Bulletin

Risk Alert

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Risk Manager's Column

I am pleased to introduce our new Legal Adviser, Zelda Olivier, who joined the AIIF team during July 2011. Zelda obtained her undergraduate law degree and her LLM in Estate Planning at the North West University in Potchefstroom. She served articles with Brian Martin Attorneys and Savage Jooste & Adams (SJA). After her admission as an attorney in April 2004, she practised as a Professional Assistant at SJA. From April 2008 she worked as an Associate in the Banking Finance and Insurance Department at Boekel De Nerée in Amsterdam. On her return to South Africa in February 2010 she again joined SJA as an Associate, running their satellite office in Hyde Park, Johannesburg.

CLAIMS TRENDS

Table 1: Comparative Analysis: 2010, 2009, 2008 and 2007 ***as at 12 months***
Number of claims notified

YEAR	2010	% of Total	2009	% of Total	2008	% of Total	2007	% of Total
Conveyancing	154	31%	279	46%	293	55%	100	33%
RAF prescription	101	21%	118	20%	94	18%	71	23%
Litigation	77	16%	55	9%	62	12%	58	19%
RAF u/s	39	8%	35	6%	18	3%	13	4%
Other	121	24%	113	19%	62	12%	61	20%
TOTAL	492	100%	600	100%	529	100%	303	100%

Table 1 compares the **numbers of claims** per claim type over the past four years, as they stood at the end of the insurance year at 30 June (12 months)

Comparing the 2009 and 2010 years (at 12 months), there was an effective 45% reduction in the number of conveyancing claims, year on year and an 18% reduction in the total number of claims, year on year.

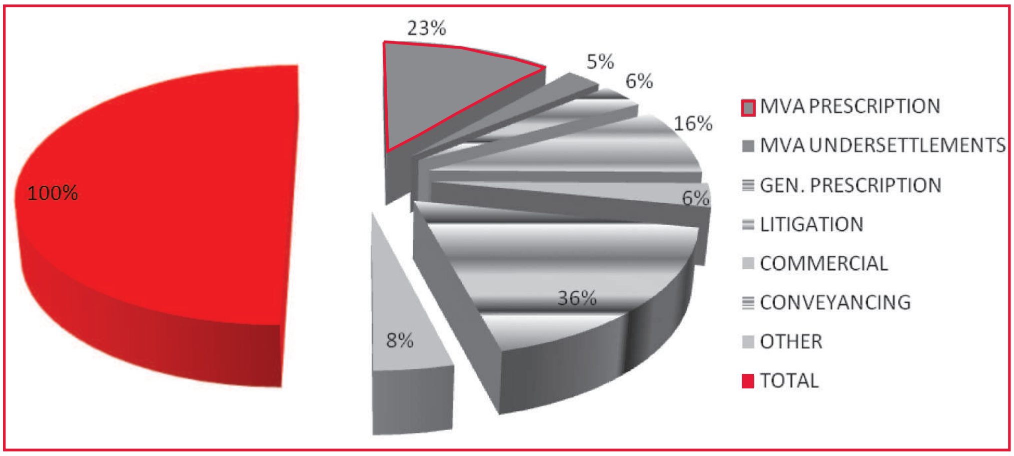
Risk Manager's Column continued...

Table 2 below compares the **total incurred values of claims** per claim type over the past four years, as they stood as at the end of the insurance year at 30 June (i.e. at 12 months). The total incurred value takes into account all amounts already paid and amounts reserved for payment of capital and costs.

