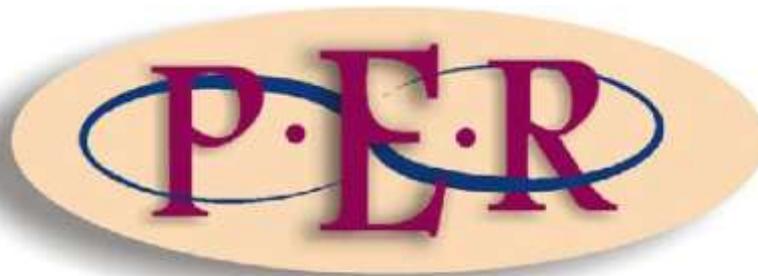


Author: AN Wagener

**THE IMPACT ON WOMEN ON THE REMOVAL OF GENDER AS A
RATING VARIABLE IN MOTOR-VEHICLE INSURANCE**

ISSN 1727-3781



2013 VOLUME 16 No 1

<http://dx.doi.org/10.4314/pej.v16i1.15>

THE IMPACT ON WOMEN ON THE REMOVAL OF GENDER AS A RATING VARIABLE IN MOTOR-VEHICLE INSURANCE

AN Wagener*

1 Introduction

It is common insurance business practice that South African motor-vehicle insurers use gender as a rating variable to classify risks into certain classes and to determine insurance premiums.¹ Whether the insured is male or female could have a significant impact on the cost of his or her premium. Men pay higher motor-vehicle insurance premiums as they are considered as a higher risk group. Women drivers can pay up to 40 per cent less than men on motor-vehicle insurance premiums as they are considered a lower risk.² Statistics show that women are involved in up to 20 per cent fewer motor-vehicle accidents than men and, when a woman is involved in a motor-vehicle accident her average repair cost is up to 35 per cent less than the average man's repair cost. It has also been found that women take fewer risks, make more careful decisions, and are more likely than men to abide by the speed limit while driving.³

The use of gender as a rating variable is not exclusive to the South African insurance industry but is widely used in overseas insurance markets. However, a recent European Court of Justice decision has ruled that the countries of the European Union are prohibited from using gender as an insurance-rating variable as from 12 December 2012.⁴ This decision has reminded South African insurers that their

* Anthea Natalie Wagener. LLB (UP) LLM (Unisa). Lecturer, Department of Mercantile Law, Unisa, South Africa. Email: Wagenan@unisa.ac.za. This article is partly based on the author's unpublished masters' dissertation entitled "The Use of Age and Gender as Rating Variables in Motor-Vehicle Insurance" (Unisa Pretoria 2011).

¹ Classification of risk is not limited to gender but other rating variables will not be discussed for the purposes of this article. They include but are not limited to age, geographical location, and years licensed.

² First for Women Date unknown <http://bit.ly/16pBB9l>.

³ First for Women Date unknown <http://bit.ly/ZuTqh2>.

⁴ ECJ 2011 <http://bit.ly/X5Ot1G>.

discriminatory insurance practices may also be subject to change if this matter is brought before a South African Court.⁵

A South African Court has not yet had the opportunity to decide on whether or not the use of gender as a rating variable amounts to unfair discrimination. The purpose of this article is to specifically examine the impact that the removal of gender as a rating variable in motor-vehicle insurance would have on women, and whether the effects thereof would influence a South African Court's decision in determining if the use of gender as a rating variable amounts to unfair discrimination. This article examines the findings of American and Canadian Courts in determining this same issue, and after considering South African equality legislation provides recommendations for a South African Court.

2 Analysis of American case law

The American cases discussed have been selected because they aptly illustrate the issue of unfair discrimination that arise from the use of gender as a rating variable in the insurance industry. The decisions vary from decisions of the United States Supreme Court to decisions of various lower courts.

Conflicting approaches exist in American case law in considering if the use of gender as a rating variable amounts to unfair discrimination. The most considerable impact that arose from the cases was the negative effect of the increased cost of motor-vehicle insurance premiums for women. Cases which required the removal of gender as a rating variable will be discussed first, and thereafter there will be a discussion of the cases which allowed gender as a rating variable.

⁵ Vivian 2011 *Cover Magazine* 36; Fourie 2011 *Cover Magazine* 40.

