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Citation for final published version:

Lewis, Richard Kurt 2004. The duty to insure. Insurance Research and Practice 19 , pp. 57-61. file

Publishers page:

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01/03/2019

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Richard Lewis, 'The Duty to Insure'

[2004] 19 *Insurance Research and Practice* 57 - 61

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The Duty to Insure

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To what extent is it compulsory to take out a contract of insurance? Apart from the well known instances of motor and employers' liability, in what other areas has Parliament required insurance against liability? This article, for the first time, brings together the various instances of compulsory insurance, and considers some of the policy implications to which the list gives rise. A second focus for the article is the effect of failure to comply with these statutory requirements. In particular, it considers whether an action in tort may lie if there is a failure to insure in the areas where it is compulsory to do so, and contrasts the position where there is no such duty.

Compulsory Insurance for Work and Road Accidents

Insurance profoundly influences the practical operation of the law of tort, and especially personal injury litigation.² Liability insurance is not merely an ancillary device to protect the insured, but is the "primary medium for the payment of compensation, and tort law [is] a subsidiary part of the process."³ The importance of insurers to the tort system is reflected in the fact that the claims which are brought closely match the areas where liability insurance is to be found. Road and work accidents predominate partly because they are the two major areas where tort insurance is compulsory. They constitute 85 per cent of all the claims brought for personal injury.⁴ They dominate the practice of tort even though they are relatively

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E Mail - LewisRK@cardiff.ac.uk This article draws on materials prepared for a report of the European Centre Of Tort And Insurance Law, based in Vienna.

² Lewis, *The Relationship Between Tort Law and Insurance in the UK*, a report for the European Centre of Tort and Insurance.

³ P. Cane, *Atiyah's Accidents, Compensation And The Law* (6th ed 1999) 191.

⁴ Datamonitor, *UK Personal Injury Litigation 2003* fig 5, with motor comprising 56 per cent of the total and employer liability 26 per cent. The total figure has hardly changed in twenty five years. The total

minor causes of disability and incapacity for work.⁵ Those suffering injury in areas not covered by insurance are extremely unlikely to obtain compensation. According to one study, whereas 1 in 4 road accident victims and 1 in 10 work accident victims gain compensation from tort, only 1 in 67 injured elsewhere do so.⁶

These two areas of compulsory insurance are well known, and the statutory requirements need not be given in detail here. There must be insurance against liability incurred, firstly, by those using a motor vehicle on a road or other public place;⁷ and secondly, by an employer for injury to his employees in the course of their employment.⁸ All employers are required to insure except for nationalised industries, most local authorities and certain public bodies. A similar exemption exists for motor insurance and is justified by the public purse being considered sufficient to guarantee the liabilities. However, small family businesses are also exempt from obtaining

was 88 per cent according to the *Report Of The Royal Commission On Civil Liability And Compensation For Personal Injury*, Cmnd 7054 (1978) (The Pearson Commission) vol 2 table 11.

⁵ D. Harris et al, *Compensation For Illness And Injury* (1984) table 2.1 found that the most common accidents were those in the home, or suffered in the course of leisure activities or in playing sport, and yet very few of these resulted in any damages award. Although work and transport injuries dominate the tort system they comprise only about half of all accidents according to Pearson op cit vol 2 table 57. Datamonitor op cit 79 estimate that there were 7.8 million accidents in the home in 1999 of which only 0.5 per cent potentially could result in a successful tort claim.

⁶ The Pearson Commission op cit vol 1 table 5. The study reveals that only 6.5 per cent of all accident victims incapacitated for three days or more are compensated by the tort system. However, if only serious injuries are considered tort becomes much more important. Where an accident causes incapacity for work for six months or more, almost a third of claimants receive tort damages. Harris et al op cit made similar findings concerning the limited importance of the tort system to accident victims in general. Its significance is reduced tenfold if account is taken of those suffering disablement not from accidents alone but from all causes, including congenital illness and disease. P. S. Atiyah, *The Damages Lottery* (Oxford: Hart Publishing, 1997) 100.

⁷ Road Traffic Act 1988 s 143 and s 145.

