



RECURRING THEMES IN MIB CASES

By Thomas Saunt



His practice consists of almost exclusively personal injury related work including clinical negligence work and professional negligence work related to these fields of practice (e.g. solicitors' and barristers' negligence in personal injury cases). Much of his work has been written advisory work and the settling of pleadings. He has been instructed in many substantial cases involving all types of damage to property and personal injuries both on his own and with a junior

1. Introduction

The MIB is a company limited by guarantee set up in 1946 to compensate the victims of road traffic accidents caused by uninsured and untraced drivers. All authorised motor insurers are required to be members of the MIB which administers a Central Fund which is funded by the insurers. The mechanism for satisfying claims against uninsured drivers is provided for in the Uninsured Drivers' Agreement between the MIB and the Minister of Transport. The Principal Agreement was made on 31st December 1945. There have been a number of such agreements since that date, the latest being dated 13th August 1999 which applies to all accidents which took place 1st October 1999 onwards. The full text of the agreement together with Notes for Guidance can be found on the Department of Transport website (www.dft.gov.uk). In 1969 a second agreement was made between the MIB and the Minister of Transport for the purpose of compensating victims of accidents caused by untraced drivers (the Untraced Drivers Agreement). The agreement currently in force is dated 7th February 2003 but only applies in respect of claims arising on or after 14th February 2003. The full text can also be found on the Department of Transport website. The current address of the MIB is Linwood House, 6-12



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2. Uninsured or Untraced

It is important to ascertain at the outset under which of the agreements any particular claim should be dealt with. Any claim against a driver who has been properly identified, either at the time of the accident or subsequently, should be dealt with under the Uninsured Drivers' Agreement whether he can be traced thereafter or not. Thus in *Gurtner v Circuit* [1968] 2 QB 587, at the scene of the accident the defendant gave his name and address and produced his certificate of insurance to the police who did not keep a record of it. Subsequently, he emigrated to Canada and could not be traced or therefore served with proceedings. The plaintiff's claim was properly dealt with under the Uninsured Drivers' Agreement.

On the other hand, if the true identity of the driver has not been established, the claim should be dealt with under the Untraced Drivers' Agreement. In *Clarke v Vedel* [1979] RTR 26 the plaintiff was run down by a motorcyclist who stopped at the scene. The motorcyclist gave his name as "David Vedel" and gave a date of birth and an address. There was no entry in the register of births of the birth of David Vedel during the period given by the motorcyclist for his date of birth. No person of that name was known at the address which he had given. The motorcycle was subsequently found to have been stolen. It was held by the Court of Appeal that the claim was properly to be dealt with under the Untraced Drivers' Agreement.

In practice, in a case where a driver has been properly identified but has subsequently disappeared the MIB will deal with the claim under the Uninsured Drivers' Agreement. Equally, where the driver is unidentified because he has given false particulars as in *Clarke v Videl* the MIB will deal with the claim under the Untraced Drivers' Agreement. If there is any doubt about whether a driver is "uninsured" or "untraced", applications should be made under both agreements.

3. Satisfaction of Claims by MIB (Clause 5)

Under the terms of the Uninsured Drivers' Agreement the MIB is required to satisfy any judgment in respect of any relevant liability which is obtained against any person in a Court in Great Britain and which has not been satisfied in full within 7 days.

“Relevant Liability” is defined in the Agreement as a liability in respect of which a contract of insurance must be in force to comply with Part VI of the Road Traffic Act 1988. Part VI of the Act (section 145) requires a person to be insured in respect of any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of the use of a motor vehicle on a road in Great Britain.

“Road” is defined in section 192 of the Act as “any highway and any other road to which the public have access.” This definition was subjected to scrutiny by the House of Lords in the case of *Clarke v Kato* [1998] 1 WLR 1647. The following guidance can be found in the speech of Lord Clyde in that case:

1. In applying the definition the first question to be asked is whether the place in issue is a highway (which term includes such things as public footpaths and public bridleways). If the answer is affirmative the definition is met.
2. If the place is not a highway it may qualify as being “any other road to which the public have access.”
3. Whether the place is one to which the public has access has to be tested by reference to facts as well as rights. The question is whether the public actually and legally have access.
4. In the context the public means general public not a special class of members of the public.
5. The consideration of access by the public only arises if the place is a road.
6. Whether the place is a “road” within the meaning of section 192 is a question of fact to be determined after consideration of its physical character and the function it existed to serve.

