

Employers' Liability Insurance
the need for change

**All-Party Parliamentary
Group on Occupational
Safety and Health**

Employer liability and motor insurance

There are two main types of insurance that the Government has made legally compulsory. These are for motor vehicles and employers. The reason for this is that in driving, or employing someone, the person is risking not only their own safety but that of a third party. Both these activities are responsible for a considerable number of deaths. Motor vehicles account for approximately 3,000 deaths a year. Work activities account for a much greater number but figures are not reliable. Although around 230 workers are killed through injuries, anything from 8,000 to 24,000 are estimated to be killed by occupation-caused diseases, mainly cancers. Because of difficulties in attributing many cancers to a specific type of exposure it is impossible to give reliable figures but the largest single cause of occupational death is asbestos, which is believed to be responsible for an estimated 4,000 deaths each year.

In addition to deaths, an estimated 280,000 people are injured in motor-related incidents and around 300,000 reportable injuries are caused through work every year.

All motorists are required to have in force an insurance policy that covers them for liability for injuries to other people or their property caused while the vehicle is in a public place. Drivers without valid insurance can have their cars seized and also be prosecuted.

Employers are required to insure against liability for injury or disease to their employees arising out of the employer's negligence. The policy cover must be for at least £5m. Any employer who does not have valid insurance in force can be fined up to £2,500 each day.

The similarities between road traffic accident and employers' liability insurance are obvious in that both are compulsory, a failure to comply is a criminal offence and insurers collect premiums from a captive market.

Yet despite the similarities, they are very different in their procedures for dealing with anyone injured or made ill by someone who is not insured.

Dealing with uninsured claimants

There can be no doubt that the problem of uninsured driving is significant in the United Kingdom. It is estimated that one in 20 cars on the road is driven without proper insurance.

Since 1946, there has been a Motor Insurers' Bureau (MIB). Every insurer underwriting compulsory motor insurance is obliged, by virtue of the Road Traffic Act 1988, to be a member of MIB and to contribute to its funding. The MIB has been obliged to pay compensation for injuries caused by uninsured or untraced drivers, broadly in line with compensation paid by insurance companies. In 2007, the MIB paid out £360 million to meet claims caused by motorists without insurance cover. The funds are raised by a levy on all motor policies. The MIB also runs the Motor Insurance Database (MID), a record of insurance details for each of the 26 million or more UK registered vehicles. The logic for a legal requirement on the insurance industry to operate a scheme such as that operated by the MIB is that the statutory obligation to have insurance against a road traffic accident created a captive market for the insurance industry. It therefore receives far more business than it would otherwise get.

Employers' liability insurance also creates a captive market yet the system works very differently. Employers Liability Compulsory Insurance (ELCI) has been compulsory since 1972. Research has indicated that there is currently 99.5 per cent compliance with ELCI. Prior to 1972, it was estimated that 90 per cent of employers had obtained insurance voluntarily. In the event of an employee being injured, killed or made ill as a result of their employer's negligence, if there is no insurer, or the insurer cannot be traced, the only recourse for the worker is to sue the employer for damages. In cases of small employers, or insolvent ones, that often means that the employee or their dependants will get no compensation at all.

This is because there is no similar body to the MIB and no levy on insurance policies to cover the cost of uninsured employers or ones where the insurer is untraceable.

There is, however, a voluntary code of practice which is run under the auspices of the ABI. It was set up in 1999 following concerns over the number of claimants who were unable to trace an insurer. This seeks to trace insurers where the claimant cannot find out by any other means who covered their employer. The ABI received 9,639 requests in 2006–2007. It was successful in tracing the insurer in only 35 per cent of cases. This means that there are a considerable number of enquiries where the insurer cannot be traced. In the last year where numbers were available, 6,273 traces were unsuccessful.

Many of these claims will be on behalf of the victims of asbestos-related diseases. Separate records are kept by the ABI on the number of enquiries relating to mesothelioma, a terminal disease caused by exposure to asbestos. Of the 1,047 enquiries between April 2007 and December 2007, again only 35 per cent were successfully traced leaving 679 unsuccessful enquiries in a nine-month period. It has been estimated that between 1 in 10 and 1 in 20 claimants with mesothelioma are unable to claim compensation as a result of a failure to trace the insurer.

The ABI has made significant attempts to improve the effectiveness of the code including the appointment of a full-time administrator to deal with enquiries and responses to the code, and a new online system available from the ABI website. However, there is no evidence that this has had a significant effect. This is because much of the information is simply not available from the insurance companies, either because the employer was not insured, the records have been destroyed, or the employer operated under a different name from that on the insurance certificate.

