PROBLEMS OF SERIOUS INJURY ASSESSMENT

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1 INTRODUCTION

Section 17(1)(b) of the Road Accident Fund Act of 1996,[1] (the Act) as amended by the Road Accident Fund Amendment Act of 2005[2] (the Amendment Act) with effect from 1 August 2008, provides amongst others that the Road Accident Fund (RAF) shall be obliged to compensate any person (the third party) for any loss or damage suffered as a result of any bodily injury arising from the driving of a motor vehicle at any place within the country provided that the obligation of the RAF to compensate a third party for non-pecuniary loss[3] shall be limited to compensation for a "serious injury" as contemplated in subsec (1A). Subsec (1A), in turn, provides that the assessment of a "serious injury" shall be carried out by a medical practitioner and shall be based on a prescribed method adopted after consultation with medical service providers, which assessment is required to be reasonable in ensuring that injuries are assessed in relation to the circumstances of the third party.

The prescribed method of such assessment is found in the regulations made in terms of the Act, regulation 3(1), which provides that the medical practitioner shall classify the injury to be "serious" if it has resulted in 30% or more of the whole person impairment (WPI) of the third party as provided in the American Medical Association's Guides to the Evaluation of Permanent Impairment Sixth Edition (AMA Guides). The regulation further provides that an injury which does not result in 30% WPI or more may be assessed as serious only if it-

- Has resulted in a serious long-term impairment or loss of a body function;
- Constitutes permanent serious disfigurement;
- Has resulted in a severe long-term mental or severe long-term behavioural disturbance or disorder; or
- Has resulted in loss of a foetus.

1 Act 56 of 1996.
2 Act 19 of 2005.
3 "Non-pecuniary loss" refers to general damages for pain, suffering and loss of amenities of life, being the opposite of "patrimonial loss", namely damage to the estate of a person.

The latter form of assessment of serious injury is commonly referred to as the "narrative test".

Confinement of compensation for non-pecuniary loss to "serious injury" was found to pass the constitutional muster in *Law Society of South Africa v Minister of Transport*,[4] which case solved the legality but not practical application of the requirement.

2 ENUMERATION OF SPECIFIC INSTANCES OF NON-SERIOUS INJURY

Apart from the general principles applicable to the determination of serious injury in terms of WPI or narrative test as provided for in the regulations, the Minister of Transport[5] has since made regulations enumerating specific nature of injuries which, unless there is something more, are disqualified from classification as serious. This was done in terms of further regulations published in May 2013.[6]

3 PROBLEMS

A number of problems which arise regarding the "serious injury" requirement relate to the stage at which such assessment should be made; the stage at which the report should be submitted; when objection thereto should be made; whether the RAF can object to assessment carried out by medical practitioners appointed by it for that purpose, and whether the RAF can still object to an assessment in respect of which medical practitioners, both appointed by itself and those appointed by the third party, agree that the injury suffered is serious. It should, for example, be noted that the RAF itself, or lawyers appointed to act, is not a medical practitioner and is therefore not in a position to carry out the assessment or verify if the injury suffered is serious. The right persons to make such a pronunciation are obviously the necessary experts, namely medical practitioners. This notwithstanding, the RAF is given the prerogative to reject assessment reports compiled by medical experts.[7]

4 2011 1 SA 400 (CC), 2011 2 BCLR 150 (CC), [2010] ZACC 25 (25 November 2010) upholding and reversing in part the decision of the North Gauteng High Court in *Law Society of South Africa v Minister of Transport* 2010 11 BCLR 1140 (GNP).

5 As defined in s 1(ix) of the Road Accident Fund Act of 1996.

6 This was done by way of amendment of regulation 3 of the Road Accident Fund Regulations, 2008 which was done in terms of regulation 3 of the Road Accident Fund Amendment Regulations, 2013 contained in Government Notice No. R. 347 published in GG 36452 of 15 May 2013, which came into effect on the same date.

7 Regulation 3(3)(c) gives the RAF the right to compensate for general damages only if it is "satisfied that the injury has been correctly assessed as serious in terms of the method provided in these regulations". This is the more interesting as while the RAF is not able to conduct the assessment itself, it must nevertheless be

4 LODGING SERIOUS INJURY ASSESSMENT REPORT WITH THE RAF

The claim for compensation for general damages is required to be submitted in terms of s 24 of the Act, read together with a number of other sections such as s 19(f) and s 23,[8] to name a few, and in accordance with the regulations. This means that the claim should be lodged in the prescribed form which is accompanied by specified documentation such as a copy of identity document of the third party and affidavit setting out the circumstances in which the collision occurred.[9] However, the "serious injury assessment report" may be submitted "separately" after submission of the claim, the only requirement being that it should be so submitted "at any time before the expiry of the periods for the lodgement of the claim prescribed in the Act and the regulations".[10] Literally, this means that in the case of a hit-and run claim the serious injury assessment report should be lodged within two years[11] of the occurrence of the collision, while in the case of identified motor vehicle the report should be lodged within three years.[12] The five-year period within which summons should be issued and served is confined to institution of legal proceedings to recover the loss and does not deal with lodgement of the claim with the RAF. Furthermore, the five-year period does not deal with submission of serious injury assessment reports. In this respect, regulation 3(3)(b)(ii) requires the third party who is waiting for "maximal medical improvement", as provided for in the AMA Guides, to submit the serious injury assessment report before that stage is reached rather than risk prescription of the claim while still waiting for possible improvement.[13] However, this is not the interpretation given to the Act and regulations by the

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satisfied that something which it is not able to do has been done correctly. This begs the question – how will it know?

8 The section deals with the period within which the claim is required to be lodged to avoid prescription, that being two years in the case of hit-and-run claims, that is, if neither the driver nor owner of the insured vehicle is known, essentially referring to unidentified insured vehicles. The prescription period is three years if the insured motor vehicle is identified. The section adds that prescription does not run against a minor, a person with mental disability, or one under curatorship. Once properly lodged within the specified period, summons commencing action may be issued and served at any time within five years.

9 Affidavit is required in terms of s 19(f).

10 Regulation 3(3)(b)(i).

11 The two-year period requirement does not appear anywhere in the Act itself, by reading which one would be excused for supposing that it is not part of the law. However, it is to be found in regulation 2, sub-regulation (1)(b) which specifically provides that a right to claim compensation from the RAF under s 17(1)(b) of the Act in respect of loss or damage arising from the driving of a motor vehicle in the case where the identity of neither the owner nor driver thereof has been established shall become prescribed upon the expiry of a period of two years from the date upon which the cause of action arose, unless a claim has been lodged within that period.