In *Clarke v Kato* it was held that a car park was not a road within the meaning of section 192.

“Caused by or arising out of the use of”.

In *Dunthorne v Bentley* [1996] PIQR 323 the plaintiff was injured when his vehicle struck the defendant who had run across the road into his path. The defendant had been driving her car which had run out of petrol. She got out of the car and, after some time, crossed the road, apparently to get help. The trial judge concluded that



her actions were “closely and causally connected with her use of the car and” therefore “arose out of such use”. His decision was upheld by the Court of Appeal.

“Motor Vehicle” is defined by section 185 (1) of the Act as a mechanically propelled vehicle intended or adapted for use on roads. In *Chief Constable of Avon v Fleming* [1987] 1 All ER 318, a motorcycle which had been manufactured for use on the road but had been adapted for scrambling by removal of its registration plate, reflectors, lights and speedometer was found not to be a motor vehicle for the purposes of the equivalent of section 185 (1). It was held that the test was whether a reasonable person, looking at the vehicle, would say that its general use encompassed possible general road use and that the particular use to which a particular person put a particular vehicle was irrelevant. A vehicle originally manufactured for use on a road could cease to be a “motor vehicle” if it was subsequently altered very substantially.

Clause 16 of the Agreement restricts the MIB’s liability for damage to property to sums between £300 and £250,000 and Clause 17 entitles the MIB to deduct from the compensation payment any sums received by the claimant from other sources, including payments made under an in insurance agreement. Clause 15 requires the claimant to assign to the MIB any unsatisfied judgment in respect of a relevant liability.

4. Exceptions to Agreement (Clause 6)

The MIB is not liable under the Agreement in the following circumstances:

- (a) The claim arises out of the use of a vehicle owned by or in possession of the Crown except where another person has undertaken responsibility of insuring the vehicle (whether or not that person is in fact insured) or where the liability is in fact covered by insurance.
- (b) The claim arises out of the use of a vehicle which is not required to be insured by virtue of section 144 of the 1988 Act. This category includes vehicles owned by local authorities, police authorities, the armed forces and London Transport.
- (c) The claim is in respect of a judgment which has been assigned or obtained by virtue of the exercise of rights of subrogation.
- (d) The claim is in respect of damage to a vehicle or losses arising therefrom and the vehicle was uninsured at the time and the claimant knew or ought to have known that it was uninsured.



(e) The claim is made by a person who was allowing himself to be carried in the vehicle and either before the commencement of his journey in the vehicle or after such commencement he could reasonably be expected to have alighted from it he, knew or ought to have known that-

- (i) the vehicle had been stolen or unlawfully taken,
- (ii) the vehicle was uninsured,
- (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.

The burden of proving all these matters is on the MIB but, in the absence of evidence to the contrary, proof by the MIB of any of the following matters shall 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 that 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 from holding or obtaining a driving licence;
- (d) that the claimant knew that the user of the vehicle was neither its owner or registered keeper nor an employee of the owner or registered keeper nor the owner or registered keeper of any other vehicle.

In the case of *White v White* [2001] 1 AC 596 the House of Lords had occasion to consider the meaning of the words "knew or ought to have known". In that case the plaintiff was injured when he was a passenger in a car driven by his brother (the first defendant) who was disqualified from driving and therefore could not be insured. The plaintiff claimed not to know that his brother was disqualified from driving at the time of the accident. This was accepted by the trial judge. The plaintiff did admit that he had known that some three years previously his brother had been disqualified from driving but claimed that he and his brother had made a joint resolution not to drive illegally thereafter. He said that at the time of the accident he believed that his brother had kept to that resolution. The trial judge found that the MIB were entitled to rely on the corresponding clause to the present



