

Department for Transport

Review of the Uninsured and Untraced Drivers' Agreements



A response by the Association of Personal Injury Lawyers

April 2013

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,400 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

We welcome the opportunity to respond to the Department of Transport's review of uninsured and untraced drivers' agreements. APIL welcomed the MIB's invitation to discuss changes to these agreements in 2009, which unfortunately did not produce a workable solution to many of the concerns raised at the time. Our comments in this response also draw upon those 2009 discussions with the Motor Insurers Bureau. With regard to uninsured and untraced drivers, it is extremely important the principle of equivalency is observed – the innocent insured driver should be able to claim against an uninsured driver in the same way that they can claim against an insured driver. At present, the agreements in place with the MIB are too contract-like, with numerous limitations and exceptions allowing the MIB to escape liability. This means that victims of uninsured drivers will be less likely to obtain the compensation that they deserve than those injured by an insured driver, and this should not continue. Further, APIL suggests that the Uninsured and Untraced Drivers agreements should be codified as a proper compensatory scheme. It is also important that the arrangements for uninsured and untraced drivers should not be considered in isolation to the statutory provisions for insured and insufficiently insured drivers.

Section 1 - Procedural requirements

Notice Obligations on the claimant- Uninsured Agreement Only

Q1 Do you agree that, if the MIB is required to be named as an additional defendant in a claim and the claim form is submitted to the MIB within a reasonable time frame, then the procedural or notice obligations on the claimant in clauses 8 to 12 of the present Uninsured Agreement can be removed? If you do not agree, can you please explain your reasons why?

We agree. APIL has previously agreed with the Motor Insurance Bureau that it would be a great improvement if the notice and service requirements contained in clauses 8 to 12 were simplified and, where appropriate, removed.

The requirement the MIB should be joined as an additional defendant, and be served with the same documents as the uninsured defendant, is a sensible one. To impose a penalty that deprives an otherwise deserving claimant from any right to claim compensation if this is not done 'at the outset', is as disproportionate as it is oppressive and it goes far beyond any measure that the MIB might reasonably require. In every other case and for all other claimants it is still possible to add a new party after an action has commenced, the same should apply in claims involving the MIB, to avoid a denial of access to justice.

Q2 Do you agree that clause 13 serves no useful purpose anymore?

We agree with this. APIL has previously expressed concerns that the consequences of failing to comply with s154 RTA 1988 requirements as contained in clause 13 are too severe. The clause was drafted before the advent of the Motor Insurance Database Information System (MIDIS), and times have changed. In light of this, APIL suggests that clause 13 should be removed completely.

Q3 What do you consider to be a reasonable timeframe for the claim form to be submitted to the MIB and when it should run from?

We feel that three years from the date of the accident is a reasonable time frame, as is the case in civil claims against insured drivers. This ensures that the victim of an uninsured driver is in an equal position to the victim of an insured driver. A driver or passenger should not be penalised if they happen to be unfortunate enough to be injured by an uninsured driver. Further, children and claimants under a disability should have the benefit of the extended limitation periods as set out for civil personal injury claims in the Limitation Act 1980.

The service of documents by claimants- Untraced Agreement only

Q4 Do you agree that a claimant should be able to serve documents by any of the forms allowed under the Civil Procedure Rules? If not, why not?

We agree. The claimant pursuing an insured driver is permitted to serve documents by any of the forms allowed under the Civil Procedure Rules. If the MIB is allowed to avoid liability by restricting the means by which the MIB can be served, then the victim of an untraced driver will be unnecessarily penalised. The principle of equivalency is very important, and the agreements for untraced and uninsured drivers should not involve traps and exclusions of which the claimant may not be aware.

The appointment of an arbitrator to approve a claim for protected parties such as minors and those without mental capacity if they are not legally represented- Untraced agreements only.

Q5 Do you agree that, for protected parties without legal representation, an arbitrator should be appointed to approve any award made by the MIB? If you do not agree, please give your reasons?

We agree that an arbitrator should be appointed to approve any award made by the MIB to protected unrepresented parties. It is important that there are safeguards in place to ensure that they have access to justice and full compensation.

Section 2 - Appeals and Disputes

The right for claimants to refer a dispute to an independent arbitrator for a decision-untraced agreement only

Q6 Do you agree that, under the Untraced Agreement, an independent arbitrator could be appointed to determine whether an extension of time should be allowed or whether an appeal is in time? If you do not agree, please explain your reasons?

Yes we agree. The requirement contained in clause 11(1)(b), that the claimant must give the MIB notice of appeal within six weeks from the date when he was given notice of the decision against which he wishes to appeal, is too strict. There may be mitigating circumstances which should allow him more time to appeal. Having an independent arbitrator to determine whether the claimant should be allowed more time will ensure fair results and access to justice.

