THE DEPARTMENT FOR WORK AND PENSIONS

REVIEW OF EMPLOYERS' LIABILITY COMPULSORY INSURANCE (ELCI)

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL03/04)

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The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 5,200 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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REVIEW OF EMPLOYERS' LIABILITY COMPULSORY INSURANCE

Introduction

1. APIL welcomes the opportunity to put forward its comments regarding the review of Employers' Liability Compulsory Insurance (ELCI) by the Department of Work and Pensions (DWP). This review is currently being conducted following the Second Stage report into Employers' Liability Compulsory Insurance published on the 4 December 2003.

2. One of the report's recommendations was to review the 1969 ELCI Act and the supporting regulations concerning incorporated companies consisting of one owner who is the sole employee. The consideration was whether to waive the requirement to obtain ELCI for limited companies which employ only their owner, so bringing the treatment of these companies into line with that of unincorporated employers.

3. In summary, APIL believes that limited companies which employ only their owner should not be exempt from compulsory liability insurance under the ELCI Act. We believe that a more appropriate solution to employers' liability (EL) insurance is to base premiums on the health and safety record of the business. This can be achieved via effective risk assessment. Additionally, we support the establishment of a centralised employers' liability bureau which could register and monitor current compulsory EL insurance and act as an insurer of "last resort" for those injured by uninsured companies.

Compulsory insurance for limited companies with its owner as sole employee

4. APIL feels that limited companies consisting of one owner who is the sole employee should still be liable to take out compulsory EL insurance. This is due to the fact that while an owner of a business cannot sue himself as the only employee, there may be people working

for the owner on a casual basis, which for the purposes of liability, are considered employees. We are particularly concerned that it is this class of casual 'employee' which will be injured and left with no means of compensation if the suggested exemption from ELCI for sole owners is granted.

5. It should be noted that a large percentage of the 300,000 plus small businesses that consist of a sole owner, who is also the only employee, work on their own. Yet there are various instances, however, where an owner may be seen as the only employee, for example for tax reasons, but has various other people working under his direction and control. The fact that the owner may provide the materials and tools necessary for the work, and also dictate the work to be done, will mean that a duty of care is owed to these 'employees'.

6. For a duty of care to arise in common law negligence a three-part test must be satisfied. There must be sufficient proximity between the parties; it must be "just, fair and reasonable" to impose a duty of care; and injury to the claimant must be reasonably foreseeable[1]. For example, a self-employed workman will satisfy the proximity and "just, fair and reasonable" test in respect of those who might be affected by his actions in carrying out his work. The test of forseeability is the vital third element.

7. Where a self-employed worker is engaged by an "employer", and if it is a genuine labour-only sub-contract, the common law duties of an employer to his employee are not owed to the self-employed workman[2]. A builder's labourer, however, working on "the lump" can be held to be an employee due to the master and servant relationship which exists – i.e. the employer can dismiss the workmen, and tells

[1] *Caparo Industries plc v. Dickman [1990] 2 A.C. 605.*
[2] See *Quinn v. Birch Bros. (Builders) Ltd. [1966] 2 Q.B. 370, CA.*

them what to do and where to do it and pays them a wage on an hourly basis[3].

8. A good example of this practice (of a person working on "the lump") is the use of "subbies" (i.e. sub-contractors) within the construction industry. While the labourer, the "subbie", will pay his own tax and national insurance, he will be under the direction and control of the business owner. This creates an employer / employee relationship between the "subbie" and the owner. In the event of an accident involving negligence on the part of the owner, he will be liable for the injuries caused to the "subbie" and the resulting compensation. Without the provision of EL insurance the "subbie" will not receive his due compensation.

9. In addition, many sole business owners who employ "subbies" do not realise that "subbies" can be considered employees in relation to liability. Due to this lack of knowledge and the limited resources of the owner of the business, it is often in this smaller sector of the market where there is a lack of ELCI cover. The creation of an exception within the current ELCI Act may well further reinforce this notion that "subbies" are not 'employees'. APIL believes that the use of an exception for sole business owners would not only result in injured "subbies" being unable to claim, but also businesses being unsure about their liability in respect of the "subbies" working under their guidance and supervision.

10. APIL feels that this lack of understanding within the wider business community should be tackled by better information being provided to companies which use sub-contractors. We believe this information would be extremely valuable, not only to sole owners of limited companies, but also to unlimited companies. It should be noted that unlimited companies share the same liability in respect of "subbies" as

[3] See *Ferguson v. John Dawson & Partners (Contractors) Ltd [1976] 1 W.L.R. 1213.*

limited companies, yet those "subbies" will not have the same legal protections as they would if working for a limited company.

11. We are particularly concerned about the removal of the ELCI burden from sole employers because of the type of industries where "subbies" are used most often - agriculture and construction. These two industries have a poor record of health and safety in relation to manual work. Last year the HSE identified the agriculture and construction industry as having the poorest safety record of the industries surveyed. Indeed in 2002/03, 107 (47 per cent) of the worker fatalities which occurred, happened in the two industries of construction (71) and agriculture (36)[4]. APIL strongly believes that the original intention of the ELCI Act was to protect casual and manual workers, such as those employed in agriculture and construction. By proposing this exemption, the people who are most likely to be adversely affected are the very people that the act originally set out to protect.

EL insurance premiums connected to effective risk assessment

12. The most important factor in considering the sustainability of the current EL system is the 'risk' insured. Poor health and safety performance leads to an increased number of injuries, which can, in turn, lead to an increased number of claims and so on. Minimising the risks of injury, ill health or fatality to the workforce must be the key to the sustainability of ELCI and the employers' liability system.

