Asbestos Victims Support Groups Forum – UK

Response to Pleural Plaques Consultation Paper CP 14/08

Introduction

The Asbestos Support Groups' Forum UK consists of the following groups representing asbestos victims throughout the UK.

Asbestos Support West Midlands; Barrow Asbestos Related Disease Support; Bradford Asbestos Victim Support Group; Cheshire Asbestos Victims Support Group; Derbyshire Asbestos Support Team; Greater Manchester Asbestos Victims Support Group; Hampshire Asbestos Support & Awareness Group; Merseyside Asbestos Victims Support Group; North-West Wales Asbestos Victims Support Group; North East Asbestos Support & Awareness Group, Ridings Asbestos Support & Awareness Group, Sheffield And Rotherham Asbestos Group

Summary

Questionnaire

Q1. We do not support proposals to raise awareness.

Q2. We think it right that the government overturns the House of Lord's decision.

Q3. We do not support a time limited no fault scheme.

Q4. If the government will not overturn the HoL decision, we would support an open ended no fault scheme providing it met minimum requirements. We think it essential that a scheme does NOT allow dispute about causation thus incurring legal costs which would make such a scheme prohibitively expensive.

Impact assessment

Q5. The Impact Assessment confuses prevalence with diagnoses and consequently exaggerates the number of compensation claims.

Additional Comment

6. The main reason why asbestos victims do not receive compensation is because they cannot trace insurers. We ask that government requires insurers to provide a guarantee fund as they do for motor traffic victims.

Q1. Do you think that the proposals to raise awareness of the nature of pleural plaques will help allay concerns?

No. In our experience, doctors take every care to reassure their patients about the implications of a diagnosis of pleural plaques. Patients are far more likely to rely upon the independent, medical advice given by specialist consultants than advice issued by government.

In one hospital in Greater Manchester, for example, the consultant respiratory physicians have produced a leaflet for their patients specifically about pleural plaques. The leaflet provides clear, straightforward advice and reassurance.

Advice given by government instead of taking action to restore compensation will not be trusted and will be seen as self-serving. Patients will rely on independent advice from their own consultants rather than advice from government's medical advisers.

No advice will reassure those pleural plaque sufferers who have witnessed many deaths of former workmates.

Q2. What are your views on whether it would or would not be appropriate to overturn the House of Lords decision on pleural plaques?

We think it right and just for the government to overturn the House of Lords decision for the following reasons and we call for the restoration of the right of pleural plaques sufferers to sue for damages.

Policy decision, not a legal decision

It is not right that expectations based on legal decisions founding a right to compensation for pleural plaques spanning twenty years should be dashed without any new evidence or change in medical knowledge. Nothing has changed. If new medical evidence had come to light showing that plaques are not related to asbestos exposure, or that plaques do not cause psychological harm, then the decision would be explicable. As things stand, asbestos victims' expectations are consistent with their experience of the disease and with medical knowledge, with law settled for over twenty years and are wholly justified.

For over twenty years the courts have accepted that the decisions to treat pleural plaques as a compensatable disease are consistent with the rules of the tort of negligence. Apparently, we are asked to accept that the law has been wrongly applied for all those years and pleural plaques are not, after all, an injury. For asbestos victims, this legal volte face is not explained by exquisitely argued arcane principles of law, but by cost; the cost to the insurance industry of compensation for pleural plaques. This decision is first and foremost a policy decision justified by legal 'principles', applied twenty years too late. As such, the decision lacks all credibility and brings the law of negligence in the UK into disrepute.

Insurers have reserved against claims for pleural plaques for over two decades and they are in a position to continue to pay damages in cases where judgment is obtained.

Dire consequences unfounded

It is argued in the consultation document that if plaques are accepted as an injury this could have far reaching implications, *'…it might lead to calls for compensation in other circumstances where no actionable damage has occurred.…'* (para. 38 & 39). If this were really the case, then after twenty years of the 'misapplication' of the law we would have already witnessed such calls and consequential increased levels of litigation for symptomless diseases. We have not and this fact alone should be enough to dismiss such an argument as fallacious.

The issue of wider implications was considered in the Financial Memorandum to the *Damages (Asbestos-Related Conditions) (Scotland) Bill.* The conclusion in the Memorandum was that legislation about any other conditions would need to be argued on its merits and would need to be passed by Parliament.

Damages (Asbestos-Related Conditions) (Scotland) Bill

The law in Scotland is already more advantageous for mesothelioma sufferers through the provisions of the Rights of Relatives to Damages (Mesothelioma) Act 2007. If the Damages (Asbestos-Related Conditions) (Scotland) Bill is passed into law asbestos victims will enjoy further advantages in Scotland. Government cannot be complacent about the growing divide in compensation for asbestos victims in the UK. It is not satisfactory to dismiss legitimate concerns about this divide simply by reference to the different legal systems. Principles of equity and justice underpin the decisions in Scotland and are not explained by differences in the legal system.

Q.3 Do you think that no fault financial support for pleural plaques would be appropriate? If so, what would the rationale for this be?

YES. If the government will not restore the right to sue for damages we would support an open-ended no fault scheme that provides a minimum payment to ALL pleural plaques sufferers. This approach is justified in principle according to our arguments articulated above and for the reasons given below is an appropriate means of providing compensation to pleural plaque sufferers if damages in law are ruled out.

No dispute as to causation

There is no argument about causation of pleural plaques. It is universally accepted that pleural plaques are caused by exposure to asbestos, above the environmental level, and invariably due to occupational exposure. In this respect plaques are similar to mesothelioma where the only known cause of this disease is exposure to asbestos. Pleural plaques are very different to asbestosis and pleural thickening where a differential diagnosis often needs to be made and medical opinion can be divided as to the aetiology of the disease. There is no dispute about the causation of pleural plaques.

Wholly disproportionate costs in adversarial system

Unlike mesothelioma, asbestosis and pleural thickening, the cost of litigating a pleural plaques case is wholly disproportionate to the damages paid. As much

work needs to be done in pleural plaques cases, tracing insurers, proving fault, finding witnesses as for any other asbestos disease. Yet damages are a fraction of the total costs of a case. The Financial Memorandum prepared from the Regulatory Impact Assessment for the *Damages (Asbestos-Related Conditions) (Scotland) Bill* estimates the average cost of a pleural plaques case to be £16,000 compared to an average damages payment of £8,000.

Low administrative cost

It is unacceptable that twice as much is paid on average in costs as paid in compensation. A no fault scheme would properly exclude such frictional costs and incur a small administrative cost.

NO legal costs

The consultation paper rightly dismisses the need to prove negligence (para 53). However, the consultation paper anticipates some legal costs (para 53) and also suggests that it would be necessary to show that plaques had developed following workplace exposure (para 56, 67). This is wholly unacceptable. A major justification for a no fault scheme for plaques is that in the vast majority of cases exposure to asbestos will have occurred at work. To allow disputation on the question of where exposure to asbestos occurred would be a waste of money and could make any scheme prohibitively expensive.

No fault schemes by their very nature are a compromise to ensure an affordable payment, which might not otherwise be made. To introduce legal arguments found in a fault system, such as the 'date of knowledge' for contaminated clothing exposure for example would undermine any scheme and make it unaffordable. The vast majority of cases are straightforward occupational cases and to try and weed out exceptions according to legal decisions would simply introdude the cost of a tort system into a no fault scheme.

The legal costs associated with the Coal Health Scheme should be a salutary warning to everyone.

Q4. If a no fault payment scheme were to be introduced:

a) which of the above two schemes should be introduced, and why?
b) which level of payment would be appropriate?
c) How should the scheme be funded?
d) What limitation period should be applied for each option?

a) An open-ended no-fault scheme should be introduced. To do otherwise would be divisive and exacerbate the already different provisions for asbestos victims in the UK.

   We reject the argument that sufferers diagnosed before the House of Lords judgment had a heightened expectation of compensation compared to sufferers post the decision. All pleural plaques sufferers had and have a justifiable expectation based on twenty and more years of compensation

payable for pleural plaques. This is the true basis of expectation, and not one artificially contrived for those diagnosed earlier.

b) Payment should be based on the Judicial Studies Board Guidance of £5,000. This would represent an overall reduction in the average payments for pleural plaques because it would exclude the higher payment for final damages. In that respect, the proposed payment of £5000 would provide an affordable figure appropriate for a no fault scheme. It would not be acceptable to opt for a lesser figure as this would be a 'token payment' and would not be consistent with a no fault scheme. The proposed figure of £5000 also excludes average legal and frictional costs of approximately £14,000, which would normally be incurred, thus reflecting a much reduced overall cost consistent with a no fault scheme.

It is axiomatic that a right to claim for any subsequent asbestos-related disease would be allowed following a payment under a no fault scheme. A no fault scheme must not debar the right to sue for a subsequent, different asbestos disease.

c) The scheme should be funded by employers' liability insurers and government according to their respective pro-rata liabilities. Providing arguments on causation are not permitted such a scheme should be reasonably straightforward and easy to administer.
Under **NO** circumstances should the tax payer pay the whole costs of a no fault scheme: payments must be shared on a pro rata basis.

We wish to reiterate the importance of not allowing disputes about causation. It would be cost effective to simply make a payment to ALL pleural plaque sufferers. To allow arguments about causation would be prohibitively expensive and make a scheme unaffordable.

d) We do not wish to give a view on limitation for a fixed period scheme as we are opposed to such a scheme, which would be unfair and divisive.

For an open-ended scheme, the limitation period should be three years from date of knowledge prior to the date when claims were halted due to the appeals process. All new claims should be made within one year of diagnosis.