Table 2: Comparative Analysis: 2010, 2009, 2008 and 2007 *as at 12 months*
Total incurred value

YEAR	2010 R	% of total	2009 R	% of Total	2008 R	% of Total	2007 R	% of Total
Conveyancing	23 392 740	39%	35 910 741	52%	33 594 593	53%	17 180 417	27%
RAF prescription	13 015 219	22%	11 976 941	17%	8 989 421	14%	14 409 839	23%
Litigation	6 400 194	11%	5 079 135	9%	5 016 456	8%	13 599 943	21%
RAF u/s	7 318 364	12%	4 364 825	7%	2 353 159	4%	3 853 420	6%
Other	9 099 589	15%	11 631 918	16%	13 359 346	21%	14 671 264	23%
Total incurred	59 226 106		68 963 560		63 312 975		63 714 883	

Graph Claims breakdown (overall): 01 July 2003 – 30 June 2011



The pie graph on the left gives a breakdown of the number of claims according to claim type, over the past eight years.

As can be seen from all the above analyses, the numbers of claims arising out of conveyancing instructions have over the years, and particularly in 2008 and 2009, exceeded those arising from other practice areas.

Conveyancing Claims

With the exclusion of most bridging finance related matters in the 2010 year, the numbers of conveyancing claims have shown a welcome reduction and are closer to 2007 levels. Nonetheless, overall conveyancing still seems to be the area that poses the greatest risk to practitioners.

Under-settlement of RAF Matters

The numbers of claims arising out of the prescription of RAF matters has remained more or less stable over recent years, but the **under-settlement of RAF matters** is an area which the insurer has earmarked as a serious threat. The numbers of such claims are increasing at an alarming rate. The quantum in these claims is usually significantly higher than for other claim types.

We urge practitioners to be extremely cautious when settling any personal injury matters. This area is a highly specialised one.

Please take careful note of the following **guidelines:**

- Do not make the mistake of delegating this sort of work to inexperienced staff, without providing very close supervision.
- All aspects of damages should be carefully investigated and researched so that a realistic claim can be made and client can be properly advised*.
- Do not settle any RAF claim without first properly canvassing all aspects with your client.
- When considering settlement, ensure that you **record in writing**, both the contents of your advice to client and the instructions received from client.
- **Confirm** your advice and client's instructions in a letter or document to be signed by client.
- Be particularly cautious where a **minor** is involved or where there has been any **head injury**, no matter how insignificant it might appear to have been.

**There is a tendency on the part of some practitioners, to avoid obtaining medico-legal reports, particularly where reliance is placed on a conclusion in the statutory medical report that future treatment is not foreseen. You need to satisfy yourself that the report is correct in that regard.*

Likewise, rather insist on an undertaking for future medical treatment even if it seems unlikely that it will be necessary.

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Attorneys practice and internet related risks

1. INTRODUCTION

The management of risk is a considered business decision and a competitive weapon. Law firms are, exquisitely fragile and unstable businesses.

Attorneys permanently face the spectre of complaints and law suits. Their conduct often leads to claims against the AFF and AIIF. They must do all they can to protect their firms, their clients and the Funds from practice management risks.

The best way a law firm can avoid complaints and possible claims is by analysing its policies, processes, and procedures for weaknesses and devising appropriate ones to minimise risks.

Information technology has brought immense benefits and advantages to law practices. The opposite is also true in that information technology has brought about risks to both the law firm and its clients. These risks have the potential to cripple a law firm by *inter alia* violating the rules of confidentiality or leading to loss of information – both of which can lead to claims. This note briefly discusses internet-related risks and how to deal with them.

2. INTERNET RELATED RISKS

2.1 Social Networking

Social networking does not introduce something fundamentally different into the profession. It is just a new mode of communication; its use in the profession is both inevitable and appropriate.

The potential problems created by, or feared in, social networking really fall into five categories:

- the breach of client confidentiality through online exchanges of information that characterise social networking sites,
- the creation of online contacts via the network that are ethically improper,
- the creation of unintended attorney-client relationships via the network,
- the violation of rules regarding advertising and solicitation, and
- the use of such sites to improperly gather information.

Blogs appear on the internet as personal journals with various contributors and a variety of topics. A blog is an easy way to get information out very quickly. For lawyers blogs are a way to inform current clients, attract potential clients and market legal services. A blog has been described as being able to establish an attorney as the “go to” person in a specific area of law, if that attorney puts up content that is current, informative, and insightful.