12 In terms of s 23(1), if the driver or owner of the motor vehicle involved is known, the claim prescribes after three years of the collision unless it is lodged within that period.

13 If this means that the serious injury assessment report has to be submitted within two or three years of the collision, as the case may be, that would be a clear rejection by the legislature of Satchwell J's approach in the case of *Van Zyl v Road Accident Fund* 2012 SA (GSJ) (11 June 2012) where it was held that if a claim

courts. In *Van Zyl v Road Accident Fund*[14], Satchwell J held that lodging the claim completed on RAF 1 form and submitting the serious injury assessment report on RAF 4 form were two distinct acts.[15] Lodging the claim was required to be done before the applicable prescription period expired, while submitting the report could be done at any time before the expiration of a period of five years, being the extended period, during which summons could be issued. In other words, once the claim is lodged as required by law, the serious injury assessment report could be submitted at any time within the extended period of five years during which summons should also be issued, if litigation were to ensue. It submitted that the decision is favourable to third parties who would be non-suited if the alternative approach were to prevail. Note, however, that the interpretation does not seem to be in harmony with the wording of regulation 3(3)(b)(i) and (ii) which specifically require that the serious injury assessment report may be submitted "at any time *before the expiry of the periods for the lodgement of the claim*".[16]

In the *Van Zyl* case the court was not called upon to decide, and accordingly did not deal with the issue whether the report could be submitted after five years of the occurrence of the cause of action once summons had been issued. Implicit in the judgment though was the intimation that such could be done. The court held that the serious injury assessment report was submitted in substantiation of the nature of the injuries suffered and was not the claim itself. Expert evidence, of which the assessment report is, could be led *viva voce* at the hearing of the matter or submitted in the form of a report as medico-legal reports are normally submitted.[17]

5 OBJECTION TO SERIOUS INJURY ASSESSMENT REPORT

If the RAF "is not satisfied that the injury has been correctly assessed" it "must" reject the serious injury assessment report and furnish the third party with the reasons for doing so.[18] Rejection of the report would mean that the third party has to refer the dispute to the Registrar of Health Professions Council who will take it to the appeal tribunal for final

was properly lodged, the serious injury assessment report could be submitted at any time within a period of five years after the collision.

14 2012 SA (GSJ) (12 June 2012).

15 *Van Zyl v Road Accident Fund* para 62.

16 My emphasis. The significance of the expiry of the periods for the "lodgement of the claim" cannot be over-emphasised.

17 *Van Zyl v Road Accident Fund* paras 63, 65, 66, 67, 75.

18 Regulation 3(3)(d)(i).

determination.[19] As an alternative to outright rejection of the assessment report, the RAF may instead direct that the third party should submit, at the cost of the RAF, to further assessment to determine whether the injury is serious.[20] Once again the RAF "must" either accept the further assessment report or dispute it, in which event the dispute should be referred to the Registrar of Health Professions Council who will take it to the appeal tribunal.[21] The RAF is required to and "must" accordingly either accept or reject the initial serious injury assessment report or further assessment.[22] Further assessment takes place at the instance of the RAF and would therefore be conducted by a medical practitioner appointed by it. The fact that the RAF has its own panel of medical practitioners, being its own experts in whom it has trust, does not prevent it from disputing their assessment which is conducted at its request.[23] Therefore the RAF is in a strong position when it comes to acceptance or rejection of serious injury assessment reports.[24]

6 TIME FRAME WITHIN WHICH TO REJECT SERIOUS INJURY ASESSMENT REPORT

6 1 General

Initially the regulations did not specify the period within which the serious injury assessment report or further assessment could to be rejected by the RAF. As a result it was common, and this still happens to date, for the third party to receive a rejection letter on the eve of the trial date.[25] However, the regulations have since been revised.[26] Currently, the position is that the RAF is given 90 days within which to accept the serious injury assessment report, reject it, or direct the third party to submit to further assessment.[27] That means that failure by the RAF to reject the third party's serious injury assessment report or further assessment within the 90-day period is final and therefore validates same. However, there is a catch here. Rejection of an assessment report or further assessment by the RAF, which is an organ of state, is an

19 Regulations 3(4) and (13).
20 Regulation 3(3)(d)(ii).
21 Regulation 3(3)(e).
22 Regulation 3(3)(c) and (e).
23 This is the essence of *Road Accident Fund v Faria* 2014 6 SA 19 (SCA).
24 As the cases of *Road Accident Fund v Faria* 2014 6 SA 19 (SCA); *Road Accident Fund v Lebeko* [2012] ZASCA 159 (15 November 2012) and *Road Accident Fund v Duma and Three Similar Cases* 2013 6 SA 9 (SCA), [2013] 1 All SA 543 (SCA) paras 19 and 20demonstrate.
25 As happened in *Road Accident Fund v Faria* 2014 6 SA 19 (SCA).
26 In terms of amended regulations contained in GN R347 published in the GG 36452 of 15 May 2013 which came into effect on the same day.
27 Regulation 3(3)(dA).

administrative action.[28] A rejection made outside the given time frame would ordinarily be invalid. Regrettably, the problem is that an administrative action, validly or allegedly invalidly taken, is nevertheless an administrative action and cannot be disregarded as being invalid and therefore of no force and effect until it is set aside by the court on application.[29] The third party is accordingly put to the task of instituting court proceedings in terms of which an order for reviewing and setting aside of the alleged late rejection of the assessment report or further assessment is sought and granted, without which the rejection, invalid as it may seem, would otherwise stand.[30]

6 2 *Road Accident Fund v Faria*

6 2 1 Facts

The facts in *Road Accident Fund v Faria*[31] were that the respondent Faria (F) was a cyclist injured in a motor vehicle collision in January 2011, the driver of the motor vehicle being known. As a result of the collision, the respondent suffered a head injury and was comatose for four and half days, sustained injuries to his right shoulder which required surgery, sustained four fractured ribs, and suffered various abrasions. On the merits the Gauteng Local Division (High Court) per Weiner J held that the RAF was 100% liable for the respondent's proven damages. In respect of the quantum of damages suffered by the respondent, the parties settled the claim for past medical expenses in an agreed amount and an undertaking was given for future medical expenses. The respondent subsumed the claim for damages for loss of future earnings under the claim for general damages for pain, suffering and loss of amenities of life.

28 *Road Accident Fund v Duma and Three Similar Cases* 2013 6 SA 9 (SCA), [2013] 1 All SA 543 (SCA), [2012] ZASCA 169 (27 November 2012) para 19.