⁸ Employers Liability (Compulsory Insurance) Act 1969 and the relevant regulations (SI 1998 No 2573). Parsons, "Employers Liability Insurance - How Secure is the System?" (1999) 28 *Industrial LJ* 109.

employers' liability insurance provided that the employees are all close family members. This has been the subject of criticism for such an exemption is not granted in motor insurance when close family members are being carried in the vehicle. It is not obvious why a farmer should be compelled to insure his sons when being carried in his car, but not when driving a tractor in the fields or helping him with what may be other dangerous tasks involved in his work.⁹ Unlike motor insurance, the rules for employers have not been revised in order to comply with European Directives or developments. Employers must be insured only up to £5 million, a sum thought insufficient in the event of multiple claims in respect of a major accident.¹⁰ By contrast motorists must carry unlimited liability for causing death or personal injury. Overall, by contrast with that for road accidents the compulsory insurance scheme for employers appears "half-hearted."¹¹

The Other Areas of Compulsory Insurance

The other areas of compulsory insurance are relatively minor in respect of personal injury, but are significant with regard to protection against economic loss. However, these miscellaneous instances of compulsory insurance reveal a lack of coherent legislative policy with regard to the need for such protection, at least in relation to personal injury. It is difficult to discern why insurance should be required in respect of certain accidents but not others. The ad hoc introduction of compulsion into the occasional statute has taken place without discussion of the potential problems caused by the lack of cover in related areas. The anomalies that result can be illustrated by the fact that insurance is required for injury caused by horses and wild animals, but not for more common injuries caused by bicycles or dogs; it is required for cars and aircraft, but not for boats or trains; it is required of employers with regard claims from their employees but not from members of the public; and it applies to nuclear reactors, but not to those using explosives or engaged in other activities which are exceptionally

⁹ Hasson, "The Employers' Liability (Compulsory Insurance) Act – A Broken Reed" (1974) Ind LJ 79.

¹⁰ Parsons op cit 115.

¹¹ J. Birds and N. Hird, *Birds' Modern Insurance Law* (5th ed 2001) 394.

hazardous. Finally it is required for causing oil pollution at sea, but not for causing it on land.

Insurance is required in the following areas:

- ❑ Owners of horse riding establishments are required to insure against liability for injuries resulting from the hire or use of their horses.¹²
- ❑ A keeper of a dangerous wild animal can only do so under licence, a condition of which is that there is insurance against liability for any damage caused by the animal.¹³
- ❑ Aircraft operators are required to hold liability insurance as a condition of obtaining their licence.¹⁴
- ❑ A licensee of a nuclear reactor is strictly liable for all damage caused and must carry liability insurance or make otherwise suitable provision for compensation claims.¹⁵
- ❑ Owners of ships carrying more than 2000 tons of oil and entering or leaving a UK port must be insured against liability.¹⁶ The relevant legislation also makes provision for the implementation of an international convention¹⁷ which will extend the duty to insure to owners of all ships carrying any of 6000 defined

¹² Riding Establishments Act 1970 s. 1 (4A) (d).

¹³ Dangerous Wild Animals Act 1976 s 1(6) (iv).

¹⁴ Civil Aviation (Licensing) Act 1960 and the relevant regulations SI 1964 No 1116.

¹⁵ Nuclear Installations Act 1965 s 19.

¹⁶ Merchant Shipping Act 1995 s 163, and the Oil Pollution (Compulsory Insurance) Regs 1997 No 1820. In 2002 the UK also signed the International Convention on Civil Liability For Pollution Damage Caused by Bunker Oil adopted by the International Maritime Organisation (IMO) in 2001. The UK acted in support of the Convention's aims of ensuring all sources of marine pollution are covered by international strict liability and compulsory insurance regimes.