The experts view blogs in two types, namely informational blogs and advisory blogs. The latter offers legal advice and therefore increases the risk of a professional indemnity claim. An advisory blog can also inadvertently create an attorney-client relationship.

Informal blogs present information or offer discussion forums. It is advisable that the information be presented in a general, non-biased manner. A blog allows you a presence on the internet. It is absolutely **not** a place to dispense legal advice.

An attorney should take extra care not to establish an attorney-client relationship in this way. A blog is seen as no different from engaging in a conversation at a cocktail party.

A blog is borderless as it can be viewed anywhere. Does this mean other provinces’ ethics rules apply? Firms that actively market to potential clients in provinces in which they are not registered will need to consider whether they are required to comply with the rules of those provinces.

E-mail is the most basic form of internet-based communication, useful for communicating with clients and transmitting documents. Similar to a blog, with e-mail, an attorney can create alert systems to keep clients apprised of recent statutory or case developments.

Internet may be used to:

- Create online chat or negotiation rooms with clients and other parties,
- Create controlled-access, allowing entry only to those with permission to view some or all of a client’s legal file online. EXTRANETS permit clients and lawyers to share, in real time, document databases, legal research and memorandums and other relevant case materials,
- Create online libraries customised to particular clients or subject matter.

The internet and its related tools can assist law firms in providing legal services to clients, but these same tools can also be sources of risk that must be monitored closely:

- The greatest risk to law firms with an internet presence is that they may not always know who their clients are. Many websites provide prospective clients with forms enabling them to engage attorneys. Other sites allow prospective clients to contact attorneys through e-mail, and some attorneys spend time in chat rooms discussing legal issues. These activities create risks in that attorney-client relationships may be created before any evaluation for appropriateness has been performed.
- The ability to communicate electronically has increased the risk of inadvertent disclosure of confidential information. E-mails and other electronic communications can easily be directed to an unintended recipient by mistake. This creates the possibility of professional indemnity exposure.
- Law firms request and create a great deal of data, which must be kept under lock and key. Attorneys collect significant amounts of personal information about their clients. The information is placed into databases within the firms’ records. It is observed that databases in the legal industry are hazardous because too often minimal requirements or none, are placed on legal firms to install adequate IT security systems.

Sensitive electronic data can be exceptionally damaging if they fall into the hands of motivated cyber criminals. The uncontrolled leak of client’s data could damage integrity of relationships.

Attorney-client privilege is the most important concept in the legal field because it protects communications between attorneys and their clients. The legal industry may have made some strides in data protection by using basic virus and spyware programmes, but it has yet to address issues of outbound e-mail protection. Given the vulnerability of e-mail systems to the threat of hackers, it is difficult for the e-mail user to remain confident in the security of electronic communications. This debate is particularly germane to attorneys acting within the ambit of the attorney-client privilege. Attorneys who wish to use e-mail to communicate

Attorneys practice and internet related risks continued...

with clients should consider the degree of security it offers and its implications for the attorney-client privilege. E-mail communications become computerised records when saved and are subject to discovery requests during litigation.

Hackers are not the only threat to the security of e-mail communications.

Other dangers include:

• **the lack of guaranteed security for transmissions between different e-mail systems.** Mis-transmissions can occur because different e-mail systems use different addressing schemes. For a message to be sent properly between systems, its address must match the addressing scheme of the recipients system. If the format does not match, the message will not be delivered or could be delivered to an unintended recipient. Imperfectly addressed messages could be sent to unintended recipients,

• the accessibility of e-mail messages by e-mail providers,

• **the informal use of e-mail** which may result in legal problems. Users may tend to view e-mail as more temporary and approach it more spontaneously than paper messages. Consequently offensive messages might be sent through e-mail that would not otherwise be sent in a formal letter. Thus, this informal use of e-mail makes it a potentially large source of damaging information.

