Part II: Why the Uninsured Drivers Agreement 1999 Needs to be Scrapped

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Compensation; Motor insurance; Motor Insurers' Bureau; Uninsured drivers

In the second of his two-part article Nicholas Bevan examines whether the MIB is fit for purpose and outlines areas for reform.

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An overview of the main defects

The most offensive defects in what is now commonly perceived by most claimant practitioners to be a notoriously unjust and unsatisfactory compensatory regime are:

- The unjustified exclusions of liability under cl.6;
- The requirement, imposed as a condition precedent of any liability, that all claimants should complete the MIB's own very detailed claim notification form, when the form itself has recently been changed so as to require applicants to supply unwarranted and wide ranging mandate that provides access to highly personal and privileged information; cl.7;
- The imposition of numerous disproportionate and heavy handed procedural requirements imposed as conditions precedent to any liability within cll.7–12. These run a coach and horses through the overriding objective of art.10;
- A bizarre penalty imposed on an innocent victim should he or she fail to request the other driver's insurance details or to pursue a formal complaint to the Police, where there are in fact no insurance details to disclose in the first place, under cl.13;
- The assertion that any sums received by the claimant as a result of the accident fall to be deducted from the compensation, cl.17;

The combined effect of these deficiencies is likely to deter or disentitle some claimants from making any application and to deny to many others their full proper compensatory entitlement. There is a strong case to argue that even if these do not individually amount to the degree of impediment that would trigger a *Francovich* action,[1] taken as a whole they fail to provide an effective implementation of the Sixth EU Motor Insurance Directive.[2]

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[1] *Francovich v Italy* (C-6/90) [1991] E.C.R. 1-5357.

[2] Directive 2008/37 amending Directive 2005/68 on reinsurance, as regards the implementing powers conferred on the Commission [2008] OJ L81/71.

The intricacies of the procedural requirements within the 1999 Agreement seem occupy something of blind spot in many practitioners' competence. Ideally, they should be handled by dedicated specialists and where not, practitioners will need to appreciate how these claims differ from a typical RTA claim; case management systems and protocols should distinguish MIB claims as a separate category of claim. Many lawyers fall into the trap of treating an MIB claim as though it were an ordinary RTA claim. This can often have disastrous consequences. Even where claimants manage to successfully sue their legal representative in negligence, the compensation awarded for professional negligence is almost inevitably reduced to take into account the risks of litigation; representing as they do the lost prospect of recovering their full entitlement.

The Uninsured Drivers Agreement 1999 was drafted long before the inception of the Civil Procedure Rules and prior to the pre action protocols that provide for the free exchange of information before proceedings are commenced. However, it was left to languish for a couple of years before being nonchalantly waived through, presumably unexamined and as drawn, by the new incumbent at the office of Secretary of State for Transport; without any proper consultation with other stakeholders. The result produced a predictably one sided compensation scheme that prejudices the legal entitlement of innocent victims.

Amended Notes for Guidance

Whilst the amended Notes For Guidance do mitigate some of the more obvious procedural failings and remove the earlier declaration that the notes for guidance do not "control or influence the legal interpretation of the Agreement", their effect is limited. Many of the procedural strike out clauses remain and there is uncertainty regarding their legal provenance.

They do not constitute an amendment of the Agreement itself, as this would require the Secretary of State's fiat. However, the MIB does act in good faith and it honours the Amended Notes. Presumably, were it to attempt to renege on the softened procedural approach it would be possible to argue that the MIB is nevertheless bound by them, or at least estopped from raising technical objections to a step taken in accordance with these notes: on the grounds that they constitute a waiver. It is not suggested that the MIB do not act in compliance with these notes or otherwise other than in good faith. Even so, this widespread inconsistency between the Agreement and the Guidance (and indeed the case law) is confusing to lay applicant.

An insurer's perspective

Whilst it is easy to criticise the Domestic Agreements regime it should be remembered that many of the conditions precedent have been introduced in an attempt to restrict improper claims and dubious tactics.