<u>Impact assessment</u>

Q5. Do you have any estimates regarding :
a) the numbers of people currently diagnosed with pleural plaques?

We deprecate the use of scan vans and we think they should have been outlawed a long time ago using the existing Ionising regulations. Under no circumstances should scan vans be permitted to operate in the future. The use of scan vans has increased the number of people who suffer anxiety about their exposure to asbestos and has increased the number of pleural

plaque claims beyond the number expected through legitimate medical investigation.

Also, we deplore the practice employed by a minority of solicitors who encourage their clients to make speculative claims for Industrial Injuries Disablement Benefit instead of seeking advice from their doctors. This practice increases their clients' anxiety and delays assessment of claimants who have a diagnosis.

Personal injury solicitors should be warned about encouraging clients to make speculative claims for Industrial Injuries Disablement Benefit in order to identify asbestos-related disease.

It is argued at para. 25 of the consultation paper that the SWORD estimate of 900 pleural plaques cases per year is an underestimate because,
"Given that pleural plaques are asymptomatic and few of the cases reported to SWORD had other diagnoses of asbestos-related disease in addition to plaques, this suggests that many of these cases were identified via chest x-rays following referral of individuals to chest physicians for other respiratory conditions, rather than because of plaques themselves. So the figure of 900 cases per year should be taken as a lower bound for the cases of pleural plaques diagnosed each year."

But, in our experience most pleural plaques diagnoses are made on the basis of referral for some other medical condition, and the diagnosis is a shock to the patient.

If a patient is investigated for a symptomatic respiratory condition and asbestosis and plaques are diagnosed that patient will not claim for pleural plaques but for the more serious and symptomatic condition, asbestosis.

The Impact Assessment confuses prevalence with diagnosis. We think that the SWORD estimate is reliable and the objections to using that estimate are unfounded.

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6. Additional Comment

The Main Obstacle to Compensation is Failure to Trace Insurers
We believe that this is a unique opportunity for government to eradicate the main obstacle to asbestos victims receiving compensation.

The main reason why asbestos victims, especially mesothelioma victims, do not receive compensation is because they are unable to trace employers' insurers.

We believe that government can show their commitment to asbestos victims, especially mesothelioma sufferers, by addressing the problems of tracing employers' liability insurers and by delivering an effective and appropriate

means to ensure that compensation is rightly paid by those with a responsibility to do so.

Protection for motor accident victims but not for workers

Governments have always acknowledged that in almost every case, prior to the introduction of the Employers' Liability (Compulsory Insurance) Regulations 1969, and post the effective date of the regulations (1.1 1972), employers held EL insurance. This was the stated rationale for not making EL insurance compulsory prior to 1972.

Failure to require retention of EL insurance data and a system to register insurance in a central and secure registry has meant that much of the insurance information is now lost or is just not made available by insurers. As a result, insurers are allowed to avoid responsibility for paying out on much of the insurance they wrote.

In contrast, motor traffic victims, even where the guilty party holds no insurance, are compensated through the Motor Insurance Bureau: a guarantee fund and insurance of last resort, funded by the insurance industry.

Removal of only measure to protect workers with long-latent diseases.

Unfortunately, the government has stripped away the only small protection currently available by laying an order to revoke regulation 4(4) of the Employers' Liability (Compulsory Insurance) regulations 1988 which required employers to retain EL insurance for 40 years. This was never a sufficient protection because no provision was made to centrally secure this information for tracing in the future. Instead of revoking the regulation, government should have looked for a complete solution to the problem of tracing insurance.

Failure of the ABI tracing scheme

It was hoped that the ABI voluntary insurance code would go some way to resolving this major problem. However, the latest review of the tracing code shows only a 15% success rate for enquiries (268 successful traces out of 1809 enquiries) and 33% success rate for post-1972 enquiries for 2005/06 (1583 successful traces out of 4849 enquiries).

An HSE commissioned report shows that there is 95.5% compliance with ELCI Regulations. It is simply inconceivable, given the almost universal compliance with ELCI regulations, that 3,266 companies failed to take out EL insurance post-1972. They did not fail to take out EL insurance, but since the policies cannot be traced their insurers escape liability where judgment is entered.

Ministers argue that ABI data shows that 98% of potential EL claimants are currently able to locate an employer or insurer to claim against. That is a red herring, it has nothing to do with long-latent disease claims; that figure refers to accident claims which will always find a current employer or insurer.

Clearly, a just and proportionate response would be for insurers to stand as an insurer of last resort as they do for motor traffic victims. Instead, the tax payer has to pay instead of the insurers.

Government 'picking up the tab' for insurers

The government is currently the 'insurer of last resort' for sufferers of asbestos-related long-latent diseases, paying small lump sum compensation payments under the Pneumoconiosis etc. (Workers Compensation) Act 1979. The government uses tax payers' money to pay partial compensation when insurers could and should pay FULL compensation.

Important Advantages of an ELIB

- An ELIB incurs no government costs and would ensure 100% recovery in every case where judgment is obtained and would generate an income stream from which government can fund lump sum payments.

- Extra revenue from recovery would allow the government to cease recovering payments from the T&N Fund which only pays T&N claimants a small percentage of their full entitlement to compensation

- The outcome of the insurers "trigger issue", which has the potential to devastate compensation for asbestos victims, would have no effect and would simply become an issue between insurers.

Government commitment to mesothelioma sufferers

The government could fulfil its stated commitment to assist mesothelioma sufferers by introducing an Employers Liability Insurance Bureau thereby removing the main obstacle to compensation for mesothelioma sufferers.

Professor Chris Parsons

Professor Chris Parsons has provided a damning critique of the current protection afforded injured workers and a compelling argument for equal protection to that afforded motor traffic victims. He concludes:

"The position of the road accident victim is enormously secure, because gaps in the compulsory insurance system have been plugged over time by a combination of court decisions, European law, domestic legislation and voluntary codes of conduct. By contrast, the employers' liability system remains a flawed one and it will continue to fail some employees, who will not receive the compensation to which they are entitled."

We have appended his article as Appendix (A)

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APPENDIX A

EMPLOYERS' LIABILITY INSURANCE – HOW SECURE IS THE SYSTEM?

Chris Parsons *

ABSTRACT

Private employers' liability insurance is compulsory for virtually all employers. It plays and increasingly important part in funding compensation for those who are injured at work, with total payments now exceeding those made under the state Industrial Injuries Scheme. A full review of the law on compulsory insurance has just been completed, and new regulations have been produced. However, many gaps remain in the law, and the security of the injured employee has, if anything, declined since it was originally introduced. This paper analyses the law on compulsory employers' liability insurance and compares it with the parallel regime which applies to the use of motor vehicles. It concludes that there are glaring inconsistencies between the two systems and that these discrepancies cannot be justified by reference to the risks involved. The position of the road accident victim is enormously secure, because gaps in the compulsory insurance system have been plugged over time by a combination of court decisions, European law, domestic legislation and voluntary codes of conduct. By contrast, the employers' liability system remains a flawed one and it will continue to fail some employees, who will not receive the compensation to which they are entitled.

1 INTRODUCTION

In 1974 the Industrial Law Journal carried an article by R. Hasson[1] on what was then a relatively new piece of legislation, the Employers' Liability (Compulsory Insurance)

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* Senior Lecturer, City University Business School. I am grateful for the advice of Professor Richard Lewis of Cardiff Law School who read an earlier draft of the article and made many helpful comments.

1 Hasson, R. *The Employers' Liability (Compulsory Insurance) Act – A Broken Reed* (1974) 3 ILJ 79.

Act 1969, which came into force on 1 January 1972. Hasson's stance was critical: he identified a number of gaps in the legislation and concluded that it fell well short of its object - to ensure that an injured employee's claim for damages would always be satisfied, regardless of the employer's own financial position.

Following a full review of the 1969 Act, the law has recently be amended by the **Employers' Liability (Compulsory Insurance) Regulations 1998**.[2] The object of this paper is to evaluate the new law in the light of various changes which have taken place since 1972 and to consider whether there has been any improvement in the security of the injured employee. As part of the process of evaluation, the system of compulsory employers' liability insurance is compared with the parallel regime applicable to motor vehicles. Third party motor insurance is the only other compulsory insurance of any real significance. It provides a good standard for comparison because the risk of injury on the road is roughly comparable to the risk of injury in the workplace[3] and the object of the compulsory insurance system - to protect the injured victim against the risk of insolvency or default by the tortfeasor - is exactly the same.

Unfortunately, many of the defects identified by Hasson still exist. In fact, the security of the injured employee has, if anything, declined since 1972 despite the growing importance of private employers' liability insurance as a source of compensation. It is also clear that the system of compulsory employers' liability insurance provides much weaker security for injured employees than the equivalent regime for road accident victims, where increasing layers of protection have been provided through voluntary schemes and as a result of legislation at national and European level. In fact, there are major discrepancies between the two regimes, and it is argued that these differences cannot be justified by reference to the risks involved.

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2 S.I. 1998 No. 2573. Most of the Regulations came into force on 1 January 1999.

3 Different methods of defining what is meant by an 'injury', and the problem of under-reporting, makes comparison difficult. Far more fatalities arise from road accidents than employment accidents but the number of non-fatal injuries at work probably exceed those attributable to motor accidents. If occupational diseases are taken into account the workplace is clearly the greater source of both fatalities and ill-health, although only a relatively small proportion of disease victims receive compensation (see, for example, Stapleton, J., *Compensating victims of diseases* (1986) 5 OJLS 248-268). We should bear in mind also that many road accident victims are in fact injured in the course of their employment: see note 79 *infra*.