2.1 American case law which found in favour of the removal of gender as a rating variable in motor-vehicle insurance

In *Hartford Accident and Indemnity Company v Insurance Commissioner of the Commonwealth of Pennsylvania*,⁶ and *Pennsylvania National Organisation for Women v Commonwealth of Pennsylvania Insurance Department*⁷ found in favour of the removal of gender as a rating variable in motor-vehicle insurance, despite the impact that it would have on women.⁸

In *Hartford* the Supreme Court of Pennsylvania had to interpret section 3(d) of the *Casualty and Surety Rate Regulation Act*⁹ ("the *Rate Act*"), and decide whether or not the conduct of the insurer constituted unfair discrimination when it required Philip V Mattes, a twenty-six year old unmarried male with an unblemished driving record, to pay more in annual motor-vehicle insurance premiums for identical cover than a similarly situated female.¹⁰ Section 3(d) of the *Rate Act* provided that "rates shall not be excessive, inadequate or unfairly discriminatory", a matter where the motor-vehicle insurer required a twenty-six year old unmarried male with an unblemished driving record to pay more (in annual motor-vehicle insurance premiums, for identical cover) than a similarly situated female. The Act did not provide any definition of the phrase "unfair discrimination". Upon giving the *Rate Act* a wide interpretation, the Court found that the insurer's use of gender-based rating constituted unfair discrimination. Although the Court was fully aware of the effect of the removal of gender as a rating variable, it found it appropriate to look beyond

⁶ *Hartford Accident and Indemnity Company v Insurance Commissioner of the Commonwealth Pennsylvania* 482 A 2d 542 (SC Pa, 1984) (hereafter "*Hartford*").

⁷ *Pennsylvania National Organisation for Women v Commonwealth of Pennsylvania Insurance Department* 551 A 2d 1162 (Pa Cmwlth, 1988) (hereafter "*Pennsylvania National Organisation for Women*").

⁸ In both *City of Los Angeles, Department of Water and Power v Manhart* 98 S Ct 1370 (1978) and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v Norris* 103 S Ct 3492 (1983), the Courts disallowed the use of gender as a variable for employees' pension calculations. These judgments are limited to the employment context and will not be discussed for the purposes of this article.

⁹ *Casualty and Surety Rate Regulation Act*, 1947.

¹⁰ *Hartford* 543-544, paras I-II.

actuarial statistics and give effect to the *Rate Act* to ensure equality of rights under the law.

In *Pennsylvania National Organisation for Women*, the Pennsylvania National Organization for Women ("NOW") appealed against the decision of the Insurance Commissioner, who had found it permissible to implement uniform motor-vehicle insurance rates for both men and women. NOW alleged that women should pay lower insurance premiums than men. This was based on the fact that, on average, women drive shorter distances than men and were therefore less likely to have motor-vehicle accidents. Further, NOW suggested that the gender-neutral approach towards rate-making violated the *Equal Rights Amendment*,¹¹ as women would in effect be subsidising men's rates. NOW provided evidence that rate structures had to be based on mileage, and that insurance companies' failure to do so gave rise to discriminatory insurance practices.¹² NOW concluded that the finding of the Commissioner, being that there was no direct link between risk of loss and mileage, was contradicted by the weight of their evidence.

The Commonwealth Court of Pennsylvania found that the Commissioner's decision to implement the use of a flat insurance rate for men and women did not violate the *Equal Rights Amendment*,¹³ as insurers had established that there was no direct link between mileage and insurance costs.¹⁴ The Court held that despite gender-based rating resulting in women having to bear more than their share of the risk, there was no violation of the *Equal Rights Amendment* as its purpose was to eliminate distinctions based on gender.¹⁵

It is clear that the Courts in *Hartford* and *Pennsylvania National Organisation for Women* did not approve of the use of gender as a rating variable. The outcome of *Hartford* and *Pennsylvania National Organisation for Women* has a negative financial

¹¹ *Constitution of the Commonwealth of Pennsylvania*: Article I, section 28. Commonly referred to as the *Equal Rights Amendment Pa Const Art I, §28*.

¹² *Pennsylvania National Organisation for Women* 1164.

¹³ *Equal Rights Amendment Pa Const Art I, §28*.

¹⁴ *Pennsylvania National Organisation for Women* 1167.