29 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA), [2004] 3 All SA 1 (SCA), [2004] ZASCA 48 (28 May 2004) para 26; *Road Accident Fund v Duma and Three Similar Cases* para 24; *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 3 SA 481 (CC), [2014] ZACC 6 (25 March 2014).

30 *Oudekraal Estates (Pty) Ltd v City of Cape Town* para 26; *Road Accident Fund v Duma and Three Similar Cases* para 24; *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd t/a Eye and Lazer Institute* paras 65, 66, 82, 89, 90, 92, 96, 99, 103, 105, 106. In the *Kirkland Investments* case Cameron J held (para 64): "Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effect on those subject to it." In this respect it should be noted that while the RAF is not the government, it is nevertheless an organ of state, thus making its decisions subject to review – *Road Accident Fund v Lebeko* [2012] ZASCA 159 (15 November 2012) para 22.

31 2014 6 SA 19 (SCA), [2014] ZASCA 65 (19 May 2014).

The respondent underwent a medico-legal assessment by an orthopaedic surgeon, Dr D, who prepared a medico-legal report. On the same date Dr D also completed a serious injury assessment form on the prescribed RAF 4 in respect of which the respondent achieved a WPI score of 4%. Regarding the narrative test, Dr D indicated that the respondent's injuries resulted in "permanent serious disfigurement" due to extensive scarring and a negatively affected physical appearance at the right shoulder, and further that the injuries resulted in a "severe long-term mental or long-term behavioural disturbance or disorder". As a result, Dr D concluded that the respondent had suffered "serious injury" and accordingly qualified for compensation for general damages. Thereafter the respondent attended a further medico-legal examination by another orthopaedic surgeon, Dr S, appointed by the RAF. Dr S did not complete a serious injury assessment report by way of RAF 4 form as required by the regulations. Instead, he incorporated in his medico-legal report a reference to AMA Guides and assessed the respondent's WPI at 8%. Dr S indicated that the respondent did not qualify for general damages under the narrative test relating to long-term impairment or loss of bodily function,[32] but made no assessment of the plaintiff's "permanent serious disfigurement or severe long-term mental or behavioural disturbances".[33]Thus according to the assessment of Dr S, the respondent did not suffer "serious injury".

Thereafter Drs D and S prepared a joint minute in terms of which they agreed that the respondent had "suffered disfigurement and psychological problems" due to the scarring at his shoulder and that as a result he suffered "serious injury" which resulted in "serious long-term impairment". It should be noted at this stage that Dr S did not say anything about his failure to deal with this issue, which he did not assess, in his medico-legal report. Subsequent to this the respondent attended another medico-legal assessment by a neuropsychologist, Dr C, who also completed an RAF 4 form which indicated that the respondent had suffered "serious injury" which resulted in "serious long-term impairment".

On the eve of the trial the RAF's attorneys sent a letter to the respondent's attorneys rejecting Dr D's RAF 4 form. The High Court held that it was not in dispute that the injuries sustained by the respondent were serious and that the objections raised by the RAF had fallen away by reason of the joint minute competed by Drs D and S. Accordingly, the respondent was

32 As contained in part 5.1 of the RAF 4 form, emanating from regulation 3(1)(b)(iii)(aa).
33 As contained in parts 5.2 and 5.3 of the RAF 4 form, emanating from regulation 3(1)(iii)(bb) and (cc).

awarded damages in the amount of R350 000.00, this being the amount agreed on by the parties in the event of the Court finding that it could award general damages.

6 2 2 Appeal Before Supreme Court Appeal

It was against the order of Weiner J that the RAF appealed to the SCA. In the meantime the RAF made payment of the full amount ordered by the High Court, including the amount of R350 000.00 which was the subject of the appeal. Subsequently the RAF discovered its mistake of paying the amount of R350 000.00. It nevertheless accepted that it would be unjust and inequitable to attempt to recover that amount from the respondent and accordingly gave its irrevocable undertaking not to seek to recover it. Moreover, the RAF undertook to pay the respondent's costs in the appeal. Resultantly the appeal was useless (moot) between the parties.

6 2 3 Issues

Before the SCA there were three issues that had to be determined, namely:

- Whether the court should determine the merits of the appeal notwithstanding the mootness of the issue between the parties;
- Whether the RAF could dispute the serious injury assessment of its own expert; and
- Whether the RAF was bound by the joint minute of the experts regarding whether the injury suffered by the respondent was "serious".

6 2 4 Decision

The Court held that it could not be said that the appeal would have no practical effect or result. On the contrary, the appeal would have a practical effect on innumerable instances of litigation involving the RAF as a litigant.[34] As a result the appeal was heard on the merits of the case and the decision of the High Court was set aside. The Court further held that the decision as to whether the injury suffered by the claimant was serious was an administrative function to be made by the RAF, and ultimately the appeal tribunal, and not the court.[35]

34 *Road Accident Fund v Faria* para 23.

35 *Road Accident Fund v Faria* para 35, following *Road Accident Fund v Duma and Three Similar Cases* para 19 and *Road Accident Fund v Lebeko* [2012] ZASCA 159 (15 November 2012) para 23.

6 2 5 Reasons

Willis JA (Maya, Shongwe JJA, Van Zyl and Mocumie AJJA concurring) held that although in terms of s 16(2)(a)(i) of the Superior Courts Act 10 of 2013, the Court had power to simply dismiss the appeal on the ground that it would have no practical effect or result, in this case it was in the public interest to hear the appeal, which involved statutory interpretation, as there were a large number of similar cases, both existing and anticipated, in which the issue would need to be resolved in the near future. If the court were to fail to decide the appeal on its merits, the prevailing confusion would continue unabated as the question was bound to arise again.[36] Considerations of "crispness" and "live issue" raised by counsel for both sides, as well as the fact that the case dealt with questions of law rather than fact, weighed heavily in favour of hearing the appeal on the merits.[37]

The fact that in terms of regulation 3(3)(d)(ii) the RAF could, after rejecting a serious injury assessment report furnished by the third party, refer such party to further assessment to ascertain whether the injury suffered was serious, and that at its own cost, could only mean that the RAF not only had a right in terms of the regulations to dispute the assessment of its medical practitioner (expert) but also had a right to refer the dispute to the appeal tribunal provided for in the regulations.[38] In the past a joint minute by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries.[39] That was no longer the case. Under the new legislative scheme the RAF was not bound by the views of its own

36 *Road Accident Fund v Faria* para 23. In this regard the court referred to the following cases: *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 WLR 483 (HL), [1999] 2 All ER 42 (HL) 47d-f; *Executive Officer, Financial Services Board v Dynamic Wealth Ltd* 2012 1 SA 453 (SCA) paras 43-44; *South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd* 2012 5 SA 125 (SCA) para 6; *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 5 SA 540 (SCA), 2007 9 BCLR 958 (SCA), [2007] 3 All SA 318 (SCA) para 4. Other cases not referred to in the *Faria* case include amongst others *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* 2005 4 SA 506 (SCA); *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 1 SA 47 (SCA);*Coin Security Group (Pty) Ltd v SA National Union For Security Officers* 2001 2 SA 872 (SCA); *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 4 SA 58 (SCA) paras 18 – 21; *Sebola v Standard Bank of South Africa* 2012 5 SA 142 (CC); *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 3 SA 514 (CC).