When the Uninsured Drivers Agreement 1999 was being formulated the motor insurance industry was having to cope with an unprecedented number of uninsured and untraced driver claims. A significant proportion of these claims were being made late in the day, probably as a result of the late presentation of claims in response to television and radio advertisement by compensation claims agents and referrers, giving the MIB little opportunity to trace the drivers responsible or to investigate the accident circumstances and the claim. The Bureau also faced reluctance by some practitioners and claimant's to cooperate with the provision of information.

In 2006, the MIB estimated that there were approximately 2 million uninsured drivers. The numbers have reduced since the introduction by the MIB of its MID helpline that enables the police to confirm whether a vehicle is insured or not. These measures are thought to contributed to a declined in numbers to 1.5 million in 2010.

It appears that the MIB's Domestic Agreements reflect the Bureau's harsh experience in dealing with uninsured driver claims in the previous decade. This may explain the extraordinary increase in the procedural conditions precedent and the excessive bureaucratic controls imposed under the 1999 Agreement. The MIB contend that their principal concern is with preventing fraudulent and exaggerated claims and vetting claims; not depressing the value of legitimate claims.

Unfortunately, this empirical and one-sided approach to shoring up the MIB's defences and revisions made to the Uninsured Drivers Agreement 1988 has only served to exacerbate further the UK Government's existing failures to properly implement the EU Motor Insurance Directives.[3] The current Agreement contains so many procedural conditions precedent to any liability, unjustified exclusions of cover and knock out clauses and results in a regime so draconian and unjust to make the 1999 Agreement completely unsalvageable.

What follows is a critique of the most egregious failings within the Uninsured Drivers Agreement 1999, it is not intended to be a comprehensive commentary.

Specific instances considered

Unjustified exclusions of certain categories of claim

We have seen in Part I that some exceptions are clearly permitted by Sixth EU Motor Insurance Directive. The following section will identify which exceptions within the Uninsured Drivers Agreement 1999 fall outside those permitted by the Directive.

Subrogated claims

Under cl.6.1(c) the MIB seeks to exclude liability to compensate persons other than the individual sustaining the injury or loss, whether the claim is based on a subrogated right of action, an assignment or other right. This rather convoluted clause (and until recently the notion that the Guarantee Fund was a fund of last resort) has been relied on in the past to justify the MIB's refusal to pay a number of legitimate heads of claim: legal costs and expenses incurred by a legal expenses insurer; legal expenses insurance premiums; success fees under a conditional fee agreement; credit hire costs; medical expenses incurred under a health policy or provided by an employer; sick pay claims and monies already advanced by a motor insurer under a comprehensive motor policy. However, we have seen from art.10 that it provides in the clearest possible terms that the MIB should compensate:

> "at least up to the limits of the insurance obligation for damage to property or personal injuries …"

It is interesting to note that the issue that precipitated the dispute in *McCall v Poulton*[4] was the MIB's refusal to pay the claimant's car hire charges. Even more significant is the fact that this head of damages appears to have been conceded in those proceedings, eventually.

It is unfortunate that art.10 is less clear in the second paragraph in stating that Member States may regard compensation as "subsidiary or non-subsidiary to other compensation arranged by the MIB, whether paid direct by the uninsured driver, an insurer or social security body". What is abundantly clear, however, is that nowhere, by implication or otherwise, does the Directive permit the level of compensation received by the claimant, from whatever source or sources, to fall below the level of a comparable claim against an insured driver. Accordingly whenever the MIB reduce a claimant's net entitlement to compensation on the basis that all or part of the claim is a subrogated claims, then this appears to be in contravention of

[3] Directive 90/232 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles [1990] OJ L129/33 now consolidated within Council Directive 2009/103 (Sixth EU Motor Insurance Directive).

[4] *McCall v Poulton* [2008] EWCA Civ 1313.

the EU Directive. This could occur, where for example, the claimant is contractually obliged to repay the cost of treatment received under a private medical health insurance policy from any damages received or where the claimant receives a payment under a personal health insurance policy as a result of the accident.

Passenger's with culpable knowledge

One further area of controversy in cl.6 concerns the exclusion of liability to compensate a passenger who knew or ought to have known about any one of five different facts, these are set out in sub-cl.6.1(e) and sub-cll.6.2–6.5. Whilst there may well be sound policy reasons for penalising irresponsible behaviour, it should be remembered that Parliament has already addressed this issue when it passed the Law Reform (Contributory Negligence) Act 1945.

