

Department for Transport

The definition of “Significant Personal Injury” under the 5th Motor Insurance Directive (2005/14/EC)



A response by the Association of Personal Injury Lawyers

July 2009

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally of practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

John McQuater – APIL President

Muiris Lyons – APIL Vice-President

David Bott – APIL EC Member

Nicholas Bevan – APIL Member

Andrew Ritchie QC – APIL Member

Any enquiries in respect of this response should be addressed, in the first instance, to:

Helen Anthony, Legal Policy Officer

APIL, 11 Castle Quay, Nottingham NG7 1FW

Tel: 0115 958 0585; Fax: 0115 958 0885

e-mail: helen.anthony@apil.org.uk

Executive summary

We are disappointed that the Department for Transport's ("the Department") proposed definition of "significant personal injury" does not reflect the intention behind the relevant clause in the 5th MID.

The directive aims to improve protection for victims of motor vehicle accidents. To help achieve this, the directive stipulates that where compensation is paid for significant personal injuries, member states may not exclude payment for property damage caused by unidentified vehicles. The explanatory memorandum which sets out the history to and purpose of the directive explains that the requirement for personal injury is solely to prevent fraud.

The Department has not, however, taken the approach of defining "significant personal injury" in such a way as only to prevent fraud. It proposes to define the term so that property damage can only be claimed in cases where the most serious injuries are suffered, thus unilaterally trying to change the effect of the directive. This faulted approach may lead to claims against the Government for failing to properly implement the directive under the *Francovich* principle.

The Department's proposal would limit the payment of compensation for property damage to all but the most serious of cases. This will have the knock on effect of meaning reduced compensation for personal injuries, as many people will pay for such damage to be repaired out of the personal injury damages awarded.

We propose a definition that will set the threshold for significant personal injury high enough to eliminate the risk of fraud but low enough to allow those people who are honest injured victims of accidents caused by unidentified drivers to claim the compensation intended.

Introduction

We welcome the opportunity to respond to the Department for Transport's consultation regarding the definition of "significant personal injury" for purposes of Article 2.6 of the 5th Motor Insurance Directive (MID).

We note that the proposed definition of "significant personal injuries" is "a continuous stay in hospital of 6 days or more within 48 hours following the accident". We are disappointed that the Department's proposal does not reflect the intention behind the relevant clause in the 5th MID. We believe the reasoning in the Department's consultation paper is misconceived and the proposal, if implemented, will not properly give effect to the 5th MID.

The intention behind the directive

The motor insurance directives aim to ensure that people negligently injured in motor accidents receive proper compensation. Directives one to four, amongst other measures: introduced compulsory third party motor insurance; ensured guarantee funds were available in all member states to compensate victims of accidents caused by unidentified or uninsured vehicles; and put in place a mechanism to allow visiting victims to settle their claims efficiently. The 5th MID continues this theme, specifically aiming "to update and improve the protection of victims of motor vehicle accidents"¹. The Department's proposal to allow property claims to be made only by people who have stayed in hospital for more than 6 days flies in the face of this objective.

¹ Section 1.3(1), p.3, Proposal for a Directive of the European Parliament and of the Council amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EC on insurance against civil liability in respect of the use of motor vehicles. Brussels, 07.06.2002, COM(2002) 244 final 2002/0124 (COD)

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0244:FIN:EN:PDF>

We are concerned at the Department's intention that "compensation for property damage claims should be appropriately and proportionally targeted"². We believe the Department is wrong to adopt this approach and to say that the 5th MID supports it is mistaken.

The aim of the relevant clause in the 5th MID is to prevent member states from unfairly restricting compensation payments for property damage caused by unidentified vehicles. This is made clear in the European Commission's explanatory memorandum concerning the 5th MID, which says as follows:

"(f) Elimination of the Member States' option to limit compensation to damage to property in the case of accidents caused by unidentified vehicles [Article 2]

Article 1(4) of Directive 84/5/EEC provides that Member States are to set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation, for damage to property or personal injuries caused by an unidentified vehicle or a non-insured vehicle.

However, the fourth subparagraph of this provision contains an exception which may seriously limit the scope of the compensation provided. It states that *"Member States may limit or exclude the payment of compensation by the body in the event of damage to property by an unidentified vehicle."* This exception is justified in the last sentence of the sixth recital to the Directive "in view of the danger of fraud".

² p.5 of the consultation paper

According to a number of complaints received by the Commission from accident victims, it seems that certain Member States exclude the payment of compensation by their national bodies for damage to property even where the specific circumstances involved eliminate any risk of fraud, e.g. when the victim has suffered personal injuries as well as damage to property in the same accident.”³

The sole reason that there is a requirement for a payment to be made for significant personal injury to enable a person to claim for property damage is to prevent fraudulent claims.