37 *Road Accident Fund v Faria* paras 21 and 22. Similar considerations influenced courts in other cases such as *Absa Bank Ltd v Van Rensburg, In re: Absa Bank Ltd v Maree* 2014 4 SA 626 (SCA), [2014] ZASCA 24 (28 March 2014); *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 4 SA 273 (SCA) para 4; *Coin Security Group (Pty) Ltd v SA National Union of Security Officers* 2001 2 SA 872 (SCA) para 8; *Natal Rugby Union v Gould* 1999 1 SA 432 (SCA), [1998] 4 All SA 258 (SCA) 444J-445B; *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111, [1944] All ER 469 .

38 *Road Accident Fund v Faria* para 31.

39 *Road Accident Fund v Faria* para 34.

expert. The assessment of injuries as "serious" was determined administratively in terms of the prescribed manner and not by the courts.[40]

As the court indicated in *Road Accident Fund v Duma and Three Similar Cases*[41] in terms of the Act as amended, the position is now that unless the RAF is so satisfied that the injuries suffered are serious, the third party simply has no claim for general damages.[42] Unless the third party can establish the jurisdictional fact that the RAF is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the RAF.[43] For the court to consider a claim for general damages, the third party had to satisfy the RAF, not the court, that his or her injury was serious. Those clear statements of the law meant that a joint minute "of the kind in question" did not, as in the past, enable the court to make a shortcut to concluding that the injury was "serious".[44]

7 COMMENT

7 1 Determination of Serious Injury Assessment is an Administrative Function

It is submitted that of the many interesting points that can be gathered from the *Faria* case, the most important one is that it highlights the fact that determination of "serious injury" assessment is an administrative rather than a judicial function. This fact is clearly provided for in the regulations and in particular regulation 3(3)(c) which provides that the RAF shall only be obliged to compensate the third party for general damages if "the Fund … is satisfied" that the injury has been correctly assessed as serious, as well as regulation 3(3)(d) which provides that the RAF "must" reject a serious injury assessment report or direct the third party to submit to a further assessment if it "is not satisfied that the injury has been correctly assessed". As the court indicated in the *Lebeko* case, it is the RAF and ultimately the appeal tribunal and not the court that "must" be satisfied that the injury suffered by the third party is "serious".[45] In this respect the court in the *Faria* case quoted with approval its

40 *Road Accident Fund v Faria* para 34; *Road Accident Fund v Duma and Three Similar Cases* para 19.
41 2013 6 SA 9 (SCA), [2013] 1 All SA 543 (SCA), [2012] ZASCA 169 (27 November 2012).
42 *Road Accident Fund v Faria* para 35; *Road Accident Fund v Duma and Three Similar Cases* para 19.
43 *Road Accident Fund v Faria* para 35.
44 *Road Accident Fund v Faria* para 35. The joint minute "of the kind in question" had significance in the instant case since the RAF's expert, Dr S, had concluded in his serious injury assessment report that the respondent had not sustained serious injury. However, in the joint minute he changed his mind and agreed that the injuries suffered were serious. Obviously, that created uncertainty.
45 *Road Accident Fund v Lebeko* [2012] ZASCA 159 (15 November 2012) para 23.

earlier decision in *Road Accident Fund v Duma and Three Similar Cases*[46] where Brand JA held:

> "In accordance with the model that the legislature chose to adopt, the question whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious."[47]

7 2 Stage of Applying the Narrative Test

Assessment of seriousness of the injury under the narrative test has a built-in trap for the unwary if not done at the right time. Regulation 3(1)(b)(iii) provides that an injury which does not result in 30% WPI "may only be assessed as serious" under the narrative test, that is, under the various instances specified in items (aa) – (dd) of the regulation. In the *Faria* case the court quite correctly held that a "narrative test" is used where the conclusion is reached in terms of regulation 3(1)(b)(iii) that the third party has less than a 30%WPI, but the injury nevertheless resulted in any of the consequences specified therein.[48] This carries the danger that once the 30% or more WPI threshold is reached, the narrative test assessment could simply be disregarded even in a case where, had it been done, it would have added ammunition to the third party's serious injury assessment. Moreover, if the dispute were eventually to be referred to the appeal tribunal, the issue of a rejected narrative test finding would also be raised and accordingly be considered. On the other hand, if the issue of narrative test was not raised during assessment by the assessing medical practitioner, it would equally not be raised as a ground of referral of the dispute to the appeal tribunal and would as a result not be considered even though had that been done, it could, in an appropriate case, have made a difference.[49] Would it then mean that a new assessment could be done under the

46 2013 6 SA 9 (SCA), [2013] 1 All SA 543 (SCA).

47 *Road Accident Fund v Duma and Three Similar Cases* para 19.

48 *Road Accident Fund v Faria* para 29.

49 It is of interest to note that in future the law would be very specific on this issue. Annexure H to the Road Accident Benefit Scheme Bill, 2014, dealing with "RABS 8: Notice of Appeal" specifically indicates that the appeal body (currently the appeal tribunal) "decides appeals on the available documentation, including your notice and any additional documentation submitted with your notice. No other written or oral arguments are considered and no witnesses appear before the appeal body. You will therefore not be called

narrative test? It is doubtful that such would be the case. After all, finality in dealing with matters of this nature is important. Failure to do a narrative test assessment could very well bar a claim of the third party which, had the assessment been done right away and at the initial stage, could have made a difference.

It is submitted that where applicable assessment under the narrative test should always be done and not be disregarded simply because the third party has achieved the 30% WPI threshold. This is so in that whereas the WPI percentage is variable, it is unlikely that a properly done narrative test assessment, say loss of foetus, could change. The outcome of a properly done narrative test assessment is most likely to remain the same.