We will begin by examining the treatment of "passenger knowledge". It will be remembered [5] that EU Directive permits Member States to exclude the payment of compensation to passengers who voluntarily entered the vehicle which caused the damages or injury when the compensatory body (i.e. the MIB) can prove that they *knew* either that it was uninsured (art.10) or that they knew that the vehicle was stolen (art.13).

It is interesting to compare the exclusions of cover within s.151 of the Road Traffic Act 1988[6] with and cl.6.1(e) of the Uninsured Drivers Agreement 1999:

Section 151 of the 1988 Act provides:

> "(4) In subsection (2)(b) above 'excluded liability' means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—
>
> (a) did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and (b) could not reasonably have been expected to have alighted from the vehicle.
>
> In this subsection the reference to a person being carried in or upon a vehicle includes a reference to a person entering or getting on to, or alighting from, the vehicle."[7]

Clause 6.1 Uninsured Drivers Agreement 1999 provides:

> "6.1 Clause 5 [which sets out the MIB's obligation to compensate] does not apply in the case of an application made in respect of a claim of any of the following descriptions (and, where part only of a claim satisfies such a description, clause S does not apply to that part)
>
> (a) ….
>
> (c) a claim by, or for the benefit of, a person ('the beneficiary') other Than …… the person suffering death, injury or other damage which is made either—
>
> (i) in respect of a cause of action or a judgment which has been assigned to the beneficiary,or
>
> (ii) pursuant to a right of subrogation or contractual or other right belonging to the beneficiary;
>
> ……..….

[5] The Sixth EU Motor Insurance Directive is considered in Part I [2011] J.P.I.L. 51.
[6] Section 151 otherwise obliges insurers to satisfy judgments against their insured for any third party liability covered by the Road Traffic Act 1988.
[7] The underlining is added by the author for emphasis.

(e) a claim which is made in respect of a relevant liability described in paragraph (2) by a claimant who, at the time of the use giving rise to the relevant liability 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 such 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.

6.2 The relevant liability referred to in paragraph (1)(e) is a liability incurred by the owner or registered keeper or a person using the vehicle in which the claimant was being carried.

6.3 The burden of proving that the claimant knew or ought to have known of any matter set out in paragraph (1)(e) shall be on MIB but, in the absence of evidence to the contrary, proof by MIB of any of the following matters shall be taken as proof of the claimant's knowledge of the matter set out in paragraph (1)(e)(ii)—

(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."

Both s.51 and cl.6 impose constructive or deemed knowledge. However, we have seen from the House of Lords ruling in *White*,[8] that a purposive interpretation of cl.6.1(e) this requires *actual* knowledge. Extending this rationale and applying the *Marleasing*[9] principle to the s.151 of the 1988 Act achieves the same result. Section 151 should be amended in any event.

However, that is not the least of it, because it is clear that the two passenger knowledge exclusions permitted by arts 10 and 13 of the Sixth EU Directive do not extend to a knowledge that the vehicle was being "used in the course or furtherance of a crime", nor to a knowledge that the vehicle was "being used as a means of escape from, or avoidance of, lawful apprehension". These additional culpable knowledge categories were not present in the 1988 version of the Uninsured Drivers Agreement. They are not permitted by the Directive and thus expose the State and the Bureau to a legal challenge. It is noteworthy that in *Farrell v Whitty* [2008] IEHC 124,[10] the European Court of Justice ruled that Member States are not entitled to introduce additional restrictions to the level of compulsory insurance cover to be accorded to passengers.

[8] *White (Brian) v White* [2001] UKHL 9.
[9] *Marleasing SA v La Comercial Internacional de Alimentación SA* (C-106/89) [1990] E.C.R. I-I4135.
[10] *Farrell v Whitty* [2008] IEHC 124.

Assumption of the court's role and prescribing rules of evidence

Another curious irregularity is the MIB's attempt, at cl.6.3 to 6.5 to abrogate to itself the right to introduce rules of evidence to establish what a claimant knew or ought to have known. In this jurisdiction, we do not operate a dual set of civil law codes; we are all equal before the same law and it is simply not within the MIB's remit of authority to prescribe the approach our civil courts should take to the evidence before it. This clause can safely be ignored.