Q7 What narrow range of circumstances do you think would help prevent abuse of the process?

An extension of time should be allowed in circumstances involving ill health of the claimant, mental health problems, where there is a lack of communication of the award, or where there is a lack of understanding of the information letter.

Q8 Do you agree that there should be a single dispute resolution process?

Yes, we agree.

The extent to which an arbitrator's decision is binding on the claimant and the MIB-Untraced agreement only

Q9 Do you agree that the MIB as well as the claimant should be required to agree that they accept the arbitrator's decision as final? If not, why not?

The MIB should not enjoy any superior notice or other privileges to those conferred on other defendants in this jurisdiction. However, it cannot be the case that the arbitrator's decisions are final. Appeals from arbitration are already provided for under the Arbitration Act 1996. Furthermore, there must be no bar to a *Francovich*-type action for breach of community law.

The right to an oral hearing with an arbitrator in respect of all disputes- Untraced agreement only

Q10 Do you agree with our proposal that a claimant should be entitled to an oral hearing for all disputes, including those not related to the award? If not, what are your reasons?

We agree that the claimant should be entitled to an oral hearing for all disputes, including those not related to the award. In *Andrews v MIB*¹ the MIB sought to argue that clause 24(4) of the untraced drivers' agreement restricted the costs in the arbitration to £500 per half day. Mr Justice Stuart-Smith QC ruled that this was wrong. Normal costs flow from the arbitration under the Arbitration Act. Secondly, rulings made in arbitration on the Untraced Drivers Agreement should be and should remain public rulings so that others can rely on rulings for the interpretation of the Agreement. This should be made clear in the Agreement.

Q11 Do you agree that there should be the potential for an arbitrator to impose a costs penalty if unreasonable challenges are made and pursued to an oral hearing? If not, what are your reasons?

Yes, we agree.

The right of a claimant to challenge the MIB's request for information or to take particular steps- Uninsured Agreement only

Q12 Do you agree that claimants should be able to appeal to an independent arbitrator rather than the Secretary of State if they dispute the reasonableness of the MIB's request for information under the Uninsured Agreement (present clause 19)? If not, what are your reasons?

We agree that claimants should be able to appeal to an independent arbitrator. In 2001, the Government pledged that its department should use alternative dispute resolution whenever possible. The Secretary of State may wish to consider the inclusion of a mediation clause within the new Uninsured Drivers Agreement so that a dispute is referred to mediation first before a costly and time consuming arbitration.

Section 3 - Provisions on Costs

The Legal Costs Regime- Untraced Agreement only

Q13 Do you agree that there should be more flexibility for the MIB to award more for legal expenses in exceptionally complex cases? If so, in what circumstances do you feel that such discretion should apply?

¹ [2012]

We agree that there should be more flexibility for the MIB to award more for legal expenses in all complex cases. It is necessary that the claimant has access to the legal representation and support that they require for the level of complexity of their case, in order to avoid a denial of access to justice. *Moore v Secretary of State for Transport and the Motor Insurers Bureau*² demonstrates that the MIB cannot be relied upon to investigate quantum in cases of any complexity, and that independent legal advice must therefore be sought in these cases. In *Moore*, an award was made by the MIB in the sum of £376,286, following a serious motor accident. The claimant's solicitors then appealed this, following advice on quantum from counsel valuing the claim at £1.19m. The arbitrator then increased the award to £585,134.56. Natural justice requires independent representation at the investigation and claim preparation stage; not just advice on quantum. In light of this, APIL recommends that the MIB carries out separate consultation on the setting of suitable fees for legal expenses, in accordance with the level of complexity and value of the claim.

Q14 Do you agree that the claimant should have the right of appeal to an arbitrator to challenge the MIB's refusal to award supplementary costs in an exceptionally complex case?

We agree.

Q15 Do you have any comments on how fixed costs at the bottom end of the scale could be amended to more accurately reflect the actual amount of legal fees which will necessarily be incurred in a low value, straightforward claim?

Q16 Do you agree with our proposal that the Agreement should be amended to make it clear that the MIB will include interest as if the claim was before a civil court? If not, please explain why not?

We agree.

Section 4 - General Issues

Knowingly entering an uninsured vehicle- Both Agreements

Q17 Do you agree that we should remove clauses 5(2)(d) and 6(3)(d) of the Untraced and Uninsured Agreements respectively? If not, why not?

² [2007] EWHC 879 (QB)

Article 10.2 of the Sixth Motor Insurance Directive permits only one exception for the MIB to escape liability; namely that “Member States may exclude the payment of compensation by the body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew that it was uninsured”. This exception must be interpreted restrictively (in keeping with the European Court of Justice rulings on the interpretation of other articles of the Directive, for example the stolen vehicle exception in Art 13)

In light of this strict interpretation, APIL has concerns with numerous exceptions in section 6 of the Uninsured Drivers Agreement, which allow the MIB to escape liability, outside of what is permitted in the Motor Insurance Directives.