• **the disorganisation of computerised information in general.** This is a practical concern about e-mail maintenance. Information stored in a computer system is often disorganised with files frequently not organised into subdirectories. If potentially privileged information is not segregated from non-privileged information, litigation can necessitate the time-consuming task of sorting files.

• **the difficulty of destroying computerised information.** Unlike paper documents, information stored in a computer is difficult to destroy. Deletion does not remove a document from a system. A user with an over-the-counter utility programme can retrieve the remnants of the deleted document. Even documents that have been overwritten can be deciphered. Without application of retention and destruction policies to computer records, a problem is created.

Without a clear and appropriate records-management policy, early destruction of electronic documents could lead to violations of an attorney's ethical and legal obligations. The risks posed by improper destruction of electronic documents are especially clear in the context of discovery. If an attorney permits or aids destruction of documents that should have been retained, the attorney may be subject to sanctions. In an American case, *Coleman (Parent) Holding Inc. v. Morgan Stanley and Company Inc.* 2005 WL 679071 (Florida Circuit Court, 1 March 2005 and 2005 WL 674885 (Fla.Cir.Ct.) Morgan Stanley stated that it may sue its former counsel for the $1.5 billion verdict it suffered because the court determined that its law firm did not respond appropriately to discovery requests for electronically-stored documents.

To be continued...

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Letters of engagement and the Consumer Protection Act

From a Risk Management perspective, the AIIF has for a long time been recommending to practitioners that they set out the terms of their engagement with clients in formal **letters of engagement**. In this regard, Ann Bertelsmann, the AIIF Risk Manager, published useful tips on engagement management and the drafting of letters of engagement in an article in a previous edition of the *Risk Alert Bulletin* (2/2010). These tips are also available on our website www.aiif.co.za. (See *Risk Management Tips*).

This article is not intended to be an exhaustive commentary on the Consumer Protection Act 68 of 2008 ('the CPA') but merely highlights certain provisions of the Act which should be borne in mind by practitioners in drafting letters of engagement. The effect of the CPA is that South African consumers will be amongst the best protected in the world.

The CPA is relevant to practitioners as service providers and certain of its implications for the profession were discussed at the LSSA AGM earlier this year. We urge practitioners to have regard to all applicable provisions of the CPA in their engagement with clients in general and in the compiling of letters of engagement in particular.

(We were previously informed that consideration was being given by the LSSA to applying for an exemption from the provisions of the CPA on behalf of all practitioners. However, at the time of writing, we have, as yet, not received any information or confirmation on the status of the proposed application. We assume that such an application would be brought by the LSSA - as the regulatory authority for attorneys - for an industry-wide exemption in terms of section 5(3) from one or more of the provisions of the CPA.)

Practitioners need to take cognisance of, *inter alia*, the following provisions in the CPA in the drawing up letters of engagement:

• The application of the CPA is very wide and **applies to every transaction (including services)** occurring within the Republic (unless exempted) (section 5);

• The letter of engagement must meet the **plain and understandable language provisions** of the CPA (section 22) - It is doubted that 'legalese' would meet the 'plain and understandable language' requirements of the CPA;

• Regard must be had to Part G of the CPA (which deals with unfair, unreasonable and unjust contract terms). Particular regard must be had to, *inter alia*, sections 48, 49 and 54 of the CPA which provide as follows (emphasis added):

Unfair, unreasonable or unjust contract terms

48. *(1) A supplier must not—*

(a) offer to supply, supply, or enter into an agreement to supply, any goods or services—

(i) at a price that is ***unfair, unreasonable or unjust****; or*

(ii) on ***terms that are unfair, unreasonable or unjust****;*

(b) ***market*** *any goods or services,* ***or negotiate, enter into or administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust;*** *or*

(c) ***require a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—***

(i) to waive any rights;