We will begin by tracing the development of compulsory employers' liability insurance and examining its relationship with the state Industrial Injuries Scheme.

2 THE DEVELOPMENT OF COMPULSORY EMPLOYERS' LIABILITY INSURANCE

The Industrial Injuries Scheme, which provides 'no-fault' compensation for employees who are injured in the course of their employment, was a product of the post-war Beveridge reforms.[4] It replaced the old system of the Workmen's Compensation Acts, which put the onus of providing no-fault compensation on the employer. In effect, this burden now shifted to the state. Many employers had insured their liability under the Workmen's Compensation Acts with private insurers and, inevitably, this class of insurance business disappeared when the Acts were repealed. However, prior to these reforms there had been much discussion about what became known as the 'alternative remedy' - that is, the right of an injured employee to sue his employer in tort[5] for damages in addition, or as an alternative, to any right he might have to the new state benefits. The passing of the first Workmen's Compensation Act in 1897 had led to a dramatic reduction in such claims,[6] but by the end of the 1930s this state of affairs was changing. Tort claims were becoming more common,[7] providing an increasingly valuable remedy for the injured workman, although he could not claim under both the Workmen's Compensation Acts and under common law, but had to elect for one remedy or the other.[8]

Beveridge was against an alternative remedy, intending that the new state scheme should provide sufficient compensation for an injured employee. However, the

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4 The National Insurance (Industrial Injuries) Act 1946 came into effect on 5 July 1948.

5 At this time a tort action could take the form of a common law claim for negligence, or an action for breach of statutory duty, or be brought under the old Employers' Liability Act 1880 - although actions under the 1880 Act were almost obsolete by 1946.

6 Thus apparently fulfilling the hopes of Joseph Chamberlain, who was largely responsible for the 1897 Act: he thought that it would remove the need for common law actions, except in very rare cases.

7 The Accident Offices Association claimed that there had been a five-fold increase in the period 1936-1943. The increase can be attributed to a number of landmark cases, such as *Lochgelly Iron and Coal Co. v. M'Mullen* [1934] AC 1 and *Wilsons and Clyde Coal Co. Ltd v. English* [1938] AC 57, and to legislation such as the Law Reform (Miscellaneous Provisions) Act 1934 and the Factories Act 1937. The passing of the Road Traffic Act 1930, and the increasing success of claimants who had been injured by motor vehicles may have also contributed to the trend.

8 See Bartrip, P. W. J. (1987), *Workmen's Compensation in twentieth century Britain* for a full discussion of the old Workmen's Compensation Acts.

Monckton committee, to which the question was referred, recommended that the tort remedy should be retained, subject to the deduction of National Insurance benefits (to prevent 'double recovery' by claimants) and abolition of the election rule. This recommendation was adopted, subject to a compromise on the question of deduction of National Insurance benefits.[9]

Although it was retained, it was assumed that the tort remedy would only be a minor source of compensation when compared with the Industrial Injuries Scheme. However, it was clear by the 1960s that the importance of the tort remedy had continued to increase. If the employer could not satisfy his claim for damages the injured employee might therefore lose a significant source of compensation. Various instances of employees failing to obtain compensation from insolvent and uninsured employers provided anecdotal evidence of the need for legislation and a notorious example, a fire in an upholstery factory Glasgow in 1968 where 19 lives were lost, finally prompted Parliament to act. As a result, the requirement for compulsory insurance (which effectively existed in respect of the coal mines) was extended to virtually all employers through the enactment of the Employers' Liability (Compulsory Insurance) Act 1969.

The Act, which came into force on 1 January 1972, requires every employer carrying on any business in Great Britain to insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain.

Nationalised industries, most local authorities and various public bodies are exempt under the Act. This is perfectly reasonable, but the Act also contain a quite unjustifiable 'family' exemption which excuses employers from the requirement to

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[9] 50% of National Insurance benefits were to be deducted against loss of earnings for a period of five years. This was a famous compromise, based partly on the fact that employees as well as employers were required to pay contributions under the new National Insurance scheme. Since then the rules on deduction of National Insurance benefits have changed significantly: see footnotes 20-22 *infra* and accompanying text.

insure in respect of employees who are close relatives.[10] Hasson criticised this provision, which is unchanged in the new law. Indeed, it is not at all obvious why relatives of a business proprietor should have less security than other employees, particularly when motorists are required to insure in respect all third parties, with no exception for family members.[11] A further exemption relieves an employer of the need to insure in respect of employees not ordinarily resident in Great Britain. Workers on offshore installations were, however, specifically included by Regulations in 1975. The latter provisions, and most of rules concerning the detailed requirements of the insurance policy were contained in a series of statutory instruments passed between 1971 and 1995. With one exception,[12] these have now been revoked and replaced by the 1998 Regulations, which amend and consolidate most of the existing law.[13]

Compulsory third party motor insurance, with which comparison will be made from time to time, has earlier origins. The first provisions were incorporated in the Road Traffic Act 1930 and nearly all the current law on the subject is now contained in the Road Traffic Act 1988. However, the use of motor vehicles as a prime means of moving people and goods within Europe (and beyond) demands a degree of international uniformity where insurance is concerned. Accordingly, the law on motor insurance has been strengthened and harmonised by a series of EC Directives, which have been incorporated in the law of the Member States and that of some non-EU countries. By contrast, there has been no attempt to harmonise insurance arrangements for industrial injuries in Europe.

3 EMPLOYERS' LIABILITY INSURANCE AND THE INDUSTRIAL INJURIES SCHEME

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10 i.e. 'husband, wife, father, mother, grandfather, step-father, step-mother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, or half-sister' (Employers' Liability (Compulsory Insurance) Act 1969, s.2(2)).

11 Of course, employers' liability policies do not exclude relatives of the employer, but where *only* family members are employed the proprietor may well choose not to insure at all.

12 The insurance provisions in the Offshore Installations and Pipeline Works (Management and Administration) Regulations 1995 (S.I. 1995 No. 738).

13 Other than the framework of the 1969 Act itself, which is unchanged.

Whereas the Industrial Injuries Scheme provides compensation on a 'no-fault' basis, employers' liability insurance, at least in theory, comes into play only when the employer is at fault, and the injured employee has a tort claim against the employer.[14] However, since the 1969 Act came into force the balance between the two schemes has changed quite strikingly, with private employers' liability insurance becoming increasingly important as a source of compensation. In 1972 employers' liability insurance was still relatively insignificant when compared with the Industrial Injuries Scheme, total annual payments running at only about half the level of the latter. The position is now very different, with total employers' liability insurance payments[15] actually exceeding those under the state scheme[16] (see Figure 1 below).

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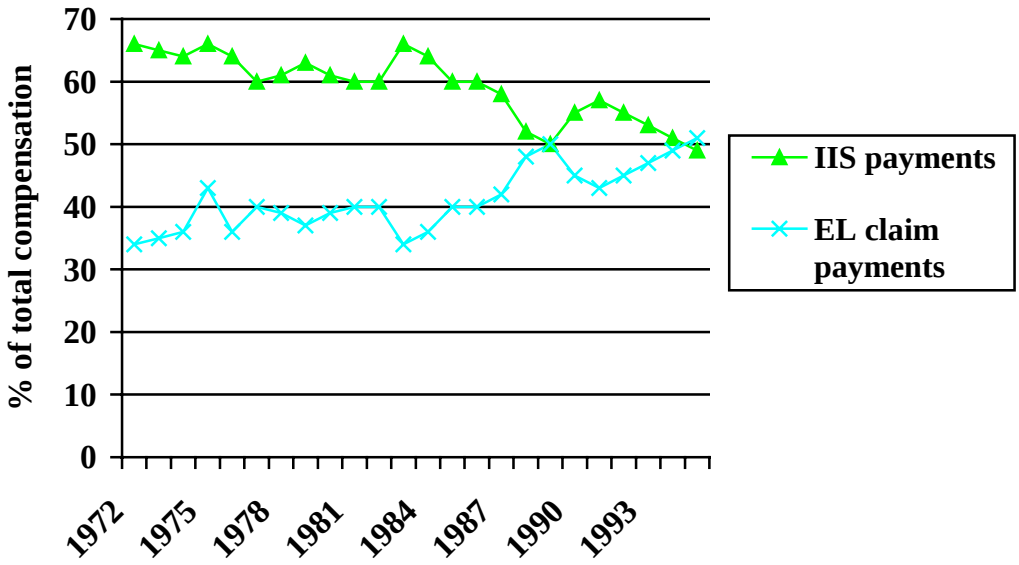
14 In fact, there are substantial areas of strict liability in employers' liability law, largely the result of statutory duties imposed by regulations made under the Health and Safety at Work Act 1974. Atiyah is highly critical of strict liability in this context, because it fudges the boundaries between tort compensation and the state scheme. He notes: 'It is difficult enough to justify the continued existence of liability based on fault in industrial accidents despite the existence of the Industrial Injuries Scheme; but it is impossible to justify the continued existence of strict liability.' (Cane, P. (1993), *Atiyah's Accidents, Compensation and the Law*, 5th edition, p. 83).

15 £738 million in 1995.

16 £731 million in 1995.

