A Practical Guide to MOTOR INSURANCE LAW FOR LEARNERS

A Guidance Note from the 2TG Insurance Group

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Introduction

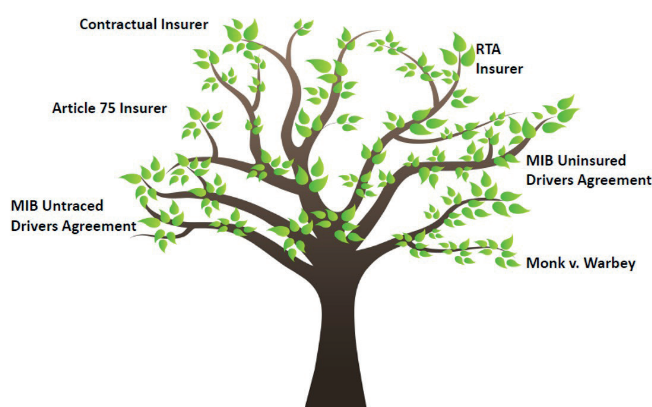
This article is the updated text of a webinar which I presented in May 2020. It's not just for beginners (although you are all very welcome) but also for more experienced practitioners who have dealt with a number of motor insurance cases and want to fit them into an orderly framework of law. I will outline how the English system works, and point up some particular areas in which the law remains uncertain and where there may be litigation in the near future.

The English motor insurance system has been described as a somewhat rickety house onto which various outbuildings and lean-tos have been added over the years. Add to that the effect of EU law, and add to *that* the effect of Brexit, and the resulting structure looks as though it is unfit for habitation. But the one key principle of the system is to ensure that if an innocent person gets injured or suffers damage as a result of a road traffic accident, whether that person is a pedestrian, a passenger in a vehicle, or the driver of another vehicle, there is some body, and not just an impecunious defendant, which will meet his or her claim.

Many of the complications in the UK – as opposed to the EU – arise from the fact that in this country, motor insurers insure the *driver* and not the vehicle. That means that even in the case of an accident involving only one vehicle, a number of insurers may be involved. Added to that is the fact that under the English law of joint and several liability, a claimant may recover the whole of his damages against any one of two or more joint tortfeasors. This means eg that if one of those tortfeasors is insured, and the other is not, the victim can recover the *whole* of his damages against the insured tortfeasor and thus against that tortfeasor's insurer, leaving the insurer with a probably worthless remedy against the uninsured driver.

The law has developed in such a way that a given motor insurer *may* have to meet a claim even though there is a contractual exclusion in the policy; even if it has not insured the person driving the vehicle; or even if the vehicle is being used for a purpose not covered by the policy - eg as a minicab rather than for social domestic and pleasure (SDP) purposes. Whether that insurer does *in fact* have to meet a claim, particularly when another insurer (motor or otherwise) is on the scene, depends on the insurer's position on what has come to be called the liability "tree". As the judge explained in *Advantage v. Stoodley* [2018] EWHC 2135, the contractual insurer sits at the top of the tree and the MIB Central Fund sits at the bottom. "As a general proposition (and looked at from the perspective of an insurer) if an insurer higher up the tree falls out, then liability to indemnify or satisfy a judgment will rest with the insurer immediately below."

The liability tree



Contractual insurer

At the top of the tree sits the contractual insurer. Since the 1930s, there has been a requirement in English law for drivers to have motor insurance, and this is now reflected in sections 143 and 145 of the Road Traffic Act 1988. These provide that a person must not use a motor vehicle on a road or other public place unless there is in force in relation to that use a policy that insures him or her against liability for death or injury "caused by, or arising out of, the use of" that vehicle.

There are several things to point out about these requirements:

(1) The obligation is on the *motorist* to have insurance complying with these requirements, and not on an insurer to issue a policy complying with them.

(2) Most motor policies contain all sorts of exceptions and conditions which purport to limit the scope of cover under the policy. These fall into two main categories:

- First of all, there are some exceptions which are expressly banned by section 148 of the RTA. A good example is a policy term stating that there will be no cover if the driver is using the vehicle under the influence of alcohol. Another is that there will be no cover unless you report the accident within a set period after it has occurred. You may wonder why insurers bother to include these: the main purpose seems to be to enable the insurer to recover its outlay from the policyholder either under statute or by virtue of a provision in the policy.
- The other category are exclusions in relation to eg deliberate damage or when the driver is engaged in racing with another motorist. These exclusions are

not expressly prohibited by the RTA, although there is continuing debate as to their interpretation – what is "deliberate" damage, what constitutes "racing"? There are few cases on these issues, although I appeared in a case called *Pinn v. Guo* (2014) Lawtel, where I persuaded the judge that my insured driver was "racing" within the meaning of our policy, so that some other insurer had to meet the claims. There is also a debate as to whether such exclusions are in fact permitted in English law, although there is binding authority (*Bristol Alliance v. Williams* [2012] EWCA 1267) to the effect that they are. So one area of uncertainty is whether this category of exclusions is permitted.

