

COMMENT BY LAW SOCIETY OF SOUTH AFRICA (LSSA)  
ON THE ROAD ACCIDENT FUND (TRANSITIONAL PROVISIONS) BILL, 2012 (THE BILL)

INTRODUCTION

The LSSA has already commented in detail on the previous bill published for comment in 2011.

The current version of the Bill is far simpler than the previous version and certain of the issues raised in our previous comment have been addressed.

However, the fundamental issue remains unresolved, namely that this Bill (as with the previous version) perpetuates discrimination against a certain class of passengers by retaining the cap of **R25 000.00** for non-pecuniary loss (general damages) unless the claimant can meet the very stringent threshold imposed by Regulation 3 of the Road Accident Fund Regulations, 2008.

The Constitutional Court has already found that capping the claims of a certain class of passengers is inconsistent with Section 9(3) of the Constitution and when considering whether the impugned provisions offended either Section 9 (1) or 9 (3) of the Constitution (the equality clause) the Constitutional Court found that, to the extent that the impugned provisions overwhelmingly affect black people, they create indirect discrimination that is presumptively unfair. It held:-

*“This is so because the discrimination is based on one of the grounds listed in Section 9 (3). Absent a rebuttal of this presumption from the Respondents, I have to accept that the type of discrimination we are concerned with here is indeed unfair”.*

Although, this class of claimant now also have a claim for special damages, over and above the capped claim, the reality is that many will not be able to prove claims for loss of income and most would have received treatment at Provincial Hospitals. The lifting of the overall cap is therefore more apparent than real.

Those that have incurred medical and hospital costs and can prove loss of income are further discriminated

against in comparison to other passengers and claimants in that their claims are subject to caps for loss of income and reduced tariffs for emergency treatment as at 1 August 2008.

As previously noted, the above differentiation would, once again, give rise to the following enquiry:-

- (a) *does the differentiation amount to 'discrimination'; and if so*
- (b) *does it amount to 'unfair discrimination'; and, if so*
- (c) *can it be justified under the limitations clause contained in Section 36 of the Constitution.*

The Constitutional Court already found that discriminating against this class of passengers was unfair and not justified but that the real issue was that of an appropriate remedy.

The question therefore remains as to whether the proposed Bill does "*fix the problem*" and "*provide relief for the inequality which the old scheme continues to cause*" and/or whether the continued inequality between this class of passengers and other classes of passengers claiming under the old Act is justified in the light of the "*serious budgetary implications of removing the limitations unconditionally.*"

In the LSSA's opinion, the imposition of a threshold on general damages which the Road Accident Fund, itself, anticipates will exclude approximately 92% of claimants from receiving compensation for general damages, in legislation ostensibly aimed at providing "*relief for the inequality which the old scheme continues to cause*" is hardly a viable solution which will meet the above enquiry. This is more so as the major constituent of the affected class of third party will have no other viable claim for compensation against the Road Accident Fund if they are denied general damages. The current version of the Bill goes some way towards providing "*relief*" by now allowing capped compensation of R25 000.00 for all affected passengers, including those who would not have qualified for any compensation for general damages at all under the old Act (*inter alia* so called social passengers and passengers in unregistered taxis). However, they are still being discriminated against, when compared to other classes of passengers whose claims for general damages are not capped.

The LSSA remains of the view that, if it is necessary to impose some kind of limit on the compensation "*in the interests of good government*", the proposed cap on loss of income and support would be sufficient and appropriate.

## COMMENT ON THE BILL

### Transitional arrangements for certain third parties

#### 2(1) (a)-(b)

Applying the provisions of the Road Accident Fund Amendment Act retrospectively to a certain class of passenger is subjecting them to yet a further differentiation.

Many of those claimants have had their cases in limbo for two years, since the decision of the Western Cape High Court in June 2010. Now, they will face a further delay by having to obtain a serious injury assessment report from a medical practitioner and might face a special plea from the Road Accident Fund to the effect that the jurisdiction of the court in which their cases currently are proceeding has been ousted, at least in relation general damages. This will have particular relevance where claimants have sued both in terms of the Road Accident Fund Act and in terms of the common law and/or where there is a dispute as to which driver is to blame.

The fact that the Road Accident Fund can still, in terms of the current Bill, from a practical point of view, avoid liability in relation to a claim from a passenger by contending that the accident was as a result of the sole negligence of the driver of the vehicle in which the claimant was being conveyed will only serve to encourage litigation on merits rather than resolving claims.

#### 2(1) (f)

This sub-section is not clear. It appears as if the intention is that claims of suppliers arising before 1 August 2008 will not be subjected to any tariffs which might be prescribed limiting the liability of the Road Accident

Fund for emergency and/or other treatment.

However, it could also mean that those claims are still subject to the R25 000.00 cap.

### 2(1)(g)

As currently drafted, it appears that this provision applies only to absolve owners, drivers and employers from common law liability if the third party does not "*expressly and unconditionally*" indicate to the Fund "*on the prescribed form*" within one year to have his or her claim remain governed by the old Act.

However, if the injured third party is under a legal impediment, the running of this period is delayed until the impediment ceases. This could result in protracted uncertainty to potential common law defendants.

It is again presumed that the intention is that the guardian or curator ad litem is empowered to make an election on the part of the person under a legal impediment and that a common law defendant would have to accept the decision if it was to have the claim remain subject to the old Act and therefore to retain the common law claim. This could be clarified.

There is, as yet, no prescribed form.