¹⁵ *Pennsylvania National Organisation for Women* 1167.

impact on women. Women will pay higher motor-vehicle insurance premiums than men, in order to subsidise the increased risk that men pose. As a result of the increased financial burden on women, there could be a redistribution of wealth from women to men. It is argued that this could not have been the intention of the *Equal Rights Amendment*.¹⁶ The intention of the latter was not to impose different benefits or burdens upon anyone based solely on their gender. The minority judgment of *Hartford* warned that this would translate into excessive rates for young women and inadequate rates for young men. When one considers the increased burden placed on women by their having to subsidise men's motor-vehicle insurance premiums, the question that arises is whether or not these judgments result in reverse discrimination, which could be seen as just another form of unfair discrimination.¹⁷

Further, it is argued that the Court in *Hartford* erred, as discrimination in terms of insurance rates should have been considered from an economic viewpoint. From this perspective no injustice exists when a price is increased in line with an increase in product cost. For example, the further away that a purchased product is from the place of delivery, the higher the delivery cost. Likewise, two similar products can also differ in price due to product characteristics. It is argued that insurance is also an economic product and should be treated as such, and that *Hartford* failed to view insurance in its proper economic context.¹⁸

2.2 American case law which did not find in favour of the removal of gender as a rating variable in motor-vehicle insurance

In *Insurance Services Office v Commissioner of Insurance*¹⁹ and in *State of Florida, Department of Insurance v Insurance Services Office*,²⁰ the Courts disapproved of the removal of gender as a rating variable in motor-vehicle insurance.

¹⁶ Miller 1984-1985 *Duq L Rev* 627.

¹⁷ Kimball 1979 *Am Bar Found Res J* 103.

¹⁸ Miller 1984-1985 *Duq L Rev* 624-626.

¹⁹ *Insurance Services Office v Commissioner of Insurance* 381 So 2d 515 (La Ct App, 1979) (hereafter "*Insurance Services Office*").

²⁰ *State of Florida, Department of Insurance v Insurance Services Office* 434 So 2d 908 (Fla App Dist, 1983) 913-914 (hereafter "*State of Florida, Department of Insurance*").

In *Insurance Services Office*, the Commissioner of Insurance of the State of Louisiana sought an order against all insurers in the state to refrain from using both age and gender as rating variables in motor-vehicle insurance as it considered it to amount to unfair discrimination. The Court held that the use of age and gender was reasonable, as a sound statistical basis existed to substantiate their use. The Court found that if age and gender were disallowed, this would result in women and all other insureds over the age of 24 years, who constitute 75 per cent of all drivers, paying a higher premium. Those under the age of 25 years would pay substantially less. The Court held that this also amounted to reverse discrimination as older and more experienced drivers would have to subsidise younger drivers.²¹

State of Florida, Department of Insurance similarly involved an appeal against a rule that was to prohibit, *inter alia*, gender as a rating variable for motor-vehicle insurance. The Court rejected an argument that the use of gender as a rating variable is socially unacceptable and found that the use thereof would be unfair only if it were found to be actuarially unsound. As evidence shows that the use of gender is actuarially sound, the Court disapproved of the removal thereof. The Court also rejected an economic impact statement prepared by the Department of Insurance as it did not reflect the estimated cost consequences of the removal of gender as a rating variable.

2.3 American case law: Conclusion

In conclusion, it appears that the removal gender as an insurance rating variable would have a considerable impact on women, as indicated in *Insurance Service Office* and *State of Florida, Department of Insurance*. However, *Hartford* and *Pennsylvania National Organisation for Women* did not consider or find it necessary to consider all the possible implications of their judgments. They were all aware that the result of their judgments would be that if they were to remove age and gender

²¹ *Insurance Services Office* 527.

as rating variables the higher risk group would ultimately subsidise the lower risk group. Although this was the most obvious consequence of their judgments, that did not affect their decisions. They ultimately considered equal treatment to be a priority and did not find the financial repercussions to carry enough weight to necessitate a different approach.

3 Analysis of Canadian case law

The Canadian cases discussed were selected because they also aptly illustrate the issue of unfair discrimination that arises from the use of gender as a rating variable in the insurance industry. In both *Zurich Insurance Co v Ontario (Human Rights Commission)*²² and *Co-operators General Insurance Co v Alberta (Human Rights Commission)*²³ the Courts disapproved of the removal of gender as a rating variable in motor-vehicle insurance.

In *Zurich* the insured lodged a complaint with the Board of Enquiry that the insurer discriminated against him on the bases of age, sex and marital status. The insurer required the insured, a single, 20-year-old male, to pay a higher monthly motor-vehicle insurance premium based on his age, sex and marital status than that of young single female drivers, young married male drivers and any other drivers above 25 years of age.²⁴ The Supreme Court of Canada had to determine whether or not in terms of the Human Rights Code,²⁵ the insurer's differentiation was based on "reasonable and *bona fide* grounds".²⁶ The Court found that disallowing discriminatory rating variables would have the result that high-risk drivers would be pooled together with lower-risk drivers. The Court held that it would be unreasonable to pool such classes together without available statistics to justify such a classification, and found individualised assessment of each insured to be wholly

²² *Zurich Insurance Co v Ontario (Human Rights Commission)* 1992 93 DLR (4th) 346 (SC Can) (hereafter "*Zurich*").

