

## RTAs – Cover Stories

*Recent case law seems to suggest that the safety net provided by the Motor Insurers' Bureau for casualties of uninsured drivers is shrinking. However, Lucy MacKinnon argues that it is not a 'no fault' compensation system.*

The Motor Insurers' Bureau ("MIB") describes its role as providing a "safety net for innocent victims of drivers who have been identified but are uninsured". This article considers whether the MIB fulfils this role in respect of uninsured drivers with reference to the "passenger exception" outlined in the Uninsured Drivers Agreement 1999.

### Background to the MIB

The MIB was set up in 1946 in response to the report of the Cassel Committee. This report recommended the establishment of a guarantee fund to remedy the vacuum left by the Road Traffic Acts 1930 and 1934 in respect of victims of uninsured drivers, leading to the Uninsured Drivers Agreement 1946. This agreement has been amended over time, the most recent version being the Uninsured Drivers Agreement 1999 (the "Agreement"). The MIB is a company limited by guarantee established by agreement between the motor insurance industry and the government. Although the MIB is not, therefore, a statutory body, its existence satisfies the government's obligations under article 1(4) of the EC Second Motor Insurance Directive 84/5/EEC (the "directive") to set up and authorise a body with the task of providing compensation for personal injuries caused by a vehicle for which the insurance obligation has not been satisfied.

### Exceptions to liability in respect of uninsured drivers

Clause 5.1 of the Agreement outlines the MIB's obligation to satisfy compensation claims. The general proposition is that the MIB will pay the relevant sum (including interest and costs) to a claimant who has obtained an unsatisfied judgment against the driver of the

vehicle. It is a precondition to payment that the claimant has obtained a judgment against the uninsured driver and that the judgment has not been satisfied in full within seven days from the date upon which the claimant became entitled to enforce it. There are a number of procedural requirements which must also be satisfied before payment will be made. In particular, there are stringent timescales which a claimant must abide by if a claim is to be successful, including the requirement to notify the MIB within 14 days that proceedings have been commenced. The Agreement further provides that service of notices and documents can only be by fax or registered or recorded delivery to the MIB's registered office. If a claimant fails to comply with the conditions precedent outlined in the Agreement, the MIB is automatically relieved from liability unless the MIB has unequivocally represented that it does not intend to rely on the breach.

There are a number of exceptions to the general proposition outlined in Clause 5.1, which are outlined in Clause 6.1. The exceptions include certain claims where:

- (a) the vehicle was owned by or in the possession of the Crown;
- (b) the vehicle was not required to be covered by a contract of insurance by virtue of section 144 of the Road Traffic Act 1988, unless the use was covered by such a contract;
- (c) the claim has been subrogated or assigned;
- (d) the claim is in respect of damage to a motor vehicle or losses arising from it where the claimant knew or ought to have known that the required insurance was not in force;
- (e) at the time of the use giving rise to the relevant liability, the claimant was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that:
  - (i) the vehicle had been stolen or unlawfully taken,
  - (ii) the vehicle was being used without there being in force in relation to its use a contract of insurance as would comply with Part VI of the 1988 Act,

- (iii) the vehicle was being used in the course or furtherance of a crime, or
- (iv) the vehicle was being used as a means of escape from, or avoidance of, lawful apprehension.

‘Knew or ought to have known’

The phrase “knew or ought to have known” is further defined in Clause 6.3. This provides that whilst the burden of proving that the claimant “knew or ought to have known” is on the MIB, in the absence of evidence to the contrary, proof by the MIB of any of the following is to be taken as proof of the claimant’s knowledge:

- (a) that the claimant was the owner or registered keeper of the vehicle or had caused or permitted its use;
- (b) that the claimant knew the vehicle was being used by a person who was below the minimum age at which he could be granted a licence authorising the driving of a vehicle of that class;
- (c) that the claimant knew that the person driving the vehicle was disqualified for holding or obtaining a driving licence;
- (d) that the claimant knew that the user of the vehicle was neither its owner nor registered keeper nor an employee of the owner or registered keeper nor the owner or registered keeper of any other vehicle.

In *White v White*, the House of Lords considered the phrase ‘knew or ought to have known’ against the background of the directive, which provides:

*“Member States may exclude the payment of compensation by [the MIB] in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the [MIB] can prove that they knew it was uninsured.”*

Lord Nicholls interpreted the phrase restrictively in order to ensure consistency with the requirements of the directive. He held that the phrase extended only to actual knowledge

and reckless disregard of obvious facts. The effect of this interpretation was to restrict the circumstances in which the MIB can avoid a payment on the basis of the claimant's "knowledge".

The interpretation of the exception contained in Clause 6(1)(e) has given rise to the most controversy. The court was required to interpret the Clause in two recent decisions.