Offsetting monies received from other sources

Another category of excluded claim is featured in cl.17 where the MIB claims to be entitled to deduct any compensation arising from a different source that has resulted from the occurrence of the death, injury or loss to which the proceedings relate. Presumably, the intention of the MIB is to catch any accident or sickness insurance policy payment received by the victim and to deduct its compensatory payment pro rata. However, under our tort law jurisprudence the rule against double recovery does not extend to an insurance payment where the claimant has paid or contributed towards the premium. No such concession is made by cl.17.

Clause 17 is clearly inconsistent art.10 because that the MIB should provide compensation, at least up to the limits of the insurance obligation for the damage to property or personal injuries caused by the untraced or uninsured driver. It also runs contrary to the equivalence and effectiveness principle propounded by *Evans*.[11]

Unjustified insistence on an applicant making enquiries

Under cl.13.1 of the 1999 Agreement the MIB contends that it will incur no liability to compensate unless the claimant has as soon as reasonably practicable:

> "(a) demanded the information and, where appropriate, the particulars specified in section 154(1) of the 1988 Act, and
>
> (b) if the person of whom the demand is made fails to comply with the provisions of that subsection—
>
> (i) made a formal complaint to a police officer in respect of such failure, and
>
> (ii) used all reasonable endeavours to obtain the name and address of the registered keeper of the vehicle or, if so required by MIB, has authorised MIB to take such steps on his behalf."

It will be recalled that s.154.(1) of the Road Traffic Act 1988 imposes an obligation on a person against whom a claim is made (not the claimant) where their liability arises out of an event that ought to be covered by a policy of insurance under s.145 of this Act must, *on demand by or on behalf of the person making the claim (i.e. the claimant):*

> "(a) state whether or not, in respect of that liability—
>
> (i) he was insured by a policy having effect for the purposes of this Part of this Act or had in force a security having effect for those purposes, or
>
> (ii) he would have been so insured or would have had in force such a security if the insurer or, as the case may be, the giver of the security had not avoided or cancelled the policy or security, and
>
> b) if he was or would have been so insured, or had or would have had in force such a security—

[11] *Evans v Motor Insurers Bureau (Mighell v Reading)* [1999] L.R.I.R. 30.

(i) give such particulars with respect to that policy or security as were specified in any certificate of insurance or security delivered in respect of that policy or security, as the case may be, under section 147 of this Act, or

(ii) where no such certificate was delivered under that section, give the following particulars, that is to say, the registration mark or other identifying particulars of the vehicle concerned, the number or other identifying particulars of the insurance policy issued in respect of the vehicle, the name of the insurer and the period of the insurance cover."

The object of s.154 is to aid a victim to identify the insurer liable to indemnify the responsible driver under s.151 to enable the victim to recover compensation Cl.13 of the 1999 Agreement subverts this principle to produce the very opposite effect.

Few motorists are aware of s.154 Road Traffic Act 1988 and far fewer still have any inkling about the not inconsiderable burden placed on them by cl.13. Where information is not provided by the other driver at the accident scene, innocent claimants (often injured) are obliged by cl.13 to undertake their own investigation and to attempt to ascertain the defendant's insurers, without any clear guidance on the extent of these inquires or on what "as soon as reasonably practicable means". Many injured motorists will be unaware that the defendant was uninsured until several weeks after the accidents. Arguably, obtaining even part of the information listed in s.154 (such as the name of the insurers or the policy number) would be insufficient and thus risk breaching this condition precedent of MIB liability.

This clause clearly discriminates against this category of claimants, as opposed to those pursuing claims against insured defendants, and there is a strong case to argue that this contravenes the EU Motor Insurers Directives. This oppressive clause is also unnecessary, with the advent of the Motor Insurers Database.

