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NEWSLETTER

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The new legislation: After years of debate, reforming amendments to the Road Accident Fund Act were finally passed by Parliament late in 2005. The RAF legal gnomes are now busy drafting regulations, the RAF administrators are planning how to redeploy their staff, and a launch date for the new dispensation seems to be about 1 July 2006. Highlights of the new Act are:

* **Retrospectivity:** The Act is not retrospective. It will only apply to claims arising on or after the gazetted commencement date for the new Act. For claims prior to that date the existing dispensation prevails.

* **Common-law right:** This is abolished for all claims for which the RAF is obliged to pay compensation save that for claims for damages for emotional shock the common-law right is preserved even if the RAF has paid compensation for other heads of damage.

* **Limited liability:** Claims for loss of income or support are restricted to a maximum of R160000 per year. This amount is to be adjusted quarterly to offset inflation. Compensation for loss of earnings or support may be paid by lump-sum or instalments. The Income Tax Act still needs to be amended to render instalment payments tax free.

* **Passenger claims:** These, and mega-claims by foreign visitors, are now all subject to the same R160000 per year limit as everybody else.

* **General damages for non-patrimonial loss:** Such damages will only be paid for "serious injuries" such as paraplegia, quadriplegia, severe head injury, and amputation. The idea being to provide a reserve fund for the victim to facilitate adjustment to new living conditions. Medical experts and the Courts can expect to be kept busy with marginal cases of "serious injury". The amount of the award to be made will probably not follow common-law, but will be by way of a formula based on the victim's percentage disability, using an international rating system such as AMA. Damages for emotional shock are excluded altogether.

* **Medical costs tariff:** Claimants will now only receive compensation according to a fixed tariff. This tariff will most likely extend to costs of wheelchairs, prostheses, and attendants.

* **Negligence and apportionment of damages:** This hurdle to a claim continues to be relevant.

* **Legal costs:** When an offer of settlement is accepted the RAF will no longer be empowered to pay a contribution to legal costs and expert witness fees which will all have to be paid by the claimant. In the event of litigation it seems that the RAF will still be liable for costs according to the Rules of Court.

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Defrocked attorneys and expert witness fees: Many expert witnesses agree to defer payment of their fees until settlement of the MVA claim. It is sad but true that every year a substantial number of attorneys are struck off the roll of attorneys by the Law Society. This striking off is supposed to protect the public against further unprofessional behaviour by such attorneys, however, it also has a devastating effect on expert witnesses who were reliant on the struck-off attorney for payment of their fees. The striking off of an attorney effectively renders that attorney insolvent. Often he disappears without trace. The expert witness cannot get relief by suing the defrocked attorney.

In theory the client on whose behalf the attorneys acted is liable to pay the expert witness' fee. But this is also an empty promise. When an attorney is struck off his files usually disappear. In theory the Law Society is supposed to redistribute the files in an orderly fashion. In practice the Law Society is swamped by a general grab, and there are few records at the end of the day to show where the files have gone. It is arguable that the Law Society is liable in delict for expert fees which become irrecoverable by reason of the Law Society's failure to adequately protect the interests of the expert witnesses.

The Fidelity Fund: Defrocked attorneys have commonly been embezzling MVA claim monies that should by rights have been paid to needy claimants, and expert witnesses. The defrauded claimant is entitled to recover from the Fidelity Fund. But, horrors, such relief is not available to an expert witness. At least so says the Fidelity Fund. This exclusion of expert witness claims is based on a narrow interpretation of the legislation governing the Fidelity Fund. There is an alternative interpretation which would give expert witnesses a right to recover, but it seems that this can only be brought about by running a test case.

Test case: Expert witnesses interested in joining forces with me to run a test case against the Fidelity Fund are invited to notify me of their interest. In the event of sufficient numbers it may also be viable to run a test case against the Law Society for damages for failing to take proper care of expert witness interests when striking off rogue attorneys.

The expected duration of hip replacements: Hip replacement surgery is one of modern medicine's great success stories. A hip replacement costs about R100000, but has a limited lifetime. Hip revisions cost more than the original prosthesis by about 25%. It is incorrect to award R125000 now for a hip revision in 15 years' time. Firstly a discount needs to be applied for the investment advantage of having the use of the money during the next 15 years, secondly a further discount needs to be applied for the chance that the victim may be dead before the surgery is needed. Quite apart from the early death issue the expected duration of a first hip prosthesis has been reported by observers to be a 90% chance of surviving 8 years with a 10% per year rate of attrition thereafter. The problem with such a statement is "What period should be used for the calculation". Life expectancy is the period until 50% of persons alive now of a stated age have died. It seems appropriate to use the same criterion for hip replacements, that is to say the period until 50% of hip replacements have failed. If 90% will survive 8 years and 10% of those will thereafter fail each year **the expected duration for a hip replacement is just over 13 years**, that is to say the number of years it will take to reduce 90% to 50% if one takes off 10% of itself each year ($90 \times 0,9 \times 0,9 \times 0,9 \times 0,9 = 53\%$). Due to loss of bone tissue second and third replacements have shorter useful durations, about 12 years for a second replacement and 10 years for a third replacement.

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