999:111). Klopper (2000:54) points out that the reasonable man is an ordinary member of society who is not particularly gifted, but who is also not careless. As the law is currently applied, it is believed that a driver can be negligent in a number of ways. The instances of negligence do not constitute a *numerus clausus*.[27]

Criticism against *culpa* as a requirement for the institution of a claim has sparked a debate between attorneys, officials of the RAF and other parties involved in the settling of third party claims.[28]

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26 Klopper 2000:53; Neethling, Potgieter & Visser 1999:111; *S v Ngubane* 1985 3 SA 677 (A)

27 Daniels lists a number of other unlawful acts (1994:E-24): Allowing a person obviously under the influence of liquor to travel upon a flat-bed lorry with no sides (*Protea Assurance Company Ltd v Matinise* 1978 1 SA 965 (A)). If part of the mechanism of the equipment (such as the spare wheel) becomes detached while a vehicle is being driven and it injures a third party, either the driver or the owner or his servant would be judged negligent in failing to have secured the spare wheel (*Santam Insurance Co Ltd v Kemp* 1971 3 SA 305 (C)). A tractor driver is negligent if he fails to warn passers-by of the potential dangers of flying objects and missiles (such as stones) and to keep away from the site where he is cutting grass with a grass-cutter being drawn by a tractor (*Roos v AA Mutual Ins Ass Ltd* 1974 4 SA 295 (C)). It is the duty of the owner of a vehicle to keep the vehicle in a reasonable condition (*Bennett v President Versekeringsmaatskappy Bpk* 1973 1 SA 674 (W)). The owner of a tractor is negligent in not satisfying himself that his servant (the driver of the tractor) has carried out his instructions adequately, the driver having been instructed to engage the gears and to secure the brake lever adequately whenever it was parked (*Van der Poel v AA Onderlinge Assuransie Assosiasie* 1980 3 SA 341 (T)). To abandon or leave a mechanically defective vehicle in a dangerous position also constitutes an unlawful act (*Rajamma v Union & National Insurance Co Ltd* 1971 2 SA 86 (N)).

28 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.

9.2 Definitions

The conveyance of a person in or on a motor vehicle includes "[e]ntering or mounting the motor vehicle concerned for the purpose of being so conveyed; and alighting from a motor vehicle concerned after having been so conveyed."[29]

According to section 1 of the Act "motor vehicle" means any vehicle designed or adapted for propulsion or haulage on a road by means of fuel, gas or electricity, including a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle.[30]

The Act does not contain a definition of driving. Driving in the strict sense of the word means "any voluntary action which directly sets a stationary vehicle into motion and is directed to control the motor vehicle after it has come into motion as well as all related actions which are reasonably and necessarily connected therewith".[31] The extended meaning of driving can be more problematic. In order to determine whether an action related to driving can be driving, one ought to ask "whether the driving related act is so intricately linked to the driving of the motor vehicle that if the driving related act did not take place, it cannot be said that the vehicle was capable of being driven" (Klopper 2000:38; Daniels 1994:E-21).

Section 17(1) states that any person whomsoever who suffered a loss as a result of a bodily injury to himself or herself personally or as a result of the death or bodily injury of someone else arising from the negligent driving of a motor vehicle, can claim compensation for bodily injuries from the Fund.[32] Third parties can be divided into drivers, pedestrians, cyclists and motorcyclists, passengers, claimants who claim for loss of support or funeral expenses and children under seven years (Olivier *et al* 1999:351-2).

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29 S 1 of the RAF-Act. Klopper is of the opinion that conveyance is a question of fact and that each case should be decided on its own merits. Daniels 1994:E-35, E-36 agrees with Klopper and refers to the case of *Aetna Insurance Company Ltd v Minister of Justice* 1960 3 SA 273 (A) as authority.

30 Klopper (2000:43) mentions that the following vehicles are not motor vehicles: a forklift, see *Prinsloo v Santam* [1996] All SA 221 (E) and *Chauke v Santam* 1997 1 SA 178 (A); a ride-on lawnmower, see *Matsiba v Santam Versekeringsmaatskappy Bpk* 1997 4 SA 852 (SCA); a midget racing car, see *Santam Limited v David Russel Mundy, Peter Viola and the Automobile Association* unreported CPD case no 4427/95; specialised construction vehicles, see *Daley and others v Hargreaves* [1961] 1 All ER 552 (QB); a go-cart, see *Burns v Currel* [1963] 2 All ER 297 (QB). See also Daniels 1994:E-19.