Clause 6(1)(e) because the plaintiff ought to have known that his brother was uninsured because he ought not to have got into the vehicle without making sure that his brother had carried out the good resolution and really had made himself a legal driver. The Court of Appeal did not interfere with this decision. However the House of Lords overruled the trial judge. The Lords held that the Agreement had to be interpreted, like any other contract, in the context in which it was made. That context was the requirements of the EEC motor Insurance Directive, of 30th December 1983, because the purpose of the Agreement was to give effect to the directive. It provided that “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...[the MIB]... can prove that they knew it was uninsured.” It was held that the exception spelled out in the Agreement was intended by the parties to carry through the provisions of the Directive. The phrase “knew or ought to have known” was intended to be co-extensive to the exception permitted by the Directive. It was intended to bear the same meaning as “knew” in the Directive and is to be interpreted restrictively. The phrase “ought to have known” is not apt to include mere negligence or carelessness. A mere failure to act with reasonable prudence is not enough. Thus the plaintiff’s claim was not excluded from the MIB agreement.

In *Pickett v Roberts* [2004] 1 WLR 2450 the claimant allowed herself to be carried in an uninsured car which she owned and knew to be uninsured. Her driver drove on to a mountain track where he began to perform handbrake turns. The claimant became frightened and asked him to stop. He did not do so and crashed the car causing her severe injuries. It was held by the Court of Appeal that clause 6(1)(e) of the 1988 Agreement (then in force), equivalent to clause 6(1)(e)(viii) of the 1999 Agreement, is intended to relieve the MIB of the obligation to satisfy a relevant judgment in respect of any relevant liability where a person had accepted the risk of being driven in a vehicle knowing it to be uninsured; that voluntary acceptance of the risk of being driven in such uninsured vehicle required both acceptance of the risk of being injured and acceptance of the risk that, if injured, compensation would not be recoverable from the uninsured driver; that, in relation to consent, the issue was likely to be whether, once given, consent had been withdrawn before the time of the use which gave rise to the liability; that there was an inherent presumption that knowledge of the vehicle’s lack of insurance, once acquired, persisted throughout the journey, but there was no presumption that consent could not be withdrawn; that, therefore, an express request to the driver to stop would not of itself be sufficient to withdraw consent to being carried in the vehicle, rather the protest had to amount to an unequivocal repudiation of the common venture to which consent had been given when the protestor entered the vehicle. In the circumstances the claimant had not made an unequivocal request to the defendant to stop the vehicle



expressed in sufficient terms to make it clear to him that she was repudiating the common venture on which they had embarked, namely the drive in the claimant's uninsured vehicle. The claimant's claim against the MIB accordingly failed.

5. Conditions Precedent to MIB's Obligation (Clause 6)

The MIB incurs no liability unless proper notice (by fax, registered or recorded delivery) of the issue of proceedings is given by the claimant, no later than 14 days after the commencement of proceedings, to an identified insurer or the MIB (preferably both) on the appropriate form, giving such information relevant to the proceedings and the Agreement accompanied by such documents as the MIB may reasonably require. The Claimant must provide the following details:

- (a) notice in writing that proceedings have been commenced;
- (b) a copy of the sealed Claim Form, Writ or other official document providing evidence of the commencement of proceedings;
- (c) a copy or details of any insurance policy providing benefits in the case of the death, bodily injury or damage to property to which the proceedings relate where the claimant is the insured party and the benefits are available to him;
- (d) copies of all correspondence in the possession of the claimant and his advisers which is relevant to the death, bodily injury or damage for which the defendant is allegedly liable or any contract of insurance which covers liability for such death, injury or damage, the benefit of which is available to the defendant;
- (e) a copy of the Particulars of Claim and a copy of all other documents which are required under the rules to be served on a defendant with the proceedings; (if the Particulars of Claim etc. have not been served on the defendant with the Claim Form, Copies must be served on the MIB not later than 7 days after they are served on the defendant;
- (f) such other reasonable information as the MIB may specify

These requirements are all mandatory and failure to comply with them is likely to lead to a claim to the MIB to fail Their purpose is to provide the MIB with official evidence that proceedings have been issued and of the date when and the court where they have been issued and other evidence of the claim. The requirement to



supply a copy of the proceedings is satisfied either by supplying the MIB with a copy of the stamped writ or summons itself or (in the county court) with a copy of the notice of issue of a default summons. Under the CPR a copy of the stamped Claim Form must be supplied. It is not sufficient to supply a copy of the unstamped writ or summons or Claim Form or of the request for the issue of the default summons (see *Cambridge v Motor Insurers' Bureau* [1998] RTR 365.)