Figure 1: Industrial Injuries Scheme payments and Employers' Liability claim payments as a percentage of total payments 1972-1996

(Source: Association of British Insurers and Department of Social Security)



There are a number of reasons for this trend, which seems set to continue. First, there have been a number of cuts in the Industrial Injuries Scheme since 1972, most of which took place in the 1980s. As a result, the total cost of the Scheme is lower in real terms than it was in the late 1970s. Second, whilst Industrial Injury Scheme benefits are raised annually, they are linked to price inflation rather than earnings' indices, which rise more rapidly. By contrast, 'social inflation' causes tort damages for personal injury, and hence employers' liability claim payments, to rise at a much higher rate than either prices or earnings.[17] Third, developments in tort law have allowed damages claims by employees in circumstances where hitherto either state benefits only, or no compensation at all, would be available.[18] Of course, the scope of the Industrial Injuries Scheme has also expanded through the prescription of new diseases, but the pace of its development has been less rapid.[19] Finally, the recoupment scheme introduced by Social Security Act 1989,[20] and progressively

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17 According to a recent study the cost per unit of exposure to insurers from serious injuries rose at an annual rate of approximately 13% between 1986 and 1995 - 6% faster than average earnings (*LIRMA UK Bodily Injury Study*, London International Insurance and Reinsurance Association (1997)).

18 Health and safety legislation set at European level and implemented through regulations made under the Health and Safety at Work act (such as the recent 'six-pack') has undoubtedly amplified the potential liability of employers. Case law has also had a significant effect, especially where disease and psychiatric injury, including stress-related illness, is concerned.

19 For example, Raynaud's Phenomenon (Vibration White Finger or 'VWF'), the second most common source of occupational disease claims against employers' liability insurers, was not prescribed until 1985, by which time there had been no fewer than four reports of the Industrial Injuries Advisory Council on the subject.

20 Now repealed and replaced by the Social Security Administration Act 1992.

tightened since,[21] enables the Compensation Recovery Unit of the DSS to claw back from employers' liability insurers a substantial portion of the benefits paid to those who are injured at work, further shifting the balance of responsibility for industrial injuries away from the state and towards the employer and his insurers.[22]

Of course, the trend towards increased reliance on private insurance could be reversed if the state scheme were to be expanded, but this seems very unlikely at present. Indeed, the possible total abolition of the Industrial Injuries Scheme, first raised at Government level in 1994, remains on the agenda, with obvious implications for the role of private insurance. It is therefore now more important than ever that the system of compulsory insurance works properly and provides adequate security for the injured employee. Unfortunately, compulsory insurance systems can fail, for a number of reasons. For example, the cover purchased may be insufficient or there may be obstacles in the claims process which make recovery of compensation difficult. In other cases compensation may be denied because the employer has failed to comply with the terms of the insurance policy or, of course, simply neglected to purchase the insurance required by law. How well the current system deals with these and other problems will be considered next.

4 THE AMOUNT OF INSURANCE COVER REQUIRED BY LAW

As we have suggested, the aims of the1969 Act will be defeated if a firm does not buy enough insurance cover. The old regulations required the employer to 'insure and maintain insurance' for an amount of at least £2 million 'in respect of claims relating to any one or more of his employees arising from any one occurrence'.[23] However, until recently this minimum statutory limit was largely academic, because cover was always written on an 'unlimited' basis, a practice going back to the pre-1948 Workmen's Compensation Acts. The position changed when the reinsurance markets decided to withdraw 'unlimited' cover in reaction to the accumulation of claims arising from the 1989 Piper Alpha oil-rig disaster. This obliged primary insurers, for the first time, to impose a limit on employers' liability policies. The 'standard' cover

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21 Most recently in the Social Security (Recovery of Benefits) Act 1997 which extends the clawback to 'small payments' of £2,500 or less, which were previously exempt.

22 The CRU recovered £145 million in benefits in 1996/7 and £173 million in 1997/8.

23 Employers' Liability (Compulsory Insurance) General Regulations 1971 (S.I. 1971 No. 1117).

became £2 million for 'off-shore' risks (from January 1993) and £10 million for other risks (from January 1995), with the option to purchase further layers of cover as necessary. Following some doubts as to the application of the statutory minimum to group companies, the regulations were hurriedly amended[24] to allow a company and its subsidiaries to be treated as one employer for insurance purposes. The ending of 'unlimited' cover called into question the adequacy of the statutory limit of £2 million and was a major factor in prompting the general review of the legislation which followed.[25]

The new Regulations which resulted from the review impose a minimum limit of £5 million for all risks, with a holding company and its subsidiaries continuing to be treated as one employer. The limit is lower than most people expected and regarded as too low by many.[26] When the old legislation came into force in January 1972 no judicial award of damages for personal injury had exceeded £100,000, or one-twentieth of the £2 million cover which the regulations then required. Increasing the original limit of £2 million to cover inflation since 1972 would produce a figure of around £20 million and restoring the relationship which existed in 1972 between the limit and the largest injury claims (i.e. a multiple of 20) would result in a figure in excess of £75 million.[27] In fact, the latter figure would be unrealistic given the limited capacity of the employers' liability insurance market.[28] Nevertheless, cover for £5 million is barely adequate even for a very small firm, and could obviously prove insufficient in the case of an incident causing serious injury to a number of employees. Individual latent disease claims settled in 30 years time may well exceed this figure and, following the recent decision of the House of Lords in *Wells v.*

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24 By S.I. 1994 No. 3301 from January 1 1995.

25 The review was ordered in December 1994.

26 Amongst others, the TUC, the Health and Safety Commission and AIRMIC (Association of Insurance and Risk Managers in Industry and Commerce) have expressed disappointment.

27 In fact, the High Court has recently (December 1998) awarded record damages of over £9.2 million in a personal injury case, more than double the largest previous amount.

28 The Association of British Insurers estimate that between 1987 and 1992 insurance companies made underwriting losses of £588 million on employers' liability business. A 1994 report by Smith New Court estimated that the major insurers incurred underwriting losses of £200 million for the 1992 financial year alone. The report suggested that, even allowing for investment income, none of the insurers analysed had made any profit on employers' liability business since 1987. Not surprisingly, insurers regard employers' liability business as unattractive and the market for cover has shrunk: 50% of risks are written by the top three offices and 72% by the top six. Excluding Lloyd's, there are probably no more than 30 insurers active in the market at present. Hasson refers to 170 companies 'selling employers'

Wells,[29] single injury claims exceeding £5 million could become quite common. Of course, most employers will insure for amounts well in excess of £5 million, but in hazardous industries, where insurance costs are high,[30] employers may be tempted to buy only the minimum cover.

Apart from these doubts about the adequacy of the new statutory limit, there is also an element of uncertainly concerning the application of policy limits to disease claims. It has never been doubted that all traumatic injuries resulting from one incident (such as an explosion) should be treated as one 'occurrence' but there is less certainty concerning disease, because an employer's decision to use a hazardous substance in the workplace might equally be regarded as a single 'occurrence'. In this case the insurance policy limit would apply collectively rather than individually to all employees who subsequently became ill. The cover might then be used up by employees who were able to get their claims in first, leaving later claimants in a much weaker position. It was originally thought that the new Regulations might seek to ensure that the policy limit applied individually to employees in such a case but, not surprisingly, drafting difficulties led to this idea being dropped, so the element of doubt remains.

By comparison, it may be noted that the Road Traffic Act 1988 requires users of motor vehicles to secure unlimited cover in respect of liability for death and bodily injury,[31] even though European law allows Member States to fix national limits at quite modest levels should they wish to do so. Apart from the question of insurance market capacity, the justification for the discrepancy between the two insurance regimes is not immediately obvious. It is submitted that the minimum amount of employers' liability cover required by law is now dangerously inadequate and that the

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liability insurance' in 1974, although the figure he quotes may refer to insurers who were *authorised* to sell at the time rather than those which were active participants in the market.

29 *Wells v. Wells, Thomas v. Brighton Health Authority, Page v. Sheerness Steel Co plc* [1998] 3 All ER. As a result of this decision multipliers for future loss will normally be based on a discount rate fixed by reference to the net return on Index Linked Government Securities (currently about 3%), and not based on judicial multipliers at 4 1/2% as before.

30 For the most dangerous occupations employers' liability premiums may be 10% of payroll, or even higher.

31 The minimum cover for third party property damage is £250,000. This relatively low limit was chosen to limit the exposure of the Motor Insurers' Bureau to very large property damage claims. In practice motor insurers provide unlimited cover in respect of property damage for 'private' cars but sometimes impose a limit for large commercial vehicles, where the potential

security provided for injured employees is, in this respect, less satisfactory than it was in 1972.

5 THE RIGHT OF THE INSURER TO AVOID THE POLICY FOR MISREPRESENTATION OR NON-DISCLOSURE

If an insurer denies cover under an employers' liability insurance the consequences for the injured employee can be severe because, in the absence of an alternative remedy, the latter will go uncompensated if the employer himself is unable to pay. In the case of employers' liability insurance the right of the insurer to avoid the insurance policy for misrepresentation or failure to disclose facts material to the risk - a central principle of insurance contract law - has never been restricted in any way. The new Regulations make no change in this regard. In fact, employers' liability insurers do sometimes take the defence, although it is not suggested that they do so lightly, or frequently.[32] However, it is submitted that the point is more likely to be taken when large sums are at stake, i.e. where the injuries in question are severe or numerous. Indeed, it was taken by the insurers in the case of the Glasgow fire, discussed earlier, which helped to generate support for the 1969 Act: as has been observed,[33] it is curious that the Act then failed to address the problem.