(ii) assume any obligation; or

(iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

(2) Without limiting the generality of subsection (1), a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject, is unfair, unreasonable or unjust if—

(a) it is excessively one-sided in favour of any person other than the consumer or other person to whom goods or services are to be supplied;

(b) the terms of the transaction or agreement are so adverse to the consumer as to be inequitable;

(c) the consumer relied upon a false, misleading or deceptive representation, as contemplated in section 41 or a statement of opinion provided by or on behalf of the supplier, to the detriment of the consumer; or

(d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49 (1), and—

(i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or

(ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

Notice required for certain terms and conditions

49. *(1) Any notice to consumers or provision of a consumer agreement that purports*

to—

(a) limit in any way the risk or liability of the supplier or any other person;

(b) constitute an assumption of risk or liability by the consumer;

(c) impose an obligation on the consumer to indemnify the supplier or any other person for any cause; or

(d) be an acknowledgement of any fact by the consumer, must be drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).

(2) In addition to subsection (1), if a provision or notice concerns any activity or facility that is subject to any risk—

(a) of an unusual character or nature;

(b) the presence of which the consumer could not reasonably be expected to be aware or notice, or which an ordinarily alert consumer could not reasonably be expected to notice or contemplate in the circumstances; or

(c) that could result in serious injury or death, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer in a manner and form that satisfies the requirements of subsections (3) to (5), and the consumer must have assented to that provision or notice by signing or initialing the provision or otherwise acting in a manner consistent with acknowledgement of the notice, awareness of the risk and acceptance of the provision.

(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.

(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—

(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and

(b) before the earlier of the time at which the consumer—

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).

Section 49 (1) (a) is of particular importance insofar as any **limitation of liability** is included in the letter of engagement. The contemplated limitation of liability must be written in plain language (Section 49 (3) read with Section 22) and the fact, nature and effect thereof must be drawn to the attention of the clients in a conspicuous manner and form that is likely to attract the attention of an ordinary alert client, having regard to the circumstances;

(a) Before the earlier time at which the client either:

(i) Begins the engagement; or

(ii) Is required or expected to offer consideration for the transaction or agreement.

Consumer's rights to demand quality service

54. *(1) When a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to—*

(a) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services;

(b) the performance of the services in a manner and quality that persons are generally entitled to expect;

(c)…; and

(d)…..

(2) If a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may

require the supplier to either—

(a) remedy any defect in the quality of the services performed or goods supplied; or

(b) refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

As the CPA is a new piece of legislation, its implications for the legal profession have, as yet, not been tested. Practitioners are encouraged to share their experiences in dealing with this piece of legislation with us.

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RAF Matters

ADJUSTMENT OF STATUTORY LIMIT IN RESPECT OF CLAIMS FOR LOSS OF INCOME AND LOSS OF SUPPORT

Published under Board Notice 130 in *Government Gazette* 34478 of 29 July 2011.

The Road Accident Fund hereby, in accordance with **section 17(4A)**(a) of the Road Accident Fund Act, Act No. 56 of 1996, as amended, adjusts and makes known that the amounts referred to in subsection 17(4)(c) are hereby adjusted to R 189 017.00 (One Hundred and Eighty Nine Thousand and Seventeen Rand), with effect from 31 July 2011, to counter the effects of CPI Inflation.

RAF CASE LAW

Assessment of "serious injury claims" in terms of section 17 of the RAF Act of 1996 (as amended) and Regulation 3 (made under s26 of the Amended Act)

1. ***Mngomezulu v RAF*** **, Gauteng High Court (unreported case no: 4643/2010)**

The plaintiff, a 25 year old male was involved in a hit-and-run motor vehicle accident on 8 August 2008, as a result of which he suffered a closed chest injury with lung contusion, a 30 cm laceration on the right thigh, compound tibia-fibula fractures and a moderate head injury. The plaintiff instituted an action against the RAF claiming compensation for the following heads of damage; past and future medical and hospital expenses, past and future loss of earnings or loss of earning capacity as well as general damages.