Fortunately, in *Shapoor v Promo Designs*[12] a piece of flawless common sense has mitigated the harsh effect of cl.13. In Shapoor, the MIB had sought to reject a claim under the Uninsured Drivers Agreement where the defendant mistakenly provided false insurance details in the erroneous belief that he was insured and where the claimant did not report the failure to provide this information to the police. The judge held that the MIB were attempting to import into their agreement an obligation to report the accident where C was uninsured or gave conflicting answers. This was held to be contrary to EC Law as it attempted to impose an additional burden on a claimant's right to compensation provided under the EU Motor Insurance Directives, one that was in conflict with the EU Directives themselves. Furthermore, a driver who honestly but mistakenly believes that they are insured does not commit an offence under s,154(2) RTA 1988, even if they are guilty of driving without insurance under s.143.

H.H. Judge Platt held that cl.13.1 only applies to circumstances where the third party has insurance; not where the third party is uninsured.

Breach of the right to privacy

Under cl.7 MIB shall incur no liability under MIB's obligation unless an application is made to the person specified in cl.9(1):

"(a) in such form,

(b) giving such information about the relevant proceedings and other matters relevant to this Agreement, and

(c) accompanied by such documents as MIB may reasonably"

It is necessary to use the MIB's application form. The prescribed form is available from the MIB website or by phone request.

[12] *Shapoor v Promo Designs*, Unreported May 1, 2009 Romford County Court.

In its Notes for Guidance, the Bureau has adopted a more lenient stance on the completion of the application form, provided that it is signed.

There are two versions of this application form. The latest version obliges an applicant to make a declaration; this is set out at s.12. At cl.4 of this declaration the applicant must consent to the disclosure of personal information and the form explicitly authorises the release to the MIB of confidential data from their employers, any government department, insurance companies, local authorities and even their medical records. These are unjustified demands which go beyond anything that the MIB have a right to demand.

Any applicant that does not complete the application form is at risk of being deemed by the MIB to have committed technical breach of cl.7, which is itself a condition precedent of any MIB liability. The imposition of this excessive and unwarranted level of disclosure exposes the Government and the MIB to the accusation that it is committing a breach of art.8 of the Human Rights Convention, which confers the right to privacy. Any solicitor that fails to properly advised client on this issue is at risk of professional misconduct.[13]

The MIB should instead rely on the usual pre action and post issue provisions for disclosure within the Civil Procedural Rules, along with every other litigant in our civil justice system.

Disproportionate insistence on disclosure

As with cl.5.1 under the UDA 1988, failure to serve the requisite notice in the form prescribed is fatal to an MIB claim. This is because this requirement is set as a condition precedent of any liability.

Under cl.9 an applicant must within 14 days *after* issue give the MIB and any relevant/potential insurer "proper" notice that he has commenced proceedings, and at the same time the applicant must supply a substantial dossier comprising:

"(a) notice in writing that proceedings have been commenced by Claim Form, Writ, or other means,

(b) a copy of the sealed Claim Form, Writ or other official document providing evidence of the commencement of the proceedings (i.e. notice of issue),

(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 or (as the case may be) his Solicitor or agent to or from the Defendant or the Defender or (as the case may be) his Solicitor, insurers or agent which is relevant to—

  (i) the death, bodily injury or damage for which the Defendant or Defender is alleged to be responsible,
  or

  (ii) any contract of insurance which covers, or which may or has been alleged to cover, liability for such death, injury or damage the benefit of which is, or is claimed to be, available to Defendant or Defender,

(e) subject to paragraph (3), a copy of the Particulars of Claim whether or not indorsed on the Claim Form, Writ or other originating process, and whether or not served (in England and Wales) on any Defendant or (in Scotland) on any Defender, and

(f) a copy of all other documents which are required under the appropriate rules of procedure to be served on a Defendant or Defender with the Claim Form, Writ or other originating process or with the Particulars of Claim, (i.e. medical report and schedule of special damages)

(g) such other information about the relevant proceedings as MIB may reasonably specify."

[13] See rr.1 and 4 of the Solicitors Code of Conduct 2007.

The over-elaborate nature of this "proper notice" is at stark odds with the simple obligation imposed on victims of insured drivers under s.152 of the 1988 Act: to give notice (written or oral) "before or within seven days after the commencement of the proceedings". Clause 9 does not permit notice to be given prior to the commencement of proceedings. It also imposes a completely disproportionate burden on the applicant, one that arguably constitutes an unwarranted impediment to an applicant's right to compensation. It is conceivable that there will be occasions when the notice provisions within cl.9 are practically impossible or excessively difficult to comply with.