²³ *Co-operators General Insurance Co v Alberta (Human Rights Commission)* 1993 107 DLR (4th) 298 (Alta CA) (hereafter "*Co-operators*").

²⁴ *Zurich* 349 para a-b.

²⁵ *Human Rights Code*, 1981.

²⁶ *Zurich* 376 para h.

impractical. The Court found the insurer's use of the discriminatory rating variables to be justifiable.

In *Co-operators* the Court accepted actuarial evidence that showed that the removal of gender as a rating variable would substantially increase the cost of motor-vehicle insurance for young female drivers. The removal of gender as a rating variable would also provide cheaper premiums for young male drivers, who were high-risk drivers. Actuarial evidence also showed that gender becomes less important as a rating variable once an insured is approximately 25 years of age. The Court found that the removal of gender as a rating variable would have a greater impact on young female drivers than on other interested groups. This finding led the Court to find that the removal of gender as a rating variable would have an unfair outcome and to disapprove of the removal thereof as a rating variable in motor-vehicle insurance.²⁷

3.1 Canadian case law: Conclusion

In conclusion, both *Zurich* and *Co-Operators* did not find the need to remove offending rating variables in motor-vehicle insurance to outweigh the significant impact that it would have on women. The Courts did not approve that women would have to cross-subsidise men and carry the increased cost, despite their being the lower-risk group. The Courts ultimately considered the avoidance of the negative financial repercussions that it would have on women a priority, and did not find the right to equal treatment to carry enough weight to necessitate a different approach.

However, a development in Canadian case law has occurred that could possibly influence case law that is similar to the decisions of *Zurich* and *Co-operators* in the future.

²⁷ *Co-operators* 318-321.

3.2 Developments in Canadian case law subsequent to Zurich and Co-operators

The developments in Canadian Case law that followed *Zurich* and *Co-operators* were *British Columbia (Public Service Employee Relations Commission) v BCGSEU*²⁸ (hereafter "*Meiorin*") and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (hereafter "*Grismer*").

In *Meiorin*²⁹ the Supreme Court of Canada established a test (hereafter the "*Meiorin* test") to determine if discrimination is justifiable.³⁰ Although *Meiorin* dealt with discrimination in the employment context, this case is applicable to insurance matters which involve possible unfair discrimination, as the Court noted that the *Meiorin* test is appropriate for interpreting all discrimination matters in Canada.³¹

The *Meiorin* test is a three-step test that requires the employer to establish, on a balance of probabilities, that:

- a) the employer adopted the standard for a purpose rationally connected to the performance of the job;
- b) the employer adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

²⁸ *British Columbia (Public Service Employee Relations Commission) v BCGSEU* 1999 3 SCR 3; 127 DLR (4th) 1 (SC Can) (hereafter "*Meiorin*").

²⁹ *Meiorin* involved a female fire fighter, Tawny Meiorin, who was discriminated against as she could not pass a compulsory fitness test for fire fighters imposed by her employer. The fitness test was more appropriate for testing the fitness level of males than of females.

³⁰ In hearing cases of discrimination before *Meiorin*, Canadian Courts tried to determine whether the discrimination was direct or indirect. This is termed a bifurcated approach. In *Meiorin*, the Supreme Court broke away from the bifurcated approach to employment discrimination, by erasing the distinction between direct and indirect discrimination regarding employer defences. The Supreme Court replaced the bifurcated approach to discrimination by introducing a unified test applicable to matters concerning both direct and indirect discrimination. The *Meiorin* test removed the distinction of having separate tests for each type of discrimination. See *Meiorin* 11-13.

³¹ *Meiorin* 13 para 25.