The RAF opposed the action (in particular disputing the claim in respect of general damage and loss of earnings) and raised a special plea stating that the plaintiff had not complied with Regulation 3 and that therefore such plaintiff's claim for general damages was "unenforceable". The court, following the decision of *Makhombothi v RAF* (unreported case no: 46854/2009), where it was held that the RAF's admission of liability in terms of section 17(1)(a) entitled the plaintiff to enforce his claim for general damages in the court and further that the jurisdiction of the court was not ousted, dismissed the special plea with costs on a scale as between attorney and client. The court referred to the RAF's view that where an objection is raised the matter must be referred to the tribunal referred to in Regulation (3)4. However, when the court enquired as to the existence and operation of the tribunal a clear answer was not provided by the RAF's legal representatives. The court concluded that it is a "phantom body" and referral of the issue to such a "mystical tribunal" would amount to an unnecessary or unjustifiable delay in the finalisation of the case. The court stated that the issue of jurisdiction is directly related to the issue of referral to a tribunal and if there is an objection to the jurisdiction of the court it should be raised by way of a special plea.

With regard to the merits, the court found that the "insured vehicle left its lane of travel on the tarmac, climbed the pavement and collided with the unsuspecting Plaintiff", thus the RAF was found to be solely liable. As per the plaintiff's particulars of claim, the basis of the claim for general damages lay in the "narrative test" in terms of Regulation 3(1)(b)(iii)(aa)-(cc). The court held that with regard to assessing the injury as serious in terms of the amendments to the RAF Act of 1996, the two alternative tests that can be used are; the "[w]hole person impairment test (WPI) as per Regulation 3(1)(b)(ii) and the so-called narrative test as per Regulation 3(1)(b)(ii)(aa)-(dd)".

The court referred to the fundamental differences between the two tests confirming that the WPI rating seeks to assess the injury and assign a WPI rating when MMI has been reached. It does not permit the rating of future impairment. The "narrative test" is a safety net providing an alternative assessment where the AMA Guides would not result in a finding of serious injury. In *casu* various reports and RAF 4's completed by medical specialists were filed confirming that the injuries sustained by the plaintiff were serious as per the "narrative test". The RAF objected to various reports on the following grounds. Firstly, with regard to one report, that MMI had not been reached at the time of completion of the RAF 4, however, the court pointed out that the concept of MMI is relevant only to WPI rating and not the "narrative test". Secondly, that the medical practitioners did not complete the RAF 4 correctly in that they had failed to assign a WPI rating and instead chose to rely on the "narrative test". To this, the court pointed out that there was nothing in the Regulations which prevented the plaintiff from being assessed in terms of the "narrative test". Either of the tests may be used and the plaintiff does not have to be assessed first in terms of the WPI test before the "narrative test". Thirdly, the reports of two medical practitioners were rejected on the basis that the injury had not been satisfactorily assessed in the RAF 4 and the RAF requested the plaintiff to avail himself for assessment by their own medical practitioners.

The court provided the following guidelines with regard to the rejection of the RAF 4:

If the RAF is not satisfied that the injury has been correctly assessed there are two routes that may be taken:

Either

(**a**) The RAF must reject the serious injury assessment report and furnish the plaintiff with reasons therefore (in terms of Regulation 3(3)(d)(i)). The court stated that this alternative applies only to procedural aspects of the assessment and provided the following examples: where the report is completed by an unqualified person; the assessment is not conducted in terms of the prescribed method; the impairment evaluation reports for a specific body part are not attached as required; the report is not completed in all particularity. In order for the RAF to succeed with this option it must not merely reject the report but provide *"sufficient reasons"* which are relevant, rational and substantial justifying such rejection (as was held in *Smit v RAF* unreported case no: 47697/ 2009 – see case *3* below).

or

(**b**) The RAF must request the plaintiff to avail him or herself for further assessment by their own appointed medical practitioner at the RAF's cost in terms of Regulation 3(3)(d)(ii). The court held that this alternative in contrast to (a) above applies to the actual material medical findings of the assessment. For the RAF to succeed with this option, it must provide dissenting medical opinion.