7 3 Maximal Medical Improvement

Regulation 3(3)(b)(ii) makes mention of "maximal medical improvement" (MMI) as provided in the AMA Guides. Briefly, the MMI is a period which has elapsed after the collision and, due to medical treatment that the third party would have received, it could be said with much confidence that not much further improvement in the condition of the third party, relative to the injury suffered, could be expected to ensue. In other words, it is the stage at which it could be concluded that the condition of the third party had improved to such extent that it could no longer be reasonably expected to change from "serious" to "not serious". Therefore, it takes time and medical treatment to reach maximal medical improvement.

One of the reasons for rejecting the "serious injury assessment report" in the *Faria* case was that it was completed and submitted fairly soon after the collision, namely after only two months. It was the contention of the RAF that at the time of assessment of the respondent after two months of the collision, it was just too early for him to have reached maximal medical improvement and therefore too soon to have assessed his injury as serious as there was plenty of time for his condition to improve. In this respect it should be noted that while there is a need to wait for maximal medical improvement, which takes time, the regulations provide that the third party should not wait for such improvement to occur before lodging the claim and submitting the serious injury assessment report if doing so would result in the

to a hearing." This demonstrates the danger of not including at an early stage issues and documentation which could have been significant but were taken for granted and therefore not raised.

claim becoming prescribed.[50] In other words, the regulations require the third party to have assessment done and accordingly submit the report even before the maximal medical improvement is achieved if only to beat the prescription deadline. Regulation 3(3)(b)(i) provides that the "serious injury assessment report" may be submitted separately after submission of the claim "at any time before the expiry of the periods for the lodgement of the claim prescribed in the Act and these regulations". The prescribed periods for lodgement of the claims is two years[51] in the case of "hit-and-run" claims and three years in other cases.[52]Accordingly, the maximal medical improvement and prescription period for lodgement of claims and submission of serious injury assessment reports are not necessarily always in harmony.

7 4 Rejection of the RAF's Own Expert Reports and Joint Minutes

The SCA reached two sweeping conclusions which can conveniently be dealt with together. The first one was that under the new legislative scheme the RAF was not bound by the views of its own expert[53], whereas the second was that while in the past a joint minute prepared by experts chosen from the contending sides would ordinarily have been conclusive in deciding an issue between a third party and the RAF, including the nature of the third party's injuries, that was no longer the case under the new dispensation.[54] As a general principle, the two propositions would no doubt be perplexing for a number of reasons. First, medical experts are chosen precisely to assist in the assessment of matters lying within their field of expertise. Secondly, the RAF itself, including its administrative staff, is not an expert in medical matters. Thirdly, the RAF uses a panel of selected medical experts chosen for their expertise. For it to find the opinion of its own experts unhelpful so as to warrant its rejection is troublesome. This is even the more disconcerting when the rejected expert opinion is not a stand-alone but is supported by the second opinion of another expert in a joint minute. This raises an interesting question whether the RAF needs further assessment of the injuries of the

50 Regulation 3(3)(b)(ii).
51 Regulation 2.
52 The regulations are specific in this respect. Regulation 3(3)(b)(i) requires the serious injury assessment report to be submitted at any time "before the expiry of the periods for the lodgement of the claim prescribed in the Act and these regulations". Regulation 3(3)(b)(ii) adds that in a case where maximal medical improvement is not yet reached, the third party should undergo assessment and submit the serious injury assessment report prior to the expiry of the relevant period of prescription required in terms of the Act and the regulations. The Act, of course, refers to s 23 which deals with periods within which claims are required to be lodged; three years as such period if the identity of either the driver or owner of the vehicle involved is known, and regulation 2 dealing with hit-and-run cases where the applicable prescription period is two years.
53 *Road Accident Fund v Faria* para 36.
54 *Road Accident Fund v Faria* para 34.

third party in the first place if it can freely reject not only the first assessment but also the second one, including a supporting joint minute.

Any reservations about the general proposition apart, it would seem that in this case the RAF had good reasons for rejecting the serious injury assessment report of its own expert and the joint minute that followed. It will be recalled that the RAF's expert, Dr S (an orthopaedic surgeon) found that the respondent's WPI was 8% and therefore did not qualify for general damages. In respect of para 5.1 of the RAF 4 form, dealing with "serious long-term impairment or loss of bodily function", Dr S concluded that the respondent did not qualify under the "narrative test". Dr S did not make assessment of the respondent's "permanent serious disfigurement or severe long-term mental or behavioural disturbances" contained in paras 5.2 and 5.3 of the RAF 4 form. Therefore according to the assessment done by Dr S, the respondent's injuries did not qualify as serious. For him to have agreed in the joint minute that the injuries suffered by the respondent were serious was inconsistent with his assessment and could accordingly not be said to have satisfied the RAF that the assessment had been correctly done as required by the regulations. As a result, it is submitted that the court was correct in holding that "a joint minute of the kind in question" did not enable the court to take a shortcut to concluding that the injury was serious.[55] Therefore, the fact that within a period of two months the RAF's own expert changed his view from finding that the injury was "not serious" to a conclusion in the joint minute that the injury "was serious" was indicative of some uncertainty in the matter which would justify further exploration.[56] Accordingly, the RAF had every reason not to be satisfied that the assessment, by its own expert for that matter, had been properly made. The rejection of the joint minute was therefore not arbitrary.

7 5 Postponement of the Case Until Finalisation of the Assessment Process

Apart from rejecting the third party's serious injury assessment report in terms of a letter or sometimes written notice, the RAF normally also files a special plea of non-compliance with s 17(1) of the Act and regulations and accordingly asks for dismissal of the claim relating to general damages. Alternatively, the RAF would also ask for postponement of adjudication of the claim pending finalisation of the dispute resolution procedure as provided for in the regulations. In the *Faria* case the contention, which the court found to be correct, was that postponement of general damages adjudication was the correct route that the High Court

55 *Road Accident Fund v Faria* para 35.
56 *Road Accident Fund v Faria* para 36.

should have followed instead of dealing with the issue before finalisation of the dispute adjudication procedure. Nevertheless, because of the mootness of the issue between the parties, the SCA was simply asked to set aside the award of general damages to the respondent,[57] which order was granted.[58]