13. APIL has called consistently for ELCI premiums to reflect the health and safety performance of the insured more closely. This would require the ELCI market to operate similarly to the motor insurance market. Good health and safety performance would attract lower premiums. This view is supported by a variety of different institutions and commentators. It is by visiting the consequences of negligence on

[4] Health and Safety Executive (HSE) *'Statistics of Fatal Injuries 2002/03'* (published 29/07/03) page 1

those who have caused it that health and safety standards will be driven to improve; an improvement in health and safety intrinsically means fewer negligent injuries and deaths. The DWP stated *"We think there is a strong case for making the improvement of health and safety practices an explicit objective of the compensation system."* The report went on to conclude that *"a key challenge is to improve the link between health and safety practices and EL premiums"*[5].

14. This suggestion by the DWP has subsequently been taken up by the insurance industry. In a press release from the Association of British Insurers (ABI) on the 8th September 2003, John Parker (ABI's head of general insurance) said *"Business will understand the health and safety practices insurers are looking for, while insurers will be able to reflect good health and safety in the terms they can offer. Hopefully, we will see rising standards of health and safety across the small business sector."*

15. In terms of incorporated companies which consist of one owner who is the sole employee, basing EL insurance premiums on health and safety records should act as an effective economic incentive. For example, if the owner works alone without any sub-contracting involved (i.e. an IT consultant) a risk assessment would demonstrate that the possibility of a claim being made against him would be slight or, more usually, he will be classed as 'self-employed'. In contrast, the employer who uses a lot of sub-contractors will have a higher risk of a claim being brought against him. In order for this employer to take advantage of a risk-assessed based premium he has to show that he has systems in place to deal with health and safety legislation. If the health and safety legislation is complied with, fewer accidents will occur, fewer claims will be made and the cost of the insurance will drop.

[5] Department of Work and Pensions – Review of Employers' Liability Compulsory Insurance (First Stage Report) (June 2003)

Employers Insurance Bureau (EIB)

16. APIL has for many years supported the establishment of an Employers Insurance Bureau (EIB) to record and monitor employers' compulsory insurance and act as insurer of "last resort".

17. The need for effective monitoring of compulsory EL insurance policies enables a negligent employer's insurer to be traced. The difficulty in tracing employers' insurers often occurs in cases involving illness or disease which are not apparent until many years after the negligent act. An example of this type of disease is asbestos. These claims are often based on exposure to asbestos which occurred many years previously – the latency period for asbestos can be up to 30 years. In order to tackle the problem the Government instigated a voluntary code in order to help injured claimants to track down the necessary insurer. Yet the Government's first annual review of the code in March 2002 stated that over 75 per cent of attempts to trace insurers were unsuccessful.

18. In order to make compulsory EL insurance effective, insurers should be compelled to give details of company's EL insurance policies to a central database and/or centralized agency. A similar scheme is currently in operation for motor car insurance with the Motor Insurance Bureau (MIB). The scheme works via insurers supplying motor insurance details to the MIB. This information is then able to be accessed in order to ascertain who is currently operating without insurance and it also allows for the effective location of insurers whose clients have been involved in accidents.

19. In addition the MIB acts as an insurer of "last resort" for claimants injured in accidents where the other driver is not insured. The Uninsured Drivers Agreement provides for both property damage and personal injury compensation where the other party is not insured. APIL would like to see a similar scheme in operation for companies which have caused a negligent personal injury but do not have EL

insurance. Admittedly this scheme would only be directly applicable to instances of negligence which occurred after 1972, when EL insurance became compulsory. The problem is that the causes of asbestos cases can be traced back further than 1972. In order to address this, APIL suggests that compensation should be paid to pre-1972 cases where the existence of insurance can be demonstrated on the balance of probability. This would also apply to cases which straddle the 1972 eligibility line.

20. APIL sees no reason why an organisation such as the EIB could not be quickly and effectively established. As has been demonstrated by the MIB, such a scheme and governing organization can be run effectively and efficiently. The fact that the MIB deal with approximately 22 million motor insurance policies demonstrates that a similar organization should be able to deal with the far fewer EL policies involved.

21. In relation to the establishment of a database to record ECLI, APIL was disappointed to read that the DWP has recently rejected calls to compel companies to submit evidence of employers' liability cover with their tax return. A spokesman for the DWP said:

"While we will continue to look at the case for an enforcement database, we are moving away from the suggestion that this should be done through tax or VAT return and in the first instance are looking at what the government itself can do via its procurement section"[6].

22. APIL is particularly concerned that the DWP, and the Government, intend to address the problem of EL policy registration via its limited procurement program. The suggestion within the Second Stage report is that the Government will *"amend, reissue and raise the profile of guidance on contracting"*[7] to make sure that all contracted bodies have

[6] Post Magazine, *'Statutory EL certification proposal rejected'* (12 February 2004), page 1
[7] Department of Work and Pensions – Review of Employers' Liability Compulsory Insurance (Second Stage Report) (04 December 2003), page 20

valid EL insurance. This will be followed up with a review in October 2004 concerning the take-up and operation of the new guidance on ensuring employers' liability compliance from bodies which contract with the public sector. APIL fails to see how these measures will in any way combat EL non-compliance within the marketplace outside the public sector. While this measure will ensure that Government contractors are properly scrutinised for EL insurance compliance, there are a huge number of companies which do not deal with the Government for their business. These firms will thus be allowed to get away with not being adequately checked for EL insurance cover.

Conclusion

23. In conclusion, APIL believes that:

- In the review of the ELCI Act 1969, limited companies which employ only their owner should not be exempted from compulsory employer liability insurance;
- Employment insurance premiums should be directly linked to a company's health and safety strategy and the risk posed to employees;
- A centralized employers' insurance bureau should be established to register and monitor ELCI and also act as an insurer of "last resort". This employers' insurance bureau should be established along the same lines as the currently operating motor insurance bureau (MIB).