Only when the measures set out in (a) and (b) above have been exhausted can the matter be referred to the tribunal.

In *casu* the court found that the RAF had incorrectly relied on option (a) above further failing to supply sufficient reasons which did not amount to a proper rejection or objection in the prescribed manner. The RAF should have rather used option (b) above. The court therefore found the RAF liable to compensate the plaintiff in respect of his claim for general damages. The court held that the RAF's eventual admittance of the truth and correctness of the medico-legal reports relating to the seriousness of the plaintiff's injuries further confirms the plaintiff's entitlement to general damages.

The RAF did not make any submissions with regard to general damages, both in its heads of arguments and in court, save to ask that the plaintiff's claim be dismissed for lack of compliance with the Act and the Regulations. The court held that the RAF "placed all its eggs in one basket" and must therefore live with the consequences.

The court was not impressed with the RAF's handling of the claim and lashed out at the claims handlers, stating that it was about time that "they are hauled to court to explain their actions under oath. At the very least courts must show their abhorrence of such conduct or attitude by awarding a punitive costs order". The court pointed out that road accident victims "are constantly faced with ill-founded, spurious and brazen attempts to delay finality of matters", trials are also unnecessarily prolonged. The court stated that the aim of the amendments "was to shorten the time for settlement or finalisation of the claims rather than to further delay them".

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2. ***Louw v RAF,* South Gauteng High Court, Case no 49084/09 (Judgment 12 August 2011)**

Background

The plaintiff sustained bodily injuries when a taxi in which she and her minor son were travelling collided with another vehicle. The collision occurred on 31 December 2008 after the Amendment Act had come into operation (i.e. 1 August 2008). The plaintiff's minor son died on the scene of the accident.

In addition to claiming for future medical and funeral expenses and future loss of earning capacity, the plaintiff claimed general damages including pain and suffering, shock and loss of amenities of life.

The Issues

The RAF conceded the merits 100% and at trial, there were essentially the following two issues before the court.

1. A special plea with regard to the plaintiff's claim for general damages.
2. Quantum

The Judgment

On the Special Plea

The defendant alleged that the plaintiff had failed to comply with the provisions of Regulation 3. The plaintiff had submitted the required RAF4 report in terms of Regulation 3(3)(a). Counsel for the defendant argued that the 60 day period referred to in section 24(5) of the Act only related to the RAF1 form and not the RAF4 form. He drew the inference that, because the section did not prescribe a time limit within which the Fund had to either reject the RAF4 report or direct that the plaintiff should submit herself to a further assessment to ascertain whether the injury was serious, the plaintiff was precluded from claiming general damages.

The Court disagreed with the defendant's counsel's reasoning, holding that, if such an interpretation prevailed the RAF could indefinitely avoid and frustrate every claim against it for general damages by simply not taking either of the above-mentioned steps.

The Court decided that in terms of section 24(5) of the Act, the defendant had had 60 days within which to object to the validity of the claim, "failing which the claim is deemed valid in all respects". The defendant had failed to object to the validity of the claim within the 60 day period and had also failed either

to reject the RAF4 report or to direct the plaintiff to submit herself for assessment.

The Court accordingly dismissed the special plea.

On the General Damages Claim

The Court had regard to Regulation 3(1)(b)(iii)(aa) to (cc) and found that the plaintiff's injuries constituted a serious long term impairment and loss of 'some' of her body functions. It also found that the tragic loss of her son and her angst about travelling in vehicles constituted a severe long-term mental or behavioural disturbance or disorder. The Court thus awarded the plaintiff general damages in the amount of R100 000 in addition to loss of earning capacity, funeral expenses and an undertaking in terms of s 17(4)(a). (The Court somewhat confusingly, also found that, on the expert evidence MMI had been reached. As discussed with regard to the *Mngomezulu* matter (above) the concept of MMI is relevant only to WPI rating and not the "narrative test").

