The new Uninsured Drivers Agreement: An analysis

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Introduction

After a lengthy consultation process, on the 3rd of July 2015, a new Uninsured Drivers Agreement (UDA) was created between the Secretary of State (SoS) and the Motor Insurers' Bureau (MIB). This is the biggest reform to the Agreement since the previous agreement was introduced in 1999. This article will examine the key reforms to the agreements and will conclude by questioning whether the new Agreement enhances the rights of victims of uninsured drivers.

Removal of Procedural Requirements

Perhaps one of the biggest reforms to the UDA comes in the form of the removal of procedural requirements which were scattered throughout the previous agreement. Clauses 9-13 of the 1999 agreement required the claimant to give proper notice[1] to the MIB or the insurer: when bringing proceedings[2] (Clause 9), after commencement of proceedings of the date of service of the claim form (Clause 10)[3] , the filing of a defence or amendment of any particular claims (Clause 11)[4], the intention to apply for or sign a judgement (Clause 12)[5], all information and particulars specified in ***Section 154 (1)*** of the Road Traffic Act[6] or if refused to give notice to the police (Clause 13). If any of these procedural requirements were not met then the MIB could refuse the claim. These procedural requirements were removed from the new Agreement as the MIB will be joined as a defendant in proceedings will therefore receive notification of phases in the process in accordance with the Civil Procedure Rules. The only procedural requirement introduced in the new UDA was that the MIB must be joined from the outset to the relevant proceedings (Clause 13).

Exclusions

Introduction of Terrorism Exclusion

Perhaps one of the more interesting additions to the Agreement is the provision which excludes liability when the claim was caused by or was in the furtherance of an Act of terrorism. This provision mirrors the Untraced Drivers Agreement (Clause 5 (d)). The rationale behind this new provision was that terrorism should not be viewed as a liability requiring coverage by a motor insurer and, hence need not be picked up by the MIB as the guarantee fund. The legality of this provision under European Law can be called into question[7] as recent ECJ decisions[8] require coverage for any use of the vehicle in line with its normal function. Although it could be contended that an act of terror does not fall within the normal function of a motor vehicle.

Removal of Crime Exception

Perhaps the least surprising alteration of the 1999 Agreement was the removal of the *"crime exception*" (Clause 6 (1) (e) (iii)) and the exception in relation to escape from lawful apprehension (Clause 6 (1) (e) (iii)). The

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[1] Proper Notice required Notice in Writing that proceedings had commenced (Clause 9 (2) (a)), a copy of a sealed claim form , writ or other official document (Clause 9 (2) (b)), a copy or details of any insurance policy providing benefits in case of death, damage or bodily injury (Clause 9 (2) (c)), copies of all correspondence (Clause 9 (2) (d)) , a copy of the particulars of the claim (Clause 9 (2) (e)) , a copy of all other documents required under the appropriate rules of procedure (Clause 9 (2) (f)), such other information about relevant proceedings (Clause 9 (2) (g))

[2] Clause 9 (1) proceedings were required within 14 days

[3] Required within 7 or 14 days (Clause 10 (3) (a) or Clause 10 (3) (B)

[4] Or a trial date

[5] Notice required within 35 days

[6] The policy of insurance or security

[7] Merkin and Hemsworth "Law of Motor Insurance" (2015, Awaiting Publication, at P 626)

[8] Vnuk v Zavarovalnica Triglav [2014] EUECJ Case C-162/13

“crime exception” was deemed worthy of *Francovich*[9] damages in against the State in *Delaney v Secretary of State for Transport* [10] due to its conflict with Article 10 of the Sixth Motor Insurance Directive[11]. Delaney concerned a passenger who was severely injured in an accident and was carrying a substantial amount of cannabis at the time. The MIB denied compensation under Clause 6 (1) (e) (iii) because the vehicle was being used in *“course or furtherance of a crime”*. The Court of Appeal allowed damages against the State due to its “serious” breach of Directives in continuing to allow this unlawful provision. It is, perhaps, no surprise that the crime exception and lawful apprehension provisions have been removed from the new Agreement.

Alteration of knowledge

Another alteration of exclusions comes in Clause 7 of the 2015 Agreement in relation to the knowledge of the passenger. Previously the 1999 agreement would allow exclusions where the passenger *“ought to have known*” that the vehicle was uninsured (Clause 6 (1) (e)). This, *prima facie*, is inconsistent with EU law which states that the passenger should be shown to have “*known*” that the vehicle was uninsured. The House of Lords in ***White v White***[12] held that the term “*ought to have known*” would need to be construed as actual or “*blind eye*” knowledge to comply with the Directives. Therefore to improve this issue, the new Agreement refers to *“reason to believe”* that the vehicle was uninsured (Clause 8 (1)). There is no doubt that this improves clarity and better reflects the issue of *‘blind eye’* knowledge.