There is, however, one significant difference between claims under motor insurance and claims under employers' liability insurance. That is that nearly all claims for compensation after a road accident will be lodged within three years of an accident happening (and usually within the first year). In the case of occupational diseases, in particular cancers, the disease may not be apparent until many decades after the employee was exposed. By then the employer may not be trading.

The Government did recognise the difficulty, in part, by setting up schemes to pay compensation to asbestos victims, although the lump sums paid out under these schemes are far less than they would receive in compensation from an insurer.

The case for an Employers' Liability Insurance Bureau

The All-Party Parliamentary Group on Occupational Safety and Health believes that there is a clear case for new arrangements for protecting claimants who are unable to trace their employer's insurer. It believes that if any industry is to be given a captive market in the way the insurance industry has in the case of employers' liability, then the industry also has a responsibility to ensure that those who lose out receive the compensation they should be entitled to.

Given the high compliance by employers of the requirement to have employers' liability insurance, the insurance industry has already received the premiums of the employers of almost all of the people who are unable to trace their employer's insurance. The only reason that they cannot receive compensation is failings in the system of keeping or accessing information.

People injured at work should not be treated any differently from those involved in road traffic accidents. For that reason the All-Party Parliamentary Group on Occupational Safety and Health is calling for the establishment of an insurance fund of last resort underpinned by a national database of insurance policies to mirror the arrangements for motor vehicle insurance. This fund should cover not only those likely to have been exposed from the date the fund was established but also claims from those who were likely to have been exposed in the past, given that insurance premiums have already been paid by the employer's workers.

The setting up of an Employers' Liability Insurance Bureau (ELIB), paid for through insurance premiums, would ensure that workers injured or killed by negligent, uninsured employers have the same right to obtain compensation from an ELIB as people injured or killed by uninsured

drivers have from the Motor Insurers Bureau. This would be a significant step towards ensuring that those who do develop a disease as a result of their employment receive their just compensation, something that is clearly not happening now. It could be at no cost to the Government and would in fact be likely to reduce the number of claims under the no-fault scheme set up under the Child Payments and other Payments Act 2008. An ELIB would also have the effect of a greatly increasing the amount of money the Government will be able to recover from payments made under the 1979 Pneumoconiosis Act.

A national database

The All-Party Parliamentary Group on Occupational Safety and Health also recommends that, in addition to setting up a fund of last resort, the Government should be investing in the future to ensure that from now on it is impossible for claimants to be unable to trace their employer's insurer where one existed. At present the industry relies on the ABI tracing scheme, which, despite the considerable efforts of the ABI, is still unable to trace the insurance records of thousands of claimants every year. These people are then unable to obtain compensation for their employer's negligence. In many cases the claimant has a terminal disease, which may leave them only months to live. They want to be able to live their last few months without having to worry about the financial situation of their dependants.

The number of cases where a claimant is unable to get information on an employer's insurer is likely to increase given the removal, in 2008, of the requirement on an employer to retain insurance records. This means that if an insurer's records are lost, as happened to one large insurer following the 1996 Manchester bomb attack, there will be no back-up records. The removal of the regulations compelling an employer to display a paper copy of the insurance policy may also lead to an increase in uninsured employers.

There is therefore an overwhelming case for the setting up of a national database of all insurance policies. This type of database is extremely effective in tracing both the motor insurance policies of those drivers who

are insured and also identifying those who are driving without insurance. It would be equally suitable in ensuring early tracing of an employer's liability insurer. Given that the cost of the fund, and the database would be met by premium payers, the establishment of such a bureau would incur no government costs but would be extremely effective in ensuring both early and accurate tracing of policies.

Conclusion

Driving without insurance and employing people without insurance are both illegal. If an effective system can be set up, funded and administered for all 26 million vehicles on the British roads, there is no reason why something similar could not be established for the employers' liability compulsory insurance policies of the 1.2 million UK businesses with employees. This would provide a vital safety net for people who need it when they are at their most vulnerable.

The fact is that a voluntary approach is failing many thousands of vulnerable claimants and their dependants who are being denied compensation as a result of the failures of others over a long period of time. The All-Party Group on Occupational Safety and Health has no hesitation in calling on the Government to take urgent action on this matter and set up a fund of last resort underpinned by a national database of all ELCI policies.

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