In the case of motor insurance the position is different. Section 151 of the Road Traffic Act (which is discussed again later in this paper) creates a duty on the part of insurers to satisfy judgements obtained by third parties against any person insured by a motor policy, even though the insurer may be entitled to avoid or cancel the contract. Section 152 (2) provides that this obligation shall not arise if the policy was 'obtained by misrepresentation or non-disclosure'. However, to obtain this relief the insurer must, within three months of the commencement of the proceedings against the insured, obtain a declaration of the court of his entitlement to avoid and must give notice to the third party of the action for the declaration within seven days of its being

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for such damage is greater. There may also be a catastrophe risk, for example, in respect vehicles used 'airside' at international airports.

32 When insurers do take the point the effect may be to transfer the loss to another insurer. See, for example, *Dunbar v. A & B Painters Ltd. and Economic Insurance Co. Ltd.* [1986] 2 Lloyd's Rep. 240 where the loss eventually fell on the professional indemnity insurers of the brokers who arranged the cover, because the non-disclosure which enabled the employers' liability insurers to avoid the contract was attributable to the latter's negligence.

33 See Hasson, *op. cit.* at 82 and Birds, J., *Modern Insurance Law*, 4th. Edition, p. 395.

commenced. If he thinks fit, the third party is entitled to be made a party to the action. Although the right to avoid still exists, its effectiveness is greatly limited by sections 151 and 152: at the very least the third party is put on his guard. In practice, an even more significant limitation is imposed by the 'Domestic Agreement'[34] amongst members of the Motor Insurers Bureau' (MIB). This internal agreement governs cases where a negligent driver is uninsured but a policy (albeit a defective one) has been issued in respect of his vehicle. In this case the 'insurer concerned' (as it is known) is obliged to satisfy the third party's claim on behalf of the MIB, but from its own funds. Defences under the policy, including misrepresentation or non-disclosure, are thus of little use.[35] Finally, it is worth mentioning that where a motorist has insured in his private capacity both he and the third party will benefit from the provisions of the Statement of General Insurance Practice, a voluntary code[36] which imposes further restrictions on an insurer's right to avoid for misrepresentation or non-disclosure.[37] Unfortunately, this code does not apply to employers' liability policies, which are commercial rather than personal insurances.

6 THE RIGHT OF THE INSURER TO AVOID THE POLICY FOR BREACH OF CONDITION

We have seen that the security of the employee may be prejudiced if his employer fails to act in good faith when the insurance is arranged. Equally, the insurance can be undermined if the insured fails to comply with the terms of the policy itself. In this case the insurers may be entitled to avoid the policy as a whole or avoid a particular claim, depending upon the precise nature of the breach.

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34 Or 'Domestic Regulations'.

35 There are one or two circumstances where the 'insurer concerned' may still wish to take the formal step of avoiding the policy: for example, to avoid a large claim for damage to third party property brought by another insurer by way of subrogation (the MIB/insurer concerned is liable for third party property damage claims up to £250,000, but not losses which are covered by the property owner's own insurance).

36 The Statements of Insurance Practice (of which there are three) are a form of self-regulation whereby members of the Association of British Insurers and Lloyd's agree to waive certain technical defences and forego their legal rights in relation to various other matters where the policyholder has insured in his private capacity. They are the 'price' paid by the insurance industry for exemption from the Unfair Contract Terms Act 1977.

37 For example, the Statement prohibits avoidance on the grounds of non-disclosure of a material fact which 'a policyholder could not reasonably be expected to have disclosed' and on grounds of 'innocent' misrepresentation.

The old Regulations gave the injured employee some protection by prohibiting four specific types of policy condition. These provisions are virtually unchanged in the current Regulations, 2(1) of which states that:

> *For the purpose of the 1969 Act, there is prohibited in any contract of insurance any condition which provides (in whatever terms) that no liability (either generally or in respect of a particular claim) shall arise under the policy, or that any such liability so arising shall cease, if –*
>
> *(a) some specified thing is done or omitted to be done after the happening of the event giving rise to a claim under the policy;*
>
> *(b) the policy holder does not take reasonable care to protect his employees against the risk of bodily injury or disease in the course of their employment;*
>
> *(c) the policy holder fails to comply with the requirements of any enactment for the protection of employees against the risk of bodily injury or disease in the course of their employment; or*
>
> *(d) the policy holder does not keep specified records or provides the insurer with or make available to him information from such records.*

Regulation 2(1)(a) refers to claims conditions (conditions precedent to liability) and, for example, prevents insurers from repudiating liability when the insured breaks a policy condition which requires him to notify claims promptly.[38]

Regulation 2(1)(b) limits the use of 'reasonable precautions' conditions, which are found in nearly all insurance policies. However, the effect is minimal, because the courts are in any case reluctant to enforce such clauses in liability policies in the absence of reckless conduct by the insured.[39] It has been suggested that a condition providing that recklessness debars liability might be enforceable,[40] although insurers have never used such clauses.

Regulation 2(1)(c) was introduced in the light of the Glasgow fire mentioned earlier where the insurers, as well as pleading non-disclosure, sought to repudiate liability on

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38 Effectively reversing the decision in *Farrell v. Federated Employers Insurance Co.* [1970] 1 WLR 1400.

39 See, for example, *Woolfall and Rimmer Ltd v. Moyle* [1942] 1 KB 66 and *Fraser v. Furman* [1967] 1 WLR 898.

40 See Birds, *op. cit.* p. 393.

the grounds that the insured had failed to comply with the provisions of the Factories Acts, as required by the policy.

Regulation 2(1)(d) refers most obviously to the provision, commonly included in an employers' liability policy, which requires the insured to keep a record of the total amount paid in wages and salaries for the year - information which is used by the insurer to adjust the premium. In fact, provisions of this sort may well be construed as 'mere' or 'collateral' conditions a breach of which entitles the insurers to damages only with no right to avoid the policy or the instant claim.[41]

The only addition in the new Regulations is a prohibition on the use of policy excesses (or deductibles), i.e. arrangements whereby the policyholder (or employee) is required to bear the first amount of any claim.[42] Even with this amendment, the list of prohibited conditions is hardly comprehensive. In particular, there is no restriction on the right of an insurer to deny liability if an injury occurs when an employee is engaged in work which falls outside the terms of the cover. The scope of the policy in this respect may be restricted in two ways. First, by the 'business description' which, in every liability policy, confines cover to activities which fall within the stated definition of the firm's activities. For example, a business description such as 'retailers of domestic electrical appliances' might be construed as excluding repair work and would certainly exclude, say, the erection of television aerials. Even if there was no misrepresentation or non-disclosure at the proposal stage[43] liability in respect of a particular claim could be denied, since the provision would probably be construed as a clause defining the risk.[44]

The second way in which the scope of cover may be restricted is through 'trade warranties',[45] that is, clauses which deny coverage if an injury arises from certain

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41 See *Re Bradley and Essex and Suffolk Accident and Indemnity Society* [1912] 1 KB 415.

42 Section 2(2). Arrangements whereby the insurer pays each claim in full and then seeks some reimbursement from the insured are not prohibited (Section 2(3)).

43 Which would allow the policy as a whole to be avoided.

44 I.e. a 'suspensive condition' - in which case it would not be controlled by the EC Directive on Unfair Terms in Consumer Contracts (enacted in the Unfair Terms in Consumer Contracts Regulations, S.I. 1994 No. 3159).

45 Which may, or may not, amount to warranties in law. If the clause takes effect as a warranty the insurer's remedy is to avoid the contract as a whole, if it is construed as an exclusion or suspensive condition the insurers may avoid a particular claim whilst allowing the contract to stand.

specified hazardous activities; e.g. demolition work, work on particular structures,[46] or work carried out beyond a certain height above ground or below a certain depth. These clauses are very common and are quite valid in law,[47] although their use has been criticised by the courts.[48] As with activities falling outside the business description, an employee who is called upon to do the work in question may well be unaware that the risk is not insured. He is unlikely to have read the policy itself and, even if he has inspected the certificate of insurance, he will not find any mention of policy restrictions on it, since inclusion is neither required by law nor carried out in practice. Insurers argue, quite legitimately, that such restrictions are necessary to protect their underwriting considerations and simply exclude risks for which no extra premium has been charged. Furthermore, insurers will not, in practice, exclude an activity if they are aware that the insured already engages in it, or is likely to do so in future: in this case they will either negotiate an appropriate premium for the risk or decline to insure at all. Nevertheless, the position is unsatisfactory from the employee's point of view. It could be improved greatly by extending the list of prohibited conditions to include provisions relating to the nature of the work done by employees, or the manner of doing it coupled, perhaps, with a right of recovery on the part of the insurer. A requirement for the full business description and any restrictive conditions to appear on the certificate of insurance would be an alternative solution.[49] Space does not permit a detailed comparison with the conditions which are prohibited in motor policies. Suffice it to say that in the case of motor insurance the prohibited conditions are greater in number, though the list is by no means comprehensive.[50] It is

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46 For example: 'Gasometers, towers, steeples, bridges, viaducts, blast furnaces, colliery overhead winding gear and roofs other than on private houses or shops consisting of not more than three floors.'

47 See *Kearney v. General Accident Fire and Life Assurance Corporation Ltd.* [1968] 2 Lloyd's Rep 240.

48 See, for example, the comments of Mr. Pratt QC sitting as deputy judge in the Queen's Bench Division at first instance, echoed by Balcombe, LJ in the Court of Appeal in *Dunbar* v. *A & B Painters Ltd. and Economic Insurance Co. Ltd.* [1986] 2 Lloyd's Rep 38. Mr. Pratt described the certificate of insurance, which stated that the employers' liability insurance concerned complied with the 1969 Act as 'a snare and a delusion', because it made no mention of a height warranty which restricted cover under the policy.