### Pickett v MIB

This case considered when a person is 'voluntarily allowing himself to be carried' in a vehicle. The claimant, who knew that the vehicle was uninsured, was injured when the driver of the vehicle lost control whilst performing a handbrake turn. The issue was whether the claimant had withdrawn her consent to being carried in the vehicle before "the time of the use which gave rise to liability" i.e. during the course of the journey. Chadwick LJ held that a passenger:

*"did not withdraw consent to being carried by voicing an objection to the manner in which the vehicle was driven. Something more than that is required; the protest must go beyond an objection to the manner of driving...the protest must amount to an unequivocal repudiation of the common venture to which consent was given when the protester entered the vehicle."*

It was held that an express request to stop the car would not be sufficient to withdraw consent but an unequivocal request to allow the protestor to alight from the vehicle with a request to stop the car would be sufficient. In this case, the claimant's statement of "for God's sake stop the car" coupled with the driver's knowledge that she did not like handbrake turns and that she was concerned for the dog in the backseat was insufficient to "*bring home to [the driver] her unequivocal repudiation of the common venture*".

May LJ made an analogy with the situation where a claimant who knew that the driver was uninsured asked the driver to stop driving at 100mph and to slow down. This would not constitute the withdrawal of consent.

In the view of the Court of Appeal, the claimant's failure lay in the fact that she had not demanded to be let out of the car so that she could disassociate herself with its use. The court was influenced by the fact that the claimant owned the car, knew that it was uninsured, knew that the driver was unlicensed and knew that he had a habit of making handbrake turns.

Although the Court of Appeal may be said to have interpreted the phrase "voluntarily allowing herself to be carried" restrictively, against the background of the claimant's knowledge, it is arguable that the decision is reconcilable with the MIB's 'safety net' aim. There is a strong argument that the claimant's conduct was not 'innocent'. Furthermore, there was no evidence that the claimant would not have travelled home in the vehicle after the driver had finished performing handbrake turns. In effect, it was not the fact that the car was being driven without insurance that concerned the claimant but the manner in which it was being driven. However, it may be said that the requirement that a passenger unequivocally repudiates the common venture is too strict a test. It is arguable that in circumstances such as these, a claimant who consents to be driven in an uninsured car but does not consent to that vehicle being driven dangerously is "innocent" when injured as a result of the dangerous driving to which she objects.

### *Sheldon v Goldstraw & MIB*

In this case, the court was concerned with the interpretation of Clause 6(1)(e) in circumstances where the claimants were dependents of a pillion passenger. The passenger had been fatally injured when the motorcycle collided with a pedestrian. The motorcycle driver was uninsured. The MIB sought to rely on Clause 6(1)(e)(ii) of the Agreement in order to deny payment to the dependent claimants. The issue which arose was whether the dependent children could be fixed with the knowledge of the deceased that the motorcycle was being used without insurance. The claimants argued that on a literal interpretation, since the dependents did not know that the vehicle was being used without insurance, the

exception did not apply. However, HHJ Tetlow looked at the background to the exclusion and took a purposive approach to interpretation. He referred to the derogation permitted by the directive which clearly enables Member States to exclude claims brought by dependents of passengers as well as by the passenger himself. HHJ Tetlow held that:

*“the common intention must have been that liability to compensate should be excluded where the injured person or the deceased person knew the driver was not insured. The context of the agreement requires the word: “Claimant” to be modified in the particular instance to read: “Dependent of the deceased” or something to that effect.”*

It was argued by the MIB that any other result would be absurd. If the claimants’ interpretation was correct, this would preclude a claimant rendered comatose by the accident from having a claim against the MIB but would enable her dependents to claim if she subsequently died from the injuries. Logically, this must be correct. However, the result is that the dependent children are not compensated for the loss of their mother in circumstances where negligence on the part of the driver has been established. Therefore, it is arguable that the MIB is not fulfilling its role as providing a safety net for victims of innocent drivers.

## Conclusion

Whilst it is tempting to conclude that recent interpretations of the Uninsured Drivers Agreement 1999 are indicative of a shrinking of the safety net provided by the MIB, in reality, it is difficult to justify such a conclusion. The MIB is funded from levies charged upon insurers who, in turn, obtain their funds from premiums charged to the public. There is an extent to which the properly insured driver would be content with the fact that a proportion of his premium was being used to fund claims brought by those who knew or ought to have known that no insurance was in place. The MIB’s role is to provide a safety net for “innocent” victims of uninsured drivers. It is not to provide a “no fault” compensation system. The cases

above merely demonstrate that the court fully considers the conduct of the victim when interpreting the limits of the MIB's liability.

### Cases

*White v White* [2001] 1WLR 481

*Pickett v MIB* [2004] 1 WLR 2450, CA

*Sheldon v Goldstraw & MIB*, unreported, Altringham County Court (HHJ Tetlow) 18<sup>th</sup> May 2004

### Bibliographical details

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