Bulletin

February 2006 – No 1/2006

Risk Alert

A joint publication of the Attorney's Fidelity Fund and the Attorneys Insurance Indemnity Fund (Association incorporated under S21 of Act 61 of 1973)

In this edition

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General Manager's Column

NEW LOOK BULLETIN

The editorial committee decided that it was time to give the Bulletin a face lift in time for the new year. We would appreciate reader's input regarding the changes and welcome any suggestions for other changes.

RAF AMENDMENT BILL

2006 should be quite an eventful year in the field of MVA practice. Attorneys working with such matters will need to keep abreast of important developments over the next few months.

The notorious Bill was signed by the President on 27 December 2005. We previously reported that the Bill (as it then was) was drawing criticism from the profession.

At the forefront of the campaign against the Bill, are the Gauteng Law Council and the Johannesburg Attorneys Association who had warned that, if the Bill became law, road accident victims would have no choice but to challenge the amendments in court. (Sabinet Parliamentary Newsletter, 24-28th October 2005).

The Council of the Law Society of South Africa (LSSA) had also given its motor vehicle accident committee a mandate to obtain legal opinion on the constitutionality of specific aspects of the Bill with a view to challenging them (see 2005(Nov) DR).

We will report further, in the May Bulletin

REGULATION 2(1) (C)
THUGWANA V RAF SCA (CASE 530/04) unreported 30-11-2004

Our "old friend" was in court again on 7 November 2005, when the appeal court had to consider whether the RAF's failure to object to the validity of a claim within 60 days, in terms of S 24(5) of the Road Accident Fund Act, could defeat a Special Plea raising non-compliance with Regulation 2(1) (c).

In terms of S 24(5) if, the Fund does not object to the validity of a claim within 60 days after lodgement, then the claim is deemed to be valid in law in all respects.

The appeal court upheld the TPD's finding that S24 (5) regulated procedural issues and could not be relied upon to validate a claim that did not comply with the substantive requirements of Regulation 2(1) (c). It held, therefore, that non-compliance with the Regulation was fatal to the claim.

Once again, we suggest that practitioners serve summons where the Fund raises non-compliance with Regulation 2 (1) (c), after which litigation can be pended by agreement until there is a finding on the matter, by the Constitutional Court. ■

Policy Queries

I have looked at the recent Risk Alert Bulletin. Whilst my firm does no MVA work I see that on, "other claims" the deductible in our instance is R84 000-00, but the insured amount remains at R1m. Surely, this is a grossly unfair situation if a sole practitioner only has a deductible of R2000-00 but the same cover?

In our November Bulletin (4/2005, at 1) we published an erratum regarding a typographical error in the copy of the English Policy which was published in August (3/2005, at 2). The deductible for a single practitioner was incorrectly reflected as R2000-00 instead of R20 000-00.

The deductibles and limits of indemnity are based on actuarial calculations. The lower deductible takes cognisance of the fact that the sole practitioner's income will usually be lower than that of a larger practice and that the latter takes on a greater number of matters (often bigger and more complex), thus increasing the risk of a claim. The general limit of indemnity of R1m ensures a minimum level of cover for the public.

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Useful Tips for MVA Practitioners

A) *Benge v RAF* (Bisho High Court) (case 545/2003) unreported 11/2/2005

Does the concession of merits by the RAF preclude the latter from raising compliance with Regulation 2(1) (c)?

FACTS

The plaintiff, a pedestrian, was injured in an accident. The merits had been settled on the basis of a 30% apportionment against the plaintiff. This was put in writing by the RAF and confirmed by the plaintiff. Thereafter a letter was sent by the RAF, inquiring whether the plaintiff had complied with Regulation 2 (1) (c).

ISSUES

The court had to decide, whether the RAF was entitled to raise the defence of non- compliance with the provisions of the regulation, after the issue of merits had been settled or conceded.

JUDGEMENT

When a claim is lodged with the RAF and a summons is issued in terms of the Road Accident Fund Act ("the Act"), the RAF's investigation will involve a two-stage inquiry, and each stage has its own questions to be answered.

The first leg of the inquiry is whether there is any liability on the part of the RAF to compensate the claimant. During this inquiry questions such as the claimant's *locus standi*, compliance with the provisions of the Act and negligence on the part of the insured driver may be considered.

The second leg of the inquiry deals with the quantification of the claimant's damages.

The court referred to the judgement in *RAF v Mothupi* 2000(4) SA 38(SCA) where it was found that by not disputing the "merits", all that the defendant conceded was the issue of negligence and the defendant had thereby not abandoned any defences available to it.

In short, the *Benge* judgement provides that the settlement or concession of the merits only pertains to the negligence aspect of the matter, and it does not amount to an acknowledgment of liability in all respects. The RAF may, therefore, still raise any defence not relating to the merits including non-compliance with Regulation 2(1) (c). The court found that the plaintiff had not complied with the regulation.

If lack of compliance with Regulation 2(1) (c) is raised, then it should be considered whether the claimant was "in a position to depose to the affidavit" and also to the possible challenge to the regulation discussed in the General Manager's Column.

It is advisable to ensure that the intentions of both the RAF and the claimant are clear. If the merits are conceded orally, such concession should be obtained from the RAF in writing. Even where the merits are conceded by the RAF, practitioners should not be *complacent and assume that they need not serve summons to interrupt prescription.*

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B) Case Study

A minor child (A) had been injured in a motor vehicle accident. His parents have accused the insured attorney, (B), of under-settling A's claim against the Road Accident Fund (RAF) and they are claiming substantial damages.