49 Both possibilities were rejected in the recent review, although the DETR will 'return to the matter in the longer term'. It is difficult to see why, at least, the second alternative should not be adopted now.

50 Eight types of condition are prohibited in motor policies. Curiously, 'reasonable precautions' conditions are not covered by the list (*National Farmer's Union Mutual v. Dawson* [1941] 2 KB 424). This appears to be the one area where the employers' liability legislation provides greater protection than the Road Traffic Act, although the existence of the Motor Insurers'

worth noting, however, that the Statement of General Insurance Practice mentioned earlier has a further favourable effect on private motor insurance contracts in that it prevents the insurer from repudiating liability where there is no causal connection between the breach and the loss.[51] Under an employers' liability policy, strictly, no such *nexus* is required, at least for most types of breach. Having said all this, neither the prohibition of specific conditions nor the protection afforded by the Statement of General Insurance Practice is of much significance compared with the general right to claim directly against the insurer which section 151 of the Road Traffic Act gives to road accident victims. As we shall see, the injured employee has no such right.

7 THE RIGHT OF THE EMPLOYEE TO MAKE A DIRECT CLAIM AGAINST THE INSURER

In many countries industrial injury insurance is a 'first party' coverage operating within the framework of a no-fault Workers' Compensation system. In this case legal liability on the part of the employer is not a pre-requisite for compensation and, indeed, the employer is often exempt from tort claims by his employees. At the risk of stating the obvious, employers' liability insurance is a third party cover which responds only when the employer is responsible in law for the injury. Of course, liability insurance claims are routinely settled through direct negotiation between representatives of the accident victim and the insurers concerned. However, if negotiations break down and the claimant wishes to assert his rights through legal action then, of course, the action lies against the insured (in our case the employer) and not the insurers, whose only obligation is to indemnify the policyholder. However, the link between the third party and the ultimate source of compensation can sometimes prove fragile, particularly if the insured becomes insolvent or his behaviour is obstructive. In the case of insolvency the claimant, whether an employee, a person injured in a road accident, or any other victim, has the benefit of the Third Parties (Rights Against Insurers) Act 1930, which effectively transfers to the third party the insured's rights under the insurance contract. Unfortunately, there are

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Bureau and the right to make a direct claim under section 151 of the Act more than compensates for the disadvantage as far as third parties are concerned.

51 The Statement provides that 'An insurer will not repudiate liability to indemnify a policyholder: ... on grounds of breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is proved'. Thus, an insurer could not deny

numerous flaws in the legislation, which is currently the subject of a joint review by the Law Commission and Scottish Law Commission. Some of these flaws were already apparent when the 1969 Act came into force, especially following *Post Office v. Norwich Union Fire Insurance Society Ltd*.[52] The *Post Office* case established that, far from having a true right of 'direct action' against the insurer, third parties must first establish the liability of the insured, either by a judgement of the court, an award in arbitration or by agreement. Cases since 1972 have shown how difficult this can be. For example, in *Bradley v. Eagle Star Insurance Co. Ltd*.[53] the plaintiff had contracted byssinosis through inhaling cotton dust at her employer's mill, but the company in question was wound up in 1975 and dissolved in 1976. The House of Lords applied *Post Office v. Norwich Union* and held, by a majority, that since the insured company had been dissolved and it was not possible for the plaintiff to restore the company and establish its liability, no right of indemnity could be transferred to her under the 1930 Act.[54] The current review of the 1930 Act should eventually result in amendments which make it easier for an injured employee whose firm has ceased to trade to obtain compensation. These are likely to include a more streamlined procedure and enhanced duties on the part of insurers and policyholders to disclose relevant policy information to third parties. However, as it stands, the Act does little to assist the proper working of the employers' liability insurance system. Although the 1930 Act applies to all liability insurances, including third party motor policies, its deficiencies appear to impact most heavily on employers' liability claimants,

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liability for a claim involving an unroadworthy vehicle, unless the accident was attributable to the unroadworthiness.

52 [1967] 2QB 363.

53 [1989] AC 957.

54 As a result of the *Bradley* case the law has been changed: the two year time limit from the date of dissolution on the right to restore companies to the register does not now apply in cases involving personal injury: See s 651 Companies Act 1985. Although this particular problem has been removed, many difficulties still flow from the fact that the Act requires the liability of the insured to be established before the victim may proceed against the insurers. This creates the need for two separate actions, one against the insured followed by one against the insurers. If the insurers defend the insured in the first action they may be taken to have waived their right to rely on any defences they may have under the policy, such as breach of condition or non-disclosure by the insured. In cases where a company has been removed from the register of companies by the time the victim wishes to sue yet another action may be necessary, in the form of an application to restore the company to the register. The problem for the victim is compounded by the fact that he can obtain disclosure of information about the insurance cover and any defences which the insurers might employ only when liability on the part of the insured has been established. He may therefore embark on expensive litigation only to find that the policy is worthless. Apart from this Byzantine procedure, there are problems concerning many other matters, including the territorial scope of the Act, the operation of

approximately half of whom now seek compensation for disease - the incidence of disease claims having risen very markedly since 1972.[55] Many claims are in respect of latent or gradually developing illnesses.[56] Obviously, the longer the latent period the greater is the chance that the insured firm will become insolvent before the disease manifests itself and, indeed, the greater the likelihood that the firm will have been wound up, necessitating the extra procedural step of restoring it to the register. Furthermore, latent diseases are particularly common amongst employees in industries which are in general decline[57] and those where insolvencies are in any case frequent.[58]

By contrast, there is rarely, if ever, a significant time lag between a motor accident and the date of the claim, so the risk of intervening insolvency is much lower.[59] Bearing all this in mind, it is ironic that the Road Traffic Act 1988 should give the road accident victim a valuable extra remedy which has no parallel in the employers' liability legislation. As we have already seen, it is provided by section 151 of the Act, which requires motor insurers to satisfy a judgement obtained by a third party against any person insured by the policy[60] if that person fails to do so. If the motorist has no insurance the third party has similar rights against the Motor Insurers' Bureau. The rights given to the third party by section 151 are broader than those conferred by the 1930 Act since they accrue in any case where a judgement has been obtained and not just when the insured is insolvent. This means that the third party is relieved of any difficulty in enforcing the judgement and cannot be kept out of his money by an

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limitation periods and the distribution of insurance money where the cover is limited and there are a number of claimants, actual or possible.

55 The number of disease claims submitted to employers' liability insurers increased by around 50% between 1986 and 1993, accounting for 56.6% of all claims in 1993. The level of disease claims dropped to 41.3% in 1995 but the contribution of disease claims to total employers' liability claims cost remained steady at around 25%. Source: *ABI Statistics Bulletin*, December 1996.

56 Measured from date of first exposure, the average latency period for asbestosis is over 30 years and, for silicosis, over 40.

57 For example, mining, shipbuilding, heavy engineering, textile manufacture and, most obviously, the asbestos industry.

58 For example, the building industry.

59 According to ABI statistics motor insurance accounts for only 12% of claims brought under the 1930 Act, compared with 30% for employers' liability and 40% for public (i.e. general) liability. A Law Commission survey of applications to restore dissolved companies to the register revealed that employers' liability accounts for 60% of such applications as against 2% for Road Traffic Act cases. Source: Law Commission/Scottish Law Commission Joint Consultation Paper on the Third Parties (Rights Against Insurers) Act 1930.

60 Which, effectively, is deemed to include almost any person at all, regardless of policy restrictions on who may drive the vehicle.

obstructive insured. Furthermore, the third party is not prejudiced by any failure on the part of the policyholder to comply with the terms of the insurance. The insurer's only real defence is misrepresentation or non-disclosure which, as we have seen, is restricted by formal requirements and, in practice, almost nullified by the operation of the MIB 'Domestic Agreement'.[61]

Finally, however, it seems that new Regulations, together with proposed future measures, will alleviate at least some of the difficulties described above. First, the Regulations now require employers to retain certificates of insurance for a period of 40 years from the expiry of the policy. The main purpose is to allow the Health and Safety Executive to detect breaches of the law more easily, but this requirement may also help victims of latent injuries to trace the insurer(s) which were on risk at the relevant time - something which has often proved very difficult in the past. Measures specifically designed to help injured employees obtain details of insurers of liquidated companies have also been proposed. Various alternatives are suggested in the consultative document which led to the new Regulations, a central register of all employers' liability policies being one possibility. These measures, along with the changes which are likely to result from the review of the 1930 Act mentioned above, should make it easier for an injured employee to identify the insurers of an insolvent firm and easier to claim. Unfortunately, they still fall a long way short of the 'blanket' protection given to road accident victims by section 151 of the Road Traffic Act.

8 EMPLOYERS WHO FAIL TO INSURE: A GUARANTEE FUND?

Regardless of how the law on compulsory insurance is framed, its objects will be defeated if the person who is required to insure simply fails to do so. The standard solution to this problem is a guarantee fund, which underpins the system by funding claims which uninsured wrongdoers are unable to satisfy themselves.

We have referred on several occasions to the guarantee fund for benefit of motor accident victims, operated by the Motor Insurers' Bureau, which was established in 1946 following the recommendations of the Cassell committee (1937). Membership of the MIB has been compulsory for all UK motor insurers since 1974, and is a

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61 See Section 5, above.

condition of their authorisation. By virtue of the second EC Directive on Motor Insurance (84/5/EEC) all EU Member States must operate similar funds.