This is made clear in the following extract, which is also from the explanatory memorandum:

“...in order to improve the protection afforded to victims in the case of damage caused by unidentified vehicles, an amendment is proposed to Article 1(4) of Directive 84/5/EEC. This amendment is aimed at restricting the discretion granted to Member States to limit or exclude payments by the compensation body in order to prevent fraud. It excludes the application of such discretion where damage to property and significant personal injuries have resulted from the same accident and where the risk of fraud is therefore negligible.”⁴

There is nothing in the directive or history to it that suggests that those who introduced the legislation had any intention of limiting claims for property damage caused by unidentified drivers to the cases which involved only the most serious injuries.

³ Op. cit. Proposal for a Directive... on insurance against civil liability in respect of the use of motor vehicles, Section 1.4 (f), p.6

⁴ Ibid., Section 2, p.13

The reason the word “significant” is included is to ensure the injury is not so minor as to make the inclusion of requirement for injury so easy to meet as to be irrelevant, such as a cut finger.

Setting the threshold

The department’s proposal sets the threshold to be able to claim for property damage caused by an unidentified vehicle too high. The consultation paper says the threshold has been set “on the basis that those requiring hospitalisation are likely to be the most seriously injured”⁵. Whilst we do not disagree with this statement, the 5th MID does not intend for a member state to have discretion except where *serious* injury occurs but where *significant* injury occurs. By effectively changing “significant” to “serious” the Department is unilaterally trying to change the effect of the directive.

This faulted approach may lead to claims against the Government for failing to properly implement the directive under the *Francovich* principle. Such claims have already successfully been run⁶.

Given the intention of the directive, we believe that the threshold for “significant personal injury” should be set high enough to eliminate the risk of fraud but low enough to allow those people who are injured victims of accidents caused by unidentified drivers to claim the compensation intended by members of the European Parliament and Council of the European Unions had in mind when they adopted the 5th MID.

⁵ p.7 of the consultation paper, in the consultation question

⁶ For example, see [Evans v Secretary of State for the Environment, Transport and the Regions \(C-63/01\)](#) (2005) All ER (EC) 763 ECJ (5th Chamber)

Our proposal for the definition of “significant personal injury” would therefore require independent medical verification of an injury, such as a letter from a general practitioner or a copy of the accident and emergency department note. We would suggest wording such as “independently verified symptoms lasting at least two weeks”.

This would meet the Department’s aim of preventing fraud because:

- the victim’s injuries have been independently verified; and
- there is the additional provision of an excess to deter fraudulent claims.

In addition, it would have low administration costs because:

- the Motor Insurers’ Bureau (MIB) would already have (or be in the process of obtaining) such independent verification in order to make the payment for personal injury necessary to trigger the relevant clause, and
- most claimants would already have an engineer’s report about the value of their vehicle as insurance is compulsory in order to be able to claim from the MIB and comprehensive cover is common.

The importance of the threshold

The Department’s consultation paper proposes a high threshold to allow injury victims to also claim for property damage. It reasons, in part, that the claimant would already have received compensation for personal injuries in the same accident.

If, however, a claimant is not allowed to claim for property damage and needs his or her vehicle, as is often the case to get to work, for example, the claimant would be forced to pay for this out of his or her own funds. It is not a big assumption to say that many people would have to pay for such damage to be repaired out of the personal injury damages awarded, which is not the purpose of such an award.

The property damage element of a claim may well be critical to helping the claimant get their life back on track after an accident. For example, consider “white van woman” running a young carpentry and joinery business driving a new van costing £40,000 containing equipment costing £25,000. She has a loan for £65,000 for both. She suffers a head on crash on the way home from work. The other car driver drove straight off so is untraced. The claimant suffered a severe whiplash injury and a mild/moderate brain injury. She is discharged from hospital after 3 days, there being no treatment needed for the whiplash and the brain injury other than wait and watch. Under the Department’s proposed definition, she will receive compensation for her injuries, but nothing for the £65,000 worth of damage done to her vehicle and equipment. She cannot afford to raise more finance, as she is already in default on the £65,000 she borrowed for the van and equipment, so although she has recovered from her injuries, she still cannot work.

The effect of the Department’s current proposal

The effect of the proposal, if implemented, would enable the MIB to exclude payments for property damage to all but the most seriously injured claimants. This would exclude claims for even the most serious whiplash cases, the vast majority of fractures, and moderate to severe brain injury.

We urge the Department to reconsider its proposal and to redefine “significant personal injury” to properly reflect the purpose for which this is included in the 5th MID.

Association of Personal Injury Lawyers

▶ 11 Castle Quay, Nottingham, NG7 1FW ● T: 0115 958 0585
● W: www.apil.org.uk ● E: mail@apil.org.uk