In *Silverton v Goodall*,[14] an MIB claim was dismissed because the claimants served their notice (under the UDA 1988] a few days late. The primary cause was a delay at the local court office in posting out the issued summons. This unjust windfall resulted notwithstanding the fact that the court held the MIB had suffered no prejudice.

Clause 9 requires the applicant to search for and obtain copies of all insurance contracts that may cover a relevant liability. This would appear to extend to: private healthcare for treatment received as a result of the accident; household; credit card policies; employers insurance; union benefits; personal accident cover. It also requires disclosure of all correspondence between applicant/claimant and the defendant or insurer. No road traffic insurer would be entitled to demand so much information. Furthermore, it ought not to be within the power of the MIB to dictate a much heavier level of pre action disclosure to that prescribed by the Civil Procedure Rules still less to impose such an oppressive sanction for any non-compliance. There is a strong case to argue that r.9, taken as a whole, constitutes yet another instance of the 1999 Agreement failing to implement the Sixth EU Motor Insurance Directive by raising unwarranted difficulties in the path of legitimate claims.

Imposition of excessive post issue notices

Under cll.10 and 11 the MIB shall incur no liability to pay a penny in compensation unless the applicant has, no later than seven days after the occurrence of any of the following events, given notice in writing of the date of that event to the MIB or insure, and supplied a copy of the relevant document:

- On the service of the proceedings, but see cl.10;
- On the filing of a defence;
- Any amendment of the Particulars of Claim;
- Any addition to any schedule or other document required to be served with the Particulars of Claim (i.e. medical report or schedule of special damages);
- Either when setting down of the case for trial or where the court gives notice to the claimant of the trial date, then seven days from when that notice is received.

Once again the Notes for Guidance relax some of the notice requirements, where the MIB is joined as a party.

Under cl.12.1 MIB shall incur no liability unless the claimant has, after commencement of the relevant proceedings and not less than 35 before the appropriate date, given notice in writing of his intention to apply for or to sign judgment in the relevant proceedings.

It is entirely right that the MIB, like any other party in our civil justice system, should be informed of relevant steps within the proceedings by a claimant. It is also appropriate that any party failing to adhere to the principles set out in overriding objective in Pt I of the Civil Procedure Rules or who otherwise acts unreasonably should be subject to a costs sanction. The Civil Procedure Rules provide adequate safeguards and sanctions for all litigants and there is no reason or justification to confer extra rights and privileges on the MIB. Furthermore the excessive penalties imposed for failing to adhere to these notice provision,

[14] *Silverton v Goodall* [1997] P.I.Q.R. P451.

whether innocently made or deliberately contrived, is wholly excessive. There is a very strong case to argue that these clauses constitute a breach of the UK Government's implementation of the Sixth Motor Insurance Directive because they infringe the "equivalent and effective" principle set by the European Court of Justice in *Evans* and because they constitute an restriction to the basic right to recover compensation under the EU Directives.

Fit for purpose?

There can be little doubt that the Uninsured Drivers Agreement 1999, is unfit for purpose. This Agreement along with its predecessor needs to be revoked and substituted by a shorter, simpler, fairer agreement in conformity with the Sixth EU Motor Insurance Directive, and given retrospective effect.

As a statement of a claimant's legal right to compensation, we have seen from the extracts set out above that it is highly misleading. How then can it be reasonable to assume that any lay claimant, pursuing an online application for compensation, would be able decipher his or her legal entitlement from reading the Agreement?

It is unacceptable that any Government backed compensation scheme should require an applicant to have to contend with the crypotographical task of devising which clause is valid and which is not. As we have seen, a correct understanding cannot be achieved merely be reading the Agreement itself; not even in if undertaken in conjunction with the MIBs' notes for guidance (which are not comprehensive anyway). A proper understanding can only be attained by someone that has a working knowledge of the Sixth EU Motor Insurance Directive as well as an appreciation of the purposive approach to the judicial interpretation of the Domestic Agreements, propounded by the House of Lords in *White*. To add further impediment, the bewildering panoply of procedural conditions precedent to liability constitute, in themselves, an unwarranted barrier to claimants' accessing their compensatory entitlement, and has been argued by some to constitute a breach of art.6 of the Human Rights Convention.