A road accident victim can call upon the MIB to satisfy a judgement obtained against an uninsured motorist if the latter does not pay within 7 days. Alternatively, and subject to the consent of the motorist, the MIB will settle the claim out of court on his behalf. In either case the offending motorist is liable (at least in theory) to reimburse the Bureau: in the first case the court judgement will be assigned to the MIB once it has satisfied the claim, and in the second the Bureau will have obtained an undertaking to repay from the motorist before agreeing to settle the claim for him.

Where the motorist has a policy which is invalid for some reason, or has recently expired, the 'insurer concerned' will, in practice, deal with the matter on behalf of the Bureau under the 'Domestic Agreement' mentioned earlier. Finally, the Bureau is also liable to pay compensation to those who are injured by untraced motorists, provided the injury in question was, on the balance of probabilities, caused by a motor vehicle and in circumstances where the driver would have been liable in law.

The sponsor of the Bill which eventually became the 1969 Act, David Watkins, was strongly in favour of a similar arrangement for the benefit of victims of employers who fail to insure, as was the TUC. However, Parliament appears to have been persuaded that the facility to impose a cumulative fine on an employer who failed to insure was an adequate response to the problem.[62] Other arguments which weighed against the introduction of a guarantee was the 'unfairness' of forcing insurers to pay for the failures of employers to insure, the added expense and bureaucracy which a fund would entail and general uncertainty about the extent of the problem posed by defaulting employers. The first argument hardly requires a response,[63] but there is some force to the second point, because an Employers' Liability Insurers Bureau would not be easy to introduce or easy to operate, given that claims in respect of disease may take many years to materialise.

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62 See Simpson, *Employers' Liability (Compulsory Insurance) Act 1969* (1972) 35 MLR 63-68 for an account of the debates on the Bill.

63 Guarantee funds are almost invariably funded by levies on insurance companies which, of course, pass on the cost in the form of higher premiums.

The introduction of a guarantee fund was considered again in the recent review but was rejected for much the same reasons as before, the view of the DETR being that greater penalties for failure to insure, which are proposed,[64] would act as sufficient increased deterrent.[65] Once again, the absence of hard information on the extent of the problem of uninsured employers weakens the case for a fund. If the number of successful prosecutions for failure to insure is anything to go by the problem is hardly a serious one, but the small number of such cases may well reflect technical difficulties in securing such prosecutions rather than a high degree of compliance with the law.[66] It has been argued that there would be little to lose in introducing a guarantee fund as a diagnostic tool: heavy claims on the fund would prove that a need exists and, conversely, infrequent claims would not be a burden to the insurance industry.[67] Not surprisingly, the insurance industry is unconvinced by this argument, regarding a guarantee fund as an unnecessary extravagance.

Whatever view is taken, it is clear that some injured employees do become victims of uninsured and insolvent employers[68] and, whether they be few or many, their position is far less secure than road accident victims who find themselves in a similar position. The evidence of a need for a guarantee fund may be largely anecdotal, but the same can be said of the 1969 Act itself.[69] Surely, if employees deserve the protection of compulsory insurance, then they deserve full protection.

9 CIVIL ACTIONS FOR BREACH OF THE DUTY TO INSURE

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64 The maximum penalty for failure to insure is currently £2,500 per day that insurance is not held. However, at present the average fine is very small and the prospect of a case being brought is remote. It is proposed to make the penalties the same as those under the Health and Safety at Work Act 1974, where fines can be £20,000 in a magistrates court and unlimited if the case is taken to Crown Court. However, this will require primary legislation.

65 But see the comments of Sir John Megaw on the potentially damaging consequences for a civil claimant of large criminal penalties in *Richardson v. Pitt-Stanley, infra*.

66 There were only 5 prosecutions in 1996 and 8 in 1997. The numbers are minuscule compared with those for prosecutions for driving without motor insurance as required by the RTA: there were 415,015 such prosecutions in England and Wales in 1996, leading to 267,932 convictions. However, under the old Regulations it was virtually impossible for HSE Inspectors to obtain evidence of breaches of the 1969 Act unless there was no insurance in force on the day they called. A 6 month time bar on prosecutions also made it easy for offenders to evade prosecution by drawing out the process.

67 A point made by the TUC in its response to the DETR on the draft version of the new Regulations.

68 For example, see *Richardson v. Pitt-Stanley* and *Quinn v. McGinty*, *infra*.

69 See the comments on the Glasgow fire in section 2 above.

Can an accident victim claim damages for breach of statutory duty from an uninsured wrongdoer when the insurance is compulsory by law? In the case of motor insurance this right exists. Sections 143(1) & (2) of the Road Traffic Act 1988 provide that a person who uses a motor vehicle on the road, or causes or permits another to do so, commits a criminal offence unless insurance (or a security) in respect of the vehicle is in force. However, *Monk v. Warbey and Others*[70] established that these sections of the Act also confer a civil remedy, allowing the victim of a road accident to claim damages in tort for breach of statutory duty from an owner who has 'caused or permitted' another to drive an uninsured vehicle. In this case the first defendant, Warbey, had lent his car to the second defendant, Knowles, in the knowledge that the third defendant, May, would actually drive the car. Monk was injured in an accident involving the vehicle but neither Knowles nor May, who admitted negligence, could satisfy the judgement which Monk obtained against them. It was held, however, that Monk was entitled to recover an equivalent sum in damages from Warbey, the car owner. The significance of the case diminished considerably with the introduction of the MIB guarantee fund for uninsured drivers. Nevertheless, the principle established in *Monk v. Warbey* survived the introduction of the MIB and has been confirmed on a number of occasions.[71]

Given that no guarantee fund exists in the case of employers' liability insurance a civil remedy akin to that conferred by section 143 of the Road Traffic Act would be extremely useful. Unfortunately, it is now clear that no such rights exist under the 1969 Act, at least in England.[72] The leading case is *Richardson v. Pitt-Stanley*[73] in which an employee who had suffered a 'mutilating' machinery accident claimed damages from the directors of the insolvent and uninsured firm which employed him. He argued that the failure to insure was a breach of statutory duty for which the directors, as well as the company, were liable under section 5 of the 1969 Act. Under this section directors and officers, as well as the company itself, are deemed guilty of an offence if the failure to insure has been committed with their consent or connivance or facilitated by their neglect. The judge in the lower court held the case

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70 [1935] 1 KB 75.

71 See, for example, *Corfield v. Groves and Another* [1950] 1 All ER.

72 *Richardson v. Pitt-Stanley* (see footnote 73 *infra* and accompanying text) has not been followed in Scotland: see *Quinn v. McGinty* [1998] Rep LR 107, where a civil action against a director for breach of statutory duty under section 5 of the 1969 Act succeeded.

to be on all fours with *Monk v. Warbey* and would have allowed the action for damages to proceed. However, the Court of Appeal reversed his decision by a majority of 2 to 1. *Monk v. Warbey* was distinguished on a number of grounds, but it is easy to agree with Stuart-Smith, LJ, who felt that none of the reasons given were especially compelling in themselves. For example, both Russell, LJ and Stuart-Smith, LJ emphasised the fact that the Road Traffic Act declared that '*it shall not be lawful'* for a person to use a vehicle on the road without insurance, or cause or permit another person to do so, whereas the 1969 Act merely stated that a person who failed to insure '*shall be guilty of an offence'*. It was felt that the former words were more apt to spell out a civil right[74] but the distinction is, to say the least, a fine one. Again, both judges felt that that the position of a director of a firm which fails to insure the employers' liability risk was not analogous to a car owner who lends his vehicle to an uninsured driver. As Stuart-Smith, LJ stated:[75]

> *'The owner of a motor car who causes or permits another to drive his vehicle puts into the hands of that person a potentially lethal object, which, if it is not driven with proper care, may cause injury to members of the public on the road. There is nothing similar in the action or inaction of a director who commits an offence under section 5 of this Act.'*

Certainly the position of the car owner and company director are not precisely the same. However, one might argue that the situation of the two is similar in a quite material way. Firms are controlled by their directors and officers and, whilst a firm is not in itself a 'potentially lethal object' a business which uses dangerous unfenced machinery, as in the *Richardson* case, exposes people to the risk of injury in much the same way. Both the car owner and the director are in a position to create risk through an instrument which they control and to mitigate it through insurance. Finally, Stuart-Smith LJ pointed to the potential injustice of imposing civil liability on a director 'who may have done no more than overlook the need to renew a policy'. However, one might argue that an injured employee who is denied compensation through such neglect has every right to look to the director for redress. Furthermore, the duty in this

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73 [1995] 1 All ER 460, CA.

74 Following *Rickless v. United Artists Corp*, 1 All ER 679, [1988] QB 40, [1987] 2 WLR 945, CA.

75 At 469, d.

case is *less* strict than that which the Road Traffic Act imposes on the car owner, which appears to be absolute.[76]

In his dissenting judgement Sir John Megaw played down differences in detail between the 1969 Act and the equivalent sections of the Road Traffic Act, focusing on what he regarded as the single fundamental purpose of the 1969, that is to protect a particular class of persons, the employees, from the risk of being deprived of lawful compensation because of the financial position of the employer.[77] This, he argued, placed the case squarely within the 'first exception' to the general rule precluding civil liability under a penal statute stated by Lord Diplock in *Lonrho Ltd v. Shell Petroleum Co Ltd*.[78] He pointed out that the penal remedy for failure to insure under the 1969 Act (at the time, a fine of £1,000 for each day during which no insurance was in force) was of no benefit to the injured employee and, indeed, might actually worsen his position by draining whatever assets the firm might have.