(3) What is meant by "*using* a motor vehicle", and what is meant by "caused by, or arising out of" such use? The matter was considered – not terribly helpfully it must be said – in the Supreme Court decision in *UK Insurance v. Pilling* [2019] UKSC 16. In that case it was held that section 145 of the RTA reflects the provisions of Article 3 of the EU Motor Insurance Directive, and so section 145 must in accordance with the *Marleasing* principle be read so as to accord with European Court decisions on "use". The position has now been modified by section 156A of the RTA (inserted by the Motor Vehicles (Compulsory Insurance) Act 2022), which provides that references in Article 3 are to be read as not including liability in respect of the use in GB of vehicles "other than motor vehicles". The scope of this provision is unclear, and further litigation on the point is likely.

RTA insurer

On the next branch down the liability tree sits what has become known as the RTA insurer.

Under section 151 of the RTA, a motor insurer is – subject to certain conditions and exceptions – under a duty to satisfy a judgment even if it has not in fact insured the person driving. In particular, under section 151(2)(b), if the liability is one which would be covered if the policy insured all persons and the judgment is obtained against someone who is not insured under the policy, then the insurer must meet the claim. So, eg, if my wife alone is insured to drive her car for SDP purposes, and I am driving it for SDP purposes, then her insurer must meet a claim against me (although it will have a right of recovery from me, and may have a right of recovery against her as well). But if, eg, I am driving her car eg as a minicab or for business use, the insurer will *not* be liable to meet the claim, at any rate as RTA insurer, because it is not a risk which would be covered if the policy insured all persons.

One contentious area, where there could well be litigation in the future, is as to the effect of the sale of a vehicle. Suppose A takes out a motor policy on his car, which covers only him to drive it. He sells the car to B, but forgets to cancel the policy. B has not taken out his own policy in respect of the car, and has an accident in it, in which some third party is injured. Does A's insurer have to meet that claim as RTA insurer? On the face of it, the situation would appear to fall within section 151, in that the policy *would have* covered B if it had covered all persons. But what about the argument that A no longer has an insurable interest in the car – is that sufficient to make the policy lapse on the sale from A to B? There is no authority on the point, and the textbook writers seem to be in two minds about it. I leave that one for you to think about.

There used to be a provision in the RTA that if an insurer was entitled to avoid a motor policy for non-disclosure or misrepresentation, then it could get a declaration to that effect under section 152, thereby enabling it to escape having to meet the claim at least under section 151. Paradoxically, in view of our subsequent departure from the EU, Regulations came into force on 1st November 2019 to bring us into line with EU law, which have effectively abolished that provision, so that the brisk business in obtaining section 152 declarations has now dried up.

Before we come down another branch on the liability tree, let's look at the position as between a contractual insurer and an RTA insurer: suppose C (the claimant) is a passenger in a car driven by A, who is covered by a contractual insurer X. Suppose also that another insurer, Y has issued a policy to B in respect of that car, but Y's policy does not cover A. A is using the car for social domestic and pleasure purposes, which is a use covered by both policies. A crash occurs injuring C, which is solely A's fault. Does A's insurer have to meet the whole of C's claim, or should it be shared between that insurer and the RTA insurer in respect of B? A contractual insurer has to indemnify its insured against his liability to a third party, and by virtue of the European Communities (Rights against Insurers) Regulations 2002 the third party has a direct right of action against the insurer. An RTA insurer's obligation is to satisfy the judgment against the driver: it is required by section 151(5) to "pay to the persons entitled to the benefits of the judgment … any sum payable under the judgment in respect of the liability …" When there is both a contractual and an RTA insurer in respect of the same claim, which must meet it?

Although it has often been assumed that a contractual insurer "trumps" an RTA insurer, and so must meet the whole claim, the answer is not in fact clear from the wording of the Road Traffic Act. My view – although the matter has not been the subject of an authoritative decision in the courts – is that it is implicit in *Eagle Star v. Provincial Insurance* [1994] 1 AC 130 and *Legal & General v. Drake Insurance* [1992] QB 887 that the hierarchy is such that the contractual insurer *would* effectively have to meet the claim alone, because the RTA insurer would have a right of contribution (whether under the Act, the law of restitution or by way of equitable contribution between insurers) from the contractual insurer. Further, the matter may turn on exclusion clauses in one or both of the policies.