Who is to blame?

Ultimate responsibility must rest with the Secretary of State for Transport, Mr John Prescott, for blithely approving this manifestly unjust anachronism back in 1999 and for the successive holders of that office under the previous Government: all of whom have failed abysmally to protect the legitimate rights of injured victims by not properly implementing the relevant EU Motor Insurance Directives. The past 12 or more years has demonstrated that is naive to rely on a private commercial contractor to act altruistically and in the public interest without sufficient supervisory safeguards being put in place. Any commercial operator will wish to maximise its commercial interests and those of its members and their shareholders.

There is little that is objectionable in the pragmatic approach of successive Governments to employ the private sector to deliver part of its social law policy aims. It is well recognised that the insurance industry has in effect funded the tort law civil justice system in this country for many decades, and by and large it has been a positive experience. However, there will always be a natural tension between motor insurance company interests and the wider, social policy and tort law objectives of our compensatory system. It is the duty of any competent government to ensure that its policy aims are properly implemented and to take decisive action when these are threatened or undermined. No government should rely excessively on the inventiveness of the Judiciary to bridge the void between what is an equivalent and effective delivery of the compensation scheme imposed under the European Directives and what provided by this agreement. The obscurity and lack of accountability associated with the present set up seems increasingly out of keeping with modern times and thinking.

All this begs the question: how is it that such a large constituency of citizens have so little influence on the extra statutory compensatory schemes devised in their name and for their protection and which, they also fund?

MIB's board of management cannot wash its hands of its responsibility either: for proposing such a harsh and unconstitutional compensation regime in the first place and for failing to replace it, despite numerous calls for its revision.

Whilst the MIB and the motor insurers it represents have legitimate interests that require protection, especially from the risk of fraudulent claims under the Untraced Drivers Agreement 2003, this should not extend to conferring upon it rights superior to any other litigant in our civil law system of justice. The Civil Procedure Rules and the courts inherent jurisdiction confer abundant powers on the courts to discourage fraudulent, reprehensible or contumelious behaviour by claimants. The MIB should be content to rely on those, along with other user of the civil justice system.

We should never lose sight of what should be the overriding imperative: that an injured victim is entitled to fair and just compensation. Nor should we forget that the insurance premium paying public have a right to expect fair and equal treatment under this compensatory regime which they fund through their premiums and this should extend to providing them with their full compensatory entitlement where they are unfortunate enough to be injured or sustain loss through the fault of an uninsured driver.

The MIB has, under the dynamic leadership of its current chief executive officer, demonstrated that it is capable of acting very effectively and efficiently as an enterprise. However, there is a limit to what the MIB senior management and its staff can do to mitigate the injustices perpetrated by the Uninsured Drivers Agreements, when they are constitutionally obliged under art.3(B)(i) of the MIB Memorandum and Articles of Association to adhere to the very Domestic Agreements that inflict them in the first place.

Each member of the MIB's management board shares a collective responsibly for the MIB's failure to fulfil the MIB's single most important role: of providing an equivalent and effective safety net for innocent victims of uninsured and untraced drivers in accordance with the EU Directives. We have seen in Pt I of this paper that art.3A(i) of the MIB's Memorandum of Articles imposes a constitutional obligation on the MIB to fulfil that compensatory role, whether imposed under our national law or through EU directives. We have seen from Pt II of this paper that the MIB board has signally failed to deliver a compensatory safety net that is equivalent to and as effective as that which would result in a claim against an insured defendant. The roll call of MIB Board members, published within their 2009 Report, include some very senior executives from within the world of motor and liability insurance. It is inconceivable that the Board was unaware of the defects within the Domestic Agreements. It is abundantly clear that the regime is biased in favour of the motor insurance companies who provide the levy and it stands to reason that this has resulted in many innocent victims being under compensated. On the other hand, it could be argued that far from serving the motor insurers interests, the Domestic Agreements have the ultimate effect of reducing the cost of insurance premiums. The casuistry of such an argument is exposed as soon as one returns to the simple principal within the Sixth EU Motor Insurance Directive. This requires the Member States to ensure that victims recover at least up to the level of compensation recover from an insured driver; this is standard that successive Government have failed to meet.