Postponement of the issue of general damages as the correct route to follow was dealt with in an earlier decision of the SCA in *Road Accident Fund v Lebeko*[59] where Pillay JA held that while the special plea of non-compliance with the regulations fell to be upheld, it was nonetheless dilatory in nature. Its success did not extinguish the third party's cause of action in respect of general damages but had the effect of postponing adjudication until at least the procedural aspects complained of have been complied with or extinguished by the operation of the regulations.[60] In upholding the special plea, it simply followed that the claim for general damages was not ripe for hearing, which decision had the effect of staying that part of the proceedings pending determination of the dispute before another forum, a procedure which was covered by rule 22(4) of the Uniform Rules of Court.[61]

7 6 Dilatory Nature of the Special Plea and Rejection of Assessment Report Can Only Mean Delay

As the SCA indicated in *Lebeko*'s case, the effect of the special plea of non-compliance with the regulations and therefore postponement of determination of the issue of general damages is dilatory in nature and allows time for referral of the serious injury assessment dispute to the appeal tribunal established in terms of the regulations.[62] Regulation 3(4)(a) requires the dispute about serious injury assessment to be referred to the Registrar of the Health Professions Council of South Africa, established in terms of s 2 of the Health Professions Act

57 *Road Accident Fund v Faria* para 33.
58 *Road Accident Fund v Faria* para 37.
59 [2012] ZASCA 159 (15 November 2012).
60 *Road Accident Fund v Lebeko* paras 28 and 30.
61 *Road Accident Fund v Lebeko* para 30. In this respect the court referred to the cases of *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 772E; *GK Breed (Bethlehem) (Edms) Bpk v Martin Harris & Seuns Investments (OVS) (Edms) Bpk* 1984 2 SA 66 (O)72A-C and *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1980 1 SA 301 (D) 301G. It should, however, be noted that rule 22(4) deals with postponement on request by the defendant of that part of his counterclaim which is in excess of the plaintiff's claim and would therefore extinguish it, meaning that even if the plaintiff were to be granted judgment on his claim there would still be a part of the defendant's counterclaim that requires determination and possible satisfaction but which is unliquidated and cannot therefore be set off. The issue is discussed at length by Van Loggerenberg, Bishop, Brickhill *Erasmus Superior Court Practice* Revision Service 40 (2012) B1-148 – B1-150.
62 *Road Accident Fund v Lebeko* paras 28 and 30.

of 1974,[63] within 90 days (three months) of the third party being informed of the rejection of the serious injury assessment report or further assessment report as the case may be. In this respect regulation 3(5)(a) provides that if the Registrar is not notified that the rejection or further assessment is disputed within the time period provided for in sub-regulation (4), that is within 90 days, the rejection or assessment becomes final and binding unless an application for condonation for late notification is lodged with the Registrar and eventually granted by the appeal tribunal. Therefore, a third party who proceeds with the claim for general damages to trial would be well-advised to lodge the dispute with the Registrar in the meantime, and that before the expiration of the given period of 90 days to avoid prescription thereof, since if condonation is not granted, rejection of serious injury assessment or further assessment becomes final and binding.[64]

There is only one Registrar of the Health Professions Council of South Africa, having one office in Pretoria with no branches. It follows that all serious injury assessment disputes in the whole country have one destination. Therefore, it does not require much imagination to appreciate the magnitude of the backlog that the appeal tribunal should be facing. In practice it takes anything from one to two years before the appeal tribunal makes a ruling on a serious injury assessment dispute. This is the case notwithstanding an honest attempt as provided for in the regulations to expedite the dispute resolution process. In terms of regulation 3(6), the Registrar is required to notify the other party to the dispute, meaning the RAF, through its attorneys of record within 15 days and at the same time furnish same with documentation provided in that regard. The RAF is given a period of 60 days within which to respond to the dispute by making submissions and providing necessary documentation.

Only after receiving a response from the other party or after the expiry of the given period of 60 days shall the Registrar refer the dispute for consideration by an appeal tribunal.[65] The appeal tribunal consists of "three independent medical practitioners" with expertise in the appropriate areas of medicine, appointed by the Registrar. Herein lies the catch. "Independent" means they are part-timers not in the employ of the State, that is, are in private practice, while "with expertise" means they are experts. If it is a challenge to secure a medico-legal examination appointment with one expert, what more of securing a mutually

63 Act 56 of 1974.
64 Regulation 3(5)(h).
65 Regulation 3(8)(a).

convenient meeting with three and not just one medical expert? This is of course no small challenge and can only mean delay in finalisation of a rejected serious injury assessment report. One can merely hope that the RAF does not lightly resort to unnecessary rejection of assessment reports or further assessment reports given the delay inherent in the dispute resolution process.[66]

7 7 The Question of Unreasonable Delay in Dealing with Serious Injury Assessment Reports

Until the regulations were amended on 15 May 2013, there was no time frame within which the RAF had to inform the third party that it was rejecting the serious injury assessment report. That had an unfortunate result that on a number of occasions, as happened in the *Faria* case, the rejection was made on the eve of the trial date. Of course that was not fair play as the RAF would in most instances have had the opportunity to have made a rejection but did not. It was against that background that an argument was raised in the *Lebeko* case that failure by the RAF to reject the serious injury assessment report within a reasonable time meant that it accepted that the injuries were serious. The alternative argument would be that the RAF was barred from rejecting the report so late in the proceedings, more particularly so due to its failure to have rejected it much earlier. [67]However, such argument did not find favour with the SCA and was rejected.[68] The attitude of the court was that if a third party was aggrieved by failure of the RAF to make a decision, such was an administrative decision to be resolved under the Promotion of Administrative Justice Act of 2000[69] (PAJA), more so that the RAF was an organ of state.[70] That meant that the third party had to approach the High Court for an order directing the RAF to make a decision on whether to accept or reject the

66 In an interview with the administrative staff of the office of the Registrar of Health Professions Council of South Africa in Pretoria in December 2014, it was indicated that the appeal tribunal meets once a month to consider a maximum of twenty referrals. That means that if the appeal tribunal were to meet every month without fail there would be twelve meetings per year at which 240 referrals would be dealt with. However, that annual turnover would be less than one week's referrals. This immediately raises the question: What happens to the referrals of the other 51 weeks of the year? Needless to say that the appeal tribunal is faced with an unbearable situation. There is therefore no doubt that something urgent has to be done to attend to the backlog.

67 *Road Accident Fund v Lebeko* [2012] ZASCA 159 (15 November 2012) para 20. This is also the argument of Kobrin "The Road Accident Fund Act 56 of 1996 and serious injury" 2014 (March) *De Rebus* 51.