31 Klopper 2000:37. Daniels (1994:E-20) quotes two cases in this regard. In *Petersen v Santam Insurance Company Ltd* 1961 1 SA 205 (C) it was said that driving in the ordinary sense means the urging on and directing of the course of the vehicle while it is in motion. In *Wells v Shield Insurance Company Ltd* 1965 2 SA 865 (C) the court decided that driving also includes "all other acts reasonably or necessarily incidental thereto, such as the starting of the engine and the manipulation of the controls which regulate the speed and direction of the vehicle and those which assist the driver and other uses of the road, such as lights and traffic indicators".

32 Klopper (2000:38) states: " Essentially the term 'third party' denotes any road accident victim who has suffered damage or injury as a result of the bodily injury of him/herself or the death of or injury to his/her breadwinner as a result of the negligent and unlawful driving of a motor vehicle". See also Daniels 1994:C-12.

It is possible that a claimant can be partially to blame for his/her damages. Where a so-called apportionment is applied against a claimant, the factual evidence is applied in terms 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. Apportionments can be applied against drivers, pedestrians, cyclists and motorcyclists. Claimants who claim loss of support or funeral expenses and children under 7 years of age need prove only one percent negligence on the part of the wrongdoer in order to succeed fully with a claim against the RAF. Passengers also need to prove only one percent negligence. The claim of a passenger can be reduced where such passenger did not wear a seat belt.

10 LIMITATIONS AND EXCLUSIONS ON DAMAGES RECOVERABLE

10.1 Liability limited

According to Klopper (2000:216), there are four classes of restrictions, namely passengers conveyed under certain circumstances (s 18(1)(a) and (b)), employees (s 18(1)(a)(iii) and 18(2) and s 8(1)(a) COIDA), members of the South African National Defence Force (s 18(3)) and funeral expenses (s 18(4)).

10.2 Liability excluded

In terms of section 19, the following third parties do not have claims against the RAF:

- a third party who cannot hold the wrongdoer delictually liable for his/her damages (s 19(a));
- an employee in terms of COIDA who is injured or killed by the exclusive negligence of his/her employer;
- a paying motor cycle passenger injured or killed by the exclusive negligence of the motorcycle driver (s 19(b)(i));
- a child or spouse of the driver of a motor vehicle who is the head of the household and not being conveyed for reward, in the course of business, in the course of employment and not for purposes of a lift club, who was killed by the sole negligence of the driver or dependant;
- where the vehicle was driven by the dependant of the third party not being conveyed for reward, in the course of business, in the course of employment and not for purposes of a lift club and the third party is killed by the sole negligence of the dependant (s 19(b)(ii));
- exclusions in terms of sections 19(c), 19(d), 19(e) and 19(f). These exclusions pertain to procedural requirements and will not be discussed in detail.

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33 In this regard see *King v Pearl Insurance* 1970 1 SA 462 (W); *Bowkers Park Komga Cooperative Ltd v SAR&H* 1980 1 SA 91 (E); *Union National South British Insurance v Vittoria* 1982 1 SA 444 (A).

10.3 Passenger conveyed in the scope of his/her employment

An employee in terms of COIDA can also have a claim under the RAF Act. If he or she was a passenger, and is subject to the provisions of section 18(2)(b), the RAF Act provides that the third party is entitled to compensation under COIDA for bodily injuries, or in the case of a dependant, for loss of maintenance resulting from the death of the employee.[34]

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 (Neethling, Potgieter & Visser 1999:210). The calculation of compensation is common law-based (Olivier *et al* 1999:364). Both patrimonial loss[35] and non-patrimonial loss[36] can be recovered from the RAF according to the general principles of the law of delict.[37] Therefore, the RAF is liable to compensate all damages proven, subject to the R25 000 maximum.

11 COIDA AND THE RAF ACT

A victim of an accident who was injured in the scope of his 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 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. Rules relating to commuting injuries are very strict and very few claims are paid out in this respect. Employees commuting between residence and workplace will be able to claim under COIDA only if their employer or a co-employee was driving the vehicle that was provided by the employer (s 22(5)). It is submitted that there should be no differentiation when an employee travels to and from his place of work in transport provided by the employer and when he or she uses own transport. In most European countries coverage exists to this extent.