¹⁷ The Hazardous and Noxious Substances Convention adopted by the IMO in May 1996.

substances, including oil and gas. When the provisions come into force the liability will be strict.¹⁸ The possibility of compulsory insurance for a broad range of environmental damage is also envisaged in a draft European Directive.¹⁹

- ❑ Insurance may also be required for a ship in UK waters in respect of a wider range of liabilities than those relating to the environment as discussed above.²⁰
- ❑ Solicitors are required to insure against their professional liabilities.²¹ Although there is no legislation forcing accountants or barristers to insure, their professional associations require them to do so.
- ❑ Because the National Health Service indemnifies them for their work in the public service, neither doctors nor dentists are required to insure in such circumstances. However, when working as independent contractors they are not protected by the NHS and, although required by their professional associations to insure, there is no statutory requirement for them to do so. Even though the Secretary of State for Health can require doctors and dentists to insure,²² this power has not been exercised. A Bill requiring these professionals to arrange an indemnity against liability failed to pass its Parliamentary stages in 2003.²³ In contrast, certain other medical professionals are required by statute to insure.²⁴

¹⁸ Little [1998] Lloyds Maritime and Commercial Law Q 554.

¹⁹ Article 14 para 2 of the draft European Directive on Environmental Liability states that, after a review of the financial security provisions, proposals may be submitted for mandatory financial security. Compulsory insurance may then be required.

²⁰ Merchant Shipping Act 1995 s 192A, as inserted by s 16 of the Merchant Shipping And Maritime Security Act 1997.

²¹ Solicitors Act 1974 s 37, and the Solicitors Indemnity Insurance Rules 2002.

²² The Health Act 1999 s 9.

²³ The Medical Practitioners and Dentists (Professional Negligence Insurance) Bill 2003.

²⁴ For example, the Osteopaths Act 1993 and the Chiropractors Act 1994.

- ❑ Independent financial advisers have been required to carry liability insurance by the industry regulator.²⁵ Insurance intermediaries were formerly required to insure against liability²⁶ and will shortly have a similar obligation when the Insurance Mediation Directive is implemented.²⁷
- ❑ Although legislation has been passed requiring estate agents to insure against liability for failing to account for clients' money, it has never been brought into force.²⁸
- ❑ Related measures have been taken to protect the public against the insolvency of others having control over clients' money, but these have not always involved requiring insurance against tort liability as such. Bonds, insurance, or industry levies as security against insolvency, rather than liability, may be required, for example, of banks²⁹ and travel agents.³⁰

Voluntary Insurance

Although, as discussed below, some do not insure in spite of being required by law to do so, it is also the case that many take out liability insurance even though they do not have to do so. For example, businesses usually carry public liability insurance to complement and extend their compulsory employers coverage by including such risks as liability arising from their occupation of property. They may also voluntarily insure against specific risks that are usually excluded from general liability policies (such as

²⁵ Financial Services and Markets Act 2000 s 138. *Investment Firms: Proposed Policy and Rules* (2003) at <http://www.fsa.gov.uk/pubs/cp/cp193.pdf>

²⁶ Under the Insurance Brokers (Registration) Act 1977 s 12.

²⁷ For the proposed changes see FSA Consultation paper P193: *Professional Indemnity Insurance for personal investment firms: proposed policy and rules* (2003) at <http://www.fsa.gov.uk/pubs/cp/cp193.pdf>

²⁸ Estate Agents Act 1979 s 16.

²⁹ Banking Act 1979.

³⁰ The Package Travel, Package Holidays and Package Tours Regulations 1992 (SI No 3288).

those deriving from liability as manufacturers of products, or from liability arising from environmental and pollution control regulations). In addition, directors and officers liability insurance may be purchased as a protection against managerial incompetence even though there is no requirement to do so.

Ordinary individuals similarly will agree to take out liability insurance beyond the scope of the compulsory cover. Often they will be unaware of the extent to which they are protected because the purchase of liability insurance is not the main purpose of the transaction. For example, certain liabilities can be indemnified merely as a consequence of a policy taken out in order to obtain a mortgage on property or to protect payment for a holiday. Purchasers may be surprised to discover that they are protected against their liability for injuries on their property or resulting from their negligence on holiday. Again, those taking out loss insurance against the contents of their home being damaged may find, on reading their policy, that they are also covered for their liability to others in many circumstances. However, there are no statutes which force people to take out these different forms of liability insurance.