68 *Road Accident Fund v Lebeko* paras 20 and 23 where it was indicated that an agreement on whether or not the injury is serious could not be assumed. The RAF, and ultimately the appeal tribunal, had to be satisfied that such was the case.

69 Act 3 of 2000.

70 *Road Accident Fund v Lebeko* [2012] ZASCA 159 (15 November 2012) para 22; *Road Accident Fund v Duma and Three Similar Cases* 2013 6 SA 9 (SCA), [2013] 1 All SA 543 (SCA), [2012] ZASCA 169 (27 November 2012) para 19.

serious injury assessment report.[71] Of course that is cold comfort to the third party as it involves incurring costs of time and money. More serious though is the obvious invitation for the RAF to reject the report, which is the most likely outcome. It should not be forgotten that what the third party is really interested in is acceptance rather than rejection of the serious injury assessment report. Forcing the RAF to make a decision can only mean inviting it to reject[72] the assessment report and would therefore not be an advisable step to take.

The new regulation 3(3)(dA), introduced by the 2013 amendment, provides that the RAF must, within 90 days from the date on which the serious injury assessment report was sent by registered post or delivered by hand, accept or reject the report or direct that the third party should submit himself or herself to further assessment. While it may appear as if the amendment has brought about some meaningful change, what it really means is that unlike in the past where the RAF would simply do nothing until on the eve of the trial, it is now required to do something within 90 days of receiving the serious injury assessment report. This raises a simple question: What happens if the RAF does not respond to the report within that period? The amendment merely requires the RAF to accept or reject the report or refer the third party for further assessment without indicating what happens if none of this is done. It is submitted that it is not correct to say, as Kobrin does, that "if the RAF does not accept or reject an assessment within 90 days from the date of service on it of the RAF 4 form, it is stopped from rejecting the assessment and is deemed to have accepted the assessment."[73] Note that Kobrin does not refer to any authority for this sweeping submission, does not point out that this is not what the amendment provides for, and further does not make mention of *Lebeko* and *Duma* cases where precisely that issue was dealt with. In the *Duma* case the court held that if the RAF were to fail to take a decision within a reasonable time, the remedy of the third party was to be found under PAJA. The court held further that a decision of the RAF, once taken, could not simply be ignored on the basis that it was not taken within a reasonable time or because no legal or medical basis was provided for the rejection.[74]

It is submitted that the effect of the amendment is to trigger the application of PAJA after 90 days of providing the RAF with a serious injury assessment report. After the elapse of that period, the third party may approach the High Court for an order directing the RAF to make

71 *Road Accident Fund v Lebeko* para 22; *Road Accident Fundv Duma and Three Similar Cases* para 19.
72 *Road Accident Fund v Duma and Three Similar Cases* para 22.
73 Kobrin 51.
74 *Road Accident Fund v Duma and Three Similar Cases* paras 19 and 20.

an election whether to accept or reject the assessment report or refer the third party to further assessment, and in the case of rejection, to also provide reasons for doing so.[75] It is further submitted that any other conclusion would fly in the face of *Lebeko* and *Duma* cases relating to the application of PAJA.

7 8 Recommendations

It is submitted that the regulations can be improved in a number of ways so as to clarify the position and also curtail the power of the RAF to abuse its right to reject the third party's serious injury assessment report as well as its own report if the assessment appears to have been properly conducted. Accordingly, it is recommended that the regulations be amended to the following effect:

- In all cases of serious injury assessment, the injury should be assessed both with regards to the 30% WPI and under the narrative test and not in respect of the WPI only unless the 30% minimum threshold is not reached, as is currently the position. Currently, regard to the narrative test is had only if the minimum 30% WPI is not reached. This means that if the matter is taken to the appeal tribunal, the only issue would be WPI to the exclusion of the narrative test. That would be unfortunate in a case where had the issue of narrative test been raised, it could have made a difference.
- The regulations should specify what happens after the elapse of a period of 90 days if the RAF has not accepted or rejected the serious injury assessment or referred the third party to further assessment. Currently, the position is exactly what it was before the 90-day period requirement was introduced. The only difference is that recourse to PAJA can be had after 90 days if there is no response on the part of the RAF. In fact, it would be preferable to provide that the right of the RAF to reject a serious injury assessment expires after the lapse of 90 days during which it was required to respond.
- The power of the RAF to abuse the right to reject a serious injury assessment report should be curtailed by providing in the regulations that if the assessment reports conducted by experts for both sides confirm the injury as serious, the RAF shall be obliged to accept that outcome with the result that any rejection thereof shall be null and void. However, the RAF should retain the right to refer the third party to further assessment whose outcome would be final if it confirms the injury a serious, whereas

75 As provided for in regulation 3(3)(d)(i).

the matter would be referred to the appeal tribunal if the further assessment does not confirm the injury as serious.

- If the assessment reports of both sides confirm the injury as serious and are supported by a joint minute of the assessing experts, the RAF should be bound by that finding as a result of which its rejection of the assessment would be null and void.
- The RAF should not be allowed to reject its own expert's serious injury assessment report unless the assessment appears not to have been properly conducted.
- A balance should be struck between the requirement of "maximal medical improvement" and submission of the serious injury assessment report, which is required to be submitted before the prescription period. The period of prescription of claims is likely to prove too short to achieve maximal medical improvement in some instances, yet the regulations require the serious injury assessment report to be submitted within that period. It is recommended that the regulations be amended to allow for submission of the assessment report a little bit later if doing so would facilitate achievement of maximal medical improvement.

8 ROAD ACCIDENT BENEFIT SCHEME BILL

Once the Road Accident Benefit Scheme Bill, 2014[76] is enacted into legislation, it will have far reaching implications for victims of road accidents. The purposes of the Bill include to provide for a "social security scheme for the victims of road accidents"; to establish the Road Accident Benefit Scheme Administrator to administer and implement the scheme; to provide a set of defined benefits on a no-fault basis to persons for bodily injury or death caused by or arising from road accidents; to exclude liability of certain persons otherwise liable for damages in terms of the common law,[77] and to provide for matters connected therewith.

Once it is enacted into legislation, the envisaged new Bill would abolish the Road Accident Act of 1996 as amended, including its "serious injury assessment" requirement. Although the purpose of the Bill is amongst others to provide a set of defined benefits on a no-fault basis to persons for "bodily injury" or death caused by or arising from road accidents, it has "bodily injury" of a different kind in mind, namely such as results in "financial loss" and not "non-

76 Published in GG No. 37612 of 9 May 2014 which is available online at http://www.gpwonline.co.za (last accessed 05-01-2015).