The notice and accompanying documents must be given to the MIB or their duly authorised agents to accept notice on their behalf. It is not sufficient to give notice to solicitors instructed to deal with procedural matters or anyone else they have express instructions to accept notice on the MIB's behalf.

6. Procedure

The claimant's solicitors should take such steps as are necessary to establish whether the defendant is insured. If they involve the MIB unnecessarily the claimant or his solicitors may incur a liability to costs: see *Mills v Toner and MIB* [1995] CLY 3725 and *Granada v SPN Fareway and MIB* [1995] CLY 378.

Once it has been established that a defendant is uninsured or there is doubt about the matter, the MIB should be notified by the claimant's solicitors of the claim. The MIB will require the claimant to fill in a claim form and either direct that the claim be dealt with by the Article 75 insurer (formerly the Domestic Regulations Insurer and defined under the MIB's Articles of Association, as the insurer who at the time of the accident which gave rise to the MIB's liability was providing any insurance against RTA liability in respect of the vehicle arising out of the use of which the liability was incurred) or nominate an insurer as its agent to investigate the claim and negotiate a settlement or deal with any litigation. An insurer will be required to deal with the claim as Article 75 Insurer notwithstanding that:

- (i) The insurance has been obtained by fraud, misrepresentation, non-disclosure of material facts or mistake; or
- (ii) Some term, description, limitation exception or condition (whether express or implied) of the insurance or of the proposal form on which it is based expressly or by implication excludes that insurer's liability whether generally or in the particular circumstances in which the judgment debtor's liability is incurred; or



- (iii) The judgment debtor was in unauthorised possession of the vehicle arising out of the use of which the liability of the judgment debtor was incurred.

Under the MIB's Articles of Association the Article 75 insurer is required to satisfy any judgment which the MIB would otherwise have to satisfy under the Agreement.

In theory the MIB has no obligation to make any payment until a judgment or order for interim payment is made against an uninsured driver. In practice most claims will be settled without proceedings being brought.

Should it become necessary to commence proceedings it is essential for the claimant's solicitors to give notice of the commencement of proceedings to the MIB within 14 days of their commencement (clause 9). The notice must be accompanied by copies of the documents referred to previously. The words "the commencement of proceedings" have their ordinary meaning, namely, the point in time at which under the rules of the relevant court the proceedings commenced.

In *Silverton v Goodall & MIB* (unreported March 11th 1997 CA), on October 7th 1994 the plaintiff's solicitors sent a request for a summons to the court which issued the summons on October 13th. The solicitors received the summons from the court on October 22nd and sent a copy to the MIB on October 28th. It was held by the Court of Appeal that since the MIB did not have notice of the commencement of proceedings within 7 days (which was then the requirement) it was not liable to satisfy the defendant's judgment.

Under the CPR, proceedings are started when the court issues a Claim Form, the date of issue being the date entered on the form by the court (Part 7.2). Under the Practice Directions to Part 7 where the Claim Form as issued was received in the court office earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date. (Practice Direction to Part 7.4.1). Since no similar specific provision is made in relation to the MIB Agreement it seems that notice of commencement must be given within 14 days (under the 1999 Agreement) of the day entered on the Claim Form by the court, not any earlier date.

7. Service where Defendant has disappeared

Where the uninsured driver has been identified but by the time of commencement of proceedings he has disappeared or cannot be served for any other reason an application should be made to the court under CPR Pt 6.8 for an order permitting service by an alternative method, usually by service on the address of the MIB.



The application should be supported by evidence stating (1) the reason an order for an alternative method of service is sought, and (2) what steps have been taken to serve by other permitted means (CPR 6PD.9). If the MIB accept that the case is appropriately dealt with under the Uninsured Drivers' Agreement objection will not normally be taken to service being effected on the MIB where the uninsured driver cannot be served.