- c) the standard was reasonably necessary to the accomplishment of that legitimate work-related purpose; to show that the standard was reasonably necessary, it must demonstrate that it was impossible to accommodate individual employees sharing the characteristics of the claimant, without imposing undue hardship on the employer.³²

The Court elaborated on the third step in the test to include a number of questions which could be raised in the course of its analysis:

- a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing, against a more individually sensitive standard?
- b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
- c) Is it necessary for all employees to meet the single standard, in order for the employer to accomplish its legitimate purpose, or could standards reflecting group or individual differences and capabilities be established?
- d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
- e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?
- f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?³³

The *Meiorin* test incorporates the duty to accommodate the individual on an individual basis by seeking practical alternatives (as the above questions demonstrate), rather than to view the individual as a member of a group.³⁴ In this regard, *Meiorin* is relevant to insurance discrimination, as it is in the nature of

³² *Meiorin* 24-25 para 54.

³³ *Meiorin* para 65.

³⁴ Seiner 2006 *Yale L & Pol'y Rev* 127. See also Braun 2005-2006 *Rev Const Stud* 123-124; Pothier 1999 *Constitutional Forum* 20-21.

insurance to divide individuals into groups for the purposes of risk assessment and the calculation of premiums.

The decision of *Grismer* followed shortly after the *Meiorin* judgment, and the Supreme Court of Canada again applied the *Meiorin* test. *Grismer* involved a matter of discrimination on the grounds of disability and the Supreme Court confirmed that the *Meiorin* test applies to all claims of discrimination under the British Columbia Human Rights Code.³⁵ Further, *Grismer* defined "accommodation" as referring to what is required under the circumstances to avoid discrimination.³⁶ *Grismer* also found that the defendant bears the burden of demonstrating that the standard incorporated every possible accommodation up to the point of undue hardship. The hardship could take the form of increased cost, and it would have to be regarded as undue before being accepted as a defence. The fact that such hardship would not be an acceptable defence could be particularly relevant as a guideline to insurers who wish to ascertain to what lengths they need to go to accommodate the insured.

Upon considering the *Meiorin* test in the insurance context, the first and second step of the test would perhaps not pose a problem for insurers.

The first step requires a rational connection between the standard and its purpose and is aimed at determining the validity of the standard's general purpose. This step would require the insurer to show a rational connection between the provision of premiums commensurate with the risk and the use of discriminatory rating variables, and this should be easy to prove.³⁷

The second step of the test incorporates a subjective element to determine the intention of the employer. This step of the test should also not be a concern for the insurer as it would have to show that the discriminatory rating variables were

³⁵ *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* 1999 3 SCR 868; 1999 181 DLR (4th) 385 (SC Can) 393 para 19 (hereafter "*Grismer*").

³⁶ *Grismer* 394 paras 22, 32.

³⁷ Lemmens and Thiery "Insurance and Human Rights" 283-284.

adopted honestly and in good faith in order to determine risk. However, the third step of the test could present a challenge for insurers.

The third step of the test requires that the standard is reasonably necessary. This could be a challenge for insurers to prove, as this step requires justification of the use of gender as a rating variable and also imposes the duty of accommodation on the insurer.³⁸

The insurer would have to justify the use of gender as a rating variable in motor-vehicle insurance by showing it to be reasonable and necessary. Evidence would have to be obtained by the insurer to show, firstly, the need for gender discrimination and, secondly, the impossibility of using a less discriminatory alternative.³⁹

Evidence would also have to show that the duty to accommodate the insured was fulfilled by the insurer, as it had made every possible accommodation short of undue hardship. The duty to accommodate would place an obligation on the insurer to individually assess the insured to determine his or her individual risk, in contrast to simply viewing the insured as a member of a group. As held in *Grismer*, accommodation by the insurer short of undue hardship can take the form of increased cost, and it would have to be regarded as undue before being accepted as a defence. It would be considered as undue when it can be proved that the increased cost would have a serious impact on the financial viability of the insurer and the availability of its insurance products.⁴⁰

In conclusion, it is clear that the *Meiorin* test places a large evidentiary burden on the insurer, and reasons given such as in *Zurich* that individual assessment of each insured is wholly impractical would appear no longer to carry any weight in terms of the *Meiorin* test. The insurer's duty to accommodate the insured up to the point of

³⁸ Lemmens and Thiery "Insurance and Human Rights" 278. See also Sheppard 2001 *McGill L J* 539-541.

³⁹ Lemmens and Thiery "Insurance and Human Rights" 283.

⁴⁰ Lemmens and Thiery "Insurance and Human Rights" 285.

undue hardship could require the insurer to assess an insured individually to determine the risk that the particular insured poses. This assessment would exclude the use of discriminatory rating variables and compel insurers to make use of rating variables such as the accident record and mileage instead. The result of individual risk assessment may be that each insured would be accurately classified according to the risk pool to which he or she belongs. The insured would then be required to pay a premium that reflected his or her individual risk. The result that such an individual risk assessment could have on the insured is that, depending on the risk, the insured could either pay more, less, or the same premium that he or she would have paid if he or she had been assessed by making use of discriminatory rating variables.