77 The excluded persons are drivers and owners of vehicles and employers, being persons primarily accountable for injury caused by the driving of their motor vehicles.

pecuniary loss". This is apparent from clause 30 in terms of which provision is made for payment of the following benefits only:

- Health care services;
- Income support benefits;
- Family support benefits; and
- Funeral benefits.

"Health care services" to which the administrator[78] shall become liable refer to health care services "reasonably required" for the treatment, care and rehabilitation of injured persons, including various health care services which may be rendered by a variety of health care providers.[79] "Income support benefits" refer to temporary income support benefit[80] and long-term income support benefits.[81] "Long-term income support benefits" are subject to a pre-accident income cap limit of R219 820 per year.[82] "Family support benefits" refer to a dependant's loss of support claim arising from the death of a breadwinner,[83] subject to a pre-accident income cap limit of R219 820 per year.[84] It is specifically provided that a beneficiary of a family support benefit is not entitled to inflationary adjustments of the family support benefit paid by the administrator but the Minister is allowed, subject to affordability, from time to time by notice in the Government Gazette, to adjust the family support benefit in order to take into account the effects of inflation.[85]

In the case of "funeral benefits", payment is in all instances in the amount of R10 000 to an immediate family member, which amount is not subject to variation, while if the claim is lodged by a claimant who is not an immediate family member of the deceased payment shall be for "all reasonable expenses incurred in respect of the funeral of the deceased up to a maximum of R10 000" subject to submission of detailed invoice or invoices reflecting the

78 The "Administrator" is defined in clause 1 to mean the "Road Accident Scheme Administrator" established by clause 3. It is intended to be the successor to the current RAF established in terms of the Road Accident Fund Act of 1996.
79 Clause 31.
80 In terms of clause 36, "temporary income support benefit" refers to loss of income for a period of up to two years, excluding the first 60 days of occurrence of the accident.
81 In terms of clause 37, "long-term income support benefits" refer to loss of income for a period beyond two years after occurrence of the accident.
82 Clause 37(7)(a)(i) read with Schedule B regulation 2.
83 Clause 39(1).
84 Clause 39(4)(a) read with Schedule B regulation 2.
85 Clause 39(9).

expenses incurred.[86] Therefore, in the case of a claim by an immediate family member, payment is automatically R10 000, while in the case of a claim by a non-immediate family member, only actual expenses incurred up to a maximum of R10 000 would be paid. The amount of R10 000 is subject to revision from time to time by the Minister of Transport.[87]

It should be noted that in accordance with the requirements of the long title, the Bill provides for a "social security scheme" and not regulation of compensation in the context of the law of delict. For this reason it provides for payment of benefits on a "no-fault basis", an antithesis of the law of delict. As the list of persons covered is wide and would probably overwhelm the limited resources of the scheme, to ensure that the scheme would be "affordable and sustainable in the long term" as indicated in the preamble, it was decided to exclude from the Bill and its scheme any form of compensation for "non-pecuniary loss" be it for serious or non-serious injury. Given that the issue of exclusion of compensation for certain types of injuries (non-serious injuries) was dealt with comprehensively in *Law Society of South Africa v Minister of Transport*,[88] it is not expected that constitutional challenge to exclusion of compensation for serious injury from the envisaged social security scheme, if any, would achieve much. Therefore, in all probability the Bill is most likely to pass constitutional muster if it were to be challenged.

While a Bill is not the law, it is suspected that it represents a transitional half-way measure in an otherwise clear move away from delictual compensation to "social security scheme" and that in years to come evolution in this area of the law would reach its final destination, namely total elimination of the law of third party delictual claims arising from motor vehicles accidents. One suspects that the ultimate goal of the legislature, which is likely to be achieved many years down the line, is to do away with the idea of compensation to victims of road accidents and to bring in its place the practice of "social security scheme assistance". The difference is that in the case of compensation it has to be "fair", whereas in the case of "social security scheme assistance" its essence is contained in the preamble to the Bill which provides:

> "…there is a need for an effective benefit system, which is reasonable, equitable, affordable and sustainable in the long term, and which optimises limited resources and facilitates timely and

86 Clause 40.
87 Clause 40(4).
88 2011 1 SA 400 (CC), 2011 2 BCLR 150 (CC), [2010] ZACC 25 (25 November 2011).

> appropriate health care and rehabilitation to lessen the impact of injuries and which provides financial support to reduce the income vulnerability of persons affected by injury or death from road accidents".

Thus, while under the law of delict the victim receives "fair compensation", under "social security scheme" to be brought about by the Bill the victim would get what is "affordable and sustainable in the long term" as determined by the Road Accident Benefit Scheme Administrator. Concisely, the social security scheme to be established in terms of the Bill is "subject to affordability"[89]and not what is "fair" to the victim of a road accident.

9 CONCLUSION

Introduction of the "serious injury assessment" requirement was intended to and did in fact achieve the desired goal of relative financial stability of the RAF by eliminating non-serious claims from the RAF system. However, to the extent that the "serious injury assessment" requirement was intended to preserve funds for the benefit of third parties who have suffered serious injury, the goal was missed by giving the RAF unrestricted right to reject a properly assessed serious injury. In brief, the RAF has been given indefeasible right to reject an assessment without control mechanism, with the result that the right is simply being abused[90] to the detriment of seriously injured third parties. It is submitted that such was not the intention of the legislature when introducing the amendments with effect from 01st August 2008. It is further submitted that it is not too late to make the amendments suggested above, if only for the plight of seriously injured third parties whom the legislature had in mind when the changes under discussion were initiated, even though it does not seem that there is much time left for the "serious injury assessment" dispensation to remain in place.

89 Clauses 37(9), 39(9) and 40(4).

90 That the right to reject a serious injury assessment report is being abused has been noted by the courts. In *Road Accident Fund v Duma and Three Similar Cases* 2013 6 SA 9 (SCA), [2013] 1 All SA 543 (SCA), [2012] ZASCA 169 (27 November 2012) para 31, Brand JA commented that the "predictable result [of the right to reject the report] is that in the end even deserving claimants whose injuries were *prima facie* serious – like those of the plaintiff in *Kubeka* [*Road Accident Fund v Kubeka*: Case No 64/2012 (GSJ) – one of the three matters in the *Duma* case] who broke his neck – are compelled to follow the long route through an internal appeal [to the appeal tribunal]." It should be noted that even in a case of obvious *prima facie* serious injuries, the "long route through an internal appeal" must still be followed as the court is not allowed to make a ruling on the seriousness of the injuries suffered.