- Clause 6(3)(d) Uninsured Drivers Agreement: this clause states that the burden of proving that the claimant knew or ought to have known of any matter set out in paragraph 6(1)(e)(ii) (that the person driving the vehicle was not insured to do so) is on the MIB, but in the absence of any evidence to the contrary, proof by the MIB that the claimant knew that the user of the vehicle was neither its owner nor registered keeper nor an employee of the owner or registered keeper of any other vehicle, will be taken as proof of the claimant’s knowledge that the driver was uninsured. We agree that the clause should be removed. Because a claimant knows that a vehicle does not belong to the driver does not automatically mean that he will know that the driver is uninsured.
- The other sub-clauses in section 6(3): These relate to some fault or deliberate wrongdoing by the claimant, for example being the owner and having full knowledge that the person driving the car was disqualified or was below the legal driving age. 6(3)(d) is unfair as it is possible for a person to not be the owner or registered keeper of the vehicle but still be insured to drive the car. It would be unfair to penalise the claimant in this way, and allow the MIB to escape liability.
- Clauses 6(1)(e)(iii) and (iv): There is nothing in the EU Motor Insurance Directives nor in the Road Traffic Act 1988 which entitles an insurer to avoid liability to compensate solely because the claimant passenger knew or had reason to believe that the vehicle was being used in the course of a crime or that it was being used as a means of escape from lawful apprehension. Accordingly the last two exclusions in clause 6(e)(iii) and (iv) are illegal and should be removed. We appreciate that joy riders should be excluded from the scheme, but it is clear that the MIB has gone further than the Directive requires. For example, if a group of teenagers get in a car driven by a friend, it is unrealistic for each one to ask the driver “are you insured?”, and the MIB should not be permitted to avoid liability if they fail to do so.

- 6(1)(d): Difficulties arise involving this sub clause which allows the MIB to escape liability where there is no valid insurance contract and the claimant either knew or ought to have known that this was the case. There can be little sympathy for those who allow others to use a vehicle they own when they know or believe they may be uninsured. It is well established that such persons are liable for any loss or damage that their neglect causes on the basis of their breach of statutory duty to insurers (*Monk v Warbey*³). However, for passengers, whilst it is accepted that Articles 13 and 10 of the 6th Motor Insurance Directive entitle the MIB to exclude such liability if the passenger *knew* the vehicle was stolen or it was uninsured, excluding liability if the passenger only has a belief that it might be stolen or that the driver is uninsured, is unlawful.

The introduction of a definition of “Crime” in the Uninsured Agreement to mirror that in the Untraced Agreement- Uninsured Agreement only

Q18 Do you agree that we should introduce a definition of crime in the Uninsured Agreement like that in the Untraced Agreement? If not, please explain why not?

Again, we would like to stress that the Motor Insurance Directives only contain one exception where the MIB should be able to escape liability, i.e. where the passenger has actual knowledge that the vehicle is uninsured. APIL has concerns about the introduction of a definition of crime in the Uninsured Drivers Agreement. Whilst the MIB has explained previously that a full definitive list of crimes would be impossible, APIL believes that the definition of crime in the proposed Uninsured Drivers’ Agreement of 2009 was far too wide, and if this definition were to be implemented, it would breach the equivalency principle, as again there would be loopholes sufficient to allow the MIB to escape liability to compensate the claimant.

Scottish Arbitrators - Both agreements

Q19 If there are any grounds why the Agreements should not be changed to reflect that the Lord President has powers to appoint arbitrators in Scotland, let us know.

Other issues

There are various other situations in which the MIB attempts to escape liability and thus the innocent victim of the uninsured driver is left without compensation.

Off road vehicles used on roads or in public places

³ [1935]

The MIB regularly refuses applications and claims by injured victims on the basis that the tortfeasor was riding an off road vehicle (trail bike or similar). The Motor Insurance Directives do not permit this exclusion and the new agreements should make it clear that the MIB may not escape liability just because the tortfeasor was riding an off road vehicle.

Off road events

The MIB regularly rejects applications by victims of uninsured drivers where the accident occurred on private land. There should not be a distinction in this way, as inconsistencies are created which result in a denial of access to justice. For example, if the drunken uninsured taxi driver runs a grandmother down in the driveway of her house she is refused compensation, but if he crashes as he reverses out of her driveway onto a public road she recovers compensation. It is not permitted by the EC regulations to make a distinction in this way, and the MIB should be liable for injuries caused by uninsured drivers regardless of whether they are driving on a public road or private land.

- Ends -

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