4 Analysis of South African law

Upon a South African Court having to decide a matter concerning the removal of gender as a rating variable section, the Court would have to apply the test for equality set out in sections 14(2) and 14(3) of the *Promotion of Equality and Prevention of Unfair Discrimination Act*⁴¹ ("the *Equality Act*"). The test specifically sets out to determine if the present discrimination is unfair.

Section 14(2) of the *Equality Act* requires that a number of factors must be taken into account in determining whether or not the respondent has proved that the discrimination is fair. The factors that have to be considered are (a) the context; (b) the factors referred to in section 14(3); and (c) whether or not the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria that are inherent in the activity concerned.

Section 14(2)(b) requires that the list of nine criteria to determine whether or not the respondent has proved that the discrimination is fair, which list is set out in

⁴¹ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter the "*Equality Act*").

section 14(3), has to be considered by a Court. The list, which is not exhaustive, includes the following:

- a) whether the discrimination impairs or is likely to impair human dignity;
- b) the impact or likely impact of the discrimination on the complainant;
- c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- d) the nature and extent of the discrimination;
- e) whether the discrimination is systemic in nature;
- f) whether the discrimination has a legitimate purpose;
- g) whether and to what extent the discrimination achieves its purpose;
- h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
 - i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
 - ii) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - iii) accommodate diversity.

An influential factor in a South African Court's decision in determining if the use of gender as a rating variable amounts to unfair discrimination would be section 14(3)(c). Historically South African women have suffered from patterns of disadvantage and are viewed as being more vulnerable in the South African context. On the other hand, it is predictable that insurers would place great emphasis on section 14(3)(f) to prove that discrimination based on gender has a legitimate purpose.⁴²

Further, Item 5 of the Schedule to the *Equality Act* identifies three illustrative practices in the insurance industry which may possibly be considered to amount to

⁴² For a further analysis of the application of s 14(2)(b) and 14(3) of the *Equality Act*, see Kok 2002 *SAJHR* 72-76.

unfair discrimination.⁴³ The second practice listed in Item 5 is of particular relevance *inter alia* for gender discrimination as it prohibits "unfair discrimination in the provision of benefits, facilities and services related to insurance". It identifies this type of discriminatory insurance practice, specifically the placing of an advantage or disadvantage to persons based *inter alia* on gender as being possibly unfair. Should a South African Court find that the practice of charging higher premiums for males and for younger drivers is unfair under this Item, insurers would not be allowed to discriminate based on age and gender.

In considering the approach a South African Court could take, it appears that the outcome, as with the American judgments and with the Canadian judgments of *Zurich* and *Co-operators*, would either be to find that the use of gender as a rating variable amounts to unfair discrimination or to disregard the right to equality in order to prevent the negative financial effect that such a finding would have on women. Regardless of what a South African Court would decide, both possible outcomes have undesirable consequences. If it is decided that the use of gender as a motor-vehicle insurance rating variable amounts to unfair discrimination, women would have to pay elevated motor-vehicle insurance premiums. If a Court decides that the financial impact on women is too substantial, it would continue to allow discrimination based on gender.

A number of further questions arise: Is there not a midway point between the extremes of disregarding the right to equality and the consequence of women subsidising men? Why can insurers not rather adopt a reformed approach to risk assessment? Would a South African Court not be more inclined to remove age and gender discrimination if there were no significant consequences for women? Could a balance be achieved between disregarding discriminatory rating variables and not penalising women for their removal? The answers appear to lie in the test formulated in *Meiorin*.

⁴³ See also Albertyn, Goldblatt and Roederer *Promotion of Equality* 115.

5 Recommendations for a South African Court

This article suggests that a balance between disregarding discriminatory rating variables and not penalising women for their removal can be found. An approach that achieves such a balance could be termed a "reformed approach". It is submitted that a test similar to the *Meiorin* test might support such a reformed approach. The *Meiorin* test requires the insurer to accommodate the insured up to the point of undue hardship through seeking practical alternatives. This approach would require a South African insurer to accommodate the insured by seeking practical alternatives up to the point of undue hardship when classifying the risk posed by the insured.