Article 75 Insurer

Perching on the next branch down is the Article 75 insurer. This is a reference to Article 75 of the Motor Insurers' Bureau's Articles of Association. In order to understand the position of such an insurer you need to know a bit about the MIB. From 1946, the motor insurance industry has had a series of agreements with the government under which the industry – through the MIB – undertakes to satisfy *unsatisfied* judgments in respect of RTAs. If there is a contractual or RTA insurer which can meet the claim, then the judgment is not usually unsatisfied. But if there is no such insurer, then if the judgment is unsatisfied within 7 days, MIB has to meet the claim.

All insurers who write motor business have to be members of MIB, and its Articles of Association constitute a contract between those members. So an Article 75 Insurer has to satisfy an *unsatisfied* judgment, but only subject to the conditions and exceptions contained in the MIB Uninsured Drivers Agreement, which we come on to look at shortly.

By Article 75(2)(a), Article 75 Insurer means "the Member who for the time of the event which gave rise to a Road Traffic Act Liability was providing *any* insurance (other than by reason only of a driving other vehicle clause) in respect of the vehicle from the use of which the liability of the judgment debtor arose." An insurer is thus Article 75 insurer even if eg the use of the vehicle was other than covered by the policy. So if someone – X - has a policy covering SDP use only, but drives the vehicle as a minicab, his insurer will be Article 75 insurer and so it has to meet a claim (subject of course to a right of recovery against X) unless there is another insurer in the frame as well. Other examples would be where there was an effective exclusion in the policy in respect of deliberate damage or racing.

The main battleground between motor insurers – at least so far as court proceedings are concerned – is whether one or both of them is only Article 75 insurer rather than contractual or RTA insurer. This may arise in a number of ways: suppose C (the claimant) is a passenger in a car driven by A, who has a contractual or RTA insurer, which is in collision with a car driven by B, for which there is only an Article 75 insurer. A and B are jointly and severally liable to C for his injury. B's insurer only has to satisfy an *unsatisfied* judgment, so that because A's insurer will either meet the claim as contractual insurer or will satisfy it as RTA insurer, B's insurer gets off the hook.

If one insurer is undoubtedly Article 75 insurer, or if the issue is eg whether it is contractual or Article 75 insurer, then the battle between it and other insurers will generally be one for the courts. But issues often arise as to whether an insurer is an Article 75 insurer at all. In that case the matter is determined by the MIB Technical Committee. This is a body consisting of representatives of member insurers, which meets several times a year, in order to determine issues such as whether a given insurer is an Article 75 insurer. It is important to bear in mind: (a) that the proceedings of the Technical Committee do not generally directly involve lawyers (although you may well be asked to advise insurers on how to present their case before the Committee), (b) there is now a complex procedure under which the dispute can be dealt with by arbitration instead, and (c) there is a right of appeal from the decision of the Tech Committee.

Before moving down another branch on the liability tree, could I mention two areas of potential current controversy relating to Article 75 status.

(1) This arises out of the Court of Appeal case of *MIB v. Lewis* [2019] EWCA Civ 909. As we have seen, by sections 143 and 145 of the RTA, insurance in the UK is only compulsory where the damage is caused by or arises out of the use of the motor vehicle *on a road or other public place*. But under EU law, there is no such restriction, and Member States are required to ensure that civil liability in respect of the use of vehicles, whether on public or private land, is covered by insurance. In *Lewis* it was held that as an "emanation of the State", MIB must meet all uninsured claims, whether the use is on a road or other public place or not. There has been doubt as to whether the wording of Article 75 meant that an Article 75 insurer had to meet a claim in respect of an off-road accident. But the decision in *Lewis* has been reversed by section 156A(1)(b) of the RTA in respect of accidents occurring on or after 28th June 2022, so that it is clear that from that date onwards, an Article 75 insurer will not have to meet such a claim.

(2) These days, many motor policies are taken out online. It is not uncommon for people to pretend that they are someone else when applying online, usually someone older or with a better driving record, so as to get cheaper – or indeed *any* – insurance. In *Shogun Finance v. Hudson* [2004] 1 AC 919, the House of Lords held by a majority, albeit in a different context, that where a contract is in writing (as opposed to oral), only the persons named in the writing can be parties to the contract, and that if the purported contracting party named in the writing knew nothing of the agreement, no binding contract is formed. In such a case, is the insurer an Article 75 insurer and so liable to meet a claim? Once again, there is no court decision on the point, and the matter would be one for the MIB Tech Committee to determine. My view is that it would be likely to hold that because the insurance had been obtained by "mistake" (see Article 75(2)(a)(1)(i)), the insurer *would* be Article 75 insurer. But the matter is not certain.