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34 Daniels (1994:E-56) gives an example: If the Compensation Commissioner (CC) compensated an employee for his/her loss, and such compensation exceeds the amount of R25 000, it follows that the RAF is not liable to make any payments towards that employee. For example, the CC awarded an amount that was made up as follows: Medical expenses R2 100; Temporary disablement from 1 May 1999 – 7 August 1999 R14 000; TOTAL R16 100. The liability of the RAF will be to R25 000 – R16 100 = R8 900. That does, however, not mean that the RAF must pay out R8 900. The RAF will calculate the damages and it can be more or less than R8 900 (subject to apportionment when applicable).

35 Klopper (2000:143) mentions that patrimonial loss "[o]ccurs when there is a diminution of value of a person's estate or patrimony as a result of a delict being committed."

36 Neethling, Potgieter & Visser (1999:241) describe non-patrimonial loss as: "[t]he diminution, as the result of a damage-causing event, in the quality of the highly personal (personality) interests of a person in satisfying his legally recognised needs but which does not affect his patrimony". See also Klopper 2000:135.

37 An exception to the "once and for all" rule is found in s 17(4) of the Act. This section allows the RAF to furnish an undertaking for future medical expenses. See Olivier *et al* 1999:362.

The amount to which the employee or his or her dependants are entitled to in terms of COIDA, has to be deducted from the claim against the RAF or its appointed agent, unless the claim under the RAF Act relates to sentimental damages and not to the compensation claimed under COIDA.[38] In any event, the total amount of the employee's claim may not exceed R25 000 per employee. According to Olivier (1995:576), due to the peculiar nature of the risk in commuting injuries of employees, the burden should not be borne exclusively by employers. One consideration mentioned by Olivier is the difficulty the employer has in controlling or preventing such accidents.

12 WHITE PAPER ON THE RAF

The White Paper on the RAF was published in 1998 (GN 170 on GG18658 of 4 February 1998). This paper was not well received, with the result that Government appointed the RAF Commission on 1 June 1999 under Satchwell J (Klopper 2000:8).

The current system contains certain elements of a social benefit system.[39] There are also elements of insurance present in the current system. From the preface of the White Paper it seems that the Government intends to bring the legislation fully within the ambit of social benefits. It states:

> "The proposals reflect a new vision. The system has evolved from the original private insurance to public compensation. The demands of a new socio-economic and constitutional dispensation – and with them, the constraints on public spending – require a transition from a delict-based compensatory system to a system of affordable state benefits". (White Paper 1998:5)

The White Paper deviates dramatically from the Road Accident Fund Act. However, fault is still a requirement. There are two important changes, the first being that children under the age of fourteen will not be held to be negligent and, secondly, a claim for funeral expenses or loss of support will be subject to a full apportionment, having taken into account the deceased's negligence.

Probably the most important innovation is a system of defined benefits, where a victim will not be compensated for his or her common law damages but will be paid a defined benefit.[40] Advocates of the new system are of the opinion that the introduction of thresholds and standardisation will lessen disputes to a great extent (Olivier *et al* 1999:371).

13 CONCLUSION

As far as occupational injuries and diseases are concerned major problems exist with regard to the scope of application of the relevant legislation. Furthermore, the administration, enforcement and financial viability of the

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38 See *Senator Versekeringsmaatskappy Bpk v Bezuidenhout* 1987 2 SA 361 (A).

39 Eg the fact that everyone pays the same premium; that the Fund cannot calculate its risks and budget accordingly.

40 There are defined benefits for every traditional head of damages, namely medical expenses, future medical expenses, loss of earnings, loss of support and funeral expenses. See Olivier *et al* 1999:374-375.

system are suspect. South Africa has a fairly poor safety record in the workplace as well as on the roads (Olivier *et al* 1999:317–8).

It is submitted that there are many differences between the current Road Accident Fund legislation and COIDA. This is the position since the two systems developed separately and integration was never considered. Considering the wider context of social protection, however, there are many similarities between COIDA and the RAF. It is submitted that a move towards defined benefits, universal assessment of "damages" suffered and a mixed fault-based system should be the first steps towards reforming the RAF, resulting in the RAF being closer associated with social protection within the ambit of social legislation.

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