Whatever view is taken of these arguments, there is no doubt that the absence of a civil remedy for a breach of statutory duty under the 1969 Act may have very serious consequences for the injured employee who, like the plaintiff in *Richardson*, may be left without remedy. By contrast, the lack of a similar remedy would be of little consequence for the victim of a road accident, for whom the MIB provides a strong safety net. It is ironic that the law should deny the former a useful remedy whilst allowing the latter a redundant one.

10 MOTOR VEHICLE INJURIES IN THE COURSE OF EMPLOYMENT

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76 A car owner who lends his vehicle to another whom he honestly and reasonably believes to be properly insured would probably still be liable to a third party under the *Monk v. Warbey* principle: Warbey's knowledge concerning the presence or absence of insurance seems to have been treated as irrelevant.

77 With respect, it is submitted that the view of Stuart-Smith LJ on this point - that the 1969 Act was also intended to protect the *employer* from the ruin which a large uninsured employers' liability claim might cause is highly questionable. The primary object of insurance is certainly to protect the policyholder, but the object of compulsory insurance *legislation* must be to protect the third party. If Parliament wished to force firms to protect their assets through insurance it would make fire insurance compulsory, since the absence of the latter is much more likely to lead to ruin than the lack of employers' liability cover.

78 [1981] 2 All ER 456, [1982] AC 173, [1981] 3 WLR 1032, HL. The 'first exception' being cases where the statutory duty or prohibition was imposed for the benefit or protection of a particular class of individuals.

Statistical data on employment injuries involving motor vehicles is surprisingly scarce. Nevertheless, it is clear that such injuries are common.[79] When an employee is injured as a result of a tortious act involving a motor vehicle the application of the two compulsory insurance regimes, and the responsibility of motor and employers' liability insurers respectively to provide indemnity, may be called into question. To minimise disputes, and prevent gaps or overlaps in coverage, there is clearly a need to co-ordinate compensation and compulsory insurance arrangements. At the same time, inconsistencies between the two regimes are brought sharply into focus at this point, where the two systems make close contact with each other.

Until recently, there was no requirement for a motor insurance policy to cover liability for death or bodily injury, arising out of and in the course of employment, of a person in the employment of a person insured by the policy. Accordingly, motor insurers excluded the risk, which was retained in the employers' liability market. In the common situation where an employee was injured through the negligent driving of a fellow employee the liability of the insurer to provide an indemnity would then depend on the sense in which the accident occurred 'in the course of employment'. If *both* employees were acting in the course of employment the loss would fall under the regime of the 1969 Act and the employers' liability insurers would satisfy the claim, whereas if either employee was not acting in the course of employment the compulsory insurance provisions of the Road Traffic Act would apply and the motor insurers would provide the indemnity.[80] Disputes typically arose where an accident

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79 Accident statistics collated by the HSC do not include road traffic injuries, even though most employees spend some working hours in travel and some spend virtually all their time on the road. Conversely, road traffic accident statistics (such as those collated by the DETR) rarely record whether or not victims were injured in the course of their employment. However, 3,670 workplace (i.e. non-road) accidents involving motor vehicles were recorded by the HSE in 1996/7, including 32 deaths, making motor vehicle accidents the third most common source of fatal injury in the workplace. According to the Pearson Report (1978) about 13% of road accident victims are injured 'at work' and about 18% on the way to or from work - equivalent to about 41,000 employment injuries on the road and around 57,000 'commuting' accidents annually. The Labour Force Survey for the years 1993/4 and 1994/5 estimates that the average number of work-related injuries each year from road accidents is about 77,000, or 24% of the total - a higher ratio which perhaps reflects the general increase in the use of motor vehicles by employees since Pearson.

80 If the victim (typically a passenger) was not acting in the course of employment the 1969 Act would obviously not apply. If the employee who caused the accident (typically the driver) was not acting in the course of employment the employer would not be vicariously liable, again taking the case outside the 1969 Act.

occurred when employees were travelling to work[81] or when, in the course of the working day, they were engaged in an activity involving a motor vehicle which was not obviously part of their job.[82] Even when it was clear that both employees were acting in the course of employment there might still be an element of uncertainty as to which insurer should ultimately bear the loss.[83]

When valid cover was in force it would not matter greatly to the victim whether payment was due from a motor or employers' liability insurer. On the other hand, if the cover was defective or non-existent it might make all the difference, particularly if the defendant could not satisfy the judgement. In this case, of course, a guarantee fund (and all the other advantages of the compulsory motor insurance regime) would be available only if the risk fell under provisions of the Road Traffic Act.[84] The situation was clearly anomalous. If, for example, two employees were injured in a motor accident caused by the negligent driving of a third, and one of the two was not 'on duty' at the time, he would be in a far better position than his fellow passenger if the employer had no insurance. Since his injury did not arise in the course of employment, he would have recourse against the MIB, whereas his colleague would get nothing if the employer could not satisfy the claim.

The position improved following the implementation of the third EC Directive on Motor Insurance (90/232/EEC).[85] The effect was to move most employment injuries involving motor vehicles from the compulsory employers' liability insurance regime

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81 See, for example *Vandyke v. Fender* [1970] 2 QB 292, *Paterson v. Costain and Press (Overseas) Ltd.* [1979] 2 Lloyd's Rep 204 and *Smith v. Stages* [1989] AC 928.

82 See, for example, *Century Insurance Co. v. Northern Ireland Road Transport Board* [1942] AC 409, [1942] 1 All ER 491 and *Hilton v. Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74.

83 See, for example, the well-known case of *Lister v. Romford Ice and Cold Storage* [1957] AC 555. From an insurance perspective, this was an attempt by employers' liability insurers to push their loss, arising from an employment injury, into the motor market. The employers' liability insurers exercised subrogation rights against the driver of a vehicle who had injured a fellow employee (who was, in fact, his father) in the course of employment. They had assumed, incorrectly, that the driver could claim an indemnity from the motor insurers. The dispute would not have arisen had a (so-called) 'Common Law Agreement' applied between these particular insurers. Under this agreement employers' liability insurers accept responsibility for the whole loss when there is an overlap with a motor policy, even if the claim is made against the negligent driver personally rather than the employer who is vicariously liable.

84 See, for example, *Lees v. Motor Insurers' Bureau* [1952] 2 All ER 511.

85 Implementation was achieved through amendments to s. 145 of the Road Traffic Act by the Motor Vehicles (Compulsory Insurance) Regulations 1992 (S.I. 1992 No. 3036) and to the Employers' Liability (Compulsory Insurance) Exemption Regulations 1971 (S.I. 1971 No. 1933) by the Employers' Liability (Compulsory Insurance) Exemption (Amendment) Regulations 1992 (S.I. 1992 No. 3172).

to the motor insurance system. There is now no requirement for an employers' liability policy to cover the liability of an employer towards an employee who is injured in the course of his employment whilst getting into, travelling in or alighting from a vehicle, whereas a motor policy must now do so. However, this does not mean that an employee who is injured by a motor vehicle will always have the benefit of the MIB 'safety net'. If the injury occurs, say, on a building site and not on the road[86] there will be no recourse against the MIB. Again, if an employer sends his employee out in a defective vehicle, with the result that he is injured, the MIB will not be liable, since the injury does not arise from the use of the vehicle on the road.

Despite these exceptions the Third Motor Directive has helped to secure the position of many claimants whose injuries are work-related. It is the only notable case where European law has influenced the employers' liability insurance regime and, sadly, one of the few real improvements which has been achieved since the 1969 Act came into force.

11 CONCLUSION

The new Regulations on compulsory employers' liability insurance are modest in effect and have done little to improve the security of the employee who is injured in the course of employment. Most of the gaps in the system identified by Hasson in 1974 are still present and, as a result, the system will continue to fail some employees, who will not receive the compensation to which they are entitled. As we have seen, the increased importance of employers' liability insurance as a source of compensation makes the effect of these gaps more serious than ever.

By contrast, the position of the road accident victim is enormously secure. Over time, gaps in the compulsory insurance system have been plugged by a combination of court decisions, European law, domestic legislation and voluntary codes of conduct. There are very few circumstances where insurers will be entitled to avoid the policy and, even when the insurance is defective or simply does not exist, the MIB provides a secure safety net. The differences between the compulsory regimes for motor and employers' liability risks can be explained by reference to historical factors and, in the

[86] As defined in s.192(1) of the 1988 Act.

particular, the lack of any impact of European law upon the latter. Nevertheless, the discrepancies between the two systems are hard to justify. To a limited extent, the superior position of the road accident victim is balanced out by remedies available to an injured employee, but not to the former. The main alternative remedy for the injured employee is the entitlement to state benefits under the Industrial Injury Scheme which, of course, are not generally available to those who are injured on the road.[87] However, the Industrial Injuries Scheme has been subject to a number of cuts in recent years and the value of the 'industrial preference' - the difference between Industrial Injury Scheme benefits and general state benefits - has diminished steadily over time. Furthermore, there is a question mark over the future of the Industrial Injuries Scheme, as there is over many state welfare benefits, and the role of private insurance is more likely to increase than diminish in the years to come. Given that the case for compulsory employers' liability insurance is stronger than it ever was, it is a pity that the system remains a flawed one.

[87] By contrast again, it is also the case that road accident victims are far more successful than injured employees in obtaining tort damages, even though the liability of the employer is sometimes strict. According to the Pearson Commission only about 10.5% of those suffering 'reportable' injuries at work received tort compensation compared with 24% for road accident victims.