Failure to Arrange the Insurance Required by Statute

Failure to comply with the statutory obligation to insure is subject to sanctions in the criminal law, the normal penalty being a small fine. New fixed penalties were announced in June 2003, but for a first offence the motoring fine is still only £200, an increase of £50. Employers can be fined up to £2,500 a day, but again in practice the fines are low and enforcement limited. The extent to which there is compliance varies. Although proof of insurance may be a pre-requisite to obtaining the relevant licence, there are many who avoid payment. It has been estimated that about 1 in 20 motorists – over a million people - do not have the insurance required.³¹ By contrast, employers are thought to be more likely to comply. The latest review suggests that only about 1

³¹ *Sunday Times*, 10 August 2003. Figures published by the Motor Insurers Information Centre show that there are over a million uninsured drivers on the UK roads every day. <http://www.miiic.org.uk>

in 200 do not have the requisite cover,³² although an earlier survey found a much higher figure for non-compliance.³³

In the areas where insurance has been made compulsory measures have been taken to ensure that compensation will be available to an innocent third party despite the misdeeds or failings of a defendant. However, again here there are various anomalies in the protection given with the result that those injured on the road have more security than those injured at work or elsewhere.³⁴ The state has intervened to regulate the tort system either directly by legislation, or indirectly by forcing insurers to ensure that the claims of certain accident victims will be met. Thus reserve funds levied from insurers will compensate, via the Motor Insurers' Bureau, if a motorist fails to comply with the obligation to insure.³⁵ If the motorist is in breach of the terms of the insurance because, for example, he drove when drunk, or on business instead of pleasure, insurers are prevented from avoiding the policy with regard to the liabilities for which the driver must insure. There is similar, although much less extensive, protection for an employee in a claim against an employer found to be in breach of a condition in his insurance policy. However, if an employer fails to comply with the statutory duty to insure there are no reserve funds available. The injured employee's claim may then be worthless. Finally, there is some protection for a claimant if the tortfeasor has gone bankrupt or into liquidation.³⁶ A direct action against the insurer may then be allowed.

³² Department of Work and Pensions, *Review of Employers' Liability Compulsory Insurance: Second Stage Report* (2003).

³³ The Small Business Service telephone survey of over 2000 businesses in 2002 suggested that the figure was 1 in 14.

³⁴ Parsons *op cit*.

³⁵ P.A. Cain, *Claims Against Uninsured And Untraced Drivers* (2003), N. Jervis and J. Dawson, *A Practical Guide To The Handling Of Motor Insurers' Bureau Claims* (2002).

³⁶ Third Party (Rights Against Insurers) Act 1930. The deficiencies of this Act were noted by the Law Commission, *Third Parties - Rights Against Insurers* Report No 272 (2001). See also the European

The effect of failure to comply with the obligation to insure in the civil law differs according to whether motor or employer's liability is being considered. In motor insurance, the failure gives rise to an action for breach of statutory duty against the person who should have taken out a policy.³⁷ However, the practical effect of this is limited because the Motor Insurers Bureau will compensate in any event for injuries caused by an uninsured driver. In contrast, where the failure to insure is that of an employer rather than a motorist there are no reserve funds. A civil action for breach of statutory duty then could have practical value. However, the Court of Appeal has held that no such action can succeed with the result that a claimant was left without compensation when he sought damages personally from the directors of the uninsured and insolvent firm that had employed him.³⁸

Failure to Arrange Insurance other than that Required by Statute

In general, although it is compulsory to insure in the areas listed above, there is no liability for otherwise failing to take out insurance. Liability is usually established by proving fault, and it is not negligent if the only failure is to put in place measures to pay for losses tortiously caused. This can be illustrated by the position of parents who, although generally not liable for their children's torts, in theory could be liable for their own torts in failing to control their child. However, no parent has ever been found liable for failing to take out insurance either against their own liability, or against that of their child.

However, this principle that there is no general duty to insure has recently been qualified at least in relation to the liability of occupiers employing independent contractors on their property. Statute prescribes that, in order to avoid liability for the acts of a contractor, the occupier must take steps to ensure that the contractor is competent to do the work in question. At least where the contractor is doing

Communities (Rights against Insurers) Regulations 2002 (SI No 3061) made pursuant to the Fourth Motor Insurance Directive (No 2000/26/EC).

³⁷ *Monk v Warbey* [1935] 1 KB 75.