8. MIB's Authority to act in Proceedings

Neither the MIB nor a Domestic Regulations insurer has any authority to act on behalf of an uninsured driver. The MIB will seek to obtain the driver's authority to act if he is available but, even where they have his authority they will not usually nominate solicitors to accept service or notice of commencement of proceedings. If the driver is unavailable or if he refuses to give the MIB authority to act, the MIB may apply to the court under CPR Pt 19.1 to be joined to the action as a defendant with permission to exercise all the rights of the uninsured defendant. This procedure was sanctioned under the old rules of court (RSC O.65 r.4) by the Court of Appeal in *Gurtner v Circuit* [1968] 2 QB 587. It is sensible for a claimant not to oppose any such application.

The MIB or any of its agents have no power to agree to any particular form of service of proceedings without the authority from the uninsured driver or by order of the court (*Yiannacou v Rehal* 20/6/97 unreported other than on Lawtel).

9. Interim Payments

Under CPR Pt 25.7 the court has power to order an interim payment (inter alia) if, "the defendant's liability will be met by:

- (1) an insurer under section 151 of the Road Traffic Act 1988; or
- (2) an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself."

10. Periodical Payments

The court does not have power to order periodical payments in a case where the MIB is involved because the requirements of security of payment specified under section 2(4) of the Damages Act 1996 are not satisfied. (Payments made by the MIB do not attract statutory protection under the Financial Services Compensation Scheme). However the MIB may wish to self fund periodical payments in a way that satisfies the requirements



of CPR Pt 41.9(2) and paragraph 3 of the practice direction thereto (e.g. by purchasing an annuity). According to the MIB website in two recent cases, *Thacker v Steeples* and *Daniels v Edge* the High Court has stated that the MIB is a secure funder and approved orders for periodical payments.

11. Proceedings against the MIB

Proceedings cannot be commenced against the MIB without its agreement until after a judgment has been obtained against the uninsured driver because it is only at that stage that the liability of the MIB arises. However, it is often convenient where an issue arises between the claimant and the MIB for the MIB to be joined as a defendant so that the issues between the claimant and the MIB can be dealt with at the same time as any issues between the claimant and the uninsured driver. This step was taken, for example, in the case of *Stinton v Stinton & MIB* [1995] RTR 167. It should be stressed that the MIB should only be joined as a defendant with the MIB's agreement.

Once judgment has been obtained and the MIB refuses to satisfy the judgment on the grounds (for example) that proper notice of commencement of proceedings was not given, the MIB, as a company limited by guarantee, can be sued in its own name. The Agreement is of course between the MIB and the Secretary of State and there is therefore no privity of contract between the claimant, who is not a party to the Agreement, and the MIB. In practice the MIB does not take this point when proceedings are commenced against it and the court has on many occasions turned a blind eye to the position, as in, for example, *Albert v MIB* [1972] AC 301.

12. The European Dimension

As has already been pointed out, the Agreement was introduced in order to implement the provisions of the European Second Council Directive of December 30th 1983 on Motor Insurance (84/5/EEC), the relevant article of which provides as follows: "Each Member State shall set up or authorise a body with the task of providing compensation...for... personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation has not been satisfied..." The Agreement is to be interpreted so as to accord with the interpretation of the Directive by the European Court, if that can be done without distorting its meaning (see *White v White supra*).



13. Checklist of Practical Considerations for Claimants

- (1) If a defendant's insurance position is not known, require him to provide details of it pursuant to section 154 of the Road Traffic Act 1988.
- (2) If the defendant is uninsured or there is doubt about the matter notify the MIB of the claim as soon as possible and in any event before the expiry of the limitation period.
- (3) Provide the MIB and any identified insurer or their agent with such documents and information as they reasonably require.
- (4) If it is necessary to commence proceedings give notice to the MIB and any identified insurer within 14 days after the commencement of proceedings accompanied by the documents specified in clause 9 of the Agreement
- (5) If there is a dispute with the MIB over its liability to deal with the claim under the Uninsured Drivers' Agreement (but not otherwise) apply to the court to join the MIB as a defendant, provided that they consent.
- (6) If, after all reasonable efforts have been made, the defendant cannot be traced, apply to the court for an order permitting service on the defendant by serving at the address of the MIB and/or any identified insurer.
- (7) Do not, if possible, leave the issue and service of proceedings until the last moment before the expiry of the limitation period. Typically it is in such circumstances that claimants and their solicitors come up against problems with regard to service of notices, proceedings etc.

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