MIB Uninsured Drivers Agreement 2015

On the next branch down is the MIB itself. It may have to meet a claim in one of two ways.

First, if there is no contractual, RTA or Article 75 insurer, then the MIB has to meet the claim – in other words, it is in effect shared between all the motor insurers in the country. Such cases are governed by the current – 2015 - MIB Uninsured Drivers Agreement, which you can find on the MIB website.

I will not go into detail on this Agreement, but it is relevant to note that it contains a number of important conditions and exceptions, in particular:

(1) MIB does not have to meet a claim if the victim has another source of recovery, eg under his own, rather than the tortfeasor's insurance: Clause 6. So if eg you have a comprehensive policy and your car is damaged by the fault of the uninsured driver of another vehicle, you cannot rely on the 2015 Agreement so as to get compensation from the MIB.

(2) A victim who is a passenger in the vehicle in question cannot recover from MIB if he "knew or had reason to believe" that the vehicle had been stolen or unlawfully taken, or that the driver was uninsured: Clause 8. There are quite a lot of cases on what "knew or had reason to believe" might mean.

MIB Untraced Drivers Agreement 2017

Next down the liability tree comes the MIB Untraced Drivers Agreement, which applies in the case of an accident where the at-fault driver *cannot be identified*. In such a situation, the application is made to MIB, and it deals with the questions of liability and quantum itself, subject to a right of appeal to an arbitrator including an oral hearing if the matter cannot be resolved otherwise.

It is important to note that the costs which a claimant may recover from MIB under the Untraced Agreement are very limited, the reason being that it is MIB itself which carries out the investigation into the accident. In *Cameron v. LV Insurance* [2019] UKSC 6, the claimant was injured when her car was involved in a hit-and-run accident. Someone got the registration number, so the car could be identified but the at-fault driver could not. The claimant's solicitors, anxious no doubt not to be restricted by the Untraced Agreement as to the amount of costs they could recover, brought

a claim – in court proceedings – against "the person unknown [driving the car]" with the insurers of the car (LV) as second defendant as RTA insurer. The Supreme Court however held that the claim against a person unknown was not permitted in this context and that LV was not directly liable under EU law to meet such a claim.

Monk v. Warbey

Hanging on the bottom branch of the liability tree is a *Monk v. Warbey* [1935] 1 KB 75 claim.

Under section 143(1)(b) of the RTA, a person must not cause or permit any other person to use a motor vehicle on a road or other public place unless there is a policy of insurance in force covering that use. So – as was held by the Court of Appeal in that case - if you cause or permit someone else to do so, an injured third party may be able to bring a claim against you for breach of statutory duty under that section.

This cause of action was devised in the days before the MIB existed, so that it provided a useful alternative claim against someone who might have the money to pay the damages even if the driver was impecunious. Such a claim can still be brought, however, as illustrated by the recent Court of Appeal case of *Sahin v. Havard* [2017] RTR 9. In that case, the claimant contended that under section 145 of the Act, motor insurance had to cover a *Monk v. Warbey* liability, so that if a person who caused or permitted the uninsured driving of a car by someone else herself had insurance, that insurer must meet the claim. It should be noted that the Court of Appeal held *against* the claimant.

Brexit

The mind-bogglingly complicated provisions of the EU (Withdrawal) Act 2018 and the EU (Withdrawal Agreement) Act 2020 are beyond the scope of this summary. As noted above, the effect of EU law has been curtailed in two specific respects by the Motor Vehicles (Compulsory Insurance) Act 2022. In other respects under the transitional arrangements (which are in force until such time as the governments has its promised "bonfire" of EU regulations) EU law will continue to influence English law in this area.

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John has appeared in many motor insurance cases, including *Sahin v. Havard* [2017] 1 WLR 1853, and is recommended as a leading junior in this area in Chambers UK.

"He is extremely experienced and is the oracle on insurance." "His knowledge of motor indemnity law is very deep – he knows it inside out."

"comprehensive knowledge, innovative approach and ability to get to the nub of complex policy issues".

"His attention to detail is second to none. He has an excellent breadth of legal knowledge and is always able to answer complex technical questions. He's also extremely approachable."

"He is well thought-of for his understanding of insurance law. He has excellent knowledge of the area and provides strong, clear advice."; "He is very strong technically, a good communicator and is always on top of the case."; "A very good technical lawyer and a charming opponent. His cross-examination is devastating."