Continuing Exclusions

Despite the removal and alteration of some exclusions, there are still some exclusions which have continued from the previous Agreement. There are doubts as to the legality of these exclusions within European Law. For example, it is arguable the exclusion in Clause 8 (1) (a) of the new Agreement which excludes compensation where the passenger, “*knew or had reason to believe that the vehicle was stolen”* is not compliant with Article 13 of the Sixth Directive which states that where an insurer refuses to pay when the passenger “*knew or had reason to believe that the vehicle was stolen”,* the Bureaux or compensation body is to pay compensation. Therefore, although such an exclusion can be utilised by an insurer to deny liability to the claimant, it should not be used by the Guarantee Fund to refuse settlement.
Another potentially unlawful exclusion exists in relation to property damage claims. Under Clause 7 (1) of the new MIB agreement, the MIB is not liable for any claim where there is no contract of insurance in force in relation to the damaged vehicle at the time of the accident. This, therefore, goes against the spirit of the Directives which requires compensation for all personal injuries or property damage claims with only limited exceptions[13].

Another exclusion which is in the 2015 Agreement which was also in the 1999 Agreement relates to where the passenger knows that the vehicle was uninsured. This is permitted under ***Article 10 (2)*** of the Sixth Directive.

Section 151 Recovery

Another significant difference between the 1999 Agreement and the 2015 Agreement is in relation to statutory clawback. Clause 10 of the 2015 Agreement places the MIB in the same position of an insurer and prevents the claimant from recovering against the MIB where an insurer is able to exercise a right of partial or total recovery against the claimant under Section 151 of the RTA[14].

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[9]Francovich v Italy (C-6/90) [1993] 2 C.M.L.R. 66
[10] Delaney v Secretary of State for Transport [2015] C.P. Rep. 25
[11] Which states that the only exclusion permitted to be used by the Guarantee Body is where the passenger enters into the vehicle knowing that the driver is uninsured See DIRECTIVE 2009/103/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009
relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability 7.10.2009
[12] White v White and another [2001] 1 W.L.R. 481
[13] In case of the Bureaux the one exception permitted is where the passenger knows that the vehicle is uninsured (Article 10 (2))
[14] Section 151 provides a right of recovery (partial or full) for the insurer from the insured where the insured permits the driver to drive the vehicle knowing that it is uninsured.

Perhaps a missed opportunity for the agreements comes in the form of compensation for accidents that occur on private land. The new Agreement states that to pay compensation, the liability must be one which would otherwise be covered by insurance in the RTA 1988. Therefore, as the RTA only covers accidents which occurred "*a road or in any public place*"[15], accidents on private land are excluded under the RTA and therefore under the MIB agreement. There can be little doubt that this is not compliant with the *Vnuk*[16] ruling as *Vnuk* requires coverage on both public and private land.

Further Important Changes

Formal entitlement to Right of Assignment

Another alteration which is worthy of note comes in the form of Clause 15 (b) of the new Agreement. This clause introduces a formal recognition that the MIB should be entitled to the assignment of a settlement and not solely of the judgement which reflects that in the majority of circumstances the case is settled prior to judgement being obtained.

A new Appeals Process

A new substantial alteration of the 1999 Agreement comes in the form of the appeals process. Previously, any dispute against a requirement of the MIB agreement would have been made to the SoS, whose decision would be final (Clause 19 (1)). This, therefore would not have been an independent decision as it is the SoS is involved in the agreement. Therefore, under Clause 17 of the new agreement, any appeals will be decided by an independent arbitrator which is appointed by the SoS from a panel of Queens Council rather than the SoS, so as to make it a fairer and more independent appeals process. Practically, it is envisaged that this process would be used infrequently, as many procedural requirements have been removed from the new agreement[17].

Does the new Agreement provide better protection to victims of Uninsured Drivers?

There can be no doubt that the new Agreement provides greater protection to the victims of uninsured drivers. The removal of the procedural requirements should make it easier to claim and will reduce costs whilst ensuring that a greater number of victims are protected. It also makes the agreement much more user friendly by reducing it in length thereby emphasising the remaining important provisions and requirements. Moreover, the SoS has, at least partially, learned its lesson from its loss of the ***Delaney*** case by removing the unfair and illegal provisions relating to vehicles used in the furtherance of a crime. This, it is submitted will enhance the protection of the victim. In addition, a new and independent appeals process will allow the challenge of the MIBs decision to deny liability in a fair way.

It is submitted, however, that this agreement does not go anywhere near far enough. The introduction of terrorism exclusion is arguably illegal. Furthermore, the MIB continues to be able to exclude some property damage claims alongside the claims in relation where the vehicle was stolen. Moreover, in its ignorance of EU law, the new Agreement does not cover for accidents which occur on private land which again can prejudice the rights of the innocent victim. Therefore, it is submitted that although the new MIB agreement is certainly a step in the correct direction, it has fallen visibly short of the protection required under EU law.

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[15] Section 143

[16] Vnuk v Zavarovalnica Triglav [2014] EUECJ Case C-162/13

[17] The Consultation Document stated that the appeals process was used infrequently previous to the new agreement and therefore it would be used in only very few cases subsequently due to the removal of the procedural requirements see Department of Transport "Department for Transport Response to the consultation on the Review of the Uninsured and Untraced Drivers' Agreements"