This reformed approach would prescribe that the insurer is to take extensive steps when classifying the insured. It is not unique for extreme steps to be required to be taken to accommodate consumers. In terms of section 81(2) of the *National Credit Act*,⁴⁴ for instance, an extensive enquiry related to a consumer's finances is required before credit is granted. This enquiry is accommodated by banks and similar institutions, despite the additional costs involved. There does not appear to be any reason why a similar process, which requires the insurer to take further steps to assess the risk posed by the individual insured, cannot be expected from an insurance company.

Thus, rather than using gender as a rating variable the insurer can individually assess the insured (at least up to the point before undue hardship) with the use of appropriate, neutral rating variables suited to the particular circumstances of the insured. This would require a much more intensive and individual risk evaluation and would require the insurer to "tailor-make" insurance for each individual insured. For example, the insurer could require the insured to take an advanced driving test to determine his or her level of skill as a driver. This test could be ongoing, to continually assess the insured's skills and to afford the insured, especially the newly licensed, the opportunity to lower his or her premiums through improved driving

⁴⁴ *National Credit Act* 34 of 2005.

skills. Another example of individual risk assessment is for the insurer to keep record of all the insured's traffic fines, thus continually assessing the road usage of the insured and being able to adjust the premiums accordingly.

The intensive and accurate classification of each insured would result in the insured truly paying premiums in accordance with the individual risk that he or she poses, without the use of age or gender as immutable rating variables or any form of a blanket approach to risk assessment.

At most, this reformed approach to insurance risk assessment would result in an inconvenience and increased cost to the insurer. In the case of *Grismer* a reasonably elevated cost might be considered as fair. However, the right to equality most certainly outweighs the inconvenience suffered by the insurer and it would quite possibly be viable for the insurance industry to absorb such an additional cost, especially when considering the size of the industry and increasing technological advances, which could reduce the cost and inconvenience involved. For example, "tailor-made" online risk assessment would reduce consultation and administrative costs. An insured may also need to be re-evaluated on a more regular basis, and online risk assessment could facilitate this process.

Very importantly, this reformed approach to insurance-risk assessment would not result in women having to subsidise men and would also be suited to the economic model of insurance, as the insured would have to pay in proportion to the cost of the product. If the insured is paying a higher premium, he or she has only his or her own self to hold accountable, as it would be the result of his or her own conduct.

Further, this reformed approach is not limited to the issue of intensive and fair risk assessment. It could also result in other related benefits. It could encourage better road usage in order to prevent loaded premiums and possibly encourage road users to take advanced driving courses in order to reduce their premiums. Insureds would feel individually responsible for the amount of their premium, and this could result in their improving their driving skills. For example, regardless of gender or age, an

individual who often causes accidents, has numerous speeding fines and drives at high-risk times such as late at night over weekends, would pay an increased premium in comparison to an individual regardless of gender who has never been the cause of an accident, has attended an advanced driving course, has no speeding fines and generally drives at low-risk times. However, the high-risk driver could eventually lower his premiums if he or she attended a driving course, drives within speed limits and remains accident-free for a reasonable period of time. Like building up a "credit record", the insured driver has the opportunity to build up a favourable "insurance driving record".

It is proposed that no fixed set of variables be used, as not all would be appropriate for each circumstance. For example, it would be inappropriate to use the "number of years licensed" for a young driver with only a few years of driving experience. An insurer could rather, for example, enquire as to the young insured's intended use of the vehicle, average mileage and social habits and require the young driver to complete an advanced driving test.

This reformed approach may, however, be disadvantageous in certain respects. If insurers require the insured to absorb the additional cost of individualized risk assessment, this may cause there to be more uninsured drivers on the road, given that motor-vehicle insurance is not (at present) compulsory. It may also discourage high-risk drivers from being insured due to their premiums being loaded.

6 Conclusion

As the *Equality Act* identifies that the discriminatory insurance practice of disadvantaging or advantaging persons based *inter alia* on their gender may possibly be unfair, South African insurers will have to consider more neutral methods of risk assessment. Insurers rely on accurate risk assessment methods to determine accurate premiums, and insureds, in turn, have the right not to be unfairly discriminated against. Therefore this article suggests a reformed approach which breaks away from the traditional discriminatory risk assessment practices without

the undesirable consequences of women subsidizing men or the continuation of discriminatory risk assessment based on gender. It is possibly just a matter of time before such a matter is heard by a South African Court, and it is hoped that the Courts will consider more neutral options than handing down a decision that has undesirable consequences.