It seems implausible that the MIB should have proposed so many exclusion and strike out clauses in the first place and then to have so trenchantly defended them if they did not intend to exercise them. However, the fragmented nature of the solicitors' profession, comprising as it does over 10,000 independent practices, makes it practically impossible to collectively establish whether or not the MIB is systematically under compensating victims of uninsured and untraced drivers. That is a task better suited to the Government.

The Secretary of State could do worse than require the board to account for their actions over the past decade. He might wish to invite the MIB to account for every wrongful deduction, limitation or exclusion of liability made under the Uninsured and Untraced Drivers Agreements between 2009 and 2010, for example. If this information is not forthcoming, perhaps the services of an independent auditor could be recommended.

It is to be hoped that the present incumbent at the office of the Secretary of State for Transport will take expeditious action to remedy the failings of his predecessors. The current regime must be replaced by a short, clear and above all fair compensatory mechanism. Furthermore, constitutional safeguards must be introduced to the MIB to ensure that rights of innocent victims are never again compromised. The case for reform is so strong that if the Secretary of State will not act, others will, either by bringing *Francovich* claims that will revive the whole issue as to whether the MIB is an emanation of the State or by means of Judicial Review should anything short of a complete overhaul be countenanced when the current regime is eventually revised.

Proposed reforms

The defects in the current compensatory regime and their causes suggest the following measures:

- Rescission of the MIB Uninsured Drivers Agreements 1988 and 1999 (including the November 2008 Supplementary Agreement) with immediate effect;
- The substitution of a new, much shorter, agreement concurrently with the rescission or new legislation; that:
  - — is shriven of all inconsistency with the Sixth EU Motor Insurance Directive and
  - — imposes no additional procedural hurdles to those imposed by s.152 Road Traffic Act 1988 or otherwise, and
  - — sets out in unambiguous terms the right to compensation: that is at least to the standards and extent required under the Sixth EU Motor Insurance Directive, and
  - — is retrospective in effect so that it applies to all relevant claims that occurred on or after December 31, 1988. (The Government is unlikely to be exposed to a raft of *Francovich* claims arising out of the 1988 Agreement since the six year time limit for making such claims runs from the date when the original cause of action against the uninsured driver occurred, *Moore v Secretary of State for Transport*[15]), and
  - — is written in plain English so that it is readily understandable without separate interpretive notes, and
- Reform of the MIB to make it more accountable for its conduct in administering the functions it fulfils on behalf of the Government under the EU Motor Insurance Directives. This accountability should not be limited to supervision by the Secretary of State on behalf of the Government but it should extend to the public at large and major stakeholders operating in the civil tort law compensatory regime. This could involve:
  - — The inception of a stakeholders committee that meets regularly to voice concerns and to report to the Secretary of State on the MIB's administration of the Domestic Agreements, and
  - — The co-option to its management board of representatives nominated by professional associations such as MASS or APIL who have an expertise in this field.
- A clearer breakdown within the MIB's financial accounts and an agreement that the levy raised from its insurance members, raised from increased premiums charged to the premium paying public, should be hypothecated to the National Guarantee Fund.

[15] *Moore v Secretary of State for Transport* [2007] EWHC 879 (QB).

- Improving the dialogue between the MIB and those who represent the interests of injured victims by creating a joint working party to devise new protocols and procedures under a reformed set of Domestic Agreements to help identify potentially fraudulent claims, to avoid incurring unnecessary legal costs and encouraging the early and economic disposal of claims.
- To appoint an independent arbitrator or commissioner to deal with any complaints in the way claims have been handled by the MIB.

It is also suggested that the new Uninsured Driver's Agreement include an obligation on both the applicant and the MIB to participate in an initial mediation assessment process or that it should otherwise encourage alternative dispute resolution, perhaps restricted to claims that fall outside the Fast Track and Low Value Personal Injury Claims in RTA scheme.