³⁸ *Richardson v Pitt-Stanley* [1995] 1 QB 123. However, this case was not followed in Scotland in *Quinn v McGinty* [1998] Rep LR 107.

hazardous work, a majority of the Court of Appeal has agreed that the occupier should inquire whether the contractor is covered by a liability insurance policy because this is one of the factors which is relevant in proving competence. However, this duty to make inquiries does not extend to checking the terms of the policy itself or to discovering whether the policy is still current. As a result, on the facts of the case, the occupier was held not liable for a negligent fairground contractor who had recently allowed his liability insurance policy to expire.³⁹

If a defendant fails to take out not liability insurance, but first party insurance which would have indemnified the claimant against loss, again there is little authority in tort to support a claim. There can be contractual responsibilities which, for example, may require one party to insure for the benefit of others having an interest in the property in question.⁴⁰ However, outside of contract or trust, there is no duty to insure. This general principle was affirmed in the case of a school that was held not liable for failing to take out insurance for the possibility of its children being injured in the course of playing sport.⁴¹ The court pointed out that there was no duty for the parent to insure the child and that it would therefore be inappropriate to place a more onerous duty upon the school. Again, in a related case, an employer was held not liable for failing to insure an employee against the risk of him being injured in the course of his employment by the fault of a third party who could not pay any damages himself.⁴² In this case the injury was suffered as a result of a road accident in Ethiopia. Although it is compulsory to insure against liability for injuries occurring in the UK, this does not extend to cover injury suffered abroad or where no liability can be

³⁹ *Gwilliam v West Hertfordshire NHS Trust* [2003] QB 443. Even in this case one judge, Sedley LJ, strongly dissented from the view that there should be a duty to check for insurance. In *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, *The Times* 13 November 2003, this dissent was supported by the first instance judge. However, on appeal, further support was given to the idea that insurance was relevant to establishing the competence of the contractor.

⁴⁰ As illustrated recently in *Scottish & Newcastle Plc v GD Construction (St Albans) Ltd* [2003] EWCA Civ 16 and *Oxford Aviation Services Ltd v Godolphin Management Co Ltd* [2004] EWHC 232.

⁴¹ *Van Oppen v Bedford Charity Trustees* [1989] 3 All ER 389.

⁴² *Rush v Reid & Tompkins Group* [1989] 3 All ER 228.

established. There is therefore no duty to arrange first party insurance for another person.

Just as there is no common law principle requiring defendants to take out loss or liability insurance, there is no formal rule to support a claimant being found contributory negligent merely because he failed to take out first-party insurance. Thus a landlord who failed to insure his property was nevertheless able to succeed in his tort action against a tenant who negligently caused damage to that property.⁴³ Similarly, the fact that a claimant has taken out first party insurance in a personal injury case is generally ignored, and damages must be paid even though the loss has been compensated from this other source.⁴⁴ Formally, the claimant is thus neither penalised for his prudence in arranging insurance, nor for his thoughtlessness in failing to insure.

Conclusion

The areas in which it is compulsory to arrange insurance against liability are diverse. Although the details of insurance against motor and employers' liability are well known to personal injury practitioners, the other areas of compulsory insurance are less familiar. The extent of the cover they require varies considerably, and protects against different types of loss. The effects of failing to insure very much depends upon the particular circumstances. When viewed as a whole the law can be seen as developing in an ad hoc fashion, responding to particular concerns at different point in time. Little thought seems to have been given to the overall picture. Why one group of victims - whether suffering personal injury, property damage or economic loss - should be better protected than others who suffer in related circumstances is rarely discussed. Policy discussion of the role of the state in compelling its citizens to take

⁴³ *Lambert v Keywood Ltd* [1999] Lloyds Rep IR 80.

⁴⁴ R. Lewis, *Deducting Benefits From Damages For Personal Injury* (1999) chap 6. However, in a property damage case insurance may have some effect. See, for example, Lord Denning in *Lamb v Camden LBC* [1981] QB 625 and Lord Hoffmann in *Transco v Stockport Metropolitan Council* [2003] UKHL 61.

out private insurance would be better informed if the areas where such protection is presently required were viewed as a whole.