Bibliography

Albertyn, Goldblatt and Roederer *Promotion of Equality*

Albertyn C, Goldblatt B and Roederer C (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000* (Witwatersrand University Press Johannesburg 2001)

Braun 2005-2006 *Rev Const Stud*

Braun E "Adverse Effect Discrimination: Proving the Prima Facie Case" 2005-2006 *Rev Const Stud* 119-150

Fourie 2011 *Cover Magazine*

Fourie C "Gender Ruling Unlikely to Affect South African Motorists" 2011 *Cover Magazine* April 40

Kimball 1979 *Am Bar Found Res J*

Kimball SL "Reverse Sex Discrimination: Manhart" 1979 *Am Bar Found Res J* 83-139

Kok 2002 *SAJHR*

Kok A "Motor Vehicle Insurance, the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act" 2002 *SAJHR* 59-85

Lemmens and Thiery "Insurance and Human Rights"

Lemmens T and Thiery Y "Insurance and Human Rights: What can Europe Learn from Canadian Anti-discrimination Law?" in Van Schoubroek C and Cousey H (eds) *Discriminatie in Verzekering – Discrimination et Assurance* (Maklu Antwerpen-Apeldoorn 2007) 253-294

Miller 1984-1985 *Duq L Rev*

Miller RA "Discrimination by Gender in Automobile Insurance: A Note on *Hartford Accident and Indemnity Co v Insurance Commissioner*" 1984-1985 *Duq L Rev* 621-630

Pothier 1999 *Constitutional Forum*

Pothier D "BCGSEU: Turning a Page in Canadian Human Rights Law" 1999 *Constitutional Forum* 19-29

Seiner 2006 *Yale L & Pol'y Rev*

Seiner JA "Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach" 2006 *Yale L & Pol'y Rev* 95-142

Sheppard 2001 *McGill L J*

Sheppard C "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v BCGSEU*" 2001 *McGill L J* 533-569

Vivian 2011 *Cover Magazine*

Vivian RW "Gender Discrimination and Insurance: Economists versus Lawyers" 2011 *Cover Magazine* April 36

Register of cases

Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v Norris 103 S Ct 3492 (US SC, 1983)

British Columbia (Public Service Employee Relations Commission) v BCGSEU 1999 3 SCR 3; 127 DLR (4th) 1 (SC Can)

British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights) 1999 3 SCR 868; 1999 181 DLR (4th) 385 (SC Can)

City of Los Angeles, Department of Water and Power v Manhart 98 S Ct 1370 (US SC, 1978)

Co-operators General Insurance Co v Alberta (Human Rights Commission) 1993 107 DLR (4th) 298 (Alta CA)

Hartford Accident and Indemnity Company v Insurance Commissioner of the Commonwealth Pennsylvania 482 A 2d 542 (SC Pa, 1984)

Insurance Services Office v Commissioner of Insurance 381 So 2d 515 (La Ct App, 1979)

Pennsylvania National Organisation for Women v Commonwealth of Pennsylvania Insurance Department 551 A 2d 1162 (Pa Cmwlth, 1988)

State of Florida, Department of Insurance v Insurance Services Office 434 So 2d 908 (Fla App Dist, 1983)

Zurich Insurance Co v Ontario (Human Rights Commission) 1992 93 DLR (4th) 346 (SC Can)

Register of legislation

Casualty and Surety Rate Regulation Act, 1947

Constitution of the Commonwealth of Pennsylvania

Human Rights Code, 1981

National Credit Act 34 of 2005

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Register of internet sources

ECJ 2011 <http://bit.ly/X5Ot1G>

European Court of Justice *Case 236/09, Association belge des Consommateurs Test-Achats ASBL, Yann van Vugt, Charles Basselier v Conseil des ministres* <http://bit.ly/X5Ot1G> [date of use 30 Jan 2012]

First for Women Date unknown <http://bit.ly/16pBB9I>

First for Women Date unknown *About First for Women* <http://bit.ly/16pBB9I> [date of use 17 Feb 2012]

First for Women Date unknown <http://bit.ly/ZuTqh2>

First for Women Date unknown *Why We Insure Women* <http://bit.ly/ZuTqh2>
[date of use 17 Feb 2012]

List of abbreviations

Am Bar Found Res J	American Bar Foundation Research Journal
Duq L Rev	Duquesne Law Review
ECJ	European Court of Justice
McGill L J	McGill Law Journal
Rev Const Stud	Review of Constitutional Studies
SAJHR	South African Journal of Human Rights
Yale L & Pol'y Rev	Yale Law & Policy Review