B had refused an offer by the RAF and had instituted action against them. Correspondence between B and the RAF shows that he had been pursuing the matter vigorously.

B's version of events is that A's parents did not wish to pursue the litigation. They were indigent, unemployed and had five children to support. They were very anxious for the matter to be finalised with the RAF so that they could "put food on the table". In the interim, they had borrowed money from B, to tide them over, but they had used it all. They did not want to wait longer for money. Despite B's best endeavours to persuade them otherwise, they insisted that the offer be accepted.

The version of the parents is that B simply accepted the offer without their approval and without explanation.

Unfortunately, and to B's disadvantage, he kept no file notes or records of his discussions with A's parents. He also failed to confirm the discussions about the settlement and his instructions, in writing.

Although B's version seems plausible, especially since the medico-legal reports confirm the dire circumstances of A's parents, the courts are not likely to come to his assistance.

The scheme has recently been faced with numerous claims by plaintiffs who allege that their erstwhile attorneys have under-settled their matters, in circumstances similar to the above.

We, therefore, once again, emphasise the need for proper record keeping. While it may seem obvious, we reiterate that practitioners should always make file notes:

i) at the end of a consultation, and
ii) at the end of a telephone discussion

Ideally, the content of the consultation should also be confirmed in writing, especially where the client chooses to act contrary to the practitioner's advice e.g. in choosing not to pursue a claim or settling for a lower amount.

If possible, the consequences of accepting a lower offer should be conveyed to the client in front of witnesses and/or a translator, if necessary. Written confirmation could also help to prevent any comebacks later on. ■

Prescription Matters

Update on *Barkhuizen v Napier* (T) (case 33129/01) unreported 17.09.2004

In our February Bulletin (1/2005, at 2) we reported on the above judgement, which was heard in the TPD (court *a quo*) and subsequently taken on appeal. Briefly, the court *a quo* held that the time-bar clause in an insurance policy was unconstitutional.

Ronald Stuart Napier v Barend Petrus Barkhuizen (SCA) (case 569/04) unreported 30.11.05

On Appeal, the SCA held that time-bar clauses in insurance contracts are not unconstitutional.

Further, that though constitutional values govern the law of contract, there was no evidence to show that the respondent had not concluded the contract with the appellant freely and in the exercise of his constitutional rights to freedom, equality and dignity.

The time-bar provision did not violate the access to courts provision in the Bill of Rights, since that provision invalidates unreasonable legislative restrictions on the enforcement of pre-existing rights. The respondent had no pre-existing right to insurance, but only the right that he acquired from his contract with the insurer. That contract itself specified that for his cover to operate he had to issue summons within 90 days.

The decision by the SCA confirms the position regarding time-bar clauses and practitioners are once again warned to be vigilant about lodging claims and/or serving summons timeously against insurers on behalf of their clients. ■

Conveyancing

CLAIMS

"Conveyancing remains the top source of negligence claims among 2-10 partner law firms in UK. According to Aon Limited, 43 percent of claim notifications are related to conveyancing. Most of the residential conveyancing negligence claims, by both number and value, are caused by procedural mistakes- such as unsatisfactory property searches, or failure to correctly advise clients."(Ghostdigest.co.za)

TOP OF THE INDEMNITY TABLES

"According to Zurich Professional, conveyancing solicitors were responsible for one third of all claims last year, and most claims were as a result of basic care. For instance, 'poor investigation into the title to the property' and 'failing to identify and deal with all the mortgages and other encumbrances affecting the property. Solicitors failed to get to grips with what may be regarded as the fundamentals of relatively routine matters." (Ghostdigest.co.za)

In our May Bulletin (2/2005), we published a graph depicting the predominant types of claims against attorneys and which showed that conveyancing accounted for the third largest number of claims against the scheme. While this is not as high as the UK, conveyancing claims remain a problem.

In addition, the problems at the Road Accident Fund have forced many attorneys to abandon their third party practices and pursue conveyancing, sometimes without the necessary experience.

Another problem is the lack of supervision of paralegals/ conveyancing secretaries.

In previous Bulletins (4/2002, 1 & 2/2003), we published articles on risky areas in conveyancing, for which information had been obtained from actual claims submitted to the scheme. The 2003 bulletins can be accessed on our website at www.aiif.co.za.

We also find the Ghostdigest (www.ghostdigest.co.za) extremely helpful in keeping abreast of current developments in Conveyancing. ■

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Letters to the editor

DEAR EDITOR

RE: RISK ALERT BULLETIN 3/2005

I have just got my copy of the Risk Alert Bulletin and have gone through it hastily and as usual I have come-up with something pleasing to the ear.

I am particularly pleased to read about the KM Blackenfell case. I do still feel that the Court should go even further to declare the requirement of an affidavit as onerous. I think situations like where the Plaintiff reports the case to Police and give information albeit not in an affidavit, should also be recognized as sufficient compliance. Maybe I will set that precedent.

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EDITOR'S NOTE

We thank Mr. Mampuru for his comments. We believe that it is the hope of most personal injury attorneys, that the far reaching consequences of Thugwana will eventually be overturned by the Constitutional Court.

As always, watch this space! ■

RISK ALERT BULLETIN

Please note the the Risk Alert Bulletin is intended to provide general information to practising attorneys and its contents are not intended as legal advice.

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