The Court showed its extreme displeasure at the defendant's legal representatives' conduct of the defendant's case, by awarding costs *de bonis propriis* in respect of the second and third days of trial. (The full judgment is available on our website at www.aiif.co.za and the court's reasons for this punitive costs order should be noted by all practitioners especially those who litigate on behalf of the RAF).

Damages suffered as a result of "an emotional shock sustained by that person when that person witnessed or observed or was informed of the bodily injury or the death of another person..." are not covered by the RAF under the amended Act.

With respect we are of the view that the court incorrectly took into account the plaintiff's shock at the death of her son in considering the issue of general damages.

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3. ***Smith & Another v RAF*, South Gauteng High Court 47697/2009, 29 April 2011**

When this matter came before the court, merits had been conceded 100% and the only issue in dispute was the claim for general damages. The defendant raised a special plea that the court lacked jurisdiction to deal with the question of general damages as the defendant had objected to the RAF 4 form.

Claassen J noted that if the RAF objects to the RAF 4 report and raises a dispute, then the court's jurisdiction is ousted and the matter is referred to a medical tribunal. He questioned whether the RAF had in fact raised a dispute as provided for in the Act in order for the matter to be referred to a tribunal.

The RAF 4 had been completed by a certain Dr Morari, six months after the accident. He confirmed in the report that the patient had reached MMI (Maximum Medical Improvement) and found that there was a 57% whole person impairment. The plaintiff had suffered a brain injury and paralysis of the left side of the body.

The RAF had written a letter to the plaintiff's attorneys stating that they rejected the assessment on the basis that the patient had not reached MMI at the date of the completion of the RAF 4. No medical opinion was relied upon to support this finding.

It emerged at trial, that the RAF routinely instructed its attorneys to object to MMI in respect of any assessments less than two years post accident. Claassen J held that this practice was arbitrary and discriminatory and not related to any objective assessment of the facts. He held further that there was no legal or medical basis for this practice and that the dispute raised was accordingly not valid.

Claassen J found that the plaintiff's expert evidence supported the fact that MMI had been reached and that the defendant had not provided any expert evidence to the contrary.

It was held therefore that the Court did have jurisdiction and that the question of general damages need not be referred to a tribunal.

The special plea was dismissed with costs on the attorney and client scale, because of unnecessary costs incurred as a result of the RAF's unjustified objection.

General damages in an amount of R1 million were awarded.

4. ***Mpondo v RAF*, Eastern Cape High Court, CA283/2011, 26 April 2011.**

The appellant appealed the judgment of the trial court on the grounds that the trial judge had erred in considering the case of *Strydom v RAF* to be a "benchmark" in determining the amount to be awarded to her for general damages. The appellant successfully contended that the award of R350 000 was disturbingly inappropriate and the Court ordered the respondent to pay R550 000 in respect of general damages.

Dambuza J in finding that the trial court had misdirected itself, stated that "when considering past awards made in comparable cases a proper basis for comparison must be ascertained. In this exercise the court should, in my view look at the pattern of awards made in comparable circumstances rather than a singular award made in respect of injuries similar to the case at hand. In my view a court, by restricting itself to one comparable case unduly fetters the discretion it has in assessing a neutral, fair and reasonable compensation for the plaintiff".

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Letters to the Editor

1

I wish to congratulate you on the new format of Risk Alert. The punchy presentation of items makes the publication much more readable and thus more effective.

Keep up the good work!

Andries Landman

2

AMA Guide

Just a quick email to advise that your members can obtain the above book from ourselves as well. They can visit www.mysupplier.co.za for more information or they can contact me directly.

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